BE CAREFUL WHAT YOU ASK FOR: LESSONS FROM NEW YORK'S RECENT EXPERIENCE WITH CAPITAL PUNISHMENT

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INTRODUCTION

On March 7, 1995, Governor George Pataki signed legislation authorizing the death penalty in New York for first-degree murder,[1] representing the State's first capital punishment law enacted in the post-*Furman* era.[2] By taking this action the governor made good on a pledge that was central to his campaign to unseat Mario Cuomo, a three-term incumbent who, like his predecessor, Hugh Carey, had repeatedly vetoed legislative efforts to resuscitate New York's death penalty after it had been declared unconstitutional.[3] The promised law was greeted with enthusiasm. The audience at the new governor's inauguration reserved its most spirited ovation for Pataki's reaffirmation of his support for capital punishment.[4]

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1. Twelve categories of first-degree murder were made punishable by death under the 1995 legislation, and a thirteenth type (killing in furtherance of an act of terrorism) was added following the September 11, 2001 terrorist attacks. N.Y. PENAL LAW § 125.27 (McKinney 2003). Also detailed were the procedures governing the prosecution's filing of a notice of intent to seek the death penalty, N.Y. CRIM. PROC. LAW § 250.40 (McKinney 1995); the jury's sentencing deliberations, *id.* § 400.27; and the New York Court of Appeals' appellate responsibilities in capital cases, *id.* § 470.30, as were various other provisions respecting capital punishment. For a comprehensive discussion of New York's 1995 death penalty legislation, see generally James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 42–45 (1996) (discussing New York's 1995 reinstitution of the death penalty).

2. The United States Supreme Court invalidated laws that gave juries unregulated discretion to impose capital sentences in Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curiam); *id.* (Douglas, J., concurring). Pursuant to the ruling in *Furman*, the New York Court of Appeals declared New York's restrictive capital punishment law, which applied only to the murder of peace officers, corrections officers, and murder committed by life-term prisoners, to be unconstitutional. People v. Fitzpatrick, 300 N.E.2d 139, 145 (N.Y. 1973). Post-*Furman* legislation that made capital punishment mandatory for those same categories of murder was declared unconstitutional in People v. Smith, 468 N.E.2d 879, 882 (N.Y. 1984) and People v. Davis, 371 N.E.2d 456, 462, 466 (N.Y. 1977).

3. *See* James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 516, 535–36 (1990) (discussing subsequent vetoes of death penalty legislation); Acker, *supra* note 1, at 43 (documenting unsuccessful legislative efforts to reinstate the death penalty); Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 310 (1996) ("Until Cuomo lost the 1994 election, these governors had won five consecutive statewide elections despite a total of eighteen separate vetoes of death penalty enactments passed by the legislature.") (citation omitted).

4. Kevin Sack, *The New Governor: The Overview; Pataki Pledges a Renewal of a*

The Legislature immediately took up the task of crafting and voting on a statute, with behind-the-scenes negotiations that involved staff from both of its chambers and the governor's office.[5] A comprehensive death penalty bill resulted. The bill was printed on the evening of March 2, a Thursday, and debate began in the State Senate barely before the ink had dried, on Monday, March 6.[6] Following passage in the Senate by a vote of 38–19, the bill was delivered to the Assembly.[7] There, the proposed legislation was debated into the early hours of the next morning and finally was approved by a 94–52 margin.[8] It was directly forwarded to the governor for his signature. Using pens that had belonged to two police officers killed in the line of duty, as their widows looked on, Governor Pataki formally approved the law, announcing, "[j]ustice will now be served."[9]

New York's resurgent death penalty legislation—a law that Governor Pataki had forecast would be "the most effective of its kind in the nation"[10]—became operative on September 1, 1995.[11] His prediction could not have been farther off the mark. Just short of nine years later, on June 24, 2004, the New York Court of Appeals ruled in *People v. LaValle* on the law's unorthodox "deadlock" provision.[12] The deadlock provision required sentencing juries in capital cases to be instructed that the trial judge would impose a sentence of twenty to twenty-five years to life imprisonment if the jurors were unable to agree unanimously whether the offender should be

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'Revolutionary Spirit of Saratoga' as Governor, N.Y. TIMES, Jan. 2, 1995, at A1.

> [Governor Pataki's] largest ovation came when he reiterated his campaign pledge to sign the death penalty into law. "When a society does not express its own horror at the crime of murder by enforcing the ultimate sanction against it, innocent lives are put at risk," he said. "Not out of a sense of vindictiveness, then, but a sense of justice—indeed, a sense of compassion for those who otherwise might become victims of murder—I will ask the Legislature to pass and I will sign and enforce the death penalty."

Id.

5. *See* Kevin Sack, *New York's Fight on Death Penalty Shifts to Courts*, N.Y. TIMES, Jan. 8, 1995 ("Less than 24 hours after Mr. Pataki delivered his inaugural address, where his pledge to sign the death penalty drew the loudest cheers, one of his top aides convened a meeting with legislative officials to begin revising the state's death penalty bill.").

6. Subject to an exception for legislation that the governor certifies "necessitate[s] an immediate vote," the New York Constitution requires that at least "three calendar legislative days" must lapse between the printing of a bill and its passage. N.Y. CONST. art. III, § 14 (amended 2001).

7. Acker, *supra* note 1, at 46.

8. *Id.*

9. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, March 8, 1995, at A1.

10. *Id.*

11. N.Y. CORRECT. LAW § 650 (McKinney 1995).

12. People v. LaValle, 817 N.E.2d 341, 356 (N.Y. 2004).

sentenced to death or life imprisonment without parole.[13] This requirement violated the state constitution's due process clause and doomed the statute.[14] Three years later, in *People v. Taylor*, the court announced definitively that "the death penalty sentencing statute is unconstitutional on its face and it is not within our power to save the statute."[15]

During the period of the 1995 statute's viability, nearly 9,000 murders were committed in New York State.[16] A smaller but indeterminate portion

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13. The statutory "deadlock" provision specified that in its instructions to the sentencing jury in a capital case,

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

N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 2004).

14. *LaValle*, 817 N.E.2d at 359. The majority opinion in the court's 4-3 decision reasoned that the deadlock instruction impermissibly interjected speculation about the offender's future dangerousness into the jury's sentencing decision and could "coerce" jurors into voting for capital punishment to prevent the offender from becoming eligible for release on parole. *Id.* at 358–59. *See generally* Acker, *supra* note 1, at 127–37 (describing the mechanics of and problems with New York's deadlock instruction); Joseph E. Fahey, *Death Penalty Jurisprudence in New York and the Supremacy Clause of the United States Constitution: How Supreme Is It?*, 27 PACE L. REV. 391, 398–404 (2007) (discussing the constitutional issues raised in *LaValle*); Randi Schwartz, *People v. LaValle*, 21 TOURO L. REV. 30, 36 (2005) ("The *LaValle* court expressed that it would be a failure of the system if a person was sentenced to death due to legislative coercion, considering the seriousness and finality of such a punishment."); Laurie B. Berberich, Note, *Jury Instructions Regarding Deadlock in Capital Sentencing*, 29 HOFSTRA L. REV. 1301, 1331 (2001) (arguing for mandatory deadlock instructions to juries in capital sentencing).

15. People v. Taylor, 878 N.E.2d 969, 984 (N.Y. 2007).

16. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., CRIME IN NEW YORK STATE: 2006 FINAL DATA, APPENDIX 1 (2007), *available at* http://criminaljustice.state.ny.us/pio/annualreport/2006_finalrelease.pdf (indicating the number of murders that occurred yearly from 1997 to 2006); N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., 1999 CRIME & JUSTICE ANNUAL REPORT § 1 (1999), *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/cja_99/sect1a.pdf [hereinafter 1999 ANNUAL REPORT] (providing statistical information on the number of murders in New York in 1999). In 1995, 1551 murders were reported. The death penalty law became effective September 1, 1995, or two-thirds of the way through the year, resulting in an estimated 511 murders committed during the four months of that year in which the law was operative. *See* 1999 ANNUAL REPORT at 2 (noting 1551 murders in 1995). From 1996 through 2003, inclusive, a total of 8007 murders were reported to the police in New York. The deaths caused in connection with the terrorist attack on the World Trade Center in New York City on September 11, 2001 were not included within the murder statistics. Jerome H. Skolnick, *Democratic Policing Confronts Terror and Protest*, 33 SYRACUSE J. INT'L L. & COM. 191, 200 (2005). A total of 899 murders were reported in New York during 2004. Disastercenter.com, New York Crime Rates 1960–2006, http://www.disastercenter.com/crime/nycrime.htm (last visited Feb. 25, 2008). *People v. LaValle* was decided on June 24, 2004, or roughly half way through the year, which suggests that an estimated 498 murders were committed during the time that the death penalty law remained in effect. The resulting total (511 + 8007 + 498 = 9016) is slightly more than 9000.

of those killings qualified as first-degree murder and hence were punishable by death.[17] District attorneys formally investigated whether to pursue capital punishment in less than ten percent (864) of the murder cases and filed notice of their intent to seek the death penalty, as required to go forward with a capital prosecution, only in a small fraction of them (58).[18] Nineteen cases proceeded to trial under the death penalty statute, fifteen progressed to a penalty hearing, and seven offenders were sentenced to death under the statute.[19] By 2003, an estimated $160 million had been spent in connection with New York's death penalty law, and considerably more had been expended by the time the statute was finally interred.[20] The state's death row was emptied in 2007 without a single death sentence affirmed or execution carried out.[21] Both supporters and detractors of the

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17. The definition of murder corresponding to the crime data reported by the state is "the willful killing of one human being by another." 1999 ANNUAL REPORT, *supra* note 16, at § 1.

18. New York Capital Defender Office, Caseload Summary (FAQs), http://www.nycdo.org/caseload_041231_answers.pdf (last visited Jan. 5, 2008). Under the 1995 legislation, prosecutors were required to file a notice of intent to seek the death penalty within 120 days of the defendant's arraignment in order to pursue a capital sentence. N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 1995).

19. New York Capital Defender Office, Caseload Summary, *supra* note 18.

20. Andrew Tilghman, *Costly Price of Capital Punishment: Restoration of the Death Penalty in New York State has Cost $160 million as Wheels of Justice Turn Slowly*, THE TIMES UNION (Albany, N.Y.), Sept. 21, 2003, at A1. This cost figure, concededly an estimate, has been used in other accounts of the financial expenditures associated with the death penalty statute. *See, e.g.*, RICHARD C. DIETER, A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY 9 (2007), *available at* http://www.deathpenaltyinfo.org/CoC.pdf (providing examples of the amount executions cost taxpayers); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1919 (2006) ("Testimony before the legislature highlighted the fact that in the scant decade that elapsed between the reintroduction of the death penalty in New York in 1995 and its judicial invalidation in 2004, the state paid over $160 million for its capital prosecutions, which resulted in not one execution.").

21. The Court of Appeals vacated every death sentence or capital conviction that it considered prior to invalidating the sentencing legislation in People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004). *See, e.g.*, People v. Mateo, 811 N.E.2d 1053, 1083 (N.Y. 2004) (setting aside appellant's death sentence because he was prosecuted under an unconstitutional two-tiered penalty scheme); People v. Cahill, 809 N.E.2d 561, 567 (N.Y. 2003) (invalidating the death sentence of the defendant because "the penalty phase was conducted without legal foundation"); People v. Harris, 779 N.E.2d 705, 729 (N.Y. 2002) (vacating the death sentence). The court had previously ruled that plea negotiations commenced under the statute following the prosecution's filing of notice of intent to seek the death penalty unconstitutionally burdened the defendant's rights against compelled self-incrimination and to trial by jury. Hynes v. Tomei, 706 N.E.2d 1201, 1203–07 (N.Y. 1998). The court also invalidated a death sentence in two cases it considered following its decision in *LaValle*: People v. Taylor, 878 N.E.2d 969, 984 (N.Y. 2007) and People v. Schulman, 843 N.E.2d 125, 140 (N.Y. 2005). The lack of executions carried out under the statute failed to surprise some observers. *See* Zimring, *supra* note 3, at 318.

> [A] number of features of New York—the statute, the political climate vis-à-vis executions, and the attitudes and expectations of those who administer the system—interact to make this state perhaps the least likely metropolitan state that has passed a capital statute to conduct an execution. If history is a reliable guide,

1995 legislation had to agree that the considerable time and money invested in the State's pursuit of capital punishment was not well spent.

New York's 1995 death penalty law was drafted behind closed doors and was rushed to the governor's desk without any opportunity provided for public input or comment. The only public airing of views pertaining to this important legislation occurred over the several hours that the bill was debated in the State Senate and Assembly immediately prior to its passage. After the capital punishment statute was invalidated in 2004, the Senate rapidly approved a bill designed to repair the unconstitutional jury deadlock provision and thus revive the law.[22] However, the chairs of three Assembly committees whose authority extended to aspects of the nullified law agreed that if the death penalty were to return to the state through revised legislation, the public would first have its say. "We decided to review New York's death penalty statute in all of its dimensions and solicit the widest range of views possible before considering which action to take, if any."[23] Between December 2004 and February 2005, Democrats Joseph Lentol,

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> any execution in New York is so far off that it is beyond the visible horizon. As far ahead as we can see, executions seem unlikely.
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> It is not clear that this prognosis would generate depression even among many of those who voted in the legislature for the new death penalty. In many ways, the death penalty law itself was the symbolic victory desired, and the remote prospect of an execution was not a major issue. . . . The major focus of the effort was producing a legislative result. The campaign issue was a death penalty, not executions.

Id.

22. *See* ASSEMB. STANDING COMM. ON CODES, ASSEMB. STANDING COMM. ON THE JUDICIARY, & ASSEMB. STANDING COMM. ON CORRECTION, NOTICE OF JOINT PUBLIC HEARING (Jan. 21, 2005), *available at* http://assembly.state.ny.us/Press/20041230/hearing.html (laying out the current state of the death penalty law, as well as giving an overview of case law surrounding the statute); Press Release, Joseph L. Bruno, N.Y. Senate Republican Majority Leader, Senate Passes Death Penalty Legislation (Aug. 11, 2004) *available at* http://www.senate.state.ny.us/pressreleases.nsf/2e0e86fa9105ed5a85256ec30061c0be/c76cc222ad5f5c2e852572c80063653f ("The New York State Senate today passed legislation (S.7720) that would amend the state's death penalty law to fix a provision that was recently ruled invalid by the state Court of Appeals."). *See generally* Al Baker, *Pataki Introduces Measure to Restore Death Penalty*, N.Y. TIMES, Aug. 11, 2004, at B4 (detailing how the New York's capital punishment law can be fixed and whether the new bill would be supported by the Assembly); Press Release, Joseph L. Bruno, N.Y. Senate Republican Majority Leader, Senate Passes Death Penalty Legislation (June 20, 2007), *available at* http://www.senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42c0/f32b1be0ae7ede4385256eee0005b645? (explaining that "juries would be given a third option of imposing a sentence of life in prison with the possibility of parole when sentencing convicted murderers").

23. JOSEPH LENTOL ET AL., THE DEATH PENALTY IN NEW YORK: A REPORT ON FIVE PUBLIC HEARINGS ON THE DEATH PENALTY IN NEW YORK CONDUCTED BY THE ASSEMBLY STANDING COMMITTEES ON CODES, JUDICIARY AND CORRECTION, December 15, 2004–February 11, 2005, at 1 (2005), *available at* http://assembly.state.ny.us/comm/Codes20050403/deathpenalty.pdf [hereinafter ASSEMB. COMM. REPORT] (noting principally that "[h]eavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur").

Chair of the Assembly Committee on Codes, Helene Weinstein, Chair of the Assembly Committee on Judiciary, and Jeffrion Aubry, Chair of the Assembly Committee on Correction, presided over five public hearings devoted to capital punishment, including three in New York City and two in Albany.[24] "Every person who asked to testify at the hearings was invited to do so."[25] One hundred forty-six witnesses appeared over the course of the hearings and twenty-four others submitted written testimony.[26]

This Article describes the issues considered and the testimony provided at the public hearings on the death penalty in New York in 2004–2005. It juxtaposes the views expressed at those hearings with the opinions advanced and defended during the legislative debates that preceded the adoption of the State's 1995 death penalty statute. The often contrasting perspectives, separated by a decade's experience and reflecting the views of a diverse mix of discussants, are offered in light of murmurings in Vermont about reinstating a capital punishment law. Assemblywoman Gloria Davis of the Bronx warned her colleagues during the 1995 debate on New York's incipient death penalty legislation, "I was taught from a little girl that you have to be careful what you ask for."[27] Those words—simple, poignant, and to the point—may well harbinger what Vermont citizens and legislators should consider as they contemplate life with capital punishment.

Part I.A lays out the variety of issues surrounding death penalty legislation and explores the range of views, moral and religious, both for and against death as a punishment. Part I.B takes into account the real economic and social costs of the death penalty. The views of the families of murder victims are examined in light of the alternate punishment of life without parole. Finally, Part I.C questions whether the process of sentencing and carrying out executions is inherently fair, raising concerns about racial and socio-economic realities.

I. NEW YORK VOICES ON CAPITAL PUNISHMENT: ISSUES AND PERSPECTIVES

To characterize the debate about the death penalty as complex, multi-layered, and essentially timeless is to belabor the obvious. Proponents and opponents of capital punishment engage a dizzying array of issues, marshal idiosyncratic arguments, draw support whence available—be it science or

24. *Id.* at tit. page.

25. *Id.* at 4.

26. *Id.* at 3.

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

faith, data or rhetoric—and arrive, as often as not, at diametrically contrasting conclusions. The debate embraces subjects about which there is no shortage of opinions, let alone consensus. Different dimensions of the arguments surrounding the death penalty nevertheless reveal themselves. Although occasionally overlapping, they cluster into three main areas.

One category of argument involves the fundamental justice or morality of the death penalty, including ethical and religious precepts. A second focus is utilitarian and asks primarily whether capital punishment is effective, and necessary to accomplish its intended purposes. A third centers on administrative issues, including the reliability of the capital sanction and whether it is used fairly. Select remarks from the 1995 legislative debates and testimony from the 2004–2005 public hearings on New York's death penalty, supplemented periodically by the citation of authorities and additional commentary, are presented below and organized pursuant to these three themes.

A. Is It Right? Retribution, Morality, and Religion

In 2000, reviewing the last twenty-five years of debate about the death penalty in this country, two scholars observed: "[W]e have witnessed the ascendancy of what has become the most important contemporary pro–death penalty argument: retribution. Here one argues that justice requires the death penalty. Those who commit the most premeditated or heinous murders should be executed simply on the grounds that they deserve it."[28] In both the 1995 and 2004–2005 legislative debates on capital punishment, retribution,[29] either standing alone as a moral issue or coupled with religious underpinnings,[30] figured prominently in the discussion.

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28. Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 52 (2000).

29. The Supreme Court has repeatedly recognized that legislatures can legitimately rely on retribution as a justification for capital punishment. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 571 (2005) (noting that the death penalty serves retributive and deterrent purposes); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (identifying retribution and deterrence as social purposes served by the death penalty); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

30. For information on the official positions of several major religious groups on capital punishment, see generally Death Penalty Information Center, Religion and the Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=2249 (last visited Feb. 2, 2008) (providing access to articles about perspectives on capital punishment from a variety of faith traditions); Pew Forum, Religious Groups' Official Positions on Capital Punishment, http://pewforum.org/docs/?DocID=274 (last visited March 18, 2008) (providing a survey of different religious views of the death penalty). *See generally* JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 4–5 (1997). Megivern focuses on

> the contemporary struggle to free the world from the death penalty, and how that

In 1995, Senator George Onorato advanced the position that:

> Whether [the death penalty is] a deterrent or not . . . the taking of a human life is the ultimate in crime on this earth, and likewise, deserves to be meted the same type of punishment.
>
> Some people don't believe in the eye for an eye or tooth for a tooth, but in this particular case, I certainly do believe that it makes sense.[31]

Assemblyman Stephen Kaufman agreed:

> [P]unishment and revenge are a valid thing and should be part of our penal system.
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> . . . .
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> . . . I believe that the murderer excludes himself from the society of human beings when he knowingly and willingly adopts the course of a ferocious beast. When that murderer who is born as a human being but chooses to live as a tiger in a jungle, wreaking terror, mayhem, torture and murder upon innocent people, that person has taken himself outside of human scope and has gone beyond the barrier of human society and deserves the ultimate sanction.[32]

Assemblyman Eric Vitaliano, one of the main sponsors of the 1995 legislation, argued that the death penalty "is moral, . . . it is just, and it is overdue."[33] He pressed his colleagues "to affirm the value of innocent life by creating a punishment commensurate with the atrocity that extinguishes

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> movement has emerged from the confluence of two other movements: (1) the movement to reinvigorate the church by redirecting its members toward retrieved gospel values . . . and (2) the worldwide movement to awaken nations to a greater appreciation of universal human rights.

Id.; *see also* Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 137 (2000) (surveying Christian support and Protestant, Catholic, and Jewish opposition to capital punishment); Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY BILL RTS. J. 179, 179 (2000) (suggesting that religious thought can be used as a comparative law model and can inform a modern approach to capital punishment).

31. New York State Senate Death Penalty Debate, Bill No. 2850, 2036 (Mar. 6, 1995) [hereinafter 1995 Senate Debate] (statement of Sen. George Onorato).

32. 1995 Assembly Debate, *supra* note 27, at 89, 91–92 (statement of Assemb. Stephen Kaufman).

33. *Id.* at 15 (statement of Assemb. Eric Vitaliano).

innocent life on an all-too-frequent basis in this State."[34]

Especially notorious killers were invoked to personify the retributivist argument. "Whom among us," asked Senator Stephen Saland, had they

> sat on the Adolph Eichman jury . . . trying a rather depraved man who had masterminded the most bestial of crimes, the most horrendous crime against humanity, who among us would have been [the] twelfth juror who would have hung that jury? . . . I certainly believe even among some of the opponents, that that would be so offensive to everything that they could possibly believe in, that they too would agree that the death penalty would be appropriate in that case.[35]

Those denouncing retribution as insufficient justification for the death penalty during the 1995 legislative debate often substituted its less sonorous relatives including "revenge"[36] and "vengeance."[37] Senator Alton Waldon, Jr. scored a rhetorical trifecta and beyond while arguing, "[W]e should not do what we're doing here today. . . . [I]n taking this road, which I call the road of retribution, the via of vendetta, the rue of revenge, the boulevard of base instincts . . . ."[38] Senator Pedro Espada, Jr. warned that "this eye for an eye kind of mentality will some day result in people . . . proposing raping the rapist for having raped, abusing the children of pedophiles for their crimes, torching the arsonist. Why not? It's all in keeping with our . . . head plunged into the moral abyss."[39] The detractors of retribution also were significantly more likely than proponents to invoke religion and the support of religious leaders in their discourse.[40]

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34. *Id.*

35. 1995 Senate Debate, *supra* note 31, at 1874–75 (statement of Sen. Stephen Saland).

36. 1995 Assembly Debate, *supra* note 27, at 38 (statement of Assemb. Deborah Glick); *id.* at 79 (statement of Assemb. Clarence Norman, Jr.).

37. 1995 Senate Debate, *supra* note 31, at 1920 (statement of Sen. Richard Dollinger); 1995 Assembly Debate, *supra* note 27, at 381 (statement of Assemb. William Boyland); *id.* at 353 (statement of Assemb. Anthony Genovesi); *id.* at 189 (statement of Assemb. Gregory Meeks).

38. 1995 Senate Debate, *supra* note 31, at 1993 (statement of Sen. Alton Waldon, Jr.).

39. *Id.* at 2005 (statement of Sen. Pedro Espada, Jr.).

40. With respect to the use of religion anti-capital punishment views, see, e.g., 1995 Senate Debate, *supra* note 31, at 1964 (statement of Sen. Emanuel Gold) (discussing a brochure produced by the New York State Catholic Bishops regarding the death penalty); *id.* at 2020 (statement of Sen. Suzi Oppenheimer) ("[A]lmost all religious leaders in our state have approached us and asked us not to adopt this [death penalty bill]."); *id.* at 1886 (statement of Sen. David Paterson) ("[The message of necessity] comes from a document whose interpretation we may disagree on but all of us seem to—the overwhelming majority of us seem to believe in it, and that's the Bible."); *id.* at 1992 (statement of Sen. Alton Waldon, Jr.) (discussing God's deliverance of the Ten Commandants to Moses, specifically the prohibition against murder); 1995 Assembly Debate, *supra* note 27, at 469–70 (statement of Assemb. Arthur Eve) (noting that nothing in the Bible justifies capital punishment); *id.* at 388 (statement of

Inevitably, parallel arguments surfaced during the 2004–2005 public hearings conducted before the three Assembly committees. Professor Robert Blecker of New York Law School, a staunch and articulate advocate of capital punishment on retributive grounds,[41] appeared as the second witness at the December 15, 2004 proceedings.[42] His testimony lingered over the course of the five public hearings, evoking continuing questions, comments, and rejoinders. "[W]e must have" capital punishment, he asserted, "There are some people who kill so cruelly, so callously, that they deserve to die, and we have an obligation to execute them. I feel certain of this. Those words, I feel certain. It's not intellectual only, it's emotional."[43]

Professor Blecker took pains to distinguish retribution, the reason he supported the death penalty, from related motivations for punishment:

> We've heard retribution disparaged as the equivalent of revenge or vengeance. Let's be perfectly clear. Retribution is not revenge. They are very different, although they come from a common source. Revenge can be limitless. Revenge can be misdirected. Revenge need not be proportional. Retribution is limited, directed and proportional. It is proportional to both the acts of the defendant, the culpable mental state and attitude of the defendant, and the harm caused.[44]

Assemb. Deborah Glick) (discussing a common thread amongst different religious groups opposing the death penalty); *id.* at 402–03 (statement of Assemb. Roger Green) (stating that God is the final arbiter of life and death); *id.* at 325 (statement of Assemb. William B. Hoyt, III) (noting that a myriad of religious groups vehemently oppose the death penalty); *id.* at 238 (statement of Assemb. Peter Rivera) (noting the Bible's prohibition against murder). For examples of supporters of capital punishment invoking religion, see 1995 Senate Debate, *supra* note 31, at 2026 (statement of Sen. Robert DiCarlo) ("[T]he traditional teachings of the [Roman Catholic] church have acknowledged as well founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding in cases of extreme gravity, the death penalty."); 1995 Assembly Debate, *supra* note 27, at 465 (statement of Assemb. Eric Vitaliano) (noting that St. Paul advocated a "responsibility on civil authority to encourage appropriate recompense and retribution so that, in this temporal world, justice is done").

41. *See* Robert Blecker, *Roots*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 169, 182 (James R. Acker et al. eds., 2d ed. 2003) (advocating the retributive theory promoted by the Old Testament).

42. New York Law School, Robert Blecker Testifies at Hearing Before New York State Assembly (Dec. 20, 2004), http:www.nylz.edu/pages/411.asp?issue=57&dept=7).

43. *The Death Penalty in New York: To Examine the Future of Capital Punishment in New York State: Hearing Before the Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on the Judiciary, and Assemb. Standing Comm. on Correction*, 2004 Leg., 40 (N.Y. 2004), available at http://nysl.nysed.gov/uhtbin/cgisirsi/20080413193913/SIRSI/0/518/0/57668812/Content/1?new_gateway_db=HYPERION&user_id=CATALOG [hereinafter Dec. 15, 2004 *Public Hearing*] (statement of Robert Blecker, Professor, New York Law School).

44. *Id.* at 47–48.

He further emphasized the need "to do it right,"[45] that is, to confine the reach of capital punishment only to "the worst of the worst"[46] offenders. Pursuant to this edict, he advocated (among other proposed reforms) eliminating the commission of murder during a contemporaneous felony, particularly robbery, as an aggravating factor qualifying an offender for death penalty eligibility.[47] At the same time, he promoted including corporate executives (so-called "red collar killers") within the death penalty–eligible class whose calculated, profit-motivated decisions exposed workers and consumers to foreseeable fatalities.[48] In anticipation of the difficulties associated with specifying the precise contours of the class of the "worst of the worst" murderers, Blecker offered the outline of a model death penalty statute to the committee members,[49] while also conceding:

> And yes there would be boundary problems and yes discretion is inevitable and unquestionably necessary. There will always be boundary problems. That's the nature of life, that's the nature of law. Law is essentially about imposing discrete goods on continuous situations. Life is a continuum and when you impose

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45. *Id.* at 40.

46. *Id.* at 55.

47. *Id.* at 52–53. See N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney 2003), which defines the intentional killing of a victim as one form of first-degree murder that renders an offender death penalty eligible.

> [W]hile the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree . . . .

Id. The special commission appointed by former Illinois Governor George Ryan to study the Illinois death penalty and its administration similarly recommended significantly restricting the scope of offenses rendering murderers death penalty eligible, and singled out killing in the course of a felony as an eligibility factor that was in particular need of limitation. REPORT OF THE [ILLINOIS] GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 66–76 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf.

48. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 92–95 (statement of Robert Blecker, Professor, New York Law School). *See also* Blecker, *supra* note 41, at 182 (noting that while a robber whose co-conspirator commits murder may receive the death penalty, corporate executives whose actions kill employees or consumers are rarely prosecuted at all, and are exempted from the death penalty in any case).

49. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 55, 68. *See generally* Robert Blecker, *Who Deserves to Die? A Time to Reconsider*, 231 N.Y. L.J. 2 (July 22, 2004) (proposing revisions to the aggravating circumstances that elevate murder to capital murder).

> a discrete good on a continuous situation and when you classify situations as relevantly alike or relevantly dissimilar you must be committed to the fact that two instances that fall just on either side of a line, will be treated fundamentally different though they are virtually indistinguishable.
>
> If you can't tolerate that, you can't tolerate law. But, having said that and having readily admitted that there will be boundary problems, the fact is we know the core. I can't tell you when day becomes night, because there's twilight. But I can tell you 12 noon is day and 12 midnight is night. I can tell you, and I can show you, and I do know and those people who have been on New York's death row in the modern era have been instances of the worst of the worst.[50]

Reminiscent of the 1995 legislative debates, witnesses and committee members who participated in the 2004–2005 public hearings grappled with the propriety of using capital punishment against specific individuals and in extreme cases that embodied the "worst of the worst" category of killings. New candidates for inclusion had emerged in the decade separating the respective forums, most notably Timothy McVeigh, who was convicted and subsequently executed for causing multiple deaths in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995,[51] and Osama bin Laden, the alleged mastermind of the September 11, 2001 terrorist attacks.[52] Older examples also stalked the public hearings,

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50. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 54.

51. *See Public Hearing on the Death Penalty Before the Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on Judiciary, and the Assemb. Standing Comm. on Corrections*, 2005 Leg., 130–38 (N.Y. 2005), *available at* http://nysl.nysed.gov/Archimages/84420.pdf [hereinafter Feb. 8, 2005 *Public Hearing*] (statement of Bud Welch, father of victim of the Oklahoma City bombing) (opposing the imposition of capital punishment for convicted Oklahoma City bomber Timothy McVeigh).

52. *See, e.g.*, *Public Hearing on the Death Penalty Before the Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on Judiciary, and the Assemb. Standing Comm. on Corrections*, 2005 Leg., 50–52 (N.Y. 2005) [hereinafter Feb. 11, 2005 *Public Hearing*] (statement of Mark Green, Former New York City Public Advocate; President, New Democracy Project) (referring to Osama bin Laden as an example of an individual who would clearly merit capital punishment); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 44 (statement of Sean M. Bryne, Executive Director, New York Prosecution Training Institute) (favoring the imposition of the death penalty if Osama bin Laden were tried for the September 11, 2001 attacks on the World Trade Center); *Public Hearing Before the Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on Judiciary, and Assemb. Standing Comm. on Corrections*, 2005 Leg., 109 (N.Y. 2005), *available at* http://nysl.nysed.gov/uhtbin/cgisirsi/dI6QieiKmq/NYSL/284790021/524/70431 [hereinafter Jan. 25, 2005 *Public Hearing*] (statement of Stewart Hancock, retired Judge, New York Court of Appeals) (stating that examples of Timothy McVeigh and Osama bin Laden are not accurate depictions of the modern use of capital punishment); *id.* at 108 (statement of Gerald Kogan, retired Chief Judge, Supreme Court of Florida) (advocating the use of the death penalty under extremely egregious circumstances).

including Adolph Hitler[53] and Lemuel Smith,[54] the latter a notorious New York serial killer who was convicted of murdering a corrections officer while serving multiple life sentences for his prior offenses, and who subsequently evaded the death penalty.[55]

No death penalty opponents were willing to contemplate a system that would make an exception for these "worst of the worst" killers.[56] Their reservations were based either on an absolutist stance against capital punishment or on skepticism that once executions were authorized for extreme cases they would be so narrowly cabined.[57] Representing the former view was Marsha Lee Watson, the President of the New York State Corrections and Law Enforcement Guardians Association, who had twenty-six years' experience working within the state correctional system. When Assemblyman Tom Kirwan cited the Lemuel Smith case and asked whether Watson believed "the death penalty is the proper penalty for someone who takes a correctional officer's life while in jail," Watson replied, "I don't think that the death penalty is an answer because we're doing exactly what we're upset about. . . . [T]aking another life to justify that is wrong. . . .

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53. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 92–93 (statement of Barbara Bernstein, Executive Director, New York Civil Liberties Union, Nassau County Chapter) (expressing why the speaker would not have executed Adolf Hitler); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 109 (statement of Stewart Hancock, retired Judge, New York Court of Appeals) ("I under certain circumstances do not have a problem with the death penalty, because I know that there are some crimes that are so horrendous . . . that the only way society can show how repugnant their crime is, is to enact the supreme penalty."); *id.* at 108–09 (statement of Gerald Kogan, retired Chief Judge, Supreme Court of Florida) (noting that under certain circumstances he does not have a problem with the imposition of death penalty, such as in the case of Hitler); *Public Hearing on the Death Penalty Before the N.Y. State Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on Judiciary, and Assemb. Standing Comm. on Corrections*, 2005 Leg., 368 (N.Y. 2005), *available at* http://nysl.nysed.gov/uhtbin/cgisirsi/e89E0AV3kr/NYSL/226740106/524/70444 (vol. 1) *and at* http://nysl.nysed.gov/uhtbin/cgisirsi/Y8ilGcCLJF/NYSL/226740106/524/70445 (vol. 2) [hereinafter Jan. 21, 2005 *Public Hearing*] (statement of Claire Laura Hogenauer, Attorney-at-Law) (stating that she would not execute Hitler); *id.* at 18 (statement of Jeffrey Kirchmer, member, Association of the Bar of New York) (favoring capital punishment in cases of people like Adolf Hitler); *id.* at 308–09 (statement of Evan Mandery, Assistant Professor, John Jay College of Criminal Justice) (noting that he sometimes queries students if they would support the death penalty for Hitler).

54. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 114–15 (statement of Stewart Hancock, retired Judge, New York Court of Appeals); Jan. 21, 2005 *Public Hearing*, *supra* note 53, 21 (statement of Bettina Plevan, President, Association of the Bar of the City of New York); *id.* at 111, 116–20 (statement of Marsha Lee Watson, President, Guardians Association of State Correctional Officers).

55. People v. Smith, 468 N.E.2d 879, 898 (1984) (invalidating mandatory death sentence imposed for murder committed by a prisoner serving a life sentence).

56. *See, e.g.*, Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 368 (statement of Claire Laura Hogenauer, Attorney-at-Law) (stating that she would not execute Hitler).

57. *See* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 63 (statement of Gerald Kogan, retired Chief Judge, Supreme Court of Florida) ("[A]re you willing to change the standard of proof that has been in existence in this country since its founding . . . that you have to prove people far beyond a reasonable doubt.").

[K]illing him is not going to bring [his victim] back."[58] Stewart Hancock, formerly a judge on the New York Court of Appeals, gave voice to the more procedurally-oriented position:

> [U]nder certain circumstances [I] do not have a problem with the death penalty, because I know that there are some crimes that are so horrendous that individuals—the only way society can show how repugnant their crime is, is to enact the supreme penalty.
>
> But I realize that you have to look at that. And we can't really use Hitler or Osama Bin Laden or whoever else is involved in 9/11 as examples, because those are out of the ordinary. . . .
>
> . . . But I think you have to look at the system overall, putting those cases aside, because I don't think—it's like comparing apples and oranges. How does the whole system function? Does the system function in a way where we as citizens of a particular governmental entity can tolerate all of the negatives, all of the costs, all of the mistakes that can be made in staying with that particular system? Would not life imprisonment, you know, without parole suffice?[59]

Representatives of numerous religious groups testified at the 2004–2005 public hearings. With a single exception, each expressed opposition to capital punishment.[60] Although several registered social and practical objections to

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58. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 111 (statement of Marsha Lee Watson, President, Guardians Association of State Correctional Officers).

59. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 109–10 (statement of Stewart Hancock, retired Judge, New York State).

60. S*ee* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 80–82 (statement of Rabbi Shlomo Blickstein, Bay Terrace Jewish Center) (expressing a biblical argument in opposition to New York's capital punishment laws); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 308 (statement of Rev. Geoffrey Black, President, New York State Council of Churches) ("This sordid act of state-sanctioned violence fails to accomplish the goals put forth by those who support it."); *id.* at 325 (statement of Dominic Candido, Clerk, Matinecock Monthly Meeting, Religious Society of Friends) ("I am humbled by the way of our history as we are once again faced with an unacceptable action by the state, the killing of human life."); *id.* at 345–51 (statement of Wanda Goldstein, Chair, Restorative Justice, Unitarian Universalist Congregation of the Catskills) (noting that the capital punishment process is inherently fallible); *id.* at 298 (statement of Rev. Daniel Hahn, Director, Lutheran Statewide Advocacy) ("[C]apital punishment is morally wrong and offensive to our society's common sense of human dignity."); *id.* at 333–37 (statement of Lee Haring, Recording Clerk, Bulls Head-Oswego Monthly Meeting, Religious Society of Friends) (relying on moral and religious arguments advocating against the death penalty in New York); *id.* at 341 (statement of Rev. John Marsh, Unitarian Universalists for Alternatives to the Death Penalty) ("When a human life is taken, the whole of our community is wounded."); *id.* at 337–39 (statement of Anita Paul, Member, Schenectady Friends Meeting) (offering a prayer that the legislature would not reinstitute the death penalty); *id.* at 313–19 (statement of Barbara Zaron, Steering Committee

the death penalty, a more fundamental theme common to many was that all life, including that of murderers, was sacred and that human judgment should not be trusted in matters properly ceded to divine authority.[61]

Member, Reform Jewish Voice of New York State) (relying on traditional Jewish principles to oppose the death penalty); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 324 (statement of Anzetta Adams, Baptist Ministers Conference of Greater New York and Vicinity) (explaining that her organization does not support capital punishment); *id.* at 328–34 (statement of Linda Chidsey, Clerk, Yearly Meeting of the New York Religious Society of Friends) ("[O]ur witness in opposition to the death penalty is both experientially and scripturally based."); *id.* at 41 (statement of Bishop Howard Hubbard, Roman Catholic Diocese of Albany) ("Executions merely continue the cycle of violence begun by the perpetrators."); *id.* at 322 (statement of Ruth Klepper, Executive Director, Interfaith Impact of New York State) (explaining that America's system of capital punishment "is severely flawed"); *id.* at 185–86 (statement of Bishop Jack McKelvey, Episcopal Diocese of Rochester) ("I believe the exercise of the death penalty is a poor choice to accomplish what society hopes to receive from it."); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 229 (statement of Rev. Chloe Breyer, Associate Minister, St. Mary's Episcopal Church) (arguing that the criminal justice system should not be based on retribution but instead restoration); *id.* at 225 (statement of Rev. Thomas Goodhue, Executive Director, Long Island Council of Churches) ("My denomination, The United Methodist Churches, [have] opposed executions for two centuries."); *id.* at 123 (statement of Rabbi Marc Gruber, Reform Jewish Voice of New York State) ("The overwhelming majority of . . . rabbis . . . [view] capital punishment as tyrannical, serving no purpose save revenge."); *id.* at 374 (statement of Claire Laura Hogenauer, Attorney-at-Law) ("Please let a higher being, not human beings, determine when someone dies."); *id*. at 234 (statement of Jim Morgan, Convenor, Brooklyn Friends Meeting's Silent Vigil to End the Death Penalty; Adjunct Professor, New York University) ("[W]e reject murder whether it is carried out by an individual or by the state."); *id.* at 238–39 (statement of Hal Weiner, Convenor, St. Savior Chapter Episcopal Peace Fellowship, Congregation of St. Savior) ("I rise to speak in opposition of the death penalty in New York."); Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 251–59 (statement of Sister Camille D'Arienzo, The Cherish Life Circle, Brooklyn) (speaking on behalf of some 900 elected leaders of womens' religious orders, arguing that "the death penalty is not, and probably cannot be, applied equitably and fairly"); *id.* at 266 (statement of Dr. James Fitzgerald, Minister for Mission and Social Justice, Riverside Church, New York City) (calling the death penalty "immoral, ineffective and impossible to perfect"); *id.* at 263–65 (statement of Arch Deacon Michael Kendall, Episcopal Diocese of New York; Vice-President, New York City Council of Churches; Chair, Public Policy Committee of New York State Council of Churches) (noting opposition of Episcopal Church to capital punishment); *id.* at 276–78 (statement of Auxiliary Bishop Dominick Lagonegro, Archdiocese of New York; Bishop Liaison, Catholic Chaplains Apostolate Committee in New York State; Catholic Bishops' Liaison, American Catholic Correctional Chaplains Association) (calling human life "inherently precious" and beseeching the Legislature to find a "more humane, hopeful and effective response[]" to violent crime); *id.* at 259–63 (statement of Rev. N.J. L'Heureux, Jr., Executive Director, Queens Federation of Churches) (asserting historical, practical, and moral opposition to the death penalty).

Representatives of a single religious group, The Brethren, voiced support for capital punishment. *See* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 341–44 (statement of Tim Taylor, Member, The Brethren) (supporting the death penalty on grounds that it is God's law); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 134–45 (statement of Robert Walker, Member, The Brethren) (explaining that capital punishment is a very rare event and has a small effect on epidemic patterns). Their testimony was prolonged by several exchanges with Assemblyman Daniel O'Donnell, who had received letters apparently authored by members of this religious organization that could have been construed as threatening in nature because they alluded that the death penalty would be appropriate for individuals such as Mr. O'Donnell, who actively supported gay rights. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 345–48 (statement of James Taylor, Member, The Brethren).

61. *See, e.g.*, Feb. 8, 2005 *Public Hearings*, *supra* note 51, at 311 (statement of Rev. Geoffrey

"God alone has the right to judge," intoned Reverend N.J. (Skip) L'Heureux, Executive Director of the Queens Federation of Churches.[62] "[O]nly God can judge," concurred Michael Kendall, Arch Deacon with the Episcopal Diocese of New York.[63] "[W]e are all imperfect, only God is perfect, and that's why judgment, such as the death penalty is something that we simply cannot do."[64] "Both in concept and in practice Jewish tradition found capital punishment repugnant, despite Biblical sanctions for it," declared Barbara Zaron on behalf of the Reform Jewish Voice of New York State.[65] "[C]apital punishment is morally wrong," stated Rev. Daniel Hahn, Director of Lutheran Statewide Advocacy.[66] Linda Chidsey testified on behalf of the New York Yearly Meeting of the Religious Society of Friends that "our witness in opposition to the death penalty is both experientially and scripturally based . . . . We believe that no one is beyond redemption, that ultimately redemption is the work of [G]od."[67] "We believe in the sanctity of human life," said Anzetta Adams through a prepared statement on behalf of the Baptist Ministers conference of Greater New York and Vicinity.[68] "In that light, we feel that . . . the church and Christian fellowship must speak out loud and clear in opposition to the death penalty."[69] Reverend Howard Hubbard, the Roman Catholic Bishop of Albany, stated:

Black, President, New York State Council of Churches) ("To sum the matter up, Jesus teaches us not to return evil for evil.").

62. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 262 (statement of Rev. N.J. L'Heureux, Jr., Executive Director, Queens Federation of Churches).

63. *Id.* at 264 (statement of Michael Kendall, Arch Deacon, Episcopal Diocese of New York).

64. *Id.*

65. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 315 (statement of Barbara Zaron, Steering Committee Member, Reform Jewish Voice of New York); *see also* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 80–82 (statement of Rabbi Shlomo Blickstein, Bay Terrace Jewish Center) (expressing a biblical argument in opposition to New York's capital punishment laws). *See generally* Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J. L. & PUB. POL'Y 33, 34–51 (1993) (noting that traditional Talmudic principles for ritual atonement for committing egregious crimes did not find their way into the American system of execution, which relies on deterrence and retributive principles); Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1039 (1998) (presenting an "overview of Jewish law with respect to legal and historical attitudes towards the death penalty").

66. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 298 (statement of Rev. Daniel B. Hahn, Director, Lutheran Statewide Advocacy).

67. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 330, 332 (statement of Linda Chidsey, Clerk, Yearly Meeting of the New York Religious Society of Friends).

68. *Id.* at 325 (statement of Anzetta Adams, Baptist Ministers Conference of Greater New York and Vicinity).

69. *Id.*

> Following the Pope's lead, the Catholic Bishops of this state and of our nation have, for decades now, been unified in our consistent and vigorous opposition to capital punishment.
>
> This position is grounded in our fundamental belief in the sacredness and dignity of all human lives, including those who have taken another life.[70]

Not all who expressed opinions about the fundamental morality of capital punishment agreed with the views overwhelmingly espoused by representatives of different religious faiths. Like Professor Blecker, some fervently maintained that death is the only punishment appropriate for some crimes and some offenders.[71] Monroe County District Attorney Michael Green, who secured a death sentence (subsequently vacated by the New York Court of Appeals) against Angel Mateo,[72] described Mateo's criminal history and most recent, gruesome crimes in detail before the Assembly committees.[73] "I submit to you," he asserted, "there is no term of incarceration that can meaningfully punish someone like Angel Mateo."[74] Michael Palladino, President of the Detectives' Endowment Association, described the recent murders of six New York City detectives and the tragic consequences of their deaths:

> They have spouses, children, goals, and dreams, just like everyone else. Then, one day, unexpectedly, their life is savagely taken from them. Many other lives are also shattered in the aftermath. . . . Have you ever held a grieving police widow? I have. You can feel every bone, every fiber of their being,

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70. *Id.* at 44 (statement of Bishop Howard Hubbard, Roman Catholic Diocese of Albany). As Bishop Hubbard explained in his testimony, the Catholic Church does not flatly prohibit the use of capital punishment, although in his 1995 encyclical, Pope John Paul II noted that "in modern society," the legitimate use of the death penalty is "very rare, if not practically non-existent." *Id.* at 43 (statement of Bishop Howard Hubbard, Roman Catholic Diocese of Albany). *See generally* Kevin L. Flannery, *Capital Punishment and the Law*, 5 AVE MARIA L. REV. 399 (2007) (making a case for the use of capital punishment in a narrow set of cases); Patrick M. Laurence, *He Beareth Not the Sword in Vain: The Church, the Courts, and Capital Punishment*, 1 AVE MARIA L. REV. 215 (2003) (offering a way for Catholic legal practitioners to respond to the Catholic Church's current position on capital punishment); Peter J. Riga, *Capital Punishment: Is the Catholic Church Abolitionist?*, 41 CATH. LAW. 241, 241–44 (2002) (explaining the Catholic Church's stance on capital punishment).

71. *See supra* notes 48–51 and accompanying text.

72. People v. Mateo 811 N.E.2d 1053, 1083 (N.Y. 2004); *see also* Petition for a Writ of Certiorari, N.Y. v. Mateo, 542 U.S. 946 (2004) (No. 03-1570) (listing Michael Green as the prosecuting attorney).

73. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 172–74 (statement of Michael Green, District Attorney, Monroe County, New York).

74. *Id.* at 175.

> trembling in their body. Have you ever looked into the eyes of one of the children left behind? I have and they all have the same dazed, confused look on their faces . . . . They will carry the trauma and anguish with them for the rest of their lives.[75]

"Capital punishment," he concluded, "is an issue of old-fashioned good versus evil. It's about just punishment for heinous and egregious acts of murder."[76]

Nevertheless, one measure of the intensity of sentiment and moral outrage felt by proponents and opponents of capital punishment in New York at the time of the 2004–2005 public hearings arguably lay in the number of citizens in the different camps who responded to the general invitation extended for all interested parties to appear and be heard. The report published by the Assembly committees that summarized the testimony presented at the five hearings revealed that:

> 146 witnesses testified in person for over thirty-five hours of oral testimony; written submissions were received by the Committees from twenty-four additional persons and groups.
>
> The testimony of these 170 hearing witnesses fills more than 1,500 transcribed pages. Written submissions received by the Committees exceed 2,500 pages.
>
> Of the persons who presented oral or written testimony, 148 opposed the death penalty, nine argued in favor of the death penalty, five argued in favor of the death penalty but suggested specific changes in the statute . . . and eight did not express an explicit view for or against the death penalty.[77]

Testifying as one of the last witnesses at the fifth and final public hearing, James Rogers, the President of the Association of Legal Aid Attorneys, mused:

> Who then argues for the death penalty . . . ? [T]he parade of people that have come before you, the endless stream of people have been against the death penalty if I'm, if keeping up with the papers serves me right. So where is all the passion? All

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75. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 34–35 (statement of Michael Palladino, President, Detectives' Endowment Assoc., Inc.).

76. *Id.* at 40.

77. ASSEMB. COMM. REPORT, *supra* note 23, at 3.

> these folks, years and years and years, pro death, pro death, pro death. Where are they?
>
> The truth of the matter is, is that when they have seen what we have all seen throughout the Country, all the exonerated people on the evening news and the evidence in state after state and jurisdiction after jurisdiction, it's hard to build up a head of steam in favor of the death penalty.[78]

"[T]oday is a much different day than 1995, when the governor proposed the [death penalty] bill," echoed Andrew Cuomo, the former Secretary of the Department of Housing and Urban Development and the son of the governor whose defeat in 1994 opened the door for the return of capital punishment to New York.[79] Cuomo concluded his testimony before the committees with words reminiscent of Rogers' observation about the paucity of individuals who had testified in support of capital punishment and what that might signify about the relative fervor with which moral views about the death penalty are maintained: "Sometimes, silence can be deafening, Assemblyman."[80]

B. Is It Useful? Is It Cost-Effective? Is It Necessary?

Another set of capital punishment issues deals less squarely with the normative judgments that lie at the heart of retribution, morality, and religion, and instead embraces empirical questions that focus on the death penalty's utility. Of principal interest in this vein are whether the death penalty deters murder more effectively than alternative sanctions; the benefits that murder victims' family members derive from the capital sanction; the relative expense of capital punishment; and the adequacy of life imprisonment without parole (LWOP) or other lengthy terms of incarceration to incapacitate potentially dangerous murderers and promote other important penological objectives.

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78. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 131 (statement of James Rogers, President, Association of Legal Aid Attorneys).

79. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 280 (statement of Andrew Cuomo, former Secretary of Housing and Urban Development); *see also supra* text accompanying note 3 (discussing Pataki's resuscitation of the death penalty).

80. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 286 (statement of Andrew Cuomo, former secretary of Housing and Urban Development). Cuomo's remark was in a somewhat different context. He offered it in response to Assemblyman Jeffrion Aubry's rumination that by failing to take action on the Senate bill reintroducing the death penalty, the Assembly would be making a statement that "we are not ready to . . . rubber stamp anything . . . . [O]ur statement . . . may be silent, but it's loud." *Id.*

1. General Deterrence

Debate has long swirled around the relationship between capital punishment and homicide rates, specifically whether threatened execution is a superior deterrent to would-be murderers than alternative sanctions such as life imprisonment or life imprisonment without the possibility of parole.[81] When the Supreme Court gave its blessing to general deterrence as a justification for capital punishment in 1976,[82] this argument was the one advanced most prominently and forcefully by death penalty proponents nationwide.[83] New York legislators similarly focused substantial attention on deterrence during their numerous sessions devoted to capital punishment leading up to and culminating with the 1995 legislation. "From the opening of the 1977 legislative session to enactment of a capital punishment law in 1995, deterrence was the principal issue driving the [New York] death penalty debate."[84] Not surprisingly, the arguments relied on a combination of anecdotes, logic, and statistical evidence.

Senator Dale Volker, a principal sponsor of New York's 1995 death penalty bill, asked, "Why did the murder rate soar in this state right after [the] death penalty was abolished?"[85] Capital punishment, he argued, would help

> mak[e] our streets safer . . . . [I]f you talk to people that have been involved in this issue and have lived with it, they will tell you that if you talk, in fact, even to the criminals who have dealt with it, that most of the criminals will recognize themselves that many of these people would not have killed in some cases if we had a death penalty.[86]

After all, "[i]f the death penalty is not a deterrent and if it really doesn't

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81. Christopher A. Thorn, Note, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 199–200 (1983).

82. Gregg v. Georgia, 428 U.S. 158, 183–86 (1976) (plurality opinion).

83. Radelet & Borg, *supra* note 28, at 44. "In the early 1970s, the top argument in favor of the death penalty was general deterrence. This argument or hypothesis suggests that we must punish offenders to discourage others from committing similar offenses; we punish past offenders to send a message to potential offenders." *Id.*

84. James M. Galliher & John F. Galliher, *A "Commonsense" Theory of Deterrence and the "Ideology" of Science: The New York State Death Penalty Debate*, 92 J. CRIM. L. & CRIMINOLOGY 307, 316 (2002).

85. 1995 Senate Debate, *supra* note 31, at 2055 (statement of Sen. Dale Volker).

86. *Id.* at 1852–53.

matter, why are so many people afraid of it? . . . The answer is, it is so serious that it does send a message and the message is one that no one can ignore."[87] Assemblyman Eric Vitaliano likewise relied on logical premises:

> Our position is also the one in harmony with common sense. Fear of death is a great motivator. Competent human beings do not knowingly embark on a course which promises to lead to their execution.
>
> Put another way, if threats of punishment, which are the essence of proscriptive deterrence, work, then the threat of death must be the greatest deterrent of all."[88]

Research evidence was invoked to different effect by death penalty supporters during the 1995 legislative debates. Some proponents cited statistical support for the deterrence rationale.[89] Others dismissed empirical studies as conflicting or inconclusive.[90] Some suggested that the relative infrequency of capital punishment and lengthy delays between sentencing and

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87. *Id.* at 2057.

88. 1995 Assembly Debate, *supra* note 27, at 9 (statement of Assemb. Eric Vitaliano).

89. *See, e.g.*, *id.* at 90–91 (statement of Assemb. Stephen Kaufman) ("Isaac Ehrlich, a professor, who proved in a study from 1933 to 1967 that for every one execution eight innocent people will be saved and that study was reaffirmed by a Professor Layton who updated the study to 1979."); *see also* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397, 398 (1975) (presenting an economic analysis that demonstrates a deterrent effect of capital punishment); Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68, 86 (1985) (finding a statistical correlation between implementing the death penalty and deterring future crime).

90. *See, e.g.*, 1995 Senate Debate, *supra* note 31, at 1879 (statement of Sen. Stephen Saland) (discussing the variations in empirical statistics). "[T]he statistics may vary and I'm willing to concede they may vary. The one thing I will never, ever concede is how do you measure the negative? How do you get into somebody's head and find out that he was deterred or she was deterred? It's an absolute impossibility." *Id.* at 1943 (statement of Sen. John DeFrancisco) (commenting on the ambiguous nature of empirical data). Empirical studies were also discussed on the Assembly floor:

> It is obvious why the opponents seek to impose a statistical burden on those of us who support the death penalty: it is because there can be no objective, empirical scientific formula to establish proscriptive deterrence, not for the death penalty nor for any other penalty.
>
> How do you prove the unprovable? How do you prove that conduct that did not occur, and therefore, no one knows about, did not occur because of the death penalty?

1995 Assembly Debate, *supra* note 27, at 9 (statement of Assemb. Eric Vitaliano).

> There are studies from professors at respected universities in this country that talk about eight people or more being saved as a result of someone receiving the death penalty. And there are some studies that show different results. You can make, I imagine, studies often fit your point of view.

Id. at 74 (statement of Assemb. Dov Hikind).

execution hopelessly diluted the death penalty's ability to affect prospective murderers. For example, Assemblyman Robert Straniere lamented that

> some of us are disappointed that the terms of this about-to-be law might result in only some 20 percent of the potential convicted murderers ever, in fact, being executed.
>
> I happen to think that for deterrence to really take effect, if, in fact, we're going to allow for lengthy appeals and very few people ever, in fact, being executed, that may weaken, to some degree, the deterrent effect of this legislation.[91]

Assemblyman Dov Hikind similarly argued:

> [I]f one looks at the states that have a death penalty today and wants to talk about the results of having a death penalty and the result of executions in those states, it is almost impossible to do that because the fact is that in order for a punishment to have an effect, it must be swift.
>
> I mean, I imagine when one of my children does something that I'm rather angry with . . . imagine if I were to punish them ten years later. Ten years later I would say to them, "By the way, what you did ten years ago, I want to punish you for today." And that is precisely what is happening in this country.
>
> So it is impossible to say whether the death penalty in Texas or California or any of the other states is working or not working—I believe it is—because the fact is that it takes ten years from the day that someone is found guilty to the day that he or she is executed if, in fact, they are ever executed.[92]

Opponents of the death penalty in the 1995 New York Legislature

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91. 1995 Assembly Debate, *supra* note 27, at 60–61 (statement of Assemb. Robert Straniere).

92. *Id.* at 74–75 (statement of Assemb. Dov Hikind). For prisoners executed in 1995, an average of 134 months, or slightly over 11 years, elapsed between imposition of the sentence and execution. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, Statistical Tables, tbl.11 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.htm. "Among all prisoners executed between 1977 and 2005, the average time between the imposition of the most recent sentence received and execution was more than 10 years." TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2005, 10 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf.

countered with analogous arguments. Neither prosecutors[93] nor police chiefs[94] believed that capital punishment deters crime, they maintained. They branded the deterrence rationale "the ultimate in empty political rhetoric,"[95] "a big lie,"[96] and claimed that asking New Yorkers to believe that capital punishment would make them safer is "at best disingenuous" and is "essentially being dishonest . . . ."[97] Addressing Senator Dale Volker, a long-time champion of the death penalty, Senator Franz Leichter scolded:

> [I]t is sheer fantasy for you to get up and to support the death penalty as being a deterrence by pointing to the fact that since the death penalty was abolished in New York State in the middle '60s, that murder has increased. I think it would be more credible for you to say that since the consumption of milk went up in those years that there is a causal relationship between the consumption of milk and murder. There is not a credible criminologist who will support your argument.[98]

The logic behind the deterrence argument simply did not make sense to the legislators who opposed the death penalty. "All evidence points to the truth that capital punishment is not a deterrent," asserted Assemblywoman Deborah Glick. "People who are angry and irrational don't stop to think about the consequences of their actions. Even if we exclude crimes of passion and only look at other circumstances, we have to recognize that criminals don't think that they're going to get caught."[99] Her colleague,

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93. *See* 1995 Senate Debate, *supra* note 31, at 2004 (statement of Sen. Pedro Espada, Jr.) ("Four out of the five district attorneys in the City of New York have told [the Senate] they can not trust this new law to fight crime . . . ."); *id.* at 2019–20 (statement of Sen. Suzi Oppenheimer) ("We have seen many prosecutors and many D.A.s come forth saying that they support . . . the death penalty, but almost none of them will say that it is a deterrent."); 1995 Assembly Debate, *supra* note 27, at 67 (statement of Assemb. Arthur Eve) (referencing witnesses from the law enforcement community who testified that the death penalty was not a deterrent).

94. *See* 1995 Senate Debate, *supra* note 31, at 1963–64 (statement of Sen. Emanuel Gold) (reporting that only one percent of police chiefs in the United States believe that the death penalty is effective); 1995 Assembly Debate, *supra* note 27, at 80–81 (statement of Assemb. Clarence Norman, Jr.) (referencing a poll that found that most police officers thought the death penalty would not help reduce crime); *id.* at 238–39 (statement of Assemb. Peter Rivera) ("[T]he chiefs of police have ranked the death penalty dead last, pun intended, as a way of reducing crime."); *id.* at 212–13 (statement of Assemb. Scott Stringer) (citing a poll that found that police chiefs ranked the death penalty as the least effective way of reducing violent crime).

95. 1995 Assembly Debate, *supra* note 27, at 206 (statement of Assemb. Scott Stringer).

96. *Id.* at 330 (statement of Assemb. Nick Perry).

97. 1995 Senate Debate, *supra* note 31, at 1954 (statement of Sen. Franz Leichter).

98. *Id.* at 1949.

99. 1995 Assembly Debate, *supra* note 27, at 38.

Assemblyman Scott Stringer, concurred:

> [T]he vast majority of murders are committed during moments of great emotional stress, people in fear . . . . It doesn't seem logical to assume that criminals are thinking about the possibility of the death penalty when they are in a fit of rage.
>
> In cases where crime is premeditated, the criminal ordinarily expects to get away with it. It's impossible to see how the threat of severe punishment can deter someone who doesn't expect to get caught . . . ."[100]

And as Senator Emanuel Gold alluded, the real issue confronting the Legislature was not whether the death penalty, operating in a vacuum, deters the commission of murder, but whether it realistically could be expected to have *marginal* or *incremental* deterrent value[101] beyond the threat already represented by lengthy imprisonment.

> If there are people in the State of New York who are petrified of the death penalty but there are people in the State of New York who say, "Well, if I go out and kill somebody, then I can only get 20 to life; there's nothing to do [sic] it," I assume that from now to September 1st, when this becomes the law, we're going to have massive murders in this state because people are going to say, "Hey, I better get my kicks in before September 1st because then they're going to kill me. If I kill somebody in August, it's only 20 to life. Piece of cake." I mean if that isn't ridiculous . . . .[102]

Arguments about capital punishment's value in deterring murder also arose during the public hearings conducted a decade after the 1995 legislative debate, but far less often and with considerably less fervor.[103] Even the emergence of a new spate of studies reporting to have found the elusive deterrent effect claimed by death penalty proponents[104] failed to

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100. *Id.* at 206–07.

101. *See* Hans Zeisel, *The Deterrent Effect of Capital Punishment: Facts vs. Faith*, 1976 SUP. CT. REV. 317, 337–38 (1976) (concluding that statistical analyses demonstrate the absence of a deterrent effect in capital punishment).

102. 1995 Senate Debate, *supra* note 31, at 1959–60 (remarks of Sen. Emmanuel Gold).

103. *See infra* pp. 24–29 (discussing the 2004–2005 public hearings on the death penalty).

104. *See, e.g.*, Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569, 569–76 (2001) ("Using a quasi-controlled group experiment, this research seeks to augment the existing econometric literature that finds empirical evidence consistent with the theory that executions deter future homicides."); Hashem Dezhbakhsh et

elevate the issue to a major point of contention. It was almost as if the debate—one in which "the sets sometimes change, [but] the actors always have the same lines"[105]—had become tiresome and the parties agreed it was time to move on.[106]

Thus, Professor Robert Blecker encouraged the Assembly committees during his 2004 testimony to "be aware that recent studies have shown consistently and marginally greater deterrent [e]ffect" of capital punishment compared to life imprisonment, and argued that such findings "make[] sense. Death is the ultimate threat, . . . the ultimate punishment. There are things that we would not do out of fear of dying that we might otherwise do out of fear of loss of liberty."[107] He also cited examples, based on interviews he had conducted with convicted murderers, of the death penalty's advantage in deterring killings. One convict told him that "the reason . . . I did kill in DC and I didn't kill in Maryland and Virginia, was because I couldn't handle what they had waiting for me there, I couldn't handle the death penalty."[108] Yet while arguing that "logically, psychologically, anecdotally and statistically, the odds are overwhelming that the death penalty is a more effective marginal deterrent"[109] than imprisonment, he argued even more forcefully that the deterrence issue was of little moment:

> But let me make it perfectly clear, for me that's irrelevant. If the death penalty were a more [e]ffective deterrent and it were immoral, if it violated human dignity, we should reject it and soundly reject it, notwithstanding the fact that it deterred. And if it failed as a more [e]ffective deterrent but was itself morally commanded, then we should embrace it, notwithstanding the fact that it failed as a deterrent.[110]

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al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) (finding that each execution results in eighteen fewer murders); Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 E. ECON. J. 237, 254 (2004) ("Abolishing the death penalty . . . not only discards a valuable deterrent but also lowers the marginal productivity of other possible deterrents in reducing murder."); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453, 453 (2003) (asserting that executions decrease homicides).

105. United States v. Leon, 468 U.S. 897, 949 (1984) (Brennan, J., dissenting).

106. *See* Radelet & Borg, *supra* note 28, at 46. The authors noted with respect to general deterrence: "In short, a remarkable change in the way the death penalty is justified is occurring. What was once the public's most widely cited justification for the death penalty is today rapidly losing its appeal." *Id.*

107. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 43 (statement of Robert Blecker, Professor, New York Law School).

108. *Id.* at 44–45.

109. *Id.* at 45.

110. *Id.*

Other witnesses, a law enforcement representative[111] and a prosecutor,[112] touted the deterrence benefits of capital punishment, and another somewhat unenthusiastically defended the recent academic findings reporting measurable deterrent effects: "[T]hey're not crackpot studies, . . . it's a mistake for us to characterize the state of evidence as being entirely one sided. I think a social scientist examining this data would say that it's ambiguous, leaning towards more evidence for the lack of deterrence . . . ."[113]

Most who addressed the subject of deterrence, however, dismissed the death penalty's relevance. Law enforcement officers,[114] a prosecutor,[115]

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111. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 36–38 (statement of Michael Palladino, President of the Detectives' Endowment Assoc., Inc.).

> Opponents of capital punishment would like you to believe that it does not act as a deterrent in preventing murder. This statement, coming from those involved in the criminal justice system, is so pathetic that it would be laughable were it not such a serious matter. The spirit and intent of the Penal Law, the whole concept of a Penal Law, is to deter the commission of crimes by using the threat of punishment.
>
> . . . .
>
> From my experience, I believe that capital punishment is most definitely a deterrent. . . . When capital punishment is law, the murder rate is lower.

Id.

112. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 24 (statement of William Fitzpatrick, Onondaga County District Attorney). "[I]n terms of deterrence, if that's the thrust of your question, is the death penalty a deterrent. My response is, of course it is. How could it not be?" *Id.*

113. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 299 (statement of Evan Mandery, Assistant Professor, John Jay College of Criminal Justice).

114. *See* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 20 (statement of Charles Billups, Chairman, Grand Council of Guardians).

> [C]oming from a law enforcement standpoint, we realize that the death penalty is not necessary and it shouldn't be brought back . . . . [S]howing the numbers throughout the City here in New York, the idea of dealing with crime, it's not a need to bring the death penalty as a deterrent. In working with the community and also working with the police department throughout the community the police are in, we have shown that numbers throughout the City here ha[ve] drastically dropped. So why would it be a need to bring back something so barbaric or as . . . irresponsible for us in dealing with human life?

Id.; Jan. 21 2005, *Public Hearing*, *supra* note 53 at 99 (statement of Randy Jurgenson, retired New York City homicide detective) ("I'm convinced that capital punishment is not a deterrent."); *id.* at 85 (statement of Anthony Miranda, Executive Chairman of the National Latino Officers' Association).

> The good deterrent to crime is good police work and the fear of getting caught in general deters crime as evidenced in the current drop in crime statistics throughout the United States, including New York. It's not the death penalty; it's the increased ability of law enforcement to actually catch and apprehend individuals. That is the deterrent.

Id.

115. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 20 (statement of Robert Morgenthau, District Attorney, New York County).

former legislators,[116] a member of the study commission appointed by Illinois Governor George Ryan to evaluate that state's death penalty law,[117] a defense lawyer with extensive experience representing murderers,[118] a retired judge,[119] academics,[120] and others[121] resoundingly disputed the logic and

> Legislators who think these measures will reduce violent crimes fool themselves and the public. Such proposals may be good politics, but they are not good law enforcement. They divert our attention from present needs. I know of no law enforcement professional who believes that the death penalty provisions . . . have affected public safety in the slightest. The criminal laws we needed were already on the books. What was missing was the commitment to enforce them.

Id.

116. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 30, 32 (statement of Catherine Abate, former New York State Sen.; former Comm'r, New York City Departments of Correction & Probation; former Chair, New York State Crime Victims Board) (citing statistics indicating that capital punishment does not deter crime); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 200–01 (statement of Richard Bartlett, former New York State Asssemb.; former Chair of New York State Penal Law Revision Commission; former Chairman of Codes; Dean of Albany Law School) (stating that the death penalty is illogical and is bad public policy).

117. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 136 (statement of Thomas Sullivan, former Co-Chair of the Illinois Commission on Capital Punishment). "[T]he truth of the matter is, that if you favor the death penalty, you['re] not being tough on crime. It has nothing whatsoever to do with, as far as we can tell, as far as anybody can tell, on the [e]ffect on crime. Zero. Zip." *Id.*

118. *Id.* at 141 (statement of Russell Neufeld, defense attorney).

> The death penalty does not function as a deterrent. It absolutely is not something that people think about when they've decided not to shoot somebody or to shoot somebody. Time and time again, it's been robberies where they thought they would go into a bodega and because they had a gun, they'd just [take] the money and the shopkeeper decided to resist to some extent and the shots were fired. Or they were so angry at their lover, their wife, the person who rejected them, that they killed them or tried to kill them. The people in the criminal justice system, people overwhelmingly who we represent, those people decided to kill people, or tried to kill people, and people who didn't, are not functioning on a rational level. It's just not what's going on. It's not the reality of the people that I've represented for the last 25 years.

Id.

119. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 110–11 (statement of Stewart Hancock, retired Judge, New York Court of Appeals).

> [O]ver 40 years I participated in the decision making in one way or another in almost 1,200 capital cases. . . . [A]nd I've developed . . . insight on things such as deterrent. . . .
>
> Deterrent basically doesn't work when you've got somebody who is committing a crime of passion. By that, they're doing it when they're angry. Or if they're under the influence of drugs, or under the influence of alcohol. Now that leaves the other group, which by and large makes up again a small percentage of the overall homicides that are committed.
>
> Those people you don't deter for the very simple reason, they don't think they're going to get caught. So if they don't think they're going to get caught, deterrence has absolutely nothing to do with whether or not you're going to prevent it from happening.

Id.

120. *Id.* at 280 (statement of John Blume, Professor, Cornell Law School; Director, Cornell

evidence supporting the argument that the threat of capital punishment discourages murder more effectively than imprisonment. The witness speaking with the most authority was Columbia University Professor, Jeffrey Fagan, who had intensively studied and critiqued the recent research reporting evidence of the death penalty's superior deterrent effect.[122] He identified several technical and logical deficiencies in the supportive studies that, in his estimation, undermined their validity.[123] His unsparing conclusion was largely shorn of the arcane language common to statisticians:

> There are serious flaws and omissions in this body of work that render it unreliable, and certainly not sound enough on which to base life and death decisions such as whether or not to reinstate the death penalty. The omissions and errors are so egregious that the work falls well within the unfortunate category of junk science or, as we say in highest of scientific review, these studies fail both the smell test and the legal test.
>
> . . . Murder is a complex and multiply-determined phenomenon. It's a very complicated business. It has gone up and down in cyclical patterns for the last 40 years. It goes up. It goes down. It goes up. It goes down. There are distinct periods of increase and decline. . . . There is no reliable or scientifically sound evidence that execution can in fact exert an effect that either acts separately or sufficiently powerfully to overwhelm these consistent and reoccurring epidemic patterns. Execution is a very small effect. It's a very rare event. But things like prisons, guns and drugs are very big, sustaining, reoccurring factors that in fact do a far better job of leveraging the murder rate up and then down than does a very small thing like execution.

Death Penalty Project). "[I]s the death penalty a deterrent? Well the overwhelming weight of the scholarly research indicates that the death penalty does not deter persons from committing murder." *Id.*

121. *See* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 44–45 (statement of Mark Green, Former New York City Public Advocate; President, New Democracy Project) (arguing that no empirical evidence links capital punishment to crime reduction); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 265–68 (statement of Diane-Marie Frappier, member of the public) (discussing the higher homicide rates, police fatalities, and cost of prosecutions in states with higher rates of executions).

122. *See* Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1806 (2006) ("In this study, we find no evidence of deterrence when the effects of execution are estimated for the subset of homicides that are most directly affected by execution."); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 259–61 (2006) (explaining Professor Fagan's approach to analyzing new deterrence research and its relationship to capital punishment).

123. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 178–85.

> . . . And so to accept [the reported evidence of incremental deterrence associated with capital punishment] uncritically invites errors that have the most severe human costs.[124]

2. Cost

If the death penalty's contributions to deterrence inspired more interest in the 1995 legislative debates than during the 2004–2005 public hearings, an inverse pattern emerged with respect to the economic costs of capital punishment. An issue that had attracted comparatively modest and abstract discussion in 1995 loomed prominently and more concretely a decade later. The main sponsors of New York's death penalty law, Senator Dale Volker and Assemblyman Eric Vitaliano, were not impressed in 1995 by the argument that the statute's enactment would impose new, unjustifiable demands on the strapped state budget. Volker labeled as "nonsense" the argument "that it's going to cost tons of money and all of this stuff," and asserted that cost estimates of capital punishment in other states "are grossly exaggerated."[125] Vitaliano did not directly challenge the conclusion that the death penalty statute would require additional expenditures, but instead argued:

> [A]ny change in a system which coddles killers like New York's does, has to cost more. . . .
>
> In any event, the cost argument rings hollow because virtually all of the increased costs in the death penalty law relate to attempts to insure fairness and due process, which the opponents of the death penalty would demand if it were not required.
>
> . . . .
>
> The bottom line is that while we have done our best to avoid needless public expenditures, tough criminal justice laws cost taxpayers money, period.[126]

As early as 1982, the New York State Defenders Association had published a report estimating that the costs of each capital case in New

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124. *Id.* at 185–86.
125. 1995 Senate Debate, *supra* note 31, at 1850 (statement of Sen. Dale Volker).
126. 1995 Assembly Debate, *supra* note 27, at 10–11 (statement of Assemb. Eric Vitaliano).

York—limited to the trial, state appeal, and U.S. Supreme Court review, but exclusive of state and federal postconviction review, death row confinement, and execution—would exceed $1.8 million.[127]

> If 20 percent of the murder cases in New York [251 convictions in 1980] are prosecuted through three stages of litigation as capital offenses at an average cost of $1.5 million, then in current dollars the death penalty will generate costs of approximately $75,000,000. If we assume that the cost will grow in proportion to the cost of the criminal justice system . . . , then in the year 2000 A.D., the death penalty will cost $1,075,000,000 annually.[128]

By the mid-1990s, several other studies and estimates converged at the conclusion that, for reasons including lengthier pretrial investigation, heightened motions practice, greater involvement of experts, prolonged jury selection, bifurcated trials, lengthy appellate and postconviction review and frequent reversals, intensive security associated with death row confinement, and others, capital punishment imposed costs greatly in excess of life imprisonment.[129]

These conclusions were not lost on death penalty opponents during the 1995 legislative debates. Several hammered at the inflated cost of capital punishment,[130] including Assemblyman Jeffrey Dinowitz, who branded the

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127. NEW YORK STATE DEFENDERS ASS'N, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 10, 26 (1982).

128. *Id.* at 26.

129. *See, e.g.*, PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 1, 98 (1993) (concluding that the extra cost of prosecuting a case capitally, per death sentence, is over $250,000, while per execution is more than $2.16 million dollars); RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY 13 (rev. ed. 1994) ("Death penalty cases are much more expensive than other criminal cases and cost much more than imprisonment for life with no possibility of parole."); Mark Costanzo & Lawrence T. White, *An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost*, 50 J. SOCIAL ISSUES 1, 9–12 (1994) (outlining reasons why the costs of the capital punishment process are greater than those associated with life imprisonment without parole); Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 58 (1989) (stating that, based on reasonable estimates of cost, capital prosecution cases cost more than non-capital prosecution cases); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1270 (1985) (stating that safeguards imposed by the Constitution make the death penalty more costly than life imprisonment).

130. *See, e.g.*, 1995 Senate Debate, *supra* note 31, at 1937–39 (statement of Sen. Catherine Abate) (explaining how the cost of implementing the death penalty will "drain . . . precious resources in the criminal justice system"); *id.* at 2045–47 (statement of Sen. Anthony Nanula) (explaining that the money for implementation of the death penalty "could be far better spent"); 1995 Assembly Debate, *supra* note 27, at 63–70 (statement of Assemb. Arthur Eve) (discussing the effect of the death penalty on

death penalty bill "the mother of all unfunded mandates."[131] Worse still, he argued, were the consequences for other, more urgent social programs:

> [I]nstead of making the education of our children the priority, you want to spend millions of dollars to kill people.
>
> Many students will no longer be able to continue their college education because of cuts to [higher education and related financial aid programs]. . . .
>
> Many people throughout this State will suffer from the proposed devastating cuts to health care. . . .
>
> Cuts to programs for the mentally ill and the mentally retarded and cuts to drug and alcohol treatment programs can have a disastrous effect on thousands of people. Cuts in welfare checks that haven't increased in years could cause a whole new army of homeless people. . . .
>
> The death penalty will cost the State and local governments many tens of millions, if not hundreds of millions of dollars per year. We can't afford it. What kind of society are we when we have a government that can't find money for education, for seniors, for kids, for the poor, for the sick, for the mentally ill, for the mentally retarded, but we can find money to kill? Money for death but not for life.[132]

As eloquently and often as cost-related arguments concerning the death penalty were made prior to the Legislature's passage of the 1995 legislation, they were advanced with additional nuance, empirical support, and apparent urgency by numerous witnesses who testified at the 2004–

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the state budget); *id.* at 365 (statement of Assemb. Herman Farrell, Jr.) (discussing the negative effects that result from the high cost of capital funding); *id.* at 318–23 (statement of Assemb. William Hoyt III) (arguing that the cost of capital punishment detracts resources from other important forms of crime deterrence); *id.* at 128–35 (statement of Assemb. Susan John) (comparing the inflated costs of capital punishment for New York and various other states); *id.* at 340 (statement of Assemb. John McEneny) (referring to the death penalty as an unfunded mandate); *id.* at 185–88 (statement of Assemb. Gregory Meeks) (stating that it is approximately three times more costly to impose the death penalty than life imprisonment); *id.* at 269 (statement of Assemb. John Murtaugh) ("Every cost study we have taken has found it far more expensive to carry out death sentences that it is to jail a killer for life."); *id.* at 343–44 (statement of Assemb. William Scarborough) (stating that an execution is more costly than life in jail); *id.* at 359–62 (statement of Assemb. Paul Tonko) (comparing the high cost of the death penalty in New York, California, Florida, and Texas).

131. 1995 Assembly Debate, *supra* note 27, at 117.

132. *Id.* at 119–21.

2005 public hearings. With accumulated experience and additional studies, the conclusion that death penalty systems are significantly more expensive to sustain than those in which LWOP is the maximum punishment seemed far less counterintuitive in 2004–2005 than it may have a decade earlier. Most members of the Assembly committees appeared to accept that reviving New York's death penalty law would demand additional resources. An Albany *Times Union* newspaper article published in 2003 had estimated that in excess of $160 million had been spent in connection with the state's 1995 death penalty law.[133] Since more than a year intervened between that article's publication and the public hearings, by then expenditures of $170 million or more were commonly assumed.[134] However, not all witnesses accepted those figures.

One skeptic was Michael Palladino, President of the Detectives' Endowment Association. "Having majored in accounting in college," he explained, "I know a little bit about numbers. They're easy to play with."[135] Referring to the body of studies calculating the costs of capital punishment, he testified, "I'm led to believe that those figures are grossly inflated and tailored to suit the argument."[136] Professor Blecker also sounded a cautionary note regarding the cost studies:

> [T]here's one benefit and one subtraction from the costs that's never taken into account by any study, and that is the hundreds of thousands of dollars saved for everybody who pleads guilty, thus waiving trials and investigations in order to avoid the death

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133. See Tilghman, *supra* note 20 ("Precise costs are difficult to pin down, but estimates suggest New Yorkers have spent more than $160 million during the past seven years prosecuting, defending and trying capital murder cases, which are exponentially more complex and protracted than ordinary felonies.").

134. *See, e.g.*, Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 153–54 (statement of Jonathan E. Gradess, Executive Director, New York State Defenders Association).

> This figure of $170 million puzzled me when I first heard it, and so I traced it a little bit. You should know where it comes from and why it is low.
>
> It is an extrapolation from a Times Union investigation conducted in 2003. That's 18 months ago. So even if its figures were correct 18 months ago, just a straight mathematical calculation would already place the cost of the death penalty at 185 million.
>
> But looking more closely at that study, the Times Union by its own report underestimated prosecution costs. . . .
>
> . . . .
>
> . . . [U]sing even a still conservative figure . . . the costs could easily be closer to 250 million [or more] . . . .

Id.

135. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 50 (statement of Michael Palladino, President, Detective's Endowment Assoc., Inc.).

136. *Id.* at 40.

> penalty. Now, that can't be coerced, . . . but it can be negotiated.
>
> When those savings are added in, it can well be argued that the death penalty is in fact cheaper. But, again, [from a retributivist perspective,] this is irrelevant.[137]

Nevertheless, other witnesses familiar with the research conducted in several jurisdictions described the virtual unanimity with which those studies concluded that death penalty systems are significantly more expensive to operate than those in which LWOP is the maximum punishment.[138] They also illuminated less immediately apparent aspects of capital punishment's greater costs. For example, Professor James Liebman explained that in research he had completed with colleagues:[139]

> [W]hat we found was huge expenditures in tax dollars and court time with almost nothing to show for it. Only six percent of the thousands of death verdicts that were imposed and reviewed [between 1973 and 1995] were actually carried out. The average time from death verdict to the few executions that occurred was ten years at that time. It has since grown to 12 years.
>
> In most states it is, in fact, the case that people on death row are more likely to die of old age or of being injured by some other inmate than they are to be executed. Now whether or not a person is eventually executed, every defendant who is tried capitally and sentenced to die costs, on average, about [] two to

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137. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 46 (statement of Robert Blecker, Professor, New York Law School). A study published after Blecker's testimony concluded that New York's 1995 death penalty law "leads defendants to accept plea bargains with harsher terms, but does not increase defendants' overall propensity to plead guilty." Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 116 (2006).

138. *See* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 230–31 (statement of Richard Dieter, Executive Director, Death Penalty Information Center) (describing the current death penalty system as a "Cadillac" which pays for both the extra costs of capital prosecutions and the expenses of life without parole for the eighty-eight percent of death-sentenced convicts who are not executed); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 202–09, 213–15 (statement of James Liebman, Professor, Columbia Law School) (stating that "the costs are just going to be dramatically greater in the capital cases").

139. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ (follow "Full Report and Endnotes" hyperlink) (reporting the high incidence of errors in capital verdicts) [hereinafter LIEBMAN, ERROR RATES]; *see also* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf (concluding that race, politics, and poor law enforcement creates pressures leading to the overuse of the death penalty and an increase in mistaken convictions).

> $4 million for that case more than that case would have cost if that person was convicted and sentenced to life without parole. But that's not the way to look at it. When you realize that most of those people who get sentenced to death are going to have their verdicts overturned and they're going to get re-sentenced to something else, you want to ask the per-execution cost. What are you paying for each execution? Because it's the execution that gives you the retribution, it's the execution that gives you the deterrence.[140]

Liebman characterized the model followed in New York during its recent experience with capital punishment as being particularly cost inefficient because of the combination of "relatively careful trial and appellate procedures"—which he lauded—and resulting "low numbers of death verdicts and executions."[141]

> Under this approach what you can predict after about 20 years of applying a new death sentence that applies like that, you can imagine that you will get one or two executions per year statewide. And over the cost [sic] of 20 years you will expect perhaps two or three executions total. The expected cost for the state over that 20 year period will be something like $500 million or about $200 million per execution beyond what it would cost to rely solely on life without parole.[142]

Richard Dieter, the Executive Director of the Death Penalty Information Center, spoke to another important feature of the higher costs of capital punishment:

> [T]here are obviously costs associated with every aspect of the death penalty. There's [sic] also costs associated with life without parole. Imprisonment is a very expensive process.
>
> What would be the worst system would be one which had all the expenses of the death penalty, the jury selection, the multiple lawyers, multiple prosecutors, the experts, the two-part trial, the appeals, all of that, and then add on to that life without parole.

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140. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 202–03 (statement of James Liebman, Professor, Columbia Law School).

141. *Id.* at 207.

142. *Id.* at 207–08.

> But that is essentially what New York has had. That is essentially what a lot of states have had. . . .
>
> . . . .
>
> . . . One thing to notice . . . is that death penalty costs are experienced up front; whereas, life without parole costs are spread out over something like 40 years.
>
> So if you take the state having to pay $1 million, a lot of that for the death penalty comes up front with the representation, pre-trial, and all of that. $1 million over a year or two is a lot more of a burden on the state, than $1 million which you can pay out over 40 years.[143]

A theme that emerged repeatedly and with special urgency during the 2004–2005 public hearings concerned the finite nature of New York's resources and, reminiscent of Assemblyman Dinowitz's argument in 1995,[144] that a decision to invest public funds in supporting capital punishment was also a decision not to invest in alternative criminal justice and social programs. This message transcended ideological lines. Thus, Jonathan Gradess, the Executive Director of the New York State Defenders Association, foresaw the Assembly Committee members being confronted in impending budget discussions by "the children of the foster care system . . . [and] the victims of AIDS," and asked them to "remember the high cost of the death penalty" when "the food pantries seek a new initiative so that the poor might eat, or the police plead for bulletproof vests."[145] He continued:

> As you struggle to meet the school funding mandate, as highways crumble and the demand to fix Medicaid reaches a crisis, the question of how New York will pay for the needs of its people should precede the current death penalty discussion.
>
> Death penalty proponents like to condemn the cost argument as the ravings of Chicken Little. But the sky is falling in New York, and it has nothing to do with those of us who are

143. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 229–33 (statement of Richard Dieter, Executive Director, Death Penalty Information Center).

144. *See supra* text accompanying note 132 (discussing the impact of capital punishment's cost on other important social programs).

145. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 150 (statement of Jonathan E. Gradess, Executive Director, New York State Defenders Association).

> describing the process, a process of short-sightedness; a process that buys guns and discards butter; that trades the needs of the homeless to purchase judicial time to hear death penalty cases; that barters away crime victims' compensation to pay for hours of appellate review; that yields to an image of execution, in exchange for the reality of highways, homes and healthcare.
>
> The attempt to execute one 19-year-old impoverished boy, for that attempt New York will place thousands of elderly citizens at medical risk through fiscal cuts. There is only one money spigot and you have to decide whether you will turn it on for human services or for the death penalty.[146]

Similar sentiments were expressed by two New York prosecutors. Robert Carney, the District Attorney of Schenectady County, accepted that capital punishment "is a justifiable sanction for the worst of the worst among us,"[147] but concluded that "it's not worth it."[148] He added:

> [T]he most compelling argument against this continued experimentation with the death penalty is, in my opinion, the misdirection of resources necessary to maintain capital punishment. At $13 million per year to fund the capital defender office, together with all the money spent for capital qualified assigned counsel, and prosecutors costs, the death penalty cost us as much as $200 million. Can it truthfully be said that putting seven people temporarily on death row was worth the expenditure of those monies? For this cost, a handful of defendants [h]ave temporarily confronted the remote prospect of execution, the families and loved ones of their victims have believed that retributive justice would be theirs only to be cruelly disappointed, . . . and many lawyers have prospered.
>
> There are so many criminal justice initiatives that are effective in reducing crime that could be enhanced for a fraction of this money.[149]

Robert Morgenthau, the District Attorney of New York County, who also opposed capital punishment on other grounds, concurred that the death penalty "waste[s] scarce law enforcement, financial and personnel

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146. *Id.* at 150–51.
147. *Id.* at 9 (statement of Robert Carney, Esq., District Attorney, Schenectady County).
148. *Id.* at 22.
149. *Id.* at 18.

resources"[150] and "drain[s] millions of dollars from more promising efforts to restore safety to our lives,"[151] such as "after school programs for young people and so on."[152] Commenting on the estimated $170 million spent in fruitless pursuit of the death penalty under the 1995 statute, Catherine Abate, the former Chair of the New York State Crime Victims Board, asked, "What can we do better with those dollars?"[153] She added:

> The crime victims community would say spend it on their restitution and financial assistance to survivors. . . .
>
> What do we have for compensation now for the survivors in New York State? The Crime Victim's Board is currently limited to paying up to $30,000, that's it, for loss of support. Up to $6,000 for burial expenses and counseling expenses for certain relatives. We can and should do better.[154]

Several others who appeared at the 2004–2005 public hearings made related points.[155] Mark Green, the former New York City Public Advocate,

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150. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 22 (statement of Robert Morgenthau, District Attorney, New York County).

151. *Id.* at 25.

152. *Id.* at 38.

153. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 9 (statement of Catherine Abate, former New York State Sen.; former Comm'r, New York City Departments of Correction & Probation; former Chair, New York State Crime Victims Board).

154. *Id.* at 9–10.

155. *See, e.g.*, Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 83 (statement of William Mordhorst) (listing possible alternative uses for money spent on capital punishment); *id.* at 86 (statement of John Payne, President, Democrats for Life, New York State Chapter) (arguing that death penalty resources would be better spent if used on crime prevention and rehabilitation); *id.* at 114–19 (statement of Leonara Wengraf, Campaign to End the Death Penalty) (arguing that money spent on capital punishment could be better spent on other social programs that would help prevent crime); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 120–21 (statement of John Dunne, New York State Sen. Emeritus, former U.S. Civil Rights Division Assistant Att'y Gen., via videotape) (arguing that state resources expended on death sentencing are better served by "improv[ing] the quality of life for [New York] citizens"); *id.* at 173 (statement of John Restivo, former inmate in the New York prison system, wrongly convicted of rape and murder) (advocating that New York spend the monies it would otherwise use on reinstating the death penalty to fund a state attorney program that would review the cases of inmates wrongly convicted); *id.* at 227–28 (statement of Marsha Weissman, Executive Director, Center for Community Alternatives) (arguing that monies allotted for the reinstatement of the death penalty would be better spent if allocated toward alternatives for incarceration and youth programs); *id.* at 136–37 (statement of Bud Welch, father of a victim of the Oklahoma City bombing) (advocating that New York can better spend state monies allocated for death penalty sentencing); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 327 (statement of Anzetta Adams, Baptist Ministers Conference of Greater New York) (urging that the money used for the death penalty should be reallocated to violence prevention); *id.* at 306 (statement of Sam Donnelly, Professor, Syracuse University College of Law) (calling the death penalty "a distraction from the measures that can most effectively control murder and other crimes"); *id.*

left the Assembly Committee members with the question raised explicitly or implicitly in others' testimony:

> You know, if I walked into your office and said I want to complain about a program that's cost 175 million dollars, and no one can prove that it's had any effect, you would go uh, let's have a press conference, let's end that. I don't care if I'm a democrat from the Bronx, I don't care if I'm a conservative from Rochester, from Monroe County. Let's join together. Then if I said to the governor this cost is for the death penalty, suddenly he would probably not want to have the press conference. Why?[156]

3. Victims

Murder victims and their survivors frequently are made a part of discussions about capital punishment, usually in the context of whether the death penalty is appropriate retribution for the victim's death or whether the offender's execution may help bring a measure of relief, if not closure, to victims' family members and loved ones.[157] Several legislative supporters of

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at 45 (statement of Bishop Howard Hubbard, Roman Catholic Diocese of Albany) (noting recent reductions in state programs addressing many social problems such as poverty, chemical dependency, and mental illness, which are roots of violent crime); *id.* at 78–79, 93–94 (statement of David Kaczynski, Assistant Director, Equinox Youth Shelter, and brother of serial mail-bomber Ted Kaczynski) (discussing the need to "invest in" addressing the problems of runaway and homeless youth, rather than divert the money toward the death penalty); *id.* at 226 (statement of Stephen Saloom, Policy Director, Innocence Project) (arguing that to avoid the risk of executing an innocent person, much more needs to be spent on investigation and procedural safeguards, which would fix other aspects of the criminal justice system); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 253 (statement of Ron Honberg, Legal Director, National Alliance for the Mentally Ill) (noting that states spend more resources on capital punishment than on helping the mentally ill); *id.* at 362 (statement of Delphine Selles, Campaign to End the Death Penalty) (arguing that money would be better spent on rehabilitation programs for convicts than capital punishment); Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 278 (statement of Bishop Dominick Lagonegro, Archdiocese of New York City) (calling attention to underfunded intervention programs); *id.* at 170–72 (statement of Kate Lowenstein, Murder Victims' Families for Reconciliation) (describing capital punishment as a misallocation of resources); *id.* at 133–37 (statement of Thomas Sullivan, Esq., former Co-Chair of the Illinois Governor's Commission on Capital Punishment) (noting, *inter alia*, the high cost of trying death penalty cases).

156. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 55 (statement of Mark Green, Former New York City Public Advocate; President, New Democracy Project).

157. *See, e.g.*, AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 34–38, 44–59 (2001) (discussing the use of victim's statements and the Supreme Court's response to them); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 52–64 (2003) (describing the various methods and uses of victim impact submissions in which "the prosecution is free to use the evidence of particular loss in arguments to a jury to the effect that only a death sentence will properly recognize the nature of the suffering of those who have been harmed by the defendant's acts"). *See generally* WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (James R. Acker & David R. Karp eds., 2006) (exploring "the

New York's 1995 capital punishment law invoked those themes. Thus, "with a heavy heart," Senator Nancy Hoffman cast an affirmative vote on the death penalty bill to "send a message to the families of victims . . . that their pain has been recognized by this state."[158] Senator Marty Markowitz solemnly read the names of individuals from his district who had been murdered before supporting the bill,[159] and Senator James Wright announced that "we are sending . . . a very clear message, that victims and their families have the first priority when it comes to rights, not criminals."[160]

A number of their counterparts in the Assembly agreed. "[W]e . . . have the right to seek retribution against those who commit heinous crimes," said Assemblyman Robert Straniere, maintaining that "[t]his tradition . . . is part of the common sense of all of us who have a sense of what is just and what is right and what is appropriate for the families of the victim and for the memory of the victim, himself or herself."[161] "We're saying to the families of victims," declared Assemblywoman Nettie Mayersohn, "Your daughter's life was important. Your husband's life was important. They weren't just specks, they were human beings who died violently."[162] Assemblyman Dov Hikind put it bluntly: "This legislation is about siding with the victims of crime rather than being so damned concerned about the criminals out there in society."[163]

To other legislators, however, capital punishment was at best a hollow offering to murder victims and their survivors. At worst, as Assemblyman John McEneny insisted, it is "an insult to the victims to offer the lives that are proposed in return for the lives that have been taken."[164] The quest for closure, opponents of the 1995 death penalty law asserted, was illusory. Senator Catherine Abate contended that:

> [T]he death penalty further harms victims because they can not rebuild their lives. They can not deal with the mourning. They can not say that there is some kind of conclusion to the case because they must wait years and years and make sure due process is served and that all the appeals which justice demands are exercised.[165]

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significance of capital punishment to murder victims' survivors").

158. 1995 Senate Debate, *supra* note 31, at 2024 (statement of Sen. Nancy Hoffman).

159. *Id.* at 2027–30 (statement of Sen. Marty Markowitz).

160. *Id.* at 2058–59 (statement of Sen. James Wright).

161. 1995 Assembly Debate, *supra* note 27, at 55–56 (statement of Assemb. Robert Straniere).

162. *Id.* at 220 (statement of Assemb. Nettie Mayersohn) (internal quotations omitted).

163. *Id.* at 72–73 (statement of Assemb. Dov Hikind).

164. *Id.* at 340–41 (statement of Assemb. John McEneny).

165. 1995 Senate Debate, *supra* note 31, at 1934 (statement of Sen. Catherine Abate); *see id*. at 1889 (statement of Sen. David Paterson).

The victims' community is not monolithic, some legislators pointed out: not all relatives of murder victims support the death penalty.[166] Assemblyman Albert Vann doubtlessly spoke for many when he rejected the inference:

> [T]hat to be in opposition to a death penalty is to be against victims and the families of victims, and that we don't have the same sympathy, the same feeling as anyone else would have because we're opposed to the death penalty. Well, this Body can't bring back life. You can't bring back anybody from the dead.
>
> So, I don't know what you think you're doing for the victim or for those who are relatives and loved ones of that victim. A momentary feeling because of the retributive aspect of it? Maybe that's all this bill is, a feeling for the moment that we've done something.[167]

While legislators in 1995 grappled with the often emotional victims' issues, not heard at those debates were the actual voices of murder victims' survivors. The 2004–2005 public hearings allowed such representation. Two relatives of homicide victims spoke at the hearings in support of the death penalty. The mother of one of the victims of John Taylor, the last murderer removed from New York's death row who had been sentenced under the 1995 law,[168] recounted how Taylor had killed her daughter and

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> The families who sat around for years, watching individuals sit on death row, hoping they will be executed, never really getting through the mourning period, never really being able to discuss any other issues . . . . Over and over again trying to lobby to see the murderer executed for the crime that he or she committed and not seeing it. Yet we are going to tell the families of victims of crimes in New York after today that their problems are solved; that we are going to execute those involved, even though very few will actually be executed.

Id.

166. *See* 1995 Assembly Debate, *supra* note 27, at 392 (statement of Assemb. Deborah Glick) (referencing a survivor of a murder victim who spoke out against the death penalty); *id.* at 205 (statement of Assemb. Richard Gottfried) ("Many of the most outspoken opponents of the death penalty . . . are, indeed, the close family members of people who have been tragically murdered . . . ."). *See generally* ROBERT RENNY CUSHING & SUSANNAH SHEFFER, DIGNITY DENIED: THE EXPERIENCE OF MURDER VICTIMS' FAMILY MEMBERS WHO OPPOSE THE DEATH PENALTY 19–20 (2002) (stating nine policy recommendations to address "inequity in the treatment of homicide survivors and in the application and enforcement of victims' rights laws"); RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY 1–5 (2003) (discussing the experiences of members of the Murder Victims' Families for Reconciliation organization, who oppose the death penalty).

167. 1995 Assembly Debate, *supra* note 27, at 310 (statement of Assemb. Albert Vann).

168. *See* People v. Taylor, 878 N.E.2d 969, 971 (N.Y. 2007) (vacating Taylor's death sentence

others: "She begged for her life. They put plastic bags over their heads. . . . He never once listened to these people that were begging, they begged for their lives and all of them were executed with bags over their heads and duct tape."[169] She thought about Taylor, who had since been resentenced to life imprisonment without parole: "You getting food, you getting family. All I got is to go to the cemetery and visit my daughter. That's all I can do is visit her in the cemetery and you can see your family, and you can laugh and talk."[170] She told the committee members: "Until it's at . . . your door—you're going to feel the same thing I'm saying. . . . Think of the crime that these people committed and if the evidence fit, I want—kill them."[171]

Debra Jaeger, the sister of the victim of James Cahill—another murderer whose death sentence under the 1995 statute was vacated by the New York Court of Appeals[172]—characterized the premeditated killing "as a classic death penalty case. The district attorney believed it, the jury and the re-sentencing judge also believed it. How the Court of Appeals didn't see it is beyond comprehension."[173] She described to the Committee how

> at Jeff Cahill's re-sentencing, we had to re-live my sister's murder. Once again we had to face the coward who caused us so much pain and loss. This law continues to victimize its victims. It's time to restore an effective death penalty law so other families will be spared the pain and suffering that we have endured.[174]

Most family members of murder victims who chose to speak at the 2004–2005 public hearings, however, opposed capital punishment. Kate Lowenstein's father was shot to death in New York City. She told the Committee members that she knew "the rage and sense of justice that led people to support the death penalty."[175] She nevertheless maintained:

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made under the 1995 sentencing statute, prior to the *LaValle* decision).

169. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 158 (statement of Joan Truman Smith, mother of a murder victim).

170. *Id.* at 160.

171. *Id.* at 158.

172. People v. Cahill, 809 N.E.2d 561, 567 (N.Y. 2003) (vacating conviction for first-degree murder in addition to vacating the capital sentence).

173. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 134; *see id.* at 6–38 (statement of William Fitzpatrick, Onondaga County District Attorney who prosecuted James Cahill for capital murder and secured a sentence of death) ("I think that in my heart that what James Cahill did merited a death sentence . . . .").

174. *Id.* at 135.

175. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 170 (statement of Kate Lowenstein, Murder Victims' Families for Reconciliation).

> The death penalty does not honor our murdered family members, so for many of us, it violates our deeply held political, social and religious beliefs. It feeds our feelings of revenge, anger and hatred and holds out to us an illusionary form of healing and what we are told will be closure. By now I hope you all know not to offer closure to a victim's family members. There is no closure. . . .
>
> . . . .
>
> Dad's violent death mangled my heart. . . . In our grief, the state tells us this will help you, but it is the murdered life we want back and in the end, nothing changes that and an execution leaves us silent. The murdered are still murdered, now another family is in agony and a system has gone forward that is contrary to everything we want justice to be, a system that values white life over black, rich over poor, the powerful over the vulnerable, the conviction of the innocent. All of these things my father taught me to fight against.
>
> New York does not need the death penalty.[176]

Variations of these sentiments were expressed repeatedly at the public hearings in the mournful voices of parents[177] and other relatives[178] of

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176. *Id.* at 171–73.

177. *See* Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 130–38 (statement of Bud Welch, father of a victim of the Oklahoma City bombing).

> I know that about half of those family members [whose relatives were killed in the 1995 Oklahoma City bombing for which Timothy McVeigh was executed] were looking for some type of relief that Monday morning [of the execution]. They simply did not find it.
>
> Since that time I've had any number that had come to me, and most commonly they say, "It just didn't do for me what I thought it would."
>
> . . . When a state puts someone on death row, they keep the family members revictimized over and over and over again, with the long appeals process.

Id. at 136; Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 152–60 (statements of Janice and Bruce Grieshaber, whose daughter Jenna was murdered) (stating that only God should choose the final punishment and that life imprisonment is enough punishment under the law); *id.* at 251–56 (statement of Marguerite Marsh, whose daughter was one of Poughkeepsie serial killer Kendall Francois's victims).

> There is never closure when you lose your child or a loved one. . . .
>
> . . . .
>
> Capital punishment serves no purpose. . . . That is not justice but revenge. . . .
>
> . . . .
>
> I have seen first-hand how revenge and hate consumes and hardens a person, and leaves no place for healing. I know that for myself that forgiveness is necessary to live out the rest of my life in peace, following the teachings of Jesus

victims of murder. Thomas Sullivan, a co-chair of the commission appointed by former Governor George Ryan in 2000 to study Illinois' death penalty,[179] described to the New York Assembly committee members how "[t]he hardest day" for the Illinois commission members "was when the victims' families came."[180] The report ultimately issued by the Illinois study commission concluded that "[i]mprovements to immediate victim services, access to support and counseling services, and better continuity in the criminal justice system, would lighten the burdens of those who have been victimized."[181] Witnesses who testified at the New York public hearings generally concurred. One of those, Bishop Jack McKelvey, observed:

> We hear statements which indicate that an execution will bring closure to a person's agony for a loved one who has been

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to have love and compassion for my fellow man.

I thank [G]od that Cathy's murder will not be the cause of another's execution.

Id. at 254–56; *see* Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 77 (statement of Carole Lee Brooks, whose son was murdered in New York City). "Honor my son and other victims of murder by acting with the highest regard for human life. You must act with the minds and spirits at levels higher than the murder[er] who killed my son." *Id.*; *see id*. at 71–72 (statement of Pat Webdale, whose daughter, Kendra, was pushed under a subway car and killed by a mentally disturbed man in New York City).

> There is something disturbing about the idea of doing to the offender the very thing that he or she is being punished for. . . .
>
> . . . You killed someone so I will kill you. It is not a balance. It is . . . out of order . . . for one human being to kill another.

Id.; *see* Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 173–77 (statement of Patricia Perry, whose son, a police officer, was killed during rescue operations following the September 11, 2001 terrorist attack in New York City).

178. *See* Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 164 (statement of Bill Pelke, Murder Victims' Families for Human Rights) ("[T]he death penalty has absolutely nothing at all to do with the healing that murder victim's family members need after a loved one has been killed, and . . . in fact it just continues that cycle of violence . . . ."). Mr. Pelke's grandmother was murdered in Gary, Indiana. *Id.*

179. REPORT OF THE [ILLINOIS] GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, *supra* note 47, at v.

180. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 137 (statement of Thomas Sullivan, Esq., former Co-Chair of the Illinois Comm. on Capital Punishment).

181. REPORT OF THE [ILLINOIS] GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, *supra* note 47, at 195. The New Jersey Death Penalty Study Commission, which recommended abolition of capital punishment in that state (a recommendation followed by the death penalty's repeal), reported: "Family members of murder victims and other witnesses expressed a wide range of views in their testimony before the Commission. The overwhelming majority of witnesses testified that life without parole is the appropriate alternative to the death penalty." NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 56 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf. In addition to concluding that capital punishment in New Jersey should be "abolished and replaced with life imprisonment without the possibility of parole," the Commission "also recommend[ed] that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide." *Id.* at 67.

> murdered. If that is true, then that person will have to hold on to his or her anger, pain, frustration, and heartache for an average of ten to fourteen years before those feelings are assuaged.
>
> This is how long it takes from crime to execution, if it occurs, in the United States. The survivors are asked to wait, to hold on to their sadness and anger for years, then encouraged to reignite the feelings, those feelings of loss, as they are interviewed before the execution and perhaps serve as a witness to that execution.
>
> Isn't it interesting that we have lived through some horrendous crimes such as Columbine, we have learned the importance of sending in psychologists, sociologists, doctors, nurses, clergy, psychiatrists, and counselors to help children and adults speak and externalize their fears, their pain, their anger and their sadness, so that it has less of a chance to do continuing harm to the individual.
>
> Early intervention is considered an important strategy for continuing health. Yet in the discussion of executions, we believe that holding on to those destructive feelings for so long a time will somehow heal. It is an issue worthy of concern.[182]

4. The Alternative of Life Imprisonment Without Parole

The 1995 law that returned capital punishment to New York also created, for the first time within the state, the alternative punishment for first-degree murder of life imprisonment without parole.[183] LWOP figures significantly into debate about the death penalty because imprisonment without parole eligibility removes most concerns that center on offenders' future dangerousness. It is also a sufficiently harsh sanction to satisfy many people's notions of just deserts. The availability of LWOP has sated some

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182. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 189–90; *see also supra* text accompanying note 153–54 (statement of Catherine Abate, former New York State Sen.; former Comm'r, New York City Departments of Correction & Probation; former Chair, New York State Crime Victims Board). *See generally* Carroll Ann Ellis et al., *The Impact of the Death Penalty on Crime Victims and Those Who Serve Them*, *in* WOUNDS THAT DO NOT BIND, *supra* note 157 at 431–44 (underscoring the importance of victim service providers and detailing the wide range of effects that murder has on victims' survivors).

183. *See* N.Y. PENAL LAW § 70.00(5) (McKinney Supp. 2007) (stating that "[a] defendant may be sentenced to life imprisonment without parole for the crime of murder in the first degree"); N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney 2004) (stating that upon a defendant's conviction of first-degree murder, "the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life without parole").

of the public appetite for the death penalty and almost certainly has contributed to the recent dramatic nationwide downturn in capital sentences.[184]

New York legislators in 1995 may not have appreciated that their work in bringing LWOP to the state's penal law would have an impact that would rival, if not transcend, the significance of their vote on the death penalty.[185] They did, however, have at their disposal the results of public opinion data suggesting that LWOP mattered to their constituents. In the spring of 1991, a statewide sample of New York voters was asked, "Do you generally favor or oppose capital punishment, that is, the death penalty, in cases where people are convicted of murder?" Roughly seven out of ten respondents—70.6%—reported "somewhat" or "strongly" favoring the death penalty.[186] However, when asked, "If convicted murderers in this state could be sentenced to life in prison with absolutely no chance of ever being released on parole or returning to society; would you prefer this as an alternative to the death penalty?," a majority (54.6%) replied affirmatively.[187] And when queried, "What if convicted murderers in this state could be sentenced to life with no chance of parole *and* also be required to work in prison industries for money that would go to the families of their victims; would you prefer this as an alternative to the death penalty?" nearly three out of four (73.0%) replied, "Yes."[188]

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184. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, STATISTICAL TABLES, tbl.14 (2006), http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st14.htm. In 1995, 326 prisoners were received in penal institutions throughout the nation under sentence of death. By 2000, that number had declined to 235, and by 2005 it had fallen to 138. *Id.* In 2006, the last year for which figures are available, just 115 prisoners were received in penal institutions under death sentence. *Id.* Although many factors almost certainly help account for the marked decline in the number of new death sentences, one important reason is likely to be the increased reliance by prosecutors and juries on LWOP as an alternative to capital punishment. *See* Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1943–45 (2006) (noting that the increasing availability of life without parole as a sentencing option has contributed significantly to the decline in death sentences).

185. *See generally* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1852 (2006). "It is clear that life without parole's purpose of offering an alternative to the death penalty, has far outstripped its proponents' goal. The result is not an abandonment of the death penalty, but an embrace of permanent incarceration for noncapital crimes." *Id.* (citation omitted).

186. William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 101 (1994).

187. *Id.* at 103.

188. *Id.* at 104. In general, giving survey respondents concrete choices between the death penalty and other punishment options tends to lower support expressed for capital punishment. *See* Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 41, at 27, 44–46 (noting that the way people are asked about the death penalty has a significant effect on their expressed support for it, notably, that support drops "sometimes precipitously" when questioners provide a "harsh and meaningful"

New York legislators were far more intransigent in their support for the death penalty, for the most part continuing to favor capital punishment even when presented with the alternative choices of LWOP or LWOP plus restitution.[189] These findings led the researchers responsible for the polling to suggest that the "lawmakers are out of touch with the actual punishment preferences of their constituents."[190] They concluded more generally that "public support for capital punishment is an illusion that has become a self-perpetuating political myth."[191] Similar claims were made by some of the legislators themselves during the 1995 death penalty debates. Citing the survey results, Assemblyman William Hoyt III argued that "support for [the death penalty] is actually paper thin. . . . These numbers tell us that the people of New York would like justice and fairness. Today, we're not giving it to them."[192]

Yet most legislators during the 1995 debates insisted that their votes in support of the capital punishment bill were consistent with, if not compelled by, the wishes of their constituents. "The people of the state of New York have asked for, as a matter of fact, spoken very clearly on this subject," maintained Senator Hugh Farley.[193] "They want restoration of the death penalty. Our first duty in this chamber is to be representative, and I choose to represent the people that sent me here."[194] "I think it's about time that the voters and the residents of the state of New York had their will done," said Senator Robert DiCarlo, "and their will is for the capital punishment to be put back into the law books."[195] Assemblyman Anthony Seminerio asserted: "You know what the bottom line is here, ladies and gentlemen? The people of New York State want the death penalty, and it's about time we give them the death penalty."[196] "I feel I have a duty to continue to keep faith with the people who sent me here," stated Assemblywoman Catherine Nolan, while announcing that she would "cast a vote in support of this legislation."[197]

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alternative).

189. *See* Bowers et al., *supra* note 186, at 135–37 (discussing differences in opinion about capital punishment between voters and legislators in New York—notably, that while a majority of voters believed LWOP preferable to the death penalty (54.6%), a majority of legislators found death preferable (63%)).

190. *Id.* at 132.

191. *Id.* at 142.

192. 1995 Assembly Debate, *supra* note 27, at 325; *see also id.* at 40 (statement of Assemb. Deborah Glick) (observing that support for the death penalty decreases when LWOP, especially LWOP with restitution, is offered as an alternative); *id.* at 378 (statement of Assemb. Vito Lopez) (asserting that LWOP is morally preferable to the death penalty and equally meets the goals of justice and deterrence).

193. 1995 Senate Debate, *supra* note 31, at 2040.

194. *Id.*

195. *Id.* at 2026.

196. 1995 Assembly Debate, *supra* note 27, at 236.

197. *Id.* at 369; *see also* 1995 Senate Debate, *supra* note 31, at 2053–54 (statement of Sen.

By the time the 2004–2005 Assembly committee public hearings were conducted, the tables had largely turned and death penalty supporters were on the defensive against claims that LWOP was the preferred sentencing option. Dr. William Bowers, the researcher principally responsible for the 1991 public opinion survey that concluded that most New Yorkers preferred LWOP to capital punishment and that legislators had for the most part been deaf to that message,[198] reminded the 2004–2005 committee members of those polling results.[199] David Kaczynski told them:

> [T]imes have changed. Back in 1995 when you were considering the issue of the death penalty, . . . you were really facing a choice in which there was no alternative means of keeping the most serious offenders out of circulation, off our streets forever. We had at that point no life imprisonment without parole.
>
> You were, in effect, in the same sense that the juries were in prior to the LaValle decision,[200] thinking that well gee, if I don't vote for the death penalty in this case, this person might some day get out, be paroled, I'd have it in my conscience that this person could commit another crime.
>
> We have now in New York State an alternative of life imprisonment without parole. In effect, the court has left us with what the people of New York really want, a safe protection for

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Joseph Bruno).

> [T]he fact of the matter is, the majority of the people in this state want a death penalty because they do feel that it delivers the right message to the perpetrators and they, as potential victims, feel comforted and safer that violent felons will get the message that, in this state, we are going to be concerned about the citizens of this state and protect their interests.

Id.; *see id.* at 1871 (statement of Sen. Kenneth LaValle) ("[T]he democratic process does work when the people in our respective districts say that [the death penalty] is something that they support and have supported it for a long period of time."); *id.* at 477–78 (statement of Assemb. Ronald Tocci). "[T]he innocent, law-abiding citizenry of this State deserves this particular action. Yes, lady justice is truly blind, but certainly not deaf. Let the majority be heard . . . ." *Id.*

198. *See supra* notes 186–88 and accompanying text (discussing the 1991 survey).

199. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 235–36 (statement of Professor William Bowers, Capital Jury Project, Northeastern University). *See generally* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 7 (statement of Catherine Abate, former New York State Sen.; Former Comm'r, New York City Departments of Correction & Probation; former Chair, New York State Crime Victims Board) (asserting that national polls indicate a majority of citizens are against capital punishment if given the option of life imprisonment without parole); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 146 (statement of Jonathan Gradess, Executive Director, New York State Defenders Association) (asserting that a majority of New Yorkers prefer LWOP to the death penalty).

200. People v. LaValle, 817 N.E.2d 341 (2004); *see supra* notes 12–14 and accompanying text (explaining the *LaValle* decision).

> the people of New York. A system that doesn't risk executing an innocent person.[201]

Other witnesses, however, disputed the claim that LWOP was an adequate substitute for capital punishment. Some lacked confidence that such sentences could guarantee that offenders in fact would never be released from prison,[202] and some stressed that justice would not be served by replacing a capital sentence with life imprisonment.[203] As a part of the latter issue, questions were raised about the relative deprivations imposed by imprisonment. Michael Palladino, representing the Detectives' Endowment Association, cited the example of a murderer he had interrogated who had killed his victim after robbing her because "he had nothing to lose and everything to gain. . . . [I]f she was dead she could never come to testify against me. . . . He said the worst that could happen to me, I spend the rest of my life in jail. It's a better life than I have now. I get fed. I can exercise. I can do whatever I want."[204] Taking exception to the argument "that a life without parole is somehow worse than death," Professor Robert Blecker asked the committee members:

> Take the time to investigate what is the quality of life among those who serve life. . . .
>
> . . . .
>
> What you discover . . . is life takes on new meaning. It takes on new joys, new satisfactions. They watch movies, they

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201. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 92–93 (statement of David Kaczynski, Executive Director, New Yorkers Against the Death Penalty).

202. *See* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 175–76 (statement of Michael Green, District Attorney, Monroe County) (citing the example of James Moore, who accepted a plea of LWOP to avoid the death penalty, only to be made parole eligible in 1982 when the New York legislature eliminated LWOP sentences and commuted them to "20 years to life"); Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 58–60 (statement of Robert Blecker, Professor, New York Law School) (noting the possibility of a commuted sentence, and calling attention to Europe's abolition of LWOP).

203. *See* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 22–23 (statement of Onondaga County District Attorney William Fitzpatrick, who prosecuted murderer James Cahill) (recalling that he believed the death penalty was the proper sentence for Cahill); *id.* at 174–75 (statement of Michael Green, District Attorney, Monroe County) (noting that additional prison sentences for repeat murderers become meaningless and that the only meaningful sentence in such cases is death); Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 50–52 (statement of Robert Blecker, Professor, New York Law School) (arguing the injustice of allowing some of the vilest murderers to enjoy life as a result of commuted sentences); *id.* at 159–60 (statement of Joan Truman Smith, mother of a murder victim) (noting the privileges that prisoners have, and comparing them with visits to her child's grave).

204. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 46–47 (statement of Michael Palladino, President of Detectives' Endowment Assoc., Inc.).

> exercise, they have tournaments, baseball tournaments, volleyball tournaments, basketball tournaments. They read. They watch television. A new society forms. New pleasures. A new pair of pants. Little things that we might take for granted as trivial come to be embraced as wonderful. A new toothbrush, the commissary, snacks, love, friendship. All deep joys of life.
>
> Restriction on freedom, do I want to spend the rest of my life in prison? I certainly do not. But what you find if you take the time to investigate is they get to live.[205]

On the other hand, veteran corrections officers reacted with some disdain to intimations that imprisonment, and particularly LWOP, is not harsh punishment. Marsha Lee Watson, who had worked in corrections twenty-six years, wondered "what kind of picture" is suggested by the prospect of life imprisonment. "Do we see a lavish mauve room with [the prisoner] walking up and down looking at TV having a wonderful life?"[206] "I can tell you that not everybody is comfortable with a cot and a meal. . . . People fear more of going to jail than they do of dying. If you were to hear some cases and you were to read the news sometimes you would hear people saying I'm not going back. I'll die first."[207]

Stephen Dalsheim served for forty-two years in the New York State Department of Correction, including twenty years as a prison superintendent. Twenty executions were carried out at Sing Sing Prison when he worked there in the 1950s.[208] Assemblywoman Helene Weinstein asked him:

> Superintendent Dalsheim, . . . I know when you were at Green Haven and Sing Sing we didn't have in our law life without parole, but now as part of the '95 law we do have life without parole and we've heard testimony from some people that life without parole would be worse for many people than the death penalty and I was wondering if you had some observations about what life without parole would really mean for someone incarcerated?[209]

Mr. Dalsheim responded:

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205. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 51–52 (statement of Robert Blecker, Professor, New York Law School).

206. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 116–17.

207. *Id.* at 92.

208. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 16 (statement of Stephen Dalsheim, retired Superintendent, Sing Sing & Downstate Correctional Facilities).

209. *Id.* at 25–26.

> It's not nice to give someone a sentence and not have hope, but I certainly prefer to have life without parole in place of the death penalty. If a mistake is made, we can say we're sorry, we can give the offender some money and he can be released. The death penalty is, there's no, you can't do anything about that, . . . so I would support life without parole.[210]

This last feature of LWOP—its allowing for the possible correction of errors and injustices—surfaced repeatedly during the 2004–2005 hearings, as it did during debate in 1995. The irreversibility of capital punishment concerned many when discussion focused on the reliability and fairness of this ultimate sanction.

C. Is It Fair?

1. Innocence

When New York legislators debated and then enacted the 1995 death penalty bill, they were well aware of the controversy surrounding the potential for executing the innocent. They had their attention called to the conclusion reached by academic researchers that during the twentieth century, New York had executed eight innocent people, more than any other state in the country.[211] They knew that Isidore Zimmerman was convicted of murdering a New York City police officer and came within two hours of execution in 1939, only to have his death sentence commuted to life imprisonment by Governor Herbert Lehman, and that he was exonerated in 1962 after spending almost a quarter century in prison.[212]

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210. *Id.* at 26.

211. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72–73 (1987); *cf.* 1995 Senate Debate, *supra* note 31, at 1894 (statement of Sen. David Paterson) ("Since 1980, when there were 187 people on death row in this country, 6 of those sentences have been commuted [and] 46 of those sentences were overturned . . . ."); 1995 Assembly Debate, *supra* note 27, at 48 (statement of Assemb. Martin Luster) (informing the Assembly of the results of the Bedau and Radelet study, mistakenly identifying six erroneous N.Y. executions rather than the correct eight).

212. *See* 1995 Senate Debate, *supra* note 31, at 1958 (statement of Sen. Emanuel Gold) (discussing the conviction and eventual exoneration of Isidore "Izzy" Zimmerman); 1995 Assembly Debate, *supra* note 27, at 48–49 (statement of Assemb. Martin Luster) (reminding the Assembly of the Isidore Zimmerman case); MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE 43–55 (1992) (describing how New York managed to convict Mr. Zimmerman in the first place and his hard road "back from the grave"). *See generally* ISIDORE ZIMMERMAN, PUNISHMENT WITHOUT CRIME (1964) (describing his experience being two hours from death when his

They were aware that modern safeguards did not eliminate the risk of condemning innocent persons, as demonstrated by DNA tests that had cleared Kirk Bloodsworth of wrongdoing following his 1984 conviction for capital murder and rape in Maryland,[213] and with more than one hundred other individuals wrongly convicted and sentenced to death in the post-*Furman* era.[214] They knew about a study documenting fifty-nine wrongful convictions for criminal homicide between 1965 and 1988 in New York,[215] one of which involved Nathaniel Carter, a high school basketball teammate of future Governor George Pataki in the town of Peekskill.[216]

The risk of executing innocent people did not derail the 1995 death penalty bill. Senator Dale Volker labeled the reports of eight wrongful executions in New York as "nonsense," insisted that "there is no solid evidence that anyone was ever executed and found innocent later," and capped his dismissal by maintaining that simply because "you are found innocent, . . . that doesn't mean that you didn't commit the crime."[217] While

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sentence was commuted, before being ultimately exonerated).

213. TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 22 (2004). *See* 1995 Assembly Debate, *supra* note 27, at 52 (statement of Assemb. Martin Luster) (mentioning Bloodsworth's conviction and death sentence, and his subsequent retrial leading to acquittal and release).

214. *See* Death Penalty Information Center, Innocence: List of Those Freed from Death Row, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited April 13, 2008) (listing 128 defendants convicted of capital crimes, sentenced to death, and then either pardoned, given a new trial leading to acquittal, or had their charges dropped, since 1973). The Death Penalty Information Center considers any former death row inmate to be innocent who has: (a) "Been acquitted of all charges related to the crime that placed them on death row"; (b) "Had all charges related to the crime that placed them on death row dismissed by the prosecution"; or (c) "Been granted a complete pardon based on evidence of innocence." RICHARD C. DIETER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (Sept. 2004), *available at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149.

215. Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965–1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 808 (1990–1991).

> "[A] wrongful homicide conviction" is a conviction for any degree of homicide—including murder, manslaughter, or criminally negligent homicide—which is overturned and never reinstated. This includes basically three categories of cases: those where the conviction was overturned and either (a) the defendant was subsequently acquitted on retrial . . . , (b) the charges were dismissed . . . , or (c) the charges were resolved by conviction of a non-homicide crime . . . .

Id. at 807 (citation omitted); *see also* 1995 Senate Debate, *supra* note 31, at 1940 (statement of Sen. Catherine Abate) ("We have seen in New York State [that] 59 people were wrongly convicted of homicide between 1965 and 1988."); 1995 Assembly Debate, *supra* note 27, at 167 (statement of Assemb. Roberto Ramirez) (referring to the same study).

216. Rosenbaum, *supra* note 215, at 812–13; Joseph Berger, *Close Call for Pataki's Friend: A State Judge Wanted to Sentence a Wrongly Convicted Man to Death*, THE TIMES UNION (Albany, N.Y.), Feb. 26, 1995, at A1; *see also* 1995 Senate Debate, *supra* note 31, at 1954–55 (statement of Sen. Franz Leichter) (discussing the conviction and eventual exoneration of Nathaniel Carter); 1995 Assembly Debate, *supra* note 27, at 82–83 (statement of Assemb. Clarence Norman, Jr.).

217. 1995 Senate Debate, *supra* note 31, at 1850–51 (statement of Sen. Dale Volker); *id.* at

acknowledging that "the execution of the innocent man or woman . . . is the strongest argument against the death penalty,"[218] Assemblyman Eric Vitaliano discounted the relevance of historical reports of such occurrences in light of "the criminal justice protections crafted by the Warren Court era decisions. Drawing conclusions from tales of the executed innocent today would be like drawing conclusions from ox cart accidents to make a point about traffic safety on the Thruway."[219] He continued:

> [W]e cannot be paralyzed by our inability to guarantee infallibility. Infallibility is not the standard . . . .
>
> The test is whether or not we are justified in taking the action we propose. What just war can be fought without the knowledge, to a moral certitude, that the mere engaging in the war will result in the innocent killing of people? Legitimate action[ ] to protect society against predators is justified.[220]

Others concerned about the issue of innocence who supported the 1995 legislation professed hope that the death penalty law ultimately would spare more innocent lives than it would claim. Said Assemblyman Daniel Feldman: "[T]he number of innocent lives saved through . . . deterrence . . . may, if we're lucky, balance out the number of innocent lives . . . . If there's any innocent life that will be taken as a result of this, that blood is on my hands. I accept that burden . . . ."[221] Assemblyman Joseph Robach concurred: "There is no ultimate guarantee [against convicting and executing the innocent]. . . . But one thing I do know, that those 18 people Art Shawcross killed, as well as the many other people that we all read about in the paper . . . , those people would all be alive if we had this provision in [the statue]."[222]

Opponents of the 1995 bill pressed hard on the inevitability that innocent people would fall victim to capital punishment. Assemblyman Martin Luster warned his colleagues that they were about to work "a fraud

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2056. *See generally* Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 161–66 (1988) (rejoining a debate about whether mistakes in conviction provide a basis for rejecting capital punishment); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121–26 (1988) (discussing methodological flaws of a study that claimed that 350 persons had been wrongfully convicted of capital or potentially capital cases, 23 of whom have actually been executed).

218. 1995 Assembly Debate, *supra* note 27, at 11 (statement of Assemb. Eric Vitaliano).

219. *Id.* at 13.

220. *Id.* at 14.

221. *Id.* at 124 (statement of Assemb. Daniel Feldman).

222. *Id.* at 44 (statement of Assemb. Joseph Robach).

upon the people of this State."[223] "[T]he biggest fraud of all," he maintained, "is to tell the people of this State that innocent people will not be executed or, if they are, what the hell, it's only once in a while. That, Madam Speaker, is a big fraud and one which I will not participate in."[224] Responding to the suggestion that modern legal procedures would provide a safeguard against "New York executing people who are, in fact, not guilty," Assemblyman Richard Gottfried asserted:

> I have a feeling that many of us try to convince ourselves that it's really not going to happen, that somehow, you know, this is not the "bad old days."
>
> But unfortunately, the reality is that the chances of New York executing innocent people . . . [are] actually increasing, largely because in recent years what had been an important safeguard in this area, namely habeas corpus proceedings in the Federal courts, has been largely eroded.[225]

Senator Martin Connor asked, "[D]oes anyone really doubt that . . . at least one innocent person will be executed?"[226] In cases of wrongful convictions resulting in imprisonment, he continued:

> [T]here is a simple remedy; unlock the jail door, often pay a judgment or award as New York State has had to do . . . and the person gets a chance to put their life back together again. The death penalty is different. Saying, "Oops, we're sorry; we made a mistake" is not enough.[227]

Assemblyman Frank Barbaro challenged the principal sponsor of the death penalty bill in the State Assembly, Eric Vitaliano, on the innocence issue:

> And the question I ask you to ponder, how many is acceptable? How many, Mr. Vitaliano, innocent people is acceptable to you to be executed to justify your pushing and sponsoring this bill? You have to answer that question. Is it one? Is it two? Is it 100? Is it 50? Because if you can't answer that question, then you

223. *Id.* at 46 (statement of Assemb. Martin Luster).
224. *Id.* at 47.
225. *Id.* at 198 (statement of Assemb. Richard Gottfried).
226. 1995 Senate Debate, *supra* note 31, at 1859–60 (statement of Sen. Martin Connor).
227. *Id.* at 1861–62.

> have no right to bring this bill before the House.[228]

Nearly ten years later, that same question hovered over the public hearings sponsored by the Assembly committees. During his testimony supporting the reenactment of a death penalty statute, Professor Robert Blecker acknowledged that "we have probably, my guess is, executed an innocent person in the modern era. We don't know who it is, but we probably have."[229] Assemblyman Michael Gianaris later asked him:

> My question to you then is when does, in your mind, the injustice of executing an innocent person outweigh the justice that you see retribution fulfilling? Or put it another way, how many innocent executions are you willing to accept in order to achieve the retribution that you seek?[230]

Mr. Blecker responded:

> A good question very well phrased. One in the particular, that is, I'm not willing to execute an innocent person knowing that person is innocent in order to achieve the execution of other people who deserve to die. So when you talk about an inhumane concreteness, nobody, nobody. But I am, as you are, realistic in knowing that no system is perfect. . . . [S]ome error will be built in, though not knowing who it is and saying that you're willing to see innocent people die on highways by not allocating more money to make them safer, you probably would not be willing to look at any individual and family and say, that's okay, we need to save the money and spend it elsewhere, you family, you're dead.
>
> When it comes to concrete people, you're not willing to do that, but you recognize systemically that you must, you cannot help but take a certain risk, as I recognize systemically that we must for the sake of justice.
>
> . . . If you want a number, I can't give you a precise number. But if you want a sense of it, almost none. Almost never is tolerable.[231]

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228. 1995 Assembly Debate, *supra* note 27, at 233–34 (statement of Assemb. Frank Barbaro).

229. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 58 (statement of Robert Blecker, Professor, New York Law School).

230. *Id.* at 98 (question of Assemb. Michael Gianaris).

231. *Id.* at 98–99. Later in the exchange, Assemblyman Gianaris again asked Professor Blecker: "[T]he question is the same, how many innocents are you willing to see executed to make sure that the

Also seamlessly bridging the gulf of nearly ten years between the 1995 legislative debates and the 2004 public hearing at which Professor Blecker testified, Assemblywoman Adele Cohen pushed him on a similar point: "Given that we're fallible, human beings are fallible, how do you say after an execution, whoops, we figured out this was a mistake."[232] He sounded a refrain similar to the answer he had supplied to Assemblyman Gianaris:

> You don't say whoops, you say sick. You feel sick. You feel sick also, how do you say after a car accident where you didn't spend the money to improve, to make the road abutments safer on a bridge. How do you say when you see mangled [corpses] or dying bodies in a car accident when you knew that another $100,000 in allocation would have saved them. What do you say? You don't say whoops, you feel sick. You think that you've misallocated your resources. You've made a tragic mistake. You do your best to prevent.
>
> There is nobody on New York's death row in this modern era who is innocent.[233]

Professor Blecker had little company during the 2004–2005 public hearings in denying that the prospect of executing innocent people under a revived death penalty statute was sufficient reason, either alone or in combination with other perceived drawbacks, to end capital punishment permanently. One witness who was closely aligned with Blecker on this issue, however, was Sean Byrne, the Executive Director of the New York

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people you're talking about are put to death, and I would suggest that, in deference back to your original answer, the answer is none." *Id.* at 101. Again, Professor Blecker demurred:

> You know, the classic statement, better that 10 guilty people go free than one innocent is convicted. So then you could ask that statement. Should it be 10, should it be 50, should it be 100? Is there no limit. Better tha[t] 10 million guilty people go free than one innocent person be convicted. Leave the death penalty aside. We can engage in the same kind of dialogue. Surely you in the end are going to say, enough is enough. At some limit, you are willing to, leaving the death penalty aside, you are willing to convict and deprive of liberty innocent people in order to make sure, at some level, that guilty people are kept in prison.

Id. at 101–02.

232. *Id.* at 60 (question of Assemb. Adele Cohen); *see also* Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 129 (statement of Cheryl Coleman, Former Albany County Assistant District Attorney, Former Albany City Court Judge) ("[E]ven now, mistakes can be made, bad mistakes, for which oops or sorry will not make amends."); *supra* text accompanying note 227 (observing that merely saying "sorry" after wrongfully executing someone is inadequate).

233. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 60 (statement of Robert Blecker, Professor, New York Law School).

Prosecutors Training Institute. Professing certainty that all persons sentenced to death under New York's 1995 law were "indisputably guilty,"[234] Byrne asserted that the exoneration of innocent people condemned to death elsewhere in the nation evidenced that "[t]he system is working as intended."[235] He also indicated that even if it came to light that an innocent person actually had been executed, he would not withdraw his support of capital punishment.[236]

Most testimony at the 2004–2005 public hearings on the issue of innocence was emphatically and overwhelmingly to the contrary. "A lot has changed since 1995," said Barry Scheck, Co-Director of the Innocence Project.[237] Scheck and other witnesses identified DNA exonerations as demonstrating so unambiguously and conclusively the fallibility of the criminal justice system that many observers now truly accepted, perhaps for the first time, that innocent people were at risk of execution.[238] Said Barbara Bernstein, representing the Nassau County Chapter of the New York Civil Liberties Union: "We used to talk about the possibility of executing the innocent, now we can talk about the inevitability. The advent of DNA has turned a hypothetical argument into a chronology of horror."[239]

Further making real the threat of wrongful executions were the numerous witnesses who appeared before the Assembly committees to offer their first-hand accounts of how justice had miscarried in their cases. Juan Melendez,[240] Madison Hobley,[241] and Ernest "Shujaa" Graham[242] had spent years under sentence of death in Florida, Illinois, and California, respectively, before new evidence led to their exonerations. Several men imprisoned in New York for murders they had not committed described the errors in their cases and the often serendipitous ways in which their names

234. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 40 (statement of Sean M. Byrne, Executive Director, New York Prosecutors Training Institute).

235. *Id.* at 41.

236. *Id.* at 56.

237. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 119 (statement of Barry Scheck, Esq., Co-Director, Innocence Project).

238. *Id.*; Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 38–39 (statement of Mark Green, Former New York City Public Advocate; President, New Democracy Project); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 61–62 (statement of Gerald Kogan, former C.J., Florida Supreme Court); *id.* at 218–21 (statement of Stephen Saloom, Innocence Project).

239. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 3, 89 (statement of Barbara Bernstein, Executive Director, New York Civil Liberties Union, Nassau County Chapter).

240. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 146–52 (statement of Juan Melendez, the ninety-ninth death row inmate to be exonerated in the United States since 1973).

241. *Id.* at 152–55 (statement of Madison Hobley, who spent sixteen years on death row before being exonerated).

242. *Id.* at 191–96 (statement of Ernest Graham, Campaign to End the Death Penalty, who spent fifteen years on death row in a California state prison).

had been cleared.[243] The Assembly committees heard testimony from two of the young men who had given false confessions and were convicted of rape in the infamous "Central Park Jogger" case.[244] They were released after serving fourteen years in prison when the true assailant confessed and was linked to the victim through DNA testing.[245] Myron Beldock, one of their attorneys, reminded the committee members:

> The Central Park Jogger case was not a death penalty case of course but the victim was so near death, so near to death and it involved the kind of facts which cause those in favor of the death penalty to cry out for vengeance, for punishment by death of the persons who could have committed such a horrible, sexually perverted and brutal attack.[246]

Yusef Salaam, one of the exonerated defendants, read a full-page newspaper advertisement paid for by Donald Trump shortly after the rape was first reported.[247] The ad cited the incident as a reason to "[b]ring back the death penalty."[248] Salaam continued:

> The would be President of the United States, Patrick Buchanan[,] suggested that it would be helpful to public order if the oldest rape defendant who was my co-defendant, Karey Wise at the time, who was a 16 year old boy, [was] tried and convicted and hung in Central Park. My co-defendants and me [fared] no better during television coverage of the case. In one notable instance, on the nationally aired Donahue television show

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243. *See* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 154–59 (statement of Daryll King) (testifying that he was wrongfully accused and convicted of killing a New York police officer, that his lawyer at trial conducted no investigations, and that his conviction was overturned on appeal when suppressed evidence and other errors were discovered); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 168–74 (statement of John Restivo, a former inmate in the New York state prison system, wrongly convicted of rape and murder) (describing how his attorneys accidentally found DNA evidence that proved to exonerate the charges of rape and murder against him); *id.* at 174–75 (statement of Sammie Thomas, a former inmate in the New York state prison system, wrongly convicted of robbery and homicide) (describing how post-verdict evidence obtained by his attorneys exonerated him of the charges of robbery and homicide); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 210–11 (statement of Jeffrey Blake) (mentioning his exoneration after serving eight years of a sentence for double homicide); *id.* at 211–18 (statement of Robert McLaughlin) (repeating that his appeals had been exhausted and his conviction overturned only after receiving media attention).

244. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 63, 72 (statements of Yusef Salaam & Karey Wise).

245. *Id.* at 67–68, 72.

246. *Id.* at 56 (statement of Myron Beldock, Attorney for Yusef Salaam).

247. *Id.* at 64 (statement of Yusef Salaam).

248. *Id.*

> [l]awyers for 2 of my co-defendants were confronted by the show's audience where one woman cried "Castrate them" to great applause. And if this woman dies, then they too should be put to death. A vicious, almost machine like cycle began to fester.
>
> . . . .
>
> In a state with the death penalty, what would have happened had [the victim] unfortunately died as a result of the attack? In all likelihood, instead of being here with you now I would have either been executed or instead of being here with you now, I'd be awaiting execution. Honorable members of the panel, again, it's only by happenstance that I . . . sit before you today.[249]

Other witnesses disputed the notion that exposing wrongful convictions and exonerating the involved individuals "prove the system works."[250] They argued that New York was remiss in failing to enact several measures that would enhance the reliability of the criminal justice system, including reforms in eyewitness identification procedures, videotaping interrogations, oversight of forensics laboratories, more liberal discovery policies, guarding against unreliable testimony offered by jailhouse informants, and many others.[251] Robert Perry, Legislative Director of the New York Civil Liberties Union, concluded his testimony by commenting on the high incidence of reversals and procedural errors in capital cases,[252] although his observations captured many of the sentiments expressed during the 2004–2005 public hearings about the risk of convicting and executing innocent people.

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249. *Id.* at 66–68.

250. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 274, 279 (statement of Ronald Tabak, Esq., President, New York Lawyers Against the Death Penalty).

251. *See* Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 183–84 (statement of Scott Christianson, author) (advocating reform to "reduce the incidence of wrongful conviction[s]"); *id.* at 95–96 (statement of Michael Whiteman, former counsel to Governors Nelson Rockefeller and Malcolm Wilson) (recommending numerous improvements); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 221–26 (statement of Stephen Saloom, Policy Director, Innocence Project) (discussing eyewitness identifications, video recording of interrogations, and forensic reliability); Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 143–44 (statement of Russell Neufeld, defense attorney) (advocating discovery reform); *id.* at 124–30 (statement of Barry Scheck, Esq., Co-Director, Innocence Project) (suggesting reforms and recounting the failings of the system of imposing the death penalty).

252. *See* LIEBMAN, ERROR RATES., *supra* note 139, at 116 (concluding that the error rate in capital sentences was sixty to seventy percent nationally).

> If what were at issue here was the fabrication of toaster[s] or the processing of social security claims, or the pre-takeoff inspection of commercial aircraft—or the conduct of any other private- or public-sector activity—neither the consuming and the taxpaying public, nor managers and investors, would for a moment tolerate the error rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment system for decades. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.[253]

2. Race Discrimination and Arbitrariness

The principal constitutional infirmity regarding the death penalty that emerged from the Supreme Court's long and confusing ruling in *Furman v. Georgia*,[254] which brought a temporary end to capital punishment, involved the risk that offenders were chosen arbitrarily to receive this most severe and irrevocable sanction.[255] As Justice Stewart memorably put it: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [These] petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[256] Justice Brennan agreed. "[T]he conclusion is virtually inescapable that [capital punishment] is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."[257] Justice Douglas focused on a particularly invidious brand of arbitrariness, concluding that the sentencing discretion enjoyed by judges and juries "enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority."[258] Justice Marshall likewise concluded that unregulated capital

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253. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 334–35.

254. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

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

> [T]he fundamental principle of *Furman* [is] that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Id. (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion)).

256. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

257. *Id.* at 293 (Brennan, J., concurring). Justice Brennan's concerns extended beyond arbitrariness in the death penalty's administration; he concluded that capital punishment is per se unconstitutional and hence in all applications violates the Eighth Amendment's prohibition against cruel and unusual punishments. *Id.* at 305 (Brennan, J., concurring).

258. *Id.* at 255 (Douglas, J., concurring).

sentencing discretion represented "an open invitation to discrimination."[259]

Statutory reforms that narrowed the class of death penalty-eligible offenders provided specific criteria to guide the sentencing authority's discretion and required appellate review of death sentences. This satisfied the Justices, in the wake of *Furman*, that the risk of arbitrariness had been reduced sufficiently to allow states to return to capital punishment.[260] Thereafter, in *McCleskey v. Kemp*, the Court rejected claims based on a comprehensive empirical study completed by Professor David Baldus and colleagues that notwithstanding the legislative reforms, race discrimination continued to infect Georgia's death penalty.[261] The "Baldus study" had produced evidence that capital punishment under Georgia's post-*Furman* death penalty law was reserved disproportionately for the murder of whites; that in otherwise similar killings, the odds of a death sentence being imposed were 4.3 times higher in white victim cases than in black victim cases.[262]

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259. *Id.* at 365 (Marshall, J., concurring).

> It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. . . . So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo.

Id. at 365–66 (footnote omitted). Like Justice Brennan, Justice Marshall concluded that the death penalty is in all applications a form of cruel and unusual punishment and thus per se unconstitutional. *Id.* at 367–68. Justice White, the fifth member of the Court in *Furman* who concluded that capital punishment, as then administered, violated the Eighth Amendment's prohibition against cruel and unusual punishments, argued that "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313 (White, J., concurring). Justice White also argued:

> At the moment that [capital punishment] ceases realistically to further [its justifiable] purposes, . . . the emerging question is whether its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

Id. at 312.

260. *See, e.g.*, Gregg, 428 U.S. at 206–07 (plurality opinion) (holding that under Georgia's death penalty statute, "the jury's discretion is channeled"); Jurek v. Texas, 428 U.S. 262, 276 (1976) ("Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) ("[The statutory reasons], and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of state law.").

261. McCleskey v. Kemp, 481 U.S. 279, 288–91 (1987).

262. *Id.* at 286–87. Comparatively limited evidence of disproportionality was found regarding the race of offenders; all else being equal, "black defendants were 1.1 times as likely to receive a death sentence as other defendants." *Id.* at 287. *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 141–88 (1990) (discussing the influence of

By the mid-1990s, evidence of racial disparities and other forms of arbitrariness in the administration of capital punishment had surfaced in several states.[263] These problems were well known to New York legislators as they debated whether to enact a death penalty statute in 1995. The law's backers were confident that New York would be immune to such difficulties. "I doubt there is a bill in the country that set up as many attempts to avoid racial bias as this bill[,]" proclaimed Senator Dale Volker.[264] Moreover, he declared, "I don't think there is real evidence that New York has gone through the kind of race problems that the southern states have gone through on the issue of the death penalty."[265] To Senator Marty Markowitz, capital punishment represented an expression of society's

> value for human life[.] . . . Whether they're black folks who have murdered black folks or white folks that have murdered black folks or whites on whites and blacks on blacks, . . . all life is equal. White life is worth no more than black life and black life is worth no less than white life.[266]

Senator Stephen Saland identified as safeguards the specific provisions of the law that required the Court of Appeals to police capital sentences for evidence of racial discrimination and arbitrariness.[267]

Skeptics of the argument that the proposed death penalty law would be administered fairly and impartially far outnumbered the bill's defenders. "[W]e know the ugly power of racism in our society," said Senator Catherine Abate, "and the death penalty again will give racism its most

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racial and suspect factors in Georgia's application of the death penalty during pre-*Furman* and post-*Furman* proceedings).

263. *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1654–60 (1998) (discussing post-*Furman* evidence of arbitrariness and discrimination in death penalty sentencing); David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 365 (1994) (showing a racial disparity in the imposition of death sentences); John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1776–77 (1998) (discussing the Baldus study which concluded that "defendants charged with killing white victims were 4.3 times more likely to receive the death penalty . . . and that Black defendants were 1.1 times more likely to receive the death penalty than other defendants").

264. 1995 Senate Debate, *supra* note 31, at 1897.

265. *Id.* at 1898.

266. *Id.* at 2033–34.

267. *Id.* at 1883–84; *see id.* at 1900 (statement of Sen. Dale Volker) ("[W]e have . . . specific language [in the statute] to deal with issues of race by the Court of Appeals.").

brutal face."[268] Assemblywoman Barbara Clark charged that the bill "was fathered by unbridled passion for revenge and mothered by the racist realization of whom the composite profile of the condemned would disproportionately resemble."[269] She dismissed the requirement of appellate review of capital sentences as a "counterfeit provision purporting to prevent racial bias verdicts," and characterized as an "Alice in Wonderland idea that private screening of potential death penalty jurors will compel those jurors to admit any and all racial bias and, therefore, prevent a conviction based on color."[270] Assemblyman Keith Wright urged, "We cannot ignore the harsh reality of the inherent racial bias that has existed in the administration of the death penalty, and we cannot allow this bias to become a principal part of the criminal justice system of this State."[271]

Other detractors railed against additional forms of arbitrariness invited by the proposed legislation. "I think that execution, the state willfully, calculatedly picking out but a few and killing them . . . is unworthy of New York as a civilized state," declared Senator Martin Connor. He added:

> [T]o just pick out a few for reasons totally extraneous to the quality of the crime, . . . because they're not wealthy, they're not popular, they're not well represented by counsel, they're not of a favored race or class and say, you—"Of all of the thousands of murders, you three will be executed, you one person will be executed" and if we don't mean . . . to use it at all as some states have, then why bother?[272]

Some questioned the absence of guidelines to regulate prosecutors' decisions to seek capital sentences.[273] Assemblyman William Scarborough, for example, argued that:

> [W]hether a person faces the death penalty or not turns on something as whimsical as the county in which the murder takes place. . . .
>
> Already here in New York one district attorney has vowed that he wants to be the first in the State to win a capital conviction. . . . So, what we are setting up is not equal justice, it

268. *Id.* at 1940.
269. 1995 Assembly Debate, *supra* note 27, at 151–52.
270. *Id.* at 151, 155.
271. *Id.* at 250.
272. 1995 Senate Debate, *supra* note 31, at 1862–63.
273. *See* 1995 Assembly Debate, *supra* note 27, at 133 (statement of Assemb. Susan John); *id.* at 242 (statement of Assemb. Peter Rivera); *id.* at 453 (statement of Assemb. Edward Sullivan).

> will not be applied equally, because what will happen is that people who commit the same heinous crime in that county will be more likely to be killed than somebody committing that same crime under the same circumstances in Manhattan where District Attorney Morgentha[u] has already stated his position on the death penalty.
>
> . . . And so justice is not blind or applied equally, but turns on factors such as the color of the victim and of the accused, the amount of money the accused has to spend on his or her defense and whether or not the district attorney wants to use the death penalty as a ticket to higher office or is aggressively in favor of execution. If this does not meet the definition of arbitrary and capricious justice, then I do not know what does.[274]

The legislators in 1995 could only argue in abstract terms about racial discrimination and arbitrariness threatening to infect the statute they were poised to enact because New York had no recent experience with the death penalty and had never attempted to implement it under a statute tailored to cure the deficiencies identified by the Supreme Court in *Furman*. But by the time the Assembly committees were considering whether to recommend reinstituting capital punishment in 2004–2005, data had been compiled about the administration of New York's death penalty law between September 1, 1995, when it first became effective, and its June 24, 2004 demise, when it was declared unconstitutional.[275] Professor David Baldus, the architect of the study of Georgia's death penalty system considered by the Supreme Court in *McCleskey v. Kemp*[276] as well as similar studies completed in other jurisdictions,[277] had examined the data and testified before the committees.

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274. *Id.* at 344–46.

275. *See, e.g.*, Capital Defender Office, Capital Punishment in New York State: Statistics from Eight Years of Representation (1995–2003), http://www.nycdo.org/caseload_031231_answers.html (discussing the status and resolution, if any, of the fifty-two death notice cases brought between September 1, 1995, and December 31, 2003 in New York State) (last visited Mar. 26, 2008).

276. *See supra* notes 261–62 and accompanying text (showing that capital punishment under Georgia's post-*Furman* death penalty law was reserved disproportionately for the murder of whites).

277. Professor Baldus explained to the Assembly Committees.

> I have conducted studies of the capital sentencing systems in the various states of the nation for the last 25 years. I've done, myself, with my colleague, George Woodworth, . . . extensive empirical studies in Georgia, Colorado, Maryland, Philadelphia and New Jersey, and I'm also familiar with the findings of other studies that have been done by other scholars in California, Illinois, Kentucky and Florida.

Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 197.

Emphasizing that his analysis was preliminary because it relied only on "unadjusted numbers" which "are not a basis to infer whether discrimination does or does not exist," he reported that "this evidence presents a prima [facie] suggestion that there may be a problem [of inconsistency and arbitrariness] in your system."[278] He noted a specific imbalance regarding the race of victim in potential capital cases. "The rate at which death notices are served [by prosecutors] is about three-and-a-half times higher" in first-degree murder cases with white victims than non-white victims.[279] Juries also were more likely to sentence offenders to death in white-victim cases.[280] He found no indication of bias against non-white offenders. In fact, owing to the primarily intraracial nature of criminal homicide (i.e., white offenders predominantly kill white victims, and non-white offenders primarily kill non-white victims) and the tendency of prosecutors and juries to favor the death penalty in murders involving white victims, black offenders appeared to be at a lower risk of being sentenced to death than white offenders.[281] "But again," he cautioned, "I don't have any controls here for the severity of these offenses, therefore, it's important for you to consider . . . the prospect of commissioning a study to examine how the system works."[282]

Baldus also commented on evidence of arbitrariness other than racial disparities. He noted that under the 1995 law there had been no executions and "only seven death sentences imposed," representing a "death sentencing rate [of] one percent" among death penalty–eligible (first-degree murder) cases.[283] This finding, he suggested, raised concerns about the arbitrary use of capital punishment similar to those identified by various justices in *Furman*.[284] He further noted discernible geographical differences in how the death penalty law had been utilized, with "downstate" prosecutors (those in and around New York City)[285] being significantly less inclined than their upstate counterparts to file death penalty notices, but more aggressive in pursuing a death sentence once such notice had been served.[286] He finally observed that the 1995 law lacked safeguards that

278. *Id.* at 199.
279. *Id.* at 200.
280. *Id.* at 201.
281. *Id.* at 201–03.
282. *Id.* at 203.
283. *Id.* at 199.
284. *Id.*; *see supra* notes 256–59 and accompanying text.
285. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 204. Professor Baldus included the following counties within the downstate region: Bronx, Queens, New York, Kings, Richmond, Nassau, Suffolk, Rockland, and Westchester. *Id.*
286. *Id.*

might have been effective in helping reduce the risk that race or other arbitrary factors would influence capital charging and sentencing decisions, including a process for centralized screening of prosecutors' charging decisions, narrowing the class of death-eligible murders, more refined jury instructions, and provisions for more discerning and comprehensive appellate review of capital sentences.[287]

Several other witnesses at the 2004–2005 public hearings spoke to issues of race and arbitrariness in the death penalty law's administration. Many opined that race discrimination was cultural and that the criminal justice system responsible for implementing the capital punishment law could hardly be insulated from those deeper, societal influences.[288] Others suggested where and how race might influence the capital punishment process, beginning with media portrayals of white-victim killings as especially horrific,[289] and continuing in prosecutors' charging decisions[290] and in the selection of jurors,[291] including the likelihood that many jurors would empathize more readily with white victims and process information relevant to their sentencing decisions differently depending on the race of victims and offenders.[292]

The disparities in capital charging policies among the sixty-two elected county prosecutors in the state inspired considerable discussion as well at the 2004–2005 public hearings. Retired New York Court of Appeals Judge Stewart Hancock observed:

> The political realities of having to run for elective office inevitably lead to situations where a defendant may be subject to

287. *Id.* at 207–12.

288. *See* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 4, 102 (statement of Dr. Delois Blakely, Community Mayor of Harlem; President, New Foundation; Chairperson, Harlem Women National) (asserting that race and wealth are more important to the outcome of capital cases than guilt or innocence); *id.* at 106 (statement of Liliana Segura, Campaign to End the Death Penalty) (stating that death row inmates are overwhelmingly poor and disproportionately black); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 195–96 (statement of Scott Christianson, author) (calling racism the greatest problem in society); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 145–46 (statement of Russell Murphy) ("[T]here is very little doubt that quiet discrimination will creep in."); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 103–04 (statement of Anthony Miranda) (identifying the "disparity in how law enforcement does address different crimes in different communities"); *id.* at 341–42 (statement of Edward Rodriguez) ("[T]here is ample empirical data of racial disparities in the criminal justice system.").

289. *See* Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 243–44 (statement of George Kendall, Esq., Holland & Knight) (explaining how media coverage may affect prosecutor's decisions in the capital punishment process).

290. *Id.* at 244.

291. *Id.* at 248–50; Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 343–47 (statement of Edward Rodriguez).

292. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 301–04 (statement of Sheri Johnson).

> the risk of a death sentence, not because of the nature of the crime, but because of the prosecutor's sensitivity to what may be perceived as a public outcry for retribution and justice.[293]

Schenectady County District Attorney Robert Carney acknowledged, but was not distressed by variation in different prosecutors' charging policies and the consequent geographic disparities in the death penalty law's administration:

> [U]nless it can be shown that a prosecutor has exercised his or her discretion in invidious or unlawful ways, how can one prosecutor's decision to seek death confer some right to escape a just and fair punishment meted out to another defendant? Must a fisherman release his catch because other fish escaped the net when it was brought to the surface?[294]

Professor Robert Blecker conceded that "[t]here is a huge county-by-county variability in this state" in using the death penalty law, and he asked, "Should there be?"[295] He further stated:

> This is a deep and difficult question because on the one hand, each district attorney is elected by his or her constituents of the county, and to that degree should reflect the values of their constituents. On the other hand, they are uniformly applying the New York penal law, at least in theory. . . .
>
> . . .To what degree do you want local control of government. To what degree do you want local opinion to count. To what degree do you want to impose uniform standards. We impose constitutionally uniform standards and state constitutional uniform standards, beyond that, we are leaving it to the good sense and discretion of each prosecutor and the good sense and discretion of each jury drawn from the community.
>
> Beyond that, I can't answer it. It's deep and difficult and it

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293. *Id.* at 72–73; *see also* Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 42–43 (statement of Mark Green, Former New York City Public Advocate; President, New Democracy Project) (questioning the constitutionality of having de facto differences in standards for execution among New York counties); *id.* at 120–21 (statement of Frederic Pratt) (explaining that the death penalty is sought frequently in some New York counties but not in others).

294. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 13 (statement of Robert Carney, Esq., District Attorney, Schenectady County).

295. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 77 (statement of Robert Blecker, Professor, New York Law School).

> seems to me, reasonable people disagree as to whether it's imposed uniformly or not.[296]

Three of the seven offenders sentenced to death during the nine-year reign of New York's 1995 death penalty law came from Long Island's Suffolk County. In contrast, only 2.6% of the state's arrests for first- and second-degree murders were made in Suffolk County during that same period.[297] Prosecutors in forty of the state's sixty-two counties, including New York County (Manhattan) (where approximately 13.3% of the arrests for first- and second-degree murders occurred), never filed a notice of intention to seek the death penalty.[298]

Stephen Dalsheim, a former corrections officer at Sing Sing Prison and formerly the Superintendent of Green Haven Prison, told the Committee members that in his experience,

> [the murderers] going to death row were not necessarily the worst of the worst. Some of the inmates at Green Haven had committed crimes far more hideous than some of those who went to Sing Sing's death row. One example I remember quite distinctly was a man who murdered a 9 year old boy. The dead boy was found hanging from a tree after he was sodomized.
>
> The man who committed the crime was allowed to plea to a lesser crime. [I] guess, the county wanted to avoid the very high expense of a death penalty trial. The murdered boy was black, his parents were drug [addicts]. In such cases there were [sic] no outpour, pouring of concern from the community. Oh, by the way, the offender was white.[299]

Mark Green, former New York City public advocate, left the Assembly committee members with the following observation:

> If the Supreme Court could strike down a Florida recount in Gore v. Bush [sic], because it violated equal protection for different counties to have different standards for vote counting, why is it [not] analytically a comparable violation of equal protection for 62 counties in New York effectively, to have 62 different standards for execution? I care about vote counting, but

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296. *Id.* at 77–78.

297. Capital Defender Office, Capital Case Processing by County: 9/1/95 Through 12/31/04, http://www.nycdo.org/caseload_041231_county_full.pdf (last visited Mar. 26, 2008).

298. *Id.*

299. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 17.

> I would assume that when the State is about to execute somebody, that is more important even than vote counting.[300]

3. Defense Counsel

The drafters of the 1995 New York death penalty legislation congratulated themselves "that there is probably not a bill in America that provides any more enhanced protection for the defendant as far as the defense attorney than this bill does."[301] With the creation of a well-funded, statewide Capital Defender Office,[302] staffed with experienced death penalty litigators, and supplemented by a system for the selective appointment of experienced, well-compensated, and qualified private counsel,[303] they indeed fashioned an admirable model for court-appointed trial counsel in capital cases.[304] Yet praise for the counsel provisions dwindled and yielded to criticism when attention turned from the trial to the legal representation afforded at later stages of review.

In particular, while the statute allowed for two trial counsel to be appointed, it required the appointment of only a single attorney on the appeal of capital convictions and sentences, and for the filing of state postconviction motions and their appeal.[305] Thereafter, the offender was on his or her own: no provision was made for court-appointed counsel.[306]

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300. *Id.* at 37, 42–43.

301. 1995 Senate Debate, *supra* note 31, at 1841 (statement of Sen. Dale Volker); *see id.* at 1946 (statement of Sen. John DeFrancisco) ("With the Capital Defenders Unit, I think it's very likely that there will be competent attorneys who are representing individuals charged with capital crimes."); *id.* at 1880 (statement of Sen. Stephen Saland) ("[T]hey're going to get some pretty damn good legal defense, because this bill is stacked to provide legal defense. . . ."); 1995 Assembly Debate, *supra* note 27, at 60 (statement of Assemb. Robert Straniere) ("[T]he very elaborate and extensive right-to-counsel provisions that are provided for, we believe, are unique and expansive.").

302. N.Y. JUD. LAW § 35-b(3) (McKinney 1995).

303. *Id.* § 35-b(5)(a).

304. *See* Acker, *supra* note 1, at 163–75 (describing the statutory powers of New York's Capital Defender Office); Zimring, *supra* note 3, at 317 (explaining how effective counsel can stalemate the death penalty process). *See generally*, Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1323 (1997) (noting that some states have established special public defender offices staffed with lawyers who specialize in capital defense practice and provide training for capital defense lawyers); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L. J. 315, 328–29 (2002) (identifying four components of a quality system of capital defense representation and noting New York as one example of such a system); Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1640–41 (1996) (discussing state provisions for indigent capital defendants).

305. N.Y. JUD. LAW § 35-b(2) (McKinney 1995).

306. *Id.* § 35-b(12).

> Nothing in this section shall be construed to authorize the appointment of counsel, investigative, expert or other services or the provision of assistance, other than

These perceived shortcomings dismayed several legislators. Assemblyman Roberto Ramirez charged:

> What we get today is a bill that does not provide appointed counsel for filing a Federal habeas corpus or for litigating a Federal habeas.
>
> All that this bill does today is to pay for trial counsel, appellate counsel and one round of post-conviction representation. But trial counsel, as we all know, has been required for capital cases since [*Powell*] *v. Alabama* in 1932,[307] and we all know that the appeal counsel has been constitutionally required since the 1960s.[308]
>
> . . . .
>
> . . . We have, in fact, gone backwards. Even in the worst states in this country, death penalty cases provide better than we have, but this bill says that the Court of Appeals would allow only one lead counsel except for good cause shown [for appeals] and at a time when no one in their right mind would accept the appointment of representing someone alone in a post-conviction case. That's exactly what we're requiring happen.
>
> We don't provide skilled lawyers for competency proceedings and this bill does not provide counsel for clemency.[309]

Matters had not improved in this regard in the ensuing decade. Hofstra

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> continuing legal education, training and advice, with respect to the filing, litigation, or appeal of a petition for a writ of habeas corpus in any federal court; nor shall anything in this section be construed to authorize the appointment of attorneys, investigative, expert or other services in connection with any proceedings other than trials, including separate sentencing proceedings, of defendants charged with murder in the first degree, appeals from judgments including a sentence of death, and initial [state postconviction] motions . . . and any appeals therefrom.

Id.

307. Powell v. Alabama, 287 U.S. 45, 73 (1932).

308. *See, e.g.*, Douglas v. California, 372 U.S. 353, 357–58 (1963) (providing that the inability of the poor to obtain a meaningful appeal due to lack of counsel violated the Fourteenth Amendment).

309. 1995 Assembly Debate, *supra* note 27, at 170–72 (internal citations added); *see also* 1995 Senate Debate, *supra* note 31, at 1927–30 (statement of Sen. Catherine Abate) (discussing the need for adequate counsel throughout criminal proceedings, including the appeals process, due to the adversarial nature of the process); *id.* at 1901–04 (statement of Sen. David Paterson) (recommending adjustments to the bill regarding inmate's counsel).

Law School Professor Eric Freedman painted a gloomy picture before the Assembly committees during his testimony in 2004. He warned the committee members that if the invalidated statute were simply reenacted in its original form, its provisions for appointment of counsel for postconviction review in capital cases would unquestionably fail to comply with minimal American Bar Association standards.[310] Moreover, he warned, "the validity of any death sentences or convictions that may be obtained under it" would be "at substantial legal risk."[311] He also found it regrettable that an offender condemned under the statute had no right to court-appointed counsel to pursue executive clemency. "[T]o put together a full clemency package, particularly one that indicates all the areas in which the legal proceedings were not sufficient to illuminate the underlying truth because of procedural obstacles and so forth, is itself a serious job for counsel."[312]

Kathryn Kase also argued to the Assembly committee members that not all was right at the trial level regarding court-appointed counsel. "New York started with some of the highest capital defense fees in the nation" for private counsel appointed in capital cases, "and it attracted . . . some of the best criminal defense lawyers around the state, even in New York City, to this work. And yet, the legislature did nothing when the Court of Appeals slashed those fees."[313] Her reference was to the fact that compensation rates for lead and associate court-appointed counsel in capital cases were, respectively, $175 per hour and $150 per hour when they were initially established in 1995.[314] However, three years later the Court of Appeals reduced those fees to $125 per hour and $100 per hour, respectively.[315] When that action was taken, Jonathan Gradess, the Executive Director of the New York State Defenders Association, forecast, "I think this is going to drive away quality lawyers, and I think this is going to put defendants at risk. This is going to create a crisis in the death penalty where none existed."[316] The Legislature acquiesced in the court's reduction of appointed trial counsel's compensation and the fees remained at the reduced level through the time of the statute's invalidation in 2004.

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310. Dec. 15, 2004 *Public Hearing*, *supra* note 43, at 215 (insisting that the provisions for postconviction death penalty representation in the invalidated New York statute do not meet ABA requirements).

311. *Id.* at 228.

312. *Id.* at 222.

313. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 243.

314. Acker, *supra* note 1, at 174.

315. David C. Leven, *Justice for the Forgotten and Despised*, 16 TOURO L. REV. 1, 3–4 & n.9 (1999).

316. Alan Finder, *New York's Highest Court Cuts Fees for Defense Lawyers in Death Penalty Cases*, N.Y. TIMES, Dec. 24, 1998, at B5.

4. The Capital Jury

The 1995 death penalty legislation required that jurors be both "death qualified" and "life qualified" to be seated in capital cases—i.e., that they not entertain "such conscientious opinions either against or in favor of [capital] punishment as to preclude [them] from rendering an impartial verdict or from properly exercising the discretion conferred upon [them] by law in the determination of a sentence."[317] It further provided for individualized, sequestered voir dire to allow attorneys to explore potential jurors' views about capital punishment, and included a specific provision permitting the lawyers to examine "without limitation the possibility of racial bias on the part of the prospective juror."[318] Both the prosecution and defense were allowed twenty peremptory challenges.[319] The law additionally allowed the trial judge to discharge the guilt-phase jury following a defendant's conviction for first-degree murder and empanel a new sentencing jury "in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party."[320]

The jury provisions of the death penalty law received modest discussion during the 1995 legislative debate. Assemblyman Nick Perry expressed concerns "that the death qualification process might disproportionately exclude women and certain racial, ethnic groups from serving on juries,"[321] a concern consistent with empirical research evidence then available.[322] He did not press the issue when Assemblyman Eric Vitaliano assured him that "current law protects against such discrimination and our Court of Appeals has so held."[323] Neither legislator could have known that, seven years later, the Court of Appeals would reject a challenge based on this very contention while reviewing a death sentence imposed under the statute by a death-qualified jury.[324]

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317. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 1995). *See generally* Morgan v. Illinois, 504 U.S. 719, 726 (1992) (discussing the life qualification); Wainwright v. Witt, 469 U.S. 412, 424 (1985) (establishing the standard for when jurors may be excused for cause based on their views of capital punishment).

318. N.Y. CRIM. PROC. LAW § 270.16(1) (McKinney 1995).

319. *Id.* § 270.25(2).

320. *Id.* § 400.27(2).

321. 1995 Assembly Debate, *supra* note 27, at 17.

322. *See* Acker, *supra* note 1, at 153 & nn.457–58 (presenting statistics on the effect death qualification has on the composition of juries); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) ("[T]he practice of death qualification threatens the representativeness of the jury by discriminating more heavily against some demographic groups than others: a fifth of the women and a quarter of the black jurors are forbidden to serve.").

323. 1995 Assembly Debate, *supra* note 27, at 17.

324. *See* People v. Harris, 779 N.E.2d 705, 717–19, 729 (N.Y. 2002) (discussing the standard

Although he might have, Assemblyman Perry did not raise the issue of whether the death-qualification process produces juries that are more prone to convict defendants and convict them of more serious charges, than juries that have not been purged of individuals whose personal scruples would interfere with their willingness to consider sentencing an offender to death. The statutory provision authorizing individualized, sequestered voir dire of potential jurors in capital cases would, in principle, help minimize the potentially prejudicial effect of jurors repeatedly hearing the lawyers question prospective panel members about punishment issues, thereby risking creating the impression that the defendant's guilt was a foregone conclusion.[325] But the systematic exclusion of individuals from capital juries who hold strong views against the death penalty still risked creating a conviction-prone jury because those who survive the death-qualification process tend to have a stronger crime control orientation than individuals who are not death qualified.[326] Nearly a decade earlier, the United States

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for determining when a juror should be excluded pursuant to CPL 270.20(1)(f)).

325. *See* Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 136 (1984) (explaining that the initial stages of a capital trial give way to an "implication of guilt" because of the amount of time and energy spent discussing the penalty phase with the potential jurors and the repeated language used by court personnel inferring guilt); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122–29 (1984) (asserting that jurors who are seated in a capital case may have "certain expectations and preconceptions . . . about the legal case that is to follow," such as an increased belief in guilt of the defendant, because the voir dire questioning during the death-qualification process repeatedly exposes jurors to death penalty questioning).

326. *See* Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 55 (1984) (stating that the use of death qualification can lead to a conviction-prone jury because "research has consistently found that those who favor the death penalty are likely to favor the prosecution, relative to those who oppose the death penalty"); Fitzgerald & Ellsworth, *supra* note 322, at 34 (asserting that "death-qualified jurors should be more favorable toward crime control values and the prosecution point of view than the jurors who are excluded from capital juries"); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 111 (1984) (stating that "death-qualified jurors are more conviction prone than excludables" because "death-qualified jurors perceive conflicting, ambiguous testimony in a way that follows the prosecution's version of the events," and they "do not show the excludables' tendency to regard conviction of the innocent as a more regrettable error than acquittal of the guilty"). These potentially biasing effects of death-qualification are unlikely to be counterbalanced by the life-qualification of capital juries, i.e., by the exclusion of the typically much smaller numbers of individuals whose strong pro–death penalty views would dispose them automatically to vote for death. *See* Joseph B. Kadane, *After* Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115, 119 (1984) (evaluating statistical evidence of the effect of the selection process in capital cases on potential jurors and concluding that "the procedure of death qualification biases the jury pool against the defense," despite the exclusion of those potential jurors who would "always" vote for the death penalty). *See generally*, Acker, *supra* note 1, at 154 (describing death-qualified juries as more prone to convict than other juries); Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT,

Supreme Court had not been persuaded that the death qualification of capital juries interfered with jurors' impartiality,[327] nor would the New York Court of Appeals be sympathetic to this claim when it was made after the statute's enactment.[328]

The primary skepticism expressed about capital juries during the 1995 legislative debates involved their susceptibility to being influenced by impermissible racial considerations.[329] Defenders of the bill cited the provision that authorized attorneys to interrogate potential jurors about racial biases they might harbor,[330] and noted that the Supreme Court had outlawed racially motivated peremptory challenges.[331] Other legislators were not as sanguine about the law's ability to trump deep-seated racial prejudices.[332]

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supra note 41, at 385 (discussing the evolution of case law governing jury selection, concluding that result of the death qualification process, although well-intentioned, can be juries more conviction prone, less concerned with due process, and more inclined to believe the prosecution).

327. *See* Lockhart v. McCree, 476 U.S. 162, 184 (1986).

> But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Id.

328. *See Harris*, 779 N.E.2d at 719 ("Where jurors express conscientious views concerning the death penalty yet still make clear that they are able to follow their oaths to act impartially, they cannot be excluded for cause from participating on the jury.").

329. *See, e.g.*, 1995 Senate Debate, *supra* note 31, at 1896 (statement of Sen. David Paterson) ("[W]e come to the question of the jury selection and the establishment of those guidelines that make sure that those individuals who happen to be minority will be eligible to serve on juries in [capital] cases in spite of the fact that prosecutors have the tendency to strike them . . . ."); 1995 Assembly Debate, *supra* note 27, at 155 (statement of Assemb. Barbara Clark) (stating that she cannot support any death penalty bill because it has "the potential to disproportionately imperil people of color").

330. *See* N.Y. CRIM. PROC. LAW § 270.16(1) (McKinney 1995) (permitting attorneys—through the use of individualized, sequestered voir dire—to examine "without limitation the possibility of racial bias on the part of the prospective juror"); 1995 Senate Debate, *supra* note 31, at 1841–42 (statement of Sen. Dale Volker) (explaining provisions that provide for questioning of jurors by judge); *id.* at 1883–84 (statement of Sen. Stephen Saland) (praising "the separate mechanism for voir dire to determine racial bias among prospective jurors"); 1995 Assembly Debate, *supra* note 27, at 59 (statement of Assemb. Robert Straniere) (describing the procedural change that requires the district attorney to declare their intent to pursue the death penalty "because there have been serious concerns raised about consequences on a racial basis of jury determinations").

331. 1995 Senate Debate, *supra* note 31, at 1884 (statement of Sen. Stephen Saland) (stating that the U.S. Supreme Court and New York state courts have outlawed peremptory challenges based on race); 1995 Assembly Debate, *supra* note 27, at 86 (statement of Assemb. Stephen Kaufman); *see also* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (holding that when a timely objection is made, a prosecutor must explain his action of removing "all black persons on the venire"); Miller-El v. Dretke, 545 U.S. 231, 231 (2005) (invalidating capital murder conviction because of *Batson* violation).

332. *See* 1995 Assembly Debate, *supra* note 27, at 155 (statement of Assemb. Barbara Clark) ("I would have to explain how and why on the day the laborer died because he could not afford a third

The discussion during the 2004–2005 public hearings about capital juries included new considerations. The potentially prejudicial effects of death-qualification received mention,[333] as did problems associated with racially discriminatory peremptory challenges.[334] Yet almost in passing, committee members' attention was directed to costs attendant to impaneling a capital jury. In response to a question about how long it took to complete the capital trial of James Cahill, Onondaga County District Attorney William Fitzpatrick explained, "The trial was, from opening statement to verdict . . . two weeks. The jury selection was just short of five months."[335] Subsequently, while explaining why capital punishment systems typically require such extensive resources, Richard Dieter described the five-month jury selection in Cahill's trial as "long, but it's not unheard of."[336]

Over the course of the five public hearings conducted in 2004–2005, committee member Daniel O'Donnell repeatedly quizzed witnesses about a conundrum concerning capital trials that troubled him. On at least three separate occasions he posed variations of the following question:

> When I was a trial practitioner, often times juries and judges would tell me that they expressed a great deal of anger at my clients because they were not remorseful. And I was always perplexed by judges about how I could argue to a jury and to a judge the innocence of my client at the same time appearing remorseful. How can you be remorseful for something that you are arguing they are not responsible for? So can someone please address the dichotomy between having a jury that is sitting in judgment and the client who [may be] maintaining his innocence and the defense counsel's role as trying to pick apart a prosecution's case to maintain innocence at the same time that same group of people are now going to have to turn around and want behavior from you and from a client, who you've spent the last three months maintaining didn't commit the crime?[337]

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appeal, the banker purchased one and lived on."). *See generally* 1995 Senate Debate, *supra* note 31, at 1859 (statement of Sen. Martin Connor) (discussing inequities in the capital punishment system including race); *id.* at 2004 (statement of Sen. Pedro Espada, Jr.) (stating that the new law "will not remove the taint of racism"); *id.* at 1984 (statement of Sen. Mary Ellen Jones) ("Well, I certainly believe that racial issues are going to be a factor [in capital punishment decisions]."); 1995 Assembly Debate, *supra* note 27, at 33–34 (statement of Assemb. Deborah Glick) (stating that the death penalty "cannot and [] will not eliminate bias"); *id.* at 248 (statement of Assemb. Keith Wright) (referencing studies concluding that the death penalty is "targeted towards African-Americans").

333. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 159–60 (statement of Colleen Brady).

334. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 249 (statement of George Kendall, Esq., Holland & Knight).

335. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 33.

336. *Id.* at 232.

337. Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 209–10; *see also* Feb. 11, 2005 *Public*

Not surprisingly, each of the witnesses to whom the question was addressed acknowledged, but was unable to resolve, the dilemma embodied in Assemblyman O'Donnell's question.[338]

Perhaps the most noteworthy new jury-related issues raised during the 2004–2005 public hearings concerned the research evidence produced by the Capital Jury Project, an ambitious study encompassing lengthy and detailed interviews with more than 1200 people who had made life and death decisions as capital jurors in fourteen states.[339] Dr. William Bowers highlighted the major research findings,[340] which suggested "seven areas in which the death penalty is failing to meet the constitutional mandates of the Supreme Court, about the way jurors are supposed to deal with or handle the . . . [capital sentencing] decision process."[341] He explained these "seven areas" as follows:

> Number one: We found that half of the jurors reported that they believe they knew what the punishment should be during the guilt stage of the trial. . . .
>
> . . . .
>
> The second and related point is we asked them a question that said: "For the following types of murder, do you believe the . . . death penalty is the only acceptable punishment, is sometimes acceptable, or is unacceptable?"
>
> . . . .

Hearing, *supra* note 52, at 126–27 (question of Assemb. Daniel J. O'Donnell) (asking Frederic Pratt, a staff attorney for the Legal Aid Society, to comment on the difficulty of changing tactics during sentencing); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 119–20 (question of Assemb. Daniel J. O'Donnell) (asking Professor James Acker to comment on the contradictions of proclaiming innocence and projecting remorse).

338. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 4, 127 (statement of Frederic Pratt, Staff Attorney, Capital Division, New York City Legal Aid Society) (asserting that higher penalties are imposed on criminal defendants who go to trial); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 120–23 (statement of Professor James Acker); Jan. 21, 2005 *Public Hearing*, *supra* note 53, at 210–11 (statement of Professor Ursula Bentele).

339. *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995) ("[T]he Capital Jury Project . . . is a multidisciplinary study of how capital jurors made their life or death sentencing decisions.").

340. *See also* Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 285–94 (statement of Prof. Steve Garvey) (describing his findings regarding confused juries and legally unqualified jurors in capital cases).

341. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 210–11 (statement of Professor William Bowers).

> . . . [H]alf or more said that death was the only acceptable punishment, instead of that it's sometimes acceptable or unacceptable.
>
> . . . .
>
> . . . The third point is about understanding jury instructions. . . .
>
> . . . .
>
> . . . [T]hese jurors, 50 percent or more fail to understand the rules, the guidelines for how mitigation should be considered.
>
> . . . Number four . . . there were some decisions of the Court . . . that made it clear that the law could not require that the death sentence be imposed. . . .
>
> . . . .
>
> . . . [T]here is an utter failure to recognize or understand on the part of jurors . . . [t]hat under no circumstances does the law require a death sentence.
>
> . . . .
>
> . . . [Point number five concerns r]esponsibility for imposing the death sentence.
>
> . . . .
>
> 15 percent, less than 20 percent of these folks could see themselves individually, or as jurors, as foremost responsible for the punishment.
>
> Number six . . . we asked how long would a defendant not given the death sentence usually spend in prison before returning to society? In every state the jurors said the defendant would usually be back in society sooner than the law permits them to become eligible for parole consideration.
>
> . . . .

> . . . Point seven is race and racism. [Several important attitudinal differences emerged between black and white jurors, particularly in cases involving black offenders and white victims, including in their perceptions regarding offenders' remorse, future dangerousness, and whether jurors harbored lingering doubt about offenders' guilt.][342]

These research findings were not available when the New York Legislature debated whether to return capital punishment to the state in 1995. Dr. Bowers observed that the involved constitutional doctrine developed by the Supreme Court and embodied in modern capital sentencing statutes to respond to the vices identified by the justices in *Furman* amounted to little more than "legal fiction,"[343] if capital jurors were not, and perhaps were not capable of, applying those rules in practice. "Sometimes we border on fooling ourselves," offered another witness, "that the very elaborate legal rules that have been designed to govern death penalty cases in fact are effective."[344]

CONCLUSION: LESSONS FOR VERMONT?

Between 1995, when their state enacted a death penalty statute after not having one for more than a generation, and 2004, when the New York Court of Appeals invalidated the law on state constitutional grounds, New Yorkers invested millions of dollars and an incalculable amount of time and effort in an enterprise that vexed many and ultimately benefited no one. Following the public hearings sponsored in 2004–2005 by the State Assembly's Committees on Codes, Judiciary, and Correction, a bill passed by the State Senate that was designed to repair and revive the flawed statute foundered and died when the Assembly took no action on it. New York thus rejoined Vermont and eleven other states that make no use of capital punishment; a group that soon expanded to include New Jersey, which

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342. *Id.* at 211–23. *See generally*, William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 41, at 413 (analyzing Capital Jury Project data and revealing that many jurors in the sentencing stages of capital murder trials do not arrive with an open mind); William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497 (2004) (using data from the Capital Jury Project to analyze the effect of race in capital sentencing); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 174–75 (2001) (questioning the role that race plays in capital punishment sentencing).

343. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 220 (statement of Prof. William Bowers).

344. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 120–21 (statement of Prof. James Acker).

rescinded its death penalty statute at the end of 2007.[345]

Whether Vermont might glean lessons from New York's recent experience with capital punishment, as some within its borders urge revival of its own long moribund law, is an open question. Vermont has a unique history, tradition, and legal culture, and distinctive demographics. It has particular fiscal and political considerations, and its own problems with crime. It differs in many other ways from its neighbor to the west. Vermonters may doubt the relevance of New York's most recent flirtation with the death penalty to their own circumstances, if for no other reason than simply because Vermont is not New York.

An analogous objection to extrapolating from other states' experiences with the death penalty was made during New York's Assembly committee-sponsored public hearings in 2004–2005. New York, witnesses took pains to observe, is not Texas;[346] it is not Alabama;[347] it is not Florida;[348] and it is not Illinois.[349] Then came the testimony of Kathryn Kase, a native New Yorker who had left her Albany law practice in 2002 to join the Texas Defender Service in Houston. "I've seen both the New York and the Texas capital punishment systems in operation," she explained. "And I'm here to tell you that they're more alike than you might think."[350] Ms. Kase further explained:

> You think about Texas, you think about Houston, where I live, and you think about Joe Cannon, the sleeping lawyer, who slept through his client, Calvin Burdine's capital murder trial.[351] Or perhaps you've heard about Joe Benn, who after his client was sentenced to death, told the Houston Chronicle that capital murder trials were boring.[352]

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345. Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N. Y. TIMES, Dec. 18, 2007, at B3.

346. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 4, 132 (statement of James Rogers, President, Association of Legal Aid Attorneys); Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 11–12 (statement of Robert Carney, Esq., District Attorney, Schenectady County); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 36 (statement of William Fitzpatrick, District Attorney).

347. Feb. 11, 2005 *Public Hearing*, *supra* note 52, at 132 (statement of James Rogers).

348. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 11–12 (statement of Robert Carney, Esq., District Attorney, Schenectady County).

349. Feb. 8, 2005 *Public Hearing*, *supra* note 51, at 11–12 (statement of Robert Carney, Esq., District Attorney, Schenectady County); Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 36 (statement of District Attorney William Fitzpatrick).

350. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 239.

351. *See* Burdine v. Johnson, 262 F.3d 336, 350 (5th Cir. 2001) (en banc), *cert. denied sub nom.* Cockrell v. Burdine, 535 U.S. 1120 (2002) (affirming grant of habeas corpus relief on a claim that the petitioner had received ineffective assistance when his counsel had slept through portions of the trial).

352. John Makeig, *Asleep on the Job: Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug.

> You might think New York is not like that. Surely we have higher standards. That's not true. In People v. Tippins in 1991, the second department said that the standards in New York for effective assistance of counsel aren't violated when a lawyer sleeps through all or part of a trial.
>
> And in fact, the Court of Appeals did not overturn that decision. . . .[353]
>
> New York is like Texas in that it does not forbid the execution of folks with mental retardation. Here, the law states specifically that if a person with mental retardation kills a correctional officer, that person can be sentenced to death . . . .[354]
>
> . . . .
>
> New York and Texas also share the dubious distinction of being unable to fairly and consistently administer the death penalty. Harris County, Texas, which is Houston, . . . was responsible for the death sentences of 79 of the 337 people who have been executed in Texas.
>
> Today, 159 of the 447 people on Texas' death row were sent there by Harris County juries. But Harris County cannot compare to Suffolk County, New York, which even today is responsible for half the folks on New York's death row, and was responsible for that before the New York Court of Appeals rule[d].[355]
>
> And if you look where capital prosecutions have occurred in New York, you're going to find that they occur far more in the

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14, 1992, at A35; *see also* McFarland v. State, 928 S.W.2d 482, 483 (Tex. Crim. App. 1996) (holding that defendant's lead counsel had provided effective assistance despite sleeping through parts of trial), *cert. denied*, 519 U.S. 1119 (1997), *abrogated by* Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998); Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 18–19 (1997) (discussing the incompetence of the trial lawyer in *McFarland*).

353. People v. Tippins, 570 N.Y.S.2d 581, 582 (N.Y. App. Div. 1991), *leave to appeal denied*, 581 N.E.2d 1069 (N.Y. 1991), *cert. denied*, 502 U.S. 1064 (1992), *order vacating conviction on habeas corpus aff'd*, Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996).

354. *See* N.Y. CRIM. PROC. LAW § 400.27(12)(d) (McKinney 2004) (stating that a defendant charged with first-degree murder, who was in a correctional facility at the time of the murder, cannot have that sentence "set aside . . . upon the ground that the defendant is mentally retarded").

355. *See supra* text accompanying note 285–86 (discussing prosecutorial discretion between counties in New York).

> more populous counties, which mirrors the Texas experience.[356]
>
> . . . .
>
> New York has the same geographical disparity going on. . . .[357]
>
> . . . .
>
> And even where New York has set itself apart from states like Texas in administering capital punishment, I fear that this state, my native state, becomes more like Texas everyday, particularly in the way that capital defense services are provided.[358]
>
> . . . .
>
> . . . [Y]ou may say Houston is different, Texas is different. It is not that different. It began not so long ago thinking that it could enact a just and fair capital punishment system. It has not.
>
> . . . .
>
> . . . Don't follow our example. Choose life.[359]

And thus, while Vermont is not New York, many attributes of capital punishment transcend jurisdictional boundaries and defy even the most carefully designed laws. There is little reason to believe that the threat of execution deters potential murderers more effectively than life imprisonment, or that murder victims' survivors reap benefits from the capital sanction. Conversely, there is abundant evidence that the death penalty is substantially more expensive than life imprisonment without parole, an alternative punishment that protects society against dangerous offenders yet lacks the irrevocability of executions when wrongful convictions, race discrimination, arbitrariness, ineffective assistance of counsel, and essentially lawless juries threaten the integrity of capital

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356. *See supra* text accompanying notes 285 (comparing prosecution rates in upstate and downstate New York).

357. *See supra* notes 293–98 and accompanying text (discussing capital sentencing disparities among counties in New York).

358. *See supra* notes 309–10 and accompanying text (expressing concern that appointment of counsel for postconviction review in capital cases would not comply with American Bar Association standards).

359. Jan. 25, 2005 *Public Hearing*, *supra* note 52, at 239–47.

sentences.

During the 1995 debate on New York's death penalty bill, Senator Martin Connor observed, as it later turned out, with remarkable prescience:

> I suspect, to the public, the death penalty is one of those measures that looks a lot better when you don't have it than when you have it. It looks a lot better as a way to speak out in frustration at crime, at murder and mayhem in society, and after you have the death penalty for a while and it's used—and New York once upon a time led the nation in using the death penalty in actually executing prisoners—after you see the parade of death officially done by the state, it doesn't look so good to the public anymore, because invariably, the somewhat freakish, arbitrary nature of the ultimate irreversible penalty becomes apparent.[360]

Although Vermont is not New York, these are words that Vermonters who are tempted to resurrect capital punishment in their state well may wish to heed.

360. 1995 Senate Debate, *supra* note 31, at 1857.