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When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation

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When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation

James R. Acker*

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I. Introduction

"I was taught from a little girl that you have to be careful what you ask for. . . ."

—Assemblywoman Gloria Davis¹

After defeating incumbent Mario Cuomo and assuming office in 1995, George E. Pataki became New York's first Republican governor since 1974.² Throughout his election campaign, Pataki promised to restore capital punishment to a state which last conducted an execution in 1963,³ and which had on its books a constitutionally deficient death penalty statute. The New York Court of Appeals had invalidated New York's very restrictive death penalty statute in 1973,⁴ and subsequently

1. Record of Proceedings, New York State Assembly, Bill No. 4843, 474 (Mar. 6, 1995) [hereinafter Assembly Debate].

2. The last Republican governor was Malcolm Wilson, who served the remainder of Nelson Rockefeller's unexpired term after Rockefeller resigned as New York's governor in 1973 to become Vice President of the United States under President Gerald Ford. *THE NEW YORK REDBOOK, 1993-1994* 31 (George A. Mitchell ed., New York Legal Publishing Corp. 92d ed. 1993). Governor Wilson signed death penalty legislation in 1974. Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209; *id.*, sec. 5, § 125.27. Over two decades later, Wilson and several other prominent New Yorkers endorsed a statement of "Fairness Principles" regarding the drafting of the 1995 death penalty statute. *NEW YORKERS FOR FAIRNESS IN CAPITAL PUNISHMENT, STATEMENT OF PRINCIPLES* (undated) (on file with PACE LAW REVIEW).

3. Eddie Lee Mays was executed for murder on August 15, 1963. WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982* 471 (1984). *See also*, *The Last Electrocutation*, N.Y. TIMES, Mar. 7, 1995, at B5 (describing Mays' crime and his execution).

4. The Temporary Commission on Revision of the Penal Law and Criminal Code had recommended abolition of the death penalty in New York in 1965. Instead of abolishing capital punishment, the State Legislature restricted it significantly that same year to apply only to the murder of a peace officer or to murder committed by a life term prisoner. Act of June 1, 1965, ch. 321, sec. 1, § 1045, 1965

ruled that replacement legislation enacted in 1974 also was unconstitutional.⁵ Then, for eighteen consecutive years, the State Legislature approved capital punishment bills, only to have Governors Carey (from 1977 through 1982) and Cuomo (from 1983 through 1994) veto the bills.⁶ A new chapter began in New York's extensive history with the death penalty when Governor

N.Y. Laws 1021-22. A 1971 amendment added the killing of an employee of a jail or correctional institution as a form of capital murder. Act of July 6, 1971, ch. 1205, sec. 1, § 125.30(1)(a)(ii), 1971 N.Y. Laws 3122-23. At this time, juries had unregulated discretion to sentence a convicted murderer to death or to life imprisonment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court ruled that sentences of death imposed at the unfettered discretion of sentencing authorities amounted to cruel and unusual punishment under the Eighth and Fourteenth Amendments. Applying *Furman*, the New York Court of Appeals ruled in 1973 that the state's death penalty procedures were unconstitutional. *People v. Fitzpatrick*, 32 N.Y.2d 499, 512, 300 N.E.2d 139, 145, 346 N.Y.S.2d 793, 802, *cert. denied*, 414 U.S. 1033 (1973). See generally James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 524-29 (1990)[hereinafter *Policy Perspectives*].

5. New York, like several other states in the confusing aftermath of *Furman v. Georgia*, 408 U.S. 238 (1972), enacted mandatory death penalty legislation in 1974. The statute required that a sentence of death be imposed upon offenders convicted of murdering a police officer or the employee of a jail or correctional institution, and upon life term prisoners convicted of murder. Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209; *id.*, ch. 367, sec. 5, § 125.27(1)(a), 1974 N.Y. Laws 1209-10. The Supreme Court subsequently ruled that mandatory capital punishment for murder is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Even narrowly defined crimes, such as the murder of a police officer, could not automatically be punished by death with no consideration given to individual offense and offender circumstances. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (*per curiam*). Relying on these decisions, the New York Court of Appeals ruled that mandatory capital punishment for the murder of a corrections employee, as provided under the new death penalty law, was unconstitutional. *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978), and *cert. denied sub nom.*, *People v. James*, 438 U.S. 914 (1978). A few years later, the state court invalidated the portion of the statute mandating capital punishment for murder committed by a life term prisoner. *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985). The United States Supreme Court later ruled that mandatory capital punishment for life-term prisoners convicted of murder is unconstitutional. *Sumner v. Shuman*, 483 U.S. 66 (1987). See generally *Policy Perspectives*, *supra* note 4, at 529-33.

6. See Sponsor's Memorandum in Support of N.Y.S. 6350, N.Y.A. 9028, 217th Sess. (1994) (providing legislative history of capital punishment bills that passed the State Senate and Assembly, gubernatorial vetoes, and failed override attempts). See also *Policy Perspectives*, *supra* note 4, at 535-36.

Pataki signed legislation returning capital punishment to the State of New York, effective September 1, 1995.⁷

The enactment of this law fulfilled Governor Pataki's campaign promise, and a commitment which the new governor reiterated during his inaugural address to the people of New York:

Our founders believed that one area where government should be strong and effective was maintaining public order and public safety. They understood society's first obligation is to those citizens who obey the law and respect the rights of others, and they expect government to protect them from those who do not.

...

Let me also note that when a society does not express its own horror at the crime of murder by enforcing the ultimate sanction against it, innocent lives are put at risk.

Not out of a sense of vindictiveness, then, but a sense of justice—indeed, a sense of compassion for those who otherwise might become victims of murder—I will ask the Legislature to pass and I will sign and enforce the death penalty. And let me say—and let me say: if one police officer's life is saved, if one less child is caught in a crossfire, if one fewer cabdriver or shopkeeper is killed in a robbery, then the death penalty will have proven itself worthwhile.⁸

On hearing these remarks, Pataki's audience erupted for what was by far the most prolonged and enthusiastic ovation of his address.⁹ Not all in attendance were so taken by these

7. Governor Pataki signed the bill (N.Y.S. 2850, N.Y.A. 4843, 218th sess. (1995)) into law on March 7, 1995. New York has been no stranger to the death penalty. Between 1890 and 1963, a total of 692 people were executed under state authority in New York. BOWERS, *supra* note 3, at 458-471 (identifying 695 persons lawfully executed in New York during this period, including three executed at Sing Sing Prison pursuant to federal death sentences). Since 1930, when national execution data first became available, New York's total of 329 executions ranks only behind Georgia and Texas among all jurisdictions in the United States. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993 675 (Kathleen Maguire & Ann L. Pastore eds., U.S. Department of Justice, Bureau of Justice Statistics 1994).

8. *The People Seek Change: Transcript of Pataki's Inaugural*, N.Y. TIMES, Jan. 2, 1995, at A28.

9. Kevin Sack, *A Call for Change: Republican Again Urges Cuts in State Taxes and in Spending*, N.Y. TIMES, Jan. 2, 1995, at A1. See also Assembly Debate, *supra* note 1, at 429-30 (remarks of Assemblyman Alexander Grannis):

There was a very interesting thing that happened last week. Governor Pataki appeared at a breakfast for *Crane's Business Weekly* or *Monthly*,

words. Mario Cuomo, who was among the officials on the rostrum, and who had politely applauded at other juncture's during the new governor's speech, sat impassively. He later observed that, "It disconcerts me that the loudest cheer would be for death."¹⁰

New York thus became the thirty-eighth state to adopt a capital punishment statute. While this new law in some respects resembles the legislation that was voted on and vetoed for the preceding eighteen years, it has several different features, including a number of unique provisions that distinguish it from the nation's other death penalty laws. This article provides a detailed description and analysis of New York's death penalty statute. This statute is significant in part because New York, as the nation's third most populous state and a recognized leader in many other legal, political, and social issues, had for many years been regarded as a linchpin among the embattled minority of jurisdictions holding out against capital punishment.

New York finds itself in the uncustomary position of being a juristic latecomer, and not a trend-setter, in the enactment of capital punishment legislation. The specifics of this statute merit close consideration because in death penalty legislation the "devil truly is in the details." Throughout this article, verbal thrusts and parries made by State Senators and Assembly representatives during the legislative debate on the bill are recounted. Many state legislators insisted that their constituents demanded this statute. Now, it is a statute that the people of

whatever it's called, and he took his message about tax cuts there, lukewarm, lukewarm response. He took his message on budget cuts, really lukewarm response. These people are smart. And then he got to his punch line and he repeated once again his campaign pledge to sign the death penalty bill, . . . the room erupted, these people these business leaders from around the City, stood up and cheered and clapped and were overjoyed.

Id. Other governors, from an earlier era, also have earned favor from their audiences by touting capital punishment. "While Nevada's governor read his state of the state address to the legislature in 1973, he 'was interrupted by applause just once,' when he called for a return to capital punishment. New York's Governor Rockefeller received 'thunderous' applause when he made the same suggestion at a labor conference." LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 90 (1992).

10. Sack, *supra* note 9, at A29.

New York must live with¹¹ and, from time to time, perhaps must die under as well.

II. New York's Death Penalty Legislation

The legislation I approve today will be the most effective of its kind in the nation.

—Governor George Pataki¹²

[This] is a bill that we think is as fair as any in the country.

—Senator Dale Volker¹³

[T]he death penalty is one of those measures that looks a lot better when you don't have it than when you have it. . . . [A]fter you have the death penalty for a while and it's used . . . it doesn't look so good to the public anymore, because invariably, the somewhat freakish, arbitrary nature of the ultimate irreversible penalty becomes apparent.

—Senator Martin Connor¹⁴

The bill to reintroduce capital punishment in New York was printed on Thursday, March 2, 1995. Under the state constitution, bills must be available for consideration by the Legislature for at least three days before action can be taken on them, unless the Governor issues a message of necessity.¹⁵ The death penalty bill lay idle on Friday, March 3, and over the weekend. On Monday, March 6, the State Senate debated and passed the bill by vote of 38-19. Debate in the Assembly commenced directly after the Senate's vote and continued well past midnight. The bill passed in the Assembly, by a margin of 94-52, on March 7 at 4:37 a.m.¹⁶ Governor Pataki signed the bill into law later that same day.

11. "And how sad it is when even long opposed members from my side of the aisle, without a hint of irony urged that we accept the inevitable and draft a death penalty bill we could live with. . . . [Some] of my colleagues . . . are fond of passing such oxymoronic propositions" —Assemblywoman Barbara Clark. Assembly Debate, *supra* note 1, at 152.

12. Memorandum from State of New York Executive Chamber, filed with N.Y.S. 2850, 1 (Mar. 7, 1995)[hereinafter Executive Memorandum].

13. New York State Senate Death Penalty Debate, Bill No. 2850, 1851 (Mar. 6, 1995) [hereinafter Senate Debate].

14. *Id.* at 1857.

15. N.Y. CONST. art. III, § 14 (amended 1938).

16. James Dao, *Death Penalty in New York is Restored After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1, B5.

No public hearings were conducted prior to the bill's passage, and there were no other opportunities for public review or comment. Some charged that this "death penalty express" was a product of closed-door, back-room politicking. Assemblyman Albert Vann observed, "I think I know a deal when I see it. This is definitely a done-deal. . . ." ¹⁷ Assemblyman Roger Green was even more disenchanted by this process:

I fear this day that the first victim of the death penalty is democratic discourse itself, that on a question as important as life or death, that we would not have allowed the people to express their concern. . . . [W]e don't pass sewage bills like this in the State of New York. ¹⁸

The apparent haste with which the legislation was drafted, and the absence of an opportunity for public debate and comment to help shape the specific provisions of the law, are evident in some particulars of the statute. In other provisions, the statute reflects considerable thought and careful drafting. New York has a new death penalty law on its books, and it is a law of tremendous significance. "That is the headline. But the fine print is equally important." ¹⁹ Senator John Marsh lamented that, "We ought to be putting this whole issue under a jeweler's

17. Assembly Debate, *supra* note 1, at 303.

18. *Id.* at 397-98. See also Symposium, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557, 561 (1995) (remarks of Ronald J. Tabak):

There was no real debate over the death penalty in the 1994 New York gubernatorial campaign. People merely knew that one candidate favored it and one candidate opposed it. Sadly, there have been no legislative hearings concerning the death penalty at which non-legislators could testify in at least twenty-five years; the legislation enacted on March 7, 1995 was drafted in secret; and the final version was released on Friday, March 3, just a weekend before both houses of the Legislature voted for it on Monday, March 6.

Id. See also, Remarks of Senator Emanuel Gold. Senate Debate, *supra* note 13, at 1957:

I'm almost embarrassed for us that a situation like this was decided not by the Legislature the way we're supposed to be doing it in open debate but with counsels working weekends and nights; and then when the Senate and the Assembly and the Governor agree, it doesn't matter what we do after that. We look at our watches.

Id.

19. Assembly Debate, *supra* note 1, at 7 (remarks of Assemblyman Eric Vitaliano).

eye. . . ."²⁰ The detailed analysis of the law that follows comes too late from this perspective, but it still merits presentation. The law will inevitably be accompanied by many questions in its application. It faces certain judicial challenge, may eventually may return to the legislature for amendment, revision, or reconsideration.

A. *First-Degree Murder*

1. *The Mens Rea Requirement*

The statute defines twelve varieties of killings as first-degree, or capital murder. For all types of first-degree murder, the offender must act with the "intent to cause the death of another person. . . ."²¹ The intent-to-kill standard is more demanding than the mens rea required to support a sentence of death under the federal Constitution. For example, offenders who commit felony murder may be executed consistently with the Eighth and Fourteenth Amendments as long as they were major participants in the predicate felony and acted with reckless indifference to human life, even if they did not personally kill the victim and had no intent to do so.²² A number of state death penalty statutes authorize capital punishment for murder absent proof that the offender intended to kill,²³ so in this respect New York's legislation is relatively exacting.

At the same time, the mens rea standard used to define capital murder in New York is not as demanding as it used to be and, arguably, is not as stringent as it should be. As recently as 1965, the state's first-degree murder statute required proof of

20. Senate Debate, *supra* note 13, at 2012-13.

21. N.Y. PENAL LAW § 125.27(1) (McKinney Supp. 1996). Two affirmative defenses are recognized under the statute:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide.

Id. § 125.27(2) (McKinney 1987).

22. *Tison v. Arizona*, 481 U.S. 137 (1987).

23. See James R. Acker & C. S. Lanier, *The Dimensions of Capital Murder*, 29 CRIM. L. BULL. 379, 385-88 (1993)[hereinafter *Dimensions of Capital Murder*](collecting statutes).

"deliberate and premeditated design to effect the death of the person killed, or of another."²⁴ Although the elements of deliberation and premeditation have been criticized as vague,²⁵ they are useful conceptually to identify the kinds of cold-blooded and planned killings that would justify capital punishment most strongly on either retributive or deterrent grounds. Intentional killings can be, and often are, spur-of-the-moment reactions to unusual precipitating circumstances. As such, they may not reflect as adversely on an offender's character as would a killing committed deliberately and after premeditation.²⁶ Additionally, killings preceded by planning and reflection should theoretically be more readily discouraged by the threat of capital punishment than intentional killings not accompanied by premeditation and deliberation.

Some states have legislation limiting death-penalty eligibility to premeditated and deliberate killings,²⁷ and in this respect resemble first-degree murder legislation introduced in the State of Pennsylvania over two centuries ago.²⁸ A few lawmakers' slips of the tongue during the 1995 legislative debate suggested that premeditation or deliberation were elements of capital murder.²⁹ However, the resulting first-degree murder statute retained "intent to cause death"³⁰—no more and no less—as the threshold mens rea requirement for death-penalty eligibility.

24. Act of June 1, 1965, ch. 321, secs. 1-2, § 1045-a(2), 1965 N.Y. Laws 1021-22. Only two types of killings were made capital crimes under the 1965 statute. *Id.* at sec. 1, §§ 1021-22.

25. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 707-09 (1937); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 773-75 (1949).

26. *Dimensions of Capital Murder*, *supra* note 23, at 382, 388-89.

27. See MD. ANN. CODE art. 27, § 407 (1996); PA. STAT. ANN. tit. 18, § 2502(a) (West 1983); VA. CODE ANN. §§ 18.2-31(1)-(9) (Michie Supp. 1995).

28. 1794 Pa. Laws 257 §§ 1-2. Although this statute defined various felony murders as capital crimes, without a heightened mens rea requirement, first-degree murder otherwise was limited to "willful, deliberate and premeditated" killings, and such analogous killings as those committed by poison or by lying in wait. See generally Keedy, *supra* note 25.

29. See Senate Debate, *supra* note 13, at 1875, 1882 (remarks of Senator Stephen Saland, referring to the bill as pertaining to different forms of "premeditated" killings); *id.* at 2023 (remarks of Senator Nancy Hoffman, stating that the bill sent "a warning to those people who commit the crime of premeditated murder . . .").

30. The mens rea provision of "intent to cause the death of another person" carries over, without change, from a 1967 revision of New York's penal law. Act of May 2, 1967, ch. 791, sec. 9, § 125.25, 1967 N.Y. Laws 2131, 2137. The new statute

2. *The Minimum Age for Death-Penalty Eligibility*

To be convicted of first-degree murder, and thus to be eligible for the death penalty, an offender must have been "more than eighteen years old at the time of the commission of the crime."³¹ As with the mens rea requirement, this provision limits the reach of capital punishment to a greater degree than required by the federal Constitution. Presently, 16-year-old offenders can be executed consistently with the "evolving standards of decency" that are the measure of cruel and unusual punishments under the Eighth Amendment.³² No jurisdiction has yet adopted specific authorizing legislation³³ that would allow 15-year-old murderers to be executed.

New York law has exempted offenders who are not over 18 from death-penalty eligibility since 1963.³⁴ Prior to that time, younger offenders were eligible for and received capital punishment. Fourteen juveniles have been executed in New York during the 20th century for crimes committed at age 16 or 17. The two most recent of these executions took place in 1956, when Norman Roye was punished by death for a murder committed when he was 16, and when William Byers was executed for a murder he committed at age 17.³⁵

specifically recognizes first-degree murder liability in cases involving "transferred intent." It provides that, "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person" N.Y. PENAL LAW § 125.27(1) (McKinney Supp. 1996) (emphasis added).

31. See *id.* § 125.27(1)(b).

32. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

33. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In *Thompson*, the four justices in the plurality were of the opinion that the Eighth Amendment flatly prohibits the execution of offenders 15 years old or younger. Justice O'Connor concurred only in the judgment, and expressly conditioned her vote on the fact that the legislation at issue did not affirmatively authorize capital punishment for 15-year old offenders. *Id.* at 857-58.

34. Act of May 3, 1963, ch. 994, sec. 1, § 1045(3), 1963 N.Y. Laws 3018.

35. Victor L. Streib, *Excluding Juveniles from New York's Impendent Death Penalty*, 54 ALB. L. REV. 625, 638, 649-53 (1990); BOWERS, *supra* note 3, at 471. Streib reports that Byers, who was 19 years old at the time of his execution, "went to his death at a slow, indifferent trot, chewing bubble gum." Streib, *supra* at 653, (quoting F. LIPSIG, *MURDER-FAMILY STYLE* 158 (1962)).

New York joins 13 other states³⁶ and the federal government³⁷ in forbidding capital punishment for crimes committed by 16- and 17-year olds. These jurisdictions use different language to exclude young offenders from death-penalty eligibility than the New York statute. These jurisdictions exempt murderers "under the age of 18," or those who had not "attained the age of 18 or more," or who were "less than 18," or who were a "minor," or a "juvenile," or who had "not reached the age of majority," or who were "not found to have been eighteen years of age or older" at the time of committing their crimes.³⁸ New

36. CAL. PENAL CODE § 190.5 (Deering Supp. 1996) ("[T]he death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime."); COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1995) (permitting death penalty "unless the defendant was under the age of 18 years at the time of the commission of the offense . . ."); CONN. GEN. STAT. ANN. § 53a-46a(h) (West 1994) ("The court shall not impose the sentence of death on the defendant if . . . at the time of the offense (1) he was under the age of 18 years . . ."); 420 ILL. COMP. STAT. ANN. ch. 720, § 5/9-1(b) (West Supp. 1995) (allowing death penalty only for a "defendant who at the time of the commission of the offense has attained the age of 18 or more . . ."); KAN. STAT. ANN. § 21-4622 (Supp. 1994) (prohibiting death penalty on "a finding that the defendant was less than 18 years of age at the time of the commission thereof" capital murder); MD. ANN. CODE art. 27, § 412(g)(1) (Supp. 1995) ("If a person found guilty of murder in the first degree was at the time the murder was committed less than 18 years old . . . at the time the murder was committed, the person . . . may not be sentenced to death."); NEB. REV. STAT. § 28-105.01 (1989) ("[T]he death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime."); N.H. REV. STAT. ANN. § 630:5 (XVII) (Supp. 1995) ("In no event shall a sentence of death be carried out upon . . . a person for an offense committed while a minor."); *but see id.* at § 630:1 (V) (1986) ("In no event shall any person under the age of 17 years be culpable of a capital murder."); N.J. STAT. ANN. § 2C:11-3(g) (West 1995) ("A juvenile who has been tried as an adult and convicted of murder shall not be sentenced" to death); N.M. STAT. ANN. § 31-18-14(A) (Michie 1994) (prohibiting capital punishment "if the defendant has not reached the age of majority at the time of the commission of the capital felony . . ."); OHIO REV. CODE ANN. § 2929.02(A) (Anderson 1993) (prohibiting death penalty for any person "who is not found to have been 18 years of age or older at the time of the commission of the offense . . ."); OR. REV. STAT. § 161.620 (1995) ("[A] sentence imposed upon any person remanded from the juvenile court . . . shall not include any sentence of death . . ."); TENN. CODE ANN. § 37-1-134(a)(1) (Supp. 1995) ("[N]or may any child transferred under the provisions of this section [pertaining to transfers of jurisdiction from juvenile court to criminal court] receive a sentence of death for the offense for which the child was transferred.").

37. 18 U.S.C. § 3591(a) (Supp. 1995) ("[N]o person may be sentenced to death who was less than 18 years of age at the time of the offense."); 21 U.S.C. § 848(1) (Supp. 1995) ("A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed.").

38. *See supra* notes 36 and 37.

York's elimination of first degree murder eligibility for offenders who are "more than eighteen years old at the time of the commission of the crime" is intriguingly different. Requiring that a person be "more than" 18 to be guilty of first-degree murder could mean either that the offender must be "beyond his or her 18th birthday" at the time of the crime, in which case 18-year-olds would be eligible for punishment by death, or it could mean murderers must be "at least 19," in which case they would not.

The legislative history regarding this issue is inconclusive. The sponsor of the bill in the Assembly³⁹ and at least two other Assembly members apparently assumed that the exemption applies only to persons under age 18,⁴⁰ while at least one supporter of the bill in the Assembly praised the law for "spelling out 18-year-olds not being eligible for"⁴¹ punishment under the statute. Memoranda filed by the Governor⁴² and the Assembly Codes Committee⁴³ explaining the bill simply track the statutory language that a person must be "more than eighteen years old at the time of the commission of the crime" in order to be convicted of first-degree murder.

The lone judicial decision on point, issued by a trial judge in a noncapital case, construed the statutory exemption to be unavailable to a defendant who may have been 18-years old at the time he allegedly committed first-degree murder.⁴⁴ Other New

39. Assembly Debate, *supra* note 1, at 461 (remarks of Assemblyman Eric Vitaliano) ("[U]nder this bill, no one under 18 can be executed.").

40. *Id.* at 58 (remarks of Assemblyman Robert Straniere) ("[I]n the past, we have discussed who . . . from an age standard, should be subject to the death penalty, and this bill, about to become law, says no one under 18."); *id.* at 142 (remarks of Assemblyman David Townsend, Jr.) ("[T]here's a specific provision in here that says you must be 18 or older, under line 34 of page 4, so we're not going to kill our children and make them subject to the death penalty.").

41. *Id.* at 42 (remarks of Assemblyman Joseph Robach). An opponent of the bill lamented the fact that anyone under the age of 21 was made eligible for the death penalty. *Id.* at 98, 478 (remarks of Assemblyman Roger Green).

42. Executive Memorandum, *supra* note 12, at 1.

43. N.Y. ASSEMBLY CODES COMMITTEE BILL MEMORANDUM, A. 4843, S.2850, at 3 (1995)[hereinafter BILL MEMORANDUM].

44. *People v. Carr*, 159 Misc. 2d 1093, 608 N.Y.S.2d 48 (N.Y. Sup. Ct., Kings Co. 1994). The court's ruling may be only dicta because the issue arose on a motion to dismiss a first-degree murder indictment filed by a defendant about whom conflicting evidence regarding a date of birth was presented to the grand jury. The grand jury heard evidence that the accused could have been either 18 or 19 years of age at the time of the alleged murder. *Id.* at 1094, 608 N.Y.S.2d at 49. The court refused to dismiss the indictment, and opined that "the words 'more than eighteen

York statutes involving age limitations normally specify that a person must be "at least" or "under" the age made significant by law,⁴⁵ although the Legislature occasionally has required that a

years old' include persons who have reached the eighteenth year of the anniversary of their birth." *Id.* at 1095, 608 N.Y.S.2d at 49. The opinion acknowledged that the "court's research disclosed no published decisions or legislative history on the meaning of the phrase 'more than eighteen years old' as used in the statute," although it did cite a "letter sent to then Governor Malcolm Wilson, dated May 14, 1974 from the Committee on Youth and Correction of the Community Service Society of New York" included in the Legislative Bill Jacket on Penal Law § 125.27 (L. 1974, ch. 367), "which states that the proposed legislation would exclude 'persons under 18.'" *Id.* at 1094 & n.1, 608 N.Y.S.2d at 49 & n.1.

45. See, e.g., N.Y. PENAL LAW § 125.25(4) (McKinney Supp. 1996) (limiting second-degree murder liability to defendants who are "eighteen years old or more" who kill a child less than 11-years old under the defined circumstances); *id.* § 125.20(4) (similarly, limiting liability for first-degree manslaughter to persons "eighteen years old or more" who kill a child younger than 11 under the described conditions); N.Y. VEH. & TRAF. LAW § 502(2)(a)-(d) (McKinney Supp. 1996) (requiring that applicants for different types of driver's licenses must be "at least" 21, 18, 17, or 16 years of age, as appropriate); N.Y. MENTAL HYG. LAW § 33.21(a)(1) (McKinney Supp. 1996) (a "minor" shall mean a person under eighteen years of age," subject to various restrictions, for purposes of securing consent for mental health treatment of minors); N.Y. DOM. REL. LAW § 15(2) (McKinney 1988) (authorizing clerk to require documentary proof of age of applicant for a marriage license if the applicant is "under eighteen years of age," and requiring written consent by parents to the marriage of a minor who is "at least sixteen years of age but under eighteen years of age"; but see *id.* (authorizing clerk to require documentary proof of age if the "clerk shall be in doubt as to whether an applicant claiming to be over eighteen years of age is actually over eighteen years of age"); *id.* § 15(3) (McKinney Supp. 1996) (requiring written judicial approval of the application for a marriage license by a party "under the age of sixteen years"); *id.* at § 81 (McKinney 1988) (allowing surviving parent of "any living child under the age of eighteen years and unmarried" to "dispose of the custody and tuition of such child" to another upon death of one parent); N.Y. PUB. HEALTH LAW § 2504(1) (McKinney 1993) (authorizing "[a]ny person who is eighteen years of age or older" to consent to medical, dental, health, and hospital services); N.Y. ALCO. BEV. CONT. LAW § 65(1), (5) (McKinney 1988) (prohibiting, under most circumstances, sale or delivery of alcoholic beverages to a person "under the age of twenty-one years"); N.Y. PENAL LAW §§ 260.20(1), (2) (McKinney Supp. 1996) (forbidding persons from involving children "less than eighteen years old," and "less than twenty-one years old," in specified activities, with exceptions granted to certain persons "under the age of twenty-one"); N.Y. ALCO. BEV. CONT. LAW §§ 100(2)(a), (2)(b) (McKinney 1987) (forbidding persons "under the age of eighteen" from working in establishments that sell alcoholic beverages, subject to certain exceptions); *id.* at § 65-b(1)(a) (prohibiting persons "under the age of twenty-one" from displaying fraudulent identification for the purpose of purchasing alcoholic beverages); N.Y. CRIM. PROC. LAW §§ 180.75(3)(a), (b) (McKinney 1995) (processing of felony complaints regarding persons "under the age of sixteen"; N.Y. FAM. CT. ACT § 311.1(3)(c) (McKinney 1983) (juvenile delinquency petition must allege that "respondent is a person under sixteen years of age at the time of the alleged act or acts"); N.Y. PENAL

person must be "over" or "more than" a certain age to be covered by or exempt from the provisions of a statute.⁴⁶ The meaning of the requirement that the defendant must have been "more than eighteen years old at the time of the commission of the crime" will not be certain until the New York Court of Appeals has an opportunity to decide the minimum age of liability for first-degree murder under the statute.⁴⁷

3. *Twelve Forms of First-Degree Murder*

[S]ome of us are disappointed that the terms of this about-to-be law might result in only some twenty percent of the potential convicted murderers ever, in fact, being executed.

—Assemblyman Robert Stranieri⁴⁸

I have no problem with the crimes that are enumerated in this bill, and perhaps I might be willing to go further—not perhaps, I would be willing to go further. . . .

—Senator Stephen Saland⁴⁹

Twelve types of intentional killings are defined as first-degree murder under the new statute. The provisions defining these different forms of capital murder are considered below.

LAW § 30.00(1) (McKinney 1987) (subject to certain exceptions, "a person less than sixteen years old is not criminally responsible for conduct."); N.Y. CRIM. PROC. LAW § 720.10 (McKinney 1995) (for purposes of youthful offender procedures, "[y]outh" means a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old . . .).

46. See, e.g., N.Y. DOM. REL. LAW § 15(2) (McKinney 1988), *supra* note 45; N.Y. FAM. CT. ACT § 301.2(1) (McKinney) ("Juvenile delinquent" means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult . . .); N.Y. WORK. COMP. LAW § 14-a(3) (McKinney 1992) ("A person over eighteen years of age may apply for a certificate of age" regarding an employment certificate, and such certificate shall issue "if he furnishes evidence that he is over eighteen years of age . . . "); N.Y. PENAL LAW § 130.55 (McKinney 1987) (authorizing affirmative defense to crime of sexual abuse in the third degree if, *inter alia*, the alleged victim "was more than fourteen years old . . . ") (cited in *People v. Carr*, 159 Misc. 2d 1093, 1095, 608 N.Y.S.2d 48, 49 (N.Y. Sup. Ct., Kings Co. 1994)).

47. An offender convicted of first-degree murder may be punished by death, life imprisonment without parole eligibility (hereinafter LWOP), or a prison sentence ranging from a minimum of 20- to 25-years to life. N.Y. PENAL LAW §§ 60.06, 70(3)(a)(1) (McKinney Supp. 1996). Of course, an 18-year old offender who received any of these sentences, and not just the death penalty, could argue that he or she could not be convicted of and punished for first-degree murder under the statute.

48. Assembly Debate, *supra* note 1, at 60-61.

49. Senate Debate, *supra* note 13, at 1875.

(i) The intended victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer.⁵⁰

Murdering a law enforcement officer is a capital crime⁵¹ or an aggravating circumstance for sentencing purposes⁵² in all death penalty jurisdictions. The rationale for making the murder of a police officer a capital offense is clear: "Because these people are literally the foot soldiers of ordered liberty, the State has an especial interest in their protection."⁵³ This type of first-degree murder under the 1995 New York law carries over from the pre-existing 1974 murder statute, with only minor changes.⁵⁴

The "police officers" to whom this type of first-degree murder applies include several law enforcement officers that traditionally are covered by death penalty laws, including members of the state police, county sheriffs and deputy sheriffs, and sworn officers of city, town, and village police departments.⁵⁵ A number of less obvious officials are also among the eighteen separately-defined types of "police officers" incorporated by reference from the Criminal Procedure Law into the first-degree murder statute. This includes investigators employed in district attorneys' offices,⁵⁶ environmental conservation officers,⁵⁷ and department of taxation and finance personnel assigned to

50. N.Y. PENAL LAW § 125.27(1)(a)(i) (McKinney Supp. 1996).

51. See *Dimensions of Capital Murder*, *supra* note 23, at 402-04 (reviewing statutes).

52. James R. Acker & C. S. Lanier, "Parsing this Lexicon of Death": *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. LAW BULL. 107, 142-46 (1994)[hereinafter *Lexicon of Death*](reviewing statutes).

53. *Roberts v. Louisiana*, 431 U.S. 633, 646-47 (1977) (Rehnquist, J., dissenting).

54. The new law inserts "intended" in front of the word "victim," and makes a minor stylistic change. Compare N.Y. PENAL LAW § 125.27(1)(a)(i) (McKinney 1974) ("the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer").

55. N.Y. CRIM. PROC. LAW §§ 1.20(34)(a),(b),(d) (McKinney 1992).

56. *Id.* § 1.20(34)(g).

57. *Id.* § 1.20(34)(j).

enforce specific tax laws.⁵⁸ While it must be presumed that the Legislature acted deliberately in defining such killings as first-degree murder, the inclusion of some of the other types of "police officers" listed in the statute strains the general rationale for making the killing of a law enforcement officer a capital crime. For instance, the intentional killings of Suffolk County park rangers,⁵⁹ and "sworn officer[s] of the water-supply police employed by the city of New York and acting outside said city"⁶⁰ also are covered under the statute.

The breadth of the class of "police officer" victims also exacerbates the problem created by authorizing the conviction of offenders who did not actually know, but "reasonably should have known," that their victims were police officers. Arguably, neither deterrence nor retribution justifies making an offender eligible for capital punishment if the offender actually was unaware at the time of the slaying that his or her victim was a police officer. At least two states' statutes require that the defendant must have known of the victim's status as a law enforcement officer before such a killing qualifies as capital murder.⁶¹ The more common practice is for death penalty legislation to conform to New York's format ("knew or reasonably should have known"), or to remain silent about whether the offender must have known or reasonably should have known that the victim was a police officer.⁶²

58. N.Y. CRIM. PROC. § 1.20(34)(q) (McKinney Supp. 1996).

59. N.Y. CRIM. PROC. § 1.20(34)(r) (McKinney 1992).

60. *Id.* § 1.20(34)(o).

61. See MISS. CODE ANN. § 97-3-19(2)(a) (1994); TEX. PENAL CODE ANN. § 19.03(a)(1) (West 1994).

62. See *Dimensions of Capital Murder*, *supra* note 23, at 402-03; *Lexicon of Death*, *supra* note 52, at 144-45. During the debate on New York's death penalty bill, Assemblyman David Townsend, J., lamented that this provision did not go far enough because "[n]ot only your undercovers, but your plain clothes detectives, the people who serve on your warrant squads, that all travel around dressed like we are face the possibility of being killed." Assembly Debate, *supra* note 1, at 143. Assemblyman Townsend explained that his former partner from the Syracuse police department was shot and killed during an undercover narcotics investigation, and he expressed concern that such a killing would not be defined as a capital crime under the provision pertaining to the murder of police officers. *Id.*

This provision does not require that the murder victim actually be a police officer. Instead, it requires that "the *intended* victim was a police officer . . ." N.Y. PENAL LAW § 125.27(1)(a)(i) (McKinney Supp. 1996) (emphasis added). Application of this section may produce some counterintuitive results. For example, an offender who intends to kill a police officer by shooting at the officer, but misses

During a 10 year interval (1975 through 1984), 66 law enforcement officers were feloniously killed in New York, or an average of between 6 and 7 per year.⁶³ Over the next 10 years, from 1985 through 1994, 40 law enforcement officers were feloniously killed in the state, an average of 4 per year.⁶⁴ Since first-degree murder consists only of intentional killings of persons whom the offender knew or reasonably should have known were police officers, fewer killings will qualify as capital murder each year under this section than would be suggested by the annual number of police officers feloniously killed.

and kills a civilian third-party, presumably would be guilty of first-degree murder under this section. Conversely, an offender who intended to kill a civilian by shooting, but who missed and instead killed a police officer, would not be guilty of first-degree murder under this provision. Several other provisions of the first-degree murder statute share this feature. See *id.* §§ 125.27(1)(a)(ii) (intended victim was a designated peace officer); 125.27(1)(a)(iii) (intended victim was a correctional employee); 125.27(1)(a)(v) (intended victim was a witness to a crime or witness' immediate family member); 125.27(1)(a)(xii) (intended victim was a judge).

63. The numbers of law enforcement officers reported feloniously slain in New York during this time period are as follows: 1975 — 10; 1976 — 4; 1977 — 10; 1978 — 5; 1979 — 7; 1980 — 11; 1981 — 7; 1982 — 6; 1983 — 1; 1984 — 5. See N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1975 CRIME AND JUSTICE ANNUAL REPORT 156 (1976); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1976 CRIME AND JUSTICE ANNUAL REPORT 182 (1977); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1977 CRIME AND JUSTICE ANNUAL REPORT 188 (1978); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1978 CRIME AND JUSTICE ANNUAL REPORT 210 (1979); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1979 CRIME AND JUSTICE ANNUAL REPORT 226 (1980); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1980 CRIME AND JUSTICE ANNUAL REPORT 255 (1981); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1981 CRIME AND JUSTICE ANNUAL REPORT 241 (1982); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1982 CRIME AND JUSTICE ANNUAL REPORT 221 (1983); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1983 CRIME AND JUSTICE ANNUAL REPORT 212 (1984); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1984 CRIME AND JUSTICE ANNUAL REPORT 211 (1985).

The definition of "law enforcement officers" for purposes of these reports is not clear. Early reports mention the state police, municipal police agencies, sheriffs' departments, and "special police agencies such as parks, railroads, university and authority forces." See, e.g., ANNUAL REPORT '76, *supra* at 182.

64. The annual numbers of law enforcement officers reported feloniously slain in New York during this time interval are as follows: 1985 — 1; 1986 — 2; 1987 — 9; 1988 — 4; 1989 — 7; 1990 — 2; 1991 — 3; 1992 — 4; 1993 — 3; 1994 — 3. See 1992 U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 23 (1993); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1993 CRIME AND JUSTICE ANNUAL REPORT 170 (1994); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1994 CRIME AND JUSTICE ANNUAL REPORT 166 (1995).

(ii) The intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth.⁶⁵

Sixty-four types of "peace officers" are defined under New York law.⁶⁶ The intentional killing of four kinds of such officers⁶⁷ is first-degree murder under the new statute⁶⁸ if the offender knew or reasonably should have known that the intended victim was a peace officer, and the officer was killed while performing his or her official duties. The four kinds of peace officers covered in the first-degree murder law are "[u]niformed court officers of the unified court system,"⁶⁹ "[p]arole officers or warrant officers in the division of parole,"⁷⁰ "[p]robation officers,"⁷¹ and "[e]mployees of the division for youth assigned to transport and warrants units who are specifically designated by the director. . . ."⁷² The most conspicuous omission from the list of public service officers included under the "police" and "peace officer" sections of the first-degree murder statute involves firefighters, whose intentional slaying in the line of duty is not made a form of capital murder.⁷³

65. N.Y. PENAL LAW § 125.27(1)(a)(ii) (McKinney Supp. 1996).

66. N.Y. CRIM. PROC. LAW § 2.10 (McKinney 1992 & Supp. 1996).

67. Under death penalty bills passed prior to the 1995 Legislative Session, the murder of all "peace officers" defined under the Criminal Procedure Law was made a capital offense. The present statute's limitation to just four types of peace officers consequently represents a significant narrowing of this category of first-degree murder. See *Policy Perspectives*, *supra* note 4, at 581.

68. N.Y. PENAL LAW § 125.27 (McKinney Supp. 1996).

69. N.Y. CRIM. PROC. LAW § 2.10(21)(a) (McKinney Supp. 1996).

70. *Id.* § 2.10(23) (McKinney 1992).

71. *Id.* § 2.10 (24).

72. *Id.* § 2.10 (25).

73. The killing of firefighters in performance of their official duties is a form of capital murder, or an aggravating factor for sentencing purposes, in several jurisdictions. See, e.g., CAL. PENAL CODE § 190.2(a)(9) (Deering Supp. 1996); ; LA. CODE CRIM. PROC. ANN. art. 905.4(A)(2) (West Supp. 1995); NEV. REV. STAT. ANN. § 200.033(7) (Michie Supp. 1995); UTAH CODE ANN. § 76-5-202(1)(k) (1995). Firefighters and fire marshals in various localities in New York are defined as "peace officers," but apparently there is no statewide classification of firefighters in this official capacity. See, e.g., N.Y. CRIM. PROC. LAW § 2.10(28) (McKinney 1992)

(iii) The intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility.⁷⁴

Like the preceding two provisions, this category of first-degree murder was designed to apply to the killing of persons in the performance of official duties directly related to the enforcement of laws or maintaining public order and safety. Under this section, the intended victim must be an employee of a state or local correctional facility,⁷⁵ and, as with the "police" and "peace officer" elements of first-degree murder, the offender must have known or reasonably should have known about his or her victim's official status. This section doubtlessly was enacted for its presumed deterrent value, since correctional personnel work closely with potentially dangerous prisoners, and for related retributive reasons. However, as drafted, this provision does not mesh well with its logical justifications.

This section applies to the murder of all "employees" of state correctional institutions and local correctional facilities, a class which presumably includes not only corrections officers and jail guards, but also clerical and custodial staff, who may not be directly responsible for the custody and care of the incarcerated, as well as people working in administrative or supervisory positions, who infrequently come into contact with prisoners. In this respect, the statute seems rather expansive. However, if the threat of capital punishment is presumed necessary to deter the imprisoned and jailed from committing murder, then the reach of this provision may be too narrow, since the murder of neither visitors to correctional facilities nor other

(defining "officers and members of the New York City fire department" as peace officers); *id.* § 2.10(30) (Nassau County fire marshalls and fire inspectors); *id.* § 2.10(41) (municipal fire police squad members); *id.* § 2.10(51) (members of the fire investigation divisions of the fire departments in the cities of Binghamton, Rochester, and Utica); *id.* § 2.10(61) (Suffolk County fire marshalls); *id.* § 2.10(62) (Town of Babylon fire marshalls).

74. N.Y. PENAL LAW § 125.27(1)(a)(iii) (McKinney Supp. 1996).

75. "'Local correctional facility' means any county jail, county penitentiary, county lockup, city jail, police station jail, town or village jail or lockup, court detention pen or hospital prison ward." N.Y. CORRECT. LAW § 40(2) (McKinney 1987).

prisoners is made a capital crime. Indeed, the statute creates the anomalous situation that if a prisoner serving a term of years intentionally kills a staff counselor employed by the prison, he or she may be guilty of capital murder, but the same prisoner would be guilty of only second-degree murder for intentionally killing either a visitor to the facility or another prisoner who may have been accompanying that counselor.

Another curiosity is that this section applies equally to prisoners and non-prisoners who murder correctional employees. There is no requirement that a killing be causally related to the victim's performance of his or her duties as a corrections employee. The statute only specifies that the victim must have been "engaged in the course of performing his official duties" when killed. Thus, a corrections officer who murdered another on the job,⁷⁶ or a secretary who killed a co-worker in a correctional facility after an argument, could be convicted of capital murder.⁷⁷ The Legislature surely did not envision that such homicides deserve punishment as first-degree murder simply because a corrections employee was killed, but the wording of this provision supports such applications.

(iv) At the time of the commission of the killing, the defendant was confined in a state correctional institution or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the killing, the defendant had escaped from

76. In the case in which the provision under New York's former death penalty statute for mandatory capital punishment for murder committed by a life term prisoner was declared unconstitutional, the prisoner (in a defense rejected by the jury) claimed that the corrections officer he was convicted of murdering may have been killed by other corrections officers. *People v. Smith*, 63 N.Y.2d 41, 59, 468 N.E.2d 879, 886, 479 N.Y.S.2d 706, 713 (1984), *cert. denied*, 469 U.S. 1227 (1985).

77. On July 14, 1995 two corrections officers allegedly were murdered by a third corrections officer in a housing complex maintained for corrections officers in Dutchess County. The alleged killer, Joseph King, was charged with two counts of second degree murder. See Carole DeMare & Joe Picchi, *Prison Guard Accused of Killing 2 Colleagues*, TIMES UNION (Albany, N.Y.), July 15, 1995, at A1, A9. Had these killings occurred on or after the effective date of the death penalty law, September 1, 1995, and had the two victims been engaged in the performance of their official duties, the slayings could have qualified as first-degree murder.

such confinement or custody while serving such a sentence and had not yet been returned to such confinement or custody.⁷⁸

There was another case, Lemuel Smith, *People v. Lemuel Smith*, which overturned our death penalty at that time. This gentleman was in prison for committing five murders and two rapes, when he murdered the prison guard, who was a lady. They found bite marks all over her, and in addition in some of his prior murders they found bite marks. What do you do with a guy that commits five murders and then commits a sixth murder in prison? Do you give him another life without parole . . . ?

—Assemblyman Stephen Kaufman⁷⁹

Although his most recent crime was committed in 1981, Lemuel Smith continued to haunt the Legislative debate on the death penalty in 1995,⁸⁰ much as his cases had in intervening years. Smith was incarcerated in Green Haven Correctional Institution in 1981, where he was serving three consecutive sentences of twenty-five-years to life imprisonment after being convicted of kidnapping and two counts of murder.⁸¹ Smith had been indicted for two additional murders allegedly committed in close proximity to his other crimes, but these indictments were dismissed after the three life sentences were imposed for his other offenses. He was also suspected of having committed an additional murder.⁸² While serving his life sentences at the Green Haven prison, he murdered corrections officer Donna Payant in 1981 by beating, biting, and strangling her, and then disposing of her body in a garbage dumpster. The mandatory sentence of death he received under the state's 1974 death penalty law was declared unconstitutional,⁸³ and Smith consequently was resentenced to another life prison term. His

78. N.Y. PENAL LAW § 125.27(1)(a)(iv) (McKinney Supp. 1996).

79. Assembly Debate, *supra* note 1, at 94.

80. See Senate Debate, *supra* note 13, at 1855 (remarks of Senator Dale Volker); *id.* at 1876 (remarks of Senator Stephen Saland); *id.* at 94 (remarks of Senator Nancy Lorraine Hoffman).

81. Under the law in existence at the time Smith was sentenced, his three consecutive sentences of 25-years to life merged into a single sentence of that same duration. *People v. Smith*, 63 N.Y.2d 41, 50 n.1, 468 N.E.2d 879, 882 n.1, 479 N.Y.S.2d 706, 709 n.1 (1984), *cert. denied*, 469 U.S. 1227 (1985).

82. *Smith's Record a Grim Trail of Murder and Mutilation*, TIMES UNION (Albany, N.Y.), April 22, 1983, at A-13.

83. *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985).

criminal history and the brutality of his crimes have earned Smith the title of New York's "poster man for capital punishment."⁸⁴

Conduct such as Smith's would be punishable under at least three separate provisions of New York's first-degree murder statute: killing a corrections employee engaged in her official duties,⁸⁵ murder committed by a person with a prior murder conviction,⁸⁶ or a killing committed by an incarcerated or escaped prisoner serving a minimum term of at least fifteen years and a maximum of life.⁸⁷ The present discussion focuses on the latter section.

Not all prisoners covered by this element of first-degree murder will have the character or prior criminal record of a Lemuel Smith, or will commit such brutal, unprovoked killings. These are the principal reasons that the courts have invalidated mandatory capital punishment for life term prisoners who commit murder, in favor of discretionary statutes that permit consideration of individual offense and offender circumstances before punishment is imposed.⁸⁸ Under New York law, various crimes are punishable by a minimum term of fifteen years in prison and a maximum of life, including first-degree⁸⁹ and second-degree murder,⁹⁰ attempted first-degree murder,⁹¹ arson,⁹² kidnapping,⁹³ and the possession⁹⁴ and sale⁹⁵ of designated types and amounts of controlled substances. Furthermore, re-

84. Hy Rosen, *As Hy Rosen Sees It* (political cartoon), TIMES UNION (Albany, N.Y.), Apr. 22, 1983, at A15 (on file with PACE LAW REVIEW).

85. N.Y. PENAL LAW § 125.27(1)(a)(iii) (McKinney Supp. 1996). See *supra* notes 73-76 and accompanying text.

86. *Id.* § 125.27(1)(a)(ix). See *infra* notes 133-42 and accompanying text.

87. N.Y. PENAL LAW § 125.27(1)(a)(iv). See *supra* note 77 and accompanying text. Smith's conduct might be punishable under other provisions of the first-degree murder statute, as well: the "torture" provision (N.Y. PENAL LAW § 125.27(1)(a)(x)); the "serial killing" provision (N.Y. PENAL LAW § 125.27(1)(a)(xi)), assuming that he killed two or more additional persons in separate criminal transactions within a two-year period of the murder for which he was sentenced, and the murders were "committed in a similar fashion or pursuant to a common scheme or plan." See *infra* notes 143-59, 160-65 and accompanying text.

88. *Sumner v. Shuman*, 483 U.S. 66 (1987); *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985).

89. N.Y. PENAL LAW § 125.27 (McKinney Supp. 1996).

90. *Id.* § 125.25.

91. *Id.* § 110.05(1) (McKinney 1987).

92. *Id.* § 150.20.

93. *Id.* § 135.25 (kidnapping in the first degree).

peat and persistent felony offenders may be sentenced to prison terms of such duration.⁹⁶ First-time rapists,⁹⁷ armed robbers,⁹⁸ burglars,⁹⁹ persons convicted of aggravated assault on law enforcement officers,¹⁰⁰ and numerous other felons cannot be sentenced so harshly.

This section of the murder statute thus provides no guarantee that the most violent or incorrigible offenders are singled out for death-penalty eligibility if they kill while incarcerated or on escape. Nor does it do a good job of identifying prisoners who, because of the lengthy sentences they already are serving, can afford to be indifferent about sanctions other than death. Unlike offenders with such aggravated records as Lemuel Smith's, most prisoners serving life sentences realistically can expect to be released on parole some time after serving their fifteen to twenty-five-year minimum terms.¹⁰¹ On the other hand, this provision is significantly more restrictive than statutes in some other jurisdictions, which make murder committed by any prisoner a death-penalty eligible offense.¹⁰²

94. N.Y. PENAL LAW § 220.21 (McKinney Supp. 1996) (criminal possession of a controlled substance in the first degree). An attempt to commit this offense is punished similarly. *Id.* § 110.05(1) (McKinney 1987).

95. *Id.* § 220.43 (McKinney 1989) (criminal sale of a controlled substance in the first degree). An attempt to commit this crime is punished similarly. *Id.* § 110.05(1) (McKinney 1987).

96. *Id.* § 70.06(3)(a) (McKinney Supp. 1996) (second felony offender, for a class A-II felony); *id.* § 70.08(2) (McKinney 1987); N.Y. PENAL LAW § 70.08 (3)(a) (McKinney Supp. 1996) (persistent violent felony offender, for a class B felony, maximum sentence of life imprisonment, minimum sentence of 10- to 25-years to life); *id.* § 70.10 (McKinney 1987) (persistent felony offender).

97. *Id.* § 130.35.

98. *Id.* § 140.30.

99. *Id.* § 160.15.

100. *Id.* § 120.11 (McKinney Supp. 1996).

101. See generally James R. Acker, *Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science*, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 289-90 & n.46 (1985)[hereinafter *Mandatory Capital Punishment*]. The new statute creates a higher mandatory minimum sentence for first-degree murder (20- to 25-years, instead of 15- to 25-years), and also creates an alternative sentencing option of life imprisonment without possibility of parole. N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney Supp. 1996); *id.* § 70.00(5); N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney Supp. 1996). The Legislature did not take the opportunity to limit the application of the first-degree murder statute to the narrower class of prisoners serving sentences of either 20- 25-years to life, or LWOP.

102. See *Dimensions of Capital Murder*, *supra* note 23, at 398-99 & n.114; *Lexicon of Death*, *supra* note 52, at 116-18.

Homicides have occurred relatively infrequently in New York prisons over the past several years.¹⁰³ The number of prison homicides may increase as changes occur that affect prison conditions and prisoners, such as greater overcrowding, and increased use of "double-celling," or housing two prisoners in a single cell. Lengthier sentences for some felonies, including the new sentencing option of life without the possibility of parole (LWOP) for first-degree murder,¹⁰⁴ may increase the number of prisoners serving fifteen-year to life sentences. Even with such changes, homicides committed by life-term prisoners are not likely to represent a large category of first-degree murder.

(v) The intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family

103. See *Policy Perspectives*, *supra* note 4, at 572-73 (reporting that there were 38 homicides of prisoners in New York's prison system between 1976 and 1984, or about four a year). Between 1989 and 1992, a total of 19 prisoners were the victims of homicides committed within prison facilities. N.Y. STATE DEPT. OF CORRECTIONAL SERVICES, DEATHS OF NEW YORK STATE INMATES, 1978-1992 8 (1994)(on file with PACE LAW REVIEW). The number of prison homicides has risen in recent years, but because the size of the prison population has skyrocketed, the annual rate of prison homicides actually has declined over the period 1978 through 1992. *Id.* at 8-9. Three homicides of prisoners occurred within prison walls in New York in 1994. N.Y. STATE DEPT. OF CORRECTIONAL SERVICES, UNUSUAL INCIDENT REPORT, January-December 1994 1 (1995) (on file with PACE LAW REVIEW).

104. See *supra* note 101 (regarding the new sentence of LWOP). See generally N.Y. PENAL LAW § 70.06(6) (McKinney Supp. 1996) (determinate sentences for second violent felony offenders); *id.* § 70.40(a) (specifying limitations on parole eligibility); N.Y. CORRECT. LAW § 803(1),(2) (McKinney Supp. 1996) (specifying limitations on prisoners' good-time credit); N.Y. CRIM. PROC. LAW § 410.91 (McKinney Supp. 1996) (limiting parole eligibility).

member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild.¹⁰⁵

The "witness-killing" form of first-degree murder is relatively narrow in certain respects, and broad in others. This provision applies generally to the murder of a witness to a crime, or of an immediate family member of that witness, committed for the purpose of preventing, influencing, or retaliating for the witness' testimony in a criminal proceeding. "[S]uch killings threaten the integrity of the justice system and impede the ability of law enforcement authorities to prevent and punish serious crime."¹⁰⁶

An important limitation on the reach of this provision is the requirement that the person slain¹⁰⁷ was "a witness to a crime committed on a prior occasion." This limitation excludes killings committed contemporaneously with the witnessed crime from qualifying as first-degree murder. For example, the car thief who kills the owner of a car as the owner "witnesses" the offender drive the vehicle away should not be eligible for prosecution under this section even if the killing allegedly took place to prevent the car-owner's later courtroom testimony. Nor should the pickpocket be prosecuted for killing the owner of the stolen wallet, who was in hot pursuit after "witnessing" the theft and would have testified about the crime in court. The restriction that the crime must have been "committed on a prior occasion" from the killing essentially excludes spontaneous killings of witnesses to crimes from death-penalty eligibility. This provision instead applies to murders committed after some opportunity for deliberation, and for the specific purpose of preventing, influencing, or retaliating for a witness' testimony.

In this respect, this element of first-degree murder is analogous to a special circumstance used under California law to render an offender death-penalty eligible:

The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any

105. N.Y. PENAL LAW § 125.27(1)(a)(v) (McKinney Supp. 1996).

106. BILL MEMORANDUM, *supra* note 43, at 2.

107. This provision also applies to the killing of immediate family members of witnesses for the purpose of preventing, influencing, or retaliating for witnesses' testimony in criminal actions or proceedings.

criminal or juvenile proceeding, *and the killing was not committed during the commission or attempted commission of the crime to which he or she was a witness*; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding¹⁰⁸

Death penalty statutes in most other jurisdictions with provisions applying to witness killings do not expressly require that the slaying and the witnessing of a crime be separated. For example, an aggravating circumstance used for capital sentencing under Delaware law applies when "[t]he murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing [his] appearance or testimony in any grand jury, criminal or civil proceeding involving such crime."¹⁰⁹ The Delaware statute is typical of several others that appear to encompass the killing of persons contemporaneously with crimes they witnessed. However, the prosecution must prove that the murder was committed for the purpose of preventing testimony.¹¹⁰

Unlike the California and Delaware statutes, as well as other states that have similar statutes, New York's witness-killing provision applies only to testimony in *criminal* actions and

108. CAL. PENAL CODE § 190.2(a)(10) (Deering Supp. 1996) (emphasis added). Ohio law contains a similar aggravating circumstance: "The victim . . . was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim . . . was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding." OHIO REV. CODE ANN. § 2929.04(A)(8) (Anderson 1993). Both California and Ohio have laws which conceivably could be applied to make the killing of a witness to a contemporaneous crime a form of capital murder or an aggravating circumstance for sentencing purposes. See CAL. PENAL CODE § 190.2(a)(5) (Deering Supp. 1996) ("The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody."); OHIO REV. CODE ANN. § 2929.04(A)(3) (Anderson 1993) ("The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.").

109. DEL. CODE ANN. tit. 11, § 4209(e)(1)(g) (1995).

110. See, e.g., IDAHO CODE § 19-2515(g)(10) (Supp. 1995); ILL. ANN. STAT. ch. 720, para. 5/9-1(b)(8) (Smith-Hurd Supp. 1995); LA. CODE CRIM. PRO. ANN. art. 905.4(A)(8) (West Supp. 1995); MO. ANN. STAT. § 565.032(2)(16) (West Supp. 1996); N.M. STAT. ANN. § 31-20A-5 (G) (Michie 1994); PA. STAT. ANN. tit. 42, § 9711(d)(5) (West Supp. 1995); UTAH CODE ANN. § 76-5-202(1)(i) (1995); WASH. REV. CODE ANN. § 10.95.020(8)(a) (West Supp. 1996).

proceedings, and does not include testimony pertaining to juvenile or civil actions.¹¹¹ However, a criminal action or proceeding need not actually be pending at the time the witness to the crime is killed. This feature of the statute potentially invites broad application of this section. For instance, a man could be charged with the first-degree murder of his wife if he previously assaulted her, and it is alleged that the killing was committed to ensure that she would not testify against him for the assault. The killing could be charged as capital murder "whether or not [a criminal] action or proceeding had been commenced" for the prior assault. Juries traditionally have been relied upon to resolve factual issues such as motive in criminal matters, including potentially capital cases. Nevertheless, the courts will have to scrutinize jury verdicts and prosecutors' charging decisions carefully in order to help avoid unjustifiably broad application of the witness-killing provision.

(vi) The defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement.¹¹²

Contract killings are a form of first-degree murder under this section. Since this provision applies only to murders committed pursuant to an *agreement* in which the killer will receive something of pecuniary value for the killing, killings committed for pecuniary gain alone do not qualify as capital murder.¹¹³

111. In addition to the California and Delaware laws, which respectively are quoted *supra* notes 108-09 and accompanying text, various other statutes do not limit the witness' prospective or past testimony to criminal proceedings. See, e.g., IDAHO CODE § 19-2515(g)(10)(1995 Supp.); UTAH CODE ANN. § 76-5-202(1)(i) (1995); WASH. REV. CODE ANN. § 10.95.020(8)(a) (West Supp. 1996); WYO. STAT. ANN. § 6-2-102(h)(viii) (Michie Supp. 1995).

112. N.Y. PENAL LAW § 125.27(1)(a)(vi) (McKinney Supp. 1996).

113. In many jurisdictions, a murder "committed for pecuniary gain" is a form of capital murder or a sentencing circumstance that renders the offender eligible for capital punishment, without the further requirement that there be a prior agreement that the killer will receive pecuniary gain from a party to the agreement. See, e.g., ALA. CODE § 13A-5-40(a)(7) (1994); *id.* § 13A-5-49(6); ARIZ. REV. STAT. ANN. § 13-703(F)(5) (West 1995); ARK. CODE ANN. § 5-4-604(6) (Michie 1993); CAL. PENAL CODE § 190.2(a)(1) (Deering Supp. 1996); GA. CODE ANN. § 17-10-30(b)(4) (1990); MISS. CODE ANN. § 99-19-101(5)(f) (1994); S.C. CODE ANN. § 16-3-20(C)(a)(4) (Law. Co-op. Supp. 1995); UTAH CODE ANN. § 76-5-202(1)(f) (1995).

Both the killer and the party procuring the killing are guilty of first-degree murder, unless the intended victim is one of the parties to the agreement.

This provision applies only to killings for hire.¹¹⁴ It is carefully worded so that the pecuniary gain from the killing must be realized from a party to the agreement or from another person acting at the direction of a party; it specifically rules out the intended victim as the source of the pecuniary gain. Significantly, this wording excludes killings where, for example, A and B agree with each other that they will kill C in order to steal C's car, C's cashbox, or realize anything else of pecuniary value from C, the intended victim. Although such a killing would be committed pursuant to "an agreement . . . in expectation of the receipt of anything of pecuniary value," it would not be first-degree murder since the financial gain from the killing would come directly from exploiting the victim, instead of representing consideration paid by a party to the agreement or by someone acting at the direction of a party.¹¹⁵

(vii) The victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based

See generally Annotation, *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Murder Was Committed for Pecuniary Gain, as Consideration or in Expectation of Receiving Something of Monetary Value, and the Like—Post-Gregg Cases*, 66 A.L.R. 4TH 417 (1988).

114. BILL MEMORANDUM, *supra* note 43, at 2 (referring to this section as "applicable to 'murder-for-hire' agreements.>").

115. *Id.* at 2-3 ("Where two persons agree to commit a robbery and kill a victim, the actual killer may be liable for a conviction for first-degree murder under subparagraph (vii) of this subdivision [pertaining to killings committed in furtherance of designated felonies], but neither would be subject to conviction under this subparagraph because the pecuniary gain would not come from one of the parties to the agreement.>").

upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter.¹¹⁶

Contemporaneous-felony killings are certain to be the most commonly committed form of capital murder. From this perspective, this provision stands out as the most significant one in the first-degree murder statute. The contemporaneous-felony circumstance is present in over three-fourths of the cases of murderers on death rows across the United States.¹¹⁷ It is not unusual in some jurisdictions for 80% to over 95% of death sentences to involve this circumstance.¹¹⁸ Killings committed during armed robberies generally account for the greatest share of contemporaneous-felony murders.¹¹⁹ Since the mid-1970s, roughly 28% to 45% of New York homicide victims, where the

116. N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney Supp. 1996).

117. Baldus et. al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 139 n.14 (1986) [hereinafter Baldus, *Arbitrariness and Discrimination*].

118. *Id.* at 138-39 (stating that "[m]ore than 80% of the defendants on death row today became death eligible because they killed in the course of a contemporaneous offense, usually an armed robbery or rape") & n.14 (citing studies that report that the contemporaneous felony factor is present in the cases of 87% of death row prisoners in Georgia, 72% of the death row prisoners in Florida, and 79% of the death row prisoners in Texas); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245, 278-79 (1988) (examining 1,686 nonnegligent "homicide events" committed in South Carolina between June, 1977 and December, 1981, identifying 311 of those cases as including a statutory aggravating circumstance that made the murder a potentially capital crime, and concluding that, "[i]n 97% or 302 of the 311 capital murders the requisite aggravating circumstance was the commission of a contemporaneous felony."). See also Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1127-28 (1990) [hereinafter Rosen] ("One study found that felony murder indictments comprise 40% of all first-degree murder indictments. Another nation-wide study found that 28% of all homicides were felony murders.") (Footnotes omitted; emphasis in original).

119. Rosen, *supra* note 118, at 1132 n.76 (citing studies which estimate that between 58% and 81.6% of felony-related murders involve armed robberies). Killings committed during armed robberies comprise the largest share of felony-related homicides in New York, as well. For years in which these data were reported, victims killed during robberies accounted for the following proportions of victims known to have been killed during felonies. (Note: for each year, there are large numbers of cases for which the circumstances under which victims were killed are unknown. The relevant statistics were no longer reported after 1988).

circumstances surrounding the offense are known, died in felony-connected killings.¹²⁰

Not all of these killings would qualify as first-degree murder under the contemporaneous felony category because several important limitations apply. First, this provision, like all other

Year Victims Known Killed During:

	Felonies (total)	Robberies	%
1976	368	305	82.9
1977	373	276	74.0
1978	343	243	70.8
1979	521	417	80.0
1980	489	384	78.5
1981	431	334	77.5
1982	396	313	79.0
1983	259	191	73.7
1984	261	136	52.1
1985	257	146	56.8
1986	389	169	43.4
1987	354	157	44.4
1988	411	179	43.6
TOTALS	4852	3250	66.7

See N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1979 CRIME AND JUSTICE ANNUAL REPORT 88-89 (1980); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1984 CRIME AND JUSTICE ANNUAL REPORT 94-95 (1985); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1985 CRIME AND JUSTICE 74 (1986); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1986 CRIME AND JUSTICE ANNUAL REPORT 75 (1987); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1987 CRIME AND JUSTICE ANNUAL REPORT 75, 80 (1988); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1988 CRIME AND JUSTICE ANNUAL REPORT 73, 78 (1989).

No explanation is given for why armed robberies account for a dwindling percentage of the victims known killed during felonies beginning in 1984. Generally, killings committed during the other named felony categories of sex crimes and arson remain fairly stable, but the generic category "other felonies" increases dramatically. Perhaps an increasing volume of drug crimes and related killings explains the sharp rise in killings committed during "other" felonies, but this is sheer speculation.

120. Since 1976, the New York State Division of Criminal Justice Services has reported the total number of "murder" victims killed each year in the state (for this purpose, "murder" also includes nonnegligent manslaughter), and has reported the number of those victims known to have been killed during felony-connected homicides, during nonfelony-connected homicides involving altercations and other circumstances, and during homicides for which the circumstances were unknown. The latter category of "circumstances unknown" always has been substantial. It is hazardous to estimate the total percentage of homicide victims killed under circumstances connected to felonies because of the large size of the "circumstances unknown" category. The percentages of victims killed in felony-connected homicides is based only on the killings for which the circumstances (felony-connected or nonfelony-connected) are known. The reported figures are as follows:

kinds of first-degree murder defined in the statute, requires that the offender *intentionally* killed his or her victim (or a third person).¹²¹ Unintentional killings, which are within the scope of

Year	Total "Murder" Victims	Felony- Connected "Murder" Victims	Non-Felony Connected "Murder" Victims	"Murder" Circumstances Unknown	"Murder" Victims Among Known Circumstances
1976	1,978	368	800	810	31.6
1977	1,913	373	923	617	28.8
1978	1,818	343	784	691	30.4
1979	2,098	521	1,030	547	33.6
1980	2,228	489	714	1,025	40.7
1981	2,177	431	687	1,059	38.6
1982	2,061	396	638	1,027	38.3
1983	1,965	259	680	1,026	27.5
1984	1,788	261	642	885	28.9
1985	1,690	257	613	820	29.5
1986	1,936	389	796	751	32.8
1987	2,003	354	665	984	34.7
1988	2,257	411	610	1,236	40.3
1989	2,266	428	636	1,202	40.2
1990	2,624	455	858	1,311	34.7
1991	2,567	470	577	1,520	44.9
1992	2,394	438	626	1,330	41.2
1993	2,428	446	642	1,340	41.0
1994	1,985	385	528	1,072	42.2

See N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1979 CRIME AND JUSTICE ANNUAL REPORT 88-89 (1980); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1984 CRIME AND JUSTICE ANNUAL REPORT 94-95 (1985); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1985 CRIME AND JUSTICE 74 (1986); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1986 CRIME AND JUSTICE ANNUAL REPORT 75 (1987); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1987 CRIME AND JUSTICE ANNUAL REPORT 75 (1988); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1988 CRIME AND JUSTICE ANNUAL REPORT 73 (1989); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1989 CRIME AND JUSTICE ANNUAL REPORT 97 (1990); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1990 CRIME AND JUSTICE ANNUAL REPORT 70 (1991); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1991 CRIME AND JUSTICE ANNUAL REPORT 78 (1992); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1992 CRIME AND JUSTICE ANNUAL REPORT 16 (1993); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1993 CRIME AND JUSTICE ANNUAL REPORT 18 (1994); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1994 CRIMINAL JUSTICE ANNUAL REPORT 18 (1995).

121. N.Y. PENAL LAW § 125.27(1) (McKinney 1987 & Supp. 1996). See *supra* note 21 and accompanying text. However, one commentator has observed that "the number of felony murder defendants who are not intentional killers is unclear but probably not many, which means that few defendants are excluded from the class." Rosen, *supra* note 118, at 1131. One form of second-degree murder under New York law is causing a death in the course of and in furtherance of the commission or attempted commission of named felonies (robbery, burglary, kidnapping,

traditional felony-murder rules,¹²² do not qualify as first-degree murder.

A second limitation concerns the predicate felonies. Only intentional killings committed in connection with the named felonies—robbery, first- or second-degree burglary, first-degree kidnapping, first- or second-degree arson, or first-degree rape, sodomy, sexual abuse, aggravated sexual abuse, escape, or their attempts, during flight after committing or attempting to commit second-degree murder—are defined as first-degree murder. A notable exception from this list is a killing committed during a drug-related felony, which is included in some jurisdictions as a form of capital murder or as an aggravating circumstance for sentencing,¹²³ even though drug offenses are not among the inherently dangerous crimes which historically were recognized as predicate felonies for purposes of the felony-murder rule.¹²⁴

Additionally, there must be a temporal and causal connection between the killing and the commission or attempted commission of the felony, or a related escape. Not only must the defendant have killed while “in the course of” committing or attempting the felony, or in the “immediate flight” therefrom, but the killing also must have been “in furtherance of” the felony or the immediate flight. These limitations exclude killings that are only remotely connected in time or purpose to the named felony, or are not committed “in the course of and furtherance of immediate flight” after the felony or attempted felony occurred.¹²⁵ Nor does the section apply when the victim is one of the participants in the felony.

arson, first-degree rape, first-degree sodomy, first-degree or aggravated sexual abuse, or first- or second-degree escape), or immediate flight therefrom. Intent to kill is not a necessary element of second-degree murder. N.Y. PENAL LAW § 125.25(3).

122. See Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450-57 (1985); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 61-62 (3d ed. 1982) [hereinafter PERKINS].

123. See *Dimensions of Capital Murder*, *supra* note 23, at 393 n.80; *Lexicon of Death*, *supra* note 52, at 122 n.74 (collecting statutes).

124. PERKINS, *supra* note 122, at 61-66; WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 7.5 (b), at 623-25 (2d ed. 1986).

125. See generally *id.* § 7.5 (f), at 632-37. “[I]t is not enough that a killing occur ‘during’ the felony or its attempt or ‘while’ it is committed or attempted; something more is required than mere coincidence of time and place There

The final significant limitation on the reach of the contemporaneous-felony element of first-degree murder involves the exclusion of accomplice liability for a killing committed by a cofelon, unless the accomplice "commanded another person to cause the death of the victim or intended victim. . . ." Under section 20 of New York's Penal Law, which is specifically referenced in this exclusion, one defendant normally is criminally liable for the conduct of another under the following circumstances:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.¹²⁶

Why accomplices who "command" another person to kill a victim are guilty of first-degree murder when that victim is killed, but not accomplices who "solicit," "request," or "importune" killings, remains something of a mystery.¹²⁷ Whatever the reason might be for these fine distinctions, the overarching significance of this exclusion is to limit first-degree murder liability in the vast majority of cases to the felon who actually killed the victim. Other participants in the contemporaneous felony ordinarily would not be guilty of capital murder even if they possessed the requisite intent to kill.¹²⁸

must be some causal relationship between the felony and the death" *Id.* at 633 (footnotes omitted).

126. N.Y. PENAL LAW § 20.00 (McKinney 1987).

127. The "Practice Commentary" accompanying N.Y. PENAL LAW § 20.00 (McKinney 1987 & Supp. 1996) does not discuss the meaning of the different verbs, "solicits, requests, commands, [and] importunes," nor does it discuss the significance of the differences between the underlying constructs. *See also* 35 N.Y. JUR. 2d *Elements of Accessorial Liability - Requisite Intent* § 3388 (1996).

128. The scope of this exclusion, in combination with the intent-to-kill *mens rea* requirement for first-degree murder, means that capital-punishment eligibility for killings committed during contemporaneous felonies is significantly more restrictive under New York law than would be permitted under federal constitutional guidelines. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that "major participation in the felony committed, combined with reckless indifference to human life" is sufficient to expose a defendant convicted of felony-murder to the risk of capital punishment, even if the offender did not intend that the killing take place, and did not personally commit the killing). The exclusion also is far broader than the statutory affirmative defense available to defendants who did not personally kill who are accused of second-degree murder committed in the course of, in

(viii) As part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction.¹²⁹

Another form of first-degree murder involves the slaying of multiple victims, "[a]s part of the same criminal transaction," exclusive of other participants in the criminal transaction. The precise meaning of the limitation that the killings occur during the same criminal transaction awaits judicial definition,¹³⁰ although it is clear that this provision is not intended to apply to recidivists¹³¹ or serial killers who commit murder over a prolonged period of time.¹³² Several other jurisdictions have similar multiple-victim provisions in their capital murder or capital-sentencing statutes.¹³³ The statute requires the prosecution to prove that the defendant intended to kill one or more victims as an element of all categories of first-degree murder, but the "intent to cause serious physical injury" suffices as the mens rea under this section for the killing of the additional victims.

(ix) Prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense

furtherance of, or immediate flight from a felony. N.Y. PENAL LAW § 125.25(3)(a)-(d) (McKinney 1987 & Supp. 1996).

129. N.Y. PENAL LAW § 125.27(1)(a)(viii) (McKinney Supp. 1996).

130. A section of New York's Criminal Procedure Law defines "criminal transaction" in a different context, pertaining to the circumstances under which "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction" N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1992). In this context, "[c]riminal transaction' means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." *Id.* § 40.10(2).

131. Another type of first-degree murder under the statute applies to offenders with prior murder convictions. N.Y. PENAL LAW § 125.27(1)(a)(ix) (McKinney Supp. 1996). See *infra* notes 134-43 and accompanying text.

132. Certain serial killings are made first-degree murder under another provision of the statute. N.Y. PENAL LAW § 125.27(1)(a)(xi). See *infra* notes 161-66 and accompanying text.

133. See *Dimensions of Capital Murder*, *supra* note 23, at 399; *Lexicon of Death*, *supra* note 52, at 132-33.

which, if committed in this state, would constitute a violation of either of such sections.¹³⁴

An offender's criminal history can make the difference between whether a murder is a capital or noncapital crime, and is directly relevant to capital sentencing decisions in many death penalty jurisdictions. Several state statutes have copied the Model Penal Code's aggravating circumstance, that "[t]he defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person."¹³⁵ Some statutes more vaguely focus on the defendant's "substantial history of serious assaultive criminal convictions,"¹³⁶ or use similar terminology.¹³⁷ Others, like New York's first-degree murder law, only make relevant the narrower criminal history of previous murder or other homicide convictions.¹³⁸ The New York statute permits other criminal convictions to be considered an aggravating circumstance, under appropriate circumstances, but only for *sentencing* purposes.¹³⁹ Thus, confining this element of first-degree murder to offenders with prior murder convictions significantly limits the death-penalty eligible class. Nationwide, roughly 10% of prisoners on death row have a record of prior criminal homicide convictions, but well over 50% have previously been convicted of other felonies.¹⁴⁰

134. N.Y. PENAL LAW § 125.27(1)(a)(ix) (McKinney Supp. 1996).

135. MODEL PENAL CODE § 210.6(3)(b) (Official Draft and Revised Comments 1980). See *Lexicon of Death*, *supra* note 52, at 112-13 n.29 (collecting statutes patterned after this provision of the Model Penal Code).

136. See, e.g., KY. REV. STAT. ANN. § 532.025(2)(a)(1) (Michie 1990); S.D. CODIFIED LAWS § 23A-27A-1(1) (Michie Supp. 1995).

137. See generally Thomas M. Fleming, Annotation, *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Defendant Was Previously Convicted of or Committed Other Violent Offense, Had History of Violent Conduct, Posed Continuing Threat to Society, and the Like—Post-Gregg Cases*, 65 A.L.R. 4TH 838 (1988).

138. See, e.g., MONT. CODE ANN. § 46-18-303(2) (1995); N.J. STAT. ANN. § 2C:11-3(c)(4)(a) (West 1996); See generally *Dimensions of Capital Murder*, *supra* note 23, at 398; *Lexicon of Death*, *supra* note 52, at 114.

139. N.Y. CRIM. PROC. LAW § 400.27(7)(b) (McKinney Supp. 1996). See *infra* notes 230-68 and accompanying text.

140. Approximately 2,575 people were under sentence of death at the end of 1992. The prior felony history of 2,421 members of this group was reported. Among this group, 230 (9.5%) had prior criminal homicide convictions; 1,310 (54.1%) had previously been convicted of another known felony; 120 (5.0%) had been convicted previously of an unspecified felony, and 761 (31.4%) had no prior felony convictions. Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Jus-

This provision of the statute applies to offenders who commit murder after already having been convicted of first-degree or second-degree murder in New York,¹⁴¹ or of an offense in another jurisdiction which satisfies the elements of first- or second-degree murder under New York law. The killing must have occurred following the offender's conviction for a prior murder, and not simply after the commission of the murder. The statute does not exempt offenders whose prior murder convictions correspond to crimes committed before they reached the age of majority. A child as young as thirteen can be convicted of second-degree murder in New York,¹⁴² and such an offense could serve as the predicate murder conviction for this element of first-degree murder.

A defendant being tried for the commission of first-degree murder could be unfairly prejudiced if the jury knew about a prior murder conviction. Accordingly, in prosecutions under this section:

if the defendant denies the previous murder conviction or remains mute, the people may prove that element of the offense only after the jury has first found the defendant guilty of intentionally causing the death of a person as charged in the indictment, in which

tice, 1992 Correctional Populations in the United States 143 (1995). The specific offenses constituting the nonhomicidal felonies are not reported, so it cannot be estimated how many of these involved the types of violent felony convictions that can form the basis for a conviction for capital murder or serve as an aggravating circumstance for sentencing purposes under some death penalty statutes.

141. Second-degree murder is defined under section 125.25 of New York's Penal Law, to which reference is made in this provision of the first-degree murder statute. See *supra* note 133 and accompanying text. Second-degree murder includes: (1) the intentional killing of another, subject to the affirmative defenses that the offender "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," or that the offense consisted of causing or aiding another person to commit suicide, without duress or deception; (2) causing another's death "[u]nder circumstances evincing a depraved indifference to human life" through which the offender "recklessly engages in conduct which creates a grave risk of death to another person"; (3) killing another during the course of and in furtherance of the commission, attempted commission, or immediate flight from designated felonies, subject to an affirmative defense available when a number of conditions are met, including that the defendant did not commit or aid the commission of the homicidal act; and (4) causing the death of a child less than 11 years old, by an offender who is 18 years old or more, who "recklessly engages in conduct which creates a grave risk of serious physical injury or death to" the child. N.Y. PENAL LAW § 125.25(1)-(4) (McKinney 1987 & Supp. 1996).

142. *Id.* § 30.00(2).

case the court shall permit the people and the defendant to offer evidence and argument . . . with respect to the previous murder conviction.¹⁴³

(x) The defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.¹⁴⁴

In order to address "the special case of a style of killing so indicative of utter depravity that imposition of the ultimate sanction should be considered,"¹⁴⁵ the drafters of the Model Penal Code created an aggravating factor for capital sentencing trials that applies when "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."¹⁴⁶ Several jurisdictions have copied the Model Penal Code's "heinous, atrocious or cruel" (hereinafter HAC) circumstance, or have adopted a variant thereof in their death penalty laws.¹⁴⁷ Most of these provisions are sentencing factors and become operative only after the offender has been convicted.¹⁴⁸ A few others, like

143. N.Y. CRIM. PROC. LAW § 200.60(3)(b) (McKinney Supp. 1996).

144. N.Y. PENAL LAW § 125.27(1)(a)(x) (McKinney Supp. 1996).

145. MODEL PENAL CODE § 210.6, Commentary, at 137 (Official Draft and Revised Comments 1980).

146. *Id.* § 210.6(3)(h).

147. See *Dimensions of Capital Murder*, *supra* note 23, at 400-01; *Lexicon of Death*, *supra* note 52, at 124-30. See also Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941 (1986)[hereinafter Rosen, *Aggravating Circumstances*].

148. See 18 U.S.C. § 3592(c)(6) (1995) ("The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim."); 21 U.S.C. § 848(n)(12) (Supp. 1995) (same); ALA. CODE § 13A-5-49(8) (1994) ("The capital offense was especially heinous, atrocious or cruel compared to other capital offenses."); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West 1995) ("The defendant committed the offense in an especially heinous, cruel or depraved manner"); ARK. CODE ANN. § 5-4-604(8)(A)-(C) (Michie 1993) ("(A) The capital murder was committed in an especially cruel or depraved manner. (B) For purposes of this subdivision, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.

'Mental anguish' is defined as the victim's uncertainty as to his ultimate fate. 'Serious physical abuse' is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. 'Torture' is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death. (C) For purposes of this subdivision, a capital murder is committed in an especially depraved manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder."); COLO. REV. STAT. § 16-11-103(5)(j) (West Supp. 1995) ("The defendant committed the offense in an especially heinous, cruel, or depraved manner."); CONN. GEN. STAT. ANN. § 53a-46a(i)(4) (West 1994) ("[T]he defendant committed the offense in an especially heinous, cruel or depraved manner."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (1995) ("The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him."); FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1995). ("The capital felony was especially heinous, atrocious, or cruel."); *id.* § 921.142(6)(j) ("The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim."); GA. CODE ANN. § 17-10-30(b)(7) (1990) ("The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."); IDAHO CODE § 19-2515(h)(5) (Supp. 1995) ("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."); *id.* § 19-2515(h)(6) ("By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life."); ILL. ANN. STAT. ch. 720, para. 5/9-1(b)(7) (Smith-Hurd Supp. 1995) ("The murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty"); IND. CODE ANN. § 35-50-2-9(b)(10) (Michie Supp. 1995) ("The defendant dismembered the victim."); KAN. STAT. ANN. § 21-4625(6) (Supp. 1994) ("The defendant committed the crime in an especially heinous, atrocious or cruel manner."); LA. CODE CRIM. PRO. ANN. art. 905.4(A)(7) (West Supp. 1995) ("The offense was committed in an especially heinous, atrocious or cruel manner."); MISS. CODE ANN. § 99-19-101(5)(h) (1994) ("The capital offense was especially heinous, atrocious or cruel."); MO. ANN. STAT. § 565.032(2)(7) (West Supp. 1996) ("The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."); MONT. CODE ANN. § 46-18-303(3) (1995) ("The offense was deliberate homicide and was committed by means of torture."); NEB. REV. STAT. § 29-2523(1)(d) (1989) ("The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."); NEV. REV. STAT. ANN. § 200.033(8) (Michie Supp. 1995) ("The murder involved torture, depravity of mind or the mutilation of the victim."); N.H. REV. STAT. ANN. § 630:5(VII)(a)(h) (Supp. 1995) ("The defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim."); N.J. STAT. ANN. § 2C:11-3(c)(4)(c) (West 1995) ("The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim."); N.C. GEN. STAT. § 15A-2000(e)(9) (Supp. 1995) ("The capital felony was especially heinous, atrocious, or cruel."); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1995) ("The murder was especially heinous, atrocious, or cruel."); PA. STAT. ANN. tit. 42, § 9711(d)(8) (West Supp. 1995) ("The offense was

New York's analogous provision, define a category of capital murder.¹⁴⁹ The potential breadth of these circumstances makes HAC-factors especially significant. As many as 60 to 80% of cases resulting in death sentences in some jurisdictions may involve the "vile murder" or "heinous, atrocious or cruel" factor.¹⁵⁰

It is unlikely that the "especially cruel and wanton" torture murder defined under New York law will figure so regularly in capital cases. Provisions of this type are notoriously vague,

committed by means of torture."); S.C. CODE ANN. § 16-3-20(C)(a)(1)(h) (Law. Co-op. Supp. 1995) ("The murder was committed while in the commission of the following crimes or acts: physical torture."); S.D. CODIFIED LAWS § 23A-27A-1(6) (Michie Supp. 1995) ("The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."); TENN. CODE ANN. § 39-13-204(i)(5) (Supp. 1995) ("The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death."); *id.* § 39-13-204(i)(13) (Supp. 1995) ("The defendant knowingly mutilated the body of the victim after death."); VA. CODE ANN. § 19.2-264.4 (C) (Michie 1995) ("The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt . . . , or that [the defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."); WYO. STAT. ANN. § 6-2-102(h)(vii) (Michie Supp. 1995) ("The murder was especially atrocious or cruel, being unnecessarily torturous to the victim.").

149. CAL. PENAL CODE § 190.2(a)(14) (Deering Supp. 1996) ("The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a consciousnessless, or pitiless crime which is unnecessarily torturous to the victim.") (special circumstance); *id.* at § 190.2(a)(18) ("The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.") (special circumstance); IDAHO CODE § 18-4003(a) (Supp. 1995) ("All murder which is perpetrated . . . when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination . . . is murder of the first degree."); NEV. REV. STAT. ANN. § 200.030(1) (Michie Supp. 1995) ("Murder of the first degree is murder which is: (a) Perpetrated by means of . . . torture"); OR. REV. STAT. § 163.095(1)(e) (1995) ("The homicide occurred in the course of or as a result of intentional maiming or torture of the victim."); UTAH CODE ANN. § 76-5-202(1)(q) (1995) ("[T]he homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.").

150. *Lexicon of Death*, *supra* note 52, at 125 (citing Baldus, *Arbitrariness and Discrimination*, *supra* note 117 at 138-39 & n.14; William J. Bowers & Glenn Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 627 (1980)).

although several have survived constitutional challenge after court decision have defined significant terms and narrowed their application.¹⁵¹ The drafters of the New York statute have made a deliberate attempt to minimize potential vagueness problems by defining operative terms of this section. Vagueness issues are particularly acute because this provision defines an element of first-degree murder, rather than serving only as a sentencing factor.

For a killing to fall within this element of first-degree murder, the defendant must have (a) "acted in an especially cruel and wanton manner," (b) "pursuant to a course of conduct," and (c) "intended to inflict and inflict[ed] torture upon the victim prior to the victim's death." The requirement that the defendant acted in a "cruel and wanton manner" is likely to be construed as superfluous or redundant to the "torture" aspect of this element. That is, proof that the defendant intended to and actually tortured the murder victim may well suffice to demonstrate that the defendant acted in an especially cruel and wanton manner. Nevertheless, since these requirements are stated separately, there is some chance that they will be interpreted as discrete sub-elements that demand independent proof.

The statute requires that the defendant engage in a "course of conduct" involving torture before his or her acts are covered by this section. This wording clearly signifies that not all gratuitous acts of cruelty toward a homicide victim qualify a killing

151. Compare *Richmond v. Lewis*, 506 U.S. 40 (1992) (sentencer's reliance on Arizona's unconstitutionally vague "especially heinous, cruel, or depraved" aggravating factor requires invalidation of death sentence), *Clemons v. Mississippi*, 494 U.S. 738 (1990) (inadequate definition of "heinous, atrocious or cruel" circumstance requires that death sentence be vacated), *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor, as applied, is unconstitutionally vague), *Godfrey v. Georgia*, 446 U.S. 420 (1980) (as applied, aggravating circumstance that murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" is unconstitutionally vague) with *Arave v. Creech*, 507 U.S. 463 (1993) (as construed by Idaho courts, aggravating circumstance that defendant exhibited "utter disregard for human life" is not unconstitutionally vague), *Walton v. Arizona*, 497 U.S. 639 (1990) ("especially heinous, cruel or depraved" aggravating factor is not unconstitutionally vague as construed by state supreme court). See generally *Tuilaepa v. California*, 114 S. Ct. 2630 (1994) (discussing general principles and standards for determining whether capital-sentencing aggravating circumstances are unconstitutionally vague, and upholding three statutory sentencing factors against challenge).

as a torture-murder. "The fact that the torture must be inflicted pursuant to a 'course of conduct' inserts both a temporal element and a requirement for a series of distinct acts prior to the victim's death as part of the definition of the crime."¹⁵²

"Torture" is defined as "the intentional and depraved infliction of extreme physical pain." Significantly, proof of the victim's psychological trauma or sensations of terror prior to death does not satisfy this definition.¹⁵³ Since the torture must be inflicted "prior to the victim's death," cases involving mutilation or dismemberment of the victim's body following death also are excluded.¹⁵⁴

The defendant not only must intentionally inflict extreme physical pain on the victim pursuant to a course of conduct, but must do so in a "depraved" way. "[D]epraved' means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain."¹⁵⁵ Almost mercifully, the statute does not define words such as "relished," "debasement," and "perversion." "Vague terms do not suddenly become clear when they are defined by reference to other vague terms."¹⁵⁶

The Supreme Court's "vagueness review is quite deferential"¹⁵⁷ when the Justices assess the adequacy of the eligibility and selection factors¹⁵⁸ articulated in death-penalty statutes.

152. BILL MEMORANDUM, *supra* note 43, at 3.

153. *Cf. Walton v. Arizona*, 497 U.S. 639, 646 (1990) (approving Arizona Supreme Court's narrowing interpretation of "especially heinous, cruel or depraved" statutory aggravating circumstance, which included the defendant's infliction of "mental anguish," or a "victim's uncertainty as to his ultimate fate," as a part of the definition of "cruel.>").

154. *Cf. TENN. CODE ANN. § 39-13-204(i)(13)* (Supp. 1995), *supra* note 148.

155. *See also ARK. CODE ANN. § 5-4-604(8)(B), (C)* (Michie 1993), *supra* note 148 (defining "torture" and "especially depraved manner" as part of capital-sentencing aggravating circumstance).

156. *Walton v. Arizona*, 497 U.S. 639, 693 n.16 (1990) (Blackmun, J., dissenting) (quoting *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988)).

157. *Tuilaepa v. California*, 512 U.S. 967 (1994).

158. "The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.' The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an as-

However, since New York's torture-murder provision defines an element of first-degree murder, and does not simply serve as a sentencing consideration, due process standards used to assess the vagueness of elements of crimes should be fully effective.¹⁵⁹ Imprecise statutes invite arbitrary application, and arbitrariness has long plagued the administration of death-penalty systems. The Legislature commendably has attempted to define and limit the scope of the torture-murder element of capital murder. Nevertheless, due to the conceptual difficulties inherent in identifying "especially cruel and wanton" killings, and the limitations of language as a device for harnessing discretion, a provision of this nature simply may defy meaningful definition.¹⁶⁰

(xi) The defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.¹⁶¹

This "serial murder" provision applies when (1) an offender has intentionally killed at least three people (the victim of the first-degree murder charged, and "two or more *additional* persons"), (2) in the State of New York, (3) during a two-year period, (4) in "separate criminal transactions," and (5) the killings were "committed in a similar fashion or pursuant to a common scheme or plan." While presumably intended to apply to killings such as those committed in the infamous "Son of Sam" case, this element of first-degree murder is laden with definitional and operational uncertainties. One question concerns how the additional killings, committed during "separate crimi-

assessment of the defendant's culpability There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."

Tuilaepa at 2635 (quoting *Arave v. Creech*, 507 U.S. 463, 467 (1993)).

159. See generally *Kolender v. Lawson*, 461 U.S. 352 (1983); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 442 N.E.2d 1222, 456 N.Y.S.2d 711, (1982); *People v. Berck*, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973); *People v. Diaz*, 4 N.Y.2d 469, 151 N.E.2d 871, 176 N.Y.S.2d 313 (1958).

160. See *Rosen, Aggravating Circumstances*, *supra* note 147; *Lexicon of Death*, *supra* note 52, at 130.

161. N.Y. PENAL LAW § 125.27(1)(a)(xi) (McKinney Supp. 1996).

nal transactions," are to be proven. The statute does not indicate whether these other killings must be established by introducing prior convictions or whether they may be proven as indicted or unindicted crimes as a part of the offender's first-degree murder trial.

Tennessee's death penalty law includes a "mass-murder" aggravating sentencing factor similar to New York's serial-killing provision, although the former law does not require that the multiple killings must have been committed "in separate criminal transactions."¹⁶² Relying on its state constitution, the Tennessee Supreme Court has ruled that killings must be established by convictions before they can be used to prove the multiple homicides that form a part of the "mass-murder" sentencing factor.¹⁶³ Even if the courts impose a similar require-

162. TENN. CODE ANN. § 39-13-204(i)(12) (Supp. 1995) ("The defendant committed 'mass murder,' which is defined as the murder of three (3) or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan."). Since the Tennessee sentencing factor, unlike New York's serial-murder provision, does not require that killings be committed during separate criminal transactions, a murderer in Tennessee who kills three victims during the course of a single bank robbery, for example, can have the "mass murder" factor applied to his or her case. *See State v. Black*, 815 S.W.2d 166, 183-84 (Tenn.1991):

The language of the subsection "within a period of forty-eight (48) months," would be applicable to the kinds of serial murders committed by Wayne Williams in Atlanta, by the "Son of Sam" in New York, or by Theodore "Ted" Bundy in Florida. The language would also be applicable to multiple murders such as those committed by Charles J. Whitman by sniper fire from the tower on the University of Texas campus. The term "mass murderer" as used in the statute can apply to multiple murders committed close in time or multiple murders committed singly over a longer period of time, not to exceed four years. We are of the opinion that the statute encompasses a situation where a defendant is simultaneously tried, as in the present case, for a series of separate but related homicides committed as part of a common scheme or plan.

Id. *See also* *State v. Van Tran*, 864 S.W.2d 465, 478 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1577 (1994):

In *Black* [*supra*], the defendant murdered three persons within a period of minutes. In the present case the killings were committed by the defendant and his accomplices within minutes, while engaged in the commission of the robbery. . . . We find the trial court was not in error when it charged the mass murder aggravating circumstance at the sentencing phase.

Id.

163. *State v. Bobo*, 727 S.W.2d 945, 951-55 (Tenn. 1987), *cert. denied*, 484 U.S. 872 (1987). The Tennessee Supreme Court has upheld application of this aggravating factor when the defendant was convicted of multiple homicides at his or her

ment for the serial-murder element of New York's first-degree murder statute, further uncertainty exists about when proof should be offered about the other killings. Specifically, the statute gives no guidance about whether the other alleged killings should be proven during the accused's first-degree murder trial, or whether, to avoid unfair prejudice to the defendant, the other alleged killings should be proven during a separate proceeding, much as is required under the section governing capital trials involving previously convicted murderers.¹⁶⁴

Further confusion is caused by the requirements that the killings were committed "in separate criminal transactions" and "in a similar fashion or pursuant to a common scheme or plan." A distraught father who shot and killed his three sleeping children with a single blast from a shotgun presumably could not be convicted under this section, because the deaths did not occur "in separate criminal transactions." But what if the children were killed by three shots from a single-action gun while sleeping in the same bed? Of if they were sleeping in separate bedrooms, and the father walked from room to room and shot them individually? Would those killings involve "separate criminal transactions"?

The prosecution additionally would be required to prove that the children were killed "in a similar fashion or pursuant to a common scheme or plan." Would it be sufficient to establish that each child was shot to death while sleeping to demonstrate that the three were killed "in a similar fashion"? What if one of the children awakened and was shot while trying to run from the house? Or if the father's gun jammed and he ended up strangling one child after shooting two?

And would a killer who routinely left bite marks on his female victims while in the course of strangling them have killed "in a similar fashion or pursuant to a common scheme or plan"?¹⁶⁵ Would it matter if some of the victims were stabbed instead of strangled, or if some had not been bitten, or if not all

capital murder trial. *State v. Van Tran*, 864 S.W.2d 465, 478 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1577 (1994); *State v. Black*, 815 S.W.2d 166, 183-84 (Tenn. 1991).

164. See *supra* note 141 and accompanying text.

165. Cf. *supra* notes 80-88 and accompanying text (discussing the crimes of Lemuel Smith).

of the victims were female? The vagueness of the essential terms, "in separate criminal transactions," and "committed in a similar fashion or pursuant to a common scheme or plan," is a troublesome aspect of this category of first-degree murder. The deceptively simple description of this element as a "serial murder" provision¹⁶⁶ belies several difficult issues that remain to be resolved in its application.

(xii) The intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge.¹⁶⁷

Many death penalty statutes contain provisions applying to the murder of officials who hold public office,¹⁶⁸ and to the murder of court personnel, including judges, prosecutors, and sometimes jurors and defense lawyers.¹⁶⁹ The final element of first-degree murder under New York law involves the relatively narrow prohibition against killing a judge.¹⁷⁰ For this provision to apply, the victim must have been killed "because" he or she was a judge. The judge apparently would not have to be acting in his or her official capacity when murdered, as long as the defendant committed the killing "because of the victim's status as a judge."¹⁷¹ However, the provision would not apply if a retired or former judge were killed for reasons related to his or her judicial activities, since the victim must be "at the time of the killing, a judge."

166. The bill memorandum prepared by the Assembly Codes Committee simply describes this element of first-degree murder as follows: "Serial Murders. This subparagraph makes an intentional killing first degree murder when the defendant has committed two or more additional intentional killings within a 24 month period in separate criminal transactions that were committed in a similar fashion or pursuant to a common scheme or plan." BILL MEMORANDUM, *supra* note 43, at 3.

167. N.Y. PENAL LAW § 125.27(1)(a)(xii) (McKinney Supp. 1996).

168. See *Dimensions of Capital Murder*, *supra* note 23, at 404-05 & n.148; *Lexicon of Death*, *supra* note 52, at 148.

169. See *Dimensions of Capital Murder*, *supra* note 23, at 404 & n.147; *Lexicon of Death*, *supra* note 52, at 146-48.

170. "Judge" means any judicial officer who is a member of or constitutes a court, whether referred to in another provision of law as a justice or by any other title." N.Y. CRIM. PROC. LAW § 1.20 (23) (McKinney Supp. 1996).

171. BILL MEMORANDUM, *supra* note 43, at 3.

B. *The Sentencing Provisions*

1. *Notice of Intent to Seek the Death Penalty*

Neither this bill nor existing statutes deal adequately with the problem of due process in the decision to seek the death penalty. The individual determination made by prosecutors is fraught with inconsistent criteria, they vary from case to case, they'll vary from jurisdiction-to-jurisdiction.

Prosecutors are subject to the vagaries of publicity and undue influence from community pressure.

—Assemblywoman Deborah Glick¹⁷²

A first-degree murder conviction does not automatically trigger a death-penalty hearing. The prosecution is under no obligation to seek a capital sentence even if the facts of a case would allow the jury to consider imposing one.¹⁷³ However, the state is precluded from pursuing a death sentence unless "the people . . . , within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court . . . a written notice of intention to seek the death penalty."¹⁷⁴ A notice of intention to seek the death penalty may be withdrawn, but once withdrawn it may not be refiled; the prosecution thereafter is barred from defining the case as a capital one.¹⁷⁵

The statute leaves prosecutors' decisions about whether to seek the death penalty in first-degree murder cases wholly unregulated. Such lack of direction is not uncommon; indeed, in other capital punishment jurisdictions, prosecutors' charging

172. Assembly Debate, *supra* note 1, at 35. See remarks of Assemblyman Edward Sullivan:

I'm just wondering what is the process under which a district attorney decides that this person's life is going to be put in jeopardy. I don't think there is any process. I think that's in violation of the 14th Amendment to the Constitution of the United States. I think the district attorney can sit in his office and flip a coin and if it's heads, he goes for the death penalty, and that's the process. And I don't know if a court in the land is going to accept that as due process, but maybe they will, I don't know.

Id. at 453.

173. N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1996).

174. *Id.* § 250.40(2). "For good cause shown the court may extend the period for service and filing of the notice." *Id.*

175. *Id.* § 250.40(4).

decisions almost never are regulated by guidelines or subject to a centralized review and approval process. There are some limited exceptions. A directive issued by the United States Attorney General requires U.S. Attorneys to secure the Attorney General's approval before initiating a capital prosecution in federal court.¹⁷⁶ At the strong urging of the New Jersey Supreme Court,¹⁷⁷ New Jersey prosecutors voluntarily adopted a set of "Guidelines for Designation of Homicide Cases for Capital Prosecution," although these guidelines have been criticized as vague, unenforceable, and ineffective.¹⁷⁸ Charging standards

176. Scott Christianson, *Corrections Law: Federal Death Penalty Protocol—Safeguard or Window Dressing?*, 32 CRIM. L. BULL. 374, 375 (1996). Under revised procedures, established by Attorney General Reno January 27, 1995, federal prosecutors who plan to seek a death sentence must outline all known aggravating and mitigating circumstances associated with the alleged offense, and supply the race of the defendant and victim. The racial information is removed "before it is reviewed at Main Justice, so the reviewer won't know the race when he considers the recommendation." 5 DOJ Alert 8, In Brief (WL Mar. 20, 1995). Critics have pointed out that race disparities have surfaced in federal capital prosecutions.

Although three-fourths of those convicted of participating in a drug enterprise under the general provisions of 21 U.S.C. § 848 are white, the death penalty provisions of the Anti-Drug Abuse Act of 1988 have been used almost exclusively against minorities. Of the first 37 federal death penalty prosecutions, all but 4 were against members of minority groups. Since she became Attorney General, Janet Reno has approved 10 death penalty prosecutions, all against African-Americans. That is an even greater racial disparity in seeking the death penalty than exists in Alabama, Georgia, Mississippi, Texas, or any other state.

Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," but Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 481 (1995) (footnotes omitted). See generally Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79, 89 n.43 (1991) (citing requirement that United States Attorney General give prior approval to federal death penalty prosecutions).

Under the Justice Department's procedures, a committee appointed by the United States Attorney General reviews requests to seek the death penalty made by U.S. Attorneys in individual cases. Defense counsel are given the opportunity to present to the committee reasons why a capital sentence should not be sought. The committee thereafter makes a recommendation to the Attorney General concerning whether the prosecution's request to seek the death penalty should be approved. The Attorney General makes the final decision, and must give written authorization before a federal case can be prosecuted capitally. See Christianson, *supra*, at 375-77 (1996).

177. *State v. Koedatich*, 112 N.J. 225, 258, 548 A.2d 939, 955-56 (1988).

178. *State v. Jackson*, 128 N.J. 136, 137-58, 607 A.2d 974, 974-85 (1992) (Handler, J., dissenting) (describing, and criticizing prosecutors' capital charging guidelines).

and guidelines for potentially capital cases have been implemented by other prosecutors,¹⁷⁹ but they are rare,¹⁸⁰ and no jurisdiction requires or enforces capital charging procedures by statute.

Prosecutorial decisionmaking is a major source of arbitrariness in several states' administration of death penalty laws.¹⁸¹ There is no reason to believe that New York will be any different. To the contrary, the conditions that exist in New York could hardly be more conducive to producing inconsistent prosecutorial charging decisions. New York City, with its teeming population and rich heterogeneity, differs dramatically from the rest of the State. Although upstate New York has several urban centers, it predominantly is populated by small cities and towns, and it has comparatively modest racial and ethnic diversity.¹⁸²

179. See Daniel E. Lundgren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655, 674 & n.90 (1995) (describing procedures used in the Los Angeles District Attorney's Office before decision is made about whether to prosecute a murder charge capitally); *Developments in the Law, Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1550-51 (1988) (generally discussing prosecutorial charging guidelines).

180. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 333-34 & n.9 (1987) (Brennan, J., dissenting); with *id.* at 357-58 (Blackmun, J., dissenting) (criticizing Georgia capital punishment law for having no guidelines to regulate prosecutorial charging discretion in potentially capital cases).

181. See BARRY A. NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 120-44 (1987); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 178-80 (1991); Baldus et al., *Symposium on Current Death Penalty Issues: Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) at 710 n.131 [hereinafter Baldus, *Comparative Review*] ("the leading source of race-of-victim discrimination in Georgia's death-sentencing system for defendants convicted of murder at trial is clearly the [prosecutor's] decision to advance the case to a penalty trial."); Leigh B. Bienen, et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 591-92 (1985).

182. See THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, 1993 NEW YORK STATE STATISTICAL YEARBOOK 120 (18th ed. 1993) (reporting New York's 1992 population to be nearly 18,000,000, and showing racial and ethnic (non-Hispanic white, non-Hispanic black, non-Hispanic other, Hispanic) breakdown of population by congressional district, and reflecting relative diversity of population in the New York City/Long Island area versus upstate New York).

In other states, prosecutors located in rural areas generally have been more likely to seek the death penalty than prosecutors in urban centers. Homicides, unfortunately, are not rare events in cities, and different community and criminal justice system pressures often are at work than exist in smaller towns.¹⁸³ Studies also consistently have revealed racial disparities in the prosecution of capital cases,¹⁸⁴ although neither the Supreme Court¹⁸⁵ nor most state courts¹⁸⁶ have been receptive to systemic challenges to death-penalty laws based on such evidence. Absent statewide charging policies or a centralized mechanism for reviewing and regulating prosecutorial charging discretion, idiosyncratic differences between prosecutors' offices inevitably will produce uneven capital prosecution patterns across the state.

For example, the five district attorneys serving in New York City, where over eighty percent of the state's criminal

183. See Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 64-66 (1984); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY. 1067, 1072-75 (1983); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY. 754 (1983); William J. Bowers & Glen Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 601, 616-19 (1980).

184. Homicides involving white victims are most likely to be prosecuted as capital crimes, and especially cases involving white victims and African-American defendants. These race effects remain even after statistical controls are imposed to take account of nonracial factors that could explain the differences. See Baldus, *Comparative Review*, *supra* note 181, at 709-10 n.131; Gross & Mauro, *supra* note 183, at 54-92; Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 922-26 (1981); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

185. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

186. David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 375 n.69 (1994) [hereinafter Baldus, *Racial Discrimination*] (collecting cases). "Two state courts, however, have rejected *McCleskey*—New Jersey, in the death sentencing context, and Minnesota, in the context of noncapital sentencing. Also, a three-person minority of the seven-member Florida Supreme Court has rejected it." (footnotes omitted) (citing *State v. Marshall*, 613 A.2d 1059, 1108-10 (N.J. 1992); *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991); *Foster v. State*, 614 So. 2d 455, 465-68 (Fla. 1992) (Barkett, C.J., concurring in part and dissenting in part), *cert. denied*, 114 S. Ct. 398 (1993)).

homicides are committed,¹⁸⁷ have expressed widely divergent views about their willingness to seek the death penalty in first-degree murder cases. The Bronx District Attorney, citing his involvement in a murder prosecution that resulted in the conviction of an innocent man, announced that he had no present intention of asking for a sentence of death in the first-degree murder cases prosecuted by his office.¹⁸⁸ The chief prosecutors

187. Between 1984 and 1994, the following numbers and proportions of murders and nonnegligent manslaughters occurred in New York City and the rest of New York State.

	New York City	Non-New York City	Total NY State
1984	1,446(81.4%)	331(18.6%)	1,777
1985	1,384(82.0%)	304(18.0%)	1,688
1986	1,582(82.9%)	327(17.1%)	1,909
1987	1,672(83.3%)	335(16.7%)	2,007
1988	1,895(84.6%)	344(15.4%)	2,239
1989	1,904(84.5%)	349(15.5%)	2,253
1990	2,245(86.1%)	361(13.9%)	2,606
1991	2,154(84.2%)	403(15.8%)	2,557
1992	1,995(83.8%)	387(16.2%)	2,382
1993	1,946(81.6%)	440(18.4%)	2,386
1994	1,561(78.8%)	419(21.2%)	1,980

N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1994 CRIME AND JUSTICE ANNUAL REPORT 8 (1995); N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1993 CRIME AND JUSTICE ANNUAL REPORT 8 (1994).

188. Adam Nossiter, *In New York City, a Mixed Response to Law from Prosecutors*, N.Y. TIMES, Mar. 8, 1995, at B5; Rayner Pike, *DA Vows Not to Seek Death Penalties*, TIMES UNION (Albany), Mar. 9, 1995 at B-4; Adam Nossiter, *Balking Prosecutors: Door Opens to Death Row Challenges*, N.Y. TIMES, Mar. 11, 1995, at 27. About 21.5% of murders and manslaughters committed in New York in 1993 occurred in the Bronx. Nossiter (Mar. 8, 1995), *supra*. The Bronx District Attorney is Robert T. Johnson. After a police officer was shot to death in the Bronx in March of 1996, Mr. Johnson announced that he would evaluate each first-degree murder case carefully before reaching a decision about whether to pursue a capital sentence. "[H]e said his opposition to the death penalty applied 'in general,' not necessarily in every case." Jan Hoffman, *Prosecutor in Bronx, Under Fire, Softens Stance against Execution*, N.Y. TIMES, Mar. 20, 1996, at A1. Not satisfied that Johnson in fact would exercise his discretion appropriately, Governor Pataki ordered him removed from the prosecution of the case involving the alleged murder of the police officer, and replaced him with Attorney General Dennis Vacco. Rachel L. Swarns, *A Killing in the Bronx: Governor Removes Bronx Prosecutor From Murder Case*, N.Y. TIMES, Mar. 22, 1996, at A1. Johnson announced that his office would assist the Attorney General's efforts to prosecute the case, but he declared his intention "to challenge [the governor's] actions in a court of law on another day." *Excerpts From Messages by Governor and the District Attorney*, N.Y. TIMES, Mar. 22, 1996, at B2.

In July 1996, Bronx County Supreme Court Justice Howard R. Silver upheld the Governor's authority to remove District Attorney Johnson from the case.

in Brooklyn,¹⁸⁹ Manhattan,¹⁹⁰ and Queens¹⁹¹ have been unenthusiastic about the new capital punishment law, although each has left the door open to seek death sentences in appropriate cases. Only the Staten Island District Attorney, who represents a district with just a fraction of the murders committed in the other New York City districts, has supported the death penalty without reservation for particular crimes.¹⁹² Elsewhere in the state, district attorneys show mixed support for the death penalty,¹⁹³ and considerable variation can be expected in their decisions to seek death sentences in potentially capital trials.

Daniel Wise, *Removal of Prosecutor Sustained: Bronx Capital Case In Vacco's Control*, N.Y. L.J., July 11, 1996, at 1. See *Matter of Johnson v. Pataki* (Supreme Court, 1st Judic. Dist., Bronx Co., July 10, 1996, (reprinted in N.Y. L.J., July 12, 1996, at 27)). The defendant, Angel Diaz, was indicted for first-degree murder, and Attorney General Vacco announced that a death sentence would be sought. See Wise, *supra*, at 1. Mr. Johnson declared his intention to appeal the Supreme Court's ruling that authorized his removal. *Id.* at 4. However, on September 5, 1996, Angel Diaz was found hanged in his Rykers Island jail cell, the victim of an apparent suicide. Rayner Pike, *Suspect in Cop Murder Hangs Self in Jail*, TIMES UNION (Albany, N.Y.), Sept. 6, 1996, at B2.

189. In Brooklyn, a spokesman for District Attorney Charles J. Hynes said that Mr. Hynes opposed the death penalty but that he was "prepared to fulfill his responsibilities," adding that "he will follow the law." Mr. Hynes thinks the "appropriate" penalty for murder is life in prison without parole, said the spokesman, Patrick Clark.

Nossiter (Mar. 8, 1995), *supra* note 188, at B5. Approximately 30.1% of New York's murders and manslaughters in 1993 were committed in Brooklyn. *Id.*

190. "District Attorney Robert M. Morgenthau of Manhattan, commenting on the new law through a spokeswoman, would only say: 'I understand that it gives the district attorney the option of either seeking the death penalty or life imprisonment without parole. I intend to exercise that discretion wisely.'" *Id.* "In the past, [Morgenthau] has written strongly worded denunciations of the death penalty." Nossiter (Mar. 11, 1995), *supra* note 188, at 27. See also Pike, *supra* note 188, at B4. In 1993, roughly 17.5% of the state's murders and manslaughters were committed in Manhattan. Nossiter (Mar. 8, 1995), *supra* note 188, at B5.

191. "District Attorney Richard A. Brown of Queens . . . expressed doubt about the death penalty's usefulness as a deterrent, and its cost. But he also said that 'whether one is for or against it is no longer the issue,' adding that 'the Legislature has spoken and I have a responsibility to carry out their mandate.'" *Id.* Queens accounted for about 11.4% of the murders and manslaughters committed in New York in 1993. *Id.*

192. "Of the top prosecutors in the city, only District Attorney William L. Murphy of Staten Island expressed a firm desire to make use of the new [death penalty] law 'in an appropriate case.'" *Id.* About 25 murders and manslaughters, or just 1% of the state's total, were committed in Staten Island in 1993. *Id.*

193. *New York Enacts Capital Punishment*, THE NAT'L L. J., Mar. 20, 1995, at A8 ("A March 3 New York Law Journal survey showed that 44 of the state's 62 DAs favored the death penalty, though half either said it will not deter crime or

2. *Guilty Pleas*

I was just saying that of the options that are offered in your bill, one is that the person would declare him or herself guilty. In doing so that person would be . . . escaping the death penalty.

—Senator Olga Mendez¹⁹⁴

....

[Y]ou can not pled [sic] guilty to the death penalty; but if you are going to plead guilty to anything else, you've got to get the consent of the D.A. The D.A. does not have to accept your plea of guilty to 20-25 years to life or to life without parole. He doesn't have to accept it. . . . [T]he person under law can not plead guilty to the death penalty. But other than that, you have to have the consent of the D.A.

—Senator Dale Volker¹⁹⁵

....

So, the ordinary life sentence is available in a murder one case under this bill only if the jury, in essence, fails in its task of selecting one of the other two sentences, . . . or if the defendant forgoes his or her right to a trial by jury and pleads guilty. . . .

So, in order for one of the three lawful sentencing options to come to pass, the jury, in whom we place such trust, has to fail in its task or the defendant has to give up his or her Constitutional right to defend himself or herself at trial.

This, I submit, is a serious distortion of the sentencing process. I would submit it deprives the defendant of due process . . . , it deprives the defendant of a fair trial . . . , and I would argue, my colleagues, it is a serious defect in this bill . . . that will ultimately result in its being declared unconstitutional.

—Assemblyman Richard Gottfried¹⁹⁶

were unsure whether it will."); Michael Hill, *Death Penalty a Political Hot Potato*, ASSOCIATED PRESS release, Apr 17, 1995) (on file with author) (providing list of New York's district attorneys and their personal views about the death penalty); Michael Hill, *Upstate Prosecutors Support Death Penalty; But Might Lack Opportunity*, ASSOCIATED PRESS release, Apr. 17, 1995 (on file with author).

With his two co-authors, retired New York Court of Appeals Judge Stewart F. Hancock, Jr., has argued that the lack of regulation of capital charging discretion is a fatal flaw in the New York statute under the state constitution. Stewart F. Hancock, Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545 (1996).

194. Senate Debate, *supra* note 13, at 1999.

195. *Id.* at 2000.

196. Assembly Debate, *supra* note 1, at 204.

The New York Constitution forbids criminal defendants from waiving a jury trial in all cases "in which the crime charged may be punishable by death. . . ." ¹⁹⁷ In keeping with this constitutional provision, prior law flatly prohibited guilty pleas to first-degree murder. ¹⁹⁸ The new law creates an exception to this general prohibition: "provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence" is other than death, *i.e.*, a prison sentence of twenty to twenty-five years to life, or life without possibility of parole. ¹⁹⁹

It is questionable whether this exception can be reconciled with the state constitutional bar against waiving trial by jury. Even if the parties and the judge agree that a sentence other than death will be imposed, a defendant who pleads guilty to first-degree murder nevertheless does forgo a jury trial for a charged "crime" that "may be punishable by death." The constitutional prohibition against waiving a jury trial relates to capital crimes, and not just to cases involving capital crimes that actually result in a death sentence. Hence, a literal reading of the constitutional provision would forbid all pleas of guilty to first-degree murder. But even if the state constitution is construed to permit guilty pleas to first-degree murder as long as the defendant actually is not punished by death, other constitutional problems plague the statute's guilty plea provisions.

The sentencing options in first-degree murder cases differ according to whether a defendant enters a plea of not guilty,

197. N.Y. CONST. art. I, § 2. This constitutional prohibition applied to all felony cases until 1938, when the state constitution was amended to permit the waiver of jury trials in all criminal cases except those in which the crime may be punishable by death:

Prior to the adoption . . . of this provision, it was not possible for a defendant in a criminal case to waive his right to a trial by jury The basis of these decisions was that the right to a trial by jury was so fundamental and so essential to the protection of the defendant's rights that it could not be waived. Indeed, the present constitutional amendment carries forth that philosophy to the extent that it makes no provision for waiver of a right to trial by jury in capital cases.

People ex rel. Rohrlich v. Follette, 20 N.Y.2d 297, 300, 229 N.E.2d 419, 420, 282 N.Y.S.2d 729, 731 (1967) (citations omitted). See also N.Y. CRIM. PROC. LAW § 320.10 Commentary (McKinney 1993).

198. N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney Supp. 1996).

199. *Id.* §§ 220.10(5)(e), 220.30(3)(b)(viii).

whether the prosecution files a notice of intention to seek the death penalty, and whether a plea of guilty is tendered and accepted. If a defendant pleads not guilty, and the prosecutor opts not to seek a death sentence, then the trial judge must impose one of two sentences on the defendant's conviction for first-degree murder: regular life (twenty to twenty-five years to life), or LWOP.²⁰⁰ When a defendant is convicted of first-degree murder following a plea of not guilty and the death penalty is sought, the jury is instructed that it may return one of two sentencing verdicts: death or LWOP. If the jury is unable to arrive at a unanimous sentencing verdict, then the judge must sentence the defendant to regular life.²⁰¹ Finally, a defendant who pleads guilty to first-degree murder cannot be sentenced to death; only a sentence of regular life or LWOP may be imposed. As previously noted, a defendant's guilty plea may be accepted only with the concurrence of the prosecutor and the approval of the court.²⁰²

As a result of these sentencing provisions, only defendants who plead not guilty, and thereby exercising both their right to be tried by a jury of their peers and their right against self-incrimination, expose themselves to the risk of capital punishment. The statute guarantees that defendants convicted on pleas of guilty will not be punished by death. The Supreme Court declared a similar sentencing scheme unconstitutional in *United States v. Jackson*.²⁰³ The Federal Kidnapping Act, which was at issue in *Jackson*, authorized capital punishment for the crime of kidnapping whenever the victim was not released unharmed, but only "if the verdict of the jury shall so recommend. . . ." ²⁰⁴ As the Court explained, "[t]he statute sets

200. *Id.* § 400.27(1).

201. *Id.* §§ 400.27(10), 400.27(11)(c)-(e). These sentencing options are discussed in greater detail *infra* notes 362-86 text and accompanying notes.

202. N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii).

203. 390 U.S. 570 (1968).

204. *Id.* 570 (quoting the Federal Kidnapping Act, 18 U.S.C. § 1201(a)). The Federal Kidnapping Act . . . provides:

Whoever knowingly transports in interstate commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty."²⁰⁵ These sentencing provisions created the following problem:

[T]he defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. . . . The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.²⁰⁶

In one respect, the New York sentencing scheme can be even more disadvantageous for defendants who plead not guilty than was the legislation at issue in *Jackson*. Defendants convicted of first-degree murder on guilty pleas under New York law can be sentenced either to regular life or LWOP, and never can be sentenced to death. Yet, when the prosecution seeks the death penalty following a defendant's plea of not guilty to first-degree murder, not only is the maximum authorized punishment death, but the jury is denied the option of returning a regular life sentence; the alternative authorized sentencing verdict is LWOP.²⁰⁷ Thus, not only is the statutory maximum sentence

Id. at 570-71.

205. *Id.* at 571.

206. *Id.* at 581 (footnote omitted). The Court further explained that "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.* at 583 (emphasis added).

Various state death penalty schemes have been invalidated under the authority of *Jackson*. See *Funicello v. New Jersey*, 403 U.S. 948 (1971) (summarily reversing judgment upholding death sentence in *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968)); *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968); *State v. Frampton*, 95 Wash. 2d 469, 627 P.2d 922 (1981). See also *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 163, 470 N.E.2d 116, 124 (1984) (relying on state constitutional principles analogous to *Jackson* rule to invalidate Massachusetts' death penalty legislation, under which "the death penalty may be imposed, if at all, only after a trial by jury. Those who plead guilty in cases in which death would be a possible sentence after trial thereby avoid the risk of being put to death. The inevitable consequence is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury.>").

207. See *supra* notes 199-200 and accompanying text. A regular life sentence can be imposed when the prosecutor seeks the death penalty and the defendant

enhanced from LWOP to death for defendants who plead not guilty in first-degree murder prosecutions in which the death penalty is being pursued, but the minimum verdict option increases from regular life to LWOP.²⁰⁸

This sentencing scheme clearly imposes a cost on defendants charged with first-degree murder who plead not guilty and exercise their right to trial by jury. In a case involving a related issue, the New York Court of Appeals invalidated a statute that required a defendant to consent to a trial without a jury in order to become eligible for youthful offender treatment. In reliance on *Jackson*, the Court observed that "a procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained."²⁰⁹

has pleaded not guilty to first-degree murder only when the jury is unable to reach unanimous agreement on one of the two sentencing verdicts available to it: death, or LWOP.

208. The increased maximum sentence of death which is available to defendants who do not plead guilty may pose the more serious constitutional problem than the increased minimum sentence. In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the Supreme Court distinguished *Jackson* on several grounds, and upheld a state statute that prohibited guilty pleas to murder indictments, but allowed pleas of non vult or nolo contendere. On acceptance of one of the latter pleas, the judge could sentence the defendant to life imprisonment or a term of up to 30 years. Defendants convicted of first-degree murder following pleas of not guilty and trials by jury faced mandatory life imprisonment. The defendant in *Corbitt* relied on *Jackson* to argue that the statutory sentencing scheme prejudiced defendants who pleaded not guilty and were convicted of first-degree murder. The Supreme Court identified:

substantial differences between this case and *Jackson*. . . . The principal difference is that the pressures to forgo trial and to plead to the charge in this case are not what they were in *Jackson*. First, the death penalty, which is "unique in its severity and irrevocability," is not involved here. . . . Furthermore, in *Jackson*, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading *non vult* because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for those who insist on a jury trial.

Id. at 217 (citation and footnote omitted).

209. *People v. Michael A.C.*, 27 N.Y.2d 79, 85, 261 N.E.2d 620, 624, 313 N.Y.S.2d 695, 701 (1970). See also *People v. Black*, 34 A.D.2d 999, 312 N.Y.S.2d 658 (1970), *aff'd* 30 N.Y.2d 593, 281 N.E.2d 849, 330 N.Y.S.2d 804 (1972). In *Black*, the defendant pleaded guilty to murder in 1968, and was sentenced to 15-years to life imprisonment. He subsequently challenged the validity of his guilty

This principle remains implicated even though the statute conditions the defendant's ability to tender a guilty plea to first-degree murder on "both the permission of the court and the consent of the people when the agreed upon sentence is either" LWOP or regular life.²¹⁰ Arguably, this condition creates a statutory analogue to the plea-bargaining discretion that prosecutors enjoy in all cases: only when a prosecutor determines that offense and offender circumstances make a case inappropriate for capital punishment will defendants be given the option of pleading guilty to first-degree murder. Under this construction, defendants in cases that truly are death-worthy cannot complain about not being given the choice to plead guilty, and defendants who are offered the chance to plead guilty simply benefit from the prosecutor's discretion to remove a case from death-penalty eligibility. No defendant faces undue pressure to plead guilty, or to forgo the right to trial by jury, because entry of a guilty plea is a privilege conditioned on the prosecutor's acquiescence.

But this argument is strained. In any particular case, a prosecutor may insist on seeking the maximum punishment for a crime or, if persuaded that the case circumstances are appropriate, may decline to seek the maximum punishment on the condition that the accused pleads guilty. If a defendant relinquishes his or her rights to plead not guilty and to be tried before a jury to gain more lenient treatment, these concessions would involve only the normal "give-and-take" of plea bargaining.²¹¹ However, the *Jackson* problem is not so easily avoided under the death penalty statute.

plea, alleging that since the death penalty could only be imposed following a plea of not guilty, New York's capital punishment statute violated *Jackson*. The Appellate Division agreed that "[u]nder the terms of our statute the death penalty may be imposed, when appropriate, only upon a jury verdict of guilty," and that "[i]n *Jackson* the Supreme Court held that under such a statutory scheme the death penalty is unconstitutional since it needlessly encourages the taking of guilty pleas." *Id.* at 659. It nevertheless ruled that the defendant had failed to establish that his guilty plea thereby was rendered involuntary. *Cf. Brady v. United States*, 397 U.S. 742 (1970). The Court of Appeals affirmed in a brief order. *People v. Black*, 30 N.Y.2d 593, 281 N.E.2d 849, 330 N.Y.S.2d 804 (1972).

210. N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney Supp. 1996).

211. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

The sentencing provisions represent a legislative promise that all defendants who plead not guilty—by virtue of that fact alone—are ineligible for a regular life sentence,²¹² and they face the threat of capital punishment if the district attorney chooses to seek that sanction. The legislation further guarantees defendants that by tendering a guilty plea to first-degree murder with the approval of the prosecutor and the judge, they not only avoid the risk of capital punishment, but they also become eligible for consideration for a prison sentence of twenty to twenty-five years to life. Individual case circumstances cannot alter the maximum and minimum sentences available to defendants who plead guilty and not guilty. The sentencing ranges are determined by the type of plea entered. In this respect the statute is inflexible, and permits no “give and take.” The *Jackson* issue is not skirted simply because the prosecutor and the trial judge must concur that an accused’s plea of guilty to first-degree murder should be accepted.²¹³ The statute still defines harsher punishment options for defendants who insist on pleading not guilty. In operation with the state constitution, it also denies defendants the option of pleading guilty in cases in which the prosecution demands the death penalty. These provisions thus prohibit defendants’ formal acknowledgment of guilt and admission of responsibility from being considered by the sentencing jury in mitigation of punishment.

212. A regular life sentence of 20- to 25-years to life is not available to the jury as a sentencing verdict; such a sentence can be imposed only if the jury is not able to agree unanimously that a sentence of death or LWOP should be imposed. See *supra* note 199 and accompanying text.

213. The *Jackson* court observed that “a criminal defendant has [no] absolute right to have his guilty plea accepted by the court.” *United States v. Jackson*, 390 U.S. 570, 584 (1968) (quoting *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)). In *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968), the Nevada Supreme Court relied on *Jackson* to invalidate a capital sentencing statute which authorized the death penalty for rape only if the jury so directed, meaning that defendants who were convicted following pleas of guilty or following bench trials in which they waived trial by jury could not be sentenced to death. The court acknowledged that the statute at issue required both the consent of the prosecution and the approval of the trial judge before a defendant was permitted to waive a jury and be tried before a judge. *Id.*, at 30 n.5, 436 P.2d at 23 n.5.

3. *The Aggravating Factors*

Like the vast majority of death penalty laws across the country,²¹⁴ the New York statute requires that aggravating and mitigating factors pertaining to the crime and the offender be taken into account before a capital sentencing decision is made.²¹⁵ Unlike many other jurisdictions,²¹⁶ only aggravating circumstances defined by statute can be considered under New York's capital sentencing law.²¹⁷ Fourteen different aggravating factors can be considered for sentencing purposes. The sentencing provisions incorporate by reference the twelve types of first degree murder defined by the Penal Law.²¹⁸ The jury is allowed to consider as aggravating factors only "those [alleged murder counts] proven beyond a reasonable doubt at trial."²¹⁹ To recap briefly, the elements of first-degree murder, which can double as aggravating sentencing factors, involve different *offense* and *offender* circumstances. The former category includes

214. James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 CRIM. L. BULL. 19, 42-52 (1995)[hereinafter *Sentencing Provisions*]; James R. Acker & Charles S. Lanier, *Aggravating Circumstances and Capital Punishment Law: Rhetoric or Real Reforms?*, 29 CRIM. L. BULL. 467, 492 n.128 (1993)[hereinafter *Aggravating Circumstances*].

215. See *infra* notes 387-402 and accompanying text on the specific provisions regarding the jury's balancing of aggravating and mitigating factors under the New York statute.

216. *Aggravating Circumstances*, *supra* note 214, at 496 & n.145.

217. N.Y. CRIM. PROC. LAW §§ 400.27(3), 400.27(7) (McKinney Supp. 1996). The former provision unequivocally provides that, with the exception of the two statutorily-defined sentencing aggravators (see *infra* notes 230-68 and accompanying text), "the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered." Other provisions of New York law authorize victim impact evidence to be offered prior to sentencing in felony cases, including criminal homicide cases. N.Y. CRIM. PROC. LAW § 380.50(2) (McKinney Supp. 1996). These provisions clearly are not intended to apply in capital cases, and expressly contemplate that the trial judge is the sentencing authority. *Id.* § 380.50(3). The Supreme Court has ruled that victim impact evidence may be admitted at capital sentencing hearings. *Payne v. Tennessee*, 501 U.S. 808 (1991). However, the admission of such evidence would be wholly inconsistent with New York's capital sentencing statute, and the limitation that the sentencing jury may only consider evidence of aggravating factors enumerated in the legislation.

218. N.Y. PENAL LAW § 125.27(1)(a)(i)-(xii) (McKinney Supp. 1996). See *supra* notes 50-170 and accompanying text.

219. N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney Supp. 1996).

both *victim* characteristics (police officers,²²⁰ designated peace officers,²²¹ correctional employees,²²² crime witnesses and their immediate families,²²³ and judges²²⁴) and other *characteristics of the crime* (murder for hire,²²⁵ murder committed during named felonies,²²⁶ the slaying of multiple victims during the same criminal transaction,²²⁷ torture murder,²²⁸ and serial murder²²⁹). First-degree murders defined by offender characteristics include intentional killings by life-term prisoners,²³⁰ and by individuals with a prior murder conviction.²³¹

Two additional aggravating factors can be proven during the penalty-phase trial, provided that the prosecution serves appropriate notice "within a reasonable time prior to trial."²³² The penalty-phase aggravators must be proven beyond a reasonable doubt and established to the unanimous satisfaction of the jury.²³³ Both the prosecution and the defendant may offer evidence during the penalty trial concerning the existence of the two penalty-phase aggravating circumstances, "subject to the

220. N.Y. PENAL LAW § 125.27(1)(a)(i) (McKinney Supp. 1996). *See supra* notes 50-64 and accompanying text.

221. N.Y. PENAL LAW § 125.27(1)(a)(ii). *See supra* notes 65-72 and accompanying text.

222. N.Y. PENAL LAW § 125.27(1)(a)(iii). *See supra* notes 74-77 and accompanying text.

223. N.Y. PENAL LAW § 125.27(1)(a)(v). *See supra* notes 105-11 and accompanying text.

224. N.Y. PENAL LAW § 125.27(1)(a)(xii). *See supra* notes 167-71 and accompanying text.

225. N.Y. PENAL LAW § 125.27(1)(a)(vi). *See supra* notes 112-15 and accompanying text.

226. N.Y. PENAL LAW § 125.27(1)(a)(vii). *See supra* notes 116-28 and accompanying text.

227. N.Y. PENAL LAW § 125.27(1)(a)(viii). *See supra* notes 129-33 and accompanying text.

228. N.Y. PENAL LAW § 125.27(1)(a)(x). *See supra* notes 144-60 and accompanying text.

229. N.Y. PENAL LAW § 125.27(1)(a)(xi). *See supra* notes 161-66 and accompanying text.

230. N.Y. PENAL LAW § 125.27(1)(a)(iv). *See supra* notes 78-104 and accompanying text.

231. N.Y. PENAL LAW § 125.27(1)(a)(ix). *See supra* notes 134-43 and accompanying text.

232. N.Y. CRIM. PROC. LAW § 400.27(7)(d) (McKinney Supp. 1996).

233. *Id.* § 400.27(7)(c).

rules governing admission of evidence in the trial of a criminal action."²³⁴

One of the special penalty-phase aggravating factors applies to first-degree murder committed through an act of terrorism.²³⁵ The other applies to offenders with two or more qualifying criminal convictions within the ten-year period preceding the commission of the first-degree murder for which the defendant is being sentenced.²³⁶

The terrorism aggravating circumstance provides as follows:

The people may present evidence at the sentencing proceeding, to the extent such evidence could not have been presented by the people at trial, to prove that the crime of murder in the first degree for which the defendant *was convicted was committed in furtherance of and after substantial planning and premeditation to commit an act of terrorism. For purposes of this section, "terrorism" means activities that involve a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by murder, assassination or kidnapping. The defendant's commission of the crime of murder in the first degree through an act of terrorism, shall, if proven at the sentencing proceeding, constitute an aggravating factor.*²³⁷

This provision is modeled closely after federal law defining an "act of terrorism"²³⁸ and after a statutory aggravating factor component of federal death penalty law.²³⁹ On its face, it suffers from significant vagueness problems. Although an attempt has been made to define "terrorism," the defining terms do little to

234. *Id.*

235. *Id.* § 400.27(7)(a).

236. *Id.* § 400.27(7)(b).

237. *Id.* § 400.27(7)(a) (emphasis added).

238. 18 U.S.C. § 3077(1) (Supp. 1995) (An "act of terrorism" means an activity that — (A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended — (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.").

239. *Id.* § 3592(c)(9) (Supp. 1995) ("The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.").

add precision or clarity.²⁴⁰ How criminal acts might be intended to "intimidate" or "coerce" a "civilian population," or "influence" the "policy of a government" by "intimidation" or "coercion," or "affect" the "conduct of a government" by murder, assassination, or kidnapping remains highly obscure. Even if the notable vagueness problems can be surmounted, first-degree murders "committed in furtherance of and after substantial planning and premeditation to commit an act of terrorism" are likely to occur very infrequently, so the terrorism aggravating circumstance almost certainly rarely will be invoked.

The same cannot be said about the penalty-phase aggravating factor relating to prior criminal convictions. That circumstance applies under the following conditions:

The people may present evidence at the sentencing proceeding to prove that *in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical serious injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of serious physical injury or death.* For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or

240. See *supra* note 156 and accompanying text. See generally *supra* notes 151 and 156-60 and accompanying text for a discussion of vagueness in the context of capital sentencing statutes.

periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.²⁴¹

This aggravating circumstance requires proof of two or more convictions of the designated crimes within the ten-year period preceding the offender's commission of (not conviction for) the first-degree murder for which sentence is being considered. The prior crimes must have been committed on different occasions. All time the offender spent incarcerated between the convictions for the prior offenses and the commission of the first-degree murder is excluded from the ten-year limitation period. The prior convictions must involve the following classes of crimes:

(1) *A class A felony other than a controlled substance offense defined under article 220 of the Penal Law.* Class A felonies carry a maximum punishment of life imprisonment or death.²⁴² Minimum sentences range between 3 to 8 years for class A-II felonies,²⁴³ and 15-years to life for class A-I felonies other than first-degree murder, which has a mandatory minimum sentence of 20- to 25-years.²⁴⁴ Convictions for class A felony controlled substances offenses are not considered under this provision,²⁴⁵ nor, presumably, are first-degree conspiracy²⁴⁶ or attempts²⁴⁷ to engage in class A felony controlled substance of-

241. N.Y. CRIM. PROC. LAW § 400.27(7)(b) (McKinney Supp. 1996) (emphasis added).

242. N.Y. PENAL LAW §§ 60.05(2), 60.06, 70.00(2)(a) (McKinney 1987 & Supp. 1996).

243. N.Y. PENAL LAW § 70.00(3)(a)(ii) (McKinney 1987).

244. N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney Supp. 1996).

245. Controlled substances offenses that are included in article 220 of the Penal Law, and which are class A felonies, include criminal possession of a controlled substance in the second degree and first degree (*Id.* §§ 220.18, 220.21), and criminal sale of a controlled substance in the second degree and first degree (N.Y. PENAL LAW §§ 220.41, 220.43 (McKinney 1987 & Supp. 1996)).

246. N.Y. PENAL LAW § 105.17 (McKinney 1987). ("A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct. Conspiracy in the first degree is a class A-I felony.")

247. *Id.* § 110.05 ("An attempt to commit a crime is a: (1) Class A-I felony when the crime attempted is the A-I felony of murder in the first degree, criminal possession of a controlled substance in the first degree or criminal sale of a con-

fenses.²⁴⁸ In addition to convictions for first-degree conspiracy and attempts to commit class A felonies, the other convictions that qualify under this section include first-degree murder,²⁴⁹ second-degree murder,²⁵⁰ first-degree kidnapping,²⁵¹ and first-degree arson.²⁵²

(2) *A class B violent felony offense specified in Penal Law section 70.02(1)(a).* Convictions for the following crimes are included within this category: attempted second-degree murder, attempted first-degree kidnapping, attempted first-degree arson, first-degree manslaughter, first-degree rape, first-degree sodomy, first-degree aggravated sexual abuse, second-degree kidnapping, first-degree burglary, second-degree arson, first-degree robbery, first-degree criminal possession of a dangerous weapon, first-degree criminal use of a firearm, aggravated assault upon a peace officer, and first-degree intimidating a victim or witness.²⁵³

(3) *A felony under New York law (or a crime under the laws of another state or the United States punishable by imprisonment of more than one year) "a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of serious physical injury or death."* This provision includes convictions for crimes "a necessary element of which" involves the actual, attempted, or threatened use of a deadly weapon,²⁵⁴ or the intentional in-

trolled substance in the first degree; (2) Class A-II felony when the crime attempted is a class A-II felony.").

248. The statute does not explicitly exclude conspiracy to engage in controlled substances offenses, nor attempts to commit controlled substances offenses, but this presumably was the legislative intent. See BILL MEMORANDUM, *supra* note 43, at 8 (indicating that the class A felony convictions excluded from consideration for this aggravating factor are "a drug offense as defined in Article 220 of the Penal Law or any attempt to commit or conspiracy to commit such an offense").

249. N.Y. PENAL LAW § 125.27 (McKinney 1987 & Supp. 1996).

250. *Id.* § 125.25.

251. N.Y. PENAL LAW § 135.25 (McKinney 1987).

252. *Id.* § 150.20.

253. *Id.* § 70.02(1)(a).

254. The death penalty provision incorporates by reference the definition of "deadly weapon" set forth in N.Y. PENAL LAW § 10.00(12) (McKinney Supp. 1996), which is as follows: "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, dagger, billy, blackjack, or metal knuckles." See N.Y. CRIM. PROC. LAW § 400.27(7)(b) (McKinney Supp. 996).

fliction of serious physical injury²⁵⁵ or death. Accordingly, the focus is on the statutory definition of the crimes, rather than on how the crimes actually were committed.²⁵⁶ Several crimes require proof of the intentional infliction of serious physical injury or death, including first-degree murder²⁵⁷ and second-degree murder²⁵⁸ (which are also class A felonies, and, thus, are already accounted for under this aggravating circumstance²⁵⁹), first-degree manslaughter,²⁶⁰ aggravated assault upon a police officer or peace officer,²⁶¹ specific subcategories of first-degree assault²⁶² and second-degree assault,²⁶³ first-degree tampering with a witness,²⁶⁴ and first-degree intimidating a victim or witness.²⁶⁵ Few crimes in New York appear to include as an element that the offender actually, attempted, or threatened to use

255. "Serious physical injury" is defined in N.Y. PENAL LAW § 10.00(10) (McKinney 1987) to mean: "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." This definition, unlike the definition of "deadly weapon," is not incorporated by reference into the death penalty law. See *supra* note 254.

256. BILL MEMORANDUM, *supra* note 43, at 8.

To be a "necessary element" of an offense, the specified conduct must appear on the face of a subdivision of a Penal Law statute for which the defendant had been previously convicted. To give just one example, a defendant convicted under subdivision (1) of Section 120.10 of the Penal Law (first degree assault) could have that conviction included as a potential predicate conviction for purposes of subdivision (7), since subdivision (1) of that statute includes, as a "necessary element" of the crime of assault in the first degree, that the defendant intended to cause "serious physical injury" and did cause such injury to a victim.

Id.

257. N.Y. PENAL LAW § 125.27 (McKinney 1987 & Supp. 1996).

258. *Id.* § 125.25(1) (McKinney 1987). Some subcategories of second-degree murder do not require the intent to cause death. *Id.* § 125.25(2)-(4) (McKinney 1987 & Supp. 1996).

259. See *supra* notes 247-48 and accompanying text.

260. N.Y. PENAL LAW § 125.20(1), (2) (McKinney 1987). Two varieties of first-degree manslaughter would not qualify: causing the death of a woman more than 24 weeks pregnant by an unjustified abortion; and a person who is at least 18 years of age who with the intent to cause physical injury, causes the death of a person less than 11 years old by recklessly engaging in conduct which creates a grave risk of serious injury to such person. *Id.* § 125.20(3), (4) (McKinney Supp. 1996).

261. N.Y. PENAL LAW § 120.11 (McKinney Supp. 1996).

262. N.Y. PENAL LAW § 120.10(1), (2) (McKinney 1987).

263. *Id.* § 120.05(1), (2).

264. N.Y. PENAL LAW § 215.13(1), (2) (McKinney 1988).

265. *Id.* § 215.17(1), (2).

a deadly weapon. Criminal use of a firearm in the first degree and second degree, respectively, involve the commission of a class B or class C felony by an offender who possesses a loaded deadly weapon "from which a shot, readily capable of producing death or serious injury may be discharged."²⁶⁶

Whenever the prosecution intends to prove the prior criminal convictions aggravating factor, it must serve appropriate notice, including "a statement setting forth the date and place of each of the alleged offenses" on which it will rely.²⁶⁷ The defendant may elect not to contest a statement of prior convictions submitted by the prosecution, in which case the trial judge must enter a finding that those convictions exist.²⁶⁸ Then, presumably, "a certificate of conviction would be published to the jury and, in the event the jury unanimously determined beyond a reasonable doubt that the requirements" of the aggravating factor had been established, the jury would consider that factor at sentencing.²⁶⁹ If the defendant chose to contest any aspect of the prior convictions, a hearing would be held before the trial judge, out of the presence of the jury, to determine the existence of the prior convictions.²⁷⁰ Upon the court's conclusion that the prior convictions have been established as alleged, a certificate

266. *Id.* §§ 265.09(1), 265.08(1) (McKinney 1989). Although these offenses are named criminal "use" of a firearm, they simply require proof of the possession of a deadly weapon that is loaded and from which a shot readily capable of producing death or serious injury could be discharged. Thus, it is uncertain whether convictions for these crimes would qualify under the death penalty law aggravating circumstance, which requires that a necessary element of the crime "involves either the use or attempted use or threatened use of a deadly weapon." N.Y. CRIM. PROC. LAW § 400.27(7)(b) (McKinney Supp. 1996). Other subcategories of first-degree and second-degree criminal use of a firearm almost certainly could not serve as predicate felony convictions, because the offender needs simply to "display what appears to be" a firearm during the commission of a class B or class C felony. N.Y. PENAL LAW §§ 265.09(2), 265.08(2) (McKinney 1989). Various other subcategories of crimes contain the element that the offender "display what appears to be" a firearm. *See, e.g.*, N.Y. PENAL LAW § 140.25(1)(d) (McKinney 1988) (second-degree burglary); N.Y. PENAL LAW § 160.10(2)(b) (McKinney Supp. 1996) (second-degree robbery).

267. N.Y. CRIM. PROC. LAW § 400.27(7)(d) (McKinney Supp. 1996).

268. N.Y. CRIM. PROC. LAW § 400.15(4) (McKinney 1994). *See* N.Y. CRIM. PROC. LAW § 400.27(7)(d) (McKinney Supp. 1996) (referring to procedures for establishing prior convictions set forth in N.Y. CRIM. PROC. LAW § 400.15(3)-(8) (McKinney 1994)).

269. BILL MEMORANDUM, *supra* note 43, at 8.

270. N.Y. CRIM. PROC. LAW § 400.15 (5)-(8) (McKinney 1994).

of conviction would be made available to the jury for its consideration, as in the case when the prior convictions are not controverted.²⁷¹

Unlike the two penalty-phase aggravating circumstances, any of the twelve aggravating factors that serve as elements of the crime of first-degree murder and that have been proven at the guilt-phase trial "shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated."²⁷² The statute specifically provides that the prosecution "shall not relitigate the existence of aggravating factors proved at trial or otherwise present evidence [at the sentencing proceeding], except . . . in rebuttal of the defendant's evidence."²⁷³ This prohibition does not apply if a new jury must be impaneled to impose the sentence; under such circumstances,

the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial.²⁷⁴

The defendant is specifically authorized to "present any evidence relevant to any mitigating factors" identified in the statute.²⁷⁵

The statutory prohibition against "relitigating" guilt-phase aggravating factors, which expressly applies to the prosecution, has less certain application to the defendant.²⁷⁶ Depending on the meaning of the word, "relitigate," this proscription could pit the defendant's right to refrain from testifying at the guilt-phase trial against his or her right to a fair sentencing hearing.

271. *Id.* See BILL MEMORANDUM, *supra* note 43, at 9.

272. N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney Supp. 1996).

273. *Id.* § 400.27(6).

274. *Id.*

275. *Id.*

276. Although one subsection of the statute exclusively states that "the people shall not relitigate the existence of aggravating factors proven at the guilt-phase trial" (see *supra* note 270 and accompanying text), a different subsection provides generally that "the aggravating factors proved at [the guilt-phase] trial . . . shall not be relitigated." N.Y. CRIM. PROC. LAW § 400.27(3). See *supra* note 268 and accompanying text.

For example, a defendant charged with the first-degree murder of an employee of the state Division for Youth (a "peace officer"²⁷⁷) might elect to present no evidence during the guilt-phase trial. If convicted of capital murder, the defendant may wish to contest that he "knew or reasonably should have known" that his victim was employed by the Division for Youth, as is required by statute.²⁷⁸ If such offer of proof would constitute "relitigating" this factor, in violation of the statute, the defendant's only opportunity to contest the *sentencing* factor would have been through his own testimony or the presentation of other evidence at the *guilt*-phase trial. Alternatively, a defendant, convicted of the first-degree murder of a Division for Youth employee, who had denied his guilt, yet presented no evidence at the guilt-phase trial, might seek an opportunity to demonstrate that his victim was acting in such a cruel or irregular manner that the deceased was not "at the time of the killing engaged in the course of performing his official duties."²⁷⁹

In both of these examples, the tendered evidence, if accepted, would negate an essential element of the sentencing factor, making that factor inappropriate for the sentencing jury's consideration. But it could also have additional value. Even if such evidence were not credited to the extent of negating the prosecution's proof of the *existence* of that factor, it could still be relevant to the *weight* or *moral significance* given the aggravating factor.²⁸⁰ A juror who concludes that a defendant did not actually know that his victim was a peace officer (even if he

277. N.Y. PENAL LAW § 125.27(1)(a)(ii) (McKinney Supp. 1996).

278. *Id.* See *supra* note 65 and accompanying text.

279. N.Y. PENAL LAW § 125.27 (1)(a)(ii) (McKinney Supp. 1996).

280. The sentencing authority in a capital trial must be permitted to express "its 'reasoned moral response' to" evidence relevant to whether a convicted offender should be sentenced to death. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). See *generally* *Blystone v. Pennsylvania*, 494 U.S. 299, 316-17 (1990) (Brennan, J., dissenting):

Just as a jury must be free to consider and weigh mitigating circumstances as independently relevant to the defendant's moral culpability, a jury must also be able to consider and weigh the severity of each aggravating circumstance. The weight of an aggravating circumstance depends on the seriousness of the crime—a significant aspect of the defendant's moral culpability. Thus, a reasoned moral response to the defendant's conduct requires the consideration of the significance of both aggravating and mitigating factors.

Id. (citation omitted).

reasonably should have known), or who learns that a defendant was being subjected to great cruelty by his victim when he killed (even if his victim was acting within "his official duties"), might legitimately attach different weight or moral significance to the aggravating factor than if the defense was silenced from presenting such evidence. Indeed, in another context the statute recognizes that sentencing evidence has significance beyond establishing the mere existence of aggravating factors. When a new sentencing jury must be impaneled at a capital trial, the legislation expressly authorizes the prosecution to introduce evidence "to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder . . . for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at [the guilt-phase] trial."²⁸¹

In *McGautha v. California*,²⁸² the Supreme Court upheld legislation that permitted death penalty decisions to be made contemporaneously with the jury's guilt-phase deliberations, and without providing the accused offender any opportunity to present evidence in addition to that introduced on the issue of guilt.²⁸³ Justice Harlan's majority opinion rejected the claim that failing to provide bifurcated guilt and sentencing trials in a capital prosecution violated the accused's Fifth Amendment right against compelled self-incrimination,²⁸⁴ or a related due process right to present evidence relevant to sentencing issues.²⁸⁵ Although this aspect of *McGautha* has not specifically been overruled,²⁸⁶ subsequent rulings leave little doubt that bi-

281. N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1996).

282. 402 U.S. 183 (1971).

283. The Ohio statute at issue in *Crampton v. Ohio*, 408 U.S. 941 (1971), a companion case to *McGautha*, alone raised the issue described in the text. The California statute challenged in *McGautha* provided for bifurcated guilt and sentencing trials, and thus did not preclude a defendant who offered no evidence at the guilt-phase trial from presenting evidence relevant to sentencing.

284. *McGautha*, 402 U.S. 183, at 213-17.

285. *Id.* at 217-20.

286. The *McGautha* Court also ruled that due process was not offended by capital sentencing decisions made at the unregulated discretion of juries. *Id.* at 196-208. The very next year the Court, relying on the Eighth Amendment's cruel and unusual punishments clause, ruled that standardless capital sentencing decisions are unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Although this feature of *McGautha* has not been explicitly overruled either, for all

furcated guilt- and penalty-phase trials are constitutionally required in capital proceedings.²⁸⁷ The rationale compelling separate guilt and sentencing trials in capital cases is "so that the jury can receive all relevant information for sentencing"²⁸⁸ without threatening the fairness of the guilt-phase trial. If the New York death penalty statute's prohibition against relitigating aggravating circumstances proved by the prosecution at the guilt-phase trial is intended to bar defendants from challenging the application of those circumstances during the sentencing proceeding, then the fundamental justification for bifurcating the guilt- and penalty-phase trials is seriously compromised.

The statute does authorize the defendant to introduce all relevant mitigating evidence during the penalty-phase proceedings,²⁸⁹ which indirectly provides an avenue for countermanding evidence that the prosecution may have introduced in proof of guilt-phase aggravating factors. But softening the blow of—or "mitigating"—aggravating factors that have been conclusively established is no substitute for being able to challenge

intent and purposes it no longer remains good law. *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (opinion of Stewart, Powell & Stevens, JJ.). See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315.

287. All of the statutes upheld by the Supreme Court when guided discretion capital sentencing legislation was approved in the aftermath of *Furman*, shared the feature of bifurcated guilt and penalty trials. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The *Gregg* Court explained that:

Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt is made—is the best answer When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

Gregg, 428 U.S. 262, 190-92 (opinion of Stewart, Powell & Stevens, JJ.) (footnotes omitted). Since the defendant must be given the opportunity to present mitigating evidence relevant to sentencing (*Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978)), bifurcated guilt and sentencing trials are essential to the integrity of capital sentencing systems. See also *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987); *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *California v. Ramos*, 463 U.S. 992, 999 (1983).

288. *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987).

289. N.Y. CRIM. PROC. LAW § 400.27(6), (9) (McKinney Supp. 1996).

the very existence of those factors. If the jury does not accept that an aggravating factor has been proven beyond a reasonable doubt, then that factor cannot be considered at sentencing at all.²⁹⁰ This is a vastly different proposition from a defendant's attempting to neutralize, or diminish, the weight given to an aggravating circumstance by establishing that countervailing factors should be considered in mitigation of punishment.²⁹¹

The New York statute stands virtually alone in providing that the aggravating factors to be considered for capital sentencing purposes are one and the same (with the exception of the terrorism and prior-convictions penalty-phase aggravators) as the elements of the crime of first-degree murder. The only similar death penalty statute in the country is Utah's.²⁹² Under other death penalty legislation, there is considerable or complete independence between the elements of capital murder and the aggravating factors or special issues that are considered for sentencing.²⁹³ This idiosyncrasy is not necessarily a weakness in the New York law. The Supreme Court has approved of the practice of relying on guilt-phase aggravating factors to narrow the class of death penalty-eligible crimes,²⁹⁴ and there are sound reasons procedurally for requiring proof of aggravating factors at the guilt-phase trial rather than at the post-conviction sentencing hearing.²⁹⁵ Moreover, providing that the ele-

290. *Id.* § 400.27(3).

291. The defendant bears the burden of establishing mitigating factors, by a preponderance of the evidence. *Id.* § 400.27(6).

292. See UTAH CODE ANN. § 76-3-207(3) (1995) (providing that the aggravating circumstances considered for sentencing "shall include those outlined in Section 76-5-202," which defines approximately 17 different types of aggravated (capital) murder. Utah's statute is significantly different from New York's, however, in that it also allows the sentencer to consider nonstatutory aggravating factors for capital sentencing purposes. *Id.* § 76-3-207(2). See also *State v. Gardner*, 789 P.2d 3 (Utah 1989), *cert. denied*, 459 U.S. 988 (1990).

293. See generally James R. Acker & Charles S. Lanier, *Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 CRIM. LAW BULL. 291, 298-302 (1993)[hereinafter *Capital Murder*]; *Dimensions of Capital Murder*, *supra* note 23, at 397.

294. *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988). See also *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994).

295. See *Capital Murder*, *supra* note 293, at 302-15 (suggesting several procedures potentially affected by whether proof of aggravating circumstances is required at the guilt phase or the sentencing phase of a capital trial, including whether a grand jury must review the aggravating factors for purposes of indictment, the frequency with which juries are death-qualified in potential capital

ments of first-degree murder proved during the guilt trial are established as aggravating factors for sentencing purposes, and may not be relitigated, has the commendable consequence of prohibiting the prosecution from offering cumulative or duplicative aggravating evidence during both the guilt and sentencing phases of capital trials.

However, the uniqueness of the New York statute may have resulted in the legislature's failing to anticipate the problems associated with precluding offenders convicted of first-degree murder from "relitigating" the sentencing factors considered in aggravation of their crimes. Capital defendants, especially those who present no evidence or do not testify during their guilt trials, should not be prevented from disputing during their sentencing hearings that crime elements previously established automatically should be considered as aggravating factors for punishment. Such a conclusive presumption unjustifiably imposes a cost on defendants who do not testify or who present no evidence at their guilt-phase trials, and it is inconsistent with the constitutional rationale for requiring bifurcated guilt and sentencing hearings in capital cases.

4. *The Mitigating Factors*

The Constitution requires that all relevant mitigating evidence be admitted at capital sentencing hearings,²⁹⁶ and that the sentencer consider²⁹⁷ and be given an opportunity to make meaningful use of that evidence²⁹⁸ before making a penalty de-

cases, whether the accused has a constitutional right to a jury determination of aggravating factors, rather than a determination made by a sentencing judge, and whether exclusionary rules and other trial rules of evidence govern proof of aggravating factors).

296. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (ruling that the sentencing authority in a capital case may "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted; emphasis in original). In a footnote accompanying this statement, Chief Justice Burger explained that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* 438 U.S. at 604 n.12. See also *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

297. *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

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

cision. New York's capital sentencing statute enumerates six mitigating factors,²⁹⁹ including a general "catch-all" provision, for the jury's consideration. The statutory mitigating factors are as follows:

(a) *The defendant has no significant history of prior criminal convictions involving the use of violence against another person.*³⁰⁰

The Model Penal Code, after which many contemporary death penalty statutes have been patterned, includes a more restrictive mitigating circumstance relevant to the offender's prior criminal history than is reflected in New York's legislation. The Model Penal Code's mitigating factor requires that "the defendant has no significant history of prior criminal activity."³⁰¹ New York's provision is more forgiving in that it focuses on the absence of prior criminal *convictions*, rather than the more inclusive domain of prior criminal *activity*.³⁰² The New York law also makes important the absence of a significant history of convictions involving *the use of personal violence*, rather than the absence of criminal convictions generally.³⁰³ Because this factor is defined by the absence of a significant history of *criminal* convictions involving violence against the person, offenses resulting in juvenile delinquency adjudications would not apply.³⁰⁴

299. N.Y. CRIM. PROC. LAW § 400.27(9)(a)-(f) (McKinney Supp. 1996). Because the Constitution requires the admission of all relevant mitigating evidence (*see supra* note 296 and accompanying text), the enumeration of mitigating factors in a capital sentencing statute does not necessarily constitute an exhaustive list. Several states do not specifically identify mitigating factors that the sentencing authority may consider in their death penalty statutes. *See* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. LAW BULL. 299, 339-40 (1994)[hereinafter *Fairness and Mercy*].

300. N.Y. CRIM. PROC. LAW § 400.27(9)(a) (McKinney Supp. 1996).

301. MODEL PENAL CODE AND COMMENTARIES, § 210.6(4)(a) (Official Draft and Revised Comments 1980).

302. New York thus joins a minority of jurisdictions that make the absence of prior criminal "convictions," and not just prior criminal "activity" of significance. *Fairness and Mercy, supra* note 299, at 316.

303. Since most jurisdictions have adopted the Model Penal Code definition of this mitigating circumstance almost verbatim, New York again is among a minority of states that require the prior criminal convictions (or activity) to involve personal violence. *Id.* 314-16.

304. In this respect, the New York statute follows the clear majority rule. Statutory mitigating factors in only two jurisdictions, Ohio and Washington, appear to contemplate that the offender's record of juvenile offenses should be consid-

The prosecution is precluded from offering "evidence or argument relating to any mitigating factor except in rebuttal of evidence offered by the defendant."³⁰⁵ Although the scope of "rebuttal" evidence that may be introduced under this provision must await judicial clarification, it seems manifest that evidence relating to an offender's violent criminal "activity" not resulting in conviction, or to the offender's history of juvenile offenses, would not be admissible.

(b) *The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired as to constitute a defense to prosecution.*³⁰⁶

The "diminished capacity" statutory mitigating factor applies to mentally retarded defendants and to defendants whose "mental capacity" or ability to conform their conduct to the law was "impaired" at the time of the offense.³⁰⁷ Offenders who suffer from such constraints arguably are not fully responsible moral agents, and thus are less deserving of the death penalty, even though they are guilty of their crimes. Indeed, New York's law generally excludes mentally retarded offenders from death-penalty eligibility, subject to the single exception that the killing occurred while the offender was confined in a state or local correctional facility, and the intended victim was a corrections employee in the performance of his or her official duties.³⁰⁸ Since the trial judge determines whether a defendant is mentally retarded and thus ineligible for capital punishment,³⁰⁹ mitigating evidence regarding the offender's mental retardation is admissible before the sentencing jury in all cases in which a

ered adversely. OHIO REV. CODE ANN. § 2929.04(B)(5) (Anderson 1993); WASH. REV. CODE ANN. § 10.95.070(1) (West Supp. 1996). See *Fairness and Mercy*, *supra* note 299, at 317.

305. N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1996).

306. *Id.* § 400.27(9)(b).

307. *Id.*

308. *Id.* § 400.27(12)(d). "Mental retardation" is defined to mean "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen." The exemption from death penalty eligibility based on mental retardation is discussed more fully at *infra* notes 414-46, and accompanying text.

309. N.Y. CRIM. PROC. LAW § 400.27(12)(c), (e).

judge rules that the defendant's mental retardation has not been established.³¹⁰

Although the statute is vague about how the offender's "mental capacity" must be "impaired" for this factor to apply, it at least includes cases involving "imperfect" claims of insanity.³¹¹ A successful insanity defense under New York law requires that a "mental disease or defect" account for the accused's lack of criminal responsibility,³¹² yet the mitigating factor contains no such limitation. Nor does New York's insanity defense recognize volitional impairment,³¹³ although the mitigating factor expressly encompasses impaired ability "to conform . . . conduct to the requirements of law." A significantly broader range of impediments to an offender's responsibility for conduct is recognized by this mitigating factor than is required to excuse a defendant entirely from criminal responsibility under the insanity defense.

310. *Id.* § 400.27(12)(e). The defendant has the burden of proving mental retardation by a preponderance of the evidence. *Id.* § 400.27(12)(a).

311. The Model Penal Code's analogous statutory mitigating factor provides: "At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication." MODEL PENAL CODE AND COMMENTARIES, *supra* note 301, § 210.6(4)(g). Several jurisdictions have adopted "imperfect insanity" mitigating factors that resemble the Model Penal Code proposal. See *Fairness and Mercy*, *supra* note 299, at 327-30.

312. New York law recognizes as an affirmative defense that the accused:

lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such [proscribed] conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either: 1. The nature and consequence of such conduct; or 2. That such conduct was wrong.

N.Y. PENAL LAW § 40.15 (McKinney 1987).

313. Insanity defenses traditionally relate to deficiencies in cognitive capacities (e.g., the accused did not know or lacked substantial capacity to appreciate the nature and consequences of his or her conduct, or that such conduct was wrong), and/or volitional capacities (e.g., the accused was unable to or lacked substantial capacity to conform his or her conduct to the requirements of law). See generally WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.2, at 310-23 (2d ed. 1986). Since New York's insanity test applies only when an offender lacks substantial capacity to know or appreciate either the nature and consequences of his or her conduct, or that such conduct was wrong (see *supra* note 312), it does not excuse offenders who suffer from impaired control of volition. See *People v. Ma-whinney*, 163 Misc. 2d 329, 622 N.Y.S.2d 182 (Bronx Co. Sup. Ct. 1994).

(c) *The defendant was under duress or under the domination of another person, although not to such a degree as to constitute a defense to prosecution.*³¹⁴

This mitigating circumstance, which is a virtual replica of the corresponding provision of the Model Penal Code,³¹⁵ applies when the defendant acted under duress or was under the domination of another person, to a degree that falls short of being a complete defense. The defense of duress is recognized when a defendant "engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist."³¹⁶ Being "under the domination of another person" is not recognized as a defense by the criminal law, and its meaning correspondingly is less clear.³¹⁷ Unlike the statutory mitigating factors in effect in several other jurisdictions, an offender need not have acted under "extreme" duress, or under the "substantial" domination of another person for this circumstance to apply.³¹⁸ In this respect, New York's provision is much more consistent than those other statutes with the constitutional requirement that the sentencer not be restricted from considering all relevant mitigating evidence.³¹⁹

314. N.Y. PENAL LAW § 400.27(9)(c) (McKinney Supp. 1996).

315. MODEL PENAL CODE AND COMMENTARIES, *supra* note 301, § 210.6(4)(f) ("The defendant acted under duress or under the domination of another person.").

316. N.Y. PENAL LAW § 40.00(1) (McKinney 1987). However, the defense of duress is unavailable "when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress." *Id.* § 40.00(2).

317. This mitigating factor has been at issue in capital cases decided in other jurisdictions. *See, e.g.*, *State v. Brooks*, 661 So. 2d 1333 (La. 1995) (holding that defendant's lawyer provided constitutionally ineffective assistance at the sentencing phase of a capital trial because, *inter alia*, no mitigating evidence was presented that the defendant was under the domination of another person); *State v. Ryan*, 534 N.W.2d 766 (Neb. 1995) (finding insufficient evidence to support mitigating factor that defendant was under the domination of another person, and thus rejecting defendant's claim of ineffective assistance of counsel based on defense counsel's failure to argue applicability of that factor).

318. *See Fairness and Mercy*, *supra* note 299, at 326-27.

319. *Cf. Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990) (since trial judge instructed the sentencing jury that it could consider nonstatutory mitigating circumstances, Pennsylvania statute making "extreme" duress and "extreme" mental or emotional disturbance mitigating factors did not unduly constrain jury's consid-

(d) *The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution.*³²⁰

This statutory mitigating factor substantially tracks the Model Penal Code³²¹ and statutes in several other jurisdictions³²² that make the defendant's relatively minor participation in a murder committed by another a mitigating circumstance. However, this factor is not likely to figure as prominently in capital trials in New York as it may elsewhere. No offender can be convicted of first-degree murder or sentenced to death under New York law without the specific intent to kill.³²³ Moreover, murder convictions premised on accomplice liability commonly arise from killings committed by one of two or more coperpetrators of armed robbery, or other serious felonies.³²⁴ The "relatively minor participation" mitigating factor will rarely be at issue in such cases, because the New York law limits death-penalty eligibility to the actual killer and to cofelons who command another to kill.³²⁵ This mitigating factor most likely will apply in a relatively narrow class of first-degree murder cases in which accomplice liability involves circumstances other than the commission of a contemporaneous felony.

(e) *The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alco-*

eration of mitigating evidence). *See generally* Jeffers v. Lewis, 974 F.2d 1075, 1078 (9th Cir. 1992); Smith v. McCormick, 914 F.2d 1153, 1167 (9th Cir. 1990).

320. N.Y. CRIM. PROC. LAW § 400.27(9)(d) (McKinney Supp. 1996).

321. MODEL PENAL CODE AND COMMENTARIES, *supra* note 301, § 210.6(4)(e) ("The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.").

322. *See Fairness and Mercy, supra* note 299, at 324.

323. N.Y. PENAL LAW § 125.27(1) (McKinney Supp. 1996). *See supra* notes 21-30 and accompanying text.

324. *Cf.* N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1996) (defining accomplice liability for second-degree murder committed during identified felonies). The Supreme Court has ruled that the Eighth Amendment is not invariably offended by the capital punishment of an offender whose guilt is predicated on a killing actually committed by a coperpetrator during the commission of a felony. *Tison v. Arizona*, 481 U.S. 137 (1987). *See supra* note 127.

325. N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney Supp. 1996). *See supra* notes 125-27 and accompanying text.

*hol or any drug, although not to such an extent as to constitute a defense to prosecution.*³²⁶

New York law recognizes as an affirmative defense to first-degree murder that "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse"³²⁷ And while "[i]ntoxication is not, as such, a defense to a criminal charge," in all criminal prosecutions the defendant may offer evidence of intoxication "whenever it is relevant to negative an element of the crime charged."³²⁸ Under most circumstances, killings that are a product of mental or emotional disturbance, or that are committed by defendants under the influence of alcohol or another drug, will not be affected by these formal rules. The related mitigating factor will have much broader application.³²⁹ It predictably will come into play regularly at capital sentencing hearings.³³⁰

326. N.Y. CRIM. PROC. LAW § 400.27(9)(e) (McKinney Supp. 1996).

327. N.Y. PENAL LAW § 125.27(2)(a) (McKinney 1987). The reasonableness of the defendant's explanation or excuse "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." *Id.*

328. *Id.* § 15.25.

329. The New York statute's definition of this mitigating circumstance is also more expansive than the analogous provision in the Model Penal Code. The Model Penal Code mitigating factor applies when "[t]he murder was committed while the defendant was under the influence of *extreme* mental or emotional disturbance." MODEL PENAL CODE AND COMMENTARIES, *supra* note 301, § 210.6(4)(b) (emphasis added). New York's mitigating circumstance applies even in the absence of "extreme" mental or emotional disturbance. The Model Penal Code further requires that, "[a]t the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of . . . intoxication." MODEL PENAL CODE AND COMMENTARIES, *supra* note 301, § 210.6(4)(g). New York's mitigating factor more broadly applies when the offender was "under the influence of" alcohol or another drug, and it does not require specific impairment of the defendant's cognitive or volitional capacities. N.Y. CRIM. PROC. LAW § 400.27(9)(e) (McKinney Supp. 1996).

330. Forty-nine percent of all state prisoners in 1991 reported being under the influence of drugs, alcohol, or both at the time they committed the offense for which they were serving a sentence. Fifty percent of state prisoners convicted of crimes of violence reported that they were under the influence of drugs, alcohol, or both, when they committed their crimes. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, DRUGS AND CRIME FACTS, 1993 6 (1994). In addition, the quality of being "mentally or emotionally disturbed" at the time of the killing, which also is recognized as a mitigating circumstance under the provision at issue, doubtlessly will be raised by many defendants convicted of capital murder. N.Y. CRIM. PROC. LAW § 400.27(9)(e) (McKinney Supp. 1996).

(f) *Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.*³³¹

This "catch-all" mitigating factor serves the constitutionally required function of assuring that all relevant mitigating evidence may be admitted at a capital sentencing hearing, even if it is not associated with a statutorily defined mitigating circumstance.³³² Under *Lockett v. Ohio*, the sentencing authority in a capital case may "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."³³³ The *Lockett* Court did not attempt to define the appropriate boundaries of mitigating evidence.³³⁴ At a minimum, the offender must be able to introduce evidence bearing on his or her personal culpability for the crime.³³⁵ Yet, the notion of mitigating circumstances sweeps more broadly, and includes character evidence and other factors that may not directly relate to the offender's responsibility for a crime.³³⁶ In practice, the courts have admit-

331. N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney Supp. 1996).

332. See *supra* note 296 and accompanying text.

333. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original) (footnote omitted).

334. See Weisberg, *supra* note 286, at 324.

335. See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989):

Underlying *Lockett* and *Eddings* [v. Oklahoma, 455 U.S. 104 (1982)] is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." . . . "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime."

Id. (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)).

336. See Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 351 (1992):

The relevancy standard used in *Lockett* implies that the sentencing inquiry must extend to an evaluation of what we might call the offender's general "moral merit" or "general deserts." The sentencer may evaluate the of-

ted a wide range of evidence offered by defendants in capital sentencing proceedings in mitigation of punishment.³³⁷

New York's death penalty statute could have enumerated additional mitigating factors potentially relevant to juries' sentencing decisions. For example, the offender's youth (or age), which is a common mitigating circumstance in other death penalty statutes,³³⁸ is absent from the New York law's list of mitigating factors.³³⁹ An expanded list of mitigating circumstances would have been desirable as an expression that the Legislature specifically recognized the potential significance of those circumstances to sentencing decisions, and to cue attorneys to consider their relevance and to present evidence about them.³⁴⁰ However, since *Lockett*, and the catch-all provision, require that evidence of additional mitigating circumstances must be received, the statute's failure to itemize a more extensive list of factors to be considered in mitigation of punishment is not unduly problematic.

fender's deserts based on all of his life works. In effect, the sentencer may determine what punishment the offender deserves by judging his "soul."

Id. (footnotes omitted).

337. See Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 301-06 (1991). Justice Scalia has called for overruling *Lockett*, in part because in his view requiring the open-ended admission of mitigating evidence is impossible to reconcile with another cardinal principle of capital punishment law, which is that death penalty decisions must be nonarbitrary and circumscribed by legislative standards. *Walton v. Arizona*, 497 U.S. 639, 661-73 (1990) (Scalia, J., concurring in part and concurring in the judgment). See also *Graham v. Collins*, 113 S. Ct. 892, 903-15 (1993) (Thomas, J., concurring) (expressing doubts about the continued viability of *Lockett*). For a discussion and attempted refutation of Justice Scalia's thesis, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation In Capital Sentencing*, 38 U.C.L.A. L. REV. 1147 (1991).

338. See *Fairness and Mercy*, *supra* note 299, at 330-33. The Model Penal Code includes as a statutory mitigating factor "the youth of the defendant at the time of the crime." MODEL PENAL CODE, *supra* note 301 § 2.10.6(4)(h). Under the Model Penal Code, as under New York law, offenders under age 18 are ineligible for capital punishment. *Id.* § 210.6(1)(d).

339. The Supreme Court repeatedly has affirmed that youth is a relevant mitigating factor for capital sentencing purposes. See, e.g., *Johnson v. Texas*, 113 S. Ct. 2658, 2668-69 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Also, the offender's advanced age could, in appropriate circumstances, serve as a mitigating factor. See TENN. CODE ANN. § 39-13-204(j)(7) (Supp. 1995) (recognizing as a mitigating factor "[t]he youth or advanced age of the defendant at the time of the crime.").

340. For examples of additional mitigating factors that have been included in other death penalty statutes, see *Fairness and Mercy*, *supra* note 299, at 333-37.

The burden of establishing mitigating factors is on the defendant, and proof is required by a preponderance of the evidence.³⁴¹ Many other death penalty statutes do not expressly assign a burden of persuasion for establishing mitigating factors, and a few statutes require only that the defendant must go forward with evidence to allow the sentencer to consider mitigating circumstances. New York joins at least five other jurisdictions that statutorily require the defendant to establish the existence of mitigating factors by a preponderance of the evidence.³⁴² The Supreme Court has strongly suggested, in dictum, that there are no federal constitutional barriers to making the defendant assume such a burden.³⁴³

At the same time, the Court has definitively ruled that a jury may not be required to find unanimously that a mitigating

341. N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1996).

342. See *Fairness and Mercy*, *supra* note 299, at 342. Maryland, New Hampshire, Pennsylvania, Wyoming, and federal law require by statute that the defendant prove the existence of mitigating factors by a preponderance of the evidence. 21 U.S.C. § 848(k) (1995); MD. ANN. CODE art. 27, § 413(g) (1996); N.H. REV. STAT. ANN. § 630:5(III) (1996); PA. STAT. ANN. tit. 42, § 9711(c)(1)(iii) (West 1982); WYO. STAT. ANN. § 6-2-102(d)(i)(B) (Michie 1996); 18 U.S.C. § 3593(c) (1995).

343. *Walton v. Arizona*, 497 U.S. 639, 651 (1990) (plurality opinion). The petitioner in *Walton* had challenged his death sentence, *inter alia*, on the ground that the statute imposed on defendants "the burden of establishing by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 649. See ARIZ. REV. STAT. ANN. § 13-703(C) (West 1995) ("The burden of establishing the existence of the [statutory mitigating] circumstances . . . is on the defendant."); See also: § 13-703(E):

In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances . . . and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Id. Justice White's plurality opinion rejected that challenge, and further continued that:

Mills [v. Maryland, 486 U.S. 367 (1988)] did not suggest that it would be forbidden to require each individual juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstance has been proved by a preponderance of the evidence. To the contrary, the jury in that case was instructed that it had to find that any mitigating circumstances had been proved by a preponderance of the evidence. . . . Neither the petitioner in *Mills* nor the Court in its opinion hinted that there was any constitutional objection to that aspect of the instructions.

Walton, 497 U.S. at 651 (citation omitted).

factor has been proven before that factor can be considered for sentencing purposes by individual jurors. Imposing a unanimity requirement would arbitrarily allow a single hold-out juror who did not believe that a mitigating circumstance had been established to deny all other jurors the opportunity to consider that circumstance. To invest such veto power in one or more jurors by requiring unanimous agreement about the existence of mitigating factors is inconsistent with the "high requirement of reliability on the determination that death is the appropriate penalty in a particular case."³⁴⁴ New York's capital sentencing statute avoids this difficulty by providing that "[a]ny member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established."³⁴⁵

This aspect of the law is crucial to its fair administration, although it also is a potential source of confusion to jurors. During their guilt-phase deliberations, jurors cannot convict a defendant unless they unanimously agree that guilt has been proven beyond a reasonable doubt. The same standards bind their deliberations about the aggravating factors they are authorized to consider for sentencing.³⁴⁶ Even though they are instructed that mitigating factors must be established only by a preponderance of the evidence, and that they are to determine individually whether mitigating circumstances exist, rather than by unanimous verdict, jurors in capital cases are prone to transfer the familiar proof beyond-a-reasonable-doubt and unanimity requirements to their consideration of mitigating factors.³⁴⁷

Another provision in New York's law could help produce or at least reinforce such a misunderstanding. The statute pro-

344. *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988). See also *McKoy v. North Carolina*, 494 U.S. 433 (1990).

345. N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 1996).

346. *Id.* § 400.27(3), (7)(c).

347. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (reporting results of interviews conducted with individuals who served as jurors in capital trials in North Carolina). See also James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203 (1992).

vides that "[i]f the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any."³⁴⁸ This section easily could be interpreted to mean that, just as it is "the jury" that "considered" mitigating and aggravating factors, so must mitigating factors be "established" to the satisfaction of the jury, instead of in the minds of individual jurors. Verdict forms that clearly indicate that mitigating factors can be considered, and can be considered established by individual jurors, without the concurrence of the entire jury, would help minimize the risk of jurors being confused about their duty to come to individual conclusions about whether mitigating circumstances have been established.³⁴⁹

The defendant is authorized to present evidence relevant to mitigating factors, "[s]ubject to the rules governing the admission of evidence in the trial of a criminal action . . .; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence."³⁵⁰ In contrast, penalty-phase evidence is admissible in many other death penalty jurisdictions under more liberal rules than generally apply to criminal trials.³⁵¹ The New York statute's exception regarding the admissibility of reliable hearsay evidence is constitutionally required in keeping with the defendant's right to a fair capital sentencing hearing.³⁵² To be faithful to this constitutional principle, opinion rules and other rules of evidence should be liber-

348. N.Y. CRIM. PROC. LAW § 400.27(11)(b) (McKinney Supp. 1996).

349. The statute directs that "[t]he court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence." *Id.* § 400.27(15). The New York Court of Appeals has published a proposed set of Uniform Rules for Capital Sentencing Forms which, at the time of this writing, had not been approved in final form. Under the proposed rules, the trial judge is to provide the jurors with a sentencing determination form, on which the judge must list each mitigating factor for which the defendant presented evidence. A box next to each such factor is to be provided, "for the jury to check if the jury considered that factor." On an adjacent line, "the jury [is] to record the number of jurors who found that the defendant established the factor." NEW YORK COURT OF APPEALS, PROPOSED UNIFORM RULES FOR CAPITAL SENTENCING FORMS § 218.1, 14 at 17 (Sept. 15, 1995).

350. N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1996).

351. See *Capital Murder*, *supra* note 293, at 310 n.80.

352. See *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam). See BILL MEMORANDUM, *supra* note 43, at 7.

ally construed in favor of admitting mitigating evidence offered on behalf of capital defendants.³⁵³

Both the prosecution and the defense are given discovery rights to penalty-phase evidence under the new statute.³⁵⁴

353. For example, lay witnesses may be asked to give opinions about an offender's mental health, general propensities, or potential for rehabilitation or adaptation to life in prison in mitigation of punishment at capital sentencing trials. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1 (1986). When commenting on the statute's recognition that reliable hearsay evidence is admissible in mitigation of punishment at capital sentencing proceedings, the Assembly Codes Committee Bill Memorandum noted that, "state evidentiary rules also allow the liberal introduction of evidence by a defendant in a criminal case. In accordance with constitutional requirements, this provision should allow defendants to present any reliable evidence even where such evidence does not meet admissibility requirements." BILL MEMORANDUM, *supra* note 43, at 7.

354. N.Y. CRIM. PROC. LAW § 400.27(14) (McKinney Supp. 1996).

(a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

Id.

Under the provisions to which reference are made in this section, the prosecutor must disclose written and recorded statements, the criminal record, and pending criminal charges pertaining to persons intended to be called as witnesses. N.Y. CRIM. PROC. LAW § 240.45(1) (McKinney 1993). The defendant has similar obligations, except insofar as the statements or information pertain to the defendant. *Id.* § 240.45(2). The prosecution further must make available statements made by the defendant or a codefendant; transcripts of the defendant's or a codefendant's grand jury testimony; reports of physical, mental, or scientific examinations or tests; photographs and drawings made by law enforcement personnel that will be introduced at trial; photographs, photocopies or other reproductions made by or at the direction of law enforcement officers; property obtained from the defendant or a codefendant; tapes or electronic recordings that will be introduced at trial; material that is subject to constitutional disclosure; and the date, time, and place of the charged crime and the defendant's arrest. *Id.* § 240.20(1)(a)-(i). The defendant is obliged to make available reports concerning a physical or mental examination, or scientific test intended for introduction at the trial, and reports or documents corresponding to the defendant's notice of intent to offer psychiatric evidence; and photographs, drawings, tapes, or other electronic recordings the defendant intends to introduce at trial. *Id.* § 240.30(1)(a),(b).

Since the prosecution's proof at the sentencing hearing is limited to the two penalty-phase aggravating factors that might be at issue,³⁵⁵ and to the rebuttal of the defendant's evidence,³⁵⁶ as a practical matter most discovery will flow from the defense to the prosecution and will concern the defendant's mitigation evidence.³⁵⁷ One available remedy for nondisclosure of information under the discovery requirements is preclusion of the evidence from the penalty hearing.³⁵⁸ However, the constitutional nature of the defendant's right to offer relevant mitigating evidence likely "will result in courts rarely, if ever, precluding a defendant from offering mitigating evidence as a sanction for the defendant's failure to comply with discovery provisions."³⁵⁹

The statute gives special attention to psychiatric evidence that may be offered at the penalty hearing.

"[P]sychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing . . . to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect, or mental condition.³⁶⁰

Although the prosecution is only permitted to offer evidence in rebuttal of the defendant's mitigating evidence, the discovery provisions governing psychiatric evidence are drafted to apply to both parties. Pretrial notice of a party's intent to offer psy-

355. N.Y. CRIM. PROC. LAW § 400.27(7)(a), (b) (McKinney Supp. 1996). See *supra* notes 233-68 and accompanying text. The twelve aggravating factors that also serve as elements of the crime of first-degree murder are not to be relitigated at the penalty trial, and the prosecution is not otherwise to offer evidence about them. N.Y. CRIM. PROC. LAW § 400.27(3), (6). See *supra* notes 272-74 and accompanying text.

356. N.Y. CRIM. PROC. LAW § 400.27(6).

357. Al O'Connor, *New York's Death Penalty Law: An Overview*, PUB. DEF. BACKUP CENTER REP. 4, 6 (Mar./Apr. 1995).

358. N.Y. CRIM. PROC. LAW § 400.27(14)(d) (McKinney Supp. 1996).

359. BILL MEMORANDUM, *supra* note 43, at 13.

360. N.Y. CRIM. PROC. LAW § 400.27(13)(a) (McKinney Supp. 1996). Under this definition, "psychiatric evidence" does not include testimony provided by lay witnesses. See O'Connor, *supra* note 357, at 6, who also argues that: "The notice requirement is further restricted to the statutorily defined mitigating factors in subdivisions (a) through (e) of CPL § 400.27 (9), and does not apply to subdivision (f), the undefined catchall mitigator which permits introduction of all other mitigating evidence." *Id.* (emphasis in original).

chiatric evidence is required. If such notice is not given, the other party is entitled to an adjournment for a reasonable period after being notified that psychiatric evidence will be offered.³⁶¹ The sanctions for failure to give notice that psychiatric evidence will be introduced include monetary penalties assessed against the offending attorney, but the court "may not in any event preclude" admission of such evidence.³⁶²

Upon being notified about the defendant's intent to introduce mitigating psychiatric evidence, the prosecution is entitled to request a court order requiring the defendant to submit to an examination by a psychiatrist, psychologist, or psychiatric social worker

designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug.³⁶³

Both the prosecutor and defense counsel are entitled to be present at an examination of the defendant ordered under this provision.³⁶⁴ If the defendant fails to cooperate when ordered to submit to such an examination, the prosecution is entitled to have the court instruct the jury about the defendant's lack of

361. N.Y. CRIM. PROC. LAW § 400.27(13)(b) (McKinney Supp. 1996).

362. *Id.* Compare *id.* with N.Y. CRIM. PROC. LAW § 400.27(14)(d). See *supra* notes 353-54.

363. N.Y. CRIM. PROC. LAW § 400.27(13)(c).

364. *Id.* Counsel's role at this examination is uncertain. Compare Executive Memorandum, *supra* note 12, at 5 ("the role of counsel is that of an observer, and neither counsel is permitted to take an active role in the examination") with BILL MEMORANDUM, *supra* note 43, at 13 ("In contrast with the limitations on the role of counsel at psychiatric examinations contained in Article 250 of the Criminal Procedure Law, subdivision (13) contains no such limitations on the role of counsel at the psychiatric examination."). The use of psychiatric evidence to establish affirmative defenses to criminal charges is governed in N.Y. CRIM. PROC. LAW § 250.10 (McKinney 1993). This provision contains analogous requirements for court-ordered mental health examination of the defendant after the defendant serves notice of intention to introduce such evidence, and specifies that "[t]he role of each counsel at such examination is that of an observer, and neither counsel shall be permitted to take an active role at the examination." *Id.* § 250.10(3). See generally O'Connor, *supra* note 357, at 6-7.

cooperation.³⁶⁵ Statements made by the defendant during such court-ordered psychiatric examinations are admissible only as they are relevant to proof of mitigating factors or mental retardation, and otherwise are inadmissible at the guilt-phase trial or in other proceedings.³⁶⁶

5. *The Sentencing Options and the Sentencing Decision*

Senator Dale Volker: . . . The judge would instruct the jurors that if they are unable to come to an agreement, a unanimous agreement, for the death penalty and if they are unable to come to a determination on life without parole, in that case the judge would sentence the person to twenty to twenty-five years to life.

Senator Richard Dollinger: So if a jury, Senator, giving due weight to the aggravating and mitigating factors, how does a jury arrive at the fact — can the jury arrive at the third option?

Senator Volker: No. A jury can not arrive at the third option. The third option would only actually be open to the judge.³⁶⁷

A defendant convicted of first-degree murder must receive one of three sentences: death, life imprisonment without parole (LWOP), or a prison term with a minimum sentence of twenty to twenty-five years, and a maximum sentence of life (a "regular life" sentence). If the offender pleads guilty to first-degree murder, which is permitted only with the consent of the prosecutor and permission of the court,³⁶⁸ or if the defendant pleads not

365. N.Y. CRIM. PROC. LAW § 400.27(13)(c) (McKinney Supp. 1996). See O'Connor, *supra* note 357, at 7:

If the defendant refuses to submit, the only sanction available to the prosecution is a jury instruction "that the defendant did not submit to or cooperate fully in such psychiatric examination." [CPL § 400.27(13)(c)]. This "adverse inference" instruction is again more limited than the charge available under CPL § 250.10, wherein the court is authorized to additionally instruct the jury that "the [defendant's] failure to submit may be considered [by the jury] in considering the merits" of the defense.

Id.

366. N.Y. CRIM. PROC. LAW § 400.27(13)(c) (McKinney Supp. 1996). Cf. *Estelle v. Smith*, 451 U.S. 454 (1981) (expert testimony based on court-ordered psychiatric examination not initiated by defendant was admitted in violation of accused's right to counsel and right against compelled self-incrimination, where defendant was not advised of and did not waive his constitutional rights).

367. Senate Debate, *supra* note 13, at 1911 (remarks of Senator Dale Volker and Senator Richard Dollinger).

368. N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney Supp. 1996). See *supra* notes 194-213 and accompanying text.

guilty and the prosecutor elects not to seek the death penalty, then the trial judge is the sentencing authority, and the judge must impose a sentence of either LWOP or regular life.³⁶⁹ If the offender pleads not guilty, and the prosecutor seeks the death penalty, then a separate sentencing hearing is conducted before the jury that determined the defendant's guilt or, in exceptional circumstances, before a newly constituted sentencing jury.³⁷⁰ Following the presentation of evidence and argument by counsel:³⁷¹

the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of twenty to twenty-five years and a maximum term of life.³⁷²

The sentencing options available when the jury is asked to sentence the defendant to death are remarkable in two respects. First, the jury is barred from deliberating about or returning a verdict of regular life imprisonment. Second, the default sentence when the jurors are unable to produce a unanimous verdict regarding either of their lawful sentencing options, death or LWOP, is a regular life sentence, and the jury is so instructed. These features of the capital sentencing scheme raise serious constitutional questions.

A capital jury lacks the authority to sentence a convicted first-degree murderer to a regular life term of twenty to twenty-five years imprisonment. When the prosecutor seeks a death sentence, a regular life sentence can be imposed if and only if the jury does not reach unanimous agreement about whether to

369. N.Y. CRIM. PROC. §§ 220.10(5)(e), 220.30(3)(6)(vii), 400.27(1).

370. *Id.* § 400.27(2). For further discussion of the sentencing jury, see *infra* notes 442-76 and accompanying text. No separate sentencing proceeding is conducted if the death penalty is not sought, and a sentence of either LWOP or regular life is to be imposed by a judge. N.Y. CRIM. PROC. LAW § 400.27(1).

371. The prosecution is to make its sentencing argument first, followed by the defendant. *Id.* § 400.27(10).

372. *Id.*

sentence the offender to death or LWOP, the only two sentencing options it is instructed to consider. The jury will know that it can cause a regular life sentence to be entered by failing to agree on a sentence of death or LWOP, but this can hardly substitute for the prerogative of deliberating about and unanimously deciding whether the offender deserves a regular life sentence. The law does not recognize the concept of a "negative" verdict, or a verdict produced by a jury's lack of agreement.³⁷³ Under the statute, the jurors have no vehicle for structuring their deliberations to produce an affirmative verdict of regular life imprisonment.

The Legislature has determined that a term of twenty to twenty-five years to life is an appropriate punishment for first-degree murder. Such a sentence is authorized when a defendant is convicted of first-degree murder on a plea of guilty,³⁷⁴ or following a trial in which the prosecution has not sought a capital sentence.³⁷⁵ Yet, only a judge, and never a jury, can affirmatively declare that a capital murder is sufficiently mitigated that a regular life sentence should be imposed. The Supreme Court has not required that juries make sentencing decisions in capital cases,³⁷⁶ nor that a regular life sentence must be a sentencing option in addition to LWOP and death.³⁷⁷ Nevertheless, in keeping with the vast majority of other jurisdictions,³⁷⁸ New

373. See N.Y. CRIM. PROC. LAW §§ 300.10(4), 310.40, 310.60, 310.70 (McKinney 1993) (generally specifying the form of verdicts authorized in criminal cases).

374. *Id.* at §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney Supp. 1996). See *supra* notes 194-213 and accompanying text.

375. N.Y. CRIM. PROC. § 400.27(1). See *supra* notes 199-200 and accompanying text.

376. See *Harris v. Alabama*, 115 S. Ct. 1031, 1037 (1995); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984). In five states, Arizona, Colorado, Idaho, Montana, and Nebraska, a trial judge or a panel of judges imposes sentence in capital cases without any participation by a jury. In four additional states, Alabama, Delaware, Florida, and Indiana, juries render advisory sentencing verdicts or make findings that are considered by a judge, but the judge has ultimate sentencing authority. See James R. Acker & Charles S. Lanier, *Law, Discretion, and the Capital Jury: A Review of Statutes and Proposals for Reform*, 32 CRIM. L. BULL., 134, 138 n.18 (1996)[hereinafter *Review of Statutes*].

377. Several jurisdictions presently have only two sentencing options in capital cases: either death or LWOP, or death or life imprisonment with parole eligibility. See *Aggravating Circumstances*, *supra* note 214, at 55-56.

378. Juries have the exclusive responsibility for making sentencing decisions in capital cases in 29 of the 38 states with death penalty laws, and under the federal death penalty statute. *Review of Statutes*, *supra* note 376 at 138 n.18.

York's statute does require jury sentencing in capital trials. It also reflects the specific legislative judgment that any of three different sentences: death, LWOP, or regular life, may be appropriate punishment for first-degree murder. Yet, the jury is stifled from expressing that a regular life sentence should be imposed in any first-degree murder case. Denying the jury the regular-life sentencing option is inconsistent with the reasons why juries traditionally have been empowered to determine sentence in capital trials.

[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. . . .

[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect “the evolving standards of decency that mark the progress of a maturing society.”³⁷⁹

The sentencing decisions made in capital cases are unique. The sentencing authority must be “provided with a vehicle for expressing its ‘reasoned moral response’”³⁸⁰ to the evidence presented at the penalty-phase trial. Under New York's stat-

379. *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 80, 101 (1958) (plurality opinion)).

380. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). See Assembly Debate, *supra* note 1, at 29-30 (remarks of Assemblymen Jeffrey Dinowitz and Eric Vitaliano):

MR. DINOWITZ: Mr. Vitaliano, can the jury impose a sentence of life with parole eligibility under this statute?

MR. VITALIANO: No, Mr. Dinowitz. The jury has only two sentencing options under the bill: either death or life imprisonment without parole. If they should deadlock, then and only then, a sentence of 20 to 25 years minimum to life maximum is imposed by the judge.

MR. DINOWITZ: But what if the case involves a 19-year-old first offender where there is overwhelming mitigation evidence and the jury unanimously reaches a reasoned, moral judgment that a life sentence with parole eligibility is an appropriate sentence, that all other sentences would be excessive, what happens then?

MR. VITALIANO: The jury is not empowered to reach that conclusion. Unless the defendant pleads guilty, a regular life sentence is not an available option for the jury to consider.

Id.

ute, the jury is denied a voice, on behalf of the community,³⁸¹ to decide that a sentence of regular life imprisonment, which the legislature otherwise has made available for first-degree murder, should be imposed on a defendant convicted of that crime. There are several related adverse consequences of this aspect of the statute.

As discussed previously, the sentencing structure makes costly, or penalizes exercise of, the right of trial by jury.³⁸² A jury's two authorized sentencing verdicts are death and LWOP. A sentencing judge's only sentencing options following a plea of guilty are LWOP and regular life. Thus, defendants who plead not guilty in capital cases risk both higher maximum and minimum sentences.

By the same token, the sentencing scheme vests prosecutors with charging discretion so profound that it borders on *de facto* sentencing authority. A prosecutor unilaterally can define the minimum and maximum sentencing options as LWOP and death by filing a notice of intention to seek the death penalty in a first-degree murder case. Conversely, the district attorney can define the minimum and maximum sentencing range as regular life and LWOP by proceeding to trial and not seeking the death penalty. With the judge's concurrence, a prosecutor

381. See Assembly Debate, *supra* note 1, at 202-04 (remarks of Assemblyman Richard Gottfried):

The problem is . . . the jury has no authority, whatsoever, to select ordinary life imprisonment as one of its sentencing options. The jury, who we rely on as the voice of the community and the central player in this whole process, the jury is prohibited from having as one of its options an ordinary life sentence. Its only options are the death penalty or life without parole. It's as if we can't trust the jury to have before it the full range of sentences.

So, the ordinary life sentence is available in a murder one case under this bill only if the jury, in essence, fails in its task of selecting one of the other two sentences, and the bill says that if they fail to impose one of the other two sentences, or if the defendant forgoes his or her right to a trial by jury and pleads guilty, then an ordinary life imprisonment sentence is available.

So, in order for one of the three lawful sentencing options to come to pass, the jury, in whom we place such trust, has to fail in its task or the defendant has to give up his or her Constitutional right to defend himself or herself at trial.

This, I submit, is a serious distortion of the sentencing process. . . . [I]t is a serious defect in this bill. . . .

Id.

382. See *supra* notes 194-213 and accompanying text.

can stipulate that a regular life sentence or a sentence of LWOP is a condition of accepting a defendant's plea of guilty. Not only is the prosecutor's discretion in this context unregulated,³⁸³ but it provides district attorneys with powerful bargaining leverage. Defendants who agree to plead guilty to first-degree murder will escape the maximum sentence of death, and also will become eligible for a regular life sentence. District attorneys thus have the untrammelled charging and plea bargaining discretion to expose a defendant to the risk of death, and also to remove the lawful sentencing option of regular life imprisonment.

The second fundamental problem with the statute's sentencing options arises when the jury is unable to reach unanimous agreement about whether the defendant should be sentenced to death or life imprisonment without parole. Under such circumstances, the statute provides that the defendant must be sentenced to a regular life sentence. The trial judge must instruct the jury accordingly at the outset of its sentencing deliberations. These provisions are irrational and will produce arbitrary sentencing decisions. They also are certain to result in death penalty verdicts that do not reflect the reasoned moral judgment of the jury.

The scheme is irrational because when the jury cannot unanimously agree about either of its two verdict options, death or LWOP, the regular life sentence that must be imposed is a punishment that the jury was unable to consider, and it may be that not a single member of the jury favors the option. For example, the jury could be divided with eleven of its members voting for death, and one voting for LWOP. If the jurors are unable to reconcile their differences, the lesser sentence of regular life imprisonment is imposed. Alternatively, the jury could be split with eleven in favor of LWOP, and one in favor of death. If the one holdout for death stands firm, the will of all twelve jurors again is frustrated, because a regular life sentence, and neither death nor LWOP will be imposed.

A regular life sentence imposed under such circumstances surely bears no relationship to the offender's culpability. Defendants in first-degree murder cases in which eleven jurors believe death is the appropriate punishment, and one insists that

383. See *supra* notes 173-93 and accompanying text.

LWOP should be imposed, or in which the jurors otherwise are divided irreconcilably between death and LWOP, will receive a less harsh sentence (regular life) than is given in cases in which no jurors favor death and all twelve favor LWOP. If a rational basis exists for the default sentencing option of regular life imprisonment, it would appear to be the impermissible one of pressuring jurors into relinquishing their views about what constitutes a morally appropriate sentence for a crime in order to ensure that the offender does not reap the benefits of a twenty to twenty-five years to life sentence.

Jurors who are deadlocked between death and LWOP will know, because they will have been instructed, that their failure to reach a verdict will result in the offender's receiving a regular life sentence. This information will exert enormous pressure on jurors to produce a verdict. Jurors may be extremely anxious about the prospect of an offender's being released from prison after serving the minimum twenty to twenty-five years of a regular life sentence. Interviews with jurors confirm their common fear that capital defendants may some day be paroled and return to the outside community.³⁸⁴ This very outcome becomes a real possibility if jurors who are divided eleven-to-one in favor of death over LWOP (or otherwise are divided) are unable to resolve their differences and reach a unanimous sentencing verdict. Not wanting to risk the possibility of the defendant's release from prison twenty years hence, or believing that such a result would not be just, the jurors holding out for a sentence less than death may conclude that a capital sentence is the only acceptable alternative.

The legislature easily could have avoided the problems associated with this sentencing scheme. The most straightforward solution would be to give the jury three affirmative verdict

384. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4-9 (1994); William Bowers, *Research Note, Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157, 169-71 (1993). See also Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 LOY. L.A. L. REV. 327, 334-43 (1993). The Supreme Court took note of some of these research results in *Simmons v. South Carolina*, 114 S. Ct. 2187, 2191 (1994).

options: death, LWOP, and regular life.³⁸⁵ If a jury reported being unable to reach unanimous agreement about a sentence, the judge could inquire of the foreperson whether one or more members of the jury had voted for death. A negative answer would necessarily mean that the jurors were divided between the choice of LWOP and regular life. The judge then would impose a regular life sentence as the least harsh verdict that one or more jurors favored. On receiving an affirmative indication that one or more jurors voted in favor of death, the judge could inquire of the foreperson whether one or more members of the jury voted in favor of a regular life sentence. A negative response would reflect that the jurors were divided between death and LWOP, and a sentence of LWOP would be imposed as the least harsh verdict supported by one or more jurors. If the judge received an affirmative response, the offender would be sentenced to a regular life sentence, since one or more jurors would have supported that verdict.³⁸⁶

385. Several death penalty jurisdictions use this straightforward method and allow the sentencing authority to choose between the three verdicts of death, LWOP, and life imprisonment with parole eligibility. See *Aggravating Circumstances*, *supra* note 214, at 55.

386. Of course, the judge also could simply inquire what the precise voting split was among the jurors. Such a direct inquiry might be perceived as more highly intrusive with regard to the jury deliberations, since it would reveal such specific information as whether there was only a single holdout for a particular sentencing verdict. Holdout jurors might feel undue pressure if they knew that the ultimate verdict tally would be made a matter of record.

Some other jurisdictions in which three sentencing options are provided in capital cases specify how a sentence is to be decided when the sentencing jury hangs. For example, in Georgia, if the jury has found that at least one statutory aggravating factor exists but is unable to arrive at a sentencing verdict, the judge may sentence the defendant either to LWOP or life imprisonment with parole eligibility. However, the judge may sentence the offender to LWOP

. . . only if the court finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance and the trial court has been informed by the jury foreman that upon their last vote, a majority of the jurors cast their vote for a sentence of death or for a sentence of life imprisonment without parole

GA. CODE ANN. § 17-10-31.1(c) (1990). See also MD. ANN. CODE art. 27, § 413(k)(7) (1996) (if sentencing jury determines not to sentence offender to death, it thereafter considers whether to impose sentence of LWOP; if the jurors are unable to agree within a reasonable time about whether to sentence offender to LWOP, the trial judge shall dismiss the jury and impose a life prison sentence); OR. REV. STAT. § 163.150(2)(a) (1995) (if jury responds to special issues so that defendant is not sentenced to death, judge imposes sentence of LWOP "unless 10 or more members of the jury further find that there are sufficient mitigating circumstances to war-

Alternatively, the legislature could have eliminated one of the two noncapital sentencing options and provided that first-degree murder must be punished by death or a fixed prison sentence of either regular life or LWOP.³⁸⁷ Under such a framework, the default punishment when the jury could not reach a unanimous sentencing decision would at least be a prison term that was an authorized sentencing verdict, and one that was supported by some members of the jury. Although eliminating a third sentencing option would solve the problems that exist under the present statute, this solution would also transform the statute radically by contradicting the range of sentences that the Legislature has indicated should be available as punishment for first-degree murder. Another possible solution, requiring the judge to declare a mistrial and to convene a new sentencing jury,³⁸⁸ also would be problematic because it would

rant life imprisonment, in which case the trial court shall sentence the defendant to life imprisonment"); TENN. CODE ANN. § 39-13-204(h) (1996):

If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreman of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

Id.; UTAH CODE ANN. § 76-3-207(4) (Supp. 1996):

If the jury is unable to reach a unanimous verdict imposing the sentence of death, . . . the court shall instruct the jury to determine by unanimous vote whether the penalty of life in prison without parole shall be imposed. If the jury is unable to reach a verdict, the court shall discharge the jury and impose the sentence of life imprisonment.

Id. See also, 18 U.S.C. § 3594 (Supp. 1996) (If sentencing jury unanimously agrees to sentence offender to death or LWOP, the judge shall impose sentence accordingly. "Otherwise, the court shall impose any lesser sentence that is authorized by law. . . . [I]f the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.")

387. In approximately 28 of the 39 capital punishment jurisdictions in this country, the sentencing authority has only two verdict options: death or LWOP, or death or life with the possibility of parole. See *Sentencing Provisions*, *supra* note 214, at 55-56.

388. California law authorizes such action when a capital sentencing jury deadlocks. CAL. PENAL CODE § 190.4(a) (Deering Supp. 1996). In Nevada, a deadlocked sentencing jury is discharged. The Nevada Supreme Court then appoints a

effectively preclude a regular life sentence from ever being imposed on an offender whose case proceeded to a sentencing hearing.³⁸⁹

The statute reflects the unambiguous legislative determination that three different penalties should be available for first-degree murder: death, LWOP, and regular life.³⁹⁰ Although a jury is denied the opportunity to deliver a verdict that an offender should receive a regular life sentence, the statute requires the jury to be instructed that such a sentence results if the jury fails to agree unanimously that the offender should be sentenced either to death or LWOP. There is no good reason not to give the jury the power to accomplish directly what it now can do only by default and indirectly. The statutory sentencing options would be preserved, and the statute's administration improved, if the jury were authorized to consider sentencing a convicted murderer to a twenty to twenty-five year to life prison sentence. The inexplicable failure³⁹¹ of

three-judge panel, consisting of the trial judge and two additional judges, and this panel conducts a new penalty hearing and determines sentence. A death sentence can be imposed only by unanimous vote of the three-judge panel. A sentence of LWOP or life imprisonment can be imposed by majority vote. NEV. REV. STAT. ANN. § 175.556 (Michie Supp. 1995).

389. A controversy exists over whether "dynamite charges," see *Allen v. United States*, 164 U.S. 492 (1896), which encourage deadlocked juries to attempt to resolve their differences and reach a verdict, ever are permissible in the context of a capital sentencing trial. Unlike a hung jury at the guilt-phase trial, a deadlocked sentencing jury usually does not result in a mistrial, with the consequent expense and time required for a retrial. Even when a sentencing jury deadlocks, a new sentencing proceeding typically is not required because a default sentencing verdict of LWOP or life imprisonment with parole eligibility is available. See *Review of Statutes*, *supra* note 376, at 168-73.

390. See also BILL MEMORANDUM, *supra* note 43, at 1, 5.

391. Consider the remarks of Senator Dale Voker, the principal sponsor of the death penalty bill in the State Senate, on this issue. Senator Volker's remarks are in response to a question posed by Senator Richard Dollinger regarding the jury's sentencing options:

There was a thought to have all three options open to the jury. There was another point at which there was a discussion that would give the judge the option of enacting life without parole or 20 (twenty) to 25 (twenty-five) years to life, but the decision was made that the jury should make the decision on the most serious of sentences, obviously the most serious sentence being the death penalty.

And I will be very honest with you, I have received some—I don't want to say criticism but some flak from some people because of the unanimous verdict. You know, there have been several Supreme Court cases that said you do not have to have a unanimous verdict for the death penalty. But our

the statute to invest the jury with such authority raises grave doubts about the constitutionality of the sentencing provisions.

The statute regulates the jury's sentencing determination as follows: "The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed."³⁹² This provision makes clear that death penalty decisions are to be the product of a two-step process. The jurors first are to assess the relative weight of the aggravating factors and the mitigating factors. Only statutory aggravating factors can be considered.³⁹³ These are limited to the elements of first-degree murder proven during the guilt-phase trial³⁹⁴ and the two sentencing factors that must be alleged and proven beyond a reasonable doubt during the penalty-phase trial.³⁹⁵ The defendant must prove mitigating factors by a preponderance of the evidence,³⁹⁶ although each individual juror—rather than the jury acting as a body—determines the existence of mitigating circumstances.³⁹⁷ The sentencing jury takes its first step toward imposing a death sentence only if its members *unanimously* find, *beyond a reasonable doubt*, that the aggravating factor(s) established *substantially* outweigh any mitigating factors that have been established (to the satisfaction of one or more jurors). The balancing of aggravating and mitigating

feeling was if you are going to have a jury enact something as serious as the death penalty, you ought to have a unanimous jury; and, very honestly, when we discussed this thing with the Governor's people, with the Assembly, the decision was to give the jury the option for the most severe penalties and let them know that if they couldn't choose one of those more severe penalties then the judge would enact the lesser penalty, which is 20 (twenty) to 25 (twenty-five) years to life.

Senate Debate, *supra* note 13, at 1915-16 (remarks of Senator Dale Volker).

392. N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 1996).

393. *Id.* § 400.27(3). See *supra* notes 216-17 and accompanying text.

394. N.Y. CRIM. PROC. § 400.27(3) See *supra* notes 218-31 and accompanying text.

395. N.Y. CRIM. PROC. LAW § 400.27(7). See *supra* notes 232-70 and accompanying text.

396. N.Y. CRIM. PROC. LAW § 400.27(6). See *supra* note 341 and accompanying text.

397. N.Y. CRIM. PROC. LAW § 400.27(11)(a). See *supra* notes 344-49 and accompanying text.

factors required under the statute is explicit,³⁹⁸ and the prosecution plainly must satisfy a substantial burden if the jury is to get to the second step in the death-sentencing process.³⁹⁹

Even if the jury unanimously concurs that the aggravating factors substantially outweigh mitigating factors, before an offender is sentenced to death the jurors must additionally determine, unanimously, that a capital sentence should be imposed. In other words, the decision that aggravating factors substantially outweigh mitigating factors is a necessary, but not sufficient, condition for imposing a capital sentence. In some jurisdictions, the sentencer's only task is to compare the weight of the aggravating and mitigating circumstances that have been proven. If the aggravating factors outweigh the mitigating factors, or if one or more aggravating circumstances have been proven but no mitigating factors have been established, the sentencing authority has no further discretion: a death sentence must be imposed.⁴⁰⁰ New York's statute, like many others,⁴⁰¹ permits but does not require that an offender be punished by death when aggravating factors outweigh mitigating circumstances.

Permissive balancing schemes are preferable to automatic ones, because they require the sentencer to directly confront the moral question of whether an offender deserves to die in punishment for a crime. This judgment is not concealed behind a surrogate decision—which appears to be more formally legal, and hence more clinical—that one or more statutory aggravating factors have been proven and that they outweigh mitigating circumstances.⁴⁰²

398. In this respect, the New York statute is distinguished from capital sentencing statutes that simply direct the sentencing authority to "consider" aggravating and mitigating factors, without explicitly requiring that those factors be compared against one another and balanced. See *Sentencing Provisions*, *supra* note 214, at 47-49.

399. Obviously, the balancing of aggravating and mitigating factors requires more than tallying and comparing the respective number of each. The moral weight or significance of aggravating and mitigating circumstances must be assessed and evaluated. *Id.* at 45-46.

400. See *id.* at 27-30. The Supreme Court has upheld such "automatic" death sentencing statutes against constitutional challenge. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

401. *Sentencing Provisions*, *supra* note 214, at 30-33.

402. *Id.* at 31-32. See generally *Blystone v. Pennsylvania*, 494 U.S. 299, 318-22 (1990) (Brennan, J., dissenting). See also BILL MEMORANDUM, *supra* note 43, at 10.

Murders occasionally will involve more than one of the aggravating factors that define first-degree murder. For example, an offender who intentionally kills a police officer during the commission of an armed robbery would be guilty of first degree murder under two different provisions of the statute.⁴⁰³ If an offender is charged with two separate, concurrent counts⁴⁰⁴ of first-degree murder, the trial judge is required to submit every such count to the guilt-phase jury.⁴⁰⁵ This procedure is required because the sentencing jury is allowed to consider only those aggravating factors based on the definition of first-degree murder that have been proven beyond a reasonable doubt at the guilt-phase trial.⁴⁰⁶ At the penalty trial, "the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence

A decision by the jury with respect to the initial step in the decision making process is not determinative of the jury's determination as to whether to impose a death sentence. Each juror must not only weigh all relevant evidence; they must make the ultimate reasoned moral choice as to whether the defendant shall be sentenced to death.

Id.

403. See N.Y. PENAL LAW § 125.27(1)(a)(i), (vii) (McKinney Supp. 1996).

404. "Concurrent counts" means two or more counts of an indictment upon which concurrent sentences only may be imposed in case of conviction thereon." N.Y. CRIM. PROC. LAW § 300.30(3) (McKinney 1993). A concurrent count is to be distinguished from a consecutive count in an indictment. "Consecutive counts" means two or more counts of an indictment upon which consecutive sentences may be imposed in case of conviction thereon." *Id.* § 300.30(2). A murder involving a single victim, based on alternative provisions of the first-degree murder statute, could not result in consecutive sentences, and hence would involve concurrent counts in an indictment. See N.Y. CRIM. PROC. § 300.30 commentary (McKinney 1993).

405. See *id.* § 300.40(3) (McKinney Supp. 1996).

406. See *id.* § 400.27(3). See also *id.* § 300.40 (Practice Commentaries, McKinney Supp. 1996):

The rationale for [the amendment requiring the court to submit all concurrent counts of first-degree murder to the jury] is that each of the concurrent counts would allege a different aggravating circumstance—i.e., a separate crime—founded upon the basic element of intentional killing . . . and, under the statutory structure for determining whether the sentence shall be death or life imprisonment without parole, the jury cannot consider any of the aggravating circumstances set forth in the various subdivisions of the murder in the first degree statute unless it has found the defendant guilty thereof in the guilt phase.

N.Y. CRIM. PROC. § 300.40 (Practice Commentaries, McKinney Supp. 1996).

of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed. . . ."⁴⁰⁷

This provision is likely to cause confusion and may prejudice the defendant. Jurors justifiably will wonder why they are being asked to consider separate and multiple sentences for the offender's murder of a single victim. In the above example, the jury will be instructed to impose one sentence based on the defendant's conviction for the murder of a police officer, after considering the aggravating sentencing factors involving the killing of a police officer and the commission of a murder during a robbery. The jury will be instructed to impose another sentence for the same killing, based on the defendant's conviction for murder perpetrated during a robbery, and it will consider the same aggravating sentencing factors involving the killing of a police officer and the commission of a murder during a robbery. These sentences are, and will appear to be, cumulative. The jury well may infer that the law ordains that the defendant deserves multiple punishments, based on the peculiar requirement that it return separate sentences of death or LWOP for different counts of the same killing.

A jury's determination that an offender should be sentenced to death or life imprisonment without parole is binding on the court,⁴⁰⁸ although the trial judge may set aside a death sentence for reasons specified under law.⁴⁰⁹ When a trial judge

407. N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney Supp. 1996).

408. *Id.* § 400.27(11)(d),(e).

409. *Id.* § 400.27(11)(d). This provision authorizes the trial judge to set aside a death sentence "upon any of the grounds set forth in [N.Y. Crim. Proc. Law] section 330.30." The latter section permits a judge to set aside or modify a verdict on the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

2. That during the trial there occurred, out of the presence of the court, improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or

3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

N.Y. CRIM. PROC. LAW § 330.30 (McKinney 1994).

sets aside a death sentence, the ordinary relief granted is a new sentencing hearing, although under appropriate circumstances the death sentence can be vacated, and a lesser sentence entered.⁴¹⁰ The prosecution may appeal a judge's decision to set aside a death sentence,⁴¹¹ and the defendant likewise may appeal from the judge's refusal to do so.⁴¹² Either party is entitled to poll the jury regarding its sentencing verdict.⁴¹³

6. *The (Partial) Exclusion of Mentally Retarded Offenders*

I would prefer a much tighter bill on the issue of retardation.

—Assemblyman James Brennan⁴¹⁴

Both substantively and procedurally, the death penalty statute's treatment of mentally retarded offenders smacks of compromise. Most, but not all, first-degree murderers who demonstrate that they were mentally retarded when they committed their crimes are excluded from death-penalty eligibility.⁴¹⁵ The statutory exemption does not apply when a state or local correctional employee is murdered by a mentally retarded defendant who is confined in a correctional facility.⁴¹⁶ The stat-

410. N.Y. CRIM. PROC. LAW § 400.27(11)(d) (McKinney Supp. 1996). *See id.* § 330.50(1) (McKinney 1994):

Upon setting aside or modifying a verdict or a part thereof upon a ground specified in subdivision one of section 330.30, the court must take the same action as the appropriate appellate court would be required to take upon reversing or modifying a judgment upon the particular ground in issue.

Id.

411. *Id.* §§ 400.27(11)(d), 450.80(3) (McKinney Supp. 1996).

412. *Id.* § 450.70(4). Professor Preiser's Practice Commentary suggests that "it is difficult to understand the rationale for" allowing the defendant to appeal from the trial judge's decision to refuse to set aside a death sentence, "since the defendant will automatically be appealing the entire judgment, including of course the sentence, and such review cannot be waived." N.Y. CRIM. PROC. LAW § 400.27 commentary (McKinney 1996).

413. N.Y. CRIM. PROC. LAW § 400.27(11)(f) (McKinney Supp. 1996).

414. Assembly Debate, *supra* note 1, at 286.

415. N.Y. CRIM. PROC. LAW § 400.27(12)(c),(e) (McKinney Supp. 1996). Subject to the exception discussed below, mentally retarded first-degree murderers are sentenced by the trial judge to a regular life sentence or to life imprisonment without parole. *Id.*

416. *Id.* § 400.27(12)(d). This section provides:

In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was

ute's dual, and in some respects mystifying, procedures that govern proof of mental retardation also reflect the back-stage differences of opinion that eventually gave birth to these provisions.

The federal Constitution does not prohibit the execution of mentally retarded persons convicted of capital murder.⁴¹⁷ By statute, at least ten other states and the federal government exempt mentally retarded offenders from death penalty eligibility.⁴¹⁸ New York's policy of partial exclusion is unique. In all other jurisdictions mental retardation either is an absolute bar to capital punishment, or it simply is a factor to be considered in possible mitigation of punishment.

The presumed justification for New York's policy is to protect correctional employees from the threat of murder by mentally retarded prisoners.⁴¹⁹ It is unclear whether incapacitated

confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing . . . shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

Id.

Since N.Y. Penal Law § 125.27(1)(a)(iii) applies when the intended murder victim was an employee of a state correctional institution or a local correctional facility (engaged in the performance of official duties, and whom the defendant knew or reasonably should have known was so employed), a mentally retarded offender technically could be executed for killing someone other than a correctional employee. See *supra* note 65. See generally *supra* notes 75-77 and accompanying text (discussing first-degree murder under the above-cited statutory provision).

417. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court ruled by vote of 5-4 that the Eighth and Fourteenth Amendments do not prohibit the execution of a convicted murderer whose IQ was "between 50 and 63, which indicated mild to moderate retardation." *Id.* at 307-08 (footnote omitted). At the same time, the Court acknowledged the common law prohibition against the execution of "idiots" and "lunatics" which was effective when the Eighth Amendment was adopted, and suggested "that it may indeed be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions." *Id.* at 333.

418. 18 U.S.C. § 3596(c) (Supp. 1995); 21 U.S.C. § 848(1) (Supp. 1995); ARK. CODE ANN. § 5-4-618(b) (Michie 1993); COLO. REV. STAT. § 16-9-403 (Supp. 1995); GA. CODE ANN. § 17-7-131(j) (1990); IND. CODE ANN. § 35-50-2-9(a) (Michie Supp. 1995); KAN. STAT. ANN. § 21-4623(d) (Supp. 1994); KY. REV. STAT. ANN. § 532.140 (Michie Supp. 1995); MD. ANN. CODE art. 27, § 412(f) (Supp. 1995); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 1994); TENN. CODE ANN. § 39-13-203 (Supp. 1995); WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1996).

419. See Executive Memorandum, *supra* note 12, at 3.

tation, through execution, or general deterrence by the threat of execution is the motivating factor.⁴²⁰ Nor is it evident why only correctional employees and not other prisoners or visitors to correctional facilities merit the protection that this section presumably affords. It is further puzzling why mentally retarded pretrial detainees, who may be in jail awaiting trial on minor charges, and long-term prisoners who are mentally retarded are equally eligible for the death penalty under this section. But what is most troublesome about this provision is that it is squarely at odds with the fundamental reason justifying the general exclusion of mentally retarded offenders from capital-punishment eligibility: their diminished moral responsibility or culpability, which is attributable to greatly subnormal mental capabilities.⁴²¹ The following colloquy that transpired during the Assembly debate of the death penalty bill exposes this problem.

MR. BRENNAN: Can you explain to me the distinction between or the rationale for—if we have someone who is mentally retarded and we determine that they are mentally retarded in one circumstance, they can be executed, but in another circumstance, they cannot be executed?

MR. VITALIANO: . . . [T]he fact that a person who is mentally retarded commits murder while serving a sentence in a correctional institution has established a greater propensity or

To protect the lives of correctional employees, and of other inmates, the bill stipulates that a sentence of death may not be set aside on the ground that the defendant is mentally retarded if the murder was committed while the defendant was under custody in a State or local correctional facility.

Id. The Governor's memorandum errs when it suggests that mentally retarded prisoners or jail inmates who murder someone other than a correctional employee (e.g., another inmate) are eligible for the death penalty under this section.

420. "Incapacitation is the effect of isolating an identified offender from the larger society, thereby preventing him or her from committing crimes in that society." DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (emphasis in original). Incapacitation, or isolation, differs from general deterrence. General deterrence is "defined in a legal context as an instance where an individual refrains from a criminal act or somehow limits its commission because of fear that otherwise someone will be legally punished." Jack Gibbs, *Preventive Effects of Capital Punishment Other than Deterrence*, 14 CRIM. L. BULL. 34, 36 (1978).

421. See generally *Penry v. Lynaugh*, 492 U.S. 302, 343-48 (1989) (Brennan, J., dissenting); John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 743-46 (1988).

danger to correctional officers, thereby making that mentally retarded defendant eligible for prosecution under the provisions of the death penalty bill—

MR. BRENNAN: You're saying that the rationale is that the defendant is more culpable in a case where they are already in a correctional facility than if they are not, is that correct?

MR. VITALIANO: I don't think the—"culpable" really isn't what subsection D is after . . . Subsection D is after the threat to correctional service personnel.

MR. BRENNAN: I see. In other words, we're trying to protect—the issue is not really related to the capacity of the defendant or the culpability of the defendant, it's a distinction involving seeking to protect correction officers, as compared to all other citizens?

MR. VITALIANO: Based on the circumstances of that particular case, where there is a mentally retarded defendant incarcerated in a correctional facility, that is something that elevates the concern, and the threat exists to correctional personnel is what motivates this particular subdivision . . . ⁴²²

This troublesome provision is rarely likely to come into play, but if and when it does, it harbors obvious equal protection concerns.⁴²³ The Supreme Court has ruled that mental retardation is not a suspect or quasi-suspect classification requiring more exacting scrutiny than normally is accorded social and economic legislation, under the rational basis test.⁴²⁴ However, the classification created under New York's death penalty statute is not between mentally retarded and non-mentally retarded offenders, but between incarcerated mentally retarded murderers whose intended victims are corrections employees, and all other mentally retarded murderers. This classification

422. Assembly Debate, *supra* note 1, at 277-78 (remarks of Assemblymen James Brennan and Eric Vitaliano). Mr. Vitaliano was the principal sponsor of the bill in the Assembly.

423. More fundamental arguments could be raised regarding whether any mentally retarded offender can be executed, under the state constitution's cruel and unusual punishments and due process clauses. *Cf. Hall v. State*, 614 So. 2d 473, 479-81 (Fla.), (Barkett, C.J., dissenting), *cert. denied*, 114 S. Ct. 109 (1993) (arguing that the execution of mentally retarded murderers violates the Florida Constitution's prohibition against cruel or unusual punishments); *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989) (holding that the Georgia Constitution's cruel and unusual punishments clause prohibits the execution of mentally retarded offenders).

424. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

can be justified only if it is first assumed that the general exemption of mentally retarded murderers from death penalty eligibility is not based on a legislative judgment that mentally retarded individuals lack sufficient culpability to be punished by death. Surely, none would argue that capital punishment should be imposed on a morally irresponsible agent, even though other utilitarian goals, such as the protection of corrections employees, might be promoted by using the capital sanction.⁴²⁵

A second assumption that must be indulged is that capital punishment for this narrow class of mentally retarded offenders in fact does promote the protection of corrections employees. For this assumption to hold, it must be accepted that mentally retarded prisoners or jail inmates can be deterred from murdering corrections employees by the threat of capital punish-

425. The death penalty cannot be used to promote the utilitarian objectives of punishment unless the prior judgment is made that the offender is sufficiently culpable to deserve to be punished by death. For example, in *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court ruled that the death penalty is per se unconstitutional for the crime of the rape of an adult. Justice White's plurality opinion observed that: "Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so." *Id.* at 592 n.4 (plurality opinion). This same principle causes it to be unthinkable to make the death penalty available for an offense such as double-parking, even though executing motorists who double park well might deter the commission of that offense, and would incapacitate violators. A threshold level of culpability is a prerequisite for the death penalty even among those convicted of murder. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (death penalty is cruel and unusual punishment for offender who was 15 years old when he committed murder, at least absent legislation specifically authorizing capital punishment for such youthful defendants); *Enmund v. Florida*, 458 U.S. 782 (1982) (offender convicted of felony murder not eligible for capital punishment when he was a minor participant in the underlying felony, and did not intend to kill, attempt to kill, or actually kill the homicide victims).

In this same vein, consider the remarks of Assemblyman Edward Sullivan during the legislative debate on New York's death penalty bill:

We know that a retarded person will be executed if that person, half in control of himself, kills in a prison, then we can say, "Well, we don't know what to do with you. We don't know how to handle you. So, we'll kill you. We know you didn't know what you were doing, but we'll kill you anyway because we don't know what else to do, and it might cost money if we don't. Of course, it will cost more money to do it, but—"

Assembly Debate, *supra* note 1, at 456-57.

ment,⁴²⁶ or else that once they commit such a murder, their execution is justifiable to incapacitate them, i.e., to ensure that they will not kill another corrections employee. It further must be postulated either that nonincarcerated mentally retarded individuals are not deterrable, or are not in need of incapacitation by capital punishment, or that the class of victims—corrections employees—deserves special protection that is not owed police officers, witnesses, judges, prospective torture-murder victims or rape-murder victims, or any other citizen who might be the victim of a first-degree murder committed by a mentally retarded individual. Only a rational basis test strained to the breaking point will allow this classification to survive an equal protection challenge.

The statute defines “mental retardation” as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.”⁴²⁷ This definition is consistent with the standard adopted by the American Association on Mental Retardation.⁴²⁸ The defendant must prove his or her mental re-

426. *But see* BILL MEMORANDUM, *supra* note 43, at 12 (“Public opinion data indicate that 82% of New Yorkers oppose the execution of the mentally retarded. The retribution and deterrence rationales which underly support for the death penalty also have little if any force when applied to an individual who is mentally retarded.”).

427. N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney Supp. 1996). The Assembly Codes Committee Bill Memorandum elaborates on this definition, as follows:

With a slight modification, the universally accepted definition of mental retardation established by the American Association on Mental Retardation (AAMR) is used for determining mental retardation under the statute. Under that definition, “mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen. This definition differs from the AAMR definition only in that the AAMR definition specifies that mental retardation must be manifested during the developmental period. Pursuant to AAMR standards, an individual is mentally retarded when they [sic] have an intelligence quotient below 75, their [sic] mental disability exists concurrently with behavioral difficulties, and their [sic] disability occurred before the age of eighteen.

BILL MEMORANDUM, *supra* note 43, at 12.

428. Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, func-

tardation by a preponderance of the evidence,⁴²⁹ and the trial judge determines whether this burden has been satisfied.⁴³⁰ If the trial judge declines to find that the defendant is mentally retarded, the sentencing jury still is entitled to consider mental retardation as a mitigating factor.⁴³¹

Alternative procedures are available for deciding whether a defendant is mentally retarded. The first option requires the judge to conduct a hearing after the offender has been convicted of first-degree murder, and before the penalty trial commences, upon the defendant's motion and a showing of reasonable cause to believe the defendant is mentally retarded. This hearing is to be held before the court alone, or, on the consent of both parties, it may be conducted in whole or in part in the presence of the sentencing jury. The court is the finder of fact, but does not announce at the conclusion of the hearing whether or not the offender is mentally retarded. Instead, the judge is required to "defer rendering any finding . . . as to whether the defendant is mentally retarded until a sentence is imposed" ⁴³²

The sentencing hearing then is conducted, and the jury may consider evidence of the defendant's mental retardation as

tional academics, leisure, and work. Mental retardation manifests before age 18.

AMERICAN ASSOCIATION ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (9th ed. 1992).

If an individual scores in or below the range of 70-75 on a standardized IQ test, the first prong of the definition of mental retardation—that involving "significantly subaverage intellectual functioning"—generally is considered to be satisfied. *Id.* at 25. For a helpful discussion of the meaning of mental retardation, see James W. Ellis, *Decisions By and For People with Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 VILL. L. REV. 1779, 1780-82 & nn.2-7 (1992). See also Heidi A. Boyden, Comment, *Heller v. Doe: Denying Equal Protection to the Mentally Retarded*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 437, 453-55 & nn.133-44 (1995).

429. N.Y. CRIM. PROC. LAW § 400.27(12)(a) (McKinney Supp. 1996). New York's law is consistent with the laws of most other jurisdictions in requiring the defendant to establish mental retardation by a preponderance of the evidence. See *Dimensions of Capital Murder*, *supra* note 23, at 413.

430. N.Y. CRIM. PROC. LAW § 400.27(12)(a) (McKinney Supp. 1996). In most jurisdictions that exclude mentally retarded offenders from death-penalty eligibility, the trial judge, rather than the jury determines whether the defendant is mentally retarded. However, in Georgia, the jury must return a verdict that the offender is guilty but mentally retarded. GA. CODE ANN. § 17-7-131(j) (1990). See *Dimensions of Capital Murder*, *supra* note 23, at 413.

431. N.Y. CRIM. PROC. LAW § 400.27(12)(d) (McKinney Supp. 1996).

432. *Id.* § 400.27(12)(a).

a mitigating circumstance.⁴³³ If the jury does not sentence the offender to death, the mental retardation issue presumably is moot, and the judge enters no finding.⁴³⁴ The trial court does announce its finding regarding the offender's mental retardation if the jury sentences the defendant to death. An affirmative finding results in the death sentence being set aside, and the judge imposes a sentence of either LWOP or regular life. The court simply accepts the jury's death penalty verdict if it finds that the defendant is not mentally retarded.⁴³⁵ The defendant presumably is entitled to include the trial judge's adverse finding about mental retardation with other appeal issues. The prosecution is not authorized to appeal a trial court's finding that the defendant is mentally retarded under these procedures.⁴³⁶

The procedures have a surreal quality about them. Under other circumstances, this quality would be intriguing, but in this context the procedures also are unusually detrimental to the administration of justice. One byproduct of the procedures is tremendous inefficiency. The potential disillusionment of jurors is another. Unnecessary emotional trauma for all parties to the proceeding is another. Unless the parties agree to their presence, the jurors will be required to sit idly for a substantial period of time between the guilt-phase and the penalty-phase trials while a hearing on the offender's mental retardation is conducted.⁴³⁷ Alternate jurors cannot be discharged,⁴³⁸ and the jury may be sequestered.⁴³⁹ Then, even if the judge is convinced that the evidence of the offender's mental retardation is overwhelming, the judge is precluded from making such a finding. A protracted sentencing hearing will ensue.

433. *Id.* § 400.27(9)(b).

434. *Id.* § 400.27(12)(b).

435. *Id.* § 400.27(12)(c).

436. Compare *id.* § 400.27(2)(f) (authorizing prosecutor's appeal of trial court's finding that defendant is mentally retarded under alternative procedures). See *infra* note 439 and accompanying text.

437. The hearing on mental retardation may be lengthy and involved. See Denis Keyes & William Edwards, *Documenting Mental Retardation by Thorough Investigation*, CAPITAL REPORT 1, No. 42, May/June 1995, at 1 (describing documentation of mental retardation in context of a capital case).

438. N.Y. CRIM. PROC. LAW § 270.30(2).

439. *Id.* § 270.55.

Jurors will anguish over the appropriate sentence to impose,⁴⁴⁰ and counsel, the defendant, and relatives of the defendant and of the murder victim will experience similar emotional upheaval.⁴⁴¹ Of course, the entire penalty-phase trial and deliberations may be completely unnecessary, since the trial judge will know whether he or she is prepared to find that the defendant is mentally retarded. It is as if the offender were only seventeen years old, and too young to be sentenced to death under New York law, yet the judge waited until after the penalty trial and the jury's sentencing verdict to disclose that fact.⁴⁴²

Under the alternative procedures provided by the statute, the mental retardation hearing can be conducted, and the issue resolved, on the defendant's written, pretrial motion.⁴⁴³ If the judge finds that the defendant is mentally retarded, the prosecution has the right to an interlocutory appeal to the Appellate Division, and the appeal is to be decided on an expedited basis

440. Capital trials are extremely stressful to jurors, because they are entrusted with the responsibility of deciding whether another human being should live or die. See Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333 (1993). See generally Tori DeAngelis, *Juror Stress Can Influence Final Verdict*, AM. PSYCHOL. ASS'N MONITOR, June, 1995, at 5-6; Theodore B. Feldmann & Roger A. Bell, *Crisis Debriefing of a Jury After a Murder Trial*, 42 HOSP. & COMMUNITY PSYCHIATRY 79 (1991).

441. See generally Margaret Vandiver, *Coping with Death: Families of the Terminally Ill, Homicide Victims and Condemned Prisoners*, in FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 123 (Michael L. Radelet ed., 1989).

442. See Harvy Lipman, *Death Penalty Looks Like Done Deal*, TIMES UNION (Albany, NY), Feb. 16, 1995, at A1, A12 (remarks of Jonathan Gradess, Executive Director of the New York State Defenders Association). See also Harvy Lipman, *Senate Republicans Put Democrats on the Spot by Passing a Bill to Restore State's Death Penalty*, TIMES UNION (Albany, N.Y.), Feb. 28, 1995, at A1, A16:

"If a judge has already heard evidence and decided a person is mentally retarded, why spend all this money on a sentencing trial, have the jury sentence someone to death, and then have the judge say, 'Fooled ya, he's mentally retarded?'" said Ron Tabak, president of New York Lawyers Against the Death Penalty. Tabak added that the "... approach is unfair, because judges would face enormous pressure not to rule someone is mentally retarded after a jury has issued its verdict."

Id.

443. N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney Supp. 1996). The motion must be filed "at a reasonable time prior to the commencement of trial," and it must allege "reasonable cause to believe the defendant is mentally retarded. . . ."

Id.

"so that pretrial delays are minimized."⁴⁴⁴ If the finding on the defendant's mental retardation is not appealed, or if it is affirmed on appeal, then no separate penalty trial is conducted following a conviction for first-degree murder, and the defendant must be sentenced to a regular life prison sentence or LWOP. If the trial judge finds that the defendant is not mentally retarded, the case proceeds to trial. The defendant may present mitigating evidence concerning his or her alleged mental retardation at the penalty trial following a conviction for first-degree murder.⁴⁴⁵ These procedures are infinitely more rational than the alternative ones, which apparently were designed to provide the prosecution with the right to appeal a trial court's finding of mental retardation in cases in which a jury's sentence of death is set aside on that basis.⁴⁴⁶

C. *The Capital Jury*

Assemblyman Nick Perry: I am concerned that the death qualification process might disproportionately exclude women and certain racial, ethnic groups from serving on juries. Are there provisions in this bill to guard against that?⁴⁴⁷

Assemblyman Eric Vitaliano: Yes, Nick. The bill guards against the situation you've described in a number of ways, including extensive jury selection provisions and the impaneling of a new jury in extraordinary circumstances. But more importantly, current

444. *Id.* § 400.27(12)(f). See also N.Y. Ct. Appeals Proposed Uniform Procedures for Appeals from Pretrial Findings of Mental Retardation in Capital Cases §§ 540.0-540.1; 1100.1-1100-3 (Sept. 15, 1995).

445. N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney Supp. 1996).

446. *Id.* §§ 450.20(10); 450.80(4). See Executive Memorandum, *supra* note 12, at 3.

As an alternative, a hearing regarding mental retardation can be held after a defendant is convicted. In that case, the hearing would be held either prior to, or contemporaneously with, the separate sentencing proceeding. To preserve the prosecution's right to take an appeal directly to the Court of Appeals a determination regarding mental retardation would only be made if the jury votes to impose the death penalty. If the jury does so and the court determines that the defendant is mentally retarded, the court must set aside the death sentence and impose a sentence of life imprisonment without parole or a sentence with a minimum term of from 20 to 25 years and a maximum term of life imprisonment.

Id.

447. Assembly Debate, *supra* note 1, at 17.

law protects against such discrimination and our Court of Appeals has so held.⁴⁴⁸

....

Assemblywoman Barbara Clark: [This] bill . . . [has] the potential to disproportionately imperil people of color by a factor of four, a multiple that is not diminished one bit by the Alice in Wonderland idea that private screening of potential death-penalty jurors will compel those jurors to admit any and all racial bias and, therefore, prevent a conviction based on color.⁴⁴⁹

The statute requires that jurors must be both "death-qualified" and "life-qualified" in order to serve in cases where "[t]he crime charged may be punishable by death."⁴⁵⁰ Specifically, a prospective juror may be challenged for cause in a capital case whenever he or she:

entertains such conscientious opinions either against or in favor of [the death penalty] . . . as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law in the determination of sentence.⁴⁵¹

As a practical matter, the number of prospective jurors who hold very strong views against the death penalty, and are not death-qualified, will exceed the number whose very strong pro-death penalty attitudes render them not life-qualified (*i.e.*, impaired from giving a defendant charged with capital murder a fair trial on guilt or innocence, or impaired from considering a sentence other than death).⁴⁵² Estimates vary regarding the sizes of the respective groups of excludable jurors and are some-

448. *Id.*

449. *Id.* at 155.

450. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney Supp. 1996). The unique provisions regarding capital juries certainly will apply only in first-degree murder cases in which the prosecution has filed the required notice of intention to seek a capital sentence, even though all cases of first-degree murder, in theory, "may be punishable by death." *See id.* § 250.40(2). "A notice of intent to seek the death penalty may be withdrawn at any time," even after a defendant's conviction for first-degree murder. *Id.* §§ 250.40(4), 400.27(1). This feature raises the possibility of abuse of capital sentencing provisions by prosecutors who perceive benefits in impaneling a death-qualified jury, but who have no intention of requesting a death sentence on the defendant's conviction for first-degree murder. *See Lockhart v. McCree*, 476 U.S. 162, 188 n.4 (1986) (Marshall, J., dissenting).

451. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney Supp. 1996).

452. *See, e.g., Morgan v. Illinois*, 504 U.S. 719 (1992). There, the Supreme Court recognized that

what unstable because the legal standards for excusing jurors for cause based on their death penalty attitudes have changed over time,⁴⁵³ and also because Americans' opinions about capital punishment have not remained constant.⁴⁵⁴ No studies have specifically examined prospective jurors in New York. Other re-

[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. . . . [B]ased on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views.

Id. at 729.

453. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Supreme Court ruled in *Witherspoon* that excusing for cause from a capital trial all prospective jurors who had "conscientious scruples" against the death penalty denied the defendant a fair trial on the issue of sentencing. *Id.* In reaching this decision, the justices announced that:

nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. at 522 n.21 (emphasis in original). Years later, in *Wainwright v. Witt*, the Court explicitly modified *Witherspoon's* death-qualification standard. 469 U.S. 412 (1985). Under *Witt*, the "standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Additionally, under the *Witt* test the grounds for disqualifying a prospective juror no longer have to be "unmistakably clear," as *Witherspoon* had required. *Witt*, 469 U.S. at 424. A juror may be excluded under *Witt* if the trial judge "is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426.

The *Witt* standard permits the disqualification of a larger class of prospective jurors than does application of the *Witherspoon* test, and the results of research on the effects of death qualification are affected by which legal standard has been employed. See Craig Haney et al., "Modern" *Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619 (1994); William C. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, 13 LAW & HUM. BEHAV. 185 (1989).

454. See Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113 (Robert M. Bohm ed., 1991); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 20 (1994) (reporting results of public opinion about capital punishment over time, including that roughly 47% of Americans supported the death pen-

search suggests that between 8.4% and 17% of citizens eligible for jury duty are not death qualified,⁴⁵⁵ and between 1% and 8.6% are not life-qualified.⁴⁵⁶

Not surprisingly, systematically disqualifying individuals from jury service based on their death penalty views (or rather, how those views impinge on their willingness to follow the law) changes the demographic composition of capital juries, and also can influence the decision of cases. Death qualification skews both the racial and gender composition of capital juries. As a group, African-Americans express dramatically less support for the death penalty than do whites, and women support capital punishment at measurably lower levels than men.⁴⁵⁷ Consequently, death-qualified juries tend to underrepresent African-Americans and women compared to their prevalence in the corresponding community.⁴⁵⁸

alty in 1967, compared with 70-75% who supported the death penalty in the 1980s through the mid-1990s).

455. See Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 42 (1984) (17.2% of respondents not death qualified); Haney et al., *supra* note 453, at 624-25 (8.4% of respondents not death qualified under Witt standard); Thompson, *supra* note 453, at 209 (11% to 17% of respondents not death qualified); Grigsby v. Mabry, 569 F. Supp. 1273, 1308 (E.D. Ark. 1983), *aff'd in part en banc* 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986) (over 14% of Arkansas respondents not death qualified); Lockhart v. McCree, 476 U.S. 162, 187 & n.3 (1986) (Marshall, J., dissenting) (estimating 11%-17% of potential jurors are not death qualified, and citing studies).

456. See Grigsby v. Mabry, 569 F. Supp. 1273, 1307-08 (E.D. Ark. 1983), *aff'd in part en banc* 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986) (reviewing studies suggesting that less than 1% to 2% of respondents are "automatic death penalty" jurors, or are not life qualified); Joseph B. Kadane, *After Hovey: A Note On Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115, 116 (1984) (1% of respondents not life qualified); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 274-76 (1988) (1% of respondents not life qualified); Haney et al., *supra* note 453, at 625 (8.6% of respondents not life qualified).

457. See Ellsworth & Gross, *supra* note 454, at 21-22 (presenting table that reflects roughly 50%-60% of African-Americans favor death penalty, compared to roughly 75%-80% of whites, and that men (roughly 80%) support the death penalty more than do women (roughly 70%)); James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 518-19 (1990-1991).

458. See Fitzgerald & Ellsworth, *supra* note 455, at 46. ("Blacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%). Similarly, our data confirm the finding that death qualification removes more women than men from capital juries (21% vs. 13%)."); Grigsby v. Mabry, 569

Research studies further suggest that death-qualified juries are more conviction-prone than juries whose membership has not been affected by the death-qualification process.⁴⁵⁹ People with strong views against capital punishment tend to hold other attitudes about the criminal justice system that are relevant to the tasks they would confront as jurors.⁴⁶⁰ Thus, prospective jurors who are not death-qualified generally put greater stock in the presumption of innocence than do death-qualified jurors, are less likely to infer guilt from the defendant's failure to testify at trial, are less willing to accept the testimony of police officers uncritically, define proof beyond a reasonable doubt at a higher threshold, evaluate aggravating and mitigating evidence differently, and harbor other views that directly bear on the assessment of evidence at a criminal trial.⁴⁶¹ Death-qualified juries tend to deliberate for less time, discuss the evidence presented less extensively, and are more apt to convict defendants and find them guilty of more serious charges, than are juries that have not been death-qualified.⁴⁶²

F. Supp. 1273, 1294 (E.D. Ark. 1983), *aff'd in part en banc*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986). Research completed for this litigation reflected that

forty-five percent of Arkansas blacks indicated that they were strongly opposed [to capital punishment] compared to 10% of the whites. Twenty-one percent of Arkansas women were strongly opposed compared to 8% of the men. . . . [E]ven after excluding "nullifiers" [jurors unable to decide guilt or innocence fairly because of their death penalty views] 29% of the blacks would never impose the death penalty compared to 9% of the whites. And whereas only 8% of Arkansas men would be *Witherspoon* excludables (after removing "nullifiers"), 13% of Arkansas women would fall into that classification. These results are consistent with national surveys over the past 30 years.

Id. A more recent study, which took account of a larger segment of individuals who would be excluded from capital jury service because of their strong pro-death penalty views, as well as those who would be excluded because of their opposition to capital punishment, also found that the disqualification process disproportionately excluded minority group members. See Haney et al., *supra* note 453, at 629-30.

459. See *Grigsby*, 569 F. Supp. at 1294.

460. See *id.*

461. See Cowan et al., *The Effect of Death Qualification on Jurors' Predisposition to Convict and On the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984).

462. See *Lockhart v. McCree*, 476 U.S. 162, 199-202 (1986) (Marshall, J., dissenting); *Grigsby v. Mabry*, 569 F. Supp. 1273, 1287-1305 (E.D. Ark. 1983) (reviewing studies), *aff'd in part en banc*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986); Cowan et al., *supra* note 461, at 53;

After reluctantly assuming the validity of such research findings in *Lockhart v. McCree*,⁴⁶³ the Supreme Court rejected a claim by a capital-murder defendant that he was denied his rights to an impartial jury, and to a jury selected from a representative cross-section of the community, as a result of the death-qualification of his jury. McCree had been convicted of capital murder, but he was not sentenced to death.⁴⁶⁴ He argued that it was unfair to excuse from the *guilt* phase of his trial those prospective jurors whose attitudes about capital punishment would preclude them from *sentencing* him to death, but who nevertheless were capable of deciding his guilt or innocence impartially.⁴⁶⁵ The unnecessary death-qualification of jurors for

Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984); Fitzgerald & Ellsworth, *supra* note 455; Haney et al., *supra* note 453; William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984).

463. 476 U.S. 162 (1986). Justice Rehnquist's majority opinion took pains "to point out what we believe to be several serious flaws in the evidence . . . [regarding] the conclusion that 'death qualification' produces 'conviction-prone' juries." *Id.* at 168 (footnote omitted). After criticizing the research studies, the Court nevertheless agreed to "assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries." *Id.* at 173. For an assessment of the Court's criticisms of the social science evidence regarding death qualification, see Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177, 189-205 (Kenneth C. Haas & James A. Inciardi eds. 1988). See generally James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 LAW & SOC'Y REV. 65, 76 n.9 (1993)[hereinafter *Different Agenda*].

464. See *Lockhart v. McCree*, 476 U.S. 162, 166 (1986). Because the prosecutor had sought the death penalty, the trial jury was death qualified. Eight prospective jurors were excused for cause because they did not meet death-qualification standards. *Id.*

465. See *Lockhart*, 476 U.S. at 167. Potential jurors whose strong anti-death penalty views render them ineligible for jury service under *Witherspoon v. Illinois*, or *Wainwright v. Witt* are generally known as "Witherspoon Excludables" or "Witt Excludables," or simply as WE's. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985); see *supra* note 453. The Witt Excludables, in turn, are comprised of two different groups. "Nullifiers" have such strong beliefs against capital punishment that they could not in good conscience vote to convict a defendant for a capital crime, since that conviction could result in a sentence of death. See *Lockhart*, 476 U.S. at 172. "Guilt Phase Includables" (GPI's), on the other hand, are capable of rendering a fair and impartial verdict at the guilt phase of a capital trial, but could not vote to sentence a defendant to death and

guilt-phase proceedings, he asserted, had resulted in a conviction-prone jury, and a jury that did not reflect a fair cross-section of the community.⁴⁶⁶ Relying in part on the state's significant interest in not having to impanel two juries in capital cases that resulted in first-degree murder convictions—one to determine guilt (which would not be death-qualified), and a second to impose sentence (which would be death-qualified)⁴⁶⁷—a majority of the Court ruled that the death-qualification process violated none of McCree's Sixth Amendment rights to a jury trial.⁴⁶⁸

Whether guilt-phase juries in first-degree murder trials should be subjected to the death-qualification process is an especially interesting issue under New York law. The statute expressly contemplates that separate juries can be impaneled for the guilt-phase and penalty trials in first-degree murder cases, although "only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party."⁴⁶⁹ It also requires that after a jury has convicted a defendant of first-degree murder, and before the penalty trial commences, the trial judge must individually examine each juror outside of the presence of other jurors, in order to "determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the

hence could not be impartial jurors for a penalty trial. See *Wainwright v. Witt*, 469 U.S. at 421. McCree's argument focused solely on the exclusion of Guilt Phase Includable jurors during the guilt-determination stage of his capital trial. See *Lockhart*, 476 U.S. at 172. He did not argue that Nullifiers could not be discharged from the guilt-phase trial, nor that Witt Excludables could not be discharged if and when the jury was asked to decide whether he, as a convicted capital defendant, should be sentenced to death. See *Lockhart*, 476 U.S. at 170 n.7.

466. See *Lockhart*, 476 U.S. at 168.

467. The Court recognized "the State's entirely proper interest in obtaining a single jury that could impartially decide all the issues in McCree's case." *Lockhart*, 476 U.S. at 180. It acknowledged that the guilt and sentencing decisions often are interrelated, and it suggested that any "residual doubt" that the jury maintained about guilt might work to the defendant's benefit at sentencing. It also noted that impaneling separate guilt-phase and sentencing-phase juries would require the duplication of much testimony. See *id.* at 181. In dissent, Justice Marshall characterized the state interests based on "efficient trial management" as being "merely unconvincing," and the interest based on the issue of residual doubt as being "offensive." *Id.* at 204 (Marshall, J., dissenting).

468. See *id.* at 162.

469. N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney Supp. 1996).

[sentencing] proceeding.”⁴⁷⁰ Any juror failing this test must be discharged and replaced by an alternate juror.⁴⁷¹ The law authorizes the trial court to seat as many alternate jurors as it deems appropriate, a significant departure from the maximum of six alternate jurors that may be chosen in other criminal cases.⁴⁷²

These provisions reflect that the Legislature perceived no overriding interest in ensuring that the same twelve jurors who decide guilt in a first-degree murder trial must also decide the defendant’s sentence. Whatever interest exists in retaining identical guilt-phase and sentencing-phase juries yields under the statute whenever a prospective penalty-phase juror has a state of mind at the conclusion of the guilt trial that is “likely to preclude” that individual from rendering an impartial sentencing decision.⁴⁷³ This principle meshes neatly with the defendant’s position in *Lockhart v. McCree*.⁴⁷⁴ In that case, the defendant argued that a juror who is capable of impartially deciding guilt or innocence at a capital trial need not be disqualified until the penalty hearing if his or her views about capital punishment would preclude an impartial sentencing decision.⁴⁷⁵

470. *Id.* See BILL MEMORANDUM, *supra* note 43, at 6.

It is envisioned that in most cases, the jurors who sat at the guilt phase of the trial will remain at the sentencing phase. A juror might be replaced if the juror became grossly unqualified for further service, had legally improper contact during the guilt phase proceedings or was otherwise legally barred from continuing. However, a juror’s reluctance or discomfort with performing the weighty duty of determining whether the death penalty should be imposed should not be grounds for replacing that juror with an alternate juror.

Id.

471. See N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney Supp. 1996).

472. See *id.* § 270.30(1). Alternate jurors are not to be discharged until the completion of the sentencing proceeding in first-degree murder cases in which capital punishment is sought. See *id.* § 270.30(2).

473. N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney Supp. 1996). Trial judges will have to exercise great caution in applying this standard. The removal of jurors who have a “state of mind that is likely to preclude” them from rendering an impartial sentencing decision, (*id.* § 400.27(2)), would be improper when applied against jurors who express reservations about imposing a death sentence, unless their views would “prevent or substantially impair” their ability to render a sentencing decision under the law. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). See *supra* note 453.

474. 476 U.S. 162 (1986).

475. *Id.*

Consistent with this principle, the defendant's interests in securing an impartial guilt-phase jury that reflects a fair cross-section of the community should take priority over the objective of having the same twelve jurors decide guilt and punishment. It is simple enough, and requires no duplication of testimony or other administrative costs, to replace nondeath-qualified guilt-phase jurors with death-qualified alternate jurors for a sentencing hearing, if and when a penalty trial is necessary in a first-degree murder trial.⁴⁷⁶

The argument against death-qualifying a guilt-phase jury under the statute is especially compelling in light of New York's strong tradition of protecting the right of trial by jury. In language that is even more unyielding than the Sixth Amendment's guarantee,⁴⁷⁷ the New York Constitution promises that "[t]rial by jury . . . shall remain inviolate forever."⁴⁷⁸ Moreover,

476. See Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 57 (1982).

[C]apital cases constitute a relatively small number of criminal trials. Moreover, the number of these cases in which a penalty determination will be necessary is even smaller. A penalty determination will occur only where a verdict on guilt has been returned that authorizes the possible imposition of capital punishment, and only where the prosecutor decides that a death penalty should be sought. Even in cases in which a penalty determination will occur, the impaneling of a new penalty jury may not always be necessary. In some cases, it may be possible to have alternate jurors replace any "automatic life imprisonment" jurors who served at the guilt determination trial.

Id. See also *Grisby v. McCree*, 758 F.2d 226, 243 (8th Cir. 1985) (*en banc*), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986); *Lockhart v. McCree*, 476 U.S. 162, 204-05 (1986) (Marshall, J., dissenting).

477. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

478. N.Y. CONST. art. I, § 2. "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. . . . [A] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death. . . ." *Id.* See generally Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J. L. & POL'Y 161, 203-10 (1995). Different state court judges have opined that the death qualification of capital jurors violates state constitutional provisions, although such a view has not prevailed in any court. See *State v. Ramseur*, 524 A.2d 188, 345-48 (N.J. 1987) (Handler, J., dissenting); *State v. Avery*, 261 S.E.2d 803, 811-12 (N.C. 1980) (Exum, J., dissenting) *State v. Young*, 853 P.2d 327, 388-93 (Utah 1993) (Durham, J., dissenting). See also James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1350-53 (1989)[hereinafter *State Constitutions*].

jury service is a "‘privilege[] of citizenship’ secured to the citizens of this State by Article I, § 1 of the State Constitution."⁴⁷⁹ Since death qualification predictably will exclude African-Americans and other minority-group citizens disproportionately from jury service,⁴⁸⁰ the unnecessary removal of guilt-phase jurors because of their death penalty views may also compromise the rights of potential jurors.

The distorting effects of the death-qualification process can be magnified by the use of peremptory challenges. The prosecution and defense are each afforded twenty peremptory challenges under New York law.⁴⁸¹ Both sides can be expected to use their peremptory challenges against prospective jurors who express strong views about the death penalty, but who nevertheless survive death qualification.⁴⁸² The combined toll taken by challenges for cause and peremptory challenges may result in a jury that is virtually purged of minority group representation.⁴⁸³

Elsewhere, the jury-selection procedures in the statute directly address the issue of race. The statute permits individualized and sequestered voir dire,⁴⁸⁴ a process which is critically important to help avoid some of the biasing effects of death qualification,⁴⁸⁵ and which is intended to encourage potential ju-

479. *People v. Kern*, 75 N.Y.2d 638, 651, 554 N.E.2d 1235, 1242, 555 N.Y.S.2d 647, 654 (1990). The New York Constitution provides: "No person shall be denied the equal protection of the laws of the state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights. . . ." N.Y. CONST. art. I, § 11.

480. See *supra* notes 457-58 and accompanying text.

481. See N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1993).

482. See generally *Gray v. Mississippi*, 481 U.S. 648, 667-68 (1987) (describing prosecutor's exercise of peremptory challenges in a capital trial).

483. See generally Winick, *supra* note 476, at 53-55; S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 741-44 (1995); F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Link*, 62 IND. L.J. 295, 323 (1986-1987).

484. See N.Y. CRIM. PROC. LAW § 270.16(1) (McKinney Supp. 1996). The option of individualized, sequestered voir dire is available on motion of either party. See *id.*

485. See *Review of Statutes*, *supra* note 376, at 157-58.

[P]rospective jurors . . . may be impressed by the link between anti-death penalty views and dismissal from jury service. From this association, they are apt to infer the judge's and, more generally, the law's disapproval of those who are reluctant to use capital punishment. The resulting assump-

rors to express themselves candidly on sensitive issues relevant to their qualifications to serve on a capital jury.⁴⁸⁶ "Each party shall be afforded a fair opportunity to question a prospective juror as to any unexplored matter affecting his or her qualifications, including without limitation the possibility of racial bias on the part of the prospective juror."⁴⁸⁷ In a special effort to encourage candid exchanges the statute authorizes the court to direct that the record of the individualized voir dire proceedings be sealed, for good cause shown, on the motion of either party.⁴⁸⁸

D. *Defense Counsel, the Prosecution, and Their Resources*

1. *Defense Counsel and Assistance for the Defense*

I suspect very strongly that there is probably not a bill in America that provides any more enhanced protection for the defendant as far as the defense attorney than this bill does.

—Senator Dale Volker⁴⁸⁹

tion . . . may be that the death penalty is the preferred punishment for murder. Additionally, repetitive questioning about attitudes toward punishment, which is inevitable during a group voir dire involving death qualification, conveys the message that choosing between a sentence of death and life imprisonment will be the trial jurors' principal duty. This focus on sentencing choices can subtly, yet powerfully, undermine the presumption of innocence by suggesting that the accused's guilt is a foregone conclusion and will not seriously be in dispute at the trial.

Id. (footnotes omitted). See Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984).

486. See *Review of Statutes*, *supra* note 376, at 158.

487. N.Y. CRIM. PROC. LAW § 270.16(1) (McKinney Supp. 1996). The Supreme Court has recognized that capital defendants charged with interracial crimes have a constitutional right to have prospective jurors advised of the alleged murder victim's race, and to have potential jurors questioned on the issue of racial bias during the voir dire. *Turner v. Murray*, 476 U.S. 28 (1986) (plurality decision).

488. See N.Y. CRIM. PROC. LAW § 270.16(2) (McKinney Supp. 1996). This provision has raised objections on First Amendment and public trial grounds. Harvey Lipman, *Death Penalty May Shackle Press, Attorney Says*, TIMES UNION (Albany, N.Y.), March 9, 1995, at B-4. The principal sponsor of the death penalty bill in the State Senate, Senator Dale Volker, took great pains to emphasize that the provision authorizing the sealing of the record of the voir dire process would be appropriate only to advance a compelling government interest, such as the protection of a juror, would require a narrowly drawn court order, and would require the trial judge to consider and reject less drastic alternatives. Senate Debate, *supra* note 13, at 1842-43.

489. Senate Debate, *supra* note 13, at 1841.

For 18 years on the floor of this House, the sponsors have told us that there would be adequate counsel provided, but today . . . after we have promised a right to counsel of adequate scope and duration, what we get is a bill that does not provide a paid lawyer up to the time of execution. . . . What we get today is a bill that does not provide appointed counsel for filing a federal habeas or for litigating a federal habeas.

All that this bill does today is to pay for trial counsel, appellate counsel and one round of post-conviction representation. . . .

So the promise of 18 years of a team defense, the historical importance of having an adequate number of lawyers for these cases to handle the complexity of them, that promise is also broken today. . . .

We don't provide skilled lawyers for competency proceedings and this bill does not provide counsel for clemency.

In sum, Mr. Speaker, what this bill does is fundamentally lie on the promise that a State-paid lawyer will stand beside poor people as long as this state decided to try someone and put them to death. . . .

—Assemblyman Roberto Ramirez⁴⁹⁰

Life hangs in the balance in capital prosecutions. In no other context should defense lawyers be more diligent in preparing their cases, or more vigorous in advocating on behalf of their clients. Yet, throughout the country, the representation provided defendants on trial for their lives too often has fallen short of the adversarial ideal. Defense lawyers in capital trials have come to court without ever having read the governing death-penalty statute.⁴⁹¹ They have conducted their representation while intoxicated and have fallen asleep in mid-trial.⁴⁹² Sometimes they have interviewed no witnesses, raised no defenses,⁴⁹³ or put on no mitigation evidence.⁴⁹⁴ Some are hope-

490. Assembly Debate, *supra* note 1, at 170-72.

491. See Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 246 (1990-91); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1842 & n.49, 1843 & n.54 (1994); Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30; Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. LAW & SOC. CHANGE 797, 803-04 (1986).

492. See Bright, *supra* note 491, at 1843 & n.53.

493. See Berger, *supra* note 491, at 249; Tabak, *supra* note 491, at 805.

lessly inexperienced or ill-prepared for and overwhelmed by the demands of trying a capital case.⁴⁹⁵

Systemic factors have a direct bearing on the quality of legal assistance provided capital defendants. Death-penalty litigation is complex and time-consuming.⁴⁹⁶ It can wreak havoc with the other demands of a law practice.⁴⁹⁷ Good lawyers are difficult to recruit. Compensation can be woefully inadequate.⁴⁹⁸ Skilled counsel may have little incentive to become involved with capital cases. Defendants can and do pay with their lives for the errors and omissions of counsel.⁴⁹⁹ An extensive report completed by the American Bar Association concluded that "the inadequacy and inadequate compensation of counsel at trial" is one of the "principal failings of the capital punishment systems in the states today."⁵⁰⁰

494. See Berger, *supra* note 491, at 247-49; Bright, *supra* note 491, at 1837; Tabak, *supra* note 491, at 805-06; Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 346-52.

495. See Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE L. REV. 1, 18-19 (1994) (Bellacosa is an Associate Judge of the New York Court of Appeals); Bright, *supra* note 491, at 1856, 1860; Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 52-56 (1992); Tabak, *supra* note 491, at 801.

496. See, e.g., *Sochor v. Florida*, 504 U.S. 527, 554 (1992) (Scalia, J., concurring) (characterizing the complexity of Supreme Court's death penalty jurisprudence as "byzantine"); *Murray v. Giarratano*, 492 U.S. 1, 27 (1989) (Stevens, J., dissenting) (calling Court's capital punishment doctrine "extremely complex"); Friedman & Stevenson, *supra* note 495, at 3-4 & n.16, 8-15; Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986). See generally Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); White, *supra* note 494.

497. See Bright, *supra* note 491, at 1855; Friedman & Stevenson, *supra* note 495, at 26-27, 30.

498. See Bellacosa, *supra* note 495, at 13-15 (discussing compensation rates for capital defense attorneys in several states, and suggesting that "[t]hese statistics reinforce the adage that 'capital punishment is for them who have no capital.'"); Bright, *supra* note 491, at 1853-55, 1867-68; Coyle et al, *supra* note 491; Friedman & Stevenson, *supra* note 495, at 21-26, 40-52; Tabak, *supra* note 491, at 801-03; Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

499. See Berger, *supra* note 491, at 248, 251-52; Bright, *supra* note 491, at 1839-40, 1859-60; Friedman & Stevenson, *supra* note 495, at 32-37; White, *supra* note 494, at 325-29.

500. American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases* 40 AM. U. L. REV. 1, 16 (1990). See also Bright, *supra* note 491, at 1842 n.48 (collecting references).

New York's death penalty legislation in many respects adopts ambitious systemic measures designed to avoid problems that have accompanied the appointment of counsel for capital defendants in other jurisdictions. The statute creates a Capital Defender Office (CDO), which is governed by a three-member Board of Directors.⁵⁰¹ The Board of Directors appoints the Capital Defender, who in turn is authorized (in consultation with the Board), to hire Deputy Capital Defenders, investigators, and staff as "necessary to effectuate the purposes of" the CDO,⁵⁰² subject to funding appropriations.⁵⁰³

The CDO performs numerous functions. It is authorized to provide direct representation of defendants who are or become "financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services"⁵⁰⁴ in potential capital cases. The statute authorizes the appointment of counsel whenever a defendant is charged with first-degree murder, or when a defendant is charged with second-degree murder "and the district attorney confirms upon inquiry by the court that the district attorney is undertaking an investigation to determine whether the defendant can or should be charged with"

501. See N.Y. JUD. LAW § 35-b(3) (McKinney Supp. 1996). Each member of the Board of Directors serves a three-year term. See *id.* One member is appointed by the Chief Judge of the New York Court of Appeals, one is appointed by the majority leader (the Temporary President) of the State Senate, and one is appointed by the Speaker of the Assembly. See *id.* Judges, prosecutors, and attorneys employed in a law enforcement capacity are excluded from Board membership. See *id.* Some members of the Legislature expressed concern about the political nature of this process of appointment. See Assembly Debate *supra* note 1, at 172-73 (remarks of Assemblyman Roberto Ramirez); *id.* at 409-10 (remarks of Assemblywoman Barbara Clark). In 1995, Chief Judge Judith Kaye appointed Arthur Liman to the Board of Directors of the Capital Defender Office, Senator Joseph Bruno appointed John Dunne, and Assemblyman Sheldon Silver appointed Christopher Stone.

502. N.Y. JUD. LAW § 35-b(4)(a). The present acting Capital Defender is Kevin Doyle.

503. See *id.* § 35-b(4).

504. *Id.* § 35-b(1).

Whenever it appears that a defendant is financially able to obtain adequate representation or investigative, expert or other such services, or to make partial payment for such representation or other services, counsel shall inform the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the capital defender office or the state.

Id. § 35-b(10).

first-degree murder, "and the court determines that there is a reasonable likelihood the defendant will be so charged. . . ." ⁵⁰⁵ The district attorney must notify the CDO whenever a defendant is charged with first-degree or second-degree murder, "by telephone, facsimile, E-mail, or other prompt electronic means" ⁵⁰⁶ The legislative history of the statute emphasizes the need for "early entry and prompt representation" ⁵⁰⁷ of defendants in potentially capital cases, and stresses that district attorneys must notify the Capital Defender "without delay" ⁵⁰⁸ whenever a first-degree or second-degree murder charge is filed. The CDO may provide, or arrange to provide, temporary legal representation to a defendant charged with first-degree murder, or with second-degree murder when the court has determined there is a reasonable likelihood that first-degree murder will be charged, if appointment of counsel has not yet occurred. ⁵⁰⁹

Although the CDO is authorized to represent defendants in potential capital cases, the CDO is not designed to be the exclusive direct provider of legal representation. The statute identifies two additional primary options for capital defense representation. ⁵¹⁰ First, the CDO has the power to enter into agreements with legal aid societies, public defenders' offices, and other not-for-profit organizations, for those entities to represent capital defendants. ⁵¹¹ Second, two attorneys—one "lead"

505. *Id.* § 35-b(1).

506. N.Y. JUD. LAW § 35-b(6)(c). The prompt electronic notification must be followed by notification by first-class mail within two business days of the charge. However, "[t]he failure to give notice shall not affect the validity of any indictment, conviction, judgment or order." *Id.*

507. BILL MEMORANDUM, *supra* note 43, at 18.

508. *Id.*

509. *See* N.Y. JUD. LAW § 35-b(7). "Any temporary representation . . . shall cease upon the court's appointment of an attorney" *Id.*

510. *See id.* § 35-b(2), 35-b(4)(b)(vi).

511. *See id.* § 35-b(4)(b)(vi). The CDO may terminate such agreements on serving 60 days notice. *See id.* It is authorized to require reports related to the agreements, and to monitor compliance with the terms of the agreements. *See id.* No entity which enters into an agreement with the CDO to represent capital defendants may be "the exclusive provider of counsel within such society's, public defender's or organization's jurisdiction." *Id.* "It is expected that staff lawyers representing capital defendants through such offices will be at least equivalent in skill, competence, and judgment to private lawyers approved by the CDO." BILL MEMORANDUM, *supra* note 43, at 18.

and one "associate" counsel—may be appointed from a list of counsel qualified to serve in capital cases.⁵¹²

The CDO plays a major role in identifying attorneys who are eligible for appointment under the latter option. In consultation with the Administrative Board of the Judicial Conference (the Chief Judge of the Court of Appeals and the Presiding Justices of the Appellate Divisions of the state's four judicial departments),⁵¹³ the CDO proposes minimum standards for lead and associate counsel in capital cases,⁵¹⁴ which must be approved by the Court of Appeals.⁵¹⁵ Additionally, four-member screening panels are established within each judicial department to create and maintain a roster of attorneys qualified to serve as lead and associate counsel in capital cases.⁵¹⁶ The Board of Directors of the CDO appoints two members of each screening panel, and the Presiding Justice of the judicial department appoints the two others.⁵¹⁷ In consultation with the Administrative Board of the Judicial Conference, and subject to the approval of the Court of Appeals, each screening panel establishes and updates a schedule of fees for the compensation of appointed counsel in capital cases.⁵¹⁸

Fee schedules shall be promulgated and approved after reviewing the rates of compensation generally paid in the department to attorneys with substantial experience in the representation of defendants charged with murder or other serious felonies and shall

512. See N.Y. JUD. LAW § 35-b(2).

513. See *id.* § 214 (McKinney 1983).

514. See *id.* § 35-b(4)(b)(iv) (McKinney Supp. 1996). "In determining the minimum standards," the CDO and the Administrative Board of the Judicial Conference are instructed to "consider among other factors both the needs of the state for an adequate number of attorneys to represent defendants in capital cases and the needs of defendants in capital cases for competent counsel." *Id.*

515. See *id.* The Court of Appeals has promulgated a set of Proposed Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases, and has distributed them for public comment. (Copy on file with the author.)

516. See N.Y. JUD. LAW § 35-b(5)(a). The CDO, in consultation with the Administrative Board of the Judicial Conference, is required to implement regulations to ensure that attorneys who qualify for inclusion on such rosters and who wish to provide representation in capital cases "are given fair opportunity to receive such appointments." *Id.*

517. See *id.*

518. See N.Y. JUD. LAW § 35-b(5)(a).

be adequate to ensure that qualified attorneys are available to represent defendants eligible to receive counsel.⁵¹⁹

When a judge appoints lead and associate counsel from the roster of qualified attorneys, a selection is made from one of four proposed teams of lawyers submitted by the CDO.⁵²⁰ The CDO need not submit a list of teams for the judge's consideration if it has entered into an agreement with a legal aid society, public defender's office, or other organization for any of those groups' representation of capital defendants.⁵²¹ With the CDO's consent, that office itself can be appointed to represent defendants in potentially capital cases.⁵²² If representation is not provided through any of these alternatives, and if none of the attorneys from the roster are available, the court is authorized to appoint "an attorney eligible for appointment pursuant to article eight-

519. *Id.* Adequate compensation is crucial to ensure that qualified counsel will engage in the representation of defendants charged with capital crimes. See *supra* notes 490-500 and accompanying text. "It is expected that, due to the complexity and difficult nature of first degree murder cases, rates and fees paid to defense counsel in capital cases will be substantially higher than those paid when lesser offenses are charged." BILL MEMORANDUM, *supra* note 43, at 19. The general fee standard quoted in the text is more equivocal than the standard included in previous death penalty bills considered and passed by the Legislature. See N.Y.S. 200, N.Y.A. 305, 214th Sess. (1991), proposed N.Y. County Law § 722-g(5):

Notwithstanding the rate and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys pursuant to this section . . . at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.

Id. (quoted in James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 616 (1990)).

520. See N.Y. JUD. LAW § 35-b(2) (McKinney Supp. 1996). "At least one of the proposed teams of qualified lead and associate counsel on any list submitted . . . shall regularly practice within the judicial department in which the defendant has been charged." *Id.* This provision makes clear that the trial judge is not limited to considering counsel who regularly practice within the judicial department in which the trial is conducted. See *id.* The statute further provides that, "[i]n the event that counsel is not appointed pursuant to the foregoing provisions . . . , the court may appoint any attorney whose name appears on a roster established pursuant to [the statute] . . . for appointment as lead or associate counsel." *Id.*

521. See *id.*

522. See *id.*

een-B of the county law, who is competent to represent defendants charged with murder and other serious felonies.”⁵²³

The CDO is invested with other statutory duties in addition to its direct representation of capital defendants. It provides legal advice and back-up assistance,⁵²⁴ as well as investigative, expert and related services to other appointed counsel in capital cases.⁵²⁵ It provides continuing legal education and training for attorneys who represent or who may represent defendants in capital cases.⁵²⁶ Through the statutory provisions for prompt notification of the CDO when an individual is charged with a crime that is or may be defined as first-degree murder,⁵²⁷ authorization of the CDO to provide temporary representation to such defendants in the early stages of a prosecution,⁵²⁸ involvement of the CDO in the appointment process and in the development of reasonable fee structures and standards for attorneys who represent defendants in capital cases,⁵²⁹ and through the assignment of the CDO to assist, educate, and train lawyers who engage in capital defense work,⁵³⁰ the statute makes the Capital Defender Office the critical hub for the state’s system of providing legal representation to indigent capital defendants.

Defendants qualifying for court-appointed counsel under the statute are entitled to pretrial and trial representation, and to representation on appeal in cases resulting in a sentence of death.⁵³¹ They are also entitled to counsel appointed under the special death penalty provisions on an initial post-conviction motion to vacate judgment or set aside a death sentence, and on the appeal of such motion.⁵³² The Court of Appeals appoints counsel for the original appeal and the appeal of a post-conviction motion.⁵³³ The trial court assigns counsel in connection

523. N.Y. JUD. LAW §35-b(2). See also N.Y. COUNTY LAW §§ 722 *et seq.* (McKinney 1991) (Article 18-B of the County Law, as referred to in the text).

524. See N.Y. JUD. LAW § 35-b(4)(b)(ii) (McKinney Supp. 1996).

525. See *id.* § 35-b(4)(b)(iii).

526. See *id.* § 35-b(4)(b)(v).

527. See *id.* § 35-b(6)(a). See BILL MEMORANDUM, *supra* note 43, at 10.

528. See N.Y. JUD. LAW § 35-b(7) (McKinney Supp. 1996).

529. See *id.* § 35-b(5)(a).

530. See *id.* § 35-b(4)(b)(v).

531. See *id.* §35-b(1).

532. See *id.*

533. See *id.* § 35-b(2).

with the motion itself.⁵³⁴ The unique qualification requirements and compensation rates for attorneys in capital cases continue to govern.⁵³⁵ The statute directs the Court of Appeals to appoint only lead counsel to appeal from a judgment including a sentence of death, but, "for good cause shown,"⁵³⁶ the Court may appoint associate counsel for the appeal. "With respect to an initial [post-conviction] motion . . . and any appeal therefrom, the appropriate court shall assign lead counsel only."⁵³⁷

No legal representation of indigents is authorized under the death penalty provisions beyond the appeal of an initial post-conviction motion.⁵³⁸ Assistance is specifically denied for the preparation, filing, or appeal of writs of federal habeas corpus.⁵³⁹ Legal assistance is not available for second or subsequent post-conviction challenges to conviction or sentence,⁵⁴⁰ for raising the issue of a prisoner's incompetency to be executed,⁵⁴¹ or for clemency petitions.⁵⁴² This policy marks a significant departure from earlier death penalty bills which had passed in the Legislature, only to be vetoed, in which indigent capital defendants were guaranteed the assistance of counsel at all stages of a capital case through execution.⁵⁴³ The enacted legislation ap-

534. See N.Y. JUD. LAW § 35-b(2).

535. See *id.* § 35-b(5)(a) (qualification requirements and fee schedules apply to the appointment of all counsel "pursuant to the provisions of this section").

536. *Id.* § 35-b(2).

537. *Id.*

538. See *id.* § 35(b)(12).

539. See *id.*

540. See N.Y. JUD. LAW § 35(b)(12). See also *Murray v. Giarratano*, 492 U.S. 1 (1989). In this case, the Supreme Court ruled that capital defendants have no federal constitutional right to court-appointed counsel to pursue state post-conviction challenges to their convictions or sentences. *Id.* at 10.

541. See N.Y. JUD. LAW § 35-b(12) (McKinney Supp. 1996). See *infra* notes 746-49 and accompanying text.

542. See N.Y. JUD. LAW § 35-b(12). See *infra* note 792 and accompanying text.

543. See, e.g., N.Y.S. 200, N.Y.A. 305, 214th Sess. (1991), proposed N.Y. COUNTY LAW § 722-g(1), *quoted in Policy Perspectives, supra* note 4, at 615. This proposed legislation provided that in all first degree murder cases:

[A] defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either (a) prior to judgment, or (b) after entry of a judgment imposing a sentence of death but before the execution of that judgment, shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with . . . this section.

Id.

parently denies counsel beyond the appeal of the first post-conviction motion for different reasons. First is the premise that defendants who are provided with high-quality representation for their trial, their appeal, and their first post-conviction motion will have less need for representation at subsequent stages.⁵⁴⁴ Second is a concern for the cost of providing continuing representation.⁵⁴⁵

The legislative history acknowledges that this statute does not limit the courts' inherent discretion, or its authority under other statutes, to appoint counsel to represent capital defendants at stages not covered in the new death penalty legislation, or to appoint a greater number of lawyers for trial, appellate, and post-conviction litigation than is provided under the death penalty provisions.⁵⁴⁶ Specifically, the principal sponsor of the death penalty bill in the Assembly, Assemblyman Eric Vitaliano, clarified during the debate on the bill that "the bill's prohibition on the assignment of counsel in successive 440 [post-conviction] motions refers to assignments made under the new Section 35(b) of the Judiciary Law. It is not intended to

544. See generally Senate Debate, *supra* note 13, at 1931.

545. See *id.* at 1932. A colloquy between Senators Catherine Abate and Dale Volker during debate of the death penalty bill is revealing.

SENATOR ABATE: But it is my understanding that this bill represents a critical departure from the former Volker-Graber bill, which provided assigned counsel from arraignment all the way to the Supreme Court. . . . [W]ritten in the bill was assignment of counsel through the entire appeal process. Why today does the bill represent a departure from the bill that passed this floor for the past 18 years?

SENATOR VOLKER: [O]ne of the things that we tried to make sure in this bill—and it's true that the bill we sponsored many years ago before all the changes occurred could have been interpreted . . . to say that a counsel could represent a person all the way to the Supreme Court of the United States, but the feeling was that the primary representation of that person should be in the trial phase, in the appeal to the Court of Appeals and the motions after that, and that what we are giving that defendant is the best possible representation, and that there is no saying that he won't get representation after that but that we are giving that person an enormous amount of—if you want to call it high-paid talent or whatever in setting up the process, . . . and that that is certainly sufficient, I think, under the circumstances to get that person to appoint where he or she has certainly been able to plead their case. After that, they certainly have the right to go on from there, but the feeling was that the State should not be—should not be mandated to pay the kind of costs that are being paid up to that point.

Id. at 1930-32.

546. See Assembly Debate, *supra* note 1, at 18-19.

impair the court's existing discretionary authority to assign counsel under County Law Article 722-b."⁵⁴⁷ Senator Volker, the principal sponsor of the bill in the Senate, alluded to the same alternative statutory authority for the appointment of counsel to capital defendants on second or subsequent post-conviction motions.⁵⁴⁸ Additionally, in response to a question about whether "the court's discretionary authority to appoint the number of lawyers it deems appropriate to fit any particular case" was altered by the bill,⁵⁴⁹ Assemblyman Vitaliano affirmed that, "the courts of this State have exercised the inherent authority to appoint counsel under the State and Federal Constitutions since the time we were a British colony, and nothing in this bill interferes with that authority. It remains inherent and plenary."⁵⁵⁰

Although Congress continues to consider reforms in federal habeas corpus law, indigent state defendants sentenced to death presently enjoy a federal statutory right to court-appointed counsel for pursuing federal habeas corpus relief.⁵⁵¹ Attorneys appointed under this statute must meet minimum

547. *Id.* at 18. See also BILL MEMORANDUM, *supra* note 43, at 18.

New York courts have the inherent power to appoint compensated counsel. This legislation provides explicit additional statutory authorization to appoint counsel in capital cases. At the same time, it does not restrict a court's inherent authority to appoint counsel. Thus, for example, the provisions of Article 18-b of the County Law would continue to apply with respect to any motion for which counsel could not be appointed under the Capital Defender statute.

Id.

548. See generally Senate Debate, *supra* note 13, at 1928.

SENATOR ABATE: Other than those—that motion appeal and the direct appeal to the Court of Appeals, it's my understanding that no attorney will be assigned in addition to these two procedures.

SENATOR VOLKER: No, it's not true. What you are talking about is that under the—under this bill, this represents, of course, a difference in the law now. After the appeal and the motion and the appeal to that motion, then you would revert back to the 18 B section so that—in other words, the defendant then, if he wanted to go further. Remember, we're going to the Court of Appeals. He has the right to that.

Id.

549. Assembly Debate, *supra* note 1, at 18 (remarks of Assemblyman Richard Brodsky).

550. *Id.* at 18-19 (remarks of Assemblyman Eric Vitaliano).

551. See 21 U.S.C.A. § 848(q)(4)(B) (West Supp. 1995). See generally *McFarland v. Scott*, 114 S. Ct. 2568 (1994).

qualifications that do not include any experience or expertise in death penalty law.⁵⁵² Nevertheless, as long as the federal legislation remains intact, the New York statute's failure to provide court-appointed counsel at state expense will not leave indigent death-row defendants without legal assistance in federal habeas corpus proceedings.⁵⁵³ The same cannot necessarily be said about other crucial litigation that may be required, including successor state post-conviction motions,⁵⁵⁴ raising the issue

552. See 21 U.S.C.A. § 848(q)(6) (West Supp. 1995). "[A]t least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." *Id.*; see Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79, 109-17 (1991) (criticizing the required qualifications as inadequate, and specifically citing the example of New York attorneys "who have practiced exclusively within the state and have no practical experience with the death penalty.") (citation omitted).

553. See 21 U.S.C.A. § 848(q)(4)(B) (West Supp. 1995). The statute provides that:

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys in the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

Id. The counsel provisions of the Anti-Drug Abuse Act, which creates a federal death penalty for defined crimes, are ambiguous concerning the scope of federally financed legal representation for state death row prisoners. Read literally, they seem to create a federal statutory right to counsel for state capital defendants for purposes of federal habeas corpus proceedings, as well as

[E]very subsequent stage of available judicial proceedings, including . . . applications for writs of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and . . . in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Id. The courts have been reluctant to read the statutory right to counsel so expansively. See *Sterling v. Scott*, 57 F.3d 451, 456-58 (5th Cir. 1995); *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993); *In re Lindsey*, 875 F.2d 1502, 1506-07 (11th Cir. 1989).

554. See generally Falk & Cary, *supra* note 478, at 213. "[A] serious challenge could be raised under the state constitution . . . to the denial of assigned counsel to a capital defendant on a subsequent collateral proceeding." *Id.*

[I]t is difficult to see why a capital defendant who has already exhausted his one collateral proceeding should be denied counsel subsequently to raise, for example, a well-founded claim of newly discovered evidence. Certainly an argument could be made . . . that the failure to provide a capital defendant with counsel in such a situation violates the state constitution.

of the defendant's competence to be executed,⁵⁵⁵ and pursuing executive clemency.⁵⁵⁶ It surely is inadequate to suggest that high-quality lawyering at the front stages of capital prosecutions will completely obviate the need for legal representation at these latter stages,⁵⁵⁷ or that volunteer lawyers will fill the void by coming forward on behalf of unrepresented death-row prisoners.⁵⁵⁸ Nor does denying counsel to condemned prisoners seem defensible as a cost-saving measure.⁵⁵⁹

Without adequate funding, the statute's elaborate provisions regarding the creation of the CDO and the appointment of counsel cannot be effective. Several legislators expressed concern during the debate on the death penalty that there were no assurances that sufficient funds would be appropriated to make the counsel provisions meaningful.⁵⁶⁰ An appropriation of \$750,000 for the CDO was made to cover start-up costs between the passage of the bill and its September 1, 1995 effectiveness

Id. at 214. *But see supra* note 545 and accompanying text.

555. *See* N.Y. CORRECT. LAW § 656(2), (3) (McKinney Supp. 1996). Under the provisions of the law that govern competency proceedings, a condemned prisoner is not entitled to court-appointed counsel until after a petition has been filed alleging the prisoner's incompetency for execution, which must be supported by the affidavit of a psychiatrist or a psychologist rendering the opinion that the defendant is incompetent. *Id.* *See infra* notes 746-49 and accompanying text.

556. *See infra* note 797 and accompanying text. *See generally* Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993).

557. *See supra* notes 544-45 and accompanying text.

558. Senate Debate, *supra* note 13, at 1901-03, 1928-30 (remarks of Senator Dale Volker).

559. *See supra* note 545 and accompanying text. *See also* Senate Debate, *supra* note 13 at 1929 (remarks of Senator Dale Volker).

In fact, one of the reasons that we're a little careful (regarding assigned counsel), very honestly . . . is that we are well aware of what some of the law firms in New York City have been doing in some of the southern states in piling on cases and motions, and so forth, and making a lot of money with motions that in some cases could be considered to be some rather spurious motions in delaying these cases forever.

Id.

560. *See* Senate Debate, *supra* note 13, at 1958-59 (remarks of Senator Emanuel Gold); *id.* at 2011 (remarks of Senator Martin Solomon); Assembly Debate, *supra* note 1, at 130, 415 (remarks of Assemblywoman Susan John); *id.* at 173-74 (remarks of Assemblyman Roberto Ramirez); *id.* at 239 (remarks of Assemblyman Peter Rivera); *id.* at 373 (remarks of Assemblyman Vito Lopez); *id.* at 406-14 (remarks of Assemblywoman Barbara Clark); *id.* at 445 (remarks of Assemblyman N. Nick Perry).

date,⁵⁶¹ and a total of \$4.5 million was allotted for the entire fiscal year.⁵⁶² Governor Pataki's proposed budget would provide \$7.3 million for the first full year of the CDO's operation.⁵⁶³

Early disagreements surfaced between the Administrative Board of the Courts and the screening panels in three of the four judicial departments regarding the compensation to be paid attorneys appointed to represent capital defendants. The Administrative Board recommended a statewide rate of \$200 per hour for lead counsel and \$175 per hour for associate counsel.⁵⁶⁴ Only the screening panel from the Fourth Department concurred in those proposed rates.⁵⁶⁵ In the Second and Third Departments, the recommended hourly rates for lead and associate counsel were \$250 and \$225 per hour, respectively, and in the First Department, the proposed rates were for \$300 and \$250 per hour.⁵⁶⁶ These figures are in contrast to the \$40 per hour (in-court) and \$25 per hour (out-of-court) fees normally paid appointed counsel in noncapital cases.⁵⁶⁷

Further disagreements emerged about whether associates and paralegals should be paid separately from the lead and associate counsel appointed in capital cases.⁵⁶⁸ The chairman of the Board of Directors of the CDO supported the screening

561. See Daniel Wise, *Pieces Fall in Place for Capital Defender Office*, N.Y. L.J., Aug. 22, 1995, at 1, 2 [hereinafter *Pieces Fall in Place*].

562. See BILL MEMORANDUM, *supra* note 43, at 22; Daniel Wise, *Doubts Emerge Over Death Penalty Costs*, N.Y. L.J., March 17, 1995, at 1, 4 [hereinafter *Doubts Emerge*]; *Pieces Fall in Place*, *supra* note 561, at 1, 2.

563. See Gary Spencer, *Pataki Backs Courts Budget of \$1 Billion: Surcharge on Awards Sought to Fund Increase*, N.Y. L.J., Dec. 18, 1995, at 1, 5.

564. See Daniel Wise, *Proposed Capital Case Fees Diverge Widely*, N.Y. L.J., Jan. 8, 1996, at 1 [hereinafter *Fees Diverge*].

565. See *id.*

566. See *id.* at 2.

567. See *id.*

568. See *Fees Diverge*, *supra* note 564, at 1. The Administrative Board proposed that associates and paralegals not be reimbursed separately from the appointed attorneys. See *id.* at 2. Once again, only the Fourth Department concurred in that recommendation. See *id.* The Third Department's screening panel proposed that the court award fees to associates and paralegals at its discretion. See *id.* The screening panel for the Second Department recommended that associates be paid half of the hourly rate of the attorneys with whom they are working, and that paralegals be paid \$75 per hour. See *id.* The First Department's screening panel proposed that associates be paid between \$75 and \$100 per hour, and that paralegals be paid \$75 per hour. See *id.* See also N.Y. COUNTY LAW § 722-b (McKinney 1991) (fixing hourly compensation rate for assigned counsel in noncapital cases).

panels' proposals, arguing that the requested rates of compensation were "necessary to ensure that the courts will be able to recruit enough lawyers who 'have the skill and zeal to handle capital cases.'"⁵⁶⁹ The New York Court of Appeals ultimately advised the state's four capital defender screening panels that it would approve compensation rates of up to \$175 per hour for lead counsel in capital cases, up to \$150 per hour for associate counsel, and it intimated that paralegals and other staff assisting assigned counsel would be entitled to separate compensation.⁵⁷⁰

The statute further guarantees that defendants in potential capital cases who are financially unable to obtain adequate "investigative, expert and other such reasonably necessary services"⁵⁷¹ are entitled to such assistance. The CDO may help supply these services when alternative counsel are appointed, but it will not always do so.⁵⁷² Provisions are made for *ex parte* proceedings authorizing defense counsel to obtain investigative, expert, or other services.⁵⁷³ Arrangements are included for securing such assistance when time exigencies do not permit prior judicial authorization.⁵⁷⁴ Attorneys may apply to a Justice of the Appellate Division to authorize them to secure the requested assistance if a trial judge does not grant the request.⁵⁷⁵ "[R]easonable fees and expenses" are to be paid for investigative, expert, and other services.⁵⁷⁶

569. *Fees Diverge*, *supra* note 564, at 2 (quoting Mr. Arthur Liman).

570. See Daniel Wise, *Defense Counsel Pay Set for Capital Cases*, N.Y. L.J., June 11, 1996, at 1, 4.

571. N.Y. JUD. LAW § 35-b(1) (McKinney Supp. 1996). For the purposes of this article, potentially capital cases are those in which the defendant has been charged with first-degree murder, or with second-degree murder when the district attorney confirms that his or her office is investigating whether a first-degree murder charge should be filed and the court determines that there is a reasonable likelihood that the defendant will be charged with first-degree murder. See *id.*

572. See *id.* § 35-b(4)(b)(iii).

573. See *id.*

574. See N.Y. JUD. LAW § 35-b(8). Before authorizing counsel to obtain investigative, expert, or other reasonably necessary services, the trial court ordinarily must find in an *ex parte* proceeding that such assistance is "reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentencing." *Id.* However, "[u]pon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision and payment for such services *nunc pro tunc*." *Id.*

575. *Id.*

576. *Id.*

All fees and expenses for counsel and related assistance are paid for by the State, rather than from county revenues.⁵⁷⁷ The system promises to be expensive to administer. All first-degree murder cases and all second-degree murder cases that could be redefined as first-degree murder will have to be treated as potential death-penalty cases until the district attorney definitively excludes the possibility that a death sentence will be sought.⁵⁷⁸ Early notification of the CDO is required under the statute, and early involvement of that office or other qualified counsel is contemplated in all potentially capital cases.⁵⁷⁹ Since the prosecution has until 120 days after arraignment on a first-degree murder indictment to file a notice of intention to seek the death penalty,⁵⁸⁰ many cases ultimately may not amount to capital prosecutions. However, the defense will not be able to gamble that any particular case will be removed from the death-penalty track. Enormous amounts of time and money will be invested by the CDO and other attorneys in all potentially capital cases, even if prosecutors will seek a death sentence in only a fraction of those cases.⁵⁸¹ Defense resources may be spread perilously thin, and the state's budgetary allocations for capital defense representation are likely to be strapped by operation of these charging provisions.⁵⁸²

2. Assistance for Capital Prosecutions

The New York State District Attorneys Association played a particularly significant role in developing the bill. [A]s a result, the bill contains various provisions that are essential to its effectiveness. Among them are the provisions . . . relating to financial

577. See *id.* § 35-b(9). Payment for assigned counsel normally is a county expenditure. See N.Y. COUNTY LAW §§ 722, 722-e (McKinney 1991).

578. See Russell Neufeld, *Problems Defending Under New York's New Death Penalty Law*, 4 J.L. & POL'Y 143, 144-46 (1995).

579. See *supra* notes 506-09 and accompanying text.

580. See *supra* note 174 and accompanying text.

581. See Daniel Wise, *Financial Shortfall Looms For Capital Defender Unit*, N.Y. L.J., Aug. 23, 1995 at 1 [hereinafter *Financial Shortfall*].

582. See Neufeld, *supra* note 578, at 146. See also *Financial Shortfall*, *supra* note 581, at 1. Moreover, representation by the CDO ceases within ten days of the prosecutor determining that a case will not be prosecuted as a capital case. N.Y. JUD. LAW § 35-b(11) (McKinney Supp. 1996). Thus, an established attorney-client relationship between the CDO and a defendant may be disrupted when prosecutors delay in announcing that they will not seek the death penalty in a case. See *Financial Shortfall*, *supra* note 581, at 1.

assistance to District Attorneys to meet the demands of capital cases

Provisions of the bill reflect as well the advice and assistance of the Attorney General, particularly bill section 34, which authorizes the Attorney General upon a proper request to direct that the resources and personnel of the Department of Law be used to assist in the prosecution or appeal of most capital cases in which the death penalty may be imposed

—Governor George Pataki⁵⁸³

There is an obligation incurred by the State of New York to take as a State expense vouchers that are submitted to the State of New York in connection with the prosecution of a death penalty case. There is no similar obligation by the State to pay on vouchers submitted in connection with a life without parole case or another lesser penalty case. It is only in connection with when the death penalty is sought.

—Assemblywoman Susan John⁵⁸⁴

I think that this bill provides every possible economic incentive to allow localities to make the number two murder cases into capital murder cases. It is as much of an incentive as anything we could have possibly done under any possible bill to ensure that we convict and kill people.

—Assemblyman Roberto Ramirez⁵⁸⁵

Capital punishment systems are extremely expensive to maintain. Heightened costs are incurred in capital cases at virtually every stage of the process, owing to factors including the appointment of multiple counsel, who are compensated at higher rates than attorneys in non-capital cases, the extensive litigation of pretrial motions, unusual demands for investigative and expert assistance, protracted jury selection, the need for separate guilt and penalty trials, which are often quite lengthy, comprehensive appellate and post-conviction review, the special conditions of confinement and supervision required for condemned prisoners, and clemency proceedings.⁵⁸⁶ Sys-

583. Executive Memorandum, *supra* note 12, at 5.

584. Assembly Debate, *supra* note 1, at 415.

585. *Id.* at 450.

586. See David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 U. KAN. L. REV. 443, 447-49, 461-62 (1989); Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-*

temic costs are especially high because extraordinary investments must be made in all capital prosecutions, even though only a fraction of those prosecutions may culminate in executions. Not all defendants charged with first-degree murder will be convicted of that offense, juries will not sentence all convicted first-degree murderers to death, and only a minority of those offenders sentenced to death ultimately are likely to be executed.⁵⁸⁷ A penal system with life imprisonment or LWOP as its maximum sanction is far less expensive in the long run than one in which exceptional costs are incurred in a great many cases to produce sporadic executions.⁵⁸⁸

The lion's share of costs in a capital prosecution—costs that will be realized whether or not a death sentence is imposed—typically occur during pretrial proceedings and the trial itself.⁵⁸⁹

Benefit Analysis of the Death Penalty, 23 LOY. L.A. L. REV. 59, 133-38 (1989); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985). See generally RICHARD C. DIETER, MILLIONS MISSENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY 3 (A Report by the Death Penalty Information Center, rev. ed. Fall, 1994).

587. A recent study of the costs of capital punishment in North Carolina projected that approximately 1 in 10 defendants sentenced to death will be executed. Based on that assumption, the authors concluded that "[t]he extra cost per execution of prosecuting a case capitally is more than \$2.16 million." PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 98 (Terry Sanford Institute of Public Policy, Duke University 1993). More generally, the discrepancy between death sentences imposed and executions is well-recognized. For example, California has authorized capital punishment since the late 1970s, and presently has 422 prisoners on death row, yet the state has conducted only two executions through 1995. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 10, 14 (Fall 1995).

From 1977, the year after the Supreme Court upheld the constitutionality of revised state capital punishment laws, to 1993, a total of 4,259 persons entered prison under sentence of death. During the 17 years, 226 persons were executed, and 1,789 were removed from under a death sentence by appellate court decisions and reviews, commutations, or death.

U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: CAPITAL PUNISHMENT 1993, at 9 (Dec. 1994).

588. See COOK & SLAWSON, *supra* note 587; DIETER, *supra* note 586; Spangenberg & Walsh, *supra* note 586; Tabak & Lane, *supra* note 586; Garey, *supra* note 586.

589. COOK & SLAWSON, *supra* note 587, at 99; DIETER, *supra* note 586, at 20-21. See generally N.Y. STATE DEFENDERS ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 19, Table 2 (1982) (estimating, in 1982, that the total defense and prosecution costs for the guilt phase and penalty phase of a capital murder trial in New York would be \$1,498,100).

In many death penalty jurisdictions, these costs are paid at the local or county level, as they are in New York in non-capital cases.⁵⁹⁰ The extraordinary costs of capital trials have left localities in some parts of the country near bankruptcy. Expenditures of hundreds of thousands, or even millions, of dollars for capital murder prosecutions can deplete county budgets, forcing cutbacks in other services,⁵⁹¹ and create a convincing disincentive for prosecutors to seek capital sentences.

New York's death penalty provisions in significant part shift the costs of prosecuting a capital case from individual counties to the State. They further authorize district attorneys to seek assistance from the Attorney General in the prosecution and appeal of capital cases.⁵⁹² A special state relief fund is created to help financially strapped district attorneys seek the death penalty in first-degree murder cases.⁵⁹³ Supporters of these measures view them as balancing the scales in light of the resources devoted to the defense of capital cases.⁵⁹⁴ Critics view them as creating cost-saving incentives for district attorneys to prosecute first-degree murder cases capitally, instead of seeking regular life or LWOP prison sentences.⁵⁹⁵ They also denounce them as unjustifiably squandering precious state resources that otherwise could be devoted to beefed up police forces, education, health care, and other social programs that in their opinion would reap far more handsome dividends to the quality of life in New York, and would promote the fight against crime far more significantly than will capital punishment.⁵⁹⁶

590. *Cf.* N.Y. COUNTY LAW § 706 (McKinney 1991).

591. *See* DIETER, *supra* note 586, at 4-6, 21-23.

592. *See id.*

593. *See id.*

594. *See generally* Executive Memorandum, *supra* note 12, at 4-5; BILL MEMORANDUM, *supra* note 43, at 16.

595. *See* Assembly Debate, *supra* note 1, at 134 (remarks of Assemblywoman Susan John).

596. *See* Assembly Debate, *supra* note 1, at 134 (remarks of Assemblywoman Susan John); *id.* at 447-50 (remarks of Assemblyman Roberto Ramirez); *see* Senate Debate, *supra* note 13, at 1933 (remarks of Senator Catherine Abate); *id.* at 1985 (remarks of Senator Mary Ellen Jones); *id.* at 2004-05 (remarks of Senator Pedro Espada, Jr.). *See generally* Assembly Debate, *supra* note 1, at 63-70 (remarks of Assemblyman Arthur Eve); *id.*, at 104-06, 398 (remarks of Assemblyman Roger Green); *id.* at 112-21 (remarks of Assemblyman Jeffrey Dinowitz); *id.* at 156 (remarks of Assemblywoman Barbara Clark); *id.* at 186-89 (remarks of Assemblyman Gregory Meeks); *id.* at 212-14 (remarks of Assemblyman Scott Stringer); *id.* at

The statute authorizes district attorneys to make *ex parte* application for reimbursement of experts whose services are "reasonably necessary" in capital prosecutions, including issues relating either to guilt or sentencing.⁵⁹⁷ Denials of such requests may be appealed to the Appellate Division.⁵⁹⁸ "Any fee or expense" paid for expert assistance for the prosecution of capital cases "shall be a state charge,"⁵⁹⁹ rather than a cost borne by the county. The statute also creates a "capital prosecution extraordinary assistance program," which distributes state funds to district attorneys for the prosecution of capital cases.⁶⁰⁰ Such monies are released when the Commissioner of the Division for Criminal Justice Services (DCJS) determines, on the basis of a written certification by the applicant district attorney, that due to the nature or number of capital cases being prosecuted by the district attorney a significant financial burden has resulted and financial assistance is necessary . . . to fulfill such district attorney's responsibilities."⁶⁰¹ DCJS also is authorized to arrange for the development of continuing legal education programs, and to contract with an organization to train, advise, and assist district attorneys in the prosecution of capital cases.⁶⁰²

Local prosecutors also may request the assistance of the Attorney General's office with the prosecution or appeal of capital cases, including the use of such resources, services, and personnel as the Attorney General deems appropriate.⁶⁰³ Requests for such assistance are routed through the Governor.⁶⁰⁴ They may

273-74 (remarks of Assemblyman John Murtaugh); *id.* at 321-24 (remarks of Assemblyman Sam Hoyt); *id.* at 365-66 (remarks of Assemblyman Herman Farrell, Jr.).

597. See N.Y. COUNTY LAW § 707(1) (McKinney Supp. 1996). "Upon a finding that timely procurement of such [expert] services could not practicably await prior authorization, the court may authorize the provision and payment for such services *nunc pro tunc*." *Id.*

598. See *id.* § 707(4).

599. *Id.* § 707(3).

600. N.Y. EXEC. LAW § 837-1 (McKinney Supp. 1996).

601. *Id.* This section further provides that funds distributed under the program "shall not be used to supplant existing resources." Funds also may be distributed "to a district attorney who, upon the request of another district attorney, has provided assistance in the prosecution of a capital case." *Id.*

602. See *id.* § 837-a(7).

603. See *id.* § 63-d(1).

604. See *id.*

be granted only when the defendant is represented by counsel appointed under the special provisions of the death penalty legislation (i.e., the CDO, roster attorneys, or an organization contracted by the CDO), or receives expert, investigative, or other services under those provisions,⁶⁰⁵ or when the defendant is represented by privately retained or pro bono counsel, and "is able to marshall substantially greater legal and investigatory resources than those reasonably available to the district attorney."⁶⁰⁶ District attorneys must file a certificate of need with their requests for assistance from the Attorney General, attesting that additional resources or personnel are required for the prosecutor to fulfill his or her responsibilities in the prosecution of a capital case.⁶⁰⁷

The legislature appropriated \$750,000 in start-up costs for prosecution services in capital cases⁶⁰⁸, and an additional \$1.8 million for such purposes during the first fiscal year in which the statute was effective.⁶⁰⁹ The Governor's budget proposed \$3.5 million to support local prosecution of death penalty cases for the fiscal year beginning April 1, 1996.⁶¹⁰ These amounts are substantially less than what some district attorneys have suggested will be necessary for them to cope with the high costs of prosecuting capital cases.⁶¹¹

605. *See id.* § 63-d(1)(i).

606. N.Y. EXEC. LAW § 63-d(1)(ii).

607. *See id.* § 63-d(2).

608. *See Doubts Emerge*, *supra* note 562.

609. *See Pieces Fall in Place*, *supra* note 561.

610. *See Fees Diverge*, *supra* note 564, at 1.

611. *See Doubts Emerge*, *supra* note 562, at 4. Looking at the long term, Brooklyn District Attorney Charles J. Hynes said even the \$5 million to \$15 million range discussed by the Legislature would not be enough. *See id.* Citing estimates that total costs of capital cases could run \$3.5 million per case or higher, he pointed out that in Brooklyn there could be as many as 80 capital cases a year. *See id.* Statewide it has been estimated that as many as 480 of the roughly 2,400 murder cases prosecuted annually involve crimes that would be classified as eligible for capital treatment under the new statute. *See id.* Erie County District Attorney Kevin M. Dillon expressed some concern that additional funding would be allocated, noting that about 5% of his offices' \$8 million budget, which comes from grants designated by individual members of the Legislature, is in "serious jeopardy." *Id.*

E. Appeals and State Post-Conviction Motions

1. The Appeal of Cases Resulting in a Sentence of Death

[A] defendant who has been convicted in a capital case cannot waive his or her appeal. It's not waiveable. So that person with the suicidal bent, "I don't want to appeal," has no choice but to appeal, and when he or she appeals, they're going to get some pretty damn good legal defense, because this bill is stacked to provide legal defense

—Senator Stephen Saland⁶¹²

Judgments involving a sentence of death are appealed directly to the New York Court of Appeals.⁶¹³ Appeals in death penalty cases are mandatory,⁶¹⁴ reflecting the implicit legislative judgment that the state has an interest in ensuring that capital sentences are imposed and executed lawfully,⁶¹⁵ even if a defendant should choose to forego appellate review of his or her

612. Senate Debate, *supra* note 13, at 1880.

613. See N.Y. CRIM. PROC. LAW § 470.30(2) (McKinney Supp. 1996); *id.* § 450.70(1) (McKinney 1994). See also N.Y. CONST. art. VI, § 3(b) (giving Court of Appeals direct appellate jurisdiction in cases involving a judgment of death).

614. See N.Y. CRIM. PROC. LAW. § 470.30(2) (McKinney Supp. 1996). "Wherever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals. Review by the court of appeals . . . may not be waived." *Id.* The mandatory, nonwaivable review involves any "judgment including a sentence of death." *Id.*; *id.* § 450.70(1) (McKinney 1994). A "judgment" consists of both "a conviction and the sentence imposed thereon." *Id.* § 1.20(15).

615. See generally Richard J. Bonnie *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988). Difficult issues arise in the context of condemned prisoners who announce that they wish to relinquish their rights to plenary legal review of their convictions or death sentences. See *id.* One of these issues is whether the autonomy of the individual sentenced to death, and his or her decision to accept that punishment, should be superior to whatever independent interest the state has to ensure that capital punishment is administered according to law. See *id.* Another issue concerns the competency of condemned prisoners to waive the right of judicial review of their sentences. See, e.g., G. Richard Strafer, 74 J. CRIM. L. & CRIMINOLOGY 860, 862. See Bonnie, *supra*; Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553 (1984).

New York joins the near-unanimous judgment of other jurisdictions by making the appeal of a judgment resulting in a sentence of death mandatory and nonwaivable. See James R. Acker & Charles S. Lanier, *Statutory Measures for More Effective Appellate Review in Capital Cases*, 31 CRIM. L. BULL. 211, 228-29 (1995) [hereinafter *Appellate Review*], which identifies Arkansas as the only death penalty jurisdiction that clearly allows death-sentenced prisoners to waive all appeals in capital cases. The law regarding waivers of appeals is unclear under Ohio law and federal law, but all other jurisdictions require appeals of death sentences and/or convictions resulting in capital sentences. See *id.*

conviction and sentence.⁶¹⁶ The Court of Appeals has the same broad authority to reach and decide issues in the appeal of death penalty cases that the Appellate Division possesses in the criminal appeals it hears.⁶¹⁷ Specifically, the High Court is authorized to consider and determine issues of fact, and not just questions of law in the appeal of cases resulting in capital sentences.⁶¹⁸ It also retains "interests of justice" review powers

616. See Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 853-54 (1987). In 1977, Gary Gilmore became the first person executed under law in this country following a 10-year moratorium on the use of capital punishment. See *id.* Gilmore waived all of his rights of appeal and died before a Utah firing squad just three and one-half months after he was convicted of murder and sentenced to death. See *id.* See generally, *Gilmore v. Utah*, 429 U.S. 1012 (1976).

617. See N.Y. CRIM. PROC. LAW § 470.30(1),(3) (McKinney Supp. 1996). "Subdivision (3) adopts, by referencing subdivision one of section 470.30, the broad scope of appellate review and corrective action authority granted to the Court by that subdivision's cross-reference to sections 470.15 and 470.20 of the Criminal Procedure Law." BILL MEMORANDUM, *supra* note 43, at 15.

618. N.Y. CRIM. PROC. LAW § 470.30(3) (McKinney Supp. 1996), *referencing id.* § 470.15(1) (McKinney 1994).

Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

Id. Compare *id.* §§ 450.90, 470.35 (limiting Court of Appeals' appellate jurisdiction in other cases to questions of law). See also *People v. Smith*, 63 N.Y.2d 41, 52, 468 N.E.2d 879, 883, 479 N.Y.S.2d 706, 710 (1984), *cert. denied* 469 U.S. 1227 (1985). This case discusses the Court of Appeals' obligation to review facts in capital appeals, as follows:

"A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." Even in a capital case, however, "this court should not readily interfere with verdicts of jurors who have had the advantage of seeing and hearing witnesses."

People v. Crum, 272 N.Y. 348, 350, 6 N.E.2d 51, 51 (1936), *quoted in* *People v. Smith*, 63 N.Y.2d 41, 52, 468 N.E.2d 879, 883, 479 N.Y.S.2d 706, 710 (1984), *cert. denied* 469 U.S. 1227 (1985). For a helpful discussion of the appellate courts' fact review, see generally N.Y. CRIM. PROC. LAW 470.15 commentary at 549 (McKinney 1994). See also *id.* § 470.15(5). "The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination

to reach errors that were not properly preserved and to set aside death sentences as being unduly harsh or severe.⁶¹⁹

The statute requires the Court of Appeals to perform three discrete functions, in addition to its general review powers, regarding appealed death sentences. The Court is charged to determine:

(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or a victim of the crime for which the defendant was convicted;

(b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. In conducting such review the court, upon request of the defendant, in addition to any other determination, shall review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted; and

(c) whether the decision to impose the sentence of death was against the weight of the evidence.⁶²⁰

By enacting these provisions, the Legislature clearly intended the Court of Appeals to police the administration of the death penalty law to ensure, to the greatest extent possible, that individual death sentences are not tainted by legally im-

that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence." *Id.*

619. See N.Y. CRIM. PROC. § 470.15(2)(c) (McKinney 1994). The new law eliminates a provision of pre-existing law which had denied the Court of Appeals the authority, "as a matter of discretion in the interest of justice [to] set aside, reduce or change a sentence of death as being unduly harsh or severe." *Id.* § 470.30(1) (McKinney 1994) (quoting former § 470.30(1) (McKinney 1994)).

Section 470.30(1) (McKinney Supp. 1996) references § 470.15, which authorizes the Appellate Division in criminal appeals to reverse or modify judgments:

deemed to be made as a matter of discretion in the interest of justice [which] include but are not limited to . . . [para.] (a) that an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial . . . so as to present a question of law, deprived the defendant of a fair trial; (b) That a sentence, though legal, was unduly harsh or severe.

Id. § 470.15(6). See also N.Y. CRIM. PROC. LAW 470.15 commentary at 549 (McKinney 1994); O'Connor, *supra* note 357, at 9.

620. N.Y. CRIM. PROC. LAW § 470.30(3)(a)-(c) (McKinney Supp. 1996).

permissible factors, including the race of the defendant or the murder victim, are not excessive or disproportionate when compared to the sentences imposed in similar cases, and are not imposed against the weight of the evidence.⁶²¹ These objectives are laudable, and the powers afforded the Court potentially can be of great importance in helping to guard against arbitrariness. Still, the statute is conspicuously short on specifics about how the sentence-review obligations are to be accomplished. Much will fall on the Court of Appeals judges to craft and implement procedures to effectuate the statutory objectives.

Two of the Court's duties under the statute are ascertaining whether death sentences were influenced by passion, prejudice, or other arbitrary or legally impermissible factors, including race,⁶²² and evaluating whether death sentences were imposed against the weight of the evidence.⁶²³ These duties will require the judges to scrutinize the details of individual case records to attempt to identify extralegal factors that may have affected capital sentences, and to assess the sufficiency of the legal foundation of particular death sentences. These inquiries necessarily will be highly idiosyncratic. While they will require the Court to focus on the unique circumstances of individual cases, the answers to these questions may, in certain cases, also be informed by the more systematic and statewide examination of cases that will be required for the Court to complete the excessiveness or disproportionality review commanded by the statute.⁶²⁴ A finding that the death sentence imposed in a case is inconsistent with the punishment normally assessed in similar cases may well support an inference that extralegal factors impermissibly influenced the sentence of death, or that a particular death sentence was imposed against the weight of the evidence.

The sentence review required under subsection (b) of the statute is commonly known as comparative proportionality re-

621. See BILL MEMORANDUM, *supra* note 43, at 15; Memorandum of State Executive Department, McKinney's Session Laws 2283 (218th Session)(1995).

622. N.Y. CRIM. PROC. LAW § 470.30(3)(a) (McKinney Supp. 1996).

623. *Id.* § 470.30(3)(c).

624. See Baldus, *Comparative Review*, *supra* note 181, at 620.

view (CPR).⁶²⁵ In other contexts, the United States Supreme Court has ruled that the death penalty is *per se* disproportionate, or an excessive punishment for specific crimes, such as rape,⁶²⁶ or when applied against offenders who are not sufficiently culpable, such as minor participants in felony murder.⁶²⁷ Comparative proportionality involves a very different notion of excessiveness. It presumes that the death penalty lawfully may be imposed on an offender for committing a crime such as first-degree murder, yet it recognizes that a capital sentence in a particular case still might be excessive in comparison to the punishment typically imposed on offenders who commit similar crimes.⁶²⁸ Comparative proportionality review

requires the reviewing court to identify other cases from the same jurisdiction that are "similar" in some pertinent respect to the death sentence case under review and to decide, in light of the sentences imposed in those other "similar" cases, whether the death sentence being scrutinized conforms to the constitutional standard of evenhanded, consistent sentencing in capital cases.⁶²⁹

625. See generally Richard Van Duizend, *Comparative Proportionality Review in Death Sentences Cases: What? How? Why?*, 8 STATE CT. J. 9, 11 (Summer 1984) [hereinafter Van Duizend, *Comparative Proportionality Review*].

626. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that death penalty is disproportionate punishment for the crime of raping an adult, and hence violates the Eighth Amendment).

627. See *Enmund v. Florida*, 458 U.S. 782 (1982). See also *Tison v. Arizona*, 481 U.S. 137 (1987) (holding the Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that resulted in murder is major and whose mental state is one of reckless indifference). The Court also has ruled that capital punishment is constitutionally excessive when used against offenders who were age 15 or younger at the time of their crimes, at least absent specific statutory authorization for such practice. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion). It further has suggested that the execution of profoundly mentally retarded (as distinguished from mildly or moderately mentally retarded) offenders would violate the Eighth Amendment on grounds of disproportionality. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989).

628. See *Pulley v. Harris*, 465 U.S. 37 (1984). Comparative "proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Id.* at 43.

629. See Baldus, *Comparative Review*, *supra* note 181 at 663.

Although not required under the federal Constitution,⁶³⁰ CPR must be completed pursuant to statute in a majority of death penalty jurisdictions.⁶³¹ However, if the frequency with which state supreme courts vacate death sentences because they are comparatively excessive is a measure of how effective CPR has been in helping to detect and correct arbitrary capital sentencing decisions, this procedure has been an abysmal failure. The state courts overwhelmingly have declined to use CPR to disturb capital sentences,⁶³² even though researchers have produced abundant evidence that aberrational death sentences are imposed within categories of similar killings.⁶³³

630. See *Pulley*, 465 U.S. at 50. The Supreme Court ruled that California's capital punishment statutes had sufficient safeguards against arbitrariness to make comparative proportionality review of death sentences unnecessary under Eighth Amendment standards. See *id.*

631. See *Appellate Review*, *supra* note 615, at 237. Statutes in 21 jurisdictions require CPR in capital appeals, and identify two additional states in which state supreme courts conduct CPR in the absence of a statutory mandate. *Id.* Connecticut is identified in this reference as requiring CPR, but it recently repealed the statutory provision requiring such review. See CONN. GEN. STAT. ANN. § 53a-46b(b) (West Supp. 1996).

632. See *Appellate Review*, *supra* note 615, at 238-39 & n.106 (citing references). For an exhaustive study of state courts and their administration of CPR, see Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts: Only the "Appearance of Justice"?*, ___ J. CRIM. L. & CRIMINOLOGY ___ (forthcoming). See also Donald H. Wallace & Jonathan R. Sorensen, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 297 (1994); Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 738-39 (1988) (reporting infrequency with which state supreme courts have vacated death sentences based on CPR). The Missouri Supreme Court invalidated one death sentence out of 70 cases in which CPR was conducted. See Wallace & Sorenson, *supra*, at 286. This action was taken in a case in which the defendant's codefendant had been sentenced to life imprisonment. See *id.* at 297.

633. See BALDUS ET AL, *EQUAL JUSTICE AND THE DEATH PENALTY* 203 (1990) [hereinafter BALDUS, *EQUAL JUSTICE*] (estimating that between 13% and 25% of the first 120 death penalty cases reviewed by the Georgia Supreme Court probably involved excessive sentences, and reporting that only 2 of those 120 sentences were vacated on disproportionality grounds, under unusual circumstances that did not require the court to compare the death sentences to a larger pool of similar cases); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245, 377-78 (1988) [hereinafter Paternoster & Kazyaka, *Administration*] (estimating that 35% to 60% of death sentences reviewed by the South Carolina Supreme Court may have been excessive; yet, that court did not vacate a single death sentence based on CPR during the first 10 years of South Carolina's guided-discretion death penalty legislation); Raymond Paternoster & Ann Marie Kazyaka, *An Ex-*

If other state appellate courts have been deficient in their conduct of CPR, a contributing factor may be the relative complexity of the task. A court logically must complete a sequence of steps, each laden with conceptual and practical challenges, if it is to assess whether the death sentence imposed in a particular case is excessive or disproportionate compared to the sentences imposed in other similar cases. First, it must begin its search for similar cases in the proper universe of cases. Courts have different choices. They can confine their quest to identify cases similar to the one under review to others that have resulted in capital sentences. Or, they can consider progressively more expansive collections of cases: all that progress to a penalty-phase hearing, whether or not a death sentence is imposed; all resulting in capital murder convictions, even if a death sentence is not sought; all prosecuted under capital murder indictments, whether or not a conviction for that offense was obtained; or all cases that could have been prosecuted capitally, regardless of whether they in fact were. The choice of the universe that will be scoured for "similar" cases is profoundly important, as the following example illustrates.

Assume that 100 indistinguishable murders are committed; for example, intentional killings occurring during an armed robbery. Assume further that 60 of the 100 defendants are indicted for first-degree murder; that 40 of the 60 prosecutions for first-degree murder result in a conviction for that offense; that prosecutors seek a death sentence in 20 of the 40 cases resulting in capital murder convictions; and that juries sentence 10 of the 20 death-penalty eligible offenders to death. Finally, assume that the death-sentenced defendant in a case being appealed has committed a comparable robbery-murder, and the state's highest court must assess whether that defendant's sentence is excessive or disproportionate compared to the dispositions in similar cases.

If the court limits its review to other cases resulting in sentences of death, it will identify 10 similar cases, all involving the same punishment as the case on appeal. It almost certainly will conclude that the capital sentence imposed in the case be-

amination of Comparatively Excessive Death Sentences in South Carolina 1979-1987, 17 N.Y.U. REV. L. & SOC. CHANGE 475, 495 (1989-1990).

ing reviewed is not aberrational, or excessive in light of the dispositions in other robbery-murder cases. Of course, such a process does not constitute meaningful comparative proportionality review at all, since the court gains only a sense of the raw number of comparable cases resulting in capital sentences, and remains completely in the dark about the relative frequency, or the rate, of imposition of death sentences in like cases.⁶³⁴ Surprisingly, some state courts limit their CPR to such a "precedent-seeking" approach that involves only the review of other death-sentence cases.⁶³⁵

Alternatively, all cases involving a penalty-phase trial could be reviewed, whether or not a death sentence was imposed. In the above example, an appeals court would note that death sentences were given in precisely half (10 out of 20) of robbery-murder cases, with the other half resulting in sentences of life imprisonment.⁶³⁶ The picture looks quite different as the pool of cases used for comparison continues to expand. If all cases resulting in capital murder convictions are consulted, including those in which the prosecutor elects not to seek a death sentence, the apparent capital-sentencing rate for robbery-murder cases dips to 25% (10 out of 40).⁶³⁷ When all cases prosecuted under first-degree murder indictments are reviewed, just 1 out of 6 (16.7%) robbery-murders result in a death sentence.⁶³⁸ And when all 100 of the robbery-murders are

634. See Baldus et al, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 2 n.1 (1980) [hereinafter, Baldus, *Excessive Sentences*].

635. See BALDUS, *EQUAL JUSTICE*, *supra* note 633, at 283, 297 n.16; Sprenger, *supra* note 632 at 730 & n.9, 738. In New Jersey, the state supreme court's CPR is limited by statute to a comparison of other cases in which death sentences have been imposed. N.J. STAT. ANN. § 2C:11-3(e) (West 1995). The New Jersey Supreme Court has reserved ruling on the constitutionality of that restriction. *State v. Marshall*, 613 A.2d 1059, 1063-64 (N.J. 1992) (declining to give this limitation, which was adopted in 1992, retroactive effect to apply to cases pending on appeal).

636. See BALDUS, *EQUAL JUSTICE*, *supra* note 633, at 284, 298 n.19. Several state courts rely on such a strategy for CPR. See *id.*

637. See *id.* Some state supreme courts have adopted this approach. See *id.* at 284, 299 n.21.

638. See *Appellate Review*, *supra* note 615, at 243 (quoting Van Duizend, *Comparative Proportionality Review*, *supra* note 625). A Task Force working under the auspices of the National Center for State Courts concluded that the pool of cases for proportionality review should contain, as a minimum, all cases in which the indictment included a death-eligible charge, and a homicide conviction

included—a measure which does not blind the court to comparable cases excluded through the exercise of prosecutorial charging discretion and decisions about whether to seek the death penalty, or by juries' guilt-determination and sentencing discretion—a reviewing court would conclude that death sentences are imposed in only 10 out of 100, or 10% of similar cases.⁶³⁹

The choice of the universe or pool of cases used to begin CPR has clear implications for measuring the frequency with which death sentences are imposed in cases that are similar to the one being appealed.⁶⁴⁰ Other information relevant to a court's sentence-review task also is affected by the definition of this universe of potentially similar cases. One consequence may be that racial discrimination is hidden. For instance, assume that in the example used above, 50 robbery-murders were committed by white defendants, and 50 were committed by African-American defendants. Further assume that all 50 black defendants were indicted for first-degree murder, but only 10 white defendants were so indicted. Such a result obviously would suggest racial discrimination, but a court that reviewed only first-

was obtained. *See id.* Under this standard, it is not necessary that a capital murder conviction be returned. *See id.* This raises the question of whether some cases, which did not result in a conviction for a capital crime, would erroneously be included in the comparison pool. *See id.* This is a valid concern, but not an insurmountable problem. The courts would have to scrutinize the facts of cases carefully to guard against the risk of overinclusiveness. But refraining from examining cases that do not result in capital murder conviction poses the more serious risk of underinclusiveness, or not taking account of comparable cases that were removed through the exercise of prosecutorial or jury discretion. *See Appellate Review*, *supra* note 615, at 243; Sprenger, *supra* note 632, at 731.

639. *See* BALDUS, EQUAL JUSTICE, *supra* note 633, at 293. Some states may wish to adopt a pool of cases broader than that defined above where there is a concern that particular types of murder cases or those involving a defendant or victim of a particular race are treated differently from their inception. In such instances, it may be necessary to work out the agreements necessary to gather information directly from police records for all homicides reported or to delete from the pool certain classes of cases which are likely to be tainted. When there is concern about the exercise of prosecutorial discretion or where the distinction between capital and noncapital murder is not clear-cut, a pool of cases including all murder indictments may be desirable. The task force guideline is recommended as the minimum necessary for effective proportionality review and is not intended to serve as a limit when a wider perspective is warranted. *See Van Duizend, Comparative Proportionality Review*, *supra* note 625, at 12 (citations omitted).

640. *See generally* Van Duizend, *Comparative Proportionality Review*, *supra* note 625, at 11.

degree murder indictments would be oblivious to this evidence. If black defendants eventually received 8 out of the 10 death sentences imposed (80%), this outcome would appear to be fair since black defendants were the subject of roughly the same percentage of first-degree murder indictments: 50 out of 60, or 83.3%. In fact, black defendants would be 4 times as likely to be sentenced to death as white defendants in comparable cases: 8 out of 50 (16%) black defendants would be sentenced to die versus 2 out of 50 (4%) white defendants.⁶⁴¹

Eradicating the influence of race from the death penalty's administration was of obvious concern to the New York Legislature.⁶⁴² The appeal provisions within the death penalty statute make two separate references to the race of the defendant and the murder victim,⁶⁴³ and the legislation expressly provides for the individual, sequestered voir dire of prospective jurors regarding possible racial biases.⁶⁴⁴ Numerous legislators voiced opinions about the statute's adequacy in guarding against racial discrimination,⁶⁴⁵ which is an area of special concern in light of the Supreme Court's refusal in *McCleskey v. Kemp*⁶⁴⁶ to

641. See BALDUS ET AL, COMMENTS: PROPOSED UNIFORM RULES FOR CAPITAL CASE DATA REPORTS AND PROPOSED CAPITAL CASE DATA REPORT FORM 4 [hereinafter BALDUS, COMMENTS].

642. See generally BILL MEMORANDUM, *supra* note 43 at 15; Senate Debate, *supra* note 13.

643. N.Y. CRIM. PROC. LAW § 470.30(3)(a), (b) (McKinney Supp. 1996). See *supra* note 620 and accompanying text.

644. See N.Y. CRIM. PROC. LAW at § 270.16(1) (McKinney Supp. 1996). See *supra* notes 484-87 and accompanying text.

645. See, e.g., Senate Debate, *supra* note 13 at 1859 (remarks of Senator Martin Connor); *id.* at 1883-84 (remarks of Senator Stephen Saland); *id.* at 1897-98 (remarks of Senator Dale Volker); *id.* at 1905-06 (remarks of Senator David Pater-son); *id.* at 1940-41 (remarks of Senator Catherine Abate); *id.* at 1984 (remarks of Senator Mary Ellen Jones); *id.* at 1994-96 (remarks of Senator Alton Waldon, Jr.); *id.* at 2004 (remarks of Senator Pedro Espada, Jr.); *id.* at 2033-34 (remarks of Senator Marty Markowitz); Assembly Debate, *supra* note 1 at 34 (remarks of Assemblywoman Deborah Glick); *id.* at 84 (remarks of Assemblyman Clarence Norman, Jr.); *id.* at 106-08, 395-401 (remarks of Assemblyman Roger Green); *id.* at 151-55 (remarks of Assemblywoman Barbara Clark); *id.* at 166-67 (remarks of Assemblyman Ramirez); *id.* at 220-21 (remarks of Assemblyman Jeffrion Aubry); *id.* at 247-50 (remarks of Assemblyman Keith Wright); *id.* at 344 (remarks of Assemblyman William Scarborough); *id.* at 377 (remarks of Assemblyman Vito Lopez); *id.* at 422-23 (remarks of Assemblywoman Carmen Arroyo); *id.* at 456 (remarks of Assemblyman Edward Sullivan).

646. 481 U.S. 279 (1987).

create a federal constitutional remedy for racially disparate capital sentencing patterns.⁶⁴⁷

In *McCleskey*, the nation's High Court rejected the equal protection and Eighth Amendment claims raised by a black defendant sentenced to death for murdering a white victim.⁶⁴⁸ The defendant argued that his capital sentence had been tainted by race discrimination, which permeated Georgia's death penalty system.⁶⁴⁹ These claims were substantiated by a comprehensive statistical study, which the Court assumed to be valid.⁶⁵⁰ The study demonstrated that white-victim homicides were significantly more likely to be prosecuted as capital cases, and result in death sentences, than comparable homicides involving black victims.⁶⁵¹ Notwithstanding this evidence, the Court, by vote of five to four, was unwilling to conclude that the defendant had demonstrated that race had influenced his sentence, or that Georgia's death penalty laws generally were administered arbitrarily.⁶⁵² The majority opinion concluded that "McCleskey's arguments are best presented to the legislative bodies."⁶⁵³

The New York Legislature did not specifically countermand *McCleskey*. It could have followed the lead of bills introduced in Congress, that ultimately were not adopted, that directly pro-

647. See *id.* at 319.

648. See *id.* at 299.

649. See *id.* at 291-92.

650. See *id.* at 291 n.7.

651. See 481 U.S. 279. After imposing statistical controls for nonracial factors that could have contributed to the sentencing disparities, the researchers (David Baldus, George Woodworth and Charles Pulaski, Jr.) concluded that the odds in white-victim homicides were 4.3 times higher than in comparable black-victim homicides to result in death sentences. See *id.* Disparate sentencing patterns based on race were especially likely to be evident in "mid-range" cases that were not at the highest or lowest levels of aggravation. *Id.* at 287 & n.5. For a detailed description of the study and its conclusions, see Baldus, *Comparative Review*, *supra* note 181, at 40-197.

652. See *McCleskey*, 481 U.S. at 297. Numerous commentators have criticized *McCleskey*. See, e.g., Vada Berger et al., *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R. C.L. L. REV. 437 (1989); Ellsworth, *supra* note 463, at 187-89; Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 134-227 (1989); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

653. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

vided what the defendant in *McCleskey* had requested.⁶⁵⁴ These bills would have required the states to adopt the same analytical framework for resolving claims of race discrimination in capital sentencing as is used in the context of employment discrimination and related claims with equal protection overtones.⁶⁵⁵ Specifically, the proposed federal legislation would have allowed capital defendants to rely on statistics reflecting racially disparate sentencing patterns to create a prima facie case of unlawful discrimination.⁶⁵⁶ The state then would have the opportunity to rebut the inference of unlawful discrimination created by the statistics by identifying legitimate, race-neutral factors in explanation of the particular sentencing decision.⁶⁵⁷ Instead of adopting an analogous state Racial Justice Act, the New York Legislature took the more modest, but significant, step of directing the Court of Appeals to examine appealed death sentences for the possible influence of race, and to consider the race of defendant and the race of the murder victim (on the defendant's request) in the course of its comparative proportionality review.⁶⁵⁸

Although the statute does not explicitly identify the universe of cases the Court of Appeals is to examine as it begins its obligatory review of appealed death-sentence cases, the new legislation does direct trial court clerks to complete data reports in designated cases so that necessary information is collected for the state high court's appellate review.⁶⁵⁹ The statute requires the Court of Appeals to promulgate rules "to ensure that in every criminal action in which a defendant is indicted for the commission of an offense defined in section 125.27 of the penal

654. See the proposed Racial Justice Act, H.R. 3315, 103d Cong., 1st Sess. (1993), and the proposed Fairness in Death Sentencing Act, H.R. 4092, 103d Cong., 2d Sess. (1994). These bills are reprinted in Baldus, *Racial Discrimination*, *supra* note 186, at 420-25.

655. See, e.g., *Bazemore v. Friday*, 478 U.S. 385 (1986); 42 U.S.C.A. §§ 2000e - 2000e-17 (West 1994) (Title VII of the Civil Rights Act of 1964).

656. See BILL MEMORANDUM, *supra* note 43.

657. See *id.* For a more detailed description of the working of these proposed bills, see *Appellate Review*, *supra* note 615, at 254-57; Baldus, *Comparative Review*, *supra* note 181; Berger, *supra* note 491; Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91).

658. See BILL MEMORANDUM, *supra* note 43.

659. See N.Y. JUD. LAW § 211-a (McKinney Supp. 1996).

law,"⁶⁶⁰ i.e., first-degree murder, the clerks of trial courts will prepare a data report by completing a standard form published by the Court of Appeals.⁶⁶¹ The data reports must be completed in all such cases, unless the indictment is dismissed, and the forms are later forwarded to the clerk of the Court of Appeals.⁶⁶² Their purpose is to "assist[] the court of appeals in determining . . . whether a particular sentence of death is disproportionate or excessive in the context of penalties imposed in similar cases, considering both the crime or crimes and the defendant."⁶⁶³ The individual data reports thereafter are compiled into a single "uniform capital case data report," which is to be made available for use by appellants in capital cases.⁶⁶⁴

The statutory definition of the class of cases in which capital case data reports are to be completed is susceptible of different interpretations. At a minimum, trial court clerks must prepare reports in all cases prosecuted under first-degree murder indictments, whether or not those cases result in convictions for first-degree murder, proceed to a penalty trial, or result in a sentence of death.⁶⁶⁵ The unmistakable inference is that the Court of Appeals should consider a universe of cases of at least this size when it engages in comparative proportionality review in capital appeals. However, as discussed above, limiting the Court's review to cases involving first-degree murder indictments presents the danger that prosecutorial charging discretion will significantly reduce the number of potentially capital cases available for the Court's consideration, and will even mask racial discrimination and other types of arbitrariness.⁶⁶⁶ A different reading of the statute avoids such problems.

Capital case data reports are to be completed in all cases which meet the following criteria: (a) "the defendant is indicted

660. *Id.*

661. *See id.* The Court of Appeals distributed proposed Uniform Rules for Capital Case Data Reports for public comment subsequent to the passage of the statute. *See* BALDUS, COMMENTS, *supra* note 641.

662. *See* N.Y. JUD. LAW § 211-a (McKinney Supp. 1996). The trial court clerks are to complete the data report forms "by reviewing the record and upon consultation with the prosecutor and the attorney for the defendant . . ." *Id.* They are to be prepared within 45 days following the trial court's disposition of a case. *See id.*

663. *Id.*

664. *Id.*

665. *See id.*

666. *See supra* notes 639-41 and accompanying text.

for the commission of an offense,” and (b) the offense allegedly committed is “defined in section 125.27 of the penal law”⁶⁶⁷ This section need not be interpreted to apply only to cases in which first-degree murder indictments actually are returned. An alternative reading, one which arguably is more consistent with the legislative intent regarding the Court of Appeals’ duty to scrutinize capital cases for evidence of systemic race discrimination and other arbitrary factors that could produce comparatively excessive capital sentences, focuses on the defendant’s alleged commission of an offense that factually is within the statutory definition of first-degree murder. Under this construction, the Court would be at liberty to consider cases involving factual circumstances that define an offense as first-degree murder, whether or not the case was prosecuted under a first-degree murder indictment. In other words, the “commission of an offense defined in”⁶⁶⁸ the first-degree murder statute, rather than the return of a first-degree murder indictment, would trigger the preparation of a capital case data report, and bring the case within the ambit of the Court’s review. Even if the statute is not interpreted in this fashion, the Court certainly could exercise its inherent and constitutional rule-making powers to ensure that it is informed of cases that could be defined as first-degree murder, even if they are not so defined because of prosecutors’ decisions not to seek, or grand juries’ unwillingness to return, indictments for first-degree murder.⁶⁶⁹

If it is to examine racial variables, and more generally conduct CPR (Comparative Proportionality Review) effectively, the Court of Appeals almost certainly will have to rely on statistical techniques as a part of its analysis. This is a step that the New Jersey Supreme Court already takes in completing its review of capital sentences.⁶⁷⁰ Systematic data collection and statistical

667. N.Y. JUD. LAW § 211-a (McKinney Supp. 1996).

668. *Id.*

669. See BALDUS, COMMENTS, *supra* note 641, at 2-6. This position regarding the Court of Appeals’ statutory and inherent authority to consider potentially capital cases in addition to those that have been prosecuted pursuant to first-degree murder indictments is presented in BALDUS, COMMENTS. See *id.*

670. *State v. Marshall*, 613 A.2d 1059 (N.J. 1992). The New Jersey Supreme Court appointed Professor David Baldus as a special master to assist it with the data collection employed for its comparative proportionality review in capital appeals. See *id.* at 1063.

analysis are virtually indispensable for meaningful CPR. The need for data and statistical techniques to interpret the data owes largely to the demands of the second stage of the comparative proportionality review analysis. Following the selection of the universe of cases that will be combed for cases comparable to the one under review, criteria must be developed and procedures employed to identify cases that in fact are "similar" to the appealed case. This is no easy task. Comparing actual murder cases, involving innumerable potentially significant differences between offense circumstances and defendant characteristics, is a far more daunting challenge than constructing and analyzing 100 hypothetical indistinguishable capital murders.

Two basic complementary strategies are available to identify "similar cases considering both the crime and the defendant."⁶⁷¹ One approach depends on matching factually similar cases. The other compares cases that are similar conceptually, according to their overall level of aggravation or culpability. These techniques are not mutually exclusive, and it would be sound strategy for a court to use the two methods in tandem, as cross-checks on reliability.⁶⁷²

Fact-based methods for comparing cases are made difficult because no two cases involve identical crimes and defendants, and it is difficult to know, *a priori*, the significance of the factual differences that inevitably will exist between cases. Nevertheless, many state courts appear to rely principally on matching the "salient factors" of cases when they conduct CPR. Thus, for example, courts might consider factors such as whether the murder was committed during a contemporaneous felony, or involved the killing of a police officer, or was committed by a defendant with a serious criminal record, or one who was just eighteen years old at the time of the crime. The courts rely on their experience, common sense, or intuition in selecting the determinative salient factors.⁶⁷³

671. N.Y. CRIM. PROC. LAW § 470.30(3)(b) (McKinney Supp. 1996).

672. See Baldus, *Arbitrariness and Discrimination*, *supra* note 117, at 201; Van Duizend, *Comparative Proportionality Review*, *supra* note 625, at 10-11.

673. See *Appellate Review*, *supra* note 615, at 244; Baldus, *Comparative Review*, *supra* note 181, at 681-82; Baldus, *Excessive Sentences*, *supra* note 634, at 32-36; Baldus, *Arbitrariness and Discrimination*, *supra* note 117, at 201; Van Duizend, *Comparative Proportionality Review*, *supra* note 625, at 10.

Another fact-dominated method of comparison depends less on evaluative judgments about what facts are important to sentencing decisions, and relies to a much greater degree on statistical findings regarding the "main determinants" of sentences. The "main determinants" approach involves matching cases that have roughly the same number of significant aggravating factors, mitigating factors, and other important characteristics. In contrast to the salient factor method of comparison, which relies on matching specific case facts, the main determinants approach identifies classes of cases with comparable numbers of the "main determinants" of sentences, as assessed by statistical analyses of sentencing decisions in potentially capital cases.⁶⁷⁴

The other basic strategy for identifying similar cases assigns cases to different classes based on a measure of their relative level of aggravation or culpability. Under this technique, cases need not share comparable facts in order to be classified as similar. Instead, the most highly aggravated cases are grouped, as are cases at intermediate and lower levels of aggravation. The groupings are determined by statistical techniques which identify and assign a weight to the aggravating, mitigating, and other case variables that contribute to sentencing decisions.⁶⁷⁵ Experienced researchers consider the use of overall culpability measures imperative for effective comparative proportionality review.⁶⁷⁶

After cases similar to the one being appealed are identified, the court must render judgment about whether the death sen-

674. See *Appellate Review*, *supra* note 615, at 244-45; Baldus, *Comparative Review*, *supra* note 181, at 684-86; Baldus, *Excessive Sentences*, *supra* note 634, at 23-35; Paternoster & Kazyaka, *Administration*, *supra* note 633, at 363-65; Van Duizend, *Comparative Proportionality Review*, *supra* note 625, at 22.

675. See *Appellate Review*, *supra* note 615, at 245; Baldus, *Comparative Review*, *supra* note 181, at 689-92; Baldus, *Excessive Sentences*, *supra* note 634, at 40; Paternoster & Kazyaka, *Administration*, *supra* note 633, at 369-77; Van Duizend, *Comparative Proportionality Review*, *supra* note 625, at 22.

676. See BALDUS, *EQUAL JUSTICE* *supra* note 633, at 293:

[P]erhaps [our] most important recommendation . . . is that the courts should supplement their fact-specific matching methods with some overall measure of culpability that will allow the courts to classify and compare all of the death-eligible cases in their jurisdiction, regardless of their factual comparability. Indeed, we believe that until such measures can be undertaken, proportionality review procedures will be plagued with the inconsistency and ad hoc nature that has characterized most state systems to date.

Id. See also N.Y. CRIM. PROC. LAW § 470.30(3)(b) (McKinney Supp. 1996).

tence imposed in the appealed case is excessive or disproportionate compared to punishments imposed in those other cases. At the extreme, this assessment will not be difficult.⁶⁷⁷ Clearly, if the appealed case is the only one of 100 comparable cases in which a death sentence was imposed, the sentence should be vacated as comparatively excessive. On the other hand, if 95 out of 100 of the similar cases resulted in a death sentence, the capital sentence imposed in the case under review would not be considered aberrational or disproportionate to the punishment normally assigned in those other cases. But in many cases, the judgment will not be so clear-cut, and the reviewing court will require a more specific criterion by which to determine when a death sentence is comparatively disproportionate. Different standards have been suggested or utilized in this context,⁶⁷⁸ although many courts simply do not articulate the bases of their conclusions about comparative excessiveness.⁶⁷⁹

Many practical matters also are essential to a court's ability to conduct CPR effectively. Comprehensive verdict forms⁶⁸⁰ and a data collection instrument⁶⁸¹ must be developed so that

677. The New York Court of Appeals is required by statute to identify in its decision "those similar cases it took into consideration." *Id.*

678. Professor Baldus and his colleagues have suggested that if the death-sentencing rate among a class of similar cases is at least .80, a rebuttable presumption is justified that a capital sentence is not comparatively excessive. If the capital-sentencing rate among similar cases is less than .35, the converse presumption arises that a death sentence is comparatively excessive. No presumptions are indulged in either direction when the death-sentencing rate within a class of similar cases is between .35 and .80. Baldus, *Comparative Review*, *supra* note 181, at 695-98. The controlling principle adopted by the New Jersey Supreme Court is as follows: "[a] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction." *State v. Marshall*, 613 A.2d 1059, 1081 (N.J. 1992) (quoting *Tichnell v. State*, 468 A.2d 1, 17 n.18 (Md. 1983)).

679. See BALDUS, *EQUAL JUSTICE*, *supra* note 633, at 287.

680. The Court of Appeals is required to "formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence." N.Y. CRIM. PROC. LAW § 400.27(15) (McKinney Supp. 1996). See proposed N.Y. CT. APP. RULE 218.1 (Uniform Rules for Capital Sentencing Form) (distributed for public review and comment, Sept. 15, 1995). See generally *Appellate Review*, *supra* note 615, at 218-22.

681. N.Y. JUD. LAW § 211-a (McKinney Supp. 1996). See *supra* notes 660-65 and accompanying text. See proposed N.Y. CT. APP. RULES 218.10, 510.7 (Uniform Rules for Capital Case Data Reports) (distributed for public review and comment, Sept. 15, 1995). See generally *Appellate Review*, *supra* note 615, at 222-26.

information necessary for the court's comparative review of cases is preserved and available for analysis. Special administrative assistance is important to allow one or more individuals trained for the job to review the information submitted to the court for completeness and accuracy, to monitor the continuing data collection process, and to provide whatever technical or support services the court deems appropriate.⁶⁸² The comparative review process can be only as good as the underlying data on which it is based. It is especially important that dispositions entered on guilty pleas, which may not be appealed or supported by a comprehensive record, and other verdicts not resulting in death sentences be documented and reviewed as thoroughly as appealed death-sentence cases.

As the court of original appellate jurisdiction in death penalty appeals,⁶⁸³ and with the unique demands imposed by CPR and its related review functions, the Court of Appeals predictably will experience a substantial increase in its workload as the death penalty law is put to use. Records in death-sentence cases can be massive, involving thousands of pages of testimony and crates of motions, documents, and exhibits.⁶⁸⁴ The judges of the High Court, who have fact-review⁶⁸⁵ and interest-of-justice review⁶⁸⁶ powers in appealed death penalty cases, will have to make detailed examination of the case record, mindful of the fact that a human life hinges on their judgment, and of the court's important role in helping to guard against arbitrary capital decision making. In some other jurisdictions, capital cases command as much as one-third or more of state supreme court judges' time.⁶⁸⁷

682. See generally *Appellate Review*, *supra* note 615, at 248.

683. See *supra* note 613 and accompanying text.

684. "Transcripts in [capital cases appealed to the California Supreme Court] typically range from 5,000 to 9,000 pages, and some contain as many as 90,000 pages." William C. Vickrey, *Opinion Filings and Appellate Court Productivity*, 78 JUDICATURE 47, 49 (July-Aug. 1994).

685. See *supra* note 618 and accompanying text.

686. See *supra* note 619 and accompanying text.

687. See *Appellate Review*, *supra* note 615 at 233 (appeals in capital cases accounted for roughly 20% to 40% of the California Supreme Court's docket between the 1987-1988 and 1991-1992 terms of court); Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 213 & n.84 (1992) (estimating that half of the Florida Supreme Court's time is absorbed with death penalty case appeals); Michael L. Radelet & Margaret Vandiver, *The Florida Supreme Court and Death Penalty Ap-*

Upon finding reversible error in an appealed death penalty case, the Court of Appeals has different remedies available.⁶⁸⁸ In addition to its normal authority to reverse a conviction and order a new trial or other appropriate disposition,⁶⁸⁹ the Court may set the death sentence aside and remand a case for a *de novo* sentencing hearing before a newly impanelled jury.⁶⁹⁰ Alternatively, it is authorized to vacate the sentence of death and remand with instructions that the defendant be resentenced by a judge either to life imprisonment without parole, or twenty to twenty-five years to life imprisonment.⁶⁹¹

2. *Post-Conviction Motions*

Assemblyman Richard Brodsky: Given the federal standard for showing no constitutional right to a review of new evidence, the New York standard being due diligence, . . . it is current New York law that a person wrongly convicted of murder and sentenced to death in New York, unless they can show . . . that they did exercise due diligence, has no right, Mr. Vitaliano, to have the matter considered by the courts of New York under this bill.

Assemblyman Eric Vitaliano: Again, Richard, with the exception that a court would be free, under this bill, to make a determination that in a death case, the failure to entertain that kind of application would be unconstitutional and then the court could create in judge-made law, judge-made rule, the right to entertain that kind of application.

. . . .

Assemblyman Brodsky: You are aware that other states, . . . which do have death penalty statutes, have standards of interest of justice as opposed to due diligence in their statutes. I take it

peals, 74 J. CRIM. LAW & CRIMINOLOGY 913, 914 (1983) (estimating that the Florida Supreme Court spends 35% to 40% of its working time resolving death case appeals). See generally Judith S. Kaye, *Book Review*, 64 TUL. L. REV. 985, 988-89 (1990) (reviewing JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1989)) (observations of Chief Judge Kaye of the New York Court of Appeals about the impact death penalty cases have on state court dockets).

688. See N.Y. CRIM. PROC. LAW § 470.30(5)(b),(c) (McKinney Supp. 1996).

689. See *id.* § 470.35 (McKinney 1994).

690. See *id.* § 470.30(5)(b) (McKinney Supp. 1996). But see Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 293-94 (1993) (describing Texas' appeals and death-sentencing laws).

691. See N.Y. CRIM. PROC. LAW § 470.30(5)(c).

that having that standard was considered and rejected . . . in this statute?

Assemblyman Vitaliano: Yes. We have that in this State in this bill, Richard, on the direct appeal.

Assemblyman Brodsky: But not for post-conviction evidence of wrong—

Assemblyman Vitaliano: Not at this time on post-conviction.⁶⁹²

A death sentence may be collaterally challenged through a post-judgment motion to set aside the sentence.⁶⁹³ Pre-existing law authorized setting aside a sentence following judgment only on the grounds that the sentence was “unauthorized, illegally imposed or otherwise invalid as a matter of law.”⁶⁹⁴ A statutory amendment allows a death sentence to be set aside for five additional reasons:

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known, by the prosecutor or by the court to be false; or . . .

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

692. Assembly Debate, *supra* note 1, at 23-24.

693. See N.Y. CRIM. PROC. LAW § 440.20(1).

694. *Id.* § 440.20(1) (McKinney Supp. 1996). Under this provision, “[t]he single ground for the motion to set aside sentence is an allegation of legal defect; either because the sentence was not authorized by law, or because it was illegally imposed.” *Id.* § 440.20(1) commentary at 558 (McKinney 1994).

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.⁶⁹⁵

No changes were made in the law authorizing post-conviction challenges to the underlying conviction in capital and other criminal cases.⁶⁹⁶ Motions of this type may be supported by three grounds in addition to those enumerated above.⁶⁹⁷

It has been suggested that the more expansive provisions authorizing post-conviction challenges to capital sentences "may prove to be illusory" because the procedural bars that govern post-conviction motions to vacate judgment still apply.⁶⁹⁸ Specifically, subject to retroactivity principles, a court must deny a post-conviction motion involving issues previously resolved on appeal, issues pending on appeal, and issues that

695. N.Y. CRIM. PROC. LAW § 440.10(1)(b),(c),(f)-(h) (McKinney 1994) *incorporated by reference in id.* § 440.20(1) (McKinney Supp. 1996).

696. *See* N.Y. CRIM. PROC. LAW § 420.20(1) (McKinney Supp. 1996).

697. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(a), (d), (e) (McKinney 1994). The additional grounds that may be offered in support of a motion to vacate judgment are:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or . . .

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings

Id. Professor Preiser notes that of the three grounds applicable to a motion to vacate judgment that do not apply to a motion to vacate sentence:

[t]he rationale for excluding [§ 440.10(1)] paragraph (a) is obvious, but there is no ready explanation for the other two exclusions. For example, a person could well be competent during the trial and then become incompetent when faced with the reality of conviction and the possibility of a death sentence (paragraph [e]). Also, while the people ordinarily would not be introducing material evidence at the sentencing proceeding, they are permitted to do so in cases where one of the two aggravating circumstances not included in the elements of the crime become relevant (see CPL § 400.27[7]) and may well be forced to do so where a new jury is empaneled [sic] for the sentencing proceeding (see *id.*, subd. 6).

Id. § 440.20 commentary at 69.

698. Jay M. Cohen & Robert Rosenthal, *The New York Death Penalty Statute* § 1.01(2)(e)(1995). *See* N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney Supp. 1996) (requiring a court considering a motion to vacate a capital sentence "to apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion.").

were not presented on appeal due to the defendant's "unjustifiable failure to raise such ground or issue upon an appeal actually perfected" ⁶⁹⁹ A court may, but is not required to, deny a motion to vacate a judgment or sentence under other circumstances: when the defendant failed to adduce facts in an appeal which could have been presented to support an issue that was omitted from the appeal but later was raised by post-conviction motion;⁷⁰⁰ when the issue was resolved through a prior motion; or when, through a prior motion, "the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."⁷⁰¹

During the course of the legislative debates, the prospect of executing innocent people under the death penalty law almost certainly evoked more discussion than any other issue.⁷⁰² Re-

699. N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 1994). See *id.* § 440.10(2)(a), (b).

700. See *id.* § 440.10(3)(a) commentary (McKinney Supp. 1996) for an example falling under this provision.

701. N.Y. CRIM. PROC. LAW § 440.10(3)(b), (c) (McKinney 1994). Under this section generally, "[a]lthough the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment." *Id.* § 440.10(3).

702. See Senate Debate, *supra* note 13, at 1848-51, 2056 (remarks of Senator Dale Volker; *id.* at 1860-64 (remarks of Senator Martin Connor); *id.* at 1894-96 (remarks of Senator David Paterson); *id.* at 1940 (remarks of Senator Catherine Abate); *id.* at 1954-55 (remarks of Senator Franz Leichter); *id.* at 1958 (remarks of Senator Emanuel Gold); *id.* at 1976-78 (remarks of Senator Joseph Galiber); *id.* at 1984 (remarks of Senator Mary Ellen Jones); *id.* at 2007 (remarks of Senator Pedro Espada, Jr.); *id.* at 2020 (remarks of Senator Suzi Oppenheimer); *id.* at 2039 (remarks of Senator Richard Dollinger); Assembly Debate, *supra* note 1, at 11-14, 20-23, 300, 466 (remarks of Assemblyman Eric Vitaliano); *id.* at 19-25, 288, 298-99 (remarks of Assemblyman Richard Brodsky); *id.* at 31-32, 390-92 (remarks of Assemblywoman Deborah Glick); *id.* at 44 (remarks of Assemblyman Joseph Robach); *id.* at 47-54, 471-72 (remarks of Assemblyman Martin Luster); *id.* at 82-83 (remarks of Assemblyman Clarence Norman, Jr.); *id.* at 86 (remarks of Assemblyman Stephen Kaufman); *id.* at 124 (remarks of Assemblyman Daniel Feldman); *id.* at 136 (remarks of Assemblywoman Susan John); *id.* at 142 (remarks of Assemblyman David Townsend, Jr.); *id.* at 150-54 (remarks of Assemblywoman Barbara Clark); *id.* at 167-68 (remarks of Assemblyman Roberto Ramirez); *id.* at 178 (remarks of Assemblyman John Guerin); *id.* at 198-202 (remarks of Assemblyman Richard Gottfried); *id.* at 223 (remarks of Assemblyman Jeffrion Aubry); *id.* at 233, 482 (remarks of Assemblyman Frank Barbaro); *id.* at 268-69 (remarks of Assemblyman John Brian Murtaugh); *id.* at 298-300 (remarks of Assemblyman Michael Balboni); *id.* at 335-37 (remarks of Assemblyman John McEneny); *id.* at 351-54 (remarks of Assemblyman Anthony Genovesi); *id.* at 356-58 (remarks of Assemblyman Paul Tonko); *id.* at 371-72 (remarks of Assemblyman Vito Lopez); *id.* at 396-

searchers have produced evidence that six New Yorkers were executed during the twentieth century for crimes they did not commit,⁷⁰³ and that over twenty additional incidents occurred involving erroneous convictions and near-executions of innocent people.⁷⁰⁴ New York's last execution occurred in 1963,⁷⁰⁵ but the experiences in other states demonstrate that miscarriages of justice continue to occur in capital cases even under modern legal procedures.⁷⁰⁶

The Supreme Court has been reluctant to authorize state death row prisoners to use the federal courts to assert claims of innocence. In *Herrera v. Collins*,⁷⁰⁷ the Court ruled that a condemned state prisoner's claim that he was innocent of the crime for which he had been sentenced to death, standing alone, could not be entertained on federal habeas corpus, except in the rarest of circumstances.⁷⁰⁸ The defendant in *Herrera* had been

97, 402 (remarks of Assemblyman Roger Green); *id.* at 445 (remarks of Assemblyman N. Nick Perry).

703. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 73 (1987) [hereinafter *Miscarriages of Justice*]. The findings of this study have been critized and defended, respectively, in Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988), and Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

704. See *Miscarriages of Justice*, *supra* note 703, at 37. Among the more famous cases involving the near-execution of innocent persons in New York was Isidore Zimmerman's. Zimmerman came within two hours of being executed before Governor Lehman commuted his sentence to life imprisonment. He was released from prison after 24 years, when he succeeded in demonstrating that evidence consistent with his claims of innocence had been suppressed at his trial. See *id.* at 171-72. See also *Policy Perspectives*, *supra* note 4, at 602-03; Tabak & Lane, *supra* note 586, at 108.

705. See *Policy Perspectives*, *supra* note 4, at 526. See *supra* note 3 and accompanying text.

706. See SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, 103D CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS (1st Sess., Oct. 21, 1993) (identifying 48 cases between 1973 and 1993 in which a convicted person was released from death row because of innocence); Tabak & Lane, *supra* note 586, at 99-110. See also Martin I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807 (1990-1991) (documenting 59 wrongful homicide convictions in New York between 1965 and 1988).

707. 506 U.S. 390 (1993).

708. See *id.* In *Herrera*, the Court ruled that "a claim of 'actual innocence' is not itself a constitutional claim [cognizable on federal habeas corpus], but instead a gateway through which a habeas petitioner must pass to have his otherwise

barred from presenting his claim of innocence to the state courts because Texas law required that challenges to criminal convictions based on newly discovered evidence must be filed within thirty days of final judgment or be forever lost.⁷⁰⁹

While New York law imposes no time limit on post-conviction challenges to judgments based on newly discovered evidence, it does bar such challenges absent a showing that the new evidence "could not have been produced by the defendant at the trial even with due diligence on his part" ⁷¹⁰ In contrast to the Court of Appeals' authority to reach issues on the appeal of death penalty cases, the state courts have no "interest of justice" powers⁷¹¹ to address claims of innocence on post-conviction motions based on newly discovered evidence when the "due diligence" exception does not apply.⁷¹² State and federal law consequently can interact to deny a condemned prisoner any judicial forum in which to present newly discovered evidence of innocence.⁷¹³

If a trial court grants a defendant's motion to set aside a death sentence, the defendant is entitled to a new penalty trial before a specially convened jury.⁷¹⁴ If the nature of the error is such that the defendant could not lawfully be resentenced to death, the court must sentence the defendant either to LWOP

barred constitutional claim considered on the merits." *Id.* at 404. However, the majority opinion allowed for a narrow exception to this rule.

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 417. See generally *Schlup v. Delo*, 115 S. Ct. 851 (1995).

709. See *Herrera*, 506 U.S. at 410-11 n.8 (1993) (citing TEX. R. APP. PROC. 31(a)(1) (1992)).

710. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 1994); *Id.* § 440.20(1) (McKinney Supp. 1996) (incorporating prior provision by reference). See *supra* note 34 and accompanying text.

711. See *supra* note 619 and accompanying text.

712. See *supra* note 619 and accompanying text.

713. See generally *Herrera*, 506 U.S. 390 (1993).

714. See N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney Supp. 1996).

or to regular life imprisonment.⁷¹⁵ The prosecution is entitled to appeal an order setting aside a capital conviction or a sentence of death,⁷¹⁶ and such appeal is lodged directly in the Court of Appeals.⁷¹⁷ The defendant is entitled to appeal the denial of a post-conviction motion in a death case to the Court of Appeals,⁷¹⁸ and has a right under the death penalty statute to the appointment of counsel for filing and appealing an initial post-conviction motion.⁷¹⁹

F. *The Final Stages*

1. *Death Warrants and Stays of Execution*

Within seven days of an offender's being sentenced to death, the trial judge must issue a death warrant directing the Commissioner of Correctional Services to execute the sentence during the week designated in the warrant.⁷²⁰ The execution must be scheduled for a week within thirty to sixty days of the issuance of the death warrant.⁷²¹ However, this is a purely formalistic exercise because an appeal from a judgment resulting in death automatically stays the execution,⁷²² and appeals in capital cases are mandatory.⁷²³ The issuance of the death warrant does have implications for the condemned prisoner's conditions of confinement. The corrections commissioner is authorized, although not required, to house death-sentenced prisoners separately from the general prison population,⁷²⁴ and

715. *See id.*

716. *See id.* An appeal stays the trial court's order that directs a new sentencing proceeding. *See id.*

717. *See id.* § 450.80(1), (2).

718. *See id.* § 450.70(2), (3) (McKinney 1994 & Supp. 1996).

719. *See* N.Y. JUD. LAW § 35-b(12) (McKinney Supp. 1996). However, the courts generally have discretionary authority to appoint counsel to represent indigent defendants in post-conviction proceedings. *See also* N.Y. COUNTY LAW § 722-b (McKinney 1991); *People ex rel. Anderson v. Warden*, 68 Misc. 2d 463, 325 N.Y.S.2d 829, 837 (Bronx Co. 1971). *See supra* notes 547-48 and accompanying text.

720. *See* N.Y. CORRECT. LAW § 650 (McKinney Supp. 1996).

721. *See id.* § 651.

722. *See* N.Y. CRIM. PROC. LAW § 460.40(1) (McKinney 1994).

723. *See id.* § 470.30(2) (McKinney Supp. 1996). *See supra* note 614 and accompanying text.

724. *See* N.Y. CORRECT. LAW § 652(2) (McKinney Supp. 1996) A prisoner sentenced to death

to promulgate special rules governing the visitation rights of death-sentenced prisoners.⁷²⁵

A stay of execution remains effective through the final determination of the appeal.⁷²⁶ However, the statute ensures that a prisoner who seeks further review of his or her conviction or death sentence will have an opportunity to do so through the resolution of a petition for writ of certiorari to the United States Supreme Court, and the filing and appeal of an initial post-conviction motion challenging the conviction or sentence.⁷²⁷ It does so by directing the Court of Appeals to adopt specific rules to this effect.⁷²⁸ The statute additionally requires the court to is-

may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.

Id. Most states do maintain segregated "death rows" for prisoners, but in some jurisdictions death-sentenced prisoners may be incarcerated with the general prison population. See AMERICAN CORRECTIONAL ASSOCIATION, MANAGING DEATH-SENTENCED INMATES: A SURVEY OF PRACTICES 40 (1989) ("More than three-fourths (31 or 77.5%) [of state prison systems] report that they provide separate housing within the institution for their inmates with death sentences; eight institutions reported that they did not."); Amanda Wunder, *Survey Summary: Capital Punishment 1994*, 19 CORRECTIONS COMPENDIUM 8, 12-14 (Nov. 1994) (identifying states with and without designated death rows in their prison systems, and reporting that Delaware, Missouri, Montana, New Mexico, Pennsylvania, and South Dakota do not maintain death rows).

Death-sentenced male prisoners in New York will be incarcerated at Clinton Correctional Facility in Dannemora, and condemned female prisoners will be incarcerated at Bedford Hills Correctional Facility, in Bedford Hills. N.Y. State Dept. Correctional Services, Directive No. 0054, Unit for Condemned Persons 1 (Aug. 31, 1995). Originally, executions were planned to take place at the Southport Correctional Facility, near Elmira. *State Moves Death House to Prison Near Elmira*, TIMES UNION (Albany, N.Y.) Jan. 18, 1996, at A7. However, local opposition arose and this plan was abandoned. The Green Haven Correctional Facility, which is located in Stormville, in Dutchess County, has been designated as at least the temporary site of executions. Personal communication, Public Information Office, N.Y. Dept. of Correctional Services (Aug. 29, 1996).

725. See N.Y. CORRECT. LAW § 652(3) (McKinney Supp. 1996).

726. If the appeal results in the death sentence being affirmed, the trial judge or another supreme court judge must issue a new death warrant within seven days. See *id.* § 650(2). See also N.Y. CRIM. PROC. LAW §§ 460.40 (1), 470.30 (2).

727. See BILL MEMORANDUM, *supra* note 43, at 15.

728. See N.Y. CRIM. PROC. LAW § 460.40(3) (McKinney Supp. 1996). See N.Y. CT. APP. RULES 510.3-510.6 (1996). The statute's indirect route of requiring the Court of Appeals to adopt rules to effectuate the law's detailed provisions is rather

sue rules to provide that stays of execution shall be issued to permit the consideration of subsequent post-conviction motions, or other legal challenges to the judgment or sentence, "only . . . for good cause shown."⁷²⁹

Supreme court judges also are authorized to issue stays of execution if and to the extent necessary to permit determination of a petition alleging that the condemned prisoner is incompetent for execution.⁷³⁰ An execution must be stayed throughout any period that a prisoner has been found incompetent.⁷³¹ A stay may not be issued on a defendant's second or subsequent petition alleging incompetency, unless, after notifying the district attorney who prosecuted the defendant and giving that prosecutor the opportunity to be heard, the court finds that there is "reasonable cause" to believe that the defendant is incompetent.⁷³² The Governor is required to stay the execution of a death warrant upon being advised by the Commissioner of Corrections that the condemned prisoner is pregnant.⁷³³ Both the State and the defendant have the right to appeal stay orders, and the Court of Appeals is required to adopt rules providing for "the expeditious perfection and determination of such appeals."⁷³⁴

2. *Determining Incompetency for Execution*

In a political world you get a Supreme Court judge who sits up there, his term is about up, high profile case, the community is up in arms, horrible crime, gone through the whole process, the shrinks say he is incompetent [to be executed], the judge can't live with that because he can't go before the voters in a week or a

unusual. "Given the level of specificity in the statute, it is difficult to understand why these stay provisions were not simply spelled out in the statute itself." O'Connor, *supra* note 357, at 9.

729. N.Y. CRIM. PROC. LAW § 460.40(3) (McKinney Supp. 1996). See also N.Y. Ct. App. Proposed Rule 510.5 (Sept. 15, 1995).

730. See N.Y. CORRECT. LAW § 656(2) (McKinney Supp. 1996). A supreme court judge sitting either in the county in which the defendant was sentenced to death or in the jurisdiction in which the defendant is incarcerated is authorized to issue a stay when a petition alleging incompetency is filed. See *infra* Part II.F.2 for a discussion of incompetency to be executed.

731. See N.Y. CRIM. PROC. LAW. § 656(5) (McKinney Supp. 1996).

732. See *id.* § 656(8).

733. See *id.* § 657(3). The statute forbids the execution of pregnant condemned prisoners. See *id.* § 657(1).

734. *Id.* § 460.40(3) (McKinney Supp. 1996).

month or a year and say, "I let that guy off, I didn't execute that guy, bring me another panel."

Isn't there a risk for that and there's no protection, no due process protection, because you've written that out, so you can't appeal that. Nobody can review that.

—Assemblyman Alexander Grannis⁷³⁵

The federal Constitution forbids the execution of death-sentenced prisoners who are mentally incompetent.⁷³⁶ The prohibition against executing incompetent prisoners long preceded the adoption of the Eighth Amendment and has been justified on several grounds, including humanitarian, penological, religious, and practical.⁷³⁷ New York's death penalty statute flatly provides that "[t]he state may not execute an inmate who is incompetent."⁷³⁸ "An inmate is 'incompetent' when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out."⁷³⁹

The Supreme Court has not defined a minimum standard for measuring competency in this context.⁷⁴⁰ New York's statu-

735. Assembly Debate, *supra* note 1, at 428.

736. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

737. The Court in *Ford v. Wainwright* said:

One explanation is that the execution of an insane person simply offends humanity . . . ; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it[.]" . . . It is also said that execution serves no purpose in these cases because madness is its own punishment. . . . More recent commentators opine that the community's quest for "retribution"—the need to offset a criminal act by a punishment of equivalent "moral quality"—is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished.

Id., 477 U.S. at 407-08 (citations omitted). An additional reason sometimes offered is that an incompetent prisoner may not be able to communicate effectively with counsel, nor bring to light reasons that would militate against his or her execution. See *id.* at 422 n.3 (Powell, J., concurring) (arguing that the ability of the condemned to communicate with counsel is not a necessary part of the definition of competency for execution).

738. N.Y. CORRECT. LAW § 656(1) (McKinney Supp. 1996).

739. *Id.*

740. The Court was not required to assess the substantive definition of incompetency that the State of Florida utilized in the leading case on incompetency to be executed, *Ford v. Wainwright*, because it found substantial deficiencies in the

tory definition reflects a narrower conception of incompetency for execution than has been adopted in several other jurisdictions,⁷⁴¹ and it is narrower than the standard recommended by the American Bar Association⁷⁴² and the test offered by Blackstone.⁷⁴³ It differs from these other standards by failing to require that the prisoner have the "capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, [and have] . . . the ability to convey such information to counsel or to the court."⁷⁴⁴ The rationale for not executing prisoners who lack this minimum communicative capacity was explained by Sir Matthew Hale who stated that, "if after judgment he become of *non sane memory*,

state's procedures for determining incompetency. 477 U.S. 399 (1986). The definition of incompetency under Florida law closely resembles New York's definition; it exempts prisoners from execution who "d[o] not have the mental capacity to understand the nature of the death penalty and why it is imposed' on them." *Id.* at 421 (Powell, J., concurring) (citing FLA. STAT. ANN. § 922.07 (West 1985)). In a concurring opinion, Justice Powell approved of this standard, and indicated that he "would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.

741. See Roberta M. Harding, "Endgame": *Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 134-37, 144-51 (1994) (identifying standards for competency for execution used in different jurisdictions). See, e.g., 21 U.S.C.A. § 848(1) (West Supp. 1996); MO. ANN. STAT. § 552.060(1) (West Supp. 1996).

742. The American Bar Association standard is as follows:

a. Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.

b. A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD 7-5.6 (1989).

743. See 4 WILLIAM BLACKSTONE, COMMENTARIES 24-25. See also *Ford v. Wainwright*, 477 U.S. 399, 406-07 (1986).

744. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD 7-5.6(b) (1989). See *supra* note 742. See generally *Solesbee v. Balkcom*, 339 U.S. 9, 20 n.3 (1950) (Frankfurter, J., dissenting).

his execution shall be spared; for were he of sound memory he might allege somewhat in stay of judgment or execution."⁷⁴⁵

This omission is especially ironic in light of one of the procedural quirks built into the statute. The issue of the prisoner's incompetency for execution must be raised by filing a petition alleging such incompetency, either in the court in which the prisoner was sentenced, or in the court of the county in which the prisoner is incarcerated. The petition must be accompanied by the affidavit of a qualified psychiatrist or certified psychologist who, "based at least in part on personal examination, attests that in the psychiatrist's or psychologist's professional opinion the inmate is incompetent and lists the pertinent facts therefor."⁷⁴⁶ However, a prisoner has no statutory right to counsel until *after* the petition alleging incompetency has been filed,⁷⁴⁷ with its supporting affidavit. How and whether condemned prisoners already experiencing mental difficulties will be able to secure a psychiatrist's or a psychologist's affidavit, attach it to a petition alleging incompetency to be executed, and file the petition in court, without the assistance of legal counsel, remains to be seen.⁷⁴⁸ The statute creates a classic "Catch-22" situation: there can be no judicial inquiry regarding competency, and no court-appointed legal counsel for the prisoner al-

745. 1 MATTHEW HALE, PLEAS OF THE CROWN 35 (1736), *quoted in* Ford v. Wainwright, 477 U.S. 399, 419 (1986) (Powell, J., concurring).

746. N.Y. CORRECT. LAW § 656(2) (McKinney Supp. 1996).

747. *See* N.Y. JUD. LAW § 35-b(12) (McKinney Supp. 1996) (providing for court-appointed counsel under the statute only through the resolution of the appeal of an initial post-conviction motion); N.Y. CORRECT. LAW § 656(3) (McKinney Supp. 1996) ("Upon the filing of a petition [alleging incompetency to be executed] . . . if the inmate does not have counsel and is financially unable to obtain counsel the court shall appoint competent counsel experienced in the trial of criminal matters to represent the inmate."). Note that counsel appointed under this section need not meet the special qualifications required to provide defense representation for the trial and appeal of capital cases, and the litigation of post-conviction motions. *See* N.Y. JUD. LAW § 35-b(2) (McKinney Supp. 1996). *See supra* notes 510-23 and accompanying text.

748. The statute provides that:

[t]he petition [alleging incompetency for execution] may be filed by the inmate, the inmate's counsel, an employee of the department [of corrections], the inmate's legal guardian, a member of such inmate's immediate family or, in the event that the inmate does not have regular contact with a member of his or her immediate family, a bona fide friend who has maintained regular contact with the inmate.

N.Y. CORRECT. LAW § 656(2) (McKinney Supp. 1996).

leging incompetency, until after the prisoner—who may be incompetent—files a petition in a court of law, with the attached affidavit of a qualified mental health professional, setting forth facts in support of his or her alleged incompetency.⁷⁴⁹

The filing of an initial petition alleging incompetency for execution triggers a stay of execution, if necessary to resolve the petition;⁷⁵⁰ however, stays are to be issued on subsequent petitions only when the court finds “reasonable cause” to believe the prisoner is incompetent.⁷⁵¹ A petition may be filed either in the county in which the prisoner was prosecuted or in which the prisoner is confined, although on request of either the district attorney or the prisoner’s counsel it may be transferred to the former court unless such a transfer would be “unduly burdensome or impracticable.”⁷⁵² Promptly upon the filing of a petition, the court is to appoint three psychiatric examiners.⁷⁵³ The examiners must be impartial, and they must be either qualified psychiatrists or certified psychologists.⁷⁵⁴ The three “psychiatric commissioners” are sworn as referees.⁷⁵⁵ Their charge is “to inquire into the inmate’s competence and report to the court” their conclusions.⁷⁵⁶

The psychiatric commissioners must promptly examine the allegedly incompetent prisoner.⁷⁵⁷ All three commissioners are to be present at the examination.⁷⁵⁸ Upon application to the court, both the prisoner’s attorney and the district attorney have the right to have the prisoner examined by a qualified psy-

749. See generally Senate Debate *supra* note 13, at 1901, 1903-04 (remarks of Senator David Paterson).

750. See N.Y. CORRECT. LAW § 656(2) (McKinney Supp. 1996). See *supra* notes 730-31 and accompanying text.

751. N.Y. CORRECT. LAW § 656(8). See *supra* note 732 and accompanying text.

752. N.Y. CORRECT. LAW § 656(2). The petition is to be served on either the district attorney who prosecuted the defendant, or the district attorney in the county in which the death-sentenced prisoner is confined. See *id.* If service is made on the latter district attorney, he or she is promptly to notify the district attorney who prosecuted the defendant. See *id.* § 656(3).

753. See *id.* § 656(2).

754. See *id.* The qualifications of a “qualified psychiatrist” and a “certified psychologist” are defined in N.Y. CRIM. PROC. LAW § 730.10(5), (6) (McKinney Supp. 1996).

755. N.Y. CORRECT. LAW § 656(2) (McKinney Supp. 1996).

756. *Id.*

757. See *id.* § 656(3).

758. See *id.*

chiatrist or certified psychologist of their designation.⁷⁵⁹ Each attorney has the right to be present at any examination made of the prisoner.⁷⁶⁰

Before rendering an opinion about the prisoner's competency, the psychiatric commissioners must conduct a proceeding at which they receive and consider evidence from the prisoner's attorney and the district attorney.⁷⁶¹ Written submissions, testimony, and psychiatric evidence all must be considered.⁷⁶² Although trial rules of evidence do not apply, the proceeding must be conducted on the record, and both sides have the right to cross-examine witnesses.⁷⁶³ The psychiatric commissioners are to report their opinions regarding the prisoner's competency to the court within sixty days of the conclusion of the proceeding.⁷⁶⁴ They must include findings of fact in their report, and provide the court with a transcript of the competency proceeding.⁷⁶⁵

The opinion of a majority of the psychiatric commissioners regarding the prisoner's competency is determinative unless the court rejects the conclusion as clearly erroneous.⁷⁶⁶ If the opinion is rejected on this ground, the court appoints another panel of psychiatric commissioners to conduct a new examination and competency proceeding.⁷⁶⁷ If the psychiatric commissioners' finding is accepted, the court enters an order accordingly.⁷⁶⁸ A new death warrant is issued if the prisoner is found to be competent for execution.⁷⁶⁹ The execution must be stayed if the

759. *See id.*

760. *See* N.Y. CORRECT. LAW §656(3) The court is to allow reasonable fees and reasonable costs for all psychiatric examiners, including the psychiatric commissioners. All such fees and costs are paid by the State, rather than by the county. *See id.* § 656(7).

761. *See* N.Y. CORRECT. LAW § 656(4).

762. *See id.*

763. *See id.* § 656(4).

764. *See id.* § 656(5).

765. *See id.* The 60-day period for the psychiatric commissioners to issue their opinion to the judge is to be met "[u]nless impracticable . . ." *Id.*

766. *See* N.Y. CORRECT. LAW § 656(6).

767. *See id.*

768. *See id.*

769. *See id.* § 656(5). The judge entering the order finding competency must "promptly inform" the judge who issued the prior death warrant. *See id.* The latter judge, in turn, must "promptly issue a new warrant . . ." *Id.*

prisoner is found to be incompetent.⁷⁷⁰ "Any other provision of law notwithstanding, no other review, judicial or otherwise, shall be available with respect to an order finding the inmate to be incompetent or competent."⁷⁷¹

The provision barring further review of a trial court's findings regarding competency for execution presumably is intended to minimize delay in carrying out executions in the latter stages of the capital punishment process.⁷⁷² This emphasis on expeditiously achieving finality, however, creates the highly unusual result that a trial judge's finding—which itself is largely dictated by the majority vote of the psychiatric commissioners—definitively resolves an issue of fundamental constitutional significance, i.e., the accused's Eighth Amendment right not to be executed if mentally incompetent. The nonreviewability of the trial judge's resolution of this issue raises due process concerns,⁷⁷³ which are exacerbated because of the community pressures confronting trial judges (whose jobs are determined by popular election) in politically supercharged death penalty cases.⁷⁷⁴

Unlike the law in some other states, New York's statute does not forever bar the execution of a prisoner who once has

770. *See id.*

771. N.Y. CORRECT. LAW §656(5)

772. *Cf.* Executive Memorandum, *supra* note 12, at 4 (describing the state's interest as "compelling" in "avoiding undue and unseemly delay in carrying out death sentences," in discussion of necessity for showing of good cause to obtain a stay of execution in connection with legal proceedings that follow rejection of an initial post-conviction motion and appeal).

773. *See generally* Paul F. Enzinna & Jana L. Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency to be Executed After Ford v. Wainwright*, 41 FLA. L. REV. 115 (1989); Note, *Ford v. Wainwright: The Eighth Amendment, Due Process and Insanity on Death Row*, 7 N. ILL. U. L. REV. 89 (1987).

774. *See* Assembly Debate, *supra* note 1, at 424-29 (colloquy between Assemblymen Alexander Grannis and Eric Vitaliano) (*quoted in part, supra* text accompanying note 735). For an excellent article discussing the pressures confronting elected judges in capital cases and an argument that the actual or perceived impartiality of elected judges in death-penalty cases is compromised, *see* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995). *See generally* Harris v. Alabama, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 486-87 (1984) (Stevens, J., dissenting).

been found incompetent.⁷⁷⁵ If the prisoner's incompetency is the product of a mental illness, the prisoner is transferred to a secure mental health facility; otherwise, the prisoner remains in the custody of the Department of Corrections.⁷⁷⁶ The administrator of a secure facility to which a prisoner is committed is authorized to make a determination that the prisoner has regained competency, at which time notification is given to the court that found the prisoner incompetent. The court then appoints a new psychiatric commission to examine the prisoner and return an opinion about his or her present competency.⁷⁷⁷ This substantial involvement of mental health professionals in the competency process is sure to present ethical dilemmas for those professionals. These dilemmas may be especially acute for psychiatrists and psychologists who are in a position to treat an incompetent prisoner, when the prisoner thereafter may be restored to competency and executed.⁷⁷⁸

775. Cf. MD. ANN. CODE art. 27, § 75A(d)(3) (Supp. 1995) (requiring commutation of incompetent prisoner's death sentence to a sentence of life imprisonment without parole). See also Harding, *supra* note 741, at 138-39 (discussing practice in Kansas and Nebraska which, *de facto*, results in the permanent commutation of the death sentence of an incompetent prisoner to life imprisonment without parole).

776. See N.Y. CORRECT. LAW § 656(5) (McKinney Supp. 1996).

777. See *id.* § 656(6).

778. See Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67 (1990); Charles Patrick Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*, 5 BEHAV. SCI. & L. 175 (1987); Douglas Mossman, *The Psychiatrist and Execution Competency: Ford-ing Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1 (1992); Michael L. Radelet & George W. Barnard, *Treating Those Found Incompetent for Execution: Ethical Chaos With Only One Solution*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 297 (1988). Issues regarding the restoration of competency to death-sentenced prisoners by the use of psychotropic drugs also have confronted the courts and mental health professionals. See *State v. Perry*, 610 So. 2d 746 (La. 1992) (ruling that state constitution forbids involuntary medication of prisoner to restore competency to be executed); *Singleton v. State*, 437 S.E.2d 53 (S.C. 1993) (ruling that state constitution forbids involuntary medication of prisoner to restore competency to be executed). See generally Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361 (1994); Kristen Wenstrup Crosby, Comment, *State v. Perry: Louisiana's Cure-to-Kill Scheme Forces Death-Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 MINN. L. REV. 1193 (1993).

3. *Executive Clemency*

The New York Constitution gives the Governor "the power to grant reprieves, commutations and pardons after conviction . . . upon such conditions and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."⁷⁷⁹ In capital cases, a reprieve temporarily postpones an execution, a commutation reduces a death sentence to a lesser punishment, and a pardon absolves the defendant of guilt, and thus removes the force of both the conviction and the punishment.⁷⁸⁰ New York governors historically have not been reluctant to exercise their commutation powers in capital cases. Although 692 people were executed under state law between 1890 and 1963, governors also commuted approximately 213 death sentences since 1890, making for a ratio of roughly 3 commutations to every 10 executions.⁷⁸¹ Such use of the commutation power is consistent with the practices of governors and pardon boards in other states in the pre-*Furman* era.⁷⁸²

New York governors have not had occasion to consider exercising their clemency powers in capital cases for several years, but future chief executives will have to confront this issue. The

779. N.Y. CONST. art. IV, § 4. The Governor "shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve." *Id.*

780. See Radelet & Zsembik, *supra* note 690, at 289.

781. See *Policy Perspectives*, *supra* note 4, at 565-66. Governors followed different commutation policies. Governors Smith and Lehman regularly commuted the death sentences of all offenders whose appeals were not affirmed unanimously by the New York Court of Appeals. See CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 73 (1974). Governor Dewey would commute death sentences when a dissent was made based on the facts of a case, as distinguished from the law. See Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 130, 170 (1964). Governor Rockefeller considered dissenting opinions issued in capital cases by the Court of Appeals, but only as one factor among others in arriving at commutation decisions. See *id.* Governor Rockefeller commuted five death sentences to terms of life imprisonment in 1965, following significant changes in the state's death penalty statute that were enacted that year. See *Policy Perspectives*, *supra* note 4, at 526.

782. See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 264-66 (1990-1991) (presenting information from 11 states regarding commutation practices in capital cases during various periods before and up to 1968, and reporting that the ratio of commutations to death sentences was approximately 2:8, to 3:8).

pendency of judicial proceedings has caused governors and pardon boards in other states to refrain from initiating clemency review in great numbers of capital cases, which makes assessing the actual rate at which death sentences have been commuted following *Furman* rather difficult. Nevertheless, indications are that commutations of capital sentences have dropped precipitously in recent years.⁷⁸³

In light of reported public opinion about the death penalty, state governors may be especially eager to disassociate themselves from any actions that could be perceived as inconsistent with enforcing capital punishment, or as not being tough on crime.⁷⁸⁴ If commutations of capital sentences have become politically improvident, or otherwise have fallen into disuse, there are potentially serious consequences for the entire capital punishment process. The Supreme Court has assumed that executive "[c]lemency is . . . the historic remedy for preventing miscarriages of justice where judicial process has been ex-

783. See *id.* at 263-64 (reporting that in the decade 1961 through 1970, the ratio of commutations to death sentences was 182-to-1,155, or 1 commutation for every 6.3 capital sentences. In the 10 years between 1979 and 1988, there were 63 commutations and 2,535 death sentences, or a ratio of 1 commutation for every 40.2 death sentences); Radelet & Zsembik, *supra* note 690 (identifying 70 commutations of capital sentences between 1973 and 1992; 41 of these commutations followed court action that made it incumbent on state governors or pardon boards to commute death sentences if cumbersome retrials were to be avoided, meaning that only 29 commutations were granted for "humanitarian" reasons); James Brooke, *Utah Debates Firing Squads in Clash of Past and Present*, N.Y. TIMES, Jan. 14, 1996, at 16 (quoting Richard C. Dieter, Executive Director of the Death Penalty Information Center, as stating that "[c]lemency is becoming a thing of the past in death-penalty cases." The article further reports that 10 death sentences were commuted in 1991, but "that number fell to one in 1994 and to zero in 1995."). In early 1996, Governor Jim Edgar of Illinois commuted the death sentence of Guinevere Garcia just hours before Garcia's scheduled execution. *Clemency Brings New Viewpoint*, TIMES UNION (Albany, N.Y.) Jan. 17, 1996, at A-9.

784. See Bright & Keenan, *supra* note 774, at 771-76; Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 720-26 (1990-1991).

hausted"⁷⁸⁵ in capital cases, and that "clemency has provided the 'fail safe' in our criminal justice system."⁷⁸⁶

New York's death penalty statute makes only brief reference to the clemency process.⁷⁸⁷ It specifies that the governor alone has the power to issue a reprieve to postpone an execution.⁷⁸⁸ It further requires the clerk of court in the county in which sentence was entered to transmit copies of the condemned offender's trial and sentencing proceedings to the governor "[w]ithin a reasonable time" following the issuance of a death warrant.⁷⁸⁹ Finally, it authorizes, but does not require the governor "to request the opinion of the attorney general, the district attorney, and the convicted person's counsel, or any of them, as to whether the execution of the person should be reprieved or suspended."⁷⁹⁰

The statute requires no specific procedures to help ensure that the governor's clemency decision is based on full and accurate information, and that it has been fairly considered.⁷⁹¹ The

785. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (footnotes omitted) (ruling that Texas' policy of denying judicial consideration of claims of newly discovered evidence filed later than 30 days after final resolution of an appeal is not unconstitutional in capital cases, and creates no right of federal habeas corpus review of a death-sentenced prisoner's claim of actual innocence, and relying in part on the existence of executive clemency to review and act on such claims). See generally Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994).

786. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

787. See N.Y. CORRECT. LAW § 655 (McKinney Supp. 1996).

788. See *id.*

789. *Id.* § 653. The clerk of court also is to transmit a statement of conviction and sentence, and "to the extent practicable," any exhibits introduced in the offender's trial or sentencing proceedings. *Id.*

790. *Id.* § 654.

791. The state constitution indicates that the governor's authority is "subject to such regulations as may be provided by law relative to the manner of applying for pardons." N.Y. CONST. art. IV, § 4. See *supra* note 779 and accompanying text. A literal reading of this section would allow procedural regulations only for the governor's pardoning power, and not also for the governor's power to grant reprieves or commutations. Even if the constitution provision were given this restrictive interpretation, nothing would prevent the Governor from implementing more rigorous procedures to govern the receipt and evaluation of information relevant to clemency decisions. Additionally, the Governor's constitutional authority to exercise clemency would still have to comply with whatever state or federal due process protections might be held to apply. See Kobil, *supra* note 556; Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994).

condemned prisoner has no statutory right to counsel for assistance in presenting a case for executive clemency.⁷⁹² Nor are there other procedural devices that would enhance the reliability of clemency decisions, such as the requirement for a hearing, the right of both the prisoner and the state to offer evidence and present argument, and requiring a statement in explanation of the governor's decision. Instituting such measures would promote not only informational accuracy, but also would foster "both the applicant's and society's sense that the decision has been a considered one."⁷⁹³

4. *Execution*

Assemblyman Philip Boyle: [A]bout six weeks ago, I wanted to make sure that I knew everything I possibly could about the death penalty, so I called up the Official Executioner of the State of Texas and I asked if I could go down and witness an execution.

....

I have to say that I'm happy that Governor Pataki has decided to use lethal injection. From the moment that the injection starts—and I was provided the very unique opportunity to actually stand next to the executioner when it happened—from the moment they start . . . the injection, the prisoner is dead within five seconds. He will cough once or twice and then a blast air, and they're gone. As far as I could tell, it was very painless and over very quickly.⁷⁹⁴

....

Assemblyman Alexander Grannis: Mr. Boyle must have been in Texas on a good day because there have been bad days in Texas when things didn't go so well. Here was one time when a technician had to probe both arms and legs of an inmate for forty-five minutes before they found a suitable vein. Is that going to be the painless way that we go about this with these execution technicians that you've got in your bill?

There was another case where a needle popped out, it sprayed all over the room, all hell broke loose, they had to run in, dodging this needle spraying out this deadly fluid to shove it back in the inmate's arm.

792. See N.Y. JUD. LAW § 35-b(1) (McKinney Supp. 1996) (right to court-appointed counsel terminates following appeal of initial motion for state post-conviction relief). See *supra* notes 542-59 and accompanying text.

793. Kobil, *supra* note 556, at 225.

794. Assembly Debate, *supra* note 1, at 190, 193.

Another time while the curtains were still up—the witnesses were watching, it took forty-seven minutes to locate a vein; the condemned man had to actually assist the doctor in finding the vein.

Assemblyman Eric Vitaliano: That's got to be the definition of a good sport, Pete.

Assemblyman Grannis: Well, or a bad day.⁷⁹⁵

The statute provides for death by lethal injection.⁷⁹⁶ This method of execution displaces electrocution, which had been used in New York since the electric chair was introduced in 1890.⁷⁹⁷ A commission appointed in 1886 to study replacing hanging as New York's form of execution actually considered lethal injection, but ultimately rejected it because of opposition from the medical profession, and based on the judgment that electrocution represented the most humane way to cause death.⁷⁹⁸ Now, however, lethal injection clearly is the preferred method of execution in this country. New York joins at least thirty-one of the thirty-seven other death penalty states, and the federal government, in making lethal injection either the exclusive procedure for carrying out death sentences, or among the alternative methods of execution available.⁷⁹⁹

795. *Id.* at 257.

796. "[T]hat is, by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead." N.Y. CORRECT. LAW § 658 (McKinney Supp. 1996).

797. New York was the first state to use the electric chair, and William Kemmler was the first person executed by electrocution, on August 6, 1890. The fascinating story behind the development of the electric chair—which included a vitriolic dispute between Thomas Edison and George Westinghouse regarding the respective merits of direct and alternating currents—is reported in Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 566-607 (1994).

798. *See id.* at 571-73.

799. The statutes designating the method of execution used in the different states are collected in Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 979 n.29 (1995). The following states make lethal injection the method of execution, or an available alternative method, that are cited in the above Comment: Connecticut (CONN. GEN. STAT. ANN. § 54-100 (West Supp. 1996)), Indiana (IND. CODE ANN. § 35-38-6-1(a) (Michie Supp. 1996)); Kansas (KAN. STAT. ANN. § 22-4001(a) (1995)); Ohio (OHIO REV. CODE ANN. § 2949.22(B)(1) (Anderson Supp. 1995)); and South Carolina (S.C. CODE ANN. § 24-3-530(A) (Law. Co-op. Supp. 1995)). Both federal law and military law provide for execution by lethal injection. *See* 28 C.F.R. § 26.3 (1995); Army Reg. 190-55, U.S. Army Correctional System: Procedures for Military Executions, para. 6-1 (Oct. 27,

Texas conducted the first execution by lethal injection, in 1982.⁸⁰⁰ The rapid movement of states to adopt lethal injection doubtlessly was inspired by the perception that lethal injection produces death less painfully and more humanely⁸⁰¹ than such traditional methods of execution as the electric chair,⁸⁰² the gas chamber,⁸⁰³ hanging,⁸⁰⁴ and the firing squad.⁸⁰⁵ Nevertheless,

1986) (*cited in* State v. Deputy, 644 A.2d 411, 421 n.7 (Del. Super. Ct. 1994)). Electrocution is retained as the exclusive method of execution in six states: Alabama, Florida, Georgia, Kentucky, Nebraska, and Tennessee. Ragon, *supra*, at 979 n.29.

800. Charles Brooks was the executed prisoner. THE AMERICAN COLLEGE OF PHYSICIANS, HUMAN RIGHTS WATCH, THE NATIONAL COALITION TO ABOLISH THE DEATH PENALTY & PHYSICIANS FOR HUMAN RIGHTS, BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 10 (1994) [hereinafter BREACH OF TRUST].

801. When he was still Governor of California, Ronald Reagan endorsed the idea of execution by lethal injection, as follows:

Being a former farmer and horse raiser, I know what it's like to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep—that's it. I myself have wondered if maybe this isn't part of our problem [with capital punishment], if maybe we should review and see if there aren't even more humane methods now—the simple shot or tranquilizer.

FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 110 (1986) (quoting Henry Schwarzschild, *Homicide by Injection*, N.Y. TIMES, Dec. 23, 1982, at A15). In *Heckler v. Chaney*, the Supreme Court rejected a civil suit filed by condemned prisoners that had alleged that the Food and Drug Administration was required to approve the drugs used for lethal injection as "safe and effective" for human executions. 470 U.S. 821 (1985).

802. See *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (describing execution by electrocution); Denno, *supra* note 797, at 624-76 (describing the process of electrocution and several botched uses of the electric chair).

803. See *Gray v. Lucas*, 463 U.S. 1237 (1983) (Marshall, J., dissenting from denial of certiorari) (describing execution by lethal gas); *Gomez v. United States District Court*, 503 U.S. 653 (1992) (Stevens, J., dissenting from denial of stay of execution) (same); *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996) (holding that execution by lethal gas violates Eighth Amendment's prohibition against cruel and unusual punishments).

804. See *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2125 (1994) (rejecting claim that execution by hanging is cruel and unusual punishment); *Campbell v. Wood*, 114 S. Ct. 2125 (1994) (Blackmun, J., dissenting from denial of certiorari) (describing hangings); Denno, *supra* note 797, at 678-86 (describing hangings).

805. See Denno, *supra* note 797, at 687-89 (describing execution by firing squad). Gary Gilmore was executed by firing squad in Utah in 1977. *Id.* In 1996 John Taylor was executed by firing squad in the same state. *Utah Debates Firing Squads In Clash of Past and Present*, N.Y. TIMES, Jan. 14, 1996, at 16. The Supreme Court approved of the firing squad as a method of execution in *Wilkerson v. Utah*. 99 U.S. 130 (1879).

several attempts at executing prisoners by lethal injection have been plagued by problems. Locating a suitable vein to accommodate the needle used for lethal injection has taken up to forty-five minutes, while a prisoner lay strapped to the execution gurney. In one case, the syringe was dislodged from the condemned prisoner's arm two minutes after the injection process had begun. The death chamber was sprayed with the lethal solution, and the needle had to be reinserted before the execution could resume. In another case, a prisoner's violent reaction to the drugs used for lethal injection involved "violent choking, gasping and writhing on the gurney—so much so that one witness fainted."⁸⁰⁶

One factor that may contribute to the problems with administering lethal injection is the medical profession's position that it is unethical for physicians and nurses to participate in executions.⁸⁰⁷ The American Medical Association's (AMA) ethical opinion on physician participation in executions is unequivocal: "A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."⁸⁰⁸ "Participation" is defined to include:

- prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure;
- monitoring vital signs on site or remotely (including monitoring electrocardiograms);
- attending or observing an execution as a physician;
- rendering of technical advice regarding execution;
- selecting injection sites;
- starting intravenous lines as a port for a lethal injection device;

806. JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990* 147 (1994). See also AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 58-60 (1989). Lethal injection as a method of execution thus far has withstood constitutional challenge in the courts. See *LaGrand v. Lewis*, 883 F. Supp. 469, 471 (D. Ariz. 1995) (citing cases).

807. See *BREACH OF TRUST*, *supra* note 800, at 13-14.

808. *Id.* at ix (quoting CODE OF MEDICAL ETHICS, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, art. 2.06 (1992)).

- prescribing, preparing, administering, or supervising injection drugs or their doses or types;
- inspecting, testing, or maintaining lethal injection devices;
- consulting with or supervising lethal injection personnel.⁸⁰⁹

Under these guidelines, a physician may “certify” death (confirm that the prisoner is dead after another has pronounced death), but may not “determine” death (monitor the prisoner’s condition during the execution and identify the point at which death has occurred).⁸¹⁰

New York’s statute provides that a licensed physician or physicians “may be present” at an execution, but that an “execution technician” or technicians—whose names “shall never be disclosed”—shall “assist in the execution”⁸¹¹ After implying that a physician’s presence at an execution is not obligatory, the statute contains an apparent contradiction, by requiring that, “[i]mmediately after the execution an examination of the body of the convicted person shall be made by the licensed physicians *present at the execution*,” who are to report in writing “the nature of the examination and the occurrence of death”⁸¹² Thus, while apparently attempting to limit physicians’ involvement to “certifying,” rather than “determining” death through one of its provisions, the statute simultaneously seems to require a physician’s attendance at an execution, in violation of the AMA code of ethics.⁸¹³ This ambiguity is certain to produce confusion about the role envisioned under the legislation for physicians in the execution process and its aftermath.

Executions are to occur in “a suitable and efficient facility, enclosed from public view,” within a prison facility designated by the Commissioner of Corrections.⁸¹⁴ Those authorized to be

809. *Id.* at 15.

810. *Id.* at 14-15. See *id.* at 15-16 for other actions that physicians may take without “participating” in executions.

811. N.Y. CORRECT. LAW § 660(1) (McKinney Supp. 1996).

812. *Id.* § 661 (emphasis added).

813. See *supra* notes 799-800 and accompanying text. See also Falk & Cary, *supra* note 478, at 234; David J. Rothman, *Physicians and the Death Penalty*, 4 J.L. & POL’Y 151, 159-60 (1995).

814. N.Y. CORRECT. LAW § 659 (McKinney Supp. 1996). Green Haven Correctional Facility has been identified, at least temporarily, as the execution house. See *supra* note 724.

present at an execution include the Commissioner,⁸¹⁵ designated execution technicians, corrections officers, and a licensed physician. The Commissioner is required to invite a judge of the supreme court, the district attorney, and the sheriff of the county in which the prisoner's conviction was returned. The prisoner's attorney and six adult citizens also must be invited to executions.⁸¹⁶ At the condemned prisoner's request, two members of the clergy,⁸¹⁷ and four relatives or "bona fide friends" also may witness the execution, "unless the commissioner determines that the presence of any named relative or friend at the execution would pose a threat to the safety or security of" the prison facility.⁸¹⁸ The statute makes no specific provision guaranteeing the press or other media representatives access to witness executions.⁸¹⁹ No person under eighteen years of age is permitted to witness an execution.⁸²⁰ Detailed provisions are made for the disposition of the executed prisoner's body.⁸²¹

III. Conclusion

The conclusion to which their most mature, calm, and industrious investigation on the subject has led the committee, is, that the punishment of death by law ought to be forthwith and forever abolished by the State of New York.

815. See N.Y. CORRECT. LAW § 660(1). However, "[t]he commissioner may appoint a deputy with the department [of corrections] to execute the warrant of execution and to perform all other duties imposed upon the commissioner under this article." *Id.* § 661(3).

816. See *id.* § 660(1). The names of the six adults who witnessed the execution are not to be disclosed until after the execution has been completed. See *id.*

817. See *id.* § 660(2).

818. *Id.* § 660(3).

819. Denying the media access to witness executions would present serious First Amendment concerns. See *Garrett v. Estelle*, 556 F.2d 1274, 1276-77 (5th Cir. 1977). Department of Corrections regulations specify that four of the six adult witnesses to the execution required by statute shall be representatives of the news media. See N.Y. State Dept. Correctional Services, Directive 0402, Media Access to the Unit for Condemned Persons and Capital Punishment Unit (Aug. 31, 1995). For an interesting historical account that includes a discussion of the press media's access to executions, see Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995).

820. See N.Y. CORRECT. LAW § 660(3) (McKinney Supp. 1996).

821. See *id.* § 662.

—Assemblyman John L. O'Sullivan (1841)⁸²²

The question whether the Commission should recommend the abolition or the retention of capital punishment in New York State presents the gravest problem our commissions call on us to face. . . . In the end, we are obliged to choose between competing values on the basis of imperfect data and our choice, on balance, is to vote for recommending abolition.

—Statement of the Majority of the Temporary State Commission on Revision of the Penal Law and Criminal Code (1965)⁸²³

The year 1995 doubtlessly marks a significant chapter in New York's long history with capital punishment. The death penalty legislation passed by the Legislature and signed into law by Governor Pataki defines twelve forms of first-degree murder as capital crimes and provides detailed sentencing procedures, jury-selection and right-to-counsel provisions, appellate review processes, and a specific execution protocol. However, before any executions occur, the statute and its administration will have to survive a series of challenges presented under both the state and federal constitutions. If the analysis in this Article is correct, the law in several respects may not measure up against constitutional requirements.

Only defendants who plead not guilty and exercise their right to trial by jury can be sentenced to death; those who, with the consent of the prosecutor and approval of the court, plead guilty to first-degree murder cannot be punished by death. A life sentence with parole eligibility after twenty to twenty-five years is unavailable as a sentencing verdict to capital juries when the death penalty is sought, yet a judge can only impose that sentence or life imprisonment without parole when an offender pleads guilty to first-degree murder or when the prosecutor does not pursue a death sentence.⁸²⁴ Capital sentencing juries are instructed that if they do not reach a unanimous verdict about whether a convicted first-degree murderer should be sentenced to death or LWOP, then a twenty to twenty-five year

822. J. O'SULLIVAN, REPORT IN FAVOR OF THE ABOLITION OF THE PUNISHMENT OF DEATH BY LAW, MADE TO THE LEGISLATURE OF THE STATE OF NEW YORK 7-8 (2d ed., Apr. 14, 1841 & photo reprint 1974).

823. NEW YORK STATE TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT 69 (1965).

824. See *supra* notes 194-213 and accompanying text.

to life sentence will be imposed—an outcome which has no rational penological basis, and which may persuade jurors to relinquish their principled views that an offender should receive either death or LWOP simply to prevent the offender from receiving a sentence with parole eligibility.⁸²⁵ Aggravating factors proved during a first-degree murder trial are conclusively established. Defendants who present no evidence during the guilt-phase of a capital trial are precluded from relitigating those aggravating circumstances when they are used to determine punishment.⁸²⁶ Other serious constitutional issues inhere elsewhere in the statute.⁸²⁷

If the statute is invalidated by judicial action, the Legislature is almost certain to attempt to repair those provisions that can be repaired, and again try to make capital punishment a viable sanction.⁸²⁸ If amendments and revisions to the statute ensue, the Legislature hopefully will not seize the opportunity to expand the death penalty law's reach or weaken its procedural protections. In many of its particulars, New York's death penalty statute is procedurally rigorous. Still, however well-crafted the legislation may or may not be, those opposed to the death penalty will have little satisfaction until the statute is removed from the books. As Assemblyman John McEneny observed:

[T]his [is] a better bill than we have seen in recent years. . . . [T]o put as much justice as possible into the bill and as many safeguards as can be put into the bill [is] to make it the kind of legislative action that more people can vote for with confidence.

. . . .

825. See *supra* notes 367-401 and accompanying text.

826. See *supra* notes 272-95 and accompanying text.

827. For example, other issues include whether guilt-phase jurors in first-degree murder trials may be death-qualified (or life-qualified) (see *supra* notes 450-85 and accompanying text); whether the right to court-appointed counsel under the law can be terminated following the appeal of an initial post-conviction motion (see *supra* notes 540-61 and accompanying text); and whether mentally retarded offenders convicted of the first-degree murder of corrections employees may be sentenced to death (see *supra* notes 415-27 and accompanying text).

828. The death penalty bill contains a severability clause: "If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof." N.Y.S. 2850, N.Y.A. 305, § 37, 218th Sess. (1995).

But I would confess that when the foundation is rotten, that no matter how the house is built, the house is doomed to failure and will not survive. The foundation, the premise that somehow justice can be arrived at through the execution of a human being . . . is not a sound foundation and cannot build a sound and lasting house.⁸²⁹

In the event that the legislation withstands constitutional scrutiny, either in its original form or following amendment and revisions, it nevertheless must survive an equally significant test. The remarks of Assemblyman Scott Stringer are on point:

[A]fter tonight we sort of have an interesting political problem on our hands. Because on the one hand, we're going to pass this death penalty bill and we're all going to leave here, some people are going to think that we actually reduced crime and we've deterred crime, but the reality is in the weeks and months and years to come no one is going to feel safer because we have the death penalty. The problems in our individual communities are still going to be the same. The issues that we talked about tonight, unfortunately, are still going to be there.

And, yet, somebody is going to have to go back to the electorate and explain that we passed the death penalty and we didn't do anything else and the problems still exist.⁸³⁰

The supreme irony of the passage of the 1995 death penalty bill may be that this very act ultimately will hasten the demise of capital punishment from the New York landscape. The enactment of a death penalty statute, and the execution of a smattering of first-degree murderers, will not contribute to solving the crime problems in New York State. At the same time, the existence of a death penalty law will thrust into focus the numerous problems associated with capital punishment: its uneven, unfair, and invidiously discriminatory application; the diversion of much-needed resources from other social programs; the inevitable risk of executing innocent people; and its dehumanizing impact on individuals and their government. Abolitionists eventually may claim victory, and in retrospect define the enactment of the capital punishment law as only a short-term anomaly.

829. Assembly Debate, *supra* note 1, at 334-35.

830. *Id.* at 433.

Abolition sentiment in New York has a long and respectable history.⁸³¹ Neither the arguments for or against the death penalty have changed substantially over the course of this history.⁸³² The 1965 Legislative Commission that recommended that capital punishment be abolished by statute in New York State very ably summarized its reasons for taking such action:

First: The execution of the penalty of death calls inescapably upon the agents of the State to perpetrate an act of supreme violence under circumstances of the greatest cruelty to the individual involved. . . .

Second: The retention of the death penalty has a seriously baneful effect on the administration of criminal justice. . . .

Third: Some erroneous convictions are inevitable in the course of the enforcement of the penal law and error sometimes cannot be established until time has passed. Such errors cannot be corrected after execution. . . .

Fourth: Experience has shown that the death penalty cannot be administered in the United States with even rough equality. . . .

Fifth: . . . There will be cruel and repulsive murders in New York whether the penalty of death is abolished or retained. The important point is that their number never will be greatly influenced by abolition. We may be confident, therefore, that in proposing action that is right upon so many grounds we shall not jeopardize the safety of the people of New York.⁸³³

The re-enactment of death penalty legislation in New York in 1995 thus marks both the end and the beginning of an era in the state's history with capital punishment. For the first time in over two decades, the Legislature and the Governor have concurred that the death penalty should be reinstituted. In due course, the courts will review their handiwork. Ultimately, the people will again pass judgment on whether state-sanctioned executions are consistent with their notion of enlightened and effective government.

831. See PHILIP E. MACKEY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861* (1982). See *supra* notes 822-23 and accompanying text.

832. See generally PHILIP E. MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975* (1976).

833. NEW YORK STATE TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 823, at 69-70.