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Who Makes the Call on Capital Punishment? How *Ring v. Arizona* Clarifies the Apprendi Rule and the Implications on Capital Sentencing

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I. INTRODUCTION

State legislatures have set up capital sentencing schemes that operate on the outskirts of the Sixth Amendment guarantee of a criminal trial by an impartial jury. In their attempts to reconcile the constitutional guarantees of the Eighth and Sixth Amendments and their interpretations by the Supreme Court, states have been caught between a proverbial rock and a hard place regarding the procedure of sentencing a defendant to death. The creative sentencing systems of several states are under scrutiny in light of the Supreme Court's most recent ruling. The impact of the decision has caused legislatures nationwide to get in line with the amorphous death penalty jurisprudence of the Supreme Court and find alternative solutions to capital sentencing.

A. Background

The constitutional right of trial by jury was upheld in a 7-2 decision by the Supreme Court in *Ring v. Arizona*.[1] In *Ring*, the Supreme Court held that a violation of the Sixth Amendment exists where a trial judge, sitting alone, enhances the maximum sentence of life in prison by imposing the death penalty because of "aggravating factors" that are not part of the elements proven for the jury's guilty verdict.

The U.S. Supreme Court held that any fact that enhances the maximum sentence must be found by the jury beyond a reasonable doubt, regardless of whether the fact is an element of the offense or a sentencing consideration, and in so doing overruled its holding in *Walton v. Arizona*.[2] The Court also clarified and bolstered its ruling of *Apprendi*

1. 122 S. Ct. 2428 (2002). Justice Ginsberg wrote the majority opinion, joined by Justices Stevens, Scalia, Kennedy, Breyer, Souter, and Thomas. Justice O'Connor dissented, joined by Chief Justice Rehnquist.

2. 497 U.S. 466 (1990).

v. New Jersey,[3] thereby causing a frenzy of reform among state legislatures whose sentencing schemes came under scrutiny.[4]

The types of sentencing schemes questioned were constructed by state legislatures in order to be in harmony with the Eighth Amendment requirement against "cruel and unusual punishment."[5] The schemes also sought to be in accordance with the Court's suggestion in *Gregg v. Georgia*[6] that states should apply special procedural safeguards when seeking the death penalty. The states argued that their sentencing procedures were established in line with stare decisis principles of capital punishment jurisprudence leading up to *Walton* and *Apprendi*.

Although the Supreme Court reached the correct result in safeguarding the constitutionality of the sentencing procedure that imposes the ultimate penalty, it did not go far enough in providing clear standards for the states to follow. The ruling in *Ring* leaves many unanswered questions regarding the unanimity requirement of the jury during sentencing, the balancing of aggravating and mitigating factors for imposing capital punishment, and deference to national and international norms and trends in this area of American jurisprudence. More importantly, however, the Court has established a theoretical foundation for a bifurcated system of prosecuting and sentencing capital offenses that extends the defendant's presumption of innocence into the sentencing realm and creates a presumption to preserve the convicted person's life.

Part II of this note discusses the controversy that existed in capital punishment sentencing that led to the decision in *Ring v. Arizona* by tracing the Supreme Court's jurisprudence of the last thirty years. Part III sets forth the factual background and procedural history of *Ring* and analyzes the reasoning of the majority and dissenting opinions. Part IV further analyzes the holding and considers the quantitative consequences and impact of *Ring* on the legal system. It also analyzes the qualitative impact on death penalty jurisprudence in the context of the roles of the jury in the sentencing phase and of judicial deference to national and world opinions of capital punishment and capital punishment's inherent

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3. 530 U.S. 466 (2000).

4. The constitutionality of the sentencing statute in Arizona, ARIZ. REV. STAT. § 13-703 (2001), was stricken by the Supreme Court in *Ring*. The validity of similar statutes in the following states was also called into question: Alabama (*see* ALA. CODE §§ 13A-5-46, 13A-5-47 (2001)); Colorado (*see* COLO. REV. STAT. § 16-11-103 (2001)); Delaware (*see* DEL. CODE ANN., tit. 11, § 4209 (1995)); Florida (*see* FLA. STAT. ANN. § 921.141 (West 2001)); Idaho (*see* IDAHO CODE § 19-2515 (Michie 2001)); Indiana (*see* IND. CODE ANN. § 35-50-2-9 (West 2001); Montana (*see* MONT. CODE ANN. § 46-18-301 (1997)); Nebraska (*see* NEB. REV. STAT. § 29-2520 (1995)).

5. U.S. CONST. amend. VIII.

6. 428 U.S. 153 (1976).

sentencing procedures. Part V briefly discusses legislative alternatives regarding capital sentencing statutes and schemes that should seek to be in harmony with *Ring*.

II. THE CONTROVERSY SURROUNDING SENTENCING SCHEMES

States have struggled historically in drafting sentencing guidelines that are in compliance with the Eighth Amendment requirement to avoid inflicting cruel and unusual punishment by imposing the death penalty only on the most socially reprehensible offenses. The effort is complicated when the sentencing system must also conform with the Sixth Amendment guarantee that a criminal defendant "shall enjoy the right to a speedy and public trial by an impartial jury."[7]

This endeavor to create a system for imposing the death penalty that is fair to the accused and at the same time uses the State's resources efficiently is made more problematic by the amorphous jurisprudence of the Supreme Court of the last thirty years regarding capital punishment and its sentencing.

One can trace this confusion to the Supreme Court's decision in *Furman v. Georgia*[8] where the Court effectively placed a moratorium on death sentences by holding capital punishment, as then practiced, unconstitutional. *Furman*, however, did not signify the end of executions in the United States, as anti-death penalty advocates certainly had hoped. The Court changed its analysis only a few years later and upheld the constitutionality of a reformed capital punishment statute in *Gregg v. Georgia*.[9]

In *Gregg*, the Court held that capital punishment did not always violate the Eighth Amendment. The Court reasoned that retribution and possible deterrence of future capital crimes were sufficient reasons to allow the imposition of death as a penalty.[10] Under the Georgia sentencing scheme at issue in *Gregg*, a prerequisite for imposing the death penalty required specific jury findings of aggravating and mitigating factors such as the circumstances of the crime or the character of the defendant. The Georgia Supreme Court, in addition to considering the legal issues on appeal, would also compare each capital sentence with the sentences imposed on defendants similarly situated in order to avoid a "wanton and freakish imposition of the death penalty."[11]

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7. U.S. CONST. amend. VI.
8. 408 U.S. 238, 238 (1972).
9. 428 U.S. 153, 207 (1976).
10. *Id.* at 183.
11. *Id.* at 224.

The Supreme Court's capital punishment jurisprudence was further muddled by later decisions in *Walton v. Arizona*,[12] *Jones v. United States*,[13] and *Apprendi v. New Jersey*.[14] The *Walton* Court, in deciding the constitutionality of the same statute at issue in *Ring*, held that the state was not required to designate certain aggravating factors as "elements" of the underlying offense in order to impose the death penalty.[15] More importantly, the highly divided Court also held that Arizona was not required to allow only the jury to determine the existence of the aggravating factors.[16] The ruling in *Walton*, therefore, left open the possibility for capital punishment to be solely at the discretion of the sentencing judge who, sitting alone, could find the presence of aggravating factors by a preponderance of the evidence and sentence the accused to death.

The issue and rule in *Walton* proved to be very divisive for the high Court. In *Jones v. United States*, the Supreme Court heard arguments relating to the statutory interpretation of a sentencing scheme that permitted sentencing enhancements to be made by the judge when no recommendation to add to the sentence was included in the indictment.[17] The Court explained the limitations on judiciary sentencing by giving a thorough historical background and holding that the limitations on judges regarding sentencing enhancements were based on the Due Process Clause and the Sixth Amendment that require "any fact (other than prior conviction) that increases the maximum penalty of a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[18] The Supreme Court also held that the states may not circumvent the due process limitations of *In re Winship*[19] by not presenting facts to the juries that increase the severity of the possible penalty.[20] Finally, the *Jones* Court reiterated that the general rule continues to be that every fact that might expand the statutory maximum penalty must be determined by a jury beyond a reasonable doubt.[21]

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12. 497 U.S. 639 (1990).

13. 526 U.S. 227 (1999).

14. 530 U.S. 466 (2000).

15. *Walton*, 497 U.S. at 647. This case was decided by a narrow 5-4 majority.

16. *Id.*

17. *Jones*, 526 U.S. at 232.

18. *Id.* at 243 n.6.

19. 397 U.S. 358 (1970). The Supreme Court clarified the due process limitations in criminal cases by holding that the government must prove beyond a reasonable doubt every element of the crime for which the defendant is accused. *Id.* at 364.

20. *Jones*, 526 U.S. at 240-41.

21. *Id.* at 248-49.

The *Apprendi* Court confirmed the opinion it expressed in *Jones* and held that the constitutional protections of the Fifth and Sixth Amendments require that "any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt."[22] The majority considered that the answer to the issue of whether judge or jury makes the call concerning sentencing enhancement was foreshadowed in *Jones*, where the Court noted that the aggravating facts must be submitted to the jury and proven beyond a reasonable doubt.[23] The *Apprendi* majority, like the majority in *Jones*, also relied on the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties."[24] Moreover, the *Apprendi* Court believed that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."[25]

States have been given a confusing and ever-changing constitutional roadmap regarding the imposition of the death penalty because of the holdings of *Walton*, *Jones*, and *Apprendi*. These cases have also made it more difficult for the states to reconcile constitutional guarantees with procedural safeguards in order to avoid an "arbitrary" and "freakish" death penalty.[26] The divisive issue of who makes the call—judge or jury—to enhance the statutory maximum sentence was again taken up by the Supreme Court in *Ring v. Arizona*. This time, the issue included the question of what the constitutional procedural safeguards are surrounding the imposition of the ultimate penalty.

III. *RING V. ARIZONA*: THE STATUTE, THE FACTS, AND THE HOLDINGS

A. Background

1. The statute

At issue in *Ring* was an Arizona sentencing statute which directed the trial judge to "conduct a separate sentencing hearing to determine the existence . . . of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed."[27] The statute further directed

22. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

23. *Jones*, 526 U.S. at 248-49.

24. *Apprendi*, 530 U.S. at 482.

25. *Id.* at 483 n.10.

26. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

27. Ring v. Arizona, 122 S. Ct. 2428, 2434 (2002) (citing ARIZ. REV. STAT. ANN. § 13-703(C) (West 2001)).

that "[t]he hearing shall be conducted before the court alone . . . [and] the court alone shall make all factual determinations" required by the sentencing statute, the United States Constitution, or the Constitution of the State of Arizona.[28]

The sentencing procedure under this regime, therefore, required that a defendant could not be put to death unless there were additional findings of fact to the essential elements of the underlying offense. The sentencing considerations under this sentencing procedure required that the findings of fact be found by a preponderance of the evidence following a guilty verdict by the jury.

2. The facts

Timothy Ring, James Greenham, and William Ferguson hijacked a Wells Fargo armored truck on November 28, 1994, when one of the couriers left the van to get money from a department store.[29] The truck and its driver were later found by the police. The driver was found inside the truck, fatally wounded by a single gun shot to the head. "[M]ore than $562,000 in cash and $271,000 in checks were missing from the van."[30] Timothy Ring was the accused shooter and mastermind of the plot.[31]

3. Procedural history

a. Arizona trial court. "The trial judge instructed the jury on alternative charges of premeditated murder and felony murder" in connection with the armed robbery.[32] "The jury deadlocked on the premeditated murder offense, with 6 of the 12 jurors voting to acquit" Ring.[33] The jury returned a guilty verdict for the felony murder charge, which is a first-degree murder under Arizona law.[34]

Following the procedure dictated by § 13-703, the trial judge, sitting alone, entered his "Special Verdict, sentencing Ring to death."[35] The judge's findings recognized "that Ring was eligible for the death penalty only if he was [the driver's] actual killer or if he was 'a major participant

28. *See* ARIZ. REV. STAT. ANN. § 13-703(C) (West 2001).
29. *Ring*, 122 S. Ct. at 2432.
30. *Id.* at 2433.
31. *Id.* at 2435.
32. *Id.* at 2433.
33. *Id.*
34. *Id.* at 2433-34 (citing ARIZ. REV. STAT. ANN. § 13-1105(A)-(B) (West 2001)).
35. *Id.* at 2435.

in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.'"[36]

During the sentencing hearing, one of Ring's associates testified against him and pointed him out as the leader of the offense who plotted and executed the robbery and the subsequent murder of the driver.[37] After the sentencing hearing, the trial judge found, by a preponderance of the evidence, two of the enumerated aggravating factors necessary to sentence Ring to death.[38] "First, the judge determined that Ring had committed the offense in expectation of receiving something of 'pecuniary value,' as described in § 13-703 . . . . Second, the judge found that the offense was committed in an especially heinous, cruel or depraved manner."[39]

b. Arizona Supreme Court. "On appeal, Ring argued that the capital sentencing scheme in Arizona violated his Sixth and Fourteenth Amendment rights . . . because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty."[40] His constitutional attack of the sentencing scheme was based on the apparent irreconcilability of *Walton*, *Jones*, and *Apprendi*.

The Arizona Supreme Court affirmed the trial court's findings, noting that the United States Supreme Court had upheld the sentencing system as constitutional in *Walton v. Arizona*.[41] Moreover, the Arizona Supreme Court also stated that *Walton* and *Apprendi* remained good law and that it was bound to follow those rulings due to stare decisis principles.

The state high court, however, made two notable observations regarding *Apprendi* and *Jones*. First, the court said that *Apprendi* and *Jones* "'raise[d] some questions about the continued viability of *Walton*',"[42] notably that the majority in *Jones* and *Apprendi* refused to expressly overrule *Walton*. Thus, *Walton* remained the controlling authority on point, and "the apparent scope of *Apprendi* and *Jones* [was] not as broad as some of the language of the two opinions suggest[ed]."[43] Second, the Arizona Supreme Court examined the *Apprendi* majority's

36. *Id.* (quoting App. to Pet. for Cert. 46a-47a; *and* citing Tison v. Arizona, 481 U.S. 137 (1987) ("holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a 'major participa[nt] in the felony committed' and who demonstrated 'reckless indifference to human life'")).

37. *Id.*

38. *Id.*

39. *Id.* (citing App. to Pet. for Cert. 49a).

40. *Id.* at 2436.

41. *Id.*

42. *Id.* (citing State v. Ring, 25 P.3d 1139, 1150 (2001)).

43. *See* State v. Ring, 25 P.3d at 1150.

interpretation of state law and noted that *Apprendi* "described Arizona's sentencing system as one that 'required judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' and not as a system that 'permit[ed] a judge to determine the existence of a factor which makes a crime a capital offense.'"[44]

The Arizona Supreme Court distinguished this case in form, seeking to uphold the sentencing scheme on the grounds that the judicial fact-finding during the sentencing portion of the trial was not for elements of the underlying offense, but rather were sentencing factors for establishing punishment. Furthermore, the court noted that the *Apprendi* dissent "squarely rejected" the *Walton* ruling with regards to the sentencing scheme insofar that "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty."[45]

"The Arizona high court concluded that" the sentencing scheme at issue is "precisely as described in Justice O'Connor's dissent" in *Apprendi* and that Ring's death sentence required judicial fact-finding.[46] Despite the court's reading of Arizona law, the court "was bound by the Supremacy Clause" to apply *Walton*, which had not been overruled, and finally "rejected Ring's constitutional attack on [Arizona's] capital murder judicial sentencing system."[47]

B. United States Supreme Court Opinions

The United States Supreme Court granted Ring's petition for a writ of certiorari in order to "allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*."[48] In a seven to two split, the majority decided the following question: Whether the aggravating factor(s) that allow the imposition of the death

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44. *Ring*, 122 S. Ct. at 2436 (quoting State v. Ring, 25 P.3d at 1151).

45. *Id.*

46. *Id.* (citing State v. Ring, 25 P.3d at 279).

47. *Id.*

48. *Id.* The Court cited several Circuit Court of Appeals decisions that raised questions about reconciling *Walton* with the *Apprendi* rule, including: United States v. Promise, 255 F.3d 150, 159-160 (4th Cir. 2001) (en banc) ("calling the continued authority of *Walton* in light of *Apprendi* 'perplexing,'" *Ring*, 122 S. Ct. at 2436); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001) (stating that "*Apprendi* may raise some doubt about *Walton*," *Ring*, 122 S. Ct. at 2436); People v. Kaczmarek, 741 N.E.2d 1131, 1142 (Ill. App. Ct. 1st Dist. 2000) (arguing, "[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to second-guess that decision here." *Ring*, 122 S. Ct. at 2436-37).

penalty may be found by the trial judge, sitting alone, or whether the Sixth Amendment guarantee to a jury trial requires the factor(s) to be found by an impartial jury.[49]

1. Majority and concurrences

The majority began its discussion by mentioning the ruling of *Walton*, which upheld the sentencing scheme in Arizona because, according to *Hildwin v. Florida*, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[50] The *Walton* Court reasoned that under the Arizona statute and sentencing scheme, the aggravating factors were not essential elements of the underlying offense required to be found by the jury beyond a reasonable doubt. Instead, "they ranked as 'sentencing considerations' guiding the choice between life and death."[51]

The *Ring* majority paid special attention to Justice Stevens's dissent in *Walton* where he "urged that the Sixth Amendment requires 'a jury determination of facts that must be established before the death penalty may be imposed.'"[52] The *Walton* dissent reasoned, and the *Ring* majority agreed, that the aggravating factors at issue operated as statutory elements of capital murder under Arizona law and the death penalty would be unavailable in their absence.[53] Therefore, the aggravating factors were required to be submitted to the jury and proven beyond a reasonable doubt.[54]

The majority also relied on the historical background of jury sentencing, reasoning that if the question had been raised in 1791, when the Sixth Amendment had been drafted, it would have been clearly answered. Again, relying on Stevens's dissent in *Walton*, the Court noted that in the late 18th Century

> the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants

49. *Ring*, 122 S. Ct. at 2432.

50. *Id.* at 2437 (quoting *Walton*, 497 U.S. at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641)).

51. *Id.* (citing *Walton*, 497 U.S. at 648). A year before *Walton*, the Court had denied a Sixth Amendment challenge to Florida's capital sentencing scheme, in which the jury recommends a sentence, but makes no explicit fact finding on the presence of aggravating circumstances. *See* Hildwin v. Florida, 490 U.S. 638 (1989).

52. *Ring*, 122 S. Ct. at 2438 (citing *Walton*, 497 U.S. at 709).

53. *Id.*

54. *Id.*

> would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.[55]

This historical perspective, the Court found, favored Ring's argument of his Sixth Amendment right and his constitutional attack of the Arizona sentencing scheme.

The *Ring* Court upheld the constitutional attack because it fell squarely under the *Apprendi* rule and the reasoning of *Jones*. The *Apprendi* rule is, in large part, a derivative of the position of the Court in *Jones*, where the majority clearly explained that the Constitution guarantees that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[56] The *Apprendi* Court also clarified that the dispositive question "is one not of form, but of effect,"[57] reasoning that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[58] Justice Scalia noted in his concurring opinion that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury" regardless whether the facts, i.e., aggravating factors, were labeled elements of the offense or sentencing considerations or any permutation of both.[59]

The *Ring* majority asserted that the Arizona Supreme Court's interpretation of the *Apprendi* rule overlooked the essential standard that "the relevant inquiry is one not of form, but of effect."[60] Furthermore, the Court reasoned, if the State's interpretation of the *Apprendi* rule was upheld, the rule would be rendered "a 'meaningless and formalistic' rule of statutory drafting"[61] which would not resolve the tension between *Walton* and *Apprendi*.

The Supreme Court noted that the *Apprendi* rule emphatically instructs that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question

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55. *Id.* (citing 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, 10-11 (1989)).

56. Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

57. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

58. *Ring*, 122 S. Ct. at 2439.

59. *Apprendi*, 530 U.S. at 499.

60. *Id.* at 494.

61. *Ring*, 122 S. Ct. at 2441 (citing *Apprendi*, 530 U.S. at 541).

'who decides,' judge or jury."[62] Rather, the *Apprendi* Court ruled that "[w]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."[63]

In addition to the *Apprendi* rule, the *Ring* majority relied on stare decisis principles to overrule *Walton* and strike down the Arizona capital sentencing scheme. The Court referred back to *Maynard v. Cartwright*,[64] where the Court held that "[s]ince *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."[65] In more recent cases, the Court explained that it had "interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope."[66] It continued to explain that "[i]f a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element."[67]

Countering Arizona's argument that judicial authority over finding aggravating factors would be a better way to safeguard against arbitrary imposition of the death penalty, the majority reasoned that the Sixth Amendment right to an impartial jury trial "does not turn on the relative rationality, fairness, or efficiency of potential factfinders."[68] The Court also noted that "the superiority of judicial factfinding in capital cases is far from evident" and that Arizona's capital sentencing scheme is in the minority to the other states that impose the death penalty and that have "responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."[69]

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62. *Id.*

63. *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

64. 486 U.S. 356 (1988). *See also Apprendi*, 530 U.S. at 522-23.

65. *Maynard*, 486 U.S. at 362.

66. *Ring*, 122 S. Ct. at 2442. *See also* United States v. Lopez, 514 U.S. 549, 561-62 (1995) (suggesting that the addition of an "express jurisdictional element" to a federal gun possession statute would render the statute constitutional under the Commerce Clause).

67. *Ring*, 122 S. Ct. at 2442.

68. *Id.*

69. *Id.* The majority found that 29 of the 38 States that impose capital punishment generally commit sentencing decisions to juries. Arizona, Colorado, Idaho, Montana, and Nebraska entrust the judge with capital sentencing factfinding and the ultimate decision to impose the death penalty. Alabama, Delaware, Florida, and Indiana have "hybrid" sentencing schemes in which the jury returns an advisory verdict but the judge makes the ultimate determination for imposing capital punishment. *Id.* at 2442 n.6.

The majority finally ruled that the Sixth Amendment requires that the jury must find any aggravating factors that determine capital punishment, particularly under Arizona's capital sentencing regime, because the "enumerated aggravating factors operate as the 'functional equivalent'" of elements of the underlying offense.[70] The Court also warned that "[t]he right to trial by jury guaranteed by the 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."[71]

Justice Scalia concurred that *Walton* needed to be overturned in order to avoid further tension with *Apprendi*. He reluctantly explained that the Supreme Court had caused the problem in the first place, noting that "[w]hat compelled Arizona (and many other states) to specify particular 'aggravating factors' that must be found before the death penalty can be imposed . . . was the line of this Court's cases beginning with *Furman v. Georgia*."[72] In other words, Scalia complained that the issue had become troublesome because the Supreme Court had coerced the states into developing a sentencing scheme using aggravating factors to narrow the field of murderers eligible for death, beginning with *Furman* and continuing through *Apprendi*.

Scalia expressed that the line of decisions since *Furman* "had no proper foundation in the Constitution," and it would have been "[b]etter for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence" than to bring jurors into the picture.[73] Even so, he agreed with the majority that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt," regardless of what the states label those facts—i.e., elements of the offense or sentencing factors.[74]

Scalia admitted in concurring that he is bothered by "the accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict."[75] The observation of this trend led him

70. *Id.* at 2443.
71. *Id.*
72. *Id.* at 2444.
73. *Id.*
74. *Id.*
75. *Id.* at 2445.

to believe that "our people's traditional belief in the right of trial by jury is in perilous decline."[76]

In a terse concurrence, Justice Kennedy expressed his opinion that *Apprendi* had been wrongly decided, but now that it is the law "its holding must be implemented in a principled way."[77] Justice Breyer also concurred in the judgment and reasoned that the Supreme Court in *Gregg v. Georgia* had held that the Eighth Amendment "requires the states to apply special procedural safeguards when they seek the death penalty," and that those safeguards include a requirement that "a *jury* impose any sentence of death."[78]

Although Justice Breyer concurred with the majority, he was troubled by "the continued difficulty of justifying capital punishment in terms of its ability to deter crime, incapacitate offenders, or rehabilitate criminals."[79] He offered five reasons as to why the death penalty, as currently administered, should be abandoned. Those reasons can be summarized as follows: (1) The death penalty is irreversible, and this irreversibility is especially egregious when the defendant is wrongfully convicted, as is "underscored by the continued division of opinion" and recent DNA testing which showed that many capital crime convictions had proved unreliable;[80] (2) the "potentially arbitrary application" of the death penalty as demonstrated by the seemingly important factors of race and socioeconomic background of the defendant in death penalty convictions;[81] (3) the "delays that increasingly accompany sentences of death make those sentences unconstitutional because of 'the suffering inherent in a prolonged wait for execution'";[82] (4) inadequate representation in capital defenses aggravates the other shortcomings mentioned above;[83] and (5) "other nations have increasingly abandoned capital punishment."[84] Justice Breyer concluded that "the danger of

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76. *Id.*

77. *Id.*

78. *Id.* at 2446 (citing Harris v. Alabama, 513 U.S. 504, 515 (1995) (Stevens, J., dissenting)).

79. *Id.*

80. *Id.* at 2447.

81. *Id.* Justice Breyer presented information that showed a "'pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty.'" *Id.* (citing U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (Feb. 1990)).

82. *Id.* at 2448 (citing Knight v. Florida, 528 U.S. 990, 994 (1999)).

83. *Id.*

84. *Id.* Justice Breyer commented on the disparity between the imposition of the death penalty in the United States as it compares worldwide and noted "that other nations have increasingly abandoned capital punishment." *Id.* He offers several sources in support of this proposition.

See, *e.g.*, San Martin, *U.S. Taken to Task Over Death Penalty*, MIAMI HERALD, May 31, 2001, p. 1 (United States is only Western industrialized Nation that authorizes the death

unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.'"[85] Justice Breyer expressed his concerns regarding the flaws of the American capital sentencing system but offered guidance with regards to reforming the current sentencing standards to better ensure constitutional guarantees.

2. The dissent

Justice O'Connor and Chief Justice Rehnquist dissented for the same reasons they dissented in *Apprendi*. They argued in *Ring* that the "rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by [the Supreme Court's] prior cases."[86]

The dissent expressed concern over the "severely destabilizing effect" that the rule in *Ring* will have on the criminal justice system and predicted that the number of appeals before the courts due to *Apprendi* would grow even worse.[87] The dissent's worry, however, that the ruling in *Ring* will cause "an enormous increase in the workload of an already overburdened judiciary" overlooks the fact that constitutional guarantees, and the preservation of human life, should always trump inconvenience and overtime hours by the judiciary.[88]

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penalty); Amnesty International Website Against the Death Penalty, Facts and Figures on the Death Penalty, (2002) http://www.web.amnesty.org/rmp/dplibrary.nsf (since *Gregg*, 111 countries have either abandoned the penalty altogether, reserved it only for exceptional crimes like wartime crimes, or have not carried out executions for at least the past 10 years); De Young, *Group Criticizes U.S. on Detainee Policy; Amnesty Warns of Human Rights Fallout*, WASHINGTON POST, May 28, 2002, p. A4 (the United States rates fourth in number of executions, after China, Iran, and Saudi Arabia).

Id.

85. *Id.* (citing Spaziano v. Florida, 468 U.S. 447, 469 (1984)).

86. *Id.* at 2449. *See also* Apprendi v. New Jersey, 530 U.S. 466, 524-52 (2000).

87. *Ring*, 122 S. Ct. at 2449. Justice O'Connor noted that there are 168 death row inmates in the five states affected by *Ring* (Colorado, Idaho, Montana, Nebraska, and Arizona), and stated that "each of whom is now likely challenge his or her death sentence." *Id.* Also, there are 529 prisoners on death row in the States whose capital sentencing schemes were called into question. Those states include Alabama, Delaware, Florida, and Indiana. *Id.* at 2450.

88. *Id.* at 2449.

IV. ANALYSIS AND IMPLICATIONS

A. Quantitative Impact

The nine states affected by the ruling in *Ring* account for approximately 797 of the nation's 3,700 death row inmates.[89] Justice O'Connor notes that approximately 697 people have been sentenced to die under the capital sentencing schemes that were invalidated or called into question by *Ring*.[90] The impact of the Supreme Court's decision has led some prosecutors to worry that "the weight of the system is going to crush [them]."[91] With regards to legislative reform, the states most affected by *Ring* are now busy devising strategies that will keep the convicted on death row and avoid a snowball effect of litigation.[92]

The states anticipate that the ruling in *Ring* will likely bring an increase in capital punishment litigation in the lower courts, particularly as the persons awaiting execution appeal their capital sentences, attack the constitutionality of the sentencing statutes and schemes, and ask for a re-sentencing or even a re-trial. This anticipated docket load on an already overworked judicial system should act as an impetus for state legislatures to conform their capital sentencing standards to the constitutional guarantees of the Sixth, Eighth, and Fourteenth Amendments, as well as keeping with the *Ring* triad.[93]

There are important qualitative effects as a result of *Ring*. An important consequence is the theoretical establishment of a bifurcated system of prosecuting and sentencing capital offenses. This system is predicated on constitutional guarantees, the defendant's presumption of innocence and of life, the weighing of aggravating and mitigating factors in sentencing, and deference to the national and international opinion. The following sections discuss these qualitative effects in more detail.

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89. *See* John Gibeaut, *States Revisit Death Sentence Cases: Prosecutors Look to Preserve Capital Rulings in wake of High Court Decision*, 1 AMERICAN BAR ASSOCIATION JOURNAL EREPORT 25 (June 28, 2002).

90. *Ring*, 122 S. Ct. at 2449-50. Justice O'Connor accounts that there are 168 prisoners on death row in the five states whose capital sentencing schemes were declared unconstitutional. Those states are Arizona, Colorado, Idaho, Montana, and Nebraska. She also accounts for 529 more death row inmates in Alabama, Delaware, Florida, and Indiana, whose hybrid capital sentencing systems were called into question. The capital sentencing scheme in the second set of states is considered hybrid because the jury renders an advisory verdict regarding punishment, but the judge makes the ultimate sentencing determination.

91. *See* Gibeaut, *supra* note 89 (quoting Jerry M. Blair, president of the Florida Prosecuting Attorneys Association).

92. *Id.*

93. I use the term "*Ring* triad" to mean the rulings of *Ring*, *Apprendi*, and *Jones*.

B. Constitutional Guarantees and the Presumption of Life

The rulings from *Ring*, *Apprendi*, and *Jones* facilitate procedures that maintain the preeminence of the constitutional guarantees of the Sixth, Eighth, and Fourteenth Amendments in both capital and non-capital criminal cases. The *Ring* triad establishes a theoretical foundation of a bifurcated system of prosecuting and sentencing capital offenses. This bifurcated system is predicated upon the principle of presumption of innocence of the defendant and broadens this presumption to preserving the life of the convicted offender.

A bifurcated system is a procedural safeguard of the constitutional guarantees of the Sixth, Eighth, and Fourteenth Amendments in capital cases. There are two phases or rounds in a bifurcated system. The first is a trial phase where the state must prove that the defendant is guilty beyond a reasonable doubt of all elements of the underlying offense. This initial phase is a standard of the American criminal justice system. The second phase involves sentencing the convicted defendant to die. The threshold for imposing capital punishment would require the prosecution to prove beyond a reasonable doubt that the state is justified in sentencing the defendant to death. This sentencing scheme would take Blackstone's postulate that "it is better that ten guilty persons escape than one innocent suffer"[94] to the echelon that it would be better for ten guilty persons live in prison than one die innocently.

The presumption that the defendant is innocent until proven guilty is the benchmark of the American justice system. This presumption is taken one step further in light of *Ring*. While the presumption of innocence is in keeping with the Due Process guarantee of the Fourteenth Amendment, it naturally carries over to sentencing. The presumption becomes that the defendant should get life in prison unless the state proves beyond a reasonable doubt the existence of aggravating factors that would convert life imprisonment into capital punishment. In other words, the state must prove that the defendant's conviction leads to the imposition of capital punishment only when the aggravating factors are proven beyond a reasonable doubt. Consequently, overcoming the presumption of life would determine that death is the appropriate punishment for the convicted defendant and the particular offense.[95]

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94. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

95. *See generally* Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351 (1984).

C. The Jury and Weighing of Aggravating and Mitigating Factors in Sentencing

Even if the presumption of life is carried out in the sentencing phase, there still remains an important issue that is left unanswered by *Ring*. The question involves how the jury will consider any aggravating and mitigating factors during sentencing. This is a particularly difficult issue for legislatures to resolve, and it is imperative that the method of weighing factors will ultimately result in the imposition of punishment that guarantees the defendant's constitutional rights.

Whether aggravating and mitigating factors are balanced against one another or as a whole will depend on how much weight each factor carries. *Ring* leaves several unanswered questions that are at the heart of capital sentencing and the role of the juries in deciding whether or not to impose the death penalty. Among these unanswered questions is whether one mitigating factor outweighs an aggravating factor and vice-versa. Also, would one aggravating factor outweigh two or more "smaller" mitigating factors? Or should the aggravating and mitigating facts be balanced as a whole? Also, should the jury find the aggravating and mitigating factors beyond a reasonable doubt or by a preponderance of the evidence before deciding a sentence? Lastly, is the role of the jury in capital sentencing advisory or conclusive? In other words, does *Ring* allow the sentencing judge to divert from the jury findings?

In order to comply with the constitutional guarantees of the Eighth and Fourteenth Amendments, and in light of *Ring*, the jury should consider the relevance of the aggravating factor vis-à-vis the mitigating factor with respect to the underlying offense. This would ensure that whatever factors the jury considers during sentencing are given a relevant value to the individual defendant and the particular crime. This method would be like a cost-benefit analysis with a social utility undercurrent in the sense that the social utility would be avoiding the imposition of an arbitrary punishment.

Convicting the defendant requires that the underlying offense be proven beyond a reasonable doubt. This standard of proof should carry over to the sentencing phase where aggravating and mitigating factors will be considered in determining the punishment. The reason that the standard of proof is at its highest level during prosecution is due to the value the criminal justice system places on the freedom and social stigma of conviction. Similarly, the moral and social value of the life of the convicted person mandates that the decision to execute the offender should be reached using the highest level of scrutiny.

If the jury finds sufficient aggravating factors to put the defendant to death, that decision should be reached unanimously. This procedural

requirement is grounded on similar principles for finding guilt beyond a reasonable doubt in capital offenses. It would also demonstrate that the jury's finding for imposing the death penalty has undergone strict consideration and that the sentence is deemed the appropriate punishment in the eyes of the jurors.

Even if the jury unanimously finds sufficient aggravating factors for imposing the death penalty, the question remains whether the jury's findings are advisory or conclusive and whether the sentencing judge is bound to follow those findings. Under the Florida sentencing scheme, for example, the jury renders an advisory verdict regarding punishment and the sentencing judge retains discretionary power to make the ultimate determination. In light of *Ring*, however, such a sentencing scheme would be considered unconstitutional. For this reason, juries should issue a final capital sentencing verdict that the judge could only invalidate if it is outrageously inappropriate or if he has reason to believe the jury is not impartial as directed by the Sixth Amendment.

A viable alternative to protect the defendant's due process and equal protection rights in capital sentencing would include weighing the aggravating and mitigating factors regarding their relevance to the crime and defendant and issuing a non-advisory and unanimous sentencing verdict. The ultimate issue remains whether such a scheme would protect the defendant from undergoing cruel and unusual punishment. This question can be answered by paying reasonable deference to national trends and world opinion of capital sentencing and its attached punishment.

D. Deference to National and International Opinion

The rhetoric from the Supreme Court is that it does not engage in judicial activism, but a careful reflection of the Court's recent docket suggests that the Court is an activist bench.[96] The Court has historically considered trends and public perceptions concerning national issues and has decided to be proactive in engaging in the dialogue, if not deciding its outcome.[97] The role of national trends regarding capital sentencing would necessarily include confronting public opinion of the sentencing schemes, the increased use of DNA testing in capital crime prosecutions, and the propensity of executing capital punishments across the nation.

Although the Court is by no means accountable to public opinion, it should reasonably consider national trends regarding the death penalty,

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96. *See* Bush v. Gore, 531 U.S. 98 (2000).

97. *See generally id.*; Roe v. Wade, 410 U.S. 113 (1973); Trop v. Dulles, 356 U.S. 86 (1958), and Brown v. Board of Educ., 349 U.S. 294 (1955).

i.e., determining the national view of cruel and unusual punishment and whether or not the capital sentencing mechanisms are conducive to uphold constitutional standards. Undoubtedly, the resulting opinions are gross generalizations of American standards. Nevertheless, the Supreme Court has held that the Eighth Amendment contains "an evolving standard of decency that mark[s] the progress of a maturing society."[98] In order to determine what that "evolving standard" is, with regards to capital sentencing and punishment, the Court should consider national views and trends.

Just as the Court should pay reasonable deference to national trends and the evolution of a national consensus, it should consider world opinion regarding capital sentencing and punishment. Deference to world opinion is not novel to the Supreme Court. In its last Term, the Supreme Court heard *Atkins v. Virginia* and held that executing the mentally retarded equated to cruel and unusual punishment and a violation of the Eight Amendment.[99] The Court's reasoning in *Atkins* notably referred to the global opinion opposing the execution of adults who had the mental capacity of a child. Also, the Court expressly looked to international practices and opinion to assess what constitutes "evolving standards of decency" for Eighth Amendment purposes in its holding in *Trop v. Dulles*.[100] Likewise, the Court should consider international trends with respect to capital sentencing schemes and standards.

International principles in private and public international law, in addition to widely-accepted international norms, have historically been a part of our domestic jurisprudence dating back to the nation's founding and the earliest vestiges of English common law.[101] More importantly, the Supreme Court has paid deference to world opinion in the past in deciding benchmark cases.[102] In 1900, Justice Gray explained that "international law is part of our law, and must be ascertained and administered by the courts of justice . . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[103]

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98. *See Trop*, 356 U.S. 86.

99. 122 S. Ct. 2242, 2252 (2002).

100. 356 U.S. at 101.

101. *See* Harold Hongju Koh, *Edward L. Barrett , Jr. Lecture On Constitutional Law:*, 35 U.C. DAVIS L. REV. 1085, 1095 (2002).

102. *See Trop*, 356 U.S. 86. *See also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (stating that "[p]olygamy has always been odious among the northern and western nations of Europe." Koh, *supra* note 101, at n.50); Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (the majority evaluated the standards of executing minors in the Soviet Union and Western European nations and took particularly careful note of the views of "other nations that share our Anglo-American heritage." Koh, *supra* note 101, at 1099).

103. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Statistics are a reflection of the international opinion regarding capital punishment. These statistics are stunning. For example, over 3,048 people were executed worldwide in 2001, an increase from 1,457 in 2000.[104] Four countries conducted 90% of these executions—China, Iran, Saudi Arabia, and the United States.[105] Only six countries have publicly executed juveniles since 1990—Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[106] As of this year, 108 out of more than 180 countries in the world have abolished the death penalty in law or practice.[107] "European regional organizations have made abolition of the death penalty a prerequisite to joining the new Europe, and a cornerstone of European human rights policy."[108]

Paying deference to international opinion—whether it is in the form of public, private, or customary international law; or in the form of global trends and norms—draws into question the enterprise of capital punishment and the sentencing schemes behind it. Justice Blackmun, shortly before his retirement from the Supreme Court, noted that "[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments."[109] With regards to the intent of the Eighth Amendment, Blackmun stated that "[t]he drafters . . . were concerned, at root, with 'the dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms."[110] More importantly, "the Court has looked to both domestic custom and the 'climate of international opinion' to determine what punishments are cruel and unusual."[111]

International opinion has formed the Supreme Court's understanding of the social values of the nation from the founding. The Court has internalized international law, norms, and trends in order to ascertain the evolving standards that characterize an enlightened or "civilized society." This deference to world opinion is not exclusive to maritime or transactional law, but carries over to reconciling the capital punishment

104. Press Release, Amnesty International, Worldwide Executions Doubled in 2001 (Sept. 4, 2002), *at* http://www.amnestyusa.org/news/2002/world04092002.html.

105. *Id.*

106. *Id.*

107. *See* Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/dpicintl.html (last visited Dec. 4, 2002).

108. *See* Koh, *supra* note 101, at 1105.

109. Harry A. Blackmun, Tribute: *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994).

110. *Id.* at 45-46.

111. *See* Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

question, and its mechanisms for sentencing, with the social utility of the penalty.

V. CONCLUSION: UNANSWERED QUESTIONS AND LEGISLATIVE ALTERNATIVES

The ruling of *Ring* raises an important unresolved issue. The question is whether the aggravating factors in the sentencing statutes should be reconsidered or reformatted to become elements of the underlying capital offense and charged as such. The uncertainty of this question means that lower courts are already dealing with the fallout from the *Ring* triad.[112] Although this note does not analyze the effect of this question, the ruling from *Ring* provides a viable framework whereby drafting capital sentencing schemes should more closely conform with constitutional guarantees to ensure that the death penalty is not cruel, unusual, arbitrary, or otherwise freakish.

There are capital sentencing statutes that would arguably pass muster under the *Ring* triad standard.[113] These schemes, however, are the exception rather than the rule. The Arkansas statute, for example, sets a high standard for imposition of the death penalty. The sentencing statute reads in pertinent part: "The jury shall impose a sentence of death if it unanimously returns written findings that: (1) Aggravating circumstances exist beyond a reasonable doubt; and (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt."[114]

The Arkansas statute provides an example of procedural safeguards that the *Ring* Court sought to uphold. The sentencing scheme involves the role of the jury in weighing aggravating factors and applies the highest standard of proof in determining the ultimate life or death of the convicted person. The attempt to construct a sentencing scheme that imposes the death penalty that complies with constitutional standards is an overwhelming and worthwhile endeavor. It becomes the hope of the judicial and legislative branches to create a procedural system that does not become a "machinery of death . . . [that] lessens us all."[115]

Simón Cantarero

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112. *See* United States v. Regan, 221 F. Supp. 2d 672 (E.D.Va. 2002); United States v. Lentz, 225 F. Supp. 2d 672 (E.D.Va. 2002); Sanchez v. Superior Court, 126 Cal. Rptr. 2d 200 (Cal. 2d Dist. Ct. App. 2002); and Bottoson v. Moore, No. SC02-1455, 2002 WL 31386790 (Fla. Oct. 24, 2002).

113. *See* ARK. CODE ANN. § 5-4-603 (Michie 1987).

114. *Id.* at § 5-4-603(a)(1)-(3).

115. Callins v. Collins, 510 U.S. 1141, 1145, 1159 (1994).