SUPREME COURT UPHOLDS A MANDATE OF DEATH WHEN THE JURY IS IN EQUIPOISE: CHALLENGED UNDER THE *APPRENDI* INTERPRETATION OF THE SIXTH AMENDMENT

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This note challenges the constitutionality of the capital sentencing scheme used by Kansas courts. The author begins by examining the history of and policies underlying the trial-by-jury guarantee of the Sixth Amendment to the U.S. Constitution. Because a criminal defendant's Sixth Amendment rights extend into the sentencing phase of a trial, the jury plays a critical role as the ultimate arbiter of both fact and judgment. The Kansas sentencing scheme mandates a sentence of death when the jury determines that the reasons for and against executing the defendant are in equipoise. As a result, the Kansas scheme diminishes the role of the jury and deprives a criminal defendant of the fundamental right to a trial by his or her peers. To remedy these problems, the author proposes three potential avenues for restoring constitutionality to the Kansas capital sentencing scheme. Specifically, the author recommends that the Kansas legislature reverse the current weighing equation that militates in favor of death, require an additional jury finding that death is the appropriate sentence, or eliminate the weighing equation altogether. In its current form, the sentencing provisions raise serious constitutional concerns. However, Kansas can restore criminal defendants' full Sixth Amendment rights, as well as the critical role the jury plays in capital cases, by adopting any of the author's three proposals.

I. INTRODUCTION

Culture and criminal law each have a way of dealing with "close calls." In baseball, umpires follow the maxim of "tie goes to the runner." A base runner is safe in the event there is uncertainty as to the decision. Similarly, judges follow the principle of lenity when interpreting a crimi-

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nal statute or imposing a criminal sentence.[1] The principle of lenity requires that a judge adhere to the statutory construction or sentence that favors the defendant where there is ambiguity regarding the appropriate finding.[2]

In baseball and criminal law alike, our preference is to err on the side of "safety." If the runner is called out when he truly was safe, the finality of the decision makes it impossible for the injustice to be corrected. In contrast, if the runner is called safe when he truly was out, there is the chance that the next batter will ground into an inning-ending double play, making the baseball universe right again.

Criminal law adheres to the same logic. William Blackstone famously noted that it is "better that ten guilty persons escape, than the one innocent suffer."[3] Benjamin Franklin believed, "[t]hat it is better a hundred guilty persons should escape than one innocent person should suffer."[4] Justice Harlan has discussed "the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[5] In criminal law, convention is to err on the side of the accused.[6]

Our criminal law sanctions tend to become more irrevocable as the seriousness of the charged offense increases. A defendant that is wrongly convicted of a parking violation can be compensated. However, contrary to the preference for caution, no reparation can be offered to a wrongly executed defendant. Thus, prudence requires extra care to be taken in adjudicating crimes with increasingly severe punishments. By this logic, capital punishment, criminal law's most severe sanction, should be imposed with the greatest caution. It is logical to assume that ambiguities, ties, and close calls will be resolved in favor of the defendant.

Adhering to this logic, the Kansas Supreme Court found unconstitutional a Kansas statute[7] that required a defendant be executed when the jury found the aggravating and mitigating factors as to whether the defendant should be sentenced to death or receive life imprisonment tied.[8]

1. Bifulco v. United States, 447 U.S. 381, 387 (1980).

2. *Id*.

3. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 358 (London, A. Strahan 1825).

4. LETTER FROM BENJAMIN FRANKLIN TO BENJAMIN VAUGHAN (Mar. 14, 1785), *in* 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., fed. ed. 1904) [hereinafter FRANKLIN LETTER].

5. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

6. *Id.* at 372; 4 BLACKSTONE, *supra* note 3, at 359; Franklin Letter, *supra* note 4.

7. KAN. STAT. ANN. § 21-4624(e) (2006).

8. State v. Marsh, 102 P.3d 445, 458 (Kan. 2004). Michael Lee Marsh III was convicted of capital murder, first degree murder, aggravated arson, and aggravated burglary in relation to the double homicide of Marry Pusch and her daughter. *Id.* at 452. He received a sentence of death, life imprisonment with a "hard forty," fifty-one months, and thirty-four months for each of the convictions respectively. *Id.* While the Kansas Supreme Court previously refused to invalidate title 21, section 4624(e) of the Kansas Statutes Annotated, holding only that it was unconstitutional as applied, the

Because the Kansas Supreme Court based its decision on the Eighth and Fourteenth Amendments to the United States Constitution, the United States Supreme Court ruled that it had jurisdiction to review the decision.[9] The decision of the Kansas Supreme Court was appealed to the United States Supreme Court and ultimately reversed.[10]

The statute in question, title 21, section 4624(e) of the Kansas Statutes, provides in pertinent part that

> [i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more . . . aggravating circumstances . . . exist and, further, 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 . . . .[11]

The plain language of this statute has a profound effect on the burden shifting analysis that occurs in a Kansas capital sentencing hearing. The burden initially rests with the State to prove that an aggravating factor exists.[12] If the State satisfies its burden, the burden then shifts to the defendant.[13] The defendant is not simply required to counter the aggravating factor with an equally persuasive mitigating factor, but instead must establish enough mitigating factors to *surpass* the weight of the aggravating factor or factors asserted against him.[14] The language clearly sets forth this peculiar burden shifting analysis that creates a mandate of

court reconsidered this position in *Marsh* and held the statutory provision to be "unconstitutional on its face." *Id*. at 458. The court stated that, "[t]he legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die." *Id*. (quoting State v. Kleypas, 40 P.3d 139, 232 (Kan. 2001)).

9. Kansas v. Marsh, 126 S. Ct. 2516, 2522 (2006) (citing Michigan v. Long, 463 U.S. 1032, 1039 n.4 (1983) ("[I]f, in our view, the state court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did, then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction." (citation omitted)).

10. *Id*. at 2529. At issue was the constitutionality of title 21, section 4624(e) of the Kansas Statutes Annotated under the Eighth and Fourteenth Amendments to the United States Constitution. Despite the Kansas Supreme Court's reasoned arguments for determining its state's own statute to be facially unconstitutional, the United States Supreme Court reversed, finding no constitutional violation in the weighing equation set forth by the Kansas sentencing scheme and relying on their decision in *Walton v. Arizona*. *Id*. at 2521, 2523–24. While the Kansas Supreme Court found title 13, section 703(E) of the Arizona Code to be distinguishable from title 21, section 4624(e) of the Kansas Statutes due to the Arizona statute's absence of a weighing equation and legislative mandate of death in the event of equipoise, *Kleypas*, 40 P.3d at 226–28, the United States Supreme Court found the Arizona scheme to be sufficiently equivalent to the Kansas sentencing scheme to control their decision on this issue. *Marsh*, 126 S. Ct. at 2523–24 (noting that "[s]imilar to the express language of the Kansas statute, the Arizona statute at issue in *Walton* has been consistently construed to mean that the death penalty will be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances"). Consistent with their decision to uphold the Arizona statute, the United States Supreme Court reversed the decision of the Kansas Supreme Court and upheld the constitutionality of the Kansas statute under the Eighth and Fourteenth Amendments. *Id*. at 2529.

11. KAN. STAT. ANN. § 21-4624.

12. *Id.*

13. *Id.*

14. *Id.*

death when the proven mitigating and aggravating circumstances are in equipoise.

A number of potential constitutional issues are implicated by the statute. Does a sentencing structure that imposes death when the jury has found that the aggravating and mitigating factors supporting and repudiating the capital sentence are in equipoise violate the Eighth Amendment's prohibition against cruel and unusual punishment?[15] Does the sentencing structure violate the Fourteenth Amendment's guarantee of due process?[16] Does the mandatory nature of the statute violate the defendant's right to a trial by jury as provided under the Sixth Amendment?[17]

The June 26, 2006, United States Supreme Court decision in *Kansas v. Marsh* answered two of these questions.[18] In a 5-4 decision, the Supreme Court upheld title 21, section 4624(e) of the Kansas Statutes Annotated as not violating the Eighth or Fourteenth Amendments.[19] The case illustrated the stark division that remains among the Supreme Court justices regarding the issue of capital punishment.[20] The justices engaged in fierce debate regarding the constitutionality of the statute on Eighth and Fourteenth Amendment grounds.[21] However, the possibility of chal-

15. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

16. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

17. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

18. Kansas v. Marsh, 126 S. Ct. 2516, 2520 (2006).

19. *Id*. at 2529.

20. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972).

21. The Court provided further justification for its decision by analyzing the Kansas statute under the two-part test established in the landmark death penalty cases of *Furman v. Georgia* and *Gregg v. Georgia*, 428 U.S. 153 (1976) to determine if a capital punishment sentencing scheme is within the confines of the Eighth Amendment. *Gregg*, 428 U.S. at 187 ("The death penalty is not a form of punishment that may never be imposed."). The *Marsh* Court ruled that the class of death-eligible defendants is sufficiently narrowed, since an additional specified element must be found for a defendant to be convicted of capital murder rather than intentional premeditated murder. *Marsh*, 126 S. Ct. at 2526 (citing KAN. STAT. ANN. § 21-3439 (2005) (listing seven additional factors that can raise an intentional and premeditated killing of a person to the level of capital murder)). Additionally, the Court held that the jury is able to deliver a reasoned, individualized sentence due to the absence of any restriction in the statute that limits the type or quantity of mitigating evidence that may be considered by the jury. *Id.* (referring to KAN. STAT. ANN. § 21-4624). Justice Souter disputed both of these conclusions in his dissenting opinion. *Id.* at 2543. He argued that the Kansas capital punishment sentencing scheme fails both prongs of the test established in *Furman* and *Gregg* because of the provision that calls for a death sentence in the event of equipoise. *Id*. Souter noted that, "[t]he statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death." *Id*. Rather than rationally narrowing the class of death eligible defendants or requiring a reasoned, individualized sentence determination, according to Souter, "[t]he statute . . . addresses the risk of a morally unjustifiable death sentence, not by minimizing it as precedent unmistakably requires, but by guaranteeing that in equipoise cases the risk will be realized, by 'placing a 'thumb [on] death's side of the scale.'" *Id*. (citing Sochor v. Florida, 504 U.S. 527, 532 (1992) (quoting Stringer v. Black, 503 U.S. 222, 232 (1992) (alteration in original))).

lenging the statute on Sixth Amendment grounds receives virtually no attention throughout Justice Thomas's opinion, Justice Scalia's concurrence, Justice Kennedy's dissent or Justice Souter's dissent.[22]

This note challenges the constitutionality of the sentencing structure set forth under title 21, section 4624(e) of the Kansas Statutes Annotated as a violation of the Sixth Amendment's right to a trial by jury.[23] The note begins with a careful examination of the history and policy behind the Sixth Amendment guarantee that a criminal be tried by a jury of his peers. This preliminary discussion establishes the framework for understanding the significance of this right in the capital sentencing context. The note next examines the scope of the Sixth Amendment guarantee to a jury trial, specifically its reach into the sentencing phase of the trial. The note chronicles the development and redaction of the mandatory nature of the Federal Sentencing Guidelines to illustrate how far the United States Supreme Court has extended the protections of the Sixth Amendment jury trial guarantee for criminal defendants into the sentencing phase of the trial. The note then analyzes precisely how title 21, section 4624(e) fails to satisfy the Supreme Court's rulings extending specific Sixth Amendment guarantees into the sentencing phase of the trial. Upon proving that title 21, section 4624(e) is constitutionally deficient, the note recommends that it be challenged as a violation of the Sixth Amendment and amended by the Kansas legislature to conform to constitutionally permissible standards.

II. BACKGROUND

As described above, the Court ultimately reinstated the constitutionality of title 21, section 4624(e) of the Kansas Statutes under the Eighth and Fourteenth Amendments.[24] Further discussion of the reason-

22. *See generally Marsh*, 126 S. Ct. at 2516. While the justices argued fiercely on the philosophy of capital punishment, discussion of the Sixth Amendment and its potential constitutional implications on title 21, section 4624(e) remained undeveloped. *Kansas v. Marsh* elicited opinions from Justices Thomas, Scalia, Kennedy, and Souter. The justices sparred over more than just the constitutional issues presented. Included in the opinions was evidence of the deep moral arguments that underlie the broader debate surrounding capital punishment. These moral arguments have risen to the forefront of popular debate due to high profile executions, publicized incidents of botched executions, and numerous exonerations of death row inmates with the advent of DNA evidence. In the majority opinion, Justice Thomas asserted that "[t]he dissent's general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose." *Id*. at 2529. Justice Scalia noted that, "The dissent essentially argues that capital punishment is such an undesirable institution—it results in the condemnation of such a large number of innocents—that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced." *Id*. at 2531 (Scalia, J., concurring). Souter makes clear in his dissent that "[w]e cannot . . . hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is 'doubtful.'" *Id*. at 2544 (Souter, J., dissenting).

23. U.S. CONST. amend. VI.

24. *Marsh*, 126 S. Ct. at 2524.

ableness of Justice Souter's dissenting argument that title 21, section 4624(e) should have been held unconstitutional under the Eighth and Fourteenth Amendments[25] is beyond the scope of this note. Rather, the following commentary will discuss the constitutionality of title 21, section 4624(e) under the Sixth Amendment to the United States Constitution. In order to fully appreciate why the Sixth Amendment right to a jury trial must be applied to this Kansas statute, this right will first be examined in its original context.

A. Trial by Jury: A Deeply Entrenched Constitutional Precept

The history of the right to a trial by jury in the United States predates not only the Constitution and Bill of Rights, but also the Declaration of Independence.[26] The right to a jury trial was declared by the First Continental Congress in the Declaration of Rights of 1774,[27] and all twelve states that had enacted constitutions prior to the Constitutional Convention set forth the right of a criminal defendant to be tried by a jury.[28] The origin of this fundamental right in America can be traced back to the first English settlement of the North American continent.[29] The right to a trial by jury was included in King James I's Charter to the Virginia Company in 1606.[30]

The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[31] In addition to appearing in the Bill of Rights,[32] the Constitution also provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[33] The right to trial by jury is, thus, the only enumerated right to appear both in the Constitution and the Bill of Rights.[34]

In establishing our system of government and law, the framers of the Constitution understood the importance of the right to a trial by jury.[35] Our government depends upon an elaborate system of checks and

25. *Id*. at 2544 (Souter, J., dissenting).

26. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

27. *Id*. (citing Declaration of Colonial Rights (Oct. 14, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 69 (U.S. Gov't Printing Office, 1904)).

28. *Id*. (citing Leonard W. Levy, *Bill of Rights, in* ESSAYS ON THE MAKING OF THE CONSTITUTION 258, 269 (Leonard W. Levy ed., 2d ed. 1987)).

29. Alschuler & Deiss, *supra* note 26, at 870 n.15 (citing Harold M. Hyman and Catherine M. Tarrant, *Aspects of American Trial Jury History, in* THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 23, 24 (Rita James Simon ed., 1975)).

30. *Id*.

31. U.S. CONST. amend. VI.

32. *Id*.

33. U.S. CONST. art. III, § 2.

34. Alschuler & Deiss, *supra* note 26, at 870.

35. *Id*. at 871.

balances that is achieved not only through a separation of powers between different branches of government, but also through a separation of duties between government officials and the population at large.[36] Within the legislative and executive branches, this check is achieved primarily through the act of voting[37] and durational terms of control.[38] Within the judicial system, where appointments, particularly in the federal judiciary, are without time limitations,[39] the check on power is achieved by involving the citizenry in the act of decision making directly.[40] By requiring the most serious of crimes to be adjudicated by the general populous, the risk of collusion between the branches of government is diminished.[41] The importance of this check on the judiciary was deemed so fundamental that Thomas Jefferson declared, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[42]

The United States Supreme Court has upheld and further emphasized the vital importance of the right to a trial by jury.[43] Relying on the fundamental nature of the jury trial in criminal cases under the American judicial system, the Court held in *Duncan v. Louisiana* that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[44] The Court additionally stated that "[f]ear 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."[45] The Court demonstrated its understanding of the jury's fundamental nature in our system of government by noting that "no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."[46]

36. Charles W. Joiner, *Jury Trials: Improved Procedures*, 48 F.R.D. 79, 80 (1969).

37. David Schleicher, "*Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 173 (2006).

38. Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 179 (1985).

39. Troy A. Eid, *Judicial Independence and Accountability: The Case Against Electing Judges*, 30 COLO. LAW. 71, 71 (2001).

40. *See* U.S. CONST. amend. VI.

41. *See* Alschuler & Deiss, *supra* note 26, at 871–75.

42. *Id*. at 876–77 (quoting Letter to the Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., Princeton 1958)).

43. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

44. *Id*.

45. *Id*. at 156.

46. *Id*. at 155–56 n.23 (1968) (quoting P. DEVLIN, TRIAL BY JURY 164 (1956)).

B. The Scope of Sixth Amendment Rights at Sentencing: A Case Study of the Development and Decline of the Federal Sentencing Guidelines

While the right to a trial by jury has been an important part of the American judicial system since its inception, the role that the jury should play in the decision-making process has often been the subject of debate.[47] In many contexts, a defendant's rights during the verdict phase are different from his or her rights at sentencing.[48] In order to establish that title 21, section 4624(e) of the Kansas Statutes Annotated violates the Sixth Amendment, one must determine whether the protections of the Sixth Amendment guarantee a criminal defendant the right to a trial by jury in both the sentencing and verdict phases of a capital trial.

The Supreme Court has historically rejected the notion that a Sixth Amendment right to a jury trial exists during the sentencing phase of a capital trial.[49] Yet, the majority of states require jury sentencing in capital cases.[50] Scholars have recently begun to challenge the idea that Sixth Amendment rights should differ between the sentencing and verdict phases of the criminal trial.[51] In addition to the historical and policy justifications discussed above,[52] the Supreme Court's jurisprudence centered on the constitutionality of the Federal Sentencing Guidelines under the Sixth Amendment has been essential to the concept that the Sixth Amendment right to a jury trial continues through to the sentencing phase of a trial.

The controversy embodied in the debate over the mandatory nature of the Federal Sentencing Guidelines has occupied the Court's attention for over two decades.[53] The advent of the Federal Sentencing Guidelines enacted by Congress in the second half of the twentieth century[54] spurred a series of United States Supreme Court decisions that have redefined the role that juries play in criminal sentencing under the Sixth Amendment.[55]

47. *See generally* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2007 (2005).

48. Matthew J. Berman et al., *Sentencing Guidelines*, 90 GEO. L.J. 1753, 1786–87 (2002) ("Facts considered by the court at sentencing must be proved by a preponderance of the evidence and may include hearsay testimony.").

49. *See* Walton v. Arizona, 497 U.S. 639, 647–49 (1990); Clemons v. Mississippi, 494 U.S. 738, 745–46 (1990); Hildwin v. Florida, 490 U.S. 638, 640 (1989); Spaziano v. Florida, 468 U.S. 447, 464 (1984); Proffitt v. Florida, 428 U.S. 242, 252 (1976).

50. Douglass, *supra* note 47, at 2026 n.339 (noting that, in 2005, thirty-three of the thirty-eight states that permitted capital punishment required jury determination of sentence).

51. *Id*. at 2007–08.

52. *See supra* Part II.A.

53. *See, e.g.*, United States v. Booker, 543 U.S. 220, 221 (2005); Blakely v. Washington, 542 U.S. 296, 296–97 (2004); Apprendi v. New Jersey, 530 U.S. 466, 466–67 (2000); Jones v. United States, 526 U.S. 227, 232 (1999); Mistretta v. United States, 488 U.S. 361, 412 (1989); McMillan v. Pennsylvania, 477 U.S. 79, 79–80 (1986).

54. 28 U.S.C. §§ 991–998 (Supp. 2005).

55. *See Booker*, 543 U.S. 220; *Blakely*, 542 U.S. 296; *Apprendi*, 530 U.S. 466; *Jones*, 526 U.S. at 232; *Mistretta*, 488 U.S. 361; *McMillan*, 477 U.S. 79.

1. Diminishing the Role of the Jury in Sentencing

The notion of legislatively derived mandatory minimum sentences has been a part of America's legal landscape virtually since its inception.[56] However, the vast majority of sentencing decisions throughout our nation's history have been left to judicial discretion.[57] This has led to great disparity among sentences for similar offenses.[58] To cure this judicial deficiency, Congress created the United States Sentencing Commission as part of the Comprehensive Crime Control Act of 1984.[59] The Commission was given the task of developing a system that would determine the appropriate sentence severity for each of the more than 2000 federal offenses.[60] On November 1, 1987, the resulting Federal Sentencing Guidelines went into effect.[61]

It did not take long for the constitutionality of the Guidelines to be challenged.[62] In January 1989, the United States Supreme Court upheld the constitutionality of the Federal Sentencing Guidelines in *Mistretta v. United States*, rejecting the petitioner's argument that "in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine."[63]

The adoption of the Federal Sentencing Guidelines succeeded in creating better uniformity and consistency among the courts.[64] The establishment of sentencing ranges also had the effect of shifting certain fact-finding obligations, traditionally delegated to the jury, to the judge.[65] Under the Federal Sentencing Guidelines, judges were permitted to rely on facts that often were not raised at trial or proven beyond a reasonable doubt to determine the defendant's sentence within a given range.[66] This

56. Kathleen H. Morkes, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 253 (2006).

57. *Id*. at 252.

58. *Id*. at 253.

59. 28 U.S.C. §§ 991–998.

60. Morkes, *supra* note 56, at 256.

61. 28 U.S.C. §§ 991–998. The Federal Sentencing Guidelines and their correlating case law greatly impacted states such as Kansas as they attempted to create their own state sentencing guidelines. Two years after the Federal Sentencing Guidelines became effective, the state of Kansas established its own state Sentencing Commission. KAN. STAT. ANN. § 74-9104 (1989). Two years later, on July 1, 1993, the Kansas Sentencing Guideline Act was passed by the Kansas legislature. KAN. STAT. ANN. §§ 21-4701 to -4728 (1995 & Supp. 2000). A determinative sentencing scheme that divided all offenses into either drug offenses or non-drug offenses was established. *Compare id.* § 21-4704 (non-drug offenses), *with id*. § 21-4705 (drug offenses). The scheme utilized a system of grids that allowed a judge to match the seriousness of the offense with the defendant's prior criminal history in order to calculate the appropriate sentence. *Id*. §§ 21-4704 to -4705.

62. *Mistretta*, 488 U.S. at 371.

63. *Id*.

64. Morkes, *supra* note 56, at 257.

65. *Id*. at 257–58.

66. *Id*. at 259.

newfound authority that had been granted to judges to make factual determinations regarding the aggravating and mitigating circumstances surrounding a defendant's case was challenged as a violation of an accused's Sixth Amendment right to a trial by jury.[67] The United States Supreme Court held in *McMillan v. Pennsylvania* that the Sixth Amendment was not violated when a state statute permitted a judge to increase a defendant's sentence beyond the statutory minimum by relying on facts not presented at trial or determined by a jury beyond a reasonable doubt.[68]

McMillan had a profound effect on the roles of judges and juries.[69] The Court later reflected on the post-*McMillan* era by stating that "[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance."[70] Defendants continued to challenge the Federal Sentencing Guidelines as a violation of their Sixth Amendment rights and eventually "[t]he Court was forced to consider how to preserve the right to a jury trial 'in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.'"[71]

2. Reconsidering the Jury's Role in Sentencing

The Court began to reconsider its position on the constitutionality of the Federal Sentencing Guidelines in 1999 in *Jones v. United States*.[72] The defendant, Nathaniel Jones, was convicted of "aiding and abetting the use of a firearm during and in relation to a crime of violence and carjacking."[73] The applicable carjacking statute allowed for three different maximum sentences depending on the bodily harm to the victim of the carjacking.[74] Instead of requiring the element of serious bodily harm to be proven beyond a reasonable doubt and accepted by the jury as an ele-

67. *McMillan*, 477 U.S. at 93.

68. *Id*. The state of Kansas had a similar mechanism for dealing with upward and downward departures from the presumed sentence. The Kansas scheme allowed a judge to depart from the recommended sentence when the judge had "substantial and compelling" reason to believe that, based on aggravating or mitigating factors, the presumptive sentence was not sufficiently proportionate to the severity of the offense. KAN. STAT. ANN. § 21-4716. The judge was required to explain the substantial and compelling reason for the departure on the record, KAN. STAT. ANN. § 21-4716(b), and was limited to a maximum upward departure of twice the presumed sentence, KAN. STAT. ANN. § 21-4719(b)(2).

69. United States v. Booker, 543 U.S. 220, 236 (citing Jones v. United States, 526 U.S. 227, 231–32 (explaining that the district court judge increased the maximum sentence from fifteen to twenty-five years)); United States v. Hammoud, 381 F.3d 316, 361–62 (4th Cir. 2004) (en banc) (Motz, J., dissenting) (explaining that the district court judge increased the maximum sentence from 57 months to 155 years); United States v. Rodriguez, 73 F.3d 161, 162–63 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing en banc) (explaining that the district court judge increased the sentence from fifty-four months to life imprisonment).

70. *Booker*, 543 U.S. at 236.

71. Morkes, *supra* note 56, at 258 (citing *Booker*, 543 U.S. at 237).

72. 526 U.S. 227 (1999).

73. *Id.* at 230.

74. 18 U.S.C. § 2119 (2000).

ment of the crime, the district court judge treated this element as a sentencing consideration.[75] In sentencing, the district court judge determined by a preponderance of the evidence that the victim had suffered serious bodily harm and sentenced Nathaniel Jones accordingly.[76] The Supreme Court found the issue of serious bodily harm to be an element of the underlying offense that required it to be submitted to the jury and proven by the Government beyond a reasonable doubt.[77]

The decision in *Jones* demonstrated the early stages of the Court's deliberate choice to reign in the authority that had been granted to judges and reestablish the role of juries in sentencing.[78] The Court stated that, "[i]t is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn."[79]

3. Reinstating the Jury's Role in Sentencing

The Court attempted to draw this line one year later in *Apprendi v. New Jersey*.[80] Charles Apprendi was charged with the possession of a firearm for an unlawful purpose, and for the unlawful possession of a prohibited weapon after firing shots into a neighbor's residence.[81] Apprendi made statements during questioning, which were later retracted, that the shooting was racially motivated.[82] Although no part of the indictment against Apprendi mentioned New Jersey's hate crime statute or the possibility that the shooting was racially motivated, the judge found by a preponderance of the evidence that the crime was racially motivated and increased Apprendi's sentence accordingly.[83]

On appeal, the United States Supreme Court held that the Sixth Amendment does not permit a defendant to be "exposed[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[84] The *Apprendi* Court additionally held that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[85] The majority opinion quoted the Stevens concurrence in *Jones v. United States* and stated that "it is unconstitutional for a legislature to remove

75. *Jones*, 526 U.S. at 231.
76. *Id*.
77. *See id*. at 232, 252.
78. Morkes, *supra* note 56, at 258–59.
79. *Jones*, 526 U.S. at 244.
80. 530 U.S. 466 (2000).
81. *Id.* at 469–70.
82. *Id*. at 469.
83. *Id*. at 469–71.
84. *Id*. at 483.
85. *Id*. at 490.

from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[86] *Apprendi* thus reestablished the role of the jury in sentencing determinations.

4. Reinstating the Jury's Role in Capital Sentencing

The *Apprendi* decision was referred to by Justice O'Connor as a "watershed change in constitutional law."[87] It did not take long for the reverberations from *Apprendi* to reach state capital sentencing schemes.[88] In *Ring v. Arizona*, the Court was faced with addressing the same Arizona capital sentencing scheme that it had previously upheld twelve years earlier in *Walton v. Arizona*.[89] The Arizona capital sentencing scheme required the trial judge to have a separate sentencing hearing to determine whether certain aggravating circumstances existed that made the defendant eligible for the death penalty.[90] The statute stated very clearly that the judge, rather than the jury, was to determine whether these factual circumstances were present.[91] The Court held in *Walton v. Arizona* that the Arizona capital sentencing scheme did not violate the Sixth Amendment by not requiring jury determination of aggravating circumstances necessary to sentence a defendant to death.[92]

In *Ring*, the jury found Timothy Stuart Ring guilty of felony murder,[93] a crime potentially punishable by death under the Arizona capital sentencing scheme.[94] Under Arizona law, Ring would only be eligible for the death penalty if he was found to be the actual killer.[95] During the sentencing proceeding, the judge made the factual determination that Ring was the actual killer and sentenced him to death.[96] An appeal was eventually heard by the Arizona Supreme Court.[97] The Arizona Supreme Court was faced with the difficult task of reconciling the United States Supreme Court's holdings in *Walton v. Arizona*[98] and *Apprendi v. New Jersey*,[99] which seemingly conflicted as to whether the presence of an

86. *Id*. (quoting Jones v. United States, 526 U.S. 227, 252 (1999)).

87. *Id*. at 524 (O'Connor, J., dissenting).

88. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(B) (2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703(B) (2006)).

89. Ring v. Arizona, 536 U.S. 584, 588 (2002).

90. ARIZ. REV. STAT. ANN. § 13-703(B) (2001) (amended 2002).

91. *Id*. (explaining that the "hearing shall be conducted before the court alone," and "[t]he court alone shall make all factual determinations required").

92. Walton v. Arizona, 497 U.S. 639, 650 (1990) (stating that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency").

93. *Ring*, 536 U.S. at 584.

94. *See* ARIZ. REV. STAT. ANN. § 13-703 (2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (2006)).

95. *See* Enmund v. Florida, 458 U.S. 782, 822–23 (1982).

96. *Ring*, 536 U.S. at 584.

97. State v. Ring, 25 P.3d 1139 (Ariz. 2001).

98. *See supra* notes 89–92 and accompanying text.

99. *See supra* note 85 and accompanying text.

aggravating factor, a circumstance necessary to increase a defendant's sentence beyond the range permitted by the jury's verdict, could be adjudicated by the judge. The Arizona Supreme Court affirmed Ring's death sentence, emphasizing the *Apprendi* Court's explicit statement that its decision was not intended to overrule *Walton*.[100]

The United States Supreme Court granted certiorari and elected to resolve the conflicting precedents.[101] The Court held in *Ring v. Arizona* that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[102] *Walton* had been overruled,[103] and *Apprendi* had effectively made its mark on state capital sentencing schemes.

5. Defining the Scope of Apprendi

The scope of *Apprendi* continued to be defined and widened with the Supreme Court's decision in *Blakely v. Washington*.[104] Howard Blakely was initially arrested and charged with first-degree kidnapping.[105] The charge was later reduced to second-degree kidnapping due to a plea agreement.[106] Under the state of Washington's criminal code and determinative sentencing scheme, the judge was given a specific range from which he could sentence the defendant.[107] However, so long as the judge found "substantial and compelling reasons justifying an exceptional sentence," and the decision was based on facts and conclusions of law not taken into account when computing the standard range for the offense, the judge could depart from the statutorily provided range.[108] This sort of increase in sentence from the maximum statutorily provided sentence is known as an "upward departure." The sentencing judge in *Blakely* used this mechanism to add slightly more than three years to the maximum sentence that Blakely could have received for second-degree kidnapping.[109] Blakely challenged the constitutionality of the Washington sentencing scheme as a violation of his Sixth Amendment rights.[110]

The State argued that the Sixth Amendment and *Apprendi* were not violated since Blakely's ultimate sentence of ninety months was within the maximum sentencing range that a judge could impose for a class B

100. *Ring*, 25 P.3d at 1150–52.
101. *Ring*, 536 U.S. at 588–89.
102. *Id.* at 589.
103. *Id*.
104. 542 U.S. 296 (2004).
105. *Id.* at 298.
106. *Id*. at 298–99.
107. WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2001).
108. WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000).
109. *Blakely*, 542 U.S. at 300.
110. *Id*. at 301

felony.[111] However, the United States Supreme Court found the way in which the Washington sentencing scheme had been carried out to be in conflict with the Sixth Amendment and *Apprendi*.[112]

The Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[113] The Court further stated that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts . . . and the judge exceeds his proper authority."[114] The *Blakely* Court solidified the *Apprendi* ruling and emphasized "the need to give intelligible content to the right of jury trial."[115] The Court stopped short of finding sentencing schemes and guidelines to be unconstitutional generally,[116] but considerable doubt remained as to whether they would soon become a statutory relic.[117] The result of the *Blakely* and *Apprendi* rulings was that any factual determination necessary to increase the defendant's sentence beyond the maximum sentence permitted at the time of verdict had to be decided by the jury.[118]

6. Eliminating the Mandatory Nature of the Federal Sentencing Guidelines

In 2004, the United States Supreme Court addressed the constitutionality of the Federal Sentencing Guidelines in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*.[119] Both cases involved respondents that had been found guilty by a jury for having possessed a certain amount of cocaine with intent to distribute.[120] Each was sentenced by the trial judge in accordance with the Federal Sentencing Guidelines.[121] On appeal, the Seventh Circuit found that the Federal Sentencing Guidelines, which required the judge to base his sentence on the jury's verdict and his own factual findings, was in violation of the

111. *Id*. at 303; *see* WASH. REV. CODE ANN. § 9A.20.021(1)(b).
112. *Blakely*, 542 U.S. at 303.
113. *Id*.
114. *Id*. at 304.
115. *Id*. at 305.
116. *Id*. at 305 n.9, 308.
117. United States v. Mueffelman, 327 F. Supp. 2d 79, 96 (D. Mass. 2004); United States v. Parson, No. 6:03-cr-204-Orl-31DAB, slip op. at 4 (M.D. Fla. July 22, 2004) (citation omitted), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/us_v.%20Parson%20(03-cr-204).pdf; United States v. Marrero, 325 F. Supp. 2d 453, 456–57 (S.D.N.Y. 2004); United States v. Sisson, 326 F. Supp. 2d 203, 205 (D. Mass. 2004); United States v. Khoury, No. 6:04-cr-24-Orl-31DAB, slip op. at 2 & n.1 (M.D. Fla. July 21, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/us_v.%20(04-cr-24).pdf; United States v. Einstman, 325 F. Supp. 2d 373, 375, 380 (S.D.N.Y. 2004); United States v. Medas, 323 F. Supp. 2d 436, 436 (E.D.N.Y. 2004).
118. *See Blakely*, 542 U.S. at 303–04; Apprendi v. New Jersey, 530 U.S. 466, 482–83 (2000).
119. United States v. Booker, 543 U.S. 220 (2005).
120. *Id*. at 227–28.
121. *Id*. at 228–29.

Sixth Amendment.[122] Before the First Circuit could take *United States v. Fanfan* on appeal, certiorari was granted and the case was consolidated with *United States v. Booker* to consider whether the holding of *Apprendi* and its progeny of case law should be extended to the Federal Sentencing Guidelines.[123]

The Court concluded that the mandatory nature of the Guidelines caused them to be unconstitutional.[124] Because the Guidelines required judges to increase a defendant's sentence based on facts not presented to the jury, but instead found by the judge, they were held to be in violation of the Sixth Amendment.[125] The Court thus reduced the authority of the Federal Sentencing Guidelines from mandatory to advisory, substantially deviating from its prior holding in *Mistretta*.[126]

III. ANALYSIS

The impact of *Apprendi* and its progeny has been widespread.[127] The Court's almost twenty-year journey from *Mistretta* to *Booker* represented a complete migration from virtually no juror participation in sentencing criminal defendants, to jurors playing a decisive role. By reinstating the jury's role in making factual determinations that affect sentencing for criminal defendants, the Supreme Court has taken a positive step towards ensuring the protective function of the jury that the framers of the Constitution intended.[128]

States have been forced to make adjustments to their sentencing guidelines in accordance with the Supreme Court's evolution of case law on the Sixth Amendment and sentencing. After a series of cases and decisions by the Kansas Supreme Court, the state of Kansas ultimately codified the holding of *Apprendi* into its state code.[129] Nevertheless, title

122. United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004).

123. *Booker*, 543 U.S. at 229.

124. *Id*. at 245.

125. *Id*.

126. *Id*. at 259–60.

127. *See, e.g.*, Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11, 42–45 (2003).

128. *See supra* Part II.A.

129. The aforementioned line of United States Supreme Court cases weighed heavily on the minds of the Kansas Supreme Court justices as they judged various challenges to the constitutionality of the Kansas Sentencing Guidelines. *See* State v. Gould, 23 P.3d 801, 809–14 (Kan. 2001); State v. Conley, 11 P.3d 1147, 1157–59 (Kan. 2000). Four months after the United States Supreme Court ruling in *Apprendi v. New Jersey*, the Kansas Supreme Court heard the appeal of Anthony D. Conley. *Conley*, 11 P.3d at 1150–51. Conley was convicted of first-degree premeditated murder and sentenced to life imprisonment with a "hard 40." *Id.* at 1151. The "hard 40" would require him to serve a prison sentence of forty years before becoming eligible for parole. KAN. STAT. ANN. § 21-4638 (2006). According to the Kansas Sentencing Guidelines, a defendant guilty of first-degree premeditated murder will generally be parole eligible after serving a prison term of twenty-five years. *Id.* § 22-3717(b)(1). However, the guidelines provide that aggravated circumstances found by the judge may warrant an increased prison term before a defendant becomes eligible for parole. *Id.* § 21-4635. Conley challenged the sentencing judge's decision to increase the minimum sentence that he was required to serve

21, section 4624(e) of the Kansas Statutes Annotated, has yet to be challenged as unconstitutional under *Apprendi*'s application of the Sixth Amendment. The remainder of this note will apply the holdings of *Apprendi* and the cases that follow to title 21, section 4624(e) and demonstrate that the sentencing scheme is unconstitutional under the Sixth Amendment.

Under *Apprendi*, a sentencing scheme that permits an upward departure from the maximum sentence permissible at the time of the jury verdict is unconstitutional under the Sixth Amendment unless the jury makes every factual finding necessary for the upward departure to be imposed.[130] Therefore, two elements must be present for a sentencing guideline to conflict with the holding in *Apprendi*: (1) the sentencing guideline must permit an upward departure, and (2) the sentencing guideline must not require that all of the factual determinations necessary to qualify for the harsher sentence be determined by the jury. The following analysis will demonstrate that title 21, section 4624(e) of the Kansas Statutes Annotated satisfies both of these elements and is thus unconstitutional under the Sixth Amendment.

A. Apprendi*'s Impact on the Role of the Jury in Sentencing*

Before embarking on this analysis, the preliminary question that must be addressed is whether the decision-making power granted to the

before becoming parole eligible from twenty-five years to forty years as an infringement of his Sixth Amendment rights and in conflict with *Apprendi* and *Jones*. *Conley*, 11 P.3d at 1157–58.

Following the United States Supreme Court's ruling in *McMillan v. Pennsylvania*, the Kansas Supreme Court upheld Conley's sentence because it did not increase the maximum sentence of life in prison, but rather increased the minimum sentence. *Id.* at 1158. The court held that this factor distinguished the case from *Apprendi* and *Jones*. *Id.* at 1157–59. The Kansas Sentencing Guidelines had survived their first *Apprendi* attack, but they would soon be challenged again.

Defendant Crystal Gould was convicted of three counts of child abuse and received a sentence of sixty-eight months in prison for each of the two counts. *Gould*, 23 P.3d at 806. The presumptive sentence according to her conviction set a maximum sentence of thirty-four months per count of child abuse. *Id.*; *see* KAN. STAT. ANN. §§ 21-3609, 4704. In adherence with the Kansas Sentencing Guidelines, the judge doubled the maximum sentence pursuant to his finding of aggravating circumstances. *Gould*, 23 P.3d at 806; *see* KAN. STAT. ANN. § 21-4719(b)(2). Gould challenged the upward departure from the presumed sentence as a violation of her Sixth Amendment rights and further claimed it to be in direct conflict with *Apprendi*. *Gould*, 23 P.3d at 809.

The Kansas Supreme Court agreed with Gould that her argument was parallel to the argument and reasoning explained in *Apprendi*. *Id*. at 813. The court held that the current Kansas Sentencing Guidelines "allows a fact or facts, other than that of a prior conviction, not found by a jury beyond a reasonable doubt, to be used to justify imposing a sentence beyond the statutory maximum for the underlying crime." *Id*. The court further stated that "*Apprendi* dictates our conclusion that Kansas' scheme for imposing upward departure sentences . . . violates the due process and jury trial rights contained in the Sixth and Fourteenth Amendments to the United States Constitution." *Id*. at 814 (finding KAN. STAT. ANN. § 21-4716 to be unconstitutional).

In response to *Gould*, the Kansas legislature codified the *Apprendi* requirements and amended its implementation of the Federal Sentencing Guidelines to read that "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt." KAN STAT. ANN. § 21-4716(b).

130. *Apprendi*, 530 U.S at 496–97.

jury in the verdict phase of the trial[131] is also constitutionally guaranteed in the sentencing phase of the trial. In 1968, the Supreme Court indirectly addressed this issue when determining whether a jury selection process that excluded potential jurors who opposed capital punishment was constitutional.[132] The defendant challenged the constitutionality of the selection process in both the verdict and sentencing phases of the trial.[133] The Court held that such a selection process did not pose a constitutional problem during the verdict phase of the trial, since risk of wrongful conviction did not result from excluding jurors that oppose capital punishment.[134] However, the Court held that "it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments."[135] The holding thus established that a defendant's Sixth Amendment rights are present in both the verdict and sentencing phases of the capital trial.

In 1984, the Supreme Court held in *Spaziano v. Florida* that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed."[136] This holding seems to question whether a defendant's Sixth Amendment rights to a trial by jury continue into the sentencing phase. However, it is important to consider this holding in its context. This ruling preceded the enactment of the Federal Sentencing Guidelines by just a few years[137] and was issued during a period in which the role of the jury in sentencing was being marginalized.[138]

While this ruling has yet to be expressly overruled by the Court, the subsequent holdings in the *Apprendi* line of cases[139] cast considerable doubt on whether *Spaziano* is still good law. The two-part test established in *Furman*[140] and *Gregg*[141] to determine that the sentence of death is sufficiently narrowed and individualized to pass muster under the Eighth Amendment, by its nature, requires additional findings of fact.[142]

131. U.S. CONST. amend. VI.

132. Witherspoon v. Illinois, 391 U.S. 510, 517–18 (1968).

133. *Id*.

134. *Id*.

135. *Id*. at 518.

136. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

137. *See* 28 U.S.C. §§ 991–998 (2000). Note that Spaziano was decided less than three years prior to the enactment of the Guidelines.

138. *See generally* Mistretta v. United States, 488 U.S. 361 (1989); McMillan v. Pennsylvania 477 U.S. 79 (1986).

139. United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 536 U.S. 227 (1999); *Mistretta*, 488 U.S. 361; *McMillan*, 477 U.S. 79.

140. Furman v. Georgia, 408 U.S. 238, 238–39 (1972).

141. Gregg v. Georgia, 428 U.S. 153, 154–55 (1976).

142. The test requires that the sentencing scheme "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Kansas v. Marsh, 126 S. Ct. 2516, 2524–25 (2006) (citing *Gregg*, 428 U.S. at 189).

According to the *Apprendi* line of cases,[143] these additional factual findings must be found by a jury, since a sentence of death is not authorized by the jury verdict alone. Therefore, a defendant has the right to have a jury participate in the sentencing phase of the capital trial.[144]

B. Establishing the Upward Departure

When sentencing a capital defendant to death, the Kansas capital sentencing scheme requires an upward departure from the sentence permitted by the jury's verdict alone.[145] As explained above,[146] an upward departure is the imposition of "a sentence greater than a sentence that could be imposed under the applicable guideline range."[147] For purposes of the *Apprendi* analysis, any sentence greater than the maximum sentence permitted at the time of the jury's verdict is considered an upward departure.[148] Under the Kansas capital sentencing scheme, the jury will determine whether the defendant should be sentenced to death in a sentencing hearing that occurs after the verdict phase of the trial.[149] Without this hearing, a death sentence may not be imposed.[150] Therefore, the maximum sentence allowed at the time of the jury verdict is life imprisonment, and an upward departure from this maximum sentence is necessary for a death sentence to be imposed.

Significantly, a notable difference exists between title 21, section 4624(e) of the Kansas Statutes Annotated and the sort of sentencing guidelines deemed unconstitutional under the *Apprendi* line of cases. Specifically, in each of the abovementioned cases, the judge imposed an upward departure from the sentencing guidelines based on a factual finding that was not determined by the jury.[151] As noted above, such a sentencing scheme has been found unconstitutional under the Sixth Amendment.[152] In contrast, the Kansas capital sentencing scheme does not require the judge to make a factual finding that has not been determined by the jury when imposing a sentence of death.[153] The mandatory language used by the statute that "the defendant shall be sentenced to death"[154] removes discretion from the judge to determine upward departures once the jury has made its determination.

143. *See supra* note 139.
144. Douglass, *supra* note 47, at 2004.
145. *See* KAN. STAT. ANN. § 21-4624(b) (2006).
146. *See supra* Part II.B.5.
147. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(E) (2004).
148. Blakely v. Washington, 542 U.S. 296, 303 (2003).
149. KAN. STAT. ANN. § 21-4624(e).
150. *Id.*
151. *See supra* note 139.
152. United States v. Booker, 543 U.S. 220, 245 (2005).
153. KAN. STAT. ANN. § 21-4624(e).
154. *Id.*

The Kansas statute creates an interesting phenomenon. If the jury determines that the aggravating and mitigating factors are in equipoise, an upward departure occurs due to the mandatory nature of the statute. However, it is unclear who has granted the upward departure. It certainly was not the judge, since he or she simply applied the jury's factual determination to the statute. Equally true, the jury cannot be said to have rendered the sentence of death. The jury has clearly acknowledged that there are equal reasons to execute as there are to sentence the defendant to life imprisonment. One is left to conclude that the sentence has in fact been rendered by the legislature through its passing of a statute that mandates a sentence of death when the jury has agreed that there are not more reasons to sentence the defendant to death than there are to sentence him to life in prison.

Therefore, although title 21, section 4624(e) is distinguishable from the unconstitutional sentencing guidelines that permitted the judge to find additional aggravating factors to allow for an upward departure, the Kansas sentencing scheme still creates the possibility of an upward departure without juror determination of every fact giving rise to the harsher sentence. The holding of *Apprendi* clearly states that the jury must determine any fact that leads to an upward departure from the maximum sentence allowed at the time of the verdict.[155] Therefore, the upward departure of this Kansas statutory provision implicates *Apprendi*, and further analysis is required to ensure that every factual determination is made by the jury.

C. Absence of Juror Determination of Every Fact Giving Rise to the Upward Departure

Judge Learned Hand asserted that "[t]he individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came."[156] Under the Kansas sentencing scheme, a defendant may forfeit his life at the hands of the Kansas legislature's sentencing scheme[157] through its improper application of the jury's determination.

So long as the jury makes all of the factual determinations regarding whether the upward departure should occur, the statute is not in violation of the *Apprendi* line of cases. However, the weighing equation set forth by the Kansas legislature removes from the jury the need to determine the ultimate factual question: whether the defendant should be sentenced to death. The statute mandates a sentence of death if two condi-

155. Apprendi v. New Jersey, 530 U.S. 466, 496–97 (2000).
156. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942).
157. KAN. STAT. ANN. § 21-4624(e).

tions are satisfied. First, the jury must determine that one of the aggravating circumstances specified by the Kansas legislature is present.[158] Second, the jury must determine that the sum of the aggravating circumstances is not outweighed by the sum of the mitigating circumstances.[159] If these conditions are satisfied, then "the defendant shall be sentenced to death."[160] The United States Supreme Court has ruled that the aforementioned mandatory language does not violate the Eighth Amendment since "it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination."[161]

However, whether such mandatory language violates the Sixth Amendment as interpreted by the *Apprendi* line of cases has not been addressed by the Court. Particularly, the Court has not determined whether the Sixth Amendment is violated insofar as the statute permits an upward departure without requiring a factual determination from the jury that the defendant should be executed in cases where the jury has determined that the aggravating and mitigating factors are in equipoise.

1. The Jury as Mere "Scorekeepers"

The discretion that the United States Supreme Court has bestowed upon states in determining the structure of their own weighing equation has been limited to the extent that it accomplishes "a more rational and equitable administration of the death penalty."[162] Under the Kansas weighing equation, a defendant can be sentenced to death even if a jury has not decided whether the defendant deserves to be executed. The Kansas weighing equation removes the jury's role in answering this ultimate factual question by mandating a death sentence when the jury is in equipoise. This effectively turns the juror into a mere "scorekeeper." After deliberation, the jury will inform the court of the number of found mitigating factors, and the number of found aggravating factors, and the judge will interpret the statute to decide the proper sentence in correlation with the jury's "final score."

One might be tempted to argue that this system is appropriate. After all, courts have typically held that there is a division of labor between judge and jury, where the jury is charged with finding the facts while the judge assumes the role of interpreting the law.[163] However, the dichotomy of fact and law as described above oversimplifies the actual role of

158. *Id.*; *id.* § 21-4625.
159. *Id.* § 21-4624(e).
160. *Id.*
161. Kansas v. Marsh, 126 S. Ct. 2516, 2525–26 (2006).
162. Boyde v. California, 494 U.S. 370, 377 (1990) (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (1988)).
163. Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 112 (2006).

the jury. In the verdict phase of the trial, "[t]he jury's function is to find the facts *and* to decide whether, on those facts, the defendant is guilty of the crime charged."[164] This latter jury function, the determination of guilt, is a mixed question of law and fact. A criminal jury is therefore more than merely a finder of fact. Its ultimate role is to interpret the facts and judge the defendant.

This notion of the jury's role is consistent with the historical principles on which the right to a trial by jury is based.[165] In a system where the jury was a pure fact finder, the judge would ask the jury to decide simple questions such as whether the defendant was at the scene of the robbery or whether the defendant had sufficient motive to commit the crime. From these factual determinations, the judge would then apply the law to the facts and determine guilt or innocence. Allowing the ultimate decision of guilt or innocence to be made by the judge would severely diminish the role of the jury to the point where it no longer stood between the defendant and governmental oppression. Vesting ultimate decision-making power with the jury gives meaning to its role in the judiciary by allowing juries to check and balance the power of the government over accused individuals.

Because the right to a jury determination continues into the sentencing phase of the capital trial,[166] so too does the need to ensure that the jury maintains its role as ultimate decision maker and not mere fact finder. The same principles that establish and support the grant of ultimate decision-making authority to the jury in the verdict phase of the trial apply to the sentencing phase of the trial as well. By reducing the role of the jury to mere fact-finder or "scorekeeper," title 21, section 4624(e) of the Kansas Statutes Annotated weakens the role of the jury to the point where it no longer serves its protective function.

Under the Kansas sentencing scheme, the jury has merely determined the "score" of the aggravating factors and mitigating factors. The ultimate factual question of whether the defendant deserves to be executed has not been decided. Yet, the end result of the Kansas sentencing scheme in a situation of equipoise is a death sentence.[167] Thus, title 21, section 4624(e) imposes an upward departure from the maximum sentence permitted at the time of verdict, despite the absence of a jury decision.

164. Shannon v. United States, 512 U.S. 573, 579 (1994) (emphasis added).
165. *See supra* Part II.A.
166. *See supra* Part III.A.
167. KAN. STAT. ANN. § 21-4624(e).

2. Is "Keeping Score" Sufficient?

The counterpoint to this argument is that a jury determination of equipoise is, in fact, a decision. This point is not without support.[168] The Kansas death penalty statute does state that "[i]f, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life."[169] Thus, the argument can be made, as Justice Thomas stated in *Kansas v. Marsh*, that "[t]he Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for . . . death."[170]

Justice Thomas is correct that the statute creates three choices for a juror: (1) there are more reasons to execute the defendant than not execute, so the defendant will be executed; (2) there are more reasons not to execute the defendant than to execute the defendant, so the defendant will not be executed; or (3) there are as many reasons not to execute the defendant as there are to execute the defendant, so the defendant will be executed.[171] Justice Thomas believes that since one can assume that jurors will follow their jury instructions,[172] one can assume that a juror who determines that there are as many reasons not to execute the defendant as there are to execute the defendant fully understands that their determination of equipoise is a decision for death.[173]

If a determination of equipoise satisfies the responsibility of the jury to determine every fact necessary for the upward departure to occur, then *Apprendi* has not been violated. In order to determine whether "keeping score" is sufficient, further analysis into the nature of an equipoise decision and the fundamental role of the jury is required.

a. The "Equipoise Equals Death Standard" as Contrary to Human Nature

Chief Justice Rehnquist noted in an earlier opinion of the Court that, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might."[174] Instead, "courts have held that jurors will take a 'commonsense' approach to jury instructions, looking to the totality of the circumstances in which the instruction has been given."[175] Justice Thomas's argument rests on the presumption that a rational juror will look to the nuances of the statutory language and determine that they have made an affirmative de-

168. Kansas v. Marsh, 126 S. Ct. 2516, 2528 (2006).
169. KAN. STAT. ANN. § 21-4624(e) (2006).
170. *Marsh*, 126 S. Ct. at 2528.
171. *Id*.
172. *Id*.
173. *Id*.
174. Boyde v. California, 494 U.S. 370, 380–81 (1990).
175. Mary Connell Grubb, *Federal Habeas Review: The Supreme Court's Failure to Apply Williams Consistently*, 93 J. CRIM. L. & CRIMINOLOGY 75, 94 (2002) (referring to *Boyde*, 494 U.S. at 381).

cision when they return a judgment of equipoise, rather than employ a commonsense interpretation and conclude that the nature of their determination of equipoise indicates their inability to render a decision as to whether the defendant deserves to be executed.

Although Justice Thomas is correct that the Supreme Court has held that, in most circumstances, it can be assumed that the jury will follow its instructions,[176] the Court has also noted that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[177]

Under the Kansas sentencing scheme these practical and human limitations require careful consideration. Principles of the criminal trial such as proof beyond a reasonable doubt[178] and innocence until proof of guilt[179] are foundational tenets of the American judicial system. Jurors are made well aware of these principles during the guilt portion of the trial.[180] As title 21, section 4624(e) exemplifies, it is possible for statutory language to conflict with the maxim of lenity that is pervasive throughout the criminal trial by requiring that equipoise mandates a sentence of death. However, it is significantly more difficult for an individual juror to contradict the basic philosophy of the American criminal justice system because jurors are engrained with notions of humanity and fairness that contravene the notion that a person deserves to die when there are as many reasons that he should live as there are that he should die. It simply assumes too much of the juror to believe that a decision has been made regarding the ultimate factual question of life or death when equipoise has been determined.

Under a commonsense application of the statute, one can see that despite a jury instruction informing the jury that the scale is in fact tilted towards death once an aggravated circumstance has been determined, it is simply too arduous a task for a juror to recalibrate his or her own internal weighing equation to account for the peculiarity of the sentencing scheme. Instead, the inevitable result in such a scheme is for the jury to end up functioning as a "scorekeeper" and not the final arbiter of fact and judgment.

176. *See* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987).

177. Bruton v. United States, 391 U.S. 123, 135 (1968).

178. United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974) (noting that a defendant is entitled to have his jury apprised of the reasonable doubt standard).

179. Taylor v. Kentucky, 436 U.S. 478, 479 (1978).

180. *Id.* at 485–86; *Pepe*, 501 F.2d at 1143.

b. Fundamental Role of the Jury: To Pass Judgment on the Accused

The Kansas scheme places form over substance by focusing more intently on the "final score" of aggravating and mitigating factors than on the ultimate question in need of judgment: whether the defendant should be sentenced to death. The Supreme Court has held that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion."[181] Justice Thomas appears to grasp this concept in the majority opinion of *Kansas v. Marsh*. He states that "[w]eighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment."[182] However, Justice Thomas simply assumes too much of the jury when he presumes that a jury can reconcile the contradictory notions that a determination of equipoise is equivalent to a decision that the defendant deserves to die.

A jury that returns a "score" of equal aggravating and mitigating factors has not drawn an ultimate conclusion that death is the appropriate sentence. An equal number of reasons to execute as to imprison would likely raise serious doubts in a reasonable juror as to whether the defendant deserves to be executed. However, title 21, section 4624(e) mandates a sentence of death in such a situation. Accordingly, it deprives a defendant of their right to have a jury pass final judgment on the most fundamental of conclusions in a capital sentencing hearing. A decision of equipoise from the jury is a final "score," but not a final decision that a death sentence is warranted.

The risks of such indecision are extraordinary. If equipoise occurs, there will be an absence of a jury decision in regards to the ultimate factual question of whether the defendant should be sentenced to death. However, the defendant will be sentenced to death, thereby receiving an upward departure from the maximum sentence receivable upon the jury's verdict. This upward departure deprives the defendant of his or her Sixth Amendment right to a trial by jury as interpreted by the *Apprendi* line of cases.[183]

IV. RECOMMENDATION

The Supreme Court has granted state legislatures the authority to determine the weighing equation to enable the most rational implementation of the death penalty.[184] However, a statute that obscures the role of the jury and undermines the Sixth Amendment cannot be said to ra-

181. United States v. Gaudin, 515 U.S. 506, 514 (1995).
182. Kansas v. Marsh, 126 S. Ct. 2516, 2528 (2006).
183. *See supra* note 139.
184. Boyde v. California, 494 U.S. 370, 377 (1990) (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (plurality opinion)).

tionally implement the death penalty. Thus, title 21, section 4624(e) of the Kansas Statutes Annotated should be challenged as unconstitutional under the Sixth Amendment as interpreted by the *Apprendi* line of cases.

Currently, the Kansas death penalty statute mandates a sentence of death if the aggravating circumstances found by the jury are not outweighed by the mitigating circumstances determined to be present.[185] This sentencing scheme is constitutionally flawed in that it violates the Sixth Amendment. The Kansas legislature need not wait for its statute to be invalidated. As will be demonstrated by examining a number of states with similar sentencing structures, a return to constitutional compliance can be accomplished through a variety of different amendments.

A. Complete Reversal

Prior to 1987, the state of New Jersey had language in its capital punishment sentencing scheme that was substantially similar to title 21, section 4624(e) of the Kansas Statutes. The New Jersey statute read as follows: "If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death."[186]

By requiring that the aggravating factors not be outweighed by the mitigating factors, the New Jersey legislature mandated a sentence of death if the jury determined the factors were in equipoise. The constitutionality of this provision was challenged in *State v. Biegenwald*.[187] The *Biegenwald* court found the statute to be unconstitutional as applied and held that "[i]f anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt."[188] Subsequently, the New Jersey legislature amended its capital sentencing statute to conform to the ruling in *Biegenwald*.[189] The post-*Biegenwald* version of the statute was changed to state that "[i]f the jury or the court finds that any aggravating factors exist and that all of the ag-

185. KAN. STAT. ANN. § 21-4624(e) (2006).

186. State v. Biegenwald, 524 A.2d 130, 153 (N.J. 1987) (citing former New Jersey statutory language).

187. *Id*. at 153–54. Rather than follow the plain statutory language as it was written, the court interpreted the legislative intent by stating that "the concept of executing him where the explanations for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors) is foreign to what the Legislature would certainly intend." *Id*. at 162.

188. *Id*.

189. N.J. STAT. ANN. § 2C:11-3 (C)(3)(a)–(b) (West 2005). This provision provides that

> [i]f the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death. If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

gravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death."[190] The legislature for the state of New Jersey thus enacted a complete reversal of its weighing equation to remedy the constitutional violation.[191]

The action taken by the state of New Jersey represents the simplest way in which Kansas could amend its sentencing scheme and return to a constitutionally accepted standard of sentencing. To accomplish the complete reversal, the Kansas legislature could rephrase its statute to read as follows: "if, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances *outweigh the aggregate* mitigating circumstances which are found to exist, the defendant shall be sentenced to death."[192]

Under this sentencing structure, a jury determination that the aggravating circumstances outweigh the mitigating circumstances would be required as a precondition to imposing a death sentence. Changing the phrase "is not outweighed by any"[193] to "outweigh the aggregate" would reverse the weighing equation of the sentencing scheme and ensure that a death sentence could not be prescribed in the event of equipoise.

B. Additional Finding that Death Sentence Is Appropriate

The Colorado legislature has declared that in order for a capital defendant to be sentenced to death, the jury must conclude both that an aggravating factor exists and that the totality of the aggravating factors is not outweighed by the totality of mitigating factors.[194] While this scheme appears functionally identical to title 21, section 4624(e) of the Kansas Statutes, it has an additional component that causes it to operate differently. If the first element described above is satisfied, the jury then must make a separate determination that the sentence of death is the appropriate penalty for the individual defendant.[195] This additional element creates a sentencing scheme that does not mandate a death sentence if the jury finds the aggravating and mitigating factors to be in equipoise. The statute ensures that the jury is always required to render the ultimate decision of whether the defendant deserves life imprisonment or death.

Adding this component would bring title 21, section 4624(e) back into constitutional compliance. An acceptable version of the statute un-

190. *Id.* § 2C:11-3(C)(3)(a).

191. The state of New Jersey has recently abolished the death penalty entirely. 2007 N.J. Sess. Law Serv. Ch. 204 Senate 171 and 2471 (West). Nevertheless, their statutory history still serves as a model for an effective solution to the current Kansas sentencing scheme.

192. *Cf.* KAN. STAT. ANN. § 21-4624(e) ("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.").

193. *Id.*

194. COLO. REV. STAT. § 18-1.3-1201(2)(a), 8A C.R.S. (1990 Supp.).

195. *Id.*

der this scheme would state that "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, *conditioned upon the jury finding that the death penalty should be imposed upon this individual.*"[196] Under this statutory scheme, the jury has the responsibility of making the ultimate decision.

C. Removal of Weighing Equation

In Montana, a jury[197] "shall impose a sentence of death if [it finds] . . . one or more of the aggravating circumstances and . . . finds that there are no mitigating circumstances sufficiently substantial to call for leniency."[198] In upholding the constitutionality of this statute, the Montana Supreme Court noted that, the scheme "does not require the death sentence to be imposed if the aggravating and mitigating factors are of equal weight."[199]

The Montana sentencing scheme provides that when a jury finds that there are equal aggravating and mitigating circumstances, it may then determine that the effect of this equipoise is sufficiently substantial to call for leniency in sentencing. Additionally, under the Montana statute, it is entirely possible for a jury to determine that the aggravating factors outweigh the mitigating factors, but a single mitigating factor is sufficiently substantial to call for leniency in sentencing.

The state of Kansas could adopt a similar sentencing scheme that would state, "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more . . . aggravating circumstances . . . exist and, further, that the existence of mitigating circumstances which are found to exist *are not sufficiently substantial to call for leniency*, the defendant shall be sentenced to death."[200] By removing the phrase "such aggravating circumstances is not outweighed by any,"[201] the weighing equation is effectively removed from the statute. Under this statutory scheme, a determination of equipoise would not deprive the jury of their ultimate responsibility to decide whether the individual defendant deserves to die.

196. *Cf. supra* note 186.

197. Title 46, section 18-305 of the Montana Code uses the word "court" instead of "jury" when describing who "shall take into account" the enumerated aggravating and mitigating circumstances. MONT. CODE ANN. § 46-18-305 (2007). However, following the decision in *Ring v. Arizona*, the Montana legislature added language allowing only the jury to "impose a penalty enhancement" in a capital case. *See id.* § 46-1-401.

198. *Id.* § 46-18-305.

199. State v. Smith, 863 P.2d 1000, 1012 (Mont. 1993).

200. *Cf. supra* note 197.

201. KAN. STAT. ANN. § 21-4624(e) (2006).

D. Recommendation Summation

The distinction between sentencing schemes found in states such as Montana, New Jersey, and Colorado and the Kansas sentencing scheme is that the former do not mandate a sentence of death if the jury determines that the aggravating and mitigating factors are in equipoise. These constitutionally permissible provisions demonstrate a variety of acceptable sentencing schemes: (1) requiring that a defendant *not* be eligible for execution in the event of equipoise,[202] (2) requiring the jury to make an additional finding that the particular defendant should be sentenced to death,[203] or (3) allowing the jury to determine whether the effect of equipoise is sufficiently substantial to call for leniency in sentencing.[204] The state of Kansas should amend its capital sentencing scheme to conform to one of the three constitutional sentencing schemes described above by either reversing its weighing equation, requiring an additional finding that the particular defendant should be given the death penalty, or removing the weighing equation altogether. Any of these amendments will cure the Sixth Amendment constitutional deficiency of title 21, section 4624(e) of the Kansas Statutes.

V. CONCLUSION

From its earliest inception, law and punishment have been inextricably intertwined. The nexus between these two principles is, quite simply, justice. When is punishment just? What severity of punishment is just? Principles of retribution, deterrence, and the need for society to protect itself from those who would harm its stability have been at the forefront of answering these questions. Throughout history, methods and means of punishment have only been limited by the creativity of lawmakers and adjudicators. However, a punishment that has consistently found its way into jurisprudence throughout the ages is the punishment of death. Few areas of law are capable of spurring more impassioned debate and disagreement than capital punishment, yet its prominence as a mode of punishment remains.

The decision of the United States Supreme Court in *Kansas v. Marsh* to reverse the Kansas Supreme Court and uphold the constitutionality of title 21, section 4624(e)[205] is evidence of the resilient nature of capital punishment. Developments in Sixth Amendment jurisprudence by way of the reduction of the reliance on the Federal Sentencing Guidelines have expanded the scope of the Sixth Amendment to reject sentencing schemes that create upward departures in sentencing without

202. *See* N.J. STAT. ANN. § 2C:11-3 c(3)(a) (West 2006).
203. *See* COLO. REV. STAT. § 18-1.3-1201(2)(a), 8A C.R.S. (1990 Supp.).
204. *See* MONT. CODE ANN. § 46-18-305 (2007).
205. *See* Kansas v. Marsh, 126 S. Ct. 2516, 2529 (2006).

jury findings of fact.[206] Although neither the United States Supreme Court nor the Kansas Supreme Court addressed the constitutionality of title 21, section 4624(e) of the Kansas Statutes under the Sixth Amendment,[207] the statute is nevertheless ripe for challenge on this issue.

The Kansas sentencing scheme fails to require the jury to decide the ultimate factual question of whether the defendant deserves to be sentenced to death or sentenced to life imprisonment when the jury determines that the aggravating and mitigating factors are in equipoise.[208] Additionally, the mandatory nature of the scheme reduces the jury to mere "scorekeepers" and inhibits the jury from exercising its vital function in the judicial system as purveyor of ultimate judgment.[209] In response to or in lieu of being challenged in the courts, the Kansas legislature should amend title 21, section 4624(e) to conform with the Sixth Amendment as interpreted by *Apprendi*. Amending the statute by way of reversing the weighing equation, requiring an additional finding that death is the appropriate sentence, or eliminating the weighing equation entirely are all sufficient amendments to the Kansas sentencing scheme.[210]

As presently written, the Kansas sentencing scheme runs contrary to the Sixth Amendment to the Constitution. Accordingly, it should be challenged as a deprivation to the constitutional rights of a criminal defendant in a capital trial and should be amended appropriately. Consistent with the wisdom of our national pastime that grants a "tie to the runner," equipoise should be resolved in favor of the defendant.

206. *See supra* note 139.
207. *See generally Marsh*, 126 S. Ct. 2516; State v. Marsh, 102 P.3d 445 (Kan. 2004).
208. *See supra* Part III.A–B.
209. *See supra* Part III.C.
210. *See supra* Part IV.