Summer 1991

The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution

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THE JURISDICTION TO DO JUSTICE: FLORIDA'S JURY OVERRIDE AND THE STATE CONSTITUTION

MICHAEL MELLO

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THE JURISDICTION TO DO JUSTICE: FLORIDA'S JURY OVERRIDE AND THE STATE CONSTITUTION*

MICHAEL MELLO**

I. INTRODUCTION

This generation of . . . lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow.

Vermont Supreme Court1

FLORIDA is one of only three states that allows a judge to over-ride a capital sentencing jury's recommendation of life imprisonment.2 Florida is the only state that employs the override

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* Copyrighted 1991, Michael Mello. The meaning of the phrase “jurisdiction to do justice” as used in this Article originated within the Florida Office of the Capital Collateral Representative in the mid-1980's. The term captures the idea that the Florida Supreme Court invariably possesses the power to do justice. This Article explores whether the court can, in good conscience, exercise that jurisdiction to invalidate the jury override based on the state constitution.

** Associate Professor, Vermont Law School; B.A., 1979, Mary Washington College; J.D., 1982, University of Virginia. In the interest of full disclosure, I note that between 1983 and 1986 I was an assistant state public defender in Florida (first at the office of the Public Defender in West Palm Beach, and later as a charter attorney with the office of the Capital Collateral Representative in Tallahassee), where all of my clients were death row inmates. I was co-counsel for Joseph Spaziano in Spaziano v. Florida, 468 U.S. 447 (1984), in which the United States Supreme Court upheld the facial federal constitutionality of Florida's jury override, and lead counsel in Spaziano v. State, 489 So. 2d 720 (Fla. 1986), in which the Florida Supreme Court upheld the state constitutionality of the override. I presently represent four condemned inmates, three of whom are on death row in Florida.

I am grateful to Laura Gillen, who typed endless drafts of the manuscript, to my research assistants, Diane Campbell, Paul Cavanaugh, and Sharyn Grobman, who provided invaluable help with this Article, and to Susan Apel and Elliot Scherker, who read and commented helpfully on the manuscript. Michael Radelet graciously provided me with most of the statutory materials used in section four.

This Article is dedicated to the memory of Craig Barnard, lead counsel in Spaziano v. Florida, 468 U.S. 447 (1984), friend, and, above all, mentor and teacher.

frequently, despite the reality that Florida juries are among the most


Only in Florida, Alabama, and Indiana do juries render non-binding recommendations of life or death. ALA. CODE § 13A-5-46 (1982); FLA. STAT. § 921.141 (Supp. 1990); IND. CODE § 35-50-2-9 (1985 & Supp. 1990). The capital sentencing provisions of Kentucky and Ohio refer to the jury’s sentencing determination as a “recommendation.” KY. REV. STAT. ANN. § 532.025 (Michie/Bobs-Merrill 1990) (the jury shall “recommend a sentence for the defendant”) (emphasis added); OHIO REV. CODE ANN. § 2929.03(D) (Baldwin 1987) (“If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to . . . this section.”) (emphasis added). Under neither statute, however, is a trial judge authorized to increase a life recommendation to a death sentence. In any event, jury overrides in either direction appear to be virtually nonexistent. E.g., Ward v. Commonwealth, 695 S.W.2d 404, 408 (Ky. 1985) (Leibson, J., concurring) (“If the jury so recommends [death], almost without exception the trial judge has followed the jury’s recommendation by imposing the death penalty”). Whereas the Ohio Supreme Court has consistently refused to recognize the constitutional implications of its statutory provisions, the Kentucky Supreme Court has reversed a death sentence where the prosecutor and trial judge emphasized that the jury sentence was only a “recommendation.” Compare State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987), cert. denied, 485 U.S. 916 (1987) and State v. Williams, 23 Ohio St. 3d 16, 490 N.E.2d 906 (1986), cert. denied, 480 U.S. 923 (1987) with Ward v. Commonwealth, 695 S.W.2d at 408.

Since the mid-nineteenth century, United States legislatures have decided with near unanimity that no person should be sentenced to die without the consent of her peers. In 1971 the Supreme Court observed that “[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 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
death-prone. Between December 1972 (when the override statute was enacted) and March 1988, 526 death sentences were imposed under Florida's present-day capital statute. Of these, 113 were life recommendation overrides. Thus, one in five people sentenced to die in Florida had jury recommendations of life.

I have suggested elsewhere that the jury override violates the federal Constitution, and Ruthann Robson and I have argued that regardless of its federal constitutionality the override should be rejected by the legislature as poor public policy. This Article explores whether the override offends the Florida constitution.

This topic may strike you as being an afterthought in light of my earlier treatments of the override. Perhaps in a way it is. But the fault lies more with my own myopia about the importance of state constitutions than with the subject matter. In Spaziano v. State in 1986, I briefed and argued to the Florida Supreme Court that the override violates the state constitution. By 1963, all jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing. 428 U.S. 280, 291-92 (1976) (footnotes omitted). See also Lockett v. Ohio, 438 U.S. 586, 598-99 (1978); W. Bowers, Executions in America 7-9 (1974).


Two Florida inmates (Ernest Dobbert and Buford White) have been executed notwithstanding jury recommendations of life. A third, Robert Francis, is scheduled to be executed on June 19, 1991.

Courts have expressed frustration with lawyers' neglect of state constitutional arguments. See Acker & Walsh, supra note 8, at 1314 n.85 (collecting examples). The Vermont Supreme Court has suggested wryly that such neglect flirts with malpractice. State v. Jewett, 500 A.2d. 233, 234 (Vt. 1985). "After Jewett was decided the Vermont Attorney General formed a special state constitutional law commission, specifically to research history and legal precedent relevant to the Vermont Constitution." Acker & Walsh, supra note 8, at 1314 n.85. The Vermont Attorney General wrote in 1988 that "state attorneys general have formed a national clearinghouse to monitor, study, and contribute to emerging state constitutional law." Amestoy, State Constitutional Law: An Attorney General's Perspective, 13 Vt. L. Rev. 337, 337 (1988).

489 So. 2d 720 (Fla. 1986).
court was rush, superficial, and artless—and it appeared near the end of a brief in excess of 250 pages. The court summarily rejected the claim. The totality of the court’s opinion addressing the issue consisted of a single sentence: “We also reject [Spaziano’s] suggestion that we disregard the United States Supreme Court’s determination that this state’s jury override procedure is constitutional, and that we hold the procedure unconstitutional under the Florida Constitution.”

In the intervening five years since Spaziano v. State was decided, I have come to take state constitutions deadly seriously. During that five year period, events have transpired that require us all to take state constitutions seriously. So think of this text as an out-of-time request for rehearing in Spaziano v. State—half-a-decade out of time, roughly. I want a second chance to explore the override’s validity under the Florida constitution.

II. THE JURY OVERRIDE IN FLORIDA

If [the trial judge] wasn’t going to follow our sentencing verdict, why did he ask us for our opinion in the first place?

A Florida capital juror

A. The Jury Override Statute: In Theory

Florida’s present day capital punishment statute was enacted in 1972 in the turbulent aftermath of Furman v. Georgia. In Furman, a divided United States Supreme Court held that the cruel and unusual punishments clause of the eighth amendment prohibited impo-
sition of the death penalty pursuant to statutes, such as Florida's, which allowed juries uncontrolled discretion to impose death. Under Florida's so-called "mercy statute" invalidated by Furman, all defendants convicted of capital offenses 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 structure or guide the jury's process of deciding whether or not to recommend mercy. Florida's capital punishment scheme had been a mercy statute for the century ending in 1972 with Furman.

Florida's post-Furman death penalty statute attempts to structure the capital punishment decision by establishing a procedure to be followed in determining what penalty should be imposed upon a conviction of first degree murder. The statute provides that the court shall, unless waived, conduct a separate sentencing proceeding before the jury. The jury 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 jury recommends death, regardless of whether the judge sentences to life, the court must set forth in writing its findings as to aggravating and mitigating circumstances. Death sentences are subject to automatic


18. Id.

19. See infra notes 205-06 and accompanying text.

20. Fla. Stat. § 921.141 (Supp. 1990). In addition to authorizing death for aggravated murder, the statute also permitted capital punishment for rape of a child under the age of eleven. The Florida Supreme Court held the latter provision unconstitutional in Buford v. State, 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982).


22. 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, 980 (Fla. 1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1982), cert. denied, 461 U.S. 909 (1983).


24. The statute requires written findings if the judge imposes death, regardless of 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). In practice, however, courts seldom provide such findings.
review by the Florida Supreme Court.\textsuperscript{25}

The Florida Supreme Court upheld the facial constitutionality of Florida's post-	extit{Furman} statute, including the jury override, in the 1973 case 	extit{State v. Dixon}.\textsuperscript{26} Applying reasoning that seems ironic in light of the subsequent frequency of \textit{death} sentences imposed by the trial judge following jury recommendations of \textit{life} imprisonment, the court explained that "[t]o a layman [sic], no capital crime might appear to be less than heinous . . . ."\textsuperscript{27} Trial judges, "with experience in the facts of criminality[, possess] the requisite knowledge to balance the facts of the case against . . . standard criminal activity . . . ."\textsuperscript{28} Such knowledge "can only be developed by involvement with the trials of numerous defendants."\textsuperscript{29} In this way "the inflamed emotions of jurors can no longer sentence a man [sic] to die; the sentence is viewed in the light of judicial experience."\textsuperscript{30}

Florida's jury override has received a substantial amount of attention from the United States Supreme Court. The Court discussed the override briefly in 1976 in \textit{Proffitt v. Florida},\textsuperscript{31} and extensively in 1984 in \textit{Spaziano v. Florida}.\textsuperscript{32} In June 1990 the Court granted certiorari in \textit{Parker v. Dugger}.\textsuperscript{33} The first of five questions presented in \textit{Parker} was whether "the application of Florida's jury over-ride standard in an individual case [is] subject to an Eighth Amendment review, and, if so, what standard of review is applicable?"\textsuperscript{34} \textit{Parker} was decided on January 22, 1991,\textsuperscript{35} and the Court invalidated the death sentence, reversed, and remanded on narrow factual grounds. The first question presented was never directly addressed.\textsuperscript{36}


\textsuperscript{26} 283 So. 2d 1 (Fla. 1973).

\textsuperscript{27} Id. at 8.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} 428 U.S. 242 (1976).


\textsuperscript{33} 110 S. Ct. 3270 (1990) (order granting certiorari).

\textsuperscript{34} Petition for Writ of Certiorari, Parker v. Dugger, No. 89-5961 (U.S. 1990).


\textsuperscript{36} Writing for the five-vote majority (Justices Marshall, Stevens, Blackmun, O'Connor, and Souter), Justice O'Connor called attention to the Florida Supreme Court's review of the factors upon which the trial judge relied in overriding the jury recommendation of life. \textit{Id.} at 736. On direct appeal the Florida Supreme Court had eliminated two aggravating factors as found by the trial
The Supreme Court first encountered the override in *Proffitt v. Florida* in 1976,\(^{37}\) holding that as a whole Florida’s then-new capital statute sufficiently guided the sentencer’s discretion and satisfied the concerns articulated in *Furman*. The condemned petitioner in *Proffitt*, whose jury had recommended death,\(^{38}\) 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.”\(^{39}\) 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 the Florida Supreme Court’s decision in *Tedder v. State*\(^ {40}\) in reasoning 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.”\(^ {41}\)

judge, but the court had upheld the override based upon a determination that the trial judge had found “no mitigating factors to balance against the aggravating factors.” *Id.* at 738 (quoting the Florida Supreme Court’s decision on direct appeal, *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984)). The Supreme Court held that “[t]he Florida Supreme Court erred in its characterization of the trial judge’s findings,” *id.*, and wrote that although the trial judge did not find any statutory mitigating factors, he must have “found and weighed non-statutory mitigating circumstances before sentencing Parker to death.” *Id.* (emphasis added). Because Parker was entitled either to have these non-statutory mitigating factors considered with the remaining aggravating factors, or at the very least to a harmless error analysis, and because the Florida Supreme Court had engaged in neither, the “affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the [eighth amendment to the] Constitution.” *Id.* at 740.

In dissent, Chief Justice Rehnquist, joined by Justices White, Kennedy, and Scalia, took issue with the majority’s perceived second-guessing of the Florida Supreme Court. *Id.* at 740 (White, J., dissenting). The dissenters criticized the majority for resting the entirety of their opinion on “a reconstruction of the record the likes of which has rarely, if ever, been performed before this Court.” *Id.* at 741.

The factual bickerings of the Court, while accurately reflecting the deep and incongruous lines of allegiance in death penalty litigation, do little to further our understanding of the eighth amendment’s application in individual override cases. The Court seemingly approved the application of the eighth amendment in individual override cases, but did nothing to explain the bounds of this holding. See *id.* (White, J., dissenting) (“The Court ultimately concludes that Parker was deprived of “meaningful appellate review” which, for reasons not fully explained, apparently entitles him to relief under the Eighth Amendment of the Constitution.”).

38. *Id.* at 246.
40. 322 So. 2d 908 (Fla. 1975).
41. 428 U.S. at 249.
The Supreme Court explicitly examined and upheld the facial constitutionality of the override in 1984 in Spaziano v. Florida. Joseph Spaziano 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. Because the death penalty is society's expression of outrage, juries rather than judges are more likely to rank reliably the offender and his or her offense on the yardstick of community anger. As evidence of this proposition, Spaziano surveyed the overwhelming rejection in this country of judge sentencing in capital cases, while noting that judicial sentencing in noncapital cases is all but universal.

The Court rejected this facial attack for two reasons. First, the Court found that as a matter of federal constitutional law retribution is not the sole justification for imposing death in individual cases: Deterrence and incapacitation also have roles. Second, the Court reasoned that even if one assumes 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 can be expressed . . . . The community's voice is heard at least as clearly in the legislature when the death penalty is authorized . . . ." This insight permitted the Court to acknowledge yet trivialize the facts that most states have jury sentencing in capital cases and that in most states a jury verdict of life imprisonment is binding. 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."

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

43. Id. at 461. See also Gillers, supra note 3, at 47-59.
44. 468 U.S. at 461-62.
45. Id. at 462.
46. Id. at 464. The Court also rejected Spaziano's two other jury override arguments. First, the Court held that the override does not violate the double jeopardy clause of the fifth amendment. Id. at 465. Second, the Court found that the override had not been applied in Spaziano's cases in an arbitrary or capricious manner and therefore did not violate the eighth amendment. Id. at 467.
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."\(^{47}\)

Stevens also pointed out that Florida's stated reasons for the override counseled against its validity. The override was enacted during the pervasive confusion following \textit{Furman v. Georgia}'s invalidation of all existing death statutes.\(^{48}\) At that time 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."\(^{49}\) 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 whether or not an individual must die is not one that has traditionally been entrusted to judges."\(^{50}\)

In retrospect it becomes plain that \textit{Spaziano v. Florida} was an early manifestation of the Court's determination to "deregulate death," as one commentator\(^{51}\) aptly put it—generally to leave it to the states to administer their capital statutes as they see fit. After fifteen years of angst and fragmentation on the Supreme Court over

\(^{47}\) Id. at 469-70 (Stevens, J., concurring in part and dissenting in part) (quoting Witherspoon v Illinois, 391 U.S. 510, 519 (1968)) (footnote omitted).


\(^{49}\) See also infra notes 55-59.

\(^{50}\) Spaziano, 468 U.S. at 475 (Stevens, J., concurring in part and dissenting in part).

\(^{51}\) Id. at 476.

\(^{52}\) Weisberg, \textit{Deregulating Death}, 1983 SUP. CT. REV. 305.
capital punishment, a stable consensus seems to have emerged among the Justices: the Court should be "going out of the business of telling the states how to administer the death penalty ..." In 1971 the Court held that the due process clause of the fourteenth amendment did not mandate standards to guide capital sentencers' discretion. One year later the Court held in *Furman v. Georgia* that the eighth amendment's cruel and unusual punishments clause did require such standards. Then, in 1976, in *Gregg*

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52. This consensus may be solidified further by the recent retirement of Justice Brennan. Interestingly, however, Justice Souter provided the decisive fifth vote in *Parker v. Dugger*, discussed *supra* note 36.


55. 408 U.S. 238 (1972). *Furman* contains a brief *per curiam* which holds that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40. Five justices wrote separately to explain their reasons for concurring in the judgment.

Only Justices Brennan and Marshall concluded that the death penalty is per se unconstitutional. Justice Brennan relied primarily on the eighth amendment, stating that "[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." *Id.* at 290. Justice Marshall took a broader view of both the history behind the eighth amendment and the discriminatory effect of the death penalty as applied. *Id.* at 364.

Justice Douglas stated that the death penalty as then applied violated both the eighth amendment and, particularly, the equal protection clause of the fourteenth amendment. "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 256-57. He did not reach the issue of whether a mandatory death penalty would be constitutional. *Id.* at 257.

Justice Stewart relied upon the equal protection clause by offering this memorable line: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

Justice White was disturbed by the infrequency of the imposition and execution of the death penalty. The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment. *Id.* at 312.

Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, dissented, relying upon the history of the adoption of the eighth amendment and the *stare decisis* value of *McGautha v. California*, 402 U.S. 183 (1971), which held that judicially-articulated standards were not needed to ensure a responsible capital sentencing decision. Those who joined in this dissent also wrote separately.

56. The effect of *Furman* was to hold the death penalty unconstitutional as then administered in the United States. In response, the states enacted two kinds of capital punishment statutes: mandatory statutes requiring the death penalty for certain classes of crimes, and guided-discretion sta-
v. Georgia and its companion cases, the Court approved the standards adopted in Georgia, Florida, and Texas. In 1978, despite Justice Rehnquist’s charge that the Court was going from “pillar to post,” and despite Chief Justice Burger’s recognition that the Court’s death penalty decisions were far from consistent, the Court held that the capital sentencer must be permitted to consider any relevant evidence proffered in mitigation, a notion reaffirmed in subsequent cases. The Court has since fine-tuned the capital system it approved in 1976, sometimes vacating death sentences and, more frequently since the 1982 Term,

61. Id. at 597-602 (opinion of Burger, C.J.).
62. See id. at 604-05 (opinion of Burger, C.J.) (holding that although individualized sentencing was matter of public policy in noncapital cases, individualized sentencing—including consideration of all relevant mitigating factors—is constitutionally required for the “profoundly different” sentence of death).
63. For examples of Supreme Court decisions vacating death sentences because the sentencer was precluded from considering mitigating factors, see Sumner v. Shuman, 483 U.S. 66 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).
64. E.g., McKoy v. North Carolina, 110 S. Ct 1227 (1990) (unanimity requirement held unconstitutional limitation on consideration of mitigating evidence); Johnson v. Mississippi, 486 U.S. 578 (1988) (sentencer’s consideration of invalid prior conviction); Booth v. Maryland, 482 U.S. 496 (1987) (use of victim impact statement, including family’s emotional reaction to and characterization of murderer and his crime); Ford v. Wainwright, 477 U.S. 399 (1986) (mere cursory review used to determine inmate’s mental competency to be executed); Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecutor’s comments to jury indicating that appeals court would correct any errors by jury); Enmund v. Florida, 458 U.S. 782 (1982) (death sentence for felony murder when defendant did not himself kill, attempt to kill, or intend that killing take place or lethal force be used); Bell v. Mississippi, 451 U.S. 430 (1981) (state’s request for death penalty on retrial violated double jeopardy clause when jury had previously imposed lesser sentence); Godfrey v. Georgia, 446 U.S. 420 (1980) (no showing of “consciousness materially more ‘depraved’ than that of any person guilty of murder” when victims were killed immediately, defendant suffered extreme emotional distress as a result of their deaths, and defendant admitted responsibility shortly after crimes); Lockett v. Ohio, 438 U.S. 586 (1978) (limitation on sentencer’s consideration of mitigating factors); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty unconstitutionally disproportionate sentence for crime of rape of an adult woman).
65. In all but one of the 15 fully argued capital cases decided between 1976 and the end of the 1981 Term, the Court reversed or vacated the death sentence. Weisberg, supra note 51, at 305 n.1. The Court rendered four capital cases at the end of the 1982 Term, all of which found against the condemned inmate. See California v. Ramos, 463 U.S. 992 (1983) (rejecting challenge that jury instruction that governor may commute life sentence without parole was speculative or impermissibly shifts focus from defendant); Barclay v. Florida, 463 U.S. 939 (1983) (finding no constitutional violation in sentencer’s consideration of nonstatutory aggravating circumstances); Barefoot v. Es-
upholding them.\textsuperscript{66}

The "deregulation" of capital punishment by the Supreme Court must be considered as a piece with the Court's increasingly restrictive view of habeas corpus. In its procedural default decisions,\textsuperscript{67} and most recently in its retroactivity cases and successive habeas petition cases,\textsuperscript{68} the Court has curtailed the availability of the writ radically.
Congress is poised to go even further.69

B. The Jury Override Statute: In Practice

The jury override’s actual implementation has been described elsewhere,70 but one aspect of such application merits reiteration and update. In the past, the override has been inefficient. Between two-thirds and three-quarters of life recommendation overrides were reversed on appeal.71 This phenomenon remains true today, only more so.

In 1975 the Florida Supreme Court held in Tedder v. State72 that jury overrides would be affirmed on appeal only if “virtually no reasonable person could differ” that death should be imposed in the case. Tedder has become the cornerstone of the Florida Supreme Court’s override doctrine.73

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70. Mello, supra note 4; Mello & Robson, supra note 7; Radelet, Rejecting the Jury, 18 U.C. DAVIS L. REV. 1485 (1985). Radelet’s article is an outstanding treatment of the jury override issues.

71. Radelet, supra note 70, at 1422; see also Mello, supra note 4, at 290; Mello & Robson, supra note 7, at 52-55.

72. 322 So. 2d 908 (Fla. 1975).

73. It is fair to say that for the most part “[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, 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 Proffitt v. Florida, 428 U.S. at 250 n.7, the vast majority of the cases explicitly apply Tedder.

Alabama and Indiana, the only other states where the capital sentencing jury’s recommendation is expressly nonbinding, do not articulate a similarly strict standard in reviewing jury overrides. See Mello, supra note 4, at 289-90. In Alabama the trial judge need only “consider” the jury’s sentenc-
The *Tedder* standard is enforced rigorously by the Florida Supreme Court. As Table 1 shows, over the decade-and-a-half life span of Florida's post-*Furman* statute, life recommendation overrides have been reversed in seventy-four percent of the cases.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number Affirmed</th>
<th>Percentage Affirmed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1975</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>1976</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>1977</td>
<td>2</td>
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<tr>
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<td>0%</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>112</strong></td>
<td><strong>29</strong></td>
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</table>

These figures become even more significant when sorted into three time frames. From 1974 (when the first override case reached the Florida Supreme Court) until the end of 1983 (just before certiorari review was granted in *Spaziano v. Florida*), sixteen of sixty-two life overrides were affirmed. In 1984 and 1985—during the pendency of *Spaziano v. Florida* in the United States Supreme Court and the year after *Spaziano* was decided—affirmances by the Florida court were significantly more frequent: twelve of eighteen (66.7%). But from 1986 through May 1990, only two of thirty-two (6.25%) were affirmed.

74. Source: Letter from Dr. Michael Radelet, Professor of Sociology, University of Florida, to Michael Mello, June 13, 1990, at 1 (copy on file with author). Radelet is the most reliable collector of data on the jury override. *E.g.*, Radelet, *supra* note 70.
Over the past half decade, in other words, overrides have been reversed in more than ninety-three percent of the relevant cases. Jury overrides of life recommendations have survived appellate review in less than seven percent of the cases.

The Florida Supreme Court has recognized that the Tedder standard is rigorous, and that it has become more so in the years since Spaziano v. Florida was decided. Citing figures somewhat (but not materially) different from the numbers cited in this Article, the court in Cochran v. State reiterates Justice Shaw's earlier statements that "during 1984-85, we affirmed on direct appeal trial judge overrides in 11 of 15 cases, 73%. By contrast, during 1986 and 1987 we have affirmed overrides in only 2 of 11 cases, less than 20%." This "current reversal rate of over 80% is a strong indicator to [trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation." A jury's verdict for life means life, save in the rarest of cases.

Thus, experience has not ameliorated the problems of applying the override. To the contrary, as time has gone by the override's reversal rate, always high, has become significantly higher. In the vernacular of the Florida legislature, something is broken here. The question is how to fix it. And by whom.

C. Solutions

The jury override—conceived in an absolutely reasonable misapprehension of Furman's ethereal requirements and applied in a way that expends enormous judicial resources with minuscule net gain—has been a dismal failure. Spaziano v. Florida and the "deregulation" of death evinced by that opinion strongly suggest that the federal courts are unlikely to intervene to solve Florida's problem with the override.

The question becomes what is to be done. The initial answer is that Florida must find its own solution. One possibility is legislative reform. In fact my experience testifying before the Florida legislature in 1984 and 1985 left me convinced that the lawmakers do not like the override and would never enact it today in the first instance. How-

75. 547 So. 2d 928 (Fla. 1989).
77. Cochran, 457 So. 2d at 933. According to Radelet, during 1984-85 the court affirmed 12 of 18 override cases; during 1986-87 the court affirmed zero of 12 overrides. Radelet, supra note 74. The difference is of little moment. The clear reality is that in the years following Spaziano v. Florida the Florida Supreme Court seldom affirms jury overrides.
78. Id.
79. Spaziano, 468 U.S. at 490 (Stevens, J., concurring in part & dissenting in part); Mello & Robson, supra note 7.
ever, the politics of death in Florida make legislative reform of the override unlikely. Legislation has been proposed repeatedly to repeal the override. For example, in the 1984 legislative session the House Committee on Criminal Justice held hearings on a bill 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. The committee voted ten to seven to strike the bill’s enacting clause, thus foreclosing consideration of the proposed legislation. Override repeal legislation was also unsuccessfully introduced in the 1985 legislative session.

The federal courts are now out of the business of regulating states’ systems of capital punishment. To judge by history, the Florida legislature is too timid. That leaves the state constitution and the Florida Supreme Court. As the following sections suggest, existing Florida

80. But perhaps not. Florida Governor Lawton Chiles, who took office in January 1991, was quoted recently as advocating repeal of the override: “I thing we’d be better,” Chiles reportedly said, “if we did away with the override.” McGarrah, State Ponders Changing Steps to Execution, Miami Herald, March 3, 1991, at 6B. This view did not prevent Chiles from signing a death warrant on Robert Francis, whose jury recommended life and who is scheduled to be executed on June 19, 1991.

81. Fla. HB 820 (1984). 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.” Id.

82. Mello & Robson, supra note 7.

83. Fla. HB 273 (1985); Fla. SB 940 (1985). Senate Bill 940 was sponsored by nineteen other senators—enough virtually to ensure passage. 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.” Id. 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. Because passage of similar legislation by the Florida House of Representatives appeared unlikely, no action was taken by the Senate Appropriations Committee or by the full Senate.

84. See generally Acker & Walsh, supra note 8. California and Massachusetts provide interesting case studies. The California Supreme Court found the death penalty in California unconstitutional in People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972), decided while Furman was pending in the United States Supreme Court. In Anderson, the court found it significant that the state constitution used the disjunctive “or” in the prohibition of cruel or unusual punishment in article I, section 6 of the California constitution. Accord Fla. Const. art. I, § 17 (prescribing cruel or unusual punishment). Relying on its state constitutional history, the California court found that when the constitution was first adopted the drafters were well aware of the significance of the disjunctive form and its use. Anderson, 6 Cal.3d at 634, 493 P.2d at 883, 100 Cal. Rptr. at 155. Furthermore, the provision survived intact through the constitution’s revisions to the modern day. Id. at 641, 493 P.2d at 887, 100 Cal. Rptr. at 159.

The court held that the death penalty was cruel in the constitutional sense. Id. at 645, 493 P.2d at 891, 100 Cal. Rptr. at 163. The court found that it was not concerned only with the “mere extinguishment of life,” which the United States Supreme Court has suggested does not violate the Eighth Amendment, or with a particular method of execution, but with the total impact of capital punishment, from the pro-
constitutional doctrine provides a foundation for holding the override

ouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use.

Id. at 646, 493 P.2d at 892, 100 Cal. Rptr. at 164 (citations omitted).

Reasoning that the standards of society are not static, the court concluded that the meaning of cruelty had to be construed in accordance with contemporary standards of decency. Id. at 647, 493 P.2d 893, 100 Cal. Rptr. at 165. The court found that public opinion polls, and the number of states with death penalty statutes or other means which reflect public acceptance of capital punishment, were not controlling factors in assessing contemporary standards of decency. Id. The infrequency of the death penalty’s application controlled. Id. at 648, 493 P.2d 894, 100 Cal. Rptr. at 166. The court adopted the findings of one report which stated “all available data indicated that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence . . . . In a few states in which the penalty exists on the statute books, there has not been an execution in decades.” Id. (quoting President’s Commission on Law Enforcement and Administration of Justice: Report 143 (1967)). On Anderson generally, see Barrett, Anderson and the Judicial Function, 45 S. Cal. L. Rev. 739 (1972); Bice, Anderson and the Adequate State Ground, 45 S. Cal. L. Rev. 750 (1972).

After the United States Supreme Court decision in Furman, the people of California amended by referendum the state constitution to permit capital punishment. See M. Meltzer, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 306 (1973). The California legislature passed a mandatory death penalty statute in 1973 in an attempt to comply with Furman. See The California Supreme Court and the Death Penalty, 2 BENCHMARK 143 (1986). In 1976, however, the United States Supreme Court invalidated the use of mandatory death sentences which did not allow the consideration of mitigating circumstances. See supra note 56. The California Supreme Court, following the opinions of the United States Supreme Court, found the California death penalty statute unconstitutional under the United States Constitution. In Rockwell v. Superior Court, 18 Cal.3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976), the court found the statute unconstitutional because “no guidelines [had] been provided by the Legislature upon which to weigh mitigating circumstances against the aggravating factors which permit imposition of the death penalty . . . .” Id. at 441, 556 P.2d at 1113, 134 Cal. Rptr. at 663. Therefore the reviewing court would not have been able to determine whether the death penalty was excessive for this particular case, disproportionate to penalties imposed in similar cases, or a product of “passion, prejudice, or any other arbitrary factor.” Id. at 441, 556 P.2d at 1114, 134 Cal. Rptr. at 663 (quoting Gregg v. Georgia, 428 U.S. 153, 212 (1976)).


However, the California Supreme Court frequently invalidated death sentences in individual cases, often grounding its decisions in state constitutional doctrine. California Supreme Court justices paid a political price for their votes in cases vacating death sentences. Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin were in 1986 denied reconfirmation by California voters, in no small measure due to their “activism” in using the state constitution to invalidate death sentences. See generally Culver & World, Rose Bird and the Politics of Judicial Accountability in California, 70 JUDICATURE 81, 86 (1986); Tabak, The Death of Fairness, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 847 (1986); Utter, State Constitutional Law, The United States Supreme Court, and Democratic Accountability, 64 WASH. L. REV. 19, 41-42 (1989); Velman, Supreme Court Retention Elections in California, 28 SANTA CLARA L. REV. 333 (1988).

Massachusetts provides an instructive comparison. The highest court of Massachusetts found the state’s death penalty cruel and unusual punishment under article 26 of the Declaration of Rights of the Massachusetts Constitution. In District Attorney for Suffolk District v. Watson, the court declared the death penalty to be unacceptable under contemporary moral standards. 381 Mass. 648,
unconstitutional. 85

661-62, 411 N.E.2d 1274, 1281 (1980). The court found:

The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable. Id. at 662, 411 N.E.2d at 1282. The court also determined that the finality of the death penalty could frustrate justice in that there could be no relief for the executed if later developments in law or evidence occurred. Id. In addition, the state's act was a denial of the executed person's humanity. Id. at 663-64, 411 N.E.2d at 1283. Finally, the court reasoned that the death penalty was arbitrarily inflicted. Id.

What is of most interest in this opinion is the court's pronouncement that a legislative effort to pass a death penalty statute which complied with the principles underlying Furman would nevertheless be unconstitutional. The court reasoned:

The Federal constitutional requirements are a constraint only upon certain aspects of jury discretion. Furman and subsequent cases do not address the discretionary powers exercised at other points in the criminal justice process. Power to decide rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges. In the totality of the process, most life or death decisions will be made by these officials, unguided and uncured by statutory standards. Id. at 667-68, 411 N.E.2d, at 1285.

The death penalty issue in Massachusetts did not end with this opinion. In a 1982 referendum, Massachusetts voters approved a constitutional amendment which stated: "No provision of the [state] constitution ... shall be construed as prohibiting the imposition of the punishment of death." With the door seemingly closed to creative jurisprudential theory, the court focused upon an inherent weakness in a newly enacted legislative death penalty statute to find the statute unconstitutional. It did so through article 12 of the Declaration of Rights of the state constitution in Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E. 2d 116 (1983).

In Colon-Cruz, the court found the statutory provision providing for the death penalty unconstitutional as applied. The statute impermissibly burdened both the right against self-incrimination and the right to jury trial guaranteed under article 12 of the Declaration of Rights. Id. at 124, 470 N.E. 2d at 119. The court's conclusion, was based upon the fact that the death penalty could be imposed only after a jury trial. Id. The defendants who pled guilty in cases in which the death penalty could be imposed would avoid that penalty. Id. As the court declared, "[t]he inevitable consequence is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury." Id. See H. Bedau, supra note 8, at 187-194 (more in-depth review of the death penalty's recent history in Massachusetts). The ultimate importance of this case was described by Bedau:

It is further evidence of the readiness of at least one state supreme court to give the closest scrutiny to legislative attempts to create a constitutionally tolerable death penalty. Second, it shows the difficulty in drafting capital statutes that do not run afoul of some constitutionally secured right of the defendant, quite apart from any question whether the death penalty per se is a 'cruel and unusual punishment.'

H. Bedau, supranote 8, at 194.

85. This Article does not attempt to assess the political costs of judicial invalidation of the override based on the state constitution, but three observations deserve brief mention. First, public support for capital punishment—high in Florida recently—by no means translates into public support for the override. My experience testifying in the Florida legislature convinces me that support for the override is marginal. Florida Governor Chiles' apparent support for override repeal, see McGarrah, supra note 80, lends further reinforcement to this idea. Second, because the Florida constitution is comparatively easy to amend, the effects of a "wrong" (i.e., publicly unpopular) decision by the judiciary invalidating the override on state constitutional grounds would be less drastic than in virtually all other states. The Florida Revised Constitution of 1968 adopted a series of
III. THE "NEW FEDERALISM"

No, my friend, the way to have good and safe government, is not to trust it all to one, but to divide it among the many. . . . What has destroyed liberty and the rights of man [sic] in every government which has ever existed under the sun? The generalizing and contracting [of] all cares and powers into one body . . .

Thomas Jefferson

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Louis Brandeis

According to a 1988 estimate, since 1970 state high courts have issued more than 450 opinions concluding that a state constitution afforded individuals broader rights than those afforded by the federal Constitution. As state courts have re-discovered their respective state constitutions, a "new federalism" has emerged in United States' jurisprudence. Schuman defined the term "new federalism" minimally three amendments proposed by the legislature, included six methods of constitutional change—more than any other state constitution. See generally Sturm, The Procedure of State Constitutional Change, 5 FLA. ST. U.L. REV. 569 (1977). The Florida constitution has been amended 41 times between the time of its adoption in 1968 and the end of 1985, a rate of 2.4 amendments per year. See Council of State Governments, The Book of the States 14 (1986 ed.). The ease with which the Florida constitution may be amended has been criticized because of the potential for legislative abuse. E.g., Note, Legislative Efforts to Amend the Florida Constitution, 5 FLA. ST. U.L. REV. 747 (1977). Third, constitutional invalidation of the override would have a negligible effect on Florida's death row population. As of April 24, 1991, Florida's death row held 295 people, the second most populous of any state. See NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. at 15-17 (April 24, 1991) (unpublished compilation). According to the database developed by Dr. Michael Radelet, as of May 2, 1991, fifteen Florida death row inmates who have received jury recommendations of life and who have had the jury overrides affirmed on appeal remain under sentence of death. Six additional inmates' cases are pending resentencing or resentencing appeal. Telephone conversation with Michael Radelet (May 2, 1991). Two Florida inmates—Ernest Dobbert and Buford White—were executed notwithstanding jury recommendations of life. Robert Francis is scheduled to be executed on June 19, 1991.

86. Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in 4 THE WRITINGS OF THOMAS JEFFERSON 421 (A. Lipscomb ed. 1904) (Monticello ed.).
to mean the state court practice of "developing interpretations of their own states' constitutions independent of United States Supreme Court interpretations of the federal Constitution." 90 Justice Brennan, an important advocate of the new federalism, argued that "[o]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." 91

At the outset of the Republic, individual rights were protected through various states' bills of rights. Passage of the federal bill of rights created dual state and federal levels of protection. Over time, the theory goes, incorporation of most of the federal bill of rights through the fourteenth amendment, coupled with the Warren Court's expansive interpretations of those rights, resulted in state reliance on federal constitutional analysis, atrophy of independent state constitutional analysis, and erosion of dual protection for individual rights.92

The new federalism posits that United States Supreme Court decisions interpreting the federal Constitution are insufficient expressions of individual rights throughout the fifty states. This assumption finds support in the theory of federalism itself, the "old federalism" 93 sadly and ahistorically tainted by its association with racist opposition to Brown v. Board of Education. 94 Federalist concerns limit the Court's decisions. While principles of federal supremacy grant the Court the power to review laws and judicial rulings in conflict with the federal Constitution, statutes and regulations, the principles of state sovereignty and autonomy restrict federal jurisdiction where state constitutions, statutes and regulations are construed on independent and adequate state grounds.95 The sheer size of federal jurisdiction restricts


93. "In reality the principles of the so-called 'New Federalism' are based upon legal principles which have remained virtually unchanged throughout a large portion of our legal history. The only thing which is 'new' is the pervasiveness of its application and the number of its adherents." Cooper, Beyond the Federal Constitution, 18 STETSON L. REV. 241, 279 n.233 (1989).

94. See generally F. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE (1973); J. WILKINSON, FROM BROWN TO BAKER (1979).

95. Developments, supra note 89, at 1332-34.
the Court to shaping general rules that can be implemented nationwide.\textsuperscript{96} Scope of jurisdiction further imposes practical constraints on the range of issues the Court considers.\textsuperscript{97}

Scope of jurisdiction, and tension between federal supremacy and state autonomy, result in Supreme Court decisions that establish federal minima, "floors" of rights which states may exceed. If state extensions of one federal right infringe upon another, the Court may also establish federal maxima—or "ceilings" of rights.\textsuperscript{98} Because the Supreme Court is constrained by the range of issues it may practically and legally consider, and is further restricted to establishing floors and ceilings of federal rights, decisions by the Court can be deemed insufficient expressions of individual rights throughout the fifty states.

Federalism empowers each state to develop its own state constitutional jurisprudence uniquely expressive of its individual constitutional traditions.\textsuperscript{99} State constitutions not only establish restraints on governmental intrusion of individual rights; they also grant positive rights to individuals.\textsuperscript{100} State judiciaries have a broader range of individual rights to consider than do their federal counterparts.\textsuperscript{101} Because states are smaller entities and because their constitutions are more easily and frequently amended,\textsuperscript{102} state judiciaries have greater access to the will, intent, traditions, customs, and special concerns of the people than do federal judges.\textsuperscript{103} Finally, as the judiciary in most states is subject to some form of democratic accountability, state rather than federal constitutional jurisprudence should most richly reflect the sovereign will of the people.\textsuperscript{104} All of these factors favor independent and active state constitutional jurisprudence expressive of each state's constitutional tradition.

The new federalism as presently practiced may have a "dark side," as its critics\textsuperscript{105} assert. The new federalism raises problems of legitimacy and

\textsuperscript{96} Id. at 1348-51.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 1336-40.
\textsuperscript{99} Utter & Piller, supra note 92, at 635-37.
\textsuperscript{101} Titrone, supra note 100, at 460-61.
\textsuperscript{102} The Florida constitution is especially easy to amend. See supra note 85.
\textsuperscript{103} Titrone, supra note 100, at 460-61.
\textsuperscript{105} E.g., Deukmejian & Thompson, \textit{All Sail and No Anchor}, 6 Hastings Const. L.Q. 975 (1979); Hudnut, \textit{State Constitutions and Individual Rights: The Case for Judicial Restraint}, 63 Den.
creates the potential for unprincipled, non-neutral, ideological, result-oriented application. The new federalism, it can be argued, is at core a gut-level dissatisfaction with decisions of the Burger and Rehnquist Courts, and federalism alone does not provide an adequate or legitimate reason for state courts to reject Supreme Court doctrine.\textsuperscript{106}

Regardless of the theoretical pros and cons of the new federalism, a significant number of state courts\textsuperscript{107} have assumed a duty to exercise independent state constitutional jurisprudence to ensure that the dual protection of individual rights inherent in federalism is realized.\textsuperscript{108} The perceived need to exercise this duty has become more acute in the last twenty years.\textsuperscript{109} As the Burger and Rehnquist Courts have retreated from the expanded protection of rights recognized during the Warren Court era,\textsuperscript{110} the federal judiciary has reduced one level of protection for individual rights—while previous abandonment of state constitutional analysis had virtually eliminated the other.\textsuperscript{111} Recent Supreme Court decisions\textsuperscript{112} have further induced states to take greater responsibility for defining the individual rights of their populaces.

\footnotesize


\textsuperscript{108} For example, the New Hampshire ("live free or die") Supreme Court observed in 1983: "When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people." State v. Ball, 471 A.2d 347, 350 (N.H. 1983); see also State v. Kennedy, 295 Or. 260, 271, 666 P.2d 1316, 1323 (1983) ("The point is . . . that a state's constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.").


\textsuperscript{111} See supra note 92 & accompanying text.

States employ a diversity of approaches in implementing the new federalism.

A. The Differing Approaches

State judiciaries have responded to the forces discussed in the previous subsection with various analytical methods and at different speeds. Although nomenclature varies widely, four identifiable methods of state constitutional analysis have emerged: primacy, independent, interstitial, and lockstep.

1. The Primacy Method: State Constitutional Analysis First, Supplemented by Federal

The primacy approach looks to the state constitution first, treating the federal Constitution as supplemental filler. If analysis under the state constitution is dispositive of the question presented, then the federal constitutional analysis is either ignored or used only as a persuasive source of support. While federal doctrine or tests may be applied in state constitutional analysis (e.g., "substantive due process," "balancing of competing interests," or "levels of judicial scrutiny"), the primacy approach invites the state judiciary to articulate independent standards of constitutional analysis. Here the analytical focus is on the state constitution, statutes and history (including legislative history), as well as on the social and political setting and on the fate of the relevant clause in subsequent constitutions.

Promotion of federalism, development of a principled state constitutional jurisprudence, contribution to development of federal jurisprudence, and preservation of state autonomy by protecting state decisions from federal review are among the articulated advantages of the primacy approach.

114. See infra note 135.
macy approach. Unbridled judicial activism and the undermining of nationwide uniformity in areas of law where it is of most import (such as criminal law and law enforcement) are two criticisms leveled at the primacy approach. A further criticism is dialogic. To the extent that state courts employing the primacy approach omit discussion of federal constitutional provisions, those states diminish their role in influencing the development of federal jurisprudence.

2. The Independent Method: Simultaneous Evaluation of State and Federal Constitutions

The independent method of constitutional analysis calls for evaluation of both state and federal provisions to determine protection afforded under each even if analysis at one level is dispositive of the issue. This method, sometimes known as the Vermont approach, lends full consideration to the relationship between state and federal constitutional rights, thus enabling evolution of a highly principled and independent body of state constitutional law. However, the costs of this thoroughness include decreased judicial efficiency and increased risk of inviting federal review, especially if there is no plain statement that the final decision rests purely on state constitutional grounds. The highest courts of Vermont, Rhode Island, Utah, and Washington provide examples of this approach.

3. The Interstitial Method: Federal Constitutional Analysis First, Supplemented by State

The interstitial approach mirrors the primacy approach, looking to the federal Constitution first and treating the state constitution as sup-

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118. Cooper, supra note 93, at 294; Linde, supra note 109, at 178-79; Utter & Pitler, supra note 92, at 647; Developments, supra note 89, at 1356-57; Note, supra note 109, at 768-77.
119. By contrast, Alexander Hamilton wrote that "there is one transcendent advantage belonging to the providence of the state governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice." The Federalist No. 17, at 113 (A. Hamilton) (J. Hamilton ed. 1864).
120. Cooper, supra note 93, at 294; Linde, supra note 109, at 178-79; Utter & Pitler, supra note 92, at 647; Developments, supra note 89, at 1356-57; Note, supra note 115, at 768-77.
121. Utter & Pitler, supra note 92, at 651-52.
122. Id.
123. Id. See Michigan v. Long, 463 U.S. 1032 (1983) (absent plain statement by state court to the contrary, federal courts will presume that state court decisions were based on federal Constitution); accord Harris v. Reed, 109 S. Ct. 1060 (1989).
If the federal Constitution is dispositive, then state constitutional analysis is not triggered. Otherwise, several factors are considered to determine specific grounds for diverging from the federal analysis: textual differences, legislative history, pre-existing state law, structural differences between the federal and state constitutions, particular state concerns, state traditions, and attitudes of the state citizenry. In addition to establishing the need and grounds for divergence, one must choose the manner or perspective through which divergence will be effected: reactive or self reliant.

The reactive perspective responds to, criticizes, and amends the federal doctrine. It asks the pragmatic question: "How useful is the federal analysis as a basis for state doctrine?" This perspective may be most appropriate where there are analogous federal and state constitutional provisions or where there is little maneuvering distance between the fed-

125. Cooper, supra note 93, at 296; Linde, supra note 109, at 178-79; Utter & Piter, supra note 92, at 651-52; Developments, supra note 89, at 1359; Note, supra note 115, at 767-71.
126. Cooper, supra note 93, at 296; Linde, supra note 108, at 178-79; Utter & Piter, supra note 92, at 651-52; Developments, supra note 89, at 1359; Note, supra note 115, at 767-71.
127. Developments, supra note 89, at 1359-62. In State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982), Justice Handler enumerated seven illustrative criteria for determining when to invoke the state constitution as an independent source of individual rights protection:

(1) Textual language—A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law.

(2) Legislative History—Legislative history may reveal an intention that will support reading the provision independently of federal law.

(3) Preexisting State law—Previously established bodies of state law may also suggest distinctive state constitutional rights.

(4) Structural Differences—Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. [For example, the] United States Constitution is a grant of enumerated powers . . . . Our [New Jersey] State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.

(5) Matters of Particular State Interest or Local Concern—When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law.

(6) State Traditions—A state's history and traditions may also provide a basis for the independent application of its constitution.

(7) Public Attitudes—Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters.

450 A.2d at 965-67 (Handler, J., concurring).

An alternative set of factors, suggested in P. Bobbitt, Constitutional Fate: Theory of the Constitution 3 (1982), and referenced in Linde, supra note 109, at 181-93, overlap with Handler's and might also apply. Bobbitt's factors are constitutional text, history (legislative history, social and political setting at the time of origin, fate of the clause in subsequent constitutions), doctrine, structure, prudence (where the court should be concerned about its own role, costs, and benefits of the public policy), and ethics (fairness, equity, justice).

eral floor and ceiling. The self reliant perspective creates original state doctrine without reference to federal analysis. This perspective may be most appropriate where there is a great deal of space between the federal floor and ceiling, or where there is no federal analogue to a state constitutional provision.129

Advantages of the interstitial approach include conformity with the supremacy principle, national uniformity of the law, judicial efficiency (avoidance of redundant federal and state constitutional analyses), and preservation of the federal floor of rights.130 Critics of this approach note several disadvantages: preventing coherent development of state law;131 creating an unwarranted presumption of validity for federal analysis under the state constitution, which undermines the state court’s duty to interpret the state constitution on its own merits; creating needless work for the United States Supreme Court, and unnecessarily inviting Supreme Court review; and subjecting state court decisions that provide broader protection to criticisms of unbridled judicial activism rather than principled development of state law.132

4. The Lockstep Method: State Constitutions at the Vanishing Point

The lockstep approach calls for adoption of the federal standard when there are analogous federal and state constitutional provisions.133 There is no consideration of state analysis. In effect, this approach cuts the state courts out of the federalism matrix whenever state constitutional provisions have federal counterparts.

The need for national uniformity is the primary justification for the lockstep method. This approach has been criticized for undermining the fundamental relationship between state and federal constitutions, breeding inconsistency with the classical model of federalism, and encroaching on the powers of the state judiciary to interpret their own constitutions.134

The typology of constitutional approaches135 discussed in this subsection is not the only way to organize the diverse universe of state consti-

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129. Id. Note that the self reliant perspective begins to resemble, and has been equated with, what this Article calls the primacy approach. See id. at 1362-66.
130. Id. at 1356-58.
131. Linde, supra note 109, at 178.
133. Cooper, supra note 93, at 294-96; Utter & Pitier, supra note 92, at 645-46; Note, supra note 115, at 764-67.
134. Utter & Pitler, supra note 91, at 646. This approach is exemplified by State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977).
135. The terminology is maddeningly nonuniform. Cooper, for example, identified three of the four approaches identified here: lockstep, independent, and an intermediate approach. Cooper, su-
tutional jurisprudence. Even though Florida has "never explicitly adopted any one approach," the categories described above provide a helpful way of understanding Florida's treatment of the right to jury trial under the state constitution.

B. The Right to Jury Trial: Florida's Approaches Under the State Constitution

This subsection first identifies the constitutional methodology employed by the Florida Supreme Court in resolving state constitutional issues of right to jury trial. That is the easy part, as the court's approach is methodologically straightforward. Florida's constitutional right to jury trial preserves the right as to those cases in which the

pra note 93, at 294-97. What Cooper called "independent" is here termed "primacy." What Cooper referred to as "middle ground" is here termed "interstitial."

Utter and Pitler, supra note 92, at 645-52, called the various approaches lockstep (or absolute harmony), primacy, interstitial (or supplemental), and dual sovereignty (here termed independent).

Linde, supra note 109, at 178-79, identified the independent, interstitial (or supplemental), and primacy approaches without specifically labeling the independent and primacy approaches. Linde's First Things First: Rediscovering the States Bill of Rights, 9 U. BALI. L. REV. 329 (1980), is considered the seminal articulation of the primacy method.

The student-written Developments, supra note 89, at 1356-66, provided the most detailed discussion of the interstitial (or supplemental) approach and its three layers of inquiry: first, determining if federal law is dispositive of the issues; second, exploring various factors to see if divergence from federal law is justified; and third, determining if a reactive or self reliant perspective is warranted by the circumstances. The piece equated self-reliant divergence from federal law with the primacy method and suggested that this method is appropriate only "when a diversity of state specific factors combine in a particular area to suggest that analogies between state and federal law are highly attenuated or when the state court has moved into an area in which federal parallels are unavailable." Id at 1364. The authors rejected the primacy model itself, arguing that the approach's basic assumption—that states are the primary sovereigns—does not reflect post-incorporation realities. The piece also recognized that when analyzing cases to determine what methodology has been used, it is often extremely difficult to differentiate between a self-reliant/interstitial approach and a primacy approach when there is no clear statement whether the analysis is starting from a federal or state constitutional provision.

Another student work, Note, supra note 115, at 764-70, discussed the dependent (or lockstep) approach, interstitial (or "gap filler") approach, and the independent approach (here termed the primacy approach).

136. Cooper, supra note 93, at 294; see also id. at 297. Cooper recommended what he termed a "reactive" approach, which seems at present, to be the appropriate vehicle for adoption by the Florida judiciary to protect state constitutional rights. Under this approach, the Florida courts may consider and then accept or reject prevailing federal interpretations of similar constitutional provisions. This permits state courts the benefits of the federal analysis, along with the analysis of other state courts, while leaving the final decision to the Florida courts.

Id. at 297.

137. This Article therefore has as its focus the entitlement to jury trial under the state constitution. The Florida Supreme Court has relied upon the Florida constitution in resolving issues concerning the incidents of the jury trial right to which one is entitled. E.g., State v. Neil, 457 So. 2d 481 (Fla. 1984) (rejecting Swain v. Alabama, 380 U.S. 202 (1966)).
right to jury trial was recognized in 1845—the time Florida adopted its first state constitution.

This subsection then attempts to place the court’s constitutional approach within the typology summarized in the previous subsection. This task is less straightforward. Still, the attempt is interesting and important in light of Spaziano v. Florida’s resolution of the jury over-ride issue as a matter of federal constitutional law.

Two sections of Florida’s Declaration of Rights protect the guarantee of trial by jury. Section 22 provides that “the right of trial by jury shall be secure to all and remain inviolate.” Section 16 provides that “[i]n all criminal prosecutions the accused shall . . . have the right to . . . trial by impartial jury.”

The right to trial by jury in Florida traces its roots to the state’s first constitution. “Our first Constitution, known as the Constitution of 1838, though it did not become effective until Florida was admitted to the Union in 1845, provided that the right of trial by jury shall forever remain inviolate.” Florida’s constitution “has contained similar language throughout our history.” The Florida Supreme Court and the Fourth District Court of Appeals have characterized the right to jury trial as “the paramount law of the land,” and “an organic right that under no circumstances should be denied.”

The supreme court has stated that “[q]uestions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions.”

Although it is sometimes difficult to identify the Florida Supreme Court’s constitutional methodology in a given area of substantive law, the court’s treatment of the right to jury trial is fairly straightforward. Almost a century of precedent states and restates the incantation that

139. Fla. Const. art I, § 16. Further, the Florida constitution prohibits “cruel or unusual punishment.” Fla. Const. art. I, § 17. This latter provision, though not the subject of much case law development, should require enhanced scrutiny of the procedure at issue here because death may be the penalty imposed. The disjunctive phrasing was important to the California Supreme Court in construing that state’s counterpart constitutional provision. See supra note 84. Further, some Florida Supreme Court justices appear increasingly receptive to the idea that because death is different from other punishments the state constitution demands enhanced scrutiny of capital cases. See, e.g., Woods v. State, 531 So. 2d 79 (Fla. 1988) (Barkett, J., dissenting) (three dissenting justices arguing that the Florida and federal constitutions forbid execution of the mentally retarded).
141. Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (quoting State v. Webb, 335 So. 2d 826, 828 (Fla. 1976)).
143. Tesher & Tesher, P.A. v. Rothfield, 392 So. 2d 1000, 1001 (Fla. 4th DCA 1981).
the Florida constitution "guarantees the right to trial by jury in only those cases in which the right was recognized at the time of the adoption of the State's first constitution." Thus, in deciding whether there is a right to jury trial in a given justiciable controversy, one must determine whether that controversy was resolved by the jury "when the Constitution of 1838 became effective in 1845." This historically-based approach to the jury trial right has not been without dissent. Some justices have urged the court to avoid the straight-jacket of history—of only looking to the state of the common law as of 1845. Justice Boyd wrote in 1984 that

146. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 698, 173 So. 2d 820, 825 (1937). See also In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434 (Fla. 1986) (jury trial provision "guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this state's first constitution became effective"); Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (quoting State v. Webb, 335 So. 2d 826, 828 (Fla. 1976)) ("It has long been established that this [jury trial] provision guarantees the right to trial by jury in only those cases in which the right was recognized at the time of the adoption of the State's first constitution"); Smith v. Barnett Bank, 350 So. 2d 358, 359 (Fla. 1st DCA 1977); In re Jones, 339 So. 2d 1117, 1118 (Fla. 1976) (quoting Ex parte Scudmore, 55 Fla. 211, 217, 46 So. 279, 283 (1908)) (jury trial right "merely secured it in those cases in which it was a matter of right before the adoption of the [first] constitution"); Hilliard v. City of Gainesville, 213 So. 2d 689, 691 (Fla. 1968) (jury trial "guarantee does not extend to cases for which there was no right to a jury trial prior to adoption of the [first] constitution"); Carter v. State Road Dep't, 189 So. 2d 793, 795 (Fla. 1966) (jury trial right "means that if, at the time of the [first constitution's] adoption, there was a right to a jury trial in a given justiciable controversy such right thereafter remained inviolate"); Boyd v. County of Dade, 123 So. 2d 323, 328 (Fla. 1960) (jury trial provision was "never intended to extend the right of jury trial but had the effect only of securing it in the cases in which it was a matter of right before the adoption of the [first] Constitution"); J.B. Green Realty Co. v. Warlow, 130 Fla. 220, 227, 177 So. 535, 538 (1937) (quoting Hunt v. City of Jacksonville, 34 Fla. 504, 506, 16 So. 398, 399 (1894)) (jury trial right "merely secures it in the cases in which it was a matter of right before the adoption of the [first] constitution"); Hawkins v. Reilim Inc., 92 Fla. 784, 788, 110 So. 350, 351 (1926) (jury trial provisions "designed to preserve and guarantee the right of trial by jury in proceedings according to the course of the common law as known and practiced at the time of the adoption of the [first] constitution"); State v. Parker, 87 Fla. 181, 187, 100 So. 260, 262 (1924) (jury trial guarantee "never intended to extend the right of jury trial, but merely secures it in the cases in which it was a matter of right before the adoption of the [first] Constitution") (emphasis in original); Ex parte Scudmore, 55 Fla. 211, 225, 46 So. 279, 283 (1907) (jury trial right secured only in "those cases in which it was matter of right before the adoption of the [first] constitution"); Pugh v. Bowden, 54 Fla. 302, 310, 45 So. 499, 501 (1907) (jury provision "does not extend the right but merely secures it in cases in which it was matter of right before the adoption of the [first] Constitution"); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 227, 37 So. 722, 723 (1904) (right serves to "secure the right in those cases only in which it was enjoyed when the Constitution became effective"); Hawthorne v. Panama Park Co., 44 Fla. 194, 196, 32 So. 812, 813 (1902) (jury right "guarantees to the citizen a right of trial by jury only in those cases where at the time of the adoption of the [first] constitution the law gave that right"); Hughes v. Hanah, 39 Fla. 365, 371, 22 So. 613, 615 (1897) (jury trial provision was "designed to preserve and guaranty the right to trial by jury in proceedings according to the course of the common law as known and practiced at the time of the adoption of the [first] constitution"); Wiggins v. Williams, 36 Fla. 637, 659, 18 So. 859, 866 (1894) (procedure deprives one of jury trial right if it "deprives a party of the right of trial by jury in a case according to the course of the common law when the [first] constitution was adopted").
in construing our constitution we should not blindly abide by the federal standards [or] strictly adhere to our past precedents. Our function is not to determine what our constitution has meant in the past, but rather to determine what it should mean now and in the future. Because of the extreme importance our society places upon a person's right to be judged by [her] peers, our constitution should be liberally interpreted to provide a right to jury trial in all criminal proceedings.\textsuperscript{147}

Justice Shaw, concurring in the case in which Boyd wrote these words, agreed that the "history of this nation's development convinces me that the constitution was written with a view to the future."\textsuperscript{148}

Justice Shaw in 1985 called upon the court to "reexamine our approach to the right to trial by jury," and he attempted to provide "more rational criteria which will reinvigorate" the jury trial provisions.\textsuperscript{149} The retrospective approach "unnecessarily freezes the development of the . . . right" at an arbitrary time in the past, with the result that the constitutional guarantee "atrophies and the right becomes increasingly less effectual as new criminal offenses are enacted into statutes for which there is no statutory right to trial by jury."\textsuperscript{150}

I find Justice Shaw's position convincing, but it has not yet commanded a majority of the court. Speaking as a court issuing holdings, the Florida Supreme Court has never deviated seriously from the proposition that in deciding jury trial issues, the controlling frame of reference is the state of Florida's law as of 1845.\textsuperscript{151}

The question now becomes how to classify the Florida Supreme Court's jury trial approach. Resolution of this issue is of no small doctrinal importance. If the court's approach is deemed to be primacy, then \textit{Spaziano v. Florida}'s decision on the federal constitutionality of the jury override is irrelevant—not even persuasive authority, much less definitive. If Florida's approach is characterized as lockstep, then \textit{Spaziano v. Florida} controls the state constitutional issue as well as the federal. If Florida's approach is considered to be independent or interstitial, then the Florida courts have varying degrees of latitude in deciding the state constitutional consequences of the jury override.

On its face, the retrospective inquiry of the Florida Supreme Court appears to fit most comfortably within the primacy theory. Whether a matter was triable by jury \textit{in Florida} in 1845 is an issue resolved, at

\textsuperscript{147} Whirley v. State, 450 So. 2d 836, 840-41 (Fla. 1984) (Boyd, J., dissenting).
\textsuperscript{148} \textit{Id.} at 840 (Shaw, J., specially concurring).
\textsuperscript{149} Reed v. State, 470 So. 2d 1382, 1385 (Fla. 1985) (Shaw, J., dissenting).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} See \textit{supra} note 146.
least in the abstract, without reference to federal law. In practice, however, the Florida Supreme Court's approach is more difficult to classify.

Florida's treatment of jury trial issues calls for separate analysis of the right under article I, section 22, granting a right to jury trial in civil cases, and article I, section 16, granting a right to jury trial in criminal cases. Both provisions, most recently restated in the 1968 Florida constitution, have federal analogues: the seventh amendment for article I, section 22, and the sixth amendment for article I, section 16. However, only the sixth amendment has been incorporated and applied to the states through the fourteenth amendment. Thus there exists no dual protection regarding the right to jury trial in civil cases, and states must develop their own law. By contrast, there is dual protection of the right to jury trial in criminal matters. Given this distinction, one would expect that in civil jury trial matters the courts would use a primacy approach, looking only to state law. In criminal jury trial matters, however, the court could utilize any of the four methods outlined in the previous subsection—depending upon how it views issues of federal supremacy and state autonomy, as well as upon how the Florida court views its duty to interpret the Florida constitution.

In civil jury trial cases, the prevailing approach is indeed the methodology of primacy. Cases examining whether a right to civil jury trial existed at common law in 1845 explicitly rely upon article I, section 22, and upon state common law as of 1845. Employing this primacy approach, the Florida Supreme Court has found that a right to civil jury trial exists as to in rem forfeiture proceedings and civil commitment proceedings, as well as when a common law issue is raised in a compulsory counterclaim to an equity issue, damages for trespass or

There is no right to jury trial in actions for eminent domain, enjoining trespass, partitioning, quiet title, or revocation of a real estate license. These cases tend to speak in terms of the state constitution as though the federal Constitution did not exist.

If primacy is the analysis of choice for civil jury trial issues, the approach taken in criminal jury trial cases is more difficult to place within the typology summarized in the previous subsection. Determining the method of constitutional analysis employed in criminal cases is problematic for two reasons. First, article I, section 22 and related legal reasoning are often referenced in criminal right to jury trial cases more appropriately analyzed under article I, section 16, and under the sixth amendment to the federal Constitution. Justice Shaw has argued in separate opinions that

the origin of our present reading of the Florida Constitution’s right to trial by jury, which emphasizes the “remain inviolate” language of article I, section 22, to the neglect of article I, section 16 which affirmatively grants the right to trial by jury in all criminal prosecutions, can be found in *Flint River Steam Boat Co. v. Roberts, Allen and Co.*, 2 Fla. 102 (1848) [...] a civil case. This emphasis, proper though it was in *Flint River*, was to have unfortunate consequences when it came to be applied to a criminal prosecution.164

Second, the right to jury trial in criminal cases is guaranteed under article I, section 16 of the Florida constitution and under the sixth amendment—except when the “crime” is a violation of a local ordinance or falls under one of four classes of federal “petty” crime exceptions. These petty crime exceptions to the right to jury trial have their roots in *federal* jurisprudence, as outlined by the Florida Supreme Court in *Whirley v. State*: a crime indictable in 1845; a crime resulting in less than six months in prison or more than a $500 fine; a crime that is malum in se; or a crime that involves moral turpitude.166

Many criminal jury trial cases turn on the distinction between petty and serious crimes, incorporating an inquiry into whether the offense

158. Hughes v. Hanah, 39 Fla. 365, 22 So. 613 (1897).
159. Carter v. State Road Dep’t, 189 So. 2d 793 (1966).
164. Whirley v. State, 450 So. 2d 836, 840 (Fla. 1984) (Shaw, J., specially concurring); see also Reed v. State, 470 So. 2d 1382, 1387 (Fla. 1985) (Shaw, J., dissenting).
165. 450 So. 2d 836 (Fla. 1984).
166. Id. at 839.
was indictable in 1845. 167 Because this criterion is similar to that used in civil jury trial cases, it may be argued that criminal cases relying on this factor to determine classification of crimes use the primacy approach because they rely upon the state constitution and upon state common law. At least prior to incorporation of the sixth amendment in 1968, one would expect criminal right to jury trial cases to be determined on a primacy basis because, like civil jury trial issues, the federal analogue was not applicable to the states.

However, that was not necessarily so. Unlike civil cases, at least since 1968 there has been a federal constitutional analogue made applicable to the states regarding the right to jury trial in criminal matters—the sixth amendment. Further, the criteria for classification adopted by the Florida Supreme Court is based upon the federal petty crimes exception. 168 One could, therefore, make the case that the court follows a self reliant/interstitial approach in deciding criminal right to jury trial cases. The court first analyzes the issue under the federal constitution and federal law to determine whether or not it is a serious crime; only then does the court look to state common law to determine if the crime was indictable in 1845.

Three cases illustrate the different approaches employed by the Florida Supreme Court in this area. Most recently, in Reed v. State 169 in 1985, the court seemed to employ the interstitial approach in deciding a criminal jury trial issue. Reed asserted a right to jury trial in county court for a petty statutory offense of criminal mischief. The supreme court’s reasoning agreeing with Reed’s claim was twofold: first, the United States Constitution was implicated; second, the court had ruled previously in Whirley v. State 170 that the federal petty crime exception to jury trial in criminal proceedings also applied to the state constitution. In applying the federal petty crimes exception, the Reed court explained that a maximum penalty of more than six months imprisonment might be sufficient to classify a crime as serious. However, a crime with less than six months may still be a serious crime if it was indictable at common law in 1845.

167. E.g., Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (quoting State v. Webb, 335 So. 2d 826, 828 (Fla. 1976)); Hilliard v. City of Gainesville, 213 So. 2d 689, 691 (Fla. 1968); Boyd v. County of Dade, 123 So. 2d 323, 328 (Fla. 1960); State v. Parker, 87 Fla. 181, 187, 100 So. 260, 262 (1924); Hunt v. City of Jacksonville, 34 Fla. 504, 506 (1894).

168. Although some cases involve the right to jury trial when a criminal court commits a person due to incorrigibility or insanity rather than classification of a crime as petty or serious, such cases still rely on the same criteria as those in the petty-serious cases cited above. E.g., Ex Parte Scudmore, 55 Fla. 211, 217, 46 So. 279, 283 (1908); Pugh v Bowden, 54 Fla. 302, 310, 45 So. 499, 501 (1907).

169. 470 So. 2d 1382 (Fla. 1985).

170. 450 So. 2d 836 (Fla. 1984).
The court in *Reed* employed a federal analysis, looked to Florida state law, relied on both federal and state case law, and held that a right to jury trial for charges of criminal mischief does exist. This was so even though the penalty for criminal mischief was less than sixty days. The controlling fact was that the crime of criminal mischief had been indictable at common law in 1845. Emphasis on the federal analysis of the petty/serious distinction, coupled with no explicit statement of a state law basis for its decision, suggests that this case could fairly be categorized as an interstitial/self reliant analysis. This is so notwithstanding the overarching fact that the constitutional frame of reference itself—grounding the inquiry in the state of *Florida* law as of 1845—is an analysis that is purely a matter of state law.

Any categorization of Florida's jury trial approach as interstitial, based on *Reed*, ought to be provisional, however. One year prior to *Reed*, the analysis employed by the court in *Whirley v. State*\(^\text{171}\)—the case relied upon in *Reed*\(^\text{172}\)—could be labeled either interstitial or independent. *Whirley* presented the question whether citizens had a right to jury trial for traffic violations. The court in *Whirley* first analyzed the right to jury trial under the sixth amendment and the federal petty offense exception and found no federally protected right to jury trial. The court went on to determine whether the right to jury trial for traffic violations was protected under the Florida constitution and concluded that it was not. The court's reasoning included subsidiary holdings that the federal petty crimes exception applied to article 1, section 16 of the Florida constitution, and that there was no statutory right to trial by jury because "the legislature failed to grant one in the case of one charged with driving or being in control of a vehicle with a blood alcohol level of 0.10 percent or above."\(^\text{173}\) This "federal first, state second" analysis exemplifies either a self reliant/interstitial or an independent approach.

*Reed* thus employed the interstitial approach in 1985; *Whirley* employed the self reliant/interstitial or independent approach in 1984. The plot thickens when one considers that *Reed* and *Whirley* both cited with approval *State v. Webb*.\(^\text{174}\) The court in *Webb* in 1976 clearly employed a primacy approach. *Webb* involved a claim that a defendant charged with a violation of a state statute requiring motor vehicles to have a valid inspection certificate is entitled to a jury trial. The court based its holding squarely on the state constitution:

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171. *Id.*
172. 470 So. 2d at 1383 (citing Whirley v. State, 450 So. 2d 836, 839 (Fla. 1984)).
174. 335 So. 2d 826 (Fla. 1976). *E.g.*, *Reed*, 470 So. 2d at 1324; *Whirley*, 450 So. 2d at 838.
We therefore hold that, there being no right to a trial by jury for this traffic violation at the time of the adoption of Florida's first constitution, the denial of a jury trial by [the inspection statute] is not prohibited by Fla. Const. art. I, 22.175

Further, the Webb court stated that while "we are influenced by the fact that, even if this statute had not been decriminalized and still involved a criminal violation for which incarceration was a possible punishment, the right to a jury trial as provided by the sixth amendment of the United States Constitution would not apply" because the crime was petty—the penalty never exceeded sixty days imprisonment or a $500 fine.176 Webb is a classic example of a primacy analysis, where the holding explicitly is based on state grounds and federal issues are addressed as influential but not dispositive.

The Florida Supreme Court’s constitutional approach in this area therefore is difficult to pigeonhole. On the one hand, it could be said that the court has evolved from Webb through Whirley to Reed: In criminal right to jury trial matters, the court has over time moved from a primacy analysis (that paralleled civil jury trial analysis) to a self reliant/interstitial approach that first addresses the federal sixth amendment right and then, applying the federal petty crime exception to article I, section 16, analyzes the right to jury trial most frequently on the basis of whether the crime was indictable or whether a right to jury trial existed at common law in 1845.

On the other hand, Webb lives. And of the three cases, Webb's analytical framework is the clearest; Reed and Whirley can perhaps be dismissed as examples of infelicitous opinion drafting. Not only has Webb’s worldview never been repudiated, but—the court continues to cite with approval Webb—a case that embodies the primacy approach.

Placing the jury trial cases into a larger doctrinal context is not terribly illuminating. Review of recent Florida Supreme Court decisions in other constitutional areas provides no clear guidance. These cases do, however, support the idea that if there is no federal analogue in jury trial cases, then the court tends to use the primacy approach. If there is a federal analogue, the court’s approaches to constitutional analysis vary.177 The court does not use any one method of constitutional analysis consistently except where search and seizure, privacy and abortion, or distribution of powers are concerned.

In substantive areas where there are federal analogues to state constitutional provisions, the analytical method ranges across all four meth-

175. Webb, 335 So. 2d at 828-29.
176. Id. at 828.
177. See generally Cooper, supra note 93.
odologies: lockstep, interstitial, independent, and primacy. The Florida constitution mandates the lockstep approach in search and seizure cases. Due process and equal protection cases evince a mixture of methods. Most due process cases employ the interstitial approach, though several cases use the primacy method. Recent equal protection cases reveal a split between the interstitial and independent approaches. Ex post facto cases tend to employ the independent ap-

178. The search and seizure provision of the Florida constitution, added in 1982, is unique in the state constitution: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. . . . This right shall be construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I § 12 (emphasis added).

While this provision does not absolutely preclude increased protection where there is no controlling United States Supreme Court authority, or where the Florida legislature enacts specific increased protections, it is a clear mandate from the sovereign people of Florida with which the courts must and do comply. See generally Cooper, supra note 93, at 275-79; Slobogin, State Adoption of Federal Law, 39 U. FLA. L. REV. 653 (1987). Chief Justice Burger applauded this provision of the Florida constitution. Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

179. Due process cases using the primacy approach include State v. Smith, 547 So. 2d 131 (Fla. 1989) (ex parte order compelling participation in a police lineup violated article I, section 9 of the Florida constitution); Hill v. State, 549 So. 2d 179 (Fla. 1989) (court explicitly rejected a broader federal interpretation and found that failure to admit double hearsay testimony did not violate article I, section 16 of the Florida constitution regarding right to a fair and speedy trial in criminal matters); State v. Glosson, 462 So. 2d 1082 (Fla. 1989) (court rejected the narrow application of the due process defense found in federal cases and held that payment of a contingent fee to an informant conditioned on cooperation and testimony needed for a successful prosecution violated article I, section 9 of Florida's constitution); Department of Ins. v. Dade Cty. Consumer Adv., 492 So. 2d 1032, 1035 (Fla. 1986) (court employed a substantive due process, rational relationship test in finding two statutes "unconstitutional under article I, section 9 of the Florida Constitution to the extent they prohibited insurance agents from rebating any portion of their commission to their customers").

180. Due process cases evincing the interstitial approach include Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988) (under fourteenth amendment, the court reversed the judge's sentence of death because the judge erred in imposing the death penalty when "there was a reasonable basis for the jury's recommendation of life imprisonment"); Engle v. State, 438 So. 2d 803 (Fla. 1983) (court explicitly relied on the sixth and fourteenth amendments in finding that consideration of testimony given at another trial unconstitutionally denied an opportunity to cross examine and confront during a sentencing hearing; the court vacated the death sentence and remanded for resentencing without empanelling another jury).

Cases decided pursuant to the interstitial approach implicitly operate under an assumption that absent a clear and plain statement of a state basis for a decision, a federal basis will be inferred. Such cases include Wood v. State, 544 So. 2d 1004, 1006 (Fla. 1989) (court held a defendant must be given notice before costs are assessed against him, noting that "this holding goes to the very heart of the requirements of the due process clauses of our state and federal constitutions"); Garron v. State, 528 So. 2d 353 (Fla. 1988) (court relied on United States Supreme Court cases to find use of post-Miranda silence as evidence of sanity violated due process); Harmon v. State, 527 So. 2d 182 (Fla. 1988) (trial court erred in overriding jury recommendation of life because reasonable people could differ that was the appropriate penalty).

181. E.g., United Tel. Long Distance v. Nichols, 546 So. 2d 717, 720 (Fla. 1989) (order requiring a long-distance telephone subsidiary to compensate the local exchange parent and its ratepayers for intangible benefits derived from the parent "is neither confiscatory nor violative of the due process
proach, while civil rights cases addressing freedoms of speech, religion, and assembly apply the interstitial approach. Thus the Florida Supreme Court employs a variety of approaches when addressing constitutional issues in substantive areas where there are federal and state constitutional analogues. Although no one approach is used consistently, on balance the court tends to favor the interstitial approach.

Where there is no federal analogue to state constitutional provisions or where the federal analogue is not applicable to the states, the Florida Supreme Court uses a purely state-based primacy approach. Where distribution of powers is at issue, the court relies solely on the Florida constitution. While there is no federal textual analogue to Florida's privacy provision under article I, section 23, there has been controversy over several federal decisions regarding the right to privacy in decisional issues concerning the right to die and right to an abortion. Disclosural issues overlap with search and seizure matters depending upon the circumstances of the case. The privacy cases suggest that the Florida Supreme Court uses a different analytical approach in privacy cases un-

182. E.g., State v. Smith, 547 So. 2d 613 (Fla. 1989) (retrospective application of an amendment requiring that multiple punishment be imposed for separate offenses where only one act is involved violated both federal and state constitutions); State v. McGriff, 537 So. 2d 107 (Fla. 1989) (retrospective application of Florida Statutes chapter 87-110 violated the ex post facto clauses of the Florida and federal constitutions).


184. E.g., Lanca Homeowners v. Lantana Cascade, 541 So. 2d 1121, 1123-24 (Fla. 1989) (section 723.079(1) of the Florida Statutes "constituted an unconstitutional intrusion on [the] Court's rulemaking authority" because the section was procedural and within the court's exclusive domain under article V, section 2(a) of the Florida constitution); Department of Bus. Reg. v. Classic Mile, Inc., 541 So. 2d 1155 (Fla. 1989) (court held statute unconstitutional under article 3, section 10 and 11(b) of the Florida constitution); Laborers' Intern., Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989) (county board exercised proper quasi-judicial powers under article V, section 1 of the Florida constitution); Watson v. First Fla. Leasing, Inc., 537 So. 2d 1370 (Fla. 1989) (statute requiring claimant to file written notice of an action in an estate proceeding held unconstitutional because it was procedural and trespassed upon the court's rulemaking authority); White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989) (court found statute limiting attorneys' fees for representation of indigent defendants to $3,500 unconstitutional when applied in time-consuming and costly capital cases, because the legislature thereby curtailed the court's inherent power to secure effective, experienced counsel in violation of article V, section 1 and article II, section 3 of the Florida constitution).


der article 1, section 23, depending upon the nature of the claim. The primacy approach is used in abortion cases,\textsuperscript{187} the interstitial approach in right to die cases.\textsuperscript{188} Disclosural decisions\textsuperscript{189} appear to trigger a primacy analysis, but they are influenced by the lockstep mandate for search and seizure claims.

Two important principles emerge from this discussion. First, the central constitutional frame of reference in deciding Florida jury trial issues is the state’s law as of 1845. Second, in deciding jury trial claims under the state constitution the Florida Supreme Court’s approach is not lockstep—\textit{Spaziano v. State} notwithstanding. The court’s approach may be categorized as primacy, independent, or self reliant/interstitial, but in any of these categories the court remains free—if not obligated—to disregard the federal courts’ resolution of the jury override’s federal constitutionality in \textit{Spaziano v. Florida}. \textit{Spaziano v. Florida} marks the beginning, not the end, of the inquiry. In other words, the Florida Supreme Court in this area retains the jurisdiction to do justice.

**IV. THE JURY OVERRIDE AND THE FLORIDA CONSTITUTION**

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.\textsuperscript{190}

\textsuperscript{187} \textit{E.g., In re T.W.}, 551 So. 2d 1186 (Fla. 1989) (statute requiring parental consent for abortions performed on a minor held unconstitutional under article 1, section 23 of Florida’s constitution); State v. Barquet, 262 So. 2d 431 (Fla. 1972) (statute imposing a prison term for manslaughter on persons who employed any means of causing an abortion unless two physicians attested the procedure was necessary to save the life of the mother held unconstitutional, on the basis that it violated the state constitution’s due process clause); see generally Cope, \textit{To Be Let Alone}, 6 FLA. ST. U.L. REV. 671 (1978); Maher, \textit{Has the Florida Constitutional Right to Decisional Privacy Finally Come of Age?}, FLA. B.J. 23 (July/August 1990); Note, \textit{Interpreting Florida’s New Constitutional Right of Privacy}, 33 U. FLA. L. REV. 565 (1981); Note, \textit{Toward a Right to Privacy}, 5 FLA. ST. U.L. REV. 631 (1977).

\textsuperscript{188} In Public Health Tr. of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989), instead of explicitly stating that article I, section 23 of the Florida constitution was the basis of the court’s decision to protect Ms. Wons’ constitutional rights of privacy and religion, the justices analyzed the right under \textit{Satz v. Perlmutter}, 379 So. 2d 359 (Fla. 1980). The \textit{Wons} court grounded the right of privacy in the federal Constitution, thus evincing an interstitial approach. A primacy approach would have been expected since there was no explicit federal analogue.

\textsuperscript{189} In Shaktman v. State, 553 So. 2d 148 (Fla. 1989), although the court used the primacy approach, citing article I section 23 as the basis for its decision, it noted that this section does not enlarge a citizen’s right to privacy for purposes of search and seizure where, as there, a pen register device was installed with all due procedural safeguards. Thus, the Florida lockstep provision regarding search and seizure overrode the privacy provision where disclosural issues were involved.

\textsuperscript{190} Duncan v. Louisiana, 391 U.S. 145, 157 (1968).
Justice Shaw's critique of the Florida Supreme Court's constitutional approach to jury trial issues makes sense. I see little reason, beyond formalism and an attachment to false consistency, to focus only on the state of the law at 1845—to the exclusion of all else. An expanded inquiry into the folly of the override would permit consideration of the functional, historical, and policy considerations Ruthann Robson and I discussed in 1985.\textsuperscript{191} Still, the court appears wedded to the retrospective analysis. Even under that cramped analysis, however, the jury override should not pass state constitutional muster.

At the time Florida adopted its first constitution in 1845, capital punishment was for the most part mandatory upon conviction by the jury (unless waived) of specified offenses. If the state constitution does in fact freeze the world in 1845, than a paradoxical argument can be made that capital punishment is a per se violation of the Florida constitution. The only sentencing scheme permitted by the Florida constitution in 1845 (mandatory sentencing by juries) falls afoul of the federal Constitution as construed today, which clearly prohibits mandatory capital sentencing.\textsuperscript{192} That is paradoxical at least. Can a defendant possibly have a state constitutional right to a federally unconstitutional procedure?

There are at least two ways to escape the dilemma crafted in the preceding paragraph. The first emphasizes that the analytical focus here must remain on the jury trial right. The right to jury trial in capital sentencing proceedings in 1845 does not imply a right to the same total capital sentencing structure—mandatory sentencing—that existed at that time. All that remains guaranteed inviolate is the right to jury trial as it existed in 1845.

Second, the dilemma could be evaded by the adoption of a state constitutional analysis that recognizes that the world is not entirely frozen in 1845. The task of courts would be to identify the core attributes of the common law right to jury trial, as those principles existed in 1845 and as they have matured over time. The essential attribute was that in 1845 a jury's verdict for life was final. That attribute goes to the heart of the jury system in 1845 and today. Only \textit{Furman v. Georgia} warped this core idea beyond recognition.\textsuperscript{193}

The historical record suggests that in 1845 capital punishment in Florida was for the most part mandatory. Once the jury found the de-

\begin{footnotes}
\item 191. Mello & Robson, \textit{supra} note 7.
\item 193. Ehrhardt & Levinson, \textit{supra} note 48 (Florida's jury override was enacted by the legislature at least in part due to reasonable misconceptions about the requirements of \textit{Furman}). \textit{See also} Mello & Robson, \textit{supra} note 7, at 68-70; Note, \textit{supra} note 48.
\end{footnotes}
fendant guilty of a capital offense, the court had no alternative but death or a *lesser* sentence. For certain crimes when committed by Black slaves, the court had the discretion to impose penalties of *less than* death.

In 1822, when Florida became a Territory, it became necessary to enact a criminal code. The First Legislative Council of Florida, meeting in Pensacola, passed "An Act for the Apprehension of Criminals, and the Punishment of Crimes and Misdemeanors." This act, which provided for the first sanctioned death penalty under Florida's territorial or state authority, designated three offenses as capital: murder, rape,

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The cover page of the Digest states that the compilation included the "Statute Law of the State of Florida, of a General and Public Character, in Force at the end of the Second Session of the General Assembly of the State, on the Sixth Day of January, 1847." However, it was authorized by an act of the general assembly in 1845, and none of the capital offenses cited here were amended between 1845 and 1847. Some changes were made in the general criminal provisions between 1845 and 1847, and they were included in the Digest. E.g., tit. I, ch. VII, ¶ 19, p.501; 1846 Act, ch. 91, § 1 (liquor licenses required); tit. I, ch. VII, ¶ 20, p.502; 1846 Act, ch. 91, § 2 (take-out liquor sales permitted); tit.I, ch. XII, ¶ 16, p. 510; 1846 Act, ch. 75, § 2 (selling liquor to slaves); tit. I, ch. XIV, ¶ 1, p.518; 1846 Act, ch. 118, § 1 (certain rivers declared navigable); tit. II, ch. I, § 3, ¶¶ 1, 2, 3 & 4, p.536; 1846 Act, ch. 104, §§ 1 & 2 (duties of jailors with respect to federal prisoners); tit. II, ch. III, § 3, ¶¶ 1, 2 & 3, p.526; 1846 Act, ch. 76, §§ 2 & 3 (judgments for costs); tit. III, ch. IV, ¶¶ 1, 2, 3 & 4, p.536; 1846 Act, ch. 104, §§ 1, 2, 3 & 4 (addressing the migration of Florida persons of color to Key West).

Because none of the 1846 changes appeared to affect any capital offense statute, the Digest seems to be an accurate compilation of the statutory law of death as of 1845.


196. Some crimes were made applicable to "any person" who committed the offense; however, some crimes and misdemeanors were made applicable only to "slaves, free negroes, and mulattoes." Digest, supra note 194, tit. IV, ch. I, § 3; An Act Relating to Crimes and Misdemeanors Committed by Slaves, Free Negroes, and Mulattoes [hereinafter "1828 Act"].

Regardless of this different treatment under the substantive crimes, the same "rules and regulations" were to be applied at slave trials as were applied at the trials of free persons. Digest, supra, tit. IV, ch. I, § 3, ¶ 1, p.542; 1828 Act § 60. It was also the duty of the court to assign and appoint counsel to defend any slave being tried before it. Digest, supra, tit. IV, ch. I, § 3, ¶ 5, p.542; 1828 Act § 57. Thus, in 1845 the jury trial was given great—arguably *more*—protection than some people (read slaves) received generally in the legal system.

In Luke, a Slave v. State, 5 Fla. 185 (1853), the court discussed—and with abhorrent language approved—the statutory difference in penalties for crimes committed upon "any person" and upon "slaves, free negroes, or mulattoes." However, the court made clear that the "humanity of the law" can be preserved only by securing for the "degraded caste" the same procedural protections claimed by whites—expressly including the right to trial by jury.

As discussed below, the legislature did allow a judge to override the automatic imposition of death upon conviction of a slave for commission of one of five crimes. Because slaves were not full citizens, and because the racially bifurcated development of the relevant statutory law stopped after the Civil War, there is no need to explore the statutory development as applied to these five crimes.

and arson. The act used mandatory language, providing that any person committing the specified offenses "shall suffer death." Six years later, the legislature added twelve crimes to the list of capital offenses and, apparently for the first time, distinguished between crimes committed by white citizens and crimes committed by Black slaves or freed people. Death was mandatory upon conviction of any one of five of these twelve offenses; the other seven were punishable, at the court's discretion, by death or a "lesser" penalty involving torture—whipping, branding, or nailing of ears.

Review of the statutory law extant in 1845 suggests that a jury decision for death was in effect a necessary condition for the imposition of the death penalty. Capital punishment was for the most part mandatory upon conviction of specified offenses. Capital sentencing was the jury's exclusive domain in the sense that jury consent was a condition precedent to death sentences. The court in no instance possessed the discretion to increase a jury's "recommended" lesser conviction/sentence to death.

In 1845, Florida had ten crimes imposing a mandatory death penalty applicable to any person regardless of race. See Table 2.

198. Id. at § 21 (emphasis added).
199. See supra note 195.
### TABLE 2
Mandatory Capital Offenses in 1845:
Applicable to Any Person Regardless of Race

<table>
<thead>
<tr>
<th>Crime</th>
<th>Digest Citation</th>
<th>Statutory Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arson</td>
<td>Digest, tit. I, ch. IV, ¶1, p.491</td>
<td>1832 Act §2.</td>
</tr>
<tr>
<td>Wilfully Perjury Which Causes the Life of Another to be Taken Away</td>
<td>Digest, tit. I, ch. V, ¶1, p.493</td>
<td>1832 Act §17.</td>
</tr>
</tbody>
</table>

There were also twelve crimes imposing a mandatory death penalty on any slave, free Black, or mulatto. See Table 3.

### TABLE 3
Mandatory Capital Offenses in 1845:
Applicable to Slaves, Free Blacks and Mulattoes

<table>
<thead>
<tr>
<th>Crime</th>
<th>Digest Citation</th>
<th>Statutory Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conspiring to Insurrection</td>
<td>Digest, tit. IV, ch. I, §1, ¶2, p.537</td>
<td>1828 Act §34.</td>
</tr>
</tbody>
</table>
Conspiring to Murder

Digest, tit. IV, ch. I, § 1, ¶ 2, p.537
1828 Act § 34.

Assault and Battery of a white Person with Intent to Kill

Digest, tit. IV, ch. I, § 1, ¶ 3, p.537
1828 Act § 35.

Poisoning With Intent to Kill

Digest, tit. IV, ch. I, § 1, ¶ 4, p.537
1828 Act § 36.

Manslaughter of a white Person

Digest, tit. IV, ch. I, § 1, ¶ 5, p.537
1840 Act § 1.

Burning Any Dwelling-House, Store, Cotton-House, Gin, Mill, Outhouse, Barn, or Stable

Digest, tit. IV, ch. I, § 1, ¶ 5, p.537
1840 Act § 1.

Accessory to Burning Any Dwelling-House, Store, Cotton-House, Gin, Mill, Outhouse, Barn, or Stable

Digest, tit. IV, ch. I, § 1, ¶ 5, p.537
1840 Act § 1.

Assault of white Woman or Child with Intent to Rape

Digest, tit. IV, ch. I, § 1, ¶ 6, p.538
1840 Act § 1.

Accessory to Assault of white Woman or Child with Intent to Rape

Digest, tit. IV, ch. I, § 1, ¶ 6, p.538
1840 Act § 1.

Shooting at a white Person With Intent to Kill

Digest, tit. IV, ch. I, § 1, ¶ 7, p.538
1828 Act § 55.

Wilful or Malicious Wounding of a white Person While Attempting to Kill Another Person

Digest, tit. IV, ch. I, § 1, ¶ 7, p.538
1828 Act § 55.

Aiding and Abetting the Wilful or Malicious Wounding of a white Person While Attempting to Kill Another Person

Digest, tit. IV, ch. I, § 1, ¶ 7, p.538
1840 Act § 55.
Additionally, five crimes imposed a mandatory death penalty upon any slave, free Black, or mulatto, but allowed the court discretion to impose alternate penalties if death was deemed inappropriate. See Table 4.

**TABLE 4**

**Mandatory Capital Offenses in 1845:**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Digest Citation</th>
<th>Statutory Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery of the Person</td>
<td><em>Digest, tit. IV, ch. I, § 1, ¶ 8, p.538</em></td>
<td>1828 Act § 56. The alternate penalty was having one’s ears nailed to posts and standing for one hour while receiving 39 lashes on the bare back.</td>
</tr>
<tr>
<td>Burglary</td>
<td><em>Digest, tit. IV, ch. I, § 1, ¶ 8, p.538</em></td>
<td>1828 Act § 56. The alternate penalty was having one’s ears nailed to posts and standing for one hour while receiving 39 lashes on the bare back.</td>
</tr>
<tr>
<td>Maiming of a white Person</td>
<td><em>Digest, tit. IV, ch. I, § 1, ¶ 9, p.538</em></td>
<td>1828 Act § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped 39 stripes and standing for one hour with one’s ears nailed to posts, or (b) having one’s hand burnt with a heated iron in open court.</td>
</tr>
</tbody>
</table>
Attempt to Commit any Capital Offense

Digest, tit. IV, ch. I, § 1, ¶ 9, p.538

1828 Act § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped 39 stripes and standing for one hour with one's ears nailed to posts, or (b) having one's hand burnt with a heated iron in open court.

Accessory to Attempt to Commit any Capital Offense

Digest, tit. IV, ch. I, § 1, ¶ 9, p.538

1828 Act § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped 39 stripes and standing for one hour with one's ears nailed to posts, or (b) having one's hand burnt with a heated iron in open court.

Thus, at the time that Florida's first constitution was ratified, a jury's verdict of guilt of a capital crime meant that a death sentence—or in limited circumstances a lesser penalty—was mandatory. A jury's verdict of death was a necessary, and usually a sufficient, condition of imposition of capital punishment. This was the functional equivalent of jury sentencing for capital offenses, at least for purposes of state constitutional doctrine.

The nexus between the jury's verdict of guilt and its determination of sentence was recognized by the Florida legislature in 1868, when it enacted a statute providing that "no person whose opinions are such as to preclude him [sic] from finding the defendant guilty of an offense punishable by death shall be compelled or allowed to serve as a juror on a trial of such an offense."201 The Florida Supreme Court applied this statute in Metzgar v. State,202 holding that it was "proper to exclude from the jury in capital cases any person who, from scru-

201. The statute is quoted in Metzgar v. State, 18 Fla. 481, 486 (1881) (emphasis added).
202. Id. at 481.
pies of conscience or some reason other than the want of sufficient proof, would refuse to find a verdict of guilty."\textsuperscript{203}

Indeed, the fact that mandatory capital punishment was a \textit{jury} matter led to the demise of mandatory capital punishment systems in the United States. Mandatory sentencing obviously meant that the jury could avoid the death penalty only by acquitting the defendant or finding him or her guilty of a lesser offense. This threat of jury nullification encouraged the states to replace their mandatory death penalties with discretionary capital punishment laws. Some twenty-four jurisdictions, including Florida, moved from mandatory to discretionary capital sentencing between the end of the Civil War and the turn of the century.\textsuperscript{204}

Capital punishment in Florida became discretionary during the 1870's—apparently in 1872.\textsuperscript{205} By 1884 the Florida Supreme Court was able to state that "the law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be actuated (and these motives are not circumscribed) the court is bound to heed their verdict and pronounce sentence accordingly."\textsuperscript{206} This remained the law of Florida until \textit{Furman v. Georgia} invalidated every jurisdiction's capital statute, including Florida's.\textsuperscript{207} Thus, for the century before \textit{Furman v. Georgia}—1872 to 1972—a Florida jury's verdict for life was clearly and explicitly and unquestionably final.

Florida's jury trial doctrine requires a determination of whether the right existed as to capital sentencing in 1845. History provides no definitive answer here, but doctrine requires that an answer be forced from the mists of the past. Although the historical record is somewhat sketchy, the practical reality appears to have been that in 1845 juries in Florida were the capital sentencers \textit{if anyone was}. It cannot be argued credibly that \textit{judges} sentenced capitally during this period. The judge was required to sentence to death or less upon a jury's verdict of guilty. In no situation was the judge authorized to \textit{increase} a jury's verdict/sentence to death.

\textsuperscript{203} Id.


\textsuperscript{205} The syllabus in Keech \textit{v. State}, 15 Fla. 391, 391 (1876), cited the "Act of February 27, 1872, ch. 1887," for the proposition that "in 'capital' cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life;" \textit{see also id. at 407}; Metzgar \textit{v. State}, 18 Fla. 482, 483 (1881). Bowers also identified 1872 as the year Florida moved from mandatory to discretionary capital sentencing. W. Bowers, \textit{supra} note 2, at 10-11.

\textsuperscript{206} Newton \textit{v. State}, 21 Fla. 53, 101 (1884); \textit{see also} Garner \textit{v. State}, 9 So. 835, 847 (Fla. 1891).

\textsuperscript{207} \textit{See} discussion \textit{supra} notes 55-62, 205-06 and accompanying text.
History seldom offers definitive answers. But given that Florida’s jury trial doctrine requires that the vagaries of history resolve the jury trial constitutional inquiry, Florida’s history as of 1845 suggests that juries were the capital sentencers in Florida at that time. The doctrinal fiction is that somebody was: judge or jury. It clearly was not the judge. By process of elimination, it was the jury—if it was anyone. Because the right to jury sentencing in capital cases existed in 1845, it remains inviolate today. Florida’s statutory provision that permits judges to impose death notwithstanding a jury’s “recommendation” of life therefore seems to violate the state constitution.

V. Conclusion

I trust jurors. I trust them if they vote for mercy or for death.

Florida Governor Lawton Chiles

Existing state constitutional law supports the idea that the jury override offends the state constitution. Florida’s override was the product of federal constitutional confusion, and its history in practice has not been a happy one. Even applying the corset of history embodied in the Florida Supreme Court’s jury trial cases, the jury override is vulnerable to state constitutional challenge.

The historical record provides space sufficient to support or invalidate the override, although on balance history weighs in on the side of invalidation. Ancient Florida history, circa 1845, suggests that jury verdicts for life were final. A century of “modern” history, from 1872 to the present, shows why jury verdicts for life should be final. Only Florida’s understandable misconception of Furman indicated otherwise, but now we know better. It would be poetically fitting for the Florida Supreme Court to repudiate the override as offensive to Florida’s history and its constitutional values past and present. Because it is offensive. In this age of deregulated death at the federal level, only the Florida Supreme Court can say that it is offensive.

208. MacGarrahan, supra note 80, at 6B.
209. Mello & Robson, supra note 7; Radelet, supra note 70; Radelet & Vandiver, supra note 25.