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Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases

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I. Introduction

Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment . . . ."," both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.¹

When juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.²

On September 7, 1984, Ernest Dobbert became the first person since the modern resumption of capital punishment³ to be exe-
cuted notwithstanding the fact that the jury in his case, by a vote of ten to two, had decided that Dobbert should live. Two months earlier, in *Spaziano v. Florida*, the United States Supreme Court had held that a state trial court may, consistent with the Constitution, impose a sentence of death despite a jury's conclusion that the defendant deserved to live.

Florida is one of only three states which allows a judge to override a jury's recommendation of life imprisonment. Florida is the only state which employs the override frequently, despite the fact that Florida juries are among the most death-prone. As of December 1984, Florida juries had recommended life over death in 24 of 26 cases where the jury had at least two votes for life. In June 1984, a Florida Court reversed a jury's recommendation of life in a case where the sentence of death had been previously imposed. The jury had voted 11 to 1 for life. While the Florida 2nd DCA reversed the jury's recommendation of life in Spaziano and a sentence of death was imposed, the Court did not determine whether the death penalty was imposed in violation of the defendant's federal and state constitutional rights. Florida is the only state which employs the override frequently, despite the fact that Florida juries are among the most death-prone.

Since the mid-nineteenth century, American legislatures have decided with near unanimity that no person should be sentenced to die without the consent of his peers. Prior to Furman v. Georgia, 408 U.S. 238 (1972), "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U.S. 183, 200 n.11 (1971). The plurality in Woodson v. North Carolina, 428 U.S. 280 (1976) traced this history:

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. . . . By 1963, all . . . jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.

7. Of the 37 states with capital punishment statutes, 30 "give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to overrule a jury's recommendation of life." *Spaziano*, 104 S. Ct. at 3164 (footnote omitted). Twenty-nine states require a jury to find that the defendant deserves to die. One state, Nevada, provides for jury capital sentencing, but if the jury cannot agree a panel of three judges decides sentence. *Id.* at 3164 n.9. Four states provide for judge sentencing in capital cases without input from a jury. *Id.* Only three states, Florida, Alabama, and Indiana, permit a judge to disregard a sentencing jury's recommendation in favor of life. *Id.* Only in Florida is the override used frequently. See infra notes 9-11 and accompanying text.

The United States Supreme Court's recent modification of Witherspoon v. Illinois, 391 U.S. 510 (1968) will further stack the deck against defendants facing the death penalty. The Court in *Witherspoon* held that a prospective juror who expressed reservations about capital punishment could be excluded for cause only if she made it "unmistakably clear" that she would automatically vote against the death penalty. *Id.* at 522 n.21. The recent decision
ber 11, 1984 life overrides had occurred eighty-seven times in Florida, as compared to twice in Indiana and six times in Alabama. Because of these numbers, Florida is the only state with an extensive and refined body of override law. More importantly, Florida

in Wainwright v. Witt, 105 S. Ct. 844 (1985) permits a juror to be excluded for cause if his views on the death penalty "would prevent or substantially impair the performance of his duties as a juror . . . ." Id. at 857 (quoting Adams v. Texas, 446 U.S. 38, 45 (1980)).


12. This is true, in part, because of Florida's enthusiasm for the death penalty generally. As of December 20, 1984, Florida's death row held 223 men, the most populous of any state. DEATH ROW U.S.A., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., at 7-8 (Dec. 20, 1984). Twenty-one people were executed in the United States in 1984. Eight of these were executed in Florida (Anthony Antone, Arthur Goode, James Adams, Carl Shrinier, David Washington, Ernest Dobbert, James Henry, and Timothy Palmes), five in Louisiana (Johnny Taylor, Elmo Sonier, Timothy Baldwin, Robert Willie, and Ernest Knighten), three in Texas (Thomas Barefoot, James Autry, and Ronald O'Bryan), two in Georgia (Ivon Stanley and Alpha Stephens), two in North Carolina (Velma Barfield and James Hutchins) and one in Virginia (Linwood Briley). In 1983, Robert Sullivan was executed in Florida, John Evans in Alabama, Jimmie Gray in Mississippi, Robert Williams in Louisiana, and John Smith in Georgia. In 1982, Frank Coppola was executed in Virginia and Charles Brooks was executed in Texas; in 1981, Steven Judy was executed in Indiana; in 1979 John Spinkielink was executed in Florida; in 1978, Jesse Bishop was executed in Nevada; in 1977 Gary Gilmore was executed in Utah. Id. at 3. The eleven executions that occurred between 1977 and 1983 are examined in Streib, Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression From "Let's Do It" to "Hey, There Ain't No Point In
is the only state that has actually executed a person despite the jury’s recommendation of a life sentence, and it is likely to continue doing so.

Spaziano is the most recent example of the United States Supreme Court’s "unwilling[ness] to say that there is any one right way for a State to set up its capital-sentencing scheme."

After a decade of agony and fragmentation on the Court, a fairly stable consensus seems to have emerged among the Justices: that the


14. Between 1971 and 1980, except for routine applications of Witherspoon v. Illinois, 390 U.S. 510 (1968), only five capital opinions were supported by a majority of the Court. "The important ones have been decided by pluralities of three or four," Gillers, supra note 8, at 8; see also id. at nn.32 & 33. The Court rendered four capital decisions in the 1982 Term, all of which were against the inmates: Barclay v. Florida, 103 S. Ct. 3418 (1983) (6-3 decision); Barefoot v. Estelle, 103 S. Ct. 3383 (1983) (6-3 decision); California v. Ramos, 103 S. Ct. 3446 (1983) (5-4 decision); Zant v. Stephens, 103 S. Ct. 2733 (1983) (7-2 decision). "The most striking fact of [these] four important cases is that the Court upheld death sentences. In the previous seven years, since the Court ‘restored’ the death penalty in Gregg [v. Georgia, 428 U.S. 153 (1976)] in all but one of the fifteen fully argued capital punishment cases decided on the merits it had vacated or reversed the death sentence." Weisberg, De-regulating Death, 1983 Sup. Ct. Rev. 305, 305 n.1.

This pattern remained constant throughout the 1983 Term as well. In three of the four capital cases decided, the Court ruled against the death-sentenced inmate. See Spaziano v. Florida, 104 S. Ct. 3154 (1984) (6-3 decision); Strickland v. Washington, 104 S. Ct. 2052 (1984) (7-2 decision); Pulley v. Harris, 104 S. Ct. 871 (1984) (7-2 decision). In Arizona v. Rumsey, 104 S. Ct. 2305 (1984), the Court affirmed the Arizona Supreme Court’s vacation of the death sentence on the basis of double jeopardy where a previous conviction resulting in a life sentence had been set aside. But in doing so, the Court did no more than refuse to overrule it’s earlier holding in Bullington v. Missouri, 451 U.S. 430 (1981), and two Justices dissented even from this modest holding. Id. at 2311 (Rehnquist and White, JJ., dissenting.)

At this writing, only two capital cases have been decided during the 1984 Term: Wainwright v. Witt, 105 S. Ct. 844 (1985), decided by a 6-3 vote against the death row inmate, and Ake v. Oklahoma, 105 S. Ct. 1087 (1985), decided 8-1 in favor of the defendant.

Commentators have noted the Court’s increasing impatience with challenges to capital sentences. See, e.g., Devine, Feldman, Giles-Klein, Ingram & Williams, Special Project: The Constitutionality of the Death Penalty in New Jersey, 15 Rutgers L.J. 261, 303-10 (1984). Perhaps the best example of this is the Supreme Court’s abrupt treatment of successive habeas petitions. See, e.g., Antone v. Dugger, 104 S. Ct. 962, 964-65 (1984); Woodard v. Hutchins, 104 S. Ct. 752 (1984); Gray v. Lucas, 104 S. Ct. 211, 212-13 (1983) (Burger, C.J., concurring). The Court has been willing to grant temporary stays of execution for death row inmates raising issues that would be controlled by cases then pending before the Court. See, e.g., Barfield v. Harris, 104 S. Ct. 3570 (1984); McCorquodale v. Balkcom, 104 S. Ct. 2383 (1984); Autry v. Estelle, 104 S. Ct. 24 (1983) (White, J., sitting as Circuit Justice). The strangest of these was the Georgia case of Alpha Stephens. Stephens argued, in a successive habeas petition, that the death penalty in Georgia was being applied in a racist manner, an issue then pending before the en banc Eleventh Circuit in Spencer v. Zant, 715 F.2d 1562, 1578 (11th Cir.), vacated pending reh’g en banc, 715 F.2d 1583 (11th Cir. 1983), en banc decision withheld, 729 F.2d 1293, 1294 (11th Cir. 1984) and McCleskey v. Zant, 580 F. Supp.
Court should be "going out of the business of telling the states how to administer the death penalty."\textsuperscript{16} So long as a state has a statute which demarks a "class of death-eligible murderers smaller than the class of all murderers,"\textsuperscript{16} so long as the sentencer retains discretion (guided by the objective formulae), and so long as the defendant has a "fairly broad opportunity to make a case for mitigation,"\textsuperscript{17} the Court will not interfere.

This Article explores the legislative question which remains after \textit{Spaziano}: As a matter of wise public policy, should Florida repeal its jury override? The next section of the Article presents a general survey of the override as defined by the capital statute and as construed by the Florida Supreme Court. The following section discusses the \textit{Spaziano} case. The remaining sections explore the policy considerations militating against retention of a judge's power to override a jury's recommendation of life, several of which are peculiarly legislative, as opposed to judicial, concerns.

\section*{II. Florida's Jury Override}

Florida's present day capital punishment statute was enacted in 1972 in the wake of \textit{Furman v. Georgia}.\textsuperscript{18} In \textit{Furman}, a sharply divided Supreme Court held that the cruel and unusual punishments clause of the eighth amendment prohibited imposition of the death penalty pursuant to statutes, such as Florida's, which allowed juries uncontrolled discretion to impose death. Under the Florida statutes, unconstitutional after \textit{Furman},\textsuperscript{19} all defendants

\textsuperscript{15} Weisberg, supra note 14, at 305 (citations omitted).
\textsuperscript{16} Id. at 358.
\textsuperscript{17} Id.
\textsuperscript{18} 408 U.S. 238 (1972).
\textsuperscript{19} Fla. Stat. §§ 775.082(1), 921.141 (1971). \textit{Furman} rendered these statutes unconstitutional. See, e.g., Pitts v. Wainwright, 408 U.S. 941 (1972); Anderson v. Florida, 408 U.S. 938 (1972); Newman v. Wainwright, 464 F.2d 615 (5th Cir. 1972); \textit{In re} Baker, 267 So. 2d 331 (Fla. 1972); Reed v. State, 267 So. 2d 70 (Fla. 1972); Chaney v. State, 267 So. 2d 65 (Fla.
convicted of a capital offense were to be sentenced to death, unless the jury recommended mercy. A jury recommendation of mercy was binding on the trial court. The statute made no attempt to define, limit, or guide the jury's process of deciding whether or not to recommend mercy.

Florida's post-*Furman* statute attempted to guide the capital punishment decision by establishing a procedure to be followed in determining what penalty should be imposed upon a conviction for first degree murder. The statute provides that the court shall, unless waived, conduct a separate sentencing proceeding before the jury. This proceeding constitutes a trial on the issue of penalty, and many trial procedures have been imported into the penalty phase. The statute provides that evidence probative of sentence may be presented "regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." The statute enumerates aggravating and mitigating circumstances to guide the jury in its deliberations. The jury then renders an "advisory sentence to the court."

The statutory language is clear that the jury's recommendation is not binding: "Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances" enters a sentence of life or death. If the sentence is death, or if the judge imposes a life sentence despite the jury's recommendation of death, the court must set forth in writing its findings as to the aggravating and mitigating circumstances. Death sentences are subject to automatic review by the

1972.

25. *Id.* § 921.141(2), (5)-(6).
26. *Id.* § 921.141(2). Although the statute speaks in terms of a recommendation by a "majority" of the jury, a split vote of 6-6 is treated as a recommendation of life imprisonment. *See Patten v. State*, 467 So. 2d 975, 979 (Fla. 1985); *Rose v. State*, 425 So. 2d 521, 525 (Fla.), *cert. denied*, 461 U.S. 909 (1983).
28. The statute requires written findings if the judge imposes death, regardless of
Florida Supreme Court. 29

The Florida Supreme Court upheld the facial constitutionality of its post-Furman capital punishment statute, including the jury override, in the 1973 case of State v. Dixon. 30 Applying reasoning that seems ironic in light of the subsequent frequency of death sentences imposed following jury recommendations of life imprisonment, the court explained that "[t]o a layman, no capital crime might appear to be less than heinous . . . ." 31 Trial judges, "with experience in the facts of criminality [possess] the requisite knowledge to balance the facts of the case against . . . standard criminal activity . . . ." 32 Such knowledge "can only be developed by involvement with the trials of numerous defendants." 33 In this way "the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience." 34

The United States Supreme Court, in Proffitt v. Florida, 35 held that Florida's new death statute sufficiently guided the sentencer's discretion and satisfied the concerns articulated in Furman. The death-sentenced petitioner in Proffitt, whose jury had recommended death, 36 argued to the Court that "[t]he jury's advisory sentencing verdict introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding its relevance. The verdict is merely an enigmatic statement that the jury recommended life or death. The basis for the recommendation need not be given." 37 The Supreme Court did not agree that the override injected arbitrary discretion into Florida's capital punishment scheme. The Court relied upon and quoted from a whether the jury recommended life or death. Id. § 921.141(3). The Florida Supreme Court has required, pursuant to its power to regulate practice and procedure, that judges imposing life sentences where the jury has recommended death must also support the sentence by written findings. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).


30. 283 So. 2d 1 (Fla. 1973).
31. Id. at 8.
32. Id.
33. Id.
34. Id.
36. Id. at 246.
Florida Supreme Court case holding that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."  

The Florida case relied upon by the United States Supreme Court was *Tedder v. State*, and the "virtually no reasonable person could differ" standard of *Tedder* has become the cornerstone of the Florida Supreme Court's override doctrine. As articulated in *Tedder* itself, the Florida override standard focuses on aggravating circumstances as the reasons for imposing death: "[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."  

More recent cases make clear that the *Tedder* standard applies equally to the mitigation side of the sentencing equation. The court in *Thomas v. State* explained that "[w]here there are one or more aggravating circumstances and the trial judge has found no mitigating circumstances sufficient to outweigh the aggravating circumstances, application of the *Tedder* rule calls for inquiry into whether there was some reasonable ground for a life sentence that might have influenced the jury to make such a recommendation." And the court concluded that "[w]here the jury recommendation is not based on some 'valid mitigating factor discernible from the record' the *Tedder* standard for a jury override is met." That the

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39. 322 So. 2d 908 (Fla. 1976).

40. It is fair to say that "[i]n the years since *Tedder* was decided, the court has] not wavered from the *Tedder* test and [has] consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty." *Thompson v. State*, 456 So. 2d 444, 447 (Fla. 1984). Though the court occasionally uses what apparently is shorthand in expressing the *Tedder* test, see e.g., *Barfield v. State*, 402 So. 2d 377, 382 (Fla. 1981); *Neary v. State*, 384 So. 2d 881, 885 (Fla. 1980); *Burch v. State*, 343 So. 2d 831, 834 (Fla. 1977), and sometimes does not cite *Tedder* when considering an override case, see *Profitt*, 428 U.S. at 250 n.7, the vast majority of the cases quote and apply *Tedder*.


41. *Tedder*, 322 So. 2d at 910 (emphasis added).

42. 456 So. 2d 454 (Fla. 1984).

43. *Id.* at 460. See also *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983) (jury's advisory verdict should not be overruled "unless no reasonable basis exists for the opinion").

44. *Thomas*, 456 So. 2d at 460 (quoting *Lusk v State*, 446 So. 2d 1038, 1043 (Fla. 1984)).
Florida Supreme Court gives full weight to the jury's consideration of possible mitigation is also suggested by *Lusk v. State*, where the court systematically applied *Tedder* first to the aggravating circumstances and then to the asserted mitigating circumstances. The court has also recently held that a life recommendation may be reasonable (and thus not subject to the override) even if based on mitigating circumstances not enumerated in the capital statute.

The *Tedder* standard has been applied to affirm a judge's override of a jury's recommendation of life where "some matter not reasonably related to a valid ground of mitigation has swayed the jury to recommend life, such as through emotional appeal, prejudice, or [something of] similar impact . . . ." Several Florida Supreme Court cases state that a sentencing judge may consider, in aggravation, information not presented to the advisory

45. 446 So. 2d 1038 (Fla. 1984).

46. *Id.* at 1043. See also *Thompson*, 456 So. 2d at 447-48. One commentator has argued that "[p]otentially mitigating conditions have figured prominently in the [Florida Supreme Court's] appellate review analysis only when the appellate court found insufficient grounds for the trial court's overruling a jury's recommendation of leniency." Dix, *supra* note 29, at 129.


48. *Thomas*, 456 So. 2d at 460; see also *Porter* v. State, 429 So. 2d 293, 296 (Fla.) ("defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution . . . might well have been calculated to influence the recommendation of a life sentence through emotional appeal"), cert. denied, 104 S. Ct. 202 (1983); *Bolander* v. State, 422 So. 2d 833, 837 (Fla. 1982) (improper for jury to base life recommendation on status of victims as drug dealers), cert. denied, 461 U.S. 939 (1983); *McCrae* v. State, 395 So. 2d 1145, 1154-55 (Fla.) (jury improperly found mitigating circumstance that defendant was under the influence of extreme mental or emotional distress at the time of crime), cert. denied, 454 U.S. 1041 (1981).
jury,\textsuperscript{49} while language in other cases is to the contrary.\textsuperscript{50} The court has also affirmed overrides based on its duty to ensure relative proportionality among comparable capital cases.\textsuperscript{51} In Barclay v. State\textsuperscript{52} and Miller v. State,\textsuperscript{53} for example, the court upheld jury overrides because equally culpable codefendants had properly been sentenced to death.\textsuperscript{54}

This body of override case law developed during the decade since Furman. On January 9, 1984, the United States Supreme Court granted certiorari\textsuperscript{55} to consider specifically whether the override aspect of Florida's statute violated the Constitution.\textsuperscript{56}

\textsuperscript{49} In Engle v. State, 438 So. 2d 803, 813 (Fla. 1983), cert. denied, 104 S. Ct. 1430 (1984), the court in deciding whether to follow a jury recommendation reasoned that "a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations." See also Porter, 429 So. 2d at 296; Smith v. State, 403 So. 2d 933, 935 (Fla. 1981); White v. State, 403 So. 2d 331, 339-40 (Fla. 1981), cert. denied, 103 S. Ct. 3571 (1983).

\textsuperscript{50} The court has said that it "cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors [by the jury]." Richardson, 437 So. 2d at 1095. In Richardson, the trial judge had overridden the jury's life recommendation because the jury "did not have the benefit of all of the evidence. . . ." Id. The Florida Supreme Court reversed the override because it could not "countenance the denigration of the jury's role implicit in these comments." Id. See also Chambers v. State, 339 So. 2d 204, 208 (Fla. 1976) (England, J., concurring). Cf. Miller v. State, 332 So. 2d 65, 68 (Fla. 1976) (rejecting trial judge's reasoning that he could consider mitigating evidence not available to jury); Messer v. State, 330 So. 2d 137, 142 (Fla. 1976) (same), cert. denied, 456 U.S. 984 (1981).

\textsuperscript{51} The concern about proportionality is reflected in situations where different juries hold equally culpable defendants guilty, yet one jury returns a life sentence while the other recommends death. The Florida Supreme Court's mandatory review of capital cases is designed in part to assure consistency among cases. See, e.g., Menendez v. State, 419 So. 2d 312, 315 (Fla. 1983); Brown v. Wainwright, 399 So. 2d 1327, 1331 (Fla.), cert. denied, 454 U.S. 1000 (1981); Slater v. State, 316 So. 2d 539, 542 (Fla. 1975); State v. Dixon, 283 So. 2d 1, 10 (1973), cert. denied, 416 U.S. 943 (1974).

\textsuperscript{52} 343 So. 2d 1266, 1271 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). The Florida Supreme Court later reconsidered its disposition of Barclay's direct appeal, finding that he had received ineffective assistance of counsel on his direct appeal. Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984). Ultimately, the court decided that the jury override had been improper in Barclay's case. Barclay v. State, 10 Fla. L.W. 299 (Fla. May 30, 1985).

\textsuperscript{53} 415 So. 2d 1262, 1263-64 (Fla. 1982), cert. denied, 459 U.S. 1158 (1983).


\textsuperscript{56} Prior to Spaziano v. Florida, 104 S. Ct. 3154 (1984), the Court had suggested that the power of a Florida judge to override a jury's life recommendation was constitutional. See Barclay v. Florida, 103 S. Ct. 3418 (1983); id. at 3428 (Stevens, J., concurring); Dobbert v. Florida, 432 U.S. 282, 294-96 (1977); Proffitt v. Florida, 428 U.S. 242, 252 (1976). But the issue was not presented or briefed in any of those cases. In Proffitt, both the judge and the
III. Spaziano v. Florida

Joseph Robert Spaziano was convicted in the Circuit Court of Seminole County, Florida of first degree murder. Following a penalty phase proceeding, a majority of the jury recommended a life sentence. The judge rejected this recommendation and imposed the death sentence, finding two aggravating circumstances: that the crime was especially heinous, atrocious, or cruel, and that the defendant had previously been convicted of felonies involving the use or threat of violence. On automatic appeal, the Florida Supreme Court affirmed the conviction, but remanded for resentencing because the trial judge had improperly considered a confidential presentencing report. The court remanded only for the trial court's reconsideration of sentence; a new advisory jury was not impaneled.

The trial judge again sentenced Spaziano to death, finding the same two aggravating circumstances he had found earlier. In deter-
mining that Spaziano had been previously convicted of violent felonies, however, the court relied upon Spaziano's prior convictions for rape and aggravated battery. These convictions had not been introduced to the sentencing jury at the initial proceeding because of the judge's mistaken belief that these offenses could not properly be considered due to a pending appeal. The Florida Supreme Court affirmed the death sentence.62

In the United States Supreme Court, Spaziano's challenge to the jury override drew heavily from Professor Stephen Gillers' article Deciding Who Dies.63 Professor Gillers argued that death is a qualitatively different kind of punishment from any other, in part because its justification in an individual case is essentially and uniquely retributive. Since the death penalty is society's expression of outrage at especially offensive conduct, the jury, as representative of the community whose outrage is being expressed, is more likely to reliably rank the offender and his offense on the yardstick of community outrage.64 As evidence of this proposition, Spaziano, again following Gillers, surveyed the overwhelming rejection in this country of judge sentencing in capital cases, while noting that judge sentencing in noncapital cases is all but universal.65

The United States Supreme Court found that this argument "obviously has some appeal,"66 but rejected it for two reasons. First, the Court found that retribution is not the sole justification for imposing death in individual cases; deterrence and incapacitation also have a role. Second, the Court reasoned that even assuming that retribution is what sets capital sentencing apart from other punishments, it does not follow that jury sentencing is required: "Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice

63. Gillers, supra note 8, at 39-74. Gillers was not writing about the jury override, although his thesis was that capital defendants have a right to jury sentencing. As the Court observed in Spaziano, however,
   [P]etitioner points out that we need not decide whether jury sentencing in all capital cases is required; this case presents only the question whether, given a jury verdict of life, the judge may override that verdict and impose death. As counsel acknowledged at oral argument, however, his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury. . . . We therefore address that fundamental premise.
   Spaziano, 104 S. Ct. at 3161 (citation omitted).
64. Gillers, supra note 8, at 47-59.
66. Spaziano, 104 S. Ct. at 3163.
can be expressed... The community's voice is heard at least as clearly in the legislature when the death penalty is authorized... This reasoning permitted the Court to acknowledge the facts that most states have jury sentencing in capital cases and that in most states a jury verdict of life imprisonment is binding, but to give these facts little significance. The Court concluded that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." 68

Justice Stevens, joined by Justices Brennan and Marshall, dissented from the majority's treatment of the jury override issue. They argued that juries as an institution are best able to determine whether the death penalty is a disproportionate punishment in a specific case:

Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decisionmaker that is best able to "express the conscience of the community on the ultimate question of life or death." 69

Justice Stevens also pointed out that Florida's stated reasons for the override counsel against its validity. The override was enacted after what one writer has called the "constitutional earthquake" 70 following Furman v. Georgia's invalidation of all existing death

67. Id. at 3164.
68. Id. at 3165. The Court also rejected two of Spaziano's other jury override arguments. First, the Court held that the override does not violate the double jeopardy clause of the fifth amendment. Id. Second, the Court found that the override had not been applied in Spaziano's case in an arbitrary or capricious manner. Id. at 3166.
69. Id. at 3167-68 (quoting Witherspoon, 391 U.S. at 519) (footnotes omitted); see also Spaziano, 104 S. Ct. at 3172-79 (Stevens, J., dissenting).
70. R. BERGER, DEATH PENALTIES 3 (1982). Justice Stevens did not characterize Furman in this way.
statutes. No one knew for certain whether a constitutional capital punishment scheme was even possible. "A legislative choice that is predicated on this sort of misunderstanding is not entitled to the same presumption of validity as one that rests wholly on a legislative assessment of sound policy and community sentiment."\textsuperscript{71} Justice Stevens also took issue with the majority's conclusion that judges possess special expertise in sentencing, reasoning that while this may be true of noncapital sentencing, it is not the case in capital sentencing because "the death penalty is unique . . . . The decision . . . is not one that has traditionally been entrusted to judges."\textsuperscript{72}

In \textit{Spaziano}, the United States Supreme Court held that the jury override does not offend the Constitution. The Court was willing to defer to the Florida legislature's judgment that the override is sound policy. The issue thus seems to have been exclusively consigned to the Florida legislature.

The topic is not a new one for Florida lawmakers. Legislation has been proposed repeatedly to repeal the override.\textsuperscript{73} In the 1984 legislative session, the House Committee on Criminal Justice held hearings on House Bill 820, which proposed amending the capital statute to render a jury's recommendation of a life sentence binding on the judge; a jury's vote for death would have remained subject to the override.\textsuperscript{74} The Committee voted ten to seven to strike the bill's enacting clause, thus foreclosing consideration of the bill.\textsuperscript{75} Override repeal legislation was again introduced in the 1985 legislative session.\textsuperscript{76} This Article addresses the possible concerns of

\begin{itemize}
\item \textsuperscript{71} \textit{Spaziano}, 104 S. Ct. at 3171 (Stevens, J., dissenting).
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} For example, Senator Gordon introduced Fla. SB 944 (1980).
\item \textsuperscript{74} The bill would have amended the statute to provide that "[i]n the event the recommendation of the majority of the jury is that the defendant be sentenced to life imprisonment, the court shall enter a sentence of life imprisonment." Fla. HB 820 (1984).
\item \textsuperscript{75} Fla. H.R., Committee on Criminal Justice, authors' unofficial transcription of tape recording of proceedings at 32 (Apr. 20, 1984) (on file, Florida State University Law Review) [hereinafter cited as Unofficial Transcript].
\item \textsuperscript{76} Fla. HB 273 (1985); Fla. SB 940 (1985). Senate Bill 940 was introduced by Senator Dunn and cosponsored by nineteen other Senators. The bill provided that in capital cases involving offenses committed after January 1, 1986, if "the recommendation of the majority of the jury is that the defendant be sentenced to life imprisonment, the court shall enter a sentence of life imprisonment." The bill was assigned to the Senate Corrections, Judiciary-Criminal, and Appropriations Committees. The Judiciary Committee, following hearings, voted in favor of the bill by a vote of 5-2, and the Corrections Committee did the same by a vote of 3-2. No action was taken by the Appropriations Committee or by the full Senate.
\end{itemize}
the legislators and advocates that the jury override be abandoned.

IV. THE DEATH DECISION AS AN EXPRESSION OF COMMUNITY OUTRAGE

It is the position of this Article that the only possible justification for capital punishment is retribution.77 The intuitive notion that the greater the punishment, the greater its inevitable deterrent value is belied by four decades of social science research demonstrating that capital punishment deters no more effectively than does life imprisonment.78 Rehabilitation is “obviously inapplicable legislation never reached the floor of the full House.


78. The trouble with this intuition is that the people who are doing the reasoning and the people who are doing the murdering are not the same people. You and I do not commit murder for a lot of reasons other than the death penalty. The death penalty might perhaps also deter us from murdering—but altogether needlessly, since we would not murder with or without it. Those who are sufficiently dissocialized to murder... are not responding to the world in the way that we are, and we simply cannot “intuit” their thinking processes from ours.


In any case, as Justice Stevens pointed out in his Spaziano dissent, the deterrence ration-
Incapacitation "would be served by execution, but in view of the availability of imprisonment as an alternate means of preventing the defendant from violating the law in the future, the death sentence [is] an excessive response to this concern."\(^{80}\) Retribution remains the central justification for decreeing that a particular human being should die.\(^{81}\)

In \textit{Gregg v. Georgia},\(^{82}\) the United States Supreme Court opined that "capital punishment is an expression of society's moral outrage at particularly offensive conduct" and that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."\(^{83}\) The Court approvingly quoted Lord Justice Denning:

\begin{quote}
Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.\(^{84}\)
\end{quote}

\(\text{\ \ale would not matter in the context of the jury override issue:}

[T]he deterrence rationale in itself argues only for ensuring that the death sentence be imposed in a significant number of cases and remain as a potential social response to the defined conduct. Since the decision whether to employ jury sentencing does not change the number of cases for which death is a possible punishment, the use of judicial sentencing cannot have sufficient impact on the deterrent effect of the statute to justify its use; a murderer's calculus will not be affected by whether the death penalty is imposed by a judge or jury.\(^{84}\)


79. \textit{Spaziano}, 104 S. Ct. at 3172 (Stevens J., dissenting).


81. \textit{See} Gillers, \textit{supra} note 8, at 54-56.


83. \textit{Id. at} 183, 184.

84. \textit{Id. at} 184 n.30 (citation omitted) (quoting \textit{ROYAL COMMISSION ON CAPITAL PUNISHMENT. MINUTES OF EVIDENCE} 207 (Dec. 1, 1949)). The roots of modern concepts of revenge are traced in Susan Jacoby's excellent book, \textit{Wild Justice}. Jacoby argues that retribution has a legitimate place in a system of criminal justice, but she also recognizes that the "death penalty is not merely legalized vengeance but vengeance taken to its extremity." S. Jacoby, \textit{Wild Justice} 235 (1983). Other writers explore retribution generally. \textit{See, e.g.}, W. Berns, \textit{For Capital Punishment} 144-175 (1979); M. Cohen, \textit{Reason and Law} 50 (1950); H. Packer,
Thus, the sentencer's task in a capital case is to determine where the defendant and his crime are located on the scale of community outrage. The Florida Supreme Court has repeatedly acknowledged that the jury's recommendation of life or death "represent[s] the judgment of the community as to whether the death sentence is appropriate" in a given case. Given that the purpose of a death sentence is to reflect community standards, judges should be denied the power of the override unless or until we are willing to evaluate prospective judges as to their propensity to embody communal consciousness.

A judge is a figure of respect in our society and therefore, at least to some extent, stands apart from it. Judges have quite distinct statutory qualifications. For example, to be a circuit judge in Florida, one must have been a member of the Florida Bar for at least five years and must not be more than seventy years of age. In addition to such formal requirements, there seem to be informal ones. A survey of the Florida circuit bench shows that it is over-

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As this Article was being prepared, an event of note caught the nation's attention. A commuter on a New York City subway shot and seriously wounded four youths who had accosted him for cigarettes and money. The event sparked a wave of national outrage—against the four young blacks who were shot. George Will, writing of the incident and its aftermath, also expressed why the death penalty is today so popular:

When a society becomes, like ours, uneasy about calling prisons penitentiaries or penal institutions and instead calls them "correctional institutions," the society has lost its bearings. If prisoners are "corrected," that is nice but it is an ancillary outcome. The point of imprisonment is punishment. The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable from the idea of vengeance, which is an expression of anger. No anger, no justice. A society incapable of sustained, focused anger in the form of controlled vengeance is decadent.


85. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); see also Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); Quince v. State, 414 So. 2d 185, 187 (Fla.), cert. denied, 459 U.S. 895 (1982); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981), cert denied, 456 U.S. 925 (1982); McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977). That jurors take their task seriously is suggested by the performance of the jury in the highly-charged "mercy killing" case of Roswell Gilbert. Although much of the public decried Gilbert's conviction of first degree murder as excessively harsh, and condemned his jury as unreasonable, the best account of the jury's deliberations, based on interviews with eleven of the twelve jurors, suggests otherwise. See May, NO WAY OUT, THE MIAMI HERALD (TROPIC MAGAZINE), July 7, 1985, at 12.

86. FLA. CONST. art. V, § 8.
whelmingly comprised of white males. While there are no available statistics concerning economic class, the realities of the expense of a law school education make it more probable than not that judges are from economically stable backgrounds. Even if the judge grew up in poverty, however, his five years as a member of the Florida Bar have probably secured him a healthy income as well as considerable status.

The composite sketch of the judge must be contrasted with that of the juror. To be eligible for jury duty in Florida one must be at least eighteen years of age, a citizen of the state, and a registered elector of his or her respective county. The eligible population is 52% female and 48% male, 13.8% Black and 8.8% Hispanic. The median annual income in Florida is $17,280, with at least 9.9% of the families surviving below the poverty line. At least 17.3% of the population is over the age of sixty-five, with 11.4% being over the age of seventy. Although these figures represent the entire population of Florida, for our purposes we assumed that the figures for eligible jurors would reflect a similar statistical composition.

These differences in potential objective traits between judges and jurors widen when the chasm between judges and capital defendants is measured. Apart from gender, judges and capital defendants tend to be at opposite ends of the spectrum. This is significant because people generally have compassion for persons most like themselves. One study has concluded that in practice, Florida juries have been less likely to be influenced by a capital defendant's race and class than have been Florida judges.

The requirement that a capital sentencing jury consist of twelve persons as compared with a solitary person acting as judge also contributes to the prospect that a cross section of the community will be making the sentencing decision. The United States Su-

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87. According to the Florida State Court Administrator's Office, as of December 31, 1984, there were 334 circuit judge positions with 4 vacancies, 8 Black, 18 women, and 1 Hispanic. Assuming that the Blacks and Hispanics are male, the statistics then show that 0.3% of the circuit judges are Hispanic, 2.41% of the judges are Black, and 5.2% of the judges are women. See computer printout accompanying Letter from H.B. Beasley, Director of Judicial Personnel Relations, to Michael Mello (Jan. 31, 1985) (on file, Florida State University Law Review).

88. See, e.g., D. KEN~NY, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW (D. Kairys ed. 1982).


90. 1984 Florida Statistical Abstract 15 table 1.34, 33 tables 1.40 and 1.41, 165 table 5.51, 168 table 5.52, 15 table 1.34 (all figures based on 1980 census).

91. Gillers, supra note 8, at 68 n.317 (quoting L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished manuscript)).
preme Court has surveyed the social science data and concluded that the likelihood of correct application of "the common sense of the community to the facts" in a criminal case increases with the number of decision makers. This is perhaps one reason for the Florida legislature's mandate that twelve persons compose a jury that will deliberate on a capital or other serious crime.

Juries, by definition, represent "a fair cross section of the community" and therefore reflect community values. The jurors need not speculate on community sentiment, because the response of the jury is the response of society. By contrast, the judge's role is not to speak for the community, but to apply the law impartially. Because of his unique status in society as well as his failure to reflect the objective qualifications of the average citizen, a judge may not be as finely calibrated to the fluctuations of community outrage as the average citizen-juror. Involvement in the criminal justice system on a day to day basis may serve to make judges callous not only to the horror of the crime but also to the ultimate issue of life or death. Further, it is questionable whether a jurist can ethically seek to speak for the community. The Canons of Judicial Ethics provide that a judge "should be unswayed by partisan interests, public clamor, or fear of criticism."

The imposition of capital punishment "rests on not a legal but an ethical judgment—an assessment of... the 'moral guilt' of the defendant." A judge is an expert in the law, not an ethicist. Society has made a determination that capital punishment in extreme

93. In Ballew, 435 U.S. at 233, the Court examined empirical data suggesting that "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result" (citation omitted). It is interesting that Ballew was an obscenity case, the sort of issue which, like the death decision, is uniquely based on evolving community standards.
94. Fla. Stat. § 913.10(1) (1983) provides that "[t]welve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases." See also Williams v. Florida, 399 U.S. 78 (1970).
96. Gillers, supra note 8, at 64.
98. Spaziano, 104 S. Ct. at 3174 (Stevens, J., dissenting).
cases is justified because it expresses the community's moral outrage. Thus, an appropriate cross section of the community whose outrage is being expressed should be given the responsibility for that decision.

One may accept the general proposition that jury sentencing is required in capital cases to ascertain the conscience of the community and yet argue that judicial sentencing is required for sentencing consistency. In Proffitt v. Florida, the United States Supreme Court upheld the facial constitutionality of Florida's death penalty statute and observed that "judicial sentencing should lead, if anything, to even greater consistency . . . , since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Yet capital cases in any one judicial circuit are relatively rare; the actual number of capital cases over which a single judge will preside will be proportionately smaller. The ordinary predicates which provide consistency in noncapital cases, such as frequency with which such an offense is tried, observation of the recidivism rate for the offense, experience with the local probation and parole officers, and general criminal experience, do not pertain in the same degree, if at all, to capital cases.

Moreover, judicial sentencing itself has been criticized in recent years for its high degree of inconsistency. The discretion of sentencing judges is being replaced with specific statutory guidelines and more limited options in determining terms of imprisonment. Florida's recent adoption of sentencing guidelines in non-capital cases occurred within this context. Finally, present practice already provides for the Florida Supreme Court to conduct proportionality review in each case, to determine whether the death sentence in that case is excessive compared to the norm of capital cases in the state.

100. Gillers, supra note 8, at 57-59.
102. Gillers, supra note 8, at 57-58.
In sum, experience or expertise is no substitute for the ability of a jury to reflect community sentiment in its decision whether to impose the death penalty. It is the jury that the framers of the United States Constitution sought to invest with special powers in order to protect individuals from the government.

V. THE ROLE OF THE JURY AS BULWARK BETWEEN INDIVIDUALS AND GOVERNMENT

Juries have a unique place in the theory and practice of the American criminal justice system. The jury of lay people legitimates the exercise of governmental power over the life or liberty of the citizen, and "places the real direction of society in the hands of the governed . . . and not in . . . the government." In deciding that the right to jury trial is fundamental and thus binding on the states through the fourteenth amendment, the Supreme Court reasoned that the right to a jury is "granted to criminal defendants in order to prevent oppression by the Government" and to protect "against arbitrary action . . . [by] the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." The jury trial right "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Thus, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen."

Justice Stevens, dissenting in Spaziano, and Professor Gillers, in his article Deciding Who Dies, argued persuasively that the reason for requiring a jury to decide guilt or innocence—"the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty—applies with special force to the determination that must precede a deprivation of life." The structure of the penalty

108. Id. at 156.
109. Id.
111. Spaziano, 104 S. Ct. at 3174-75 (Stevens, J., dissenting).
113. Spaziano, 104 S. Ct. at 3175 (Stevens, J., dissenting).
phase resembles a trial, "[b]ut more important than its procedural aspects, the life-or-death decision in capital cases depends on its link to community values for its moral and constitutional legitimacy."\textsuperscript{114}

The central function of the jury as a bulwark between an individual and the government is especially vital when the individual's life is at stake.

\section*{VI. The Issue of Cost and Efficiency}

This Article does not concede that monetary and efficiency considerations are proper in the context of deciding whether an individual should live or die. Courts have not found such variables determinative in other important areas of the law.\textsuperscript{115} Nevertheless, the Florida legislature is budget conscious. The bill analysis for HB 820, the override repeal legislation introduced by Representative James Burke in the 1984 Session, concluded that the "primary argument for the bill is economy."\textsuperscript{116} The bill analysis recognized a

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} The Court in recent years has emphasized non-financial "social costs" in defining the limits of remedies for certain previously recognized substantive rights. The most notable example of this is the Court's treatment of the fourth amendment exclusionary rule. See, \textit{e.g.}, United States v. Leon, 104 S. Ct. 3405, 3412-13 (1984); United States v. Havens, 446 U.S. 620, 627 (1980); United States v. Calandra, 414 U.S. 338, 349-52 (1974). Even in this limited context, a cost-benefit approach has drawn sharp criticism from dissenters who believe that "personal liberties are not based on the law of averages." \textit{Leon}, 104 S. Ct. at 3438 (Brennan, J., dissenting) (quoting \textit{Faretta} v. California, 422 U.S. 506, 834 (1975)).
\item Still, in deciding whether to give constitutional stature to a previously unrecognized substantive right, the Court has not found fiscal impact controlling. See, \textit{e.g.}, \textit{Ake} v. Oklahoma, 105 S. Ct. 1087 (1985) (right to psychiatrist as a defense expert); Roberts v. LaVallee, 389 U.S. 40 (1967) (right to transcript of preliminary hearing); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony trials); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript). In \textit{Argersinger} v. \textit{Hamlin}, 407 U.S. 25 (1972), the Court did note in the margin that the nation's legal resources were sufficient to implement a right to counsel in misdemeanor trials carrying the possibility of imprisonment, a right first recognized in that case. \textit{Id.} at 37 n.7. See also \textit{Ake} v. Oklahoma, 105 S. Ct. 1087, 1094-95 (1985) (discussing fiscal impact of recognizing indigent defendant's right to expert psychiatric assistance in preparing for capital trial). Justice Powell, while concurring with the result in \textit{Argersinger}, stressed the costs of the constitutional principle embraced by the majority, 407 U.S. at 58-63, but concluded that if the Constitution requires the rule announced by the majority, the consequences are immaterial. If I were satisfied that the guarantee of due process required the assistance of counsel in every case in which a jail sentence is imposed or that the only workable method of insuring justice is to adopt the majority's rule, I would not hesitate to join the Court's opinion despite my misgivings as to its effect upon the administration of justice. \textit{Id.} at 62.
\item \textsuperscript{116} Fla. H.R., Committee on Criminal Justice, HB 820 Bill Analysis at 2 (Mar. 26, 1984)
\end{itemize}
previously proffered conclusion that "[t]he strongest predictor of a favorable Florida Supreme Court decision is a jury recommendation of life imprisonment rather than death."117 The bill analysis cited statistics showing that

as of March 1, 1984, 347 persons had been sentenced to death under the current law. In 85 of those cases the trial judge overrode the jury's advisory sentence of life. Sixty-one of those cases have been reviewed by the Florida Supreme Court and only 19 were affirmed. Of those 19, 7 were later reversed by a federal court. Thus roughly 4/5 of the decisions to override the jury's recommended life sentence have been reversed on appeal.118

When Senator Edgar Dunn, sponsor of the Senate counterpart to HB 820,119 testified in support of HB 820 he stressed considerations of efficiency:

[(In) [s]eventy-five percent of the cases where the judge has over-

(on file, Florida State University Law Review) [hereinafter cited as Bill Analysis]. See also infra note 124.

With one exception, these reversals by the Florida Supreme Court were predicated on the trial court's erroneous disregard of the jury's verdict for life:

As of March 15, 1985, the Florida Supreme Court had reduced 39 cases with jury recommendations of life to sentences of life. We identified the decisions in these cases and read them to determine the court's reasons for reducing the cases to life. For each case we listed the court's reasons, and then compared them. This analysis revealed a strong and consistent pattern. The Florida Supreme Court clearly disagreed with the trial judge's reasoning in 38 of the 39 cases. That is, the Florida Supreme Court indicated that the jury was correct in its decision to recommend life, and the trial judge was incorrect in overriding the jury. In the last case, the court reduced the sentence to life due to an unusual situation involving different juries at the guilt and sentencing phases.


The House Staff Analysis noted that such a "large reversal rate may create a public perception that capital felons are escaping justice through technical and dilatory appeals. This perception undermines the integrity and credibility of the trial courts' determinations." Id. at 3.

turned [a] recommended sentence of mercy by [the] jury, the appellate courts have overturned that decision. I believe the inefficiency in the system that is only twenty-five percent right is compelling of our attention. I can’t imagine us as civil lawyers permitting a system to exist that is so frequently in error. If I thought that the judges hearing my cases on the civil side down in Daytona were going to be wrong seventy-five percent of the time, I’d be up there asking my fellow legislators to try to find a system that was a little more . . . reliable than one that produced such results.120

In addition to the error factor, the burden on the courts, especially the Florida Supreme Court, is a consideration. One former Justice of the Florida Supreme Court estimated that the court spent from thirty-five to forty percent of its time on death penalty cases, and two former research aides to Florida Supreme Court Justice Ben Overton have written that “[u]nquestionably, the most difficult and time-consuming class of cases which the court reviews is the direct appeal from a circuit court order imposing the death penalty.”121 A calculation made in 1983 concluded that the backlog of death penalty cases at the Florida Supreme Court was one hundred three. It would take the court approximately two and one-half years to clear this backlog. Thirty of these cases were pending precisely because a circuit judge had rejected a jury recommendation of a life sentence.122 If the power of judges to override the jury’s recommendation of a life sentence were repealed, it is suggested that the Florida Supreme Court’s caseload would be reduced by twenty-five percent.123

Precise monetary figures concerning the cost of the jury override are not available, though rough estimates have been ventured. Any conclusion that the cost of executing a person is less than the cost of housing that person in prison fails to take into account the expense of the appeal and postconviction system.124 At least one

120. Unofficial Transcript, supra note 75, at 7.
121. Letter from Michael L. Radelet, supra note 118, at 2; Borgognoni & Keane, supra note 9, at 329.
122. Skene, Judges, not juries, have last say on death sentences in Florida, St. Petersburg Times, Nov. 15, 1983, at 1-A, col.1.
123. Id.
124. “The point is not that it is cheaper to keep a particular person in prison for life than it is to execute him. It is, rather, that the system—the judicial and correctional process—will be less expensive if it is not burdened by a death penalty.” Nakell, The Cost of the Death Penalty, in The Death Penalty in America 241, 241 (H. Bedau ed. 1982). See also The Assembly Ways and Means Committee and the Division of the Budget, Capital
commentator has guessed that the cost of a direct appeal to the Florida Supreme Court is about one hundred thousand dollars.\textsuperscript{125} Multiplied by eighty-seven override cases, the cost to the state is $8.7 million. This cost cannot be offset by concomitant savings to the Department of Corrections, because two-thirds of that eight and one-half million dollars is "wasted" when the judge's override decision is reversed by the Florida Supreme Court and the state must sustain the successful appellant's life in prison.

The statistics derived from analyzing the jury override in terms of monetary cost and governmental efficiency support the conclusion that the override should be repealed. However, a more important reason to abandon the practice of allowing a judge to override a jury's recommendation of life exists.

\section*{VII. The Possibility of Executing an Innocent Person}

Although "the capital convicting and sentencing process has necessarily become extraordinarily careful to avoid executing those who are innocent or who deserve some sentence other than..."
death,” the fact remains that the capital punishment system is not foolproof. Errors are inevitable in a system conceived and governed by humans. Professor Charles Black has demonstrated that the problems of mistake and arbitrariness in capital cases are “not fringe-problems, susceptible to being mopped up by minor refinements in concept and technique, but are at the very core of the matter and are insoluble by any methods now known or foreseeable.”

The question is whether the risk of error in a given enterprise is acceptable or unacceptable given the gravity of the resulting consequences. A person who has been put to death by the state cannot be resurrected, even if it is later determined that the person was innocent of the convicted crime. For this reason, the United States Supreme Court’s capital cases over the past decade have attempted to reduce the risk of error in the death decision. The jury override, however, increases that risk to an intolerable level.

Jurors are instructed to determine the guilt of an accused beyond a “reasonable doubt.” There is, however, another type of doubt, often called “whimsical doubt,” i.e., doubt not rising to the level of reasonable doubt. If a juror entertained such a whimsical doubt, he or she would still be duty bound to convict the defendant. Yet such a doubt as to the guilt of a capital defendant is an important consideration in deciding whether to impose an irrevocable penalty. As the United States Court of Appeals for the Eleventh Circuit recently explained:

The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any

126. Greenberg, supra note 124, at 908.
127. C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 17-18 (2d ed. 1981); see also J. Frank & B. Frank, Not Guilty (1957); E. Borchard, Convicting the Innocent (1932); Amsterdam, supra note 78, at 349. See generally H. Bedau & M. Radelet, Miscarriages of Justice in Potentially Capital Cases (June 1, 1985) (unpublished manuscript).

Good examples are the cases of Freddie Pitts and Wilbert Lee, who were twice sentenced to death in Florida. They spent twelve years in Florida prisons, most of them on death row. In 1975, the Florida Cabinet, in its capacity as the state clemency board, pardoned Pitts and Lee on the basis of a finding that they were in fact innocent. See H. Bedau, The Death Penalty in America 239-41 (1982); G. Miller, Invitation to a Lynching (1975). “[O]nly the general constitutional attack which we were then mounting upon the death penalty in Florida kept Pitts and Lee alive long enough to permit discovery of the evidence of their innocence.” Amsterdam, supra note 78, at 349. The constitutional attack resulted in a ten-year moratorium on executions. See supra note 3. That constitutional attack “is now dead, and so would Pitts and Lee be if they were tried tomorrow.” Amsterdam, supra note 78, at 349.
doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason —and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.

The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.\textsuperscript{128}

The Model Penal Code also recognizes that residual doubt concerning guilt is an appropriate consideration during the penalty phase of a capital case. Model Penal Code article 210.6 provides for a separate penalty proceeding before the trial judge and jury during which evidence is presented concerning the enumerated mitigating and aggravating factors. However, the trial judge may forego the penalty phase and impose a sentence of life imprisonment if the court is satisfied that “although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.”\textsuperscript{129} The 1980 comments to the Code explained this provision as “an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.”\textsuperscript{130}

Thus, the drafters of the Model Penal Code considered doubt relating to guilt to be important enough to preclude the imposition of the death sentence, notwithstanding the hypothetical existence of a dozen aggravating circumstances. The British Royal Commission on Capital Punishment took a similar position regarding reprieves when there remains a “scintilla” of doubt as to guilt.\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
  \item[129.] \textit{Model Penal Code} § 210.6(1)(f) (1980).
  \item[130.] \textit{Id.} at comment 5.
  \item[131.] \textit{Royal Commission on Capital Punishment} 1949-1953, para. 39, at 12 (“There are
The American state courts which have considered the relevance of less than reasonable doubt have not adhered to the liberal Model Penal Code view. However, at least three states, Georgia, Colorado, and California, have recognized that evidence as to guilt is relevant at the penalty phase. In Blankenship v. State, a unanimous Georgia Supreme Court reversed the defendant's second death sentence. The first sentence had been previously vacated by the Georgia Supreme Court, and the case remanded for resentencing. During the resentencing proceeding, the judge excluded all evidence of guilt or innocence, stating that the jury, which in Georgia possesses the exclusive right to impose a death sentence, would not need to "retry" the guilt issue. In vacating this second death sentence, the Georgia Supreme Court held that

[w]hen the sentencing phase of a death penalty case is retried by a jury other than the one which determined guilt, evidence presented by the defense, as well as evidence presented by the state, may not be excluded on the ground that it would only "go to the guilt or innocence of the defendant." In essence, although the resentencing trial will have no effect on any previous convictions, the parties are entitled to offer evidence relating to circumstances of the crime.

The Colorado Supreme Court, in People v. District Court, held that Colorado's death penalty statute was unconstitutional, in part because "if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all." In People v. Terry, a pre-Furman case, the California Supreme Court observed that "[t]he lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." In Florida, the Supreme Court has not granted the whimsical doubt theory any credence. Although there are some pre-Furman cases which are possibly to the contrary, Florida's modern stance
is set out in *Buford v. State*: 139

A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

... Here the defendant committed the murder or Fat Boy did it. This question was settled by the verdict of guilty. 140

Florida's disregard of the relationship between the jury's doubt about guilt and the jury's recommendation of a life sentence discounts a case such as *Jaramillo v. State*. 141 In *Jaramillo*, the Florida Supreme Court reversed two convictions for first degree murder because it found that the circumstantial evidence introduced by the state was legally insufficient to support the guilty verdicts. The convictions and death sentences were accordingly vacated and Jaramillo was ordered released from custody immediately. The reported Florida Supreme Court opinion omits the fact that these sentences were imposed by a Dade County circuit judge despite the fact that the jury *unanimously* recommended a life sentence. 142 It is extremely plausible that the jury entertained doubts about the guilt of Jaramillo and thus declined to impose death sentences for a savage double murder.

As noted at the outset of this Article, the first execution of a person whose death sentence had been imposed as a result of the jury override was Ernest Dobbert. Dobbert was convicted of brutally torturing and murdering his own daughter. The jury recommended a life sentence by a vote of ten to two. 143 Judge R. Hudson Oliff disregarded the recommendation and imposed the death

139. 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982).
140. Id. at 953. This aspect of *Buford* was recently reaffirmed in *Burr v. State*, 466 So. 2d 1051, 1054 (Fla. 1985). *See also Sireci v. State*, 399 So. 2d 964, 972 (Fla. 1981), cert. denied, 466 U.S. 984 (1982).
141. 417 So. 2d 257 (Fla. 1982).
At Dobbert's trial, much evidence was introduced concerning Dobbert's violence toward his children. The conviction for first degree murder, however, rested solely on the testimony of his thirteen-year-old son. This testimony was later recanted when the son became an adult and stated in an affidavit that his trial testimony was the result of hypnotism, thorazine, and his attempt to please the staff at the children's home because they were good to him in a way he had not known for years. Although Dobbert undoubtedly committed horrible acts upon his children, there exists real doubt concerning whether Dobbert intentionally committed the first degree murder of his daughter. Dobbert's execution does not remove that doubt.

VIII. APPELLATE REVIEW DOES NOT CURE THE OVERRIDE

Appellate review of override cases results in approximately two-thirds of those death sentences being vacated by the Florida Supreme Court. However, even if society is willing to settle for proportional justice and sacrifice the Dobberts to save the Jaramillos, the appellate process cannot ensure that death sentences appropriately express the moral conscience of the community.

In Tedder v. State, the Florida Supreme Court held that before a death sentence will be affirmed despite a jury's verdict recommending life imprisonment "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." This means that the facts support-

144. As of mid-1983, Judge Olliff had sentenced four defendants, including Dobbert, to death. In every one of these cases, the jury had returned a recommendation of life imprisonment. See Barclay v. Florida, 103 S. Ct. 3418, 3440 (1983) (Marshall, J., dissenting).
146. Similarly, in his separate opinion in Spaziano, Justice Stevens noted that while the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body. It may well be that the jury was . . . sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that the jury concluded that a sentence of death could not be morally justified in this case.
Spaziano, 104 S. Ct. at 3178 n.34 (Stevens, J., dissenting).
147. See supra note 118.
148. 322 So. 2d 908 (Fla. 1975).
149. Id. at 910.
ing the aggravating circumstances must be such that no reasonable person could disagree that they support a sentence of death and also means that the facts supporting mitigating circumstances in favor of a life sentence be so clearly nonexistent that no reasonable person could find them.150

The problems with the Tedder standard are manifold. At first blush the standard may seem similar to that for a judgment of acquittal.151 Yet unlike measuring the legal sufficiency of evidence to sustain a verdict, evidence supporting the decision of whether the defendant should live or die is not subject to a strictly factual analysis. This is so in part because the yardstick used by the jury is its sense of moral outrage at the defendant and his act.

Second, the Tedder standard seeks to judge whether the jurors are acting as reasonable persons although "mercy, of course, can never be a wholly rational, calculated, and logical process."152 Mercy is, by nature, a subjective determination. The standards formulated to guide the sentencer's discretion are "intended to prevent caprice in the decision to inflict the penalty; the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice."153

A third problem with the Tedder standard is that in Florida the jury does not make specific findings concerning its verdict for life imprisonment.154 Thus, ".[l]ike Adam Smith's invisible hand, the process of weighing evidence in capital sentencing is observable only in its results."155 Because the jury's recommendation consists merely of an opaque statement reflecting that a majority of the jurors are in favor of either a life sentence or death, the sentencing judge and the Florida Supreme Court can only speculate as to the

150. See supra notes 41-47 and accompanying text.
154. Compare Fla. Stat. § 921.141(3) (1983) (judge imposing a death sentence must support sentence with findings) with id. § 921.141(2) (no comparable provision as to jury recommendation).
underlying basis of the verdict. Most often, the court will not be aware of the extent of the majority, unless the trial judge has asked the jury foreperson to reveal how many jurors composed the majority.\textsuperscript{156} In no event will the appellate court be aware of which jurors recommended life or death, unless the verdict is unanimous. The appellate court will not have had the opportunity to observe the demeanor and attentiveness of the jurors, just as it does not have the opportunity to observe the defendant who is the subject of the jury's verdict. In sum, the Florida Supreme Court has no basis upon which to determine whether the jurors acted as reasonable persons, even if the decision made was a reasonable one.

Fourth, "reasonable persons can differ over the fate of every criminal defendant in every death penalty case."\textsuperscript{157} In every jury override case, a circuit judge and a jury composed of twelve men and women have in fact disagreed on the appropriateness of the death sentence. In two-thirds of the cases in which the judge overrides the jury's recommendation of life, the Florida Supreme Court disagrees.\textsuperscript{158} In seventeen of the twenty-four cases in which the Florida Supreme Court has affirmed a trial judge's override, at least one Justice of the Florida Supreme Court has dissented.\textsuperscript{159} In

\textsuperscript{156} This usually does not happen. See Brief of Petitioner, appendix B, Spaziano v. Florida, 104 S. Ct. 3154 (1984) (of 85 reported overrides, the jury vote was known in only 25 cases).

\textsuperscript{157} Spinke\textsuperscript{U}ink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

\textsuperscript{158} See supra note 118 and accompanying text.

virtually every case in which the Florida Supreme Court has upheld the jury override, there has been at least one possible mitigating circumstance evident from the face of published opinions.160


160. See Heiney v. Florida, 105 S. Ct. 303, 304 (1984) (Marshall, J., dissenting from denial of certiorari) (doubt about guilt) (denying certiorari from Heiney v. State, 447 So. 2d 210 (Fla. 1984)); Lusk v. State, 446 So. 2d 1038, 1045 (Overton, J., dissenting) ("The jury could have reasonably believed the appellant's testimony that he had been threatened by the victim and feared for his life."); cert. denied, 105 S. Ct. 229 (1984); Roulty v. State, 440 So. 2d 1257, 1266 (Fla. 1983) (domestic difficulties; girlfriend left defendant and spent the night with victim; possible mitigating circumstances of age of defendant, lack of prior significant criminal activity and extreme emotional disturbance), cert. denied, 104 S. Ct. 3591 (1984); Porter v. State, 429 So. 2d 293, 296 (Fla.) (possible mitigating circumstances of age, marital and parental status, lack of significant history of prior criminal activity and employment history), cert. denied, 104 S. Ct. 202 (1983); Bolander v. State, 422 So. 2d 835, 837 (Fla. 1982) (disparity between sentences received by defendant and codefendant; weakness of evidence of guilt which was based on testimony of codefendant), cert. denied, 103 S. Ct. 2111 (1983); Stevens v. State, 419 So. 2d 1058, 1065 (Fla. 1982) (McDonald, J., dissenting) ("The jury could have concluded that Stevens participated in the robbery and rape, but that [the codefendant] was the sole perpetrator of the homicide."); cert. denied, 459 U.S. 1228 (1983); Miller v. State, 415 So. 2d 1262, 1264 (Fla. 1982) (McDonald, J., dissenting) (The homicide was "the culmination of a drug and alcohol infested party . . . A psychologist testified that Miller [had] a weak ego, that he [was] a 'follower,' that he [was] whatever his environment [dictated]."), cert. denied, 459 U.S. 1158 (1983); Buford v. State, 403 So. 2d 943, 953 (Fla. 1981) (doubt about guilt), cert. denied, 454 U.S. 1163 (1982); White v. State, 403 So. 2d 331, 339-40 (Fla. 1981) (defendant was an accomplice in a capital felony committed by another and his participation was rather minor); Zeigler v. State, 402 So. 2d 365, 376 (Fla. 1981) ("The evidence establishes . . . [t]he Defendant has no significant history of prior criminal activity."); cert. denied, 455 U.S. 1035 (1982); McCrae v. State, 395 So. 2d 1145, 1155 (Fla. 1980) (doctor testified that defendant was under the influence of extreme mental or emotional disturbance at the time the crimes were committed), cert. denied, 454 U.S. 1041 (1981); Johnson v. State, 393 So. 2d 1069, 1075 (Sundberg, J., dissenting) ("There is nothing about the actual homicide itself to set it apart from the norm of murders—a single gunshot to the chest with death ensuing instantly. [And] . . . the fusillade of pistol shots [was] initiated by the victim."); id. at 1076 (McDonald, J., dissenting) ("The victim initiated the shooting . . . The testimony of the psychologist could lead one to believe that the defendant's apparent malevolent act against the victim was in fact an unplanned reaction to being fired at."); cert. denied, 454 U.S. 882 (1981); Dobbert v. State, 328 So. 2d 433, 436-37 (Fla. 1976) (a period of mental stress preceding the homicide); id. at 444 n.* (England, J., dissenting) ("[B]y imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people could differ with him."); aff'd on other grounds, 432 U.S. 282 (1977); Hoy v. State, 353 So. 2d 826, 833 (Fla. 1977) (sentencing judge found defendant's age and lack of prior criminal activity to be mitigating factors) (Governor and Cabinet subsequently commuted sentence to life), cert. denied, 439 U.S. 420 (1977); Barclay v. State, 343 So. 2d 1266, 1271 (Fla. 1977) (age), cert. denied, 439 U.S. 892 (1978); Douglas v. State, 328 So. 2d 18, 18 (love triangle in which defendant had prior relationship with victim's wife and lived with her from time to time), cert. denied, 429 U.S. 871 (1976); Sawyer v. State, 313 So. 2d 680, 680-81 (Fla. 1975) (unintentional killing in the course of a robbery to support a two-hundred dollar per day heroin habit) (Governor and Cabinet subsequently commuted sentence to life), cert. denied, 428 U.S. 911 (1976); Gardner v. State, 313 So. 2d 675, 678-79 (Fla. 1975) (Ervin, J., dissenting) (husband
Unless one is willing to conclude that majorities of various juries, numerous circuit judges and all the justices of the Florida Supreme Court are not "reasonable persons," their differing conclusions in capital cases militate against any reasonable person accepting the validity of the Tedder standard.

IX. Symmetry Between Life Overrides and Death Overrides

The Florida capital sentencing scheme which allows the trial judge to override a jury's recommendation of a life sentence also allows the judge to override the jury's recommendation of a death sentence. Given that the jury is the best calibrator of retribution, the issue which presents itself is whether the judge should be empowered to override the jury's recommendation of the death sentence. To disallow the override of a jury recommendation of life or death would render Florida's system similar to that employed in thirty other states, simply a scheme of jury sentencing.161

This issue surfaced during the hearings on HB 820 proposing a repeal of the jury override prompting the following exchange:

Mr. McEwan: Senator, I understand this bill, and I understand where you're coming from, but if the [jury] recommends mercy or life imprisonment, then the [judge] has to grant that. But if the jury recommends death, he doesn't have to go by that. Senator [Dunn]: That's right.

Mr. McEwan: Philosophically, where are we coming from? Let's put it in there that the judge, that the jury says death, there will be death. Do you mean, do you see a problem with that, I have trouble with that . . . .

. . . . Life's life, but death can be life also.

Senator Dunn: I would be very happy to see that. Because I think that has a symmetry to it that is appealing.

. . . .

The problem . . . with it is that as everyone that I know who has read Furman has come to the conclusion that you have to have a superintendent authority to intervene between that determination by the jury that death is appropriate in a given case. In other words, you have to have that judge be able to intervene.

murders wife in context of alcoholism and marital tension), vacated on other grounds, 430 U.S. 349 (1977).

161. See supra note 7.
Capital Punishment

You don't have to have it for the other side.\textsuperscript{162}

Despite Senator Dunn's conclusion, a jury sentencing statute would pass constitutional muster, providing that the jury made specific findings of aggravating and mitigating circumstances, that the Florida Supreme Court conducted a proportionality review, that the courts retained their inherent power to correct legal errors occurring at the sentencing proceeding, and that unanimity was required for death sentences.\textsuperscript{163} Such a statute has withstood United States Supreme Court scrutiny,\textsuperscript{164} and jury sentencing is the predominant method of sentencing in states which administer the death penalty.\textsuperscript{165}

While a judge's decision to impose a life sentence when the jury has recommended death is constitutional under the present Florida system, the inquiry as to the advisability of such a practice remains. It is the position of this Article that the death override serves an important purpose and should not be rejected. As one commentator, apparently generally in favor of the death penalty, has noted: "permitting a judge to reject death and grant life is justified. The community sometimes becomes inflamed on debatable facts, and raises the hue and cry for vengeance. The judge should be permitted to act as a detached overseer to restrain passion-numbed judgments."\textsuperscript{166} Such reasoning is generally proffered in favor of retaining the death override. When the Florida Supreme Court first considered Florida's post-Furman statute, the court focused on the override provision solely in terms of the judge overriding a jury's recommendation of death. The court concluded that "the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."\textsuperscript{167}

This Article has previously concluded, however, that judges possess no special expertise on the issue of imposing the death penalty and are less likely to embody the community sentiment that is at

\textsuperscript{162} Unofficial Transcript, supra note 75, at 12-13.
\textsuperscript{163} Of the 30 states with jury sentencing, 23 explicitly provide for a sentence of life imprisonment unless the jury unanimously votes for death. See Gillers, supra note 8, at 102-19.
\textsuperscript{165} See supra note 7.
\textsuperscript{166} Little, Another View, 36 U. Fla. L. Rev. 200, 204 (1984).
\textsuperscript{167} State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).
the core of the death decision. Unfortunately, case histories and statistics relevant to the issue of death override are not available. It is therefore very difficult to assess the number and type of cases in which a judge either has overridden or will override a jury's recommendation. The judge must make written findings when a sentence of life imprisonment is imposed despite a jury's recommendation of death, but this order, unlike an order imposing the death sentence, is not directly appealable to the Florida Supreme Court.

Allowing judges to override death sentences, but not life sentences, and effectively insulating the judge's death override from appellate review, would apparently create an irrational asymmetry in the system. Such inequality would be intolerable if the criminal justice system were an abstractly rational system. It is not.

The foundation of Anglo-American criminal jurisprudence is expressed in the words of the sixteenth-century jurist, Sir John Fortescue: "Indeed, I would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned, and suffer capitally." The system is one which presumes one is innocent until proven guilty and not one in which a person possesses no presumptions and must be proven either guilty or innocent.

While the existence of a death override without a similar provision for a life override creates an asymmetry, it is "an asymmetry weighted on the side of mercy." Such an "asymmetry is offensive, however, only if one assumes that the grant of mercy to some,

168. See supra notes 77-104 and accompanying text.
169. Justice Stevens noted in Spaziano that "[i]f there are any cases in which the jury override procedure has worked to the defendant's advantage because the trial judge rejected a jury's recommendation of death, they have not been brought to our attention by the Attorney General of Florida, who would presumably be aware of any such cases." Spaziano v. Florida, 104 S. Ct. 3154, 3171 n.14. (1984) (Stevens, J., dissenting). At the hearings on Fla. HB 820 (1984), Chairperson Martinez told the committee that he had instructed his staff to obtain information on death overrides but that "[i]t's not easily available. It's going to almost require the State [A]ttorneys going through their files and their cases . . . ." See Unofficial Transcript, supra note 75, at 15.
170. Capital cases are appealed automatically to the Florida Supreme Court. FLA. STAT. § 921.141(4) (1983).
based on their particularized circumstances, somehow abridges the
constitutional rights of others whose particular circumstances do
not inspire mercy.\textsuperscript{173} Asymmetry in the death penalty has been
dclared constitutionally viable in the context of limiting aggravat-
ing circumstances to those enumerated in the statute while al-
owing mitigating circumstances to include any circumstance,
whether listed by the statute or not.\textsuperscript{174} Similarly, in the guilt phase
of capital cases as well as in nonecapital cases, a judge may enter a
judgment of acquittal despite the jury's rendition of a guilty ver-
dict,\textsuperscript{175} but there is no provision allowing a judge to adjudicate a
defendant guilty where the jury has rendered a verdict of not
guilty. This fundamental principal should be extended to the pen-

\textsuperscript{173} Washington v. Watkins, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981), cert. denied, 456

\textsuperscript{174} The Florida Supreme Court has held that "aggravating circumstances enumerated
in the statute . . . are exclusive; no others may be used for that purpose." Purdy v. State,
343 So. 2d 4, 6 (Fla.), cert. denied, 434 U.S. 847 (1977); see also Miller v. State, 373 So. 2d
882, 885 (Fla. 1979); Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977). Though this principle
is not required by the United States Constitution, Barclay v. Florida, 103 S. Ct. 3418, 3424-
25 (1983), it appears to be firmly established law in Florida. By contrast, the federal Consti-
tution does mandate that the capital sentencer be permitted to consider and give indepen-
dent mitigating weight to any relevant mitigating circumstance, even if not enumerated in
the capital statute. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438
U.S. 558, 604 (1978)). See also supra note 47.

\textsuperscript{175} See supra note 151. One component of the jury's death decision could, consistent
with our argument, remain subject to review by the trial judge even under a "both ways
binding" system of jury sentencing. In the manner of a special verdict, the jury's determina-
tion of specific aggravating and mitigating circumstances could properly be scrutinized by
the court, since these, for the most part, refer to objectively ascertainable facts. See, e.g.,
Fla. Stat. § 921.141(5)(a) (1983) (capital felony committed by person under sentence of
imprisonment); id. § 921.141(5)(b) (defendant previously convicted of another capital fel-
ony); id. § 921.141(5)(f) (capital felony committed for pecuniary gain); but see id. §
921.141(5)(h) (capital felony "especially heinous, atrocious or cruel"); Mello, supra note 58.
To the extent that judges have greater expertise in factfinding, the jury's findings of fact
against the defendant at the penalty phase should be subject to corrective action, as they
are at the guilt phase.

The findings of aggravating and mitigating circumstances constitute only one step in the
death decision, however. Even if aggravating circumstances are found to exist, they must
still be weighed against mitigating circumstances to determine if death is the appropriate
penalty in the given case. It is here that the governing standard is moral and ethical, rather
than legal, and it is here that a single judge has no apparent competence to defy the judg-
ment of the community's representatives.

This bifurcation of the penalty determination could be implemented in several different
forms. For example, after the jury has rendered its verdict and specified the aggravating
circumstances it has found, the court could review those circumstances to determine if they
were supported by the record; if not, the judge would then require the jury to recommence
deliberations. A more efficient mechanism would be for the court to decide, in advance of
jury deliberations, which aggravating circumstances would be supported by the record and
then to instruct the jury on only those aggravating circumstances.
alty phase.

Therefore, weighting the jury override in favor of life is not only constitutionally permissible, but in accordance with the tenets of Anglo-American jurisprudence. It is the life override that is the historical anomaly.

X. TINKERING WITH THE STATUTE

An ostensible legislative and gubernatorial anxiety is that any changes to the death penalty statute would render the statute's constitutional validity questionable. The offices of the Florida Attorney General, various State's Attorneys and the Governor have argued that any "tinkering with the statute" is inadvisable and would generate challenges by Death Row inmates. The saying "if it ain't broken, don't fix it" is popular in the Florida legislature. The problem with applying this homily to the death penalty statute is that legislators equate constitutionality with perfection. Imperfect statutes may be constitutional, but that is an insufficient justification for failing to improve a statute, especially when that statute governs who shall die.

A. The History of the Override

Florida's statutory provision that a judge may override the life sentence recommendation of a jury is not based upon any judgment, either legislative or judicial, that the override serves an important state interest. Rather, the override is a product of the state's misapprehension that it was required by the United States Supreme Court's decision in Furman v. Georgia. The Furman decision consists of a terse per curiam disposing of the cases at bar, followed by nine separate opinions of the individual Justices. No Justice in the five-person majority joined in the opinion of any other. Furman continues to engender confusion and to provide fer-

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176. See Unofficial Transcript, supra note 75, at 16 (statement of Mr. Arnold) (asking, "[will repeal] create another avenue of appeal? I suspect it will, or will it automatically take them off of Death Row?"); id. at 20 (statement of Mr. Stone) (arguing that repeal would give rise to equal protection and due process challenges by all death-sentenced inmates); id. at 24 (statement of Mr. Weidinger, representing Governor Graham) (endorsing remarks of Mr. Stone).

177. Compare id. at 2 (testimony of Senator Dunn) ("I think it is broke and therefore needs to be fixed.").

178. 408 U.S. 238 (1972) (per curiam).

tile material for commentators.180

The statutes at issue in *Furman* were held unconstitutional because they lacked standards to distinguish who should live from who should not. The Court rejected capital systems that facilitated arbitrariness. Justices Brennan and Marshall would have held the death penalty per se unconstitutional.181 Justices Stewart and White reasoned that arbitrariness voided the capital punishment statutes before the Court.182 Justice Douglas stressed that the evil that inheres in a standardless system is that it encourages sentencers to give legal and irremedial effect to their race, class, and other prejudices.183 Where the law grants unfettered discretion, it is not surprising that such discretion will be exercised by the powerful against the less powerful, including the poor and minorities. Florida's override was passed in direct response to the diverse concerns expressed in the various *Furman* opinions.

At the time of *Furman*, Florida was in the process of amending its 1872 capital punishment law which for the previous century had entrusted juries to make the determination whether or not to impose the death sentence. *Furman* created much confusion in Florida, as elsewhere, and the two houses of the Florida legislature divided sharply on the appropriate response to the Supreme Court's opinions.184 The Florida Senate interpreted *Furman* as requiring jury consideration of statutorily enumerated aggravating and mitigating circumstances, followed by jury rendition of an advisory opinion reached by majority vote. Under the Senate's scheme, a verdict for life imprisonment would be binding, but a verdict for the death penalty would be subject to the judge's override.185

The Governor, Attorney General, and Florida House of Repre-
sentatives interpreted *Furman* differently. According to the House Bill, the jury would be entirely excluded from the penalty phase.\(^{186}\) Faced with such opposing views, a conference committee formulated a compromise which became the law of the state.\(^{187}\) This final version included aggravating and mitigating circumstances and the jury's rendition of an advisory sentence which the judge could override in favor of either life or death.\(^{188}\)

At least one legislator privy to that confusion now believes that the judge's override in favor of death was a mistake.\(^{189}\) Although the Florida Supreme Court has perpetuated that mistake by opining that "allowing the jury's recommendation to be binding would violate *Furman*,"\(^{190}\) the United States Supreme Court has made it clear that "sentencing by the trial judge certainly is not required by *Furman*"\(^{191}\) and that "[n]othing in any of [the Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution."\(^{192}\) *Furman* invalidated prior sentencing schemes because they allowed the sentencer unbridled discretion to impose death and not because they allowed the jury discretion to extend mercy.

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186. *Id.* at 14.

187. *Id.* at 15. Senator Dunn, one of the drafters of the resulting statute, described the conference committee thusly:

  We went to Conference Committee and I can remember to this day that Conference Committee going to about one-thirty or two o'clock in the morning. I remember talking to some of the members of the Senate whom I respect today and did then, and some of them are still in the Senate. And going out in the hall and I remember one of them asking me, do you really think it is better to go to judges as opposed to the jury. No, we don't. We think we have to because *Furman* requires it. What we sat down or really at that point stood there and worked out was a compromise, a cross if you will, a hybrid between what was done in the Senate version and the House version. And that cross was the utilization of the jury as a recommending authority on the question of the ultimate sentence.

  . . . The question to me from the [S]enator was, well how do we try to make the consistent role of the, how we try to make the role of the jury consistent with the tradition in this state? And frankly, we found no way to do it. At that time, we were of the opinion that we had to have symmetry in the system, that we had to therefore permit a judge to overturn a recommended sentence of mercy by the jury.

Unofficial Transcript, *supra* note 75, at 5-6.


189. Unofficial Transcript, *supra* note 75, at 6 (testimony of Senator Dunn).


191. *Spaziano*, 104 S. Ct. at 3164 n.8

B. Effect of the Override’s Repeal

Even assuming that Florida legislators recognize that the override provision of the capital statute was passed due to a misapprehension of constitutional requirements and assuming further that these legislators are convinced that allowing a judge to override a jury’s recommendation of life is inconsistent with a criminal justice system weighted in favor of mercy, legislators express genuine concern about the practical impact of repeal of the override. This concern is focused upon the effect of the override’s repeal upon the persons sentenced to death during the life override’s tenure.

Those inmates whose juries recommended the death penalty and who were thereafter accordingly sentenced to death by the trial judge would have no apparent status to object to the amendment. The present death-recommended inmates would be in no worse a position after repeal of the life override.

The effect of repeal on the seventeen inmates who presently reside on Death Row because a judge overrode a jury’s recommendation of a life sentence, and whose death sentences have been affirmed by the Florida Supreme Court, is more problematic. This issue was debated seriously during the hearings on House Bill 820, which proposed repeal of the life override. The legal issue centered around the constitutional prohibition of ex post facto laws.

While it is clear that the ex post facto clause only bars changes that work to the disadvantage of criminal defendants and that the clause only precludes modifications in substantive law and not changes in procedural law, the testimony on House Bill 820 conflicted on the issue of whether the override was properly categorized as substantive or procedural. State Attorney for the Nineteenth Judicial Circuit, Robert Stone, expressed his concern for the then twelve inmates on Death Row (following Florida Supreme Court affirmation) due to a life override thusly:

There is no question in my mind that the United States Supreme Court would immediately commute those sentences to life. . . . [W]hat would be more substantive than life or death? You can call it procedure if you want to, but it’s substantive, let’s face it. What they would say is, that now in Florida there is a class of people that are not being sentenced to death, and yet

193. Unofficial Transcript, supra note 75, at 15-16 (remarks of Representative Arnold).
196. These inmates would appear not to have a valid claim based on the equal protec-
you're taking twelve people who were not given this opportunity prior to passing this law and I submit that a federal court would immediately commute those sentences to life. They would have good grounds to. No question about it. 197

Senator Dunn, a supporter of the repeal of the life override as well as a supporter of the death penalty, testified to the contrary:

In my opinion, this would not affect retroactively the convictions of anyone for the reason that really this is a procedural matter, number one, and in my judgment is not substantive. It is a procedure where substantive rights are determined. Next, I would suggest to you that the problem, and there is a serious problem as to how you deal with those individuals, I think the only avenue is executive clemency. I think the Governor would have a tough
time, but I believe they were convicted under the law . . . and they ought to be given the judgment of the law as it existed at that time and still exists, I would say [it] would not affect them at all. What we’re looking for is prospective application. 198

The law supports Senator Dunn’s conclusion that an amendment repealing the override would not create an ex post facto law. First, repeal of the override is not a change that operates to disadvantage defendants. Second, the amendment is a change in procedural law. In Dobbert v. Florida, 199 the United States Supreme Court considered a challenge to a death sentence based upon the ex post facto clause. At the time Dobbert committed his crimes, Florida did not have a constitutional death penalty statute. 200 Several months after Dobbert’s offense, Florida enacted the statute that was upheld in Proffitt v. Florida. 201 Dobbert was sentenced to die under the new statute. The Court upheld Dobbert’s sentence, reasoning that: “Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. . . . [T]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed . . . .” 202 Similarly, the repeal of the judge’s power to override a jury’s recommendation of a life sentence would be a procedural change in the statute and thus not subject to a constitutional challenge under the ex post facto clause.

Again, however, constitutionality should not be equated with perfection. There is nothing to prevent the Florida legislature from explicitly making the amendment retroactive in application. 203 The

198. Id. at 16.
200. Dobbert allegedly committed his crimes in 1971. Florida’s capital statute was invalidated by Furman one year later.
203. The political prospects do not, however, appear promising. Fla. SB 940 (1985) provided that repeal of the life override would “apply only to offenses committed on or after January 1, 1986” and that “[p]ersons who committed a capital felony prior to such date shall be sentenced in accordance with the law in effect at the time the [offense] was committed.” Id. sec. 2. The bill further provided: “It is the intent of the Legislature that the amendments . . . shall not constitute grounds for appeal of a sentence for an offense committed before January 1, 1986 nor constitute grounds to apply for executive clemency or any other form of post-conviction relief.” Id. sec. 2(2).

The legislature’s authority to restrict clemency in this way rests on shaky constitutional ground. Clemency in Florida flows from a “self-executing constitutional provision” which vests “sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.” Sullivan v. Askew, 348 So. 2d 312, 315 (Fla.), cert. denied, 434 U.S. 878 (1977).
spectator of actually executing those override inmates whose death sentences have been affirmed by the Florida Supreme Court counsels against making repeal prospective only. We believe that prospective repeal would be unwise and unfair, but not unconstitutional.

The “tinkering with the statute” argument against repealing the jury override fails to account for previous amendments to the death penalty statute. In 1979, the legislature added a subsection to the capital sentencing statute making it an aggravating circumstance if the offense was “committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.”

The legislature also amended the statute to delete language suggesting that mitigating circumstances were restricted to those enumerated in the statute.

More importantly, however, the “tinkering with the statute” position fails to account for the duty of legislators to address a grave defect in the law governing the most awesome exercise of state power over the life of a citizen. Senator Dunn testified concerning this obligation:

I don’t think we can turn our backs to the problem of unreliability in the system as we now have it.

We can’t turn our backs for this reason, really for two reasons.

The supreme court has held that “an attempt on the part of the Legislature to exercise any part of the pardoning power would be in conflict with the Constitution.” Id. at 316. Similarly, the legislature’s felt need to limit legal and judicially-cognizable issues seems unnecessary. The Florida Constitution provides that the repeal or amendment of a criminal statute shall not affect the prosecution or punishment of any crime previously committed. See Fla. Const. art. X, § 9; Helmig v. State, 330 So. 2d 246 (Fla. 1st DCA 1976).

204. Ch. 79-353, 1979 Fla. Laws 1828 (codified at Fla. Stat. § 921.141(5)(i) (1979)). The Florida Supreme Court upheld this aggravating circumstance against an ex post facto challenge in Combs v. State, 403 So. 2d 418, 420-21 (Fla. 1981), cert. denied, 466 U.S. 984 (1982). In some sense the statutory addition was already a part of the elements of the crime for which Combs was being tried. But the Florida Supreme Court has recognized that simple premeditation cannot qualify under the new aggravating factor; there must be a greater level of premeditation, a more methodical intent. See, e.g., King v. State, 436 So. 2d 50, 55 (Fla. 1983); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983), cert. denied, 104 S. Ct. 1690 (1984); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982). A state cannot use an element of the underlying capital felony as an aggravating circumstance justifying the death sentence, because the constitutional function of an aggravating circumstance is to “genuinely narrow the class of persons eligible for the death penalty . . . .” Zant v. Stephens, 103 S. Ct. 2733, 2742-43 (1983). For this reason, an aggravating circumstance cannot merely duplicate an element of the crime itself. See Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985).

Number one, it's not moral, it's not ethical, it's not honorable for us not to attend to the system when we know, we have reason to know, that it's not working right in that particular. We have a duty as legislators in my opinion to fix that part of the system because we ought to know from statistics alone that it's not right. We ought to know when we compare the eighty-two cases in Florida with what is being done throughout the country, that something's awry in Florida. . . . Now, I don't subscribe to the proposition that the standard enunciated by the Florida Supreme Court is even working. It obviously isn't working.

The second reason that I think we need to address this question [is that] [t] hose of us, myself included, who support capital punishment, have a duty to assure that it is implemented fairly and impartially and that we have done all in our power to respond to those other people who do not like capital punishment, who think we have blood on our hands, to be honorable in the performance of our duty either as legislators, or in the executive branch . . . .

Thus, at least one proponent of capital punishment believes that the statute is in fact "broken" and worth "fixing."

XI. Conclusion

The provision of Florida's capital sentencing statute which allows a circuit judge to override a jury's recommendation of a life sentence and results in the imposition of a death sentence and resulting execution should be amended by the Florida legislature. Although the override has been upheld as constitutional by the United States Supreme Court, policy considerations militate against retaining it. The override results in a debasement of the jury's role as the proper reflection of community sentiment. The override is costly in terms of governmental efficiency and monetary resources. The override increases the likelihood that an innocent person may be executed and is inconsistent with a judicial system that is weighted in favor of mercy. The problems caused by the override cannot be cured by appellate review, although such problems can be cured by legislative action. Legislative repeal of the power of a judge to override a jury's recommendation of life is within the province, duty and ethical obligation of Florida legislators.

206. See Unofficial Transcript, supra note 75, at 7-8.