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Death Beyond a Reasonable Doubt

Janet C. Hoeffel

I. INTRODUCTION

In the forty-four years since the Court employed the Eighth Amendment to temporarily suspend the death penalty in the United States in *Furman v. Georgia*¹ in 1972, the Court has spilled an enormous amount of ink attempting to instruct the states on how to properly guide jurors' discretion in imposing the death penalty. Yet, in its voluminous Eighth Amendment jurisprudence, the Justices spilled not one drop suggesting the familiar and unifying standard of beyond a reasonable doubt as a guide.

The Court has finally and recently inched toward this standard in capital cases, not through an Eighth Amendment lens, but through the Sixth Amendment's right to a jury trial. In 2000, *Apprendi v. New Jersey*² was the Court's watershed Sixth Amendment case marking the expansion of the jury trial right into new realms. The Court brought its newly-minted jury trial analysis to bear in the penalty phase of capital cases in both *Ring v. Arizona*³ in 2002 and *Hurst v. Florida*⁴ in 2016. In both cases, the Court held that a jury, and not a judge, must find the

Catherine D. Pierson Professor of Law, Tulane Law School. I wish to thank the Arkansas Law Review for putting together this symposium on the future of the death penalty, the other participants in the symposium, and Arkansas law professors Laurent Sacharoff and Brian Gallini for inviting me. I also want to thank the faculty at Tulane Law School who participated in a presentation of an earlier draft of this Article, including Keith Werhan, Ann Lipton, and Sally Richardson. For close reading and advice, I also thank Pamela Metzger and Stephen Singer. Finally, for his exhaustive research, I am indebted to Alan Williams.

1. 408 U.S. 238 (1972).

2. 530 U.S. 466 (2000).

3. 536 U.S. 584 (2002).

4. 136 S. Ct. 616 (2016).

aggravating factor or factors, at least one of which is necessary for a death verdict, and that the jury must find the existence of that factor or factors beyond a reasonable doubt.⁵

This Article explains that a robust application of *Apprendi* to capital cases goes further than the narrow holdings of *Ring* and *Hurst*. Justice Sotomayor strongly hints at this extension in her opinion for seven members of the Court in *Hurst*.⁶ The Court seems poised to go the next step. To apply *Apprendi* in earnest is to apply it in light of the history of the jury trial and the beyond a reasonable doubt standard in capital cases. The logic and language of *Hurst v. Florida* and the historical underpinnings of the right to have a jury make certain findings beyond a reasonable doubt lead to the conclusion that jurors must make all determinations necessary for the imposition of death beyond a reasonable doubt.

While states have different statutory schemes for how death is decided, known as “weighing” versus “non-weighing” schemes, it makes little difference when applying the jury trial right. If jurors have to find that aggravating factors outweigh mitigating factors before death may be imposed, then jurors have to find that beyond a reasonable doubt.⁷ If jurors have to find the defendant represents a future danger in a non-weighing state, it must be found beyond a reasonable doubt.⁸ In all cases, in all schemes, the final judgment jurors must make is whether, in the end, death is the appropriate punishment. This Article argues they must find this to be the case beyond a reasonable doubt.⁹

Because the Court is paying close attention to history in expanding the jury trial right into new realms, Part I of this Article sets out the history of the right to trial by jury and the origins of the beyond a reasonable doubt standard, with a particular focus on capital cases. It describes the importance of both to protect the collective rights of the people: to have

5. *Ring*, 536 U.S. at 609; *Hurst*, 136 S. Ct. at 624.

6. *See infra* notes 120-31 and accompanying text.

7. *See infra* notes 105-107 and accompanying text.

8. *See infra* notes 111-12 and accompanying text.

9. *See infra* notes 142-43, 161-64, 179-80 and accompanying text.

twelve members of the community unanimously decide death instead of a single jurist and to impose the beyond a reasonable doubt standard on the decision, to protect those jurors from the angst of eternal damnation lest they are responsible for killing an innocent man.

Part II then describes the Court's own recent development of the jury trial right, relying heavily on history at the time of the founding of the nation. In the non-capital arena, from *Apprendi* through *Alleyne v. United States*,¹⁰ the Court has viewed this right robustly and expansively. In the capital arena, the Court has not yet had the opportunity to develop the right more fully, as the appellants in both *Ring* and *Hurst* asked a narrow, discrete question of the Court. However, this Part describes how the language of *Hurst* demonstrates the Court recognizes the next steps. This Part also gives the lay of the land, showing a deep split in the states as far as the use of reasonable doubt in the jury's decision-making on the imposition of death.

Part III brings history and *Hurst*'s logic and language together to demonstrate how, to comply with *Apprendi*, the jury, and not a judge, must decide the ultimate issue, separate and apart from preceding issues like the weighing decision. One jurist has embraced this wholeheartedly. In *Rauf v. State*,¹¹ the Delaware Supreme Court issued a per curiam opinion ruling Delaware's death penalty statute unconstitutional in light of a broad reading of *Hurst*.¹² Chief Justice Strine wrote separately, for three of the Justices:

From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result.¹³

10. 133 S. Ct. 2151, 2159-60, 2163-64 (2013).

11. 145 A.3d 430, 432-33 (Del. 2016).

12. *Id.* at 434.

13. *Id.* at 437.

The logic, history, and conclusion, are inescapable, and the Court appears willing to entertain the conclusion if presented with the question.

II. HISTORY OF JURY TRIALS AND BEYOND A REASONABLE DOUBT: COLLECTIVE RIGHTS OF THE COMMUNITY

In modern day practice and language, the Sixth Amendment right to a jury trial belongs to the criminal defendant¹⁴ and the due process clause gives the defendant the right to make the prosecution prove its case against him beyond a reasonable doubt.¹⁵ These rights inure to the benefit of the individual criminal defendant, who otherwise would be left to the discretion of one jurist with no standards to guide him.

While it is certainly and undeniably true that these are individual rights of the defendant, they are also both, now and historically, rights of the community.¹⁶ Often forgotten, it seems, is the history of both the jury trial and the reasonable doubt standard as stemming from the concerns of the community, most particularly in capital cases. This section will explore the history of these two intertwined features of the criminal justice system to demonstrate their origin as collective rights of the community.

14. See U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. [The defendant's] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

15. See *In re Winship*, 397 U.S. 358, 363-64 (1970) ("The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.").

16. This is not an unusual feature of criminal procedure rights. For example, as practiced, *Batson v. Kentucky* gives the criminal defendant an equal protection right to a jury of his peers. 469 U.S. 79, 86-87 (1989). *Batson*, however, stems from the equal protection right of the community to serve as jurors. *Id.* at 99.

A. The Community's Right to Decide Punishment in Capital Cases

The history of the jury trial right illuminates it as a collective right of the people to stand in the place of the sovereign to impose punishment on anyone. Given that the consequences of a determination of guilt was typically death, “the jury trial right, for the British colonies and later the confederation of states, was primarily about the fledgling American community’s ability to judge its own people and pronounce their punishment.”¹⁷ It is therefore simultaneously a collective right of the people to judge and the individual right of the defendant to be judged by his peers.

The influential thinkers for the Founders—Sir Edward Coke, Matthew Hale, Cesare Beccaria, and especially William Blackstone—wrote of the jury trial right as a public institution.¹⁸ William Blackstone explained the jury right as belonging to the individual in the grand jury context and the community in the petit jury context:

[T]he founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king *for any capital crime*, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.¹⁹

The jury trial was the right of the community “to guard against a spirit of oppression and tyranny on the part of rulers,” and “was from very early times insisted on by our ancestors in

17. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 399 (2009).

18. *Id.* at 415-18 (dissecting the works of these thinkers to demonstrate their focus on the right as collective not individual).

19. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 343 (4th ed., Oxford, Clarendon Press 1770) (emphasis added).

the parent country, as the great bulwark of their civil and political liberties.”²⁰

Further, Blackstone said, “The *right of punishing* belongs not to any one individual in particular, but to the society in general[.]”²¹ From the founding, the jury’s role as the sentencer in capital cases “was unquestioned.”²² Because trials were not bifurcated, “[t]he question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding conducted as an adversarial trial.”²³

In England, until 1957, murder—and over 200 other crimes—was punishable by a mandatory sentence of death.²⁴ Similarly in the colonies, and at the time of the founding, almost all felonies carried the death penalty.²⁵ Imprisonment and degrees of murder were innovations not yet developed as alternatives.²⁶ Jurors exercised mercy in cases where they

20. *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (quoting 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 540-41 (4th ed. 1873)); *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 106 (1998) (noting the jury trial right “was not simply and always an individual right but also an institution of localism and popular sovereignty”); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *GEO. L.J.* 183, 196-97 (2005) (noting that the original jury trial right in the Constitution “was meant to be a right of We the People to administer justice”).

21. BLACKSTONE, *supra* note 19, at 364 (emphasis added); *see also* *Alleyne v. United States*, 133 S. Ct. 2151, 2159 (2013) (“Consistent with this connection between crime and punishment, various treatises defined ‘crime’ as consisting of every fact which ‘is in law essential to the punishment sought to be inflicted,’ or the whole of the wrong ‘to which the law affixes . . . punishment.’”).

22. *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting) (quoting 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)).

23. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 *COLUM. L. REV.* 1967, 1972 (2005).

24. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

25. “At the time the Eighth Amendment was adopted in 1791,” all of the States made a death sentence mandatory for “a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy.” *Id.*

26. It was not until 1794 that Pennsylvania was successful in reforming the law, dividing murder into degrees. *Id.* at 290. Nonetheless, a conviction for first-degree murder still required imposition of a mandatory death sentence; a term of imprisonment was imposed for second-degree murder. *See id.* at 290-91. Other states followed suit or kept the old law. Either way, a jury verdict of guilty of capital murder meant an automatic death sentence throughout the United States until the mid-1800s. *Id.* at 291. Beginning with Tennessee in 1838, States began to “abandon mandatory death sentences in favor of

believed the death penalty was too harsh by acquitting the defendant.²⁷ Rather than finding this an abdication of duty, this exercise of mercy was considered a primary function of the community. John Adams wrote, “It is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”²⁸ Adams endorsed the jury trial right as emanating “from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people.”²⁹

In *Duncan v. Louisiana*,³⁰ hailed as the signature case establishing a criminal defendant’s individual right to a jury trial, the Court also underscored the fundamental right to a jury trial as a community right: “Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.”³¹ The Court explained that the jury trial came to America with the “strong support” of the English colonists:

Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies . . . on October 19, 1765—[considered as stating] “the most essential rights and liberties of the colonists”—was the declaration: “That trial by jury is the inherent and invaluable right of every British subject in these colonies.”³²

discretionary death penalty statutes.” *Woodson*, 428 U.S. at 291. By 1920, approximately 40 states had made death sentences discretionary for first-degree murder and other capital offenses. *Id.*

27. As the Court explained in *Woodson*, “At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.” 428 U.S. at 293.

28. 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS 255 (Charles Francis Adams, ed., Boston, Little, Brown & Co. 1865).

29. *Id.* at 253.

30. 391 U.S. 145 (1968).

31. *Id.* at 156.

32. *Id.*

Further, the *Duncan* Court recounted, the First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared “[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”³³

The Journal of the Proceedings of the Congress, held in Philadelphia, September 5, 1774, mimicked Blackstone’s description of the jury trial right as the collective right of the people and the individual right of the accused:

The next great right is that of trial by jury. This provides, that neither life, liberty nor property can be taken from the possessor, until twelve of his unexceptional countrymen and peers, of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry face to face, in open Court, before as many of the people as chuse [sic] to attend, shall pass their sentence upon oath against him³⁴

After a thorough review of this history, Laura Appleman concludes, “[T]he Continental Congress thought it important to not only mention trial by jury, but also to explain that this jury trial right was public, expressive, and local Popular understanding of the jury trial right would have unquestionably seen it as a right of the community, no matter where or how it was inserted into the Constitution.”³⁵

33. *Id.*

34. Appleman, *supra* note 17, at 421-22 (quoting U.S. CONT’L CONG., JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, SEPTEMBER 5, 1774, at 121 (1774)); *see also* Alleyne v. United States, 133 S. Ct. 2151, 2161 (2013) (“It also preserves the historic role of the jury as an intermediary between the State and criminal defendants.”); Williams v. Florida, 399 U.S. 78, 100 (1970) (“[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser.”); *see supra* note 14, 20 and accompanying text.

35. Appleman, *supra* note 17, at 426, 438. Justice White for the Court in *Duncan* also underscored the collectivity of the right:

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to

When death was on the table, the community was entitled to interpose itself, in the form of a jury, between the accused and the sovereign.³⁶ As the next section demonstrates, this was the case for hundreds of years, beginning in the thirteenth century.³⁷

B. Beyond a Reasonable Doubt as the Moral Conscience of the Community

As with the right to a jury trial, the beyond a reasonable doubt standard has both a collective and individual aspect. The modern rationale for the standard bears little relation to its history, but this is not to say either need be jettisoned. They can be reconciled. The modern rationale was expressed in 1970 in *In re Winship*,³⁸ where the Court held that the requirement that the prosecution prove guilt beyond a reasonable doubt was a requirement of the Constitution under the Due Process Clause.³⁹

The Court expressed this due process right as inuring to the benefit of the criminal defendant. The “reasonable doubt” requirement “has [a] vital role in our criminal procedure for cogent reasons.”⁴⁰ The prosecution subjects the criminal defendant both to “the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.”⁴¹ This procedural protection

entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

36. See White, *supra* note 22, at 10 (“[B]y the time [of] the Bill of Rights . . . the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established.”).

37. To have one jurist put a man to death, as was the case in Alabama until 2017, see *infra* note 109, and is currently the case in Montana, see *infra* note 109, was simply unthinkable for hundreds of years both before and after the founding of our nation.

38. 397 U.S. 358 (1970).

39. *Id.* at 364.

40. *Id.* at 363.

41. *Id.*

“provides concrete substance for the presumption of innocence”⁴² and reduces the risk of erroneous convictions.

However, the Court also expressed a shade of the history of the reasonable doubt rule when it described it as essential to ensure only the guilty are “condemned”:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.⁴³

Going back in time, we see that it is the “moral force” of the standard in protecting the community that brought it about.

The “beyond a reasonable doubt” standard emerged into use in the eighteenth century as the product of a history of Christian juries fearful of the moral consequences of returning guilty verdicts.⁴⁴ Along with the requirement of a unanimous verdict of twelve jurors, it was a “moral comfort” rule, not a guide to fact finding.⁴⁵ When it first appeared in the Boston Massacre trial in Robert Paine’s closing argument in 1770, its use was meant to ease the jurors’ path to conviction.⁴⁶

The origin of the jury trial itself, as a replacement to decision-making by judges, was tied to the anxieties of judges in returning guilty verdicts in cases of blood punishments and death. If perchance a judge convicted an innocent man, it was a mortal sin in the older Christian tradition.⁴⁷ Because of the judicial discomfit, by the thirteenth century, England had developed the criminal jury trial as we know it today.⁴⁸ Now it

42. *Id.* The Court in *Jackson v. Virginia* described the reasonable doubt standard in similar terms: “[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” 443 U.S. 307, 315 (1979).

43. *In re Winship*, 397 U.S. 358, 364 (1970).

44. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 3 (2008).

45. *Id.* at 6.

46. *Id.* at 193.

47. *Id.* at 3.

48. *Id.* at 138.

was to be jurors, not judges, who had to bear the potential moral consequences of sitting in judgment in blood cases.

By the end of the Middle Ages, jurors found some salvation in the “special verdict,” where they could find facts only and leave the judgment to the judge.⁴⁹ As explained by legal historian James Whitman:

Death and doubt: these were the great issues. Sir Edward Coke too cited the same doctrine at the end of the century. For him too the need for special verdicts arose in cases where the jury experienced doubt: “[N]ote, reader, in all cases where the jurors find the special matter doubtful in law pertinent and tending to the issue which they are to try, there the Court ought to accept it.” Death and doubt presented the great challenges for the criminal jury.⁵⁰

In the seventeenth century, jurors lost the right to a special verdict and then regained it and, similarly, lost and regained the relief of the benefit of clergy (which assignment allowed the accused to escape punishment).⁵¹ Additionally, jurors had the option of transporting the condemned to the colonies as another method to escape the moral stain of blood punishments.⁵² However, that option came to an end with the American Revolution.⁵³

Without the option of transportation, jurors in the 1780s understandably often refused to find guilt in cases of blood punishment and death, believing they themselves faced potential damnation.⁵⁴ Theological tracts and moral philosophers in the eighteenth century emphasized in cases of *any* doubt, jurors should take the “safer side” or the “safer path.”⁵⁵ Hence, jurors acquitted.⁵⁶ Because execution was the usual punishment and

49. WHITMAN, *supra* note 44, at 157.

50. *Id.*

51. *Id.* at 162.

52. *Id.*

53. *Id.* at 187.

54. WHITMAN, *supra* note 44, at 187; *see also id.* at 174 (noting the “safer path” doctrine, including in Sir Matthew Hale’s HISTORY OF THE PLEAS OF THE CROWN (1736), where he writes “[W]hen you are in doubt, do not act, especially in Cases of Life”).

55. *Id.* at 199.

56. *Id.* at 199, 200.

transportation to the colonies was not an alternative, the moral concerns of the jurors did not dissipate by the eighteenth century, even though blood punishments were rare. James Whitman posits we may not have seen the emergence of reasonable doubt if execution were not the usual punishment.⁵⁷

Reasonable doubt as a moral concept, making its debut in England in the 1780s, was a response to the “timidity” of jurors who experienced “a general dread lest the charge of innocent blood should lie at their doors.”⁵⁸ Jurors so instructed, could convict if they were convinced beyond a *reasonable* doubt, as opposed to all doubt:⁵⁹

[The theology of reasonable doubt] was designed to quell fears about the responsibility for judgment, not to resolve factual mysteries. It was designed to coax jurors into acting, in situations in which they felt uneasy about the “perilous” task of condemning others.⁶⁰

Importantly, the moral focus was not on the finding of facts, which had always been more of a given than they are

57. *Id.* at 187.

58. WHITMAN, *supra* note 44, at 4.

59. For a time, the phrasing of the matter of proof in moral evidence was beyond *any* doubt. See Barbara J. Shapiro, “*To a Moral Certainty*”: *Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 179-80 (1986) (“It was the ‘indispensable duty’ of the judges in charging the jury to ask ‘whether they are satisfied, beyond the probability of doubt, that the defendant is guilty.’”); see also S. PHILLIPS, *THEORY OF PRESUMPTIVE PROOF* 58 (1814) (stating “that the ‘impression in the mind of a jury in a criminal case’ must not be ‘that the prisoner is probably guilty, but that he really and absolutely is so.’ If the jury had doubts, they were to acquit.”); BARBARA J. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* 33 (1991) (“Moral evidence was to be distinguished from demonstration, which led to absolute certainty, for the proofs involved in moral evidence were fallible. They, therefore, could not produce absolute certainty but only ‘probable judgment, or at most moral certainty.’ Probability, however, might ‘rise so high, as to exclude all reasonable doubt.’”).

60. WHITMAN, *supra* note 44, at 204. Erik Lillquist agrees that “[i]t seems likely that the rise of the reasonable doubt standard was related to the increasing resistance of the public—both American and British—to the application of the capital sanction.” Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 51 (2005). See also Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 148-49, 149 n.206-07 (2002) (giving views of nineteenth-century commentators); Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1195 (2003) (“[T]he early life of the reasonable-doubt instruction appears to [have been] limited solely to capital trials . . .”).

today, but on the morality of punishment.⁶¹ As eloquently put by James Whitman, “There is nothing in that phrase [reasonable doubt] that tells us how to go about determining uncertain facts in any rational or scientific way. The phrase tells us a great deal, though, about how to feel easy in our consciences when we condemn others.”⁶²

By the end of the eighteenth century the concepts of moral certainty and proof beyond reasonable doubt were interwoven in the treatises and literature.⁶³ There is little debate among scholars that proof beyond a reasonable doubt was equated with moral certainty.⁶⁴ Because trials were not based on scientific, demonstrable proof, but witness reports (called “moral evidence”), moral certainty was “the highest degree of certitude based on such evidence.”⁶⁵ If one had real doubts, moral certainty was not reached.⁶⁶ “At the beginning of the nineteenth century, proof beyond all reasonable doubt was the most popular version [of the standard].”⁶⁷ Instructions to jurors were guides to

61. WHITMAN, *supra* note 44, at 209.

62. *Id.* at 204.

63. See Shapiro, *supra* note 59, at 185 (explaining how Thomas Starkie’s *Practical Treatise on the Law of Evidence* was influential into the nineteenth century and reflected the modern standard; it said, “Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact.” (quoting THOMAS STARKIE, PRACTICAL TREATISE ON THE LAW OF EVIDENCE (2d ed. London 1833))).

64. See Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 111 (1999); Shapiro, *supra* note 59, at 170-71.

65. Solan, *supra* note 64, at 111; see also Shapiro, *supra* note 59, at 175 (“The addition of the concept of moral certainty reflected the desire to make legal language consistent with the philosophical terminology of the day. This terminology, however foreign to modern ears, was part of the language and discourse of the educated classes in both England and America. ‘Satisfied conscience,’ ‘reasonable doubt,’ and ‘moral certainty’ were widely used concepts, and these and related terms were to be found in moral, theological, historical, and philosophical as well as legal discourse.”).

66. See Shapiro, *supra* note 59, at 177 (“John Morgan’s 1789 *Essay Upon the Law of Evidence* similarly relied on a Lockean conception of knowledge . . . [He said that] [t]he mind ‘ought not any longer to doubt but, to be nearly if not as perfectly well-satisfied as if we of ourselves knew the fact.’ Morgan’s ‘satisfaction’ was also synonymous with judicial demands for jury ‘satisfaction’ or ‘satisfied conscience.’ Jury verdicts must be based on the very highest knowledge available to man in matters of fact.”).

67. Solan, *supra* note 64, at 110 n.23. As Barbara Shapiro uncovers, Simon Greenleaf’s *Treatise on the Law of Evidence*, “a famous nineteenth-century American treatise,” explained it in a manner that comes closest to more modern jury instructions:

moral persuasion and satisfaction and not intended to do the work of “finding facts.”⁶⁸

The next section describes the Court’s own efforts at describing and filling out a jury trial right, with its attendant proof beyond a reasonable doubt standard, using a historical analysis. While its interpretation of the history expands the application of the jury trial right, its goals have been limited in the capital context, and its historical unearthing incomplete. This Article will demonstrate there is room and intention for this doctrine to expand further in the penalty phase of a capital trial.

II. THE SUPREME COURT’S SIXTH AMENDMENT JURISPRUDENCE PRE-*HURST*

A. Non-Capital Application from *Apprendi* to *Alleyne*

Since the year 2000,⁶⁹ the Court has been on a steady path to define and expand the parameters of the Sixth Amendment right to a jury trial consistent with its understanding of the right at the time of this nation’s founding. The intention of the Court has not been to contract, expand, or change the right but to

Matters of fact are proved by *moral evidence* alone; by which is meant, not only that kind of evidence, which is employed on subjects connected with moral conduct, but all the evidence, which is not obtained either from intuition, or from demonstration. In the ordinary affairs of life, we do not require demonstrative evidence . . . and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them By *satisfactory evidence* . . . is intended that amount of proof, which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances, which will amount to this degree of proof, can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man, and so to convince them, that he would venture to act upon that conviction, in the matters of the highest concern and importance to his own interest.

Shapiro, *supra* note 59, at 189 (quoting SIMON GREENLEAF, TREATISE ON THE LAW OF EVIDENCE 4-5 (2d ed. Boston 1844)).

68. Shapiro, *supra* note 59, at 155-56.

69. The effort started a year earlier in *Jones v. United States*, where the Court noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, 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.” 526 U.S. 227, 243 n.6 (1999).

interpret its application properly according to its roots. The result has been its steady expansion into realms not in existence at the time of the founders.

The watershed case in this interpretative effort is *Apprendi v. New Jersey*.⁷⁰ New Jersey's statute had authorized a trial judge, after a guilty verdict, to impose an extended term of imprisonment if she found that the crime was, in essence, a "hate crime."⁷¹ The judge so found in *Apprendi's* case.⁷² In reversing that enhanced portion of the sentence, the Court held that:

[The procedure violated two] constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."⁷³

The Court incorporated the history of the jury trial "as the great bulwark of [our] civil and political liberties,"⁷⁴ quoting Blackstone on the importance of judgment by members of the community⁷⁵ and finding it in the company of proof beyond a reasonable doubt.⁷⁶ Relying on the time period of our nation's founding, the Court wrote that there was no known "distinction

70. 530 U.S. 466 (2000).

71. *Id.* at 468-69.

72. *Id.* at 471.

73. *Id.* at 476-77.

74. *Id.* at 477 (quoting STORY, *supra* note 20, at 540-541).

75. *Apprendi*, 530 U.S. at 477 (noting that "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . .'" (emphasis in original)).

76. *Id.* at 478 (stating that simultaneously, and "[e]qually well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798.'"'). Note that according to James Whitman, the Court gets this wrong: as has been discussed, jurors had been using a higher standard of no doubt and "reasonable doubt" was brought into play to allay their moral fears about convicting an innocent man. Whitman, *supra* note 44, at 193-94.

between an ‘element’ of a felony offense and a ‘sentencing factor’” in any criminal proceeding.⁷⁷ Recognizing unitary trials were the norm, the Court said, “The defendant’s ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.”⁷⁸ A finding of guilt by the jury dictated the sentence the judge would pronounce.⁷⁹

Therefore, the Court held that regardless of New Jersey’s claim that the hate crime enhancement was a “sentencing factor” for the judge’s determination and not an “element” of the crime, “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”⁸⁰ The Court easily held that answer was yes in *Apprendi*, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁸¹ It is this last phrasing that became the clarion call for future cases.

In *Blakely v. Washington*,⁸² an extension of *Apprendi* that invalidated much of Washington’s sentencing guidelines,⁸³

77. *Apprendi*, 530 U.S. at 478.

78. *Id.* at 478-79 (“[A]fter verdict, and barring a defect in the indictment, pardon, or benefit of clergy, ‘the court *must pronounce that judgment, which the law hath annexed to the crime*’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369-70 (1769) (emphasis added by Court)). A jury proceeded upon “an indictment containing ‘all the facts and circumstances which constitute the offence . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted.’” *Id.* at 478 (quoting JOHN FREDERICK ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862) (emphasis added by Court)).

79. *Apprendi*, 530 U.S. at 479.

80. *Id.* at 494; *see also id.* at 484 (“If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.”).

81. *Id.* at 490.

82. 542 U.S. 296 (2004).

Justice Scalia wrote for the Court, “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”⁸⁴ This re-phrasing of the holding is critical when considering the penalty phase of a capital case. As will be discussed more fully below, most jurists make the mistake of thinking the jury trial guarantee is fulfilled once a defendant is found “death eligible,” typically defined as once an aggravating factor is found. But that finding is only one of the findings that must be made before the maximum penalty of death may be imposed.⁸⁵

While there are more cases in the Court’s *Apprendi* line in the non-capital arena,⁸⁶ *Alleyne v. United States*⁸⁷ is noteworthy because it demonstrates the Court’s devotion to *Apprendi*’s expansive meaning, regardless of the cost. In *Alleyne*, the Court overruled its own post-*Apprendi* opinion to find that any fact that increases mandatory minimum sentence for crime is an element of the crime that must be submitted to a jury and found beyond a reasonable doubt.⁸⁸ Overturning *Harris v. United States*,⁸⁹ the Court clarified that it meant what it said when it said

83. See *id.* at 305. *Blakely* foreshadowed the ultimate invalidation of much of the federal sentencing guidelines by the Court in *United States v. Booker*, 543 U.S. 220 (2005).

84. *Blakely*, 542 U.S. at 303-304.

85. As applied to a capital case, John Douglass observed that a defendant cannot be sentenced to death upon finding of the alleged aggravating factor or factors alone, unless that is all that is presented at sentencing. Douglass, *supra* note 23, at 2004-05. Rather, “[a]fter *Furman*, *Woodson*, and *Lockett v. Ohio*, no death sentence can ever be imposed even on a death-eligible defendant until the sentencer considers ‘any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’” *Id.* John Douglass has pointed out the gamesmanship that can emerge from distinguishing “eligibility” aggravating factors that are charged in the indictment by the prosecution, and therefore must be proven beyond a reasonable doubt, from other aggravating evidence not officially charged. *Id.* at 2001-2002. For example, the prosecutor could list “pecuniary gain” as the sole statutory aggravator that must be proven beyond a reasonable doubt but nonetheless put on evidence that the defendant used torturous means, not subject to such any standard of proof for the jury. *Id.*

86. See, e.g., *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2348-49 (2012); *Cunningham v. California*, 127 S. Ct. 856, 860 (2007); *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

87. 133 S. Ct. 2151 (2013).

88. *Id.* at 2155.

89. 536 U.S. 545 (2002).

in *Apprendi* that the question is “one not of form, but of effect.”⁹⁰ The jury must make the finding, whether it is one that increases the minimum or the maximum. *Alleyne* represents the Court’s willingness to upend years of practice and its own supporting precedents in its stolid devotion to the jury trial right.

B. *Apprendi* in the Capital Penalty Phase: *Ring v. Arizona*

Falling directly in line with the holding of *Apprendi*, the Court did not balk in applying it to the penalty phase of a capital case. In *Ring v. Arizona*,⁹¹ the Court invalidated the procedure in Arizona whereby, following a jury adjudication of a defendant’s guilt of first-degree murder, the trial judge, sitting alone, determined the presence or absence of aggravating factors, at least one of which was required by Arizona law to make a defendant eligible for the death penalty.⁹² Instead, applying *Apprendi*’s holding, the Court held that “the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict”⁹³ and therefore had to be found by a jury beyond a reasonable doubt.⁹⁴

In his concurrence, Justice Scalia, writing separately to note his own personal conundrum with the Eighth Amendment edifice the Court had built post-*Furman*, but endorsing a robust Sixth Amendment analysis, famously stated that findings “essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of

90. 530 U.S. 466, 494 (2000).

91. 536 U.S. 584 (2002).

92. *Id.* at 592-93 (“At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated ‘aggravating circumstances’ and any ‘mitigating circumstances.’ The State’s law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and ‘there are no mitigating circumstances sufficiently substantial to call for leniency.’”).

93. *Id.* at 604.

94. Arizona’s statute already included the requirement, so the issue in *Ring* was whether a judge could make this finding. *Id.* at 597. Justice Scalia in concurrence explicitly stated the aggravating factors “must be found by the jury beyond a reasonable doubt” under the Sixth Amendment. *Id.* at 612 (Scalia, J., concurring).

the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”⁹⁵ Although unhappy with the requirement of aggravating factors, he nonetheless agreed that they must be found by a jury beyond a reasonable doubt.⁹⁶ In strong terms, he stated:

[O]ur people’s traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.⁹⁷

This position represents a strong signal that the Sixth Amendment may have more pedigree to guide juries in imposing death than the Eighth Amendment.⁹⁸

The Court was keen to note that the question presented in *Ring* was “tightly delineated”;⁹⁹ the defendant “contend[ed] only that the Sixth Amendment required jury findings on the aggravating circumstances against him.”¹⁰⁰ The Court noted, “He makes no Sixth Amendment claim with respect to the mitigating circumstances. Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.”¹⁰¹ The

95. *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

96. In his view, the edifice of aggravating circumstances in statutes, built by states largely in response to *Furman v. Georgia*, 408 U.S. 238 (1972), and subsequent Supreme Court case law, is not required under the Constitution. *See id.* Yet, once built, his devotion to the Sixth Amendment’s jury trial requirement commands the result in *Ring*. *Id.* at 612.

97. *Id.* Note that Justice Scalia stated his belief that a judge in Arizona could still make the ultimate life or death decision once the jury had found an aggravating factor. *Id.* This Article’s point is to demonstrate that history and logical progression of the Court’s case law command that a jury make this decision.

98. *See Ring*, 536 U.S. at 614 (Breyer, J., concurring). In *Ring*, Justice Breyer did not join the opinion but concurred in the result believing that the Eighth Amendment, and not the Sixth Amendment, requires jury sentencing in capital cases. *Id.*

99. *Id.* at 597 n.4.

100. *Id.*

101. *Id.* (citing *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), an Eighth Amendment case where a plurality of the Court said, “[I]t has never [been] suggested that jury sentencing is constitutionally required.”).

Court was also not presented with the question of whether the finding that aggravating factors outweighed mitigating factors was a finding that increased the maximum punishment that could be imposed and therefore needed to be made by a jury beyond a reasonable doubt.

This noted reference to the narrowness of the question presented foreshadowed the Court's more expanded discussion of the factfinding in capital cases that should fall in line in *Hurst v. Florida*.¹⁰² Indeed the Court closes its opinion in *Ring* with the broad statement, "The 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."¹⁰³

III. *HURST V. FLORIDA*

*Hurst v. Florida*¹⁰⁴ sets a course for an expanded jury trial right in capital cases, one that is true to its origins. Reading Justice Sotomayor's words, for seven members of the Court, leaves little doubt that the Court is laying down tracks. The logical progression after *Hurst* is to demand that *all* findings—whether in the form of weighing or not—required for imposition of death, including the finding that death is the appropriate punishment, be made by a jury beyond a reasonable doubt. First, to understand the potential impact of *Hurst* and its logical extension, we need a snapshot of the statutory schemes in place for capital punishment before the Court decided the case.

A. The Lay of the Land Pre-Hurst

Of those thirty-two jurisdictions that have the death penalty,¹⁰⁵ the map of the use of the beyond a reasonable doubt

102. 136 S. Ct. 616 (2016).

103. 536 U.S. at 609.

104. 136 S. Ct. 616 (2016).

105. Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the United

standard at any point in the penalty process is a patchwork. In nine “weighing” states, jurors must use a reasonable doubt standard at the weighing stage: either they must find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt before they are authorized to impose the death penalty or they must be convinced beyond a reasonable doubt that any mitigating circumstances did not outweigh the aggravating circumstances.¹⁰⁶ Of those nine states, Utah also requires additionally that the beyond a reasonable doubt standard be applied to the ultimate decision:

The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, *and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.*¹⁰⁷

Similarly, but not as broadly, in Washington, a “non-weighing” state, the trial court instructs the jury “to deliberate upon the following question: ‘Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?’”¹⁰⁸

On the other hand, there is the possibility of completely eschewing a jury trial right: before *Hurst* four states allowed the

States Government. *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/MGB5-4H6F].

106. For Arkansas, see ARK. CODE ANN. § 5-4-603(a) (2013). For Colorado, see *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc); *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990) (en banc). For Kansas, see PATTERN INSTRUCTIONS KANSAS CRIMINAL 54.060 (4th ed.) (West 2016). For Missouri, see *State v. Whitfield*, 107 S.W.3d 253, 256-63 (Mo. 2003) (en banc). For North Carolina, see N.C.P.I.-CRIM. 150.10 for jury instructions. For Ohio, see OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2017) (proposed legislation). For Tennessee, see TENN. CODE ANN. § 39-13-204(g)(1) (West 2014). For Utah, see UTAH CODE ANN. § 76-3-207 (5)(b) (West 2016); *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1982)). For Wyoming, see *Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003).

107. UTAH CODE ANN. § 76-3-207 (5)(b) (West 2016) (emphasis added).

108. WASH. REV. CODE § 10.95.060(4) (West 2016).

judge to usurp the jury's decision-making, whether by calling the jury's decision merely advisory, allowing a judicial override, or by making the decision alone.¹⁰⁹ In addition, ten "weighing" jurisdictions (nine states and the federal government) use language that jury findings of aggravating factors must "outweigh" or "sufficiently outweigh" mitigating circumstances, but with no standard for the weighing.¹¹⁰ Five more states do

109. For Montana, see MONT. CODE ANN. § 46-18-301(1) (2017) (proposed legislation) ("When a defendant is found guilty or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing must be conducted before the court alone."). Alabama allowed for a judicial override of a jury's recommendation of life until 2017, when the legislature finally eliminated judicial override. See *Alabama Ends Death Penalty by Judicial Override*, USNEWS, (Apr. 11, 2017, 6:30PM), <https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override> [<https://perma.cc/2JF8-2Z74>]; Ala. Code. 1975 § 13A-5-47(a) (2017). Florida's scheme was struck down by the *Hurst* decision. See 136 S. Ct. 616, 616-18 (2016). Additionally, the Delaware Supreme Court held its state scheme unconstitutional after *Hurst* in *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016).

110. For Arizona, see *State v. Glassel*, 116 P.3d 1193, 1218-19 (Ariz. 2005) (en banc) (finding Arizona's death penalty scheme constitutional even though it provides "no objective standards to guide the jury in weighing aggravating and mitigating circumstances"). For California, see CAL. PENAL CODE § 190.3 (West 2003) ("[T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances *outweigh* the mitigating circumstances.") (emphasis added). For Idaho, see *State v. Payne*, 199 P.3d 123, 154 (Idaho 2008) ("[T]he jury is to . . . conduct the weighing process of aggravating and mitigating factors to determine if the defendant should be sentenced to death."). For Indiana, see IND. CODE § 35-50-2-9(1) (West 2016) (proposed legislation) ("Before a sentence may be imposed under this section, the jury . . . must find that . . . any mitigating circumstances that exists are *outweighed* by the aggravating circumstance or circumstances.") (emphasis added). For Mississippi, see MISS. CODE ANN. § 99-19-101(2) (West 2017) (proposed legislation) ("the jury shall deliberate . . . [as to w]hether *sufficient* mitigating circumstances exist . . . which *outweigh* the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death") (emphasis added). For Nevada, see NEV. REV. STAT. § 175.554(3) (2016) (a jury "may impose a sentence of death *only if* it finds . . . that there are no mitigating circumstances *sufficient* to *outweigh* the aggravating circumstance or circumstances found") (emphasis added). For New Hampshire, see N.H. REV. STAT. ANN. § 630:5(IV) (2016) ("The jury shall consider . . . whether the aggravating factors found to exist *sufficiently outweigh* any mitigating factor or factors found to exist . . . Based upon this consideration, *if* the jury concludes that the aggravating factors *outweigh* the mitigating factors . . . the jury . . . may recommend that a sentence of death be imposed.") (emphasis added). For Oklahoma, see OKLA. STAT. ANN. tit. 21 § 701.11 (2016) ("*Unless* . . . it is found that any . . . aggravating circumstance is *outweighed* by the finding of one or more mitigating circumstances, *the death penalty shall not be imposed.*") (emphasis added). For

not require weighing of aggravating and mitigating circumstances but, in various forms, have the jury more or less consider the aggravating and mitigating circumstances and decide whether to impose death, again without any standard for making their decision.¹¹¹ Three additional states do not require weighing but require the jury to answer certain questions—such as whether the defendant is a future danger—before imposing the death penalty.¹¹²

Pennsylvania, see 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2016) (proposed legislation) (“The verdict must be a sentence of death . . . if the jury unanimously finds one or more aggravating circumstances which *outweigh* any mitigating circumstances.”) (emphasis added). For the U.S. Government, see 18 U.S.C. § 3593(e)(3) (2012) (“[T]he jury . . . shall consider whether all the aggravating factor or factors found to exist *sufficiently outweigh* all of the mitigating factor or factors found to exist to *justify* a sentence of death”) (emphasis added). Additionally, as of 2017, after the Alabama legislature eliminated the power of the judge to override a jury’s sentence to life, see *supra* note 109, Alabama is a weighing state. See Ala. Code. 1975 § 13A-5-46 (e) (2017) (“[I]f the jury determines that one or more aggravating circumstances . . . exist and that they outweigh the mitigating circumstances, if any, it shall return a verdict of death.”).

111. For Georgia, see GA. CODE ANN. § 17-10-31(a) (West 2016) (“Where . . . a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the accused to death.”). For Kentucky, see KY. REV. STAT. ANN. § 532.025(1)(b) (proposed legislation) (“[T]he jury shall . . . determine whether any mitigating or aggravating circumstances . . . exist and [shall] recommend a sentence for the defendant.”). For Louisiana, see LA. CODE CRIM. PROC. ANN. art. 905.3 (2016) (“A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed.”). For South Carolina, see S.C. CODE ANN. § 16-3-20(B) (proposed legislation) (“In the [sentencing] proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.”); *Smith v. Moore*, 137 F.3d 808, 815 (4th Cir. 1998) (stating that South Carolina is a non-weighing state). For South Dakota, see S.D. CODIFIED LAWS § 23A-27A-1 (2016) (“[I]n all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the jury for it to consider, any mitigating circumstances and any . . . aggravating circumstances which may be supported by the evidence.”); S.D. CODIFIED LAWS § 23A-27A-4 (2016) (“If, upon a trial by jury, a person is convicted of a Class A felony, a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed.”).

112. For Oregon, see OR. REV. STAT. § 163.150(1)(b)(B), (d) (2017). For Texas, see TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b), (c) (West 2015). For Virginia, see VA. CODE ANN. § 19.2-264.4(C) (West 2016). Oregon and Texas, under the provisions noted here, both require the jury to determine whether there is a probability the defendant will

The courts that explicitly considered the application of *Apprendi* and *Ring* to the weighing decision were also divided (leading to some of the divisions just described). Five state supreme courts held that *Apprendi* applied to the weighing determination, *i.e.*, that a jury must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt before it can impose the death penalty.¹¹³

On the other hand, ten state courts and four federal circuits held that *Apprendi* is inapplicable to the weighing process. Some courts clung to the limits of *Ring*'s narrow holding as applying only to the finding of aggravating factors.¹¹⁴ Most reasoned that the weighing process was not a fact-finding one,¹¹⁵

commit criminal acts making him a future danger, and must decide this probability “beyond a reasonable doubt,” but this conflation of two standards—probability and “beyond a reasonable doubt” presents its own problems. See *infra* notes 174-77 and accompanying text.

113. *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc) (finding a jury—rather than a three-judge panel—must “be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors.”); *State v. Rizzo*, 833 A.2d 363, 410 (Conn. 2003) (finding “the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case”); *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016) (holding statute unconstitutional where judge, not jury, weighs aggravators and mitigating circumstances and fails to require that aggravators outweigh mitigating circumstances beyond a reasonable doubt); *State v. Whitfield*, 107 S.W.3d 253, 261-62 (Mo. 2003) (en banc) (reasoning that the finding that the aggravators outweigh the mitigating circumstances is a finding of fact under *Ring*); *Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003) (“If the jury is to be instructed to ‘weigh,’ . . . the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.”). See also *McLaughlin v. Steele*, 173 F. Supp. 3d 855, 896 (E.D. Mo. 2016) (granting habeas relief where jury did not unanimously find mitigating evidence failed to outweigh aggravating factors, a finding of fact and therefore a violation of *Ring*).

114. See, *e.g.*, *People v. Ballard*, 794 N.E.2d 788, 821 (Ill. 2002) (noting Ballard’s “complaint concern[ed] mitigating, not aggravating, factors” and though it was bound by this Court’s precedents, it was “not bound to extend the decisions . . .”).

115. *United States v. Gabrion*, 719 F.3d 511, 532-33 (6th Cir. 2013) (“The result [of weighing] is one of judgment, of shades of gray . . . the judgment is . . . not a finding of fact, but a moral judgment”); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (“the requisite weighing [provision of the Federal Death Penalty Act] constitutes a process, not a fact to be found”); *People v. Prieto*, 66 P.3d 1123, 1155 (Cal. 2003) (“[Because] the penalty phase determination in California is normative, not factual,” the jury need not find that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) (“[T]he weighing process is not a fact-finding one based on evidence”); *Com v. Roney*, 866 A.2d 351, 360 (Pa. 2005) (“[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi*

but something else: a “normative one,”¹¹⁶ or “a moral or legal judgment.”¹¹⁷ Others reasoned that the weighing process does not increase the maximum punishment.¹¹⁸ As we will see, these protestations have little merit.¹¹⁹

The bottom line is a deep division in the states as to the role and placement of the beyond a reasonable doubt standard. In *Hurst v. Florida*, the Court signaled trouble for those states that do not apply the standard to *all* factual findings required for imposition of a death sentence, all of which must be found by a jury, not a judge.

does not apply here.”); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) (“[T]he balancing process is not ‘a fact necessary to constitute the crime with which [the defendant] is charged’ such that it would invoke the constitutional requirement of proof beyond a reasonable doubt”); *State v. Longo*, 148 P.3d 892, 906 (Or. 2006) (holding that the weighing “does not involve any determination of fact”).

116. *People v. Merriman*, 332 P.3d 1187, 1265 (Cal. 2014) (“[D]etermining the balance of evidence of aggravation and mitigation and the appropriate penalty do not entail the finding of facts but rather a single fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.”).

117. *Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) (“[T]he weighing process is not a factual determination . . . [but] instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum.”); *Nunnery v. State*, 263 P.3d 235, 251 (Nev. 2011) (overruling previous decision that held weighing to be a factual determination because it is instead a moral judgment); *Ohio v. Belton*, No. 2012-0902, 2016 WL 1592786, at *9 (Ohio Apr. 20, 2016) (finding that the weighing process “is not a fact-finding process subject to the Sixth Amendment” but that it “amounts to a complex moral judgment about what penalty to impose upon a defendant who is already death-penalty eligible”); *see also* *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) (“[T]he jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather] it is a ‘highly subjective,’ ‘largely moral judgment’ ‘regarding the punishment that a particular person deserves . . .’”); *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) (following the reasoning of the Fifth Circuit in *Fields*).

118. *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004) (“The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard.”). *But see id.* at 273 (Rucker, J., dissenting in part, concurring in part) (“The plain language of Indiana’s capital sentencing scheme makes death eligibility contingent upon certain findings that must be weighed by the jury . . . [T]hey are at a minimum the type of findings anticipated by *Apprendi* and *Ring* and thus require proof beyond a reasonable doubt.”); *State v. Gales*, 658 N.W.2d 604, 626-27 (Neb. 2003) (“These [weighing] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.”); *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002) (“It is [the aggravating factor] finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death.”).

119. *See infra* notes 142-182 and accompanying text.

B. *Hurst v. Florida*

In 2016, the Court decided *Hurst v. Florida*¹²⁰ and struck down Florida's capital penalty scheme for violating Hurst's right to a jury trial.¹²¹ Its strict holding is a narrow one—a simple application of *Ring* to Florida's scheme. However, Justice Sotomayor chose to use language signaling a larger problem with many more state schemes' compliance with the right to a jury and findings beyond a reasonable doubt, such that Florida, for one, chose to honor that signaling on remand, at least in part.

Florida was (and still is) a “weighing state,” where the scheme was that the sentencer had to find that an aggravating factor existed beyond a reasonable doubt per *Ring*, and then had to find that any aggravating factor or factors outweighed any mitigating circumstances before death could be imposed.¹²² The jury gave only an advisory verdict, and the judge could ignore it completely, deciding aggravating factors and mitigating circumstances, their weight, and the sentence.¹²³ The narrow question presented by the appellant in *Hurst* was, per *Ring*, whether a jury, rather than a judge, must find aggravating circumstances beyond a reasonable doubt.¹²⁴ Justice Sotomayor gave that a one sentence “yes” at the end of her discussion for the Court.¹²⁵ But that narrow, one-sentence conclusion was eclipsed by her broader discussion.

For seven members of the Court, Justice Sotomayor consistently repeated and emphasized that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.”¹²⁶ She did not use

120. 136 S. Ct. 616 (2016).

121. *Id.* at 619.

122. *Id.* at 620.

123. *Id.*

124. *Id.* at 621.

125. *Hurst*, 136 S. Ct. at 624 (“Florida’s sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.”). The Court overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), in that they held that the Sixth Amendment did not require that findings authorizing the death penalty be made by a jury. *Hurst*, 136 S. Ct. at 623 (expressly overruling cases “in relevant part”).

126. *Id.* at 619.

only the words “aggravating factors,” but instead used the words “findings” or “factual findings.”¹²⁷ In condemning Florida’s scheme, she wrote, “Florida does not require the jury to make *the critical findings necessary to impose the death penalty.*”¹²⁸ She quoted the statute: “Notwithstanding the recommendation of a majority of the jury, the court, *after weighing the aggravating and mitigating circumstances*, shall enter a sentence of life imprisonment or death.”¹²⁹ Further, if the court imposes death, it must “set forth in writing *its findings upon which the sentence of death is based.*”¹³⁰ “The trial court *alone* must *find the facts . . . [t]hat sufficient aggravating circumstances exist’ and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.*”¹³¹

Indicating that the weighing decision was part of the “findings” that a jury must find, she quoted *Walton v. Arizona*:

It is true that in Florida the jury recommends a sentence, but *it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances* and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a *jury’s findings of fact with respect to sentencing issues* than does a trial judge in Arizona.¹³²

We can assume the Justice chose her words carefully¹³³ and that the six Justices joining the opinion would have balked at the

127. *Id.* at 622.

128. *Id.* (emphasis added).

129. *Id.* at 620 (quoting FLA. STAT. § 921.141(3)) (emphasis added).

130. *Hurst*, 136 S. Ct. at 620 (citing FLA. STAT. ANN. § 921.141(3) (2017)) (emphasis added).

131. *Id.* at 622 (citing FLA. STAT. ANN. § 921.141(3)) (emphasis on “alone” in original; remaining emphasis added).

132. *Id.* at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

133. Her language is fully consistent with her dissenting opinion from denial of certiorari in *Woodward v. Alabama*, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting). At the time of the opinion, until new legislation passed in 2017, see *supra* note 109, Alabama allowed a judge to override a jury’s decision on the sentence. *Id.* at 406. There, she condemned the scheme and wrote that the “required finding that the aggravating factors of a defendant’s crime outweigh the mitigating factors . . . is necessary to impose the death penalty.” *Id.* at 410-11. This parallels her language that “Florida does not require the jury to make *the critical findings necessary to impose the death penalty.*” *Hurst*, 136 S. Ct. at 622.

broadness of the “factual findings” language if they did not agree with the signaling effect of this dictum. The next domino to fall in line, if presented to the Court, would be an application of the reasonable doubt standard to a jury’s decision that aggravators outweigh mitigating circumstances.

C. *Kansas v. Carr* Does Not Derail *Hurst*’s Sixth Amendment Train

In the same term as *Hurst*, an opinion that Justice Scalia joined, Justice Scalia penned an opinion in *Kansas v. Carr*,¹³⁴ where he held for eight members of the Court (with Justice Sotomayor dissenting) that the Eighth Amendment did not require that the jury be instructed that mitigating circumstances need not be proven beyond a reasonable doubt.¹³⁵ Lest there be any confusion that *Hurst* cannot be reconciled with *Carr*, it must be emphasized that *Carr* is not a Sixth Amendment case and, in fact, what it does say about the Sixth Amendment is consistent with *Hurst*.

The Court in *Carr* rejected the defendant’s argument that the instructions may have confused the jury by emphasizing that the instructions given, and required by Kansas’s statutory scheme, “ma[de] clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt.”¹³⁶ Hence, Kansas’ statutory scheme complies with the Sixth Amendment, as considered in the broad contours of *Hurst*, because the jury is required not only to determine the existence of an aggravating circumstance but also that aggravators outweigh mitigating circumstances beyond a reasonable doubt.¹³⁷

Justice Scalia mused in dicta in *Carr* that “we doubt whether it is even possible to apply a standard of proof to the

134. 136 S. Ct. 633 (2016).

135. *Id.* at 643-44.

136. *Id.* at 643.

137. *Id.*; see also *Kansas v. Marsh*, 548 U.S. 163, 173 (2006) (“In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators.”).

mitigating-factor determination,”¹³⁸ calling it “largely a judgment call.”¹³⁹ He also offered that the weighing determination “is mostly a question of mercy,” and “[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt.”¹⁴⁰ While the Eighth Amendment requires no such finding, the Sixth Amendment does.¹⁴¹ Clearly, Kansas thought it possible for such a weighing to be made beyond a reasonable doubt. And, as was discussed above and to which this Article turns again below, the history of the beyond a reasonable doubt standard shows it was meant for exactly such “judgment calls.” It was given to the jury as a tool of moral comfort in making a life or death decision.

IV. THE LOGICAL PROGRESSION FROM *HURST*

In compliance with *Apprendi* and its progeny, this Article submits the jury, and not a judge, must make all findings necessary to impose the death penalty, and it must make those findings beyond a reasonable doubt. As *Blakely* stated, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”¹⁴² What are those findings? In weighing states, it is the finding of an aggravator, it is the finding that aggravators outweigh mitigating circumstances, and it is the finding that even then, death is the appropriate punishment.¹⁴³ In non-weighing states,

138. 136 S. Ct. at 642.

139. *Id.*

140. *Id.*

141. Also inapposite here is *Harris v. Alabama*, 513 U.S. 504 (1995), which rejected “the notion that ‘a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.’” *Id.* at 512 (citation omitted). *Harris* was an Eighth Amendment decision and one decided before *Apprendi*. It is doubtful *Harris* stands for anything with regard to the Sixth Amendment, and is no longer viable after *Apprendi* and *Hurst*.

142. 542 U.S. 296, 303-04 (2004).

143. See, e.g., NEV. REV. STAT. ANN. § 175.554(2) (West 2016). Some weighing states have these three separate stages while most end the inquiry if the jury finds the aggravators outweigh the mitigating circumstances. See, e.g., *Weisheit v. State*, 26 N.E.3d 3, 19-20 (Ind. 2015) (holding that there was no sentencing error when the jury and trial court imposed a death sentence upon determining that the aggravating factors outweighed any mitigating factors); *Commonwealth v. Towles*, 106 A.3d 591, 607-08 (Pa. 2014)

the schemes vary, but the endpoint is the same, all findings, including the finding that death is the appropriate punishment, must be made beyond a reasonable doubt. If the scheme lacks this ultimate finding as a separate question for the jury, then the scheme violates the Sixth Amendment. This conclusion is greatly enhanced by the death-specific study of the history of jury trials and of the reasonable doubt standard.

A. Weighing Determinations

Florida had to immediately grapple with *Hurst*. On remand, the Supreme Court of Florida read *Hurst*'s tea leaves and required that the jury, and not the judge, make the critical weighing findings necessary before imposition of a death sentence.¹⁴⁴ Therefore, the court held that a jury was to decide the existence of each aggravating factor; the finding "that the aggravating factors are sufficient to impose death"; and the finding that "aggravating factors outweigh mitigating circumstances."¹⁴⁵ However, the Florida court simultaneously misunderstood that complete compliance with *Apprendi* and *Hurst*'s logical next steps requires that *all* findings must not only be made by a jury but must be made *beyond a reasonable doubt*. The Florida Supreme Court held that only the first of the three findings must be found beyond a reasonable doubt, per *Ring*, and did not require the standard for the other findings.¹⁴⁶ Hence, Florida joins the weighing states that do not require all findings beyond a reasonable doubt.¹⁴⁷

(finding that the jury clearly determined that aggravating factors outweighed any mitigating factors and that a death sentence was properly imposed). The problem with the latter state schemes, and the reason why jurors should be given an opportunity even after the weighing to make the decision up or down, is that, too often, an inadequate defense attorney presents little in mitigation. Jurors may well find that statutory aggravators literally "outweigh" the non-existent or minimally existent mitigating circumstances in a botched robbery attempt, for example, but still believe death is not proportional to the offense.

144. *Hurst v. Florida*, 202 So. 3d 40, 57 (Fla. 2016).

145. *Id.* at 53.

146. *Id.*

147. Most of the opinion is devoted to another core component of the jury trial right in capital cases—unanimity. Whereas the previous statute had not required unanimity in the death verdict, the Florida Supreme Court delved into history to outlaw this practice and

All “weighing states” save two¹⁴⁸ require that the finding that aggravating factors outweigh mitigating factors must precede a decision to impose death; life is the default punishment absent the weighing.¹⁴⁹ As for the two outliers, such burden-shifting violates the Sixth Amendment right to a jury trial and the right to have the prosecution carry the burden of proof on factual findings leading to a death sentence beyond a reasonable doubt. In any event, the finding that aggravators outweigh mitigating circumstances is necessary to make a defendant eligible for death and hence must be found by a jury beyond a reasonable doubt.¹⁵⁰

What of the arguments by state and federal courts, referenced above,¹⁵¹ that “weighing” is not a finding of fact but a “normative,” “moral,” or “legal” judgment? It is certainly true that any “weighing” the jury does is more normative than factual. No one would believe that the jurors in a capital case sit in the jury room with a scale, with aggravators on one side and mitigating circumstances on the other. How would one weigh the aggravating factor that the crime was heinous, atrocious, and cruel (a “normative” issue if ever there was one) against the mitigating circumstances of the youthful age and lack of record of the offender? How might one weigh the elderly status of the victim against the extreme distress or mental handicap of the defendant? In making its weighing finding, the jury most likely uses its moral sense after looking at the entire picture painted for them by the litigants. This does not mean *Apprendi* does not apply.

find a unanimous death verdict to be a critical component of the jury trial right. *Id.* at 54-59.

148. See ARIZ. REV. STAT. ANN. § 13-752(G) (2016) (“At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency.”); KAN. STAT. ANN. § 21-6617(e) (West 2017) (“If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.”).

149. See *id.*

150. See *id.*

151. See *supra* notes 115-117.

Cabining *Apprendi* to only findings of fact, and not all findings a jury must make, whatever their flavor, is too literal an interpretation of that case and of the right to a jury trial. While the holding of *Apprendi* discusses facts that increase the maximum punishment, that does not mean *Apprendi* applies only to facts. The Court has repeatedly demonstrated that “the relevant inquiry is one not of form, but of effect”:¹⁵² findings “essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”¹⁵³ The jury’s finding that aggravators outweigh mitigating circumstances is a necessary finding before death may be imposed. The finding is “essential to the level of punishment that the defendant receives.”¹⁵⁴

Hurst’s language signals that this is the case, although it does shoehorn the weighing into a “*factual finding*”: “Florida does not require the jury to make *the critical findings necessary to impose the death penalty*,”¹⁵⁵ and:

It is true that in Florida the jury recommends a sentence, but *it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances* and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a *jury’s findings of fact with respect to sentencing issues* than does a trial judge in Arizona.¹⁵⁶

The clear signal of *Hurst* is that, if the issue were directly presented to the Court, it would decide that the weighing determination is subject to the Sixth Amendment and therefore is a finding that must be made by a jury beyond a reasonable doubt.

It is worthy of note here that many of the findings we ask the jury to make are not clearly just “factual.” Jurors may find as fact that the defendant killed the victim but their finding as to

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

153. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

154. *Id.*

155. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) (emphasis added).

156. *Id.* at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

the defendant's *mens rea*—*e.g.*, whether he killed negligently, whether he killed with “malice aforethought”—is a normative, evaluative one.¹⁵⁷ Jurors apply facts to law and make judgments, evaluations, opinions, and conclusions. Ultimately, to decide “guilt” beyond a reasonable doubt is not a factual finding but a judgment or opinion.¹⁵⁸ That is what the weighing determination is.

Additionally, the history of the beyond a reasonable doubt standard set out above demonstrates that its very essence is to provide a guide in moral, not factual, decisions. To say that weighing is “normative” or is a “judgment” speaks to the very origins of the reasonable doubt standard. As James Whitman unearthed, it emanated from an obsession with “doubt and death.”¹⁵⁹ It counterbalanced a standard of no doubt, giving the jury breathing room to make difficult, moral decisions in matters of life and death.

Under this interpretation of the Sixth Amendment, the death penalty statutes in the weighing states that do not require that the jury find beyond a reasonable doubt that aggravators outweigh mitigating circumstances before death may be imposed are all invalid.¹⁶⁰ Assuming each of these states would pass new statutes that comply with the requirement, there may be a question whether the standard makes a difference. There is in fact evidence of a correlative impact between the heightened standard of beyond a reasonable doubt and death verdicts. In 2014, there were seventy-three death sentences in the United

157. See Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 562-63 (2011) (making the point that a jury deciding guilt on the elements of negligent homicide must make “some very non-factual, subjective, even moral assessments about the defendant”).

158. Notably, the Court has wrangled with the term “factual findings” in the context of the Federal Rules of Evidence and found it did not necessarily denote just “facts” but could include conclusions and opinions drawn from facts. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988) (holding that “factual findings” includes opinions and noting “the analytical difficulty of drawing . . . a line [between fact and opinion]”).

159. Whitman, *supra* note 44, at 157.

160. See *supra* notes 116-17 and accompanying text.

States in only twenty states.¹⁶¹ All but seven of these were imposed in states that *did not* require the jury to determine beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances (or that death was the appropriate punishment).¹⁶²

In 2015, there were forty-nine death sentences imposed, and three states imposed more than half of those death sentences: Alabama (6), Florida (9) and California (14).¹⁶³ If we add Pennsylvania and Texas to Alabama, Florida, and California, these five states produced the most death verdicts in the country between 2012 and 2015,¹⁶⁴ and none of them required that the jury determine beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances (or that death was the appropriate punishment).¹⁶⁵ In Alabama and Florida, the jury did not even make the decision but only rendered an advisory verdict.¹⁶⁶ Of the forty-nine death sentences, all but four of these were imposed in states that did not require the jury to determine beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances, or that death was the appropriate punishment.¹⁶⁷

Even if there were not this correlation, the “reasonable doubt” standard is a fundamental component of our criminal justice system. Underscoring the importance of the high standard of proof in a criminal trial, the Court has found that a constitutionally deficient instruction on the meaning of reasonable doubt can never be harmless and requires automatic

161. *See Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> [<https://perma.cc/W7PQ-FVPN>].

162. Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 208 (1991).

163. *See Death Sentences in the United States from 1977 by State and by Year*, *supra* note 161.

164. *See id.*

165. *See supra* notes 109-112 and accompanying text.

166. *See supra* note 109 (stating Alabama allowed judicial override of a jury’s life verdict until the legislature eliminated it in 2017).

167. *See Death Sentences in the United States from 1977 by State and by Year*, *supra* note 161.

reversal.¹⁶⁸ In *Cage v. Louisiana*,¹⁶⁹ the Court summarily reversed a conviction based upon use of the phrases “actual substantial doubt” and “grave uncertainty,” which suggested a “higher degree of doubt than is required for acquittal under the reasonable-doubt standard.”¹⁷⁰ While debates over its phrasing rage, the “beyond a reasonable doubt” standard is a core Constitutional right.

B. Non-Weighing Determinations

The typical non-weighing state statute substitutes the weighing terminology with the requirement that the jury must find an aggravator and more or less “consider” any mitigating evidence when deciding if death is the appropriate punishment.¹⁷¹ Hence, in states like Georgia, Louisiana, and South Dakota, the jury is instructed it must find that at least one aggravating circumstance exists beyond a reasonable doubt (per *Ring*), and then it must consider any mitigating evidence presented in deciding whether the death penalty should be imposed.¹⁷²

It would appear jurors have unbridled discretion at this point to decide life or death without any reference to “weighing.” However, as the Supreme Court itself has noted, “The [weighing/non-weighing] terminology is somewhat misleading, since we have held that in all capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant’s mitigating evidence.”¹⁷³ Therefore, back in the jury room, things likely look no different than in weighing states. Jurors are looking at all of the evidence of aggravating and mitigating factors put before them and making a holistic determination

168. See *Sullivan v. Louisiana*, 508 U.S. 275, 277-82 (1993).

169. 498 U.S. 39 (1990).

170. *Id.* at 40-41.

171. *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) (“[D]rawing an arbitrary line in the sand between the ‘eligibility and selection phases’ of the sentencing decision is, in my view, incoherent and ultimately doomed to failure.”).

172. See GA. CODE ANN. § 17-10-31(a) (West 2016); LA. CODE CRIM. PROC. ANN. art. 905.3 (2016); S.D. CODIFIED LAWS § 23A-27A-1 (2016).

173. *Brown v. Sanders*, 546 U.S. 212, 216-17 (2006).

whether death is appropriate under the circumstances. Jurors in these non-weighting states are doing the same thing they are doing in weighing states. The difference is they do not officially make an intermediate determination but simply come out for or against death. For the same reasons outlined for weighing states and for the reasons outlined in the next section, the jurors here too should be instructed that they have to make this decision beyond a reasonable doubt.

Three states do require jurors to make intermediate determinations.¹⁷⁴ Taking Texas as an example, particularly because it is so problematic, the jury must decide “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”¹⁷⁵ and must decide this probability beyond a reasonable doubt.¹⁷⁶ If the jury finds this, then they must find that death should be imposed unless “there is a sufficient mitigating circumstance or circumstances to warrant . . . a sentence of life imprisonment without parole”¹⁷⁷ There is inherent confusion in instructing a jury to find a probability beyond a reasonable doubt. This provision not only lowers the constitutional standard but it then forces the jury’s hand to find death without benefit of the standard of making the prosecution prove it is appropriate beyond a reasonable doubt. This forced scheme is far from the jury trial right given the community for hundreds of years, giving jurors the protection of a standard to make a moral decision that only they are authorized to make.

C. Death as the Appropriate Punishment

Does the *Hurst* language also logically lead to a Sixth Amendment requirement that the jury must find, after all other findings are made, that, under the circumstances, death is the appropriate punishment beyond a reasonable doubt? As already noted, a few state statutes isolate this as a final question for the

174. See *supra* note 112 (referencing Oregon, Texas and Virginia).

175. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (West 2013).

176. TEX. CODE CRIM. PROC. ANN. art. § 37.071(c).

177. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e)(1).

jurors after weighing, but many do not. If the statute does isolate the issue, there is no coherent reason why this question should be treated any differently than the questions that precede it. *Hurst* says that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death,”¹⁷⁸ but then goes on to soften “facts” into “findings.”¹⁷⁹ That death is appropriate is a finding necessary to impose death, and so it seems under *Hurst*’s logic that it must be made by a jury beyond a reasonable doubt. However, very few states isolate this as a separate step and it is unclear *Hurst* goes that far yet. However, *Hurst* emanates from *Apprendi*, and *Apprendi* interprets the Sixth Amendment according to its historical roots. The historical roots of the jury trial right and its attendant beyond a reasonable doubt standard answer the question at the top of this paragraph “yes.”

History demonstrates the community’s right to decide punishment in a capital case, and the right to have a standard to apply—death beyond a reasonable doubt—to protect its moral conscience. History counsels that states have to give the community the ultimate question separately from any and all steps that come before. The beyond a reasonable doubt standard had as its target the moral conscience of jurors in deciding whether to put a man to death: that was its *raison d’être*. Both the standard and the requirement of twelve unanimous jurors were “moral comfort” tools for those who were put to the task of deciding whether a man should be executed. The standard was aimed at punishment, not fact finding.

There is no reason to believe jurors do not need that moral comfort today as well in capital cases. It is an awesome decision, and to ask them to make it without giving them an instruction on a standard is to leave them rudderless and uncertain. There is evidence that jurors who sit in capital cases and return death verdicts suffer great anxiety long after the

178. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

179. *Id.* at 622.

verdict is returned.¹⁸⁰ They have a right to answer the life or death question with a standard to guide them. Two states have gotten this right: Delaware and Utah.

Delaware was a state where the jury gave an advisory opinion and the judge could ignore it.¹⁸¹ Post-*Hurst*, the Delaware Supreme Court found the statute unconstitutional in *Rauf v. State*.¹⁸² The court, in a per curiam opinion, not only decided to read *Hurst* broadly and understood it to mean that all factual findings had to be made by a jury beyond a reasonable doubt, but Chief Justice Strine, writing for a plurality, found that the Sixth Amendment required a jury to make the ultimate determination of death beyond a reasonable doubt:

I find it impossible to embrace a reading of *Hurst* that judicially draws a limit to the right to a jury in the death penalty context to having the jury make only the determinations necessary to make the defendant eligible to be sentenced to death by someone else, rather than to make the determinations itself that must be made if the defendant is in fact to receive a death sentence. I am unable to discern in the Sixth Amendment any dividing line between the decision that someone is eligible for death and the decision that he should in fact die.¹⁸³

Justice Strine engaged in a lengthy discussion of the hundreds of years of history of the role of the jury in capital cases, noting that “[t]he proposition that any defendant should go to his death without a jury of his peers deciding that should happen would have been alien to the Founders.”¹⁸⁴ He concluded that when the Supreme Court required in *Hurst* “a jury, not a judge, to find each fact necessary to impose a

180. See Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333, 1338 n.21 (1993) (noting jurors have emotional trouble after capital trials).

181. See *Rauf v. State*, 145 A.3d 430, 434-35 (Del. 2016).

182. *Id.* at 434. The Delaware Attorney General’s office will not appeal the ruling. *Delaware Attorney General Will Not Appeal Decision Striking Down Death Penalty Statute*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6531> [<https://perma.cc/E4M2-JAP3>]. Hence, as of today, Delaware no longer has the death penalty.

183. *Rauf*, 145 A.3d at 436.

184. *Id.*

sentence of death,”¹⁸⁵ it was aware that, “[i]f those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility” but to selectivity.¹⁸⁶ Therefore, the Constitution required that a jury of twelve must unanimously decide death beyond a reasonable doubt for it to be imposed.

As the only state that explicitly requires that jurors make a separate finding that death is the appropriate punishment beyond a reasonable doubt, the Utah Supreme Court defended this standard in a straightforward way, not attempting to shoehorn it into a factual finding:

The ultimate purpose in the penalty phase is not one of factfinding, but the fixing of a penalty, and the fixing of a penalty is a matter of judgment about what penal consequences should attach to the commission of a capital crime by a particular defendant. The reasonable doubt standard is, of course, also employed as a standard for factfinding; but that standard, which is only used when the most basic interests are at stake, also conveys to a decision maker a sense of the solemnity of the task and the necessity for a high degree of certitude, given the nature of the values to be weighed, in imposing the death sentence.¹⁸⁷

The fixing of a penalty is exactly what jurors were doing when the jury trial right and the beyond a reasonable doubt standard were being refined during the years of the founding of our nation. Utah seems to have gotten it exactly right.

A study of the history of the jury trial right and the beyond a reasonable doubt standard show that in *capital* cases they were not tied so tightly to the “fact finding” language of *Apprendi*, *Ring*, and *Hurst*. Rather, at the time of the founding of our nation, and there is no reason it should be different now, the community, in the form of a jury, decided whether men would live or die, and for that bald decision, they had the moral protection of a reasonable doubt standard.

185. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

186. *Rauf*, 145 A.3d at 464.

187. *State v. Wood*, 648 P.2d 71, 84 (Utah 1982).

V. CONCLUSION

The Supreme Court opened a window on the jury trial right in *Apprendi v. New Jersey* and has continued to prop it open. Through that window came *Hurst v. Florida*, where Justice Sotomayor signaled the Court's willingness to entertain further applications of the right in capital cases. While it is clear from *Ring v. Arizona* and *Hurst* that the jury must find any aggravating factors beyond a reasonable doubt, *Hurst* indicates that the jury trial right would attach to any findings necessary for imposition of death. That would mean, at the very least, that jurors in "weighing" states would have to find the aggravators outweighed any mitigating circumstances beyond a reasonable doubt.

Less clear from the Court's decision and *Apprendi*'s applications is whether it also means that before death may be imposed, a jury must find the penalty appropriate beyond a reasonable doubt. This Article used a historical approach to this question, as the Court has done in interpreting the Sixth Amendment's jury trial right. In capital cases, for hundreds of years, it has been the right of the community, and not a judge, to decide on the penalty of death. Because this was, and still is, such an awesome decision, philosophers and legal thinkers in the eighteenth century minted the "beyond a reasonable doubt" standard to protect the jurors' moral consciences in the imposition of this draconian punishment. Ironically, given how it is viewed today, it was designed to make imposition easier, as jurors were reluctant to impose it with no guidance lest they suffer great harm were they to sentence to death an innocent man.

Jurors today, no less than yesterday, should have the guidance of a standard—one held so important as to require reversal if misstated in noncapital cases—on which to decide life or death. It is surely grotesque to constitutionally require a jury find guilt beyond a reasonable doubt in a fraud case but to have no such constitutional requirement in a case where a man or woman's life hangs in the balance. It is both an individual

and collective concern for the criminal justice system and the Court has the means and, perhaps the will, to address it.