

1995

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Recommended Citation

Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J. L. & Pol'y (1995).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol4/iss1/8>

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DEATH-DEFYING FEATS: STATE CONSTITUTIONAL CHALLENGES TO NEW YORK'S DEATH PENALTY

Mary R. Falk* & Eve Cary**

While this court has the power to correct constitutional or other errors retroactively by ordering new trials for capital defendants whose appeals are pending or who have been fortunate enough to obtain stays of execution or commutations, it cannot of course, raise the dead.¹

It is the Supreme Court's function to define the limits of what states can do, not what they should do. Focusing on the outer limits of state power averts attention from the inner question: What is the proper exercise of criminal procedure? The real question for us is not what the State can do, but rather what we should do. . . .²

INTRODUCTION

What follows is an essay in several senses: "an experiment," "a rehearsal," "a first tentative attempt at learning."³ It is not a

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¹ Suffolk Dist. Attorney v. Watson, 411 N.E.2d 1274, 1282 (Mass. 1980), *superseded by statute as stated in* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984).

² State v. Ramseur, 524 A.2d 188, 295 (N.J. 1987) (O'Hern, J., concurring).

³ NEW SHORTER OXFORD ENGLISH DICTIONARY 851 (4th ed. 1993).

traditional law review article, in that it does not present a completed body of research and conclusions drawn from it; rather, this is ultimately a call for research.

From the moment it began to seem that New York again would have capital punishment legislation, it was clear to any prosecutor or member of the criminal defense bar—given the United States Supreme Court's "deregulation"⁴ of capital punishment—that only the New York State Constitution, and thus our court of appeals, stood between us and the death penalty. Would the court of appeals strike down the new statute as *per se* unconstitutional? Or would it find that specific provisions violated the state constitution? Surely, constructing arguments and counter-arguments, perhaps even predicting the court's conclusions, could not be all that difficult. Surely, it should be possible to measure the new law against what we know of the court's state constitutional jurisprudence and reach reasoned conclusions, analogizing to the decisions of other state courts presented with similar issues.

But educated guessing—let alone guessing correctly—is almost impossible here, rather like being asked to speak a language that has not yet been invented.⁵ This is so first of all because, as the

⁴ Since the early 1980s, the Supreme Court has regularly rejected challenges by death row inmates. *See, e.g.,* Callins v. Collins, 114 S. Ct. 1127 (1994) (allowing the states great freedom in death penalty matters).

The term "deregulation" was coined by Robert Weisberg. *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1983).

⁵ The least fruitful research tool here is the grapevine—knowing the judges' personal convictions about the death penalty would be of little use. One of the most powerful expressions of personal abhorrence of the death penalty is contained in then-Chief Judge Charles Breitel's dissent from a decision striking down New York's former death penalty. In *People v. Davis*, Judge Breitel wrote:

I find capital punishment repulsive, unproven to be an effective deterrent . . . unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction.

43 N.Y.2d 17, 39, 371 N.E.2d 456, 468, 400 N.Y.S.2d 735, 747-48 (1977). More recently, in a law review article Judge Joseph Bellacosa expressed misgivings about the death penalty, but he warned readers to draw no conclusions about his position. *See* Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty*:

Supreme Court has recognized, death is "different" from all other punishments.⁶ It is, therefore, not possible to analogize capital punishment issues to any other area of the law. Further, it is unclear what method of state constitutional adjudication the court of appeals will use.⁷ And no matter what method the court adopts, the resolution of many death penalty issues requires reliance on highly specialized research, much of it empirical and non-traditional, and most of it yet to be undertaken. Finally, the experience of other states is not very useful because of textual differences in state constitutions and capital punishment statutes, and because so many death penalty issues turn on evidence that is not only empirical, but local as well.

All we can do here is to try to see what general shape some death penalty issues might take in New York courts. To that end, in part I we provide a brief summary of the capital punishment jurisprudence of the United States Supreme Court; in part II we detail the history and methodology of state constitutional adjudication; and in part III we examine constitutional challenges to the death penalty in other states. In part IV, we then analyze just a few of the challenges we believe likely to come before the New York Court of Appeals, and we identify areas where further research is needed.

We reach just one practical conclusion, which is that potential challenges are numberless, a vast empty space on the map. The challenges we anticipate in this essay—*per se* and facial challenges to the statute—may account for only a small part of the challenges eventually raised. Several factors conjoin to multiply the issues. First, the door to the federal courts is all but closed and the reach of the state constitution unknown.⁸ Second, capital prosecutions are procedurally complex and the opportunities for error are endless. The Supreme Court's paradoxical requirement that capital

"*Old Sparky's*" *Jolt to the Legal Profession*, 14 PACE L. REV. 1, 2 (1994).

⁶ See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357 (1977). The penalty of death is different, of course, because it is "severe beyond rectification." *Ramseur*, 524 A.2d at 303 (Handler, J., dissenting).

⁷ See *infra* part II.

⁸ See James R. Acker & Elizabeth A. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1301 (1989).

prosecutions be at once consistent and individualized is in itself a bottomless pit of potential error. And finally, because death is fundamentally different from all other sentences, any issue that can be colorably framed in state constitutional terms will be raised. In short, litigators and judges—in particular the judges of the court of appeals—have their work cut out for them.

Finally, in the course of this project we have come to believe that even people who are not opposed to the death penalty itself may reasonably conclude that New York's new statute should be stricken as unconstitutional on two grounds that seem unassailable. First, imposition of the death penalty under the new statute appears plainly to violate both the federal and state constitutions because the statute permits defendants to escape the risk of a death sentence by pleading guilty to capital murder as charged.⁹ This provision improperly burdens the right to a jury trial and the guarantee against compelled self-incrimination by effectively making their exercise punishable by death.¹⁰

Second, anyone who becomes fully familiar with death penalty jurisprudence is likely to come to agree with Justice Alan Handler of the New Jersey Supreme Court that the death penalty eventually reveals itself to be unconstitutional in practice, even if we begin by believing it to be constitutional in principle.¹¹ This is so because it is not humanly possible to devise procedures for its fair imposition—procedures that adequately take into account the stunning “moral fact”¹² that death is different from all other punishments.

⁹ Death Penalty—Imposition and Procedures—Assignment of Counsel [hereinafter Death Penalty Act] § 10, 1995 N.Y. LAWS 1, 4 (amending N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1993)); Death Penalty Act § 11, 1995 N.Y. LAWS at 4 (amending N.Y. CRIM. PROC. LAW § 220.30(3)(b)(vii) (McKinney 1993)).

¹⁰ *United States v. Jackson*, 390 U.S. 570, 583 (1968). *See infra* part IV.B.1.

¹¹ *See, e.g., State v. Bey*, 645 A.2d 685, 732 (N.J. 1994) (Handler, J., dissenting); *State v. Ramseur*, 524 A.2d 188, 373 (N.J. 1987) (Handler, J., dissenting).

¹² *Bey*, 645 A.2d at 731-32 (Handler, J., dissenting).

I. THE DEATH PENALTY AND THE FEDERAL CONSTITUTION

To understand the importance of the role of state constitutions in the area of capital punishment, a brief overview of the Supreme Court's pronouncements on the Federal Constitution's applicability to the death penalty is necessary. The starting point is *Furman v. Georgia*¹³ which was decided in 1972. While *Furman* was not the decision that opponents of the death penalty had hoped for, because the Court did not find capital punishment a *per se* violation of the Constitution, it did have the effect of striking down the death penalty statutes of thirty-nine states and various federal statutory provisions, as well as vacating the death sentences of over six hundred condemned prisoners.¹⁴ The Court announced its decision in a brief, *per curiam* opinion, holding simply that "the imposition and carrying out of the death penalty in [the cases before the Court] constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁵ All nine Justices wrote separate opinions. Justices William Douglas, William Brennan, Potter Stewart, Byron White and Thurgood Marshall concurred; Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell and William Rehnquist dissented.¹⁶

While only Justices Brennan and Marshall found the death penalty to be *per se* unconstitutional, all of the concurring Justices agreed that the death penalty as applied under the challenged statutes violated the Eighth and Fourteenth Amendments because "[j]uries (or judges, as the case may be) [had] practically untrammelled discretion to let an accused live or insist that he die,"¹⁷ and

¹³ 408 U.S. 238 (1972).

¹⁴ *Id.* at 417 (Powell, J., dissenting).

¹⁵ *Id.* at 239-40.

¹⁶ Justices Lewis Powell and Harry Blackmun subsequently changed their minds. Justice Powell has "come to think that capital punishment should be abolished." John C. Jeffries, Jr., *A Change of Mind That Came Too Late*, N.Y. TIMES, June 23, 1994, at A1. Justice Blackmun recently wrote that he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed." *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of *certiorari*).

¹⁷ *Furman*, 408 U.S. at 248 (Douglas, J., concurring).

because there was no meaningful basis for distinguishing the few cases in which the death penalty was imposed from the many cases in which it was not.¹⁸ They concurred in Justice White's conclusion that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."¹⁹

Thus, the opinion in *Furman* established the principle that, in order for a capital punishment statute to be constitutional, it must at least insure both that the death penalty is imposed consistently and that it is individualized. Consistency is achieved by the narrowing of the class of cases in which death may be imposed; individualization is achieved by legislatively guiding the sentencing authority in selecting the persons within the class on whom the death penalty should be imposed.

Although many were hopeful that *Furman* would effectively end capital punishment in the United States, a number of state legislatures reacted to the decision by attempting to draft statutes that would avoid the arbitrariness in the imposition of the death penalty that the Supreme Court had condemned.²⁰ One of the first post-*Furman* statutes to reach the Supreme Court was Georgia's.²¹ In *Gregg v. Georgia*,²² the Supreme Court finally rejected the argument first raised in *Furman* that contemporary standards of decency had evolved to a point where capital punishment could no longer be tolerated.²³ On the contrary, the Court said, "the punishment of death does not invariably violate the Constitution"²⁴ and is "not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the

¹⁸ *Id.* at 248 (Douglas, J., concurring).

¹⁹ *Id.* at 310 (White, J., concurring).

²⁰ See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 145 (1986).

²¹ GA. CODE ANN. §§ 17-10-30 to -10-35 (1990).

²² 428 U.S. 153 (1976).

²³ *Id.* at 173.

²⁴ *Id.* at 169.

character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”²⁵

The Court then went on to examine the procedures necessary to avoid the arbitrariness in the imposition of the death penalty that was condemned in *Furman*. *Furman*, the Court said, “mandates 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.”²⁶ An “indispensable prerequisite to a reasoned determination of whether a defendant shall live or die”²⁷ is accurate sentencing information concerning the circumstances of the offense and the character and propensities of the offender.²⁸ While jury sentencing is desirable in capital cases in order “to maintain a link between contemporary community values and the penal system”²⁹ it also creates a problem because “[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt . . . [and indeed] may even be extremely prejudicial to a fair determination of that question.”³⁰

Thus, the Court suggested that “a bifurcated procedure . . . in which the question of sentence is not considered until the determination of guilt has been made is the best answer.”³¹ Moreover, because “members of a jury will have had little, if any, experience in sentencing, they are unlikely to be skilled in dealing with the [sentencing] information [that] they are given.”³² Therefore, to avoid arbitrariness, the jury must also be given “guidance regarding the factors about the crime and the defendant that the state,

²⁵ *Id.* at 187.

²⁶ *Id.* at 189.

²⁷ *Id.* at 190.

²⁸ *Id.* at 189 (citing *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

²⁹ *Id.* at 190 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

³⁰ *Id.*

³¹ *Id.* at 190-91.

³² *Id.* at 192.

representing organized society, deems particularly relevant to the sentencing decision."³³

Having outlined these principles, the Supreme Court went on to hold constitutional Georgia's new statute, which narrowed the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which the jury had to find to exist before capital punishment could be imposed.³⁴ The statute met *Furman's* concerns, the Court said, because it focused the jury's attention on

the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by legislative guidelines.³⁵

In addition, the Court noted, the statute provided for the automatic appeal of any death sentence to the Georgia Supreme Court, which would insure against arbitrariness in capital sentencing.³⁶

On the same day the Supreme Court issued its decision in *Gregg*, it upheld the new Texas³⁷ and Florida³⁸ death penalty statutes, which like Georgia's, provided procedural safeguards against arbitrariness. It also struck down capital punishment statutes in Louisiana³⁹ and North Carolina,⁴⁰ however, because both states had responded to *Furman* by passing statutes that provided mandatory death penalties for defendants convicted of first degree

³³ *Id.*

³⁴ *Id.* at 206-07.

³⁵ *Id.*

³⁶ *Id.* at 198.

³⁷ See *Jurek v. Texas*, 428 U.S. 262, order vacated by *Gregg v. Georgia*, 429 U.S. 875 (1976).

³⁸ See *Proffitt v. Florida*, 428 U.S. 242, order vacated by *Gregg v. Georgia*, 429 U.S. 875 (1976).

³⁹ See *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁴⁰ See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

murder. Mandatory death sentences, the plurality held, were unduly harsh and rigid and did not allow for "particularized consideration of relevant aspects of the character and record of each convicted defendant."⁴¹

A year after the Supreme Court decided *Gregg* and its companion cases, it decided another important series of cases in which it held that capital punishment violates the Eighth Amendment when the punishment is disproportionate to the crime for which it is imposed. Thus, in *Coker v. Georgia*,⁴² the Court struck down the Georgia statute that provided for a death penalty in rape cases involving an adult woman stating its "abiding conviction that the death penalty, which is 'unique in its severity and irrevocability . . . ' is an excessive penalty for the rapist who, as such, does not take a human life."⁴³ The Court likewise held the death penalty to be an excessive punishment for the crimes of kidnapping and robbery where the victim is not killed. Finally, in *Enmund v. Florida*,⁴⁴ the Court held that a felony murderer who has not in fact killed, attempted to kill or intended that a killing take place or that lethal force be used may not receive a sentence of death.⁴⁵ Punishment, the Court said, "must be tailored to . . . personal responsibility and moral guilt."⁴⁶

A recurrent theme running throughout death penalty jurisprudence is the role that race plays in capital sentencing decisions. Opponents of the death penalty repeatedly argued that it was imposed disproportionately on Blacks⁴⁷ and therefore violated the Equal Protection Clause.⁴⁸ For the most part, however, these

⁴¹ *Gregg v. Georgia*, 428 U.S. 153, 303 (1976).

⁴² 433 U.S. 584 (1977).

⁴³ *Id.* at 598.

⁴⁴ 458 U.S. 782 (1982).

⁴⁵ *Id.* at 798.

⁴⁶ *Id.* at 801. Subsequently, in *Tison v. Arizona*, the Court clarified the standard for punishment by holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. 137, 158 (1987).

⁴⁷ The term "Black" is used throughout this article to encompass a broader spectrum of minorities than the term "African American" denotes.

⁴⁸ *Symposium on Race and Criminal Justice*, 51 WASH. & LEE L. REV. 359 (1994). The Equal Protection Clause states that the state shall not "deny to any

claims were largely anecdotal. Finally, in 1987, the Supreme Court squarely faced the issue in *McCleskey v. Kemp*,⁴⁹ a case in which a highly sophisticated study of two thousand Georgia murder cases occurring during the 1970s showed that race had infected the administration of Georgia's capital punishment statute in two ways: "persons who murder[ed] whites were more likely to be sentenced to death than persons who murder[ed] blacks, and black murderers [were] more likely to be sentenced to death than white murderers."⁵⁰

The Supreme Court rejected McCleskey's argument that his sentence violated the Fourteenth Amendment, despite its acceptance of the statistical evidence showing a discrepancy in the imposition of the death penalty that appeared to correlate with race.⁵¹ The Court concluded that such apparent discrepancies in sentencing are "an inevitable part of our criminal justice system."⁵² McCleskey had shown no purposeful discrimination in his own case, and the mere risk that racial prejudice might regularly infect capital sentencing decisions was "constitutionally acceptable."⁵³

The above discussion outlines the major threshold issues decided by the Supreme Court in the area of capital punishment. These cases, however, represent only the tip of the iceberg that constitutes federal death penalty jurisprudence. Since *Furman*, the Supreme Court has decided dozens of cases challenging the substance and application of most of the post-*Furman* death penalty statutes.⁵⁴

person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁴⁹ 481 U.S. 279 (1987).

⁵⁰ *Id.* at 291; see also DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 314-15 (1990).

⁵¹ *McCleskey*, 481 U.S. at 290-92.

⁵² *Id.* at 312.

⁵³ *Id.* at 309.

⁵⁴ Some of the issues that the Court has decided include: whether a state may execute children, see *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); whether a constitutional error can be harmless in a capital case, see *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986); whether a defendant who received a life sentence and whose conviction is reversed on appeal may be resentenced to death after conviction on retrial, see

It is perhaps unsurprising, given the amount of time the Supreme Court had to spend deciding death penalty cases in the years after *Furman*, that at some point it would become concerned about the degree to which the federal judiciary had become involved in the overseeing of state criminal courts. Indeed, in 1983, which has been referred to by one commentator as a "dark year on

Bullington v. Missouri, 451 U.S. 430, 438 (1981); whether an insane person may be executed, see *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); whether a mentally retarded person may be executed, see *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989); whether the prohibition against double jeopardy prohibits the reimposition of the death penalty where the original sentence of death was imposed by error, see *Poland v. Arizona*, 476 U.S. 147 (1986); *Zant v. Stephens*, 462 U.S. 862 (1983); whether a person who becomes insane after being sentenced to death may be restored to sanity against his or her will with anti-psychotic drugs in order that he or she may be executed, compare *Washington v. Harper*, 494 U.S. 210, 227 (1990) with *State v. Perry*, 610 So.2d 746, 761 (La. 1992); whether a defendant who pleads guilty in one state in order to avoid the death penalty can be sentenced to death for the same crime by a different sovereign, see *Heath v. Alabama*, 474 U.S. 82, 88 (1985), but see *Hunnicut v. Oklahoma*, 755 P.2d 105, 111 (Okla. Crim. App. 1988); under what circumstances a juror's views on capital punishment can be grounds for excluding him or her from a capital jury and at what stage, see *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Lockhart v. McCree*, 476 U.S. 162, 178 (1986); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); whether a statute that authorizes death as punishment for a crime that is "outrageously or wantonly vile, horrible or inhuman," *Godfrey v. Georgia*, 446 U.S. 420, 422, 428-29 (1980), or "especially heinous, atrocious or cruel," *Maynard v. Cartwright*, 486 U.S. 356, 361-64 (1988), is too vague to be constitutional; whether the sentencing authority may rely on either an aggravating or a mitigating factor not specified in the statute, see *Barclay v. Florida*, 463 U.S. 939, 949 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); whether it is permissible to impose death where the sole aggravating factor is identical to an element of the crime, see *Lowenfield v. Phelps*, 484 U.S. 231, 241-44 (1988); determining the permissible scope of psychiatric testimony at a sentencing proceeding, see *Barefoot v. Estelle*, 463 U.S. 880, 899-906 (1983); whether victim impact statements are permissible at a sentencing proceeding, see *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); and whether a sentencing court may rely on undisclosed information in imposing a death sentence, see *Gardner v. Florida*, 430 U.S. 349, 358-61 (1977).

death row,"⁵⁵ the Court began the process of extricating the federal judiciary from the administration of capital punishment by cutting back severely on the use of federal habeas corpus to challenge the death penalty in cases in which there had been a full and fair hearing by the state courts on the same issues raised in the habeas petition. Thus, instead of protecting the rights of capital defendants to the utmost, the Court began to leave some issues of the administration of the death penalty up to the states on the ground that not to do so would be to undermine the autonomy of state legislatures to enact laws that their citizens wanted.

As a result of the unwillingness of the federal courts to oversee the administration of the death penalty, the New York Court of Appeals is now faced with an invitation—or perhaps a challenge—to decide a wide variety of serious issues as a matter of New York State constitutional law. It remains to be seen whether the court will conclude with Justice Harlan that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁵⁶

II. STATE CONSTITUTIONAL METHODOLOGY IN THE NEW YORK COURT OF APPEALS

At the same time that the Supreme Court began to deregulate the death penalty, it was also cutting back on the expansion of individual rights generally. In response, litigants, who no longer found a receptive federal forum in which to raise their claims, increasingly began to turn to the state courts for vindication of their rights under their state constitutions. This trend, which became known as the "New Federalism" movement, is nothing new. In fact, the New Federalism movement is simply an attempt to regain for state constitutions the role that they once had as the "primary

⁵⁵ See Richard E. Wirick, Comment, *Dark Year on Death Row: Guiding Sentence Discretion After Zant, Barclay and Harris*, 17 U.C. DAVIS L. REV. 689 (1984).

⁵⁶ *McGautha v. California*, 402 U.S. 183, 204 (1971).

guardian[s]" of individual liberties⁵⁷ in a time of decreasing federal interest in these rights.

At the time the Federal Bill of Rights was drafted, it applied to actions of the federal government alone. State constitutions were the only curbs on the power of state governments. Thus, at this time, state courts performed a meaningful task if they simply interpreted state constitutional provisions identically to analogous provisions of the Federal Constitution. Once the Due Process Clause of the Fourteenth Amendment⁵⁸ became available to limit the power of state governments, however, it became clear that state constitutions that did no more than mimic the Federal Constitution would be superfluous. In fact, this is exactly what happened.⁵⁹

During the Warren Court years,⁶⁰ individual rights became increasingly federalized.⁶¹ Litigants chose federal forums and when they could not—because they were criminal defendants, for example—they argued federal constitutional claims in state court. The state courts then interpreted the Federal Constitution, occasionally tacking on a sentence saying that the same result was compelled by the state constitution as well. At the time of expanding federal rights, no state court ever considered providing broader rights under the state constitution than were provided under the Federal Constitution, and no purpose would have been served by determining that the state constitution provided fewer rights than the Federal Constitution. Thus, state constitutions became a kind of vestigial organ, like wisdom teeth.

⁵⁷ *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring).

⁵⁸ The Fourteenth Amendment states, in pertinent part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁵⁹ See *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973) [hereinafter *Project Report*].

⁶⁰ The period between 1953 and 1969 is considered the "Warren Court years."

⁶¹ *Project Report*, *supra* note 59, at 274.

As the Burger Court⁶² cut back on individual rights,⁶³ however, the state court practice of deciding federal before, or in lieu of, state constitutional claims came under increasing criticism. Justices Stevens and Brennan were among the critics who favored a primacy approach to constitutional litigation.⁶⁴ They urged courts to decide cases under the state constitution in the first instance. If a court found that a state statute met state constitutional standards, only then would it decide if the statute met the federally established minimum standards. If the court struck down the statute on state constitutional grounds, however, there would be no need to decide the case under federal law at all.⁶⁵ The primacy approach, it was argued, would result in a body of state constitutional jurisprudence which had been conspicuously lacking.

If the state courts have, as they unquestionably do, the power to interpret their own state constitutions before considering federal constitutional claims as yet undecided by the Supreme Court, then it follows that they are likewise empowered to interpret provisions in their own state constitutions differently from the manner in which the Supreme Court has already interpreted identical provisions of the Federal Constitution. It is therefore puzzling that an intense nationwide debate has emerged—and in New York it is a particularly intense one—concerning the circumstances under which a state court may properly decide that a provision in a state constitution guarantees more protection to individual rights than does an identical provision of the Federal Constitution already interpreted by the Supreme Court.

⁶² The period between 1969 and 1986 is referred to as the "Burger Court years."

⁶³ See Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1115 (1994).

⁶⁴ See *Massachusetts v. Upton*, 466 U.S. 727, 735-39 (1984) (Stevens, J., concurring); William J. Brennan, Jr., *Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11 (1988).

⁶⁵ In *Michigan v. Long*, the Supreme Court announced that where a state court "indicates clearly and expressly that [its decision] is alternatively based on *bona fide* separate, adequate and independent grounds," the Court will decline to review the decision. 463 U.S. 1032, 1041 (1983).

On one side of this debate are those who argue that our dual constitutional system permits a state court faced with the task of deciding an issue already decided by the Supreme Court simply to construe its own constitution as it deems appropriate, taking into consideration the "various factors that constitute sound constitutional analysis."⁶⁶ A state court may turn to the opinions of the Supreme Court, both majority and dissenting, on the same issue under the Federal Constitution as sources of wisdom, but not as precedent entitled to any particular level of deference. In New York, Chief Judge Judith S. Kaye espouses this methodology.⁶⁷

On the other side of the debate are those who would reverse the presumption of state independence, and argue that where the federal and state constitutions are identical, state courts should adhere to the federal constitutional interpretation, if one exists, unless some peculiarity in the history or traditions of the state dictates a different interpretation.⁶⁸ Some of these "non-interpretive factors"—that is, factors not arising from the wording of the text itself—include pre-existing state law, matters of particular state or local concern, state traditions and distinctive public attitudes.⁶⁹ In short, a state court may deviate from the federal constitutional interpretation only if there is some identifiable characteristic of the state or its citizens that makes a different interpretation particularly appropriate. In New York, Judge Joseph Bellacosa is the most consistent proponent of this method of state constitutional interpretation.

The difference among the judges of the New York Court of Appeals concerning state constitutional methodology is not unique; the same debate has persisted for at least a decade in many other

⁶⁶ *State v. Hunt*, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring).

⁶⁷ *See People v. Scott*, 79 N.Y.2d 474, 502-06, 593 N.E.2d 1328, 1346-48, 583 N.Y.S.2d 920, 938-40 (1992) (Kaye, C.J., concurring) ("We must of course be faithful to our precedents, . . . But when we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution.").

⁶⁸ *See id.* at 509, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942 (Bellacosa, J., dissenting).

⁶⁹ *Id.* at 509-10, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942 (Bellacosa, J., dissenting).

state courts. The question in the New York Court of Appeals is unusually vexed, however, because the judges appear to disagree not only about what methodology they should adopt, but also about what methodology they have adopted in the past. According to Judge Bellacosa, the court has firmly embraced noninterpretive analysis and when it abandons that methodology it is "an undermining of *stare decisis*."⁷⁰ Judge Kaye, on the other hand, denies that the court of appeals has ever employed any sort of rigid method of state constitutional interpretation in deciding whether the protections of the New York Constitution extend further than those of the Federal Constitution.⁷¹

In fact, the past cases of the New York Court of Appeals on this subject are ambiguous. The lawyers who wish to relitigate capital punishment issues before the court of appeals under the state constitution will therefore have the daunting task of challenging a brand new statute in a court that has not entertained a death penalty case in two decades, a court composed of judges who have never been faced with such a case and who, moreover, disagree about the methodology that they will use in reaching their decision. In this situation, it is clear that the only effective course will be to raise every available challenge including those that have failed in the Supreme Court, those that have been effective in other state courts and those based on New York's peculiar history and attributes.⁷²

III. STATE CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY IN OTHER STATES

The first thing to be said about state constitutional challenges to the death penalty is that they have rarely succeeded.⁷³ If

⁷⁰ *Id.* at 513, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

⁷¹ *People v. Scott*, 79 N.Y.2d 474, 504, 593 N.E.2d 1328, 1347, 583 N.Y.S.2d 920, 939 (1992) (Kaye, C.J., concurring).

⁷² We argue elsewhere that neither precedent nor principle compels strict noninterpretive analysis even where federal and state constitutional provisions are identical. See Eve Cary & Mary R. Falk, *People v. Scott and People v. Keta, Democracy Begins in Conversation*, 58 BROOK. L. REV. 1279, 1321-53 (1993).

⁷³ See Acker & Walsh, *supra* note 8, at 1363 n.151 (listing state supreme

numbers tell the whole story, there is a long and dusty road ahead for New York's capital defense bar. Yet whatever the significance of the win-loss tally, the state constitutional death penalty jurisprudence of other states offers us only limited substantive guidance.

First, a more than usually sticky web of difference frustrates analogy and makes many decisions simply inapposite. Together, the Supreme Court's earlier close scrutiny of capital punishment and its recent deregulation have resulted in state death penalty statutes with complex and widely varying provisions. For example, aggravating and mitigating factors are different and differently framed in different states, and the burden of proof at sentencing varies from state to state. Further, the language and substance of state constitutions vary enormously.⁷⁴ For example, some state bills' of rights conjunctively prohibit "cruel and unusual" punishment,⁷⁵ like the Eighth Amendment.⁷⁶ Some, however, use the disjunctive "cruel or unusual,"⁷⁷ prohibit only "cruel" punishments,⁷⁸ are silent on

court cases rejecting state constitutional challenges to the death penalty).

⁷⁴ The vast majority of state constitutional challenges to the death penalty arise, as one would expect, under the various state bills' of rights, and many of these arise under provisions which, like the Eighth Amendment to the Federal Constitution, forbid excessive punishment. Others invoke the guarantee of due process. However, challenges may also arise under other provisions, such as those mandating a separation of governmental powers. *See, e.g.,* *People v. Guest*, 503 N.E.2d 255, 272 (Ill. 1986) (arguing that the prosecutor's decision to seek the death penalty after the defendant's conviction of a capital crime usurped judicial power).

⁷⁵ New York's Constitution, for example, states that "[e]xcessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." N.Y. CONST. art. I, § 5.

⁷⁶ The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

⁷⁷ California relied on this disjunctive formulation to conclude that its Constitution provided greater protection than the Eighth Amendment. *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972). California's Constitution states that "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed." CAL. CONST. art. I, § 17.

⁷⁸ For example, Delaware's parallel constitutional provision provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted" DEL. CONST. art. I, § 11.

the subject,⁷⁹ or use entirely different language to limit punishment.⁸⁰

But even decisions construing statutory and constitutional provisions that are identical to New York's will be of limited usefulness here, because so many of the most commonly raised and most troubling death penalty issues involve empirical evidence. For example, empirical studies are crucial to assessing contemporary standards of decency,⁸¹ racial justice,⁸² deterrence,⁸³ the conviction proneness of "death-qualified" juries⁸⁴ and attitudes toward the mentally ill and mentally retarded.⁸⁵ Indeed, state courts *ask* for factual support;⁸⁶ thus, the single most important lesson New York practitioners can take from the experience of other states is, "Do your homework." Where it is available, local data will of course carry more weight. Moreover, should the New York Court of Appeals employ noninterpretive analysis, requiring state-specific reasons to depart from federal precedent,⁸⁷ local data will be dispositive.

There are two other reasons why the experience of other states is of limited usefulness to New York. First, although citations to state constitutions abound, there is less inquiry into state

⁷⁹ For example, the Connecticut Constitution has no provision regarding cruel and unusual punishment.

⁸⁰ For example, Oregon's Constitution provides that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." OR. CONST. art. 1, § 15.

⁸¹ See *infra* notes 103-13 and accompanying text.

⁸² See *infra* notes 120-51 and accompanying text.

⁸³ See *infra* notes 103-13 and accompanying text.

⁸⁴ "Death qualification" refers generally to the exclusion of potential jurors opposed to the death penalty from capital trials and sentencing procedures. See *infra* part IV.B.2.

⁸⁵ See *infra* part IV.B.7.

⁸⁶ See, e.g., *State v. Ramseur*, 524 A.2d 188, 252 n.54 (N.J. 1987) (calling for empirical evidence on the claim that "death qualification" of jurors results in disproportionate exclusion of women and minorities from capital juries).

⁸⁷ See *supra* notes 68-73 and accompanying text. We assume here that many—though certainly not all—challenges to New York's death penalty will be raised under the provisions of our state constitution that are textually identical to the provisions in the Federal Bill of Rights, or very similarly framed, thus suggesting noninterpretive analysis.

constitutional meaning and method than one might expect, and second, much of that inquiry is terse and conclusory.⁸⁸ The conjunction of the rise of the New Federalism and the Supreme Court's deregulation of capital punishment would lead one to expect, by now, a large and well-developed body of caselaw. Indeed, the Court's deregulation of the area, premised in part as it is on deference to the state courts' understanding of local conditions, constitutes an open invitation to build a state constitutional death penalty jurisprudence—whether on or above the federal constitutional floor.⁸⁹

The urgency of the issues and the seeming lack of any arguments for federal-state uniformity on the death penalty would further prompt expectations of a substantial caselaw. Yet, there are

⁸⁸ For an excellent survey of state constitutional death penalty decisions before 1989, see generally, James R. Acker & Elizabeth R. Walsh, *supra* note 8; see also HUGO ADAM BEDAU, *DEATH IS DIFFERENT* 186 (1987) (finding the contributions of state courts to death penalty jurisprudence "slight and erratic").

⁸⁹ One recent commentator argues that the Supreme Court's deregulation of capital punishment should be understood not as a retreat from the protection of individual rights, but rather as a balancing of the enforcement of Eighth Amendment norms against "considerations of governmental structure, institutional capacity, and institutional responsibility." Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1649 (1993). Bilionis argues that:

Precisely because the Court balances, the rules it lays down do not coextend with the Eighth Amendment's normative content, do not exhaust the potential of those constitutional values, and do not ensure a normatively legitimate system of capital punishment . . . the problem is the [Supreme] Court's grasp, not the reach of the underlying norms. Therein lies the key to unleashing the potential of state constitutional law. Nature abhors a vacuum, and so too, in its own way, does our national constitutional environment. State constitutions are a force that can fill the void, adding a measure of enforcement to constitutional norms that the Supreme Court, because of its own limitations, cannot itself provide. Thus conceived, state constitutional law is not a liberal activist's ploy to *evade* the Supreme Court's Eighth Amendment doctrine, but in fact an integral means to *complement* the federal law.

Id. at 1684-85 (emphasis added) (citations omitted); see also *Ramseur*, 524 A.2d at 209. ("Application of state constitutional provisions to these questions is particularly appropriate in view of the '[c]onsiderations of federalism' that have constrained the United States Supreme Court in this area.") (citing *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

no more than several dozen decisions that discuss in any depth the application of the state constitution to any of the many challenges (*per se* and statutory) to the death penalty. Most state constitutional claims are quickly dismissed, many in *de facto* lockstep with federal constitutional interpretation and without analysis.⁹⁰ These decisions offer us little substantive or methodological guidance.

The small extent of state constitutional death penalty jurisprudence and its cryptic nature are surprising, but not unaccountable. The sheer volume of death penalty issues is undoubtedly a factor. Moreover, it may well be that practitioners are not making creative and well-developed arguments and are themselves overly dependent on federal constitutional analysis. In addition, after years of domination by federal constitutional law, it is difficult for a state court to create out of the void a coherent and innovative jurisprudence, working in a volatile political and legal culture and in an area that evokes the most passionate and divisive feelings.

Of the several state courts that have engaged in more than state constitutional lip-service, two stand out for the thoroughness and thoughtfulness of their death penalty opinions: the New Jersey Supreme Court, which has upheld the *per se* constitutionality of the death penalty and the constitutionality of all but one statutory provision,⁹¹ and the Supreme Judicial Court of Massachusetts, which sustained both *per se* and statutory challenges.⁹²

⁹⁰ As its name suggests, "lockstep" interpretation of state constitutional provisions simply replicates federal constitutional analysis. See Acker & Walsh, *supra* note 8, at 1316.

⁹¹ *State v. Gerald*, 549 A.2d 792 (N.J. 1988) (holding that the state constitution is violated when the defendant who intended to cause bodily injury, but not death, is sentenced to death); *State v. Ramseur*, 524 A.2d 188 (N.J. 1987) (holding that the death penalty was not *per se* unconstitutional).

⁹² *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984) (invalidating the death penalty statute on grounds that it impermissibly burdened defendants' right against self-incrimination and right to a jury trial); *Suffolk Dist. Attorney v. Watson*, 411 N.E. 2d 952 (Mass. 1980) (holding the death penalty statute unconstitutional), *superseded by statute as stated in* *Commonwealth v. Colon-Cruz*, 470 N.E. 116 (1984). The New Jersey Supreme Court most often employs noninterpretive analysis, while the Supreme Judicial Court of Massachusetts favors a primacy approach which gives the decisions of the United States Supreme Court no more weight than any other persuasive precedent. Yet

Despite the misgivings expressed here, much of the analysis in the section that follows, identifying potential state constitutional challenges to New York's death penalty, "relies" on the decisions of other state courts. Ultimately, of course, such reliance is antithetical to the notion of state constitutional jurisprudence. Thus, the issues we catalogue here are just a beginning. The coming years will call upon New York's criminal defense bar for creativity of the best and most principled kind.

IV. STATE CONSTITUTIONAL CHALLENGES TO NEW YORK'S DEATH PENALTY

Below, we discuss some of the most likely state constitutional challenges to New York's death penalty. We discuss *per se* challenges first, followed by challenges to the statute. Of course, *per se* challenges and challenges to the statute do not nearly exhaust potential challenges under the New York Constitution.⁹³ As we continue to read and think about the death penalty, the issues seem to multiply to infinity. For practical reasons alone, we limit our discussion here to *per se* challenges and just a few of the many potential statutory challenges.

A. *Per Se* Challenges

State constitutional challenges to capital punishment itself have succeeded just twice, in California⁹⁴ and in Massachusetts.⁹⁵

difference in method is not itself dispositive. The most insistent critic of New Jersey's death penalty statute, Justice Alan Handler, is also the most vocal proponent of noninterpretive analysis. *See, e.g., State v. Hunt*, 450 A.2d 952, 957 (N.J. 1982) (Handler, J., concurring).

⁹³ That is to say, there are many potential challenges that are not visible on the face of the statute. For example, although the United States Supreme Court has held that the erroneous admission of evidence at the penalty phase of a bifurcated capital trial can be harmless, the Court itself was not without some reservations, and the argument will certainly be made in New York that as a matter of due process, any such error at the penalty phase is reversible error. *See Clemons v. Mississippi*, 494 U.S. 738 (1990).

⁹⁴ *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

Although both of those states thereupon amended their constitutions to permit the imposition of the death penalty,⁹⁶ *per se* challenges should not be dismissed as empty ritual. First, as the authors of a survey of state constitutional challenges point out, many decisions on the legitimacy of the death penalty consist of little more than the recitation of the lockstep credo: the constitution of state "X" provides no more protection than the Federal Constitution.⁹⁷ Moreover, some decisions which uphold capital punishment were made over lengthy and passionate dissents.⁹⁸ When well-crafted and well-supported arguments are made to a court committed to independent state constitutional analysis, the results cannot be a foregone conclusion.

Nor should the experience of California and Massachusetts be seen to shut the door on *per se* challenges. Ironically, it illustrates one of the major arguments *for* the New Federalism: state constitutional decisions are more simply and expeditiously subject to majoritarian review than are the constitutional edicts of the United States Supreme Court.⁹⁹ Finally, times not only change, they keep

⁹⁵ See *Suffolk Dist. Attorney v. Watson*, 411 N.E.2d 1274 (Mass. 1980), *superseded by statute as stated in* *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (1984).

⁹⁶ CAL. CONST. art. I, § 27; MASS. CONST. pt. 1, art. 26.

⁹⁷ See *Acker & Walsh*, *supra* note 8, at 1331 n.151.

⁹⁸ See, e.g., *State v. Ross*, 646 A.2d 1318, 1373 (Conn. 1994) (Berdon, J., dissenting); *State v. Ramseur*, 524 A.2d 188, 300 (N.J. 1987) (Handler, J., dissenting); *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981) (Brock, C.J., dissenting); *Hopkinson v. State*, 632 P.2d 79, 172 (Wyo. 1981) (Rose, C.J., dissenting); *Adams v. State*, 271 N.E.2d 425, 431 (Ind. 1971) (DeBruler, J., dissenting).

Indeed, Justice Robert Berdon's dissent in *Ross* suggests that the issue is not settled in Connecticut. Four justices of the Connecticut Supreme Court disqualified themselves in *Ross*. By statute, the chief justice may designate judges of the Superior Court to sit in such a circumstance. *Ross* was thus decided by only three justices of the supreme court—one of whom (Berdon) dissented. Justice Berdon suggests that upon reconsideration by all seven justices, the death penalty may well be found to violate the Connecticut Constitution. *Ross*, 646 A.2d at 1383 (Berdon, J., dissenting).

⁹⁹ See, e.g., *State v. Rupe*, 683 P.2d 571, 599 (Wash. 1984) (Dolliver, J., concurring) ("[I]t is the duty of this court to express its understanding of the moral judgments rendered by the people in their constitution. If the people then

on changing. The capital punishment experiment proceeds in three dozen states. Subject to empirical evidence, it may well be argued that the experiment has failed. Two former supporters of the death penalty on the Supreme Court have already reached this conclusion.¹⁰⁰

The substantive arguments for and against the death penalty are, by now, predictable.¹⁰¹ Less clear is how practitioners will frame

believe the court is in error, the means to correct that error are available through the appropriate mechanism to amend our basic document.”), *cert. denied*, 486 U.S. 1061 (1988).

It should also be noted that amending the Massachusetts Constitution was not the end of the story. The Supreme Judicial Court of Massachusetts subsequently found that the death penalty statute violated the state constitutional guarantee of jury trial because it permitted defendants accused of capital crimes to plead guilty to those offenses, but did not permit the imposition of a death sentence on such defendants. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124 (Mass. 1984). At the writing of this essay, 11 years after *Colon-Cruz*, the Massachusetts Legislature has not passed a new statute and Massachusetts has no death penalty. *See infra* part IV.B.1. (discussing the constitutionality of New York’s statute which also permits guilty pleas to capital murder).

¹⁰⁰ *See supra* note 16 (noting Justices Blackmun and Powell’s change of heart).

¹⁰¹ Although the focus of arguments about the death penalty alters with the mood of the times, the major arguments appear to be the following:

Pro

- Some criminals deserve to die.
- The death penalty effectively incapacitates.
- The death penalty deters violent crime.
- The death penalty promotes an orderly society by deterring self-help vigilantism.
- Election results and opinion polls show that the public favors capital punishment.

Con

- The state degrades human life and dignity when it kills its own citizens.
- The death penalty is *per se* cruel; it inevitably causes not only physical pain but psychological torment.
- The death penalty has not been proven to deter more effectively than life in prison.
- Life in prison effectively incapacitates.
- Innocent people are executed by mistake.
- The death penalty brutalizes instead of deterring.

and support these arguments. Also unknown—and of great consequence—is the method of constitutional analysis the court of appeals will apply, and how much it will defer to the legislature.

1. *Excessive Punishment*

Per se arguments against capital punishment are traditionally raised under one or more of three provisions commonly included in state bills' of rights: the prohibition of excessive punishment and the guarantees of due process and equal treatment.¹⁰² As articulated in the Eighth Amendment's interdiction of cruel and unusual punishment, the first of these three grounds has dominated *per se* arguments in the Supreme Court. The state courts have largely echoed this focus, demonstrating how difficult it is for courts and litigants to independently think about rights after long domination by federal constitutional law. Moreover, the debate in state court most often follows the patterns of the plurality and dissenting arguments in *Gregg v. Georgia*,¹⁰³ although excessive penalty

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- The huge expense of death penalty prosecutions and broad prosecutorial discretion in charging and plea-bargaining result in arbitrary imposition.
 - The death penalty is inevitably racially and economically discriminatory.
 - An informed public would reject the death penalty.
 - Every other Western democracy rejects the death penalty; South Africa has just rejected it.

¹⁰² For example, the New York Constitution forbids the infliction of "cruel and unusual punishment," and it also provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." N.Y. CONST. art. I, §§ 5, 6. The very first provision of the State Constitution also appears to guarantee due process, by stating that "[n]o member of this state shall be disenfranchised, or deprived of any of the rights or privileges secured to the citizens thereof, unless by the law of the land. . . ." N.Y. CONST. art. I, § 1. Section 11 provides, in pertinent part, that "[n]o person shall be denied the equal protection of the laws of this state. . . . No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights. . . ." N.Y. CONST. art. I, § 11.

¹⁰³ 428 U.S. 153 (1976). In *Gregg*, the Supreme Court held that the death penalty is not a *per se* violation of the Eighth Amendment. To reach this

conclusion, the Court pointed out that the prevalence of death penalty statutes showed that in fact, our society favors capital punishment. *Id.* at 179-81. But because the Eighth Amendment demands more than acceptability to contemporary society, the Court went on to ask whether the death penalty "comports with the basic concept of human dignity at the core of the Amendment." *Id.* at 182 (citation omitted). The Court framed this inquiry as whether capital punishment is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183 (citations omitted). The Court pointedly refused closer scrutiny, writing "we cannot 'invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.'" *Id.* at 182-83 (quoting *Furman v. Georgia*, 408 U.S. 238, 451 (1972) (Powell, J., dissenting)).

The Court deemed the relevant penological goals to be retribution and deterrence of capital crimes. *Id.* at 183. Pronouncing retribution neither a "dominant" nor a "forbidden" goal, the Court described it as "unappealing to many, but . . . essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* at 183. Moreover, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184.

With respect to deterrence, the Court acknowledged that some studies suggested that the death penalty was no greater a deterrent than lesser penalties, and recognized that "there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185. Nonetheless, the Court was satisfied that some would-be murderers are deterred by the death penalty, and the Court left to local legislatures the resolution of the complex factual issue of criminal deterrence. *Id.* at 186.

Considering the final question before it—whether death was a disproportionate punishment for the crime of murder—the Court determined that "when a life has been taken deliberately . . . we cannot say that the punishment is invariably disproportionate to the crime." *Id.* at 187. Thus, the Court concluded that "the punishment of death does not invariably violate the Constitution," and is "not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.* at 169, 187.

Justices Brennan and Marshall dissented in *Gregg*, regarding the death penalty as *per se* unconstitutional. *Id.* at 227 (Brennan, J., dissenting); *Id.* at 231 (Marshall, J., dissenting). Justice Brennan incorporated his *Furman* concurrence, where he formulated a four-part Eighth Amendment inquiry. *Id.* at 229 (Brennan, J., concurring). Justice Brennan would consider a punishment "cruel and unusual," that is, "not comport[ing] with human dignity" if it is 1) "so severe as to be degrading to the dignity of human beings;" 2) arbitrarily inflicted; 3)

arguments can be framed in many other ways.¹⁰⁴ Deciding

"unacceptable to contemporary society;" and 4) "excessive," that is, "unnecessary." *Furman v. Georgia*, 408 U.S. 238, 270-88 (1972) (Brennan, J., concurring). Holding the death penalty to that test, in *Gregg* Justice Brennan concluded, first, that it denies the humanity of persons executed and is "uniquely degrading to human dignity." *Gregg*, 428 U.S. at 291 (Brennan, J., concurring). Were the death penalty not "a punishment of longstanding usage and acceptance," he would consider it cruel and unusual on that ground alone. *Id.* (Brennan, J., concurring). Second, because the death penalty is legally available in many cases, but inflicted in very few, Justice Brennan argued that "it smacks of little more than a lottery system." *Id.* at 293 (Brennan, J., concurring). Rejecting the state's argument that the minute number of executions represents "informed selectivity" rather than arbitrariness, Justice Brennan found the rarity of death penalty impositions much more significant than the mere existence of death penalty laws. *Id.* at 293-94 (Brennan, J., concurring). Finally, Justice Brennan determined that the death penalty was unnecessary to deter violent crimes because the risk of execution is remote, but that of long-term imprisonment is real. *Id.* at 302 (Brennan, J., concurring).

In his *Gregg* dissent, Justice Marshall asserted that the death penalty is *per se* unconstitutional for two reasons: because it is excessive—that is, unnecessary to any valid penological purpose—and because "the American people, fully informed as to the purposes of the death penalty and its liabilities, would . . . reject it as morally unacceptable." *Id.* at 231-32 (Marshall, J., dissenting). The death penalty cannot be justified by deterrence, according to Justice Marshall, because "the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." *Id.* at 233 (Marshall, J., dissenting) (quoting UNITED NATIONS DEP'T OF ECON. & SOCIAL AFF., CAPITAL PUNISHMENT 123 (1968)). Retribution, as discussed in the plurality opinion, is broken down by Justice Marshall into three separate components: two "utilitarian" notions and one pure retribution idea. As to the two practical justifications—that "the death penalty preempts the citizenry from taking the law into its own hands and reinforces moral values," Justice Marshall believed that lesser penalties were sufficient to these ends. *Id.* at 238-39 (Marshall, J., dissenting). But it was the notion of pure retribution that appalled Justice Marshall the most:

The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as [the plurality opinion] remind[s] us, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. . . . [Rather, it must] compor[t] with the basic concept of human dignity at the core of the Amendment.

Id. at 240 (Marshall, J., dissenting) (quotations omitted).

¹⁰⁴ Indeed, it can be argued that the emulation of federal death penalty jurisprudence is not only unnecessary, but also potentially disastrous. A state court

excessive punishment challenges, most state courts tend to presume that the legislature acted rationally in enacting capital punishment and they therefore exercise "great restraint."¹⁰⁵ These courts follow the *Gregg* plurality in asking only whether capital punishment is "so totally without penological justification that it results in the gratuitous infliction of suffering."¹⁰⁶ To the extent that the Supreme Court's deference to the legislature is based on its own institutional limitations and its concern for federalism, the state courts' exercise of the same deference does not seem entirely logical.

The majority opinion in *State v. Ramseur*¹⁰⁷ is an example of complete deference to the judgments of the legislature and "society." The New Jersey Supreme Court there reached the following conclusions to hold that the death penalty did not violate the state constitution:

The view that the death penalty does not accord with contemporary standards of decency draws much of its support from those convinced, for many reasons, of the death penalty's futility, indecency, and inhumanity. They include some of the best-informed students of the subject, many of whom believe that society would share their views if it were better informed. . . . The "contemporary standard of decency" against which the death penalty must be

that adopts the reasoning of the *Gregg* plurality to find the death penalty not *per se* unconstitutional inevitably buys into the Supreme Court's post-*Furman* consistency-individualization jurisprudence. In a scholarly and powerful dissent in *Ramseur*, where the New Jersey Supreme Court adopted *Gregg* under the state constitution, Justice Handler argued that the result would be the arbitrary imposition of the death penalty and a jurisprudential morass of incoherence and wasted resources. *State v. Ramseur*, 524 A.2d 188, 301-21 (N.J. 1987) (Handler, J., dissenting). Although leaning toward the conviction that the death penalty is *per se* unconstitutional, Justice Handler argued that the only conceivable framework for its equitable imposition would be a state constitutional doctrine of fundamental fairness grounded in the state guarantee of due process. *Id.* (Handler, J., dissenting).

¹⁰⁵ *State v. Ross*, 646 A.2d 1318, 1356 (Conn. 1994), *cert. denied*, 115 S. Ct. 1133 (1995).

¹⁰⁶ *Gregg*, 428 U.S. at 183 (citations omitted).

¹⁰⁷ 524 A.2d 188 (N.J. 1987).

tested, however, is that of the community, not that of its scientists, penologists, or jurists. . . . [I]t is a widely held belief, and a strongly held one in our society, that the appropriate penalty for murder may be death.¹⁰⁸

. . . .

The Legislature, speaking for its citizens, has determined that the demands of justice are met by executing those who murder.¹⁰⁹

. . . .

We respect the arguments of those who believe that a more enlightened view is that the death penalty serves no legitimate penological purpose. In this area of crime and punishment, however, it is not our function to weigh competing arguments and determine which is more enlightened. The wisdom of the death penalty is not for this Court to decide.¹¹⁰

A troubling omission in *Ramseur*, and indeed in all but one of the post-*Gregg* cases that have considered the question of whether capital punishment is cruel,¹¹¹ is any discussion of what it is *like* for the condemned person to be sentenced to death and then executed. Instead, courts discuss the penological views of societies, past and present, remarking that cruel punishments like crucifixion and immolation, although once popular, are today viewed with distaste. They then reason tautologically that because the death penalty, unlike sentences of torture, still exists, the citizenry must want it to exist. Therefore, contemporary standards of decency do not deem death a cruel punishment. Therefore, the courts have no power to abolish it.

¹⁰⁸ *Id.* at 211 (citations omitted).

¹⁰⁹ *Id.* at 215. Yet the court notes that “[t]he legislative history of the [Death Penalty] Act provides no persuasive evidence of the Legislature’s purpose.” *Id.* at 214.

¹¹⁰ *Id.* at 216 (citations omitted).

¹¹¹ *Suffolk Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[T]he death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror.”), *superseded by statute as stated in* *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (1984).

Opponents of the death penalty find a great deal wrong with this reasoning, not the least of which is that it fails to take into consideration the possibility that Clarence Darrow was right when he said, "that capital punishment is horrible and cruel is the reason for its existence."¹¹² Given the fact that the legislatures of ten states have recently introduced bills that would provide for the punishment of caning, it appears that the society that votes for the death penalty is one that wants to inflict cruel punishments on criminals. The job of the courts in that case is, of course, to prevent the public from getting what it wants.

It is significant that the only courts to hold the death penalty unconstitutional are the ones that include among their members' opinions a graphic description of the death penalty from the point of view of the condemned.¹¹³

¹¹² *Id.* at 1290 (citing ATTORNEYS FOR THE NAACP LEGAL DEF. & EDUC. FUND, *A Cruel and Unusual Punishment*, in VOICES AGAINST DEATH 264, 283 (1976)).

¹¹³ For example, a concurring opinion in *Watson* recounts the following:

For over two years, Henry Arsenault 'lived on death row feeling as if the Court's sentence were slowly being carried out.' Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. 'There was a day to day choking, tremulous fear that quickly became suffocating.' If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither privacy nor dignity. Apart from the guards he was alone much of the time as the day of his execution neared.

. . . .

The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not be for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind a one-way mirror. When the executioner tested the chair, the lights dimmed. Arsenault heard other prisoners scream. After the chaplain gave him last rites, Arsenault heard the door slam shut and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably.

It is also interesting that the New Jersey Supreme Court, in holding that the wisdom of the death penalty was not for it to decide, implicitly recognized the cruelty of the death penalty. In discussing the aggravating factors in the statute, the court found that "execution-style" murders may definitely be considered "depraved" because

if the victim is aware as a practical certainty that he is about to be executed, his psychological suffering obviously is extreme. In making the victim aware of such imminent execution, the defendant must have as his purpose for doing so that this knowledge will cause the victim to endure great psychological suffering.¹¹⁴

The state courts' failure to examine the reality of the death penalty in deciding whether it violates the Eighth Amendment, and their decision to treat the issue instead simply as a separation-of-powers question, allows them to avoid confronting the moral fact that death is different from all other punishments.

2. *Due Process*

An argument made less frequently than the excessive-penalty argument is that the death penalty violates substantive due process, an argument of which the Supreme Court has taken little notice. Although it has succeeded just once, in *Commonwealth v. O'Neal*,¹¹⁵ a Massachusetts case, the due process argument is nonetheless a simple and intuitive argument that cries out to be made.

A doctor sedated him. And he was moved off death row.

Id. at 1290 (Liacos, J., concurring) (en banc); see also *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

¹¹⁴ *Ramseur*, 524 A.2d at 232 n.39.

¹¹⁵ 339 N.E.2d 676 (Mass. 1975); see also *Ramseur*, 524 A.2d at 214 n.40 (explaining and dismissing a due process argument). In New Jersey, the challenge was raised under Article I, § 1, which guarantees the rights of "enjoying and defending life and liberty." N.J. CONST. art. I, § 1. Like its adoption of *Gregg*, the New Jersey Supreme Court's rejection of the due process argument has a hollow ring.

Traditional excessive-punishment challenges to the death penalty require the government simply to meet a test of rationality—that is, it must show that the penalty was enacted for some reason other than a mere legislative desire to inflict gratuitous suffering. In contrast, the due process argument begins with the proposition that the right to life is fundamental, the basis of all other rights and the right without which other rights do not exist.¹¹⁶ Accordingly, when the state proposes to deprive a citizen of life, it must demonstrate that it has a compelling interest in doing so and that no less restrictive, more precisely adapted means exist for fulfilling the stated goal.¹¹⁷

The state's generally merited assumption that its judgments will automatically be awarded the presumption of rationality is well illustrated in *O'Neal*. There, the state, apparently assuming that the court would defer to legislative judgment, simply did not address the issue of the justification for the enactment of the death penalty. When the Supreme Judicial Court of Massachusetts postponed the proceedings to allow the parties to adduce evidence on the question, the state could not produce convincing proof that the death penalty was necessary to further any compelling state interest.¹¹⁸

Opponents of the death penalty in New York might reasonably feel optimistic about their chances of success should the court of appeals agree to apply strict scrutiny to the capital punishment statute, for even the Supreme Court has agreed that existing data is inconclusive on the issue of whether the death penalty deters would-be murderers.¹¹⁹ The far more difficult task will be to convince the court to depart from the other state courts that have viewed challenges to the death penalty as they would a claim that a lengthy prison sentence for the statutory rape of a seventeen-year-old is excessive; that is, as a subject firmly within the province of the legislature.

¹¹⁶ *Ramseur*, 524 A.2d at 213.

¹¹⁷ *Id.*

¹¹⁸ *O'Neal*, 339 N.E.2d at 676.

¹¹⁹ *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976).

3. *Equal Treatment*

The third possible ground of state constitutional *per se* challenge to the death penalty is the guarantee of equal treatment.¹²⁰ The argument is that the death penalty inherently and inevitably discriminates against defendants who are poor, Black, or more usually both.

In *McCleskey v. Kemp*,¹²¹ the Supreme Court was presented with the question "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that [the death sentence of petitioner, a Black man,] is unconstitutional under the Eighth or Fourteenth Amendment."¹²²

Concerning McCleskey's equal protection argument under the Fourteenth Amendment, the Court held that such a claim requires the petitioner to shoulder the burden of proving the existence of purposeful discrimination.¹²³ Thus, in a death penalty case, a condemned defendant would have to prove that "the legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."¹²⁴ The Court rejected the Equal Protection claim in *McCleskey* because the petitioner failed to show a discriminatory purpose behind the Georgia statute.¹²⁵

McCleskey also argued that the Georgia system violated the Eighth Amendment because it was arbitrary and capricious in application by allowing racial considerations to influence capital sentencing decisions.¹²⁶ The Court rejected this claim because a

¹²⁰ New York's Bill of Rights provides that "[n]o person shall be denied the equal protection of the laws of [their] state. . . ." and that "[n]o person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights. . . ." N.Y. CONST. art. I, § 11.

¹²¹ 481 U.S. 279 (1987).

¹²² *Id.* at 282-83.

¹²³ *Id.* at 298.

¹²⁴ *Id.*

¹²⁵ *Id.* at 298-99.

¹²⁶ *Id.* at 308.

study, which was conducted by David C. Baldus, George Woodworth and Charles Pulaski introduced to prove racial discrimination showed no more than that "a particular factor [race] entered into some [sentencing] decisions,"¹²⁷ not that race entered into all decisions or into the decision in McCleskey's case.¹²⁸ Therefore, said the Court, the question is "at what point the risk of racial discrimination in capital sentencing becomes constitutionally unacceptable."¹²⁹ McCleskey argued that a "likelihood" of race discrimination was constitutionally unacceptable.¹³⁰ The Court disagreed: "At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."¹³¹

The Court went on to explain that "[i]n light of safeguards designed to minimize racial bias in the process, the fundamental value of a jury trial in our criminal justice system, and the benefits that [jury] discretion [in sentencing] provides to criminal defendants," the racial bias shown in the study was not constitutionally significant.¹³² Moreover, the Court was concerned that, should it accept McCleskey's claim, inevitably noncapital defendants would raise the same challenge and open the floodgates of litigation.¹³³ The legislature was the body to hear such complaints, not the courts.¹³⁴

Because of the pervasiveness of racial bias in the criminal justice system, equal treatment challenges have been brought in a

¹²⁷ *Id.* See DAVID C. BALDUS, *EQUAL JUSTICE AND THE DEATH PENALTY* (1990). The Baldus study "purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim, and, to a lesser extent, the race of the defendant." *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987). The study indicates that "black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty." *Id.* at 287.

¹²⁸ *McCleskey*, 481 U.S. at 308.

¹²⁹ *Id.* at 309 (citations omitted).

¹³⁰ "McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of social prejudice influencing capital sentencing decisions." *Id.* at 309.

¹³¹ *Id.* at 312.

¹³² *Id.* at 313.

¹³³ *Id.* at 314-17.

¹³⁴ *Id.* at 319.

number of state courts.¹³⁵ Thus far, the argument has not succeeded on its own, although the decision of the Supreme Judicial Court of Massachusetts in *Suffolk District Attorney v. Watson*¹³⁶ was based in significant part on the conviction that the death penalty is disproportionately imposed on Black people.¹³⁷ In *Watson*, the court relied upon the Baldus study, and also upon the President's Commission on Law Enforcement and Administration of Justice which concluded that "there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro and the members of unpopular groups."¹³⁸

Examining statistics concerning the imposition of death penalties in Florida, Georgia and Texas under post-*Furman* statutes upheld by the Supreme Court, the Massachusetts court concluded that "very little has changed as to arbitrariness and discrimination."¹³⁹ Moreover, the court "reject[ed] any suggestion that racial discrimination is confined to the South or to any other geographical area."¹⁴⁰ Significantly, the court also took judicial

¹³⁵ See, e.g., *State v. Mallet*, 732 S.W.2d 527, cert. denied by Mallet v. Missouri, 484 U.S. 933 (1987); *State v. Ramseur*, 524 A.2d 188 (N.J. 1987); *State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984); *Suffolk Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1285 (Mass. 1980), superseded by statute as stated in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984).

¹³⁶ 411 N.E.2d 1274 (Mass. 1980), superseded by statute as stated in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984).

¹³⁷ *Id.* at 1285.

¹³⁸ *Watson*, 411 N.E.2d at 1285 (citing THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUST. 143 (1976)); see also C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

¹³⁹ *Watson*, 411 N.E.2d at 1285.

¹⁴⁰ *Id.* at 1286. In *Watson*, the court noted that

[e]xamination of death sentences imposed in Florida, Georgia and Texas under post-*Furman* statutes upheld by the Supreme Court in 1976 indicates that very little has changed as to arbitrariness and discrimination. The criminal homicide data from the date of the post-*Furman* statutes through 1977 indicate the following: In Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to

notice of "the existence of racial prejudice in some persons in this Commonwealth [of Massachusetts]." ¹⁴¹ The court concluded that while our society's "failure to bring evenhandedness to the entire spectrum of criminal punishment" ¹⁴² does not require the abandonment of all such punishments on constitutional grounds, "the supreme punishment of death, inflicted as it is by chance and caprice, may not stand." ¹⁴³ The arbitrariness and discrimination which the Supreme Court had found "inevitable," and therefore constitutionally permissible, the Massachusetts court instead found to offend the Massachusetts Declaration of Rights. ¹⁴⁴

The decision of the Massachusetts Supreme Judicial Court contrasts for two reasons with the decisions of other state courts that have been presented with the issue of race bias in capital sentencing. First, the Massachusetts court did not treat *McCleskey* as having been finally dispositive of the issue as did, for example, the Ohio Supreme Court which declined to review the issue because "[t]he Supreme Court recently resolved this issue in *McCleskey*. . . . a criminal defendant must prove that . . . purposeful discrimination had an effect on him." ¹⁴⁵

Second, in concluding that racial bias would inevitably be an unacceptable factor in capital sentencing in Massachusetts, the Supreme Judicial Court was willing to rely on the same statistics used by the Supreme Court in *McCleskey*, as well as on statistics

death; of 111 whites who killed blacks, *none* were sentenced to death. In Georgia, of 268 blacks who killed whites, thirty-seven (14.3%) were sentenced to death; of seventy-one whites who killed blacks, two (2.8%) were sentenced to death. In Texas, of 344 blacks who killed whites, twenty-seven (7.8%) were sentenced to death; of 143 whites who killed blacks, *none* were sentenced to death.

Id. at 1285. Moreover, the Court relied on the experience of Ohio under a post-*Furman* statute through 1977 which showed that, "of 173 black persons who killed white persons, thirty-seven of them (21.4%) were sentenced to death. Of forty-seven whites who killed blacks, *none* were sentenced to death." *Id.* at 1286.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1286; see also MASS. CONST. art. 26.

¹⁴⁵ *State v. Zuern*, 512 N.E.2d 585, 593 (Ohio 1987) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

from other states, and on its own knowledge that the citizens of Massachusetts were not miraculously free of racial prejudice. Other state courts, in contrast, have held that the inability of capital defendants to produce new, local statistics comparable to those in the Baldus study defeated their claims of race discrimination in sentencing.¹⁴⁶ For example, the Missouri Supreme Court sitting *en banc* found that “[c]ompared to the statistics introduced by defendant in *McCleskey*, the statistics offered by the defendant here . . . are insufficient to establish such a claim.”¹⁴⁷ The New Jersey Supreme Court was “not convinced” that the requirement that a capital jury’s discretion be rationally guided had failed to protect Black defendants from race discrimination in the imposition of their capital sentences in other states or that it would inevitably fail in New Jersey.¹⁴⁸ “No court has found constitutionally significant evidence of racial discrimination in the application of a post-*Furman* death penalty statute and no such evidence has been presented to us in this case.”¹⁴⁹ The court agreed, of course, to receive in the future any new evidence that condemned persons were being executed in New Jersey in a racially discriminatory manner.¹⁵⁰ It refused, however, “preemptively to invalidate the [Death Penalty] Act on the theory that it will inevitably be applied in a racially discriminatory fashion.”¹⁵¹

These state court cases raise the troubling notion that a decade must pass and two thousand New Yorkers must be executed (or languish on death row) before a statistically valid challenge to race bias in capital sentencing can be raised under the state constitution. And even then, if the court of appeals follows the lead of the other state courts marching in lockstep with the Supreme Court and

¹⁴⁶ See *State v. Mallett*, 732 S.W.2d 527 (Mo. 1987), *cert. denied* by *Mallett v. Missouri*, 484 U.S. 933 (1987).

¹⁴⁷ *Id.* at 539 (“Of those individuals (excluding appellant) who have been sentenced to death in Missouri since 1977, 39% are non-white. Of those non-white row inmates, 53% had white victims. Of the white death row inmates, 74% had white victims. Missouri’s racial composition is 88.4% white and 11.6% non-white.”).

¹⁴⁸ *State v. Ramseur*, 524 A.2d 188, 216 (N.J. 1987).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

requires a showing of purposeful race discrimination in an individual case, no defendant will ever meet the burden. It is thus obvious that considerable thought must go into what evidence might convince the court of appeals that the risk of race discrimination in capital sentencing determinations is real, despite the provisions in the statute designed to root it out.¹⁵²

In addition to the grounds of state constitutional challenges advanced—excessive punishment, due process, or equal treatment—the method of constitutional analysis employed by the court of appeals will also be important to the fate of *per se* challenges. As discussed above, the court of appeals may, like the Massachusetts high court, simply interpret the language of the state constitution, using any and all of the traditional tools of interpretation. On the other hand, given the fact that the language of the excessive punishment and due process provisions of the New York Constitution is so close to that of the Federal Constitution,¹⁵³ the court of appeals may choose to adopt the “noninterpretive” analysis

¹⁵² The New York Criminal Procedure Law provides that the parties may, on motion, examine prospective jurors individually and outside the presence of other prospective jurors regarding the possibility of racial bias. Death Penalty Act § 14, 1995 N.Y. LAWS at 5 (amending the Criminal Procedure Law by adding a new § 270.16). New York’s Criminal Procedure Law also requires the court of appeals to “review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted.” Death Penalty Act § 27, 1995 N.Y. LAWS at 13-14 (amending N.Y. CRIM. PROC. LAW § 470.30 (McKinney 1994)). As Justice Antonin Scalia pointed out in *J.E.B. v. Alabama ex rel T.B.*, however, voir dire of jurors concerning their racial biases is inevitably ineffective because frequently jurors are unaware of their own biases and therefore cannot answer truthfully when asked about them. 114 S. Ct. 1419, 1438-39 (1994).

¹⁵³ The Eighth Amendment to the United States Constitution and Article I, § 5, of the New York Constitution both forbid “cruel and unusual punishment.” U.S. CONST. amend. VIII; N.Y. CONST. art I, § 5. The Fourteenth Amendment to the United States Constitution and § 6 of the New York Constitution both forbid the deprivation of “life, liberty or property without due process of law.” U.S. CONST. amend XIV; N.Y. CONST. art. I, § 6. It should be noted, however, that Article I, § 6, begins the New York Constitution with the promise that no New Yorker shall be “deprived of any of the rights or privileges secured to any citizen . . . unless by the law of the land.” N.Y. CONST. art I, § 1.

avored by the New Jersey Supreme Court and require a showing of state-specific reasons sufficient to justify departure from federal precedent.¹⁵⁴ Argument over the proper method of analysis seems inevitable, and litigants must therefore be prepared to support their arguments with social-science data about New York and with reference to our judicial, legislative and social history.

Indeed, no matter what method or combination of methods the court of appeals uses, the factual support adduced for arguments for and against the death penalty will be crucial. Whether the death penalty deters, whether it offends community standards of decency, whether its immense expense will result in arbitrary enforcement and whether it inevitably falls disproportionately on poor and minority defendants are just some of the questions upon which empirical studies can shed light. In short, we need to try to understand our past as well as our present in order to debate New York's death penalty. Fresh inquiry is imperative—inquiry into the social, constitutional, legislative and judicial history of both the state and the nation, insofar as it bears on punishment in general, and the death penalty in particular.

B. Challenges to the Statute

1. Death-Avoidance Guilty Pleas

New York's Criminal Procedure Law formerly forbade pleas of guilty to capital murder.¹⁵⁵ However, the new death penalty legislation amends this provision, adding that a defendant "may enter such a plea with both the permission of the Court and the consent of the People when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for . . . murder in the first degree."¹⁵⁶ In other words, the state may not

¹⁵⁴ See *supra* notes 65-70 and accompanying text.

¹⁵⁵ N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney 1993).

¹⁵⁶ Death Penalty Act § 10, 1995 N.Y. LAWS at 4 (amending N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1993)); Death Penalty Act § 11, 1995 N.Y. LAWS at 4 (amending N.Y. CRIM. PROC. LAW § 220.30(3)(b)(vii)

put to death a defendant who pleads guilty as charged. Because a defendant who goes to trial risks death, and one who pleads guilty avoids the risk, it will undoubtedly be argued that the new statute impermissibly burdens the guarantee against compelled self-incrimination and the right to trial by jury that are contained in both the New York and Federal Constitutions,¹⁵⁷ and that the imposition of the death penalty is therefore unconstitutional in all circumstances.

The Supreme Court has held that the availability of a death-avoidance plea¹⁵⁸ unconstitutionally chills the exercise of Fifth and Sixth Amendment rights.¹⁵⁹ In *United States v. Jackson*¹⁶⁰ and *Pope v. United States*,¹⁶¹ the Court struck down the death penalty provisions of the Federal Kidnapping and Bank Robbery Acts because under both statutes, the state could impose the death penalty after a jury trial, but the state could only sentence to prison those defendants who pleaded guilty as charged or chose bench trials.¹⁶² This procedure was held to penalize defendants who pleaded not guilty and to "needlessly chill the exercise of basic constitutional rights."¹⁶³ Relying on *Jackson*, state courts have

(McKinney 1993)).

¹⁵⁷ U.S. CONST. amends. V, VI; N.Y. CONST. art. I, §§ 2, 6.

¹⁵⁸ Used here, the term "death-avoidance plea" refers only to statutorily permitted pleas to murder in the first degree. The term does not refer to bargained-for pleas to lesser, noncapital offenses. One can argue, however, that the availability of plea bargains in capital cases, unlike plea-bargaining in other situations where only differing terms of years are at stake, also puts an unconstitutionally high price on the exercise of the right to defend and the right to be tried by a jury. As with what we term here "death-avoidance pleas," the proper remedy is not the abolition of plea-bargaining in capital cases, but abolition of the death penalty entirely. See *infra* notes 163-65 and accompanying text.

¹⁵⁹ See *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *Pope v. United States*, 392 U.S. 651, 651 (1968).

¹⁶⁰ 390 U.S. 570 (1968).

¹⁶¹ 392 U.S. 651 (1968).

¹⁶² *Jackson*, 390 U.S. at 578-79, 583; *Pope*, 392 U.S. at 651.

¹⁶³ *Jackson*, 390 U.S. at 582-83. *Jackson* invalidated sentences of death; it did not mean, however, that all guilty pleas entered under the statute were *per se* coerced. See *Brady v. United States*, 397 U.S. 742, 746-47 (1970).

likewise held that the availability of death-avoidance pleas violates the Federal Constitution, their state constitutions, or both.¹⁶⁴

Upon finding these constitutional violations, the state courts, like the Supreme Court, were obliged to sever and strike either the death penalty or the plea provision.¹⁶⁵ New Jersey, Washington,

¹⁶⁴ See, e.g., *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1994) (violating the Massachusetts Constitution); *State v. Johnson*, 595 A.2d 498 (N.H. 1991) (violating the New Hampshire and the Federal Constitutions); *State v. Frampton*, 627 P.2d 922 (Wash. 1981) (holding that the procedure is "unconstitutional" and citing *Jackson*); *State v. Funicello*, 286 A.2d 55 (N.J. 1972) (violating the New Jersey and the Federal Constitutions), *cert. denied* by New Jersey v. Presha, 408 U.S. 942 (1972).

New York had death-avoidance pleas prior to *Jackson*. Although the New York Court of Appeals never squarely held that the death penalty was unconstitutional if such pleas were available, the court indicated as much, and the Criminal Procedure Law was amended to forbid guilty pleas in capital crimes. N.Y. CRIM. PROC. §§ 220.10 (5)(e), 220.30 (3)(b)(vii) (McKinney 1993); see *People v. Black*, 30 N.Y.2d 593, 281 N.E.2d 849, 330 N.Y.S.2d 804 (1972), *affirming* 34 A.D.2d 999, 312 N.Y.S.2d 658 (2d Dep't 1970); cf. *People v. A.C.*, 27 N.Y.2d 79, 86, 261 N.E.2d 620, 625, 313 N.Y.S.2d 695, 701 (1970) (holding a statute in a noncapital case to be unconstitutional because it "offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it . . ."; relying on *Jackson*).

¹⁶⁵ The only other possibility consistent with *Jackson* would be to interpret the statute to require capital jury sentencing of defendants who plead guilty. Given the explicit language of New York's statute, however, that route seems barred. It would seem thus that only the legislature can save both guilty pleas and the death penalty. Yet, ironically, the possibility of a death sentence upon a plea of guilty may be as constitutionally dubious as the impossibility of such a sentence.

Judge Hans Linde of the Oregon Supreme Court, an important figure in the New Federalism movement, has argued that no person may constitutionally be put to death without "the highest degree of certainty by a unanimous jury that every element of a capital crime has been proved beyond a reasonable doubt . . ." *State v. Wagner*, 752 P.2d 1136, 1186 (Linde, J., dissenting). Judge Linde's argument, rejected by the majority of the Oregon Court, is based in part on heightened concern for the rights of capital defendants reflected in a state constitutional provision that forbids, as does New York's Constitution, the waiver of jury trials in capital cases. *Id.* (Linde, J., dissenting). It may well have been to avoid an objection, such as Judge Linde's, that the New York Legislature created the death-avoidance plea. In so doing, however, it fell afoul of *Jackson*. Such paradoxes characterize contemporary death penalty jurisprudence: legislators

New Hampshire and Massachusetts all struck the death penalty,¹⁶⁶ following the example of *Jackson*, where the Court considered that forcing every capital defendant to go to trial would be an unnecessarily oppressive remedy.¹⁶⁷

The only distinction between the new New York statute and the statutes condemned in *Jackson* and *Pope* appears to be a distinction that makes no doctrinal difference. The defendants in those cases could escape the threat of death by choosing either a guilty plea or a bench trial. However, the New York Constitution forbids the waiver of trial by jury whenever "the crime charged may be punishable by death."¹⁶⁸ The choice, thus, is between a guilty plea or a jury trial. On the basis of the same distinction—New Jersey also forbids the waiver of trial by jury in capital cases—the New Jersey Supreme Court initially concluded that *Jackson* did not apply to New Jersey's death penalty.¹⁶⁹ In *State v. Forcella*, the court reasoned first that the right to a jury only attached once a defendant chose to go to trial, and that, because such a defendant could not waive a jury, the right to trial by jury could not possibly be burdened by the guilty-plea provision.¹⁷⁰ With respect to the right not to plead guilty, the court contended that its invocation in *Jackson* was unnecessary to the decision there,¹⁷¹ and that in any event, any burden on the right not to plead guilty was not needless, but justifiable because the provision operated to the benefit of defendants who pled guilty.¹⁷²

The dissenters in *Forcella* responded that the right to be tried by a jury is not just the right of a defendant who goes to trial, but rather, one of the rights a defendant gives up by pleading guilty, and that a defendant who pleaded guilty in New Jersey thus gave

and prosecutors seek to avoid one constitutional pitfall only to fall into another. See *infra* part IV.B.8. and Conclusion.

¹⁶⁶ *Colon-Cruz*, 470 N.E.2d at 129; *Johnson*, 595 A.2d at 504; *Frampton*, 627 P.2d at 927; *Funicello*, 286 A.2d at 59.

¹⁶⁷ *Jackson*, 390 U.S. at 584.

¹⁶⁸ N.Y. CONST. art I, § 2.

¹⁶⁹ See, e.g., *State v. Forcella*, 245 A.2d 181, 269 (N.J. 1968).

¹⁷⁰ *Id.* at 185.

¹⁷¹ *Id.*

¹⁷² *Id.* at 187-88.

up *both* the guarantee against compelled self-incrimination and the right to a jury.¹⁷³ Moreover, the dissenters maintained, *Jackson* itself answered the rest of the majority's contentions. According to *Jackson*, the vice of the federal death penalty statute was not that it encouraged the sacrifice of rights without conferring a benefit, but rather, that it needlessly penalized—by death—the assertion of such rights.¹⁷⁴ The defendants in *Forcella* appealed to the Supreme Court, which remanded for reconsideration in light of *Jackson*, seemingly vindicating the dissenters.¹⁷⁵ Upon reconsideration, the New Jersey Supreme Court capitulated, holding that it could not constitutionally impose the death penalty after trial under a statutory scheme that included death-avoidance pleas.¹⁷⁶

Thus it would appear that under *Jackson*, New York's statute violates the Federal Constitution. But the ultimate outcome of such a challenge is far from certain. The *Jackson* argument is, of course, only compelling so long as *Jackson*, decided in 1968, remains good law. Would the Supreme Court, as currently constituted and in keeping with its policy of deregulation, distinguish or overrule *Jackson*? There is some reason to believe so. If the court of appeals were to strike down either the death-avoidance plea or the death penalty itself on the basis of *Jackson* alone, the Supreme Court could, of course, review the decision.¹⁷⁷ Were the court of appeals to reach the same result on the basis of both state and Federal Constitutions, or on the basis of the New York Constitution alone, however, the Supreme Court could not review the decision.¹⁷⁸ Both prudence and principle counsel exploration of state constitutional grounds here.

¹⁷³ *Id.* at 199-200 (Jacobs & Hall, J.J., dissenting).

¹⁷⁴ *Id.* at 198 (Jacobs & Hall, J.J., dissenting).

¹⁷⁵ *Funicello v. New Jersey*, 403 U.S. 948 (1971). In the meanwhile, appellant *Forcella* had died of natural causes.

¹⁷⁶ *State v. Funicello*, 286 A.2d 55 (N.J. 1972), *cert. denied by New Jersey v. Presha*, 408 U.S. 942 (1972). The court invalidated the death penalty provision and all pending death sentences.

¹⁷⁷ See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.1 (1991).

¹⁷⁸ *Id.* at § 2.13; see also *supra* note 65.

Certainly, the guarantee of trial by jury contained in the New York Constitution suggests on its face even *more* protection than the Sixth Amendment promises: the right is to be “forever inviolate” and may not be waived in a capital trial.¹⁷⁹ The state constitution uses language identical to that of the Federal Constitution to prohibit compelled self-incrimination; inquiry into the constitution’s history and interpretation is needed, as is inquiry into New York’s former prohibition of death-avoidance pleas, which seems to have been a response to *Jackson*. Serious thought must also go into the issues of remedy and severability.¹⁸⁰ Finally, the magnitude of the guilty-plea issue makes early resolution crucial—resolution before direct appeal of the first conviction under the new statute.

2. *Death Qualification of Jurors*

New York’s death penalty statute provides for a bifurcated trial—a “guilt” phase and a “penalty” phase—and, ordinarily, just one “unitary” jury to sit at both phases.¹⁸¹ The statute also provides for the “death qualification” of the jury prior to the guilt phase.¹⁸² Death qualification refers in general to the exclusion by challenges for cause of potential jurors whose opposition to the death penalty would prevent or impair their ability to properly discharge their duties as jurors.

¹⁷⁹ N.Y. CONST. art. 1, § 2.

¹⁸⁰ The Death Penalty Act provides for the severability of any provision declared unconstitutional. Death Penalty Act § 37, 1995 N.Y. LAWS at 25.

¹⁸¹ Death Penalty Act § 20, 1995 N.Y. LAWS at 6 (amending the Criminal Procedure Law by adding a new § 400.27).

¹⁸² Death Penalty Act § 15, 1995 N.Y. LAWS at 5 (amending N.Y. CRIM. PROC. LAW § 270.20(1)(f)(McKinney 1993)). This section permits challenges for cause to prospective jurors when

[t]he crime charged may be punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of such punishment as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law in the determination of a sentence.

Id.

Few would argue that jurors who could not impose the death penalty should sit at the sentencing phase, or that jurors who because of opposition to the death penalty could not vote to convict at the guilt phase should be allowed to sit at all in capital cases. But what has been repeatedly challenged is the exclusion from the guilt-determination phase of jurors whose scruples about capital punishment would not prevent them from fairly reaching a verdict. Although thus far, no challenge has succeeded,¹⁸³ death qualification¹⁸⁴ bears so centrally on basic guarantees of fairness that it seems certain to be the subject of state constitutional challenge in New York.

That death qualification at the guilt phase is an historical vestige that has lost its historical justification is beyond debate. Simply put, when, as it was for most of its existence, the death penalty was mandatory and capital trials were unitary, the state had an obvious interest in excluding jurors who could not impose a death sentence. However, the bifurcated trial preferred by the Supreme Court would seem to have all but extinguished any legitimate interest in excluding from the guilt phase jurors who believe themselves able to convict but unable to impose a death sentence.¹⁸⁵

Yet anachronism is not the most unsettling charge against death qualification. On the basis of concededly valid social-scientific studies, it has long been argued that the death qualification process

¹⁸³ See *Lockhart v. McCree*, 476 U.S. 162 (1986); see also *State v. Alvarez*, 872 P.2d 450, 454-55 (Utah 1994); *State v. Ramseur*, 524 A.2d 188, 250-54 (N.J. 1987). However, death qualification has generated both concern and dissent in the courts that have considered it. See, e.g., *Alvarez*, 872 P.2d at 462 (Zimmerman & Stewart, J.J., concurring; Durham, J., dissenting); *Ramseur*, 524 A.2d at 295-300, 345-48 (O'Hern, J., concurring; Handler, J., dissenting); *Commonwealth v. Maxwell*, 477 A.2d 1309, 1318-21 (Pa. 1984) (Nix, J., dissenting), *cert. denied by Maxwell v. Pennsylvania*, 469 U.S. 971 (1984).

¹⁸⁴ For convenience, the term "death qualification" will be used in the rest of this section to refer only to the exclusion at the guilt phase of potential jurors who could not vote for the death penalty at the sentencing phase.

¹⁸⁵ The Court stated in *Gregg* that arbitrary and capricious imposition of the death penalty could best be avoided by a bifurcated proceeding. *Gregg v. Georgia*, 428 U.S. 153, 191-92 (1976).

produces juries biased in favor of conviction.¹⁸⁶ Accepting the empirical evidence of bias, the Supreme Court nonetheless held that death qualification does not violate the Federal Constitution in *Lockhart v. McCree*.¹⁸⁷ Moreover, state constitutional challenges to the death penalty based on death qualification have thus far failed, although passionate dissent has been registered.¹⁸⁸

The opinions of the New Jersey Supreme Court in *State v. Ramseur*¹⁸⁹ instructively set out the terms of the debate over death qualification in state court. The majority rejected the defendant's claim that death qualification violated the right to an impartial jury inherent in the state constitutional guarantee of trial by jury.¹⁹⁰ Finding no distinctive New Jersey attitude toward the death penalty, and noting somewhat illogically that "this Court previously permitted death qualification in trials where the guilt and penalty phases were combined,"¹⁹¹ the majority adopted the position of the United States Supreme Court in *Lockhart*. Accepting, like the Supreme Court, the truth of empirical evidence that death-qualified juries are more conviction-prone than

¹⁸⁶ Some of the data presented to the Supreme Court in *Lockhart* is summarized in *Grigsby v. Mabry*, 569 F. Supp. 1273, 1290-304 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom* *Lockhart v. McCree*, 476 U.S. 162 (1986); *see also* *Lockhart*, 476 U.S. at 202-03 (Marshall, J., dissenting); *State v. Young*, 853 P.2d 327, 388-93 (Utah 1993) (Durham, J., dissenting). Death-qualified juries are more punitive than those juries on which opponents of capital punishment are allowed to sit. Death-qualified jurors are substantially more likely to convict or to convict of more serious charges. They are also "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions." *Lockhart*, 476 U.S. at 187. (Marshall, J., dissenting). Moreover, "[b]y focusing on the penalty before the trial actually begins . . . the judge, the prosecutor, and the defense counsel convey the impression that they all believe the defendant is guilty, that the 'real' issue is the appropriate penalty, and that the defendant really deserves the death penalty." *Grigsby*, 569 F. Supp. at 1303.

¹⁸⁷ 476 U.S. 162 (1986).

¹⁸⁸ *See, e.g., Alvarez*, 872 P.2d at 454-55, 462; *State v. Ramseur*, 524 A.2d 188, 250-54, 295-300, 344-48 (N.J. 1987); *Maxwell*, 477 A.2d at 1318-22.

¹⁸⁹ 524 A.2d 188 (N.J. 1987).

¹⁹⁰ *Id.* at 250-54.

¹⁹¹ *Id.* at 252.

nondeath-qualified juries, the *Ramseur* majority nonetheless rejected the impartial-jury argument, citing the Supreme Court's conclusion that "if the Constitution required a certain mix of individual viewpoints, i.e., those less or more prone to convict on a particular jury, then courts would be required to undertake the difficult task of balancing each jury."¹⁹² Given the state's "entirely proper interest in obtaining a single jury that could impartially decide all of the issues,"¹⁹³ the balance is struck against the defendant's claim. Moreover, the *Ramseur* majority was convinced that there was "no satisfactory alternative to death qualification of jurors prior to the guilt phase."¹⁹⁴

However, the New Jersey court expressed concern in *Ramseur* about another aspect of *Lockhart*; namely, the Supreme Court's rejection of the petitioner's argument that death qualification deprived him of his right to a jury representing a fair cross-section of the community.¹⁹⁵ In *Lockhart*, the Court reasoned that conscientious objectors to the death penalty are not "a distinctive group in the community," unlike "women and racial minorities," which are "groups previously recognized as distinctive" for Sixth Amendment purposes.¹⁹⁶ The New Jersey court was troubled by evidence cited by the federal court overruled in *Lockhart*, "evidence establish[ing] that one consistent and inevitable result of the death qualification process is the disproportionate exclusion of blacks and women."¹⁹⁷ The *Ramseur* majority continued:

We have before us no evidence that in New Jersey there has been a resultant systematic exclusion of blacks and women in disproportionate numbers. We recently expressed our disdain for the systematic exclusion of distinctive groups because of our special commitment to the fair cross-section requirement. Therefore, if data relevant to the New Jersey practice are presented to us indicating such a

¹⁹² *Id.* at 251 (citing *Lockhart v. McCree*, 476 U.S. 162, 178-79 (1986)).

¹⁹³ *Id.* (quoting *Lockhart*, 476 U.S. at 180).

¹⁹⁴ *Id.* at 253.

¹⁹⁵ 476 U.S. 162, 174 (1986).

¹⁹⁶ *Id.* at 174-77.

¹⁹⁷ *Ramseur*, 524 A.2d at 252 n.54 (quoting *Grigsby v. Mabry*, 569 F. Supp. 1273, 1283 (E.D. Ark. 1983)).

result, we would be prepared to address this constitutional concern.¹⁹⁸

Justice Handler dissented from the majority's conclusion that death qualification does not violate the right to an impartial jury.¹⁹⁹ Although he questioned the logic of *Lockhart*, his major disagreement involved the majority's failure to "construe the New Jersey Constitution as an independent source of protection."²⁰⁰ Justice Handler argued that:

The balance this Court makes under our Constitution must be different from that made by the United States Supreme Court. . . . First, the right to be tried by an impartial jury is given great protection under our state standards and under our State Constitution Second, under the state doctrine of fundamental fairness, that right to an impartial jury must be applied even more strictly when life is at stake.²⁰¹

Given his greater interest in impartiality, and his conviction that the practical problem can be solved without imposing any substantial burden on the state—by using two separate juries or by death-qualifying the jury after the guilt phase and replacing non-death-qualified jurors with alternate jurors²⁰²—Justice Handler concluded that New Jersey's death qualification procedure "violates

¹⁹⁸ *Id.*; see also *Grigsby v. McCree*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom*, *Lockhart v. McCree*, 476 U.S. 162 (1986). In *Grisby*, the court stated:

Blacks and women constitute significant and distinctive groups of jury-eligible citizens within Arkansas and the Nation. Death qualification results in their systematic disproportionate removal from juries which try the guilt-innocence of persons accused of capital crimes, without adequate justification, in violation of the accused's right to a representative jury comprised of a fair cross-section of the community.

Id. at 231 n.9.

¹⁹⁹ *Ramseur*, 524 A.2d at 300 (Handler, J., dissenting).

²⁰⁰ *Id.* at 346-47 (Handler, J., dissenting).

²⁰¹ *Id.* at 347 (Handler, J., dissenting) (citations omitted).

²⁰² *Id.* at 348 (Handler, J., dissenting); see also *Lockhart*, 476 U.S. at 203-05 (Marshall, J., dissenting); *Grigsby*, 569 F. Supp. at 1319.

State constitutional guarantees of a fair and impartial jury as a matter of fundamental fairness.”²⁰³

In his *Ramseur* concurrence, Justice Daniel O’Hern also rejected the death qualification process, but on different grounds.²⁰⁴ He found it unnecessary to decide whether the New Jersey Constitution provides more protection than the Federal Constitution. Rather, he would have held that “in the exercise of our judicial supervision over the criminal justice system, continuing to death-qualify juries at the guilt phase . . . is inconsistent with New Jersey’s traditional sense of fairness and justice.”²⁰⁵

Justice O’Hern summarized *Lockhart* as holding “that it is all right to determine a defendant’s guilt by a jury more prone to convict than by a jury representative of a cross-section of the community.”²⁰⁶ He continued:

The Court permits that result because it believes that the State is entitled to have jurors in the penalty phase who will conscientiously apply the laws of the State. The Court extends this entitlement to the guilt phase, not because it believes that such a trial produces a fairer verdict, but because it does not believe in the limited exercise of its constitutional supervision over state criminal trials it should impose upon the states the burden of empaneling a penalty-phase jury if the guilt-phase jury cannot sit to resolve the penalty. . . . I recognize that the added burdens are real and are not insubstantial, but I believe they are ones that society would be willing to make to preserve the central value of our criminal justice system—trial by an impartial jury, not one that is more prone to convict.²⁰⁷

Finally, Justice O’Hern articulated the doctrinal basis of his conclusion, in more abstract terms, as follows:

It is the Supreme Court’s function to define the limits of what states can do, not what they should do. Focusing on

²⁰³ *Ramseur*, 524 A.2d at 348.

²⁰⁴ *Id.* at 294 (O’Hern, J., concurring).

²⁰⁵ *Id.* at 295 (O’Hern, J., concurring).

²⁰⁶ *Id.* (O’Hern, J., concurring).

²⁰⁷ *Id.* at 296 (O’Hern, J., concurring).

the outer limits of state power averts attention from the inner question: what is the proper exercise of criminal procedure? The real question for us is not what the state can do, but rather what we should do in the just exercise of our common law supervisory power over criminal practice within our jurisdiction.²⁰⁸

The *Ramseur* opinions suggest several different kinds of challenges to New York's death qualification procedure, which is very similar to New Jersey's.²⁰⁹ First, there is the argument that *Lockhart* is simply wrong, illogical and contradictory of the Supreme Court's own precedent.²¹⁰ Second, if special New York concern for impartial juries and juries representative of a fair cross-section of the community can be demonstrated by historical and social-scientific evidence, then it can be argued that the state constitution provides *more* protection than the Federal Constitution.²¹¹ Finally, death qualification can be challenged

²⁰⁸ *Id.* at 295 (O'Hern, J., concurring). Put another way, the reach of constitutional norms is often much greater than the Supreme Court's institutional grasp. See generally Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Norms*, 91 HARV. L. REV. 1212 (1978).

²⁰⁹ However, it must be noted that New York's statute also provides for the removal for cause of potential jurors whose "conscientious opinions" in favor of the death penalty will interfere with their ability to render an impartial verdict or properly exercise sentencing discretion. Death Penalty Act § 15, 1995 N.Y. LAWS at 5 (amending N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 1993)). In 1992, the Supreme Court held that a capital defendant must be permitted to challenge for cause any prospective juror who would *automatically* vote for the death penalty. *Morgan v. Illinois*, 504 U.S. 719 (1992). One state supreme court has assumed that such "life-qualifying" challenges provide some "counter-balancing" to death qualification. *State v. Moore*, 697 P.2d 233, 237 (Utah 1985). Yet there seems to be no empirical evidence of any counter-balancing. In fact, recent studies "continue to show a statistically significant likelihood that death qualification frequently will produce conviction-prone juries regardless of any counter-balancing effect of excluding" jurors who would automatically vote for the death penalty. *State v. Young*, 853 P.2d 327, 387 (Durham, J., dissenting). Much work remains to be done if the troubling puzzle of death qualification is to be solved.

²¹⁰ *Ramseur*, 524 A.2d at 320 (Handler, J., dissenting).

²¹¹ *Id.* at 209 (citing *California v. Ramos*, 463 U.S. 992 (1983), and noting that in capital cases "[i]t is elementary that States are free to provide greater

without challenging the Supreme Court's reasoning or finding interpretive or noninterpretive reasons for more constitutional protection. Instead, death qualification can be challenged under Justice O'Hern's *can-should* rationale.²¹² According to Justice O'Hern's analysis, the Supreme Court decides the outer limits of state power; whether on the basis of their supervisory power or under their own constitutions, state courts decide not whether to give the *same* or *more* protection, but the proper exercise of power.²¹³

There are still other potential challenges to death qualification, however. For example, challenges can also be based on the state constitutional guarantee of the free exercise of religion.²¹⁴ This argument maintains that the prospective jurors' rights to religious freedom are violated when they are excluded from service on capital juries solely because their religious beliefs forbid the imposition of the death penalty.

Finally, it can be argued that an innocent defendant who faces trial on a capital charge before what the state itself concedes to be a conviction-prone jury may have no choice but to accept whatever plea bargain is offered. Even accepting, for argument's sake, that a defendant can otherwise enter such a plea voluntarily, surely it can be argued that the specter of a conviction-prone jury tips the constitutional balance, violating state constitutional guarantees of due process and against compelled self-incrimination.

3. *Assistance of Counsel*

The single feature that characterizes almost every case in which the death penalty has been imposed is the abysmal quality of representation that the defendant received. In no other area of the

protections in their criminal justice system than the Federal Constitution requires").

²¹² *Id.* at 295 (O'Hern, J. concurring).

²¹³ Put another way, state courts may properly give life to under-enforced norms. See Billionis, *supra* note 89, at 1684-85.

²¹⁴ The New York Constitution provides that "[t]he free exercise and enjoyment of religious profession and worship . . . shall forever be allowed in this state to all mankind." N.Y. CONST. art. I, § 3.

law does one read as many accounts of incompetent, unethical, lazy, negligent, racist attorneys providing inadequate representation to the invariably indigent capital defendant.²¹⁵ Indeed, Stephen B. Bright, the director of the Southern Center for Human Rights in Atlanta and one of the most experienced death penalty litigators in the country, entitled his recent essay in the *Yale Law Journal*, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*.²¹⁶

Bright identifies a number of reasons that the defendants most in need of the best representation regularly receive the worst. Foremost among these is the fact that "the compensation provided to individual court-appointed lawyers is so minimal that few accomplished lawyers can be enticed to defend capital cases. Those who do take a capital case cannot afford to devote the time required to defend it properly."²¹⁷ Prosecutors, on the other hand, are generally well-funded.

A related reason for poor capital representation is that the attorneys assigned to represent indigents rarely handle death penalty cases regularly and therefore lack the expertise, even if they possess the funds and the desire to do a competent job. Prosecutors, on the other hand, have established death penalty bureaus in their offices staffed by attorneys who do nothing else but capital prosecutions and who are, consequently, experts in their field.

Ultimately, Bright points out, it is the judiciary that is largely to blame for the ineffective assistance of counsel that indigent capital defendants routinely receive because the standard set by the Supreme Court for judging lawyers' competence is so low.²¹⁸ Moreover, at the same time that the courts have lowered the standards for effective representation, they have raised the procedural requirements for challenging trial errors on appeal. Thus, courts find that attorneys have provided effective representation, even where they neglect to move for relief or to raise objections at trial, thus forfeiting appellate review of reversible errors.

²¹⁵ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

²¹⁶ *Id.*

²¹⁷ *Id.* at 1844.

²¹⁸ *Id.* at 1843, 1857-58.

The question, therefore, is whether the pattern of inadequate representation of capital defendants in other states will repeat itself in New York and, if it does, how the court of appeals will respond. It is, of course, an article of faith for New Yorkers that few things that happen in the Deep South could ever happen in their state. Moreover, it is clear that the drafters of New York's death penalty statute intended that capital defendants should receive adequate representation. Nevertheless, there is cause for concern, for even where the desire to provide such representation exists, it may simply be beyond the ability of the state to provide it.

Under section 29 of the New York death penalty statute, defendants who are unable to afford representation are entitled to the appointment of two attorneys from the time they are charged with first degree murder (or from the time that the district attorney informs the court that the prosecutor's office is investigating whether a defendant charged with second degree murder can or should be charged with first degree murder) through sentencing.²¹⁹ Once a court sentences a defendant to death, one and possibly two lawyers will be assigned to handle the appeal.²²⁰ In addition, a convicted capital defendant is entitled to representation by appointed counsel on one, and only one, collateral proceeding under sections 440.10 or 440.20 of the Criminal Procedure Law, and on appeal from any order denying an initial post-judgment motion pursuant to one of those sections.²²¹ Additionally, the defendant is entitled to investigative, expert and other "reasonably necessary" services.²²²

On its face, the New York statute provides capital defendants with representation at more stages than the Supreme Court requires under the Federal Constitution. Assignment of counsel to indigent defendants at trial and on appeal is, of course, guaranteed by the

²¹⁹ Death Penalty Act § 29, 1995 N.Y. LAWS at 15-19 (amending the Judiciary Law by adding a new § 35-b).

²²⁰ *Id.*

²²¹ N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994); Death Penalty Act § 21, 1995 N.Y. LAWS at 2 (amending N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 1994)).

²²² Death Penalty Act § 29, 1995 N.Y. LAWS at 15-19 (amends the Judiciary Law by adding a new § 35-b).

Sixth Amendment. In *Murray v. Giarratano*,²²³ however, the Supreme Court held that the Federal Constitution does not require the state to appoint counsel for indigent prisoners seeking state post-conviction relief. The requirement of "a greater degree of reliability" in death penalty cases applies only to "the trial stage of capital offense adjudication where the court and jury hear testimony, receive evidence and decide questions of guilt and punishment."²²⁴ Thus, the Court contrasted the trial stage of a criminal proceeding with the appellate stage, at which the defendant "needs an attorney not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."²²⁵

Nevertheless, a serious challenge could be raised under the state constitution in the appropriate case to the denial of assigned counsel to a capital defendant on a subsequent collateral proceeding.²²⁶ In *Murray*, dissenting Justices Stevens, joined by Justices Brennan, Marshall and Blackmun noted that while

[i]deally, direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception . . . significant evidence [exists to show that] in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality.²²⁷

Justice Stevens pointed to the fact that federal habeas corpus relief was granted in only 0.25% to 7% of noncapital cases in recent years while the success rate in capital cases ranged from 60% to 70%.²²⁸ He concluded that "[s]uch a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process."²²⁹ The statute in *Murray* provided no counsel for

²²³ 492 U.S. 1 (1989).

²²⁴ *Id.* at 9.

²²⁵ *Id.* at 7-9 (quoting *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974)).

²²⁶ *Id.* at 23 (Stevens, J., dissenting).

²²⁷ *Id.* at 23 (Stevens, J., dissenting).

²²⁸ *Id.* at 23-24 (Stevens, J., dissenting).

²²⁹ *Id.* at 24 (Stevens, J., dissenting).

collateral review.²³⁰ Still, it is difficult to see why a capital defendant who has already exhausted his one collateral proceeding should be denied counsel subsequently to raise, for example, a well-founded claim of newly discovered evidence. Certainly an argument could be made, in the appropriate case, that the failure to provide a capital defendant with counsel in such a situation violates the state constitution.

Even if the court of appeals holds that the statute adequately provides for counsel at all crucial stages, the problem of ensuring that the counsel provided is competent will still remain. As Stephen B. Bright points out, the main cause of inadequate representation is insufficient money.²³¹ While the legislature appears to intend to provide adequate funding for capital defense, the fact is that it is unlikely that it will be able to do so because capital representation, properly performed, is extremely costly.

In a recent article, Judge Joseph Bellacosa, of the New York Court of Appeals, gives several examples of death penalty cases which required years of litigation until sentences were finally vacated.²³² In one Mississippi case, the New York law firm Cahill Gordon & Reindel, represented the defendant.²³³ The law firm's fee was \$1.7 million dollars.²³⁴ In another case, the attorneys of an inmate of Arizona's death row spent over \$2 million dollars in lawyer hours and \$100,000.00 in out-of-pocket expenses.²³⁵ Judge

²³⁰ VA. CODE ANN. § 14.1-183 (Michie 1993). The Virginia statute provides that:

Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to the therefor, except what may be included in the costs recovered from the opposite party.

Id.

²³¹ Bright, *supra* note 215, at 1843-44.

²³² Bellacosa, *supra* note 5, at 3.

²³³ Bellacosa, *supra* note 5, at 8 (discussing Johnson v. Mississippi, 486 U.S. 578 (1988)).

²³⁴ Bellacosa, *supra* note 5, at 10.

²³⁵ Bellacosa, *supra* note 5, at 16.

Bellacosa's point was not that these sums were excessive, but rather that this is what competent representation can cost.²³⁶

While the New York Legislature clearly understood that it would have to provide additional funding for capital representation, it remains unclear whether the courts can or will reimburse defense attorneys for the hours that they actually must spend to defend capital cases, and whether the courts can or will reimburse the necessary expenses incurred during investigation and preparation²³⁷ at rates that will enable good attorneys to handle the case.²³⁸ If New York, like so many other states, cannot pay the going rate for top-level representation, serious claims of inadequate assistance of counsel will surely result.

Indeed, not only does the experience of other states compel this conclusion,²³⁹ but it is consistent with the experience in New York in noncapital cases. Only a few highly competent attorneys in New York City regularly handle assigned cases because the reimbursement rate in noncapital cases is extremely low. And, indeed, a very low standard of competence is tolerated by the courts from assigned counsel in serious criminal cases carrying heavy penalties.

When death penalty cases reach the New York Court of Appeals, the question will be whether the court will do as the federal and other state courts have done and simply lower the standard of competence to the level of payment, or whether it will require the state to pay for justice in death penalty cases. At a time

²³⁶ Bellacosa, *supra* note 5, at 15-16.

²³⁷ As of this writing, negotiations are going on between the Capital Defender Office, which was established to oversee the defense of capital cases, and the comptroller over how lawyers representing capital defendants will be paid. The Capital Defender Office was allotted \$4.5 million in the current state budget with just \$250,000.00 of that earmarked to pay attorneys handling capital cases. It is unclear what will happen when the \$250,000.00 runs out. Daniel Wise, *Four Panels Named for Death Penalty Cases; Assignments Include Counsel Compensation*, N.Y.L.J., Aug. 16, 1995, at 1.

²³⁸ A commentator involved in the process of setting the compensation rates for defenders of indigent capital defendants predicts that rates will be \$125.00 per hour, or slightly less, for in-court work and \$75.00 per hour for out-of-court work. *Id.*

²³⁹ Bright, *supra* note 215, at 1841-44.

when the state is required to cut essential services to New Yorkers and lay off thousands of workers,²⁴⁰ one wonders why it should pay millions of dollars for the prosecution and defense of persons charged with capital crimes. The only constitutional conclusion may be, however, that capital punishment is a luxury that the state cannot afford.

Finally, the disparity in competence between prosecutors and defense attorneys in capital cases is as likely to exist in New York as in other states. New York will soon have a group of highly skilled prosecutors handling death penalty cases, while defense attorneys will not have the same opportunity to develop such expertise.²⁴¹ The statute does provide for the creation of a Capital Defender Office to oversee the provision of representation in death penalty cases.²⁴² The Office is authorized to provide representation to capital defendants;²⁴³ to provide legal or other advice and investigative, expert and other reasonably necessary services to counsel appointed to represent capital defendants;²⁴⁴ to enter into an agreement with a legal aid society or other not-for-profit organization to provide representation to capital defendants;²⁴⁵ and to determine minimum standards of competence for attorneys representing capital defendants.²⁴⁶

While the staff of the Capital Defender Office and the Legal Aid attorneys who work regularly on death penalty cases will no doubt provide competent representation, most of the representation of capital defendants is expected to be performed by private attorneys with the help of the Capital Defender Office.²⁴⁷ While some of these will be the dedicated and highly competent lawyers who have taken on death penalty cases around the country, at great

²⁴⁰ See James Dao, *The Pataki Budget; The Overview: Pataki Proposes Broad Reduction in State Spending*, N.Y. TIMES, Feb. 2, 1995, at A1.

²⁴¹ Jan Hoffman, *Lawyers Prepare for New York's Penalty*, N.Y. TIMES, Aug. 31, 1995, at A4.

²⁴² Death Penalty Act § 29, 1995 N.Y. LAWS at 15-19 (amending the Judiciary Law by adding a new § 35-b).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

personal sacrifice, the existence of such attorneys is not guaranteed. Moreover, the death penalty statute provides that the minimum competence of attorneys to handle death penalty cases shall be determined "taking into consideration not just the needs of defendants for adequate representation, but also the needs of the state for an adequate number of attorneys."²⁴⁸

Although the amount paid to attorneys assigned to represent capital defendants is low, compared to the fees of experienced private attorneys, the rate paid for assigned capital representation is higher than the rate paid assigned attorneys in noncapital cases.²⁴⁹ Attorneys who earn their living by handling assigned cases may consider capital representation lucrative work. If these attorneys know that there will ultimately be a cap on what they can earn in such cases, however, there is a danger that they will do as they do in noncapital cases, which is to give the cases short-shrift.

Even if some highly competent attorneys agree to take on capital cases, as Judge Bellacosa urges them to do as part of their ethical obligations as attorneys, few can afford to handle more than one such case.²⁵⁰ Thus, even good attorneys will have had little experience in handling capital cases. Indeed, given that New York has not had a death penalty for over twenty years, there are almost no lawyers in New York with experience handling such cases. In this situation, a great disparity can be expected between the performance of defense counsel and the performance of prosecutors which will inevitably result in claims of inadequate representation.²⁵¹

In sum, despite the legislature's best efforts to ensure that the death penalty in New York will be administered fairly, we can expect the problems that have resulted in such low quality

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Bellacosa, *supra* note 5, at 39-40.

²⁵¹ In the unlikely event that an individual defendant possesses more resources with which to defend himself or herself than the state has with which to prosecute him or her, the statute provides that the district attorney's office can call on the resources of the attorney general's office to balance the scales. Death Penalty Act § 34, 1995 N.Y. LAWS at 24 (amending the Executive Law by adding a new § 63-d).

representation in death penalty cases throughout the country to arise here as well. The important question, therefore, is whether the court of appeals will find that our state constitution demands a higher standard of attorney competence than does the Federal Constitution.

In fact, the New York Court of Appeals may be receptive to state constitutional arguments concerning adequacy of counsel. On a number of occasions, the court has stated that New York has a long history of providing a higher degree of protection to the right to counsel than is provided by the Federal Constitution.²⁵² For example, in *People v. Harris*,²⁵³ the court found that "the Supreme Court's rule is not adequate to protect New York citizens from *Payton* violations because of our right to counsel rule."²⁵⁴ The court went on to describe the "protective body of law" in New York in the area of the right to counsel under the state constitution "which is 'far more expansive than the Federal counterpart.'"²⁵⁵ Similarly, in *People v. Ellis*,²⁵⁶ the court of appeals rejected the *Strickland v. Washington*²⁵⁷ test for competence of counsel which requires a defendant to show first, by overcoming a strong presumption to the contrary, that the attorney's performance was "not within the range of competence demanded of attorneys in criminal cases;"²⁵⁸ and second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁵⁹ The court of appeals instead adopted a less stringent "totality of the circumstances" test under which a defendant must simply show that in the

²⁵² *People v. Harris*, 77 N.Y.2d 434, 439, 570 N.E.2d 1051, 1054, 568 N.Y.S.2d 702, 705 (1991); see also *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990); *People v. Hobson*, 39 N.Y.2d 479, 384 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

²⁵³ 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

²⁵⁴ *Id.* at 440, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705 (analyzing *Payton v. New York*, 445 U.S. 573 (1980)).

²⁵⁵ *Id.*, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705 (citing *People v. Bing*, 76 N.Y.2d 331, 338-39, 558 N.E.2d 1011, 1014, 559 N.Y.S.2d 474, 477 (1990)).

²⁵⁶ 81 N.Y.2d 854, 613 N.E.2d 529, 597 N.Y.S.2d 623 (1993).

²⁵⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁵⁸ *Id.* at 687.

²⁵⁹ *Id.* at 694.

circumstances of the particular case, viewed in their totality, counsel's representation was not "meaningful."²⁶⁰

In his recent article, Judge Bellacosa wrote in consternation at the "grotesque imbalance in the scales of justice" due to the number of death penalty cases in which representation by counsel was inadequate, and he called on the Bar to help remedy the situation.²⁶¹ Whether or not New York lawyers respond to the call, Judge Bellacosa's article is another indication that the court of appeals is not prepared to tolerate the inadequate representation of capital defendants even though such representation might pass federal constitutional scrutiny.

An additional question related to the standard of competence that the court of appeals will require from attorneys in death penalty cases is what procedural requirements courts will impose on capital defendants seeking to raise unpreserved claims on appeal. The court might be urged to abandon its generally rigid preservation requirements in capital cases. Certainly, the court has held many times that issues involving denial of the right to counsel can be raised for the first time on appeal.²⁶² An argument might therefore be constructed that because death is different, issues that counsel failed to raise below should be considered on appeal in capital cases.

4. *Aggravating Circumstances Proven at the "Guilt Phase"*

To be constitutional, a capital sentencing scheme must ensure that the murderers who are sentenced to death are "materially more 'depraved'" than those who receive prison sentences.²⁶³ The requirement that a jury must find at least one statutory aggravating circumstance before recommending a death sentence is the method

²⁶⁰ *Ellis*, 81 N.Y.2d at 856, 613 N.E.2d at 503, 597 N.Y.S.2d at 624 (quoting *People v. Baldi*, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981)).

²⁶¹ Bellacosa, *supra* note 5, at 37-38.

²⁶² See, e.g., *People v. Kinchen*, 60 N.Y.2d 772, 773, 457 N.E.2d 786, 787, 469 N.Y.S.2d 680, 681 (1983); *People v. Samuels*, 49 N.Y.2d 218, 221, 400 N.E.2d 1344, 1345, 424 N.Y.S.2d 892, 894 (1980).

²⁶³ *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

used to narrow the class of persons eligible for execution. In most states, this narrowing procedure takes place during the sentencing phase of a capital trial. That is, after a defendant has been found guilty under a statute broadly defining murder, the jury in a separate proceeding goes on to consider whether the murder was one of the worst murders under legislatively determined standards of depravity.

New York, however, is one of a minority of states that have adopted a different system. New York's capital punishment statute narrows the class of death-eligible defendants in the first instance by providing restrictive definitions of first degree murder. Thus, with two exceptions,²⁶⁴ the only aggravating circumstances that the jury may consider are elements of the crime that have been proven beyond a reasonable doubt at trial.²⁶⁵ The aggravating factor or factors proved at trial are deemed established beyond a reasonable doubt for purposes of sentencing and may not be relitigated at the sentencing proceeding.²⁶⁶ Thus, a capital sentencing proceeding in New York will consist simply of the balancing of any mitigating circumstances against the aggravating circumstances already found.

The constitutionality of a similar system was upheld by the Supreme Court in *Lowenfield v. Phelps*.²⁶⁷ There, the defendant sought to vacate his sentence of death on the ground that the sole aggravating circumstance found by the jury at the sentencing phase of the trial was identical to an element of the capital crime of

²⁶⁴ The New York Criminal Procedure Law provides that in any prosecution in which the defendant denies a previous murder conviction or remains mute, "the people may prove that element of the offense only after the jury has first found the defendant guilty of intentionally causing" the victim's death. Death Penalty Act § 8, 1995 N.Y. LAWS at 3 (amending N.Y. CRIM. PROC. LAW § 200.60(3)(b) (McKinney 1993)). Section 400.27(7)(a) of the New York Criminal Procedure Law permits the prosecution to prove one additional aggravating circumstance at the sentencing phase—that the killing was committed in an "act of terrorism." Death Penalty Act § 20, 1995 N.Y. LAWS at 6-12 (amending the Criminal Procedure Law by adding a new § 400.27(7)(a)).

²⁶⁵ Death Penalty Act § 20, 1995 N.Y. LAWS at 6-12 (amending the Criminal Procedure Law by adding a new § 400.27).

²⁶⁶ *Id.*

²⁶⁷ 484 U.S. 231 (1988).

which the defendant had been convicted.²⁶⁸ The defendant argued that “this overlap left the jury at the sentencing phase free merely to repeat one of its findings in the guilt phase, and thus not to narrow further in the sentencing phase the class of death-eligible murderers.”²⁶⁹ The Court, however, saw “no reason why [the] narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase,”²⁷⁰ explaining that

the narrowing function required for a regime of capital punishment may be provided in either of . . . two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana [and New York] have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.²⁷¹

The Court’s reasoning was criticized in a dissent written by Justice Marshall, who argued that a sentencing scheme in which an element of the crime of which the defendant is convicted is also an aggravating factor that justifies the imposition of the death penalty violates two principles.²⁷² First, such a scheme violates the principle that the discretion of the sentencer be guided by a narrowing of the class of people eligible for the death penalty. Second, it violates the principle that the sentencer be fully cognizant of its responsibility for the imposition of a sentence of life or death are violated by Justice Marshall wrote:

[T]he narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition. The only conceivable

²⁶⁸ *Id.* at 241.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 244-45.

²⁷¹ *Id.* at 246.

²⁷² *Id.* at 246-59 (Marshall, J., dissenting).

reason for making narrowing a constitutional requirement is its function in structuring sentencing deliberations. By permitting the removal of the narrowing function from the sentencing process altogether, the Court reduces it to a mechanical formality entirely unrelated to the choice between life and death.²⁷³

Moreover, Justice Marshall pointed out the relegation of the narrowing function to the guilt phase of a capital trial leads the sentencing jurors to believe that a defendant's eligibility for a death sentence has already been established during the guilt phase—findings arrived at without any contemplation of their implication for the defendant's sentence.²⁷⁴

Indeed, [in *Lowenfield*] the Court specifically instructed the jury at the start of its guilt phase deliberations: 'You are not to discuss, in any way, the possibility of any penalties whatsoever.' Then, during the penalty hearing, the prosecutor twice reminded the jury that it had already found during the guilt phase one of the aggravating circumstances that the State urged was applicable to petitioner's sentence. The prosecutor's argument might well have convinced the jury that it had no choice about and hence no responsibility for the defendant's eligibility for the death penalty. This situation cannot be squared with our promise to ensure that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'²⁷⁵

New York's statute "tilts the sentencing scales toward the imposition of the death penalty"²⁷⁶ even more than did the Louisiana statute at issue in *Lowenfield*. Under the Louisiana statute, the jury was required to consider aggravating factors at sentencing and thus *could* reconsider the overlapping factor even if it was unlikely to do so.²⁷⁷ Under the New York statute, however,

²⁷³ *Id.* at 257 (Marshall, J., dissenting).

²⁷⁴ *Id.* (Marshall, J., dissenting).

²⁷⁵ *Id.* at 257-58 (Marshall, J., dissenting) (citations omitted).

²⁷⁶ *Id.* at 258 (Marshall, J., dissenting).

²⁷⁷ *Id.* (Marshall, J., dissenting).

the jury is prohibited from reconsidering aggravating factors at the sentencing phase of trial.²⁷⁸ Thus, jurors, who are instructed not to consider the sentence at the time that they consider guilt,²⁷⁹ will begin their sentencing deliberations by finding that they have already done half the job without knowing it; aggravating factors have already been proven and all that remains to be determined is whether the defendant has provided any reason why he or she should not be executed. The system is no more fair if jurors are informed at the guilt phase of trial about the implications of their verdict on sentencing. If given the choice between acquitting a guilty murderer or imposing a disproportionate death sentence on him or her, most jurors would doubtless opt for the latter course.

In sum, New York's capital sentencing scheme is designed to result in the imposition of the death penalty by a jury that does not understand the implications of its actions or by one that is organized to impose a sentence of death. Given New York's long history of providing enhanced protections to criminal defendants, the court of appeals would have strong grounds under the state constitution for vacating a sentence of death imposed by such a jury.

5. *Felony Murder*

Only intentional murders are punishable by death under New York's capital punishment statute.²⁸⁰ The fact that a murder was committed during the course of the commission of an enumerated felony is, however, an aggravating circumstance that can justify the

²⁷⁸ The new statute provides that at the sentencing phase, "the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered." Death Penalty Act § 20, 1995 N.Y. LAWS at 6-12 (amending the Criminal Procedure Law by adding a new § 400.27).

²⁷⁹ New York juries are, in fact, routinely instructed not to consider possible sentence in determining guilt. See Committee on Criminal Jury Instructions, CRIMINAL JURY INSTRUCTIONS OF NEW YORK § 6.30, at 255-57 (1991).

²⁸⁰ Death Penalty Act § 2, 1995 N.Y. LAWS at 1 (amending N.Y. PENAL LAW § 60.06 (McKinney 1987)).

imposition of a death sentence.²⁸¹ Thus, while New York's statute does not suffer from the same lack of narrowing as do the statutes of other states that permit the execution of felony murderers who show only reckless indifference to life, it also does not insure that only the worst murderers are selected for execution.

Under section seven of the New York statute, in addition to intentional felony murderers, the murderers of police officers, peace officers, employees of correctional institutions and judges may be executed.²⁸² Additionally, defendants who have killed witnesses to keep them from testifying, hitmen, previously convicted murderers, terrorists and the killers of more than one person at the same time, or more than two people in the state as part of the same plan during the previous two years, are also eligible for the death penalty.²⁸³ Finally, murderers who first torture their victims may be sentenced to death.²⁸⁴ This means that the intentional murder of most victims is not punishable by death unless the murder was accompanied by torture or was committed during the course of another crime.

The result of New York's scheme is likely to be the freakish imposition of the death penalty that the Supreme Court condemned in *Furman*.²⁸⁵ For example, a thrill-killer who fires a high-powered rifle at cars on a highway killing one person and injuring one hundred others would not be death eligible, nor would a defendant who stalked his victim for months before finally killing her. An illegal abortionist who intentionally allows a patient to bleed to death can receive only a prison sentence.²⁸⁶ Susan Smith

²⁸¹ Death Penalty Act § 7, 1995 N.Y. LAWS at 2-3 (amending N.Y. PENAL LAW § 125.27(1) (McKinney 1987)).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁸⁶ The recent case of a Queens obstetrician convicted of murder for letting an abortion patient bleed to death illustrates the conflicting public opinion such a case can raise. See Carey Goldberg, *After Thousands of Abortions, Some Questions; If Practice Makes Perfect, Is Imperfection Malpractice? Doctor in Line of Fire Says No*, N.Y. TIMES, Sept. 5, 1995, at B1; Lynette Holloway, *25 Years to Life for Doctor in Woman's Death After a Bungled Abortion*, N.Y. TIMES, Sept. 13, 1995, at B3.

would not have been eligible for the death penalty in New York had she rolled only one of her children into a lake to drown.²⁸⁷ In contrast, a surprised burglar who becomes nervous and shoots a returning homeowner is death eligible, as is a defendant who simply drives his victim to another location before shooting him. A defendant who shoots a stranger on the subway for insulting him cannot be executed, but one who shoots a stranger for his sneakers can. In sum, while some felony murderers may fall into the "more materially depraved category," it is clear that many do not. The statute, however, makes no distinctions among felony murders and thus may, under the state constitution, fail sufficiently to narrow the class of death eligible defendants to meet the state's constitutional requirements of consistency and proportionality in capital sentencing.

Moreover, there is some evidence supporting the conclusion that the inclusion of felony murder as an aggravating factor has a disparate racial impact. In a recent article, one commentator reported on a study in Dade County, Florida which showed that only 8% of non-felony murders involved killers and victims of different races, while about 45% of felony murders involved victims and killers of different races.²⁸⁸ In 95% of these cases, the killer was Black and the victim was White.²⁸⁹ Further, of all Black defendants indicted for murdering White victims, 84% were prosecuted under the felony murder rule.²⁹⁰ Finally, other studies conclude that a Black defendant who kills a White victim during a felony is the defendant most likely to receive a death sentence.²⁹¹

²⁸⁷ Susan Smith, a resident of South Carolina, was arrested, tried and convicted for murdering her two young sons. Ms. Smith confessed to rolling her car into a lake with her children strapped inside their car seats. The jury declined to recommend the death penalty, and instead Ms. Smith was sentenced to life in prison. See Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES, July 29, 1995, at A1; Rick Bragg, *Police Say Woman Admits to Killings as Bodies of Two Children Are Found Inside Her Car*, N.Y. TIMES, Nov. 4, 1994, at A1.

²⁸⁸ Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117 (1990).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1117.

²⁹¹ *Id.* at 1118-19.

The author of the article points out that there may be many reasons justifying the disparity.²⁹² Nevertheless, the inclusion of felony murder in a capital sentencing statute "does allow a large, racially skewed group of defendants . . . to be convicted of first degree murder and thus to be potentially eligible for the death penalty."²⁹³ The New York statute, of course, provides for proportionality review by the court of appeals.²⁹⁴ The inclusion of felony murder in the statute, however, makes it inevitable that the issue of proportionality will be problematic.

6. *Prior Murder Conviction as Aggravating Factor*

The death penalty may be imposed on a defendant convicted of murder in New York if, prior to the killing, the defendant has been convicted of second degree murder²⁹⁵ or has been convicted in another jurisdiction of an offense which, if committed in New York would constitute a violation of either Penal Law sections 125.25 or 125.27.²⁹⁶ The prior murder can have occurred at any time, and

²⁹² *Id.* at 1117.

²⁹³ *Id.* at 1120.

²⁹⁴ Death Penalty Act § 27.30, 1995 N.Y. LAWS at 13-14 (amending N.Y. CRIM. PROC. LAW § 470.30 (McKinney 1994)).

²⁹⁵ N.Y. PENAL LAW § 125.25 (McKinney 1987 & Supp. 1995).

²⁹⁶ Death Penalty Act § 7, 1995 N.Y. LAWS at 2-3 (amending N.Y. PENAL LAW § 125.27(1) (McKinney 1987)). Section 125.25 of the New York Penal Law states that a person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person . . . ; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of another person other than one of the participants . . . ; or

it is not necessary that it have been committed after the effective date of the death penalty statute to be considered an aggravating factor justifying the imposition of the death penalty.²⁹⁷ A principled argument can be made that this section applied to a defendant whose previous crime predated the enactment of the statute violates the Ex Post Facto Clause because it alters the legal consequences of the prior conviction to the defendant's detriment.

The court of appeals rejected a similar ex post facto argument when it was raised in the context of a challenge to the Second Violent Felony Law and the Persistent Violent Felony Law which both reclassified certain felonies as violent and then provided for enhanced punishment of a defendant who had previously been convicted of those violent felonies.²⁹⁸ In response to the argument that this scheme violated the Ex Post Facto Clause when applied to defendants whose prior convictions predated the law, the court held that "a sentence as a multiple offender 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"²⁹⁹

The court's reasoning may be less persuasive, however, where the penalty for the latest crime is stiffened to death. The fact that death is different certainly could cause the New York Court of Appeals to reconsider the issue in the new context.

7. *Execution of the Mentally Retarded*

The New York death penalty statute provides that a capital

4. Under circumstances evincing a depraved indifference to human life, and being [18] years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than [11] years old and thereby causes the death of such person.

N.Y. PENAL LAW § 125.25.

²⁹⁷ *Id.*

²⁹⁸ *People v. Morse*, 62 N.Y.2d 205, 465 N.E.2d 12, 476 N.Y.S.2d 505 (1984), *appeal dismissed*, *Vega v. New York*, 469 U.S. 1186 (1985).

²⁹⁹ *Id.* at 217-18, 465 N.E.2d at 17, 476 N.Y.S.2d at 510 (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

defendant's mental retardation shall be considered as a mitigating circumstance at the sentencing proceeding.³⁰⁰ In the event that a death sentence is imposed, however, the court shall, in most cases, render a finding with respect to whether the defendant is mentally retarded and, if it finds this to be the case, shall set aside the sentence of death.³⁰¹ If a defendant is convicted of first degree murder for a killing committed while he or she was incarcerated in either a state or local correctional facility or institution, however, the court may not set aside a death sentence on the ground of mental retardation.³⁰² In short, the New York statute prohibits the execution of mentally retarded persons except those who kill while they are in custody.

The Supreme Court has held that the execution of a mentally retarded person does not necessarily violate the Federal Constitution. In *Penry v. Lynaugh*,³⁰³ the Supreme Court upheld the death sentence of a defendant suffering from what the defense psychiatrist diagnosed as "organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience."³⁰⁴ The Court rejected Penry's claim that it would be cruel and unusual punishment, prohibited by the Eighth Amendment, to execute a mentally retarded person who had the reasoning capacity of a seven-year-old.³⁰⁵ The Court concluded that while "the common law prohibition against punishing 'idiots' for their crimes suggests that it may indeed be 'cruel and unusual punishment' to execute persons who are profoundly or severely retarded and wholly lacking in the capacity to appreciate the wrongfulness of their actions,"³⁰⁶ not all mentally retarded people "inevitably lack the cognitive, volitional and moral capacity to act with the degree of culpability associated with the death

³⁰⁰ Death Penalty Act § 20, 1995 N.Y. LAWS at 6-12 (amending the Criminal Procedure Law by adding a new § 400.27).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ 492 U.S. 302 (1989).

³⁰⁴ *Id.* at 308.

³⁰⁵ *Id.* at 340.

³⁰⁶ *Id.* at 333.

penalty.”³⁰⁷ Therefore, the Federal Constitution requires only that sentencers be able to consider mental retardation as a mitigating circumstance.³⁰⁸ This holding was based on the Court’s belief that “[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today.”³⁰⁹

At least one state court has taken the opinion in *Penry* as an invitation to rely on its own state constitution in deciding how much protection should be afforded to mentally retarded capital defendants. The Georgia Supreme Court, in *Fleming v. Zant*,³¹⁰ considered the issue and concluded that regardless of the national consensus, “objective evidence indicates that a consensus against execution of the mentally retarded does exist among Georgians.”³¹¹

If the argument is accepted that a similar consensus exists among New Yorkers that the New York Constitution prohibits the execution of mentally retarded persons, and the statute’s general prohibition indicates that it does,³¹² then it is difficult to see on what principled basis the execution of retarded persons who commit their crimes while in custody can be tolerated. Moreover, even if the execution of a mentally retarded person serving a life sentence could be defended on utilitarian grounds, New York’s statute precludes judicial determination of the appropriateness of the execution of a mentally retarded person who kills while in the local lock-up on a disorderly conduct charge or in pretrial detention.³¹³ It seems likely that the court of appeals might well find such a result unacceptable under the state constitution.

³⁰⁷ *Id.* at 338.

³⁰⁸ *Id.* at 337.

³⁰⁹ *Id.* at 340.

³¹⁰ 386 S.E.2d 339 (Ga. 1989).

³¹¹ *Id.* at 342.

³¹² Death Penalty Act § 20(9)(B), 1995 N.Y. LAWS at 13 (amending the Criminal Procedure Law by adding a new § 400.27).

³¹³ Death Penalty Act § 20(12)(D), 1995 N.Y. LAWS at 15 (amending the Criminal Procedure Law by adding a new § 400.27).

8. *The Lethal Injection Paradox*

New York's new capital punishment legislation prescribes death by lethal injection.³¹⁴ At first glance, this change from a more gruesome means of execution—electrocution—to a less gruesome means seems unassailable. But second thought uncovers principled and troubling objections arising from the new death penalty provisions of the Corrections Law.

There are two major kinds of objection here: objections that arise under the state constitutional prohibition of cruel and unusual punishment,³¹⁵ and objections that arise out of what has been called the “medicalization” of execution.³¹⁶ These two kinds of objections exist in a particularly vexing relationship to each other: the more a lethal injection statute seeks to avoid one kind of objection, the more it gives rise to the other.

The first argument that might be raised under the state constitution's guarantee against excessive punishment is that despite its humane image, lethal injection does indeed inflict needless suffering.³¹⁷ Although lethal injection may be less disturbing for on-lookers, electrocution in fact kills faster and painlessly if done correctly.³¹⁸ Moreover, the preparation for lethal injection can

³¹⁴ Death Penalty Act § 32, 1995 N.Y. LAWS at 20-24 (repealing N.Y. CORRECT. LAW art. 22-B (McKinney 1987 & Supp. 1995) and amending N.Y. CORRECT. LAW by adding a new Article 22-B, § 658 which calls for the injection of “a substance or substances in lethal quantity”).

³¹⁵ N.Y. CONST. art. I, § 5.

³¹⁶ See, e.g., Karen Ross Demers, *The Medicalization of the Death Penalty*, in WOODROW WILSON SCH. OF PUB. & INT'L AFF., POLICY CONFERENCE FINAL REPORT: A DECADE OF CAPITAL PUNISHMENT IN NEW JERSEY 355 (1992). The Policy Conference Final Report was submitted to the New Jersey Assembly Judiciary Committee and the New Jersey Senate Judiciary Committee in March, 1992.

³¹⁷ When last it spoke to the issue, concluding that electrocution did not violate the state prohibition of cruel and unusual punishment, the court of appeals ruled that only a means of execution involving “the possible risk of torture and unnecessary pain” would violate that provision. *People v. Kemmler*, 119 N.Y. 569, 577, 24 N.E. 6, 8 (1890), *affirmed by In re Kemmler*, 136 U.S. 436 (1890).

³¹⁸ Demers, *supra*, note 316, at 370 (noting that a specialist in brain electrophysiology suggests that electrocution destroys brain cells in thousandths of a

involve lengthy and painful probing to find and insert the intravenous line into a patent vein.³¹⁹

In addition, lethal injection can involve, indeed has involved, horrendous suffering when the execution equipment fails or when the complex procedure is performed by a person with insufficient skills.³²⁰ Whether the former danger is a significant one will depend on which of the available "execution machines" New York uses and how it is maintained; the latter danger, however, inheres in New York's use of "execution technicians."³²¹ The statute is silent as to the selection, training and qualifications of these persons—indeed, it is silent as to everything about them except that their identity shall never be disclosed.³²²

Physicians' ethics forbid them to participate in executions or to supervise those who carry them out.³²³ Ethical considerations similarly restrict the participation of nurses and other health professionals.³²⁴ Thus, execution technicians will be persons without medical training unless medically trained personnel volunteer to violate their profession's ethical commands or are coerced into doing so. Insufficient training creates a greater risk of painful or botched executions.³²⁵

second and that beheading may be faster).

³¹⁹ Demers, *supra* note 316, at 369.

³²⁰ Demers, *supra* note 316, at 368-69. Although "lethal injection" sounds simple, like a flu shot, it is in fact complex. It requires not only starting an intravenous line, but also properly mixing and administering a combination of drugs. Demers, *supra* note 316, at 368-69.

³²¹ Death Penalty Act § 32, 1995 N.Y. LAWS at 20-24 (repealing N.Y. CORRECT. LAW art. 22-B (McKinney 1987 & Supp. 1995) and amending the New York Correction Law by adding a new Article 22-B).

³²² *Id.*

³²³ THE AMERICAN COLLEGE OF PHYSICIANS, HUMAN RIGHTS WATCH, THE NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, PHYSICIANS FOR HUMAN RIGHTS, BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 13-15 (1994) [hereinafter BREACH OF TRUST].

³²⁴ *Id.* at 14.

³²⁵ Demers, *supra* note 316, at 369. Delaware's lethal injection statute was challenged on the ground that it failed to provide appropriate guidelines for the selection and training of execution technicians. The Delaware Supreme Court rejected this argument on the grounds that the statute delegated the development of execution procedures to the Department of Corrections, and that, in any case,

Finally, although humane and anesthetic execution methods figure large in the marketing of the death penalty, New York's statute on its face contains no requirement that death be as swift and painless as possible. It provides only that "[t]he punishment of death shall be inflicted by lethal injection; that is, by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead."³²⁶ On its face, the statute would countenance death by injection of corrosive lye or rat poison, or by a slow drip of arsenic. A common-sense argument can be made that such a statute does not adequately protect against cruel and unusual punishment.

Yet the flaws in the statute were undoubtedly not introduced by drafters who were incompetent or sadistic. Rather, what can be seen as unsatisfactory or even unconstitutional vagueness most probably arises from the attempt to avoid another whole category of objections, objections that are inherent in the medicalization of execution. There are two kinds: (1) ethical objections to the participation of medical professionals in executions, and (2) objections to lethal injection itself as "a corruption and exploitation of the healing profession's role in society."³²⁷

As to the purely ethical objections, the medical profession is seemingly unanimous. The position of the American Medical Association ("AMA"), as articulated in the Code of Medical Ethics,

previous executions had shown these procedures to be "reliable." *State v. Deputy*, 644 A.2d 411, 420 (Del. 1994). In contrast, New York's statute contains no such delegation to the Department of Corrections, which is charged only with providing and maintaining a "suitable and efficient" facility containing the "apparatus and equipment necessary for the carrying out of executions by lethal injection." Death Penalty Act § 32, 1995 N.Y. LAWS at 20-24 (repealing N.Y. CORRECT. LAW art. 22-B (McKinney 1987 & Supp. 1995) and amending the Correction Law by adding a new Article 22-B). There is, of course, no evidence as to the "reliability" of New York's execution technicians, at least not with respect to lethal injection.

³²⁶ Death Penalty Act § 32, 1995 N.Y. LAWS at 20-24 (repealing N.Y. CORRECT. LAW art. 22-B (McKinney 1987 & Supp. 1995) and amending the Correction Law by adding a new Article 22-B).

³²⁷ BREACH OF TRUST, *supra* note 323, at 13 (citing W. J. Curran & W. Casscells, *The Ethics of Medical Participation in Capital Punishment*, 302 NEW ENG. J. MED. 226-30 (1980)).

is that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.”³²⁸ Guidelines developed by the AMA Council on Ethical and Judicial Affairs define participation in execution by lethal injection to include:

- prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure;
- monitoring vital signs on site or remotely (including monitoring electrocardiograms) [and thus “determining” death];
- attending or observing an execution as a physician;
- selecting injection sites;
- starting intravenous lines as a port for a lethal injection device;
- prescribing, preparing, administering, or supervising injection drugs or their doses or types;
- inspecting, testing, or maintaining lethal injection devices;
- consulting with or supervising lethal injection personnel.³²⁹

Like that of other state statutes, the vagueness of New York’s lethal injection provision is most likely deliberate.³³⁰ an attempt to avoid language that would reveal lethal injection to be a medical procedure performed by medically trained personnel using medical equipment and drugs certified for therapeutic use.³³¹

³²⁸ BREACH OF TRUST, *supra* note 323, at 13 (citing 1992 Code of Medical Ethics, current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association (art. 2.06)). As noted above, the ethical codes of other medical and public health organizations also condemn participation in executions. BREACH OF TRUST, *supra* note 323 at 13-14.

³²⁹ BREACH OF TRUST, *supra* note 323, at 15.

³³⁰ See BREACH OF TRUST, *supra* note 323, at 17-21. Most states’ departments of correction create regulations for the infliction of death by lethal injection. These codes, which are not always a matter of public record, sometimes “translate” the vague statutory language into procedures that clearly violate the AMA’s ethical guidelines.

³³¹ The Federal Drug Administration (“FDA”) has certified no drugs for use in lethal injection. All the substances used are certified for therapeutic use. The

The New York death penalty statute, however, has not been sanitized of all that would conflict with the AMA guidelines. According to the AMA guidelines, physicians may not attend or observe executions in their professional capacity and they may not "determine" death by monitoring vital signs, although they may attend in a "totally nonprofessional capacity" and they may "certify" death after it has been "determined."³³² In contrast, New York's Correction Law now provides that

a licensed physician or physicians *may* be present at the execution Immediately after the execution an examination of the body of the convicted person *shall be made by the licensed physicians present at the execution* and their report in writing stating the nature of the examination and occurrence of death shall be annexed³³³

to a certificate filed by the Commissioner of Corrections.³³⁴ Although the physicians' presence is initially permissive—they *may* be present—it becomes clear in section 661 that physicians are to be present in their professional capacity and that their presence is in fact required.³³⁵ Moreover, it is not entirely clear whether the physician's involvement is in *certifying* or in *determining* death. Thus, on its face the statute may require participation that violates the AMA guidelines in at least two important respects.

Finally, many doctors and health professionals object to lethal injection because, statutory language notwithstanding, it uses

argument has been made—unsuccessfully—that FDA regulations "preempt" state approval of execution substances. See *Heckler v. Chaney*, 470 U.S. 821 (1985). The FDA itself has declined to take any action, and its exercise of discretion has been upheld by the Supreme Court. *Id.* at 828-38. Opponents of lethal injection point out that the FDA certifies drugs for veterinary use, to insure that when animals are put down the procedure is painless. Cf. Stephen G. Wood, *Regulation, Deregulation and Re-regulation: An American Perspective*, 1987 B.Y.U. L. REV. 381, 435-37 (1987).

³³² BREACH OF TRUST, *supra* note 323, at 15-16.

³³³ Death Penalty Act § 32, 1995 N.Y. LAWS at 20-24 (repealing N.Y. CORRECT. LAW art. 22-B (McKinney 1987 & Supp. 1995) and amending the Correction Law by adding a new Article 22-B) (emphasis added).

³³⁴ *Id.*

³³⁵ *Id.*

medical procedures designed to serve life to extinguish life.³³⁶ Further, in their view, cynicism and deception compound the wrong: "state legislatures have been less concerned with easing the sufferings of those put to death than with reducing opposition to the death penalty by giving it the appearance of clinical practice and making it seem humane."³³⁷ This concern on the part of the medical profession is tragically well grounded in history. It is well established that in Nazi Germany, physician involvement in torture and slaughter—the medicalization of cruelty—actually lulled the consciences of many and stifled public opposition.³³⁸ Thus, defendants accused of capital crimes may have another troubling, principled objection to New York's "humane" means of execution. If white coats and syringes can make genocide seem acceptable, *a fortiori*, the gentle, therapeutic image of the lethal injection can render a jury unduly willing to convict and to impose a death sentence. It is easy to imagine how the idea of therapeutic execution could lead a juror to forget just how *different* death is. Should empirical evidence bear out this intuitive argument, plausible state and federal challenges to the statute will exist.

In conclusion, the means of execution in New York's new death penalty statute is not the unproblematic provision it might at first seem. This is so because compassionate execution is, at bottom, a paradox that defies resolution, a contradiction in terms best summed up by the macabre term used by the New Jersey Administrative Code to describe the substances used in lethal injection: "execution medications."³³⁹

CONCLUSION

In this essay, we have suggested that the potential challenges to New York's death penalty statute are infinite, and that New York,

³³⁶ Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 571-73, 619 n.467 (1994).

³³⁷ Aryeh Neier, *Watching Rights*, NATION, June 12, 1995, at 819; *see also* Demers, *supra* note 316, at 357-60.

³³⁸ *See* ROBERT JAY LIFTON, *THE NAZI DOCTORS* (1986).

³³⁹ N.J. ADMIN. CODE tit. 10A, §§ 16-10.8 - 16-10.14 (1995).

like every other state that has a death penalty, must now prepare to spend enormous resources in the prosecution and defense of capital cases at both the trial and appellate levels. The vast quantity of death penalty litigation that has swamped the courts is often portrayed as the work of those who believe that it is always immoral and unconstitutional for the state to execute one of its citizens. If these absolutists would stop bringing endless, frivolous challenges to capital punishment statutes, the argument goes, the death penalty could be administered swiftly and cheaply and two of the major objections to its imposition would be erased.

This perception, however, is inaccurate. The endless debate in the courts is not between those who believe that the death penalty is immoral under any circumstances and those who believe that what is immoral is to promise brutal killers that they will never have to suffer the same pain that they have inflicted on their innocent victims. The real controversy is the result of the ambivalence of the proponents of capital punishment concerning the circumstances under which they can comfortably find that a defendant has forfeited the right to live.

For, in fact, our societal standards of decency have evolved. We no longer string suspects up first and ask questions later. We do not believe in torture. We temper our belief in evil with an understanding of human psychology. Therefore, when we say that the majority of our citizens want capital punishment, we must qualify the statement by adding that the majority of those want capital punishment only as long as they can be perfectly certain that no innocent person will ever be executed, that racial or other discrimination did not enter into the decision to execute, that persons who for some reason could not control or did not understand the implications of their actions will not receive the death penalty, that only the very worst killers will be punished by death and that the ultimate punishment will be uniformly applied so that none of the worst escape. Finally, they want to be confident that when a sentence of death is carried out it is done so without inflicting pain or humiliation on the defendant.

It is easy to see that simply making the factual determinations necessary to fulfill these goals in an individual case requires considerable time and expense. What makes the process more difficult, however, is that many of our aims are contradictory.

Thus, if we are successful in one endeavor, we fail at another. For example, we know that if the death penalty ever deters, it does so only when it is imposed swiftly and surely so as to leave potential murderers in no doubt that if they are caught they will certainly be executed. Such swift and sure punishment, however, is entirely at odds with our desire to insure beyond all doubt that only the guilty are executed and that the punishment fits the criminal as well as the crime. Likewise, the belief that punishment must be individualized results inevitably in a lack of uniformity in the meting out of death sentences. Finally, while we abhor the spectacle of public, painful execution, we also have qualms about doctors' participation in sanitized, state-sponsored killings behind closed doors.

After years of trying to reconcile mutually exclusive principles in death penalty cases, it was perhaps inevitable that the Supreme Court and lower federal courts would finally solve the problem by shutting their doors to capital defendants. In so doing, they have been able to invoke countervailing principles of federalism: the administration of capital punishment is a matter for state courts to determine. The state courts are therefore now, in most instances, the courts of last resort for those whom the state seeks to kill. We suggest that the New York Court of Appeals will have no easier time administering the death penalty than has had any other court, for the more one studies the issue, the more one becomes convinced with Justice Handler that capital punishment is a thing that cannot rightly be done because it cannot—ever—be done right.

Today's decision serves as further confirmation of the failure of our experiment with capital punishment. The Court's early belief that it could fashion a constitutionally-legitimate process for imposing the death penalty, [see State v. Ramseur, 524 A.2d 188, 294 (1987)] ("How we will resolve this paradox remains as yet fully unrevealed to us. We shall continue to labor on the process."), has foundered on yet another rock The inconsistency, subjectivity, and moralizing evident in today's decision are the inevitable products of a futile endeavor: the quest to devise and to apply a standard of due-process protection commensurate with the gravity of a death sentence. . . . I think it . . . evident that the Court must either reject its effort to carry out capital punishment or accommodate itself to the juridical brutality of imposing death without due-process protections commensurate to its awesome finality.

We are constrained in capital cases to concentrate unremittant attention and expend enormous public resources on persons who deserve no sympathy whatsoever. Sympathy has nothing to do with our judicial duty; our common humanity, however, has everything to do with it. If we allow death to be imposed without the full measure of constitutional protection and defend endlessly the legitimacy of what we do, we invite only disrespect for the law.³⁴⁰

³⁴⁰ State v. Martini, 651 A.2d 949, 1001 (N.J. 1994) (Handler, J., dissenting) (citation omitted), *cert. denied*, No. 95-5073, 1995 WL 411745 (U.S. Oct. 2, 1995).