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## The New York Death Penalty: Are Murderers in Your County Excluded?

Kerry E. Ford

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# Comment

## The New York Death Penalty: Are Murderers in Your County Excluded?

"The generality of a law inflicting capital punishment is one thing. What may be said of the validity of the law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions."<sup>1</sup>

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## I. Introduction

The death penalty is the most severe punishment that can be administered in our society. It presents a moral tension between those who view it as the ultimate deterrent factor and those who view it as a brutal and unjustified punishment. What remains clear is that any law providing for such severe punishment must be administered in compliance with the Constitution of the United States. Ironically, evidence of the unconstitutionality of the New York death penalty has been provided by the very people who have the responsibility to implement the death penalty—the district attorneys themselves.<sup>2</sup> In formulating the policies of their offices, some district attorneys have essentially ignored the purpose of the New York death penalty legislation<sup>3</sup> and have decided to advance their own personal be-

2. See *infra* notes 5-22 and accompanying text.

3. See *infra* note 253 and accompanying text.

liefs over the desires of the people by not seeking the death penalty in cases where it is applicable.<sup>4</sup>

Bronx County District Attorney Robert T. Johnson is a vocal opponent of the death penalty statute in New York.<sup>5</sup> District Attorney Johnson has voiced his intent to exercise his discretion and pursue life imprisonment without parole in cases that qualify for the death penalty.<sup>6</sup> Personal reasons, such as his upbringing and respect for the value of life, and his experience of prosecuting and convicting an innocent man of intentional murder are given as explanations of this policy.<sup>7</sup> District Attorney Johnson sees many uncertainties in the legislation and questions whether juries will impose the penalty, whether its application will be fair, whether the defendant will actually be executed and whether others will be deterred.<sup>8</sup> In light of the tremendous cost of the trials and appeals in capital cases and these uncertainties, Mr. Johnson states that the money could be better spent by increasing the number of judges and courtrooms and establishing crime fighting and prevention programs.<sup>9</sup>

However, other district attorneys who are also personally opposed to the death penalty intend to consider the death penalty in the appropriate cases.<sup>10</sup> Queens County District Attorney Richard A. Brown states that it is his "responsibility" to carry out the mandate of the Legislature.<sup>11</sup> He intends to utilize the broad discretion that the legislation provides to prosecutors, as well as the guidance and eligibility requirements, in a fair and just manner.<sup>12</sup>

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4. See *infra* notes 5-9 and accompanying text.

5. See Letter from Robert T. Johnson, District Attorney, *Bronx County District Attorney's Office*, to Kerry E. Ford, Associate, *Pace Law Review* (March 7, 1995) (on file with the *Pace Law Review*).

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.*

10. See *infra* notes 11-17 and accompanying text.

11. Letter from Richard A. Brown, District Attorney, *Queens County District Attorney's Office*, to Kerry E. Ford, Associate, *Pace Law Review* (Jan. 3, 1996) (on file with the *Pace Law Review*).

12. See *id.*

Also personally opposed to the law is Charles J. Hynes, Brooklyn County District Attorney.<sup>13</sup> Although his personal beliefs are at odds with the legislation, Hynes indicates that he is required due to his oath, the obligations of his office, and the standards for prosecutors nationwide, to uphold the laws of New York, including the death penalty law, in a fair-minded way.<sup>14</sup> It is not the role of a prosecutor, nor is it within their power, to legislate by adopting policies that change the intent of those who make the laws for society.<sup>15</sup> In anticipation of the first death penalty case in Brooklyn, Hynes has formed a special team of fifteen prosecutors to handle such cases.<sup>16</sup> New York County District Attorney Robert M. Morgenthau stated that it is within the discretion of the district attorney whether or not to seek the death penalty and that he intends to exercise that discretion wisely.<sup>17</sup>

Johnson's policy is not pleasing many leaders in New York, especially when he declared that he would not seek the death penalty for Michael Vernon, a man accused of killing five people

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13. See Letter from Charles J. Hynes, District Attorney, *Kings County District Attorney's Office*, to Kerry E. Ford, Associate, *Pace Law Review* (Jan. 23, 1996) (on file with the *Pace Law Review*). "I have stated publicly and often my belief that life imprisonment without parole is a more appropriate and effective penalty than capital punishment." *Id.* at 1.

14. See *id.* According to the New York State Constitution, Article XIII § 13, the duty of the District Attorney is "to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected . . ." *Id.* A district attorney represents the people of the State and the State's legal system. See *id.* at 2.

15. See *id.* If a prosecutor believes that a change in the law is appropriate, he or she may vocalize such a position and work towards that goal, but must remember that the process of change belongs to the legislature. See *id.*

16. See *id.* It is the policy of Hynes' Office to investigate thoroughly each case where first degree murder may be charged and to seek input from the defense concerning any mitigating factors before deciding whether to seek death or life imprisonment without parole. See *id.* All such information is presented to a committee of attorneys from the Kings County District Attorney's Office representing the diversity of the county. See *id.* This committee evaluates the information available and recommends to District Attorney Hynes which sentence should be sought in a particular case. See *id.*

17. See Letter from Robert M. Morgenthau, District Attorney, *New York County District Attorney's Office*, to Kerry E. Ford, Associate, *Pace Law Review* (Jan. 22, 1996) (on file with the *Pace Law Review*). District Attorney Morgenthau declined further comment on this issue because his office currently has a first degree murder case pending. See *id.*

while robbing a Bronx shoestore.<sup>18</sup> Vernon is clearly eligible for the death penalty because he committed murder in the course of committing a robbery.<sup>19</sup> Calling such a decision "arbitrary and capricious," New York Senator Guy Velella, the Bronx Republican leader, has voiced his displeasure with Johnson's decision.<sup>20</sup> Velella believes that such snap decisions could jeopardize the validity of the death penalty statute in New York since criminals sentenced to death in other counties could argue that the statute is unconstitutional because if there is no death penalty in the Bronx there is no equal protection under the law.<sup>21</sup> Governor Pataki also had "grave reservations" about Johnson's decision and considered replacing him because he was concerned that the law was not being "faithfully executed" by Johnson as the State Constitution requires of all public officials.<sup>22</sup>

Considering the number of murders that occur in certain counties of New York, it is reasonable to question how fairly the death penalty will be administered if some of those counties fail to utilize it.<sup>23</sup> The result of these policies is the unequal administration of the death penalty in different counties because of the district attorney's predetermined policies regarding when and if the death penalty will be implemented. An equal protection violation surfaces when a murderer in one New York county faces death as a punishment but a murderer in another New York county faces only life imprisonment because of a policy announced by an individual district attorney.

Part II of this comment will discuss the meaning and historical development of the prohibition against the use of "cruel and unusual punishments"<sup>24</sup> under the Eighth Amendment. Part III will address the history of capital punishment in the

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18. See Gregg Birnbaum, *Gov To D.A.s: Seek Death - Or Else*, N.Y. POST, Dec. 22, 1995, at 30 [hereinafter Birnbaum].

19. See N.Y. PENAL LAW § 125.27(a)(vii) (McKinney Supp. 1996).

20. Ray Kerrison, *Bronx DA Will be the Death of True Justice*, N.Y. POST, Dec. 22, 1995, at 30.

21. See *id.*

22. Birnbaum, *supra* note 18; see also *supra* note 14.

23. According to Police Department statistics, Brooklyn led New York City in 1994 with 548 murders, the Bronx followed with 514, Queens had 275 and there were 25 murders in Staten Island. See Patricia Hurtado, *Hynes, Reluctantly Will Ask for Death Task Force in Studying Which Offenders Will Face Executioner*, NEWSDAY, Apr. 30, 1995, at A64.

24. U.S. CONST. amend. VIII.

United States from the common law to the present. Part IV will examine the Fourteenth Amendment and its Equal Protection Clause. Part IV further discusses purposeful discrimination and the impact of prosecutorial discretion. Part V focuses on specific provisions of the New York death penalty legislation. Part VI addresses the constitutionality of the New York death penalty legislation. The final part of the Comment will conclude that the selective enforcement of the death penalty by district attorneys, according to their individual policies, is a violation of the Equal Protection Clause.

## II. The History of the Eighth Amendment

### A. *The Origins and Purpose of the Clause*

After the Norman Conquest of England in 1066, the system of penalties which ensured equality between the punishment and the crime disappeared, replaced with a discretionary amercement.<sup>25</sup> Although the discretionary aspect of amercements allowed the individual circumstances of a case to be considered in the punishment, it also provided an opportunity for the levying of excessive fines.<sup>26</sup> The phrase "cruel and unusual punishments" first appeared in the English Bill of Rights, enacted December 16, 1689, and was primarily directed at curbing the selective or irregular application of harsh penalties as well as forbidding arbitrary and discriminatory punishments.<sup>27</sup>

The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>28</sup> The basic concept underlying

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25. See *Furman v. Georgia*, 408 U.S. 238, 242-43 (1972) (per curiam) (Douglas, J., concurring) (citing Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969)). An amercement is the infliction of a penalty at the discretion of the court. See WEBSTER'S NEW INTERNATIONAL DICTIONARY 83 (2d ed. 1957). It differs from a fine in that a fine is, or was originally, a fixed and certain sum prescribed by statute for an offense, whereas an amercement is discretionary. See *id.*

26. See *Furman*, 408 U.S. at 243 (Douglas, J., concurring) (citing Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969)).

27. See *id.* at 242-43 (citing Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. at 845-46 (1969)).

28. U.S. CONST. amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660 (1962).

this amendment is the assurance that the states' power to punish will "be exercised within the limits of civilized standards" to maintain the dignity of man.<sup>29</sup> In democratic societies, it is the legislature, not the courts, that respond to the will and the moral values of the people.<sup>30</sup> Therefore, this clause requires legislatures to write evenhanded, nonselective and nonarbitrary penal laws, and requires judges to see that the laws are applied as such.<sup>31</sup>

### B. "Cruel and Unusual" in the United States

In adopting the "cruel and unusual" language from the English Bill of Rights, the framers of the Eighth Amendment intended to limit the legislature's power to proscribe punishments for crimes,<sup>32</sup> and to prohibit torture and other barbaric punishments.<sup>33</sup> The Supreme Court did not limit the prohibition against "cruel and unusual" punishment to those methods considered barbaric in the eighteenth century but have adopted a flexible approach to the amendment.<sup>34</sup> The Court recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth."<sup>35</sup> Therefore, the clause may acquire a new or different meaning as society and public opinion change and become enlightened by humane justice.<sup>36</sup> However, the central focus remains on the idea that "the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."<sup>37</sup>

### C. "Cruel and Unusual" and Capital Punishment

The first cases raising Eighth Amendment claims focused on particular methods used to inflict the death penalty to deter-

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29. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

30. *See Furman*, 408 U.S. at 383 (Burger, C.J., dissenting).

31. *See id.* at 256 (Douglas, J., concurring).

32. *See id.* at 263 (Brennan, J., concurring).

33. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *see also Wilkerson v. Utah*, 99 U.S. 130 (1878) (forbidding the use of torture or punishments of unnecessary cruelty); *In Re Kemmler*, 136 U.S. 436, 446 (1890) (prohibiting punishments involving lingering death).

34. *See Gregg*, 428 U.S. at 171.

35. *Weems v. United States*, 217 U.S. 349, 373 (1910).

36. *See id.* at 378.

37. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).



mine if they were cruel and unusual.<sup>38</sup> In *Wilkerson v. Utah*,<sup>39</sup> the petitioner was convicted of premeditated murder in the territory of Utah and was sentenced by the presiding justice to death by public shooting.<sup>40</sup> The Supreme Court upheld this method citing the power of the territory to define offenses and prescribe the punishment of the offenders within the limits of the provision against cruel and unusual punishments.<sup>41</sup> At that time, shooting as a mode of punishment was not considered cruel and unusual and was used by the military for various offenses.<sup>42</sup>

In *Louisiana ex rel. Francis v. Resweber*,<sup>43</sup> the petitioner, convicted of murder, was placed in the electric chair and the switch was thrown but because of a mechanical failure, death did not result.<sup>44</sup> The petitioner was returned to jail and a second death warrant was issued by the Governor.<sup>45</sup> The petitioner claimed that he endured the psychological strain of preparation for electrocution, and to require him to undergo this preparation again amounted to cruel and unusual punishment.<sup>46</sup> The Supreme Court held that there was no violation of the Eighth Amendment, stating that the Constitution protects against cruelty inherent in the method of punishment, not the necessary suffering involved in extinguishing life humanely.<sup>47</sup> The Court reasoned that although an accident prevented the

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38. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In Re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

39. 99 U.S. 130 (1878).

40. See *id.* The laws of the territory of Utah provided that every person convicted of murder in the first degree shall suffer death but did not provide the specific method to be employed. See *id.* at 132. The duty to pass sentence was upon the court. See *id.*

41. *Id.* at 133.

42. See *id.* at 134. For mutiny, desertion, and other military crimes the method of punishment employed was shooting. See *id.*

43. 329 U.S. 459 (1947).

44. See *id.* at 459, 460.

45. See *id.* at 460-61.

46. See *id.* at 464. See *In Re Kemmler*, 136 U.S. 436 (1890). In *Kemmler*, the petitioner claimed that electrocution constituted cruel and unusual punishment. See *id.* at 443. The Supreme Court upheld this method of execution stating that the use of electricity is not barbaric and results in instantaneous and painless death. See *id.*

47. See *Kemmler*, 136 U.S. at 443.

success of the first attempt, it did not add an element of cruelty to the subsequent execution.<sup>48</sup>

In *Weems v. United States*<sup>49</sup> the Supreme Court expanded the scope of the amendment when it considered whether chained imprisonment for a minimum of twelve years at hard and painful labor, the loss of civil rights, and lifetime surveillance, was a proportional punishment for the crime of falsifying an official document.<sup>50</sup> In holding such punishment to be cruel and unusual the Court did not focus on the cruelty or pain present in the punishment, but instead upon the lack of proportionality between the crime and the punishment.<sup>51</sup> Therefore, any analysis under the Eighth Amendment must consider whether the punishment involves the unnecessary and wanton infliction of pain,<sup>52</sup> as well as whether it is grossly out of proportion to the severity of the crime.<sup>53</sup>

In ruling on these methods the Supreme Court implicitly asserted that death as a punishment was valid in certain circumstances and did not violate the Eighth Amendment.<sup>54</sup> However, it was not until *Furman v. Georgia*<sup>55</sup> that the Supreme Court squarely confronted the claim that death is per se cruel and unusual punishment.<sup>56</sup> To decide this question the *Furman* Court relied on the history of both the Eighth Amendment and capital punishment.<sup>57</sup>

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48. *See id.*

49. 217 U.S. 349 (1910).

50. *See id.*

51. *See id.* at 366-67. *See also* *Trop v. Dulles*, 356 U.S. 86, 126-27 (1958), where the Supreme Court held that taking away the citizenship of a person convicted by court martial of desertion from the United States Army constituted cruel and unusual punishment. The Court acknowledged that fines, and even execution, may be selected as punishment depending on the seriousness of the crime. *See id.* at 100.

52. *Furman*, 408 U.S. at 382-83 (Burger, C.J., dissenting).

53. *Weems*, 217 U.S. at 366-67.

54. *Furman*, 408 U.S. at 285 (Brennan, J., concurring).

55. 408 U.S. 238.

56. *Id.* *See infra* notes 69-85.

57. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

### III. The History of Capital Punishment

#### A. Common Law - 1971

The death penalty is said to have two purposes: retribution and deterrence.<sup>58</sup> It has been employed throughout history to punish individuals for their crimes.<sup>59</sup> At common law, a mandatory death sentence was imposed on all convicted murderers, but in the United States there has been, from the beginning, a "rebellion against the common law rule imposing a mandatory death sentence on all convicted murderers."<sup>60</sup> As a result, many states attempted to restrict the death penalty by narrowing the class of murders to be punished by death.<sup>61</sup> However, in those cases the juries simply took the law into their own hands by refusing to convict the defendant of the capital offense, thus avoiding sentencing the defendant to death.<sup>62</sup> Rather than refining the defined capital offenses, the legislatures, recognizing the necessity of juries being able to recommend mercy in some cases, simply granted the juries the discretion to do so.<sup>63</sup> The entire question of when to impose capital punishment was for the jury alone to decide.<sup>64</sup>

In *McGautha v. California*,<sup>65</sup> the Supreme Court held that complete jury discretion to pronounce life or death was within constitutional bounds.<sup>66</sup> The Court reasoned that the states were allowed to assume that jurors confronted with the important task of deciding whether a person lives or dies, will only make such a decision after considering a variety of factors including the consequences of their decision.<sup>67</sup> The Court rejected

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58. See *Gregg*, 428 U.S. at 183.

59. See *Trop*, 356 U.S. at 99.

60. *McGautha v. California*, 402 U.S. 183, 198 (1971).

61. See *id.* at 198.

62. See *id.* at 199.

63. See *id.*

64. See *Winston v. United States*, 172 U.S. 303, 312-13 (1899). In *Winston*, the Supreme Court reversed a murder conviction in which the trial judge instructed the jury that it should not return a recommendation of mercy unless it found mitigating factors existed. See *id.* at 313. In so holding, the Court declared that the defendant's characteristics, the irrevocability of the sentence of death or any apprehension that all the facts had not been presented were for the jury alone to consider. See *id.*

65. 402 U.S. 183 (1971).

66. See *id.* at 207.

67. See *id.* at 207-08.

the argument that such discretion should be given only where standards to guide the decision are also provided.<sup>68</sup>

B. *The Modern View: 1971 - Present*

1. *Furman v. Georgia*<sup>69</sup>

The Supreme Court greatly affected the future of death penalty legislation in its per curiam decision in *Furman*.<sup>70</sup> Three cases were consolidated in *Furman*<sup>71</sup> where the limited issue before the court was whether the imposition and carrying out of the death penalty in cases where the jury exercised complete discretion to impose or withhold the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>72</sup> Adopting the dissent of Justice Brennan in *McGautha*, the Supreme Court in *Furman* declared unconstitutional a Georgia death penalty statute because it failed to provide juries with guidance and procedures to follow when they are called on to sentence a defendant in a capital case.<sup>73</sup>

In his concurring opinion, Justice Douglas wrote that statutes which provide untrammelled discretion to juries in sentencing a defendant in a capital case were unconstitutional in their operation,<sup>74</sup> reasoning that "[t]hey are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."<sup>75</sup> When a severe pun-

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68. See *id.* The dissent wrote that the Fourteenth Amendment's Due Process Clause would render unconstitutional any capital sentencing procedures that are constructed to allow variation from one case to another without any mechanism to prevent those variations from causing random and arbitrary decisions. See *id.* at 248-49 (Brennan, J., dissenting).

69. 408 U.S. 238 (1972)(per curiam).

70. *Id.*

71. *Furman v. Georgia*, 167 S.E.2d 628 (1969); *Jackson v. Georgia*, 171 S.E.2d (1969); *Branch v. Texas*, 447 S.W.2d 932 (1969).

72. See *Furman*, 408 U.S. at 239-40.

73. See *id.* at 247 n.11. (Douglas, J., concurring); *id.* at 294-95, 305-06 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 365 (Marshall, J., concurring).

74. See *id.* at 256-57 (Douglas, J., concurring).

75. *Id.* at 257. Justice Douglas wrote that allowing discretion to judges and juries allows the death penalty statute to be selectively applied, feeding prejudices against the accused if he is poor, despised, lacking in political clout or a member of a minority. See *id.* at 255.

ishment is inflicted in a majority of the cases, it is unlikely that it is being inflicted arbitrarily.<sup>76</sup> If, however, the infliction of the punishment is different from what is usually done, it is a fair indication that the punishment is being arbitrarily administered.<sup>77</sup> Without provisions to guide the jury in their decision, the result was that the death penalty was being imposed discriminatorily,<sup>78</sup> wantonly and freakishly,<sup>79</sup> and so infrequently<sup>80</sup> that it was "cruel and unusual."<sup>81</sup>

Although recognizing that death as a punishment is unique in its severity and irrevocability, the Court did not decide the issue of whether capital punishment per se violated the Constitution's ban on "cruel and unusual punishments."<sup>82</sup> The petitioner's argument that the standards of decency had developed to such a point that society no longer tolerated capital punishment was accepted by two justices who would have held it per se unconstitutional.<sup>83</sup> Four justices would have held that capital punishment is not unconstitutional per se,<sup>84</sup> and three, while agreeing that the statutes in *Furman* were invalid as applied, refused to decide the question of whether such punishment should never be imposed.<sup>85</sup>

## 2. *Gregg v. Georgia*<sup>86</sup>

Following *Furman*, Georgia amended its death penalty statute in an effort to cure the constitutional infirmities found by the *Furman* Court.<sup>87</sup> The Supreme Court had the opportu-

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76. *See id.* at 276 (Brennan, J., concurring).

77. *See id.* at 276-77.

78. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (per curiam) (Douglas, J., concurring).

79. *See id.* at 310 (Stewart, J., concurring).

80. *See id.* at 311 (White, J., concurring).

81. *See id.* at 312.

82. *See id.* at 396-402 (Burger, C.J., dissenting).

83. *See id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

84. *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (per curiam) (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

85. *See id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

86. 428 U.S. 153 (1976).

87. *See id.* at 180.

nity to rule on the amended statute in *Gregg v. Georgia*.<sup>88</sup> The Georgia Legislature narrowed the class of murderers subject to the death penalty by statutorily specifying aggravating circumstances, one of which must be proven beyond a reasonable doubt before the jury could impose a death sentence.<sup>89</sup> Such factors called on the jury to consider the circumstances of the crime,<sup>90</sup> and the characteristics of the criminal.<sup>91</sup> The jury was still afforded discretion in sentencing but could no longer decide whether a defendant should live or die without guidance or direction, as they did before the *Furman* decision.<sup>92</sup> As an additional safeguard against the arbitrary imposition of the death penalty, the Georgia statute also provided automatic appeal of all death sentences to the State's Supreme Court.<sup>93</sup> The Court would decide whether the sentence was imposed due to prejudice, whether the evidence supported the jury's finding of an aggravating factor and whether the sentence was disproportionate to sentences imposed in other cases.<sup>94</sup>

The Supreme Court stated that the concerns expressed in *Furman* could therefore "be met by a carefully drafted statute that ensure[s] that the sentencing [body] is given adequate information and guidance."<sup>95</sup> The Court found that these concerns would best be met by a system that provides for a bifurcated proceeding where the sentencing body is given all the information that is relevant to the imposition of the sentence and is provided with standards to guide its use of the information.<sup>96</sup> However, the Court recognized that procedures other

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88. *See id.* at 162-63.

89. *See id.* at 197. In addition to the statutorily defined aggravating factors, the statute also allowed other relevant mitigating or aggravating factors to be considered. *See id.* at 197.

90. *See id.* These considerations included, but were not limited to, whether the crime of murder was committed in the course of another capital felony, whether it was a peace officer who was murdered, and whether it was committed in a particularly heinous manner. *See id.*

91. *See id.* These characteristics might include whether the defendant has prior convictions and whether special facts exist that mitigate against imposing the death penalty, such as youth, extent of cooperation with the police, or emotional state. *See id.*

92. *Gregg v. Georgia*, 428 U.S. 153, 197-98 (1976).

93. *See id.*

94. *See id.*

95. *Id.* at 195.

96. *See id.*

than those set forth in *Gregg* may satisfy the concerns in *Furman* and that each distinct sentencing system would have to be looked at individually.<sup>97</sup>

Citing the historical use of the death penalty,<sup>98</sup> the text of the Constitution,<sup>99</sup> and the case law of the Supreme Court,<sup>100</sup> the Court answered the question of whether death as a punishment was always unconstitutional in the negative.<sup>101</sup> The Court stated that American society still regards capital punishment as an appropriate punishment as evidenced by the legislative response to the *Furman* decision.<sup>102</sup> The death penalty statutes enacted after *Furman* addressed the concerns expressed by the Court in *Furman* primarily by specifying factors to consider and procedures to be followed by the jury in deciding whether or not to impose the death penalty.<sup>103</sup>

The Eighth Amendment is only one of the constitutional limitations with which the New York death penalty legislation must comply in order to be deemed constitutional.<sup>104</sup> The Fourteenth Amendment and its Equal Protection Clause are two ad-

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97. *See id.*

98. *See supra* Part III.A.

99. The Fifth, Eighth and Fourteenth Amendments all contemplate the use of the death penalty in their language. The Fifth Amendment reads that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Fourteenth Amendment reads, ". . . nor shall any State deprive any person of life, . . . without due process of law." U.S. CONST. amend. XIV, § 1.

100. *See, e.g.,* *Wilkerson v. Utah*, 99 U.S. 130; *In Re Kemmler*, 136 U.S. 436; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459.

101. *See Gregg*, 428 U.S. at 187.

102. *See id.* at 179-80. After *Furman* at least 35 states enacted death penalty statutes for at least some crimes that result in the death of another. *See id.*

103. *See id.* at 179.

104. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977); *see also, e.g.,* *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (death penalty sentence imposed against 16 year old reversed as "cruel and unusual" pursuant to Eighth Amendment where unhappy childhood and possible emotional disturbance were not considered as mitigating factors); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment requires that retardation be considered as mitigating factor to avoid "cruel and unusual" punishment); *Stanford v. Kentucky*, 492 U.S. 361, 378-80 (1989) (death penalty imposed on 16 year old is not a per se violation of Eighth Amendment's bar on "cruel and unusual" punishment).

ditional limitations.<sup>105</sup> The enactment of the Fourteenth Amendment provided additional safeguards against arbitrary state laws, including death penalty laws.<sup>106</sup>

#### IV. The Fourteenth Amendment

##### A. *Restrictions on State Action Prior to the Enactment of the Fourteenth Amendment*

In *Barron v. Baltimore*<sup>107</sup> the Supreme Court held that the Fifth Amendment was only a restriction on the federal government and was not binding on the states.<sup>108</sup> In *Barron*, the Supreme Court reasoned that the amendment demanded security against encroachments of the federal government and that the amendment expressed no intention for it to apply to the states.<sup>109</sup> Barron, a wharf owner, sued the city claiming that street construction had diverted the stream flow so that it deposited silt in front of his wharf, making it too shallow for vessels.<sup>110</sup> His claim was that this action violated the Fifth Amendment,<sup>111</sup> which provides that private property shall not be "taken for public use, without just compensation."<sup>112</sup> The Supreme Court denied his claim that the Fifth Amendment should be construed to restrain the power of the states, explaining that the Constitution was established collectively by the people of the United States, for themselves and their own government, rather than for the government of the individual states.<sup>113</sup>

##### B. *The Enactment of the Fourteenth Amendment*

Following the decision in *Barron*, the Fourteenth Amendment<sup>114</sup> was enacted and the Supreme Court had the opportu-

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105. See *McCleskey v. Kemp*, 481 U.S. 279, 345 (1987) (Blackmun, J., dissenting).

106. See *Godfrey v. Georgia*, 446 U.S. 420 (1980); see also *McGuartha*, 420 U.S. at 287 (Brennan, J., dissenting).

107. 32 U.S. 243 (1833).

108. See *id.* at 247.

109. See *id.* at 248.

110. See *id.* at 244.

111. See *id.* at 247.

112. U.S. CONST. amend. V.

113. See *Barron*, 32 U.S. at 250-51.

114. U.S. CONST. amend. XIV, § 1. The amendment provides that:



nity to interpret it for the first time in *The Slaughterhouse Cases*.<sup>115</sup> The Supreme Court stated that even on the most casual examination of the amendment, its purpose was to firmly establish the freedom of the slaves and protect them from the oppression that they had endured in the past.<sup>116</sup> However, in *Strauder v. West Virginia*<sup>117</sup> the Supreme Court stated that there might be times when the amendment may be implicated for other purposes.<sup>118</sup>

Following the enactment of the Fourteenth Amendment, a new question developed. In light of the fact that the Bill of Rights was to protect the individual against various forms of interference by the federal government, the question became whether the Bill of Rights was applicable to the states through the Fourteenth Amendment.<sup>119</sup> Cases since *The Slaughterhouse Cases* have gradually held that most of the Bill of Rights is ap-

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[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

115. 83 U.S. 36 (1872). These cases concerned a Louisiana law that prohibited livestock yards and slaughterhouses within New Orleans and the immediate surrounding area. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.2, at 370-71 (5th ed. 1995). However, an exception to the statute allowed one company to operate a slaughterhouse in the area. *See id.* The petitioners brought an action contending that the monopoly created by the statute violated the Thirteenth and Fourteenth Amendments. *See id.* at 371. The Supreme Court rejected the Thirteenth Amendment argument reasoning that the amendment was solely for the purpose of abolishing slavery and was inapplicable in this case. *See id.* The Court held that the monopoly created by the legislature did not infringe on the privileges and immunities of United States citizenship provided for in the Fourteenth Amendment. *See id.* The Court also disposed of the due process argument by holding that the due process clause of the Fourteenth Amendment did not guarantee substantive fairness of laws passed by states. *See id.* The equal protection claim was also disposed of by the Court when it held that the Equal Protection Clause was only intended to protect blacks from discrimination by the states. *See id.*

116. *See The Slaughterhouse Cases*, 83 U.S. at 71.

117. 100 U.S. 303 (1879).

118. *See id.* at 310. *See infra* notes 125-26 and accompanying text.

119. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

plicable to the states through the Due Process Clause.<sup>120</sup> The only amendments not incorporated in the Fourteenth Amendment are the Second, Third, Seventh and Fifth Amendment requirements of grand jury indictments.<sup>121</sup>

### 1. *The Equal Protection Clause of the Fourteenth Amendment*

One provision of the Fourteenth Amendment is the Equal Protection Clause which states that "[n]o State shall make or enforce any laws which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>122</sup> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent official conduct which discriminates on the basis of race.<sup>123</sup> From the beginning, courts have interpreted the Equal Protection Clause to impose "a general restraint on the use of classifications, whatever the area

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120. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (Fifth Amendment right to compensation for property taken by the state); *Fiske v. Kansas*, 274 U.S. 380 (1927) (First Amendment rights to freedom of speech, press and religion); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment right to be free from unreasonable searches and seizures); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment prohibition against cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right to be free from self incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation of an opposing witness); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy and public trial); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to a jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right prohibiting double jeopardy); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Eighth Amendment prohibition against excessive bail).

121. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

122. U.S. CONST. amend. XIV, § 1. Although an independent Equal Protection Clause does not exist in the Fifth Amendment, the Due Process Clause of the Fifth Amendment does contain an equal protection component prohibiting such discrimination on the part of the United States. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

123. See *Washington v. Davis*, 426 U.S. 229, 239 (1976). In this case the Supreme Court held that recruiting procedures used by the District of Columbia police force did not violate the Equal Protection Clause. See *id.* Although the law had a disproportionate impact on blacks, such impact did not constitute an intent to discriminate. See *id.* at 238-41. The Court found that the law established racially neutral employment qualifications and served the legitimate government purpose of assuring that only qualified applicants were hired. See *id.* at 245-46.

regulated, whatever the classification criteria used."<sup>124</sup> Therefore, the original purpose of the Fourteenth Amendment, to ensure the equal treatment for blacks, has been extended broadly to other areas, including gender<sup>125</sup> and alienage.<sup>126</sup> Its purpose is to guarantee that people who are similarly situated will be treated similarly and that those who are not similarly situated will not be treated similarly.<sup>127</sup>

## 2. *The Components of an Equal Protection Challenge*

Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.<sup>128</sup> Such intent to discriminate does not have to be the sole purpose of the government action; it is enough that it is a motivating factor in the action.<sup>129</sup> However, such purposeful discrimination may not necessarily appear on the face of the law,<sup>130</sup> but may occur when a facially neutral statute is applied in a purposefully discriminatory manner.<sup>131</sup> A discriminatory purpose may also be inferred from the totality of the relevant facts, including the fact that the law has a disproportionate impact on a particular race.<sup>132</sup> However, a law neutral on its face, serving ends that are within the power of the government to pursue, is not necessarily invalid because it affects a greater proportion of one race than another.<sup>133</sup> Therefore, disproportionate impact is not irrel-

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124. GERALD GUNTHER, CONSTITUTIONAL LAW, 676 (10th ed. 1980).

125. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (the Supreme Court struck down as violative of the Equal Protection Clause a statute preferring men over women as administrators of estates).

126. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (a Texas statute which permitted local school districts to deny free education to alien children was held to be a denial of equal protection because the legislative history of the Clause showed that it was intended to cover any person physically within the borders of a state).

127. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 1438 (2d ed. 1988).

128. See *Washington v. Davis*, 426 U.S. at 240. Methods of establishing intent can be in the form of proof of a racially disproportionate impact, historical background, or legislative or administrative history. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267, 268 (1977).

129. See *Arlington Heights*, 429 U.S. at 265-66.

130. See *id.* at 266.

131. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

132. See *Davis*, 426 U.S. at 242. The impact of a law may be an important starting point in determining whether discrimination was a motivating factor in the enactment of the law. See also *Arlington Heights*, 429 U.S. at 266.

133. See *Arlington Heights*, 429 U.S. at 265-66.

evant but, alone, it does not invalidate a law under the Equal Protection Clause.<sup>134</sup> Sometimes, a clear pattern, inexplicable on grounds other than a purpose to discriminate, may emerge from the effect of a state action even when a law is neutral on its face.<sup>135</sup>

A prima facie case of an equal protection violation is established when three factors are met.<sup>136</sup> First, the petitioner must establish that he is a member of a distinct group that is singled out for different treatment.<sup>137</sup> Second, he must show a substantial amount of differential treatment.<sup>138</sup> The final factor to be established is that the allegedly discriminatory process is susceptible to abuse or is not racially neutral.<sup>139</sup> When a prima facie case of an equal protection violation is established, the burden shifts to the State to rebut the presumption of unconstitutional action by showing a permissible purpose for the law.<sup>140</sup>

### 3. *Methods of Proving Purposeful Discrimination*

Determining whether a discriminatory purpose motivated a particular official course of action requires an analysis of the circumstantial or direct evidence surrounding the action.<sup>141</sup> Whether the action bears a greater impact on one group over another is a starting point in this analysis.<sup>142</sup> Sometimes the discriminatory purpose is established in the very words of the

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134. *See id.* at 265. However, the line between discriminatory impact and purpose may not be so clear. *See id.* at 266. It may be that the most probative evidence of the actor's intent is the objective evidence of what actually happened rather than evidence describing the subjective state of the actor because it is normally presumed that an actor intends the natural results of his deeds. *See id.* However, a constitutional issue does not arise whenever there is a disproportionate impact, but only when the impact is so pronounced that the effect and purpose blend together. *See id.* at 265-66.

135. *See id.* at 266. *See also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Cases such as these are rare and without a pattern as obvious as that in *Yick Wo*, impact alone is not enough and the court must look to other evidence. *See Arlington Heights*, 429 U.S. at 266.

136. *See Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* at 494-95.

141. *See Arlington Heights*, 429 U.S. at 266.

142. *See id.*; *see also Davis*, 426 U.S. at 242.

challenged statute and sometimes other evidence is needed to establish the purpose.<sup>143</sup>

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>144</sup> the Supreme Court listed types of evidence, other than statistics, that can be used to prove a discriminatory purpose.<sup>145</sup> The historical background of the decision is one way to derive intent, especially by putting focus on whether official actions were taken for invidious purposes.<sup>146</sup> The specific sequence of events leading up to the challenged decision may also show the decisionmaker's intent.<sup>147</sup> Another method would be to look at whether normal procedural or substantive sequences were followed.<sup>148</sup> The legislative or administrative history is also highly relevant to purpose, such as statements made by members of the decisionmaking body, minutes from meetings or reports.<sup>149</sup>

One of the most important cases regarding capital sentencing and equal protection is *McClesky v. Kemp*.<sup>150</sup> In *McClesky*, a black defendant argued that his death sentence violated the Equal Protection Clause of the Fourteenth Amendment because statistical information<sup>151</sup> showed that petit juries in Georgia im-

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143. See *Arlington Heights*, 429 U.S. at 266.

144. 429 U.S. 252 (1977). In *Arlington Heights*, a real estate developer alleged that the local authorities refused to rezone a tract of land from a single-family to a multiple-family classification because of racially discriminatory purposes. See *id.* at 254. The developer intended to build racially integrated, low to moderate income housing. See *id.* at 254-57. The Supreme Court held for the Village finding that although the Village's actions arguably caused a greater discriminatory effect on minorities, effect alone was insufficient to establish purposeful discrimination. See *id.* at 269-71.

145. See *id.* at 267-68.

146. See *id.* at 267.

147. See *id.* For example, if the tract of land had always been zoned for multiple-family dwellings, but was suddenly changed to single-family zoning when the town learned of the intent to build integrated housing, that sequence may provide evidence of intent. See *id.*

148. See *id.*

149. See *id.* at 268.

150. 481 U.S. 279 (1987).

151. The petitioner relied on a statistical study performed by Professors David C. Baldus, Charles Pulaski and George Woodworth which purported to show a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and the race of the defendant. See *id.* at 286. The study indicated that defendants charged with killing white people received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. See *id.* Additionally, the study found that the

posed the death penalty more frequently on those who kill whites, in particular blacks who murder whites.<sup>152</sup> The Supreme Court held that the statistics offered by the defendant did not show that in his case, the death penalty was imposed because of his race.<sup>153</sup> The Court stated that a constitutional violation of the Fourteenth Amendment requires the defendant to show the existence of purposeful discrimination and that such discrimination had a discriminatory effect on the defendant in his case.<sup>154</sup> The Court reasoned that because the statistics combined the actions of hundreds of juries whose actions were taken under different situations, they did not establish that the jury in the defendant's case acted discriminatorily.<sup>155</sup>

However, the Court did acknowledge that in certain contexts statistics may be a successful method to prove purposeful discrimination.<sup>156</sup> Although such proof usually must show a "stark" pattern before acceptance,<sup>157</sup> the Court has permitted statistics of a lesser degree in the context of jury venire selection<sup>158</sup> and violations of Title VII of the Civil Rights Act of 1964.<sup>159</sup> One factor distinguishing cases in which statistics have been accepted as proof of discriminatory intent despite lack of a stark pattern is that the statistics are applied to only a limited number of qualifications, while in a capital sentencing case the jury can consider a wide variety of factors relevant to the defendant's background, character and the offense.<sup>160</sup> Therefore, the application of an inference drawn from general statistics to

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death penalty was imposed in 22% of the cases involving black defendants and white victims; 1% of the cases with black defendants and black victims; and 3% of the cases involving white defendants and black victims. *See id.* Baldus also found that prosecutors sought the death penalty in 70% of the cases where the victim was white and the defendant was black; 32% of the cases involving white defendants and victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims. *See id.* at 287.

152. *See id.* at 286-87.

153. *See id.* at 292-93, 297.

154. *See id.* at 292.

155. *See id.* at 294-95 & n.15.

156. *See McClesky v. Kemp*, 481 U.S. 279, 293-94 (1987).

157. *See id.* at 293; *see also Arlington Heights*, 429 U.S. at 266; and *see, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

158. *See McClesky*, 481 U.S. at 294 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13).

159. *See id.* at 294.

160. *See id.*

a specific and complicated decision in a capital case is not the same as the application of an inference in the type of decision which considers only a few factors or qualifications.<sup>161</sup> Another difference is that in venire selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity.<sup>162</sup> In *McClesky*, the State had no opportunity to rebut the statistics because of the public policy that jurors not be called to testify regarding the motives and influences that led to their decision.<sup>163</sup>

#### 4. *Types of Purposeful Discrimination*

##### a. *Facially Discriminatory*

In *Strauder v. West Virginia*<sup>164</sup> the Supreme Court found unconstitutional a statute which permitted only white male citizens to serve as jurors.<sup>165</sup> The petitioner was convicted of murder by an all white jury and on appeal he alleged that such a conviction was rendered in violation of the Equal Protection Clause.<sup>166</sup> In holding the statute invalid, the Supreme Court focused on the purpose of the Fourteenth Amendment and found that the statute failed to protect black defendants against the prejudice of white jurors.<sup>167</sup> The Court pointed out that while a black defendant did not have a right to a trial before an all black jury,<sup>168</sup> he did have the right to a jury composed of people selected without discrimination against his color.<sup>169</sup> To deny people the right to participate as jurors because of their race is an impediment to securing that race-equal justice under the laws.<sup>170</sup> Where the equal protection claim is based on an overtly discriminated class it has been found that it is not necessary to show discriminatory intent.<sup>171</sup>

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161. *See id.* at 294-95.

162. *See id.* at 296.

163. *See id.*

164. 100 U.S. 303 (1879).

165. *See id.*

166. *See id.* at 304.

167. *See id.* at 306-09.

168. *See id.* at 309.

169. *See id.* at 305.

170. *See Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

171. *See id.* at 303.

In *Snowden v. Hughes*<sup>172</sup> the petitioner was a Republican candidate in a primary election in which, according to a statute,<sup>173</sup> the two Republican candidates with the most votes and the Democrat with the most votes were to be nominated.<sup>174</sup> The petitioner was one of the two candidates with the most votes but his name was not submitted.<sup>175</sup> Petitioner alleged that the respondents, members of the Illinois State Canvassing Board, willfully, maliciously and arbitrarily failed to file petitioner's name with the Secretary of State as required and that such action deprived him of the nomination and constituted unequal administration of the laws.<sup>176</sup> The Supreme Court held that the respondents' actions, although constituting state action within the prohibitions of the Fourteenth Amendment, did not violate the Equal Protection Clause because they were not shown to be purposely discriminatory and were based on a permissible classification.<sup>177</sup>

b. *Statutes Enacted with the Purpose to Discriminate*

*Personnel Administrator v. Feeney*<sup>178</sup> presented to the Supreme Court the question of whether Massachusetts' veterans' preference statute<sup>179</sup> discriminated against women in violation of the Equal Protection Clause.<sup>180</sup> Under the statute all veterans who qualified for state civil service positions had to be

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172. 321 U.S. 1 (1944).

173. ILL. REV. STAT. ch. 46, § 8-13 (repealed 1982).

174. See *Snowden*, 321 U.S. at 39.

175. See *id.*

176. See *id.* at 4.

177. See *id.* at 8-9. Where, as here, a statute requires official action which discriminates between a successful and an unsuccessful candidate, it is permissible and is not a violation of the Equal Protection Clause. See *id.* at 8.

178. 442 U.S. 256 (1979).

179. MASS. GEN. LAWS ANN., ch. 31 (1932) (current version at MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979)).

180. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 259 (1979). The federal government and virtually all the states afford some hiring preference to veterans. See *id.* at 261. The Massachusetts statute was one of the most generous in that it applied to all civil service jobs, was available to men or women, including nurses, who were honorably discharged from the United States Armed Forces after at least ninety days of service, one day of which was during wartime. See *id.* at 261-62. The preference could be exercised at any time, as many times as the veteran wanted. See *id.* at 262.



considered for appointment before qualifying nonveterans.<sup>181</sup> The petitioner, a female nonveteran, argued that the preference excluded women from the most desirable civil service jobs.<sup>182</sup> Although the statute attempted to include as many women veterans as possible, it overwhelmingly favored men.<sup>183</sup> The district court found that although the absolute preference statute was not enacted to discriminate against women, it did have a devastating effect on their employment opportunities.<sup>184</sup> In holding the absolute preference unconstitutional, the district court stated that a more limited form of preference would serve the state's interest in aiding veterans and could be constitutional.<sup>185</sup>

The Supreme Court found the issue to be whether the appellee showed that the statute was shaped by a gender-based discriminatory purpose.<sup>186</sup> Citing the findings of the district court, the Supreme Court held that although any statute favoring veterans is inherently gender-based, the Massachusetts statute was not enacted with the purpose to discriminate against women.<sup>187</sup> Discriminatory purpose implies that the decisionmaker selected or reaffirmed a particular course of conduct at least in part "because of," not merely "in spite of," its adverse

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181. *See id.* at 259. These preference statutes are generally justified as a reward to veterans for their sacrifice in military service, to ease the transition to civilian life, to encourage service and to attract loyal people to civil service positions. *See id.* at 265.

182. *See id.* at 264. During a twelve year tenure as a public employee the petitioner took and passed several civil service exams. *See id.* Those who pass the examinations are ranked according to score on an eligibility list and when positions become available the top ranking people on the list are considered. *See id.* at 263. Due to the preference given veterans, Ms. Feeney found herself behind them on the list even though her scores were higher than many of the veterans. *See id.* at 264.

183. *See id.* at 269. When the litigation began, over 98% of veterans in Massachusetts were men; only 1.8% were female and over one quarter of the Massachusetts population were veterans. *See id.* at 270. This imbalance is due in part to the restrictions on the number of women who could enlist in the United States Armed Forces and the fact that women were never included in the draft. *See id.* at 269-70.

184. *See id.* at 260.

185. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 260 (1979).

186. *See id.* at 276.

187. *See id.* at 276-77. The Court felt that any statute favoring veterans would necessarily be discriminatory against women because of historical, gender-based, military practices. *See id.*

effects on an identifiable group.<sup>188</sup> In this case, the statute was enacted to benefit all veterans, and adversely affected both women and men who were not veterans.<sup>189</sup> Therefore, because all nonveterans were treated alike, male or female, there was no equal protection violation.

c. *Discrimination Through Enforcement*

Sometimes a clear pattern, inexplicable on grounds other than race, emerges from the effect of government action in carrying out a statute that is neutral on its face.<sup>190</sup> An example of this is illustrated in *Yick Wo v. Hopkins*.<sup>191</sup> In *Yick Wo*, a San Francisco city ordinance prohibited the establishment or maintenance of certain laundries without the permission from the Board of Supervisors.<sup>192</sup> The permission was not necessary if the laundry was constructed out of stone or brick.<sup>193</sup> The petitioner, a native of China, had a laundry business in the same building for twenty-two years, as well as a license from the board of fire wardens and the health inspector approving the use and safety of the building for a laundry business.<sup>194</sup> The city of San Francisco had, at that time, 320 laundries, 240 of which were owned and operated by Chinese and 310 of the total were constructed of wood.<sup>195</sup>

The petitioner alleged that 150 Chinese were arrested for maintaining laundries without the consent of the Board of Supervisors while eighty non-Chinese owners, also lacking the appropriate consent, were not arrested.<sup>196</sup> The Supreme Court found that the Board of Supervisor's authority to grant or withhold consent was not exercised upon consideration of the circumstances of each case but was a purely arbitrary power exercised without guidance and at the mere will of the Board members.<sup>197</sup> Rather than prescribe a rule and conditions for the

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188. *Id.* at 279.

189. *See id.* at 280.

190. *See Arlington Heights*, 429 U.S. at 266.

191. 118 U.S. 356 (1886).

192. *See id.* at 357.

193. *See id.*

194. *See id.* at 358.

195. *See id.* at 358-59.

196. *See id.* at 359.

197. *See Yick Wo v. Hopkins*, 118 U.S. 356, 366-67 (1886).

regulation of laundries to which all similarly situated owners had to conform, the rule arbitrarily created two classes: those permitted to use the wooden buildings and those who were refused consent at the will of the Board.<sup>198</sup> The Court further stated that although a law may appear fair on its face, if it is applied and administered unequally by public officials in a way that makes unjust and illegal discriminations between persons in similar circumstances, it is a denial of justice and is prohibited by the Equal Protection Clause of the Constitution.<sup>199</sup>

Discrimination through the enforcement of a statute is not always as clear as it was in *Yick Wo*. Sometimes, discrimination through enforcement is masqueraded as prosecutorial discretion.<sup>200</sup> However, cases have acknowledged that the use of prosecutorial discretion may also be a weapon of discrimination.<sup>201</sup>

Prosecutorial discretion is intertwined in many equal protection claims because "the power to be lenient [also] is the power to discriminate."<sup>202</sup> Our criminal justice system affords the government broad discretion as to whom to prosecute<sup>203</sup> so abuse must be clear in order to find such discretion in violation of the Constitution.<sup>204</sup> "Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection."<sup>205</sup> There is no doubt that inherent in this discretion is the potential for individual and institutional abuse.<sup>206</sup> With this in mind it should be noted that, although broad, prosecutorial discretion is not "unfettered" and is subject to constitutional constraints.<sup>207</sup>

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198. *See id.* at 368.

199. *See id.* at 373-74.

200. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

201. *See, e.g., id.* at 368 (Blackmun, J., dissenting).

202. *McClesky*, 481 U.S. at 312 (quoting KENNETH C. DAVIS, DISCRETIONARY JUSTICE 170 (1980)).

203. *See Bordenkircher*, 434 U.S. at 364.

204. *See McClesky*, 481 U.S. at 296-97.

205. *Moss v. Hornig*, 314 F.2d 89, 92 (2d Cir. 1963); *see also United States v. Rickenbacker*, 309 F.2d 462, 464 (2d Cir. 1962).

206. *See Bordenkircher*, 434 U.S. at 365.

207. *See United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

In *Oyler v. Boles*,<sup>208</sup> the Supreme Court considered whether the conscious exercise of some selectivity by state prosecuting authorities was, in itself, a violation of the equal protection of the laws.<sup>209</sup> The petitioners were serving life sentences imposed under the West Virginia habitual criminal statute<sup>210</sup> which provided for a mandatory life sentence upon the third conviction of a crime punishable by imprisonment.<sup>211</sup> The petitioners claimed that their rights to equal protection of the laws were violated because the law was only applied to a minority of those subject to its provisions.<sup>212</sup> Petitioners contended that the habitual criminal statute imposed a mandatory duty on the prosecutors to seek the more severe penalty against all people who come within the statutory requirements but that it was done in only a minority of the cases.<sup>213</sup> The petitioners argued that this violated the equal protection rights of criminals against whom the heavier penalty was enforced.<sup>214</sup>

The Supreme Court denied the petitioners' claim because the petitioners failed to prove that the disparity in the enforcement of the sentencing scheme was due to anything more than the unavailability of police records to prosecutors and their lack of knowledge that they were dealing with a three-time offender, rather than any intent to discriminate based on an unjustifiable standard.<sup>215</sup> The Court held that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."<sup>216</sup>

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208. 368 U.S. 448 (1962). This appeal consolidated two cases, *Oyler v. Boles* and *Crabtree v. Boles*. See *id.* at 448.

209. See *id.* at 456.

210. W. VA. CODE § 6130 (1961) (current version at W. VA. CODE § 61-11-18 (Supp. 1996)).

211. See *Oyler*, 368 U.S. at 449.

212. See *id.* at 455. Oyler claimed that six men were eligible for prosecution as habitual offenders but that he was the only one prosecuted as such. See *id.* Crabtree alleged that 904 known offenders throughout West Virginia were not sentenced as required by the mandatory statutes. See *id.*

213. See *id.* The Court noted that it was unknown whether the failure to prosecute other offenders was due to a policy decision to proceed in only certain cases or to a lack of knowledge on the part of prosecutors. See *id.* at 456.

214. See *id.* at 455-56.

215. See *id.* at 456.

216. *Id.*; see also *Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963) (state prosecutor's decision to prosecute petitioner for violating a Sunday Closing Law and not others was not a denial of equal protection).

A similar selective enforcement challenge was presented to the Supreme Court in *Wayte v. United States*.<sup>217</sup> In *Wayte*, a Presidential Proclamation directed that male citizens and certain male residents born during 1960 register with the Selective Service during a specific week.<sup>218</sup> Although the petitioner fell within the designated class, he failed to register and instead wrote letters to government officials stating that he did not register and did not intend to do so.<sup>219</sup> These letters were placed in a Selective Service file which tracked other reported nonregistrants.<sup>220</sup> Subsequently, the Selective Service adopted a policy of selective enforcement under which it would only investigate and prosecute those men whose names were in that file.<sup>221</sup>

Wayte claimed that he and others indicted were impermissibly targeted for prosecution because they exercised their First Amendment rights and were vocal in their opposition to the draft.<sup>222</sup> The Department of Justice recognized that those likely to be prosecuted were the vocal opponents, and conceded that the Department knew allegations such as the one made by Wayte would be made.<sup>223</sup> However, because a more active system of enforcement was not available, the Department decided to prosecute using the file to track all reported nonregistrants.<sup>224</sup>

The Supreme Court rejected Wayte's argument and found that the Selective Service treated all nonregistrants similarly.<sup>225</sup> In evaluating Wayte's claim, the Court stated that selective enforcement claims should be evaluated according to the standards of equal protection,<sup>226</sup> which requires the petitioner to show that the statute had a discriminatory effect and that it was motivated by a discriminatory purpose.<sup>227</sup> The petitioner

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217. 470 U.S. 598 (1984).

218. *See id.* at 601.

219. *See id.*

220. *See id.* This file included all men that made it known to the Selective Service themselves that they did not register and those men made known by other sources. *See id.*

221. *See id.*

222. *See id.* at 604.

223. *See Wayte v. United States*, 470 U.S. 598, 603 (1984).

224. *See id.*

225. *See id.* at 610.

226. *See id.* at 608.

227. *See Personnel Adm'r*, 442 U.S. at 272.

failed to show that the enforcement policy selected nonregistrants according to whether they spoke out about the process.<sup>228</sup> The evidence showed that while many of the men the government prosecuted had been vocal in their opposition, the government also prosecuted those who were reported but did not protest.<sup>229</sup> The Court acknowledged the broad discretion given to prosecutors and reaffirmed that concept, recognizing that the decision of whether or not to prosecute is "particularly ill-suited [for] judicial review."<sup>230</sup> "[T]he strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."<sup>231</sup> Further, judicial supervision in this area would increase cost, cause delay, threaten to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and could also undermine the effectiveness of prosecutions by revealing the government's enforcement policy.<sup>232</sup>

It is in light of this history that the New York Legislature enacted legislation providing for the death sentence in New York. To be deemed constitutional such legislation must conform to the mandates derived from this history.

## V. The New York Death Penalty Legislation

### A. *Purposes and Goals*

On September 1, 1995, Governor George E. Pataki approved and signed into law death penalty legislation in New York.<sup>233</sup> On approving the legislation Governor Pataki stated:

[T]he citizens of New York State have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. [They] . . .

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228. See *Wayte*, 470 U.S. at 609.

229. See *id.*

230. *Id.* at 607.

231. *Id.*

232. See *id.*

233. See Act of March 7, 1995, ch. 1, 1995 N.Y. Laws.

are convinced the death penalty will deter these vicious crimes and I, as their Governor agree.<sup>234</sup>

The purpose of this legislation is to allow for the imposition of the death penalty when a defendant is convicted for certain types of intentional murder.<sup>235</sup>

In light of the *Furman* decision, such legislation must provide the jury with adequate guidance when they are called on to sentence a first degree murderer.<sup>236</sup> Prior New York death penalty legislation was declared unconstitutional by the New York Court of Appeals because it gave the jury the complete discretion to decide whether to impose the death penalty on a defendant.<sup>237</sup> The Court of Appeals, citing *Furman*, reasoned that such statutory discretion rendered the death penalty cruel and unusual punishment.<sup>238</sup> Governor Pataki assures that the infirmities in past New York legislation are avoided in the current law which establishes a bifurcated trial procedure and sets forth clear standards to narrow the scope of the death penalty and to guide the jury in determining whether to impose it.<sup>239</sup>

## B. *The Provisions*

### 1. *Who is Subject to its Provisions*

The death penalty legislation provides three options for sentencing defendants convicted of first degree murder:<sup>240</sup> death, life imprisonment without parole<sup>241</sup> and an intermediate

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234. Memorandum from Governor George E. Pataki approving L. 1995, ch. 1; Death Penalty (Sept. 1, 1995).

235. See Bill Memorandum from the New York State Assembly, 218th Session, 1995 Regular Session for L. 1995, ch. 1 (March 7, 1995).

236. See *supra* notes 73-75 and accompanying text.

237. See *People v. Fitzpatrick*, 346 N.Y.S.2d 793 (1973). N.Y. PENAL LAW § 125.35(5) (repealed 1974), provided that a defendant convicted of murder shall be sentenced to death if, after another proceeding, the jury unanimously agreed to impose such a penalty and the court was convinced that the victim was a peace officer who was killed in the course of his official duties. If the jury unanimously agreed to impose the death penalty the court was required to do so. See *id.*

238. See *Fitzpatrick*, 346 N.Y.S.2d at 802.

239. See Memorandum from Governor George E. Pataki, *supra* note 234.

240. See N.Y. PENAL LAW § 60.06 (McKinney Supp. 1996).

241. A defendant sentenced to life imprisonment without parole shall not become eligible for parole or conditional release and is committed to the custody of the state department of correctional services for the remainder of his life. See N.Y. PENAL LAW § 70.00.

sentence of regular life for a class A-I felony other than a sentence of life imprisonment without parole.<sup>242</sup>

The New York death penalty legislation specifically defines the offenses which are subject to the punishment of death.<sup>243</sup> First degree murder requires that a person intend to cause the death of another person and in fact cause that death.<sup>244</sup> In addition to intent, the prosecution must prove beyond a reasonable doubt<sup>245</sup> the elements of at least one of twelve statutorily defined aggravating factors<sup>246</sup> that render the defendant subject to the death penalty.<sup>247</sup> These aggravating circumstances include the murder of a police officer,<sup>248</sup> a peace officer,<sup>249</sup> an employee of a local correctional facility,<sup>250</sup> a judge,<sup>251</sup> or a witness,<sup>252</sup> or the family member of a witness.<sup>253</sup> In addition, a defendant is subject to the death penalty if he murders while in a correctional facility or while escaping from such a facility,<sup>254</sup> or if he murders while committing another serious felony.<sup>255</sup> Contract killers,<sup>256</sup> those who commit two or more murders within twenty four months,<sup>257</sup> and those who have murdered before,<sup>258</sup> may also receive the death penalty.<sup>259</sup> Executions under this law will be carried out by lethal injection<sup>260</sup> in a state prison.<sup>261</sup>

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242. *See id.* An intermediate sentence for an A-I felony is a minimum of twenty to twenty five years and a maximum of life for defendants convicted of first degree murder who are not sentenced to death or life imprisonment. *See id.*

243. *See* N.Y. PENAL LAW § 125.27.

244. *See id.*

245. *See* N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney Supp. 1996).

246. *See id.* This section defines the aggravating factors as each subparagraph of paragraph (a) of subdivision one of section 125.27 of the N.Y. Penal Law. *See id.*

247. *See* N.Y. PENAL LAW § 125.27.

248. *See id.* § 125.27(a)(i).

249. *See id.* § 125.27(a)(ii).

250. *See id.* § 125.27(iii).

251. *See id.* § 125.27(xii).

252. *See id.* § 125.27(v).

253. *See* N.Y. PENAL LAW § 125.27(v) (McKinney Supp. 1996).

254. *See id.* § 125.27(iv).

255. *See id.* § 125.27(vii).

256. *See id.* § 125.27(vi).

257. *See id.* § 125.27(xi).

258. *See id.* § 125.27(ix).

259. *See* N.Y. PENAL LAW § 125.27 (McKinney Supp. 1996).

260. *See* N.Y. CORRECT. LAW § 658 (McKinney Supp. 1996). Lethal injection seems to be the least cruel method of capital punishment because there is little or no mutilation of the body; the violence is limited to the insertion of a needle; the



## 2. Sentencing Procedures

To protect the interests of a defendant in a capital case, procedures have been established in order to assure the defendant the full opportunity to defend his rights.<sup>262</sup> One such procedure is the requirement that the prosecution give the defendant and the court adequate written notice of their intent to seek the death penalty in a particular case.<sup>263</sup> The people have 120 days from the time of the defendant's arraignment to make such a decision,<sup>264</sup> and if the notice is withdrawn it can not be refiled.<sup>265</sup> After notice is filed the defendant is given an additional sixty days to file new motions or supplement motions pending before the court.<sup>266</sup> There are also pre-sentencing provisions protecting the defendant from prejudice due to the personal beliefs of the jurors.<sup>267</sup> In any capital case, either party, upon motion, may examine prospective jurors regarding their qualifications as jurors, including the possibility of racial bias.<sup>268</sup> The legislature also recognized that the personal opinions of the jurors regarding capital punishment may prejudice the defendant, so any juror with opinions that make it impossible to render an impartial decision on the sentence may be discharged by the court.<sup>269</sup>

The death penalty legislation sets forth procedures and guidelines to aid the jury in determining the proper sentence for a convicted murderer.<sup>270</sup> When the prosecution seeks the death penalty such determination is made at a separate sentencing proceeding where the same jury that decided the defendant's

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prisoner is given a barbiturate to kill the pain before the poison enters the body. See Peter S. Adolf, Note, *Killing Me Softly: Is the Gas Chamber, Or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CONST. L.Q. 815, 863-64 (1995).

261. See N.Y. CORRECT. LAW § 659.

262. See N.Y. CRIM. PROC. LAW §§ 250.40, 270.16, 270.20 (McKinney Supp. 1996).

263. See *id.* § 250.40.

264. See *id.* § 250.40(1)-(2).

265. See *id.* § 250.40(4).

266. See *id.* § 250.40(3).

267. See *id.* §§ 270.16, 270.20.

268. See N.Y. CRIM. PROC. LAW § 270.16 (McKinney Supp. 1996).

269. See *id.* § 400.27(2).

270. See *id.* § 400.27(1).

guilt<sup>271</sup> decides whether the defendant is sentenced to death<sup>272</sup> or life imprisonment without parole.<sup>273</sup> If the prosecution does not seek the death penalty, the court will sentence the defendant without a separate sentencing proceeding.<sup>274</sup>

During a separate sentencing proceeding the jury may only consider the aggravating factor or factors proven at trial beyond a reasonable doubt by the prosecution.<sup>275</sup> Those aggravating factors established at trial are deemed to be established at the separate sentencing proceeding and are not to be relitigated,<sup>276</sup> except in rebuttal to any evidence relevant to a mitigating factor offered by the defendant at the sentencing proceeding.<sup>277</sup> The jury is also to consider several mitigating factors at the sentencing proceeding including the defendant's history of violent acts, the mental state of the defendant at the time of the crime, the circumstances under which the crime was committed, the degree of involvement by the defendant in the crime, the defendant's use of drugs or alcohol at the time of the crime or any other relevant circumstance regarding the defendant's state of mind, character, background or record.<sup>278</sup> These mitigating fac-

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271. *See id.* § 400.27(2).

272. A sentence of death should be imposed only when the jury finds unanimously that the aggravating factors substantially outweigh the mitigating factors, and unanimously agree that the death sentence should be imposed. *See id.* § 400.27(11)(a).

273. *See id.* § 400.27(1).

274. *See* N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1996).

275. *See id.* § 400.27(3)(a).

276. *See id.*

277. *See id.* § 400.27(6) The defendant is not precluded from offering reliable hearsay evidence and is to be given liberal opportunity to offer reliable evidence that would otherwise be inadmissible. *See* *Green v. Georgia*, 442 U.S. 95 (1979).

278. *See* N.Y. CRIM. PROC. LAW § 400.27(9). The statute provides as mitigating factors: (a) whether the defendant has a significant history of prior criminal convictions involving the use of violence against another person; (b) whether the defendant was mentally retarded at the time of the crime, or his mental capacity was so impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution; (c) whether the defendant was under duress or the domination of another, although not to such a point as to constitute a defense to prosecution; (d) whether 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; (e) whether the murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or drugs, but not so minor as to constitute a defense; or (f) any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the

tors must be proven by the defendant by a preponderance of the evidence.<sup>279</sup> At the conclusion of the trial for first degree murder the court is to charge the jury that with respect to the murder charge, they should consider whether or not to sentence the defendant to death or life imprisonment without parole and that a unanimous decision is required.<sup>280</sup> In the event the jury is unable to reach a unanimous conclusion, the court will sentence the defendant to either life imprisonment without parole or a term or imprisonment for the defendant's regular life.<sup>281</sup>

An analysis of this legislation can only be done by considering the Eighth Amendment's prohibition against "cruel and unusual punishments," the history of capital punishment, and the Fourteenth Amendment's guarantee of equal protection. To be upheld as constitutional the New York legislation must conform to the mandates of the Constitution and Supreme Court case law.

## VI. The Constitutionality of the New York Death Penalty

Historically, there has always been a concern that punishments should fit the crime and be administered fairly and equally among those deserving of the punishment.<sup>282</sup> The enactment of the Eighth Amendment provided a yardstick against which the severity of punishments could be measured. The New York death penalty legislation must be measured against this constitutional yardstick before it can be rendered a valid law. The Eighth Amendment is a clear mandate against the infliction of unnecessary and barbaric punishments against any criminal.<sup>283</sup> The Supreme Court has recognized that although capital punishment is permitted,<sup>284</sup> the deliberate infliction of

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crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime. *See id.*

279. *See id.* §400.27(6). Any juror who finds a mitigating factor to have been established by the defendant by a preponderance of the evidence may consider such factor regardless of whether the jury unanimously agrees. *See id.* § 400.27(11)(a).

280. *See id.* § 400.27(10).

281. *See id.*

282. *See supra* notes 25-31 and accompanying text.

283. *See supra* notes 32-33 and accompanying text.

284. *See supra* notes 38-48, 98-102 and accompanying text.

unnecessary pain is not.<sup>285</sup> Therefore, any punishment, including the death penalty, must be within civilized standards of society,<sup>286</sup> and proportional to the severity of the crime.<sup>287</sup>

### A. *The Level of Civility*

The New York Legislature has enacted a law providing for the death penalty in certain cases of first degree murder and has done so with the support of Governor Pataki and the public.<sup>288</sup> The enactment of the death penalty in New York came after many years without such legislation.<sup>289</sup> The election of Governor Pataki, an outspoken supporter of the death penalty, is indicative of the mindset of New Yorkers: that to combat the growing problem of violent crimes in our society, a measure as drastic as the death penalty is necessary. The people of New York have spoken, through their legislature, and that voice represents society's endorsement of capital punishment as a proper form of punishment. Simply because such legislation has been enacted does not assure that it is within the limits of the Constitution. The New York legislation must be applied in an even-handed manner to ensure its validity.<sup>290</sup>

The historical use of capital punishment<sup>291</sup> and the standards of civility in our society<sup>292</sup> must be considered when deciding the constitutionality of a death penalty statute.<sup>293</sup> The New York legislation provides for the use of lethal injection to administer the death penalty.<sup>294</sup> The punishment of death has been long recognized as proportional to the crime of murder,<sup>295</sup> therefore the remaining question is whether the method employed is within civilized standards and does not inflict unnecessary pain.<sup>296</sup> The method of lethal injection will be upheld because it does not inflict unnecessary or wanton pain. In fact,

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285. See *supra* notes 32-33.

286. See *supra* note 29 and accompanying text.

287. See *supra* notes 51-53.

288. See *supra* notes 233-35.

289. See *supra* note 237 and accompanying text.

290. See *supra* note 31 and accompanying text.

291. See *supra* Part II.C.

292. See *supra* note 29 and accompanying text.

293. See *supra* Part II.B.

294. See *supra* note 260 and accompanying text.

295. See *supra* notes 38-48 and accompanying text.

296. See *supra* note 29 and accompanying text.

efforts are made to minimize the pain of the prisoner by administering pain killing drugs before the injection.<sup>297</sup> Such efforts are made in order to end the prisoner's life in the most humane, peaceful and civilized manner possible.

Although the method employed meets the test under the Eighth Amendment, it is still necessary that the New York Death penalty legislation meet the constitutional mandate of *Furman v. Georgia*.<sup>298</sup> Although prior to the *Furman* decision it was considered constitutional for juries to decide whether to impose the death penalty without guidance and according to their own feelings and beliefs,<sup>299</sup> such discretion is no longer afforded.<sup>300</sup> In *Furman*, the Supreme Court held that it is unconstitutional to give juries unguided discretion when they sentence a capital defendant to death<sup>301</sup> because such discretion affords juries the opportunity to discriminate against certain defendants for arbitrary reasons.<sup>302</sup> Therefore, in order to meet the constitutional requirement of *Furman*, the New York legislation must provide guidance to juries that will prevent the death penalty from being imposed arbitrarily.<sup>303</sup>

In *Gregg*, the Supreme Court approved a Georgia death penalty statute which narrowed the class of murderers subject to the death penalty by requiring at least one aggravating factor to be proven beyond a reasonable doubt.<sup>304</sup> Because the jury was required to consider the circumstances of the crime and the characteristics of the criminal, the defendant was protected from arbitrary sentences.<sup>305</sup> The *Gregg* court specifically endorsed statutes that provide for bifurcated proceedings, consisting of a guilt phase and a sentencing phase, where the jury is given all the relevant information, and guidance on how to use it.<sup>306</sup>

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297. See *supra* note 260.

298. See *supra* notes 69-85 and accompanying text.

299. See *supra* notes 63-68 and accompanying text.

300. See *supra* note 73 and accompanying text.

301. See *supra* notes 69-73 and accompanying text.

302. See *supra* notes 74-81 and accompanying text.

303. See *supra* notes 74-81 and accompanying text.

304. See *supra* notes 89-97 and accompanying text.

305. See *supra* notes 89-92 and accompanying text.

306. See *supra* note 96 and accompanying text.

In conformity with *Furman* and *Gregg* the New York legislation contains several provisions for checking jury discretion. First, the legislation provides for three possible sentences for defendants who fit the statutory prerequisites.<sup>307</sup> Therefore, the sentence is not mandatory and the jury still maintains some discretion. However, this discretion does not permit the jury to sentence defendants to death who do not fit the strict statutory definition. This specific and narrow definition of what crimes are subject to the death penalty means that a jury cannot randomly decide to impose it, or fail to impose it, in cases where their own prejudices come into play. Additionally, prospective jurors can be questioned regarding any possible prejudices they may entertain which would prevent them from rendering an impartial decision regarding a sentence.<sup>308</sup>

Second, a separate sentencing proceeding is provided, where the jury who decided the defendant's guilt also decides his sentence.<sup>309</sup> This assures that the jury is aware of all the relevant facts that are necessary to correctly decide the fate of a defendant. The separate sentencing proceeding allows the jury to consider only those aggravating factors the jury unanimously agreed were proven beyond a reasonable doubt.<sup>310</sup> Mitigating factors may be considered by the jury, if proven by a preponderance by the defendant, even if the jury is not unanimous in believing such factor was proven.<sup>311</sup> This allows for mercy for defendants who convince even one juror that the mitigating factors outweigh the aggravating factors. The jury's decision regarding the sentence must be unanimous and if they fail to reach such a decision, the court has the power to take the case from the jury and sentence the defendant to life or a term of imprisonment for the defendant's regular life.<sup>312</sup>

The above provisions guide the jury in making their decision and do not leave all aspects of the decision to their own discretion. Therefore, the New York death penalty law is constitutional in light of *Furman*.<sup>313</sup> The decision whether or not to

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307. See *supra* notes 240-42 and accompanying text.

308. See *supra* notes 268-69 and accompanying text.

309. See *supra* notes 271-73 and accompanying text.

310. See *supra* note 275 and accompanying text.

311. See *supra* notes 278-79 and accompanying text.

312. See *supra* note 281 and accompanying text.

313. See *supra* note 73 and accompanying text.

sentence a defendant to death depends on whether the prosecutor seeks such a sentence, whether an aggravating factor exists and whether the jury can reach a unanimous decision. The legislation enumerates specific circumstances for the jury to consider in deciding a sentence and does not leave the jury to depend on their own feelings and prejudices in sentencing a capital defendant. The New York statute mirrors the statute approved by the Supreme Court in *Gregg v. Georgia*<sup>314</sup> and would therefore meet the standards required by *Furman*<sup>315</sup> and *Gregg*.<sup>316</sup>

### B. *Its Equality as Applied*

Initially, the Fourteenth Amendment's interpretation focused solely on alleviating the racial prejudice that the newly freed slaves endured.<sup>317</sup> This purpose extended to each of the Amendment's provisions, including the Equal Protection Clause. This clause restrains the use of classifications based on any criteria and therefore covers an area broader than just race.<sup>318</sup> The Equal Protection Clause requires that if a classification is made, it must consist of similarly situated people who should be, and are, treated similarly.<sup>319</sup>

Subjecting murderers in one New York county to the death penalty but excluding murderers in another county from the same punishment creates a classification that the Equal Protection Clause prohibits. The broad applicability of the Clause to classifications based on any discriminating criteria establishes that it must also encompass discrimination based on where a person is prosecuted for a crime. The Equal Protection Clause guarantees that every person receive equal treatment under the laws, unless a unique difference requires different treatment.<sup>320</sup> No form of discrimination is acceptable under this constitutional provision, including classifications based on geographical differences.

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314. See *supra* notes 89-93 and accompanying text.

315. See *supra* Part III.B.

316. See *supra* Part III.B.

317. See *supra* note 116 and accompanying text.

318. See *supra* notes 125-26 and accompanying text.

319. See *supra* note 127 and accompanying text.

320. See *supra* notes 122, 127 and accompanying text.

The New York death penalty legislation classifies all first degree murderers who meet at least one aggravating factor together. They are similarly situated in the fact that they have all committed a crime that makes them subject to the death penalty. When these similarly situated people are treated differently, due to the policies of the district attorneys, the Equal Protection Clause is violated.

### 1. *The Prima Facie Case*

The *Castaneda* three-factor standard establishes a prima facie case of an equal protection violation for a capital defendant.<sup>321</sup> The defendant must first establish that he is a member of a distinct group that is singled out for different treatment.<sup>322</sup> A capital defendant could establish this by showing that he is a member of the group of first degree murderers who face the death penalty and is therefore treated differently from other first degree murderers who do not face death. Second, the capital defendant must show a substantial amount of differential treatment.<sup>323</sup> There can be no argument that losing your life for committing a crime is significantly different than serving time in prison. Therefore, a capital defendant challenging a district attorney's enforcement of the death penalty could also meet this standard. The final factor is that the allegedly discriminatory process is susceptible to abuse or is not racially neutral.<sup>324</sup> Whenever one person is responsible for making decisions there is the significant possibility that their individual prejudices will play a role in that process.<sup>325</sup> If district attorneys are permitted to make policy decisions, based on personal beliefs, they cease to answer to anyone else and can freely abuse the process at will. District attorneys work for the people of New York and when they ignore the laws, they ignore the people, and abuse the office. In order to be successful in such a constitutional challenge a capital defendant must prove that the different treatment

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321. See *supra* notes 136-40 and accompanying text.

322. See *supra* note 137 and accompanying text.

323. See *supra* note 138 and accompanying text.

324. See *supra* note 139 and accompanying text.

325. See *supra* notes 202-07 and accompanying text.



given to capital defendants is the result of purposeful discrimination.<sup>326</sup>

## 2. *Proving the Case*

The capital defendant has many methods to prove purposeful discrimination by the district attorneys, and can do so using circumstantial or direct evidence.<sup>327</sup> A good starting point is to see whether the challenged action bears a greater burden on one group over another.<sup>328</sup> In the scenario presented in this comment it is clear that those charged with first degree murder in counties where the death penalty is sought are clearly bearing a greater burden than those who murder in counties where death is not sought. In the former case, the defendants face losing their lives, while in the latter case the risk is only freedom. However, this unequal burden is only a starting point in establishing purposeful discrimination.

The Supreme Court listed several methods of proving discrimination in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>329</sup> some of which are useful in the present challenge. The New York legislation provides 120 days for the prosecutor to decide whether to seek the death penalty in a particular case.<sup>330</sup> Failure to utilize this time and fully consider the individual circumstances of each case is a departure from the law and the normal procedure that is followed by other district attorneys.<sup>331</sup> A capital defendant may also utilize the legislative history of the New York legislation and the statements of the Governor and other leaders in New York State to show that the law is being executed in a discriminating manner.<sup>332</sup> Clearly, the law was enacted to be implemented and not to be ignored or in effect repealed at the whim of district attorneys. The purpose of the statute is being ignored by district attorneys who fail to consider it in applicable cases and therefore the law is being applied unequally.

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326. See *supra* note 128 and accompanying text.

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

328. See *supra* note 142 and accompanying text.

329. See *supra* notes 129, 145-49 and accompanying text.

330. See *supra* notes 263-65 and accompanying text.

331. See *supra* note 148 and accompanying text.

332. See *supra* note 149 and accompanying text. See also *supra* notes 20-22 and accompanying text.

Although *McClesky* severely limited the use of statistics in capital sentencing cases based on race, it does not effect the present challenge in the same way. The *McClesky* court acknowledged that statistics may be used to show purposeful discrimination when they pertain to certain limited considerations.<sup>333</sup> Therefore, statistics may provide evidence of purposeful discrimination if they show that the actions of the district attorney in deciding not to pursue the death penalty had a direct discriminatory effect on a defendant who faces the death penalty.

a. *The Case of Facial Discrimination*

A statute may discriminate in several different ways, one being when the very words of the statute are discriminatory. *Strauder v. West Virginia* illustrates one such type of facially discriminatory statute.<sup>334</sup> However, *Strauder* is inapplicable to the challenge considered in this Comment because the New York death penalty legislation does not classify defendants based on any impermissible criteria. It treats all first degree murderers who fall within the statutory prerequisites in the same way and this classification is permissible because they are similar situated. It is not until a member of that similar class is treated differently that an equal protection violation surfaces. As in *Snowden*, where it was permissible to discriminate between successful and unsuccessful candidates in an election,<sup>335</sup> it is similarly permissible to discriminate between those who fit the first degree murder statutory prerequisites and those criminals who do not. In each case it is proper to treat the two groups differently, because they are different. Therefore, the New York legislation is not facially discriminatory.

b. *The Case of Enactments with the Purpose to Discriminate*

However, further analysis of the New York legislation must be done to see whether it violates the Equal Protection Clause because it was enacted with the purpose to discriminate. A discriminatory purpose implies that the decisionmaker selected a

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333. See *supra* note 158 and accompanying text.

334. See *supra* notes 164-71 and accompanying text.

335. See *supra* notes 172-77 and accompanying text.

course of conduct, at least partly because of its adverse effects on an identifiable group.<sup>336</sup> This New York death penalty statute was enacted to subject all individuals who intentionally take the life of another, under certain enumerated circumstances, to the punishment of death. It was not the intention of the New York Legislature—the decisionmaker—to enact a statute that would only apply to certain counties in New York. If such intent existed, the legislature would have expressly so provided. It was not so provided because such a provision would render the law facially discriminatory and unconstitutional.

c. *The Case of Discrimination Through Enforcement*

A capital defendant who wishes to challenge the constitutionality of the New York death penalty legislation would be successful in arguing that it violates the Equal Protection Clause because it is enforced in an arbitrary manner by the district attorneys. In *Yick Wo*, the Supreme Court found that the San Francisco Board of Supervisor's authority to grant or withhold consent to maintain a laundry was arbitrarily exercised without guidance, and at the will of the Board members.<sup>337</sup> The effect was to create two separate classes of similarly situated people: those who wanted to operate a laundry and were granted consent, and those who wanted to operate a laundry and were refused consent.<sup>338</sup> The statute granting such discretion to the Board was held to violate the Equal Protection Clause because it was applied unequally by public officials and resulted in unjust and illegal discriminations between similarly situated people.<sup>339</sup>

*Yick Wo* is analogous to the situation presented in this Comment. When district attorneys arbitrarily decide to enforce a statute according to their own policies, they create two classes, those who are subject to the death penalty and may receive it, and those who are subject to the death penalty and will not receive it. Here, as in *Yick Wo*, public officials are unequally applying a law and creating unjust and illegal discriminations based on where a person is prosecuted for a crime. This differ-

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336. See *supra* note 188 and accompanying text.

337. See *supra* notes 197-98 and accompanying text.

338. See *supra* note 198 and accompanying text.

339. See *supra* note 199 and accompanying text.

ent treatment of similarly situated people is the very type of classification that the Equal Protection Clause was meant to prohibit.

Claims of discrimination through enforcement are difficult to prove because of the broad discretion the government is given in deciding whom to prosecute.<sup>340</sup> Clearly, the district attorneys do not have to seek the death penalty in every case of first degree murder because the mitigating factors in a particular case may make seeking the death penalty futile.<sup>341</sup> It is not argued that district attorneys are not permitted to exercise their judgment and choose not to seek the death penalty in a particular case. But, this discretion creates a problem when it is exercised in a manner that is inconsistent with the Constitution. In *Oyler v. Boles*, the Supreme Court was faced with a case where the prosecutor failed to seek a mandatory sentence for a habitual criminal in all the cases where it was applicable.<sup>342</sup> The Court found that although the statute was not applied in all the cases where it could have been, it was not due to discrimination, but to the unavailability of police records and a lack of knowledge on the part of the prosecutors.

*Oyler* is distinguishable from the equal protection claim in this comment because the district attorneys are deciding not to seek the death penalty before the relevant information is even provided to them. Only the existence of an intentional murder and an aggravating factor is necessary to seek the death penalty. These factors depend on information that is readily available for the district attorney's consideration. While it is true that the conscious exercise of some selectivity in enforcement is not a constitutional violation,<sup>343</sup> selectivity which puts personal policy above the law cannot be valid. The legislation provides 120 days<sup>344</sup> so the district attorneys can carefully consider each case and proceed according to their judgment. To ignore that provision is to ignore the law and is an abuse of power.

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340. See *supra* notes 203-07 and accompanying text.

341. See *supra* notes 202-07 and accompanying text.

342. See *supra* notes 208-16 and accompanying text.

343. See *supra* note 216.

344. See *supra* note 264 and accompanying text.

*Wayte v. United States*<sup>345</sup> presents another equal protection case against which to measure the challenge presented in this comment. In *Wayte*, the Supreme Court found that the selective prosecution system employed by the Selective Service to deal with people who did not register was not based on impermissible discrimination.<sup>346</sup> Although nonregistrants who were vocal in their opposition to the registration requirement were prosecuted, so were other men who failed to register and were not vocal in their opposition.<sup>347</sup> Therefore, the Court found that the system treated all nonregistrants equally.<sup>348</sup>

*Wayte*, like *Oyler*, differs from a capital defendant's claim that his equal protection rights are violated by the district attorneys selectively seeking the death penalty. Again, the selectivity in *Wayte* was due to the availability of information, the names of nonregistrants,<sup>349</sup> and not to the arbitrary policies of prosecutors. The prosecutors in *Wayte* had no choice to operate this selective enforcement policy because they could not prosecute people they did not know were in violation of the statute. The selectivity in enforcement at issue in this Comment is due to individual policy choices, not to the absence of information. There will be people who commit murder in the first degree who avoid the death sentence. However, this should occur only after the prosecutor weighs the strength of his case and considers all of the aggravating and mitigating factors and decides not to seek the death penalty, or a jury decides on a different sentence. Prosecutors are allowed 120 days to weigh the facts of each particular capital case and to make a well reasoned decision regarding the sentence to seek. The problem arises when the district attorneys simply disregard the law and refuse to consider the facts of any case because they have personally decided that the death penalty is not proper punishment. There is no question that guidance is provided to the district attorneys under the New York legislation. The issue is whether they up-

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345. See *supra* note 217.

346. See *supra* notes 228-32 and accompanying text.

347. See *supra* notes 228-29 and accompanying text.

348. See *supra* note 225 and accompanying text.

349. See *supra* notes 223-24 and accompanying text.

hold their duty, required of them by their oath,<sup>350</sup> to contemplate the death penalty in cases in which it is applicable.

## VII. Conclusion

Wielding the power to end a person's life is without question an awesome responsibility. It should only be utilized when the factors of a case are carefully considered and a fair determination is made that justice requires the punishment of death. The nature of this punishment carries with it a troublesome debate over whether anyone should have the power to end another person's life. The death penalty has been an accepted method of punishment for hundreds of years and New York has documented its support of it through its recent legislation. The legislation puts the power to end another's life in the hands of both the district attorney and a jury, who decide this ultimate question after thoroughly considering all the relevant factors of a case. Absent from the death penalty legislation is the sentence that says that the decision of who is executed and who is not is for the district attorneys alone to decide. District attorneys are required to faithfully execute the laws of the State of New York, including the death penalty law. There simply is no room for the intrusion of personal beliefs and opinions in meeting this requirement. Enforcement of a blanket policy, which effectively nullifies the enactment of the law and elevates personal policy above that law, cannot be accepted as merely an effect of prosecutorial discretion.

The Constitution of the United States guarantees all people equal treatment under the laws. The laws of New York should apply to all people in New York, not just to those whom the district attorneys decide the laws should apply. When the New York Legislature enacted a death penalty statute it failed to provide a section making the entire law subject to the individual policies of district attorneys. It failed to provide this section because it did not intend the district attorneys to have such power. If New York is to have a constitutional death penalty statute it must apply to all who fall under its provisions. It is not being argued that the death sentence should be mandatory, only that it should be fairly and uniformly applied. If it is ap-

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350. *See supra* notes 14-15.

plied arbitrarily, according to the district attorneys' policies, it will be struck down as unconstitutional as a violation of the Equal Protection Clause.

*Kerry E. Ford\**

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\* This article is dedicated to my mother and father for their endless support.