



Summer 6-1-2006

The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making

William J. Bowers

Wanda D. Foglia

Jean E. Giles

Michael E. Antonio

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Courts Commons](#), [Criminal Procedure Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

William J. Bowers, Wanda D. Foglia, Jean E. Giles, and Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931 (2006).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol63/iss3/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making¹

William J. Bowers*
Wanda D. Foglia**
Jean E. Giles***
Michael E. Antonio****

Table of Contents

I. Legal Background.....	932
II. Implications of <i>Ring v. Arizona</i>	935
A. Competing Interpretations of <i>Ring</i>	940
B. Juries as Conscience of the Community	946
C. Juries as Responsible for the Defendant's Punishment.....	948
III. The Capital Jury Project	950
IV. Jurors Under Hybrid and Binding Capital Statutes.....	952
A. Taking Responsibility for the Defendant's Punishment	954
1. Statistical Data	954
2. Narrative Accounts.....	960
3. Overview	962
B. Understanding Sentencing Instructions	963
1. Statistical Data	964
2. Narrative Accounts.....	969
3. Overview	971

1. This Article is based on research supported by the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

* Ph.D., Columbia University; B.A., Washington & Lee University.

** J.D., Ph.D., University of Pennsylvania; B.A., Rutgers College.

*** J.D., Yale University; B.A., Indiana University.

**** Ph.D., Northeastern University; M.A., University of Delaware; B.S., Ursinus College.

C.	Making the Punishment Decision	972
1.	Statistical Data	973
2.	Narrative Accounts.....	977
3.	Overview.....	980
V.	The Politics of Judging Capital Cases Under Hybrid Statutes	981
A.	Appellate Judges and Death Penalty Politics	982
B.	Trial Judges and Death Penalty Politics Under Hybrid Statutes	985
C.	Jury and Judge Decision-Making in Life to Death Override Cases.....	991
1.	The William Knotts Case	992
2.	The Clayton Flowers Case	999
VI.	Conclusion.....	1002

I. Legal Background

When *Gregg v. Georgia*² and companion cases³ endorsed this country's return to capital punishment in 1976, the United States Supreme Court accepted different approaches for guiding the exercise of sentencing discretion.⁴ Common to these new *Gregg*-approved post-*Furman*⁵ capital statutes was a two stage, or bifurcated trial at which the guilt and sentencing decisions were to be made separately and independently.⁶ Since then, all death penalty jurisdictions

2. *Gregg v. Georgia*, 428 U.S. 153 (1976).

3. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

4. These have been identified as "balancing" statutes that require the sentencer to weigh aggravating factors against mitigating factors, "threshold" statutes that require only that the sentencer find at least one statutory aggravating factor and consider mitigation, and "directed" statutes under which the sentencer must consider special sentencing issues. These distinctions among statutes are reviewed in Stephen Giles, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 26-31, 41-43 (1980) and Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974). Acker and Lanier provide a detailed discussion of the forms that these statutes now take. See generally James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299 (1994).

5. *Furman v. Georgia*, 408 U.S. 238 (1972) (ruling that capital punishment as then practiced in the United States was arbitrary and capricious in violation of the Eighth Amendment protection against "cruel and unusual" punishment).

6. Concurrent with *Gregg*, the Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976), rejected statutes that made the death penalty mandatory upon conviction of a capital offense at a unitary trial that decided both guilt and punishment.

have had a two-phase proceeding in which a jury decides guilt in the first phase of the trial, and if they find the defendant guilty of capital murder, a second penalty phase of the trial is held to determine the punishment.

States differed, however, in the sentencing responsibilities they gave judge and jury at the penalty stage of a capital trial. In 2002, before the Court's decision in *Ring v. Arizona*,⁷ twenty-nine of the thirty-eight death penalty states gave sentencing authority to the jury; the trial judge had little or no role in sentencing.⁸ Five states had judge only death penalty statutes that provided for judicial determinations of the factual foundation and the ultimate sentence without jury participation in the penalty phase of the trial.⁹ There were also four judge override states at that time that provided for a sentencing jury, but made the jury's sentencing decision advisory and gave the judge final sentencing authority.¹⁰

Petitioners initially challenged the constitutionality of judge override and judge only sentencing without success. The Court gave mixed messages in the pivotal *Gregg*¹¹ and *Proffitt*¹² cases. In *Gregg*, the Court noted that juries were a significant and reliable objective index of contemporary values with respect to the imposition of the death penalty,¹³ yet in *Proffitt* it observed that it has never suggested that jury sentencing is "constitutionally required."¹⁴ The Court

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

8. *See id.* at 608 n.6 (listing state codes that give sentencing authority to juries). The states using jury sentencing are Arkansas, California, Connecticut, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

Although the jury's sentencing verdict is presumed to be correct in these twenty-nine states, the trial judges in California, Kansas, Kentucky, Ohio, South Carolina, and Virginia have statutory authority, under specific circumstances, to invalidate a jury's death penalty verdict and substitute a life sentence. In none of these states, however, may the trial judge impose a death sentence when the jury's verdict was life.

9. *See id.* (listing state codes giving judges the authority to determine the factual foundation for the sentence and the ultimate sentence). Arizona, Idaho, Montana, and Nebraska give the trial judge the authority to decide the sentence and Colorado vests the authority in a three-judge panel.

10. *See id.* (listing the state codes for states that used, what the *Ring* Court called "hybrid systems," that made the jury's verdict advisory and gave the trial judge the authority to override the jury recommendation whether it was life or death). Alabama, Delaware, Florida, and Indiana make the jury's sentencing decision advisory to the judge.

11. *Gregg v. Georgia*, 428 U.S. 153 (1976).

12. *Proffitt v. Florida*, 428 U.S. 242 (1976).

13. *Gregg*, 428 U.S. at 181 (seemingly supporting juries as the proper sentencing authority).

14. *Proffitt*, 428 U.S. at 252 (seemingly lessening its support of juries as the proper

subsequently held in *Spaziano v. Florida* that judge override is not per se unconstitutional,¹⁵ and later, in *Harris v. Alabama*, that judges need not give "great weight" to jury sentencing recommendations.¹⁶ Concerning judge only sentencing, in *Walton v. Arizona*, the Court approved judge sentencing without the participation of a sentencing jury.¹⁷

The tide then turned in *Ring*.¹⁸ The Supreme Court rejected judge only sentencing in capital cases.¹⁹ It held that the Sixth Amendment requires that findings which determine whether a death penalty may be imposed must be made by a jury.²⁰ The Court explained that when a factual determination makes a defendant eligible for a more severe sentence it is the functional equivalent of an element of a greater offense, regardless of what it is called, so the Sixth Amendment's jury trial guarantee applies.²¹ The Arizona statute was

sentencing authority). The Court went on to say:

[I]t would appear that judicial sentencing would 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 at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Id. at 252.

15. See *Spaziano v. Florida*, 468 U.S. 447, 447 (1984) (upholding Florida's judge override statute). In holding that the judge's imposition of the death sentence after the jury recommended life did not violate the right to a trial by jury, the Court differentiated the sentencing phase of a capital trial from a guilt determination and held that the Sixth Amendment never has been thought to guarantee a right to a jury determination of the issue of the appropriate punishment to be imposed on an individual. *Id.* at 459; see also *Hildwin v. Florida*, 490 U.S. 638, 639 (1989) (per curiam) (rejecting a Sixth Amendment challenge to Florida's hybrid statute by saying the issue had been resolved by *Spaziano*).

16. See *Harris v. Alabama*, 513 U.S. 504, 508 (1995) (upholding Alabama's capital statute). Harris claimed Alabama's capital statute was unconstitutional because it failed to specify the weight trial judges must give to jury sentencing recommendations. *Id.* The Court rejected Harris's claim, holding that requiring "great weight" to be given to jury recommendations would "place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.* at 512. The Court did, however, acknowledge the "crucial protection" afforded by the *Tedder* standard. *Id.* at 510 (quoting *Dobbett v. Florida*, 432 U.S. 282, 295 (1977)).

17. See *Walton v. Arizona*, 497 U.S. 639, 639 (1990) (upholding Arizona's capital statute). In *Walton*, the Court held that the Arizona statute did not violate the Sixth Amendment because aggravating factors were not "elements of the offense," rather they were "sentencing considerations" that guided the choice between life and death sentences. *Id.* at 648.

18. *Ring v. Arizona*, 536 U.S. 584 (2002).

19. *Id.* at 589.

20. *Id.* at 609 (overruling *Walton* to the extent it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty).

21. The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI, § 1. This right has been made applicable to the states by the Fourteenth Amendment.

unconstitutional because it allowed a judge, rather than a jury, to determine the existence of factors necessary for the imposition of the death penalty.²²

II. Implications of *Ring v. Arizona*

In *Ring*, the Court repudiated the distinction between elements of the offense and sentencing considerations that it had relied upon in *Walton*.²³ In *Ring*, Justice Ginsburg, joined by five other justices,²⁴ indicated that, despite the importance of stare decisis, the *Walton* decision was "overrule(d) to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."²⁵

The *Ring* Court explained that the *Walton* decision could not be reconciled with its holding in the noncapital case, *Apprendi v. New Jersey*.²⁶ In *Apprendi*, the Court ruled that the existence of racial animus needed for the application of an enhanced penalty under hate crimes legislation must be found by a jury, not by a judge.²⁷ Quoting from *Apprendi*, the *Ring* opinion reiterated that it

22. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated aggravating factors operate as the 'functional equivalent of an element of a greater offense' the Sixth Amendment requires that they be found by a jury." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000))).

23. *Apprendi*, 530 U.S. at 563 (overruling *Walton* in part).

24. Justices Stevens, Scalia, Kennedy, Souter, and Thomas joined the majority opinion. Justice Scalia, joined by Justice Thomas, filed a concurring opinion; Justice Kennedy also filed a separate concurrence. Justice Breyer wrote an opinion concurring in the judgment but not in the majority's constitutional reasoning. Justice O'Connor filed a dissent in which Chief Justice Rehnquist joined.

25. *Ring*, 536 U.S. at 609.

26. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The majority opinion in *Apprendi* explicitly exempted *Walton* from its effect by saying that the Arizona statute did not allow a judge to make findings that raised the maximum sentence, rather it merely allowed a judge to apply sentencing considerations that determined whether the defendant should get a lesser or greater sentence after the jury had determined it was a capital offense. *Id.* at 522-23 (discussing the decision not to address *Walton*). In dissent, Justice O'Connor argued, however, that the judge's finding did increase the maximum penalty because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Id.* at 538 (O'Connor, J., dissenting).

27. The importance of requiring that a jury decide the facts that will determine the sentence was emphasized a year before *Apprendi* in *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Court had to decide whether the federal carjacking statute, which provided three different maximum penalties, depending on the degree of injury, defined three separate crimes or a single crime. *Id.* at 229. If it decided the statute defined one crime, then the degrees of injury would be sentencing factors that determined the appropriate maximum and could be

violates the Sixth Amendment for a judge to make a determination that increases a defendant's penalty:

The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."²⁸

The U.S. Supreme Court acknowledged in *Ring* that *Apprendi* and *Walton* were irreconcilable and overruled *Walton*.²⁹ The *Ring* Court made it clear that it did not matter if the state called them sentencing factors, sentencing enhancements, or as Justice Scalia says in his concurrence, "Mary Jane;"³⁰ if a finding increases the potential punishment, it is "the functional equivalent of an element of a greater offense."³¹ The *Ring* rationale stressed the importance of the jury in criminal proceedings. The Court rejected the argument that judges might be less arbitrary than juries in the imposition of the death penalty.³² First, it explained that the Sixth Amendment right does not turn on who would be the most rational, fair, or efficient fact finder.³³ Noting that the jury trial guarantee was one of the least controversial portions of the Bill of Rights, the Court emphasized that the founders of this country did not want to leave criminal justice decision-making to the State.³⁴ It went on to express doubts

found by the judge. The Court held that the statute must be interpreted as describing three different crimes to avoid what it called grave constitutional questions. *Id.* at 240. The Court restated the principle that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

28. *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (citations omitted); see also *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.").

29. *Ring*, 536 U.S. at 609 (overruling *Walton* in part).

30. *Id.* at 610 (Scalia, J., concurring).

31. *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19 (2000)). The *Ring* Court went on to reject the State's arguments that because "death is different," capital cases should be handled differently from other criminal cases. *Id.* at 587. The State had maintained that even if normally a jury must make any findings that could serve to enhance the penalty, it should be permissible to allow a judicial determination of aggravating factors necessary for a death sentence because "death is different." *Id.* The Court summarily dismissed this argument by saying there was no apparent reason or precedent for the proposed "death is different" exception for capital cases. *Id.*

32. *Id.* at 607.

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

34. *Id.*

about whether judicial decision-making actually was superior, citing the fact that the majority of states used juries to sentence capital defendants.³⁵

As Justice O'Connor indicated in her dissent, the *Ring* decision not only invalidated the capital sentencing schemes that provided for a judicial determination of punishment in Arizona, Colorado, Idaho, Montana, and Nebraska, but it would serve as a basis for challenging the override statutes of Alabama, Delaware, Florida, and Indiana where the jury's verdict was advisory and the judge made the final sentencing decision.³⁶ Indeed, concerns over the continued viability of override statutes in the wake of *Ring* led to legislative reforms in Indiana and Delaware that took effect within a month and a half of the *Ring* decision. Effective June 30, 2002, Indiana dropped override by making the jury recommendation binding on the trial judge.³⁷ For cases decided after July 22, 2002, Delaware precludes the death penalty unless the jury finds at least one statutory aggravating factor; but it still allows the judge, without considering any additional evidence, to determine whether aggravation outweighs mitigation.³⁸

The Alabama statute still provides for an advisory sentencing verdict after the punishment phase³⁹ but, as explained in the next subsection, the state

35. *Id.* at 607-08.

36. *Id.* at 621 (O'Connor, J., dissenting) (discussing the implication of the Court's decision to declare the Arizona statute unconstitutional).

37. See IND. CODE ANN. § 35-50-2-9(e) (West 2004) (noting the amendment by Ind. Pub. L. No. 117-2002 (effective June 30, 2004) that replaced language that said the judge was not bound by the jury recommendation with language that says that if the jury reaches a sentencing recommendation the "court shall sentence the defendant accordingly"). This revision of the Indiana statute was enacted prior to the June 24, 2002 announcement of the U.S. Supreme Court's *Ring* decision, and there is no official legislative history, but "it was widely reported that the Indiana Legislature was concerned that the forthcoming decision in *Ring* might invalidate the Indiana sentencing framework." *Indiana v. Barker*, No. 49605-9308-CF-095544 (Marion Super. Ct. June 27, 2003) (order dismissing death penalty request) at 2-3 (citing *Bill Nixes Judicial Override on Death Penalty Cases*, HAMMOND & MUNSTER TIMES, Feb. 21, 2002, and *High Court Case Could Nullify Death Sentences*, INDIANAPOLIS STAR, Feb. 20, 2002, at A1) (on file with the Washington and Lee Law Review).

38. See 73 Del. Laws 423 (2002) (amending DEL. CODE ANN., tit. 11, § 4209 (2002)). A judge may not impose a death sentence unless the jury has found at least one aggravating circumstance listed in the statute unanimously and beyond a reasonable doubt. *Id.* If the jury does find one aggravating circumstance, the judge, without considering any additional evidence, shall impose a death sentence if he or she determines by a preponderance of the evidence that the aggravating evidence outweighs the mitigating evidence. *Id.*

39. The relevant portions of Alabama statute, Section 13A-5-46, provide:

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury . . . it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section.

appellate courts have attempted to provide guidance to the trial courts on how to implement the statute without running afoul of *Ring*.⁴⁰ The Alabama statute provides that after a penalty trial the jury must return an advisory verdict of life in prison without parole if it finds that there are no aggravating circumstances.⁴¹ If the jury finds aggravating circumstances but determines that the aggravating circumstances outweigh the mitigating circumstances, then subsection (e)(3) provides that they must recommend death.⁴² After the jury returns an advisory verdict, Section 13A-5-47 provides that the judge order a pre-sentence investigation report and allow the parties for a second time to present arguments relating to aggravating and mitigating circumstances.⁴³ Subsection (e) of 13A-5-47 provides that the court shall determine the sentence by deciding whether the aggravating circumstances it finds outweigh the mitigating circumstances. The jury's recommendation is to be given consideration, but it is not binding.

The Florida statute also permits judges to override the jury's sentencing recommendations, despite conflicting opinions among the state supreme court

(e) After deliberation, the jury shall return an advisory verdict as follows:

- (1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;
- (2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;
- (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

ALA. CODE § 13A-5-46 (1994).

40. See *infra* Part II.C (explaining state courts' treatment of judge override statutes in the wake of *Ring*).

41. ALA. CODE § 13A-5-46 (1994).

42. *Id.*

43. The statute provides:

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

ALA. CODE § 13A-5-47(d) (1994).

justices regarding the implications of *Ring*.⁴⁴ Section 921.141(2) provides that the jury should decide "[w]hether sufficient aggravating circumstances exist, . . . [w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances," and, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death."⁴⁵ The following subsection, 921.141(3), states that "notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death."⁴⁶ It goes on to require that the judge state his or her findings of fact in writing if a death sentence is imposed.⁴⁷ These findings of fact must indicate that there were sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.

Whenever an Alabama or Florida judge overrides a jury recommendation for life, then, the judge must be making a determination that contradicts a jury finding. Either the judge must find aggravating factors that the jury did not think existed,⁴⁸ find that the aggravating factors outweighed the mitigating factors when the jury did not so find, or find that the aggravating factors were sufficient when the jury reached the opposite conclusion. Because *Ring* could be decided simply by requiring that a jury rather than a judge determine the aggravating circumstances that make the defendant eligible for a death sentence, the majority opinion did not have to reach the issue of whether a jury must also decide whether the aggravating evidence outweighed the mitigating evidence or the relative sufficiency findings, without which death cannot be imposed in Alabama and Florida.⁴⁹

44. See *infra* notes 65–71 and accompanying text.

45. Florida Statute Section 921.141(2) provides in its entirety:

Advisory sentence by the jury—after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

FLA. STAT. ANN. § 921.141(2) (West 2002).

46. *Id.* § 921.141(3).

47. *Id.*

48. The Alabama statute actually allows the judge to hear evidence relating to the pre-sentence report which the jury did not consider when reaching its sentencing recommendation. ALA. CODE § 13A-5-47 (1994). Findings based on additional evidence are precisely what the Court condemned in *Ring v. Arizona*, 536 U.S. 584, 592–98 (2002).

49. The majority indicates in footnote 4 that they are not deciding whether the Sixth

A. Competing Interpretations of *Ring*

Justice Scalia took the position in his *Ring* concurrence that the Sixth Amendment applies only to findings of aggravating facts that must be made by a jury but not to judgments regarding the relative weight or sufficiency of the evidence needed to justify a death sentence that may, in his view, be made by a judge.⁵⁰ His argument would appear to validate the recently reformed Delaware capital statute and the weighing and sufficiency provisions of the Alabama and Florida statutes. Yet, the logic of *Ring* suggests that the reach of the Sixth Amendment's protection in capital sentencing is broader than Justice Scalia maintains.⁵¹ The Court's emphasis on effect over form discounts the relevance of substantive differences between findings of fact and findings of weight or sufficiency. Although findings that aggravation exists are prerequisite to judgments of its weight or sufficiency relative to mitigation, they are no more essential than the mandated value judgments to the life or death sentencing decision. Without findings of each kind the death penalty cannot be imposed under the Alabama and Florida statutes. The rationale of *Ring* would seem, therefore, to require that jurors decide the relative weight or sufficiency of aggravating and mitigating factors.⁵²

Amendment requires "the jury to make the ultimate determination whether to impose the death penalty," as the defendant does not make that claim. *Ring*, 536 U.S. at 597 n.4.

50. *Id.* at 610–13 (Scalia, J., concurring).

51. Bryan Stevenson observes that the Court's assertions of similarity between hybrid and judge-only statutes, in its rulings leading up to *Ring* indicate that hybrid statutes are no longer constitutional. See Bryan A. Stevenson, *Two Views on the Impact of Ring v. Arizona on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1106–10 (2003) (discussing the five death penalty decisions which "shaped the modern era of capital punishment jurisprudence"). He explains that the rationale requiring that a jury find the aggravating circumstance that qualifies a defendant for the death penalty would also necessitate that a jury determine the "two other components of the tripartite sentencing determination:" Findings regarding the existence of mitigating factors and a determination of the relative weight of aggravating and mitigating factors. *Id.* at 1126. Just as a death sentence may not be imposed without findings of aggravation, it cannot be imposed unless there is a determination regarding mitigation, and a determination that aggravation outweighs mitigation. *Id.* at 1129.

In a companion law review article, Nathan Forrester takes the opposing view that a jury need only find an aggravating circumstance to qualify the defendant for the death penalty, and then the judge can make the ultimate determination of whether the defendant deserves that punishment. See generally Nathan A. Forrester, *Two Views on the Impact of Ring v. Arizona on Capital Sentencing: Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime after Ring v. Arizona*, 54 ALA. L. REV. 1157 (2003).

52. It seems especially important to have jurors decide the relative weight or sufficiency of aggravating and mitigating factors because this decision involves making value judgments. See *infra* note 89 and accompanying text. Also see Justice Breyer's concurring opinion in *Ring*,

Courts in the states with override statutes have taken various approaches to *Ring*, but all to the same effect: Each has affirmed its hybrid statute. The Supreme Court of Alabama held, in *Ex parte Waldrop*,⁵³ that *Ring* was not violated because at least one aggravating factor, committing a capital offense during a robbery, was implicit in the jury's verdicts of guilt on the murder and robbery charges.⁵⁴ The Alabama court seems to have taken the approach suggested by Justice Scalia, as it went on to hold that "whether the aggravating circumstances outweighed the mitigating circumstances is not a finding of fact or an element of the offense."⁵⁵ A subsequent case, *Ex parte McNabb*,⁵⁶ involved a death sentence that depended on an aggravating circumstance that was not implicit in the conviction of guilt.⁵⁷ In *McNabb*, the jury recommended death, and the Alabama Supreme Court held that they must have found an aggravating circumstance beyond a reasonable doubt before making a death recommendation, because the trial judge had instructed them that a finding of aggravation was a prerequisite for recommending death.⁵⁸ In *Ex parte McGriff*,⁵⁹ the Alabama Supreme Court cites *Waldrop* and *McNabb* with approval, and explains that the *McGriff* case is similar to *McNabb* because a conviction of guilt in both these latter cases did not include the aggravating circumstance alleged.⁶⁰ The *McGriff* jury also had recommended death, but the case was remanded on other grounds, and the court was concerned that there might be a problem meeting the *Ring* requirements if the subsequent jury recommended life.⁶¹ The Alabama Supreme Court instructed that at the retrial the lower court should avoid using the words "advisory" and "recommendation" when referring to findings of aggravation and include specific questions on the verdict form that would record the jurors' votes on the finding of aggravation.⁶² This would make it clear whether the requisite finding of aggravation had been made by the jury and allow the judge to override the jury regardless of whether they recommended life or death.

536 U.S. at 580, discussed *infra* in notes 90–91 and accompanying text.

53. *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2003).

54. *Id.* at 1188.

55. *Id.* at 1190.

56. *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004).

57. *See id.* at 999 (providing a brief discussion of the defendant's crime).

58. *See id.* at 1044 (finding the jury instructions were not in plain error).

59. *Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004).

60. *See id.* at 1037–38 (discussing the circumstance of *McNabb* and *Waldrop*).

61. *See id.* at 1034–39 (discussing the failure of the trial judge to provide a heat of passion instruction and providing instructions on remand).

62. *See id.* at 1038 (providing instructions for remand).

Delaware also concluded that *Ring* does not require the jury to do the weighing, because only one aggravating circumstance is needed to make the defendant death eligible.⁶³ According to its analysis, the weighing of aggravators against mitigators does not increase the potential punishment, rather it "ensures that the punishment imposed is appropriate and proportional."⁶⁴

The Florida Supreme Court did not have to decide if *Ring* required a jury determination of whether the sufficiency of the aggravators compared to the mitigators warranted death because of the way they upheld their statute in *Bottoson v. Moore*.⁶⁵ In denying Bottoson relief under *Ring*, they noted that the U.S. Supreme Court had summarily denied Bottoson's petition for certiorari and lifted his stay of execution four days after deciding *Ring* and without mentioning *Ring* or instructing the Florida Court to reconsider *Bottoson* in light of *Ring*.⁶⁶ The Florida Supreme Court emphasized that the U.S. Supreme Court had repeatedly upheld its capital statute in the past,⁶⁷ and cited U.S.

63. See *Brice v. Delaware*, 815 A.2d 314, 322 (Del. 2003) ("Once the jury determines that a statutory aggravating factor exists, the defendant becomes death eligible."); see also *Ortiz v. Delaware*, 869 A.2d 285, 305 (Del. 2005) (relying on *Brice* to reject the defendant's claim that his death sentence was unconstitutional under *Ring* because it was based, at least in part, on judicial findings of non-statutory aggravators).

64. *Ortiz*, 869 A.2d at 305 (quoting *Brice*, 815 A.2d at 322).

65. *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (denying the defendant's petition because the Supreme Court did not direct the State Supreme Court to reconsider the defendant's case after *Ring*).

66. *Id.* at 695. Several of the justices in the *Bottoson* case noted that the U.S. Supreme Court's denial of certiorari may not indicate approval of Florida's statute. *Id.* at 699 (Quince, J., concurring). Justice Shaw in his concurrence suggested that certiorari may have been denied because in the federal courts a new rule of law will not be applied in post conviction appeals. *Id.* at 711 (Shaw, J., concurring) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). Chief Justice Anstead stated, "Whether this denial [of certiorari] was based on a procedural bar, a lack of retroactive effect, or some other reason, is impossible to know." *Id.* at 704 n. 17 (Anstead, C.J., concurring).

In *Brice*, the Delaware Supreme Court included the following footnote in its discussion of the meaning of the denial of certiorari in the *Bottoson* case:

Of course, the United States Supreme Court has cautioned against drawing broad conclusions from a denial of certiorari. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998) ("[T]he denial of a petition for writ of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."); see also *Lackey v. Texas*, 514 U.S. 1045 (1995) ("Often a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'") (quoting *McCrory v. New York*, 461 U.S. 961 (1983)).

Brice, 815 A.2d at 319 n.3.

67. See *Bottoson*, 833 So. 2d at 695 n.4 (referencing four major cases in which the U.S. Supreme Court had upheld the Florida capital statute).

Supreme Court case law holding that state courts should follow precedents that directly control even if they seem to conflict with subsequent rulings that arise in different contexts.⁶⁸ Because *Ring* did not directly rule on the Florida statute and previous cases had found it constitutional, the per curiam opinion refrained from holding the statute unconstitutional. However, the concurrences of Justices Shaw and Pariente indicated that they thought Florida's approach was problematic after *Ring*, and were upholding Bottoson's death sentence because he had a prior violent felony conviction that was exempt from the *Ring* requirement because it resulted from a prior case where the defendant had the right to a jury determination.⁶⁹ Chief Justice Anstead and Justice Pariente emphasized that the Florida and Arizona statutes were essentially the same, and the former quoted U.S. Supreme Court language to that effect from the *Walton* decision.⁷⁰ It is not necessary to discuss all the different arguments presented in *Bottoson*, but the lack of accord on the impact of *Ring* is reflected in the seven separate opinions written by the state supreme court justices in this per curiam decision. Despite the conflicting opinions of the Florida Supreme Court justices, they have relied on *Bottoson* to repeatedly reject *Ring*-based challenges to their statute.⁷¹

The state supreme court in Indiana rejected *Ring* challenges to death sentences in two cases because jury findings of the requisite aggravating

68. *Id.* at 695 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the other courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citing *Rodriguez De Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989))).

69. *See id.* at 718–19 (Shaw, J., concurring) (providing a different reading of *Ring*); *id.* at 722–23 (Pariente, J., concurring) (providing a recommendation for administering Florida's death statute in light of *Ring*).

70. Chief Justice Anstead relies on the following quote from *Walton*:

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. at 704 (Anstead, C.J., concurring) (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). Judge Pariente also focuses on the similarity between the Florida and Arizona statutes. *Id.* at 720–21 (Pariente, J., concurring).

71. *See, e.g., Johnson v. State*, 903 So. 2d 888, 900 (Fla. 2005) (relying on *Bottoson* to reject a challenge to Florida's death penalty scheme); *Hernando-Albertez v. State*, 889 So. 2d 721, 733 (Fla. 2004).

circumstance were implicit in the jury's recommendations⁷² and the Indiana Supreme Court made clear in *Ritchie v. Indiana*⁷³ that it also was adopting the view that the judge can weigh aggravating and mitigating circumstance once there has been a jury finding of aggravation. In the *Ritchie* case, the court expressly rejects the argument that the jury must weigh aggravating and mitigating circumstances,⁷⁴ and cites cases in other jurisdictions reaching similar conclusions.⁷⁵

Although Nevada does not have a hybrid statute, its supreme court had to deal with a *Ring* challenge in *Johnson v. State*⁷⁶ because the state statute allowed a three-judge panel to decide the sentence when the jury could not reach a unanimous decision in a capital case.⁷⁷ The court held that the Nevada statute violated *Ring* because it "requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'"⁷⁸ Although the court recognized that *Ring* had not explicitly reached this issue, it determined that *Ring* still required a jury to make both determinations because a defendant could not receive the death penalty without the second finding pertaining to mitigation.⁷⁹ The Nevada Supreme Court reasoned that the weighing process in its statute "is necessary to authorize the death penalty in Nevada, and [it concluded] that it is in part a factual determination, not merely discretionary weighing."⁸⁰

72. See *Brown v. State*, 783 N.E.2d 1121, 1126 (Ind. 2003) (finding no violation of *Ring*); *Overstreet v. State*, 783 N.E.2d 1140, 1161 (Ind. 2003) (holding that *Ring* does not require specific jury forms).

73. *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004).

74. *Id.* at 266–67 (noting that other states with similar sentencing schemes have reached the same conclusion).

75. See also *State v. Ben-Yisrayl*, 809 N.E.2d 309, 311 (Ind. 2004) (reversing a lower court judge's determination that required the jury to decide the weighing element as the finding that aggravation outweighed mitigation also was required before a death penalty could be imposed); *State v. Barker*, 809 N.E.2d 312, 314–15 (Ind. 2004) (same); *State v. Charles Barker*, Order Dismissing Death Penalty Request, 49G05-9308-CF-095544, at 11. *In accord*, *State v. Ben-Yisrayl*, Order on Defendant's Motion to Dismiss the Death Penalty Request, CR84-076E.

76. *Johnson v. State*, 59 P.3d 450 (Nev. 2002).

77. *Id.* at 458–62 (applying *Ring* to the Nevada Statute).

78. *Id.* at 460 (quoting NEV. REV. STAT. § 175.554(3) (West 2001)).

79. *Id.* (noting that the finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada).

80. *Id.* at 460.

When the Supreme Court overruled *Walton* in the *Ring* decision, it abandoned the distinction between elements of the offense and sentencing factors that it had previously used to uphold hybrid statutes in *Proffitt*,⁸¹ *Spaziano*,⁸² *Hildwin*,⁸³ and *Harris*.⁸⁴ The logic used in *Ring* as a justification for overruling *Walton* casts doubt on the constitutionality of hybrid statutes,⁸⁵ but *Ring* did not make any definitive pronouncements regarding the status of hybrid statutes because its holding was limited to findings of aggravation under Arizona's judicial sentencing scheme. As the Court points out, *Ring*'s claim was "tightly delineated" and did not include the issues of whether a jury must find mitigating circumstances or assess the relative weight of aggravating and mitigating circumstances to "make the ultimate determination whether to impose the death penalty."⁸⁶

Arguably, judge override statutes are even more problematic than the judge only statutes invalidated by *Ring*. When judges override jury recommendations based on the sufficiency or relative weight of evidence they are enhancing the penalty by actually contradicting what the jury found, not merely by making additional findings. Furthermore, these determinations involve value judgments that seem especially appropriate for the jury considering the concerns underlying the Sixth Amendment right to a jury trial. Kalven and Zeisel's seminal research on jury decision-making found that it was precisely with respect to values that judge and jury are most apt to differ.⁸⁷ *Ring*'s emphasis on the importance of a jury determination raises another crucial question in the hybrid context: Does giving the judge authority over the jury in making the punishment decision compromise the jury's sense of responsibility or scrupulousness in their decision-making?

When deciding whether judicial override is constitutional after *Ring*, many aspects of these hybrid systems must be considered. A fundamental question is whether it is sufficient if a jury has found at least one aggravating factor; and if

81. *Proffitt v. Florida*, 428 U.S. 428 (1976).

82. *Spaziano v. Florida*, 468 U.S. 447 (1984).

83. *Hildwin v. Florida*, 490 U.S. 638 (1989).

84. *Harris v. Alabama*, 513 U.S. 504 (1995).

85. *See Apprendi v. New Jersey*, 530 U.S. 466, 538 (2000) (O'Connor, J., dissenting) (discussing how *Ring* casts doubt on the constitutionality of hybrid statutes).

86. *See Ring v. Arizona*, 536 U.S. 584, 597 n.4 (2002).

87. *See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY* 494-95 (1966) (discussing how roughly two out of three of the criminal cases where judges indicated that they would have decided differently than the jury were "marked by some jury response to values"). In the thirty-five cases they studied in which either the judge or the jury would impose death, the judge and jury only agreed in fourteen cases, while they disagreed about the penalty in twenty-one cases. *Id.* at 436.

it matters if the aggravating factor is a prior conviction, a contemporaneous crime included in the guilt conviction, or a part of the jury recommendation at sentencing. A second key question is whether the jury should decide the relative weight or the sufficiency of aggravating and mitigating factors considering these determinations are essential before death can be imposed. Thirdly, it must be determined whether the constitutionality of a judicial sentence of death turns on whether the jury recommendation was life or death. The quality of jury decision-making under hybrid statutes should be taken into account when answering these questions. If giving the judge authority over the jury in making the punishment decision compromises the jury's sense of responsibility or scrupulousness in their decision-making, it seems inadvisable to preserve any vestiges of these hybrid systems.

B. Juries as Conscience of the Community

In *Ring*, Justice Breyer concurred with the Court's invalidation of Arizona's judge only sentencing scheme but not with its constitutional reasoning.⁸⁸ He relied instead upon the Eighth Amendment's emphasis on the jury's role as the "conscience of the community," for the argument that the jury alone must make the ultimate life or death sentencing decision, and hence both the fact finding and evaluative judgments inherent in that decision.⁸⁹ Jury sentencing is essential, he observed, because the main justification for capital punishment is retribution, and juries are better able than judges to decide when that purpose is served.⁹⁰ Because juries more accurately represent the composition and experience of the community at large, they better reflect community sentiments about what penalty is deserved in a particular case. Justice Breyer cites language from prior cases in support of his argument:

88. See *Ring*, 536 U.S. at 613–19 (Breyer, J., concurring).

89. See *id.* at 616 (Breyer, J., concurring) (noting that jurors have an important comparative advantage over judges in respect to retribution).

90. Justice Breyer writes, "I am convinced by the reasons that Justice Stevens has given. These include (1) his belief that retribution provides the main justification for capital punishment, and (2) his assessment of the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end." *Id.* at 614 (Breyer, J., concurring). He argues, again, following Justice Stevens, that the death penalty cannot be justified on the grounds of deterrence or incapacitation. *Id.* at 614–15 (Breyer, J., concurring). He observes that studies of deterrence are at most inconclusive, and that research on incapacitation shows that offenders sentenced to life without parole rather than the death penalty rarely commit additional crimes. *Id.*

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole." Hence they are more likely to "express the conscience of the community on the ultimate question of life or death," and better able to determine in the particular case the need for retribution, namely, "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."⁹¹

Breyer sees jury sentencing in capital cases as one of the special procedural safeguards required by *Gregg*, without which *Furman* forbids capital punishment.⁹²

Further reason for needing the jury as a barometer of community sentiments, according to Justice Breyer, is the "continued division of opinion" on capital punishment.⁹³ He points out that many believe the death penalty is fundamentally cruel and unusual because it is irreversible and sometimes wrongly imposed, its application is influenced by race and socioeconomic factors, it often involves intolerably long delays, and defendants often receive inadequate representation.⁹⁴ He notes that the United States is the only Western industrialized nation that still uses the death penalty, but more than two-thirds of American counties have not imposed the death penalty since the *Gregg* decision in 1976.⁹⁵ For these reasons, he argues, "the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the

91. *Id.* at 615–16 (Breyer, J., concurring) (internal citations omitted). In support of this argument, Breyer cites research showing that judges who override jury life verdicts are especially prone to making serious errors. J. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 405–06 (2002) (hereinafter A BROKEN SYSTEM), available at http://www.thejusticeproject.org/press/reports/a_broken_system.part-ii.html.

92. Justice Breyer states:

This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. Otherwise, the constitutional prohibition against "cruel and unusual punishments" would forbid its use. Justice Stevens has written that those safeguards include a requirement that a jury impose any sentence of death. Although I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view, and with the related views of others upon which it in part relies.

Ring, 536 U.S. at 614 (Breyer, J., concurring) (internal citations omitted).

93. *Id.* at 616 (Breyer, J., concurring).

94. *Id.* at 616–17 (Breyer, J., concurring) (discussing the views of those opposing the death penalty).

95. *Id.* at 618 (Breyer, J., concurring) (citing A BROKEN SYSTEM, *supra* note 91, at App. B tbl.11A).

death penalty is made by a jury rather than by a single governmental official."⁹⁶ He concludes that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death."⁹⁷

C. Juries as Responsible for the Defendant's Punishment

Beyond the holding of *Ring* and the arguments set forth by Justice Breyer, there is the further critical issue of the jury's acceptance of responsibility, as mandated by *Caldwell v. Mississippi*,⁹⁸ when the judge may override their decision. In *Caldwell*, the U.S. Supreme Court reasoned:

A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.⁹⁹

Professor Michael Mello has argued that, by their nature, statutes that permit judges to override the jury's sentence lead jurors to eschew responsibility for their sentencing decision, and that override statutes thus constitute a built-in structural violation of *Caldwell*.¹⁰⁰ That is, unlike individual prosecutors who may, in some instances, lead jurors to deny responsibility, jury override does so across the board in all cases that reach the penalty phase of a capital trial. Mello aptly characterizes this situation:

At some point in the sentencing proceeding . . . the jury is . . . told that the ultimate sentencing responsibility rests not upon itself, but with the trial judge. The judge will make the final determination; they are only to issue a "recommendation" or "advisory" sentence. . . . The message is clear: Your job is not to decide whether the defendant will live or die; you are here only to provide your advice, your opinion, and the court is not bound by your recommendation. . . . The jury is left, at best, with the sense that its

96. *Id.* at 618 (Breyer, J., concurring) (quoting *Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring)).

97. *Id.* at 619 (Breyer, J., concurring).

98. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

99. *Id.* at 333.

100. See Michael A. Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 303 (1989) (examining the "constitutionality of capital sentencing schemes that divide sentencing responsibility between judge and juries").

sentencing decision will not necessarily be followed. At worst, it may believe that its determination is only pro forma, of little relevance to the defendant's fate. Faced with its diminished sentencing role, this jury is prone toward the same death-bias against which the Court warned in *Caldwell*.¹⁰¹

In *Bottoson*, where the Florida Supreme Court evaluated the impact of *Ring* on its statute, Justice Lewis's concurrence also expresses concerns about the validity of Florida's approach in light of *Caldwell* in conjunction with *Ring*.¹⁰² He notes that although the Florida Supreme Court had previously rejected a *Caldwell* challenge to its jury instructions, the jury instructions may be invalid after *Ring* because they tell the jury that its sentence is merely a recommendation.¹⁰³ Justice Lewis explains that:

[C]learly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from *Ring*.¹⁰⁴

This issue concerning the impact of override on the jury's willingness to assume full responsibility for the punishment of the convicted capital defendant is a fundamentally empirical question. The more specific questions it asks are: Does the fact that a jury may have its decision reversed by the trial judge diminish the sense of responsibility or how seriously jurors take their duties? Does it make them more careless about understanding or following their sentencing instructions? Does it make them less scrupulous about their decision-making, impatient to be done with the decision?

Mello marshaled indirect evidence from social psychological studies and mock jury research to address some of these questions.¹⁰⁵ Doubtless most of the research he assembled could be subjected to the same complaints leveled against studies submitted by the defense in *Lockhart v. McCree*¹⁰⁶ namely, that the findings are suspect because the subjects were not real jurors who made the

101. *Id.*

102. See *Bottoson v. Moore*, 833 So. 2d 693, 731–34 (2002) (Lewis, J., concurring).

103. See *id.* at 731 (Lewis, J., concurring) (explaining how Florida's standard penalty phase jury instructions may no longer be valid). But see *Combs v. State*, 525 So. 2d 853, 854 (Fla. 1988) (rejecting the petitioner's argument that the standard jury instruction was unconstitutional); *Cook v. State*, 792 So. 2d 1197, 1201 (Fla. 2001) (same).

104. *Bottoson*, 833 So. 2d at 733 (Lewis, J., concurring).

105. See Mello, *supra* note 100, at 315–32 (discussing the jury's willingness to discuss responses).

106. *Lockhart v. McCree*, 476 U.S. 162 (1986).

actual sentencing decision in real capital cases.¹⁰⁷ We obviate this objection here with data from interviews conducted by the Capital Jury Project (CJP) with real jurors in real capital cases who made the life or death sentencing decision in judge override and jury binding states. Notably, findings from the CJP interviews with capital jurors were recently cited in *Schriro v. Summerlin*¹⁰⁸ with respect to whether the decision of judges or juries are a more reliable reflection of community values, a concern of Justice Breyer in *Ring*. The question we address here is not whether judge or jury is more reliable or appropriate as sentencer, but whether jurors are better sentencers when their decisions are final and binding on the trial judge or when their decisions are simply recommendations that may or may not be followed by the trial judge.

The findings of the Capital Jury Project presented here make clear the danger of allowing the override statutes to stand. The Sixth and Eighth Amendment arguments enunciated in *Ring* and the importance of jury's recognizing their responsibility emphasized in *Caldwell* all suggest that the hybrid systems are fatally flawed. Findings revealing that jurors in states with hybrid systems are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment demonstrate how the potential for judicial override eviscerates Sixth and Eighth Amendment protections and warrants the concerns raised in *Caldwell*.

III. The Capital Jury Project

The Capital Jury Project is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation.¹⁰⁹ The findings of the CJP are based on in-depth interviews with persons who have

107. One study cited by Mello did involve interviews with jurors who sat in actual capital sentencing hearings in Florida. See Mello, *supra* note 100, at 318 n.149 (citing William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1988)).

108. *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (citing articles based on the CJP).

109. The CJP was undertaken by university-based investigators specializing in the analysis of data collected in their respective states and collaborating to address the following objectives of the Project: (1) To examine and systematically describe jurors' exercise of capital sentencing discretion; (2) to identify the sources and assess the extent of arbitrariness in jurors' exercise of capital discretion; and (3) to assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing. This research was supported by the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252; Dr. William J. Bowers, Principal Investigator.

served as jurors on capital trials in fourteen states. The interviews chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.¹¹⁰ Fourteen states were chosen to represent the principal variations in capital sentencing statutes, including the distinction between hybrid and binding schemes.¹¹¹ Juror interviews were conducted in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

Within the respective states, the researchers selected samples of fifteen to thirty capital trials,¹¹² representing both death and life sentencing outcomes.¹¹³

110. The research is based on a common core of data collected in the participating states. The investigators cooperatively developed a core juror interview instrument for use in all states and enhanced the usefulness of this instrument in their respective states by adding to the information gathered in the core interviews in their states, by conducting additional interviews in selected cases of special interest, and by incorporating additional case-specific data from other sources. The juror interviews obtained data on some 700 variables through structured questions used in all states, and included open-ended questions that called for detailed narrative accounts of the respondents' experiences as capital jurors. Neutrally worded questions were read verbatim to avoid influencing jurors' responses. Advanced law and social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews were guaranteed confidentiality. The preparation of the interview data for state-level and project-wide statistical analyses was carried out at the College of Criminal Justice, Northeastern University under the direction of William J. Bowers. For further information on the research design and methodology, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077-85 (1995).

111. The sample was designed to include (1) states with "threshold," "balancing," and "directed" statutory guidelines for the exercise of sentencing discretion, (2) states with "traditional" and "narrowing" statutory definitions of capital murder, and (3) states that make the jury sentencing decision binding and those that permit the judge to override the jury's decision. For further details about sampling states, see *id.* at 1077-79.

112. The sample of trials was restricted to those in which the defendant was charged with a murder punishable by death, convicted of that murder in the guilt phase of the trial, and sentenced to life or death by a jury in the sentencing phase of the trial. The sampling plan for each state called for an equal representation of trials that ended in life and death sentencing decisions to maximize the potential for comparing and contrasting jurors in "life" and "death" cases within each state. Hence, trials were not sampled to be strictly representative within states or within the nation as a whole, but to facilitate analytic comparisons. See *id.* at 1079-89 (providing further details about sampling trials within states).

113. Although the death penalty alternative was a "life sentence" in most states, states differed in the mandatory minimum sentence served before parole eligibility. Alabama, California, Missouri, and Pennsylvania had life without the possibility of parole as the only death penalty alternative. The mandatory minimum for parole eligibility in these states is shown in William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 tbl.1 (1999).

From each trial, a target sample of four jurors was systematically selected for in-depth, three to four hour personal interviews.¹¹⁴ The questioning probed for jurors' assumptions, reasoning, and deliberations when deciding the punishment, how and when they made their decision, what factors they considered, and their understanding of the jury's sentencing instructions. Most interviews were tape recorded and transcribed.

A total of 1198 interviews with jurors from 353 capital trials in fourteen states have been conducted.¹¹⁵ These fourteen states are responsible for 76.12% of the persons on death row as of January 1, 2005, and for 78.19% of the 972 persons who were executed between 1977 and June 8, 2005.¹¹⁶ Some forty articles presenting and discussing the findings of the CJP have been published in scholarly journals.¹¹⁷

IV. Jurors Under Hybrid and Binding Capital Statutes

We now examine the punishment decision-making of jurors under hybrid and binding capital statutes. In particular we investigate the impact of hybrid statutes on jurors' willingness to assume responsibility for the sentencing decision, on the care they take to understand

114. Investigators could conduct additional interviews in cases where the initial interviews raised questions that further interviews might help to resolve. In two states (Kentucky and Virginia), samples of more than four jurors were drawn from cases where the minimum sample of trials with life or death outcomes could not be met within the initial time frame for data collection. The target sample of four jurors per case was not always met due to difficulties in applying the sampling and replacement protocol, locating jurors whose addresses and phone numbers had changed or were not initially correct or sufficiently detailed, and the unwillingness of some jurors to be interviewed, despite the \$20 incentive payment. Of the 353 trials in the sample, 39 trials are represented by a single juror, 45 by 2, 71 by 3, 152 by 4, 31 by 5, 13 by 6, and 1 each by 7 and 8 jurors.

115. The number of jurors interviewed and the number of trials from which they were drawn in each state are as follows: Alabama, 59 jurors, 20 trials; California, 152 jurors, 36 trials; Florida, 117 jurors, 30 trials; Georgia, 77 jurors, 25 trials; Indiana, 102 jurors, 32 trials; Kentucky, 113 jurors, 31 trials; Louisiana, 30 jurors, 10 trials; Missouri, 61 jurors, 19 trials; North Carolina, 83 jurors, 26 trials; Pennsylvania, 74 jurors, 28 trials; South Carolina, 114 jurors, 31 trials; Tennessee, 49 jurors, 15 trials; Texas, 120 jurors, 38 trials; and Virginia, 47 jurors, 12 trials.

116. See *Death Row Inmates by State*, <http://www.deathpenaltyinfo.org/article.php?scid=98&did=188#state> (last visited Sept. 28, 2006); *Executions by State*, <http://www.deathpenaltyinfo.org/article.php?scid=88&did=186#state> (last visited Sept. 28, 2006).

117. A complete list of publications reporting CJP findings can be found at <http://www.cjp.neu.edu>, which is periodically updated and includes the full text of some articles. The most detailed discussion of the research methodology can be found in Bowers, *supra* note 110, at 1077-79.

sentencing instructions, and on the conscientiousness with which they make the sentencing decision. The findings are based on two kinds of data from the CJP interviews with capital jurors: (1) Jurors' responses to structured questions with predetermined response options that probed their thinking and decision-making during the trial, and (2) jurors' narrative accounts of their decision-making in response to open ended questions that encouraged them to describe the decision-making process in their own words.

In each area of inquiry, we first present jurors' responses to structured questions and then their narrative accounts. The analysis of responses to structured questions compares jurors from Alabama, Florida, and Indiana, where the trial judge was able to override the jury's sentence, with jurors from the eleven other states, where their sentencing decisions were binding. Jurors' responses are shown separately for the respective states.¹¹⁸ Juror responses are grouped into hybrid and binding categories and the differences between the hybrid and binding states are tested for statistical significance.¹¹⁹ The state-by-state tabulation of jurors' responses makes it possible to see how consistently the hybrid-binding difference distinguishes not merely the group of hybrid states from the group of binding states but each of the hybrid states from any and all of the binding states.¹²⁰ In addition to this statistical evidence, we draw upon the interviews with

118. The tables do not show percentages for Louisiana separately because the sampling goals were not met for that state and hence the state specific statistics are less reliable. The twenty-nine interviews conducted with Louisiana capital jurors are, however, included in the summary statistics for the jury binding states as a group.

119. For each of the differences between the group of jurors in the three hybrid states and the group in the eleven binding states in Tables 1–3, we test for the probability that the observed difference would occur by chance. Given that the sampling of jurors was clustered by trial, the traditional Chi Square test of statistical independence is not appropriate. However, the STATA 8.0 software package allows us to calculate an *F* statistic with an adjustment for the clustering of jurors by trial. The *p* value associated with this *F* statistic can be interpreted in the same way as the *p* value for the Chi Square statistic. See STATA CORP., STATA STATISTICAL SOFTWARE: RELEASE 8.0., STATA SURVEY DATA: REFERENCE MANUAL RELEASE 8.0 at 73 (2003).

The *p* value for the *F* test indicates the probability that the observed difference between jurors in the three hybrid and the eleven binding states would occur by chance. The scientific convention is to consider a difference as statistically significant (not a result of chance variation) if the probability (*p* value) is less than .05; that is, such a difference would occur by chance in less than five of one hundred samples of the same size.

120. Because we sampled roughly equal numbers of life and death cases in each state, the percentage differences between states in the variables under consideration will tend to be independent of, and hence not confounded by, factors that produce differences in the likelihood of a death sentence among states. For this reason, of course, the state specific percentages are not strictly representative state level estimates of the variables in question.

jurors from the hybrid states for verbatim accounts of their thinking and behavior that help to elucidate and explain the statistical findings. We confirm the robustness of the findings in Appendix A.

A. Taking Responsibility for the Defendant's Punishment

The jurors in hybrid states were especially unlikely to see themselves as responsible for the defendant's punishment. Nearly all jurors in the three hybrid states understood that the judge did not have to accept their punishment decision. In light of this recognition, they were far less likely than those in the binding states to say the jury was strictly responsible for whether the defendant lived or died.¹²¹ Under hybrid as compared to binding statutes, jurors saw the jury as less responsible than the judge and themselves individually as less responsible than the jury collectively for the defendant's punishment. The jurors in hybrid states were also less likely than those in the binding states to "feel bad" about the possibility of having their sentence rejected by the trial judge either because it made their sentencing decision less important or because the defendant might not get the punishment he deserved.

1. Statistical Data

The responsibility-related findings presented in Table 1 are based on three sets of questions. The first two questions asked whether jurors believed that the judge must accept the jury's sentencing decision¹²² and

121. The Court in *Caldwell* stressed that capital jurors must see themselves as the ones responsible for the defendant's punishment. The Court stated that "[t]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985). The Court also noted that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29.

122. The exact wording of the first of these two questions was:
How likely did you think it was that a jury decision for the death penalty would be accepted or rejected by the trial judge?

- _____ the judge must accept the jury's decision; it's final
- _____ the judge would probably accept the jury's decision
- _____ the judge would probably reject the jury's decision
- _____ had no idea what the judge would do

whether they felt that the defendant's punishment was strictly the jury's responsibility.¹²³ The second set of questions asked jurors to rank five agents or sources in terms of responsibility for the defendant's punishment.¹²⁴ The remaining two questions probed whether jurors felt bad about the possibility that their sentencing decision might be overridden by the judge.¹²⁵

The percent affirming the first response option appears in column 1 of Table 1.

123. The exact wording of this question was:

When you were considering the punishment, did you think that whether [defendant's name] lived or died was

- ☐ strictly the jury's responsibility and no one else's?
- ☐ mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision?
- ☐ partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence in all cases?
- ☐ mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision?

The percent affirming the first of these response options appears in column 2 of Table 1.

124. The question read:

Rank the following from "most" through "least" responsible for [defendant's name] punishment. (Give one for most through five for least responsible.)

- ☐ the law that states what punishment applies
- ☐ the judge who imposes the sentence
- ☐ the jury that votes for the sentence
- ☐ the individual juror since the jury's decision depends on the vote of each juror
- ☐ [Defendant's name] because his/her conduct is what actually determined the punishment

Two variables were formed from three of the responses to this five part question, one indicating that the judge was ranked as more responsible than the jury, and the other indicating that the jury was ranked as more responsible than the individual juror. They appear respectively in columns 3 and 4 of Table 1.

125. The exact wording of the questions on how the jurors felt about the possibility of a judicial override was:

Did the chances that your punishment decision might be overruled or changed make you feel . . .

- ☐ bad, because it makes our sentencing decision less important?
- ☐ bad, because it means that [defendant's name] might not get what s/he deserves?

Jurors had the option of answering "yes," "no," or "not sure" to each of these queries. The percent giving an affirmative response to each appears respectively in columns 5 and 6 of Table 1.

Table 1: Percent of Jurors Responding to Various Indicators of Responsibility for the Defendant's Punishment in Hybrid and Binding States							
						Felt Bad Because of Possible Override	
	Judge Must Accept Jury Sentence	Sentence is Strictly Jury's Responsibility		Jury More Responsible Than Judge	Juror More Responsible Than Jury	Decision Made Less Important	Not Get Deserved Punishment
HYBRID STATES:							
AL	0.0	9.8		45.8-	26.1	19.1	21.7
FL	4.3	6.0		63.2	27.0	23.1	27.4
IN	8.3	6.4		51.6	32.3	18.8	24.2
All Hybrid	4.9	6.9		55.6	28.8	20.8	25.2
BINDING STATES:							
CA	39.6	41.4		84.2	36.5	34.3	34.4
GA	57.3	53.4		87.7	41.2	28.1	45.5
KY	24.1	20.4		70.8	33.3	33.0	50.5
MO	44.3	33.3		90.0	28.8	34.5	35.7
NC	56.6	35.4		80.3	34.7	29.7	32.9
PA	47.3	42.9		86.8	36.4	33.3	33.8
SC	48.2	22.3		82.9	52.7	32.5	38.1
TN	53.2	25.5		85.1	43.5	31.1	40.0
TX	51.7	33.9		83.9	33.6	37.5	42.1
VA	38.6	22.7		83.7	32.6	30.0	43.9
All Binding	45.6	33.0		82.5	38.0	33.5	39.9
<i>p</i> =*	.0000	.0000		.0000	.0087	.0001	.0001

* *p* value for the difference between all jurors in hybrid and in binding states

Do jurors understand when their punishment decision is binding on the trial judge or merely a recommendation the judge is free to accept or reject? The first column of figures in Table 1 shows the percent of jurors in each state who thought that "the judge must accept the jury's decision; it's final." Almost none of the jurors in the hybrid states failed to understand that their sentencing verdict was only advisory. No juror in Alabama and very few in Florida and Indiana answered that the judge must accept the jury's decision. In these

hybrid states as a group only one in twenty jurors (4.9%) believed their punishment decision was final.

Striking is the fact that even in the bindings states no more than six out of ten jurors recognize that the judge must accept their punishment decision. Apparently, many of these jurors were reluctant to believe or to acknowledge that the life or death decision was theirs alone to make. The jury's sentence is, of course, subject to review and reversal in the appellate courts and recognition of this may have prompted some jurors to answer that their decision was not final. Yet, the question to jurors was explicitly limited to the trial judge as the one who must accept or might override their verdict. In view of the unambiguous character of the question, it appears that even in the binding states many jurors simply preferred to assume that the trial judge would exercise discretion in the final determination of the punishment.¹²⁶

Given this recognition of the judge's authority to step in and override the jury's punishment decision in hybrid states, do jurors in these states take a different view of the jury's responsibility for the defendant's punishment? At least for binding statutes, the *Caldwell* doctrine holds that jurors must not see the jury's responsibility as shared or passed on to judges who may review the sentencing decision, and it barred prosecutors from arguing to this effect.¹²⁷ Hence, jurors should believe that whether the defendant lives or dies is strictly the jury's responsibility and no one else's. The second column of figures in Table 1 shows the percentage of jurors in each state who subscribed to precisely this statement about the jury's responsibility.

Caldwell's prescription is virtually a dead letter in the hybrid states. Only about one in twenty jurors (6.9%) in these states believed that whether the defendant lived or died was strictly the jury's responsibility. Jurors in the binding states are also very reluctant to see the jury as strictly responsible for the defendant's punishment. Two thirds of them see the jury's responsibility as shared with or passed on to trial or appellate judges.¹²⁸ This widespread failure

126. The three CJP states that explicitly require trial judges to review jury imposed death sentences and authorize them to impose a life sentence when it is called for by their review (California, Kentucky, and Virginia) are significantly below the other strictly binding states in the percent saying that the jury's punishment decision is final (column 1). The difference (33.9 versus 54.1) is significant at $p = .000$ (applying the procedure described *supra* note 119 to the difference between these three states and the remaining eight strictly binding states, including Louisiana). These three states do not, however, differ significantly from the remaining strictly binding states with respect to any of the other factors examined in this statistical analysis, so we will continue to include them in the "binding" category.

127. See discussion *supra* note 121 (discussing the *Caldwell* decision).

128. Jurors in the binding states responded in the following proportions: 33.0% "mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision;" 17.9% "partly the jury's responsibility and partly the

of jurors in binding states to believe the jury alone is responsible for the punishment decision is obviously at odds with the *Caldwell* doctrine. The even more pervasive denial of responsibility among jurors in hybrid states is still further at odds with the spirit of *Caldwell*, but here at least their denial is consistent with the recognition that the jury's decision will be reviewed and could be overturned by the trial judge.

Who or what then do jurors see as most responsible for the defendant's punishment? When asked to rank the law, the judge, the jury, the individual juror, and the defendant¹²⁹ from most to least responsible for the defendant's punishment, jurors' responses in both hybrid and binding states reveal that they think foremost responsibility lies beyond the actors involved in the decision process.¹³⁰ Virtually half of the jurors said the defendant himself is the one most responsible for his punishment.¹³¹ Although it is true that he is responsible for the crime, indeed this is precisely what the jury determined when it convicted him, to say he is responsible for his own punishment is a transparent "agentic shift."¹³² It transfers responsibility to the person whose fate must be decided as the one to blame for the onerous decision jurors must make. Another third of the jurors¹³³ say the law that provides for the death penalty is most responsible. Clearly, in this response jurors are fixing on something antecedent or structural that serves as a necessary condition for the punishment instead of the straightforward matter of who decides what the punishment should be in the case at hand.

responsibility of the judge and appeals courts who review the jury's sentence in all cases;" 16.1% "mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision." The fact that the binding state jurors are more reluctant to see the jury as strictly responsible than they were to acknowledge that the jury's decision was binding on the trial judge (a difference of 12.6 percentage points between columns 1 and 2 for the binding states), may be due to the fact that the alternative responses to this question make reference to appellate as well as trial judges.

129. See *supra* note 124 (providing the exact wording of the question and response options).

130. Jurors' rankings of these sources of responsibility are not tabulated here. For earlier analyses of responses to this question, broken down by hybrid and binding states, see Bowers, *supra* note 110, at t.11.

131. The percentages are 46.3% in hybrid and 50.1% in binding states; not a statistically significant difference.

132. This term was coined by Stanley Milgram to identify the assignment of responsibility for inflicting pain on others, in this case the recipient of the pain. STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 132-34 (1974).

133. The percentages are 34.2% in hybrid and 32.4% in binding states; not a statistically significant difference.

Having relegated themselves and the trial judge to the ranks of the less responsible, it is here that jurors in hybrid states differ from those in binding states in the relative responsibility they assigned to those participating in the decision process; namely, the judge, the jury, and the individual juror. This is reflected in the percent of jurors who say the jury is less responsible than the judge, and in the percent who say the individual juror is less responsible than the jury as a group (shown in columns 3 and 4 of Table 1).

The measure of responsibility of jury relative to judge confirms that the hybrid statutes undermine jurors' sense of the jury's responsibility (column 3). Jurors in each of the three hybrid states were less likely to place the jury ahead of the judge in responsibility for the defendant's punishment than jurors in any of the binding states. The corresponding measure of juror relative to jury responsibility reveals that the hybrid statutes further undermine jurors' sense of individual responsibility. While most jurors see themselves individually as less responsible for the punishment than the jury collectively, this is especially true of jurors in hybrid as compared to binding states (column 4 of Table 1). In fact, the jurors in all three hybrid states fall below the percent for jurors in the binding states and even below the jurors in all but one of the specific binding states.¹³⁴ The hybrid statutes thus undermine not only jurors' belief in the responsibility of the jury as a unit but also their sense of individual personal responsibility for the punishment.

How jurors felt about the possibility that their punishment decision might be overruled or changed is a further indication of their personal investment in, or sense of responsibility for, the punishment decision. In this connection, jurors could answer that it would make them feel bad "because it made their sentencing decision less important" or "because the defendant might not get [the punishment] s/he deserved." Quite obviously, these reactions might be expected of jurors who have assumed a personal sense of responsibility for the punishment decision.

Jurors in the hybrid states were substantially less likely to feel bad for either of these two reasons, as shown in the two far right columns of Table 1. In states where the judge could override their decision, only one out of five (20.8%) jurors indicated that they would feel bad because "it makes (their) sentencing decision less important" and only one in four (25.2%) would feel bad because "it means that (the defendant) might not get what s/he deserves," as compared, respectively, to one in three (33.5%) and four of ten (39.9%) in the binding states. These differences between hybrid and binding states are

134. The only exception to this state-by-state consistency is that the binding state of Missouri falls 3.5 percentage points below the hybrid state of Indiana.

substantial and consistent. In response to each question, all three override state percentages are below any of the binding state percentages.

The much reduced tendency of hybrid jurors to feel bad about the prospect of having their sentencing decision overturned is consistent with their diminished sense of the jury's responsibility relative to the trial judge and their own diminished sense of personal responsibility relative to the jury. Such a reduced sense of responsibility carries the further ominous implication that jurors under hybrid statutes are apt to be less conscientious in making the awesome moral judgment at the heart of capital sentencing.¹³⁵ Indeed, this reduced sense of responsibility for the defendant's punishment may well be at the root of the further problems under hybrid statutes of jurors failing to understand instructions and rushing to judgment, examined in Sections B and C of this analysis.

2. *Narrative Accounts*¹³⁶

Jurors' narrative accounts of their decision-making in the hybrid states further indicates that they attempt to deny or escape responsibility for the defendant's punishment. These accounts stress that the judge makes the final sentencing decision and that this relieves the jurors of feeling responsible for the defendant's punishment. The accounts presented here are drawn from jurors' responses to a question that asked: "In your own words, can you tell me what the jury did to reach its decision about the defendant's punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?"

In each of the override states, jurors commonly described themselves as making only a recommendation or suggestion rather than a decision about the defendant's punishment. In all three states, they use the same language or

135. The *Caldwell* Court stressed the need for jurors to appreciate their "truly awesome responsibility" as indispensable for the reliability required in capital sentencing by the Eighth Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). The Court stated that:

Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with and indeed as indispensable to the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 329.

136. Excerpts are identified by state abbreviation and juror identification number. The L or the D at the end indicates whether the case resulted in a life or death sentence, respectively. All transcripts of the quoted juror interviews are on file with the Washington and Lee Law Review.

phrases to characterize what they did: as "just a recommendation,"¹³⁷ as "only a recommendation,"¹³⁸ or as "a suggestion."¹³⁹

As one Indiana juror elaborated, "We were not really deciding, but were making a recommendation. Whatever we decided, that didn't mean the judge had to go with that recommendation."¹⁴⁰ Another juror from Indiana said, "We knew that even if the jury decided the death penalty, the judge would not necessarily follow. [The] judge could impose a prison term. [The] jury thought of it more as a recommendation than a decision."¹⁴¹ An Alabama juror explained, "I knew we'd make a recommendation about the punishment not a decision."¹⁴² Likewise, a Florida juror said, "We don't really make the final decision. We make the recommendation. The judge makes the final decision."¹⁴³ Another Florida juror said, "We were not to decide—we would give our opinion but the choice would be up to the judge. We would not be sentencing him."¹⁴⁴ An Indiana juror offered an apt analogy, "It's almost like the electoral college, you vote for this, but it doesn't really count."¹⁴⁵

Placing the decision in the judge's hands relieved jurors of responsibility for the punishment. Many jurors saw this removal of responsibility as a relief. As an Indiana juror noted, "We knew that even if the jury decided the death penalty, the judge would not necessarily follow. Our decision would not tie the judge down. This relieved the minds of us jurors, we were not killing anyone."¹⁴⁶ Another juror described the judge's authority to overrule the jury's sentence as meaning it was "not the whole thing on our shoulders."¹⁴⁷ Another noted that "it crossed my mind that it was comforting, that if we really did screw up, that the judge could override our recommendation."¹⁴⁸ Still another observed, "It made it easier simply to say yes because it didn't put us [in the position of being] directly responsible."¹⁴⁹

137. AL1814L, FL0155L.

138. IN0484D, FL0212D, FL0219D.

139. IN0559L, FL0194D, FL0220D.

140. IN0464D.

141. IN0452D.

142. AL1843L.

143. FL0152D.

144. FL0190D.

145. IN0464D.

146. IN0452D.

147. IN0464D.

148. IN0468L.

149. IN0492D.

An Alabama juror interpreted the possibility of override as meaning that "technically we weren't responsible The burden didn't lie on us."¹⁵⁰ Another Alabama juror was "relieved that my decision won't give her the death penalty."¹⁵¹ Still another expressed relief, saying, "[I] felt an out by what [the] judge said by overriding it."¹⁵² A Florida juror noted likewise that "what we had to remember was that it was a recommendation and not the final say, so, that made our minds feel better."¹⁵³ In a case where the juror's exact words were not tape-recorded, the interviewer noted the juror as saying, "Guidelines took juror's responsibility away—which he was glad about."¹⁵⁴ Another juror felt that "[the judge] was taking some of the responsibility off our shoulders and allowing us to give an opinion and yet carrying the full load herself of whether it would indeed be the death penalty or not."¹⁵⁵

Like the Alabama juror who "felt an out," a Florida juror felt "off the hook." This juror said "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook."¹⁵⁶ Indeed, this juror found the sentencing process to be "not as traumatic as deciding his guilt because we would take the steps, make a recommendation, and the judge would make the final choice."¹⁵⁷ In the words of another Florida juror, the bottom line would seem to be, "I didn't want this on my conscience."¹⁵⁸

3. Overview

Whether the judge can override a jury sentence of death clearly influences jurors' views about their responsibility for the defendant's fate. Although the Capital Jury Project has revealed that jurors fail to understand many aspects of the capital sentencing process, nearly all the jurors in hybrid states realized that the judge did not have to accept their decision and recognized that the sentence was not strictly the jury's responsibility. Compared to jurors in binding states, they were less likely to see themselves individually or the jury on which they

150. AL1801D.

151. AL1830D.

152. AL1836L.

153. FL0193D.

154. FL0256D.

155. FL0190L.

156. FL0212D.

157. FL0212D.

158. FL0175D.

served as responsible for the defendant's punishment. Jurors who could be overridden also were less likely to feel bad about the idea that their decision might be overruled. Knowing from the outset that their decision was merely a recommendation evidently made them feel less vested in the decision.

At the same time that jurors' understandings of who is responsible for the sentence in hybrid states may accurately reflect the law in those states, the reduced sense of responsibility under hybrid statutes is troublesome in light of *Caldwell*¹⁵⁹ and *Ring*.¹⁶⁰ *Caldwell* emphasized the danger of unreliable sentences if they are the work of a jury that believes "that the responsibility for any ultimate determination of death will rest with others."¹⁶¹ There can be little doubt in view of the contrast between jurors' responses in hybrid and binding states in Table 1 that the possibility of judicial override significantly reduces jurors' sense of personal responsibility for the sentence. *Ring* stressed the defendant's right to have a jury rather than a judge determine the basis for a death sentence. If jurors are less invested in, or conscientious about making the punishment decision in hybrid states, *Ring*'s promise will be hollow because their decision-making will be subject to an increased danger of unreliability and arbitrariness. On both counts, then, the override statutes appear to be undermining the constitutional underpinnings of capital sentencing.

B. Understanding Sentencing Instructions

The research of the Capital Jury Project has revealed that many jurors fail to understand aspects of the law that are supposed to guide their punishment decision-making.¹⁶² The analysis here indicates that such misunderstandings are exacerbated under hybrid statutes. In hybrid, as opposed to binding states, fewer jurors understood that they were free to consider mitigating and aggravating factors beyond those enumerated in their statutes, and more jurors simply said they did not know what aggravating and mitigating factors they could consider. Ironically, although they were less likely to say they knew what aggravating or mitigating factors they could consider, jurors in the hybrid states were more likely than those in the bindings states to say they had no trouble

159. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

160. *Ring v. Arizona*, 536 U.S. 584 (2002).

161. *Caldwell*, 472 U.S. at 333.

162. See generally William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003) (discussing the process of jury decision-making); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?* 70 IND. L.J. 1161 (1995) (discussing jury instructions in a capital trial).

understanding the judge's sentencing instruction and less likely to report having sought clarification of the instructions from the trial judge. With respect to the procedures and guidelines for making the punishment decision, then, jurors under hybrid statutes were less informed, less conscious that they were ill informed, and less motivated to become better informed.

1. Statistical Data

The findings on jurors' comprehension of sentencing guidelines in Table 2 are based on jurors' responses to several sets of questions. Parallel questions asked jurors what factors they were allowed to consider in favor of a death sentence and in favor of a life or a lesser sentence.¹⁶³ Another question asked jurors if they had any difficulty understanding the judge's sentencing instructions.¹⁶⁴ A further question asked whether during sentencing deliberations the jurors asked the judge for clarification of the law or the jury instructions.¹⁶⁵ Jurors' responses to these questions appear in Table 2.

163. The exact wording of these two questions was:

Among factors in favor of life or a lesser sentence, could the jury consider . . .

- ☐ any mitigating factor that made the crime not as bad?
- ☐ only a specific list of mitigating factors mentioned by the judge?
- ☐ (DON'T KNOW)

Among factors in favor of a death sentence, could the jury consider . . .

- ☐ any aggravating factor that made the crime worse?
- ☐ only a specific list of aggravating factors mentioned by the judge?
- ☐ (DON'T KNOW)

The percentage giving the first and third response options to the question about mitigating factors appears in columns 1 and 2 of Table 2; the percentage giving these response options to the question about aggravating factors appears in columns 3 and 4 of Table 2.

164. The exact wording of the question was:

Did you have any difficulty understanding or following the judge's sentencing instructions to the jury?

- ☐ no
- ☐ yes (IF SO,) explain

The percent giving the second response option appears in column 5 of Table 2.

165. The exact wording of the question was:

During your sentencing deliberations, did the jury stop to ask the judge for further explanation of the law or clarification of the instructions to the jury?

- ☐ yes
- ☐ no

The percent giving the first response option appears in column 6 of Table 2.

Table 2: Percent of Jurors Responding to Various Indicators of Understanding Sentencing Instructions in Hybrid and Binding States								
Percent of Jurors Indicating They Understood That:								
	Mitigating Evidence			Aggravating Evidence				
	Any Can Be Considered	Don't Know		Any Can Be Considered	Don't Know		Had Difficulty with Instructions	Asked Judge to Clarify Instructions
HYBRID STATES:								
AL	45.3	39.6		**	45.3		15.1	42.3
FL	50.4	35.0		**	38.5		6.0	21.6
IN	47.5	27.3		40.0	29.0		15.8	31.6
All Hybrid	48.3	33.1		40.0	36.3		11.4	29.5
BINDING STATES:								
CA	75.8	14.1		53.3	29.6		20.1	57.3
GA	59.5	31.1		52.7	33.8		22.1	74.0
KY	54.1	24.8		46.3	29.6		20.0	54.7
MO	63.2	21.1		48.3	28.3		***	39.0
NC	61.3	13.8		**	13.6		37.8	64.2
PA	40.5	18.9		**	27.0		***	54.3
SC	48.2	36.8		46.5	33.3		15.0	48.6
TN	58.7	10.9		45.5	11.0		***	56.5
TX	60.4	31.3		57.1	24.5		***	39.8
VA	46.7	22.2		40.9	27.3		16.3	53.7
All Binding	57.8	22.7		49.2	27.1		21.1	53.7
<i>p</i> =*	.0081	.0009		.0767	.0046		.0015	.0000

* *p* value for the differences between jurors in hybrid and in binding states.

** Because the law is different in these four states, the percentages do not represent those correctly understanding the law. The percentages for jurors in hybrid and binding states and the significance of the difference between the two groupings of jurors were calculated omitting the data from these four states.

*** Because this question was asked of fewer than half of the jurors in these four states, the percentages are not regarded as reliable for these states. Again, the percentage for jurors in hybrid and binding states and the significance of the difference between the jurors in the two groupings of states were calculated omitting the data from the four states with substantial missing data for this column.

All states must allow jurors to consider any relevant mitigating evidence according to *Lockett v. Ohio*.¹⁶⁶ This unfettered freedom to consider any and all mitigation is essential if jurors are to make the constitutionally required, individualized determination of whether a defendant deserves the death penalty.¹⁶⁷ Yet, the figures in the first two columns of Table 2 show that fewer jurors in hybrid than in binding states believed that they were allowed to consider any and all mitigating factors, and more conceded outright that they did not know whether they were restricted to factors listed in the statute or free to consider any and all factors in mitigation.

Jurors in hybrid states more often voiced the mistaken belief that they were restricted to the consideration of mitigating factors set forth in their capital statute. As seen in Table 2, column 1, the percentage correctly realizing that they were allowed to consider any mitigating factors in the hybrid states is statistically significant and nearly ten percentage points below this percentage in the binding states (48.3% versus 57.8%). The percentage for each of the three override states is below the percentage for all jurors in the binding states; Florida falls below seven, Indiana below eight, and Alabama below nine of the ten binding¹⁶⁸ states in the percentage correctly understanding that they could consider any mitigation.

Beyond their greater misunderstanding of what factors they could consider in mitigation, jurors in the hybrid states more often conceded outright that they simply did not know whether they could consider any mitigating factors or only those identified in the statute (Table 2, column 2). Each of the hybrid states is above all jurors in the binding states in the percentage saying "don't know" to

166. *Lockett v. Ohio* 438 U.S. 586, 608 (1978).

167. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (requiring jurors to make an individual determination before sentencing defendant to death).

168. Pennsylvania is the only state with a lower percentage than Alabama and has the lowest percentage of all the states for the portion of jurors understanding that any relevant mitigating evidence can be considered. The unusual language in the Pennsylvania statute may explain why the percentage is so much lower than in the other binding states. Section 9711 of Title 42 of the Pennsylvania Consolidated Statutes states that the jury should be instructed that the verdict "must be a sentence of death" if they find at least one aggravating circumstances and "no mitigating circumstance." 42 PA. CONS. STAT. § 9711 (2004). Considering the characteristics of most capital defendants and death eligible crimes, it is hard to imagine a capital case where there is absolutely no mitigating evidence if one is truly allowed to consider any relevant evidence that makes the defendant less blameworthy. Instructions that imply that a finding of "no mitigation" is a likely conclusion may make it harder for jurors to comprehend that they actually are allowed to consider any relevant evidence that they believe is mitigating. See Wanda D. Foglia, *Mandatory Language in Pennsylvania Capital Statute Exacerbates Problems with Jury Decision-Making*, Unpublished paper presented at Annual Meeting of American Society of Criminology in Atlanta, Ga (2001) (on file with the Washington and Lee Law Review).

the question about what mitigation they could consider; Alabama jurors are above the jurors in all binding states, and Florida jurors are above those in all but one of the binding states. The hybrid states are significantly above the binding states by 10.4 percentage points in not knowing what mitigation they could consider.

Concerning aggravation, in all states jurors must find at least one statutory aggravating factor in order for the defendant to become eligible for the death penalty. After such "narrowing," in the words of *Zant v. Stephens*,¹⁶⁹ jurors may then consider any other nonstatutory factors in aggravation unless the state capital statute or state case law explicitly restricts their consideration only to aggravators specified in the statute.¹⁷⁰ Whether jurors could consider any aggravators, or were restricted to statutory aggravating circumstances, is thus a state specific option.¹⁷¹ Four CJP states—Alabama, Florida, North Carolina, and Pennsylvania—restrict jurors to aggravating factors specified in the statute¹⁷² while the other ten have no such restriction. The percentages saying jurors could consider any aggravating evidence for Alabama, Florida, North Carolina, and Pennsylvania have been omitted from column 3 of Table 2 since they do not represent a correct understanding of the law pertaining to the consideration of aggravation in these states.

As with mitigation, fewer jurors in the hybrid state of Indiana correctly believed that they were free to consider any factors in aggravation. The percentage in Indiana is below the percentage for all jurors in the nine binding states (in column 3).¹⁷³ Though consistent, this overall 9.2 percentage point difference between jurors in the one hybrid and nine binding states (40.0%

169. *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (discussing the narrowing function of statutory aggravating circumstances).

170. *See id.* at 904 (permitting but not requiring states to confine considerations to statutory aggravating factors). Four of the CJP states do require that jurors only consider statutory aggravators either by statute, as in Florida, FLA. STAT. § 921.141 (2002), North Carolina, N.C. GEN. STAT. § 15A-2000 (2000), and Pennsylvania, 42 PA. CONS. STAT. § 9711 (2004), or by case law, as in Alabama, *Ponder v. State*, 688 So. 2d 280, 285 (Ala. Crim. App. 1996).

171. In all states, jurors must find at least one statutory aggravating factor for the defendant to qualify for the death penalty. Since the question asked whether jurors were free to consider any aggravating factors (including those enumerated in the statute) or restricted to factors identified in the statute, the response options are not confounded by the requirement that at least one statutory aggravator be found.

172. *See supra* note 170 (discussing the respective state standards).

173. This represents the eight states for which percentages are shown in column 3 and Louisiana, which is not shown in the table as indicated in *supra* note 118 and accompanying text.

versus 49.2%) does not reach statistical significance using the $p = .05$ level.¹⁷⁴ Thus, while the data suggest a tendency for hybrid jurors to think that they are confined to the statutory aggravators like their tendency to believe they were confined to statutory mitigators, this pattern is not strong enough to be regarded as statistically reliable.¹⁷⁵

Again, the jurors in hybrid states more often simply conceded that they did not know whether they could consider any factors in aggravation or only those identified by the statute (Table 2, column 4). This difference of 9.2 points (36.3% versus 27.1%) in the percentage saying they did not know is statistically significant. Alabama and Florida jurors were more often in the dark about what they could consider in aggravation than jurors in any of the other states.

Why do jurors in hybrid states more often misunderstand or simply not know the rules supposed to govern their consideration of aggravation and mitigation? Is it because they feel less responsible for the defendant's punishment, and are, consequently, less concerned or conscientious about making the punishment decision? Their responses to two questions—one about whether they thought they understood the instructions and the other about whether they asked for clarification of the instructions (shown in columns 5 and 6 of Table 2)—shed light on this question.

The first of these questions asked jurors whether they had any difficulty understanding or following the judge's sentencing instructions to the jury.¹⁷⁶ Despite more often acknowledging that they did not know whether they could consider any or only statutory aggravating and mitigating factors (columns 2 and 4) and less often being correct about what they could consider when they thought they did know (columns 1 and 3), jurors in hybrid states were less likely than others to say that they had difficulty understanding the judge's sentencing instructions. The percentage for the jurors in the three override states was virtually half that for the jurors in the binding states, a difference of

174. $p = .0767$.

175. Notably, the tendency for more jurors in hybrid than in binding states to be mistaken about the aggravating factors they could consider carries over to the four states that limited jurors to statutory aggravating factors. Though fewer than three of ten jurors overall in these states understood that they were confined to statutory aggravators, this understanding was one third to one half as common in the hybrid states of Alabama (11.3%) and Florida (17.9%) than in the binding states of North Carolina (37.0%) and Pennsylvania (35.1%).

176. Jurors' responses to this question are altogether missing for Missouri and largely incomplete for Pennsylvania, Tennessee, and Texas because this question was dropped from a revision of the interview instrument used late in the interviewing process. Because more than half of the jurors in each of these states (100.0% in Missouri, 54.1% in Pennsylvania, 69.4% in Tennessee, and 58.3% in Texas) were not asked this question, the percentages are not shown for these states in Table 2, column 5. The available responses from these states are included, however, in percentage for all jurors in binding states.

9.7 percentage points (11.4% versus 21.1%). Florida jurors were below their counterparts in all states, and jurors in Alabama and Indiana were below those in all states except South Carolina (among the binding states with available data).

The one fact about sentencing they did clearly understand was that the judge, not the jury, would have the last word about the defendant's punishment (Table 1, column 1), and this may well have rendered aspects of the sentencing instructions having to do with aggravation and mitigation of less concern to them.

The other relevant question here asked, "During your sentencing deliberations, did the jury stop to ask the judge for further explanation of the law or clarification of the instructions to the jury?" In hybrid states, jurors were far less likely to say, "Yes." The right most column in Table 2 shows that the percentage asking for clarification of the instructions in each of the three hybrid states were among the lowest in the column and substantially less than the percentage for all jurors in the binding states. The jurors in Florida and Indiana fell below those in all binding states, and those in Alabama were below those in all states except Missouri and Texas. The percentage indicating that the jury asked for further explanation of the law or clarification of the instructions was 24.2 percentage points lower in the hybrid than in the binding states (29.5% versus 53.7%). Hence, the hybrid jurors were more often ignorant of or wrong about the rules supposed to govern their decision-making, at least in part because they typically presumed they understood when they did not and because they usually made no effort to learn otherwise when they were wrong—both signs that they were less serious or conscientious about making the sentencing decision than jurors in other states.

2. *Narrative Accounts*

Jurors' memories of the judge's instructions for sentencing in the hybrid states were distinctive in that they seldom mentioned aggravating or mitigating circumstances. Frequently the only thing they had to say, presumably their clearest memory of the judge's sentencing instructions, was that the judge, not the jury, would make the decision on punishment. Jurors' accounts presented here are drawn from their responses to a question that asked specifically about jury instructions. It read: "What do you remember about the judge's instructions to the jury for deciding what the punishment should be?"

In response to this question an Indiana juror on a jury that recommended the death penalty recounted: "[The judge] stressed a lot that it was just a recommendation. He said, all you're going to do, he said, if you say yes, he should get the death penalty, that's not actually, you know, it doesn't mean we're actually going to give him the death penalty. It's just, you're recommending to the judge, and they, that was, all this recommendation stuff was, was all we ever heard, that's all we ever heard, was you're just recommending. They wanted to make sure we didn't think we were actually killing him."¹⁷⁷

Responding to the same question, an Indiana life juror, said, "The main thing I remember is that no matter what we recommended that he could do whatever he wanted. Whether we suggested the death penalty or not it was just that, a suggestion."¹⁷⁸ Another Indiana juror recounted, "Well, [the judge] told us, that, to read those instructions again like it said in there, and that, . . . just because we said something, didn't mean that that was truly what his recommendation was gonna be. It was that, just solely that, a recommendation. And then that was pretty much it."¹⁷⁹

Alabama jurors expressed similar understandings when asked the same question. One death juror recounted, "Our decision was a recommendation to the court. Technically we weren't responsible. The judge could overrule us The burden didn't lie on us."¹⁸⁰ A life juror responded, "Just a recommendation—judge gave the actual sentence."¹⁸¹ Another juror said, "[The] Judge made a point, he could over-ride (give the jurors an out)."¹⁸² One juror remembered, "When the judge instructed them on sentencing he told them that he would make the final decision, taking their vote into consideration."¹⁸³

Nor did Florida jurors' responses to this question about jury instructions differ. One life juror said, "I remember [the judge] told us whatever we voted would not be the actual sentence—it was just our recommendation to him—he would have the final say in what the sentence would be."¹⁸⁴ Another said, "We were supposed to give a suggestion but

177. IN492D.

178. IN0558L.

179. IN0469L.

180. AL1801D.

181. AL1814L.

182. AL1836L.

183. AL1959L.

184. FL0155L.

then it was up to him."¹⁸⁵ A death juror remembered that the judge "basically told us what our options were and that ours was a recommendation—that he made the final say."¹⁸⁶ A juror on the same jury had a similar recollection: "Basically that we would recommend a sentence—that he would have leeway to decide and that [if] he wanted to change it, he could."¹⁸⁷

Jurors perceived that the judge was emphatic about his or her power to trump their decision, and they remembered this even though they were vague about other details of the instructions. They used terms such as "stressed," "was very explicit," and "emphasized" to describe this aspect of his instructions. One juror recalled, "The judge stressed that the jury's recommendation was not binding on the judge."¹⁸⁸ Another said, "[The judge] was very explicit—ours was only a recommendation."¹⁸⁹ Yet another said, "[The judge] emphasized that even though we recommended something that we would not be making the final decision—that he would be."¹⁹⁰ And, even when jurors acknowledged that they had difficulty recalling the specifics of the judge's sentencing instructions, they still remembered the point about override. One said, "I don't remember much about [the instructions] other than that the ultimate decision wasn't in our hands, that ours would be a recommendation"¹⁹¹ Or as another recounted, "[I] don't really remember what the judge said but [I] do remember him reading us aggravating and mitigating circumstances and that our decision was only a recommendation."¹⁹²

3. Overview

The greater misunderstanding of jury sentencing instructions among jurors in hybrid states appears to be rooted in the assumption that such standards do not matter much since the judge actually decides the punishment. This is what jurors stress over and over again in their responses to the question that asked what they remember about the judge's

185. FL0194D.

186. FL0191D.

187. FL0193D.

188. FL0182D.

189. FL0217D.

190. FL0229D.

191. FL0220D.

192. FL0223L.

instructions. They clearly remember and eagerly seize upon the judge's assurance that he or she would make the punishment decision. In this light it is hardly surprising that they less often said they had difficulty understanding the judge's sentencing instructions than did jurors in bindings states. Since they understood that the judge would make the final decision, that made his instructions to them seem less relevant. Nor is it surprising that jurors in hybrid states were much less likely to ask the judge during their sentencing deliberations for clarification of the law or the jury instructions. A misunderstanding appears less consequential when the judge has said he will make the decision.

Yet, understanding and following jury instructions is essential to reliability in capital sentencing. It was fundamental to the Supreme Court's acceptance of the modern death penalty in *Gregg* and companion cases and is fundamental to its subsequent jurisprudence. These CJP data show that failing to understand sentencing instructions is a problem especially pronounced under hybrid statutes. The problem is most evident in the greater number of jurors in hybrid states who concede outright that they do not know whether they can consider any aggravating or mitigating factors or only those listed in their statutes, and the greater number who think they are limited to statutory mitigating factors when making their punishment decisions. The prospect of judicial overrides appears to make jurors more ignorant of and mistaken about how to make the punishment decision and less willing to exert effort towards making sure they understand the guidance they are supposed to follow.

C. Making the Punishment Decision

Jury deliberations on punishment require individual jurors to reach a group decision on whether the defendant should live or die. Conscientious jurors might be expected to devote considerable time and effort to such a portentous decision. They might be expected to request copies of the testimony or transcript to review during their deliberations, to remain undecided longer and perhaps require more votes before they reach a final decision. Less conscientious jurors will be impatient with deliberations and quick to decide. Comparing juror responses in hybrid and binding states to questions about these issues reveals that jurors under hybrid statutes make the sentencing decision more quickly, more often without reviewing transcripts of the testimony, with fewer votes and with fewer jurors undecided about punishment at the first vote. The possibility of a

judicial override appears to reduce the effort jurors devote to making life or death decisions in capital cases.

1. Statistical Data

The findings that reflect the time and effort jurors invested in making the life or death decision presented in Table 3 draw upon their responses to four sets of questions. One asked jurors how long it took them to reach their punishment decision.¹⁹³ A second asked jurors how many votes were required for them to reach the decision.¹⁹⁴ A third asked how many jurors were undecided at the first jury vote.¹⁹⁵ And a final question asked jurors whether during their punishment deliberations they asked the judge for a review of the transcript of certain testimony.¹⁹⁶

193. The exact wording of the question was:

About how long, overall, did the jury deliberate on the defendant's punishment in order to reach its final decision?

The question was open ended; interviewers were instructed to prompt for the numbers of days, hours, and minutes insofar as respondents could answer with this degree of exactitude. Their answers were recorded in the following format:

[____ # of days; ____ # of hours; ____ # of minutes].

The percentage giving an estimate of one hour or less appears in column 1 and the percentage giving an estimate of more than three hours appears in column 2 of Table 3.

194. The exact wording of the question was:

As best you can remember, how many votes did the jury take on what sentence to impose?

____ # of votes

The percentage indicating that the jury made its sentencing decision with only one vote appears in column 3 of Table 3.

195. The exact wording of the question was:

When the first jury vote was taken, roughly how many of the jurors . . .

____ # voted for a death sentence?

____ # voted for a life (OR ALTERNATIVE) sentence?

____ # were undecided?

The percentage indicating that no jurors were undecided in response to the third query appears in column 4 of Table 3.

196. The exact wording of the question was:

During your sentencing deliberations, did the jury stop to ask the judge for a review or transcript of certain testimony?

____ yes

____ no

The percentage giving the first response option appears in column 5 of Table 3.

Table 3: Percent of Jurors Responding to Various Indicators of Hurried Decision-Making in Hybrid and Binding States					
Percent of Jurors Saying:					
	Sentence Decided in:				
	One Hour or Less	Three or More Hours	Sentence Decided in One Vote	No Juror was Undecided at First Vote	Asked for Testimony Review or Transcript
HYBRID STATES:					
AL	37.7	37.7	26.5	78.7	21.6
FL	38.3	16.5	43.0	84.1	19.8
IN	28.4	46.3	26.3	58.6	34.0
All Hybrid	34.6	31.6	33.7	74.1	25.4
BINDING STATES:					
CA	6.7	86.7	15.3	63.9	48.3
GA	21.3	58.7	18.6	68.1	21.9
KY	15.7	52.8	20.4	58.9	34.3
MO	8.5	45.8	22.0	62.5	33.9
NC	15.0	63.8	25.9	72.8	38.0
PA	23.6	54.2	24.3	53.8	38.9
SC	16.1	42.0	14.3	58.7	37.3
TN	13.0	50.0	29.0	70.5	37.8
TX	14.9	51.8	25.0	45.8	43.4
VA	25.6	39.5	20.0	70.0	28.6
All Binding	15.3	56.2	20.5	69.3	37.8
p^*	.0000	.0000	.0004	.0167	.0030

* p value for the difference between all jurors in hybrid and in binding states.

Jurors in the hybrid states decided on punishment much more quickly than others. They were more likely to decide in an hour or less and less likely to take three or more hours to decide, as shown in columns 1 and 2 of Table 3. In fact, more than twice as many jurors in hybrid as in other states reported that the decision was made in an hour or less (34.6% versus 15.3%). In each of the hybrid states jurors more often reported that the decision was made this quickly than did jurors in any of the binding states. By the same token, jurors in the

hybrid states were less often involved in decisions that lasted three hours or longer, the time it took more than half of the jurors under bindings statutes. Those saying the decision took more than three hours is 24.6 percentage points lower in the hybrid than in the binding states (31.6% versus 56.2%).

Additionally, the vote count required for reaching a death verdict seems to be what accounts for the sizable hybrid-binding difference in deliberations lasting longer than three hours. In Indiana, where jurors must be unanimous, the percentage saying the decision took longer than three hours was below the corresponding figures in only six of the ten bindings states. By contrast, in Alabama and Florida where the vote need not be unanimous the percentage taking longer than three hours are below those in all ten binding states. Moreover, the percentage saying more than three hours in Florida where a majority rules was well below that in Alabama where a death recommendation requires ten votes. Hence, in those relatively uncommon instances under hybrid statutes when it takes longer than an hour to reach a punishment decision, whether it takes as long as three hours is a function of the number of jurors needed for such a verdict. These data thus reveal that both the authority of judges to override jury punishment decisions and the rule that juries need not reach consensus to recommend the punishment figure in an apparent rush to judgment under hybrid statutes.

Hybrid statutes thus have a double-barreled influence in hastening punishment deliberations. They increase the likelihood that juries will make the punishment decision in an hour or less, and when it takes longer than an hour they shorten the time needed for such a decision by the degree of consensus they require for such a verdict. Does this quick decision-making under hybrid statutes compromise the capital defendant's right to an "individualized" sentencing decision¹⁹⁷ based on a full consideration of mitigation essential for a reasoned moral choice?¹⁹⁸ Jurors' responses to three questions shed further light on this possibility.

The number of votes the jury takes to reach its punishment decision may reflect the degree to which jurors challenge and contest the views of their peers. It may reflect the kind of healthy disagreement that forces jurors to soberly

197. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (elaborating on the individual standard); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (discussing individual sentencing).

198. In *Perry v. Lynaugh*, 492 U.S. 302, 328 (1989), Justice O'Connor stressed that the sentencing decision must be a reasoned moral response that entails the full consideration of the defendant's background, character and crime. She states that "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (O'Connor, J., concurring in judgment)).

review and rethink their assumptions and conclusions. Jurors were asked, "How many votes did the jury take on what sentence to impose?" The percentages in column 3 of Table 3 show that in hybrid states jurors are more likely to decide the sentence on their first vote. The three override states as a group are 13.2 percentage points above the average for the binding states (33.7% versus 20.5%). Indiana and Alabama are not far above many of the bindings states, but Florida shows the most substantial departure from the other states. Perhaps Florida's majority wins decision rule that typically forecloses protracted deliberations also makes one vote all it takes to reach a punishment verdict in many cases.¹⁹⁹

Does deciding on punishment quickly, even in just one vote, under hybrid statutes mean that jurors more often have their minds made up early in punishment deliberations? Jurors who are initially undecided about the defendant's punishment are probably open to opposing arguments and evidence essential for making a reasoned moral choice. One question asked how many jurors were undecided at the first vote on punishment. While most jurors answered that nobody was undecided at the first vote, this response was more common by 10.2 percentage points (74.1% versus 63.9%) in the hybrid than in the binding states (column 4). The percentages for each of the hybrid states reveal, however, that this difference is owing to the greater numbers who said no juror was undecided in Alabama and Florida. The percentage for Indiana is actually below that for all jurors in binding states. Jurors were clearly less likely to voice uncertainty or indecision in these two states either because they spent less effort wrestling with the pros and cons of the alternative punishments or because the non-unanimous decision rules make jurors less reluctant to take a stand or to express their position when the jurors first vote on the punishment.

Is it only the expression of disagreement or is it the conscientiousness with which jurors approach their task as well that suffers under hybrid statutes? A mark of scrupulous decision-making is close and careful review of the evidence during jury deliberations. A good indication of this reliance on the evidence may be reflected in a review of trial testimony with the aid of the trial transcript. A question asked jurors whether during sentencing deliberations the jury stopped to ask the judge for a review or transcript of certain testimony. The figures in column 5 indicate that jurors were less likely to ask the trial

199. A further examination of the data shows that the percentage being able to decide in two votes is greater in Alabama than in Indiana (28.6% versus 21.7%), and the average number of votes required to decide the sentence was 3.7% in Alabama as compared to 4.0% in Indiana. Thus, while requiring a consensus of ten instead of twelve seems not to increase the percentage of sentences decided in one vote, it does appear to decrease the number of votes required to resolve the sentencing question.

judge for a transcript or a review of the testimony of witnesses in the hybrid states. The difference in reviewing testimony between the two groups of states was 12.4 percentage points (25.4% versus 37.8%), while all three hybrid states were below the percentage for the binding states, again, it was the hybrid states without an unanimity requirement where the difference was greatest. Jurors in the hybrid states are clearly quicker to decide on punishment, and this appears to be a rush to judgment that dispenses with the time consuming review and consideration of detailed testimony and evidence.

2. Narrative Accounts

The accounts of many jurors in hybrid states indicate that they did not devote much time, energy, or emotional commitment to the punishment decision. Some jurors explained that since the judge could override their decision, lengthy deliberations would be a waste of time. For jurors' accounts that pertain to the commitment of time and effort to the punishment decision, we returned to the question that asked, "In your own words, can you tell me what the jury did to reach its decision about the defendant's punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?"

In response to this question, Indiana jurors indicated that judge override forced compromise and weakened holdouts. One Indiana juror explained, "[W]e compromised, and unanimously agreed that he had intentionally killed [one victim's name] and unanimously agreed that he had, that it had not been proven, that he had killed, intentionally killed, the other one."²⁰⁰ Another juror in this case reported, "It did not take long at all. . . . Just a couple of hours and really that was leisurely. When we went into the jury room it was a matter of unwinding, we had a bit to eat. So really it didn't take that long. If we had been all business it would have taken a half hour."²⁰¹

The effect of prospective judge override on potential holdouts is illustrated in the words of another Indiana juror: "There was one holdout. She just had a thing about the death sentence. It wasn't this thing in particular. Just the death sentence. (Interviewer's Comment: She soon came around.) I think [it was] partly because the judge could overturn any thing we said. It was just a recommendation, not a 'we're going to do it tomorrow' thing. It seemed to clear her conscience."²⁰² Other Indiana jurors reported that the decision was

200. IN0468L.

201. IN0465D.

202. IN0465D.

made quickly without giving much explanation: "On the punishment, we, deliberated like, fifteen minutes, only had to take one vote."²⁰³ "We all agreed to the death penalty right away, there was no argument. It was quick and clear."²⁰⁴

In Alabama, jurors conveyed the impression that the jury was in a hurry, it did not take very long, it was a real quick thing: "[We] were in a hurry to give punishment and get out of there."²⁰⁵ "Didn't take very long. Everyone agreed on life. One or two thought if he was guilty that's what he deserved. We didn't discuss much."²⁰⁶ "It was a real quick thing 15–20 minutes. We wanted to go out because it was too quick it was just real quick. Not a lot of deliberations."²⁰⁷

In a few instances jurors indicated that the punishment decision was already made before deliberations; this naturally shortened deliberations. One juror said, "Well as I said, when we went into the jury room it was a rather brief thing. We had agreed that we were not going to give him death. . . . After a very few minutes it was accepted by all the jurors."²⁰⁸ In the words of another juror, "She got the other jurors to agree in advance not to vote for capital punishment."²⁰⁹ "[We] took a poll first to see where jurors stood. Jurors had pretty much made up their mind before they got into deliberations and never changed. Discussed view[s] and left it at that."²¹⁰

In Alabama, which requires a ten to two vote to impose the death penalty, jurors explained that deliberations were brought to an end by the prospect of judge override, "[Male juror's name] was the last to change his vote to life without parole. He did change because he knew the judge would have the final say. . . . He knew in his own mind that the judge had the authority to overrule [sic] or go with that decision."²¹¹ In another Alabama case, jurors who wanted the death penalty nonetheless went along with a lesser sentence in the hope that the judge would override the jury's decision: "We knew judge had final say-so. So we went along with LWOP. No way to change the minds of those three. Most of 'em went along with LWOP 'cause we hoped the judge would go

203. IN0469L.

204. IN0455D.

205. AL1840L.

206. AL1814L.

207. AL1857L.

208. AL1844L.

209. AL1847L.

210. AL1813L.

211. AL1838L.

ahead with the death penalty."²¹² One potential holdout juror reported that he was, "disturbed at [the quickness]. . . . Everybody had already decided except for me. They were all ready to vote. They took a vote. I was trying to decide—went over everything. I cast the deciding vote for [the] death penalty."²¹³

In Florida, a number of jurors were emphatic about how quickly the jury reached its decision without even offering an explanation: "I firmly believe that within 2 minutes of walking into the jury room everybody there knew exactly the way he was going to vote."²¹⁴ "We talked but pretty much had our minds made up. Took vote in 30 minutes."²¹⁵ "It was pretty quick—the jurors took a vote and everyone voted for the death sentence."²¹⁶ "There seemed to be very little discussion at all—they seemed to be eager to vote for death."²¹⁷ "The punishment was very cut and dried. We just voted, there was no disagreement."²¹⁸

Some jurors felt that their fellow jurors did not take their duties seriously: "I think that some of the jurors took it too lightly."²¹⁹ "In general, they did not consider how serious the decision was many jurors treated it like a 'party' and did not consider its importance."²²⁰

Florida jurors recounted how a simple majority vote ended deliberations: A Florida death case juror said, "We went in this time the same way we went in for the first phase let's sit down and talk for a minute and make sure we understand the two penalty options that we have. We have death and life imprisonment. The life in prison does not involve parole so this fellow will not be out next week or two or three years down the road. So then we did a straw vote and I believe it was 8–4 for death which was enough right there to recommend death."²²¹ A life case juror said, "One person tried to get us to speak one at a time—what punishment we should recommend. Wrote opinion on paper—the vote turned out to be eight to four in favor of life. No further

212. AL1811L.

213. AL1830D.

214. FL0188L.

215. FL0263D.

216. FL0255D.

217. FL0216L.

218. FL0197L.

219. FL0175L.

220. FL0257D.

221. FL0193D.

votes taken."²²² Another life case juror said, "We didn't spend a great deal of time on it. All we had to do was have a majority."²²³

The need for only a majority in Florida influenced the decision process. Pro death jurors disarmed opponents with the fact that the vote did not need to be unanimous. "We discussed the fact that it did not have to be unanimous. There were a couple who didn't feel strongly enough about capital punishment [to] apply it to [the defendant]. One man kept saying that he couldn't take the responsibility of putting someone to death. . . . So then we had to discuss that our decision did not have to be unanimous and that what we do is make a recommendation and the judge may or may not go with our decision."²²⁴ In another case, pro death jurors actively opposed going to the judge with a question. "The jury was mostly women and they were very vicious and they all wanted the death penalty right away. I wanted to go back to the judge to see if he could give us the option of life without parole but they didn't want me to do that so we voted and it ended up being death."²²⁵ Another Florida death case juror opined, "[If] it had to be a unanimous decision, it would never have been reached."²²⁶

3. Overview

Hybrid capital statutes evidently foster a rush to judgment in capital sentencing, contrary to the kind of responsible, informed and reasoned moral choice contemplated by *Penry*.²²⁷ This conclusion is grounded in the fact that a significantly greater number of jurors in these states report deciding the sentence in less than an hour, and significantly fewer report taking more than three hours to reach a punishment verdict, in the fact that more jurors report that the jury reached its punishment decision in one vote, that no jurors were undecided about punishment at the first vote and that jurors did not stop their deliberations to ask the judge for a transcript of certain testimony. This constellation of differences comprise a pattern of rushing to judgment in hybrid states, and the rush appears even greater when jurors may recommend punishment without an unanimous vote. When the trial judge decides what the punishment should be regardless of what the jury recommends, jurors are less

222. FL0184L.

223. FL0183L.

224. FL0212D.

225. FL0208D.

226. FL0212D

227. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

likely to feel responsible for the punishment, less concerned with jury instructions, and in a hurry to be done with their punishment deliberations.

These findings prove robust against a challenge of spuriousness. We have tested the statistically significant differences between hybrid and binding states shown in Tables 1–3 against the possibility that they could be due to systematic differences in characteristics of the crimes, the defendants, or the jurors between these two categories of states. We address this issue in Appendix A where we show that none of these factors that do differ significantly between hybrid and binding states account for any of the observed hybrid-binding differences in Tables 1–3. The findings are thus shown not to be a spurious product of other differences between the hybrid and binding states.

The analysis now shifts from jurors to judges under hybrid capital statutes.

V. The Politics of Judging Capital Cases Under Hybrid Statutes

In most states the judges who conduct capital trials do not make the life or death sentencing decision. Prosecutors decide whether to bring a capital charge, juries decide whether the punishment will be death, and trial judges are bound by the jury's punishment decision. Appellate judges do review these jury decisions, but they cannot impose death sentences, only invalidate them. Under hybrid statutes the situation is different, trial judges have final sentencing authority; they can impose death sentences; they can override a jury vote for life. When their sentencing decisions accord with their constituents' feelings about the right punishment, they will win public approval. In cases where media coverage has stirred public ire and the jury that hears the evidence votes for life, the trial judge's override to death may win public favor. Indeed as election time approaches, a well-publicized life to death override could help win re-election. The temptation to convert a jury's life verdict into a death sentence may increase as a judicial election nears, especially if such an election is apt to be close.

In this section we first review evidence of how the decisions of appellate judges with the authority to invalidate jury imposed death sentences provoke political responses that influence their re-election prospects. Next we turn to evidence of how the actions of trial judges with the power to override jury life verdicts with death sentences is related to seeking public favor and elective office in hybrid states. Then, returning to the CJP interviews with capital jurors, we examine two cases in which judges imposed the death penalty despite jury life verdicts for evidence of trial judges' sensibilities to the conscience of the community under hybrid statutes.

A. Appellate Judges and Death Penalty Politics

Appellate judges who become identified as likely to overturn death sentences have been removed from office in a number of states.²²⁸ In California, a 1986 campaign targeted Supreme Court Chief Justice Rose Bird for her record of reversing death sentences.²²⁹ The challengers used paid TV spots designed to arouse resentment in the community to attack Bird.²³⁰ One such commercial showed a mother gazing at a picture of her young daughter, who was a murder victim and lamenting that, if not for Bird, her daughter would still be alive. Bird lost a 1986 recall election by a two-to-one margin.²³¹ Tarred with the same brush, Associate Justices Grodin and Reynoso were voted out in the same election.²³² Commenting on the effect of these removals, former California Supreme Court Justice Otto Kaus observed:

I'm afraid the era of retaining judges on the basis of their character, without tallying up their votes, is a thing of the past. There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.²³³

In Mississippi, Justice James Robertson was voted off the state supreme court in 1992, after being attacked for a "morally repugnant" death penalty decision.²³⁴ His opponent, who campaigned as a "law and order candidate," actually attacked Robertson for expressing the view that the Constitution did not permit the death penalty for rape where there was no loss of life (despite the U.S. Supreme Court's ruling twelve years earlier that the rape of an adult woman was no longer a capital offense).²³⁵

228. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 776-813 (1995) (providing an extensive inventory of instances illustrating the political implications and ramifications of the death penalty-related decisions and actions of judges).

229. See Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J. 52, 53 (Apr. 1987) (discussing the removal of Justice Bird).

230. *Id.*

231. *Id.*

232. *Id.*

233. Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQ. 107, 118 (1988).

234. See Bright & Keenan, *supra* note 228, at 763 (discussing political implications of death penalty decisions).

235. *Id.* (citing *Court's Ruling Morally Repugnant*, CLARION LEDGER, July 2, 1989). The case was *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring) (expressing the view that there was "as much chance of the Supreme Court sanctioning death as a penalty for any non-fatal rape as the proverbial snowball enjoys in the

In Tennessee, Justice Penny White was voted off the state supreme court after concurring in an opinion that reversed a death sentence.²³⁶ The Tennessee Conservative Union sent out materials to the voting public including a brochure that mentioned three cases in which Justice White "puts the rights of criminals before the rights of victims."²³⁷

In Texas, Judge Norman E. Lanford, who presided over the state district court in Houston was defeated in the Republican primary by Caprice Cosper, a prosecutor who specialized in death cases.²³⁸ She claimed that as a judge, Lanford recommended that a death sentence be set aside due to prosecutorial misconduct, and directed an acquittal in another murder case due to constitutional violations.²³⁹ Cosper was elected after a campaign in which radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.²⁴⁰

In Florida, Supreme Court Justice Rosemary Barkett faced criticism in a bitter and contentious U.S. Senate confirmation hearings on her nomination to the Eleventh Circuit Court of Appeals.²⁴¹ Republicans attacked Barkett for her alleged refusal to enforce death sentences and branded her a "liberal who coddles criminals."²⁴² Unlike Bird, Barkett was able to withstand the scrutiny directed at her death penalty record in the U.S. Senate.

Former North Carolina Supreme Court Justice James Exum has speculated that political death may be the inevitable consequence of opposing capital punishment.²⁴³ He described how North Carolina's High Court overturned a

nether regions"). Twelve years earlier, the Supreme Court had outlawed the death penalty for the non-fatal rape of an adult woman in *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

236. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. REV. 308, 310-13 (1997) (describing defeat of Penny White).

237. See *id.* at 314 (quoting Tennessee Republican Party, Campaign Brochure, *Just Say NO!* (1996)). See also Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1029 (discussing Justice Stevens' Opening Assembly Address, American Bar Association Annual Meeting (Aug. 3, 1996)).

238. See Bright & Keenan, *supra* note 228, at 763 (discussing Judge Lanford).

239. See *id.* (citing *Network Affiliates Feature Bush Interview*, HOUSTON POST, Mar. 10, 1992, at A13).

240. *Id.*

241. See Paul Anderson, *Barkett Caught in Senate Cross-Fire Over Crime*, MIAMI HERALD, Mar. 1, 1994, at 1A (describing Senate hearings Barkett endured in her attempt to secure federal court of appeals judgeship).

242. *Id.*

243. Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure*, 21 FORDHAM URB. L.J. 239, 270 (1994).

death sentence because of an error related to a preemptory challenge.²⁴⁴ As a result, the court was the target of an "unfair critique" in an op-ed article that appeared in the *Charlotte Observer* concluding the court's decision was "simply ridiculous."²⁴⁵ Other criticisms followed in the media in the form of a cartoon illustrating a loss of confidence in the court itself.²⁴⁶ Justice Exum concluded that, "the more this type of thing occurs in our state judiciaries, the less likely it is going to be that the state judges will be able to survive if they sometimes overturn death sentences."²⁴⁷

Systematic research finds that this political vulnerability of appellate judges takes a toll on their opinions and voting in capital cases. In a case study of the Louisiana State Supreme Court, Melinda Hall found that a justice who tended to support defendants' claims in criminal cases was less likely to do so in capital than in non-capital cases and even less apt to do so in capital cases as re-election time approached.²⁴⁸ In a personal interview, this justice explicitly conceded that he withheld dissents in capital cases because he feared they would attract adverse publicity and thus hurt his re-election chances.²⁴⁹

This pattern was confirmed in two broader studies. A sample of state supreme court justices from Texas, North Carolina, Louisiana, and Kentucky showed that dissents from decisions denying defendants' claims in capital cases were reduced if justices (1) were elected from a local rather than a statewide district, (2) had won their previous election by a narrow margin, (3) were

244. *Id.* at 272 (discussing the difficulty of survival for a state court judge overturning a death sentence).

245. *Id.* at 272-73.

246. *Id.* at 273.

247. *Id.* Nor is the effect of public response limited to the recall of appellate judges. It appears to have prompted statutory changes, as well. In 1991, Delaware switched from jury sentencing to a jury override system following the imposition of life sentences on defendants by a New Castle County jury in a much publicized capital murder case involving the execution style murders of two armored car guards. *See State v. Cohen*, 604 A.2d 846, 848-49 (Del. 1992) (describing the "new" law). The bill was enacted under a suspension of legislative rules on the day it was introduced with little debate in either house of the General Assembly. *Id.* at 849. Colorado abandoned jury sentencing in 1995 in favor of a three judge sentencing panel who, presumably, would be less likely to be overruled following Governor Richard Lamm's expressed regret at having appointed two state supreme court judges with whose rulings in a capital case the governor disagreed. *See Robin Lutz, Comment, Experimenting with Death: An Examination of Colorado's Use of the Three Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227, 237-38 (2002) (discussing how political pressure may affect a judge's sentencing decision).

248. *See* Melinda G. Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1119-21 (1987) (applying concepts derived from neo-institutionalism to coalition behavior in state supreme courts).

249. *Id.* at 1120 (describing judicial reasons for not dissenting).

nearing a re-election contest, (4) had the experience of previously seeking re-election, and/or (5) had prior representational service.²⁵⁰ In a further study of supreme court justices in California, Louisiana, New Jersey, and Ohio for the period 1980–1988, Hall and Brace extended the analysis of voting and dissenting in capital cases among state supreme court justices to include factors such as political party affiliation, years on the court, age, partisan judicial elections, judicial rules favoring seniority, and competition for judicial office.²⁵¹ They found that the positions appellate judges take when reviewing capital cases are influenced significantly by the anticipated reactions of their constituents, independent of these other factors "in states with partisan ballots . . . political competition works to reduce the likelihood of dissents against imposition of the death penalty."²⁵²

B. Trial Judges and Death Penalty Politics Under Hybrid Statutes

What about trial judges who have final authority to make the life or death sentencing decision under hybrid statutes? They are closer than appellate judges to the local communities in which these crimes occur and to the public outraged by their gruesome facts and hideous details. They can see that the repercussions of an unpopular decision in a capital case could be ruinous to their careers.²⁵³ Testimony to this recognition is the far more common incidence of life to death than death to life overrides.²⁵⁴ As Justice Stevens presciently observed some twenty years ago concerning Florida's hybrid statute, "the fact that more persons identify with victims of crime than with

250. See Melinda G. Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 430–32 (1992) (suggesting that "state supreme court justices act strategically to minimize electoral opposition").

251. See Melinda G. Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147, 147–68 (1992) (providing additional study of factors influencing state supreme court decisions).

252. *Id.* at 163.

253. See Stephen B. Bright, *Keynote Address: Capital Punishment and the Criminal Justice System: Court of Vengeance or Courts of Justice*, 45 AM. U. L. REV. 279, 283 (1995) (citing James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1330 n.145 (1989)).

254. See Burnside, *supra* note 237, at 1042–44. Burnside reports that life to death overrides outnumbered death to life overrides by ten to one in Alabama where judges run on partisan ballots; three to one in Florida and two to one in Indiana, where judges face nonpartisan retention elections; in Delaware there were no life to death overrides. *Id.* at 1043. The unanimous vote for a jury sentencing verdict in Indiana may have curbed life to death overrides, and the appointment rather than election of trial judges in Delaware may have liberated judges from political pressures at work in other hybrid states.

capital defendants inevitably encourages judges who must face election to reject a recommendation of leniency.²⁵⁵ Other observers have also surmised that the prospect of public discontent with a show of leniency encourages judges in hybrid states to override the life recommendations of juries, especially so in the run up to judicial elections.²⁵⁶

Indeed, trial judges in hybrid states often trumpet their life to death overrides in election campaigning. An Indiana judge's decision to override the jury's life recommendation is an example. Three weeks before Judge Thomas Newman Jr. sentenced Benny Saylor to die, an attorney announced that she would run against Newman in the Democratic primary.²⁵⁷ This challenge was the first opponent the judge had faced in years.²⁵⁸ After winning the primary, Newman campaigned on the slogan, "A Tough Judge for Tough Times" and included in his television advertisement that he had imposed a death sentence in the Saylor case.²⁵⁹

In Alabama, judicial elections are marked by professions of fealty to the death penalty.²⁶⁰ Judge Ferril McRae used advertisements showing his support for capital punishment in a hotly contested primary election. One of his TV ads states that he presided over more than 9,000 cases, including some of the most heinous murder trials in Alabama's history, while at the same time the names of notorious convicted murders whom McRae sentenced to death flash on the

255. *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (Stevens, J., concurring in part and dissenting in part). Justice Stevens elaborated on this point in *Harris v. Alabama*, 513 U.S. 504, 518–19 (1995) (Stevens, J., dissenting). Stevens asserted that jury decisions are more reliable because juries are not motivated by political considerations:

I am convinced that our jury system provides reliable insulation against the passions of the polity. Voting for a political candidate who vows to be "tough on crime" differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death. Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done.

Id.

256. See Ross, *supra* note 233, at 118 (discussing how state judges are subject to majoritarian pressures); see also Vivian Berger, *Black Box Decisions on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1085 n.107 (1991) (asserting that political pressure may affect elected judges, "skewing their verdicts").

257. Steve Mills, *In Death Cases Jurors Don't Always Prevail*, CHI. TRIB., Dec. 28, 2000, at A1 (discussing Judge Newman's decision to override the jury's verdict).

258. *Id.*

259. *Id.*

260. Ken Silverstein, *The Judge as Lynch Mob: How Alabama Judges Use Judicial Overrides to Disregard Juries and Impose Death Sentences*, THE AM. PROSPECT, May 7, 2001, at 26.

screen with captions such as "Singleton, Murdered Catholic Nun" and "State Trooper Martin, Murdered and Burned Wife."²⁶¹ Notably, in the latter case the jury had convicted Martin but voted to spare his life at the time the campaign ad ran. Though McRae had not yet imposed the sentence, the ad virtually announced that he planned to give Martin death,²⁶² which he soon did.²⁶³

Alabama judges running for seats on the state supreme court also stress their pro-death penalty actions and decisions as trial judges. For example, Judge Claud Neilson boasted in a campaign that he'd "looked into the eyes of murderers and sentenced them to death."²⁶⁴ Incumbent candidate Kenneth Ingram used a TV ad that opened with grainy videotape footage from inside a convenience store where, twenty years earlier, a teenager had murdered the owner.²⁶⁵ "Here," said the ad's narrator, "a 68-year-old woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die."²⁶⁶ The victim's daughter then appears on screen to give her personal endorsement.²⁶⁷ "It was my mother who was killed, and Judge Ingram gave us justice."²⁶⁸

In Florida, the override of jury sentencing decisions is a foregone conclusion for some trial judges. Jacksonville, Florida Judge Hudson Olliff has overridden many jury life sentences with the death penalty.²⁶⁹ Life to death overrides could also be anticipated from Florida Judge William Lamar Rose.

261. *Id.*

262. *Id.* Martin's attorney feared that the primary election would cause Judge McRae to exploit Martin's case. In an interview he said of the judge, "He'd given plenty of continuances to me in the past, but this time he refused to extend the May 1 trial date . . . I don't know if he was politically motivated, but I do know that he had the opportunity to be on TV and in the newspapers every day."

263. See *Harris v. Alabama*, 513 U.S. 504, 513 (1995) (noting that statistics compiled by the Alabama Prison Project were lodged with the clerk of the United States Supreme Court). The statistics of Nov. 29, 1994 show that that six of the overrides were by Judge Ferrill McRae, five were by Judge Randall Thomas, and four were by Judge Braxton L. Kittrell, Jr. See Amended Motion for Recusal 7-8, *Whisenant v. State*, No. CC 77-697 (Ala. Cir. Ct. Mobile County Feb. 7, 1991) (showing that although there are nine circuit court judges in Mobile, Judge McRae had presided over 30% of the capital cases because he assigned a large number of such cases to himself). Judge Randall Thomas overrode the jury and imposed death on Louise Harris, the petitioner in *Harris v. Alabama*.

264. Silverstein, *supra* note 260, at 26.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. See, e.g., *Barclary v. Florida*, 463 U.S. 939, 980-81 (1983) (Marshall, J., dissenting) (observing Judge Olliff's use of the same boilerplate language in three different cases in overriding jury life sentences).

Judge Rose protested the 1972 *Furman* decision that ruled the death penalty unconstitutional by slinging a noose over a tree limb on the courthouse lawn.²⁷⁰ Even when a Florida judge grants a change of venue, the purpose may not be to protect the right of the accused to a fair trial. A circuit court in Florida revealed after the death sentence was entered against Raleigh Porter that the presiding judge, Richard M. Stanley, had told the clerk that he was changing the venue to another county that had "good, fair-minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said, he would send Porter to the chair."²⁷¹ The jury returned a life verdict and Judge Stanley, wearing brass knuckles and a gun at the sentencing hearing, sentenced Porter to death.²⁷²

Once again, statistical evidence bears out the influence of political considerations, this time on the life to death override behavior of trial judges under Alabama's hybrid statute. Fred Burnside examined the frequency of Alabama override figures from 1986 through 1998 and found that their occurrence was concentrated in the year before judicial elections.²⁷³ That is, there was a pronounced increase in overrides in the twelve months before the elections as compared to the remaining five years of the judges' six year terms.²⁷⁴ In fact, there were almost three times as many life to death overrides in the year before the elections (15) than the yearly average for the other five years between elections (5.8).²⁷⁵ Burnside concluded, "These results are extremely significant statistically and indicate that something other than legal doctrine is affecting Alabama's use of the override."²⁷⁶

Burnside further showed that while life to death overrides are twice as frequent in Florida as in Alabama, they outnumbered death to life overrides by ten to one in Alabama where judges run on partisan ballots compared to three to one in Florida and two to one in Indiana where judges face nonpartisan

270. DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH* ROW, 413-18 (1995) (describing Judge Rose's override in favor of the death sentence for Doug McCray and the eventual reversal of that conviction after seventeen years in the Florida state courts).

271. *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995) (remanding for a hearing on whether the petitioner could establish "cause" for failing to present previously his claim that he was denied a fair and impartial judge).

272. *Id.* at 1488.

273. Burnside, *supra* note 237, at 1041 (presenting Alabama override statistics).

274. *Id.*

275. *Id.*

276. *Id.* (reporting that the probability that this pattern could have been generated by a random process is only 0.015).

retention elections.²⁷⁷ Behind these extremely disproportionate override ratios for trial judges, there is a gross disparity in the response of appellate courts. The overwhelming majority of life to death overrides in Florida have been reversed by the state supreme court²⁷⁸ while virtually none were reversed in Alabama.²⁷⁹ This seems to be more than a testimony that Florida judges' life to death overrides are unreliably premised on erroneous judgments and findings. It is hard to imagine that this drastic disparity actually reflects such a difference in the quality of judging between the two states. But whatever the explanation, it is surely symptomatic of yet another level of arbitrariness in the operation of hybrid capital statutes, and hence in the treatment of capital defendants.

The relative frequency of life to death overrides and their concentration prior to judicial elections suggests that trial judges in hybrid states are shortchanging informed "community conscience" embodied in the jury which has been exposed to the trial evidence in favor of ill-informed community sentiments that may be stirred up by media coverage of the crime. The fact that judges override life to death sentences far more often than death to life sentences suggests that they are more sensitive to the public's call for harsh punishment than to evidence and arguments of mitigation. The fact that they perform such life to death overrides more often in the run up to judicial elections suggests that the politics of gaining or retaining office heightens this insensitivity to mitigation.²⁸⁰ The conscience of the community is reflected not

277. *Id.* at 1043. Burnside also found that life to death overrides were much less common and not disproportionate to death to life overrides in Indiana and Delaware. The requisite unanimous vote for a jury sentencing verdict in Indiana may have curbed life to death overrides in that state and the appointment rather than election of trial judges in Delaware may have liberated judges to override more death than life sentences in that state. In contrast to Florida and Alabama, the number of overrides are relatively few in Indiana and Delaware.

278. See John M. Richardson, Comment, *Reforming the Jury Override: Protecting Capital Defendants' Rights by Returning to the System's Original Purpose*, 94 J. CRIM. L. & CRIMINOLOGY 455, 466 n.5 (2004) (noting that the Florida Supreme Court reversed eighty percent of cases where the judge overrode the jury's life recommendation).

279. Burnside, *supra* note 237, at 1043 (citing Brief of Petitioner at 8, *Harris v. Alabama*, 513 U.S. 504 (1995) (No. 93-7659)). Burnside emphasizes that the appellate court's deference to trial judges in life to death override cases in Alabama is more astonishing when one considers that a third of all Alabama death sentences get reversed. *Id.* It also is noteworthy that about a third of the defendants on death row are there because of life to death overrides and, as these cases are not getting reversed, the reversal rate for the non-override cases is actually higher than a third. *Id.* (citing Tracy L. Snell, U.S. Dep't. of Justice, *Capital Punishment 1997*, BUREAU JUST. STAT. BULL., Dec. 1998, at 15).

280. See Bright & Keenan, *supra* note 228, at 795.

The Bill of Rights guarantees an accused certain procedural safeguards, regardless of whether those safeguards are supported by popular sentiment at the time of the trial, in order to protect the accused from the passions of the moment. But nothing protects an elected judge who enforces the Constitution from an angry constituency

in the sentiments of the broader public that may have strong reactions to a particular crime but in a representative jury chosen to be open-minded and instructed to be unbiased,²⁸¹ a jury that becomes familiar with the facts of the crime and the character of the defendant from the evidence and witnesses who appear in the courtroom, and that must be receptive to evidence of mitigation in order to make a sentencing decision that will be a "reasoned moral response."²⁸²

We have seen in Part III that capital sentencing under hybrid statutes is flawed by the unwillingness of jurors to take responsibility for the defendant's punishment, by their failure to understand sentencing instructions, and by their rush to judgment.²⁸³ From the anecdotal and statistical evidence reviewed here in Part IV, hybrid sentencing appears further flawed by the political concerns of trial judges in hybrid states, concerns that appear to diminish their sensitivity to the community conscience when making the final punishment decision. If this diagnosis of judicial vulnerability to political concerns is correct, it should be reflected in the reasoning of judges who override jury life sentences, especially in cases where the community conscience is at a premium. For a direct indication of whether trial judges in hybrid states are failing to meet sentencing

that is concerned only about the end result of a ruling and may have little understanding of what the law requires. Judges who must keep one eye on the next election often cannot resist the temptation to wink at the Constitution.

As previously discussed, some judges have scheduled capital cases for before an election or have refused to continue a case until after an election in order to gain the publicity and other political benefits that accompany presiding over such a trial. In these situations, the judge is under immense pressure to make rulings that favor the prosecution because an unpopular decision will quickly turn the anticipated benefits of association with the case into a major liability that could result in defeat in the election.

Id. Justice Stevens has observed that:

Elected judges too often appear to listen [to] the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life?

Walton v. Arizona, 497 U.S. 639, 714 n.4 (1990) (Stevens, J., dissenting).

281. As Justice Stevens has observed, jury decisions reflect the values of the communities in which the jurors live; therefore, they provide a better assessment of what the community believes is the appropriate punishment for a particular crime. *See Spaziano v. Florida*, 468 U.S. 447, 487 (1984) (Stevens, J., concurring in part and dissenting in part). It is also worth noting that capital juries are culled of people who are unwilling to impose the death penalty under any circumstances. *Wainwright v. Witt*, 469 U.S. 412, 440 (1985) (Brennan, J., dissenting). Thus, a certain segment of the community already is excluded from capital juries.

282. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

283. *See supra* Part III (discussing the results of the Capital Jury Project).

standards, we would want to know how both jurors and judges in the same life to death override cases reached their punishment verdicts, and we would want cases in which the flaws in jury decision-making under hybrid statutes are less consequential. For this purpose, we have identified two cases in which we have indications of how both judges and jurors reached their sentencing decisions and in which the critical element of community conscience is at a premium. The two cases we examine are instances in which the defendant was a juvenile at the time of the crime. This is generally a strong mitigating consideration among jurors that can be expected to override other faults in jury decision-making.²⁸⁴ We now return to the CJP interviews with capital jurors, this time to their accounts of how they made their sentencing decisions in life to death override cases where we have some indication of judges' reasoning as well.

C. Jury and Judge Decision-Making in Life to Death Override Cases

Two cases in the CJP sample were trials in which the judge imposed a death sentence despite a jury vote for life. These were both Alabama cases²⁸⁵ in which the defendant was a juvenile at the time of the crime.²⁸⁶ William Knotts was seventeen, and Clayton Flowers was fifteen, when they committed their crimes.²⁸⁷ Since a defendant's juvenile status, less than eighteen years of age at the time of the crime, is usually a strongly mitigating consideration in the minds of jurors,²⁸⁸ these two cases present a strategic test of the trial judge's

284. See generally William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. Rev. 609 (2004) (examining community consciences as reflected in juror accounts of their decision-making in cases with juvenile defendants).

285. In the sampling of Florida cases the decision was made not to interview jurors in override cases.

286. Both death sentences would now be unconstitutional in light of the U.S. Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551, 568 (2005) that outlawed the death penalty for persons younger than eighteen years of age at the time of their crimes.

287. See *Knotts v. State*, 686 So. 2d 431, 441 n.1 (Ala. Crim. App. 1995); *Flowers v. State*, 586 So. 2d 978, 979 (Ala. Crim. App. 1991). For an earlier analysis of these cases see Bowers, *supra* note 284, at 636 n.150 (2004).

288. See Bowers, *supra* note 284, at 636 (discussing jury decision-making in juvenile capital cases); Michael E. Antonio et al., *Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty*, 87 JUDICATURE 6, 274-83 (2004) (discussing the conscience of the community in juvenile capital cases); see also William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 tbl.12 (1998) (comparing the relative strength of defendant's juvenile status with other mitigating considerations in jurors'

determination that the punishment should be death. For these two cases, we first examine the strength of jurors' regard for the defendant's youthful age as mitigation sufficient to offset a death sentence. We then examine the available evidence of the judges' regard for such mitigation.

1. *The William Knotts Case*

The *Knotts* jury voted nine to three for a sentence of life without parole. Interviews were conducted with four *Knotts* jurors. One juror recounted the details of the crime in response to the following question:

Q:²⁸⁹ Now, I'd like you to tell me about the crime. In your own words, give me the details I need to understand what happened and why.

J: . . . [Knotts] and another boy went out walking one day, went AWOL [from the juvenile detention institution where they were housed]. [They were] standing on the bridge and a car came by and they thought the car intentionally tried to hit them, and they jumped off the bridge, and they saw the car went and turned off and went up the road. Evidently in [Knotts'] mind [this experience] just gnawed and gnawed at him and he went he waited [a couple of weeks] till he was doing shop and went to the bathroom, and crawled up in the crawl space. And then when everybody left, he went back down, he wrote a note that I guess said he was going to Dover which was a lie. He then wandered around the general vicinity of [this incident] hiding in the woods and things like that, broke into a couple houses. It looked like ostensibly to get food and clothing because evidently it was cold out at that time of year. It wasn't real bright because he left, you know, he'd just take off his stuff and put on the other people's stuff. While he was doing this, evidently he found some guns. He found a gun at one house and took it. He found a gun and some bullets at another house and took it. Evidently, somewhere during this time, he spotted the same car that [he thought tried to run him down]. He then found what house [the driver lived in] and went into the house and waited for her. While he was waiting for her, he committed some more burglaries, I think he got some tennis shoes or something like that, which made it a capital offense (a felony murder). He then hid in the laundry room. When he saw her come up, she walked in the house with her young son, evidently, she walked into the den, he pulled the gun and fired it at her probably two or three times . . . he then evidently found the child. The prosecution's case was he tried to shoot at the child, but the jury didn't really believe that. He had made a statement, a taped, videotaped statement, that he thought about taking the

minds).

289. Quotations preceded by "Q" refer to questions from the instrument; those preceded by "J" refer to juror responses; those preceded by "I" refer to follow-up inquiries by the interviewer.

child with him. He then stole their car and drove to Birmingham. Evidently, to see his girlfriend and they caught him in a parking lot outside a business, at which, I think, a business outside of where she worked. He had gone to see her, evidently, he had gone to her house and talked to her briefly and then I think it was the next morning he was asleep in the car. They took him to Montgomery, videotaped the confession, which he just looked like a zombie. Just confessed to everything. He was just 'yes, sir' and said everything he did . . . he didn't try . . . the guy was sitting there saying 'well of course,' he said, he shot at the lady, but didn't know if he had killed her.

I: He didn't do anything to the kid, he just left the kid there?

J: Just left the kid there.

The defendant's dysfunctional family life and disruptive upbringing were predominant in jurors' accounts. Indeed, this same juror began her account of the crime with a description of the defendant's background. It served as a preamble to her story of the crime.

J: William Knotts was, definitely had a very troubled childhood. Growing up with an abusive father who was an alcoholic. He had run away from home several times to try and get away from the situation. They found him I think in a church or at city hall or a courtroom or something like that crying when he was about 11, 12, or 13 and he asked not to be put back in the home. So they placed him in a whole series of councilor [sic] care, foster care type situations. I really think the H.R. blew it, they moved him around an awful lot. Obviously that [sic] the child had a lot of problems. He was probably, attention deficit disorder, had some emotional problems, hyperactive, like that type of situation. He was being passed around. Several things, finally he had um, he was at one care facility and they had a long list of what they called infractions, but most of them were things like what I would call kids stuff, like talking to other kids after curfew, and things like that. Well, anyway, he got into one situation uh, he threw some chairs or something in the rec. room because he got mad so they transferred him over to Mount Meigs.

This juror was haunted by the failure of authorities to provide much needed care and treatment for young Knotts as indicated in her response to the following question.

Q: Is there anything about this case that sticks in your mind, or that you keep thinking about?

J: I really think that this is a case where society was culpable in this crime. To me that really stuck in my mind. That the, that the authorities really botched it, it should have never happened. One, the child should have

gotten good counseling, should have been put in a permanent facility, so there was some permanence in his life. You know what I mean, they were trying to get him in King's Ranch. But he should have been placed in one place and kept in one place and they worked on him in one place, rather than when he did something, just some minor little cut up, that didn't go by their rules, they transferred him. Uh, to me that was the thing that stuck in my mind. . . . The authorities that are taking care of thirteen-year olds should be more professional. And that stuck in my mind, that the witnesses that they had for the people that were in charge with him while he was a juvenile. I was not impressed with them.²⁹⁰

Another juror was especially troubled by Knotts' dysfunctional family and his parents' failure to care for him, to the point where they did not appear at the trial for his life. When asked what stuck in her mind, this juror responded:

J: His mother and father were not, I know that children can do a lot of wrong things, but what in the world could make his momma and daddy not be there for him, you know I cannot imagine that. I have children and I cannot imagine not being there for my children and I don't know what they said that though the mother felt she did what the husband wanted her to do. He controlled everything. They showed them in counseling sessions and he'd try to be a good guy but it was very evident that she was . . . afraid of him according to the testimony he abused her. The husband abused the mother. I just can't imagine them not being there.²⁹¹

This juror reported further that the father also abused Knotts and his sister. From the interviewer's written transcription of comments at the end of a question about the respondent's thoughts or feelings about the defendant, the juror noted that the jury "[h]eard a lot after his lawyer brought out evidence about his home life. Abused by father. Sister sexually abused."²⁹²

This juror's comments also reveal that the jurors watched the defendant closely during the trial in an effort to understand his thinking and motivation. She said that the discussion during guilt deliberations focused a great deal on the defendant's reactions during the trial.²⁹³

J: He would, they would be talking, asking questions and its like we were all trying to look at his face to see if there were any emotions. He would never make eye contact, never would he, looked down for the biggest part

290. AL1833L.

291. AL1832L.

292. *Id.*

293. *Id.*

of the time he, we watched how he reacted when different people [testified] we talked about that a great deal.²⁹⁴

When the questioning moved to the jury's punishment decision, the first juror began her account with a telling contrast between William Knott's appearance during the trial and his appearance a year and a half earlier on his video-taped confession.

J: [He spent] maybe a year and a half, maybe two years in jail before the trial. It was quite a period of time because he was, I really can't remember, I just know that he was much older from when he had actually committed the crime, cause he changed, his appearance. He'd become a man, he was a boy before, when we saw then, when we saw the videotape of his confession, he was like a little boy who had, messed up. But I did . . . a totally different human being than that was at the trial. It was really like, they had put him on some kind of drug.²⁹⁵

This juror then turned to the jury's discussions and its role in the punishment decision.

J: We talked about humane. We talked about being pre-meditated, we went back over a lot of the evidence and read more things about him, about his behavior and his childhood. The records that they produced from the other facility that he had been to played a large part, a tremendous part in our verdict for life without parole.²⁹⁶

Another juror recounted:

J: We looked at, spent a long time looking at a document that was not entered that was introduced as evidence but was not really brought out much in court. That was his medical history which was surprising. I don't know, but it looked like it was more than four or five hundred pages. One of the jurors was involved with special ed., so she picked up real quick from looking at the medical record why she thought that, why she thought, why he was doing what he was doing, when he was, you know, a lot younger, and it really looked like that, he wasn't getting the kind of treatment he was supposed to be getting.²⁹⁷

This juror was then asked whether there was anything more about the jury that would help explain why it reached its decision. She responded:

J: I really believe that his [b]ackground played a big part in it especially see there were, there were two, three school teachers on this jury who dealt

294. *Id.*

295. *Id.*

296. *Id.*

297. AL1833L.

with children similar to him every day. They said a lot of things that influenced us, so that I think the child's, the boy's background had a lot to do with our decision.²⁹⁸

In spite of the jurors' belief that Knotts' age, immaturity, dysfunctional family, and disruptive upbringing warranted a life sentence, the trial judge nonetheless imposed the death penalty and the Alabama Court of Criminal Appeals upheld the judge's sentence.²⁹⁹ Drawing upon the judge's sentencing report, the appellate court explained: "The trial court found the existence of two aggravating circumstances and five mitigating circumstances. It . . . weighed the aggravating circumstances against the mitigating circumstances, and finding that the aggravating circumstances outweighed the mitigating circumstances, sentenced the appellant to death."³⁰⁰ As mitigation, the judge found factors the jurors recounted in their interviews:

- (1) that the appellant has no significant history of prior criminal activity;
- (2) that the appellant was 17 years and 11 months old at the time of the commission of the crimes; (3) that the appellant comes from a dysfunctional family with an alcoholic, abusive father and that this background had a severe effect on him; (4) that he is impulsive and immature for his age, and he never learned to adequately control his emotions; and (5) that his entry into the state juvenile system began as a runaway from a dysfunctional home and not because of delinquent acts.³⁰¹

The two aggravating circumstances that outweighed these five mitigating circumstances in the mind of the trial judge were:

- (1) that the capital [offense was]³⁰² committed while the defendant was engaged in the commission of or attempted commission of a burglary and a robbery, and (2) that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses.³⁰³

The obvious question is why did these two aggravators outweigh the five mitigators in the judge's mind? Was the robbery or burglary exceptionally weighty as aggravation? The appeals court simply commented, "[W]e take judicial notice that similar crimes are being punished capitally throughout this

298. AL1832L.

299. *Knotts v. State*, 686 So. 2d 431, 483 (Ala. Crim. App. 1995).

300. *Id.* at 483.

301. *Id.* at 483 (citations to Alabama Code Section omitted).

302. The appeals court used the plural "offenses were" here. To avoid confusion, we have substituted the singular reference to the crime which constituted a single killing, as did the court in its description of the second aggravator immediately below.

303. *Knotts*, 686 So. 2d at 446 (citations to Alabama Code section omitted).

state"³⁰⁴ and ignored the critical question of whether these other cases had comparable mitigation. The appellate court paid more attention to the heinous, atrocious, cruel aggravator, though here again it made no effort to assess its weight relative to the mitigators in this case. Instead, it sought chiefly to address the challenge that this aggravator was not in fact an aggravator at all in this case.³⁰⁵

Here is how the trial judge justified his determination that the crime was heinous, atrocious, or cruel:

The State's evidence revealed the following:

A. Knotts constantly thought over a period of approximately two weeks and planned this murder which was motivated by revenge, because he was mad at Mrs. Rhodes for what he thought was her intentionally splashing water on him. B. Knotts waited no less than two hours for Mrs. Rhodes to return home so that he could carry out his plan. C. Knotts deliberately sat at Mrs. Rhodes' [sic] home and took no opportunity to leave, both before and after Mrs. Rhodes's arrival at her home . . . E. Mrs. Rhodes suffered extreme physical pain, mental anguish and emotional trauma from the time she was first shot . . . G. Mrs. Rhodes' [sic] baby, Darius, witnessed her murder. It is reasonable to believe she experienced horror and terror prior to her death, fearful for the safety of her son, Darius, who was hollering and screaming for his mother. H. While Mrs. Rhodes lay helpless and defenseless on the floor, Knotts consciously shot her a second time in the

304. *Id.* at 484 ("We take judicial notice that similar crimes are being punished capitally throughout this state.").

305. In affirming this aggravator the court wrote, "[W]e adhere to the standard announced in *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981): the particular offense must be one of those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.'" *Knotts*, 686 So. 2d at 446. The Court went on to say:

The appellant argues, in substance, that he dispatched the victim quickly, without unnecessary suffering, and that, therefore, the offenses were not "conscienceless or pitiless" and "unnecessarily torturous to the victim" as required by the *Kyzer* standard. We do not agree. There was sufficient evidence to support the trial court's finding of the existence of the aggravating circumstance. After being shot in her arm, the victim, who was apparently stunned, sat down on her couch and faced her killer. It is reasonable to conclude from the evidence that she was concerned about her child who had run into the room screaming at the sound of the shot; that she made an effort to go to her child and was shot in the back as she fell; and that the victim was aware of a third shot, which we conclude must have been fired almost immediately after the appellant's shooting the victim twice because of his admittedly hasty flight and that she could have believed had been fired in the direction of her child. The medical testimony shows that she was conscious between 30 seconds and a minute after she was shot in her back. One can only imagine the terror that she experienced from the time she was first shot until she lost consciousness.

Id. at 447-48.

back leaving her to die. This was the fatal wound, and according to the forensic pathologist, Mrs. Rhodes remained conscious for at least thirty (30) to sixty (60) seconds after this shot.³⁰⁶

The CJP interviews indicate that the jurors considered the question of the heinous, atrocious and cruel character of the crime at length. They talked about the fact that the defendant did not harm the child, and that the victims' death was relatively quick, not purposely protracted. They compared this crime to others they regarded as heinous and concluded this one was not. The second juror quoted above, in responding to the question that asked jurors to describe what the jury did to reach its punishment decision, recounted:

J: There was also some discussion about whether the [defendant] actually shot at the child. The jury didn't believe . . . the prosecution's contention that he did. There was also a long discussion again about the physical evidence, and about how quick death occurred and whether it was, you know, and there was also some discussion about what was heinous, atrocious, and cruel. And there was some discussion about, for us being, you know, from the kind of part of society that would be on the jury, any murder is heinous, atrocious and cruel. But it's not, to me, it, it's a discretion, it's not like a Charlie Manson. You know, it wasn't like that other case where the guy goes and kills the people and carves his initials in their heads and chops their heads off. . . . So to us, even though there was a murder, a senseless murder, it was not like he held the woman and kidnapped her, and, you know for hours or something like that in the house, or even if he just tied her up. It wasn't like that, she walked in the house and boom he shot her kind of thing.³⁰⁷

Clearly, the death sentence imposed by the trial judge in this case, contrary to the jury's recommendation, was not owing to the judge's failure to recognize the mitigation; indeed, in his sentencing memorandum, the trial judge affirmed the essence of the mitigation as recounted by the jurors in their interviews with us. The difference comes in the meaning or the weight the judge and the jury assign to this mitigation relative to the aggravation. For the judge it carried relatively little weight, for the jurors it was decisive. Their interviews make it clear that his family experience, his treatment in juvenile facilities, his immaturity, impulsivity and other psychological attributes as reflected in the

306. *Id.* at 447. According to the appellate court, two of the trial judge's findings "cannot be reasonably supported by the evidence." The appellate court rejected the trial court's findings that "D. Knotts hid and shot Mrs. Rhodes in her own home, knowing all the time she was unaware of his presence and completely defenseless and helpless" and "F. Mrs. Rhodes was unaware of and did not realize Knotts' intent to kill her when he pursued her from the den as she struggled toward her son." *Id.* at 447 n.12.

307. AL1833L.

documentation presented to the jury, made the death penalty not just less acceptable but unacceptable to them. The jurors appear to have searched their consciences in making a "reasoned moral choice" based on an "individualized" assessment of this defendant's age, character, background and upbringing, as constitutionally mandated.³⁰⁸ The judge may have sensed that the broader public wanted to see a death sentence in Knotts' case and perhaps this made him insensitive to the weight of the mitigation in the community conscience as represented by the persons who served as jurors and were familiar with the mitigation in this case. The politics of punishment may have made him unable to give effect to the true conscience of the community in his decision-making on Knotts' punishment.³⁰⁹

2. *The Clayton Flowers Case*

The *Flowers* jury voted eleven to one for a sentence of life without parole.³¹⁰ In the *Flowers* case, interviews were conducted with five jurors, but the interviewer did not have a tape recorder, so we have only the interviewer's usually brief synopses of jurors' responses as hastily transcribed in the course of the interview. While this restricts our ability to convey jurors' responses in their own words, it does provide us with a picture of how the jurors thought about the crime and the defendant, and how they reached their sentencing decision.

The crime was committed by Clayton Flowers who was fifteen years old at the time of the crime and an accomplice, William Caroway, who was eighteen. They met up with a nineteen year old girl they knew, Karen Rolin, after her work at a fast food outlet and went out with her in her car. Her beaten body was found the next day in a nearby creek. Both Flowers and Caroway made confessions to the police that implicated them in the killing. Flowers confessed to acquiescing in the crime but denied being the one responsible for the killing. He claimed to have had consensual sex with the victim but said that Caroway forcibly sodomized the victim and killed her with a tire iron. Caroway claimed that Flowers was chiefly responsible for the killing but did not testify at Flowers' trial, invoking the Fifth Amendment protection against self-

308. See *Woodson v. North Carolina*, 428 U.S. 280, 288–305 (1976) (discussing the need for individualized decision-making).

309. This resonates with Justice Stevens' observations in that jurors are a better barometer of community conscience than judges. See *Walton v. Arizona*, 497 U.S. 639, 714 n.4 (1990) (quoting Justice Stevens).

310. *Flowers v. State*, 586 So. 2d 978, 979 (Ala. Crim. App. 1991).

incrimination, although he did claim chief responsibility for the killing according to a cellmate whose testimony to this effect was barred by the trial judge.³¹¹ Flowers was tried first and convicted of capital murder; Caroway was tried three months later and convicted of noncapital murder. Both were tried before the same judge who deferred sentencing until both trials were completed.

Flowers' youthfulness was the critical mitigating consideration in jurors' minds. When asked "what was the single most important factor in the jury's decision about what the defendant's punishment should be," one juror simply said, "He was too young for the death penalty."³¹² In fact, Flowers' age raised serious questions in jurors' minds about his guilt of capital murder. Several believed that his youthfulness made him especially vulnerable to the peer pressure of his older co-perpetrator. One said he was "coerced by the other man involved in the crime."³¹³ Another said, "He did it to protect himself from the co-defendant."³¹⁴

Two jurors explicitly linked Flowers' age to the jury's difficulties in reaching a guilt decision. In response to a question that asked what were the main areas or points on which jurors disagreed, a juror said, "[A] couple of jurors did not want to find him guilty because they were hesitant to either give him the death penalty or life without parole because of his age."³¹⁵ Another juror put it this way, "[S]ome of the jurors knew that he was guilty but were trying to find a loophole to find him not guilty because of his age."³¹⁶ In response to a question that asked, "Was there any discussion of whether defendant was guilty of murder, but not of capital murder?" a juror said this was the "main argument" during their protracted guilt deliberations.³¹⁷ The jury deliberated for nine hours over two days to reach its capital murder verdict.³¹⁸

The jurors reported not having been informed that they would have to choose between a life or death sentence if they convicted Flowers of capital murder. One juror said, "[T]he jury wasn't aware that they would have to make

311. The Court of Criminal Appeals of Alabama confirmed the cellmate's readiness to testify and affirmed the trial court's decision to bar this testimony. *Flowers*, 586 So. 2d at 985.

312. AL1857D.

313. AL1856D.

314. AL1858D.

315. AL1856D.

316. AL1860D.

317. AL1857D.

318. See *Jury Finds Bay Minette Teen Guilty of Murder*, E. SHORE COURIER, Sept. 6, 1989, at 1A (describing the deliberation process).

a decision on sentencing."³¹⁹ They learned this only after they rendered their guilt decision. Several were disconcerted when they found out, as another juror put it, "I was in shock that we had to go back and decide on the sentence."³²⁰ They reported, moreover, that no witnesses were called at the penalty stage of the trial. A juror said, "[N]o evidence was given on punishment. The attorneys both spoke to the jury and then the judge gave instructions."³²¹ The jury then deliberated, for only fifteen to twenty minutes, and voted eleven to one for a life sentence. A juror described the deliberations saying, "[O]ne guy said we should kill him. He was the only one. It was a real quick thing 15–20 minutes."³²²

At the sentencing hearing for both defendants at the same time, Flowers's attorney argued that a death sentence was unconstitutional for his client since the Supreme Court had ruled in *Thompson v. Oklahoma*³²³ that the death penalty was cruel and unusual as punishment for a defendant who was less than sixteen years of age at the time of his crime.³²⁴ He also observed that the local police and the county sheriff's department had improperly interrogated Flowers by not having a parent or attorney present during the interrogations. These authorities claimed that Flowers waived this right but neither the police nor sheriff's departments could produce the waiver of this right they each said Flowers had signed.³²⁵

Despite the jury's eleven to one life vote and the Supreme Court's *Thompson* decision, the judge in the *Flowers* case found the death penalty "morally compelling"³²⁶ and, when he imposed the death sentence, he called the crime "especially heinous atrocious and cruel compared to other capital offenses."³²⁷ An analysis of the sentencing memoranda of trial judges in thirty Alabama override cases, including *Flowers*, found that Flowers's judge was among a small minority of four judges who found that aggravating outweighed mitigating factors "to a moral certainty."³²⁸ At the same time and for the same

319. AL1859D.

320. AL1857D.

321. AL1858D.

322. AL1857D.

323. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

324. *Id.*

325. *Flowers Sentenced to Death by Electrocution*, THE ONLOOKER, Feb. 24, 1990, at 1A.

326. See Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 31 (1994) (reviewing the sentencing memoranda of trial judges in thirty Alabama override cases, including that of *Flowers*).

327. *Flowers Sentenced to Death by Electrocution*, *supra* note 325, at 1A.

328. Russell, *supra* note 326, at 31.

crime, he sentenced Flowers's co-perpetrator, William Caroway, who was convicted of noncapital murder, to imprisonment for life.³²⁹

Was the judge's thinking dominated by the presumption that someone had to pay the ultimate price for this crime? Was it not despite but because Caroway got a life sentence that he sentenced Flowers to death? Was imposing a death sentence when the jury wanted life more important to him than the fact that his death sentence was apt to be overturned? His decision appears to be consistent with a logic that dictates punishment as a response to public sentiments apart from mitigation, proportionality, or constitutional requirements.

Of course, the judge in the *Flowers*, as in the *Knotts* case, could not know the critical mitigating role of the defendant's age in jurors' minds and their punishment decision-making. They did know that the jurors favored a life sentence by substantial nine to three and eleven to one margins. Yet, in both cases the judges' override decisions declared that the juries were wrong. The evidence from the interviews with jurors in these cases suggest, however, that it was not the juries but the judges who were wrong, that the judges were insensitive to community sentiments essential to a reasoned moral judgment about punishment. In the *Flowers* case the jury was vindicated; the judge was declared wrong because the sentence he imposed violated the U.S. Supreme Court's ruling in *Thompson v. Oklahoma* that outlawed the death penalty for defendants less than sixteen years of age at the time of their crime,³³⁰ the ruling invoked by the Alabama Court of Criminal Appeals in vacating Flowers's death sentence.³³¹

VI. Conclusion

Ring implies that trial judges cannot sentence to death without juries that consider aggravating and mitigating circumstances, reach findings that qualify the defendant for a death sentence, and make a life or death recommendation.³³²

329. See *Flowers Sentenced to Death by Electrocution*, *supra* note 325, at 1A (noting the punishments of Flowers and Caroway).

330. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (forbidding death penalty sentencing for juveniles under 16 years of age).

331. *Flowers v. State*, 586 So. 2d 978, 991 (Ala. Crim. App. 1991).

332. As an alternative, Justice Scalia suggests in his *Ring* concurrence that judge only sentencing (without the participation of a jury during the penalty stage of the trial) might be constitutional under statutes that authorize juries to make findings of aggravation that qualify the defendant for a death sentence during the guilt stage of the trial. *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Scalia, J., concurring).

The question is whether to permit the trial judge to convert a jury's life verdict into a death sentence, in light of what is now known about the impact of hybrid sentencing on the decision-making of jurors and trial judges.

There is of course a basis for invalidating judge override in the logic of *Ring*, apart from the empirical realities of jury and judge sentencing behavior. The Court could find that *Apprendi*'s maxim that any finding necessary for an enhanced punishment, whether a finding of fact or a judgment of sufficiency or weight regarding aggravating and mitigating circumstances, must be made by a jury. The hybrid states have so far adopted a narrower interpretation of *Ring* that preserves their override statutes and past death sentences. Indiana judges initially overturned override death sentences on the basis of *Ring* but were reversed by the Indiana Supreme Court. The Delaware, Alabama and Florida Supreme Courts have rejected *Ring* based challenges to their hybrid statutes and their override of imposed death sentences.

The Court could also rely upon the Eighth Amendment argument advanced by Justice Breyer in *Ring*, and earlier by Justice Stevens in *Spaziano* and *Harris*, that the Constitution requires the jury to be the sole sentencer. This is so, they argue, because retribution, as the essential purpose of capital punishment, must reflect the community conscience, and the jury is the embodiment of that conscience. It is also so, they argue, because the Constitution safeguards the defendant against having the trial judge, as an agent of the state, act single-handedly (contrary to the jury's conscience and verdict) to impose death as punishment.

In addition to these constitutional leads pregnant in the *Ring* majority opinion and in Justice Breyer's concurrence, the Court's decision about hybrid statutes should be informed by the empirical realities of judge override in capital sentencing. One of those empirical realities, the one most prominently revealed in this examination of the decision-making of capital jurors, is the effect of override in undermining the conscientiousness and responsibility felt by jurors in the exercise of their capital sentencing discretion. The other empirical reality is the corruption of the judicial override itself, the conversion of an intended protection against misguided jury decision-making into an instrument of arbitrary death sentencing in its own right.

The statistical analysis shows that jurors in hybrid states are significantly more likely than others to deny responsibility for the defendant's punishment, to misunderstand sentencing instructions, and to rush to judgment,³³³ all signs

333. To be sure, the data show that denying responsibility for the defendant's punishment and misunderstanding sentencing instructions are serious problems of the modern death penalty in all states, yet they are substantially and significantly more egregious among capital jurors in judge override than in jury binding states. For further documentation and discussion of these

of the jury's lack of conscientiousness in its role as sentencer. These aspects of capital sentencing have constitutional implications. In *Caldwell*, the Court insisted that jurors whose sentencing decisions are final and binding on the trial judge must not believe that responsibility for the defendant's punishment lies elsewhere. Hybrid statutes explicitly hand final sentencing authority to the trial judge. Virtually all jurors in hybrid states understand that their decision is not final and this decisively undermines jurors' feelings of responsibility for the defendant's punishment, contrary to the spirit of *Caldwell*. *Gregg* established that sentencing discretion be guided by statutory provisions. *Lockett* made it clear that a full consideration of relevant mitigating evidence was a crucial part of this statutory guidance. Yet, jurors under hybrid statutes more often fail to understand sentencing instructions, especially to recognize that they are not limited in the consideration of mitigation. Symptomatic of diminished conscientiousness, they more often fail to recognize that they do not understand instructions and less often take steps to clarify them. *Penry* called for the sentencing decision to be a reasoned moral response to the evidence of aggravation and mitigation. The rush to judgment reflected in deciding on the first vote, taking fewer votes, and making the decision more quickly are symptomatic of the failure of jurors in the override states to make their punishment decisions a "reasoned moral judgment" as *Penry* prescribes.

It might be argued that the failure of jurors in override states to be as conscientious as those elsewhere in making the punishment decision is the very reason judicial override is needed in these states. But this mistakes cause for effect. It finds fault with the jurors when the hybrid statutes are to blame. It assumes that jurors in override states are innately less able than elsewhere. In fact, the statistical analysis in Appendix A examines many characteristics of jurors including race, gender, and education, that might distinguish between jurors in override as compared to binding states. It demonstrates that none of these factors begin to account for the observed differences in jurors' sentencing behavior under override and binding statutes. The inferior jury decision-making in hybrid states is not the cause, but the effect, of giving the trial judge the authority to invalidate the jury's sentencing decision and replace it with his or her own verdict.

and other constitutional difficulties in capital sentencing as revealed in the CJP interviews, see generally William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003) and William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413-67 (James R. Acker et al., 2d ed. 2003).

Ironically, judge override is not only a cause of jury demoralization, but it is, itself, a source of further arbitrariness in capital sentencing. Though the power to override jury sentences may have been conceived as a protection against arbitrary sentencing, it has turned out to be just the opposite. That is to say, the override power has a pernicious effect on sentencing owing to the influence of electoral politics. In states where trial judges play no role in sentencing but appellate judges do review and rule upon death sentences, there is evidence of appellate judges suffering at the ballot box for their opinions and decisions in overturning death sentences. Research shows, in turn, that appellate judges curb dissents in decisions upholding death sentences as their judicial elections approach, especially if the election is apt to be closely contested.

Under hybrid statutes this political pressure is concentrated on the local trial judges who have final sentencing authority. The power to override the jury's punishment decision subjects the trial judge in hybrid states to close public scrutiny, second guessing, and the prospect of removal from office. There are stark instances of trial judges in hybrid states who prominently advance their records of life to death overrides for votes at election time. Here too, statistical evidence shows that life to death overrides are significantly more common in the run up to judicial elections and when judges run on partisan ballots. The pattern appears to be one of pandering for political advantage at the expense of defendants whose lives are at stake.³³⁴

The CJP interviews with jurors who served on two life to death override cases with juvenile defendants show, moreover, that the judge's overrides ran contrary to the community conscience as embodied in jurors' thinking and decision-making. In these two cases, the judges appear to have acted without an appreciation for the community conscience, as reflected in jurors' accounts of their own thinking and decision-making about what the punishment should be. While we have no direct evidence that either of these judges acted out of concern about the broader public's response to their punishment decisions, the need for safeguards against the arbitrary actions of trial judges as state officials, claimed by Breyer and Stevens before him, is confirmed in jurors' accounts of

334. See *supra* note 247 and accompanying text. The failure to know what actual jurors think and how they reach their punishment decisions is a detriment the Court has acknowledged in other contexts such as jury selection, *Lockhart v. McCree*, 476 U.S. 162, 169–70 (1986), and racial bias, *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987), because it forces the Court to rely upon assumptions that may in fact be legal fictions. The importance of assessing the community conscience through interviews with actual jurors is illustrated with respect to the juvenile death penalty in *Bowers et al.*, *supra* note 284, and *Antonio et al.*, *supra* note 288.

the basis for their life sentences in these cases where the trial judge nevertheless imposed the death penalty.

We have seen that under hybrid statutes, juries fall short of constitutionally prescribed performance with respect to assuming responsibility for the defendant's punishment, understanding and recognizing when they do not understand sentencing instructions, and taking time to deliberate thoroughly upon the convicted defendant's punishment. Beyond this, under hybrid statutes trial judges submit to political pressure to override jury life sentences, especially when their election or re-election is expected to be close. Protection is needed against this jury demoralization and against the force of public wrath about heinous crimes on judicial behavior. The answer must not be to ignore the empirical realities of capital sentencing under hybrid statutes, but to remove the scourge of judicial override that is at the root of jury demoralization and judicial corruption in capital sentencing. The law should not subject judges to undue pressures to compromise judicial neutrality, especially not when it also weakens jurors' conscientiousness and sense of responsibility and even more so when the defendant's life is at stake. The constitution requires greater care and reliability in capital sentencing.

APPENDIX A: A Test for Spuriousness

The question we address here is whether the differences between hybrid and binding states in Tables 1–3 are attributable to other differences between these states. Are the observed differences in the degree to which jurors are willing to take responsibility for the defendant's punishment, the extent to which they understand instructions, and the time and effort they will invest in reaching the sentencing decision, simply the product of other factors that differ by state? It might be, for example, that the differences discussed in Tables 1–3 are owing to other factors such as the nature of the crimes, the characteristics of the defendants or victims, the quality of the prosecution or defense, or attributes of the persons who serve as jurors in the respective states. To account for the observed differences, such factors would have to both (1) differ between hybrid and binding states and (2) be related to the respective indicators of taking responsibility, understanding instructions, and making decisions.

To identify factors that might meet this two-fold criteria, we compared jurors in hybrid and binding states on a variety of factors relating to the crime, the defendant, the victim, the prosecution and defense, and the jurors themselves. These included some thirty-four factors such as the following: the attention the case received in the community; the number of perpetrators and victims; the age, sex, and race of defendant and victim; the relationships of defendant to victim; and social status and background characteristics of the jurors. Hybrid/binding differences were not statistically significant for twenty-four of these variables.³³⁵

Crime related variables:

- ❖ the amount of attention the case received in the community
- ❖ juror's view on the viciousness of the murder
- ❖ juror's view on how depraved they thought the defendant was
- ❖ the number of people killed
- ❖ whether defendant and victim were spouse or ex-spouse
- ❖ whether defendant and victim were family relations
- ❖ whether defendant and victim were neighbors
- ❖ whether defendant and victim were friends
- ❖ whether defendant and victim were acquaintances
- ❖ whether defendant and victim were co-workers
- ❖ whether defendant and victim were employer/employee
- ❖ whether defendant and victim were tenant/landlord
- ❖ juror's feelings about guilt before guilt deliberations

Defendant and victim variables:

- ❖ gender of the defendant
- ❖ age of the victim

Prosecution and defense variables:

- ❖ juror's view that prosecution performance was competent/professional
- ❖ juror's assessment that prosecution did an "outstanding job"
- ❖ juror's view that defense performance was competent/professional
- ❖ juror's assessment that defense did an "outstanding job"
- ❖ juror's view of money or resources of prosecution relative to defense

335. The same test for the significance of hybrid/binding differences in Tables 1-3 was used here. See *supra* note 119 and accompanying text (discussing the statistical calculators).

Juror Characteristics:

- ❖ juror's gender
- ❖ juror's age
- ❖ juror's race (white or non-white)

Sentencing outcome:

- ❖ whether the final sentence was a death or life sentence

Statistically significant differences between hybrid and bindings states were found on ten variables: three reflecting the nature of the crime, four pertaining to characteristics of the defendant or victim, and three concerning the jurors. The crimes in hybrid states more often involved a single perpetrator, less often involved strangers and more often involved lovers. The defendants were younger; victims were more commonly female; and both defendants and victims were more typically white in hybrid than in binding states. Jurors were less educated, had lower incomes, and more often attended religious services in the hybrid states.

To test whether any of the significant hybrid/binding differences in Tables 1–3 are attributable to one or more of these ten significant differences in crime, defendant, victim and juror variables between hybrid and bindings states, we conducted Logistic Regression analyses with hybrid/binding status and these ten significant correlates as simultaneous predictors.³³⁶

The statistical significance of hybrid/binding status as a predictor of the seventeen indicators of taking responsibility, understanding instructions, and making decisions, independent of these ten correlates as control variables, appears in Table A1. The table shows both the *p* value indicating the probability that the observed difference would occur by chance and the *t* test scores on which the *p* values are based.³³⁷ The *t* test values permit comparisons of the significance of the differences between hybrid and binding states among these indicators of taking responsibility, understanding instructions, and making decisions where the *p* values are less than .001 and thus all appear as .000.

336. Logistic Regression is the preferred statistical approach for analysis of dichotomous dependent variables. To minimize the effect of missing data in the analysis, we introduced a dummy variable for the missing data on each independent variable. Essentially, this ensures that all valid responses will be included in the analysis. R.J. LITTLE & D.B. RUBIN, *STATISTICAL ANALYSIS WITH MISSING DATA* (1987).

337. Since the sampling of jurors was clustered by trial, we have employed the STATA 8.0 software package that allows us to calculate statistical significance with an adjustment for the clustering of jurors by trial. STATA STATISTICAL SOFTWARE: RELEASE 8.0 (2000).

Table A1: Significance of Differences Owing to Hybrid Statutes on 17 Indicators of Taking Responsibility, Understanding Instructions and Making Decision Controlling for 10 Correlates of Hybrid versus Bindings Status.

Significance of the Difference Between Jurors in Hybrid and Binding States		
	<i>t</i> test	<i>p</i> value
Taking Responsibility		
Judge must accept jury sentence	9.30	.000
Penalty strictly jury responsibility	7.15	.000
Jury more responsible than judge	7.17	.000
Juror more responsible than jury	2.83	.005
Jury's decision made unimportant	3.40	.000
Penalty may not be what's deserved	4.10	.000
Understanding Sentencing Instructions		
Could consider any mitigating factor	2.11	.035
Don't know mitigators to consider	-2.73	.007
Could consider any aggravating factor*	1.99	.048
Don't know aggravators to consider	2.26	.024
No trouble understanding instructions	2.53	.012
Did not ask to clarify instructions	5.62	.000
Making the Punishment Decision		
Decided sentence in one hour or less	-4.54	.000
More than three hours to reach sentence	4.50	.000
Decided on punishment in one vote	-3.46	.001
No jurors undecided on first vote	-2.79	.006
Asked for testimony or transcript	2.90	.004

* Statistics calculated excluding Alabama, Florida, North Carolina, and Pennsylvania³³⁸

338. See *supra* note 163 and accompanying text (explaining the data in column 3 of Table 2).

The regression analysis demonstrates that the hybrid-binding differences are quite independent of these possibly confounding factors. In the presence of these controls, in fact, the sixteen significant differences between hybrid and binding states in Tables 1–3 remain so with the controls (as shown in Table A1). Indeed, controlling for these correlates of hybrid status alters the statistical significance only slightly in most instances. The one factor that was not significantly related to hybrid status at the .05 probability level in the analysis of percentage differences, "Could consider any aggravating factor" (Table 2, column 3) $p = .0767$, actually becomes significant at the .05 level in the logistic regression analysis, $p = .048$.³³⁹

We thus, find that the pernicious effects of hybrid statutes shown in Table 1–3 are confirmed in the presence of possibly confounding sources of spuriousness. Hence, we can be confident that comparing CJP interviews with capital jurors who decided cases in Alabama, Florida, and Indiana under hybrid statutes with those from jurors in states where their decision was binding, truly reveals that the punishment decisions of jurors in hybrid states were fraught with less seriousness and conscientiousness owing to jurors' recognition that their punishment decision was not final. Where their sentence determination was merely a recommendation, they more often denied responsibility for the defendant's punishment, they more often failed to understand jury instructions, and they devoted less time and effort to deciding the sentence. The robustness of the hybrid-binding differences demonstrated here confirms the evidently deleterious effects of judicial override, and underscores the constitutional costs of allowing the hybrid statutes to stand.

339. Recall that this comparison was based on a reduced sample of states because four of the states did require jurors to restrict their considerations to statutory aggravating factors (*see supra* Table 2 and accompanying text), which makes it less likely that differences will be statistically significant.