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TAKING CALDWELL V. MISSISSIPPI SERIOUSLY: THE UNCONSTITUTIONALITY OF CAPITAL STATUTES THAT DIVIDE SENTENCING RESPONSIBILITY BETWEEN JUDGE AND JURY

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I. INTRODUCTION

In most states with the death penalty, juries sentence;¹ in most capital punishment states where juries do not sentence, judges sentence.² In Florida, Alabama, and Indiana, juries *and* judges sentence: The jury renders a nonbinding sentencing recommendation, which the judge may follow or disregard.³

¹ Twenty-nine jurisdictions with presumptively valid capital statutes allow a death sentence only if the jury votes for death, unless the defendant has requested sentencing by the court. See 49 U.S.C. § 1473(c) (1982); ARK. STAT. ANN. § 41-1301 (1977); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. § 16-11-103 (1986 & Supp. 1987); CONN. GEN. STAT. § 53a-46a (1983); DEL. CODE ANN. tit. 11, § 4209 (1987); GA. CODE ANN. §§ 17-10-30 to 17-10-32 (1982); ILL. REV. STAT. ch. 38, para. 9-1 (Supp. 1984); KY. REV. STAT. ANN. § 532.025(1)(b) (Michie/Bobbs-Merrill 1985); LA. CODE CRIM. PROC. ANN. art. 905.8 (West Supp. 1988); MD. ANN. CODE art. 27, § 413 (1987); MASS. GEN. LAWS ANN. ch. 279, §§ 68, 70 (West Supp. 1988); MISS. CODE ANN. § 99-19-101 (Supp. 1987); MO. REV. STAT. § 565.006 (Supp. 1982); N.H. REV. STAT. ANN. § 630.5 (1986 & Supp. 1987); N.J. STAT. ANN. § 2C:11-3 (West 1982 & Supp. 1988); N.M. STAT. ANN. § 31-20A-3 (1987); N.C. GEN. STAT. § 15A-2000 (1983); OHIO REV. CODE ANN. § 2929.03 (Baldwin 1986); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1988 & Supp. 1988); 42 PA. CONS. STAT. ANN. § 9711(f) (Purdon 1982); S.C. CODE ANN. § 16-3-20 (Law Co-op. 1985 & Supp. 1987); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1988); TENN. CODE ANN. § 39-2-203 (1982); TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981 & Supp. 1988); UTAH CODE ANN. § 76-3-207 (Supp. 1983); VA. CODE ANN. § 19.2-264.4 (1983); WASH. REV. CODE ANN. § 10.95.030 (Supp. 1988); WYO. STAT. § 6-2-102 (1983). In Nevada, the jury is given responsibility for imposing the sentence in a capital case, but if the jury cannot agree, a panel of three judges may impose sentence. NEV. REV. STAT. ANN. §§ 175.554, 175.556 (Michie 1986).

² In Arizona, Idaho, Montana, and Nebraska, the court alone imposes sentence. ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1983-1984); IDAHO CODE § 19-2515 (1987); MONT. CODE ANN. § 46-18-301 (1987); NEB. REV. STAT. § 29-2520 (1985).

³ FLA. STAT. § 921.141 (1983); ALA. CODE § 13A-5-46 (1982); IND. CODE § 35-50-2-9 (Supp. 1984). The capital sentencing provisions of Kentucky and Ohio refer to the jury's sentencing determination as a "recommendation." KY. REV. STAT. § 532.025(1)(b) (Michie/Bobbs-Merrill 1985) (jury shall "recommend a sentence for the defendant"); OHIO REV. CODE ANN. § 2929.03(D) (Baldwin 1986) ("If the trial jury recommends that the sentence of death be imposed upon the offender, the Court shall proceed to impose sentence pursuant to . . . this section."). Under neither statute, however, may a trial judge *increase* a life recommen-

This article examines the constitutionality of capital sentencing schemes that divide sentencing responsibility between judges and juries. The United States Supreme Court recently addressed the capital sentencing responsibility issue in a somewhat different — although, I will argue, analogous — context in *Caldwell v. Mississippi*.⁴ The Court in *Caldwell* vacated a jury-imposed death sentence because the prosecutor told the jury in closing argument that the ultimate responsibility for determining the appropriateness of the sentence rested with the appellate court, and not with the jury. The prosecutor's statement was an inaccurate statement of Mississippi law: it also diminished the jury's sense of sentencing responsibility.⁵

The Justices in *Caldwell* identified two related constitutional evils: giving the jury misinformation about its role and giving the jury information that, even if accurate, diminished its sense of responsibility.⁶ Some lower courts applying *Caldwell* have focused on the misinformation dimension of *Caldwell*;⁷ others have emphasized the critical task of maintaining a jury's sense of responsibility.⁸

dation to a death sentence. The judge is authorized, at her discretion, to *reduce* a recommendation of death to a life sentence. Such an occurrence is rare, however. *E.g.*, *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (Leibson, J., concurring) ("If a jury so recommends [death], almost without exception the trial judge has followed the jury's recommendation by imposing the death penalty."). Although the Ohio Supreme Court has consistently refused to recognize the constitutional implications in its statutory provisions, the Kentucky Supreme Court has reversed a death sentence where the prosecutor and trial judge emphasized that the jury sentence was only a "recommendation." *Compare* *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987), *cert. denied*, 108 S. Ct. 1089 (1988) and *State v. Rogers*, 28 Ohio St. 3d 427, 504 N.E.2d 52 (1986), *cert. denied*, 108 S. Ct. 358 (1987) and *State v. Williams*, 23 Ohio St. 3d 16, 490 N.E.2d 906 (1986), *cert. denied*, 480 U.S. 923 (1987) with *Ward v. Commonwealth*, 695 S.W.2d at 408. The concerns raised by these statutes are analogous and relevant to those implicated under the Alabama, Florida, and Indiana override provisions discussed in this article. *See* *Steffen v. Ohio*, 108 S. Ct. 1089 (1988) (Brennan, Marshall, & Blackmun, JJ., dissenting from denial of certiorari).

⁴ 472 U.S. 320 (1985).

⁵ *Id.* at 328–30, 341.

⁶ *Id.* at 332–33. *See also* *Darden v. Wainwright*, 106 S. Ct. 2464, 2473 n.15 (1986) (interpreting *Caldwell* to prohibit those comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision").

⁷ *E.g.*, *Main v. Dugger*, 844 F.2d 1446, 1449 (11th Cir. 1988) (en banc), *petition for cert. filed*, 57 U.S.L.W. 3007 (U.S. June 19, 1988) (No. 87-2073); *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988) (en banc); *Adams v. Wainwright*, 804 F.2d 1526, 1532–33 (11th Cir. 1986), *modified sub nom. on other grounds*, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988); *Combs v. State*, 525 So. 2d 853, 856–57 (Fla. 1988); *Grossman v. State*, 525 So. 2d 833, 839 (Fla. 1988); *Foster v. State*, 518 So. 2d 901, 901–02 (Fla. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

⁸ *E.g.*, *Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 391 (Ky. 1985) ("The importance of *Caldwell v. Mississippi* is that it makes clear that what is critical is telling the jury that

I will focus on the diminution of responsibility component of *Caldwell*.

Under the trifurcated systems of Florida, Alabama, and Indiana, even a descriptively accurate statement regarding the specific roles of the judge and jury would suggest that each bears, at most, only partial responsibility for the sentence. As a result, both judge and jury could look to the other as the decisionmaker responsible for making the hard choices — with neither ever doing so. When responsibility for a death sentence is divided, there exists the danger — identified in *Caldwell* as constitutionally intolerable — that *no one* bears the ultimate responsibility for this critical decision.

II. THE JURY OVERRIDE STATUTES

Jury override statutes are a recent phenomenon. In Florida, for example, juries sentenced in capital cases for the century prior to the Supreme Court's 1972 decision in *Furman v. Georgia*,⁹ which invalidated all capital statutes in the United States as then administered.¹⁰ The jury override procedure was

its sentence is only a recommendation, without regard to the argument over whether the word 'recommendation' is technically correct.").

⁹ 408 U.S. 238 (1972).

¹⁰ In 1822, when Florida became a Territory, Florida enacted its first criminal code. The First Legislative Council of Florida, meeting in Pensacola, passed "An Act for the Apprehension of Criminals, and the Punishment of Crimes and Misdemeanors." See Session Laws, Act of Sept. 17, 1822. This act, which provided for the first sanctioned death penalty under Florida's territorial or state authority, designated three offenses as capital: murder, rape, and arson. The act used mandatory language, specifying that any person committing the specified offenses "shall suffer death." *Id.* § 21. Sixteen years later, the legislature added twelve crimes to the list of capital offenses; this act, apparently for the first time, distinguished between crimes committed by white citizens and crimes committed by Black slaves or freed people. Death was made mandatory upon conviction of seven of these twelve offenses; the other five were punishable, at the court's discretion, by death, whipping, branding, or maiming. See Session Laws, Act of Nov. 21, 1838, §§ 38, 34, 56, 35, 36, 39, 23, 24, 25, 19.

By 1847, all but two capital offenses carried a mandatory penalty of death. The *Manual or Digest of the Statute Law of the State of Florida*, a publication that "Digested and Arranged" the statutes "In Force At The End of the General Assembly of the State, On The Sixth Day of January, 1847," reported that at that time death "shall" be imposed for murder, rape, arson, stealing a slave, perjury that causes an innocent life to be taken, conspiracy by a Black person, assault of a white by a Black person, manslaughter of a white person by a Black person, and assault of a white woman or child by a Black person. *Id.* at tit. 1, ch. III, § 1, ch. IV, § 1, § 6, ch. V, § 1, tit. 4, ch. 1, §§ 2-7. Only two offenses gave the court discretion to impose a sentence of less than death. *Id.* at tit. 4, ch. 1, §§ 8, 9.

The 1847 *Digest* also records the beginnings of the trend away from mandatory sentencing. The legislature had by 1847 given the jury discretion in sentencing for a wide variety of noncapital offenses: manslaughter, involuntary manslaughter, burglary, larceny, robbery,

Florida's attempt to comply with the unclear commands of *Furman*.¹¹

The statutory provisions of the three jury override states are substantially similar. With the exception of details regarding the actual sentencing procedures and hearings, the statutes of Alabama and Indiana are patterned after the Florida legislation.¹² The United States Supreme Court, in *Spaziano v. Florida*,¹³ upheld the constitutionality of the Florida override provision. Subsequent to *Spaziano*, the Court has denied certiorari to challenges to the Alabama and Indiana override provisions.¹⁴ Both states have relied on *Spaziano* to uphold the constitutionality of their own override provisions.¹⁵

Since Florida's current capital punishment statute was enacted in 1972, there have been 526 death sentences imposed in the state.¹⁶ Of these, 113 resulted from judge overrides of jury recommendations of life sentences.¹⁷ Therefore, the trial judge disregarded the jury's determination that life imprisonment was the appropriate punishment for one out of every four Florida defendants sentenced to death. In Alabama, of ninety-six prisoners currently on death row, seventeen were sentenced to death following the jury's rec-

and stealing, among many others. See *id.* at tit. 1, ch. 111, §§ 2, 3, 4, ch. IV, §§ 2, 3. In 1872, the legislature rejected mandatory capital punishment in favor of discretionary death sentencing. W. BOWERS, *LEGAL HOMICIDE* 10-11 (1984). By 1884 the Florida Supreme Court was able to state that "[t]he law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be actuated (and these motives are not circumscribed) the court is bound to heed their verdict and pronounce sentence accordingly." *Newton v. State*, 21 Fla. 53, 101 (1884); see also *Garner v. State*, 28 Fla. 113, 161, 9 So. 835, 847 (1891).

¹¹ Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10, 12-15 (1973); Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 68-70 (1985).

¹² Following the Supreme Court's determination that the Florida statute satisfied the constitutional requirements and concerns of *Furman*, see *Proffitt v. Florida*, 428 U.S. 242, 251 (1976), both Alabama and Indiana enacted statutes substantially similar to the Florida provisions. Compare ALA. CODE § 13A-5-45 through § 13A-5-53 (1981) and FLA. STAT. § 921.141 (1983) with IND. CODE § 35-50-2-9 (1981). See also Note, *The Indiana Death Penalty: An Exercise in Constitutional Futility*, 15 VAL. U.L. REV. 409, 426 (1981).

¹³ 468 U.S. 447 (1984).

¹⁴ *Harrell v. Alabama*, 106 S. Ct. 269 (1985); *Schiro v. Indiana*, 106 S. Ct. 1246 (1986).

¹⁵ E.g., *Ex Parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985); *Bieghler v. State*, 481 N.E.2d 78, 94 (Ind. 1985).

¹⁶ Letter from Michael Radelet, Ph.D., Associate Professor, University of Florida, to Dennis Balske, Esq. (Mar. 7, 1988) [hereinafter Radelet Letter]; see also Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409 (1985).

¹⁷ Radelet Letter, *supra* note 16.

ommendation of life imprisonment.¹⁸ In Indiana, trial courts have overridden jury's life recommendations on three occasions.¹⁹

A. *The Statutes*

Upon conviction of a capital felony, a separate sentencing proceeding is conducted to determine whether the defendant should be sentenced to life imprisonment or death.²⁰ During this primary sentencing phase, evidence is presented to the jury to show the existence or nonexistence of aggravating and mitigating circumstances. The jury considers all evidence introduced at the trial, as well as any additional evidence or testimony relevant to the sentencing determination.²¹ After all of the sentencing evidence is presented, the jury makes an "advisory"²² sentence or "recommendation."²³

In order to recommend a sentence of death, the jury must find the existence of at least one aggravating circumstance, and conclude that any mitigating circumstances are outweighed by the aggravating circumstances.²⁴ Indiana and Florida require that aggravating circumstances be proven beyond a reasonable doubt, whereas Alabama only requires findings that such factors exist. The jury is not required to issue findings on the circumstances considered.

In all three jury override states, after the jury has returned its advisory sentence, the judge completes the final phase of the sentencing procedure by making the ultimate sentencing determination. The judge is required to make her own findings as to aggravating and mitigating circumstances, independently of the jury's deliberations.²⁵ In deciding upon the sentence, the statutes in Alabama and Indiana require the judge to consider the jury's advisory

¹⁸ Letter from Eva Ansley, Alabama Capital Case Resource Center, to Michael Mello (May 26, 1988). There are two additional Alabama cases, no longer under an active death sentence, where death sentences were imposed after a jury recommendation of life-without-parole. Arthur Jones was executed on March 21, 1986. *Jones v. State*, 456 So. 2d 366 (Ala. Crim. App. 1983), *aff'd*, Ex Parte Jones, 456 So. 2d 380 (Ala. 1984), *cert. denied*, 470 U.S. 1062 (1985). Coy Patrick Crowe was resented to life imprisonment in November 1986. *Crowe v. State*, 485 So. 2d 351 (Ala. Crim. App. 1985), *rev'd*, Ex Parte Crowe, 485 So. 2d 373 (Ala.), *cert. denied*, 106 S. Ct. 3284 (1986).

¹⁹ Letter from Eva Ansley, *supra* note 18.

²⁰ FLA. STAT. § 921.141(1); ALA. STAT. §§ 13A-5-45, 13A-5-46; IND. STAT. § 35-50-2-9(d).

²¹ FLA. STAT. § 921.141(1); ALA. CODE § 13A-5-45(c); IND. CODE § 35-50-2-9(d).

²² FLA. STAT. § 921.141(2); ALA. CODE § 13A-5-46(e).

²³ IND. CODE § 35-50-2-9(e)(2).

²⁴ *Id.* § 35-50-2-9(e); FLA. STAT. § 921.141(2); ALA. CODE § 13A-5-46(e)(3).

²⁵ FLA. STAT. § 921.141(3); ALA. CODE §§ 13A-5-47, 48; IND. CODE § 35-50-2-9(e).

sentence.²⁶ The Florida statute contains no such express provision for consideration of the jury's recommendation, but the Florida Supreme Court has held that the jury's recommendation is to be accorded great deference.²⁷ In all three states, nonetheless, the statutes are clear as to the nonbinding nature of the jury's recommendation.²⁸ In each case where the judge imposes a death sentence, the court must enter written findings of fact concerning the aggravating and mitigating circumstances.²⁹

B. Appellate Review of Jury Overrides

In all three jury overrides states, the capital sentencing statutes expressly provide for automatic review of death sentences. In Florida and Indiana, the judgment of conviction and sentence of death is subject to review by the state's supreme court.³⁰ In Alabama, the condemned person is entitled to review by the Alabama Court of Criminal Appeals, subject to discretionary review by the Alabama Supreme Court.³¹

Alabama and Indiana have adopted similar standards for review of the judge-imposed death sentence, regardless of the jury's advisory sentence. In both states, the guilt or innocence determination as well as the appropriateness of the death sentences are reviewed for error.³² In neither Alabama nor Indiana, however, does the appellate court review the trial court's jury override sentencing in light of the jury's recommendation. In Indiana the "rules governing the scope of appellate review of sentences provide that the appellate court 'will not revise a sentence authorized by statute except where such sentence is *manifestly unreasonable*,' and a 'sentence is not manifestly unreasonable unless no reasonable person

²⁶ ALA. CODE § 13A-5-47(e); IND. CODE § 35-50-2-9(e).

²⁷ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see also Engle v. State*, 438 So. 2d 803, 812 (Fla. 1983).

²⁸ FLA. STAT. § 921.141(3) ("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."); ALA. CODE § 13A-5-47(e) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."); IND. CODE § 35-50-2-9(e) ("The court is not bound by the jury's recommendation.").

²⁹ FLA. STAT. § 921.141(3); ALA. CODE § 13A-5-47(d); IND. CODE § 35-50-1A-3.

³⁰ FLA. STAT. § 921.141(4); IND. CODE § 35-50-2-9(h).

³¹ ALA. CODE § 13A-5-53.

³² *See Floyd v. State*, 486 So. 2d 1309, 1316 (Ala. Crim. App. 1985), *aff'd sub nom. Ex Parte Floyd*, 486 So. 2d 1321, 1323 (Ala. 1986); *Schiro v. State*, 451 N.E.2d 1047, 1053 (Ind.), *cert. denied*, 464 U.S. 1003 (1983).

could find such sentence appropriate"³³ Thus, the focus of appellate review in those states is on the propriety of the trial judge's decision, with the jury's recommendation viewed, at best, as a factor to be "considered." The trial court's findings of aggravating and mitigating circumstances, along with asserted procedural errors, provide the basis for appellate review. Indeed, some Alabama and Indiana cases have rejected the jury recommendation of sentence as an especially significant factor in appellate review.³⁴ There have been no capital sentence reversals on the issue of jury override in the Alabama appellate courts.³⁵ Likewise, in Indiana, there have been no appellate court reversals or remands due to a judge's error in considering the jury's advisory sentence.³⁶ Both states upheld the constitutionality of their jury override provisions after *Spaziano*.³⁷

In Florida, by contrast, a death sentence imposed following a jury's recommendation of life imprisonment will be sustained on appeal only if the "facts suggesting a sentence of death . . . [are so] clear and convincing that virtually no reasonable person could differ."³⁸ Florida's stringent standard of review has been applied vigorously by the Florida Supreme Court. Between two-thirds and three-fourths of all life overrides reviewed by the court have been vacated and remanded for imposition of a life sentence, resentencing, or retrial.³⁹ Although the scope and realm of appellate review may be limited, a jury recommendation of life imprisonment remains the single best indicator of the Florida Supreme Court's reversal of the trial judge's death sentence.⁴⁰

³³ *Schiro v. Indiana*, 106 S. Ct. 1247, 1248 (1986) (Marshall, J., dissenting from denial of certiorari) (emphasis in original).

³⁴ *Ex Parte Jones*, 456 So. 2d 380, 382 (Ala. 1984) ("It appears to this Court, however, that the United States Supreme Court, in *Proffitt* and *Dobbert*, did not find the *Tedder* rule to be a general constitutional requirement under a statutory scheme similar to that of Florida."); *Schiro*, 451 N.E.2d at 1058 ("While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty.").

³⁵ Letter from Eva Ansley, Alabama Capital Case Resource Center, to Dennis Balske, Esq. (Mar. 9, 1988).

³⁶ Letter from Monica Foster, Indiana Public Defenders Office, to Michael Mello (May 24, 1988).

³⁷ *Ex Parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985); *Bieghler v. State*, 481 N.E.2d 78, 94 (Ind. 1985).

³⁸ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

³⁹ Letter from Michael Radelet to Dennis Balske, Esq. (Mar. 7, 1988); Mello & Robson, *supra* note 11, at 52-55.

⁴⁰ Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 923 (1983).

III. CALDWELL v. MISSISSIPPI

Bobby Caldwell was convicted of the shooting death of a grocery store owner during the course of a robbery. In their case for mitigation during sentencing proceedings, Caldwell's lawyers asked the jury to show mercy, pointing to Caldwell's youth, character, and background. Defense counsel stressed the gravity and responsibility of sentencing a person to death.⁴¹ In reply, the prosecutor sought to minimize the jury's responsibility for its decision, stating:

I'm in complete disagreement with the approach the defense has taken. . . . I think it's unfair. 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. My God, how unfair can you be? Your job is reviewable. They know it.⁴²

The trial court, over defense objections, allowed the prosecutor's statements to stand, and explained to the jury that a death penalty is automatically reviewable.⁴³

Writing for a majority of the Court,⁴⁴ Justice Marshall held that these court-endorsed prosecutorial statements undermined the

⁴¹ Defense counsel stated that: "It's going to be your decision. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know — an awesome responsibility." 472 U.S. 320, 324 (1985).

⁴² *Id.* at 325.

⁴³ *Id.*

⁴⁴ Because Justice O'Connor wrote a separate concurrence, the *Caldwell* opinion is, technically, a plurality opinion. Justice O'Connor's brief concurrence, however, expresses only her disagreement with the plurality's treatment of *California v. Ramos*, 463 U.S. 992 (1983), and its suggestion that an accurate and non-misleading instruction about appellate review might be invalid because it would serve no valid state penological interest. Prefacing her discussion, she clearly stated that she joined "the judgment and the opinion of the Court, with the exception of Part IV-A. I write separately to express my views about the Court's discussion of *California v. Ramos*." 472 U.S. at 341 (O'Connor, J., concurring) (emphasis added). O'Connor fully joined in the fundamental thrust of Marshall's analysis: the conclusion that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Thus, the essential teachings of the *Caldwell* opinion represent the majority view of the Court, not merely a plurality opinion.

Indeed, Justice Rehnquist, dissenting, made frequent references to "the Court's" faulty analysis, rather than to the opinion of a mere plurality. *E.g.*, *id.* at 350 (Rehnquist, J., dissenting) ("I therefore find unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the statements here").

When other Justices writing in subsequent opinions have cited *Caldwell*, they have referred to it as the view of "this Court." *E.g.*, *Steffen v. Ohio*, 108 S. Ct. 1089, 1090 (1988) (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting from denial of certiorari);

eighth amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case."⁴⁵ At issue was the concern that "the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion."⁴⁶ Marshall emphasized that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."⁴⁷ Because the Court could not be certain that the prosecutor's

Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15, 2476 (1986) (Blackmun, J., dissenting). In *Steffen*, Justice Brennan explained that "this Court laid down a general prohibition against trial comments that minimize a jury's sense of responsibility for a death sentence." 108 S. Ct. at 1090. Brennan went on to describe the portion of the opinion that was the product of "a four-justice plurality," not joined by Justice O'Connor. *Id.* at 1091. With the exception of that part of *Caldwell*, the body of the opinion is a majority view.

Perhaps most telling of the fact that *Caldwell* is perceived, effectively, as a majority opinion, is the treatment that the case has received by the supreme courts of the several states that have addressed *Caldwell* claims. The Supreme Court of Virginia stated that in *Caldwell*, "Justice Marshall, writing for a majority of five, found that unreliability and bias inhere in death sentences following 'state-induced suggestions that the sentencing jury may shift its stint of responsibility to an appellate court.'" *Frye v. Commonwealth*, 231 Va. 370, 396, 345 S.E.2d 267, 285 (1986). The *Frye* court noted that "[o]ne section of Justice Marshall's opinion speaks for only a plurality of the Court, as Justice O'Connor wrote separately to express her view of the application of *California v. Ramos*." *Id.* at 396 n.5, 345 S.E.2d at 287 n.5. Similarly, the Supreme Court of Colorado, in *People v. Drake*, referred to *Caldwell* as the decision of "the United States Supreme Court," and held it to be fully controlling. 748 P.2d 1237, 1258-59 (Colo. 1988) (finding reversible error where prosecutor told sentencing jury that "you have a shared responsibility" because the job of passing on the death penalty is, ultimately, on the trial court). The New Jersey Supreme Court, in *State v. Ramseur*, finding error in the trial court's instructions that the jury's sentencing role was "merely to apply the law," held that "as the United States Supreme Court has recently made clear," jury instructions must never lead capital sentencers to believe that their responsibility is diminished. 106 N.J. 123, 316, 524 A.2d 188, 286 (1987). In fact, in virtually every state supreme court opinion that has addressed similar *Caldwell* claims, the *Caldwell* opinion is referred to as that of "the Court." See, e.g., *Hooks v. State*, 502 So. 2d 401, 401 (Ala. Crim. App. 1987); *People v. Milner*, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1988); *People v. Lego*, 116 Ill. 2d 323, 350, 507 N.E.2d 800, 810 (1987); *Matthews v. Commonwealth*, 709 S.W.2d 414, 421 (Ky. 1985); *State v. Clark*, 492 So. 2d 862, 871 (La. 1986); *Booker v. State*, 511 So. 2d 1329, 1332 (Miss. 1987); *Mazzan v. State*, 733 P.2d 850, 851 (Nev. 1987); *State v. Buell*, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1988); *Commonwealth v. Baker*, 511 Pa. 1, 21, 511 A.2d 777, 791 (1986); *Modden v. State*, 721 S.W.2d 859, 862 (Tex. Ct. App. 1986); *Petition of Jeffries*, 110 Wash. 2d 326, 752 P.2d 1338 (1988).

⁴⁵ *Caldwell*, 472 U.S. at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); see also, e.g., *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.").

⁴⁶ *Caldwell*, 472 U.S. at 329.

⁴⁷ *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

statements had no effect on the sentencing decision, the decision did not meet the standard of reliability required by the eighth amendment. Although Caldwell's conviction was affirmed, his death sentence was vacated.⁴⁸

Justice Marshall's opinion identified four reasons to fear "substantial unreliability" and a bias in favor of death sentences when there are suggestions that the jury sentencing decision is not final.⁴⁹ First, he noted the limited scope of appellate review of sentencing decisions. Appellate courts are "wholly ill-suited to evaluate the appropriateness of death in the first instance" because of the inability of the appellate record to convey the "intangibles" that may affect a death sentence.⁵⁰ Because "most appellate courts review sentencing determinations with a presumption of correctness," a defendant's right to a fair sentencing determination would not be merely postponed, but deprived altogether.⁵¹

Second, Justice Marshall observed that there was an "intolerable danger" that a jury, otherwise unconvinced that death is the appropriate sentence, might wish to "send a message" of extreme disapproval of the defendant's acts.⁵² Confident that the decision could be "corrected on appeal," the jury might more freely impose a sentence of death.

Third, because only a death sentence is reviewable, a jury's inclination to "delegate" responsibility would necessitate imposition of a death sentence. This would present the "specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns."⁵³ The death sentence resulting from the jury's desire to avoid ultimate responsibility could lead to a defendant's execution despite a state's failure to prove that death was the appropriate punishment.

⁴⁸ *Id.* at 341.

⁴⁹ *Id.* at 330.

⁵⁰ *Id.* Justice Marshall stated:

Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from the appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of mankind."

Id. (quoting *Woodson*, 428 U.S. at 304). He stated further, "[w]hen we held that a defendant has a constitutional right to the consideration of such factors . . . we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id.* at 330-31.

⁵¹ *Id.*

⁵² *Id.* at 331.

⁵³ *Id.* at 332.

Finally, Marshall acknowledged the extremely difficult position in which the capital sentencing juror is placed. Faced with the issue of deciding whether another should die, jurors are given "only partial guidance" and afforded "substantial discretion."⁵⁴ "Given such a situation," Marshall wrote, "the uncorrected suggestion that the responsibility for any determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of the role."⁵⁵ This problem is compounded when the jury is made aware that the ultimate arbiters are the justices of the state's supreme court. It is possible 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."⁵⁶ The invitation to rely on judicial review "will generate a bias toward returning a death sentence that is simply too great."⁵⁷

In light of the foregoing reasons, Marshall's opinion observed that legal authorities have almost unanimously rejected the type of statements made by the prosecutor in *Caldwell*. Most state courts that have dealt with the question have condemned the prejudicial effect of prosecutorial conduct that minimizes the juror's sense of responsibility.⁵⁸

Marshall addressed and rejected the state's three arguments for why *Caldwell*'s death sentence should be upheld regardless of the prosecutor's statements. First, Marshall found no merit to the state's contention that the prosecutor's comments were "invited" as a "reasonable response" to the defense counsel's arguments.⁵⁹ Second, Marshall reasoned that the Court's decision in *Donnelly v. DeChristoforo*⁶⁰ did not preclude a finding of constitutional error in the misleading arguments of a prosecutor.⁶¹ Third, Marshall rejected

⁵⁴ *Id.* at 333.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 333-34.

⁵⁹ *Id.* at 336-37.

⁶⁰ 416 U.S. 637 (1974). The *Donnelly* Court examined the prejudicial effect of a prosecutor's remark to the jury, in reference to defendant and his counsel: "They said that they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." *Id.* at 640. The Court held that this remark, though ambiguous, stood corrected by the trial court's specific disapproving instructions. *Id.* at 644-45. The Court emphasized the distinction between "ordinary trial error of a prosecutor" and "that sort of egregious misconduct" that would amount to a denial of constitutional due process. *Id.* at 647-48.

⁶¹ *Caldwell*, 472 U.S. at 337-40.

the state's argument that *California v. Ramos*⁶² was authority permitting states freely to decide what information about post-sentencing procedure to expose to a jury. Where the prosecutor's argument about appellate review is neither accurate nor relevant, the limited, valid state interest outlined in *Ramos* is not satisfied.⁶³ "That appellate review is available to a capital defendant," wrote Marshall, "is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence."⁶⁴ Creating an image of diminished responsibility is not a valid state interest and is not sanctioned by *Ramos*, Marshall concluded.⁶⁵

Justice O'Connor concurred in *Caldwell*, joining in the judgment and Marshall's opinion, with the exception of Marshall's brief treatment of *Ramos*. O'Connor, who wrote the Court's opinion in *Ramos*, agreed with Marshall's statement that *Ramos* was not controlling in *Caldwell*, reasoning that the prosecutor's comments "were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility."⁶⁶ O'Connor disagreed with what she perceived as Marshall's implication that any information regarding appellate review would be "wholly irrelevant."⁶⁷ Jurors may not understand the limited scope of appellate review, argued O'Connor, and accurate information may be needed to educate the jury on the importance of their decision.⁶⁸ The Constitution, she maintained, does not preclude the giving of in-

⁶² 463 U.S. 992 (1983). In *Ramos*, the Court upheld the constitutionality of California's statutory requirement that capital sentencing juries be instructed about the state governor's power to commute a sentence of life imprisonment without parole to a lesser sentence with the possibility of parole. *Id.* at 997. The Court determined that the provision served a legitimate state interest of accurately informing jurors of the significance of their sentencing decision. *Id.* at 1009.

⁶³ *Caldwell*, 472 U.S. at 336.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 342 (O'Connor, J., concurring).

⁶⁷ *Id.*

⁶⁸ Justice O'Connor stated that:

Should a state conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose a policy choice in favor of jury education. . . . Laypersons cannot be expected to appreciate without explanation the limited nature of appellate review, especially in light of the reassuring picture of "automatic" review evoked by the sentencing court and prosecutor in this case.

472 U.S. at 342, 343 (O'Connor, J., concurring).

structions that include such information.⁶⁹ O'Connor nonetheless agreed with Marshall's assessment that neither *Ramos* nor the Constitution permit the type of prosecutorial conduct exhibited in *Caldwell*: "I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously.'"⁷⁰

Justice Rehnquist wrote the dissenting opinion in *Caldwell*. He argued that the prosecutor's statements, viewed in the context of the entire closing argument, adequately stressed the importance of the jury's sentencing role.⁷¹ Further, he disputed Marshall's assumption that a sentencing jury with a reduced sense of responsibility is more likely to vote for the death penalty.⁷² Finally, Rehnquist criticized what he saw as the Court's willingness to find constitutional error in any departure from "optimum procedure" in a capital case.⁷³

IV. LEGAL DOCTRINE: APPLYING THE DIMINISHED RESPONSIBILITY DOCTRINAL AND POLICY CONCERNS OF *CALDWELL* TO THE JURY OVERRIDE STATUTES

A. *Caldwell* and Trial Level Judicial Review

The *Caldwell* Court held that substantial unreliability and bias in favor of death sentences may result from state-induced suggestions that the capital sentencing jury may shift its sense of respon-

⁶⁹ *Id.* at 342 (O'Connor, J., concurring). Justice O'Connor, who wrote the opinion in *Ramos*, misinterpreted and exaggerated Marshall's treatment of *Ramos*. Marshall wrote that a death sentence should never be imposed merely on the basis of the availability of the appellate review. In that context, Marshall viewed appellate review as a factor "wholly irrelevant to the determination of the appropriate sentence." *Id.* at 336. Although O'Connor argued that informing a jury of the limited scope of appellate review may be important to enhance the jury's sense of responsibility, there is nothing in Marshall's opinion to show that the plurality would not favor such jury instructions if used to increase capital sentencing reliability.

O'Connor may have been reacting to a misperception that the Court was abandoning *Ramos*. Indeed, Marshall favorably referred to O'Connor's language in *Ramos* that emphasized the "indispensability of sentencers who 'appreciat[e] . . . the gravity of their choice and . . . the moral responsibility reposed in them as sentencers.'" *Caldwell*, 472 U.S. at 336 (quoting *Ramos*, 463 U.S. at 1011).

⁷⁰ *Id.* at 343 (O'Connor, J., concurring) (citation omitted).

⁷¹ *Id.* at 349 (Rehnquist, J., dissenting).

⁷² *Id.* at 349-50 (Rehnquist, J., dissenting).

⁷³ 472 U.S. at 351 (Rehnquist, J., dissenting).

sibility to an appellate court. The type of prosecutorial misconduct and jury instructions condemned in *Caldwell* — comments about appellate review — had long been viewed improper by most state courts as a matter of state law or federal due process requirements.⁷⁴

Although the improper remarks in *Caldwell* referred to appellate review, state courts prior to *Caldwell* had held that any prosecutorial or judicial comment that tended to dilute a jury's sense of responsibility in capital sentencing was erroneous. Comments that pointed to trial level judicial review, as well as to appellate level judicial review, were equally proscribed.⁷⁵ These cases are in accord with the broader mandate of *Caldwell* that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."⁷⁶ The 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 determination.

The *Caldwell* Court held that, when a jury is told that the "alternative decisionmakers" are 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."⁷⁷ Although the specter of the state's supreme court would indeed cut an impressive and formidable visage to lay jurors, the high court stands as a distant abstraction. To the capital sentencing juror, the trial judge is posted as the immediate and tangible legal authority. She is their judge. As the *Caldwell* Court noted, the capital sentencing jury is placed in a difficult and uncomfortable position, facing an awesome responsibility. Moreover, they are given only partial guidance as to how their judgment should be exercised.⁷⁸

⁷⁴ *Caldwell*, 472 U.S. at 333-35.

⁷⁵ *Fleming v. State*, 240 Ga. 142, 146, 240 S.E.2d 37, 40 (1977) (reversible error where prosecutor told jury that death sentence would be reviewed by trial judge and by appellate court); *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (prosecutor impermissibly sought to divert jury from responsibility by telling jury that judge has ultimate sentencing role); *State v. Tyner*, 273 S.C. 646, 659, 258 S.E.2d 559, 565-66 (1979) (death sentence invalid where prosecutor argued that trial court would review any recommendation of death); *Lyons v. Commonwealth*, 204 Va. 375, 379, 131 S.E.2d 407, 409-10 (1963) (improper for prosecutor to tell jury that if it errs, trial court can correct mistake).

⁷⁶ *Caldwell*, 472 U.S. at 328-29 (emphasis added).

⁷⁷ *Id.* at 333.

⁷⁸ *Id.*

This guidance is provided by the trial judge, along with substantial instruction and assistance through each step of the trial process. To the jurors, the judge becomes, in effect, *their* judge, their ally in the legal process. In his recent book *Anatomy of a Jury*, Seymour Wishman wrote that "[m]ost 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."⁷⁹

The respect that the jury develops for the trial judge is reinforced by the court's control and command over the entire proceeding. The reference is further underscored by the trappings and wardrobe of the court. Cloaked in her black robe,⁸⁰ the trial judge emerges from the recesses of her chambers. All rise as she enters the courtroom and climbs to her elevated position at 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.

The authority and influence of the trial judge over the jury has long been recognized by the law. Because of this strong influence, the law has sought to strike a balance between promoting respect and deference while preventing undue bias and influence. As the Supreme Court noted nearly a century ago, "it is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that [her] slightest word or intimation is received with deference, and may prove controlling."⁸¹ Given such strong deference and respect accorded to the trial judge by the jury, the possibility that the jury may prefer to pass some of its frightening capital sentencing responsibility onto the shoulders of the trial judge is very real. As the *Caldwell* Court recognized, "it is certainly plausible to believe that many jurors will be tempted to view" the trial judge as having "'more of a right' to make such an important decision than has the jury."⁸² The prejudicial effects identified in *Caldwell*, therefore, are equally applicable to suggestions that lead a jury to believe that the responsibility for its sentencing decision, whether labeled as a "recommendation" or otherwise, will rest with the trial court.

⁷⁹ S. WISHMAN, *ANATOMY OF A JURY* 146 (1986); see also A. OSBORN, *THE MIND OF THE JUROR* 55, 207 (1937).

⁸⁰ See generally 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 6-1.3 (1986) ("The trial judge's appearance and demeanor should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.").

⁸¹ *Starr v. United States*, 153 U.S. 614, 626 (1894).

⁸² *Caldwell*, 472 U.S. at 333.

When the *Caldwell* Court laid down its general prohibition against trial comments that minimize a jury's sense of responsibility for a death sentence, it identified four ways in which bias in favor of death could result.⁸³ Each of these factors is equally salient where trial level, rather than appellate level, judicial review is posited to the penalty jury.

Justice Marshall's *Caldwell* opinion first reasoned that a jury composed of lay persons might not understand the limited nature of appellate review.⁸⁴ Marshall wrote of the inability of the appellate court to hear evidence and to see witnesses and their demeanor; therefore, appellate courts review sentencing determinations with a presumption of correctness. Although a trial judge, in contrast, is present to weigh evidence and evaluate witnesses' credibility, in most states where the trial judge fixes the actual penalty after considering the jury's "recommendation," there is an explicit or implicit presumption of correctness in the jury's determination. In Florida, as previously noted, where by statute the jury issues only an "advisory" sentence, the judge may only disregard that sentence where "virtually no reasonable person" could have made the recommended determination.⁸⁵ Even in the four states whose death penalty statutes authorize a trial judge to *reduce* a jury's recommendation of death,⁸⁶ this action may not be undertaken arbitrarily: The jury's sentencing determination is presumed to be correct.⁸⁷

The second factor identified by Marshall in *Caldwell* was that a jury might reach a death verdict even when unconvinced that death was the appropriate punishment, in order to "send a message" of extreme disapproval.⁸⁸ Given that the trial judge has the power, in theory if not in practice, to override the jury's death sentence, the jury may more freely apply that penalty, knowing that the judge has the wisdom and authority to "correct" the sentence. Whereas the prospect for appellate review raised in *Caldwell* remains a distant recourse in the mind of the hesitant or undecided juror, the trial

⁸³ *Id.* at 330-33.

⁸⁴ See *supra* notes 50-51 and accompanying text.

⁸⁵ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

⁸⁶ CAL. PENAL CODE § 190.1 through § 190.5 (West 1988); KY. REV. STAT. ANN. § 532.025(1)(b) (Baldwin Supp. 1988); OHIO REV. CODE ANN. § 2929.03 (Baldwin 1986); VA. CODE ANN. § 19.2-264.2 through § 19.2-264.5 (1983 & Supp. 1988).

⁸⁷ E.g., VA. CODE § 19.264.5 (The court must either impose sentence in accordance with the verdict fixing punishment at death or "set aside the sentence of death and impose a sentence of imprisonment for life." The court may only set aside a death sentence after consideration of a probation officer's report and "upon good cause shown.").

⁸⁸ See *supra* note 52 and accompanying text.

judge is present, has heard the evidence, and, it would appear, could immediately apply the "appropriate" sentence. For this reason, the second problem posed by Justice Marshall is equally — if not more — salient where the jury is told that the trial judge is the ultimate sentencer, with mandated override authority.

Marshall's third assumption was that jurors might correctly assume that judicial review can reverse a death sentence but not a life sentence, and may choose to apply death in order to ensure reviewability.⁸⁹ In the three override states, Florida, Alabama, and Indiana, the judge has the *power* to override or reverse recommendations of both life and death. Technically, then, this third factor is inapplicable to those three states. Functionally, however, override of death sentences is virtually never practiced. So although judicial review exists in theory, it rarely interferes with the imposition of the death sentence. In all other states where the jury's capital sentencing role is termed a "recommendation" and the trial judge is afforded sentencing discretion, that discretion may duly be exercised to overturn a jury's recommendation of the death penalty. In those jurisdictions, therefore, the third danger addressed by Marshall is as relevant to the trial judge as it is to appellate review of a jury's sentence.

Finally, Justice Marshall spoke of the danger that jurors, otherwise reluctant to vote for a death sentence, might minimize the importance of their role where they are told that the alternative decisionmaker is a state supreme court justice.⁹⁰ As previously discussed, the deference and reliance that the juror feels toward the trial judge is great, and would create an equally unacceptable risk that the jurors' sense of responsibility would be diminished.

The Supreme Court, as well as lower courts, have indicated that *Caldwell* applies to situations where the trial judge has been posited to the penalty jury as the final sentencing decisionmaker. The Supreme Court has summarily vacated death sentences and remanded those cases for reconsideration in light of *Caldwell* where statements were made to the capital sentencing jury that the trial judge had the responsibility for applying the death penalty.⁹¹

⁸⁹ See *supra* note 53 and accompanying text.

⁹⁰ See *supra* notes 54–57 and accompanying text.

⁹¹ *Rogers v. Ohio*, 474 U.S. 1002 (1985) (order summarily granting certiorari and reversing and remanding for reconsideration in light of *Caldwell* in *Rogers v. State*) (comments to jury that its sentencing determination was "only a recommendation," although technically an accurate statement of applicable state law, may be misleading); *Tucker v. Kemp*, 474 U.S. 1001 (1985) (order summarily reversing and remanding for reconsideration in light of

Federal circuit courts have followed this broad mandate, addressing a wide range of *Caldwell* claims. Both the Fifth and Eleventh Circuits have found constitutional error in prosecutors' and judges' comments that the trial judge, not the jury, was responsible for the "final" sentencing determination.⁹² The Tenth Circuit, on the other hand, has applied *Caldwell* to cases where the sentencing jury was told that its role was "part of the greater criminal justice system," and found no constitutional error in those cases.⁹³

State courts have also applied *Caldwell* to cases where the sentencing jury's sense of responsibility may have been reduced in reliance upon the trial judge's power to review and "correct" a death sentence. The Supreme Court of Virginia expressly rejected the Commonwealth's contention that *Caldwell* only applied to comments about appellate review.⁹⁴ Such a narrow interpretation, the court

Caldwell; prosecutor's comments that jury was only "last link" in a process that included police officers, district attorney, and trial judge).

⁹² *Wheat v. Thigpen*, 793 F.2d 621, 628-29 (5th Cir. 1986) (prosecutor's comments that jury's sentencing decision was not final and would be reviewed by the trial judge and appeals courts were impermissible under *Caldwell*); *Mann v. Dugger*, 844 F.2d 1446, 1458 (11th Cir. 1988) (en banc) (prosecutor's and trial court's references to jury's advisory sentencing as mere recommendation violation of eighth amendment) *petition for cert. filed*, 57 U.S.L.W. 3007 (U.S. June 19, 1988) (No. 87-2073); *Adams v. Wainwright*, 804 F.2d 1526, 1528-33 (11th Cir. 1986), *modified sub nom. on other grounds*, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987) *cert. granted*, 108 S. Ct. 1106 (1988). *But see* *Harich v. Dugger*, 844 F.2d 1464, 1472-75 (11th Cir. 1988) (en banc) (trial court's instructions that it would make the final sentencing determination did not diminish weight of jury's advisory sentencing role); *Julius v. Johnson*, 840 F.2d 1533, 1544 (11th Cir. 1988) (prosecutor did not diminish jury's sentencing responsibility by accurately informing it that its advisory sentencing verdict was subject to review by trial court); *Davis v. Kemp*, 829 F.2d 1522, 1530 (11th Cir. 1987) (no reversible error when prosecutor emphasized jury's role as final link in long judicial process); *Celestine v. Butler*, 823 F.2d 74, 79 (5th Cir. 1987) (use of word "recommendation," in view of entire jury instructions, did not diminish jury's sentencing authority); *Mulligan v. Kemp*, 818 F.2d 746, 748 (11th Cir. 1987) (trial court's use of word "recommend" did not diminish jury's sense of responsibility where jury was also informed that court would be bound by jury's recommendation); *Tucker v. Kemp*, 802 F.2d 1293, 1297 (11th Cir. 1986) (en banc) (prosecutor's comments that jury was "last link" in process that included police, district attorney, and trial judge did not render sentencing proceedings fundamentally unfair); *Thomas v. Wainwright*, 788 F.2d 684, 689 (11th Cir. 1986) (trial court's instructions that jury had only an advisory sentencing role not improper); *Brooks v. Kemp*, 762 F.2d 1383, 1410-11 (11th Cir. 1985) (en banc) (prosecutor's reference to roles of all participants in judicial process, although ambiguous, did not undermine jury's responsibility for its sentencing decision).

⁹³ *Parks v. Brown*, 840 F.2d 1496, 1503-04 (10th Cir. 1987) (prosecutor's comments regarding jury's sentencing role as part of larger criminal justice system did not minimize importance of jury's determination); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir. 1987) (no error where prosecutor emphasized that jury was part of whole criminal justice system).

⁹⁴ *Frye v. Commonwealth*, 231 Va. 370, 397-98, 345 S.E.2d 267, 284-87 (1986) (prosecutor's statements that the responsibility for sentencing is not jury's, and that "the judge will be the person that fixes sentence," constituted reversible error).

held, "ignored the sweeping language of the [*Caldwell*] Court, prohibiting any argument which leads a jury to believe that the sentencing responsibility lies 'elsewhere.'"⁹⁵ The Colorado Supreme Court similarly held that any argument that leads the jury to believe that the responsibility for sentencing is "shared" with the trial court is grounds for reversal.⁹⁶

The state supreme courts and appellate courts of ten other states — Kentucky, Ohio, Illinois, Missouri, Georgia, California, Tennessee, Alabama, New Jersey, and Florida — have addressed *Caldwell* claims in contexts other than remarks about appellate review.⁹⁷ Of these, only one jurisdiction, Florida, has held that *Caldwell* is inapplicable to its sentencing scheme.⁹⁸

Given the reasoning of the Court in *Caldwell*, it is not surprising that no court has held that *Caldwell* is applicable only to appellate judicial review. Every court that has addressed *Caldwell* claims has

⁹⁵ *Id.* at 397, 345 S.E.2d at 285.

⁹⁶ *People v. Drake*, 748 P.2d 1237, 1258–60 (Colo. 1988).

⁹⁷ *Matthews v. Commonwealth*, 709 S.W.2d 414, 421–22 (Ky. 1985) (although brief reference to jury's decision as a "recommendation" did not require reversal, "court and prosecutor must be extremely careful to avoid leaving the jury with any impression that would diminish its 'awesome responsibility' in imposing the death sentence"); *Holland v. Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985) (trial court erred when it advised jury that the judge "can change" the penalty imposed by the jury); *State v. Buell*, 22 Ohio St. 3d 124, 142–44, 489 N.E.2d 795, 811–13 (1986) (instruction to jury that its determination regarding death penalty was non-binding on trial court did not diminish jury's sense of responsibility); *People v. Lego*, 116 Ill. 2d 323, 348, 507 N.E.2d 800, 810 (1987) (state attorney's brief suggestion that jury decision was only a recommendation, in light of further admonishments regarding seriousness of task, did not shift jury's sense of responsibility); *State v. Roberts*, 709 S.W.2d 857, 869 (Mo. 1986) (prosecutor's statement that jury would make a sentencing recommendation, although not reversible error, should be avoided hereafter); *State v. Hance*, 254 Ga. 575, 578, 332 S.E.2d 287, 291 (1985) (comments that jury would not be any more responsible for death sentence than police officers, grand jury, district attorney, or trial judge did not tend to diminish jury's sense of responsibility); *People v. Milner*, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988) (prosecutor's assurances that jury need not "shoulder the responsibility" because "the law protects" them in their capital sentencing determination impermissibly misled jury as to its responsibility in imposing death sentence); *Johnson v. State*, No. 83-241-III, 1988 WL 3632 (Tenn. Crim. App. Jan. 20, 1988) (prosecutor's statements that sentencing jury was "just a part of the process" for determining punishment impermissibly lessened the jury's sense of its decision making role); *Hooks v. State*, 502 So. 2d 401, 401 (Ala. Crim. App. 1988) (prosecutor's statements regarding jury's advisory role were accurate and non-misleading); *State v. Ramseur*, 106 N.J. 123, 316, 524 A.2d 188, 286–87 (1987) (trial court's instructions that jury's task was "merely to apply the law" were prejudicial error); *Combs v. State*, 525 So. 2d 853, 858 (Fla. 1988) (trial court's instructions that jury would issue an advisory sentence was accurate statement of Florida law and did not violate dictates of *Caldwell*).

⁹⁸ *Combs v. State*, 525 So. 2d 853, 858, (Fla. 1988). *But cf.* *Garcia v. State*, 492 So. 2d 360, 367 (Fla. 1986) (failure to stress importance of jury role would violate *Caldwell*).

rejected its narrow application to appellate review alone. *Caldwell's* prohibition against comments that minimize a jury's sense of responsibility in sentencing capital defendants applies to trial judges as well as to appellate judges.

B. *Caldwell and the Jury Override Statutes*

The jury override statutes of Alabama, Florida, and Indiana divide capital sentencing responsibility. The jury in each of these states must submit a verdict on the guilt or innocence of the capital defendant. Then, this same jury must attend the sentencing phase of the bifurcated proceeding, where evidence of aggravating and mitigating circumstances is presented. The jury is asked to weigh this information carefully, to deliberate carefully, and then, finally, to set its judgment as to whether the defendant has forfeited his right to live.

At some point in the sentencing proceeding, however, the jury is provided with an additional piece of information. It is told that the ultimate sentencing responsibility rests not upon itself, but with the trial judge. The judge will make the final determination; they are only to issue a "recommendation" or "advisory" sentence. Whether this news is provided by the prosecution, by the defense, or by the court is of no import. The message is clear: Your job is not to decide whether the defendant will live or die; you are here only to provide your advice, your opinion, and the court is not bound by your recommendation. It makes no difference if the jury is informed that the trial judge must accord its recommendation "great weight"⁹⁹ or merely give it some unspecified degree of "consideration."¹⁰⁰ The jury is left, at best, with the sense that its sentencing decision will not necessarily be followed. At worst, it may believe that its determination is only *pro forma*, of little relevance to the defendant's fate. Faced with its diminished sentencing role, this jury is prone toward the same death-bias against which the Court warned in *Caldwell*.

Marshall's *Caldwell* opinion stems from the basic notion that jurors are naturally reluctant to impose a death sentence. This notion is grounded in a well established body of both legal

⁹⁹ *E.g.*, *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

¹⁰⁰ *E.g.*, ALA. CODE § 13A-5-47(e) (1982); IND. CODE § 35-50-2-9(e) (Supp. 1984).

doctrine¹⁰¹ and empirical evidence.¹⁰² Indeed, the *voir dire* process in a capital case is to a large extent devoted to choosing jurors who are not biased unreasonably toward the objectives of either the state or the defendant. And although the Supreme Court has approved the procedure of selecting "death-qualified" jurors,¹⁰³ a capital sentencing scheme must meet the eighth amendment's need for heightened reliability in the determination that death is the appropriate punishment in a specific case.¹⁰⁴ It is the jury's natural reluctance to invoke the death penalty, the "quality of mercy" that it brings to the sentencing proceeding, that fosters the reliability required by the Constitution.¹⁰⁵

Justice Marshall's proscription against statements that lead a capital sentencer to believe that sentencing responsibility rests elsewhere draws from a deep well of established common law doctrine.

¹⁰¹ E.g., *State v. White*, 286 N.C. 395, 404, 211 S.E.2d 445, 450 (1975) (prosecutor's argument to jury regarding availability of judicial review of death sentence "was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty to murder in the first degree by diluting their responsibility for its consequences").

¹⁰² E.g., Radelet, *supra* note 16, at 1413 ("The first observation that can be made from these data is that jurors are less likely to favor the imposition of a death sentence than are judges."); KALVEN & ZEISEL, *THE AMERICAN JURY* 434-49 (1971).

¹⁰³ *Lockhart v. McCree*, 106 S. Ct. 1758, 1764-70 (1986) (process of "death-qualifying" jurors — identifying and excluding from service venire members with conscientious scruples against the death penalty — held constitutional). The bitter irony of Florida's jury override experience is that jurors in that state are among the most death-prone in the country. As one Florida trial judge stated, "Northern Florida is the last constitutional stronghold of people conservative about and protective of law enforcement." Interview with Florida Circuit Judge John Rudd, conducted for Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 1 (1988). In such an environment, where a juror's natural reluctance toward imposing a death sentence may well be minimal, it is difficult to ignore the bias toward death that might result from a jury's awareness that its decision is not binding.

¹⁰⁴ E.g., *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

¹⁰⁵ As Justice Marshall wrote in *Caldwell*, the capital sentencer must consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." *Caldwell*, 472 U.S. at 330 (quoting *Woodson v. North Carolina*, 428 U.S. at 304). Although Marshall noted that appellate courts were not suited to evaluate the appropriateness of the death penalty in the first instance, *id.*, data describing the history of jury overrides in Florida strongly demonstrates that trial judges are far more likely to impose a death sentence than are juries. A full one-quarter of all death sentences imposed in Florida since the adoption of its new statute have been the result of judges overriding a jury recommendation of life imprisonment. In other words, in some one hundred twenty cases, a jury was not willing to recommend that the defendant be put to death, whereas the trial judge chose to disregard the jury's sentiment and impose the death penalty. See *supra* notes 16-17 and accompanying text.

The *Caldwell* rationale reflects a virtually unanimous response raised whenever legal authorities have confronted the question of a capital sentencer's diminished responsibility.¹⁰⁶ The rather sparse account of state law outlined in *Caldwell* does not fully convey the breadth and depth of the doctrinal foundation for the proposition that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."¹⁰⁷ *Caldwell* elevated these concerns from the realm of common law notions of fairness to the level of eighth amendment constitutional imperative.

As the *Caldwell* Court noted, almost every state supreme court that has addressed the issue has condemned the specter of a diminished sense of responsibility in capital sentencing¹⁰⁸ — but, prior to *Caldwell*, never as a matter of eighth amendment law. Although case law dating back to the late nineteenth century may be cited,¹⁰⁹ the body of state law that has emerged in the last several decades establishes the near consensus. Interestingly, it is within the Southern states, where the death penalty has been most enthusiastically

¹⁰⁶ See *Caldwell*, 472 U.S. at 333–34.

¹⁰⁷ *Id.* at 328–29.

¹⁰⁸ The Court noted that states have long recognized the importance of maintaining a jury's sense of responsibility in non-capital cases as well, albeit not as a matter of eighth amendment doctrine. *Id.* at 334. Although the ramifications of diluting a jury's role in these contexts is arguably less profound than in the capital setting, the body of state law condemning such a result is no less abundant. Regardless of the punishment at stake, the general prohibition is well established: Actions that have the effect of minimizing the jury's task are intolerable as a matter of law and are grounds for reversal. *E.g.*, *United States v. Fiorio*, 300 F.2d 424, 427 (7th Cir. 1962) (trial court's instruction, during narcotics trial, that court of appeals would review outcome, was prejudicial and required reversal); *Blount v. State*, 509 S.W.2d 615, 616 (Tex. Crim. App. 1974) (state law violated by prosecutor's statements during sentencing phase of robbery trial that jury need not concern itself with granting probation); *People v. Smith*, 206 Cal. 235, 239, 273 P. 789, 790 (1929) (instructions during embezzlement trial were reversible error under state law where jury was told that trial court could reduce punishment); *Hodges v. State*, 15 Ga. 117, 122 (1854) (stabbing conviction reversed where trial court instructed jury that defendant could seek appeal to state supreme court: "Again we must condemn, as we have had occasion to do heretofore, this remark. If defendants have the advantage, as intimated by the Court, it is one which they are entitled to under the law; and it does not relieve either the Court or the Jury from the obligation to mete out to them, not only the full measure of their legal rights, but in cases of doubt, to give to prisoners the benefit of these doubts. To administer justice in mercy, less than this cannot be done.").

¹⁰⁹ *State v. Biggerstaff*, 17 Mont. 510, 514, 43 P. 709, 711 (1896) ("The language complained of was highly improper and reprehensible, and we think the court should, of its own motion, have prevented its use, or directed the jury to wholly disregard it."); *Monroe v. State*, 5 Ga. 85, 139 (1848) ("We think, too, that the remark which fell from the Court, reminding the jury of the existence of an appellate tribunal, . . . however well intentioned, was calculated, nevertheless, to lessen their sense of their own responsibility.").

embraced, that this doctrinal legacy has been refined. One year before the United States Supreme Court decided *Caldwell*, the Mississippi Supreme Court held:

The role of the juror in a capital murder trial brings with it an awesome responsibility. . . . Because of the importance of the juror's deliberations we must be cautious in avoiding any actions which tend to reduce the jurors' sense of responsibility for their decision. They must not be permitted to look down the road for someone else to pass the buck to. . . . Jurors faced with the portentous duty of deciding an accused's fate will take comfort in the fact of review. They may view their role as *merely advisory*, a view which can prove fatal to an accused.¹¹⁰

The supreme courts of Florida, Georgia, Kansas, Kentucky, Louisiana, North Carolina, and South Carolina had all joined in this view long before the United States Supreme Court addressed the issue in *Caldwell*¹¹¹ — although, again, never as a matter of

¹¹⁰ *Wiley v. State*, 449 So. 2d 756, 762 (Miss. 1984) (finding reversible error in prosecutor's remarks) (emphasis added). Interestingly, the Mississippi court's decision in *Bobby Caldwell's* case, one year earlier, stands as somewhat of an anomaly in that state's death penalty jurisprudence. That court has consistently held that comments that dilute the capital sentencer's role are impermissible. *E.g.*, *Williams v. State*, 445 So. 2d 798, 810–12 (Miss. 1984) (state law required that death sentence be reversed and remanded for new sentencing hearing where state argued that defendant had "eight stages of appeal" ahead of him); *Hill v. State*, 432 So. 2d 427, 439 (Miss. 1983) (although procedural bar precluded reversal, "[a]ny argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. . . . [I]n a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected"). The Mississippi Supreme Court's decision in *Caldwell's* case was, in fact, a 4 to 4 decision. Dissenting Justice Lee reasoned that

[t]he logic of the rule [prohibiting such comments] is beyond question. Comment of this nature has the effect of lessening a juror's sense of responsibility for the fate of the accused. Those jurors who are not convinced that a defendant's life should be taken may not argue so strongly or hold their position when they are led to believe that a reviewing court will correct a mistake in their judgment.

Caldwell v. State, 443 So. 2d 806, 816 (Miss. 1983) (Lee, J., dissenting, joined by Patterson, C.J., Prather J., and Robertson, J.).

¹¹¹ *E.g.*, *Pait v. State*, 112 So. 2d 380, 383–86 (Fla. 1959) (prosecutor's comments to jury that defendant's death sentence would be subject to appeal by state supreme court violated state law and required reversal); *Fleming v. State*, 240 Ga. 142, 146, 240 S.E.2d 37, 40 (1977) (death sentence reversed where prosecutor, contrary to state law, told jury that penalty would be reviewed by trial judge and state supreme court); *Prevatte v. State*, 233 Ga. 929, 931, 214 S.E.2d 365, 367 (1975) (prosecutor's remarks to judge, in jury's presence, that trial court could reduce death sentence had "inevitable effect" of encouraging jury to "attach diminished consequences to their verdict, and take less than full responsibility for their awesome task . . ."); *State v. Henderson*, 226 Kan. 726, 737, 603 P.2d 613, 622 (1979) (district attorney's remarks that homicide conviction could be reversed upon appeal amounted to reversible

eighth amendment doctrine. The fact that a comment or instruction was technically accurate has been equally rejected as an exception to this general prohibition against diminishing the jury's sense of sentencing responsibility.¹¹² As a matter of state law, any action that might diminish the jury's sense of responsibility in capital sentencing was firmly proscribed.

Nor has the common law on this issue been limited to that of Southern states composing the death belt. The supreme courts of California, New York, and New Jersey have been among those that have addressed and set forth similar prohibitions.¹¹³ As New York's Justice Sears reasoned in *People v. Johnson*:

The vice of the statements and questions of the District Attorney lies not primarily in the incorrectness of the

error under state law); *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (Kentucky law forbids prosecutor's attempt to diminish jury's sense of responsibility by describing jury's death sentence as "only a recommendation"); *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984) (prosecutor's references to jury's sentencing decision as recommendation impermissible under law of commonwealth); *State v. Willie*, 410 So. 2d 1019, 1034 (La. 1982) (prosecutor's argument that jury's decision was not final lessened its "awesome responsibility" and required reversal under state law); *State v. Berry*, 391 So. 2d 406, 420 (La. 1980) (Calogero, J., dissenting) ("[t]he overwhelming consensus of cases from other jurisdictions is to the effect that 'comments by the prosecuting attorney . . . to the jury on the power of the court to suspend sentence . . . are calculated to induce the jury to disregard their responsibility, and are improper'") (quoting 75 AM. JUR. 2d *Trial* § 230, 309); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979) (prosecutor's impermissible references to possibility of appellate review and commutation required reversal under state law); *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975) (prosecutor's argument regarding judicial review of death sentence was "clearly intended to overcome the jurors' natural reluctance" by diluting their sense of responsibility); *State v. Tyner*, 273 S.C. 646, 658, 258 S.E.2d 559, 565-66 (1979) (death sentence reversed where prosecutor, disregarding state law, commented that jury's decision would be reviewed by trial judge and appellate court); *State v. Gilbert*, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979) (jury's sense of responsibility was diminished by prosecutor's argument that trial judge would review death sentence). *But see* *State v. Monroe*, 397 So. 2d 1258, 1270 (La. 1981) (reference by prosecutor to appellate review, in light of entire argument, did not amount to reversible error under Louisiana law); *State v. Berry*, 391 So. 2d at 418 (prosecutor's brief reference to appellate review did not render proceedings fundamentally unfair).

¹¹² *E.g.*, *Ward v. Commonwealth*, 695 S.W.2d 404, 407-08 (Ky. 1985) (prosecutor's comment that jury would make "only a recommendation" of sentence, although technically accurate, violated commonwealth's law by impermissibly reducing jury's sense of responsibility).

¹¹³ *People v. Morse*, 60 Cal. 2d 631, 649, 388 P.2d 33, 44-47, 36 Cal. Rptr. 201, 215, (1964) (prosecutor's argument that trial judge could reduce death sentence tends to reduce jury's sense of responsibility in imposing the death penalty); *People v. Johnson*, 284 N.Y. 182, 188, 30 N.E.2d 465, 467 (1940) (arguments emphasizing defendant's right to appeal constituted reversible error); *State v. Mount*, 30 N.J. 195, 212, 152 A.2d 343, 351 (1959) (reversible error in trial court's instructions to venireperson that appellate review would follow death sentence).

statement that an appeal . . . is compulsory but in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunity for review. . . . *Nothing can be permitted* to weaken the jurors' sense of obligation in the performance of their duties.¹¹⁴

The fact that the remainder of jurisdictions have not addressed this issue indicates that such statements and instructions are viewed as fundamentally improper. It seems that few judges or prosecutors would be willing to risk reversal over so blatant an indiscretion.

It is well established common law doctrine, therefore, that capital juries must maintain a strong sense of responsibility toward their sentencing decisions. This is the case regardless of whether a jury is imputed with the task of actually fixing the sentence or of making a "mere" recommendation to the court. The Supreme Court in *Caldwell* recognized for the first time the eighth amendment dimensions of these concerns.

The *Caldwell* Court rested its holding on the eighth amendment: "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."¹¹⁵ Because death is different, there is a heightened need for reliability whenever a state seeks to take a defendant's life. The sentencing process, accordingly, must "facilitate the responsible and reliable exercise of sentencing discretion."¹¹⁶

The divided sentencing responsibility imposed by the override states is inimical to this requirement. Florida and Alabama have both defended their sentencing provisions against *Caldwell*-based attacks on the premise that the judge, and not the jury, is the actual capital sentencer.¹¹⁷ Accurate information regarding this fact, it is argued, neither misleads nor diminishes the jury's sense of respon-

¹¹⁴ *Johnson*, 284 N.Y. at 188, 30 N.E.2d at 467 (emphasis added).

¹¹⁵ *California v. Ramos*, 463 U.S. 992, 998-99 (1983); see also *Mills v. Maryland*, 108 S. Ct. 1860, 1866-67 (1988); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

¹¹⁶ *Caldwell*, 472 U.S. at 329.

¹¹⁷ E.g., *Combs v. State*, 525 So. 2d 853, 858 (Fla. 1988) (trial court's instructions that jury could issue an advisory sentence was accurate statement of Florida law and did not violate dictates of *Caldwell*); *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (trial judge may explain to the jury its advisory role "as long as the significance of [the jury's] recommendation is adequately stressed"); *Hooks v. State*, 502 So. 2d 401, 401 (Ala. Crim. App. 1988) (statements regarding jury's advisory role were accurate and non-misleading).

sibility. The judge is not bound by the jury's recommendation and carries the ultimate burden of determining the appropriate sentence. Proponents point to the language of the statutes, which require the trial judge to undertake an independent assessment of any aggravating or mitigating factor before handing down a sentence.¹¹⁸

This reasoning, appealing as it must be to pragmatists who are loath to risk reversal of the hundreds of death sentences that have been imposed under these statutes, is as flawed as the statutes it defends. Although the trial judge is not, technically, bound by the jury's recommendation or "advisory" sentence, she is certainly, if immeasurably, affected by it. A closer look at the policies and provisions of each of the three statutes reveals the consideration and deference that is given to the jury's advisory sentence by the trial court.

Florida's statutory language gives little clue of the true nature of its juries' sentencing role. "Notwithstanding the recommendation of the jury," the statute says, the judge "shall enter a sentence of life imprisonment or death."¹¹⁹ Under the override standard adopted by the Florida Supreme Court in *Tedder v. State* in 1975, however, a trial judge is normally required to follow the jury's recommendation:¹²⁰ "The facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."¹²¹ The Florida Supreme Court has scrupulously applied the standard in the last fourteen years, acknowledging that the jury's recommendation represents the judgment of the community as to whether death is the appropriate punishment in a given case. Accordingly, it is entitled to great weight, and will not

¹¹⁸ E.g., ALA. CODE § 13A-5-47(e) ("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 . . ."); FLA. STAT. 921.141(3) ("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 . . ."); IND. CODE § 35-50-2-9(e) ("The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based upon the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.").

¹¹⁹ FLA. STA. § 921.141(3).

¹²⁰ Although *Tedder* requires a judge to give great deference to a jury's recommendation of a *life* sentence, the Florida Supreme Court subsequently held that the same standard extends to a jury's recommendation of *death*, as well. E.g., *Smith v. State*, 515 So. 2d 182 (Fla. 1987); *LeDuc v. State*, 365 So. 2d 149, 151 (Fla. 1978) (jury's sentence of death "should not be disturbed if all relevant data was considered, unless there appears strong reasons [sic] to believe that reasonable persons could not agree with the recommendation").

¹²¹ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

be disturbed unless it is manifestly unreasonable — which it rarely is.¹²² Under the Florida Supreme Court's mandate, the recommendation of the capital sentencing jury exercises substantial influence upon the trial judge. It is chimerical to suppose that, under this regime, the jury's recommendation is "merely" advisory.¹²³

The United States Supreme Court, in holding the Florida statute constitutional, expressly endorsed the *Tedder* standard.¹²⁴ The Eleventh Circuit has also recognized the significance of this standard and the substantive sentencing role accorded to the jury.¹²⁵ The court noted that "it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a *sui generis* impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error."¹²⁶

The force that this recommendation exerts upon the trial judge is sufficient to raise doubts about the reliability of a death sentence that is born of the divided sentencing roles imposed by the override

¹²² *E.g.*, *DuBoise v. State*, 520 So. 2d 260, 266 (Fla. 1988); *Wasko v. State*, 505 So. 2d 1314, 1318 (Fla. 1987); *Garcia v. State*, 492 So. 2d 360, 367 (Fla. 1986); *Huddleston v. State*, 475 So. 2d 204, 206 (Fla. 1985); *Lusk v. State*, 446 So. 2d 1038, 1043 (Fla. 1984); *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983); *McCampbell v. State*, 421 So. 2d 1072, 1075 (Fla. 1982); *Jacobs v. State*, 396 So. 2d 713, 717-18 (Fla. 1981); *Ross v. State*, 386 So. 2d 1191, 1197 (Fla. 1980); *Stone v. State*, 378 So. 2d 765, 772 (Fla. 1979); *Shue v. State*, 366 So. 2d 387, 390 (Fla. 1978); *Burch v. State*, 343 So. 2d 831, 834 (Fla. 1977); *Provence v. State*, 337 So. 2d 783, 787 (Fla. 1976). See generally *Mello & Robson*, *supra* note 11, at 38-40.

¹²³ Indeed, the Florida Supreme Court has rejected this notion, in holding: "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." *Riley v. Wainwright*, 517 So. 2d 656, 659 (Fla. 1987); accord *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). The best description of the way the Florida courts treat jury error is in *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc) *petition for cert. filed*, 57 U.S.L.W. 3007 (U.S. June 19, 1988) (No. 87-2073).

¹²⁴ *Spaziano v. Florida*, 468 U.S. 447, 461-62, 465 (1984) (although Constitution does not require capital sentencing by jury, jury input serves as "community voice" in the sentencing process); *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) (*Tedder* standard affords defendant "significant" safeguards).

¹²⁵ *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988) (en banc) ("Because the jury's recommendation is significant in these ways, the concerns voiced in *Caldwell* are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility."), *petition for cert. filed*, 57 U.S.L.W. 3007 (U.S. June 19, 1988) (No. 87-2073); *Adams v. Wainwright*, 804 F.2d 1526, 1530 (11th Cir. 1986) ("Clearly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of *Caldwell*."), *modified sub nom. on other grounds*, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988).

¹²⁶ *Mann*, 844 F.2d at 1454.

statute. Add to this unholy alliance the fact that trial judges are elected officials, accountable to the general public, and the odds of a judge overriding a jury's recommendation of death are practically nil.¹²⁷ In reality, the number of such death overrides is negligible. For a single juror to even partially rely upon the prospect of a judge "correcting" a death sentence is to risk the very dangers of bias in favor of death against which *Caldwell* cautioned. There is too real a possibility that a juror might chose to "send a message" or to delegate ultimate responsibility to the judge that the juror has come to know and respect throughout the trial. In Florida, where only a majority of jurors is required for a recommendation of death, the override provision serves as an invitation to abandon the eighth amendment's requirement for heightened reliability in the capital sentencing process. Under *Caldwell*, such a situation is constitutionally intolerable.

The override provisions of Alabama and Indiana were patterned after the Florida statute.¹²⁸ In form, they differ little from their model. One critical difference, however, is that both statutes, unlike Florida's, expressly require a trial judge to give consideration to the jury's sentencing recommendation.¹²⁹ Given that both states require that their statutes be interpreted based on their plain language,¹³⁰ the jury's statutory role, on its face, is far from meaningless.¹³¹

¹²⁷ The Eleventh Circuit acknowledged the effect that political considerations might have upon a capital sentencing judge: "It would indeed be surprising were the trial judge, who in Florida is also an electorally accountable official, not powerfully affected by the result of that [jury recommendation] process." *Id.*; see also *State v. Roberts*, 709 S.W.2d 857, 872 (Mo. 1986) (Blackman, J., concurring) ("Under the climate presently prevailing a circuit judge would risk his career if he were to set aside a death verdict rendered by a jury."); Radelet, *supra* note 16, at 1414. The saga of Chief Justice Rose Bird and her two colleagues on the California Supreme Court grimly illustrates this point. The three were targeted by conservative lobbyists critical of their record on death penalty reversals. Spurred on by the ensuing multi-million dollar campaign to unseat the justices, California voters denied them reconfirmation in 1986 elections. *L.A. Daily J.*, Nov. 6, 1986, at 1, col. 6; *id.*, Aug. 26, 1986, at 1, col. 6.

As Professor Radelet explains, there is no central data source for tracing cases where a trial judge sentenced a defendant to life after a jury recommendation of death. Nevertheless, Radelet's research indicated that no more than a dozen such overrides occurred as compared at the time to nearly ninety death sentences following a jury recommendation of life. Radelet, *supra* note 16, at 1454.

¹²⁸ See *supra* note 12 and accompanying text.

¹²⁹ See *supra* notes 20-29 and accompanying text.

¹³⁰ *Combs v. Cook*, 238 Ind. 392, 397, 151 N.E.2d 144, 147 (1958) (a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to its words); *Ex Parte Jones*, 456 So. 2d 380, 382-83 (Ala. 1984); *Ex. Parte Madison County, Ala.*, 406 So. 2d 398, 400 (Ala. 1981).

¹³¹ As the Indiana Supreme Court held: "[I]t seems unlikely, . . . that the legislature would specifically require the court to consider the jury's recommendation if that consider-

Despite the obvious statutory provision for the jury's significant role in capital sentencing, neither Alabama nor Indiana has adopted a standard for appellate review of jury overrides that resembles Florida's "reasonable person" *Tedder* standard.¹³² Yet although Alabama and Indiana have rejected such an express standard, they have also recognized that the jury's advisory sentence is far from meaningless and is accorded weight by the trial court. The Indiana Supreme Court, recognizing the force that a jury's recommendation exerts on a trial judge, has stated:

Notwithstanding that the sentence determination by the jury is not binding upon the judge, we do not regard it as a mere formality having no substantive value. If we did, error if any, in such regard could not be other than harmless. On the contrary, the recommendation of the jury is a very valuable contribution to the process, in that it comes from a group representative of the defendant's peers, who are likely to reflect, collectively, the standards of the community.¹³³

Thus, although it has eschewed an explicit "*Tedder*" standard, the Indiana court has planted the seed of its functional equivalent.¹³⁴

The Alabama courts, in comparison, have steadfastly refused to issue a similar acknowledgment of the effect that an advisory death sentence must have on the trial judge's ultimate sentencing decision.¹³⁵ Alabama's statute, however, contains additional, signif-

ation amounted only to a book entry noting the recommendation. This court regards the practical effect of the jury's recommendation as significant." *Williams v. State*, No. 985-S-372, slip op. at 8 (Ind. July 8, 1988).

¹³² See *supra* note 34 and accompanying text.

¹³³ *Williams v. State*, No. 985-S-372, slip op. at 8 (Ind. July 8, 1988) (quoting *Brewer v. State*, 417 N.E.2d 889, 909 (Ind.), *cert. denied*, 458 U.S. 1122 (1981)).

¹³⁴ Justice Marshall, dissenting from denial of certiorari in *Shiro v. Indiana*, criticized Indiana's refusal to endorse a standard of review that accords a jury's recommendation a presumption of correctness: "A serious inadequacy in the Indiana capital sentencing procedure dramatically distinguishes it from the [Florida] jury-override procedure that this Court upheld in *Spaziano v. Florida*. . . . In contrast, the State of Indiana has not committed itself to any comparable safeguard to protect against the arbitrary rejection of a life sentence." 475 U.S. 1036, 1036, 1038 (1986).

¹³⁵ *E.g.*, *Hooks v. State*, 3 Div. 460, slip op. at 62 (Ala. Crim. App. Mar. 10, 1987) ("The trial judge's and prosecutor's remarks clearly defined the jury's role in the sentencing scheme. Thus, the jury could not have been confused as to its responsibility in the sentencing process. The remarks here were a correct statement of the law and did not tend to mislead or misinform the jury, thus we conclude the remarks were not improper under *Caldwell*."). But compare *Hooks* to cases where errors were made at the penalty phase, before an "advisory" jury, and were held not harmless, and grounds for reversal of sentence. *E.g.*, *Ex Parte Whisenant*, 482 So. 2d 1247, 1248 (Ala. 1984) (state's improper references to other crimes

icant provisions that underscore the jury's important capital sentencing role. Following conviction of a capital crime, the punishment phase must be held before a jury unless both parties consent and receive approval from the court for a hearing before the judge alone. All relevant factors in mitigation or aggravation are presented for the jury's consideration. A recommendation of death must be based on a vote of at least ten jurors. If the jury is unable to reach a verdict on an advisory sentence, mistrial of the sentencing hearing may result.¹³⁶ These factors all belie the suggestion that the jury's sentencing role is insignificant. Although a trial judge is not statutorily bound to follow the jury's recommended sentence, it is inconceivable that she will not be influenced by the "community's voice."¹³⁷ As the United States Supreme Court noted, in *Beck v. Alabama*, an Alabama case:

[I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing . . . before he imposes sentence.¹³⁸

allegedly committed by defendant rendered penalty phase unfair and required new sentencing hearing). Alabama's mixed message, then, is one of both minimizing and maintaining the significance of the jury's sentencing role.

¹³⁶ ALA. CODE § 13A-5-46.

¹³⁷ Although the Eleventh Circuit's *Mann* decision focused on the jury override provisions of Florida, its analysis of the powerful psychological impact that a jury's advisory sentence has upon a trial judge holds sway in Alabama and Indiana as well:

In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. . . . We do not find it surprising that the supreme court would make this kind of normative judgment. A jury recommendation of death, is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of the death sentence.

Mann v. Dugger, 844 F.2d 1446, 1453-54 (11th Cir. 1988) (en banc), *petition for cert. filed*, 57 U.S.L.W. 3007 (U.S. June 19, 1988) (No. 87-2073).

¹³⁸ *Beck v. Alabama*, 447 U.S. 625, 645 (1980); *cf. Baldwin v. Alabama*, 472 U.S. 372 (1985). Under Alabama's 1975 sentencing scheme, since repealed, a jury was required, upon finding a defendant guilty of first-degree murder, to issue a "recommendation" sentence of death. The *Baldwin* Court held that this provision was not unconstitutional, because judges were aware that juries had no opportunity to consider mitigating circumstances and that the advisory sentence conveyed "nothing more than a verdict of guilty." *Baldwin*, 472 U.S. at 388. The 1975 statute, unlike its current successor, did not contain language requiring the judge to "consider" the jury's recommendation.

The Eleventh Circuit's assessment of the "*sui generis* impact"¹³⁹ that a jury's advisory sentence is bound to have on a trial judge certainly applies, then, to the jury override statutes of Alabama and Indiana, as well as to Florida's. Further, the specter of politics surfaces in these two states as well, for it cannot be said that an elected judge would lightly disregard a jury's sentence of death.¹⁴⁰ Finally, that judges generally follow a jury's recommendation of death is borne out by the override's history: Death overrides in Alabama and Indiana are clearly the exception.¹⁴¹

In all three override states, the jury's sentencing role is far greater than its statutory description would suggest. Even a technically accurate description of the jury's sentence as a "recommendation" or "advisory sentence" does not convey the true import of the jury's determination.¹⁴² The exact quality of consideration that

¹³⁹ Mann v. Dugger, 844 F.2d at 1454.

¹⁴⁰ Alabama Supreme Court Justice Jones, dissenting in *Jacobs v. State*, aptly described the beast when he wrote:

The majority's judicial review "cure-all" obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official. . . . [T]o leave sentence reduction in the prerogative of the trial court is to place undue pressures upon this office. Again, admittedly, a trial judge must often be the bulwark of the legal system when presented with unpopular causes and adverse public opinion. This State's recent history, however, reflects the outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death. Clearly, this pressure constituted an undue compulsion on the trial judge to conform the sentence which he imposes with that previously returned by the jury.

361 So. 2d 640, 650-51 (Ala. 1978) (Jacobs, J., dissenting) (footnote omitted).

¹⁴¹ For example, there were eight capital convictions in Montgomery County, Alabama between January 1, 1986 and August 8, 1988. In seven cases, the judge and jury agreed on the sentence. In one case, the judge sentenced the defendant to life-without-parole after the jury recommended death. See Letter from Wendy Parker to Eva Ansley, Aug. 15, 1988.

¹⁴² It is impractical to simply not inform the jury of the true nature of its sentencing role. It is not difficult to imagine the confusion and outrage that might result when a jury deliberates upon the fate of the defendant, only to learn that the judge may — and has — completely disregarded its sentencing determination. It is most likely, in any case, that the average venireperson would be aware of the potential for override, and treat this divided responsibility as requiring that he or she issue only an advisory decision.

The other alternative, of attempting to fully and accurately inform the jury of the importance of its recommendation, is bound for failure. Any qualification of the jury's role, as being "advisory" or a "recommendation," will still engender the possibility of a juror attaching diminished consequences to his or her sentencing decision. As one Kentucky Supreme Court justice argued, any use of the word "recommendation" to describe the jury's sentencing role, although accurate, sends the message that the jury's "awesome responsibility" is lessened by the fact that their decision is not the final one:

Continuously we are confronted by the fact that these words are used before the jury to minimize its responsibility in deciding on the death penalty. Some-

a trial judge accords this determination may vary, but it is certainly a significant factor that cannot wholly be ignored by the judicial "ultimate sentencer." The jury, on the other hand, instructed or reminded that its role is advisory, may, at best, treat its decision as not bearing the weight of deciding upon another person's death. Although the degree that a juror's sense of responsibility is lessened may likewise vary, one cannot say that it will have "no effect" on the outcome of the sentencing proceeding.¹⁴³ Under such a capital sentencing scheme, both judge and jury may take comfort in the knowledge that *neither* is ultimately, fully responsible for the fate of a defendant. The concerns of *Caldwell* — the danger of a bias towards death sentence — are implicated here.

V. THE DANGERS OF DIMINISHING THE SENTENCER'S SENSE OF ITS RESPONSIBILITY: THE EMPIRICAL EVIDENCE

The theory advanced by Justice Marshall in *Caldwell*, and extended in the above discussion to apply to trial-level judicial review as well, rests on two separate phenomenological assumptions: (1) that a reduced sense of responsibility will affect a sentencer's decision, and (2) that comments about judicial review will in fact tend to produce such a reduction. These assumptions have a common sense, intuitive appeal. But the Court in *Caldwell* did not explore whether this intuition finds support in the empirical literature.

The empirical literature is not conclusive. Psychologists and researchers have conducted hundreds of experiments on jury decisionmaking, but most have implicitly assumed that the experimental jury is the ultimate finder of fact for purposes of the sim-

times we sidestep the problem by saying that the word was not overused, and sometimes, as in the present case . . . we recognize that the prejudice is too serious to ignore. . . . While it is true that KRS 532.025(1)(b) provides that the jury "shall recommend a sentence for the defendant," the fact is that when the jury votes for the death penalty, it is much more than merely a recommendation. . . . If the jury so recommends, almost without exception the trial judge has followed the jury's recommendation by imposing the death penalty. . . . [O]nce and for all, we should get rid of the unfair prejudice inhering in use of the word "recommend" to describe the jury's function in setting a penalty.

Ward v. Commonwealth, 695 S.W.2d 404, 408, 409 (Ky. 1985) (Leibson, J., concurring). The problem lies, therefore, not with the administration of the override provisions, but with their fundamental unfairness.

¹⁴³ *Caldwell*'s "no effect" test has been subsequently applied by the Court in one other capital sentence case. *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987) (Court rejected state's harmlessness argument because it could not "confidently conclude" that excluded evidence "would have had *no effect* upon the jury's deliberations") (emphasis added).

ulation. Studies of jury perception, bias, understanding, or dynamics have not troubled to manipulate the presence or absence of judicial review. Indirect evidence is more plentiful, but it is subject to caveats; for instance, experiments that do offer insight into diminished responsibility often focus on situations like crime reporting or emergency intervention, which may or may not be generalizable to capital jury deliberation.

Still, a survey of published research offers persuasive support for the *Caldwell* decision and for the corollary notion that the logic of *Caldwell* requires invalidation of the jury override statutes. As to the initial assumption in *Caldwell*, that a reduced sense of responsibility will affect the sentencer's decision, there are four relevant areas of research. First, studies have compared decisions made when consequences would attach against decisions that had no consequences.¹⁴⁴ These studies can be analogized to a *Caldwell* situation — if that case is characterized as one in which the jury reminded of appellate review is relieved of the consequences of its decision — and to the situation confronted by penalty phase juries and judges in the jury override states. These studies offer a strong inference that consequences affect outcome. Decisionmakers who know that their decision has consequences may weigh the evidence differently than they would in a nonconsequences situation, and thus may reach a different decision.

Second, there are the “unresponsive bystander” studies, experiments demonstrating that a diffusion of responsibility occurs when several onlookers witness an emergency.¹⁴⁵ This diffusion encourages each bystander to be unresponsive, and spreads the guilt or blame resulting from nonintervention. Just as an individual deciding how to respond to an emergency will be more likely to leave it up to someone else to act if responsibility is shared, a juror faced with a capital sentencing decision may be affected by the knowledge that a reviewing court will have the ultimate responsibility for the defendant's life. These studies can be viewed as a subtle version of the consequences or accountability studies summarized above. Responsibility for the consequences is not specifically allocated, but it is assessed by the individual bystander (*i.e.*, juror or judge) at the moment of decision as a function of the number of other onlookers present.

¹⁴⁴ See *infra* notes 150–75 and accompanying text.

¹⁴⁵ See *infra* notes 176–86 and accompanying text.

Third, there are sentence severity studies, experiments that test the effects of requiring a decisionmaker to choose between a harsh and a lenient result, without the option of an intermediate outcome.¹⁴⁶ These studies indicate that harsher penalties will lengthen deliberation times, a trend that could be interpreted as a demonstration of increased feelings of responsibility and need for certainty among the jurors. Juries also will decide in favor of the defendant more frequently if no moderate penalty is available, again suggesting a heightened responsibility effect. There are some contradictory findings; in particular, some studies show that where the crime is egregious, sentence severity does little to discourage conviction. These studies do not necessarily take away from the general findings, however; they instead could be interpreted as an exception or special category.

Fourth, there are rule of decision studies that show that unanimous rule juries need more time to reach a verdict than do non-unanimous juries.¹⁴⁷ Unanimous rule juries also tend to involve minority viewpoint jurors more fully and to be more confident in the correctness of their verdict. These results could be interpreted as a reflection of the fact that providing each juror with a veto power over the verdict increases that juror's sense of responsibility for the outcome. When each juror knows that he or she could have prevented a unanimous verdict, and thus a decision by the jury, the consequences bear more heavily on him or her. There are other explanations for increased deliberation time on unanimous juries, most obviously the fact that it is more difficult to achieve complete agreement than to obtain a simple majority, but jury dynamics do not necessarily account for the whole difference. In a study that compared the decisions of a jury told that its decisions would be publicly analyzed by a review board with those of a jury not so instructed, accountable jurors deliberated longer and were more confident of their decisions. Enhanced responsibility apparently played a key role.

As to the second assumption of *Caldwell*, that comments about judicial review actually produce a diminished sense of responsibility, the empirical evidence is sketchier. One study demonstrated that comments by bystanders may significantly affect the response of an unwitting subject to an emergency, but a jury's unique position makes it unclear whether this finding can be generalized to a court-

¹⁴⁶ See *infra* notes 187-92 and accompanying text.

¹⁴⁷ See *infra* notes 193-97 and accompanying text.

room.¹⁴⁸ The accountability and bystander studies are suggestive, in that verbal instructions were frequently used to establish the responsibility condition, but again there are perhaps too many differences to generalize.

Only a specific study will really answer the question of whether references to review will induce a jury to delegate responsibility or otherwise minimize its role. No such study has yet been undertaken.¹⁴⁹ In light of the studies indicating the potential effects of reduced responsibility, perhaps strong evidence of a causal link is unnecessary; the mere possibility that comments on judicial review could trigger diminished feelings of responsibility may suffice to render the divided sentencing responsibility statutes unconstitutional.

In this section I examine the research touching on sentencer responsibility that is outlined above. I discuss the implications of the Court's holding in *Caldwell* for the jury override statutes. Although the empirical evidence has shortcomings, I suggest that a sentencer's sense of responsibility for the consequences of his or her decision indeed does affect both the decisionmaking process and the outcome. The following discussion is arranged by type of experiment: accountability, bystander intervention, sentence severity, and rule of decision, followed by a section on the impact of verbal comments. The categories overlap in many ways; for instance, most could logically be seen as different aspects of the accountability question. Nonetheless, each has a slightly different focus, and each also supplements and bolsters the other areas in important ways. Therefore, separation in this manner seemed to make sense.

¹⁴⁸ See *infra* notes 198-207 and accompanying text.

¹⁴⁹ The ideal study would compare the decisions of a real jury that had been told of appellate review with the decisions of a jury that had not received such information. Strict limitations on jury contacts make it unlikely that such a study will ever be undertaken. The best alternative would be an experiment using mock jurors and a videotaped trial.

A recent study by William Geimer and Jonathan Amsterdam revealed that some jurors who sat in actual capital sentencing hearings in Florida were influenced by their awareness that a recommendation of death could be overridden by the trial judge. In interviews with several dozen ex-jurors on the factors that influenced their sentencing decisions, six jurors referred to their knowledge of the judge's override powers. Half of these jurors stated that this knowledge increased their willingness to invoke the death penalty. Although this data does not represent the results of an exhaustive study (only those jurors who could be located and were willing to be interviewed were represented), the fact that even three jurors in this sample group were adversely influenced by their sense of divided responsibility is sufficient to raise concerns about the reliability of the resulting death sentences. See *Interview Data collected for Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1988).

A. Accountability/Nonaccountability

One of the great debates in experimental psychology centers on the extent to which results achieved in laboratory or classroom simulations accurately reflect what happens in the real world: Do experimental subjects really act the same way as persons on the street faced with the same problem? Jury researchers have not been immune from questions of external validity, in large part because of the eminently reasonable observation that a decision to deprive someone of his or her liberty or life may be especially stressful.¹⁵⁰ To assess external validity, researchers have conducted two types of experiments designed to demonstrate the effect, if any, of real world consequences on decisionmaking. One experiment contrasts the decisions of a real jury with those of mock juries hearing the same case, and another study contrasts the decisions of mock juries when accountability for "real" consequences is manipulated. Although the results have not been uniform, accountability for the consequences of a decision has been a discernible factor.

I. Mock/Real Comparisons

Two studies have used a comparison of real and mock jury decisions. The first, completed by Diamond and Zeisel in 1974,¹⁵¹ had startling results:

Aggregating over 10 different courtroom trials, they found that only 50 percent of the real juries (whose numbers were selected in the usual way through *voir dire*) favored guilty, whereas 80 percent of the "challenged" juries (composed of jurors excused from the real juries during *voir dire*), 100 percent of the "English" juries (composed of random selectees from the jury rolls without further examination), and 90 percent of the presiding judges (privately) favored guilty. They attributed this significant association to the realism of the former's role

¹⁵⁰ Some research has shown that when a jury brings in a guilty verdict, jurors increase their negative evaluations of the defendant. One study suggested that one reason for this may be that "juries feel a tremendous amount of anxiety in bringing in a guilty verdict, and thus seek to reduce their anxiety by increasing their negative evaluations of the defendant." Elwork, Sales & Suggs, *The Trial: A Research Review*, in *THE TRIAL PROCESS* 29 (Sales ed. 1973).

¹⁵¹ A Courtroom Experiment on Juror Selection and Decisionmaking, Paper Presented at the Annual Meeting of the American Psychological Association, New Orleans, 1974, cited by Davis, Bray & Holt, *The Empirical Study of Decision Processes in Juries*, in *LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY* 350 (Tapp & Levine eds. 1977).

(although all juries were otherwise treated as similarly as practicable by the court), and argued against the influence of composition *per se*.¹⁵²

The study contained at least two possible flaws: The real juries in fact did differ in composition from the others, and there was a lack of replication among the ten trials.¹⁵³ Nevertheless, the study provides "a measure of support" for the proposition that real juries are more cautious in reaching guilty verdicts because of their "covering responsibility."¹⁵⁴

The second study, by Hastie, Penrod, and Pennington, attempted to simulate the conditions of an actual trial as realistically as possible.¹⁵⁵ The experiment was carried out on working days in Massachusetts court and jury rooms, mock jurors were subjected to voir dire, and deliberation time was unlimited. Subjects were drawn from the jury rolls, and thus were far more representative than in experiments using students as mock jurors. Most of the mock jurors had served on juries before, and they gave the experiment high ratings for realism and seriousness.¹⁵⁶

In contrast to Diamond and Zeisel's findings, mock jury behavior resembled the performance of the real jury in the videotaped case presented. The most frequently chosen verdict of second degree murder was the same as the actual verdict. Nonetheless, a key difference appeared:

Experimental jurors were aware that their verdicts would not affect a real defendant's fate. Although experimental jurors went so far as to discuss the effects of their verdict on the defendant and his family, the gravity of their deliberations did not match the quality of an actual murder trial. The clearest sign of this occurred at the end of the deliberation when a verdict was rendered. Experimental jurors typically greeted the end of their task with feelings of relief and pleasure, while a typical postconviction murder juror is a study in dejection and solemnity.¹⁵⁷

The atmosphere of deliberation was atypical, yet juror involvement was still very high. The study concluded that, because of the high

¹⁵² Davis, Bray & Holt, *supra* note 151, at 350.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983).

¹⁵⁶ *Id.* at 42.

¹⁵⁷ *Id.* at 43.

level of involvement, the nature of the verdicts reached "would not necessarily be disturbed" by the lack of real consequences to the defendant.¹⁵⁸ The consistency between the verdicts of the real and mock juries supports this assertion.

2. Mock Jury Comparisons

Two studies support the conclusion that responsibility indeed influences decisionmaking, although the impact reported by Diamond and Zeisel was not duplicated. Wilson and Donnerstein (1977) employed two groups of student jurors, half of whom were told that they were actually deciding a student discipline case and half of whom were told that they were part of a hypothetical decision-making study.¹⁵⁹ The experimenters also manipulated the defendant's character attractiveness and physical attractiveness to see if this varied the results between jury groups.¹⁶⁰ In each of three experiments, the "real consequences" jurors were more likely to convict than role-players, the reverse of Diamond and Zeisel's outcome.¹⁶¹ The defendant's character attractiveness had no effect on the guilt judgments of real consequences subjects, but it did influence their punishment recommendation. For hypothetical consequences subjects, character attractiveness affected both the determination of guilt and of punishment.¹⁶² Physical attractiveness had no apparent effect on either jury group.¹⁶³

The fact that character attractiveness influenced the hypothetical but not the real consequences jurors on the question of guilt could reflect the unequal responsibility of the two groups. This interpretation is supported by findings that the real consequences

¹⁵⁸ *Id.* at 43-44.

¹⁵⁹ Wilson & Donnerstein, *Guilty or Not Guilty? A Look at the "Simulated" Jury Paradigm*, 7 J. APPLIED SOC. PSYCHOLOGY 175 (1977).

¹⁶⁰ *Id.* Real consequences jurors were told that the experimenter needed confidential help in a matter involving a student suspected of having distributed the questions on an exam. The teacher did not want to decide the matter himself because it was an unusual situation; instead he would rely on the judgment of the student's peers, and punish the student if the judgment was guilty. The jurors were then given a booklet describing the details of the incident, and were told to "[m]ake your judgments as best you can since your decision will determine what will happen to the student." *Id.* at 179. Hypothetical jurors were told that they were part of an experiment on the student judicial process, and were asked to make their judgment as if they were members of a real jury. *Id.*

¹⁶¹ *Id.* at 181, 183, 184. Arguably, differing outcomes on leniency effects are unimportant; facts will always differ, and the increased scrutiny triggered by heightened responsibility will merely produce a more certain decision on which way the evidence points.

¹⁶² *Id.* at 181-82.

¹⁶³ *Id.* at 183.

group demonstrated greater recall of the situational evidence of the case and by "[i]nformal observations by the experimenter [which] indicated that the real consequences subjects spent more time making their decisions than did hypothetical consequences subjects."¹⁶⁴ The experimenters hypothesized that the real consequences subjects might "weight the evidence differently in terms of importance than do hypothetical consequences subjects."¹⁶⁵

Real consequences subjects likely knew how a typical juror should respond and so focused on the situational evidence and weighted it more heavily than the evidence regarding the offender's character. This might then result in not being influenced by the offender's attractiveness, . . . giving more convictions overall, and recalling more situational evidence.¹⁶⁶

If the real consequences reaction was not simply to focus on particular evidence because a typical juror would focus on it, but to focus because, like a typical juror, more responsibility accompanied a decision that would bring certain consequences, it would tend to bear out the assumption of *Caldwell* that a jury's impulse to minimize its role could affect the verdict.

A second study, by Davis, Stasser, Spitzer, and Holt (1976), also suggests that jury responsibility affects deliberations.¹⁶⁷ Mock jurors were told that, after they had deliberated to a verdict, they would be asked to publicly account for their decision before a panel of experts. The deliberations of these accountable jurors were compared to the deliberations of mock jurors whose verdicts would not be reviewed. Both the accountable and nonaccountable juries saw a videotaped rape trial and then deliberated to a verdict.¹⁶⁸ Accountable juries reached slightly fewer guilty verdicts than their nonaccountable counterparts, but this difference was not great. More significant was the fact that the accountable juries seemed to have a more energetic debate, expending more effort in reaching a verdict. They also were generally more confident about their conclusions, and they were more nearly certain, when they did vote to

¹⁶⁴ *Id.* at 187.

¹⁶⁵ *Id.* at 185.

¹⁶⁶ *Id.* at 187.

¹⁶⁷ Davis, Stasser, Spitzer & Holt, *Changes in Group Members' Decision Preferences During Discussion: An Illustration With Mock Juries*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 1177 (1976), cited in HOROWITZ & WILLING, *THE PSYCHOLOGY OF LAW* 217 (1984).

¹⁶⁸ HOROWITZ & WILLING, *supra* note 167, at 217.

convict, that the defendant had committed the crime. The study hypothesized that this confidence resulted from a greater "interaction investment."¹⁶⁹ Again, this would bear out the position of *Caldwell* that downplaying the jury's role could undermine the responsible and reliable exercise of sentencing power.

The studies that indicate that responsibility is important are not uncontradicted, however. Kerr, Nerenz, and Herrick (1979) concluded that there was no difference in decisionmaking between "real consequences" and role-playing jurors.¹⁷⁰ Their experiment entailed a student discipline scenario similar to the one utilized by Wilson and Donnerstein.¹⁷¹ One-half of the subjects were told that their decision would have actual consequences for the student defendant, whereas the other half were told that the case they were to decide had actually been tried some time before. Because Kerr, *et al* hypothesized that the real consequences jurors in the Wilson and Donnerstein study might have recommended harsher punishment than their mock counterparts as a result of hostility toward a cheater who would affect grade curves, his experiment utilized students from the University of California at San Diego, who were told that the student defendant attended the University of California at Davis. Kerr also used several stratagems to enhance the credibility of the real consequences scenario.¹⁷²

Real consequences jurors were given a written summary of the case, were asked to decide guilt or innocence, to rate their certainty on a seven point scale, and to recommend a punishment on a seven

¹⁶⁹ *Id.* at 217-18. This interpretation would track the results obtained with unanimous rule of decision juries, which also tended to have lengthier debates and to be more certain of outcomes. "Interaction investment" and its effects may be linked to heightened responsibility. See *infra* notes 193-97 and accompanying text.

¹⁷⁰ Kerr, Nerenz & Herrick, *Role Playing and the Study of Jury Behavior*, 7 SOC. METHODS & RES. 337 (1979).

¹⁷¹ Groups of thirty subjects were told that they were to participate in an experimental program to test alternatives to the university's system of discipline, in particular, the use of a student jury to decide a student discipline case. A student previously charged with malicious destruction of university property had agreed to this form of adjudication. The subjects were provided with transcripts of a hearing on the case that had taken place earlier, and were allotted a fixed amount of time to read the transcript. They were then divided into juries of six to deliberate, again for a fixed amount of time. The real consequence subjects were told that the case would be decided by a majority of the juries deliberating on the case, and that if the defendant were found guilty the dean would consider the penalty recommendations. *Id.* at 342-43.

¹⁷² These included asking if any of the subjects had attended U.C. Davis recently. When a female confederate stated she had attended a summer session there, and had read about the case, she was excused from the experiment. Post-experiment interviews indicated that this technique was effective in establishing authenticity. *Id.* at 343-44.

point scale. After privately marking their predeliberation decisions, the jurors were then divided into six member juries and left to deliberate to a unanimous verdict on guilt and on the level of punishment. Deliberation time on each decision was limited to forty-five minutes. Mock jurors simply received the witness summary, and were told to try to place themselves in the roles of the actual jurors who tried the case.¹⁷³

The manipulation was quite successful, in that the perceived importance of the actual juror's decisions was significantly greater than that of their mock counterparts. But the results indicated that this perception made little difference in the outcome between the two. The verdicts and sentence recommendations were nearly identical. The only divergence was that real consequences jurors were more lenient in their postdeliberation sentence recommendations, which did not affect the final jury decision already made and did not affect the defendant. The experimenters attributed this to "a desire to be lenient with the defendant when it was safe to do so."¹⁷⁴

The experiment was intended to support the external validity of jury research results obtained with mock juries, but the experimenters noted that the results of this study could not be indiscriminately generalized to actual juries. The experimental six person juries, for instance, shared responsibility for the defendant's fate; no single juror was the sole arbiter, and the limits on deliberation time were unrealistic.¹⁷⁵ Still, because almost no differences in decisions were observed, the results raise questions about the effects of diminished responsibility. In a serious situation where participant involvement is high, even substantial differences in responsibility may have little effect on outcome. Kerr, *et al's* results would support this point of view.

Where the situation is a high stress one, however, like a capital sentencing decision, this experimental jury data gathered under distinctly different conditions of reality and gravity may be inapplicable. If this were so, the theory of *Caldwell* — and its implications for the jury override statutes — would remain intact.

B. *Bystander Intervention*

Experiments focusing on willingness to intervene under varying circumstances offer several insights into the intersection of re-

¹⁷³ *Id.* at 344-45.

¹⁷⁴ *Id.* at 350-51.

¹⁷⁵ *Id.* at 351.

duced responsibility and decisionmaking. In several well-known studies, Latané and Darley investigated the relation between bystander responsibility and willingness to intervene. The studies involved controlled "emergencies," posing various levels of danger to the victim and the bystander.¹⁷⁶

In each situation studied, the experimenters found that bystanders were less likely to intervene if other bystanders were also present. They concluded that:

If only one bystander is present at an emergency, he carries all of the responsibility for dealing with it; he will feel all of the guilt from not acting; he will bear all of the blame that accrues for nonintervention. If others are present, the onus of responsibility is diffused, and the finger of blame points less directly at any one person. The individual may be more likely to resolve his conflict between intervening and nonintervening in favor of the latter alternative

Finally, if others are known to be present but their behavior cannot be closely observed, any one bystander may assume that one of the other observers is already taking action to end the emergency. If so, his own intervention would only be redundant — perhaps harmfully or confusingly so. Thus, given the presence of other onlookers whose behavior cannot be observed, any given bystander can rationalize his own inaction by convincing himself that "somebody else must be doing something."¹⁷⁷

¹⁷⁶ B. LATANÉ & J. DARLEY, *THE UNRESPONSIVE BYSTANDER* (1968). For example, one experiment staged an unexpected epileptic seizure:

A college student arrived in the laboratory and was ushered into an individual room from which a communication system would enable him to talk to the other participants. It was explained to him that he was to take part in a discussion about personal problems associated with college life and that the discussion would be held over the intercom system, rather than face-to-face, in order to avoid embarrassment by preserving the anonymity of the subjects. During the course of the discussion, one of the other subjects underwent what appeared to be a very serious nervous seizure similar to epilepsy. During the fit it was impossible for the subject to talk to the other discussants or to find out what, if anything, they were doing about the emergency

The number of bystanders that the subject perceived to be present had a major effect on the likelihood with which he would report the emergency. . . . Eighty-five percent of the subjects who thought they alone knew of the victim's plight reported the seizure before the victim was cut off, while only 31 percent of those who thought four other bystanders were present did so.

Id. at 94, 97.

¹⁷⁷ *Id.* at 90-91.

Other experiments reached results similar to those of Latané and Darley. A 1970 study supported the hypothesis that a person who is made to feel responsible for another will be most likely to act to help.¹⁷⁸ Subjects who were told that they were participating in an experiment on the effects of punishment on learning were far more likely to cease administering electric shocks to the "learner" when they were made fully responsible for the learner's well-being.¹⁷⁹ Shaffer, Rogel, and Hendrick (1975) tested increased responsibility by arranging a theft in a library under various conditions.¹⁸⁰ The results were as predicted. Of the subjects who were asked to guard the victim's property, 77% intervened (or said they would intervene) at the time of the theft. But only 48% of those who received no request for assistance actually would have intervened.¹⁸¹ A second experiment tested the effect of the presence or absence of an inattentive confederate at the time of the theft. The experimenters hypothesized that another individual's presence at the table would diffuse responsibility and reduce the rates of intervention by the subject. This hypothesis also proved to be correct.¹⁸² The experimenters concluded:

¹⁷⁸ Tilker, *Socially Responsible Behavior as a Function of Observer Responsibility and Victim Feedback*, 14 J. PERSONALITY & SOC. PSYCHOLOGY 95 (1970).

¹⁷⁹ *Id.* at 100.

¹⁸⁰ The experiment was designed as follows:

The victim seated himself at the table occupied by the subject. After 2-3 minutes of apparent studying, the victim got up and walked away from the table in the direction of the reference section of the library, leaving behind an assortment of personal belongings. Before his departure, the victim asked half the subjects to watch his belongings for 5 minutes while he obtained a reference (request condition). The remaining half of the subjects were not asked to guard the victim's personal property (no request condition).

Two minutes after the departure of the victim, the thief appeared and began rummaging through the victim's belongings. The thief was careful to make some noise in order to draw the subject's attention. The thief searched through all of the victim's books and folders and finally reached into the female victim's purse (or lifted the book that the male victim had been reading), discovering approximately \$20 in the victim's wallet, (or discovering the male victim's wristwatch, concealed beneath the open book). At this point, the thief glanced out of the corner of his eye at the subject, hurriedly placed the money (or watch) into his pocket, and walked quickly away from the table.

Shaffer, Rogel & Hendrick, *Intervention in the Library: The Effect of Increased Responsibility on Bystanders' Willingness to Prevent a Theft*, 5 J. APPLIED SOC. PSYCHOLOGY 303, 306 (1975). As a control, a group of subjects who agreed to participate in a study responded to a questionnaire asking how they would have acted in the situation described. *Id.* at 307-08.

¹⁸¹ *Id.* at 308.

¹⁸² *Id.* at 315.

It seems likely that a commitment to the victim's prior request for assistance represents a simple taking of responsibility on the part of the bystander, an act that almost certainly would increase his subsequent costs for not intervening. For example, the bystander's agreement to watch the victim's belongings entrusts those belongings to him. A subsequent theft of the entrusted belongings would likely arouse the bystander's guilt over his failure to abide by his commitment, and may lead the bystander to anticipate some form of reprisal from a rather angry victim who had every reason to expect his assistance. . . . Since bystanders in the no request conditions were not offered an opportunity to formally assume responsibility for the victim's belongings and, hence, were not exposed to the high costs for not helping implied by this commitment, their low rate of intervention is to be anticipated.¹⁸³

The results contain clear implications for the criminal justice system:

The existence of many actors in the system raises the potential for increased *diffusion of responsibility*, wherein, despite wide discretion to act, no action is taken. Each decision-making component may decline to take the responsibility for a decision because it knows that other components are equally capable of taking action.¹⁸⁴

The result could be precisely what Justice Marshall feared in *Caldwell*: a jury recommendation of death despite some doubt, in the knowledge that the case will be reviewed; judicial affirmation, based on deference to the jury's decision; a denial of clemency, because the governor feels that the courts have spoken; execution, because if it was wrong someone would have done something about it earlier in the process.¹⁸⁵

On the other hand, the relevance of bystander intervention to jury deliberation should not be overstated. First, it is not clear that these "emergency" situation studies may be generalized to jury decisionmaking. Not only is the juror not faced with a sudden choice between action and inaction, he or she is not in a position of individual responsibility. As a member of a body, responsibility may

¹⁸³ *Id.* at 317-18.

¹⁸⁴ M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 216 (1978) (emphasis added).

¹⁸⁵ *See id.*

already be diffused to the point where the existence of judicial review is not a significant factor.¹⁸⁶ The accountability studies contradict this possibility to an extent, demonstrating that consequences affect group decision. Second, the jury as a whole deliberates and decides what to do. This deliberation may counteract an individual juror's urge to shift responsibility to another body, simply by instilling a sense of obligation to contribute to the group of which she is a part.

Furthermore, because the sentencing decision is difficult no matter what the outcome, this unresponsive bystander phenomenon may cut both ways. The "inaction" that the appellate court will remedy could be the same regardless of whether the decision is to grant life or to impose death. In states like Mississippi, where only a death sentence triggers automatic judicial review of the sentence, this phenomenon does not pose a problem because only one verdict will leave the jury in a posture of shared responsibility. In a state like Florida, however, which permits jury override no matter what the jury's decision, the difficulty remains because the jury can avoid responsibility either way. If we assume that death is the more difficult choice to reach, and that without any mention of review a jury would favor leniency, then advertent to review might impermissibly lead more jurors to vote for death than they otherwise would because they had been told that responsibility would be shared. On the other hand, if the assumption of preference for life is untrue, then a jury shift caused by knowledge of review would be in favor of life imprisonment. Because the choice preference is unknown, and will likely vary with the facts of the case, the harm of diffused responsibility remains somewhat uncertain.

Despite these caveats, the general findings of the unresponsive bystander studies are highly suggestive. The notion that jurors, like any other individuals faced with a difficult or unpleasant choice, will be glad to shift their burden to someone else's shoulders appeals strongly to a conception of human nature founded on everyday observation. Even though the consequences of this handwashing of the defendant cannot be clearly documented or predicted, it is unlikely that a "better" choice will result given the limited parameters of judicial review.

¹⁸⁶ An antidote to diffusion of responsibility among the jurors might be a unanimous rule of decision, which may increase individual responsibility because every juror has an effective veto.

C. Sentence Severity

Several studies that have examined the effects of presenting a decisionmaker with a decision that will have an impact suggest that harsher consequences heighten decisional caution. This result could reflect an increase of the decisionmaker's responsibility. For example, one study found that a juror's "threshold probability" — the perceived probability of guilt necessary for the juror to decide in favor of conviction — rose when capital punishment was the penalty in a simulated trial, as against the threshold when life imprisonment was the most severe sentence.¹⁸⁷ A commentator points out: "It does . . . seem reasonable that jurors would demand a higher probability of guilt where the stakes of making a type 1 error of convicting the innocent are greater, although in more severe crimes there may be a greater desire to obtain a conviction."¹⁸⁸ In other words, when jurors found themselves responsible for severe consequences, they required a high level of proof. If responsibility was reduced by reducing the consequences, then less proof was required.

Vidmar (1972) found that simulated jurors who were asked to read a description of an attempted robbery and consequent killing of a store owner seldom chose a verdict of not guilty when they had at least one moderate penalty option.¹⁸⁹ On the other hand, over half the jurors faced with only a severe penalty option did choose a verdict of not guilty. Similarly, Kaplan and Simon (1972) observed that jurors given the choice between finding a defendant guilty of first degree murder and not guilty acquitted far more often than jurors given four options, including second degree murder and manslaughter.¹⁹⁰ Kerr (1978) used similar materials and got nearly the same results.¹⁹¹

¹⁸⁷ Peterson, *The Juror's Decision*, cited in NAGEL & NEEF, DECISION THEORY AND THE LEGAL PROCESS 208 n.16 (1979).

¹⁸⁸ NAGEL & NEEF, *supra* note 187, at 208 n.16. "As one might hypothesize, when the severity of the penalty is mentioned, the threshold probability for conviction tends to go up and the likelihood of conviction may thus tend to go down." *Id.* at 202.

¹⁸⁹ Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOLOGY 211 (1972).

¹⁹⁰ Kaplan & Simon, *Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising from the "Algiers Motel" Trial* 7 LAW & SOC. REV. 87 (1972), cited in M. GREENBERG & R.B. RUBACK, SOCIAL PSYCHOLOGY OF THE CRIMINAL JUSTICE SYSTEM 169 (1975).

¹⁹¹ Kerr, *Severity of Prescribed Penalty and Mock Juror's Verdicts*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1431, (1978), cited in M. GREENBERG & R.B. RUBACK, *supra* note 190, at 169.

In a thesis study conducted by Krupa (1979), Kerr's findings were further developed.

Some students were led to believe that their decisions would have real conse-

Responsibility for a severe penalty affects not only determinations of guilt; it affects length of deliberation as well. Davis, Kerr, Stasser, Meek, and Holt (1977) found that concern over sentence severity and consequences to the victim increased deliberation time. Juries deliberated longer in cases where the potential sentence was severe and victim consequences were mild and in cases where the potential sentence was mild and victim consequences were severe.¹⁹²

The question, then, is whether comments on judicial review have the same tendency to reduce responsibility as do reduced penalties. If it is true that reluctance to make an error in convicting an innocent defendant is high where the consequences are severe, then reference to judicial review could well affect the decision. Reference to judicial review implies, as Justice Marshall noted in *Caldwell*, that the jury's decision will be reviewed for correctness; it is as if the possibility of a more moderate decision is introduced. Instead of an irrevocable choice between life and death, the jury has an intermediate choice; impose death, but with the understanding that the decision is not final. Rather than being forced to make the hard decision, the jury has a fall-back option. The defendant is

quences for a real defendant, while others believed the case was simulated. While "real" jurors were generally more conviction-prone, they turned in less convictions than simulated jurors when (a) the evidence was weakly incriminating, and (b) the prescribed punishment was severe, and (c) an external authority, rather than they, controlled the eventual punishment. Thus, "real" jurors substantially decreased convictions based on weak evidence when an overly severe punishment (in this case, expulsion from school for copying an exam) that they could not influence would befall the defendant. When evidence was strong, and/or they would have the power to ameliorate punishment, conviction rate was unaffected by potential punishment severity.

Kaplan, *Cognitive Processes in the Individual Juror* (unpublished masters thesis, Northern Illinois Univ. 1979), in J. HOROWITZ & T. WILLING, *THE PSYCHOLOGY OF THE COURTROOM* 217 (N. Kerr & R. Tray eds. 1982) (citing S. Krupa, *Effects of Control and Severity of Punishment Alternatives on Jury Decision-making* (1979) (emphasis in original)).

¹⁹² *Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries*, 18 *Organizational Behavior and Human Performance* 346, cited in B. SALES, *THE TRIAL PROCESS* 29 (1981).

Because there is evidence of a leniency shift during deliberation, the fact that deliberation is shortened by a more moderate decision alternative may work against a defendant as well. Although this is not a direct effect of reduced responsibility, several studies have documented the fact that in all but the cases where the evidence against the defendant is strongest, jurors as individuals are more likely to favor conviction before than after deliberation. E.g., Stasser, Kerr & Bray, *The Social Psychology of Jury Deliberations: Structure, Process, and Product*, in HOROWITZ & WILLING, *supra* note 191, at 221, 247, and studies cited therein; I. HOROWITZ & T. WILLING, *THE PSYCHOLOGY OF LAW* 214 (1984) and studies cited therein. This trend is particularly strong when the weight of opinion before deliberation favors acquittal, but it has been observed also when the majority of jurors favored conviction as they went into the jury room. Stasser, Kerr and Bray, *supra*, at 247.

left with a chance to show the reviewing court that it was all a mistake. As a result, the jury may impose a more severe penalty (*i.e.*, death subject to judicial review) than it otherwise would.

D. *Rules of Decision*

Decision rules have several effects. Juries that must reach a unanimous decision tend to deliberate longer, delving into the evidence more thoroughly; minority viewpoints are seen as more influential; satisfaction with the decision is higher; and hung juries are more common.¹⁹³ Hastie, Penrod, and Pennington polled participants in their jury study and found that perceptions of the thoroughness and seriousness of deliberation decreased as the rule of decision shifted from unanimous to five-sixths to three-fourths.¹⁹⁴ The experimenters felt that this trend comported with the idea of reduced responsibility. They noted:

The notion is that decision rule affects the seriousness or gravity with which an individual juror addresses the decisionmaking task. A lessened feeling of seriousness or gravity produces lowered motivation to review information thoroughly in the case before changing verdict preferences. This results in faster, less considered movement from initial verdict preferences to the most popular verdict within the jury.¹⁹⁵

This same reduction in responsibility could also partially explain why majority rule juries convict more often than unanimous rule juries. Jurors who have doubts about the guilt of the defendant may resolve them more quickly when it appears that a majority will make an opposing vote meaningless anyway. Such an interpretation is not free from dispute, though:

The problem here is that a subjective sense of lowered responsibility is not clearly associated with majority decision rules. In fact, on the surface, a juror in a verdict-rendering majority under a nonunanimous decision rule is more likely to feel responsibility. Typically fewer jurors render the verdict, and often they render the verdict in the face of persistent opposition from an outvoted minority faction. . . . However, if responsibility is defined as the

¹⁹³ R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 155, at 32.

¹⁹⁴ *Id.* at 77.

¹⁹⁵ *Id.* at 115.

ability of an outside observer to identify an individual juror's verdict preference at the end of deliberation, the unanimous decision produces the greatest sense of individual responsibility in that the observer can be certain of every juror's final vote. . . . This interpretation would be consistent with the conclusion that heightened individual responsibility is associated with slower growth of the largest faction. The problem is that in a typical major felony case, the jury is polled individually in court after the verdict is rendered. . . . Thus even this subtle version of the diffusion of responsibility account does not apply to actual trial procedure.¹⁹⁶

If a majority rule of decision does affect jury deliberation by lessening the motivation of each juror to carefully review the issues, however, it is arguable that reference to judicial review would have the same impact. As was noted above, intra-jury effects may not be generalizable to a situation where responsibility is shifted to a separate, non-jury entity; but there is no particular evidence that this is so. In the Davis and Stasser study, the mock jury that was told that its decision would be reviewed by a panel of experts deliberated harder and longer than a mock jury that was not subject to post-decision scrutiny.¹⁹⁷ This suggests that the existence of a non-jury entity may be just as influential as an intra-jury rule of decision. Because that study in a sense heightened the responsibility of the reviewed jury rather than diffused it, however, the outcome might be attributable to other factors.

E. *The Power of Suggestion*

Notwithstanding the data on the effects of responsibility on decisionmaking, one important question remains unanswered: Will comments to jurors regarding review actually induce them to take their job less seriously than if no comments had been made? The studies discussed above touched on this question; for instance, bystander studies indicate that responsibility may be diffused by the presence of others. Perhaps references to review unfairly alerts the jury to such a presence. The accountability and severity studies indicate that decisions varied depending on what was going to happen to the defendant next; perhaps being told that a death penalty is subject to review and override mitigates the consequences to such

¹⁹⁶ *Id.* at 116-17.

¹⁹⁷ See *supra* notes 167-69 and accompanying text.

a degree that the decision is affected. The lack of empirical data on this point leaves a hole in the analysis, and doubts over whether the results of psychology experiments can validly be generalized to a capital jury compound the problem.

There is some evidence of the potency of such comments. Bickman and Rosenbaum devised two experiments designed to test the felt responsibility theory of Latané and Darley.¹⁹⁸ Particularly, they sought to determine whether the verbal behavior of a bystander could influence intervention. In the first experiment, a confederate "attempted to influence subjects to notice an incident and interpret it as a crime and . . . either encouraged the subjects to assume responsibility by reporting the crime or discouraged reporting."¹⁹⁹ The experimenters hypothesized that if encouraging and discouraging comments instilled a sense of responsibility, they would influence reporting in the expected direction.

The incident staged was a shoplifting,²⁰⁰ and the results showed that, although only 21% of the subjects felt that the confederate had attempted to influence them, the influence in fact was quite significant. Of the subjects who were encouraged to report, 72% did so, in comparison to only 32% of the discouraged subjects.²⁰¹ The experiment demonstrated that "a few encouraging or discouraging comments by an unknown witness can strongly affect a bystander's willingness to report a criminal incident."²⁰² There was no indication that self-perceived responsibility varied between encouragement and discourage conditions.²⁰³

A second experiment "attempted to influence the subject's perception of the event by defining it as not a crime."²⁰⁴ The experi-

¹⁹⁸ Bickman & Rosenbaum, *Crime Reporting as a Function of Bystander Encouragement, Surveillance, and Credibility*, 35 J. PERSONALITY & SOC. PSYCHOLOGY 577 (1977).

¹⁹⁹ *Id.* at 578.

²⁰⁰ In the experiment, an apparent thief wheeled a shopping cart containing a few items into a checkout line. With the subject in line behind her, the thief unloaded the groceries in her cart and then, when the subject was deemed to be looking, grabbed a few items from the checkout display and stuffed them in her purse. A thirty-five year old female confederate wearing a hat and coat and with a cart full of groceries, who had followed the subject into the checkout line, would then either encourage or discourage reporting. In the discourage condition, the confederate would say, "[I]t's the store's problem. They have security people here." In the encourage condition, the confederate would say, "We should report it. It's our responsibility." *Id.* at 579.

²⁰¹ *Id.* at 580.

²⁰² *Id.* at 581.

²⁰³ *Id.*

²⁰⁴ *Id.* at 582. In this experiment, subjects were told that they were to observe shoppers' reactions to a store display. Each subject was paired with a confederate who, when a video-

menters hypothesized that, as compared with their first experiment "where the confederate expresses the appropriate course of action, subjects exposed to this interpretation manipulation will be less likely to define the event as a crime."²⁰⁵ Once again there was strong "evidence that the subject's definitions of the situation and their definitions of the appropriate responses were differentially affected by the verbal influence manipulations."²⁰⁶ When encouraged to report, seventy-two percent of the subjects did so, whereas only fourteen percent reported when told that the incident was not a crime, and only eight percent did so when discouraged from reporting. As in the first experiment, the verbal manipulation did not have any direct effect on subjects' perceptions of responsibility for reporting, but "a few verbal comments can suggest the appropriate course of action, and thus have a strong impact on one's tendency to report the crime to the proper authorities."²⁰⁷

Distinctions between the conditions of the experiment and a capital case could be drawn, but the study does suggest just how readily people faced with hard choices and uncertainty will respond to a suggestion of what action would be appropriate. This will be especially true when the suggestion comes from representatives of the state: the prosecutor or the judge. Like the rest of the research discussed above, it is not dispositive on the question of jury responsibility. But in conjunction with that research, it contributes to an argument that cumulatively is quite persuasive.

VI. CONCLUSION

The Court in *Caldwell* reasoned that information diminishing a capital sentencer's sense of responsibility created dangers that the Court found constitutionally intolerable. The logic of *Caldwell* suggests the invalidity of sentencing schemes that divide sentencing responsibility at the trial level. The Court's *Caldwell* reasoning, and the extension of that reasoning to the jury override statutes, finds support in the empirical literature.

Although the precise degree of consideration that a trial judge gives to the jury's advisory sentence in the override states may

taped shoplifting incident suddenly appeared on the screen, either interpreted it as a shoplift or as a non-incident (e.g., "I'm sure she'll pay for it. She probably told the clerk she put it in her purse."). *Id.* at 582-83.

²⁰⁵ *Id.* at 582.

²⁰⁶ *Id.* at 583.

²⁰⁷ *Id.* at 584.

remain in the province of metaphysics, there is little doubt that that sentencing responsibility is, to some extent, divided and shared. The trial judge, though not "bound" by this sentence in either of the three override states, is certainly subject to its influence. Under these singular sentencing provisions, the judge is by no means the sole sentencer.

Most critical, however, is the possibility that the capital juror, informed that his or her sentencing role is advisory, will actualize the dangers of bias toward a death sentence that *Caldwell* exposed. Before invalidating these statutes or voiding death sentences imposed under them, courts ought not require proof that jurors actually were adversely influenced by the divided sentencing roles. It is sufficiently intolerable that even the risk of such a phenomenon exists.

The *Caldwell* Court set out a strict test for determining whether diminished sentencer responsibility so inheres in a sentencing procedure as to render it constitutionally invalid: "Because we can not say that this effort had *no effect* on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."²⁰⁸ There is, simply, no way that one can confidently conclude that the jury override statutes of Alabama, Florida, and Indiana do not yield such a result. Such a degree of unreliability in a capital sentencing scheme is constitutionally intolerable.

²⁰⁸ 472 U.S. 320, 341 (1985) (emphasis added).