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# Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?

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# Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?

Richard L. Wiener, M.L.S., Ph.D.\*

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## I. INTRODUCTION

After I finished reading Professor Baldus' (and colleagues') report, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*,<sup>1</sup> I spent a great deal of time deciding how a research psychologist such as myself could best respond to this thorough analysis of the manner in which homicide cases have been adjudicated in the Nebraska state courts. A number of possible approaches emerged in my thinking. First, there was the work's contribution to scientific theory and the accumulation of knowledge, the bottom line for all empirical investigations. A psychologist must ask about the contribution that any individual study makes to the accumulation of scientific theory and facts, in this case, the way in which sentencing decisions are reached in first degree murder trials. Sentencing decisions influence and are influenced by human thought, affect, and action. As a psychologist, I am interested in what the Baldus team's Nebraska homicide data tell us about the psychology of sentencing (i.e., the role of cognition, attitude, and affect) in the process by which judges impose punishments upon defendants. The Baldus team collected an enor-

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1. 81 NEB. L. REV. 486 (2002) [hereinafter *Nebraska Study*].

mous amount of data.<sup>2</sup> They coded details from a variety of difficult to interpret sources for 185 death-eligible decisions. The sample defines the existing capital murder universe of defendants for the period between 1973 and 1999.<sup>3</sup> The outcomes of Nebraska prosecutors' determinations of whether to seek the death penalty and the outcomes of judicial sentencing in cases where the prosecutors asked for the death penalty are well documented in this work. The overall strength of the project lays in the external validity of the study, that is, the ability to generalize the findings beyond the current sample of cases, prosecutors, judges, offenders, and periods of time. In that sense, the Baldus and colleagues' study is the final word on death sentencing in Nebraska as it was practiced before the Supreme Court's holding in *Ring v. Arizona*.<sup>4</sup>

This point, of course, brings me to the second way in which I could make my comments, that is by addressing the way in which this empirical report impacts the legal analysis of the capital murder scheme in Nebraska, which unlike most other states that make the death penalty available for first-degree murder, assigns the burden of deciding whether to impose the death penalty to trial judges and not to jurors.<sup>5</sup> From a psychologist's point of view, this process results in an extremely interesting judgment and decision task for the single judge or the three-judge panel charged with evaluating the facts in any given case to determine how to assign punishment.

The Justices of the United States Supreme Court also considered the principles of punishment and sentencing when they ruled in *Ring*. The Court held that Arizona's penalty scheme in capital murder trials was in violation of the Sixth Amendment's guaranty of a jury trial because Arizona judges, and not jurors, determined whether statutory aggravating circumstances existed.<sup>6</sup> The finding of aggravating circumstances is what makes the defendant eligible for the death penalty. The holding in *Ring* will require changes in the way Nebraska courts try capital murder cases and the way in which sentencing decisions are reached.<sup>7</sup> As a psychologist, I am interested in whether the data reported in the Baldus study<sup>8</sup> will assist the state legislature to revise its capital murder scheme, not only to meet the newly articulated standards of *Ring*, but also to improve the quality of the decision process in Nebraska's homicide dispositions. At the outset, I found Justice Ginsburg's legal analysis in *Ring* compelling. Nonetheless, I

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2. *Id.*

3. *Id.* at 496.

4. 122 S. Ct. 2428 (2002).

5. NEB. REV. STAT. § 29-2520 (Reissue 1995).

6. *Ring*, 122 S. Ct. at 2443.

7. *Id.*

8. *Nebraska Study*, *supra* note 1.

believe that this case represents a lost opportunity to use social science and psychological data to examine the homicide sentencing decisions of judges and juries. An important question to consider is whether the Nebraska Legislature can make use of empirical data (in this case the Baldus team's findings) to analyze its current sentencing scheme in capital murder trials in a way that the Supreme Court was unable or unwilling to do in its analysis in *Ring*.

A third approach to commenting on the Baldus team's study is to go beyond what it tells us about substantive policy recommendations and to learn from it more about the way in which social scientists might use empirical investigations to make policy recommendations. The findings reported in this piece have implications for the ways in which Nebraska's legislature might adjust its sentencing scheme to promote consistency and efficiency while staying within the guidelines of the Sixth Amendment of the U.S. Constitution. It also offers an example of how one group of scholars used empirical data to reach conclusions about homicide dispositions in state court. As a psychologist, I would be remiss not to comment on the methodological strengths and weaknesses of the Baldus team's research. The methodological rigor in the research forms the basis to evaluate the reliability and validity of the groups' conclusions. Unfortunately, in all empirical investigations there are tradeoffs that investigators cannot avoid. That is, they "buy" protections against certain types of potential errors by relaxing methodological rigor in other areas and as a result increase risk of other types of methodological ills. For this reason, the soundest empirical conclusions emerge from programs of research that combine maximally different methodological tools. It is therefore important to understand what the Baldus team's data can say (with utmost scientific confidence) about the disposition of homicide cases in Nebraska.

Without doubt, the most profitable analysis of the Baldus team's findings would require a careful review of its implications for the substantive accumulation of scientific knowledge, the Sixth Amendment's requirements for jury trials, the Eighth Amendment's requirement that sentencing not be arbitrary and capricious,<sup>9</sup> and its contribution to the empirical analysis of policy. The unabridged version of such an analysis would rival the page length of the original paper and would take this symposium far from the purposes that its editors intended. Nonetheless, an abridged version will at least need to ask three sets of questions of the most significant findings in the report. For each of these findings I will raise two questions about the theory and accumulation of findings: 1) How do the findings relate to what we know about decisionmaking in capital crimes? and 2) What do the finding

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9. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

tell us about the way in which judges (and other decisionmakers) draw inferences about legal issues relevant to the dispositions of homicide cases? With regard to the social implications of the empirical and legal analysis in the report, I will ask two questions of the findings: 1) Do the findings have implications for how people think, feel, or behave in legal contexts? and 2) Do the findings have the potential to impact the social world beyond the policy implications that the author's discussed? Finally, I will inquire about the methodology of this impressive policy analysis and ask: 1) What are the methodological strengths and weaknesses of each of the findings? 2) What are the limitations of the methodology? and 3) How could alternative approaches add to the findings?

If I applied this analysis to each of the thirteen or fourteen important and interesting findings of this long and impressive empirical report, I would once again exceed the original article in page length. I would certainly take this piece beyond its circumscribed purpose, to raise some issues that the authors of the empirical work may reflect upon in order to push their own thinking in directions that they might not have considered going and, as a result, help interpret the meaning and significance of this important piece of work. The work is detailed and the analyses are complex. As suggested above, the Baldus group's research is the final word on death sentencing in Nebraska as it was practiced from 1977 to 1999. However, the cost of collecting existing archival data at this level of detail is that it limits the researcher to asking questions that are answerable only by the types of variables that are available in the existing data archives.

Psychologists refer to this as an issue of construct validity. The question becomes does the study sample broadly not only over time, people, and places—or time, jurisdictions, courtrooms, judges, and offenders in this case—but also whether the researcher has sampled broadly across the kinds of questions that are interesting in the study of sentencing. Such factors might include but are not limited to questions about:

1. the attitudinal and ideological beliefs of the judges,
2. the affective responses of the judges to the fact patterns as offered during the hearings,
3. the attitudes, ideological beliefs, and strategies of the attorneys that represented the offenders,
4. the style and content of the attorneys' arguments during the hearing,
5. the affective reactions of the offenders during the hearing,
6. the reactions of the local communities to the possible aggravating and mitigating factors as portrayed in the media (and the judge's awareness of these factors).

In defense of the construct validity of this study, the consistency analyses demonstrated that the judges in these cases were as consistent in finding the “worst of the worst” as were the juries in New Jersey, a state the Baldus team argues to be comparable to Nebraska, but one in which juries make sentencing decisions in capital trials.<sup>10</sup> At the same time, this same set of analyses shows that there was in an absolute sense some degree of variability among “near neighbor” offenders in Nebraska.<sup>11</sup> Finally, the overall regression analysis shows reasonable predictability of outcome, but it still leaves a great deal of room for a sizable number of undiscovered predictors of judicial decisionmaking. In other words, while the strength of the relationships between predictors and outcomes in the regression analyses were moderate, a substantial amount of outcome variability (i.e., life or death) remained unaccounted for. Therefore, we can only presume that there are other non-included factors which might also predict significant components of the dispositions in these cases. As a psychologist, I suspect that many of the constructs not sampled that would add to the explained variability in the study are likely to be psychological factors, most of which were not measured or estimated in this sample. I cannot help but wonder more about how the judges made the decisions that they did and how the psychology of the attorneys, offenders, and community shaped the judgment outcomes.

However, I digress and will return to my self-assigned task. I intend to review several major findings in the study with the intent of raising some questions for discussion and further elaboration by the Baldus team. At the time of the oral presentation of the paper and the resulting reactions made by the invited commentators, I was faced with the impossible job of determining which findings were less important and could therefore be left out of my analysis. However, the U.S. Supreme Court came to my rescue in its summer 2002 term, when it held in *Ring v. Arizona*<sup>12</sup> that the Sixth Amendment guarantee of a trial by jury prohibits judges sitting alone from finding aggravating circumstances necessary for imposition of the death penalty. The logic followed in *Ring* highlights the importance of how judges and jurors use aggravating and mitigating circumstances to reach penalty decisions.

In a prior case, *Walton v. Arizona*,<sup>13</sup> the Court held that because aggravating factors were “sentencing considerations” and not “elements of the offense,” Arizona’s sentencing scheme did not curtail a defendant’s right to a jury verdict. The *Walton* Court held that Arizona’s statute asked judges to consider whether to “place a substan-

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10. *Nebraska Study*, *supra* note 1, at 656-58.

11. *Id.*

12. 122 S. Ct. 2428, 2443 (2002).

13. 497 U.S. 639 (1990).

tive limitation on sentencing,"<sup>14</sup> the effect of which was to guide the "choice between life and death"<sup>15</sup> and not to make findings of fact with regard to an "element of the crime of capital murder"<sup>16</sup> (aggravation is not an element of first-degree murder in Arizona). However, in *Apprendi v. New Jersey*,<sup>17</sup> the Supreme Court ruled that a sentencing judge was prohibited from making a factual finding that the defendant's crime "had been motivated by racial animus,"<sup>18</sup> thus triggering New Jersey's hate crime enhancement, which had the effect of doubling the defendant's maximum prison sentence. In *Ring*, the Justices reasoned, "[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."<sup>19</sup> The Court said the issue was "not one of form, but of effect."<sup>20</sup> Writing for the majority in *Ring*, Justice Ginsberg came to the conclusion that if the Sixth Amendment forbids a trial judge to decide an issue of fact that results in an enhancement of a penalty without a factual finding by a jury, then surely a judge sitting without a jury may not find aggravation in a capital murder case to impose the death penalty.<sup>21</sup> Justice Ginsburg reasoned that the prohibition stands even if the finding of fact is not an "element of the crime" but is instead merely a "sentencing consideration."<sup>22</sup> Therefore, *Ring* overruled *Walton* "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."<sup>23</sup>

The holding in *Ring* is a narrow one in that it makes illegal the sentencing schemes in the five states that assign the ultimate sentencing decision entirely to judges (Arizona, Colorado, Idaho, Montana, and Nebraska).<sup>24</sup> However, as Justice Scalia pointed out in his concurring opinion, the ruling in *Ring* seemingly does not preclude states from allowing judges to determine whether to impose the death penalty in cases where aggravation is made an element of the crime to be determined by the jury in the guilt phase of capital murder trials.<sup>25</sup> Therefore, if a state like Nebraska required its juries to determine whether aggravation existed beyond a reasonable doubt in the guilt

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14. *Id.* at 648.

15. *Id.*

16. *Id.*

17. 530 U.S. 466 (2000).

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

19. *Id.*

20. *Id.* at 2430.

21. *Id.* at 2443.

22. *Id.* at 2438.

23. *Id.* at 2443.

24. *Id.* at 2442 n.6.

25. *Id.* at 2445.

phase of capital murder trials, it could still leave the trial judges to balance the aggravation against any mitigation to reach a final sentence and decide whether to impose the death penalty.

In light of these considerations, the Baldus group's findings regarding how judges use aggravation and mitigation become exceedingly interesting and important for purposes of considering possible ways to reform Nebraska's capital murder scheme. Accordingly, African American homicide defendants are more likely to face the possibility of the death penalty as a result of differences in prosecutors' use of their discretion in the urban, as opposed to rural, areas of Nebraska (i.e., urban prosecutors are more likely to seek the death penalty) coupled with the fact that most Blacks live in urbanized Nebraska counties.<sup>26</sup> It appears that the judges' more balanced use of aggravation and mitigation offsets the disadvantages suffered by Black defendants<sup>27</sup> so that the Baldus group's findings of how judges use specific aggravating factors, the number of aggravating factors, their use of specific mitigation, and the number of mitigating factors are central to considerations of reform.

Not all the Justices in *Ring* embraced a narrow interpretation of the prohibition against judicial decisionmaking in capital murder cases. Justice Breyer came to the same conclusion that the Constitution forbids judges to act alone to find aggravation that could trigger a death sentence by a very different route. He argued that, "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."<sup>28</sup> Justice Breyer concluded that its retributive function prevents the death penalty from constituting cruel and unusual punishment. He reached this conclusion by citing the empirical literature, which calls into serious doubt the effectiveness of the death penalty as a deterrent of homicide, by assuming that the death penalty is not necessary to incapacitate beyond the sentence of life in prison without the possibility of probation or parole, and by observing that rehabilitation is obviously not a purpose of the death penalty. Justice Breyer argued, "[with] respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to the 'community's moral sensibility' because they 'reflect more accurately the composition and experiences of the community as a whole.'"<sup>29</sup> Of course, Breyer's reasoning implies that jurors will be able to make these determinations by taking into consideration the qualities of criminal actions and not irrational factors that might bias the decision process. Advocates of judicial sen-

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26. *Nebraska Study*, *supra* note 1, at 623-26.

27. *Id.* at 656-58.

28. *Ring*, 122 S. Ct. at 2446.

29. *Id.* at 2447 (quoting Spaziano v. Florida, 468 U.S. 477, 481, 486 (Stevens, J., concurring in part and dissenting in part)).



tencing in death penalty cases, individuals who might favor reform that maintains the role of judges in assigning the death penalty, after first allowing juries to determine aggravation in the guilt phase of a trial, would likely take solace in the suggestion that judges are less arbitrary decisionmakers than jurors. In fact, Arizona made this very claim, suggesting the superiority of judicial sentencing in *Ring*.<sup>30</sup> The Court rejected the argument because "the Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders."<sup>31</sup> Still, legislative reformers might conclude that Nebraska trial judges will be less arbitrary in evaluations of mitigation when deciding whether to impose the death penalty. Interestingly, the Baldus group found that the socioeconomic status of the homicide victims influenced the decisions of the Nebraska judges.<sup>32</sup> Judges were more likely to impose the death penalty against defendants convicted of killing victims higher in socioeconomic status.<sup>33</sup> These considerations suggest that the Baldus group's findings regarding victim socioeconomic status are another significant factor for the Legislatures to consider when reviewing future reforms to Nebraska's capital murder scheme. I turn now to these findings to consider each from a psychological point of view.

## II. AGGRAVATING FACTORS AS PREDICTORS OF THE DEATH SENTENCE OUTCOMES

*The findings of the regression analysis and the individual indicator analyses in the Baldus group's study show that some (e.g., contract murder and prior record of serious assault), but not all aggravating factors (e.g. victim is a police officer and motive to hinder government function) were significant predictors of the death sentence outcomes among death-eligible defendants.*

These data would seem to imply that judges, if not prosecutors, weigh more heavily some very specific aggravating factors to the relative exclusion of others. From a purely psychological point of view, I am interested in why judges weigh some aggravating factors more than others. What is it about a contract murder that commands so much attention? Why is it more important than multiple victims or even the heinousness of the crime? Is this an affective reaction, one made relatively automatically with little deliberation or is it a cold cognition, which requires considerable deliberation and thought? Perhaps, it exposes a political position that reflects the decisionmaker's perception of public opinion, if not the reality of the public's collective view of homicide. Is there a theory of justice that emerges from an understanding of how specific aggravating factors act in the minds of

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30. *Id.* at 2442.

31. *Id.*

32. *Nebraska Study*, *supra* note 1, at 609.

33. *Id.*

judges and prosecutors? Does the public assign similar weights to these aggravating circumstances? Is there congruence between the judges' and the lay public's theory of aggravation? These questions are important from a purely theoretical point of view because their answers are necessary for developing a model to describe and explain how judges, and perhaps prosecutors, reach judgments about the "deathworthiness" of defendants. However, it is not possible to answer these questions only with the archival data that the Baldus team collected. The answers to these issues require, at the very least, additional measures of affect, attitude, and perceived seriousness of the crimes adjudicated and evaluated from the archive. While such data would not be easy to collect because it would require judges and/or prosecutors to complete rating scales for each case that they process (preferably prior to the time that they reach final decisions), they are necessary to build a more complete theory of how sentences are reached in capital murder cases. From a scientific perspective, the legislatures (in this case the Nebraska Legislature) and the courts could come to a more rational set of conclusions about the ability of judges and prosecutors to follow the law without bias, if they possessed this type of information.

Unfortunately, following the *Ring* ruling, it will not be possible to collect this type of data from judges trying capital murder cases; however, they could be collected from prosecutors deciding whether or not to seek the death penalty. A study that included prosecutors' ratings of attitudes, affective reactions, and the specific political responses to each homicide case would nicely supplement the Baldus group's data. The results of this study would be especially interesting if the researcher collected a matching public sample to compare and contrast with findings that explained how prosecutors (and perhaps defense attorneys) view homicide cases. In the post-*Ring* reform debates, these data would certainly be helpful to Nebraska and other states' legislators who will be trying to reshape sentencing schemes to be consistent with the demands of the Sixth Amendment.

The Baldus data invite further investigation into the process by which judges, prosecutors, and even defense attorneys use aggravating circumstances. I wonder if specific aggravating circumstances activate automatic, perhaps inescapable affective reactions<sup>34</sup> in judges, prosecutors, and very likely jurors, which result in immediate, non-deliberative judgments of deathworthiness. The test of this hypothesis would require an experiment in which researchers manipulate information regarding specific aggravating circumstances (i.e., present different forms of the information to different decisionmakers) within an otherwise unchanging set of case facts. Measures would include

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34. See John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AMER. PSYCHOLOGIST 462 (1999).

much more than the participants' final sentencing recommendations. They would include ratings of affect, attitudes, elements of the crime, and perhaps, some more sophisticated reaction time measures to distinguish implicit from explicit reactions to the heinousness of the events. These types of data are in the domain of experimental psychologists. Hopefully, the Baldus group's data will stimulate psychologists to work on a theory of how judges, prosecutors, and jurors reach sentencing decisions, and whether some aggravating factors elicit automatic, inescapable reactions. As far as I know, this work has not been done and it would likely have an important theoretical and practical significance in light of the direction that capital murder legislation will take post-*Ring*. Psychological research has focused much more on the role of mitigation than aggravation in death penalty sentences.<sup>35</sup>

The fact that some aggravating factors are weighed more heavily than others in Nebraska cases is of enormous social significance for attorneys and trial consultants at least in Nebraska and perhaps in other jurisdictions as well. The value of these findings before *Ring* was indisputable. Trial consultants and attorneys on both sides of these cases could have used the outcomes of the Baldus analyses to evaluate specific cases with an eye toward understanding the best way to argue those cases. Trial consultants or attorneys might have used these data to either highlight or offset the most discriminating aggravating factors, depending upon the side they represented. However, the *Ring* holding makes these data much less useful from a trial management point of view because they may say very little about the way in which such factors influence jurors who will now be required to evaluate aggravating factors before either a jury or a judge can impose the death penalty.

Finally, most psychologists could not avoid commenting on the methodological strengths and weaknesses that go to the interpretability of these results. As discussed earlier, the overwhelming strength of the Baldus group's Nebraska study is the external validity strengthened, in part, by the exhaustive effort through which the researchers sampled all relevant death penalty cases heard over an extended period of time. They are to be commended for their efforts. Their coding of aggravation, mitigation, and salient factors shows extensive detail. I have done a number of projects that involved coding these types of variables and I congratulate these researchers for their perseverance. The richness of the data set is a major strength of the study.

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35. Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, PSYCHOL. PUB. POL'Y & L. (forthcoming) (analyzing jury discretion in penalty phases of murder trials).

In the psychological literature, this type of content analysis of case files would normally be accompanied by a testing of the psychometric properties of the resulting variables. The issue of inter-coder agreement stands out as one that could present some reliability difficulties in the Baldus team's analysis of aggravating factors. It is that some aggravating circumstances were more easily identified in these cases than were others. For example, assume for the moment that the coders had an easier time evaluating whether a case included a contract murder than evaluating whether the case included the heinousness of the defendant's actions as an aggravating circumstance. If this were the case, then the reliability (i.e., the lack of random error) associated with contract killing would be much greater than that for ratings of heinousness. The resulting differential reliability could be a plausible rival hypothesis for the heavy weight that judges and prosecutors seemed to place on contract murders relative to simple heinousness. One could go further and ask whether the construct validity of abstract factors such as heinousness is sufficiently supported in the coding scheme. Heinousness as an aggravating factor is not as well defined in the law as is a contract killing. It therefore follows that in at least some cases it might have been difficult for the Baldus coders to accurately determine whether heinousness was a factor at issue. Under these conditions, the presence or absence of heinousness as an aggravating factor (relative to the presence or absence of say a contract murder) may have less predictive power because it was difficult to determine in which cases heinousness appeared as an aggravating factor. This argument could be extended to the measurement of other aggravating factors as well. It is this type of measurement problem that makes large scale archival research projects so difficult to complete.

Finally, there is the issue of causation and correlation. As is the case in all correlational studies of legal decisionmaking (i.e., those that do not manipulate independent variables), it is difficult to establish that the predictor of interest (here, the presence or absence of single or multiple aggravating factors), and not some other third variable factor that is correlated with the predictor variable of interest, is the determinant of the decision outcome. It is also difficult to determine the direction of the causal flow to decide which correlate is most likely the cause of the other. Undoubtedly, the Baldus group favors an interpretation in which the judges used the specific aggravating factors that are significantly related to the penalty outcomes to reach sentencing decisions, but it is also possible that other unmeasured and undetected issues were systematically related to the aggravating factors. Factors such as motivation of the defendants and victims, relationship between the defendants and victims, history of the defendants' behaviors, and childhood backgrounds of the defendants

might very well be correlated with aggravating factors such as the heinousness of the crime or the presence of other victims. Further, it is also possible that the judges used the aggravating factors to justify the sentencing decisions that they had already reached, rather than as the input into the calculus that produced the judgment outcomes. To the Baldus groups' credit, they measured many other third variable factors and tried to statistically control for them in either regression analyses or multiple contingency table breakdowns. However, as the authors point out, small sample sizes limit the usefulness of multivariate statistics as a technique to control confounding factors by measuring them and including them in a statistical model.<sup>36</sup>

Despite these concerns, these data and the reported analyses of their contribution to judicial decisionmaking in capital murder cases provide our best estimates of the way in which judges made pre-*Ring* sentencing decisions. The major point that I make is that single methodologies distort results in knowable ways and require confirmation with alternative approaches. Psychologists could play an important role in testing the conclusions of the Baldus group by designing studies that present and manipulate, under controlled conditions, the specific aggravating factors that were significant predictors in the Baldus groups' regression analyses. Researchers could ask a sample of judges and prosecutors to evaluate cases that are identical except with variations in the combinations of aggravating factors present in the fact patterns. If we find the same relationship between manipulated aggravating factors and sentencing judgments as reported in the Baldus group's Nebraska study, then we can feel much more confident about the weights that decisionmakers assigned to each of the aggravating circumstances in their capital murder sentencing decisions.

### III. NUMBER OF AGGRAVATING FACTORS, MITIGATION, AND PREDICTING DEATH SENTENCES

*The findings of the regression analysis and the individual indicator analyses in the Baldus group's study show that as the number of aggravating factors in cases increase, the offender is more likely to receive a death sentence. This seems to be true despite the fact that neither individual mitigating factors nor the number of mitigating factors are significantly related to case outcome.*

This finding is disquieting, but not unexpected. The jury decision-making literature regarding sentencing in capital murder trials shows that jurors have a difficult time evaluating mitigating circumstances.<sup>37</sup> In fact, several studies demonstrated that jurors do not un-

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36. *Nebraska Study*, *supra* note 1, at 535-36.

37. See generally James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 L. & HUM. BEHAV. 203 (1992); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*,

derstand what mitigating circumstances actually are.<sup>38</sup> Other studies show that jurors confuse specific mitigating circumstances and treat them as aggravating factors.<sup>39</sup> Some sentencing jurors seem to treat the offender's earlier life successes in socially appropriate enterprises as if they were aggravating factors, reasoning that because the defendant led a successful prior life, he should have known better as an adult.<sup>40</sup> One study found that instead of balancing aggravation and mitigation as the law requires, mock jurors weighed independently the aggravating and mitigating circumstances, allowing each to make its own contribution to the sentence.<sup>41</sup> In this study, research participants failed to use mitigation to offset the effects of aggravation.<sup>42</sup> In other words, the mock jurors weighed aggravation separately from mitigation to reach sentencing judgments.

It is, of course, unlikely that the judges and prosecutors do not understand the concepts of aggravation and mitigation. Furthermore, the Nebraska data suggest that the judges consciously believe that the law in Nebraska requires them to consider the totality of the aggravation in a case and not just the number of aggravators. Yet, the findings are very clear that as the number of aggravating factors grow in number the death penalty is more and more likely to be imposed regardless of the mitigation considered individually, considered as the total number of mitigating factors, or considered as the totality of the circumstances.<sup>43</sup> This leads to an implicit rule in Nebraska which might read something like, "a death penalty is almost a sure bet with three or more aggravating factors but is a close call, depending upon other factors, with less than two aggravating factors."

The critical question becomes how judges reach decisions in cases where there are fewer than three aggravating factors. The data, as they exist, do seem to suggest that decisionmakers take mitigation into consideration with low levels of aggravation, but the findings are

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18 L. & HUM. BEHAV. 411 (1994); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & HUM. BEHAV. 575 (1997); Richard L. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, 28 J. APPLIED SOC. PSYCHOL. 124 (1998); Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455 (1995); Wiener et al., *supra* note 35.

38. See generally Luginbuhl, *supra* note 37.

39. Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, *supra* note 37.

40. Craig Haney et al., *Deciding To Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149 (1994).

41. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, *supra* note 37.

42. *Id.*

43. *Nebraska Study*, *supra* note 1, at 548-62.

not significant and the sample sizes are rather small.<sup>44</sup> The uncomfortable conclusion that survives is that it is not at all clear how sentencing decisions were reached when there were fewer than three aggravating factors. Perhaps the psychological constructs that I outlined above (e.g., affect, motivation, attitude, ideology) determined the sentence when aggravation was low to moderate. If these factors did come into play, one could ask whether they did so implicitly (i.e., below the level of awareness) or explicitly (i.e., with deliberation)?

Once again, I see the need for some experimental work that manipulates under controlled circumstances the number of aggravating circumstances and the number and type of mitigating circumstances in the context of case descriptions derived from the fact patterns in some of the Nebraska cases analyzed in the Baldus report. Of particular interest in these experiments would be the interaction of strength of aggravation and strength of mitigation. If prosecutors and judges follow the law, then strong enough mitigation should offset aggravation, when aggravation reaches some "deathworthy" threshold. Below that threshold mitigation is irrelevant to the sentencing process. A defendant is eligible for the death penalty only after serious enough aggravation is found beyond a reasonable doubt and only then should mitigation become part of the decision calculus. The experimental work that I would recommend would include measures of affective reactions, attitudes toward punishment, and scales of political ideology to begin to estimate the effects of these factors in the Nebraska's capital murder calculus.

Following *Ring*, the focus of this work should be expanded to include mock jury experiments that investigate the way in which aggravation, mitigation, and psychological factors (i.e., comprehension of jury instructions, affective reactions to the fact patterns, attitudes toward punishment, and political ideologies) interact to produce sentencing decisions among prosecutors, judges, and jurors. The end product of this type of work will be of enormous value to Nebraska and other state legislatures in reforming death penalty sentencing consistent with the holding in *Ring*. Of equal interest from a social policy perspective is the discrepancy between the law (both as written and as practiced) and the implicit theories of justice that citizens use to evaluate these types of cases. For example, it would be very interesting to find out if Nebraska jury-eligible citizens uphold the rule of three aggravators that figured prominently in judicial decisionmaking. More generally, the comparison of survey data and experimental studies of the decisionmaking processes of the Nebraska citizenry to the Baldus group's results with regard to the relative roles of aggravation and mitigation in homicide cases could be most informative to policymak-

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44. *Id.* at 554.

ers. Put simply, post-*Ring* reformations of the capital sentencing calculus would likely be influenced by data that points out discrepancies between how the citizens of the state on one hand and the prosecutors and judges on the other weigh aggravation and mitigation.

From a more methodological point of view, the problem of construct validity takes on a new dimension when one considers the addition of non-statutory mitigating circumstances in capital murder dispositions. A mitigating circumstance can be any aspect of the crime or characteristic of the defendant that argues for leniency in sentencing.<sup>45</sup> Therefore, each non-statutory mitigating circumstance is defined largely by a subjective standard, that is by the perceptions of the individual sentencers. The judges were not queried about the mitigating factors that they found in each case and it is difficult to code the strength of mitigation in any case or set of cases from the official record without input from the sentencers. The Baldus group's attempts at coding mitigation may be an accurate reflection of statutory mitigation but one can only speculate on the non-statutory sources of mitigation that the judges (and prosecutors deciding whether to seek the death penalty) might have brought to the decision task. Perhaps, one of the reasons for the lack of mitigation effects results from underestimating the strength of mitigation that went into the decisionmakers' judgment calculus. My own work with juries<sup>46</sup> convinces me that the non-statutory mitigating factors (i.e., defendant remorse, defendant affect, victim's family affect, sentence certainty, and decisionmakers' views of the death penalty) may very well be the most influential mitigating factors.

Still, these data do estimate the strength of aggravation and mitigation using several alternative operational definitions of those constructs.<sup>47</sup> However, there is little in the way of a direct measure of the interaction between aggravation and mitigation in the analyses. Neither the regression analyses nor the individual cross tabulation breakdowns reported in the Baldus group's paper, test the interaction between level of aggravation and level of mitigation. As discussed above, this would be an interesting measure to examine, especially post-*Ring*. That is, one factor that should be influential in determining whether to completely remove judges from the sentencing process or to relegate their involvement to evaluating mitigation after aggravation is found by a jury is the way in which the judges used mitigation at different levels of aggravation. Assume that the regression analysis produced a significant interaction between aggravation and mitigation strength on sentencing outcomes in a way that high levels of mitigation had some impact once aggravation was found, but low

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45. *Lockett v. Ohio*, 438 U.S. 586 (1978).

46. Wiener et al., *supra* note 35.

47. *Nebraska Study*, *supra* note 1, at 548-62.



levels did not produce that effect. This pattern would suggest that the trial judges were effective at representing, at least, the law's intention to balance aggravation with mitigation. The results of this type of re-analysis of the Baldus team's data should be of general interest to the Nebraska Legislature.

#### IV. SOCIOECONOMIC STATUS OF VICTIMS AND SENTENCE OUTCOMES

*The findings of the regression analysis and the individual indicator analyses in the Baldus group's study show a strong effect for socioeconomic status of victims. Defendants charged with killing victims with high as compared to low social economic status were more likely to receive the death penalty.<sup>48</sup>*

While the seemingly obvious explanation for this outcome is that victims who are "valued" more in the community trigger a harsh sentence against the defendants convicted of causing their death, the reason for the need of this harsher sentence is elusive. From a psychological point of view I suspect that this result is driven not by rational information processing but rather by experiential processing (emotionally driven decisionmaking).<sup>49</sup> It may turn out that the judges were angrier at the killing of high status community members than at the killing of less highly valued citizens. Once again, the affective component remains unstudied in this data set, and an investigation of the role of affect probably requires an experimental manipulation of socioeconomic status of the defendant assessed with ratings of experiential processes (e.g., emotional reactions), as well as, sentencing outcomes.

Nonetheless, it would seem that this largely descriptive finding in the Baldus team's analysis lends considerable support to Justice Breyer's Eighth Amendment argument in *Ring v. Arizona* that sentencing in capital murder cases, if it is justified by its retributive function, is best left to the juries and not judges.<sup>50</sup> It is doubtful that the community values, at least as consciously and deliberately expressed, would be consistent with a sentencing scheme that favors killers of low status victims over killers of high status victims. While the test of the bias awaits archival studies of actual sitting juries and/or with experimental research that varies and presents victims of varying economic status to jury-eligible citizens, it is still the case that the ability of judges to reflect accurately community values of retribution will always be suspect, even if the role of the trial judge is limited to consid-

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48. *Id.* at 608-16.

49. See generally, Seymour Epstein & Rosemary Pacini, *Some Basic Issues Regarding Dual-Process Theories from the Perspective of Cognitive-Experiential Self-Theory*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 462-482 (Sheely Chaiken & Yaacov Trope eds., 1999).

50. 122 S. Ct. 2428, 2447 (2002).

eration of mitigating factors. Furthermore, if new capital murder sentencing schemes limit the role of judges to evaluating mitigation after the jury finds aggravation, the trial judges may still show socioeconomic status biases by finding stronger mitigation with low status victims and weaker mitigation with high status victims. Unfortunately, the Baldus team's data is silent on the interaction of mitigation and socioeconomic status of the deceased (although it may be possible to test this interaction with the Nebraska data). Therefore, these speculations await additional data and/or additional analyses.

The implications of the socioeconomic status finding are disturbing and any policy ameliorations are not obvious. The data suggest that in Nebraska (and very likely in other states) bias in social status perspective exists at the very highest levels of decisionmaking. These data do not tell us anything about decisionmaking in other areas of the criminal justice system. We are left with unanswered questions (questions that the Baldus team did not set out to answer) such as how far does the bias against the value of low socioeconomic status individuals reach? Does it generalize to jurors, legislators, police, executive officers in local and state government, and appellate level courts? If the bias is pervasive, then there are indeed many ways in which prejudice against the less successful in our society could be expressed at a variety of different levels in the criminal justice system. Further, it is not at all clear how policy could be forged to rid the system of this prejudice against the less successful members of society.

One of the methodological implications of the status finding is that the study is in fact sensitive enough to detect biases that the prosecutors and judges harbor when trying capital murder cases. That is, if this design and these data were sensitive enough to detect one type of bias originating with the characteristics of the homicide victims, it lends support to the sensitivity of the Baldus group's data to find other biases that resulted from other social attributes of the victims and their accused murders. This brings us back to the major finding and ultimate purpose of this research project.

## V. MINORITIES ADVANCING TO THE PENALTY PHASE IN CAPITAL CASES

*The findings of the regression analysis and the individual indicator analyses in the Baldus group's study show some limited evidence that minorities are more likely to advance to the death penalty stage. However, final sentencing effects for the defendant's race, the victim's race, and various defendant and victim race combinations are not significant when the level of defendant culpability and other extra-legal factors are controlled.<sup>51</sup>*

Prior research with this paradigm has found evidence of racial bias in other jurisdictions. Most notable are data describing the disposi-

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51. *Nebraska Study, supra* note 1, at 566-90.

tions of capital murder cases in Georgia collected by the Baldus group<sup>52</sup> and reviewed by the Supreme Court in *McKlesky v. Kemp*,<sup>53</sup> which demonstrated that Black defendants who killed White victims were most at risk for the death penalty. Also at high risk were murders of White victims relative to Black victims regardless of the race of the defendant. Additional data collected by the Baldus group in Pennsylvania showed evidence of racial discrimination in capital murder sentencing in Philadelphia.<sup>54</sup> One cannot help but wonder why the Nebraska results are inconsistent with the prior research in these two other jurisdictions. Some help may come from the jury decisionmaking literature in social psychology. For example in a recent set of experiments concerned with jury decisionmaking in general, but not specifically with sentencing in first-degree murder cases, White mock jurors tried to embrace an egalitarian value system and therefore only showed racial bias in cases in which there were not blatantly salient racial issues. In cases in which the race of the defendant is a material issue at trial (e.g., discrimination cases) White jurors do not manifest judgments that reflect racial bias.<sup>55</sup> An evaluation of the fact patterns in the Nebraska cases could show similar results for judges and prosecutors. Perhaps, the race of the defendants or victims was central to the fact patterns in enough of these cases to trigger egalitarian decisionmaking by the judges and offset racial biases in the statistical analyses. While this hypothesis was not tested in the Baldus group data, some secondary analyses could explore this explanation.

In one study conducted with mock jurors making sentencing decisions in California, the authors varied the race of the defendant experimentally and included measured juror comprehension of California penalty phase instructions as a secondary predictor.<sup>56</sup> They found that those jurors who poorly comprehended the instructions were more likely to assign the death penalty to Black defendants than to White defendants.<sup>57</sup> These data suggest that individuals who do not

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52. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 157, 184-88 (1990).

53. 481 U.S. 279 (1987).

54. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

55. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black defendants in the American courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

56. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337 (2000).

57. *Id.*

understand the law but who are required to impose a sentence under conditions of uncertainty and in an emotionally charged context will fall back on their implicit theories of justice and social order. Hence, jurors who understand the instructions are constrained to balance aggravating and mitigating factors as the law requires. However, those without that understanding are free to allow personal biases to dominate. Indeed, my own work with Missouri mock jurors showed high levels of juror miscomprehension of penalty phase instructions even after the jurors deliberated in groups to reach sentencing decisions.<sup>58</sup> However, when we attempted to improve comprehension by simplifying the instructions and presenting them in a flow chart format, juror understanding increased significantly.<sup>59</sup>

Nebraska judges understand penalty phase law and therefore constrain their own implicit theories of justice to comply with their commitments to follow the law. Perhaps, if the jurors in Georgia and the mock jurors in California and Missouri were presented with jury instructions that they could understand and follow, they too would follow the law and inhibit their own implicit systems of bias. If this logic is correct, then it may very well turn out that sentencing decisions in Nebraska following the new *Ring* standard for the Sixth Amendment may very well fall prey to the same kinds of racial bias in other state systems. This speculation is further supported by the Baldus group's finding that Black offenders compared to White offenders in Nebraska are more likely to advance to penalty phase trials for homicide and that it was the judge's unprejudiced application of the law that offset these disparate impact results in the final disposition of capital murder cases. Ironically, the results of the Baldus studies together with the California and Missouri mock jury experiments predict that one unintended outcome of *Ring* may very well be to increase the effects of defendant and victim race in those states that prior to *Ring* opted for judicial sentencing in capital murder cases.

Having made these comments regarding the implications of the absence of ethnicity effects in the Nebraska data, I must qualify my speculations with some warnings. The logic of the Baldus team's logistic regression approach is that with enough data, researchers can take into account the effects of a large number of potentially confounding variables in a data base of measured predictors. Measuring and statistically controlling for factors such as socioeconomic status of the offenders, race of the victims, race of the defendants, levels of culpability, strength of aggravation, strength of mitigation, and a host of other legal and extra-legal factors is limited by the ability of the researchers to anticipate potential confounds and to collect enough data to provide the statistical tests with ample power and adequate stabil-

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58. Wiener et al., *supra* note 35 (manuscript at Section II, on file with author).

59. *Id.*

ity to control for them. As Professor Baldus points out, the sample sizes in this study are relatively small compared to other studies that applied this procedure (i.e., Georgia and Philadelphia).<sup>60</sup> In fact there were only twenty-nine death sentences imposed during the duration of this study. Only seven of these defendants were minorities and just two of them were executed or remain at risk of execution. Only fourteen White defendant cases ended in a death sentence and only five of them were executed or remain at risk. It is difficult to use statistical controls to reach definitive conclusions about racial bias with so few cases sampling the various combinations of defendant race, victim race, and sentencing outcome. In the final analysis it is true that there is no evidence of racial discrimination in the Nebraska study, but it is also the case that the analysis of bias would have been a great deal more sensitive if more cases had been available for analysis.<sup>61</sup>

## VI. CONCLUSION

In the end, the Baldus group's analysis of the disposition of capital murder cases in Nebraska prior to the Supreme Court's decision in *Ring v. Arizona*<sup>62</sup> was a careful and thorough analysis of an archival data set. It enjoys the ecological validity advantages of such an approach and it suffers from the internal validity and construct validity problems of that research paradigm. Taking the strengths and weaknesses of this study together leads to the conclusion that these are important data that should go a long way toward helping policymakers reform capital murder sentencing law to come into compliance with the Sixth Amendment standard announced in *Ring*. From a social scientist's perspective, these valuable data shed a great deal of light on the strengths and weaknesses of judicial sentencing. Furthermore, they may be among the last data sets collected on judicial decisionmaking in capital murder cases. I am grateful that Professor Baldus and his colleagues went to such great lengths to collect and analyze these cases and enrich our understanding in this important area at the intersection of law and human behavior.

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60. *Nebraska Study*, *supra* note 1, at 535-36.

61. *Id.*

62. 122 S. Ct. 2428 (2002).