Rejecting the Jury: The Imposition of the Death Penalty in Florida

*Michael L. Radelet**

INTRODUCTION

Over the last decade, the state of Florida has led the United States both in the number of people sentenced to death and in the number of prisoners executed. Almost one out of every six persons condemned to die in the United States today lives in Florida.[1] Florida was also the first state to reenact the death penalty after the then existing capital statutes were invalidated by the 1972 *Furman v. Georgia*[2] decision and its related cases. Part of the explanation for the high rate of death sentencing in Florida is that its present death penalty statute is among the broadest in the country. Even in cases in which the petit jury has rendered an advisory sentence of life imprisonment, the Florida statute allows the trial judge to sentence the defendant to death. This Article focuses on this override provision,[3] and presents data that profile selected characteristics of the population of those who have been sentenced to death under the present Florida law.

---

*Associate Professor, Department of Sociology, University of Florida. B.A. 1972, Michigan State University; M.A. 1974, Eastern Michigan University; Ph.D. 1977, Purdue University; Postdoctoral Fellow 1977-79, University of Wisconsin.

I would like to thank Kay Isaly and Margaret Vandiver for their assistance in gathering the data used in this Article, Michael A. Mello for sharing with me the research he conducted as co-counsel on the *Spaziano* case; and Hugo Adam Bedau for suggesting and encouraging this line of research.

[1] As of May 1, 1985, there were 1513 known death row inmates in the United States, of whom 227 (15%) lived in Florida. Thirty-seven states allowed the use of capital punishment, of which 32 had at least one condemned inmate. *See* NAACP LEGAL DEFENSE & EDUCATIONAL FUND INC., DEATH ROW, U.S.A. (May 1, 1985) (unpublished compilation).

[2] 408 U.S. 238 (1972).

[3] FLA. STAT. ANN. § 921.141 (2)(3) (West Supp. 1985).

I. BACKGROUND

Prior to *Furman*, Florida statutes directed that all defendants found guilty of a capital offense be sentenced to death unless a majority of the trial jury recommended mercy, in which case the defendant was sentenced to imprisonment for life.[4] Following the *Furman* decision in June 1972, a special session of the Florida Legislature was called, the primary purpose of which was to consider a new death penalty law. This special session convened in late November 1972, and new capital punishment procedures were passed on December 1.[5] The statute was signed into law by Governor Askew on December 8, and became effective immediately. It was thus available for use even in those cases in which the crime (but not the indictment) predated its passage.[6]

The present Florida death penalty statute is the product of a compromise reached between the state House and Senate. In the 1972 Special Session, the House of Representatives unanimously passed a bill giving sentencing responsibility to a three-judge tribunal. The Senate's bill, passed by a vote of thirty-nine to one, instead contained a provision that involved the jury in the sentencing decision. According to the Senate bill, the trial judge was required to impose a life sentence if the jury refused to recommend death. A jury recommendation of death, however, required judicial agreement for imposition. The resulting statute, drafted by a conference committee appointed to resolve these differences,[7] passed with one dissent in the Senate and two in the House.

The statute directs that when a defendant is found guilty of first degree murder, a separate sentencing hearing is held. In this phase, the jury is presented evidence on any of the nine statutorily defined aggravating and seven mitigating circumstances that are intended to guide

---

[4] Act of July 2, 1970, ch. 70-339, § 119, 1970 Fla. Laws 989, 1051 (codified at then FLA. STAT. ANN. § 919.23).

[5] *See* Ehrhardt & Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); *see also* Note, *Florida's Legislative and Judicial Responses to* Furman v. Georgia: *An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108 (1974).

[6] The case of Ernest John Dobbert is relevant here. Dobbert was convicted of murdering his nine-year-old daughter and was sentenced to death on April 12, 1974. The murder occurred in December 1971, when the prevailing Florida death penalty statute stipulated that the trial judge could not override a jury recommendation of life. In his 1974 trial, Dobbert's Jacksonville jury voted ten-two for life, but the trial judge rejected this recommendation. On September 7, 1984, Dobbert was executed. *See* Dobbert v. Wainwright, 105 S. Ct. 34 (1984); Dobbert v. Florida, 432 U.S. 282 (1977); Dobbert v. Wainwright, 742 F.2d 1274 (1984); Dobbert v. Strickland, 532 F. Supp. 545 (1982).

[7] *See* Ehrhardt & Levinson, *supra* note 5.

their decision on whether to recommend life or death.[8] A life sentence is defined as a twenty-five year minimum sentence before parole eligibility. The jury vote need not be unanimous, and a tie vote is defined as a vote for mercy. Because each juror is asked simply if the majority of the jury voted for life or death, the exact breakdown of the vote is often unknown. Nor are the jurors asked to report the aggravating and mitigating circumstances that shaped their decisions. The trial judge is responsible for imposing the final life or death sentence and is not constrained by either the jury recommendation or vote. If the judge imposes a death sentence, he or she must prepare a written sentencing memorandum outlining the aggravating and mitigating circumstances that were found and used to make the life-or-death decision.

Unlike sentences for other crimes, punishments for twentieth century capital cases have usually been given only after jury input. In 1953, of the thirty-nine jurisdictions employing discretionary capital sentencing, thirty-five required its imposition through a jury vote that could not be vetoed by a judge.[9] At the time of the 1972 *Furman* decision, forty-one jurisdictions had nonmandatory capital punishment, and thirty-nine of these required jury consent.[10] Thus, statutes that allow judges to reject a jury recommendation of life, such as Florida's, have been relatively rare.

II. Present Status and Methodology

The existing death penalty statutes in the United States demonstrate that the majority of state legislatures have decided to make juries rather than judges the ultimate sentencing authority in capital cases. Of the thirty-seven jurisdictions that permitted the use of capital punishment in mid-1984, thirty gave the life or death decision to the jury. One of these jurisdictions, Nevada, allows a panel of three judges to impose

---

[8] The original statute passed in 1972 contained eight aggravating circumstances. The ninth was added in 1979. This ninth circumstance states: "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Fla. Stat. Ann. § 921.141 (5)(i) (West Supp. 1985).

[9] Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1100-01 (1953). In Spaziano v. Florida, 104 S. Ct. 3154, 3169 (1984), the Court stated that in 1948 there were 42 jurisdictions with discretionary capital sentencing; 39 of these required a jury recommendation that could not be overridden by the judge. Knowlton's review indicates that the Court's figures are incorrect.

[10] Spaziano v. Florida, 104 S. Ct. 3154, 3169 (1984).

sentence if the jury cannot agree.[11] In four other states (Arizona,[12] Idaho,[13] Montana,[14] and Nebraska[15]), the trial judge alone imposes sentence. Thus, when jury input is requested, almost all legislatures have made the jury's recommendation binding on the trial judge. In addition to Florida, only Indiana[16] and Alabama[17] allow a judge to override a jury recommendation of life imprisonment. To date this has happened twice in Indiana, six times in Alabama, and eighty-seven times in Florida.[18] Almost one-fourth of those sentenced to death in Florida under its present statute have had a jury recommendation of life.

To compare these eighty-seven override cases with other death penalty cases, data have been compiled on all post-*Furman* death penalty cases in Florida. Between December 8, 1972 and September 20, 1984, 376 death sentences were imposed in the state. Five of these sentences were handed down for the rape of a minor child, while the remaining 371 were pronounced following conviction for first degree murder.[19] The rape cases, two of which contained a jury recommendation of life, are deleted from the following analysis. A total of 334 homicide cases involved the first death sentence imposed for the crime; thirty-six defendants had a death sentence reimposed after a new trial or sentencing hearing, and one defendant had a death sentence imposed a third time. This defendant's first two death sentences were recommended by juries; his third jury recommended life. Cases involving a second or a third death sentence for the same crime (usually after remand from a higher court) are deleted from this analysis, as are eight other cases that have extensive missing data. The data presented below describe characteristics of the remaining 326 cases, eighty-four of which include a jury

---

[11] NEV. REV. STAT. § 175.556 (1981).

[12] ARIZ. REV. STAT. ANN. § 13-703(B) (1978 & Supp. 1984).

[13] IDAHO CODE § 19-2515 (1979 & Supp. 1984).

[14] MONT. CODE ANN. § 46-18-301 (1983).

[15] NEB. REV. STAT. § 29-2522 (1984).

[16] IND. CODE ANN. § 35-50-2-9(e) (West 1978 & Supp. 1984).

[17] ALA. CODE § 13A-5-47(e) (1982).

[18] Information from Indiana was obtained from the Indiana Criminal Justice Institute, Indianapolis. Letter from Bobby Jay Small, Director, Indiana Criminal Justice Institute to Michael L. Radelet (Sept. 20, 1984) (copy on file with *U.C. Davis Law Review*). Alabama data were obtained from Mr. Ed Carnes, Assistant Alabama Attorney General. Letter from Ed Carnes, Assistant Alabama Attorney General to Michael L. Radelet (Nov. 29, 1984) (copy on file with *U.C. Davis Law Review*).

[19] The statute passed in 1972 allowed the death penalty for defendants aged 18 or older convicted of the sexual battery of a child under age 11. This provision was ruled unconstitutional by the Florida Supreme Court in Buford v. State, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 450 U.S. 1163 (1982).

recommendation of life. These cases involve 316 men and two women; eight men received death sentences in two separate trials for two separate crimes, and hence will be treated as sixteen separate cases.

Data on each case were gathered using several methodological techniques. First, names of all defendants sentenced to death were obtained from the Florida Department of Corrections. Questionnaires were then sent to each condemned inmate soliciting demographic information about himself and the victim, information about the circumstances of the crime, and the name of his attorney. The attorney was then contacted and asked to supply the judge's sentencing memorandum for the case, which outlines each aggravating and mitigating circumstance found in the case. These data are regularly supplemented with newspaper clippings and any appellate decisions in the case.

III. RESULTS

The first observation that can be made from these data is that jurors are less likely to favor the imposition of a death sentence than are judges. This observation confirms earlier findings. In the most extensive empirical study yet conducted on jury behavior in America, Kalven and Zeisel collected data indicating that jurors were less likely than judges to impose a death sentence.[20] The relevant part of their study examined 111 cases in which a person was convicted of homicide and for which the only possible punishments were life or death. In most cases, the judge and jury agreed on the penalty, recommending life in seventy-six cases (68 percent) and death in fourteen cases (13 percent). But in the remaining twenty-one cases, wherein the judge and jury disagreed over sentence, the jury was more likely to ask for life (fourteen cases; 13 percent) than for death (seven cases; 6 percent). Overall, the jury gave death in twenty-one cases, while the judge favored death in twenty-eight cases. Note that of the thirty-five cases in which either the judge or jury favored death, both agreed on the penalty in only fourteen, or 40 percent of the cases.

The frequency of judicial overrides of jury recommendations for mercy in Florida capital cases tends to confirm what had been suggested by the patterns in the small sample of Kalven and Zeisel. Of the 326 cases in the Florida sample, eighty-four (25.77 percent) had jury recommendations of life imprisonment. Missing from the Florida data, however, are the cases in which a jury has recommended death but the judge nevertheless has imposed life. Because such cases are not auto-

[20] H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 434-49 (1966).

matically appealed to the Florida Supreme Court, there is no central data source through which such cases can be identified, and thus the precise frequency of this occurrence is unknown. Vigorous testing of the Kalven/Zeisel hypothesis requires such data. Numerous inquiries to several criminal attorneys and state officials, however, make us confident that less than a dozen such cases have occurred since the current statute was enacted. Thus, like the pattern observed by Kalven and Zeisel, it appears that in Florida, circuit court judges are more likely to favor a death sentence than are jurors.

Table 1 presents data on eleven case characteristics. It shows that on these eleven variables, there are no significant differences between those with jury recommendations of life and those with jury recommendations of death. Characteristics examined include the defendant's race, age at time of crime, and education, the victim's sex, race, and age, the number of homicide victims, year of death sentence, type of trial attorney, and the number of aggravating and mitigating circumstances. The latter circumstances are found in the sentencing memoranda prepared by the judges at the time of sentencing. Overall, the data in Table 1 clearly allow rejection of the hypothesis that these eleven variables are useful in distinguishing the two groups. Only two differences are noteworthy. First, 40 percent of those with a private attorney had life recommendations, while 23.3 percent of those with court appointed or public defenders had life recommendations. This suggests that judges might be more likely to override jury recommendations of life in cases with private attorneys, perhaps because they feel that private attorneys, on the whole, are more skilled at eliciting unwarranted sympathy from the jury than are other types of attorneys. Second, note that in the average case, the sentencing judge found 3.81 aggravating and .52 mitigating circumstances. Because when a jury recommends death and the judge concurs we would expect the decision to impose death to be more clear-cut than in override cases, the ratio of aggravating/mitigating circumstances should be higher in the cases in which both judge and jury agree on sentence. However, the data do not support this hypothesis. In cases in which the jury recommended death the ratio of aggravating/mitigating circumstances is 3.87/.597 or 6.48, while in override cases the ratio is 3.64/.448 or 8.12. This suggests that in override cases the findings of aggravating and mitigating circumstances might be seen by the judge more as an effort to justify, rather than to direct, the sentencing decision.

TABLE 1

Jury Recommendation Cross-Classified by Selected Case Characteristics
(Row Proportions in Parentheses; Standard Deviations in Brackets)

	JURYREC			
	Life	Death	Total	
1. Defendant's Race (N=326)				
White/Hisp.	49 (.254)	144 (.746)	193	(.592)
Black	35 (.263)	98 (.737)	133	(.408)
2. Victim's Sex (N=326)				
Male	55 (.276)	144 (.724)	199	(.610)
Female	29 (.228)	98 (.772)	127	(.390)
3. Victim's Race (N=326)				
White/Hisp	74 (.254)	217 (.746)	291	(.893)
Black	9 (.273)	24 (.727)	33	(.101)
Both	1 (.500)	1 (.500)	2	(.006)
4. Number of Homicide Victims (N=325)				
1	67 (.257)	194 (.743)	261	(.803)
2	11 (.256)	32 (.744)	43	(.101)
3 or more	6 (.286)	15 (.714)	21	(.065)
5. Year of Sentence (N=326)				
1972-75	20 (.303)	46 (.697)	66	(.202)
1976-78	22 (.244)	68 (.756)	90	(.276)
1979-81	21 (.276)	55 (.724)	76	(.233)
1982- 9/84	21 (.223)	73 (.777)	94	(.288)
6. Type of Trial Attorney (N=322)				
Public Defender	29 (.223)	101 (.777)	130	(.404)
Court Appointed	33 (.243)	103 (.757)	136	(.422)
Private	22 (.407)	32 (.593)	54	(.168)
Self	0	2	2	(.006)
7. Defendant's Age (N=323)	26.80 [6.83; N=83]	27.90 [7.63; N=240]	27.62	[7.44]
8. Defendant's Education (N=280)	10.90 [2.06; N=72]	10.21 [2.68; N=208]	10.39	[2.55]
9. Victim's Age (N=255)	40.95 [20.48; N=65]	39.4 [20.62; N=190]	39.80	[20.56]
10. Number of Aggravating Circumstances (N=245)	3.64 [1.62; N=66]	3.87 [1.34; N=179]	3.81	[1.4]
11. Number of Mitigating Circumstances (N=246)	.448 [.72; N=67]	.597 [.77; N=179]	.520	[.760]

TABLE 2

Characteristics of Florida Homicides
1973-1983

Defendants Arrested (N=10,588)		Victims (N=12,819)	
Male	8,902 (.841)	Male	9,535 (.744)
Female	1,686 (.159)	Female	3,284 (.256)
White	4,991 (.471)	White	7,062 (.551)
Black	5,538 (.523)	Black	5,687 (.444)
Other	59 (.005)	Other	70 (.005)

The data in Table 1 are also useful in profiling the characteristics of those sentenced to death under Florida's post-*Furman* capital statute. Only one such profile is available in the United States, and that was done on eighty-three Florida death row inmates in 1977.[21] Note that Table 1 presents characteristics of all cases involving a death sentence, not solely those cases of present death row inmates. For purposes of general comparison, Table 2 presents data on the race/sex characteristics of defendants and victims of all Florida homicides between January 1, 1973 and December 31, 1983.[22] Table 2 shows that 84.1 percent of those arrested in Florida for homicide in the period since the present death penalty statute was enacted were male. Of the 326 death penalty cases, however, 99.4 percent (324 cases) involve male defendants. Of the homicide victims in the state, 74.4 percent have been male, while only 61.0 percent of those sentenced to death had male victims. Thus, male defendants and those with female victims are more likely to be sentenced to death in Florida than their representation in the population of homicide defendants would suggest. This may be due to the possibility that such crimes are more heinous or severe than are other

[21] Lewis, *Killing the Killers: A Post*-Furman *Profile of Florida's Condemned*, 25 CRIME & DELINQ. 200 (1979); *see also* Lewis, Mannle, Allen & Vetter, *A Post*-Furman *Profile of Florida's Condemned — A Question of Discrimination in Terms of the Race of the Victim and a Comment on* Spenkelink v. Wainwright, 9 STETSON L. REV. 1 (1979).

[22] Data in Table 2 were compiled from the 1973-1983 annual reports of the Florida Department of Law Enforcement. *See* FLORIDA DEP'T OF LAW ENFORCEMENT, 1983 ANNUAL REPORT, CRIME IN FLORIDA. Note that the death penalty statute was in effect for those indicted after December 8, 1972, and the data in Table 2 begin with crimes committed on January 1, 1973. In addition, the statewide homicide data end with crimes committed on December 31, 1983, while the death row data describe those sentenced to death up to September 20, 1984. These slight differences are unlikely to affect the validity of the reported comparisons.

homicides, or it may indicate a sex bias in homicide sentencing. Racial patterns are also noteworthy. Table 2 shows that whites make up about 47.1 percent of those arrested for homicide in the state, while Table 1 shows that whites are 59.2 percent of those sentenced to death. This apparent bias against white defendants, however, is explained by race of victim. Most homicides are intraracial; whites kill whites and blacks kill blacks.[23] Because cases in which blacks are killed are treated as less important than cases in which whites are killed, white defendants are disproportionately sentenced to death. Blacks have been 44.4 percent of the homicide victims in the state since the beginning of 1973, but only 10.1 percent of those sentenced to death were convicted of killing blacks. Several studies have demonstrated that Florida's tendency to treat those who kill whites more harshly than those who kill blacks cannot be explained by differences in the severity of the crimes.[24]

Table 1 also presents other characteristics of Florida's condemned population. It can be seen that 80.3 percent of those sentenced to death had one homicide victim, and there is no increasing or decreasing pattern in the frequency of death sentences (or in jury overrides) over the last eleven years. Only 16.8 percent of the defendants were able to hire private trial attorneys, no doubt reflecting their relatively low socioeconomic status. The typical defendant among those sentenced to death in Florida since 1972 is twenty-eight years old and holds a tenth grade education, while the average victim is forty years old.

Table 1 also shows that the judge in the average capital cases found 3.81 aggravating and .52 mitigating circumstances.[25] The frequency

---

[23] Among 1983 homicides involving one victim, 94% of the black victims and 88% of the white victims were slain by defendants of their own race. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS; CRIME IN THE UNITED STATES (1983).

[24] Bowers & Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. (1985) (forthcoming); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

[25] The coding of aggravating and mitigating circumstances was done by matching sentencing memoranda and Florida Supreme Court decisions on direct appeal. Sentencing memos were not filed in two cases and could not be obtained by the author for ten other cases, and thus these cases are deleted.

The coding of these circumstances is not as straightforward as one might expect. If trial judges clearly stated the findings on which they based their decisions, and if the Florida Supreme Court considered and ruled on each circumstance, the coding would

TABLE 3

Number of Cases in Which Each Aggravating Circumstance Found (N=246)

		N (Proportion)
A.	The capital felony was committed by a person under sentence of imprisonment.	57 (.232)
B.	The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.	116 (.472)
C.	The defendant knowingly created a great risk of death to many persons.	55 (.224)
D.	The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.	177 (.720)
E.	The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.	96 (.390)
F.	The capital felony was committed for pecuniary gain.	94 (.382)
G.	The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.	34 (.138)
H.	The capital felony was especially heinous, atrocious, or cruel.	203 (.825)
I.	The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.	58/85 (.682)

have been simple and precise. In many of the more recent death penalty cases, this was true. However, for other cases, especially the earlier ones, both the sentencing memos and the Florida Supreme Court decisions are ambiguous. The coding thus involved some subjective judgment, as it assumes order even in those cases where no order is

with which each aggravating circumstance has been found is presented in Table 3. This table includes only those 246 cases that had been reviewed and decided by the Florida Supreme Court on direct appeal before September 20, 1984. Almost all the cases (82.5 percent) were found to be "especially heinous, atrocious, or cruel," the aggravating circumstance found at section (5)(h) of the statute.[26] Most (72.0 percent) were also found to include circumstance (5)(d), indicating concurrent commission of an additional specified felony. Finally, among the eighty-five cases involving a death sentence imposed after 1979, when circumstance (5)(i) was added to the statute, 68.2 percent included a positive finding on this factor.[27]

Table 4 presents similar data for mitigating circumstances. Most statutorily defined mitigating circumstances are rarely found; of the seven circumstances, five were found in thirteen or fewer cases. The most frequently cited mitigating circumstance involves the lack of prior criminality. Nearly a quarter of those defendants sentenced to death had no significant histories of prior criminal activity. The only other mitigating circumstance found with moderate frequency is the circumstance specifying the age of the defendant, which was found in 18.3 percent of the cases. Of all the aggravating and mitigating circumstances, the defendant's age is the most objective and easiest to ascertain. However, as shown in Table 5, there is great variation in whether the circumstance is applied, even given defendants of the same age. Of the thirty-nine men sentenced to death who were aged twenty or less at the time of the crime, ten did not have a finding of age as a mitigating circumstance in their cases.

---

apparent.

[26] Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984).

[27] Further analysis was done to ascertain if there were any significant associations between jury recommendation and the findings of aggravating and mitigating circumstances. Only one such association was found: judges are more likely to find aggravating circumstance (5)(b) (involving previous conviction for a violent felony) when the jury recommended death than when it recommended life. This circumstance was found in 51.96% of the cases with a death recommendation (93/179) and 34.33% of the cases with a life recommendation (23/67). The chi-square figure for this difference is significant at the .02 level.

TABLE 4

Number of Cases in Which Each Mitigating Circumstance Found (N=246)

		N (Proportion)
A.	The defendant has no significant history of prior criminal activity.	58 (.236)
B.	The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.	13 (.053)
C.	The victim was a participant in the defendant's conduct or consented to the act.	1 (.004)
D.	The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.	3 (.012)
E.	The defendant acted under extreme duress or under the substantial domination of another person.	2 (.008)
F.	The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.	9 (.037)
G.	The age of the defendant at the time of the crime.	45 (.183)

IV. The Override Provision and Public Policy

The United States Supreme Court, in *Spaziano v. Florida*, held that the Constitution does not require that a jury's recommendation of life imprisonment be binding in capital cases.[28] The Court found nothing irrational or arbitrary about Spaziano's death sentence and found no indication that the override provision would increase the probability of arbitrary or discriminatory use of the death penalty. Spaziano's challenge to the override provision was treated by the Court as equivalent to asking that all capital sentencing decisions, in all jurisdictions, be made alone by a jury. In four states the court alone, without jury input,

[28] 104 S. Ct. 3154 (1984).

TABLE 5

Age As Mitigating Circumstance By Age of Defendant

Age	Cases	Cases in which Circumstance Found	Proportion
15	2	1	.500
16	2	2	1.000
17	4	2	.500
18	7	4	.571
19	11	8	.727
20	13	4	.308
21	11	8	.727
22	13	6	.462
23	19	4	.211
24	19	1	.053
25	8	1	.125
26-27	27	0	.000
28	12	1	.083
29	9	0	.000
30	9	2	.222
31-52	32	0	.000
57	2	1	.500
N	200	45	

imposes sentence in capital cases, and the Supreme Court concluded that if this procedure was permissible, no constitutional right would be violated by first asking a jury for its advice. "If a judge may be vested with sole responsibility for imposing the penalty," the Court wrote, "then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of a jury."[29]

While *Spaziano* resolved many of the constitutional questions about override procedures, major public policy questions remain. This Article focuses on three principal challenges to the Legislature's wisdom in retaining the override procedure: 1) the costs to defendants and the criminal justice system, 2) the representativeness and competence of the jury, and 3) the jury's certainty of the defendant's criminal involvement.

[29] *Id.* at 3165.

A. Cost

The cost issue hinges on the observation that almost three-quarters of those sentenced to death after jury recommendations of life subsequently have had their death sentences vacated. Table 6 presents data cross-classified by jury recommendation and the Florida Supreme Court's decision on direct appeal.[30] The two variables are strongly associated, with the probability of affirmation over twice as high among those with a jury recommendation of death (.640) than among those with a jury recommendation of life (.313). Over half of those sentenced to death after jury recommendations of life (37/67; 55.2 percent) later had their sentences reduced to life by the Florida Supreme Court on direct appeal. Four defendants with life recommendations were awarded new trials, while four others were remanded to the trial court for new sentencing hearings. Seven of these eight defendants subsequently received sentences of life or less. One man with a jury recommendation of life has been executed in Florida.[31] Additionally, four of the remaining twenty defendants whose death sentences were affirmed by the Florida Supreme Court despite their jury's sentence recommendations of life no longer face the threat of execution. One of these men received executive clemency, while three others had their sentences reduced to life or less by further court action.

If present trends continue, very few defendants who have been sentenced to death following a jury recommendation of life will ever be executed. In over two-thirds of the cases in which the judge rejects a jury recommendation of life, the Florida Supreme Court finds the sentence unjustified or otherwise erroneous and initiates corrective action. Nonetheless, while the death sentence can be removed, it is removed only after two major costs are incurred.

The first cost is psychological — the ordeal experienced by the defendants and their families, friends, and attorneys that begins when the death sentence is first pronounced. The families and the inmates must live under the stigma of condemnation, a stigma that remains even if the appellate courts eventually find the death sentence unwarranted. Although many view the pain of capital punishment as primarily resulting from the execution itself, living under the sentence of death or

---

[30] For an analysis that examines the first 145 post-*Furman* cases decided on direct appeal by the Florida Supreme Court, see Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).

[31] *See supra* note 6.

TABLE 6

Florida Supreme Court Decisions on First Direct Appeal by Jury Recommendation
(column proportions in parentheses)

FLORIDA SUPREME COURT DECISION	JURY RECOMMENDATION		
	Life	Death or Waive	N
Affirmed	21 (.313)	114 (.640)	135
Reduced to Life	37 (.552)	5 (.028)	42
New Trial	4 (.060)	29 (.163)	33
New Sentencing			
With Jury	4 (.060)	19 (.107)	23
Without Jury	0	10 (.056)	10
Reduced or Dismissed	1 (.015)	1 (.006)	2
N	67	178	245

Chi Square = 96.74; $p < .001$

having a loved one do so are major aspects of the death penalty's retributive impact.[32] The Florida Supreme Court might rule that the crime warrants life imprisonment, but it cannot remove the pains suffered when a death sentence, no matter how erroneous, is first handed down. While appellate courts will always find random cases in which a death sentence has been imposed erroneously, the frequency of this finding following a jury recommendation of life suggests a systemic imposition of a punishment that is disproportionate to the severity of the crime in these cases.

The second cost is fiscal. The erroneous imposition of death sentences levies huge and unnecessary financial costs to both defendants and the state in correcting the blunders. No reliable figures on these financial costs can be estimated and the range is undoubtedly wide, but it is not unreasonable to suggest that the sum can be measured in the hundreds of thousands of dollars for each case. In 1981, the then Chief Justice of the Florida Supreme Court estimated that the Court was then spending from 35 to 40 percent of its time on death penalty cases,

[32] *See, e.g.*, R. JOHNSON, CONDEMNED TO DIE (1981); Radelet, Vandiver & Berardo, *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. FAM. ISSUES 593 (1983).

a share that he felt was far too high.[33] The cost in Florida Supreme Court time is only one factor that makes the death penalty much more costly than simply incarcerating all condemned defendants for life.[34] It would be in the interests of the state to save its taxpayers' money and relieve the burden on its criminal justice system by allowing the Florida Supreme Court to concentrate its resources on those cases that have at least a moderate probability of affirmation. The state would save further costs by freeing the time of the prosecutors, public defenders, and court appointed attorneys that are involved in case litigation.[35] From the state's perspective, one must question whether the number of hours invested in cases with a jury recommendation of life are justifiable given that so few of the cases will eventually result in execution. Had the financial costs of unwarranted override cases been foreseen by the 1972 Legislature, it is difficult to believe that the override provision would have been included in the statute.

B. Representativeness and Competence of the Jury

A second issue raised by the override provision concerns the traditional role of the jury as being the representative of the will of the community. A strong argument for making a jury recommendation of life binding is that it makes the death penalty more democratic and reflective of the will of the community.[36]

Before making this argument, however, it must be acknowledged that capital juries are not truly representative of their communities, as they underrepresent opponents of capital punishment. Potential jurors whose opposition to the death penalty may prevent or substantially impair the performance of their duties as jurors may be excluded for cause from

---

[33] *See Graham Suggests Changes in Death Penalty Reviews*, Gainesville Sun, Aug. 24, 1981, at B1, col. 5.

[34] *See, e.g.*, NEW YORK STATE DEFENDERS ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1223 (1985).

[35] The cost of the defendant's direct appeal to the state Supreme Court is usually paid by the state. Data on the type of appeal attorney are available for 316 of the 326 cases. Of these, 181 had a public defender, 107 had a court appointed private attorney, and only 28 defendants were able to retain a private attorney. It is unknown how many of these private attorneys volunteered their services for no or reduced fees.

[36] For an excellent discussion of how juries are better able than judges to give an accurate reflection of the community's outrage, see Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31 (1985).

service on capital juries.[37] Thus, a jury recommendation of life imprisonment in first degree murder cases is not an easy accomplishment, and would occur with more frequency if persons with doubts about the death penalty were not excluded from juries. A jury recommendation of life imprisonment comes from a jury that would, at least in some cases, recommend the use of the death penalty. The override provision cannot therefore be justified on the basis of a necessity to guard against refusal to condemn defendants by anti-death penalty jurors.

Despite the removal of persons who stand opposed to the death penalty, members of capital juries tend to be more representative of the community than are judges. Of the 341 Florida Circuit Court judges, twenty-one are women and only eight are black, and all are members of the Florida Bar.[38] Such characteristics suggest that juries can give more accurate reflections of the conscience of the community than can a single judge. A binding jury vote for life could also be a safeguard against any possible idiosyncrasies, prejudices, or political loyalties of individual judges. In this sense, representativeness is related to competence.

Judges who override jury recommendations of life imprisonment present an implicit challenge to the competence of the jury. In *Tedder v. State*, the Florida Supreme Court wrote: "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."[39] These words suggest that by overriding a jury recommendation of life, the trial judge, in effect, must claim that a majority of the jury is not reasonable people. An override using this standard insults those jurors who have tried to do their jobs as conscientiously as possible, but who then see their collective judgments ignored. They must live knowing they played a part in sending a person to death row who they truly believe should not be executed.[40]

Under the present Florida statute, juries do a better job in determining who the legislature singled out for death than do judges. The United States Supreme Court did not foresee this outcome when it up-

---

[37] Witherspoon v. Illinois, 391 U.S. 510 (1968). For a recent statement on the exclusion of anti-death penalty citizens from juries, see Wainwright v. Witt, 105 S. Ct. 844 (1985).

[38] Data supplied by the Florida Office of State Court's Administrator, Dec. 1984.

[39] 322 So. 2d 908, 910 (Fla. 1975).

[40] Ernest van den Haag points out that this might actually cause some jurors, believing the defendant not to deserve death and fearing that the judge might override their sentence recommendation, to vote for acquittal in the guilt phase. *See infra* note 46.

held the statute in *Proffitt v. Florida*.[41] In the decision, Justice Stewart, joined by Justices Powell and Stevens, postulated that judicial sentencing in capital cases might actually be better than jury sentencing:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[42]

This is a major empirical claim, and while it may be true in cases in which the judge overrides a jury recommendation of death, it is unsupported by the data in override cases in which the jury recommends life. First, as pointed out by Professor Gillers, the typical trial judge sees so few first degree murder cases over his or her career that there is really only a small opportunity to develop the "consistency" referred to by Justice Stewart.[43] Second, as Justice Stevens wrote in 1984, "[n]ot only has the Florida Supreme Court proved much more likely to reverse in a jury override case than in any other type of capital case, . . . but also the clear majority of override cases ultimately result in sentences of life imprisonment rather than death."[44] Indeed, if we take the opinion of the Florida Supreme Court as the standard against which to determine who should live and who should die, the data presented above make it clear that in the override cases with a jury recommendation of life, the jury is correct far more often than is the judge.

In noncapital cases, judges have experiences and knowledge that might make them more qualified than juries in determining sentences. For example, judges may be better qualified to assess prospects for rehabilitation or recidivism.[45] But in capital cases, while such knowledge might make a judge override a death recommendation, the decision to impose a death sentence is primarily a question about community desires for retribution. As a reflection of community sentiments, the feelings of a panel of twelve are, by definition, a more accurate measure than are the feelings of one judge.[46]

---

[41] 428 U.S. 242 (1976).

[42] *Id.* at 252.

[43] Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 57-59 (1980).

[44] Spaziano v. Florida, 104 S. Ct. 3154, 3172 n.17 (1984) (Stevens, J., concurring and dissenting).

[45] *See, e.g.*, Gillers, *supra* note 43, at 57.

[46] Even supporters of the death penalty are critical of the Florida provision that allows trial judges to reject a jury's vote of mercy. As one writes:

> When Florida judges bypass recommendations of mercy and impose death sentences, this needlessly mutes the expressed opinion of the people. The

C. Whimsical Doubt?

A jury's recommendation of life imprisonment may in some cases reflect doubt in the jury's mind about the defendant's degree of involvement in the crime. Here involvement includes both intent and action; in the extreme case, a juror's lingering belief that the defendant is actually innocent may be reflected in a vote for life imprisonment rather than death. The criterion for guilt, "beyond a reasonable doubt," is not the same as absolute certainty, and thus a small but nonzero proportion of all defendants convicted of homicide or sentenced to death will be innocent. Indeed, this contention is supported by historical research. Approximately 350 wrongful convictions for homicide, including approximately 100 involving the imposition of a death sentence upon a defendant who later was shown to be completely innocent, have been identified in the United States since 1900.[47]

Courts have recognized that doubts about the defendant's guilt may lead jurors to vote against the death penalty. In *People v. Terry*, the California Supreme Court found that "[t]he lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment."[48] In *Smith*

> law should not permit a mercy decision to be overridden; because to do so substitutes the judgment and emotions of one judge for the integrated decision of the six or twelve. Thus, the community voice is shouted down.
>
> On the other hand, permitting the judge to reject death and grant life is justified. The community sometimes becomes inflamed on debatable facts, and raises the hue and cry for vengeance. The judge should be permitted to act as a detached overseer to restrain passion-numbed judgments.

Little, *Another View*, 36 U. FLA. L. REV. 200, 204 (1984).

Professor Ernest van den Haag, perhaps America's strongest proponent of the death penalty, also supports making jury recommendations binding. He writes:

> My view is . . . that authority given a judge to override a jury recommendation, or sentence of life, in favor of a death sentence might lead juries to find innocent a guilty defendant who, they fear, might suffer the death penalty and whom they don't want to suffer it.
>
> I would equally oppose a judge's right to replace a jury's death with a life sentence. The reasoning here is different. I do not see any reason why the judge's sentencing opinion should be superior to the jury's. Moreover, if the judge could not make a sentence harsher but could make it milder justice would not be served, for justice, as distinguished from charity, cannot be rigged in favor of either defense or prosecution.

Letter from Professor Ernest van den Haag to Michael L. Radelet (Apr. 22, 1985) (copy on file with *U.C. Davis Law Review*).

[47] H. Bedau & M. Radelet, Miscarriages of Justice in Potentially Capital Cases (June 1985) (unpublished manuscript).

[48] 61 Cal. 2d 137, 146, 390 P.2d 381, 387, 37 Cal. Rptr. 605, 611 (1964).

v. Wainwright, the Eleventh Circuit Court of Appeals acknowledged that "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.' "[49] The court went on to quote from its decision in *Smith v. Balkcom*:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt — doubt based upon reason — and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt — this absence of absolute certainty — can be real.
>
> . . . [T]he juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.[50]

Thus, jurors may feel that given the chance, albeit slim, that their decision to convict of a capital crime was erroneous, that it would be preferable to err on the side of mercy. Judges, on the other hand, who often have heard defendants' claims of minimal involvement, lack of intent, or innocence, might be more callous and less responsive in any given case. Because of the frequency with which judges hear these claims, individual juries might be better able to respond when such claims are raised.

This whimsical or lingering doubt appears to have been present in the recent case of Annibal Jaramillo, convicted in Dade County (Miami) in 1981 of a double murder. Despite the brutality of the crimes, Jaramillo's death-qualified jury was *unanimous* in its recommendation of life imprisonment. Nonetheless, the trial judge ignored this recommendation, and Jaramillo was sentenced to two consecutive death sentences. Jaramillo was convicted solely on the basis of fingerprint evidence. He had visited the crime scene the day before the homicides occurred (he had been a friend of the victims' roommate for several years), and thus had a plausible explanation for the presence of these prints. After Jaramillo spent fifteen months on death row, the Florida Supreme Court voted six to one that the state's evidence was legally insufficient to support the guilty verdicts. Rather than order a new trial, they ordered Jaramillo's immediate release.[51] This case vividly demonstrates that permitting a judge to override a jury recommendation of life undeniably increases the probability that an innocent person will be sentenced to death and perhaps even executed.

---

[49] 741 F.2d 1248, 1255 (1984).

[50] *Id.* (quoting Smith v. Balkcom, 660 F.2d 573, 580-81 (1981)).

[51] Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

A similar issue developed in the *Dobbert* case.[52] Dobbert was convicted of second degree murder for the death of his son, and convicted of first degree murder (and executed) for the death of his daughter. Like in the *Jaramillo* case, Dobbert's death-qualified jury voted to recommend life imprisonment despite the severity of the crimes. Their vote was ten to two. The trial judge nevertheless rejected this recommendation and sentenced Dobbert to death. The only witness at the trial to testify against Dobbert was another son, who later recanted his testimony by claiming that his sister's death was not premeditated. Had this been true, Dobbert would not have been guilty of a capital offense. Justice Marshall, joined by Justice Brennan, unsuccessfully argued that there was a serious question about whether Dobbert was guilty of a capital offense under Florida law. Criticizing the Supreme Court's refusal to block Dobbert's execution and commenting on these facts, Marshall wrote:

> That may well make Dobbert guilty of second-degree murder in Florida, but it cannot make him guilty of first-degree murder there. Nor can it subject him to the death penalty in that state. Dobbert is certainly no innocent man, but he may well be a guilty one to whom Florida's legislators have not chosen to apply the death penalty.[53]

Again, the *Dobbert* case points out that a juror's recommendation of life imprisonment may in some cases reflect some small but extremely significant doubt about the defendant's degree of involvement in the crime.[54]

The *Jaramillo* and *Dobbert* cases exemplify how there might be whimsical or lingering doubt about some defendants' guilt in some capital cases. Indeed, some might argue that the above facts suggest the doubt could have been quite reasonable. The bottom line is that given any doubt whatsoever, making a jury recommendation of life binding would give any benefits of such doubt to the defendant. As the Florida law now stands, even if twelve pro-death penalty jurors feel that the

---

[52] *See supra* note 6.

[53] Dobbert v. Wainwright, 105 S. Ct. 34, 44 (1984).

[54] There are also some questions of guilt and intent in the *Spaziano* case. In the words of Justice Stevens:

> While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak . . . . It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that the jury concluded that a sentence of death could not be morally justified in this case.

Spaziano v. Florida, 104 S. Ct. 3154, 3178 n.34 (1984).

defendant does not deserve to be executed, one judge has the power to veto their recommendation and sentence the defendant to death.

CONCLUSION

The Governor and nearly all members of the Florida Legislature are strong proponents of the death penalty. Public opinion polls indicate that about three-quarters of the Florida population support capital punishment.[55] Among the data that such polls do not give us, however, is information that distinguishes support for the death penalty *in theory* versus support for the death penalty as *actually applied*.[56] It is doubtful that the override procedure increases public support for the death penalty; a more plausible hypothesis would be that many supporters of the death penalty in Florida would withdraw their support for executions in cases that contain a jury recommendation of life imprisonment. Justice Stevens, in a 1985 speech dedicating a new law library at Florida State University, called the override provision of Florida's law a "procedural defect." In his words: "In practice, therefore, a procedure that was probably intended by the Legislature to provide the defendant with two chances to obtain mercy seems actually to have provided the prosecutor with two chances to obtain the death penalty."[57] Nevertheless, a 1984 Legislative bill in Florida to make a jury vote of life binding in capital cases failed by a ten to seven vote in the House Committee on Criminal Justice. Such legislation was reintroduced in the 1985 session, but it again failed to pass. The analysis in this Article finds no rationale for retaining the judge's power to override life recommenda-

---

[55] A New York Times poll taken in Florida on October 25-31, 1984, found strong support for the death penalty, and no change in attitudes since a similar poll was conducted seven months earlier. Capital punishment showed 73% approval and 14% disapproval. Whites favored death 81 to 12, Hispanics 68 to 23, and blacks 48 to 38. Those with annual incomes over $27,000 favored capital punishment 84 to 10, while those with annual family incomes of less than $9000 favored death by 47 to 33. *See Poll Shows Conservatism is High in Sunshine State*, Gainesville Sun, Nov. 23, 1984, at A1, col. 3. This survey, of course, did not measure what the public knew or what they felt about the way the death penalty was *actually imposed* by the state. For a critical discussion of such public opinion polling, see Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116 (1983); Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974).

[56] Black, *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1 (1978); *see also* Vidmar & Ellsworth, *supra* note 55.

[57] *State Statute Favors Death, Says Justice*, Tallahassee Democrat, Jan. 27, 1985, at 1A; *see also* Spaziano v. Florida, 104 S. Ct. 3154, 3171 n.14 (1984). Justice Stevens' address will be published in 13 FLA. ST. U.L. REV. (1985) (forthcoming).

tions. Indeed, the results clearly indicate that unless the legislators simply want the state to execute as many prisoners as it can, regardless of cost and community sentiments, they will vote to make a jury's recommendation of life binding.