PUNISHMENT OR POLITICS? NEW YORK STATE'S DEATH PENALTY*

> Some men probably abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged.[1]

Society no longer hangs murderers. Lethal injections are the current execution method of choice.[2] Though less commonly used, we still view death as the ultimate form of punishment. Recently, the people of New York State reiterated this sentiment when they elected a governor who promptly signed the New York State death penalty statute into law.[3]

Nevertheless, unlike most criminal laws with sanctions that exact real world consequences, the recently enacted New York statute[4] is not the proverbial wolf masquerading as a sheep; it is the sheep masquerading as a wolf. The New York State death penalty statute does not further the policy goals for which the legislature enacted it.

The New York State death penalty statute is arguably the most challenge-proof statute of its kind written to date.[5] Although this may appear to be a positive trait, the statute's challenge-proof nature may prevent it from furthering its purposes. On its face, the statute authorizes a death sentence for first-degree murderers. By attaining immunity from constitutional challenge, however, the statute may realistically and ironically prevent an execution from ever taking place in New York.

Some might say that a death penalty statute which virtually precludes the possibility of an actual execution is the correct future of the death penalty not only in New York, but in modern America.[6] This end is not only unprincipled, but also antithetical to death penalty proponents and opponents alike.

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* The author dedicates this Note to her friends and family. To her friends for remaining open-minded even when they disagreed, and for providing a stimulating yet safe forum in which to examine ideas and ideologies; to her brother, for his unselfish support and faith in her abilities; and most of all, to her parents, for teaching by words, but more by example, that morality is not a flexible concept, that all life deserves respect, and that love, integrity and loyalty are priceless.

[1] Samuel R. Gross, *Reply to Daniel Polsby*, 44 BUFF. L. REV. 541, 541 (1996) (quoting JAMES F. STEPHEN, A HISTORY OF CRIMINAL LAW IN ENGLAND (1883)).

[2] *See* Ursula Bentele, *The Death Penalty in New York: Past, Present . . . Future?*, 4 J.L. & POL'Y 73, 75 (1995).

[3] *See* Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J.L. & POL'Y 81, 81 (1995). New York State had not had a constitutionally viable death penalty for three decades. *See id.*

[4] N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997).

[5] *See* Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 293-94 (1996).

[6] *See id.* at 286.

This Note explores the New York State death penalty in terms of its social, political and historical context. It examines the New York statute from analytical, theoretical and practical perspectives. Part I summarizes the history of the death penalty in both the United States and New York State. Part II focuses on the text, meaning and consequences of the New York State death penalty statute. Part III analyzes theories of punishment, how they apply generally to the death penalty, and how they specifically play out in the context of the New York statute. Part IV proposes alterations to both the statute's text and its policies.

I. BACKGROUND AND HISTORY OF THE DEATH PENALTY IN AMERICA

The American era of exacting death as a penalty for serious crimes began with the arrival of the first colonists.[7] The first recorded legal execution in colonial America took place in the Virginia Colony in 1622.[8] In early American history, the Old Testament provided the authority for capital punishment.[9] Since then, there have been many state-sanctioned executions, but the authoritative grounds have shifted from biblical to secular sources.

The United States Constitution does not explicitly authorize or prohibit the death penalty. This is not surprising since the Constitution serves as a framework for the law rather than an enumeration of specific laws. Nevertheless, history clearly demonstrates that the colonists widely accepted the death penalty as a form of punishment for a variety of crimes.[10]

Over the last 220 years, however, American attitudes toward capital punishment have changed. Currently, there is considerable debate surrounding the morality of capital punishment, particularly about what might be the most appropriate method. This debate reaches far beyond the simple question of being either "for" or "against" capital punishment.

The heated and complex debate over capital punishment is due to the many permutations of policy and practice that it encompasses. One of the most enduring subsidiary debates focuses on which crimes warrant punishment by death.[11] For purposes of this analysis and in keeping with the Supreme Court's decision in *Coker v. Georgia*,[12] this discussion of capital punishment will focus specifically on individuals convicted of first-degree murder ("murderers").

The common law defines "murder" as the killing of a human being by another with malice aforethought.[13] Modern American criminal law defines "murder" as a statutory crime with differentiations, called "degrees," which depend on the mental state of the accused.[14] Most statutes define first-degree murder as

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[7] *See* THE DEATH PENALTY IN AMERICA 6 (Hugo Adam Bedau ed., 3d ed. 1982).

[8] *See id.* at 3 (stating that Daniel Frank suffered execution for theft).

[9] *See id.* at 7.

[10] *See id.* at 6-8.

[11] *See id.* at 8-9.

[12] 433 U.S. 584 (1977).

[13] *See* United States v. Wharton, 433 F.2d 451, 454 (D.C. Cir. 1970).

[14] *See* THE DEATH PENALTY IN AMERICA, *supra* note 7, at 4-5.

the intentional taking of life, or more specifically, killing in a willful, deliberate and premeditated manner,[15] or during the perpetration of an enumerated felony.[16]

Increasing support for the death penalty over the last thirty years illustrates the shift in American attitudes from the less enthusiastic support of the 1940's and 50's to the more favorable support it receives today.[17] Currently, American death penalty proponents outnumber its opponents roughly two to one.[18]

A. *The Death Penalty Under Federal Law*

There are three main sources of federal law: the Constitution, federal case law and federal statutes. The Unites States Constitution serves as the basic starting point of any discussion. The case law fleshes out the constitutional framework and identifies the major areas of contention. Federal criminal statutes serve as a comparative model for the New York statute.

The capital punishment debate implicates three constitutional provisions. The Fifth Amendment provides that the federal government may not deprive any person of life without the due process of law,[19] while the Fourteenth Amendment speaks to the states in similar terms.[20] There are two principles implicit in these provisions. First, the taking of human life is a serious act. Second, neither the federal government nor the states may take human life without satisfying procedural and substantive due process requirements.[21]

The Eighth Amendment prohibits "cruel and unusual" punishment.[22] This prohibition speaks to the states in ambiguous terms.[23] Much debate surrounds the meaning of the words "cruel" and "unusual."[24] Although many argue that the Eighth Amendment prohibits capital punishment, both a textual reading and a "Framers intent" analysis prove otherwise.[25]

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[15] *See* 18 PA. CONS. STAT. ANN. § 2502 (West 1983).

[16] This is commonly called the felony-murder rule, where qualifying felonies include arson, rape, robbery, burglary and kidnapping. *See id.*

[17] *See* THE DEATH PENALTY IN AMERICA, *supra* note 7, at 65.

[18] *See id.*

[19] U.S. CONST. amend. V.

[20] U.S. CONST. amend. XIV.

[21] *See* U.S. v. Salermo, 481 U.S. 739, 746 (1987) (finding that procedural due process requires the government to implement life deprivations in a fair manner, while substantive due process prohibits the government from conduct which "shocks the conscience" or "interferes with rights 'implicit in the concept of ordered liberty' ").

[22] U.S. CONST. amend. VIII.

[23] Prohibitions contained in the Eighth Amendment apply to the states through the incorporation doctrine. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).

[24] *See* THE DEATH PENALTY IN AMERICA, *supra* note 7, at 247-48.

[25] In a textual analysis, because the Fifth and Fourteenth Amendments prohibit the deprivation of life without due process of law, it follows that as long as due process is afforded, a deprivation of life is permissible. From a Framer's intent perspective, because capital punishment existed at the time the Constitution was written and ratified and the Framers did not explicitly prohibit it, the death penalty is a permissible form of punishment under the Constitution. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 375-84 (1972)

In *Furman v. Georgia*,[26] a divided Supreme Court essentially struck down all then-current death penalty statutes as unconstitutional. Each Justice filed separate opinions expressing his own approach to the Eighth Amendment issue, either concurring with or dissenting from the *per curiam* decision. Justices Brennan and Marshall concluded that all capital punishment was unconstitutional because it violated modern standards of human dignity.[27] Justices Douglas, Stewart, and White reasoned that the modern schemes of unguided discretion led to an unpredictable application of capital punishment and the possibility of a disproportionately severe impact on Blacks in violation of the Eighth Amendment.[28]

Following this decision, the states had the option to re-create and enact new laws using *Furman* as the standard.[29] Unfortunately, the *per curiam* decision coupled with the splintered concurrences did not provide a solid framework upon which the states could base their new death penalty statutes.[30] The *Furman* decision merely established that the Constitution at least required that the death penalty "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[31] "[T]o minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."[32] These newly enumerated yet vague standards would be further refined over the next few years.

In 1976, the Court considered the constitutionality of Georgia's post-*Furman* death penalty statute in *Gregg v. Georgia*.[33] Under an Eighth Amendment analysis, the Supreme Court held that capital punishment is not *per se* unconstitutional.[34] The Court determined that the Georgia death penalty statute satisfied the *Furman* standard[35] because: (1) the statute in *Gregg* narrowed "the class of murderers subject to capital punishment by specifying [ten] statutory aggravating circumstances;"[36] (2) the jury had to "consider any other appropriate aggravating or mitigating circumstances;"[37] and (3) the statute "provide[d] for automatic appeal of all death sentences to Georgia's Supreme Court."[38] Moreover, in *Proffitt*

(Burger, C.J., dissenting).

[26] 408 U.S. 238 (1972) (per curiam).

[27] *See id.* at 305 (Brennan, J., concurring).

[28] *See id.* at 255-56 (Douglas, J., concurring).

[29] *See* JAY M. COHEN & ROBERT ROSENTHAL, NEW YORK'S DEATH PENALTY LEGISLATION 29 (1995).

[30] *See Furman*, 408 U.S. 238.

[31] Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

[32] *Id.* at 199.

[33] *Id.* at 207.

[34] *See id.* at 169-79.

[35] *Id.* at 206-07.

[36] *Id.* at 196-97.

[37] *Id.* at 197.

[38] *Id.* at 198.

v. Florida,[39] decided the same day as *Gregg*, the Supreme Court reinforced its holding that the death penalty is a viable form of punishment under a guided discretion formulation.[40] However, capital punishment is unconstitutional for any crime other than murder.[41] Currently, there is a federal death penalty for murders committed by drug "king-pins"[42] or in the course of drive-by shootings,[43] car-jackings,[44] espionage,[45] or terrorism.[46]

B. *State Death Penalty Law*

Since 1976, the year the Supreme Court upheld the death penalty as a valid form of punishment for murder, states could enact their own constitutionally sound versions of a death penalty law. However, over the past thirty years, the New York Court of Appeals, the state's highest court, has deemed New York's existing version of the death penalty unconstitutional three times.[47]

Every year since 1977, the New York State Legislature has passed death penalty bills in an attempt to enact a constitutionally viable death penalty law.[48] However, these bills have failed to obtain final approval because of gubernatorial vetoes.[49] For almost two decades, Governors Hugh Carey and Mario Cuomo kept death penalty proponents at bay.[50]

Nevertheless, New York State has a distinguished and controversial death penalty history. In 1888, New York became the first state to centralize executions by means of the electric chair.[51] The first official New York State execution took place on August 6, 1890.[52] Subsequently, New York was a leader in both frequency and total numbers of executions. Between 1890 and 1963, New York executed 695 persons.[53] However, public support dwindled and, consequently, use

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[39] 428 U.S. 242 (1976).

[40] *See id.* at 253. *See also* Jurek v. Texas, 428 U.S. 262 (1976). All three decisions, *Gregg*, *Proffitt* and *Jurek*, were decided by a 7-2 majority.

[41] *See* Coker, 433 U.S. 584.

[42] *See* 21 U.S.C. § 848 (1994).

[43] *See* 18 U.S.C. § 36 (1994).

[44] *See id.* § 2119.

[45] *See id.* § 794(a).

[46] *See id.* § 2332(a).

[47] *See* COHEN & ROSENTHAL, *supra* note 29, at 3; *see also* People v. Smith, 468 N.E.2d 879 (N.Y. 1984); People v. Davis, 371 N.E.2d 456 (N.Y. 1977), *cert. denied*, 438 U.S. 914 (1978); People v. Fitzpatrick, 300 N.E.2d 139 (N.Y. 1973), *cert. denied*, 414 U.S. 1033 (1973).

[48] *See* COHEN & ROSENTHAL, *supra* note 29, at 3.

[49] *See id.*

[50] *See id.*

[51] *See* Lumer & Tenney, *supra* note 3, at 83-84.

[52] *See id.* at 85-86. William Kemmler, a Buffalo man was executed by electric chair for the ax murder of his common law wife. *See id.; see also Facts About the Death Penalty in New York State*, THE BUFFALO NEWS, Dec. 8, 1996, at 10M.

[53] *See* Lumer & Tenney, *supra* note 3, at 83.

of the death penalty declined in the 1940's and 50's.[54] On August 15, 1963, Eddie Lee Mays was the last person executed in New York[55] before the Supreme Court decision that temporarily repealed the death penalty.[56] The last New Yorker to receive a death sentence was Lemuel Smith in 1981.[57]

On March 7, 1995, almost twenty years after the pivotal 1976 Supreme Court decisions,[58] New York State finally enacted a statute authorizing the death penalty.[59] After years of heated political debate, New York again stepped over the threshold and enacted its own version of the death penalty.[60] The drafters carefully studied history and proposed a statute that, barring an overruling of *Furman*, is arguably the most challenge-proof statute written to date.[61]

II. THE NEW YORK DEATH PENALTY STATUTE

On March 7, 1995, New York became the thirty-eighth state[62] to sanction death as the ultimate form of punishment for first-degree murders.[63] The New York death penalty statute went into effect on September 1, 1995.[64]

The new death penalty provisions substantially expand New York Penal Law § 125.27, which defines first-degree murder.[65] Capital punishment is available for a defendant, at least eighteen years old, who kills someone, with the intent to kill, and with the existence of at least one of twelve aggravating factors.[66] These twelve aggravating factors include instances where:

> i. the intended victim was a police officer . . . engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer; or

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[54] *See id.* at 84.

[55] *See* Gene Warner, *Pataki Victory Means N.Y. State Will Enact Death Penalty in '95*, THE BUFFALO NEWS, Nov. 10, 1994, at 13. Mays was the last person to die in New York's electric chair. He reportedly said, "he would rather 'fry' than spend his life in prison." *Id. See also* Shirley E. Perlman, *District Attorneys Face a Difficult Decision, Life or Death*, NEWSDAY, Mar. 31, 1996, at A7. Mays was convicted of shooting a woman in an East Harlem bar. *See id.* The 1965 repeal followed the scheduling of George Whitmore, Jr. for execution for the murder of two women. Whitmore confessed to the murders but later recanted, claiming that his original confession was coerced. Subsequently, Whitmore was cleared and another man was convicted. *See id.*

[56] *See Furman*, 408 U.S. at 240.

[57] *See* Warner, *supra* note 55, at 13. Smith was convicted of strangling a corrections officer while in prison for murder. His sentence was later thrown out by the New York Court of Appeals. *See id.*

[58] *See Gregg*, 428 U.S. 153; *Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242.

[59] *See* N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997).

[60] *See id.*

[61] *See* Weisberg, *supra* note 5, at 293-300.

[62] *See* Bentele, *supra* note 2, at 73.

[63] *See* N.Y. PENAL LAW § 125.27.

[64] *See id.*

[65] *See* COHEN & ROSENTHAL, *supra* note 29, at 5.

[66] *See id.*

ii. the intended victim was a peace officer . . . engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or an employee of the division for youth; or

iii. the intended victim was an employee of a state correctional institution or . . . local correctional facility . . . engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility; or

iv. at the time of the commission of the killing, the defendant was confined in a state correctional institution or was otherwise in custody upon a [life] sentence . . . or . . . the defendant had escaped from such confinement or custody while serving such a sentence . . . ; or

v. the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action . . . or the intended victim had previously testified . . . or the intended victim was an immediate family member of a witness who had previously testified . . . and the killing was committed for the purpose of exacting retribution . . . ; or

vi. the defendant committed the killing or procured commission of the killing pursuant to an agreement . . . to commit the same for the receipt . . . of anything of pecuniary value . . . ; or

vii. the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary . . . , kidnapping . . . , arson . . . , rape . . . , sodomy . . . , sexual abuse . . . , aggravated sexual abuse . . . , or escape . . . , or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree . . . ; or

viii. as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person . . . causes the death of an additional person . . . ; or

ix. prior to committing the killing, the defendant had been convicted of murder . . . ; or

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

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

xii. the intended victim was a judge . . . and the defendant killed such victim because such victim was, at the time of the killing, a judge.[67]

A. *Analysis of the New York State Statute*

One commentator's analysis concludes that "[t]he New York death penalty law exhibits an almost stylized concern for achieving the most precisely tailored rules of substance and procedure . . . ."[68] Even a quick perusal of the statute makes this claim self-evident. The New York statute establishes a variety of minimum standards for death penalty eligibility which are substantially higher than all other current death penalty statutes.[69]

The New York statute reads like a check list of post-*Furman* Supreme Court cases.[70] "In its aim of being proof against constitutional attack, it not only accrues the constitutional wisdom of the last twenty years; it takes the most 'conservative' and prophylactic view of constitutional law possible."[71] The statutory aggravating and narrowing circumstances achieve what one commentator calls a "state-of-the-art moral taxonomy of murder."[72] Differentiation is based on victim identity[73] and the "moral quality of motives,"[74] rather than the traditional *mens rea* classification.[75]

Two New York practitioners, Jay M. Cohen and Robert Rosenthal, identify six main procedural components of the death penalty statute that thwart actual imposition of the death penalty.[76] These impediments relate to how states try and sentence an accused to death: (1) prosecutorial discretion in seeking the death penalty, (2) jury selection, (3) the penalty phase, (4) mental retardation limitations on the death penalty, (5) motions to set aside the sentence, and (6) appeals.[77]

The first procedural component thwarting the death penalty process is prosecutorial discretion. Once there is a first-degree murder indictment, the district attorney may seek the death penalty.[78] If the district attorney decides to pursue a death sentence, she has 120 days to file and serve a written notice stating

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[67] N.Y. PENAL LAW § 125.27.

[68] *See* Weisberg, *supra* note 5, at 300.

[69] *See* Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 317 (1996).

[70] *See* Weisberg, *supra* note 5, at 293.

[71] *Id.*

[72] *Id.* at 294.

[73] *See id.* at 295. The statute includes reference to police officers, peace officers, witnesses, judges and prison guards. *See* N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997).

[74] Weisberg, *supra* note 5, at 295. Aggravating factors are established for killing for pecuniary gain, committing torture, serial killings or traditional felony-murders. *See* N.Y. Penal Law § 125.27(1)(a)(vii).

[75] *See* Weisberg, *supra* note 5, at 295.

[76] *See* COHEN & ROSENTHAL, *supra* note 29, at 7-22.

[77] *See id.*

[78] *See id.* at 7.

that intention.[79] If the district attorney fails to file or serve notice, the statute precludes her from ever subsequently seeking the death penalty.[80] The district attorney may withdraw the notice at any point, but once withdrawn, she cannot refile it.[81] Furthermore, the statute mandates that the Court of Appeals conduct a proportionality review to ensure that the individual district attorney's selection process "is based on objective and lawful criteria."[82]

Prosecutorial discretion thwarts the death penalty's use by allowing individual district attorneys the option of not pursuing a death sentence in a qualifying case. This provides a defendant with many opportunities to escape execution and serve a reduced sentence. At every stage of the prosecutorial process, from indictment or arraignment through appeal, the district attorney has the option of irrevocably withdrawing the request for the death penalty. These decisions to withdraw create situations where the defendant's maximum penalty can range anywhere from twenty years with parole to life without parole.[83]

The second procedural component of the death penalty statute that hinders the process is jury selection. The jury selection differs significantly in capital trials versus other criminal trials.[84] In capital trials, jury selection is on the record, but may be sealed in whole or in part on either party's motion.[85] The statute provides for the questioning of each potential juror outside the presence of the other jurors, on any matter affecting the juror's qualifications, including racial bias.[86]

In addition, a potential juror may be excused on a challenge for cause for conscientious opinions either "for" or "against" the death penalty.[87] Therefore, a judge may excuse a juror not only for impartial verdict purposes, but also in instances where "beliefs would interfere with the proper exercise of the juror's sentencing discretion under the law."[88] The jury selection process in capital trials is too selective, weeding out all but the most bland and feeble-minded. This clearly serves to minimize the number of cases in which the death penalty is imposed.

The third procedural obstacle in the death penalty process is the trial's penalty phase. A capital trial is bifurcated into a guilt phase and a sentencing phase.[89] Once the jury returns a guilty verdict, there is a prompt proceeding to decide a sentence of either life without parole or death.[90] The statute solely empowers the

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[79] *See id.*
[80] *See id.*
[81] *See id.*
[82] *Id.* at 7-8.
[83] *See id.* at 5.
[84] *See id.* at 8.
[85] *See id.* at 9.
[86] *See id.*
[87] *See id.*
[88] *Id.*
[89] *See id.* at 10.
[90] *See id.*

trial jury to impose the death penalty upon a convicted murderer.[91]

The jury must weigh the aggravating factors for each count against the mitigating evidence.[92] The jury may only consider these aggravating factors after the state has proven their existence beyond a reasonable doubt during the guilt phase.[93] The only two factors to be proven at the sentencing phase are: (1) terrorism, or (2) the existence of two prior designated felonies - within ten years.[94] However, the prosecution may only present evidence relating to these two aggravating factors if they give pre-trial notice, state specific dates and places of offenses, present the aggravating factors according to the rules of evidence, and a unanimous jury finds that the aggravating circumstances exist beyond a reasonable doubt.[95]

The defendant may introduce reliable hearsay evidence to bolster evidence of mitigation, which he must prove by a preponderance of the evidence.[96] Mitigating factors include whether defendant: (1) lacked a significant record of violent crime convictions; (2) suffered mental retardation or had impaired mental state at the time of the murder; (3) was under duress or the domination of another; (4) was convicted as an accomplice but his participation was minor; (5) suffered mental or emotional disturbance or was under the influence of drugs or alcohol at the time of the murder; and, (6) committed the crime under peculiar circumstances, or the defendant's state of mind or condition, or any other relevant information concerning the defendant's character, background, or record affected the crime.[97]

Once both sides sum up, the jury must return a unanimous decision as to either a death sentence or life imprisonment without parole.[98] In order to impose a death sentence, the jury must find unanimously, beyond a reasonable doubt, that the aggravating factors substantially outweigh the mitigating factors, and the jury must specify which factors it relied on in making its decision.[99] If the jury fails to reach unanimity, the court may sentence the defendant to a minimum term of twenty to twenty-five years and a maximum term of life in prison.[100] The wide range of mitigating factors, combined with the unanimity and beyond a reasonable doubt requirements for aggravating factors, frustrate the process by setting

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[91] *See id.* at 10-11. There may be as many alternate jurors as the judge deems necessary. *See id.* at 10. Although alternates are usually dismissed once the jury enters deliberations, in a capital case they will remain until the sentencing phase is completed. *See id.*

[92] *See id.* at 12.

[93] *See id.*

[94] *See id.* at 12-13.

[95] *See id.* at 13.

[96] *See id.* at 14.

[97] *See id.* The district attorney may offer evidence in order to rebut the mitigation evidence. *See id.*

[98] *See id.* at 14-15.

[99] *See id.*

[100] *See id.*

unrealistic standards for decision-making.[101]

The fourth procedural component hindering the process is that the state may not impose the death penalty on those afflicted with mental deficiencies.[102] Mentally deficient individuals may suffer death only if "the defendant committed the first-degree murder by murdering an employee of a correctional facility while in prison."[103] Many who commit brutal and multiple murders are mentally deficient or can be portrayed as such. This blanket and easily manipulated standard, therefore exempts many deserving murderers from facing death.

The fifth component obstructing the process is the motion to set aside the sentence. If the jury imposes the death sentence, the judge may still set it aside for any grounds set forth in Criminal Procedure Law § 330.30.[104] The defendant may also seek to set aside the death sentence pursuant to Criminal Procedure Law §§ 440.20[105] and 440.10.[106] The defendant may also attack the sentence in the trial court on the grounds that it was the product of duress or misrepresentation by the district attorney or the court.[107]

Motions to set aside the sentence thwart the process by allowing overly scrupulous review of the trial. Allowing these collateral attacks chips away at the very structure of our criminal justice system. We should not subject unanimous death penalty sentences rendered by carefully screened and selected juries to such motions.

The sixth component that thwarts the process are appeals. Only New York's Court of Appeals may review death penalty sentences.[108] The Court must review every death sentence on the record.[109] This review is not waivable.[110] The Court of Appeals review includes considering whether: (1) the jury imposed the death sentence under the influence of passion, prejudice, or any other arbitrary or impermissible factor, including the race of either the defendant or the victim; (2) the sentence is excessive or disproportionate; and (3) the decision to impose the

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[101] It is important to note that even at this late stage the prosecution can choose to withdraw its request for the death penalty. *See id.* at 10.

[102] *See id.* at 18.

[103] *Id.*

[104] *See id.* at 16-17. Section 330.30 governs grounds for motions to set aside a verdict, including: reversals as a matter of law, improper juror conduct and discovery of new evidence which the defendant could not have produced at trial and which may have proven favorable to the defendant. N.Y. CRIM. PROC. LAW § 330.30 (McKinney 1994).

[105] Section 440.20 governs motions to set aside a sentence on grounds that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. N.Y. CRIM. PROC. LAW § 440.20 (McKinney 1994).

[106] Section 440.10 governs motions to vacate a judgment, including: lack of subject matter or personal jurisdiction, judgment procured by duress, misrepresentation or fraud on the part of the prosecuting attorney, false material evidence and discovery of new evidence favorable to the defendant. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994).

[107] *See* COHEN & ROSENTHAL, *supra* note 29, at 20.

[108] *See id.* at 21.

[109] *See id.*

[110] *See id.*

death sentence was against the weight of the evidence.[111] Appellate review is not only necessary, but desirable. However, the amendments to the procedural rules allow for far broader review that is an unnecessary and costly addition to an already generous appellate review process.

All of these very carefully constructed procedural safeguards impede a convicted murderer's actual execution by giving a removed and possibly politically biased appellate court an almost inexhaustible supply of devices through which they can derail a justified execution. Although procedural safeguards are necessary to protect the innocent from wrongful execution, the New York statute creates a seemingly insurmountable barrier to execution for even the most vile and clearly guilty defendants.

B. *Application of the New York Death Penalty Statute*

1. A Theoretical Application

In theory, executions should follow shortly after authorization of the death penalty. New York State does not lack brutal murderers who qualify for a death sentence even under the new stringent law. In a seven month window from September 1, 1995, to March 31, 1996, there were over 375 murders in New York State, of which approximately fifty-eight potentially qualified for the death penalty.[112] A law journal survey of the ten New York counties that sought the greatest number of murder indictments between September 1, 1995, and September 1, 1996, reveals that out of the 860 murder indictments, only 102 (twelve percent) were considered possible death penalty cases.[113] Of these cases, the state only prosecuted forty as first-degree murders, and only three as death penalty cases.[114]

Some professionals estimate that approximately fifteen to twenty percent of all murders fall within the twelve categories defined by the statute as sufficiently heinous to justify the ultimate sanction of death.[115] Given these statistics, it would appear that in the more than two years since the statute became effective, at least one person would be facing execution, even if not yet executed.

2. Actual Application § 125.27

Contrary to theoretical suppositions, New York has not sentenced anyone to death.[116] Many reasons exist for this facial anomaly. The normal backlog in tri-

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[111] *See id.*

[112] *See* Perlman, *supra* note 55, at A7-A37.

[113] Daniel Wise, *Use of Death Penalty Law Sparse; 3 of 860 Indictments Fell Under Statute*, N.Y.L.J., Dec. 24, 1996, at 1.

[114] *See id.* A more recent statistic shows that as of February 16, 1997, almost 1,300 people have been charged with murder, while the threat of an actual death sentence exists in only a handful of cases. *See* William K. Rashbaum & Gene Mustain, *Death Cases in Disarray*, DAILY NEWS (N.Y.), Feb. 16, 1997, at 6.

[115] *See* Wise, *supra* note 113, at 4.

[116] *See* Perlman, *supra* note 55, at A7.

als, prosecutorial discretion, and the very nature of this challenge-proof statute all contribute to the delay in an actual death sentence and execution.

First, because the statute is not retroactive, it takes time for people to commit new murders; then be subsequently charged, indicted, prosecuted, and convicted; their cases appealed; and final death sentences pronounced and ultimately carried out.[117] However, given that 58 to 102 murderers qualify for the death penalty, no dearth of candidates exists.[118]

Many district attorneys are reluctant to seek the death penalty for a variety of personal, legal, and practical reasons.[119] Although under the statute, the district attorney has "virtually unchecked discretionary authority" to decide whether to seek the death penalty,[120] few district attorneys vigorously pursued a death penalty indictment or conviction. Each district attorney in New York struggles with several issues.

Some district attorneys' personal principles make it necessary for them to oppose seeking a death sentence in their jurisdiction.[121] Some are morally opposed to capital punishment and refuse to pursue a death sentence, opting instead for the alternative sentence of life without parole.[122] Others cite the possibility of erroneous convictions and the resultant execution of innocent parties as too great a risk to justify any death sentence.[123]

From a legal perspective, many are waiting for the "right" case which would clearly satisfy the mandates of the statute and set a favorable precedent.[124] Legally, as well as politically, the statute's well-being requires the success of the first verdict in a New York death penalty case.[125] An optimal case would be one where both the fact pattern and the legal issues are tight and solid enough to withstand constitutional challenge and extreme judicial and public scrutiny.

The existence of plea bargaining and voluntary guilty pleas raises another legal issue. On the one hand, the recent trend has been for murder suspects to plead guilty to a lesser charge, or in exchange for a sentence of life without parole, so as to avoid a trial and a possible death sentence.[126] However, a defendant maintains no absolute right to plea bargain or to plead guilty to an indict-

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[117] *See* Warner, *supra* note 55, at A13.

[118] *See* Perlman, *supra* note 55, at A7.

[119] *See id.*

[120] COHEN & ROSENTHAL, *supra* note 29, at 35.

[121] *See generally* Jan Hoffman, *Death Penalty Raises Issue of Obligation of Prosecutor,* N.Y. TIMES, Mar. 17, 1996, at A33 (stating that Bronx District Attorney Robert Johnson is reluctant to seek the death penalty on ethical, legal, pragmatic and political grounds); Fred Kaplan, *Two Years on the Books, N.Y. Death Penalty Unused,* BOSTON GLOBE, Mar. 6, 1997, at A1 (describing Brooklyn District Attorney Charles Hynes as being morally opposed to capital punishment); Perlman, *supra* note 55, at A7 (indicating that many New York District Attorneys are reluctant to seek the death penalty).

[122] *See id.*

[123] *See id.*

[124] *See id.* The death penalty is reserved only for the "most heinous" crimes.

[125] *See* Rashbaum & Mustain, *supra* note 114, at 6.

[126] *See id.*

ment for first-degree murder.[127] A defendant may only enter a guilty plea to a first-degree murder charge if the penalty is *not* death, and both the district attorney and the court consent.[128]

In practice, prosecutors find the new law discouraging.[129] It requires more work, investigation and expense with little chance of a favorable verdict.[130] To seek the death penalty involves a great outcome-oriented risk. If a jury does not unanimously decide to impose either death or life imprisonment, the defendant may only get a lesser sentence of twenty years to life imprisonment from a judge.[131]

In New York City, only Brooklyn District Attorney Charles J. Hynes is currently seeking executions under the statute.[132] Given the sensational publicity and political pressure an unsuccessful bid for a death sentence would generate, prosecutors are reluctant to ask a jury for the death penalty unless they are certain the jury would grant it.

III. POLICIES FURTHERED BY THE DEATH PENALTY IN NEW YORK STATE

A. *Theories of Punishment*

Many different theories of punishment exist. The irrevocable sanction of death's spotlight, however, illuminates some theories as more compelling and inviting of careful scrutiny than others. Nevertheless, the state must ground its justifications for executions in sound principle as well as policy.

Theories of punishment fall under two classic philosophies: utilitarian and retributivist. Essentially, utilitarian theories justify punishment for past offenses based on the greater good served by preventing future offenses.[133] Utilitarian theory looks forward and strives to obtain net social gain.[134] Utilitarian theories include: (a) deterrence; (b) incapacitation; (c) rehabilitation; and (d) denunciation.[135] Retribution forms the general theory behind a retributivist philosophy. Retribution covers three variations: assaultive retribution, protective retribution and victim vindication.[136]

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[127] *See* COHEN & ROSENTHAL, *supra* note 29, at 35.

[128] *See id.*

[129] *See* Perlman, *supra* note 55, at A7.

[130] *See id.*

[131] *See* Jan Hoffman, *Deciding When to Seek Execution*, N.Y. TIMES, Nov. 13, 1996, at B3.

[132] *See No Death Penalty in a Double Slaying*, N.Y. TIMES, Jan. 11, 1997, at A31.

[133] *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (F. Schoeman ed., 1987).

[134] *See id.* at 11, 24-26; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 9 (2d ed. 1995).

[135] *See* Moore, *supra* note 133, at 10, 39-40.

[136] *See* DRESSLER, *supra* note 134, at 11-13.

Deterrence has two subsets, specific and general.[137] Specific deterrence theorizes that punishment will deter future bad acts by the punished person.[138] The punished persons will "learn their lesson" and refrain from future bad acts to avoid additional punishment.[139] Specific deterrence justifies the death penalty because once the state executes a murderer, that person cannot murder again, thereby preventing future bad acts.

Punishing a criminal achieves general deterrence by signaling that the state regards certain behaviors as undesirable, intolerable and subject to appropriate punishment.[140] Punishment conveys the message that individuals perpetrating similar conduct will suffer similar consequences.[141] By executing murderers, society sends the message that it will execute future murderers. Therefore, potential murderers will engage in a cost-benefit analysis[142] and decide that committing murder does not equal the price of their own lives.

Although general deterrence is an intuitive and popular idea, much controversy surrounds it, particularly in its application as a justification for the death penalty. Many feel that the small number of murderers the state actually executes cannot realistically deter anyone.[143] The fear of swift and sure justice traditionally grounds deterrence.[144] Given the extreme care with which the state tries death penalty cases, one may question whether any death penalty statute can achieve the required swift and sure standard.

Tremendous delay, averaging fifteen to twenty years between the murder at issue and the execution of the convicted murderer, compounds the uncertainty.[145] A general deterrence justification merits serious scrutiny, particularly in the context of the New York death penalty statute, where the careful drafting practically precludes an actual execution. Specifically, the many procedural safeguards prolong the conviction and sentencing process.[146] Ultimately, the time lapse between the crime and the punishment becomes so large as to attenuate any cause and effect relationship that forms the basis for general deterrence.

Incapacitation theory asserts that isolating the bad actor, either by death or imprisonment, prevents him from committing future criminal acts.[147] According to incapacitation theory, as in the specific deterrence analysis,[148] executing a

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[137] *See id.* at 38-39.

[138] *See id.* at 10.

[139] *See id.*

[140] *See id.*

[141] *See id.*

[142] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 355-57 (3d. ed. 1986) (discussing the theory of "cost-benefit analysis").

[143] *See* AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA 1972-1994 175 (Robert H. Haines ed., 1996).

[144] *See id.*

[145] *See* Zimring, *supra* note 69, at 312.

[146] *See infra* Part IIA.

[147] *See* DRESSLER, *supra* note 134, at 10.

[148] *See infra* this Part.

convicted murderer prevents him from committing any further harm.[149] Thus, the death penalty successfully incapacitates convicted murderers. However, the death penalty can only successfully incapacitate if the executions actually occur. Incapacitation theory has questionable legitimacy in New York because the law only targets a few first-degree murderers who realistically will never face execution.

For the purposes of this discussion, rehabilitation provides no justification as a goal of capital punishment. The rehabilitative model justifies punishment because of the reforming good it does the criminal.[150] By establishing a death penalty, we implicitly state that either the death penalty properly punishes a murderer and we do not care about his rehabilitation, or we have made a normative judgment that we cannot rehabilitate some people.

However, rehabilitation likewise provides minimal justification in the 'twenty years to life' or 'life-imprisonment without parole' sentences. Rehabilitation focuses on changing the "offender's intent, motivation or even character" to make him suitable for release.[151] The sentences of life without parole and death do not contemplate release. Therefore, rehabilitation is a moot theory in these cases.

To sentence someone to a prison term of life without parole involves the same two implicit statements concerning lack of care with regard to rehabilitation or the determination of a lack of rehabilitative potential. Therefore, the lack of rehabilitative goals in the application of capital punishment is a less serious omission.

The theory of denunciation holds that by penalizing an offender, society expresses an important statement about its disapproval of the committed offense and offender.[152] A penalty declares that society will not tolerate the behavior in question and that the bad actor will bear the burden of that social disapproval.[153] When the state executes a convicted murderer, it declares that the government and society will not tolerate murder. In theory, New York State has made a strong denunciating statement merely by enacting a death penalty. However, some may argue that the failure to actually execute a deserving murderer lessens or nullifies the impact of the statement.

Retribution theory centers around the idea of punishment as restoring an objective order rather than satisfying a subjective craving for revenge.[154] It is a Kantian "just deserts" model based on the idea that the criminal act justifies the punishment.[155] The punished individual's moral culpability justifies punishment.[156] "A retributivist punishes because, and only because, the offender de-

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[149] *See* DRESSLER, *supra* note 134, at 10.

[150] *See* Moore, *supra* note 133, at 179.

[151] ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 58 (1975).

[152] *See* DRESSLER, *supra* note 134, at 13-14.

[153] *See* NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 22 (1980).

[154] *See* VAN DEN HAAG, *supra* note 151, at 58.

[155] *See* DRESSLER, *supra* note 134, at 11. *See also* IMMANUAL KANT, THE PHILOSOPHY OF LAW 197-98 (W. Hastie trans. 1887).

[156] *See* Moore, *supra* note 133, at 179.

served it."[157]

Not only is punishment "justified," but society has a "duty" to punish offenders.[158] When one commits a crime, an imbalance or a "debt" to society results.[159] The only way to rectify this imbalance is by punishing the perpetrator who caused the imbalance, so he can "pay back" his debt.[160] By executing a convicted first-degree murderer, the state rectifies the imbalance the murder created.

Essentially, no theory of punishment can satisfactorily justify the New York law's current form. Although the different theories justify both the death penalty statute's letter and intent, the statute fails to achieve its intended result — actual executions. Thus, this failure significantly weakens these justifications. We may find partial justification for the statute as it currently operates in the general deterrence and denunciation theories. However, this assumes the belief that the mere threat of death, however uncertain, will deter future murderers. This hypothetical effect would most likely dissipate quickly. The premise that some punishment must actually take place underlies all punishment theories. As time wears on and the state executes no one, the statute will slowly desiccate into an unjustified, empty shell.

B. *New York State Governor Pataki on the Death Penalty*

> The citizens of New York State have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. The citizens of New York State are convinced the death penalty will deter these vicious crimes and I, as their Governor, agree. The legislation I approve today will be the most effective of its kind in the nation. It is balanced to safeguard defendants' rights while ensuring that our state has a fully credible and enforceable death penalty statute. This law significantly buttresses the twin pillars of an effective criminal justice system—deterrence and true justice for those convicted of violent crimes. For too many years, too many New Yorkers have lived in fear of crime. This, alone, won't stop crime but it is an important step in the right direction.[161]

The preceding statement refers to all punishment theories, both retributive and utilitarian. Explicitly, New York Governor George Pataki speaks about the enactment's deterrent effect and the retributivist notion of true justice. Implicitly, the statement refers to the death penalty's incapacitative and denunciative aspects.

The most puzzling part of the statement is the Governor's repeated use of the word "effective." One can only speculate about what the Governor meant by

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[157] *Id.*

[158] *See id.*

[159] *See* DRESSLER, *supra* note 134, at 13.

[160] *See id.*

[161] N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997) (statement of New York Governor George Pataki on the death penalty).

using a powerful word to describe a facially powerful sanction, which in reality has no teeth.

C. *The Death Penalty and Its Political Influence*

Some claim and many others speculate that differing views on the death penalty allowed Republican George Pataki to dethrone popular Democrat incumbent Mario Cuomo as Governor of New York.[162] Evidenced by both the State Senate and Assembly passing death penalty reinstatement bills every year since 1979, New York State citizens clearly had been clamoring for the death penalty.[163]

The New York State Legislature made numerous attempts to override Cuomo's persistent veto and reinstate the death penalty.[164] Finally, in 1994, New York decided that it could wait and play the legislative game no longer and it elected death penalty proponent, George Pataki, as governor.[165] However, the real battle for a truly effective death penalty has barely begun.

IV. THE FUTURE OF NEW YORK STATE'S DEATH PENALTY

A. *The Current Death Penalty Statute's Creation of an Unprincipled Limbo*

Essentially, the current New York State Death Penalty Statute has created an unprincipled limbo, whereby the law says one thing on its face, but in reality, it creates completely opposite results. On the one hand, those categorically or morally opposed to the death penalty cannot be satisfied knowing that the threat of state sanctioned execution looms in the perhaps not so distant future. On the other hand, if we take the words of one commentator seriously that "[t]wenty more years in New York without an execution would be no surprise,"[166] proponents will justifiably feel duped by a law with no teeth. Franklin Zimring, a law professor at Berkeley, believes that hopes of the new death penalty legislation sweeping away major obstacles to executions are unrealistic.[167]

Robert Weisberg, a law professor at Stanford,[168] speaks of the New York statute as a cultural document where the morally optimal number of executions would approach zero.[169] Weisberg claims that one may view the statute as a "pragmatic instrument" which establishes a "certain moral and political stability in a nervous society."[170]

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[162] *See* Weisberg, *supra* note 5, at 283-84.

[163] *See* AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA 1972-1994, *supra* note 143, at 208 n.24.

[164] *See* James Dao, *Death Penalty In New York Reinstated After 18 Years; Pataki Sees Justice Served,* N.Y. TIMES, Mar. 8, 1995, at A1.

[165] *See* Weisberg, *supra* note 5, at 283-84.

[166] Zimring, *supra* note 69, at 304.

[167] *See id.* at 314-15.

[168] *See* Weisberg, *supra* note 5.

[169] *See id.* at 286.

[170] *Id.* at 285.

Weisberg creates a hypothetical social engineer who designs a system whereby there would be just enough executions to "keep the art form alive, but not so many as to cause excessive social cost."[171] He believes this is a crude yet logical compromise between proponents and opponents.[172] Unfortunately, academic and so-called "logical" compromises are impossibilities in the real world.

New York State Attorney General Dennis C. Vacco estimates that if someone faced the death sentence in New York today, it would take three to four years before the actual execution.[173] As a basis for comparison within the region, New Jersey, where the death penalty has been legal since 1982, has yet to execute a single person.[174] The New Jersey Death Penalty Statute is similar to the New York statute both substantively and procedurally.[175] One may view the New York statute as an even further refinement of the very thorough New Jersey statute in terms of its challenge-proof nature.

It is naive to think that the vocal and powerful proponents who nearly overrode Cuomo's veto so many times and finally voted him out of office will sit idly by in a state where the death penalty lacks practical application. Zimring concedes that "[a]s a matter of principle, limbo in execution policy is an unsatisfactory condition," but further confesses that limbo may be preferable to any viable alternatives.[176]

B. *Proposal for a More Effective Statute*

Perhaps after all the heated debate, legal scholarship, and tireless effort expended in order to reinstate the death penalty in New York, it may appear presumptuous to propose a "better" statute. It may be even more presumptuous to suggest that there are not one, but two more effective statutory approaches for New York State to consider. New Yorkers need to debate and decide which of the two proposals better expresses the criminal sanctions and social policies they wish to further within their borders.

Although some may prefer the current situation, where New York State has an inoperative death penalty statute, many may find this limbo both unprincipled and intolerable. Therefore, New York State should do one of two things: abolish the death penalty or amend the statute. If New York chooses to amend the statute, it must widen the net of eligibility, streamline the process, and impose a statewide prosecutorial policy that vigorously pursues death sentences and executions.

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[171] *Id.* at 286.

[172] *See id.*

[173] *See Facts About the Death Penalty in New York State*, *supra* note 52, at 10M.

[174] *See id.*

[175] *Compare* N.J. STAT. ANN. § 2C:11-3 (West 1995), *with* N.Y. PENAL LAW § 127.27 (McKinney Supp. 1997).

[176] *See* Zimring, *supra* note 69, at 323.

1. Option Number One

The first option is to once again outlaw the death penalty in New York. This would probably entail the election of an anti-death penalty governor and numerous anti-death penalty state representatives. However, considering the present political and social atmosphere in New York State, this appears an unlikely solution.

2. Option Number Two

The other option is to amend the current statute to allow for a significant number of executions. This could be accomplished in two ways: actual amendment or a shift in state prosecutorial policy. A combination of the two would probably yield the best results.

Currently, the main problem appears to be the lack of prosecutorial fervor on the part of various district attorneys. Nevertheless, it is unconstitutional to make capital punishment mandatory for even certain aggravating types of first-degree murder.

To remedy this problem, the state legislature should amend the statute to require district attorneys to ask for the death penalty in all cases where the facts fit the initial criteria defining first-degree murder. In addition, the State should announce and enforce a non-statutory policy to vigorously pursue the death penalty in all first-degree murder cases. This type of policy's constitutional permissibility is unsettled. Issues of gubernatorial policy-making versus prosecutorial discretion would need further research and investigation.

If one deems this type of policy permissible yet ineffective as a result of individual district attorney resistance, voters must let their will be known. Over time, if New Yorkers want a more vigorous application, they will have to show their preferences at the ballot box when voting for their county District Attorney. The citizenry elected the current District Attorneys not only prior to Pataki's election and the enactment of the death penalty statute, but before any controversy arose as to whether District Attorneys would pursue and impose the death penalty. As each county district attorney in New York State faces death penalty decisions for qualifying murders, and makes clear their personal feelings as well as their official policy regarding the death penalty, citizens will be able to make informed decisions in future elections.

At this time, it is uncertain which statutory provisions provide the most unnecessary obstacles to executions. Current cases are rare and tend to resolve themselves before any of the procedural requirements become significant. However, there are two foreseeable problems concerning the jury and sentencing processes. First, the law should completely separate the trial's guilt and sentencing stages so that the jury does not consider the death sentence when deciding the question of guilt. Second, during the sentencing phase, if the jury does not unanimously impose death, then life without parole should be the default sentence rather than life with parole.

V. CONCLUSION

Eventually, and probably sooner than later, people on both sides of the issue will realize that the current New York State death penalty satisfies no one. By authorizing capital punishment, but in practice barring executions, this solution, far from pleasing everyone, as Weisberg and others suggest, pleases no one.

A statute that produces an outcome counter to its goals cannot satisfy those who believe that we should prohibit state-authorized killing. The knowledge that eventually a case will arise that passes both state and federal constitutional muster and allows the state to execute a person makes for a disturbing and uncertain future.

Others who feel that the death penalty is permissible or desirable will realize that a facially satisfactory statute is actually both insufficient and dishonest. To say that the mere existence of a death penalty statute will placate the masses is condescending and underestimates death penalty proponents. Discussion of the enactment of the death penalty as a "symbolic victory"[177] is hollow and unconvincing.

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[177] *See id.* at 318.