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Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts

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U.S. Attorney: "[The grand jurors] are not explicitly advised that the impact of their decision is to subject the defendant to a death penalty."

Judge: "Aren't they told if you're indicting these three aggravating factors what that means?"

U.S. Attorney: "No."

Judge: "Any advice at all about the maximum penalty that a return of the draft indictment would entail?"

U.S. Attorney: "No . . . they have been told from time immemorial that punishment is not their concern. What is their concern is the finding of facts."[1]

I. Introduction

The federal system places the decision to subject a person to a trial on a capital charge in the hands of sixteen to twenty-three citizens.[2] Yet, as the above excerpt from the oral argument in *United States v. Allen*[3] illustrates, the grand jury is uninformed regarding punishment.[4] It is simply unaware that a "true bill" will jeopardize the life of the indicted.[5]

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1. Respondent's January 17, 2003 Oral Argument at 32:00, United States v. Allen, 357 F.3d 745 (8th Cir. 2004), *rehearing en banc granted by, vacated by* 2004 U.S. App. LEXIS 9190 (8th Cir. May 11, 2004), *at* http://www.ca8.uscourts.gov/oralargs/oaFrame.html.

2. FED. R. CRIM. P. 6(a)(1).

3. 357 F.3d 745 (8th Cir. 2004).

4. *See* Respondent's January 17, 2004 Oral Argument, *supra* note 1, at 32:00 (stating that the grand jury was unaware of the possible punishment).

5. *Id.*

The constitutional implications of blind grand jury deliberations on capital offenses are considerable. Moreover, in addition to the emotional effect of standing trial for one's life, a capital indictment has a profound effect on trial procedure and expense.[6] It subjects a defendant to a punishment-qualified petit jury and to an extended bifurcated trial.[7] Capital defense counsel must spend much time and expense investigating the defendant's history, background, and mental condition in order to defend against aggravating factors such as future dangerousness, and to uncover mitigating circumstances that may warrant a sentence less than death.[8] With this in mind, it appears logical that the decision to charge a capital offense should only be made after careful deliberation by a body of citizens acting independently of both prosecutor and judge.

The federal courts are now in a position to address this problem and to reinvigorate the grand jury's role in the charging process. In 2002 the United States Supreme Court ruled in *Ring v. Arizona*[9] that Arizona's capital sentencing scheme was unconstitutional because it allowed a judge, rather than a jury, to determine the existence of aggravating factors.[10] The statutory aggravating factors demarcated the line between life and death, and as such, the Court concluded, were to be treated as elements of an aggravated offense of capital murder.[11] The same holds true in the federal system.[12] Without a finding from the jury that a defendant committed a capital-eligible offense with, for example, the expectation of pecuniary gain or in a heinous, depraved, or cruel manner, a federal defendant cannot be sentenced to death.[13]

Ring was premised on the Sixth Amendment right to a jury trial.[14] However, that decision represented an application of the mandate of *Apprendi v. New Jersey*[15] that under the Due Process Clause of the Fifth and Fourteenth Amendments, " '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

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6. For a thorough analysis of the costs of capital defense representation, see generally SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE U. S, FED. DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (1998), *at* www.uscourts.gov/dpenalty/4REPORT.htm#decision.

7. *Id.* at I.B.1.

8. *See* Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000)) (stating that capital defense counsel have an " 'obligation to conduct a thorough investigation of the defendant's background' ").

9. 536 U.S. 584 (2002).

10. Ring v. Arizona, 536 U.S. 584, 608 (2002).

11. *Id.* at 592.

12. *See* 18 U.S.C. § 3592 (2000) ("Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified.").

13. *Id.*

14. *Ring*, 536 U.S. at 588.

15. 530 U.S. 466 (2000).

beyond a reasonable doubt.' "[16] Indeed, although the Supreme Court has yet to explicitly rule that in federal cases the Fifth Amendment requires statutory aggravating factors to be submitted to the grand jury, there is little doubt that *Ring* requires this result.[17] At the time of this writing, at least three federal circuits have already ruled that the Indictment Clause requires that capital indictments contain statutory aggravating factors.[18] Furthermore, United States Department of Justice policy now directs all federal prosecutors to submit statutory aggravating factors to the grand jury.[19]

A grand jury determination of aggravating facts is a necessary and constitutionally required step for prosecutors seeking the death penalty. But the requirement lacks force unless the grand jurors are informed of the capital consequences of their charging decisions.[20] This article explains why the Constitution mandates that federal grand juries must be informed that aggravating factors demarcate the line between a capital and noncapital charge. Part II will focus on the historical function of the grand jury and will demonstrate that because the framers felt so strongly about the "informed" grand jury, they included the right as part of the Fifth Amendment. Part III will describe the current state of Supreme Court death penalty jurisprudence in order to show how the informed grand jury comports with current doctrine. Part IV

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16. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 (1999)); *see* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *Ring*, 536 U.S. at 608 (basing the Court's decision on the strictures of *Apprendi*). Although stated in the language of due process, it is quite settled that the Grand Jury Clause of the Fifth Amendment does not apply to the states. Hurtado v. California, 110 U.S. 516, 538 (1884). The quoted language from *Jones* probably referred to the requirement that all elements of an offense must be contained in the charging document under the Notice Clause of the Sixth Amendment, incorporated in the Fourteenth Amendment. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."); Cole v. Arkansas, 333 U.S. 196, 201 (1948).

17. *See* United States v. Cotton, 535 U.S. 625, 627 (2002) (ruling in a non-capital federal case that the *Apprendi* rule applies to Indictment Clause challenges).

18. *See* United States v. Robinson, 367 F.3d 278, 284 (5th Cir. 2004) ("*Ring*'s Sixth Amendment holding applies with equal force in the context of a Fifth Amendment Indictment Clause challenge, even though the Supreme Court has yet to hold as much in a capital case."); United States v. Allen, 357 F.3d 745, 748 (8th Cir. 2004) (holding that "aggravating factors essential to qualify a particular defendant as death eligible . . . must be alleged in the indictment"); United States v. Higgs, 353 F.3d 281, 297 (4th Cir. 2003) ("[T]he principles of *Apprendi* and *Ring* dictate that any factor required to be submitted to the jury must be included in the indictment.").

19. *See* Memorandum from James Comey, Deputy Attorney General, to all federal prosecutors, at 3 (July 2, 2004) (on file with author) (stating that prosecutors should immediately begin including in indictments all statutory aggravating factors).

20. *See infra* Part IV (discussing the inadequacy of a grand jury determination of aggravating facts without the knowledge of the punishment consequences of its decision).

will argue that the modern grand jury has been severed from both its original function and the Supreme Court's interpretation of its duties. Part V will describe the benefits an informed grand jury can provide for the problematic area of prosecutorial discretion in capital charging decisions. Finally, this article will close with a short section on the applicability of the informed grand jury to state proceedings.

II. The Historical Function

The grand jury began its rich, if sometimes sordid, history in 1166 with the Assize of Clarendon.[21] King Henry II of England's decree provided "for a body of twelve men in each county" to report to the King persons "who were suspected of crimes."[22] These panels were not formed for the function purportedly served by the modern grand jury.[23] Instead of protecting the innocent from arbitrary abuses of power, the early grand juries were summoned for the sole purpose of increasing the King's power over the Church.[24] These early grand juries, however, were not empaneled under the guidance of the courts or the Crown.[25] The members proceeded solely on the basis of their own knowledge of what had occurred in the community.[26] Because the panel operated with complete independence, at least insofar as it had the power to bring its own accusations, and under strict secrecy, the grand jury developed into a feared and powerful institution.[27] Thus, the institution began as a body of men free from the constraints of the law.[28]

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21. RICHARD D. YOUNGER, THE PEOPLE'S PANEL 1 (1963).

22. *In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

23. *See* LEROY D. CLARK, THE GRAND JURY 7 (1975) (stating that the purposes of the first grand juries must be separated from its modern characteristics).

24. *Id.* Prior to the decree, persons charged with most crimes (including murder) would, most often, be referred to the ecclesiastical courts, and any levied fine would be forfeited to the Church. *Id.* at 8. With the Assize, the King captured judicial control over the common criminal process. *Id.* An indictment was tantamount to a conviction because the charged individual usually faced trial by ordeal, which could consist of, among other atrocities, the boiling of appendages. *Id.* at 9. For a more thorough discussion of early trial practices, see MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 6–9 (1977).

25. SUZAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY PRACTICE § 2.1, at 5 (1996).

26. CLARK, *supra* note 23, at 9. The members could, however, face consequences for failing to return a "true bill" for those the King sought to punish. *Id.*

27. *Russo*, 53 F.R.D. at 568; CLARK, *supra* note 23, at 9.

28. *See* Ric Simmons, *Re-examining the Grand Jury: Is there Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 5–6 (2002) (describing how the early grand juries would hear no evidence and would often bring indictments against those who were not guilty).

In time, the functions and format of the grand jury changed.[29] It was not until the seventeenth century, however, that the grand jury began to be perceived as a shield against malicious prosecutions.[30] In 1681 two London grand juries refused to indict Stephen Colledge and the Earl of Shaftesbury for high treason.[31] The famous pair represented the chief Protestant opposition to Charles II's efforts to restore the Catholic Church in England.[32] After the grand jury failed to indict Colledge, the King sought a new indictment in a district more sympathetic to his politics.[33] The second grand jury returned an indictment against Colledge that led to his execution.[34] The King then moved against Shaftesbury.[35] During consideration of the indictment, the prosecutor sought to hold the proceedings in public.[36] The predominantly Protestant grand jury members, arguing that an open proceeding would subject their decisions to undue influence, objected.[37] The chief justice, nevertheless, acquiesced to the prosecutor's request.[38] The panel members, however, did not respond as kindly to the prosecutor's demands: they refused to indict.[39] Shaftesbury, fearing the same fate as Colledge, fled the country.[40]

This defiant act was looked upon by the people of England as a confirmation of their legal rights and prompted Sir John Somers, a close friend of Shaftesbury, to write his famous manuscript describing the importance of the grand jury as a bulwark against malicious prosecutions.[41] The political and legal atmosphere surrounding these proceedings, however, reveals an important flaw in the public perception. The Protestant grand jurors who failed to return indictments against Colledge and Shaftesbury obviously were sympathetic to the pair's cause. Given the broad interpretations of treason by the Crown, the pair

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29. *See* BRENNER & LOCKHART, *supra* note 25, § 2.1, at 5 (describing the abolishment of the trial by ordeal and the establishment of the petit jury).

30. FRANKEL & NAFTALIS, *supra* note 24, at 9.

31. *Id.* at 10.

32. CLARK, *supra* note 23, at 9.

33. *Id.* at 10.

34. *Id.*

35. *Id.*

36. Helen E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM L. REV. 701, 717–18 (1972).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 719.

41. *See* GILBERT BURNET, HISTORY OF MY OWN TIME: VOLUME II, 882 (London, London Bookfellows 1725) (1724) (describing how Sir John Somers's manuscript impacted the atmosphere of the time). *See generally* JOHN SOMERS, THE SECURITY OF ENGLISH-MENS LIVES (London, T. Mitchel 1681) (praising the grand jury as an important protection against malicious prosecutions).

probably *was* legally guilty.[42] Instead of defining the grand jury's role as a protector of the innocent, as is widely believed, these grand juries actually engaged in a form of grand jury nullification.[43] They passed judgment on the wisdom of the law itself.[44] Thus, the grand jury settled into its true historical role—arguably its role since its inception—as the conscience of the community in which it sits.[45]

The American colonists did not overlook this role of the grand jury as guardian of the community.[46] The popularity of Lord Somers's manuscript reached its zenith in the colonies, and the grand jury became one of the early forums for revolt.[47] In perhaps the most famous example from colonial times, at least two successive grand juries refused to indict John Peter Zenger in 1743 for seditious libel against the Royal Governor of New York.[48] Perhaps the Governor believed that the grand jury proceedings would frighten Zenger into submission, regardless of the legal truth of the charges.[49] More likely, though, Zenger had indeed violated the broad definition of libel, for truth could not be claimed as a defense.[50] In 1765 grand juries refused to indict the leaders of the Stamp Act riots.[51] In 1768 a grand jury refused to find a "true bill" against the editors of the *Boston Gazette* despite Chief Justice Thomas Hutchinson's assertion that the grand jurors would be damned if they did not.[52] Hutchinson quickly realized the futility of submitting unpopular indictments to Massachusetts grand juries.[53] Later that year, Hutchinson declined to seek indictments against the colonists responsible for the riots surrounding the seizure of John Hancock's sloop *Liberty*.[54]

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42. Schwartz, *supra* note 36, at 716–17.

43. Simmons, *supra* note 28, at 10.

44. *Id.*

45. *See id.* at 2–10 (describing the subtle functions of the historical grand jury in addition to finding probable cause).

46. YOUNGER, *supra* note 21, at 22.

47. *Id.* at 21.

48. *See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE 1-14 (2d ed. 1997) (reporting three successive failures to indict Zenger followed by prosecution by information); CLARK, *supra* note 23, at 18 (reporting two); FRANKEL & NAFTALIS, *supra* note 24, at 11 (reporting two failures followed by prosecution through information in which the jury returned a not guilty verdict).

49. CLARK, *supra* note 23, at 18.

50. *Id.*; Simmons, *supra* note 28, at 11 n.47.

51. YOUNGER, *supra* note 21, at 28.

52. *Id.*

53. *Id.* at 28–29.

54. *Id.*; *see also* DIRK HOERDER, CROWD ACTION IN REVOLUTIONARY MASSACHUSETTS 1765–1780, at 164–70 (1977) (describing the *Liberty* riots and aftermath in detail).

After 1776 all of the newly drafted state constitutions, except for New Jersey's, either included an express right to a grand jury indictment or language that was widely interpreted as such, and every state enacted statutes that secured the right.[55] When the newly drafted federal Constitution was submitted to the states without a grand jury provision, several of the states objected.[56] Massachusetts led the call for amendments, partly due to the efforts of John Hancock , who was no doubt affected by his experience with the *Liberty* riots.[57] On December 15, 1791, the Grand Jury Clause was ratified as part of the Fifth Amendment to the United States Constitution.[58] It reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger.[59]

In this way the right of a grand jury indictment was secured, not simply as a means to determine probable cause, but as the bulwark of local custom.[60] The grand jury of the United States Constitution was created to secure a voice for the local community in which it sits: a voice with not enough force to be heard in Congress.[61]

Nearly a century later, in 1881, the Supreme Court ruled that a state's use of an information, rather than a grand jury indictment, did not offend the Due Process Clause of the newly-ratified Fourteenth Amendment.[62] Nonetheless, the Court remained reverent of the grand jury as a federal constitutional right.[63] In *Ex parte Bain,*[64] decided only three years after *Hurtado*, the Court granted a writ of habeas corpus because the indictment in that case had been amended by the

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55. BEALE ET AL., *supra* note 48, at 1-17; YOUNGER, *supra* note 21, at 37.

56. BEALE ET AL., *supra* note 48, at 1-18.

57. *Id.*; *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.2(g) (3d ed. 2000) (stating that the "authority of the grand jury to 'nullify' the law arguably was the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights").

58. BEALE ET AL., *supra* note 48, at 1-19.

59. U.S. CONST. amend. V.

60. *See* Simmons, *supra* note 28, at 13 (describing the political, rather than legal rationale for the Fifth Amendment, notwithstanding its stated legal purpose).

61. *See* United States v. Navarro-Vargas, 367 F.3d 896, 902 (9th Cir. 2004) (Kozinski, J., dissenting) ("An independent grand jury—one that interposes the local community's values on prosecutorial decisions that are controlled by policies set in Washington as to the enforcement of laws passed in Washington—seems like an important safeguard that is entirely consistent with the grand jury's traditional function").

62. *Hurtado*, 110 U.S. at 538; U.S. CONST. amend. XIV.

63. *See, e.g.*, Ex parte Bain, 121 U.S. 1, 13 (1887) (praising the value of the grand jury).

64. 121 U.S. 1 (1887).

trial court rather than a grand jury.[65] In holding that the amended indictment deprived the trial court of the ability to try the defendant, the Court stated that even though there is no longer the danger of executive oppression, "it remains true that the grand jury is as valuable as ever in securing . . . 'individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury.' "[66] If probable cause was the only barrier to amendment, it would appear that a judicial determination would have sufficed, but the Court obviously believed in the "full sense of [the Fifth Amendment's] necessity and of its value."[67]

The Court later recognized that mere technical errors should not render an indictment defective.[68] Nevertheless, in *Smith v. United States*,[69] the Court warned that the "substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules."[70] In *United States v. Stirone*,[71] the Court reaffirmed the *Bain* ruling by holding that a variation between the indictment and proof at trial "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury."[72] The Court added that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."[73] As recently as 1992 the Supreme Court affirmed the importance of the traditional grand jury functions by holding that the Fifth Amendment does not "permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself."[74]

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65. *Bain*, 121 U.S. at 13.

66. *Id.* at 12 (quoting Jones v. Robbins, 74 Mass. (1 Gray) 329, 344 (1857)).

67. *Id.*

68. *E.g.*, United States v. Debrow, 346 U.S. 374, 376 (1953); Williams v. United States, 341 U.S. 97, 104 (1951); Hagner v. United States, 285 U.S. 427, 433 (1932).

69. 360 U.S. 1 (1959).

70. Smith v. United States, 360 U.S. 1, 9 (1959).

71. 361 U.S. 212 (1960).

72. United States v. Stirone, 361 U.S. 212, 217 (1960).

73. *Id.* The holding that an indictment error cannot be dismissed as harmless error is questionable after *Cotton*. *See Cotton*, 535 U.S. at 632–33 (addressing but not deciding whether an indictment error is structural because the claim was not raised at trial and, therefore, was subject to plain error analysis). Regardless, the issue may be analyzed differently in the capital context because a capital defendant may not waive his Fifth Amendment right. FED. RULE CRIM. P. 7 (b); Smith v. United States, 360 U.S. 1, 6 (1959).

74. United States v. Williams, 504 U.S. 36, 50 (1992). *Williams* involved a federal court's power to require exculpatory evidence to be presented to the grand jury. *Id.* at 52. A requirement that the grand jury be informed of the capital consequences of aggravating factors is not a judicial reshaping of the grand jury institution. On the contrary, such a requirement is aligned with the traditional function of the grand jury.

Unfortunately, the increasingly complicated criminal codes and sentencing schemes have weakened the role of this venerable institution.[75] There is little doubt that the Shaftesbury grand jurors knew the consequences of their actions.[76] For that matter, the grand juries formed under the Assize of Clarendon were well aware that a trial by ordeal was rarely survived.[77] During the Revolutionary period, most felonies were capital offenses.[78] A defendant could expect to be sentenced to death for treason, murder, manslaughter, rape, robbery, burglary, and arson.[79] In many colonies, even seemingly minor crimes could result in death sentences. For instance, in Virginia it was a capital offense to receive a stolen horse.[80] In Connecticut, Massachusetts, and New York blasphemy was a capital crime.[81] Shortly after ratification of the Constitution, Congress passed its first murder statute providing simply for the sentence of death to any person who committed willful murder within the exclusive jurisdiction of the United States.[82] Furthermore, most grand jurors were well-educated and well-informed citizens of the community and, as such, were familiar with the relatively narrow range of sentences that could be imposed upon a defendant found guilty of a particular crime.[83] In fact, the early practice of "hanging day," when convicted felons were hanged before thousands of onlookers, forcefully warned all citizens of the consequences of certain felonious acts.[84] Considering these facts, there is no doubt that the grand jury contem-

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75. *See, e.g.*, United States v. Walker, 202 F.3d 181, 182 n. 1 (3d Cir. 2000) (describing the modern federal sentencing guidelines as an "Internal Revenue Code-like network of enhancements and adjustments").

76. *See* Simmons, *supra* note 28, at 9–10 (describing how the immediately preceding indictment against Colledge led to a quick public execution).

77. *See* FRANKEL & NAFTALIS, *supra* note 24, at 7–8 (describing how an indictment was tantamount to conviction and often death).

78. *See* Williams v. New York, 337 U.S. 241, 247–48 (1949) ("This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial."); *see also* Woodson v. North Carolina, 428 U.S. 280, 289 (1976) ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses."). For a more elaborate discussion of early punishment theory see generally RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW (2000).

79. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 5 (2002).

80. *Id.* at 8.

81. *Id.* at 6.

82. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 3, 1 Stat. 112, 113 (1790).

83. *See* JUNE BARBARA KRESS, RISE TO THE CHALLENGE. FEDERAL GRAND JURY REPRESSION, RESISTENCE, AND REFORM. 1970–1973, at 72 (1978) (describing the colonial grand jurors as the most "financially secure and influential people of that period").

84. For a detailed description of the popularity of "hanging day" and the elaborate ceremonial practices accompanying the events see BANNER, *supra* note 79, at 24–52.

plated by John Hancock and James Madison was an informed grand jury. Grand jurors undeniably knew and were able to consider the possible punishment when they voted on whether to indict.[85] The grand jury is presently incapable of making those judgments.[86]

III. Modern Death Penalty Doctrine

To appreciate the full potential of the grand jury's role in the post-*Ring* environment, an understanding of the development of the Supreme Court's modern death penalty doctrine is necessary. In 1972 the Court in *Furman v. Georgia*[87] effectively declared then-existing death penalty schemes unconstitutional.[88] In the wake of that decision, state legislatures scrambled to adopt new death penalty statutes to remedy the "arbitrary and capricious" manner in which the death penalty had been imposed.[89] Unfortunately, because five separate and in some ways conflicting concurring opinions accompanied the per curiam *Furman* decision, the Court provided legislatures with little guidance for this task.[90] The Court's 1975 Term exacerbated the problem when the Court addressed a set of very distinct capital schemes.[91] These opinions simply concluded that the death penalty was not per se unconstitutional;[92] that a state must establish standards to guide the sentencer's discretion;[93] and that a sentencer must be allowed to consider mitigating evidence in order to determine that "death is the appropriate punishment in a specific case."[94] As a result of the Court's vagueness, the docket was inundated with death penalty challenges over the next ten years.[95] By 1987, however, the Court settled on two major thresholds that a state's death penalty system must pass to survive Eighth Amendment challenges: (1) a state must narrow the circumstances in which the

85. *See* text accompanying notes 75–84 (describing how grand jurors were educated and informed about punishment).

86. *See* Respondent's January 17, 2004 Oral Argument, *supra* note 1, at 32:00 (stating that the grand jurors are unaware and told to ignore the possible punishment).

87. 408 U.S. 238 (1972).

88. Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

89. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 226–27, 238–41 (1986).

90. Bryan A. Stevenson, *Two Views on the Impact of* Ring v. Arizona *on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1091 (2003).

91. *Id.* at 1092.

92. Gregg v. Georgia, 428 U.S. 153, 176–87 (1976).

93. Jurek v. Texas, 428 U.S. 262, 270–74 (1976); Proffitt v. Florida, 428 U.S. 242, 251–53 (1976); *Gregg*, 428 U.S. at 196–98.

94. *Woodson*, 428 U.S. at 305; Roberts v. Louisiana, 428 U.S. 326, 333–34 (1976).

95. *See generally* McClesky v. Kemp, 481 U.S. 279, 303–12 (1987) (analyzing the Court's capital cases since *Gregg*).

death penalty can be imposed; and (2) the sentencer must make an individualized determination of the appropriateness of the death penalty in each case.[96]

Naturally, these twin goals, often described simply as consistency and individualization, tend to conflict.[97] A purely individualized death penalty scheme grants unfettered discretion to the jury.[98] Conversely, to apply the death penalty in a fully consistent manner, it would be necessary to automatically impose the death penalty for certain categories of offenses without considering the particularities of the offense and the character of the accused.[99] The difficulty in balancing the two standards eventually led two justices to abandon the doctrine.[100] Justice Scalia, in *Walton v. Arizona*,[101] declared that "[s]ince I cannot possibly be guided by what seem to me incompatible principles, I must reject [individualization as] plainly in error."[102] Four years later, Justice Blackmun expressed his agreement with Justice Scalia's determination that the goals of consistency and individualization could never be reconciled.[103] However, he drew a different conclusion. After twenty-two years on the Supreme Court bench, in which he consistently voted to uphold the constitutionality of the death penalty, Justice Blackmun concluded that "[t]he death penalty experiment has failed."[104]

The issue of the petit jury's involvement in sentencing is related to the tension between consistency and individualization. Of the five capital cases to come before the Court in the 1975 Term, only one directly dealt with this

96. *McCleskey*, 481 U.S. at 305–06 (1987); *see* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

97. *See, e.g.*, Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 94–95 (2002) (describing the twin goals as consistency and individualization).

98. This is precisely what led the Supreme Court to declare Georgia's death penalty scheme unconstitutional in *Furman*. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 314 (Marshall, J., concurring).

99. *See Woodson*, 428 U.S. at 293–99 (describing the inadequacies of mandatory death sentences). For a more thorough discussion of the conflicting death penalty thresholds see generally Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

100. *See* Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part) (abandoning individualization); Callins v. Collins, 510 U.S. 1141, 1144–45 (1992) (Blackmun, J., dissenting) (abandoning the doctrine as a whole).

101. 497 U.S. 639 (1990).

102. *Walton*, 497 U.S. at 673 (Scalia, J., concurring in part).

103. *Callins*, 510 U.S. at 1144–45 (1992) (Blackmun, J., dissenting).

104. *Id.* at 1145.

issue.[105] In *Proffitt v. Florida*,[106] the Court ruled that the Eighth Amendment poses no bar to a judicial determination of the ultimate sentence in capital cases.[107] The rationale, although stated in a plurality opinion, rests on the assumption that a judge is in no worse a position than the jury to make the ultimate sentencing determination and, further, that a judicial determination could lead to greater consistency in sentencing determinations.[108] The opinion did, however, acknowledge that jury sentencing provides an "important societal function."[109] The Court did not clarify exactly what that function entails but rather cited to a footnote in *Witherspoon v. Illinois*[110] in which the Court stated that a capital sentencing jury provides an important "link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' "[111] Ironically, that very footnote could be seen as implying that jury sentencing is constitutionally required under the Eighth Amendment, but that conclusion was not drawn by those joining the plurality opinion.[112] Nevertheless, a majority of the Court has subsequently adopted the *Proffitt* rationale.[113]

Ring, however, calls into question the continuing validity of these decisions.[114] The Court did not go so far as to require a jury determination of punishment.[115] Quite to the contrary, the Court emphasized that the case merely concerned the application of *Apprendi* to Arizona's capital sentencing scheme.[116] However, Arizona's leading argument in support of judicial determinations of aggravating facts mirrored Justice Powell's rationale in *Proffitt* for rejecting the

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105. *See Proffitt*, 428 U.S. at 252 (plurality opinion) (stating that the fundamental difference between the statute at issue in *Gregg* and the one before the Court was that, in Florida, a judge determined the sentence).

106. 428 U.S. 242 (1976).

107. *Proffitt*, 428 U.S. at 252.

108. *Id.*

109. *Id.*

110. 391 U.S. 510 (1968).

111. *Proffitt*, 428 U.S. at 252 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

112. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (declaring that the definition of cruel and unusual punishment is determined by what society accepts as reasonable).

113. *See* Spaziano v. Florida, 468 U.S. 447, 462–63 (1984) (stating that "the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge"); *see also Walton*, 497 U.S. at 647 (stating that the Court has soundly rejected any notion that the Constitution requires a jury to determine punishment).

114. *See Ring*, 536 U.S. at 609 (overruling *Walton* to the extent that it allows a judge to determine the existence of aggravating factors).

115. *See id.* (requiring the jury to find facts upon which a sentence is enhanced but not a jury determination).

116. *Id.* at 597 n.4.

Eighth Amendment challenge to judge sentencing.[117] Writing for the *Ring* majority, Justice Ginsburg rejected Arizona's position that judicially determined aggravating factors are a necessary procedure for consistent application of the death penalty.[118] She added that the " 'founders of the American Republic were not prepared to leave [criminal justice] to the State' " and although a jury trial may not be the most efficient criminal process, " '[the petit jury] has always been free.' "[119]

This language may not signify a paradigmatic shift in death penalty jurisprudence.[120] It does, however, affirm that the historic freedom the petit jury retains in finding facts, as an embodiment of the community's conscience rather than the government's desire, is fundamental to the Constitution.[121] Furthermore, it suggests that a state may not invoke the Eighth Amendment goal of consistency in capital sentencing to justify abrogation of the historic role of community participation in the criminal process.[122] Even Justice Scalia, who does not subscribe to the principle that individualized sentencing determinations are constitutionally mandated, stated in his *Ring* concurrence that the Sixth Amendment right to a jury trial is seriously eroded "by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed."[123] Justice Breyer's concurrence signifies the strongest departure from the consistency prong.[124] In the same passage within which he acknowledged that 92 counties account for 50% of imposed death penalties since *Furman*, he also stated that requiring a jury determination of punishment would "assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted."[125]

Ring suggests that the Court has shifted its emphasis somewhat from *Furman*-era doctrine. The Court now appears more willing to entertain challenges to the death penalty process that are posited as violations of constitutional rights other than the Eighth Amendment.[126] The question remains

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117. *Id.* at 607; *Proffitt*, 428 U.S. at 252.

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

119. *Id.* (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

120. *But see* Stevenson, *supra* note 90, at 111 (stating that Justice Ginsberg's language may signify a shift "in the way in which the Court approaches the issue of jury involvement in capital sentencing").

121. *See Ring*, 536 U.S. at 607 (describing the founders' emphasis on a free jury).

122. *See id.* (rejecting Arizona's consistency argument for judicial fact-finding).

123. *Id.* at 612 (Scalia, J., concurring).

124. *Id.* at 613–19 (Breyer, J., concurring).

125. *Id.* at 618 (Breyer, J., concurring).

126. *See id.* at 611 (Scalia, J., concurring) (stating that the erroneous *Walton* outcome was due to the fact that the question was presented on Eighth Amendment, rather than Sixth Amendment, terms).

whether analysis of rights such as the Sixth Amendment's jury trial guarantee differs in the death penalty context.[127] There is support for the proposition that it does.[128] Regardless, the Court has yet to consider in any federal death penalty case the constitutional right that guarantees a body of citizens best situated to reflect the community's conscience— the Fifth Amendment right to a grand jury indictment.[129]

IV. The Modern Grand Jury— Uninformed and Misdirected

A. The Model Charge

When a federal grand jury is empaneled, it is not initially given specific instructions relating to the alleged offense.[130] Instead, the grand jury receives a "charge" that briefly summarizes the history of the institution and details the panel's responsibilities.[131] The relevant portion from the model charge recommended by the Administrative Office of the United States Courts advises:

> You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activities as criminal. That is to be determined by Congress and not you.
>
> Furthermore, when deciding whether or not to indict, you should not be concerned about punishment in the event of conviction. Judges alone determine punishment.[132]

This charge is a misstatement of federal law, at least insofar as death penalty cases are concerned.[133] In federal capital cases, the judge does not determine punishment.[134] The United States Code dictates that "the jury by unanimous

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127. *See Ring*, 536 U.S. at 599 (analyzing the jury's historical role in capital trials, but not determining whether Sixth Amendment analysis differs in that context).

128. In *Witherspoon*, the Court reversed the capital conviction of the defendant as to punishment, but not as to guilt. *Witherspoon*, 391 U.S. at 523. Holding that the penalty violated the Sixth and Fourteenth Amendments to the United States Constitution because jurors that expressed reservations about the death penalty were excluded, the Court stated that "in this case the jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death." *Id.* at 518.

129. In 2002 the Court did consider the failure of an indictment to list an aggravating fact in a noncapital case. *Cotton*, 535 U.S. at 634. The Court found, however, that the error had been waived by a failure to object at trial, and did not warrant correction as "plain error." *Id.*

130. BEALE ET AL., *supra* note 48, at 4-10.

131. *Id.*

132. *Id.* at 4-15.

133. *See* 18 U.S.C. § 3594 (2000) (stating that a federal judge must accept the jury's recommendation).

134. *Id.*

vote . . . recommend[s] whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."[135] The judge may not impose a greater sentence than the jury recommends.[136] Furthermore, petit jurors are almost always instructed that they alone must determine the sentence.[137] The additional requirement that all capital case juries must be punishment qualified—no juror can serve in a capital case who cannot consider both the death penalty and life imprisonment as possible punishments—underscores the model charge's inaccuracy.[138]

At first glance, the model charge's misstatement does not appear to affect the indictment process. It can hardly matter to the individual grand jurors who makes the ultimate determination. However, the model charge's clear de-emphasis on the role of the community in the death penalty context directly contrasts with the Supreme Court's recent affirmation of the petit jury's responsibilities.[139] Essentially, capital grand jurors are told that the government will determine whether or not the accused is sentenced to death. The responsibility factor is thereby removed from their decision-making process. The Supreme Court has made clear that responsibility is "indispensable to . . . the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment.' "[140] Although the Court was addressing the need for responsible sentencing decisions, the importance of responsible judgments at every stage of the capital process is of paramount importance.[141] The grand jurors must not be led to believe that their role, and that of the community, is of little importance in the greater judicial scheme.

The broader significance of the model charge is that it misstates the constitutional function of the grand jury. Whether or not grand jurors have been instructed "from time immemorial that punishment is not their concern," the grand jury has operated as an independent body at least since Shaftesbury's era

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135. 18 U.S.C. § 3593(e) (2000).

136. *See* 18 U.S.C. § 3594 (2000) ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly.").

137. *See* Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985) ("[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

138. *See generally* Adams v. Texas, 448 U.S. 38, 40–58 (1980) (describing the capital qualification process in Texas as compared to other states). *See also* Morgan v. Illinois, 504 U.S. 719, 729 (1992) (ruling that the defense must be allowed to strike a juror who would automatically vote for death).

139. *See Ring*, 536 U.S. at 608 (requiring a jury finding of aggravating facts); *supra* Part III (describing how *Ring* inevitably alters the petit jury's role in sentencing).

140. *Caldwell*, 472 U.S. at 330 (1985) (quoting *Woodson*, 428 U.S. at 305).

141. *See* Semeraro, *supra* note 97, at 83 (emphasizing the need for responsibility in "death-enabling decisions at each step in the process from legislative drafting through appellate review").

and, of course, at the time of ratification of the Fifth Amendment.[142] Implicit in its independence is the "right" to refuse to indict. This "right" operates regardless of a positive determination of probable cause. In *Vasquez v. Hillery*,[143] the Supreme Court stated that:

> [t]he Grand Jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of a grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps the most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, "the grand jury is not bound to indict in every case where a conviction can be obtained."[144]

This understanding of the grand jury's historic function has been echoed in the lower courts.[145] In *Gaither v. United States*,[146] the court reasoned that because "it has the power to indict even where a clear violation of the law is shown, the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh."[147] The Northern District of Illinois, referring to the refusal of the Shaftesbury grand jurors to indict in the face of extreme judicial pressure, stated that "[t]his inherent right of the grand jury remains firmly imbedded in law."[148] "Just as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or a no bill as they deem fit."[149] When the grand jury is told not to consider punishment or the wisdom of the laws, it is commanded to surrender the power that the law has long vested in it. Thus, the Fifth Amendment is emptied of much of its significance.

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142. Respondent's January 17, 2004 Oral Argument in *Allen*, *supra* note 1, at 32:00; *see supra* Part II (describing the historical independence of the grand jury).

143. 474 U.S. 254 (1986).

144. Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

145. *See, e.g.*, United States v. Asdrubal-Herrera, 470 F. Supp 939, 942 (N.D. Ill. 1979) (stating that the grand jury can refuse to indict even with a finding of probable cause); Gaither v. United States, 413 F.2d 1061, 1066 (D.C. Cir. 1969) (same).

146. 413 F.2d 1061 (D.C. Cir. 1969).

147. *Gaither*, 413 F.2d at 1066 n.6 (quoting 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 6.02(1) (Cipes ed. 1968)).

148. *Asdrubal-Herrera*, 470 F. Supp. at 942.

149. *Id.*; *see also In re* Jordon, 439 F. Supp. 199, 204 n.5 (S.D.W.V. 1977) (recognizing the grand jury's right to refuse an indictment by a "form of (grand) jury nullification"); United States v. Cox, 342 F.2d 167, 189–90 (5th Cir. 1965) (Wisdom, J., concurring) ("[The grand jury] has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.").

Attacks on the sufficiency (or lack thereof) of the information placed before the grand jury are relatively rare in the American justice system.[150] When the question has been presented to the courts, judges have almost unanimously rejected the claims.[151] The issue of whether grand jurors had been erroneously instructed on their duties, however, has only been decided by one federal circuit.[152] In 2002 David Francis Marcucci challenged the constitutionality of the model grand jury charge because it failed to "explain to the grand jurors that they can refuse to indict even if they find probable cause."[153] Relying on *Vasquez*, Marcucci claimed that the Supreme Court's express recognition of the grand jury's "nullification" ability required the court to inform grand jurors of that power.[154] The United States Court of Appeals for the Ninth Circuit disagreed.[155] It reasoned that because the relevant *Vasquez* passage is dictum that merely describes a historical practice, and that the language of the model charge, stating that the grand jury *should* indict if it finds probable cause, there is "room—albeit limited room—for a grand jury to reject an indictment."[156]

In 2004 the Ninth Circuit was again asked to consider the adequacy of the model charge.[157] In *United States v. Navarro-Vargas*,[158] the defendant challenged that portion of the model charge instructing the grand jurors that they could not consider the wisdom of the laws and should not consider punishment in determining whether or not to indict.[159] The court stated that it had already examined and found the model charge constitutional and, therefore, affirmed the conviction.[160]

Both cases drew spirited dissents. Dissenting in *Marcucci*, Judge Michael Hawkins stressed the significance of the grand jury as an independent body.[161] He recognized the important tradition of grand jury nullification.[162] He added that regardless of the wisdom behind instructing the grand jurors on their right

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150. *See Williams*, 504 U.S. at 53–54 (describing the history of motions to quash indictments based on the sufficiency of evidence placed before the grand jury).

151. *Id.*

152. *See* United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002) (addressing the constitutionality of the model grand jury charge); *Navarro-Vargas*, 367 F.3d at 897 (same).

153. *Marcucci*, 299 F.3d at 1159.

154. *Id.* at 1160.

155. *Id.* at 1164.

156. *Id.*

157. *Navarro-Vargas*, 367 F.3d at 897.

158. 367 F.3d 896 (9th Cir. 2004).

159. *Navarro-Vargas*, 367 F.3d at 897.

160. *Id.* at 898–99.

161. *Marcucci*, 299 F.3d at 1167 (Hawkins, J., dissenting).

162. *Id.*

to "nullify" the indictment, the model charge clearly misled panel members.[163] He also contended that barring grand jurors from considering the wisdom of enacted laws or punishment ran "afoul of traditional understandings of the grand jury."[164]

Judge Alex Kozinski dissented in *Navarro-Vargas*.[165] He stated that although he believed *Marcucci* was wrongly decided for the reasons set forth by Judge Hawkins, stare decisis bound him to reject the defendant's attack on the propriety of instructing the grand jurors that they should not consider punishment.[166] However, on the issue of whether the grand jurors could be affirmatively instructed *not* to consider the wisdom of the laws, he felt *Marcucci* impelled the opposite conclusion.[167] The fact that the wisdom of the laws instruction was stated in mandatory terms directly conflicted with the *Marccucci* court's reasoning that the instruction left room for a grand jury to reject an indictment.[168] Interestingly, the subtle differences in the model charge's language misled the *Navarro-Vargas* majority, which framed the question presented as whether the grand jury could be instructed that they "*could not* consider the wisdom of criminal laws *or* punishment" when determining whether or not to indict.[169]

Obviously these cases present a hurdle for defendants challenging the model charge in the Ninth Circuit. The fact that both decisions drew such strong dissents, however, provides some reason for optimism that other circuits may reach a different conclusion.[170] Furthermore, the defendants in both cases were not charged with capital offenses.[171] As the Supreme Court has often repeated, "the penalty of death is quantitatively different from a sentence of imprisonment, however long."[172] Regardless, empowering the grand jury with the ability to refuse an indictment despite a finding of probable cause is only one of the necessary steps in restoring the institution to its former vitality.

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163. *Id.* at 1169.

164. *Id.*

165. *Navarro-Vargas*, 367 F.3d at 899 (Kozinski, J., dissenting).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 897 (emphasis added).

170. *Marcucci*, 299 F.3d at 1166–73 (Hawkins, J., dissenting); *Navarro-Vargas*, 367 F.3d at 899–903 (Kozinski, J., dissenting).

171. *See Marcucci*, 299 F.3d at 1158 (appealing conviction for importing and possessing marijuana); *Navarro-Vargas*, 367 F.3d at 897 (same).

172. *Woodson*, 428 U.S. at 305 (opinion of Stewart, J.).

B. *Informing the Grand Jury*

Vasquez noted that one of the most important functions of the grand jury is the decision to charge "a capital offense or a noncapital offense."[173] If grand jurors are unaware that statutory aggravating factors, and not the homicide allegation itself, demarcate the line between life and death, the significance of that function is seriously diminished. With *Ring* comes the opportunity to place the grand jury's present inadequacies before the courts.

Ring undeniably enlarged citizen involvement in punishment determinations.[174] Although the petit jury has always determined the existence of aggravating factors under modern federal death penalty statutes, the Court has now expressly stated that the Sixth Amendment requires this result.[175] *Ring* declared that the Sixth Amendment guarantees that criminal justice cannot be wholly left to government officials.[176] It follows, then, that the Supreme Court will no longer passively extol the community's involvement in factual determinations without actively *ensuring* its right to do so. Furthermore, *Ring*'s Sixth Amendment analysis signals that the Court may be more willing to undertake this task when the questioned procedure erodes a specific constitutional right, rather than when it is challenged as cruel and unusual punishment.[177]

Ring's significance to the Fifth Amendment Indictment Clause is readily apparent. The Supreme Court has stated that "[t]he grand and petit juries . . . form a 'strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government].' "[178] If a grand jury is denied the opportunity to determine whether an individual defendant should face a capital charge, the powerful effect of that first "barrier" is greatly diminished.

The founders of our nation regarded the grand jury as a vital institution for reflecting the beliefs and values of the local community.[179] The institution's undeniable independence permits the grand jury to operate without any

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173. *Vazquez*, 474 U.S. at 263; *see also* Campbell v. Louisiana, 523 U.S. 392, 399 (1998) ("It controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime.").

174. *See* Stevenson, *supra* note 90, at 1111–37 (analyzing *Ring*'s sweeping implications on jury sentencing).

175. *Ring*, 536 U.S. at 608.

176. *Id.* at 607.

177. *See supra* Part III (analyzing the shift in death penalty procedure analysis from the Eighth Amendment to specifically delineated rights).

178. United States v. Harris, 536 U.S. 545, 564 (2000) (quoting Duncan v. Louisiana, 391 U.S. 145, 151 (1968)).

179. *See supra* Part II (describing the events that led to the inclusion of the grand jury right as part of the Fifth Amendment).

government interference.[180] Unlike even the petit jury, it is not subject to the tactical gerrymandering of peremptory challenges or voir dire examination and thus generally represents a broader cross-section of ideals and values within a particular locality.[181] In this way, the grand jury is even better situated than the petit jury to fulfill its role as the "conscience of the community."[182] As the Supreme Court stated in *Wood v. Georgia*,[183] "[T]he 'ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute.' "[184] If *Ring* does, in fact, signal that the community's moral input into factual determinations at the sentencing phase is guaranteed by the Sixth Amendment, the courts must allow the community a similar opportunity in the charging phase.[185] Specifically, consistent with the functioning of the grand jury at the time of this nation's founding, the Constitution requires the courts to provide the grand jurors with the ability to reflect the community's values in determining whether or not a capital trial is appropriate for each particular case.[186]

Ring's insistence that the goal of consistency must not detract from Sixth Amendment protections holds equally true in the Fifth Amendment context. The government cannot guard against arbitrary decision-making by withholding information from the grand jury. That is not to say that the grand jury must be informed of exculpatory information or mitigating factors.[187] A court simply must provide the grand jurors with adequate information to enable the grand jury to determine whether the prosecutor's evidence of aggravating facts warrants a capital charge.

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180. *See Williams*, 504 U.S. at 47 (concluding that the grand jury's independence derives in part from the fact that it is not provided for in the body of the Constitution and therefore remains separated from any branch of the federal government).

181. *See* BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY 9–19 (1993) (describing the federal grand jury selection process through individual experience and in the federal system as a whole).

182. *Gaither*, 413 F.2d at 1066.

183. 370 U.S. 375 (1966).

184. Wood v. Georgia, 370 U.S. 375, 390 (1966) (quoting POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW 642 (2d ed. 1909)).

185. *See supra* Part III (arguing that the Sixth Amendment may guarantee that the community's moral sensibilities be reflected in a jury determination under *Ring*). Regardless, because the jury is now required to find aggravating facts before a sentence of death is imposed, *Ring* effectually guarantees this result in the punishment phase. *Ring*, 536 U.S. at 608.

186. *See supra* Part II (describing the historical function of the grand jury).

187. *See Williams*, 504 U.S. at 54 (stating that challenging an indictment based upon inadequate evidence before a grand jury "run[s] counter to the whole history of the grand jury institution" (internal quotation marks omitted)). The proposition that a grand jury must be informed of the law is quite unlike challenging the prosecutor's evidence before a grand jury. Unlike the latter situation, an informed grand jury is completely consistent with its functional history. *See supra* Part II (describing how the colonial grand juries were well-informed).

Whether or not the Court eventually adopts Justice Scalia's position that individualization is an unnecessary goal, *Ring* guarantees that the individual circumstances of each case will be reflected in the verdict.[188] A capital offense is unlike any other.[189] The death penalty is part and parcel to every determination made during the sentencing proceeding.[190] The petit jury certainly considers the effect of its factual determinations on the sentencing decision and votes accordingly.[191] If the grand jury is to remain the first tier of protection between the government and the accused, it must be able to protect a person from standing trial for his life when the facts do not warrant it. Implicit in the determination of facts, such as whether the crime was committed in a "especially heinous, cruel, or depraved manner" or that "the victim was particularly vulnerable," is the determination that the death penalty would be at least potentially justified.[192] If grand jurors are ignorant of the consequences of their actions, the Indictment Clause of the Fifth Amendment is effectively incapacitated. Justice Scalia feared that failing to apply the *Apprendi* doctrine to the death penalty eligibility factors in *Ring* would lead to the petit jury's "perilous decline."[193] Under current practice, the grand jury has largely met that fate.[194] "We cannot preserve our veneration for the protection . . . in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it."[195]

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188. *See supra* Part III (describing how *Ring*, regardless of whether the judge determines the ultimate sentence, affects the jury sentencing process); *see also* Sundby, *supra* note 99, 1170–71 (describing how individualization inevitably enters the death penalty process through jury determinations with or without constitutionally mandated mitigating factors); *cf. Adams*, 448 U.S. at 50 (stating that jurors cannot be excluded if they state that they will honestly determine the existence of facts even if they concede that "the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt").

189. *See Woodson*, 428 U.S. at 305 (stating that "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long").

190. *See* Sundby, *supra* note 99, 1170–71 (describing the role of jury nullification in the death penalty context).

191. *Id.*

192. *See* 18 U.S.C. § 3592(c) (2004) (listing the aggravating factors for homicide); *see also Allen*, 357 F.3d at 757–58 (citing State v. Finch, 975 P.2d 967, 1007–08 (Wash. 1999)) (determining that a petit jury's determination of aggravating facts does not compel the conclusion that the grand jury would have found those same facts because capital aggravators are "relatively qualitative determinations").

193. *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

194. *See* Respondent's January 17, 2004 Oral Argument, *supra* note 1, at 32:00 (stating that the grand jury is told not to consider punishment).

195. *Id.*

V. The Collateral Effect on the Charging Process

A. Racial Disparity

Beyond the constitutional requirement of an informed grand jury, reinvigoration of the grand jury may ameliorate some problems affecting the death penalty process. One of the most persistent issues in the continuing death penalty debate is that of racial disparity.[196] Statistics show an alarming gap between white and minority defendants in charging and sentencing.[197] As of 2004 seventy-five percent of those approved for federal capital prosecution since the federal death penalty was reinstated in 1988 have been members of minority groups.[198] Seventy-three percent of defendants placed on the federal death row have been minorities.[199] Under Attorney General Ashcroft's tenure, minority defendants accused of murdering white victims were more likely to be targeted for capital prosecution than are minority defendants accused of killing other minority victims.[200]

In *McCleskey v. Kemp*,[201] the Supreme Court addressed the issue of racial disparity in the state of Georgia.[202] The defendant presented statistical evidence that showed, accounting for other relevant variables, that a defendant charged with killing a white victim was 4.3 times more likely to receive the death penalty than a defendant charged with the murder of a black victim.[203] The Court first addressed McCleskey's claim that the Georgia sentencing procedure violated the Equal Protection Clause.[204] Because McCleskey could not show a purposeful intent to discriminate or that discrimination adversely affected his own case, the challenge failed.[205] The Court noted that statistics can provide the necessary proof of discriminatory intent, but because McClesky's statewide data reflected

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196. *See* Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. AND MARY L. REV. 2083, 2085 (2004) (stating that the capital sentencing reform movement is due mostly to concerns about racial discrimination).

197. *See generally* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND/CRIM. JUSTICE PROJECT, DEATH ROW U.S.A. 1, *at* http://www.deathpenaltyinfo.org/DRUSA-20040401.pdf (last visited October 27, 2004) (compiling all current racial statistics regarding the death penalty).

198. Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615, 1617 (2004).

199. *Id.*

200. *Id.* at 1626.

201. 481 U.S. 279 (1987).

202. *McCleskey*, 481 U.S. at 282–83.

203. *Id.* at 287. The statistical evidence came from the Baldus study, created by Professors David C. Baldus, Charles Pulaski, and George Woodworth, and examined statistics gathered from over 2,000 murder cases in Georgia during the 1970's. *Id.* at 286. The authors accounted for 230 non-racial variables that may have otherwise explained any disparities. *Id.* at 287.

204. *Id.* at 291.

205. *Id.* at 297.

decisions by numerous properly selected juries, the evidence did not show that McCleskey's own jury acted with improper intent.[206] McCleskey's claim that his statistical evidence proved that the death penalty was imposed in violation of the Eighth Amendment also failed.[207] Georgia's sentencing scheme provided for an individualized determination in each case and narrowed the class of defendants subject to the death penalty.[208] The Court held that the Georgia scheme met the twin requirements of consistency and individualization and, therefore, did not constitute cruel and unusual punishment.[209]

Significantly, the *McCleskey* Court did not question the validity of McCleskey's conclusions.[210] Nor, as the current federal statistics show, is there any reason for confidence that racial disparity does not continue to affect the application of the death penalty in the United States.[211] The *McCleskey* Court simply could not find a solution without being forced to vacate the death penalty in every particular case.[212] Unfortunately, the fact remains that race plays a role in the capital process.[213]

The informed grand jury may be able to play a positive role in addressing this issue. Grand jury members, just as petit jurors, are subject to their own personal passions and prejudices.[214] However, as previously mentioned, the grand jury usually represents a broader cross-section of the community.[215] The jurors may not be struck for any reason.[216] They are not punishment qualified.[217] Furthermore, no one can disagree that one of the grand jury's most important functions is to protect against prosecutorial prejudice and overreaching.[218]

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206. *Id.* at 294.

207. *Id.* at 313.

208. *McCleskey*, 481 U.S. at 308.

209. *Id.*

210. *See id.* at 315 (stating that the Baldus study could implicate the entire criminal system in the United States). The Court did seem to acknowledge that McCleskey's claims were significant but determined that they were better suited as arguments for legislative reform. *Id.* at 319.

211. McNally, *supra* note 198, at 1645.

212. *See McCleskey*, 481 U.S. at 313–16 (arguing that virtually any defendant could achieve a reversal of their conviction if the Court found the racial disparity statistics constituted a valid Eighth Amendment claim).

213. *See* McNally, *supra* note 198, at 1645 (statistically showing that race affects the federal death penalty).

214. *See* BLANK, *supra* note 181, at 9–19 (describing how personal prejudices affect the federal grand jury).

215. *See id.* (describing the selection process through individual experience and in the federal system as a whole).

216. *Id.* Grand jurors may, subject to the presiding court's judgment, be excused for personal reasons. *Id.*

217. *Id.*

218. *See generally Vasquez*, 474 U.S. at 263–64 (stating that a grand jury system from which

Grand juries aware of the consequences of their decisions are more likely to take responsibility for their actions.[219] Placing a second body, or third if one accounts for the prosecutor, as a restriction against a racially biased sentence of death, is a protection worth having. This protection can only be realized if the jury is adequately informed of its capital charging power.

B. Restoring the Local Influence on the Federal Death Penalty

Another important issue affecting the federal death penalty is the so-called federalism debate.[220] On January 27, 1995, the United States Department of Justice ordered that all federal prosecutors submit to the Attorney General's Review Committee on Capital Cases ("Review Committee") all cases in which a defendant is charged with a capital-eligible offense for a determination as to whether the death penalty will be sought.[221] Under the death penalty protocol, as it is commonly known, U.S. attorneys must submit their cases regardless of whether they wish to seek the death penalty.[222] Under this system, Attorney General Janet Reno overruled federal prosecutors' decisions to seek life sentences twenty-six times during her tenure.[223] During the tenure of Attorney General John Ashcroft, the numbers rose substantially.[224] As of August 6, 2004, Attorney General Ashcroft overruled federal prosecutors' recommendations to forgo the death penalty forty-one times.[225] In addition, Attorney Genral Ashcroft insisted on reviewing—and in some instances rejecting—all plea agreements by which local federal prosecutors had proposed to avoid a capital trial by accepting a defendant's guilty plea in exchange for a life sentence.[226] The

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blacks have been systematically excluded fatally affects the charging process).

219. *See* Semararo, *supra* note 97, 97–98 (describing how a sense of responsibility leads to more "reflective, carefully considered decisions").

220. *See generally* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1714–17 (2003) (describing how nationally consistent charging decisions encroach on a particular locality's views on the death penalty).

221. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1998–2000) 1–2 (2000), *at* http://www.usdoj.gov/dag/pubdoc/dpsurvey.html; *see also* UNITED STATES ATTORNEY'S MANUAL, §§ 9-10.010 – 10.120 (2001) (describing the death penalty review process), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam.

222. UNITED STATES ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL § 70 (2004), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00070.htm [herinafter CRIMINAL RESOURCE MANUAL].

223. Gleeson, *supra* note 220, at 1697.

224. *Id.*

225. Julia Preston, *Killers Get Life Sentences, In Setback to Justice Dept.*, N.Y. TIMES, August 6, 2004, at B1.

226. Gleeson, *supra* note 220, at 1697 n.2; *see also* CRIMINAL RESOURCE MANUAL, *supra* note 222, at § 70 (requiring the protocol process for plea agreements that preclude imposition of the death penalty).

stated rationale behind the death penalty protocol is to achieve national uniformity in capital charging decisions.[227] In particular, the protocol seeks to ensure against racial considerations factoring into the capital charging process.[228] None of the members of the Review Committee, nor the Attorney General, are ever directly informed of a defendant's race.[229]

The idea of national uniformity in prosecutorial decision-making is consistent with the Supreme Court's goal of consistency.[230] However, as the statistics show, the protocol may not have achieved its desired effect.[231] Furthermore, such centralized decision-making can conflict with any particular jurisdiction's prevailing views on the death penalty.[232] An informed grand jury will strike the necessary balance between the centralized federal policy and a particular locality's concerns.[233] The petit jury, although able to reflect the community's moral beliefs on the ultimate punishment decision, does nothing to prevent a defendant from standing trial for his life in a jurisdiction that does not otherwise generally condone the death penalty.[234] Although not specifically included in the language of the Fifth Amendment, the use of the grand jury in this context is analogous to the vicinage right included in the Sixth Amendment.[235] By assuring an in-state venue for criminal trials, the framers of our Constitution intended that the criminal process be governed mostly by local rather than national standards.[236] Judge Alex Kozinski's *Navarro-Vargas* dissent

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227. Gleeson, *supra* note 220, at 1698–99.

228. *Id.* at 1699.

229. U.S. DEP'T OF JUSTICE, *supra* note 221, at 3.

230. *See supra* Part III (describing the Supreme Court's modern death penalty doctrine).

231. *See* McNally, *supra* note 198, at 1617 (describing the apparent racial disparity on the federal death row).

232. *See* Gleeson, *supra* note 220, at 1716 (describing how the death penalty protocol conflicts with local concerns).

> In a federal system that rightly accords great deference to states' prerogatives, the federalization of the death penalty should be limited to cases in which there is a heightened and demonstrable federal interest, one that justifies the imposition of a capital prosecution on communities that refuse to permit them in their own courts.

Id.

233. Judge Gleeson provides a scathing critique of the Justice Department's implementation of its death penalty protocol in his article. *See generally id.* at 1722–28 (discussing the protocol's adverse impact on criminal investigations). Many of his concerns may not be wholly addressed by the implementation of an informed grand jury.

234. *See id.* at 1717 (describing how a federal prosecutor's charging decisions are inevitably controlled by the ease in which he could convince a jury to convict on a capital charge).

235. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

236. *See generally* Michael C. Dorf, *The Misguided Uniformity in Capital Punishment: Why It Conflicts With Constitutional Jury Trial Rights*, Findlaw.com (Feb. 19, 2003) (arguing that the death penalty

aptly summarizes this point: "An independent grand jury—one that interposes the local community's values on prosecutorial decisions that are controlled by policies set in Washington as to the enforcement of laws passed in Washington—seems like an important safeguard that is entirely consistent with the grand jury's traditional function."[237]

VI. Application to State Grand Juries

Charging methods greatly differ among the various states.[238] In those states that do require a grand jury indictment for capital offenses, the informed grand jury problem is exacerbated by the fact that the Supreme Court has not ruled on the applicability of *Ring* to state charging procedures.[239] It appears doubtful that the Court will. The right to a grand jury indictment has not been incorporated into the Due Process Clause of the Fourteenth Amendment.[240] The absence of aggravating factors in the charging document may raise notice guarantee problems.[241] However, at least one state has ruled that notice can be and is provided by other methods such as a bill of particulars.[242] Although other forms of notice may not always provide the defendant with the exact aggravating factors that the prosecution will rely on, it appears that as a practical matter, the absence of aggravators in an indictment does not violate the Due Process Clause in most instances.[243]

In states that do provide for a grand jury indictment, capital defense attorneys should focus their attention on the state's grand jury guarantee. In most instances, the right to an indictment has been included in the state constitution or has been a statutory "right" since the state was formed.[244] In

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protocol is impliedly unconstitutional) *at* http://writ.news.findlaw.com/dorf/20030219.html.

237. *Navarro-Vargas*, 367 F.3d at 902 (Kozinski, J., dissenting).

238. *See, e.g.*, ALA. CONST. art. I, § 8 (requiring a grand jury indictment for all felony cases but allowing the legislature to abolish the use of a grand jury indictment for misdemeanors); ALASKA CONST. art. I, § 8 (requiring a grand jury indictment for all infamous crimes unless waived); ARIZ. CONST. art. II, § 30 (allowing the use of indictment or information for prosecution of all crimes); ARK CONST. amend. XXI, § 1 (abolishing the grand jury indictment requirement).

239. *See Ring*, 536 U.S. at 597 n.4 (stating that the defendant did not contend that his indictment was constitutionally defective and noting that the Fifth Amendment is not incorporated into the Fourteenth Amendment).

240. *Hurtado*, 110 U.S. at 538.

241. *See Cole*, 333 U.S. at 201 (stating that notice of the particular charge is one of the clearest established principles of due process).

242. Primeaux v. State, 88 P.3d 893, 899–900 (Okla. Crim. App. 2004). Oklahoma charged Primeaux by information, rather than indictment. *Id.* However, the court's reasoning appears to apply regardless of the charging method. *Id.*

243. *Id.*

244. *See supra* Part II (describing how every state in the post-revolutionary period enacted laws guaranteeing the right to a grand jury indictment).

State v. Fortin,[245] the Supreme Court of New Jersey addressed the issue of whether, under the New Jersey Constitution, aggravating factors must be submitted to the grand jury.[246] The court acknowledged that a defendant in New Jersey is given adequate notice of the aggravators at a separate hearing.[247] Nevertheless, the court found that "those assurances of notice and a well-founded prosecution are not adequate substitutes for the [New Jersey] constitutional right of a grand jury presentation if aggravating factors are elements of the crime of capital murder."[248] Finding that capital aggravators are indeed elements under *Ring* and *Apprendi*, the court declared a prospective rule that aggravating facts must be included in an indictment.[249] Regardless of whether a state's right to indictment is characterized as a statutory or constitutional right, the New Jersey Supreme Court's analysis appears to apply to many states.[250] Once a state has established that its own law requires aggravating factors to be submitted to the grand jury, this article's analysis of the right to an informed grand jury in the federal context applies at the state level.[251]

VII. Conclusion

The grand jury is perhaps one of our most important and least understood institutions. Historically veiled in secrecy and independent from any other branch of government, the "people's panel" provides invaluable protection to the community and the individual citizen. It gives a voice to the ideals and morality of the local community as against a centralized national political process. However, the grand jury's effective power has been severely limited. Federal grand jurors no longer understand the consequences of their actions, and, in fact, are ordered to ignore anything but the facts of the particular case. Thus, the grand jury has tended to become nothing more than a "rubber stamp" for the prosecution.

The Supreme Court's decision in *Ring* to require submission of statutory aggravating factors to the petit jury presents an opportunity to restore the grand jury to its once-prominent position. An informed grand jury, fully aware that aggravating facts demarcate the line between life and death, has the opportunity

245. 843 A.2d 974 (N.J. 2004).

246. State v. Fortin, 843 A.2d 974, 1027–28 (N.J. 2004).

247. *Id.* at 1030.

248. *Id.*

249. *Id.* at 1035–36.

250. *Id.* at 1035 (stating that the state constitutional right to an indictment has no less force than its federal counterpart).

251. It should be noted that the pertinent language of the model grand jury charge, although promulgated for use in federal courts, is likely substantially similar to state charges. *See* BEALE ET AL., *supra* note 48, at 4-15 (providing the model grand jury charge for use in all grand jury proceedings).

to speak, once again, as the moral voice of the community. The grand jury, as envisioned by the founders of our Nation, was an institution informed of the applicable law. It knew the consequences of its actions and was thus able to provide protection and moderation where an otherwise strict application of the law would be too harsh.

The Supreme Court has signaled that it may be willing to review death penalty procedures in a new light. When claims are presented as a violation of a specific delineated right, the Court may be more likely to deem specific grand jury procedures unconstitutional. As it stands, the grand jury cannot provide its constitutionally mandated function of standing between the accuser and the accused. It simply doesn't have the necessary tools. The death penalty is the most severe punishment that society can impose on an individual. More than any other punishment, the nature of the death penalty commands that the Constitution's basic protections cannot be sacrificed in the interest of convenience or efficiency. It is only proper that no individual should have to defend his life unless a grand jury has first determined that he should.

CASE NOTES:

United States Supreme Court