

# When Judges Impose the Death Penalty After the Jury Recommends Life: *Harris v. Alabama* as the Excision of the Tympanic Membrane in an Augmentedly Death-Biased Procedure

By AMY D. RONNER\*

## Table of Contents

I. The Excision of the Tympanic Membrane .....	224
II. The Augmentation of Death Bias .....	234
A. The <i>Caldwell</i> Decision .....	234
B. Augmented Death Bias .....	238
III. The Annihilation of the Only Safeguard .....	244
A. The <i>Tedder</i> Safeguard.....	244
B. The Effect of an Annihilation of the <i>Tedder</i> Safeguard .....	248
IV. <i>Harris v. Alabama</i> as the Excised Tympanic Membrane with Augmented Death Bias and Without the <i>Tedder</i> Safeguard .....	250
A. The <i>Harris</i> Decision .....	250
1. Background.....	250
2. The Supreme Court Decision .....	252
3. The Dissent.....	256
B. The Excised Tympanic Membrane, the Augmented Death Bias and the Annihilation of the <i>Tedder</i> Safeguard .....	257
Conclusion .....	266

---

\* Associate Professor of Law, St. Thomas University School of Law. J.D., 1985, University of Miami; Ph.D., 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College. I am grateful to my research assistants, Deby Raccina, Priscilla Warren, and Denise Kistner. Although the views expressed in this article are not necessarily consistent with his, I would like to dedicate the article to one of my heroes, the Honorable Bennett H. Brummer, Public Defender of Dade County, Florida.

In a sonnet, "To His Son,"<sup>1</sup> Sir Walter Raleigh commented on the death penalty:

Three things there be that prosper all apace  
 And flourish, while they are asunder far;  
 But on a day they meet all in a place,  
 And when they meet, they one another mar.  
 And they be these: the wood, the weed, the wag.  
 The wood is that that makes the gallows tree;  
 The weed is that that strings the hangman's bag;  
 The wag, my pretty knave, betokens thee.  
 Now mark, dear boy: while these assemble not,  
 Green springs the tree, hemp grows, the wag is wild;  
 But when they meet, it makes the timber rot,  
 It frets the halter, and it chokes the child.  
*God Bless the Child!*

### Introduction

For Raleigh, the irony was that the execution ensued from the conflux of three vital things, which were unto themselves quite innocuous. In the broadest sense, however, the English Renaissance bard realized that anatomizing the painful inscrutability of a hanging could bring about some relief in the form of understanding. Had the United States Supreme Court in its recent death penalty decision, *Harris v. Alabama*,<sup>2</sup> reduced the capital sentencing scheme at issue to its three components,<sup>3</sup> it, in all likelihood, would have pronounced it unconstitutional for judges to impose death after juries return an advisory life verdict.

In thirty-three of the thirty-seven capital punishment states, juries play a part in the sentencing decision.<sup>4</sup> In all but four of these thirty-three "death states"—namely, Alabama, Florida, Indiana, and Delaware—the jury's verdict is final.<sup>5</sup> Under a sentencing statute such as

---

1. Sir Walter Raleigh, *To His Son*, in *POETRY OF THE ENGLISH RENAISSANCE* 138, 139 (J. William Hebel & Hoyt H. Hudson eds., 1957).

2. 115 S. Ct. 1031 (1995).

3. The three components, as described below, are the excision of the tympanic membrane, augmented death bias, and annihilation of the only safeguard.

4. *Id.* at 1038 (Stevens, J., dissenting). The four states in which the judge alone is authorized to decide life or death are Arizona (ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1994)), Idaho (IDAHO CODE § 19-2515 (1995)), Montana (MONT. CODE ANN. §§ 46-18-103, 301 (1993)), and Nebraska (NEB. REV. STAT. § 29-2522 (1994)). In Nevada (NEV. REV. STAT. ANN. § 175.556 (Michie 1993)), a three judge panel makes the decision if the jury cannot reach an agreement.

5. See *Harris*, 115 S. Ct. at 1038 (Stevens, J., dissenting). The override statutes are ALA. CODE § 13A-5-47(e) (1994), FLA. STAT. ANN. § 921.141(2)-(3) (West 1994), IND. CODE ANN. § 35-50-2-9(e) (Burns 1995), DEL. CODE ANN. tit. 11, § 4209(d) (Supp. 1994); see also Michael L. Radelet & Michael Mello, *Death-To-Life Overrides: Saving the Re-*

Alabama's, at issue in *Harris*, a judge can override the jury's advisory life verdict and impose the death sentence.<sup>6</sup>

The *Harris* decision is not the first in which the Supreme Court rejected a constitutional challenge to a capital sentencing statute with an override provision. In a seminal 1976 death penalty case, *Proffitt v. Florida*,<sup>7</sup> the petitioner contended that the statutory guidelines failed to adequately prescribe how the judge was to weigh the jury's advisory verdict.<sup>8</sup> What *Proffitt* involved, however, was not a disagreement between the judge and jury, but a situation where the judge sentenced the defendant to death after the jury returned an advisory verdict recommending death.

Later, *Spaziano v. Florida*<sup>9</sup> presented the Supreme Court with the discordant situation in which a judge rejected a jury life recommendation and imposed death. In a six to three decision, the Court determined that such an override scheme was constitutionally valid and did not violate the Eighth Amendment's protection against cruel and unusual punishment, the Fifth Amendment's Double Jeopardy Clause, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment's Due Process Clause.<sup>10</sup>

---

*sources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 196, 196 (1992); Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9-10 (1994).

6. ALA. CODE § 13A-5-47(e) (1994).

7. 428 U.S. 242 (1976).

8. Specifically, the Supreme Court in *Proffitt* concluded that the Florida death penalty procedures satisfy the requisites of *Furman v. Georgia*, 408 U.S. 238 (1972). *Proffitt*, 425 U.S. at 253. According to the *Proffitt* decision, the Florida procedures gave trial judges specific and detailed guidance to assist them in deciding whether to impose the death penalty or imprisonment for life. *Id.* Also, the decisions are reviewed to ensure that they comport with other sentences imposed under similar circumstances. *Id.* Further, the Court concluded that the aggravating circumstances, as construed by the Florida Supreme Court, provided adequate guidance to the sentencers and the statute gave clear and precise directions to enable both the judge and jury to weigh the aggravating circumstances against the mitigators. *Id.* at 251. The *Proffitt* Court, moreover, said capital judges had more capital sentencing experience than juries and thus were better qualified to make the decision. *Id.* at 252. *But see* Russell, *supra* note 5, at 12 n.59 ("Ironically, a 1980 study of Florida judges showed that the average trial judge had made only three capital sentencing decisions during the seven and one-half years encompassing the post-*Furman* period.").

9. 468 U.S. 447 (1984).

10. *Id.* at 457-64. The *Spaziano* Court stated:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

*Id.* at 464; *see also infra* notes 151-167 and accompanying text.

A common denominator in the Supreme Court's reasons for validating Florida's jury override scheme has been its explicit approval of a safeguard, known as the *Tedder* standard,<sup>11</sup> which requires a Florida sentencing judge to accord "great weight"<sup>12</sup> to the jury verdict.<sup>13</sup> Specifically, the *Tedder* standard prevents a trial judge from overriding a jury's life verdict unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."<sup>14</sup> The *Spaziano* Court, acknowledging the *Tedder* safeguard as "significant," expressed its "satis[faction] that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role."<sup>15</sup>

Despite the Supreme Court's consistent praise of the *Tedder* protection, Alabama courts have persisted in their refusal to engraft a *Tedder* or *Tedder*-like safeguard onto their own override statute.<sup>16</sup> This difference between the Alabama and Florida capital sentencing

---

11. The *Tedder* standard comes from the decision in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975); see *infra* notes 146-150 and accompanying text.

12. *Tedder*, 322 So. 2d at 910.

13. See *Proffit*, 428 U.S. at 249 (holding *Tedder* to be more than an adequate safeguard); *Spaziano*, 468 U.S. at 465 (praising *Tedder* standard); see also *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasizing that *Tedder* is a "crucial protection").

14. *Tedder*, 322 So. 2d at 910; see *infra* notes 146-150 and accompanying text.

15. *Spaziano*, 468 U.S. at 465; see *infra* notes 151-167 and accompanying text.

16. See, e.g., *Ex parte Jones*, 456 So. 2d 380, 382 (Ala. 1984) (declining to adopt *Tedder*, which is not "a general constitutional requirement"); *Giles v. State*, 632 So. 2d 568, 573 (Ala. Crim. App. 1992) (argument that a *Tedder* standard should be adopted "has been decided adversely to the appellant on numerous occasions"). The two other override states, Delaware and Indiana, have standards similar to Alabama's. See, e.g., *Pennell v. State*, 604 A.2d 1368, 1377-78 (Del. 1992) (finding *Tedder* analysis "didactic," and concluding that record supported judge's sentence); *Martinez Chavez v. State*, 539 N.E.2d 4, 5 (Ind. 1989) ("[S]tandard by which the jury's recommendation would be accorded a presumption of correctness . . . was derived from . . . *Tedder*."); *Schiro v. State*, 451 N.E.2d 1047, 1070 (Ind. 1983) ("Any standard of less stringency [than *Tedder*] detracts from the jury's contribution to the sentencing decision . . .").

Significantly, at the time of the writing of this Article, there was a bill on the Florida Governor's desk, which if signed would have done away with Florida's *Tedder* safeguard. The bill provided:

Following the return of the jury's nonbinding advisory recommendation, the court shall make an independent weighing of the aggravating and mitigating circumstances and determine the appropriate sentence. The nonbinding advisory recommendation shall be used solely for the purpose of apprising the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information. 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 . . . .

Fla. HB 1319 (1995). The Governor, however, vetoed the bill.

procedures<sup>17</sup> that became the Supreme Court's primary focus in *Harris*, in which the Court concluded that "the Eighth Amendment to the Constitution [did not] require[ ] the sentencing judge to ascribe any particular weight to the verdict of an advisory jury."<sup>18</sup>

What the *Harris* Court did not mention, however, were two other aspects of the jury override scheme, both of which when combined with the third—the absence of the *Tedder* safeguard—make an Alabama judge's override of a jury life verdict an effectually murderous anathema. In addition, what the Court reiterated set off a seductive non sequitur by creating an ostensibly logical ligature between its precept that "the Constitution permits the trial judge, acting alone, to impose a capital sentence," and its conclusion that "[the Constitution] is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it proper weight."<sup>19</sup> As this Article proposes, such reasoning can guarantee the occurrence of executions after a jury has determined that a death sentence is an overwhelmingly *inappropriate* result.

This Article further argues that a capital sentencing statute allowing a judge to sentence a defendant to death after a jury returns a life verdict is an intolerably pernicious procedure. Part I of this Article contains a condensed discussion of the importance of the jury in a criminal proceeding and its special function in the capital sentencing phase. It suggests that the policies underlying jury participation in the determination of life or death transcend what are the basic objectives of having juries serve as the decisionmakers in criminal trials. Juries as capital sentencers do more than merely serve to preserve societal faith in the criminal justice system, afford individuals some participation in democratic decisionmaking, or provide a shield from arbitrary governmental oppression.<sup>20</sup> In pronouncing a capital sentence, the jury also does more than just serve as "the conscience of the community,"<sup>21</sup> or express "society's moral outrage at particular offensive conduct."<sup>22</sup>

---

17. If the Florida Governor had not vetoed the bill, which the Legislature had passed right after the *Harris* decision, the Alabama and Florida capital sentencing procedures would have been somewhat similar.

18. *Harris*, 115 S. Ct. at 1034.

19. *Id.* at 1037.

20. See *infra* notes 29-74 and accompanying text.

21. Anne B. Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1392-97 (1994); see *infra* notes 44-45 and accompanying text.

22. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); see *infra* note 46 and accompanying text.

As described in Part I, the capital sentencing jury acts as the tympanic membrane.<sup>23</sup> In this capacity, the jurors receive the most feasibly complete narrative of a defendant literally fighting for life. As such, the capital sentencing phase of the trial is designed to expose the jury to the most unredacted version of information about the individual defendant and convey the whole of what occurred in the language of aggravating and mitigating circumstances. The mitigators, both statutory and nonstatutory, are purposefully broad so as to encompass a whole range of compelling information about the particular defendant and other details surrounding the crime. Thus, as participants in capital sentencing, the jury functions as the proper auditor of the defendant's life noises, and out of the defendant's mitigative amalgam, returns a verdict of life or death. Part I also contains a description of the real devastation that occurs when a judge trumps a jury life verdict with the death penalty, an act metaphorically equated with the excision of the tympanic membrane.

Part II seemingly detours to an analysis of the reasoning in *Caldwell v. Mississippi*,<sup>24</sup> in which the Supreme Court recognized the unconstitutionality of allowing the death sentencer to believe that someone else is really responsible for determining the appropriateness of death. Of special concern to the *Caldwell* Court was that such a sense of diminished responsibility creates a death-biased jury, which, in turn, could result in executions when the sentencer never actually concluded that death was the appropriate sentence.<sup>25</sup>

From there, I rely preliminarily on the analysis of Professor Mello, who applies *Caldwell* to jury override statutes, and asserts "[t]he danger of bias and unreliability that may stem from a diminished sense of sentencing responsibility remains just as great when a jury is told that the trial judge will review and make the ultimate sentencing decision."<sup>26</sup> This section then advances the position that jury override statutes do not spawn mere death bias, but actually *augment* death bias.

---

23. The tympanic membrane "closes externally the cavity of the middle ear and functions in the mechanical reception of sound waves and in their transmission to the site of sensory reception." WEBSTER'S NEW COLLEGIATE DICTIONARY 1277 (9th ed. 1988). I employ the tympanic membrane as a metaphor in connection with my discussion of the jury's role.

24. 472 U.S. 320, 328-29 (1985).

25. *Id.* at 331-32.

26. Michael 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, 297 (1989).

In connection with an analysis of augmented death bias and stressing the special significance of the issuance of a jury life verdict in spite of an augmented death bias, this Article then defines the cataclysmic consequences of a trial judge scrapping such life advice. Specifically, what I suggest is that such augmented death bias, built right into a jury override system, does not just pose what the *Caldwell* Court saw as the *potential* danger of an improper execution. Rather, what augmented death bias does is guarantee the very occurrence of the *Caldwell* horror: the death botch.

Part III explores the significance of the *Tedder* standard, which requires a trial judge to give "great weight"<sup>27</sup> to the jury recommendation, and discusses the tribute historically paid by the Supreme Court to the *Tedder* standard. The core of Part III, however, is the contention that in the context of statutorily authorized judicial overrides of jury life recommendations, *Tedder* is not simply important, but is in fact, the *only* saving grace. Essentially, the kind of deference that *Tedder* compels judges to accord to advisory jury verdicts ministers to the capital sentencing jury not only the constitutionally assigned role as the community's "conscience" or voice of "outrage," but also as the tympanic membrane. It is here that I suggest that the *Tedder* constraint can become the only iota of amelioration when an advisory jury returns a life verdict, which, in an augmentedly death-biased system, is nearly miraculous. Part III is thus an attempt to disclose the disturbing ramifications of such an override system without a *Tedder* safeguard.

Part IV then delves into the Supreme Court's recent *Harris* decision and identifies the dangers inherent in the Court's conclusion that "the Eighth Amendment . . . [does not] require[ ] the sentencing judge to ascribe any particular weight to the verdict of the advisory jury."<sup>28</sup> What I submit in this context is that the *Harris* Court has done what is conceivably worse than legitimizing state murder. By upholding Alabama's capital sentencing scheme, the Court has condoned the annihilation of the only protection, the *Tedder* standard, in an arena of augmented death bias and in so doing, has effectually excised the tympanic membrane. As such, the *Harris* decision is, in truth, the Supreme Court's imprimatur on the convergence of three of the most toxic capital sentencing phenomena. As I will show, the effect will be to encourage improper executions and ultimately disparage human life.

---

27. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

28. *Harris*, 115 S. Ct. at 1034.

This Article's conclusion partially reverts to its beginning by expanding Raleigh's sonnet into a conceit. Through this, I explore the consequences of such a convergence of three things that, unlike Raleigh's, are quite noxious unto themselves: the excision of the tympanic membrane, augmented death bias, and an annihilation of the sole *Tedder* safeguard.

## I. The Excision of the Tympanic Membrane

As Alexander Hamilton noted, the right to a jury trial was one of the few points of agreement between the Federalists and Anti-Federalists at the 1787 Constitutional Convention:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.<sup>29</sup>

In fact, the twelve states that already had written constitutions before the Constitutional Convention all guaranteed a criminal defendant's right to a jury trial.<sup>30</sup> The United States Constitution of 1789 enumerated that same jury guarantee, which was one of few included in both the original document and Bill of Rights.<sup>31</sup>

The Sixth Amendment gives a criminal defendant the right to trial by "an impartial jury of the State and district wherein the crime shall have been committed."<sup>32</sup> Under *Duncan v. Louisiana*, states cannot abridge this fundamental right.<sup>33</sup> Built into the Sixth Amendment guarantee and the historical safeguarding of the right to an impartial jury is a basic awareness that a jury is not only the "conscience

---

29. THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. See generally Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 & n.15 (1994).

31. See *id.* at 870 & nn.12-13.

32. U.S. CONST. amend. VI.

33. 391 U.S. 145 (1968). *Duncan*, who was charged and convicted of simple battery, requested a jury trial. The request was denied and *Duncan* was convicted. *Id.* at 146. Subsequently, the Supreme Court held that the denial of such a request violated *Duncan's* Sixth Amendment right to a trial by jury. *Id.* at 149-50.



of the community,"<sup>34</sup> but also essential to society's faith in our criminal justice system.<sup>35</sup>

Further, the jury is, of course, an avenue for individual participation in democratic decisionmaking<sup>36</sup> and likewise serves as a shield against arbitrary governmental oppression.<sup>37</sup> In *Duncan*, the Supreme Court elaborated on the preeminent role of the jury in our criminal justice system:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to

---

34. See Poulin, *supra* note 21, at 1392-97; see also Jeremy W. Barber, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1228-29 (1994) ("[T]he definition of community is malleable; for example, a defendant who was raised in poverty in a broken home may be entitled to a jury composed of others from the same background. The Supreme Court has rejected this notion, but the expansive reading is not an implausible construction of 'peer' or 'community.'").

35. See JON M. VAN DYKE, *JURY SELECTION PROCEDURE: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 32 (1977) (asserting the underrepresentation of minorities on juries makes minorities mistrust the criminal justice system). Cf. Alschuler & Deiss, *supra* note 30, at 868 ("Our central theme is that as the jury's composition became more democratic, its role in American civic life declined.").

36. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); see also HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* 3 (1993) ("The jury is one of our most democratic institutions."); Barber, *supra* note 34, at 1230 ("The infusion of laymen into the criminal justice system legitimizes the administration of justice and bolsters democracy. It counters the professional desensitization that is inevitable in those who confront the criminal justice system daily."); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 512 (1986) (discussing the role of juries in criminal trials).

37. Katherine Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 826 (1989); see also Daniel W. Van Ness, *Preserving A Community Voice: The Case For Half-And-Half Juries In Racially-Charged Criminal Cases*, 28 JOHN MARSHALL L. REV. 1, 1-2 (1994) ("While the Court has frequently held that the function of the jury is to protect the defendant from oppressive governmental authority, the Court has also recognized the other roles as necessary, appropriate, and compatible with protecting the defendant's rights.").

entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.<sup>38</sup>

Such language in *Duncan* amounts to a tribute to the jury as an emblem of democracy with its potential interdiction of the evils that ensue from an undue concentration of power in the hands of one or few.<sup>39</sup>

Some purposeful inexactitude is another aspect of the jury system. Judge Higginbotham touches upon this in his description of how “black box” decisions are uniquely the province of the jury:

While certain decisions must be made, yea or nay, the choice is not easily defended by rational exposition. To the contrary, the decisions can be no more than the collective hunch of the jury. This is the soul of decision making by juries, and it is inevitably discretionary in the sense that it is beyond the reach of jury instructions and other such devices designed to restrain or guide the jury’s discretion. These decisions are by necessity black box calls. The only check upon this core power of irreducible discretion is the jury’s representative character. By drawing persons from the populace and vesting them with powers over the liberty of others and maintaining their anonymity, we draw upon the jury’s ability to mirror the community’s values and attitudes.<sup>40</sup>

Basically, what Judge Higginbotham describes as the “core power of irreducible discretion,” which can amount to a “collective hunch” and at times defy “rational exposition,” is not a drawback of jury decisionmaking but one of its virtues—namely, its truly human component.<sup>41</sup> One legal scholar has argued that our criminal justice system with its various mechanisms, which “free the jury from accountability

---

38. *Duncan*, 391 U.S. at 155-56.

39. In discussing the struggle between judges and juries over decisionmaking authority, Phoebe Haddon states, “‘At a time when judges were dependent instruments of the crown, a jury of one’s peers and neighbors seemed to be a promising bulwark against the tyrannous enforcement of the law.’” Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY L. REV. 29, 41 (1994) (quoting Harold M. Hyman & Catharine M. Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 25, 27-28 (Rita J. Simon ed., 1975)); see also WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (1971) (describing the origins of the American jury); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 2-3 (1989) (discussing historical antecedents of the right to a jury trial).

40. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1051-52 (1991); 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 (1991).

41. But there are quite a few critics of the jury system. See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 4 n.2 (1966) (listing jury critics); see also J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 495-96 (1985).

for its verdict"<sup>42</sup> and give it "the power to nullify—that is, the power to acquit or to convict on reduced charges despite overwhelming evidence against the defendant,"<sup>43</sup> tends to nourish what is human in the deliberative process. When juries participate in capital sentencing, all of the salient policies behind the jury system apply, but with even greater force. Specifically, in capital sentencing, the jury's role as "conscience of the community"<sup>44</sup> manifests itself in several ways. As one commentator has identified, there is a belief, "[e]specially at a time when capital punishment is hotly debated, [that] a death sentence should be the determination of a group of twelve lay persons chosen at random from the widest population."<sup>45</sup> Because death penalty advocates typically justify the sentence as societal retribution, the states that include juries in the sentencing process envision the representa-

---

42. See Poulin, *supra* note 21, at 1398. The rule that jurors are not accountable for their verdicts dates back to Bushell's Case, 124 Eng. Rep. 1006, 1010 (P.C. 1670).

43. Poulin, *supra* note 21, at 1399. Professor Poulin further states:

It has been argued that our system authorizes jury nullification, in other words, that the jury has *de jure* authority to acquit against the law. Even if those arguments are incorrect, the jury has *de facto* power to nullify. In a criminal trial, the court cannot direct a verdict of guilty, no matter how strong the evidence. In addition, if the jury acquits, double jeopardy bars the prosecution from appealing the verdict or seeking retrial. Similarly, if the jury convicts the defendant of a less serious offense than the one charged, the prosecution cannot again try the defendant on the more serious charge. This effect occurs regardless of whether the jury consciously rejects the law, embraces a merciful attitude, or is simply confused concerning the law or facts. Thus, nullification—with or without authority, intended or not—is part of our system.

*Id.* at 1399-1400 (footnotes omitted); see also *United States v. Dougherty*, 473 F.2d 1113, 1141-42 (D.C. Cir. 1972) ("[N]ullification can and should serve an important function in the criminal process . . . . The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary."); Alschuler & Deiss, *supra* note 30, at 871-75 (discussing the jury's role in resisting English authority before the revolution and the case of John Peter Zenger); Barber, *supra* note 34, at 1230 ("Through juror nullification, a jury has the power to mitigate some of the harshness of the numb, professional administration of justice and to provide some clemency and mercy."); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 241 (1993) (arguing "judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values").

44. Poulin, *supra* note 21, at 1392.

45. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 4-5 (1994). *But see generally* text accompanying *infra* notes 125-127 (discussion of death-qualified jurors and *Witherspoon-Wainwright* progeny).

tive cross-section of the community as the rightful vocalizers of "society's moral outrage at particularly offensive conduct."<sup>46</sup>

In addition, the jury as the shield against oppression, and the basic "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges,"<sup>47</sup> figure prominently in capital sentencing to prevent the jaws of the political climate from mauling a human life. Specifically, trial judges, with their sights on promotion or on mere prolongation of their tenure, can find themselves currying political favor through demonstrated zeal for the death penalty.<sup>48</sup> Placing the responsibility, however, on the jury can cleanse personal ambition from life-or-death decisionmaking.

There is still another feature to jury involvement in capital sentencing. Criminal trials, as do all trials, contain narratives. The impressions juries derive from such narratives influence the outcomes of the trials. One problem that the defense typically faces is how to effectively transmit the accused's story to the decisionmakers. In fact, sometimes lawyering can deleteriously distort or obfuscate the accused's story.<sup>49</sup> In a capital trial, for instance, the jury's reactions to an accused's story can literally make the difference between life or death. Even when the accused does not take the stand, his or her

---

46. *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976) (elaborating "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous . . . that the only . . . response may be the penalty of death."); see also Higginbotham, *supra* note 40, at 1048 (discussing the entanglement of juries and the death penalty and the "choice between a sentence of life or death" as one "uniquely laden with expressions of anger and retribution and . . . freighted with goals of general and specific deterrence").

47. *Duncan*, 391 U.S. at 156; see also SIR PATRICK DEVLIN, *TRIAL BY JURY* 159 (1956) (discussing the limitations of the judiciary and "[t]he malady that sooner or later affects most men of a profession," which is the tendency "to construct a mystique that cuts them off from the common man"); Paul Mancino, III, *Jury Waiver In Capital Cases: An Assessment of the Voluntary, Knowing, and Intelligent Standard*, 39 CLEV. ST. L. REV. 605, 611 (1991) (discussing the failure of judges to "speak for the community"); Parker, *supra* note 41, at 495 (discussing the jury as "the best protection against judicial injustice").

48. See generally *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting).

49. In this respect, Professor Alfieri's discussion of the "falsifications attending lawyer storytelling" in poverty law practice serves as a helpful analogue:

My suspicion is that a lawyer's telling of his client's story in advocacy falsifies the normative content of that story. The normative content of a client's story consists of substantive narratives which construct the meanings and images of the client's social world. Both the lawyer and the client speak in narratives. Lawyer storytelling falsifies client story when lawyer narratives silence and displace client narratives.

Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111 (1991).

perspective must somehow filter its way to the decisionmakers. Sometimes even where the defendant's story is not particularly compelling, it may be all the accused has—a whisper of a hope at salvation. Such defense stories can sometimes create a sense of commonality between the individual on trial and the decisionmakers. Specifically, images of the accused's world can even, albeit sometimes seemingly mysteriously, build the semblance of a bridge from the defense table to the jury box. In a capital case, such a construct can become the very conduit of life.

In the conviction phase of any trial, the legal system can silence and redact the accused's story. Evidentiary and procedural rules can exacerbate the problem and have the effect of keeping whole chapters of the accused's story from the jury. Although the sentencing phase of a capital trial has its own set of limitations, it is designed to create a forum in which the defendant's voice is least likely to be muffled or lost. That proceeding, the one that determines life or death, aspires to be a realm of least falsification.

Florida's capital sentencing procedure is part of the statute enacted in response to *Furman v. Georgia*.<sup>50</sup> Before *Furman*, Florida statutes mandated that all defendants convicted of a capital offense be sentenced to death unless the trial jury recommended mercy.<sup>51</sup> That recommendation of mercy was binding on the trial court.<sup>52</sup> According to the *Furman* Court, the Eighth Amendment infirmity was that the statute gave the juries uncontrolled discretion to impose the death penalty.<sup>53</sup>

---

50. 408 U.S. 238 (1972). For discussions of how Florida's statute was an attempt to accommodate the directives of *Furman*, see generally Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 924, 927-28 (1991); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 35-36 (1985); Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1410-11 (1985); Radelet & Mello, *supra* note 5, at 196-99; Michael L. Radelet & Margaret Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 913-14 (1983).

51. Law of July 2, 1970, ch. 136, § 3, 1971 Fla. Laws 554 (repealed 1972); see Law of July 2, 1970, ch. 339, § 119, 1970 Fla. Laws 1051 (repealed 1972).

52. See, e.g., *Newton v. State*, 21 Fla. 53, 101 (1884) ("If a majority of the jurors recommend mercy, by whatever motives they may be actuated, (and these motives are not circumscribed) the court is bound to heed their verdict, and pronounce sentence accordingly."); see also *Garner v. State*, 9 So. 835, 847 (Fla. 1891) (applying *Newton*).

53. *Furman*, 408 U.S. at 253-57 (Douglas, J., concurring); see generally Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1346-48 (1994) (discussion of *Furman*).

Consequently, the post-*Furman* enactment constitutes an attempt to give the capital sentencers some guidance.<sup>54</sup> Under the present statute, there is a separate sentencing hearing before the jury, one which in many ways replicates an actual trial.<sup>55</sup> The statute, however, permits the parties to present evidence probative of the sentence “regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.”<sup>56</sup> As in some other states, the statute enumerates the aggravating and mitigating circumstances that are to guide the jury in its deliberations.<sup>57</sup>

The mitigating circumstances are, of course, of special concern to the defense. In *Lockett v. Ohio*,<sup>58</sup> the United States Supreme Court stated:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.<sup>59</sup>

---

54. See Radelet & Mello, *supra* note 5, at 197 (“Florida’s statutory provision that a judge may override a jury’s life recommendation is not based upon any legislative or judicial judgment that the life-to-death override serves a crucial state interest. Rather, the provision is a product of the Legislature’s reasonable misunderstanding that such an override provision was required by . . . *Furman*.”).

55. FLA. STAT. ANN. § 921.141 (West 1994 & Supp. 1995).

56. FLA. STAT. ANN. § 921.141(1) (West 1994). The statute also provides that the “subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.” *Id.*

57. FLA. STAT. ANN. § 921.141(5)-(6) (West 1994 & Supp. 1995). Of the other three override states, Alabama and Indiana also have statutes that list aggravators and mitigators. See ALA. CODE §§ 13A-5-49, 13A-5-51 (1994); IND. CODE ANN. § 35-50-2-9(b)-(c) (Burns 1995). Delaware’s statute, however, enumerates only the aggravating circumstances. DEL. CODE ANN. tit. 11, § 4209(e) (Supp. 1994).

58. 438 U.S. 586 (1978).

59. *Id.* at 604. The *Lockett* Court underscored that “an individualized decision is essential in capital cases” and the courts need to treat “each defendant in a capital case with that degree of respect due the uniqueness of the individual.” *Id.* at 605; see also *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (trial judge’s exclusion of evidence of the defendant’s emotional disturbance as a mitigating factor and consideration of only the circumstance of the defendant’s youth violates the Eighth Amendment); *Skipper v. South Carolina*, 476 U.S. 1, 4-6 (1986) (trial judge’s exclusion of testimony in the sentencing phase regarding the defendant’s “good adjustment” to incarceration between arrest and trial was improper because the evidence was mitigating).

See generally Daniel R. Harris, *Capital Sentencing After Walton v. Arizona: A Retreat from the “Death is Different” Doctrine*, 40 AM. U. L. REV. 1389, 1403-05 (1991) (discussing the requirement of individualized sentencing); Joshua N. Sondheim, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty*

Consequently, the defense has quite a range of mitigating factors to work with in the sentencing phase. The Florida statute, which is compatible with *Lockett* and its progeny, provides that “[a]ggravating circumstances shall be *limited* to the [enumerated factors],”<sup>60</sup> with no limiting preamble to the list of statutory mitigators.<sup>61</sup> As such, the mitigators are sufficiently expansive and can encompass a rather vast panoply of details about the capital defendant and crime.<sup>62</sup>

Within the category of mitigation, defendants can, at a minimum, divulge their age and the absence of a “significant history of prior criminal activity.”<sup>63</sup> Juries can hear how the felony occurred while the defendants were under the influence of extreme emotional or mental disturbance and learn of the victim’s consent or participation in the act.<sup>64</sup> Such defendants can further explain that they were “[accomplices] in the capital felony committed by another person,” that they played a relatively minor part in the whole act, and that they “acted under extreme duress or under the substantial domination of another person.”<sup>65</sup> Moreover, such juries can, at least, consider the defend-

---

*Sentencing*, 41 HASTINGS L.J. 409, 410 (1990) (discussing how jurors may “improperly weigh mitigating factors on the side of aggravation, altering the proper balance between aggravating and mitigating factors in a particular case”).

60. FLA. STAT. ANN. § 921.141(5) (West Supp. 1995) (emphasis added).

61. FLA. STAT. ANN. § 921.141(6) (West 1994); see *Proffit v. Florida*, 428 U.S. 242, 250 n.8 (1976); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987); see also *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (“When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.”).

62. See, e.g., *Larkins v. State*, 655 So. 2d 95 (Fla. 1995). In *Larkin*, the court noted:

During sentencing, defense counsel also relied on Dr. Dee’s testimony to establish other nonstatutory mitigating circumstances relating to Larkins’ personal history . . . . [T]his testimony and other evidence established that: (1) Larkins’ previous conviction was not murder but manslaughter; (2) he was a poor reader; (3) he experienced difficulty in school; (4) he dropped out of school at the fifth or sixth grade; (5) the offense was the result of impulsivity and irritability; (6) he drank alcoholic beverages the night of the incident; (7) he functions at the lower 20% of the population in intelligence; (8) he came from a barren cultural background; (9) his memory ranks in the lowest one percent of the population; (10) he has chronic mental problems caused by drugs and alcohol; (11) he is withdrawn and has difficulty establishing relationships.

*Id.* at 100-01; see also *Besaraba v. State*, 656 So. 2d 441, 446-47 (Fla. 1995) (discussing defendant’s badly deprived and unstable childhood, physical and emotional problems, alcohol and drug abuse, good character, reliable employment, and good behavior in prison as mitigating factors).

63. FLA. STAT. ANN. § 921.141(6)(a), (g) (West 1994). The statutory mitigators in two of the other override states, Alabama and Indiana, are quite similar to those in Florida. See, e.g., ALA. CODE § 13A-5-51 (1994); IND. CODE ANN. § 35-50-2-9(c) (Burns 1995).

64. FLA. STAT. ANN. § 921.141(6)(b)-(c) (West 1994).

65. *Id.* § 921.141(6)(d)-(e).

ants' capacity to appreciate the criminality of their conduct and that the capacity "to conform [their] conduct to the requirements of [the] law was substantially impaired."<sup>66</sup> As such, the statutory mitigators alone are quite unlimited and, when combined with the seeming infinity of nonstatutory mitigators, can successfully transmit to the jury a defense narrative with little recension.

As participants in capital sentencing, juries are not just the "conscience" or "voice" of the community. They simultaneously function as the intended recipients of the defendant's mitigative life noises. In the language of synecdoche, the capital-sentencing jury acts as the community's tympanic membrane.

Some purposeful inexactitude might be at work in the jury's deliberative processing of the defense narrative. Sometimes residual or lingering doubt that the jury has with respect to the defendant's guilt makes its way into the deliberations.<sup>67</sup> Although such doubt does not rise to a level sufficient to prompt an acquittal, it either makes the sentencing jury more receptive to the mitigative narrative or becomes what is tantamount to an actual mitigator.<sup>68</sup> Also, where there are no "antimersey instructions"<sup>69</sup> or where such instructions exist but do not effectively snuff out the jurors' merciful impulses, the jury's "compassion for the individual"<sup>70</sup> may move a jury to spare a life. While feel-

---

66. *Id.* § 921.141(6)(f).

67. See Jennifer R. Treadway, Note, 'Residual Doubt' in Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor, 43 CASE W. RES. L. REV. 215, 215 (1992) ("Residual doubt is any remaining or lingering doubt a jury has concerning the defendant's guilt despite having been satisfied 'beyond a reasonable doubt.' In certain states, the jury may consider residual doubt as a non-statutory mitigating factor.") (footnote omitted); see also William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27 (1987) (defining lingering doubt).

68. See Treadway, *supra* note 67 (discussing how residual doubt is logical and relevant and is an operative mitigating factor in capital sentencing); see also *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. Nov. 1981) ("There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real."), *cert. denied*, 459 U.S. 882 (1982).

69. See Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 531-36 (1992) (discussing antipathy instructions); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (analyzing the impact emotions have on retributive capital sentencing); see, e.g., *California v. Brown*, 479 U.S. 538, 540 (1987) (upholding instruction directing the jury to refrain from basing its sentencing decision on "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling").

70. *Brown*, 479 U.S. at 562-63 (Blackmun, J., dissenting) ("[W]e adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on



ings such as residual doubt and mercy can resist identification, and often operate on something akin to a deliberative subliminal plane, they are nevertheless present. Although sometimes amorphous, mercy and doubt influence death penalty decisionmaking.

One of the basic assumptions behind having the jury act as decisionmaker is that a group can do better than one. As the United States Supreme Court stated as early as 1874, “[i]t is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts . . . than can a single judge.”<sup>71</sup> In the death penalty context, having a group make the determination fosters what Justice Stevens calls “respect for the value of human life.”<sup>72</sup> As Justice Stevens saw it, “the public presumes that a death sentence imposed by a jury reflects the community’s judgment that death is the appropriate response to the defendant’s crime.”<sup>73</sup> Because that “presumption does not attach to a lone government official’s decree,”<sup>74</sup> such a judicial imposition of death can devalue human life itself and, in turn, effectually proliferate killing.

In twenty-nine of the thirty-three states which involve juries in capital sentencing, the jury’s decision is final.<sup>75</sup> Four states, however, allow judges to reject the jury’s advice.<sup>76</sup> When a jury advises a life sentence and a judge replaces it with the death penalty, the override tramples upon the most sacred principles. In the sentencing phase, the jury, as the tympanic membrane, has received the most *unsilenced*, *undisplaced*, and *unfalsified* defense sounds that can travel through the mitigative cavities. If, after processing such defense noises, the rightful outcome translates itself into a spared life and the judge then trumps that with death, such judicial obliteration nullifies a process especially designed to maximize the opportunity for the defense to fight for life. That is, through the effectual deracination of the rightful

---

account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of ‘contemporary values,’ . . . we see in the sentencer’s expression of mercy a distinctive feature of our society that we deeply value.”) (citation omitted); see also Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989).

71. *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874); see also *KALVEN & ZEISEL*, *supra* note 41, at 498.

72. *Harris v. Alabama*, 115 S. Ct. 1031, 1041 (1995) (Stevens, J., dissenting).

73. *Id.*

74. *Id.*

75. See *supra* notes 4-6.

76. See *supra* notes 5-6.

audience for that mitigative defense narrative, such an override constitutes the excision of the tympanic membrane.

While a judicial override of a typical jury decision derogates the role of the jury, a judicial rejection of a jury *life* verdict spawns unique damage. This Article argues such a specific excision of the tympanic membrane in the form of nullification of jury *life* advice inevitably engenders the trivialization of human life.

## II. The Augmentation of Death Bias

### A. The *Caldwell* Decision

In *Caldwell v. Mississippi*, the United States Supreme Court deemed it unconstitutional for a prosecutor to lead the death sentencer to believe that someone else is ultimately responsible for making the life or death decision.<sup>77</sup> Although the Supreme Court has considerably eroded *Caldwell*,<sup>78</sup> the *Caldwell* reasoning applies to override capital sentencing statutes.

In *Caldwell*, the defendant shot and killed the owner of a small grocery store.<sup>79</sup> In this Mississippi bifurcated proceeding, the jury convicted Caldwell of capital murder.<sup>80</sup> In the sentencing hearing, the defense attorneys presented Caldwell's "youth, family background, and poverty, as well as general character evidence" as mitigating factors.<sup>81</sup> In an effort to inspire the jury to appreciate the gravity of the situation and the enormity of their responsibility, the defense attorney argued:

[Every] life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death—the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and

---

77. 472 U.S. 320 (1985).

78. See *infra* note 105 and accompanying text.

79. *Caldwell*, 472 U.S. at 324.

80. *Id.*

81. *Id.*

you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.<sup>82</sup>

The prosecutor responded by trying to diminish that sense of “awesome responsibility,” and argued to the jury the defense had actually done something improper.<sup>83</sup> The prosecutor then stated, “I think the lawyers know better. Now, they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision.”<sup>84</sup> Before the defense objected, the prosecutor asserted, “My God, how unfair can you be? Your job is reviewable. They know it.”<sup>85</sup>

The trial court overruled the defense objection, and determined that the jury should be told that the sentence “is reviewable automatically as the death penalty commands.”<sup>86</sup> Consequently, the prosecutor continued:

They said “Thou shalt not kill.” If that applies to him, it applies to you, insinuating that your decision is the final decision and that they’re gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it’s unfair and I don’t mind telling them so.<sup>87</sup>

The jury sentenced Caldwell to death, and the Mississippi Supreme Court affirmed the sentence.<sup>88</sup> The United States Supreme Court granted certiorari to consider whether the prosecutor’s comments violated the Eighth Amendment.<sup>89</sup>

The Supreme Court stated, “Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State.”<sup>90</sup> The Court then determined that the

---

82. *Id.*

83. *Id.* at 325.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 325-26.

88. *Caldwell v. State*, 443 So. 2d 806 (Miss. 1983). While the Mississippi court unanimously affirmed the conviction, it divided four to four on the validity of the death sentence. *Id.* at 807. In affirming, the court relied on the decision in *California v. Ramos*, 463 U.S. 992 (1983), in which the Supreme Court held that the decision to mention appellate review was the State’s. *Caldwell*, 443 So. 2d at 813. The dissent, although not disputing that interpretation of *Ramos*, argued that under state law, the prosecutor’s argument was unfair. *Id.* at 815-17 (Lee, J., dissenting).

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

90. *Caldwell*, 472 U.S. at 329.

state-induced suggestion that “the sentencing jury may shift its . . . responsibility to an appellate court” creates both substantial unreliability and a bias in favor of death sentences.<sup>91</sup>

First, the Court attributed the death bias to the limitation inherent in the appellate process itself, which was something that a jury of lay people might not readily grasp.<sup>92</sup> As the Court explained, the delegation of sentencing responsibility which the prosecution had urged “not only postpones the defendant’s right to a fair determination of the appropriateness of his death” sentence, but would actually deprive him of that right.<sup>93</sup>

What made such prosecutorial conduct an outright deprivation of a jury decision on death was that appellate courts are basically “ill-suited” to make the death decision in the first instance.<sup>94</sup> As the *Caldwell* Court saw it, “‘compassionate or mitigating factors stemming from the diverse frailties of humankind’” are indeed relevant in capital sentencing and “sentencers who [are] present to hear the evidence and arguments and see the witnesses,” are best adept at considering such intangibles.<sup>95</sup> Lastly, the jury’s notion that the appellate tribunal can independently decide the life-or-death issue is, of course, inaccurate.<sup>96</sup> Thus, the result can be an execution without a death sentencer ever determining whether death is the appropriate sentence.<sup>97</sup>

Second, the Court adopted Justice Stevens’s assessment of a similar prosecutorial argument in another case—his fear that it presents “an intolerable danger of bias toward a death sentence.”<sup>98</sup> That is, even if the jury does not believe that the death penalty is actually appropriate, it might nevertheless issue such a sentence just to “send a message” of its disapproval of the defendant’s conduct.<sup>99</sup> Such perceived delegation could make the jury feel at liberty to send such a message since it believes the appellate court will simply correct the error.<sup>100</sup> The result can be an execution not called for by the sentencer.

---

91. *Id.* at 330.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 331 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

96. *Id.* at 331-32.

97. *Id.* at 332.

98. *Id.* at 331.

99. *Id.*

100. *Id.* at 330.

Third, the Court pointed out that death bias can derive from the jury's understanding that only a death sentence will be reviewed.<sup>101</sup> For the jury, this could transmute into a belief that any decision to delegate sentencing can only be effectuated by returning the death sentence.<sup>102</sup> Thus, the prosecutorial conduct posed a danger that the issuance of a death penalty might simply signify the sentencer wished to avoid responsibility for the decision—not that the sentencer actually deemed death to be the proper sentence.

Finally, the Court elaborated on how the circumstances of a capital trial can magnify the severity of the prejudice of such prosecutorial comments:

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. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. . . . 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 . . . in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used for an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.<sup>103</sup>

According to the Court, the danger of a death-biased jury was increased by the jury's possible glorification of the purported delegates as *the* "legal authorities" with "more of a 'right' to make such an important decision."<sup>104</sup>

---

101. *Id.* at 332.

102. *Id.*

103. *Id.* at 333.

104. *Id.* In *Caldwell*, the State also advanced arguments for upholding the death sentence despite the prosecutor's comments. First, it argued that under *California v. Ramos*, 463 U.S. 992 (1983), it is the State's responsibility to determine what a capital sentencing jury should know about post-sentencing proceedings. *Caldwell*, 472 U.S. at 335. Next, it asserted the prosecutor's comments were "invited" or rather, "a reasonable response to defense counsel's arguments." *Id.* Lastly, the State, relying on *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), insisted there could be no finding of constitutional error based on the prosecutorial comments. *Caldwell*, 472 U.S. at 335. The *Caldwell* Court, however, rejected all three backup contentions.

In a concurring opinion, Justice O'Connor wrote separately to express her view that *Ramos* does not "imply that the giving of nonmisleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." *Id.* at 341 (O'Connor, J., concurring). According to Justice O'Connor, what made the prosecutor's remarks "impermissible" was that "they were inaccurate and misleading." *Id.* at 342.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice White joined. After accusing the Court of mischaracterizing the prosecutor's argument, the dissent admonished that precedent "teach[es] that a death sentence need not be va-

In the wake of *Caldwell*, the Supreme Court narrowed its application to certain types of comments during sentencing that *mislead* the jury about its role in the sentencing process in a way that allows the jury to feel less responsible for the sentencing decision.<sup>105</sup> Despite such ostensible limiting of *Caldwell* to situations where misleading comments go to the jury, in truth, the danger of creating a death-biased jury or purely delegatory death verdict is present whenever *any* message—accurate or inaccurate—has the effect of minimizing the sense of importance that the jury attaches to its role in capital sentencing.

## B. Augmented Death Bias

In a jury override system, the jurors are aware that the ultimate responsibility for life or death rests not with themselves but with the trial judge.<sup>106</sup> As one commentator has pointed out, a jury faced with its diminished sentencing role is “prone toward the same death bias

---

cated in every case where the procedures by which it is imposed are in some way flawed.” *Id.* at 348 (Rehnquist, J., dissenting). The dissent also asserted that there was “nothing wrong with urging a capital sentencing jury to disregard emotion and render a decision based on the law and the facts.” *Id.* at 349.

105. *Darden v. Wainwright*, 477 U.S. 168, 184 n.14 (1986). In *Darden*, the Court distinguished *Caldwell* on other grounds. Unlike the situation in *Caldwell*, the comments in *Darden* were not made at sentencing, but at the guilt-innocence phase of the trial, which reduced the possibility or degree of effect on sentencing. *Id.* at 183 n.14. Also, in *Darden*, the “trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.” *Id.* at 183-84 n.14.

In the wake of *Darden*, the Supreme Court stated that “[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 114 S. Ct. 2004, 2009-10 (1994) (rejecting contention that the admission of evidence regarding defendant’s prior death sentence did not trigger *Caldwell* rule by undermining the jury’s sense of responsibility); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (prisoner whose murder conviction became final before *Caldwell* rule was announced could not use the rule to challenge his capital sentence in federal habeas corpus action because it was not a “watershed” rule of criminal procedure necessary to the fundamental fairness of the proceeding).

106. *See, e.g., Smith v. State*, 588 So. 2d 561, 574 (Ala. Crim. App. 1991) (quoting *Smith v. State*, 581 So. 2d 497, 519-20 (Ala. Crim. App. 1990)), *rev’d on other grounds sub nom. Ex parte Smith*, 581 So. 2d 531 (Ala. 1991) (trial court instructs jury that its sentencing authority is advisory and a recommendation)); *Larkins v. State*, 655 So. 2d 95, 100 (Fla. 1995) (“Florida’s standard jury instruction in capital cases instructs that the jury’s role is advisory, but important.”); *Lowery v. State*, 640 N.E.2d 1031, 1043-44 (Ind. 1994) (jury was informed that responsibility for sentencing rests with the judge); *see also Mello, supra* note 26, at 303 (in override states, “[a]t some point in the sentencing proceeding, . . . the jury . . . is told that the ultimate sentencing responsibility rests not upon itself, but with the trial judge”).

against which the Court warned in *Caldwell*.<sup>107</sup> Further, a jury override system does not create merely the *same* death bias that the *Caldwell* Court feared, but actually an *augmented* death bias.<sup>108</sup>

What the *Caldwell* Court feared was the institutional limits of appellate review, coupled with a jury's lack of appreciation of these limits, could cause the outright deprivation of the right to a fair determination of the appropriateness of a death sentence.<sup>109</sup> The Florida override scheme should elicit the same fear. Although Florida's capital sentencing judges, unlike appellate courts, *are* present to hear the evidence and arguments and see the witnesses,<sup>110</sup> they are nevertheless quite analogous to appellate tribunals.<sup>111</sup> As discussed below, Florida has the *Tedder* safeguard, which prohibits judges from freely disregarding the jury's sentence and replacing it with their own judgment.<sup>112</sup> Therefore, the Florida jury's sentence carries great

---

107. Mello, *supra* note 26, at 303. The Supreme Court's subsequent narrowing of *Caldwell* to "misleading" information that diminishes the jury's role, *see supra* note 105, has given courts a basis for rejecting arguments that juries, aware that they are advisory and their verdict is a recommendation, have an unconstitutional *Caldwell* bias. *See, e.g.*, *Dugger v. Adams*, 489 U.S. 401, 407 (1989) (because "the challenged instructions accurately described the role of [Florida's advisory] jury under state law, there is no basis for a *Caldwell* claim"); *Smith*, 588 So. 2d at 574 (informing jurors that judge could change death sentence at judge's discretion did not violate *Caldwell* because it "in no way misled the jury as to its role in sentencing"); *Sullivan v. State*, 636 A.2d 931, 941 (Del.), *cert. denied*, 115 S. Ct. 110 (1994) (prosecutor's remarks concerning the judge's "ultimate decision" was distinguishable from *Caldwell* because it did not misstate the law or mislead the jury); *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993) (Florida's jury instructions are accurate and do not violate *Caldwell*); *Lowery*, 640 N.E.2d at 1044 (because the information concerning the jury's role in the death sentence was an "accurate reflection[ ] of the law in Indiana," it did not violate *Caldwell* principles).

108. *See Nicks v. Alabama*, 487 U.S. 1241, 1241 (1988) (Marshall, J., joined by Brennan, J., dissenting to denial of writ of certiorari). In *Nicks*, the prosecutor argued to the jury:

The opinion, which you will come to a conclusion when you go back and deliberate—Let me say this, it will be only an advisory opinion. The law provides for you to present this to the Court for their consideration. The ultimate decisions [sic] rests with Judge Reynolds. He will be the one to take whatever ruling that you send out and decide whether it will be life without parole or death by electrocution in the electric chair.

*Id.* at 1242. The dissent expressed its view that the argument "perhaps *even more baldly* than the statements in *Caldwell*, sought to minimize the jury's sense of its awesome responsibility to determine whether petitioner would live or die by encouraging the jury to view its verdict as merely 'advisory.'" *Id.* (emphasis added); *see also Bundy v. Dugger*, 488 U.S. 1036, 1036 (1989) (Brennan, J., joined by Marshall, J., dissenting to denial of stay of execution).

109. *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

110. *Id.* at 331.

111. *Cf. Mello, supra* note 26, at 299.

112. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see infra* notes 146-150 and accompanying text.

weight and can be rejected by the judge *only* when virtually no reasonable person could have made the recommendation.<sup>113</sup>

Even Florida juries, which are somehow aware of the *Tedder* standard, can lack the sophistication to really grasp its significance. In the same way that many lay people vaguely believe that appellate courts actually retry cases, advisory juries can similarly view the sentencing judge as an unconstrained overrider. Thus, Florida juries, like the *Caldwell* jury, can believe they are delegating the ultimate decision, and therefore pronounce a death sentence without giving it full consideration. In Florida, as in the *Caldwell* situation, an improperly delegated death sentence can end up with the supposed delegatee rubber-stamping the prosecutor's recommendation.

In an override system, such as Alabama's, where the judge must only "consider" the jury's recommendation,<sup>114</sup> the judge as the unconstrained decisionmaker is not a mere potential perception but in fact a reality. Consequently, where the judge *is* the *true* delegatee, the dangers inherent in jury diminution of responsibility for the death sentence are present. Also, as discussed below in connection with *Harris*, the actual practice of Alabama judges makes the delegatory death sentence of an Alabama jury even more likely to result in an improper execution.<sup>115</sup>

In a jury override system, a jury can do what the *Caldwell* Court feared—send a message of its disapproval of the defendant's acts—without a trace of inhibition. In *Caldwell*, the Court reasoned the mere prospect of an appellate court on call to correct the sentence eased the way for a jury to send a message in the form of a death verdict. In an override system, the pronouncement of death may be even easier because, as the jury sees it, the perceived delegatee is right there in the room to correct the send-the-message verdict almost instantly.<sup>116</sup>

Further, the *Caldwell* Court articulated its concern that "[the imposition of] a death sentence out of a desire to avoid responsibility for its decision presents the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns."<sup>117</sup> In an override system, a jury, wishing to ensure reviewability by issuing a death sentence, can do so with impunity. This is because the only con-

---

113. *Tedder*, 322 So. 2d at 910; see *infra* notes 146-150 and accompanying text.

114. ALA. CODE § 13A-5-47(e) (1994); see also *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

115. See *infra* notes 210-222, 263-265 and accompanying text.

116. See Mello, *supra* note 26, at 297-99.

117. *Caldwell v. Mississippi*, 472 U.S. 320, 332 (1985).



ceivable impediment to a jury imposing death, for the sole purpose of securing appellate review, is its extant awareness that responsibility avoidance is not and cannot be a legitimate basis for a death recommendation. An override system, however, effectively eradicates this one conceivable impediment to a purely delegatory sentence: understanding that judges can almost instantly right their wrong, an advisory jury believes that the judge will impose life if the judge finds an illegitimate factor behind the jury's death recommendation. As such, advisory juries can view it as a "win-win" situation and thus reason that a decision with an illegitimate basis will be fixed by the judge, and if not, will proceed to a higher court for review. In short, jury override can be viewed as delegation without guilt.

Also, the *Caldwell* Court emphasized the pressures on a sentencing jury "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice,"<sup>118</sup> and acknowledged the enticement inherent in a diminution of their role. That sense of relief, in the form of diminished responsibility due to practically immediate judicial review, must be viewed as even more attractive to an advisory jury sitting in the same capital sentencing pressure cooker.<sup>119</sup>

The *Caldwell* Court reasoned, when jurors know that the real decisionmakers will be the justices of the state's highest court, "[i]t is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a 'right' to make such an important decision than has the jury."<sup>120</sup> But, as Professor Mello has aptly stated, while "the high court stands as a distant abstraction . . . the trial judge is posted as the immediate and tangible legal authority. She is their judge."<sup>121</sup> As Professor Mello has illustrated, the courtroom formalities reinforce the respect that the jury develops for *their* judge:

Cloaked in her black robe, the trial judge emerges from the recesses of her chambers. All rise as she enters the courtroom and climbs to her elevated position on the bench. These images all serve to establish and reinforce the image of the trial judge as the preeminent legal authority. It is within this context that the jury views the trial judge.<sup>122</sup>

Unlike the *Caldwell* situation, where the supposed sentencers are the lofty, faceless justices on the state supreme court, the override sys-

---

118. *Id.* at 333.

119. *See* Mello, *supra* note 26, at 298.

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

121. Mello, *supra* note 26, at 297.

122. *Id.* at 298.

tem portrays the real sentencer as the jury's own judge, the individual who guided them personally through the "very difficult and uncomfortable" ordeal.<sup>123</sup> Further, because capital proceedings tend to be lengthy, by the time sentencing arrives, the advisory jury has embraced their judge as part of their family—their parent.<sup>124</sup> In such a situation, delegating responsibility to the symbolic parent is not just easy but quite natural.

Consequently, all of the prejudicial effects the *Caldwell* Court identified are magnified when it is an advisory jury issuing an advisory sentence that the judge can reject. It thus follows logically from the reasoning in *Caldwell* that, if a jury's mere impression that sentencing responsibility rests with the appellate court creates a death bias, then the jurors' understanding that their judge has the real life-or-death decision creates a death-bias *plus*.

The *Caldwell*-like predilection is not the only factor creating a death-leaning on the part of a capital sentencing jury. Under *Witherspoon v. Illinois*, jurors who make it unmistakably clear that they will automatically vote against the death penalty can be excluded.<sup>125</sup> Thus, the jury will be composed of individuals who *will* consider death. Also, under *Wainwright v. Witt*, the prosecution can exclude such jurors for cause if their views on the death penalty would "prevent or substantially impair[] performance of [their] duties as juror[s]."<sup>126</sup> Both *Witherspoon* and *Wainwright* in effect guarantee the

123. See *Caldwell*, 472 U.S. at 333; *supra* text accompanying note 118.

124. See Mello, *supra* note 26, at 298 (quoting SEYMOUR WISHMAN, ANATOMY OF A JURY 146 (1986) ("Most jurors arrive in a courtroom with great respect for the judge, whom they see as a fair-minded father [sic] figure interested only in the implementation of justice.'")).

125. 391 U.S. 510, 522 n.21 (1968). In *Witherspoon*, the Supreme Court determined the State could not cleanse the jury of "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle," because that would produce a "hanging jury." *Id.* at 520. The State, however, could remove venire persons who made it:

[U]nmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

*Id.* at 522-23 n.21.

126. 469 U.S. 412, 424 (1985); see *Adams v. Texas*, 488 U.S. 38, 45 (1980). *But see Morgan v. Illinois*, 112 S. Ct. 2222, 2233 (1992) (recognizing defendants have the same right of specific inquiry previously only granted to prosecutors). For a discussion of death qualification, see James M. Carr, Note, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427 (1987); Valerie T. Rosenson, Note, *Wainwright v. Witt: The Court Casts a False Light Backward*, 66 B.U. L. REV. 311 (1986); see also Bruce J. Winick, *Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital*

presence of a death-qualified jury—a jury who will consider death. This further magnifies the already augmented death bias, the one intrinsic to the advisory jury system.<sup>127</sup>

In the mind of the *Caldwell* Court, the omnipresent concern was that the hypothetical botch—the improper execution—happens when a death sentencer never actually makes the determination that death is the appropriate sentence. A jury override system, however, which spawns an augmented death bias, guarantees that the *Caldwell* Court's hypothetical horror—the improper execution—will actually materialize.

In this respect, a jury override system may produce unjustified executions. In a jury override system, with its built-in augmentedly death-biased jury, a jury's life recommendation is highly improbable. What such an outcome signifies is that an advisory jury—with its *Caldwell*-plus extreme leaning toward death, after considering the relevant factors—and hearing the arguments nevertheless decided the capital defendant should live. In such a situation, the circumstances favoring life had to have been so strong that they overcame not just a death bias, but an augmented death bias. Thus, the capital defendant that obtains a life recommendation in a jury override jurisdiction must have effectually rebutted what is tantamount to an irrebuttable presumption in favor of death.

---

*Cases in a State in Which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825 (1983) (suggesting how death qualification creates a jury that might not be impartial and one that does not represent a fair cross-section of the community); Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 6 (1982) (arguing “the use of peremptory challenges to eliminate potential jurors opposed to the death penalty offends due process and sixth and eighth amendment values”).

127. Also, the impact of a decision like *Payne v. Tennessee*, 501 U.S. 808 (1991), in which the Court determined the Eighth Amendment does not prohibit a jury from considering victim impact evidence, can further increase a jury's leaning toward a death sentence. See Aida Alaka, Note, *Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in Payne v. Tennessee*, 23 LOY. U. CHI. L.J. 581, 617 (1992) (*Payne* decision “justif[ies] the introduction of arbitrary, capricious, and inflammatory evidence into the sentencing phase of a capital trial”); Michael I. Oberlander, Note, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621 (1992) (explaining, inter alia, how victim impact evidence will lead to disparate sentencing of similarly situated defendants); see also FLA. STAT. ANN. § 921.141(7) (West Supp. 1995) (“[Victim impact evidence] . . . shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.”). In addition, there is a study showing that “misunderstandings by jurors in capital trials may dispose them to reach the death penalty.” Scott Burgins, *Jurors Ignore, Misunderstand Instructions*, 81 A.B.A. J. 30 (1995).

When a judge overrides such an advisory life sentence, he or she is arbitrarily imposing a death conclusion on facts that overwhelmingly and almost conclusively warrant life. The danger feared in *Caldwell*—that someone will die who should not—is the almost certain result of a judge's rejection of an advisory jury's life recommendation.

### III. The Annihilation of the Only Safeguard

#### A. The *Tedder* Safeguard

On several occasions, the United States Supreme Court has approved Florida's capital sentencing statute and paid homage to the "significant safeguard" that the *Tedder* standard affords a defendant.<sup>128</sup> In *Tedder v. State*, Tedder's wife and mother-in-law were laying a sidewalk outside their trailer.<sup>129</sup> Tedder, who had recently separated from his wife, suddenly stepped out from behind a tree and fired a shot, causing the women to flee.<sup>130</sup> Tedder's wife ran with the baby to the back bedroom of the trailer to get a shotgun.<sup>131</sup> While loading the shotgun, she heard more shots and her mother's screams.<sup>132</sup> Tedder then broke into the bedroom, took away his wife's shotgun,<sup>133</sup> and commanded his wife to bring the baby and come with him.<sup>134</sup> While they were leaving, Tedder's wife saw her mother lying on the floor in the hallway.<sup>135</sup> Tedder would not let his wife examine the body.<sup>136</sup> Tedder's mother-in-law died from the gun shot wounds.<sup>137</sup>

After the jury convicted Tedder of first degree murder, the sentencing trial was held.<sup>138</sup> The attorneys, however, presented no additional evidence except that Tedder was twenty years old.<sup>139</sup> The jury deliberated for only sixteen minutes and recommended life imprisonment.<sup>140</sup>

The next day, the trial judge conducted the sentencing hearing.<sup>141</sup> The only additional evidence that he considered was a presentence

---

128. *Spaziano v. Florida*, 468 U.S. 447, 465 (1984); *see also supra* note 13.

129. 322 So. 2d 908, 909 (Fla. 1975).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 909-10.

investigation report, which showed that Tedder had a prior conviction for breaking and entering with intent to commit a misdemeanor.<sup>142</sup> The trial judge overrode the jury recommendation and issued a death sentence.<sup>143</sup> Although the judge found no mitigating circumstances, he listed three aggravating ones: "(1) that [Tedder] knowingly created a great risk of death to many persons, (2) that the crime was committed while the defendant was . . . [also committing] a kidnapping, and (3) that the crime was especially heinous, atrocious or cruel."<sup>144</sup>

The Florida Supreme Court found the death penalty inappropriate. In so doing, the court said "[a] jury recommendation under [the Florida] trifurcated death penalty statute should be given great weight."<sup>145</sup> The court specified that "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."<sup>146</sup> The court, concluding that the situation in *Tedder* failed to satisfy the standard for overriding the jury's advisory sentence, directed the trial judge to impose life imprisonment instead.<sup>147</sup>

The *Tedder* standard has figured prominently in United States Supreme Court decisions upholding the constitutionality of Florida's capital sentencing statute. For example, in the seminal case *Spaziano v. Florida*, which was a challenge to a judge's imposition of a death sentence where the jury had recommended life, the primary evidence against Spaziano was the testimony of only one witness.<sup>148</sup> According to that witness, Spaziano had taken him to a garbage dump to show him the remains of two women he claimed to have tortured and murdered.<sup>149</sup> Spaziano attacked the recall and perception of the witness due to his substantial drug habit.<sup>150</sup> After deliberating for more than

---

142. *Id.* at 910.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 910-11.

148. 468 U.S. 447 (1984).

149. *Id.* at 450.

150. *Id.*; see Michael Mello, *Innocent Man Faces Execution*, MIAMI HERALD, June 4, 1995, at C1, C6. Mello, who represented Mr. Spaziano, is convinced his client was innocent; he explained that the State's chief witness, Anthony Dilisio, was 16 years old at the time of the events in question. Mello, *supra*, at C6. Apparently, "Dilisio testified [that] he never believed Mr. Spaziano and that he thought Mr. Spaziano was bragging to impress him." *Id.* Also, Dilisio "indicated that he idolized Mr. Spaziano . . . [and] did not report what he had seen to the police because he wanted to become a member of the Outlaw Motorcycle Club." *Id.* What was not revealed, however, to either the judge or the jury was

six hours, the jury reported itself deadlocked; the trial court then gave the *Allen* charge.<sup>151</sup> Shortly thereafter, the jury convicted Spaziano of first-degree murder.

Later, that same jury reviewed the aggravating and mitigating circumstances at the sentencing hearing and recommended life.<sup>152</sup> The judge, however, in sentencing Spaziano to death concluded that, in spite of the jury recommendation, "sufficient aggravating circumstances existed to justify and authorize a death sentence" and "the mitigating circumstances were insufficient to outweigh such aggravating circumstances."<sup>153</sup>

The Florida Supreme Court ultimately affirmed the death sentence, finding no constitutional infirmity in the override procedure.<sup>154</sup> The court specifically concluded since the evidence in *Spaziano* satisfied the *Tedder* standard, it was sufficient to justify the judge's rejection of the jury's life sentence.<sup>155</sup>

Justice Blackmun delivered the United States Supreme Court's affirmance, in which he underscored that it was not a constitutional requirement that a jury impose the death penalty, and emphasized what the Court saw as "two fundamental flaws" in Spaziano's argument.<sup>156</sup> First, the Court disagreed with the notion that there were

---

that Dilisio's testimony was possibly "manufactured" and that Dilisio did not "remember" his story until he was under police hypnosis." *Id.* Significantly, the Supreme Court of Florida remanded the Spaziano matter to the trial court for an evidentiary hearing on the issue of Dilisio's recanted testimony. *Spaziano v. State*, No. 67,929, 1995 Fla. LEXIS 1428 (Sept. 8, 1995).

151. *Spaziano*, 468 U.S. at 450; see *Allen v. United States*, 164 U.S. 492 (1896) (creating the "*Allen* charge," also known as the "hammer charge").

152. *Spaziano*, 468 U.S. at 451. It has to be quite significant that the once deadlocked jury decided to recommend life, a phenomenon conceivably attributable to residual or lingering doubt. See *supra* notes 67-68 and accompanying text; see also Mello, *supra* note 150, at C1 ("Mr. Spaziano is, I believe in my bone marrow, innocent."), C6 ("I am convinced that Mr. Spaziano is innocent, but I can't prove it with certainty.").

153. *Spaziano*, 468 U.S. at 452. The judge determined the aggravating factors were the "especially heinous and atrocious" nature of the homicide and the defendant's previous convictions for violent felonies, and found no mitigators except "perhaps, the age of the defendant." *Id.*

154. *Spaziano v. State*, 433 So. 2d 508 (Fla. 1983). In the first appeal, the Supreme Court of Florida affirmed the conviction, but reversed the death sentence. *Spaziano v. State*, 393 So. 2d 1119 (Fla. 1981). The problem with the sentence was that the trial court had relied on confidential information in the presentence investigation report without disclosure to the defense or giving the defense an opportunity to respond to the evidence. *Id.* at 1122. On remand, the trial court ordered a new presentence investigation report and invited the defense to present evidence in response. *Spaziano*, 433 So. 2d at 510. After Spaziano offered no such evidence, the judge sentenced Spaziano to death. *Id.*

155. *Spaziano*, 433 So. 2d at 511.

156. *Spaziano*, 468 U.S. at 461.

clear demarcations between capital and noncapital sentences. The Court, for example, pointed out that “[a]lthough incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding.”<sup>157</sup> Further, the Court rejected the argument that retribution—which “is an element of all punishments society imposes”—is what sets the death penalty apart from noncapital sentences.<sup>158</sup>

Second, the Court expressed the view that, even if it were true that the death penalty had a unique retributive purpose, it did not follow that such a sentence was within the exclusive domain of the jury. As the Court explained, “[i]mposing the sentence in individual cases is not the sole or even the primary vehicle through which the community’s voice can be expressed.”<sup>159</sup> The *Spaziano* Court elaborated:

The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the ‘community’s voice’ is not given free rein. The community’s voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined.<sup>160</sup>

As such, the Court concluded that a judge alone could properly impose death. Although the Court acknowledged that a majority of states have juries perform capital sentencing, it recited that “[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.”<sup>161</sup> From there, the Court reasoned that “[i]f a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge’s exercising that responsibility after receiving the advice of the jury.”<sup>162</sup>

Significantly, the Court commended Florida’s *Tedder* standard and denominated it as a “significant safeguard” for the capital defendant.<sup>163</sup> The Court also expressed its satisfaction that the Florida

---

157. *Id.* at 461-62 (citations omitted).

158. *Id.* at 462.

159. *Id.*

160. *Id.* (citations omitted).

161. *Id.* at 464.

162. *Id.* at 465.

163. *Id.*

Supreme Court took the standard seriously and did not hesitate to reverse a trial court where it had derogated the jury's role.<sup>164</sup>

### B. The Effect of an Annihilation of the *Tedder* Safeguard

Implicit in the praise of the *Tedder* standard as a "significant safeguard"<sup>165</sup> is the Court's enfeebling of its own conclusion that the death penalty need not issue from a jury. Under *Tedder*, a jury life sentence enjoys "great weight" and the judge cannot reject the jury's advice unless "the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ."<sup>166</sup> Because the "reasonable person" is the juror, then literal compliance with the *Tedder* standard should elicit judicial adherence to the advisory jury verdict. Thus, implicit in the *Spaziano* Court's ostensible support of Florida's *Tedder* safeguard is the Court's unspoken allegiance to the very principle it purported to reject—capital sentencing is, in truth, the jury's job.

In his dissenting opinion in *Spaziano*, Justice Stevens argued that under the Florida scheme, "[t]he administration of the statute actually reflects a deeply rooted impulse to legitimate the process through involvement of the jury."<sup>167</sup> According to Justice Stevens, this sense of the jury as integral to the process emerges, not just in the state's incorporation of an advisory jury, but also because the statute has been "construed to forbid a trial judge to reject the jury's decision unless he finds that the evidence in favor of a death sentence is so clear and convincing that virtually no reasonable person could impose a lesser sentence."<sup>168</sup> In the dissent's perspective, Florida's statute actually endorses the jury as "important to the fairness and legitimacy of capital punishment."<sup>169</sup> Consequently, what Justice Stevens suggests is that genuine approbation of the *Tedder* safeguard in an advisory jury

---

164. *Id.* In a dissenting opinion, with whom Justices Brennan and Marshall joined, Justice Stevens said:

If the State wishes to execute a citizen, it must persuade a jury of his peers that death is an appropriate punishment for his offense. If it cannot do so, then I do not believe it can be said with an acceptable degree of assurance that imposition of the death penalty would be consistent with the community's sense of proportionality. Thus, in this case Florida has authorized the imposition of disproportionate punishment in violation of the Eighth and Fourteenth Amendments.

*Id.* at 490 (Stevens, J., concurring in part and dissenting in part).

165. *Id.* at 465.

166. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

167. *Spaziano*, 468 U.S. at 475 (Stevens, J., concurring in part and dissenting in part).

168. *Id.* at 475-76.

169. *Id.* at 476.



set-up impugns the Court's notion that juries need not be *the* death sentencers.

Before *Harris*, the Supreme Court recognized that if a judge is statutorily empowered with a jury override, then the *Tedder* standard is crucial to justice. This, however, is not just because the *Tedder* standard can partially ensure that the death sentence comes from the jury, which is the "voice of the community," and thus the penalty is truly an "expression of society's moral outrage at particularly offensive conduct."<sup>170</sup> Additionally, the *Tedder* safeguard can diminish the potential double jeopardy effect of an override sentencing scheme.

Justice Stevens argues in his *Harris* dissent that a statutory provision for a "death sentence upon a verdict by *either* the jury or the judge . . . would violate the Constitution's command that no defendant 'be twice put in jeopardy of life or limb.'<sup>171</sup> Under such a potentially duplicative procedure, a zealous prosecutor who fails to get a death sentence out of a jury would have a second chance before the judge. The new decisionmaker would be quite free to accept exactly what the jury had just rejected.

While an override sentencing scheme by itself has a double jeopardy taint, a *Tedder* standard is what can save it from becoming the atrocity that, as Justice Stevens envisioned, would "require[ ] the defendant to stave off a death sentence at each of two *de novo* sentencing hearings."<sup>172</sup> In a *Tedder* system, the defendant receiving life from a jury has at least a strong recommendation, one that theoretically carries "great weight"<sup>173</sup> and should minimize the risk of a sudden turnabout in the form of a judicial imposition of death. Thus, *Tedder* can in some situations become a capital defendant's only friend—the sole insulation from a potentially unconstitutional toxic exposure to two life-threatening *de novo* ordeals.

Also, assuming the basic premise that statutory override schemes create an augmented predilection on the part of the sentencing jury to issue a death sentence, then *Tedder* is not just important, it is critical. When an advisory jury, although imbued with an extreme death bias nevertheless decides on life imprisonment, it has, in effect, announced that death is not just inappropriate but in fact *overwhelmingly* inappropriate. Specifically, to that advisory jury, the evidence so substan-

---

170. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); see *supra* note 46.

171. *Harris v. Alabama*, 115 S. Ct. 1031, 1040 (1995) (Stevens, J., dissenting) (quoting U.S. CONST. amend. V).

172. *Id.* (Stevens, J., dissenting).

173. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

tially supported life that it rebutted a practically irrebuttable presumption in favor of death. As explained, a jury recommendation of life in an override jurisdiction is not just life, but life to the zenithal degree.

While in an augmentedly death-biased arena, a judge's single-handed obliteration of the seemingly extraordinary life verdict is an outrage, a *Tedder* standard, which can inhibit such judicial overrides, is and can become the only conceivable saving grace. It is the iota of amelioration in a world of extreme death predilection.

#### **IV. *Harris v. Alabama* as the Excised Tympanic Membrane with Augmented Death Bias and Without the *Tedder* Safeguard**

##### **A. The *Harris* Decision**

###### *1. Background*

In *Harris v. Alabama*, a jury convicted Louise Harris of capital murder<sup>174</sup> on the following facts. Harris was married to a deputy sheriff and having an affair with Lorenzo McCarter.<sup>175</sup> When Harris requested McCarter to get someone to kill her husband, McCarter solicited a coworker, who not only refused but told his supervisor about the incident.<sup>176</sup> McCarter, however, did find accomplices (Sockwell and Hood), paid them \$100, and vaguely promised them more money when they completed the deed.<sup>177</sup> On the night of the planned murder, Harris alerted McCarter on his beeper that her husband was leaving for work.<sup>178</sup> McCarter and Hood stationed themselves in the car on a nearby street while Sockwell hid in the bushes by a stop sign.<sup>179</sup> When Harris's husband pulled up at the intersection, Sockwell emerged and shot the victim "point blank."<sup>180</sup> After questioning, the police arrested Harris.<sup>181</sup> McCarter agreed to cooperate with the State "in exchange for the prosecutor's promise not to seek the death penalty."<sup>182</sup> Consequently, McCarter testified that Harris

---

174. 115 S. Ct. 1031, 1033 (1995).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

had sought his help in killing her husband so that they could share in his death benefits of about \$250,000.<sup>183</sup>

In Alabama, such a conviction entitles the defendant to a sentencing hearing before the trial jury unless both parties waive that procedure and the court approves the waiver.<sup>184</sup> At the sentencing hearing, the State must prove the statutory aggravating factors beyond a reasonable doubt,<sup>185</sup> and the defendant may proffer mitigating circumstances which the State must disprove by a preponderance of the evidence.<sup>186</sup> If the jury finds that the aggravating factors outweigh the mitigating circumstances, then it should recommend death.<sup>187</sup> Otherwise, the advisory verdict is life imprisonment without parole.<sup>188</sup> If ten jurors agree, the jury may recommend death.<sup>189</sup> The verdict of life imprisonment, however, requires a simple majority.<sup>190</sup>

After the judge learns of the jury recommendation and the actual vote tally, he or she may impose the sentence. The sentencing statute provides:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict. . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.<sup>191</sup>

If the judge imposes a death sentence, there is automatic review in the appellate court.<sup>192</sup> If the appellate court affirms, the Alabama Supreme Court grants certiorari as a matter of right.<sup>193</sup>

It was under this Alabama sentencing scheme that Louise Harris had a sentencing hearing. At her hearing, several witnesses attested to her good background and strong character.<sup>194</sup> Harris was rearing seven children, holding three jobs at once, and participating actively in

---

183. *Id.*

184. ALA. CODE § 13A-5-44(c) (1994).

185. *Id.* § 13A-5-45(e).

186. *Id.* § 13A-5-45(g).

187. *Id.* § 13A-5-46(e).

188. *Id.* § 13A-5-46(e)(2).

189. *Id.* § 13A-5-46(f).

190. *Id.*

191. *Id.* § 13A-5-47(e).

192. *Id.* § 13A-5-53(a).

193. *Id.* § 13A-5-53(b). Also, the "appellate courts must independently weigh aggravating and mitigating circumstances and determine whether the death penalty is disproportionate to sentences rendered in comparable cases." *Id.*, quoted in *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

194. *Harris*, 115 S. Ct. at 1033.

her church.<sup>195</sup> The jury thus recommended, by a seven to five vote, that she be imprisoned for life without parole.<sup>196</sup>

The judge overrode the jury recommendation and imposed the death sentence.<sup>197</sup> In so doing, the judge found the existence of only one aggravating circumstance—Harris had commissioned the murder for pecuniary gain.<sup>198</sup> The judge found the absence of a prior criminal record to be a statutory mitigator.<sup>199</sup> As nonstatutory mitigators, the judge found Harris to be a hardworking, respected member of her church and community.<sup>200</sup> After stressing that it was Harris who had planned and financed the commission of the crime and stood to benefit the most from it, the judge determined that “the one statutory aggravating circumstance . . . far outweighed all of the nonstatutory mitigating circumstances, and that the sentence ought to be death.”<sup>201</sup>

In separate proceedings, juries convicted Harris’s coconspirators of capital murder.<sup>202</sup> While McCarter and Hood received life imprisonment, the judge sentenced Sockwell, the one who actually pulled the trigger, to death.<sup>203</sup> With respect to Sockwell’s sentence, the judge also overrode the jury’s advisory life verdict.<sup>204</sup>

In the state appellate court, Harris unsuccessfully argued the capital sentencing statute was unconstitutional because it did not specify the weight the judge must accord the jury’s recommendation, and thus had the effect of an arbitrary imposition of the death penalty.<sup>205</sup> After the state appellate court affirmed Harris’s sentence, the United States Supreme Court granted certiorari.<sup>206</sup>

## 2. *The Supreme Court Decision*

Delivering the opinion of the Court, Justice O’Connor compared Alabama’s and Florida’s sentencing schemes.<sup>207</sup> As the Court noted,

---

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *Id.* at 1034.

206. The Alabama Court of Criminal Appeals rejected Harris’s contention that the *Tedder* standard was a constitutional requisite. *Harris v. State*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992), *aff’d sub nom. Ex parte Harris*, 632 So. 2d 543 (Ala. 1993), *cert. granted sub nom. Harris v. Alabama*, 114 S. Ct. 2736 (1994) (No. 93-7659).

207. *Harris*, 115 S. Ct. at 1034.

while both states “require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge,” the Florida Supreme Court has mandated that the trial judge give great weight to the jury’s recommendation.<sup>208</sup> Specifically, the Court acknowledged that the *Tedder* standard precluded a Florida judge from overriding a life verdict unless “‘the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.’”<sup>209</sup>

In contrast, Alabama lacked what Harris asserted was essential—the *Tedder* standard or its functional equivalent. In Alabama, the judge had merely to “consider” the jury’s recommendation.<sup>210</sup> Harris urged the distinction between Alabama and Florida was significant because the Eighth Amendment required the State to define the weight that the sentencing judge must give to an advisory jury verdict.<sup>211</sup>

The Supreme Court, ostensibly interpreting its decision in *Spaziano*, recited that it had:

rejected the contention that “placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.”<sup>212</sup>

From there, the Court conceded that it had on numerous occasions praised the “crucial protection” that the *Tedder* standard provides to the defendant.<sup>213</sup> According to the Court, however, such praise was not equivalent to its elevation of the *Tedder* standard to the stature of a constitutional mandate.<sup>214</sup> Rather, as the *Harris* Court saw it, “the hallmark of the analysis [was] not the particular weight a State chooses to place upon the jury’s advice, but whether the scheme adequately channels the sentencer’s discretion so as to prevent arbitrary results.”<sup>215</sup>

Also, the Court elaborated somewhat on its pattern of deferring to state legislatures. For example, the Court had neither required that states specify a “‘method for balancing mitigating and aggravating factors in a capital sentencing proceeding,’” nor that they ascribe any

---

208. *Id.*

209. *Id.* (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

210. *Id.*

211. *Id.*

212. *Id.* (quoting *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

213. *Id.* at 1035 (quoting *Dobbert v. Florida*, 432 U.S. 282, 295 (1977)).

214. *Id.*

215. *Id.*

specific weight to particular factors.<sup>216</sup> In the Court's perspective, it thus followed that its imposition of the "great weight" standard on the jury recommendation "would offend . . . established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system."<sup>217</sup>

Further, the Court rejected Harris's contention that, under Alabama law, the jury actually enjoys the key sentencing role and is subject only to review by the judge.<sup>218</sup> In making this argument, Harris mentioned the Alabama appellate court reversals of death sentences due to the advisory juries' exposure to prejudicial error.<sup>219</sup> As Harris submitted, such courts had to have concluded that, although the judge was not infected by the same harmful error, reversal was nevertheless warranted because the death penalty was really the jury's verdict.<sup>220</sup> The Court, however, responded that the reason the death sentence reversals were proper in those harmful error cases was because "the jury recommendation play[ed] a role in the judge's decision," not because the recommendation was necessarily the "determinative" factor.<sup>221</sup> As the Court stated, "[e]rror is committed when the jury considers an invalid factor and its verdict is in turn considered by the judge . . . ."<sup>222</sup>

While the Supreme Court acknowledged some of the statistics in Florida and Alabama, the Court ultimately described the numbers as meaningless.<sup>223</sup> The Court stated the numbers were virtually useless because they could not propel the Court into the "minds of the decisionmakers" or tell them "how many cases in which a jury recommendation of life imprisonment is adopted would have ended differently had the judge not been required to consider the jury's advice."<sup>224</sup> The Court further stated that statistics had no bearing on the constitutionality of such sentencing schemes.<sup>225</sup> The Court stressed the real issue

---

216. *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988)).

217. *Id.* at 1036.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* The Court observed in Florida, capital defendants had "'a second chance for life with the trial judge.'" *Id.* (quoting *Dobbert v. Florida*, 432 U.S. 282, 296 (1977)). In Alabama, however, there had been only five instances where the judge had rejected an advisory death verdict. *Id.* In contrast, Alabama had 47 impositions of a death sentence over a jury recommendation of life. *Id.*

224. *Id.* at 1036.

225. *Id.*

was not the number of actual death sentences, but “whether the penalties imposed [were] the product of properly guided discretion and not of arbitrary whim.”<sup>226</sup> In this respect, the Court again deferred to the state legislators: “If the Alabama Statute indeed has not had the effect that we or its drafters had anticipated, such unintended results would be of little constitutional consequence. An ineffectual law is for the State legislature to amend, not for us to annul.”<sup>227</sup>

Finally, the Court rejected Harris’s contention that “apparent disparities” in the weight that various judges had given to jury verdicts in Alabama cases established a fatal arbitrariness.<sup>228</sup> Harris gave as an example the fact that the judge in her case did not specify a reason for rejecting the jury’s advice, although in another case the judge had indicated that he had given “great weight” to the recommendation.<sup>229</sup> According to Harris, other Alabama judges had rejected jury verdicts purportedly because there was a “reasonable basis” to do so or because the verdict was “unquestionably bizarre.”<sup>230</sup> Harris, in fact, quoted one judge verbatim as saying, “if this were not a proper case for the death penalty to be imposed, a proper case could scarcely be imagined.”<sup>231</sup>

The Supreme Court, however, could not abide by Harris’s reading of such variegated judicial standards as illustrative of how judges “have divergent understandings of the statutory requirement that the jury verdicts be considered.”<sup>232</sup> The Court instead characterized them as conversely proving how judges obeyed the statutory command by “consider[ing]” jury advice.<sup>233</sup>

In summing up, the Court said that because the “Constitution permits the trial judge, acting alone, to impose a capital sentence,” it surely is not “offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.”<sup>234</sup> In essence, the *Harris* Court equated the judge as *sole* capital sentencer with the judge as capital jury *overrider*.

---

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 1036-37; see *State v. Coral*, 629 So. 2d 988, 995 (Ala. Crim. App. 1992).

230. See *Harris*, 115 S. Ct. at 1037.

231. *Id.* (citation omitted).

232. *Id.*

233. *Id.*

234. *Id.*

### 3. *The Dissent*

In his lone dissent, Justice Stevens stated that, even if he had wholeheartedly embraced the reasoning in *Spaziano*, he would still deem “the complete absence of standards to guide the judge’s consideration of the jury’s verdict” to be constitutionally invalid.<sup>235</sup>

First, as Justice Stevens advocated, the Court’s “opinions have repeatedly emphasized that death is a fundamentally different kind of penalty from any other that society may impose.”<sup>236</sup> That is, a capital sentence’s “principal justification . . . is retribution” and “expresses the community’s judgment that no lesser sanction will provide an adequate response to the defendant’s outrageous affront to humanity.”<sup>237</sup> As such, the jury verdict is what best “reflect[s] the considered view of the community.”<sup>238</sup>

Second, Justice Stevens, analogizing the issue before the Court to what endures as a well-settled taboo—“judges . . . determin[ing] the guilt or innocence of an accused without her consent”—concluded that that very prohibition should likewise apply to “life-or-death sentencing decisions.”<sup>239</sup> In this respect, Justice Stevens elaborated on the danger that judges may be too susceptible to the “political climate,” which can coerce them into “constantly profess[ing] their fealty to the death penalty.”<sup>240</sup>

Third, in Justice Stevens’s view, the advisory nature of the jury verdict can make matters worse. As Justice Stevens stated, “[i]f Alabama’s statute expressly provided for a death sentence upon a verdict by *either* the jury or the judge, . . . it would violate the Constitution’s command that no defendant ‘be twice put in jeopardy of life or limb.’”<sup>241</sup> Justice Stevens, condemning the Alabama scheme as having this very double jeopardy effect, explained:

Alabama trial judges almost always adopt jury verdicts recommending death; a prosecutor who wins before the jury can be confident that the defendant will receive a death sentence. A prosecutor who loses before the jury gets a second, fresh opportunity to secure a death sentence. She may present the judge

---

235. *Id.* (Stevens, J., dissenting).

236. *Id.*

237. *Id.*

238. *Id.* at 1039. According to Justice Stevens, “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.” *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1040 (quoting U.S. CONST. amend. V).



with exactly the same evidence and arguments that the jury rejected. The defendant's life is twice put in jeopardy, once before the jury and again in the repeat performance before a different, and likely less sympathetic, decisionmaker.<sup>242</sup>

Fourth, Justice Stevens asserted "[d]eath sentences imposed by judges over contrary jury verdicts do more than countermand the community's judgment."<sup>243</sup> Instead, such overrides actually "express contempt for that judgment."<sup>244</sup> Specifically, Justice Stevens's concern was that by allowing a "lone government official's decree" to prompt an execution can "undermine respect for the value of human life itself and unwittingly increase tolerance of killing."<sup>245</sup>

Fifth, Justice Stevens endorsed a reading of *Spaziano* as the Court's recognition that "a jury override scheme is unconstitutional without *Tedder*."<sup>246</sup> Also, as Justice Stevens pointed out, "[t]he *Spaziano* Court held that the rejection of capital jury sentencing by all but seven States, and of capital jury overrides by all but (at that time) three, did not demonstrate an 'evolving standard' disfavoring overrides."<sup>247</sup> According to Justice Stevens, what would harmonize *Spaziano* is a conclusion that the anomaly of Alabama's standardless override scheme should signify an unequivocal and already evolved disfavor. In summing up, Justice Stevens said that "[t]o permit the state to execute a woman in spite of the community's considered judgment that she should not die is to sever the death penalty from its only legitimate mooring."<sup>248</sup>

#### **B. The Excised Tympanic Membrane, the Augmented Death Bias and the Annihilation of the *Tedder* Safeguard**

In *Harris*, the Supreme Court ratified a capital sentencing scheme, which combines three of the most noxious attributes: the augmentation of death bias, the annihilation of the sole *Tedder* safeguard, and the excision of the tympanic membrane. First, the Alabama capital sentencing procedure spawns not just the death bias that the Court feared in *Caldwell*, but an augmented death bias. In concluding 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

---

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1042.

247. *Id.* (quoting *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984)).

248. *Id.* at 1042-43.

responsibility for determining the appropriateness of the defendant's death rests elsewhere," the *Caldwell* Court recognized the dangers inherent in the perceived delegatee being an appellate tribunal.<sup>249</sup> According to the *Caldwell* Court, the "institutional limits on what an appellate court can do" combined with a jury's likely inability to fully appreciate such limits may "not simply postpone the defendant's right to a fair determination of the appropriateness of his death," but actually deprive the defendant of that right.<sup>250</sup> A *Caldwell* jury, afflicted with the notion that it can shift the enormous responsibility to the appellate court, ends up delegating the life-or-death decision to a tribunal "wholly ill-suited to evaluate the appropriateness of death in the first instance" and bound to review sentencing determinations with a "presumption of correctness."<sup>251</sup>

While, as addressed above, Florida's capital sentencing procedure presents even more dangers than the situation in *Caldwell*, Alabama's scheme is considerably worse than Florida's. As the Supreme Court acknowledged in *Harris*, an important difference between Florida and Alabama is that Alabama requires only that the judge "consider" the jury's recommendation.<sup>252</sup> Moreover, Alabama courts have refused to read the *Tedder* standard into the statute.<sup>253</sup> Although the mere "consider" requirement means that the Alabama sentencing judge, unlike the appellate court in *Caldwell* or the *Tedder* judge in Florida, is relatively free to reject jury advice; in practice, such a rejection rarely occurs when the advice is death.<sup>254</sup> The *Harris* Court actually focused on this fact:

We have observed in the Florida context that permitting the trial judge to reject the jury's advisory verdict may afford capital defendants "a second chance for life with the trial judge." . . . In practice, however, Alabama's sentencing scheme has yielded some ostensibly surprising statistics. According to the Alabama Prison Project, there have been only 5 cases in which the judge rejected an advisory verdict of death, compared to 47 instances where the judge imposed a death sentence over a jury recommendation of life.<sup>255</sup>

Consequently, the Alabama advisory jury may—just like a *Caldwell* jury—pronounce death out of desire to delegate responsibility.

---

249. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

250. *Id.* at 330.

251. *Id.* at 330-31.

252. *Harris v. Alabama*, 115 S. Ct. 1031, 1034 (1995).

253. *Id.*

254. *Id.* at 1036.

255. *Id.* (quoting *Dobbert v. Florida*, 432 U.S. 282, 296 (1977)).

Also, although the supposed Alabama delegatee is not “*wholly ill-suited to evaluate the appropriateness of death*” in the first instance,<sup>256</sup> he or she is actually present to weigh evidence, evaluate witness credibility, and not bound to give that jury advice “great weight”<sup>257</sup> or a “presumption of correctness”<sup>258</sup>; the “ostensibly surprising statistics”<sup>259</sup> disclose that such delegation is perhaps more dangerously misleading than that in *Caldwell*.<sup>260</sup> Specifically, the putative delegatee will rarely veer from jury death advice. Therefore, in Alabama, as in the *Caldwell* situation, “[t]he ‘delegation’ of sentencing responsibility . . . would thus not simply postpone the defendant’s right to a fair determination of the appropriateness of death[, but] rather . . . would deprive [the defendant] of that right.”<sup>261</sup>

What especially disturbed the *Caldwell* Court was that the delegatory sentence can bring about death without a sentencer actually having determined whether death is the appropriate sentence.<sup>262</sup> In the *Caldwell* situation or in Florida, which at the moment still has a *Tedder* safeguard, there is a possibility that the fatal delegatory sentence will not issue. Conceivably, some *Caldwell* or Florida juries harbor an accurate awareness of the limits on what the putative delegatee can do.<sup>263</sup> Such an awareness can, at least in some instances, infiltrate the jury’s deliberative process and prevent the death sentence from springing wholly from the jury’s desire and belief that it *can* delegate. Consequently, in the *Caldwell* predicament or a *Tedder* jurisdiction, a chance that the jurors do grasp the constraints on the supposed delegatee can constitute a hope of some adulteration of the purely delegatory impulse.

While Alabama has all of the dangers inherent in a *Caldwell* scenario or *Tedder* state, it lacks that one ray of hope. An Alabama jury, having the knowledge that the judge will merely “consider” its advice and need not give it “great weight,” faces no possible impediment to

---

256. *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) (emphasis added).

257. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

258. *Caldwell*, 472 U.S. at 331.

259. *Harris*, 115 S. Ct. at 1036.

260. See *Caldwell*, 472 U.S. at 336. Even if we look only myopically at the language in decisions in the wake of *Caldwell* that purport to limit the *Caldwell* rule to “misleading” the jury in such a way as to diminish its sense of responsibility for capital sentencing, see *supra* note 105 and accompanying text, then Alabama’s scheme still violates the *Caldwell* principles. That is, the Alabama jury believes it is issuing a delegatory death sentence when, in practice, jury death will almost always be judicially affirmed.

261. *Id.* at 330.

262. *Id.*

263. See *id.*

an act of pure delegation. Stated otherwise, the Alabama judge as delegatee is not an illusion, but a reality. Thus, the happenstance of a jury actually grasping the meaning or legal effect of the word "consider" will not chill but will actually promote an act of pure delegation.

Other aspects of the *Caldwell* situation, which the Supreme Court believed were capable of creating a death-biased jury, were even more potent in the capital sentencing scheme before the *Harris* Court. Specifically, the *Caldwell* Court feared "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts."<sup>264</sup> As the Court viewed it, the jury's belief that "it can more freely 'err because the error may be corrected on appeal,'" smoothes the way for such a send-a-message death sentence.<sup>265</sup> As discussed above, when the perceived corrector is *the* Alabama judge right there in the room, sending a message in the form of death advice is even easier: in the mind of the jury, the fix will be immediate, and because the Alabama judge will only "consider" their verdict, there are perceivably few or no obstacles to a quick judicial fix.

Also, the *Caldwell* Court opined that "[i]f the jury understands that only a death sentence will be reviewed, it will also understand that any decision to 'delegate' responsibility for sentencing can be effectuated by returning that sentence."<sup>266</sup> Alabama's capital sentencing procedure most effectively encourages the imposition of death "based on a factor wholly irrelevant to legitimate sentencing concerns."<sup>267</sup>

If an Alabama judge ultimately sentences the defendant to death, an appellate court automatically reviews the conviction and sentence.<sup>268</sup> Upon affirmance, the Alabama Supreme Court grants certiorari as a matter of right.<sup>269</sup> Consequently, an Alabama jury, understanding that death paves the way to appellate review, will already have some leaning toward a death recommendation. A countervailing factor, however, can in some instances be a jury's sense of discomfort about recommending death for the sole purpose of securing reviewability. Such a jury sentiment, even one adrift on some sub-

---

264. *Id.* at 331.

265. *Id.* (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring)).

266. *Id.* at 332.

267. *Id.*

268. ALA. CODE § 13A-5-47(e) (1994).

269. *Id.* § 13A-5-53(b).

liminal deliberative plane, can potentially counteract the impulse to sentence for the purpose of delegation.

Alabama's sentencing scheme actually eliminates that potential antidote to a jury's predilection to impose a death sentence "out of a desire to avoid responsibility."<sup>270</sup> A jury, understanding the judge can impose life if he or she finds that the jury had an illegitimate basis for advising death, can go for the death sentence without the slightest qualm. For an Alabama jury, it is a "win-win" proposition: their judicially-approved death advice secures the comfort of appellate review while the presence of the immediate corrector alleviates any potential trace of discomfort that their purely delegatory death sentence can create. Thus, while Alabama's sentencing procedures present all the "intolerable" dangers the *Caldwell* Court attributed to a sense of diminished responsibility, it also purges the process of potential tempering mechanisms.

Further, the *Caldwell* Court reasoned when jurors, who are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice" and know that the real decisionmakers will be the justices of the state supreme court, "will be tempted to view these respected legal authorities as having more of a 'right' to make such an important decision than has the jury."<sup>271</sup> The fact, however, that the Alabama corrector is, as Professor Mello has described it, the very judge that the jurors have come to know and respect throughout the trial,<sup>272</sup> compounds the harm. In the course of the trial, the judge—in a robe, commanding obedience, ruling on objections, and seemingly endowed with all the answers—undergoes real deification. Trusting that parental deity, jurors are tempted to delegate more to that figure than to the faceless delegates on the higher courts.<sup>273</sup>

Although the Alabama scheme augments the "intolerable dangers" that the *Caldwell* Court described, the *Harris* Court does not deal with the issue of potential death bias on the part of an Alabama advisory jury. Conceivably, the Court's silence in this regard is due to its conviction that its decisions in the wake of *Caldwell* have lowered *Caldwell* into an abyss of nonviability.<sup>274</sup> Such silence, however, more likely derives from the Court's implicit notion that, because *Harris*

---

270. *Caldwell v. Mississippi*, 472 U.S. 320, 332 (1985).

271. *Id.* at 333.

272. See Mello, *supra* note 26, at 298.

273. See *id.*

274. See *supra* notes 108-109 and accompanying text.

involved a jury that actually recommended life, the whole issue of jury death bias is irrelevant.

It is, in part, this failure to grapple with *Caldwell* as a fair analogue, or to identify the role of augmented death bias in the workings of such a jury override scheme, which renders the *Harris* reasoning disturbingly glib. As discussed above, if such a jury override scheme creates an augmentedly death-biased jury, then the jury's recommendation of life is highly improbable. Louise Harris, with witnesses "attest[ing] to her good background and strong character" and her "rearing several children, h[olding] three jobs simultaneously, and participat[ing] actively in her church,"<sup>275</sup> managed somehow to make it through the augmentedly death-biased battle field intact. Louise Harris, in winning life by a seven to five vote, had to have, in effect, rebutted that nearly irrebuttable presumption in favor of death. When the sentencing judge rejected this extreme life advice, he effectually ensured for Louise Harris what the *Caldwell* Court feared as a mere possibility—an execution unsupported by a founded determination that death was the appropriate punishment for the individual defendant.

Second, the *Harris* decision explicitly annihilates the sole safeguard of the *Tedder* standard. What makes such demise especially noxious is that it compounds the damage an augmentedly death-biased procedure already spawns. When under an override scheme such as that in Alabama, an advisory jury decides that life is the appropriate verdict, then, as stated earlier, life has to be *overwhelmingly* appropriate. It is only a *Tedder*-like standard, which requires trial judges to accord "great weight" to the jury's recommendation, and prohibits them from overriding the advisory life verdict, unless "the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ,"<sup>276</sup> that prevents the arbitrary demolition of the extreme life verdict and its wholly arbitrary replacement with death.

In determining that *Tedder* is not a constitutional requisite and the Eighth Amendment does not require the sentencing judge to ascribe "any particular weight to the verdict of an advisory jury,"<sup>277</sup> the *Harris* Court disingenuously retreats from its earlier consistent elevation of the *Tedder* standard as the "crucial protection"<sup>278</sup> for cap-

---

275. *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

276. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

277. *Harris*, 115 S. Ct. at 1034.

278. *Id.* at 1035 (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)).

ital defendants. In an ostensible effort to downplay its praise of the Florida Supreme Court for “tak[ing the *Tedder*] . . . standard seriously . . . and not hesitat[ing] to reverse a trial court if it derogates the jury’s role,”<sup>279</sup> the Court demotes such language to something beneath dicta.

A most disquieting repugnancy, of course, is between the Court’s refusal to deem the *Tedder* standard a constitutional requisite and its denomination of the “hallmark of the analysis” as “whether the scheme adequately channels the sentencer’s discretion so as to prevent arbitrary results.”<sup>280</sup> Specifically, in an augmentedly death-biased system, the judicial override of the jury life verdict is most likely arbitrary.

Further, the Court’s alignment of its rejection of a *Tedder* or *Tedder*-like requisite with its other decisions, in which it putatively declined to intrude on legislative choice, is similarly misguided. As the Court saw it, Harris’s position was not only like one it had previously rejected—“a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required”<sup>281</sup>—but also inconsistent with its well-settled corollary that the Constitution does not require that a state ascribe any specific weight to particular factors to be considered by the sentencer.<sup>282</sup>

Such a relegation of the *Tedder* safeguard issue to some general category of the balancing and weighing of mitigators and aggravators is inappropriate. Specifically, the balancing and weighing of mitigating and aggravating factors can be components of the purposeful inexactitude built into the deliberative process, one designed to subsume feelings that compel mercy or even some residual or lingering doubt.<sup>283</sup> Concededly, such an elusive process can defy containment in *one* legislatively imposed structure of specifics and particulars. A *Tedder* standard, however, is not of that genre. It does not involve the assignment of weights and balancing methods in the mix of deliberative factors. What *Tedder* does is guarantee some respect for the product that emerges from jury deliberation and serves to prevent the arbitrary judicial veto of the jury’s decisionmaking process.

If the Court’s rationale for not requiring the specification of methods for balancing mitigating and aggravating factors, or the attachment of specific weights to particular factors protecting the delib-

---

279. *Id.* (quoting *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

280. *Id.*

281. *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988)).

282. *Id.*

283. *See supra* notes 67-70 and accompanying text.

erative process,<sup>284</sup> then the Court's eradication of *Tedder* is glaringly contradictory. That is, in an override system it is the *Tedder* standard that can heed the sanctity of that decisionmaking process by safekeeping the verdict itself. Thus, the *Harris* Court's simultaneous preservation of legislative leeway in the context of weighing and balancing, and its obliteration of the very standard that secures the outcome of all that weighing and balancing, is self-defeating.

In addition, to evoke the language of Justice Stevens's dissent, the jury override scheme without *Tedder* has "perverse" double jeopardy consequences.<sup>285</sup> In a standardless override system, a jury life verdict can be almost as if it never happened. The prosecutor, who "may present the judge with exactly the same evidence and arguments that the jury rejected," has a better shot at death before the "likely less sympathetic decisionmaker."<sup>286</sup> Because the jury life verdict can be almost as if it never happened, the override scheme without *Tedder*, "devolve[s] into a procedure that requires the defendant to stave off a death sentence at each of two *de novo* hearings."<sup>287</sup> How can anything more literally put a Louise Harris twice in jeopardy of life?

Third, not only does the *Harris* Court annihilate the *Tedder* standard in precisely the situation in which it is most needed, but also promotes the excision of the tympanic membrane. The determinative slice comes in the form of the Court's seductive non sequitur: "The Constitution permits the trial judge, acting alone, to impose a capital sentence[; i]t is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight."<sup>288</sup> One problem is that a judge imposing death after a jury returns a life verdict exacerbates what is already inherent in the death penalty—the denigration of human life—and thus, is surely not *the same* as a judge acting alone.

An override scheme such as Alabama's derogates the role of the jury and, as Justice Stevens pointed out, "aggravates the very dangers [the death penalty] was intended to deter."<sup>289</sup> According to his dissent, overrides sacrifice the legitimacy of jury verdicts at potentially great costs.<sup>290</sup> Because of the perceivedly honored status of the jury, the public presumes that a death sentence imposed by a jury reflects

---

284. *Harris*, 115 S. Ct. at 1035.

285. *Id.* at 1040 (Stevens, J., dissenting).

286. *Id.*

287. *Id.*

288. *Id.* at 1037.

289. *Id.* at 1041.

290. *Id.*



the community's judgment that death is the appropriate response to the crime.<sup>291</sup> In contrast, however, "the same presumption does not attach to a lone government official's decree."<sup>292</sup> For, as Justice Stevens viewed it, such "government-sanctioned executions unsupported by judgments of a fair cross-section of the citizenry may undermine respect for the value of human life itself and unwittingly increase tolerance of killing."<sup>293</sup>

This increased tolerance of killing also is a product of the override's disparagement of the capital sentencing hearing. A capital defendant's story can, of course, literally mean life or death. It can be the mercy-producing, communicative bridge from the defense table to the "black box."<sup>294</sup> The sentencing phase of a capital trial is, in fact, designed to be the place where the accused's voice is less subject to falsification and diminution.<sup>295</sup>

In making its life or death determination, the capital sentencer must be allowed to consider all sorts of mitigating circumstances. As the Supreme Court has held, the "consideration of the character and record of the individual offender or the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death."<sup>296</sup> That capital sentencing phase as *the* procedural conduit for transmitting defense noises to the jury is so crucial that the state legislatures may not even circumscribe the mitigators.<sup>297</sup>

The capital sentencing hearing can, of course, be quite time-consuming and stressful for the jurors. When a judge can simply discard a life recommendation, which is the fruit of the sentencing jury's labor, the message is one that shrivels not just the fruit but the labor itself. In a *Tedder* jurisdiction, the judicial rejection of life advice literally brands *a* particular jury's decision as unreasonable.<sup>298</sup> A sentencing scheme, such as the one in *Harris*, however, constitutes a blanket legislative pronouncement that *all* juries mean little as participants in capital sentencing and their decisions should carry little or no weight.

---

291. *Id.*

292. *Id.*

293. *Id.*; see also *id.* at 1041 n.9 ("Research has provided evidence that executions actually increase the level of violence in society.").

294. See Higginbotham, *supra* note 40, at 1051.

295. See *supra* notes 49-50 and accompanying text.

296. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); see also *supra* note 59.

297. See *supra* notes 58-62 and accompanying text.

298. See *Radelet & Mello*, *supra* note 5, at 204 ("Under *Tedder*, if a judge overrides a jury's recommendation of life imprisonment, the judge is not-so-implicitly stating that the jury is not composed of 'reasonable people.'").

Thus, the *Tedder*-less scheme more broadly indicts the whole capital jury sentencing system.

While the override of any jury verdict transforms the jury sentencing hearing into an ersatz proceeding, the judge's replacement of life with death deflates the main thrust of the hearing and the role of the defense narrative. The whole process, one which emphasizes sending mitigators to the intended auditory organ—the tympanic membrane—becomes for the overridden jury a time-wasting exercise in futility. As such, the message of such an override procedure is essentially tripled. First, it expresses contempt for the community's judgment.<sup>299</sup> Second, it hurls that same contempt at the very process whereby the sentencing jury arrives at its judgment. Third, it increases contempt for human life. In other words, the override's effectual relegation of the life or death story telling process to the category of sham conterminously brands life itself as a sham.

The excision of the tympanic membrane breeds a species of murder, and not just in the form of a "government-sanctioned execution" of a Louise Harris.<sup>300</sup> There is also homicide in the statutorily sanctioned derision of the very process that the individualized Louise Harris story obtained for Louise Harris her jury life verdict. The broader impartation is that life is simply unimportant. The *Harris* decision, thus, with its rejection of the *Tedder* safeguard in an augmented death-biased context, and with its approval of the excision of the tympanic membrane, fosters a view that human life is trivial.

### Conclusion

The capital sentencing procedure ratified by the *Harris* Court should not be dismissed as the mere equivalent of a "trial judge, acting alone, . . . impos[ing] a capital sentence."<sup>301</sup> What makes such an override scheme more dangerous than a death penalty issuing from a lone sentencer is its tendency to create an augmented death bias on the part of the jury while simultaneously eliminating the one safeguard that can conceivably accord some deference to a jury's life verdict.

The Alabama statute irresistibly entices an advisory jury into delegating responsibility through a death recommendation. An Alabama jury wishing only to send a message of its disapproval of the defendant's conduct can do so freely because the judge, the one it has grown

---

299. *Harris v. Alabama*, 115 S. Ct. 1031, 1041 (1995) (Stevens, J., dissenting).

300. *Id.*

301. *Id.* at 1037.

to trust,<sup>302</sup> is right there ready to deliver a nearly instant fix. Where there is pure incentive to ensure appellate review that propels a jury to issue a death verdict, the advisory jury can do so without the slightest misgiving. This is because the jury understands that their deified judge can almost immediately correct a result with an illegitimate underlying basis.

Also, in Alabama, the fact that the putative delegatee will rarely reject death advice makes the sense of diminished responsibility misleading and the procedure noxious. That is, as the Supreme Court had feared in *Caldwell*, delegation does “not simply postpone the defendant’s right to a fair determination of the appropriateness of death[, but] rather . . . deprive[s the defendant] of that right.”<sup>303</sup>

Further, while Alabama’s capital sentencing scheme magnifies the dangers the Court identified in *Caldwell*, it lacks a mechanism that could possibly inhibit delegation. In override jurisdictions that have a *Tedder* or *Tedder*-like standard, jurors, truly understanding that their recommendation carries “great weight,”<sup>304</sup> can possibly discern a glitch in their attempt to avoid responsibility through advising death. Alabama juries, however, likely lack any such perception that could operate to chill attempted delegation. Specifically, an Alabama advisory jury, unaware of the death-override statistics yet grasping the real significance of its advice as something for mere judicial consideration, can unrestrainedly return a purely delegatory death verdict.

Because of its built-in augmented death bias, a judicial override of a jury death recommendation is quite different from judicial rejection of life advice. When a judge overrides death advice, the effect is salutary, not just because it spares a life, but also because it compensates for a jury decision ensuing from an extreme death predilection. When an augmentedly death-biased jury recommends life, however, the jury’s assessment has to be that life is overwhelmingly appropriate. When judges override a *life* verdict, they guarantee for a capital defendant what the *Caldwell* Court feared was the possible outcome of a death-biased jury—an unsupported execution.

While an override procedure with its tendency to augment death bias is by itself devastating, which the Supreme Court approved in *Harris*, the override without a *Tedder* or *Tedder*-like safeguard is compounded devastation. Specifically, the “great weight” standard for-

---

302. See generally Mello *supra* note 26, at 297-98; *supra* notes 122-127 and accompanying text.

303. *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

304. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

bidding a judge from rejecting jury life advice, unless the facts suggest a sentence of death so clear and convincing that virtually no reasonable person could differ, stands as the solitary protector against that extreme life decision. Thus, the absence of *Tedder* not only engenders what Justice Stevens described as “perverse”<sup>305</sup> double jeopardy consequences, but ensures and even effectually proliferates improper executions.

Also, through validation of an override procedure without a *Tedder* safeguard or its functional equivalent, the Supreme Court denigrates the role of the jury and the policies underlying the Sixth Amendment jury guarantee. Implicit in *Harris* is a disregard not only for the “conscience of the community,”<sup>306</sup> but also the very jury system that affords individual participation in democratic decisionmaking and serves as a shield from arbitrary governmental oppression.<sup>307</sup>

Additionally, the impact of the *Harris* decision on the tympanic membrane is most unsettling. As explained above, in capital sentencing, the jury functions as the intended recipient of the defendant’s mitigative life noises. When such a jury—after hearing the most relatively unsilenced, undisplaced, and unfalsified defense sounds—makes the crucial determination and a judge simply overrides that determination, the effect is like an excision of the tympanic membrane. In *Harris*, the Supreme Court encourages such an excision.

While concededly a judicial rejection of a jury death verdict is also an excision of the tympanic membrane and a disparagement of the jury’s part in the capital sentencing process, an override serving to spare a life or err in favor of life is saliently different from an override that results in the single-handed imposition of death.<sup>308</sup> Specifically, when the excision of the tympanic membrane ends up with a judicial jettison of jury *life* advice, its impact has to be what Justice Stevens envisioned as the “undermine[d] respect for the value of human life

---

305. *Harris*, 115 S. Ct. at 1040 (Stevens, J., dissenting).

306. See *supra* note 26; see also *supra* notes 34, 44-46 and accompanying text.

307. See *supra* notes 36-39, 47-48, 71-74.

308. The Florida Supreme Court has stated the *Tedder* standard also applies to jury death recommendations. See, e.g., *Grossman v. State*, 525 So. 2d 833, 839 n.1 (Fla. 1988); *LeDuc v. State*, 365 So. 2d 149, 151 (Fla. 1978); see also *Radelet & Mello, supra* note 5, at 206 (quoting *Stanley v. Zant*, 697 F.2d 955, 960 (11th Cir. 1983) (“[A]bolishing the Florida judge’s power to override a jury’s life recommendation, but not the power to override a death recommendation, would create an asymmetry. But it would be an ‘an asymmetry weighted on the side of mercy.’”)), *cert. denied*, 467 U.S. 1219 (1984). *Radelet and Mello* also argue that the judicial overriding of death recommendations has certain “pragmatic benefits”—like allowing for an “early and efficient means to filter out cases for which the death penalty is inappropriate.” *Radelet & Mello, supra* note 5, at 208-09.

and unwittingly increase[d] tolerance of killing.”<sup>309</sup> That devastation is not just due to the public presumption “that a death sentence imposed by a jury reflects the community’s judgment that death is the appropriate response to the defendant’s crime,” one which “does not attach to a lone government official’s decree.”<sup>310</sup> It also derives from the override’s effectual degradation of the very life or death hearing and disdain for the jury labor that went into the process of arriving at a life verdict. What an override of a jury life verdict uniquely does is trivialize the very product of the enterprise.

It is, of course, even more degrading when that judicial obliteration of life can take place without the necessity of a controlling standard. One of the messages arising from the now judicially condoned standardless override is that the shift from life to death is insignificant, and thus an event not worthy of submission to the contours of any real circumspection or governance. If, as Justice Brandeis once admonished, “[g]overnment is the potent, the omnipresent teacher,”<sup>311</sup> then the Supreme Court’s governmental sanctioning of what can be a single-handed and cavalier death blow does not merely teach, but, in fact, dignifies the act of killing. In truth, the *Harris* decision constitutes the Supreme Court’s apotheosis of governmental murder.

This Article began with Sir Walter Raleigh’s attempts to parse pain with his sonnet, “To His Son.”<sup>312</sup> Through his dissection of an execution into its veritable components, the poet arrives at the “rotting” and “fretting” and “choking” qualities of the whole.<sup>313</sup> Had the Supreme Court in *Harris* analyzed the statutory death scheme with only some of that poetic precision, it would have declined to approve the consummate assemblage of three things that are quite “rotting” and “fretting” and “choking” unto themselves: an augmented death bias, a standardless override, and an excision of the tympanic membrane.

---

309. *Harris*, 115 S. Ct. at 1041 (Stevens, J., dissenting).

310. *Id.*

311. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

312. *See supra* note 1 and accompanying text.

313. *Id.*

