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To Act Or Not To Act: Will New York's Defeated Death Penalty Be Resurrected?

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**TO ACT OR NOT TO ACT: WILL NEW YORK'S
DEFEATED DEATH PENALTY
BE RESURRECTED?**

Diana N. Huffman

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INTRODUCTION

Capital punishment has always been a topic of controversy in the United States. The debate about the death penalty, its value as a way to permanently incapacitate society's most dangerous criminals and its effectiveness as a deterrent to violent crime, has increased over the last three years. This phenomenon is particularly visible in New York State where, in 2004, the New York Court of Appeals struck down the State's death penalty statute as invalid under the New York Constitution.¹ Three years later, in *People v. Taylor*,² the Court reiterated its prohibition on the use of capital punishment under the current statute and overturned the death sentence of the last man on New York's death row.³ New York's death row is now empty and the Capital Defender Office, established in 1995 when the death penalty statute was enacted, has closed.⁴ The *de jure* moratorium on state executions initiated by

1. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

2. 878 N.E.2d 969 (N.Y. 2007).

3. See Alan Feuer, *Murderer's Sentence Tossed Out*, N.Y. TIMES, Oct. 24, 2007, at B3.

4. See Marnie Eisenstadt, *10 Years Later: Death Penalty on the Books, off the Agenda*, POST-STANDARD (Syracuse, N.Y.), Sept. 25, 2005, at A1; Joel Stashenko, *Capital Defender Readies to Shut Doors*, N.Y.L.J., Oct. 29, 2007, at col. 4 [hereinafter Stashenko, *Capital Defender*]; Joel Stashenko, *Court of Appeals to Hear Last Pending Death Case: Outcome Could Be Affected by Addition of Two New Judges*, N.Y.L.J., Sept. 10, 2007, at S1 [hereinafter Stashenko, *Court of Appeals*]. The Capital Defender Office is a state agency "established under New York State's death penalty statute and was given the statutory mandate of ensuring that defendants who cannot afford

People v. LaValle will continue unless the state legislature amends the death penalty statute to cure the constitutional defects identified by the Court of Appeals.

What is the future of capital punishment in New York? In 2008, the question of whether the New York State Legislature will address the *LaValle* and *Taylor* decisions by either amending or repealing the death penalty statute remains unresolved.⁵ This Note describes the evolution of New York's 1995 death penalty statute, analyzes the way in which the state legislature could respond to the statute's unconstitutionality, and recommends that the legislature end the current debate over the future of capital punishment in New York by abolishing the death penalty.

Part I describes the evolution of death penalty legislation at the federal level and within New York State. It focuses on the structure of New York's death penalty, examines its statutory provisions, and then explores the Court of Appeals' reasons for declaring the statute unconstitutional. Part I further discusses the legislative reaction to the statute's invalidation and describes the current debate in New York about the continued desirability of capital punishment. Part II presents the legislative alternatives of either amending or abolishing New York's death penalty statute and discusses the arguments for and against each option. Finally, Part III argues that despite the challenges involved in either amending and reinstating the death penalty or abolishing it, the legislature should not allow the statute simply to remain inoperable by default. This Note concludes that given the need for action, the State Legislature should move to abolish the death penalty in New York.

I. THE RISE AND FALL OF NEW YORK'S DEATH PENALTY STATUTE

This Part examines the history and development of New York's death penalty statute: first, introducing the requirements established by the Supreme Court for a constitutional capital punishment scheme; then, examining the structure of New York's death

adequate representation in capital cases receive effective assistance of counsel. The statute also charged the CDO with creating an effective system of capital defense throughout New York State." Capital Defender Office Website, <http://www.nycdo.org> (last visited Sept. 25, 2008); see also THE CAPITAL DEFENDER OFFICE, CAPITAL PUNISHMENT IN NEW YORK STATE: STATISTICS FROM EIGHT YEARS OF REPRESENTATION 1995-2003 (2003), <http://www.nycdo.org/8yr.html> (last visited Sept. 25, 2008).

5. See *infra* Part I.F.

penalty statute in light of Supreme Court jurisprudence. This Part also reviews the New York Court of Appeals' decision invalidating the statute as violating the state constitution; and finally, describes the legislative reaction to this *de jure* moratorium on capital punishment in New York.

A. Supreme Court Jurisprudence on Capital Punishment

The U.S. Supreme Court's regulation of capital punishment began with the 1972 landmark case, *Furman v. Georgia*,⁶ in which the Court found unfettered capital sentencing discretion unconstitutional. By failing to provide safeguards against arbitrary sentencing decisions, capital punishment statutes like Georgia's violated the Eighth and Fourteenth Amendments.⁷ *Furman* invalidated all death penalty statutes as they existed in the United States in 1972, initiating a nationwide four-year moratorium on capital punishment.

The moratorium ended in 1976 with *Gregg v. Georgia*,⁸ when the Supreme Court upheld Georgia's newly-enacted capital sentencing scheme.⁹ Specifically, the Court found that the Georgia statute satisfied the constitutional mandate identified in *Furman*: to withstand Eighth Amendment scrutiny, a capital punishment statute must provide "clear and objective" standards for determining death-eligibility.¹⁰

Importantly, in *Gregg*, the Court expressly rejected the rigid categorization of death as cruel and unusual punishment.¹¹ Prior to *Gregg*, the Supreme Court had addressed the constitutionality of

6. 408 U.S. 238 (1972).

7. See Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 5 & n.26 (2006), available at <http://ssrn.com/abstract=959400>; see also Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 896 n.78 (2007) (noting that the *Furman* decision "effectively declared unconstitutional the death penalty statutes then in place in 40 states and commuted the sentences of 629 death row inmates around the country").

8. 428 U.S. 153 (1976).

9. See Kirchmeier, *Casting a Wider Net*, *supra* note 7.

10. As the Court explained in *Gregg*, the Eighth Amendment requires procedural safeguards to prevent against "arbitrary and capricious" decision-making. See *Gregg*, 428 U.S. at 189, 193; *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.") (internal citations omitted).

11. See *Gregg*, 428 U.S. at 168-69.

specific capital punishment regimes and had often “assumed and asserted the constitutionality of capital punishment.”¹² Not until *Gregg*, however, did the Court explicitly state that the death penalty “does not invariably violate the Constitution.”¹³ This clarification was critical in reviving capital punishment nationwide. In fact, since 1972, thirty-seven states have reinstated the death penalty,¹⁴ crafting capital sentencing statutes to comply with the requirements articulated by the Supreme Court in *Furman*, *Gregg*, and their progeny.¹⁵

Over the past forty years, the Supreme Court has established clear guidelines for state legislation of a legal and constitutional death penalty regime. In decisions following *Furman*, the Supreme Court identified two features necessary for a constitutional capital sentencing scheme: first, a method to narrow the class of offenders eligible for the death penalty,¹⁶ and second, an individualized sentencing determination based on consideration of the particular defendant’s character, record, and circumstances.¹⁷ Although state death penalty statutes differ on certain points, each uses a two-step process whereby the sentencer makes a factual determination of

12. *Id.* at 169.

13. *Id.*

14. The thirty-seven states that adopted death penalty statutes after 1972 were: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. There has not been an execution in Kansas, New Hampshire, or New York since 1976. See DEATH PENALTY INFO. CTR., *FACTS ABOUT THE DEATH PENALTY* (2007). The New Jersey death penalty was abolished in 2007. See *infra* note 170.

15. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (requiring individualized sentencing); *Gregg*, 428 U.S. at 193 (requiring guided discretion); *Furman v. Georgia*, 408 U.S. 238, 400 (1972) (requiring narrowing of jury discretion); see also Jason M. Schoenberg, *Making the Constitutional Cut: Evaluating New York’s Death Penalty Statute in Light of the Supreme Court’s Capital Punishment Mandates*, 8 J.L. & POL’Y 337, 342-43 (1999).

16. Statutory aggravating circumstances are used in many states, such as New York, to guide sentencing discretion. According to the Supreme Court, “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

17. See *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (finding mandatory death penalty statute unconstitutional because sentencer was not allowed to consider the defendant’s character and record).

the defendant's death-eligibility, followed by a discretionary determination of the appropriate punishment.¹⁸

B. New York's 1995 Statute in Light of Supreme Court Mandates

On March 7, 1995, New York State enacted a death penalty statute authorizing capital punishment for thirteen categories of intentional murder.¹⁹ Capital trials in New York are conducted in two stages.²⁰ First, the jury must decide whether the defendant is guilty of first degree murder.²¹ New York's death penalty statute, section 400.27 of the New York Criminal Procedure Law ("CPL"),²² "narrows" the class of death-eligible defendants by requiring that, in the guilt phase of a capital trial, the jury find at least one statutory aggravating factor established beyond a reasonable doubt.²³ The burden of proof rests with the government and the jury must agree unanimously on each aggravating factor.²⁴

After a defendant is convicted of first degree murder, the trial court conducts a separate sentencing²⁵ proceeding with the same jury that determined the defendant's guilt.²⁶ The government may seek a capital sentence only if it has filed timely notice of intent.²⁷

18. See *Gregg*, 428 U.S. at 193.

19. New York's death penalty statute went into effect on September 1, 1995. See 1995 N.Y. Sess. Laws 20.40 (McKinney); see also Andrea E. Girolamo, *Punishment or Politics? New York State's Death Penalty*, 7 B.U. PUB. INT. L.J. 117, 121 (1998) (citing N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997)). The New York statute authorizes capital punishment for "thirteen categories of intentional murder, including murders committed in furtherance of other crimes like robbery, rape or burglary." JOSEPH LENTOL ET AL., N.Y. ASSEMBLY STANDING COMMS. CODES, JUDICIARY, AND CORR., THE DEATH PENALTY IN NEW YORK, 14 (2005), available at <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

20. See Schoenberg, *supra* note 15, at 357-63.

21. First degree murder is defined by N.Y. PENAL LAW § 125.27 (McKinney 2003).

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

23. See *id.* § 400.27(7)(b). Aggravating factors are listed in N.Y. PENAL LAW § 125.27(1)(a) (McKinney 2004). The Supreme Court has approved "[t]he use of 'aggravating circumstances' . . . [as] a means of . . . narrowing the class of death-eligible persons." *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988).

24. See § 400.27(7)(b).

25. Also referred to as the "penalty phase."

26. See N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney 2004). *But see id.* § 400.27(2) (listing exceptions to impaneling same jury). A jury trial cannot be waived in a New York capital case. See N.Y. CONST. art. I, § 2 ("A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death."); see also N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1974).

27. See N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 1995). The government has limited time in which to seek a capital trial: it must file a written notice of intent

The government can withdraw this notice at any time.²⁸ Individualized sentencing is accomplished in New York capital cases through the presentation and consideration of the mitigating circumstances of the crime and the individual character of the defendant.²⁹ In New York, capital sentencing authority rests with the jury, who must choose to sentence a defendant convicted of first degree murder to either death or life imprisonment without parole.³⁰ The jury makes this sentencing decision by weighing the aggravating factors established in the trial's guilt phase³¹ and the mitigating factors that each juror finds that the defendant³² proved³³ by a preponderance of the evidence.³⁴

Furthermore, a death sentence may be imposed only if the jury agrees unanimously that: first, the aggravating factors "substantially outweigh" the mitigating factors beyond a reasonable doubt,³⁵ and second, that death is the appropriate sentence.³⁶ New York affords a capital defendant additional protection by allowing the jury to elect not to impose the death penalty even if the jury finds that the aggravating factors substantially outweigh the mitigating factors.³⁷ If the jury's sentencing resolution is unanimous,³⁸

to seek the death penalty within 120 days of the defendant's arraignment on an indictment charging him with first-degree murder.

28. See § 400.27(1) ("Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case . . .").

29. See *id.* § 400.27(9) (listing mitigating factors for jurors to consider; subsection (f) allows introduction of any potentially mitigating evidence); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . [T]o meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.").

30. § 400.27(1); N.Y. PENAL LAW § 70.00(5) (McKinney 2007) ("Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release.").

31. See N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney 2004).

32. At sentencing, the defendant may present evidence towards establishing the existence of any mitigating factor he wishes the jury to consider. See § 400.27(9).

33. Each juror can decide for himself whether and which mitigating factors have been established, regardless of what his fellow jurors find. See *id.* § 400.27(11).

34. See *id.* § 400.27(6); see also Girolamo *supra* note 19, at 122-23.

35. See § 400.27(11)(a).

36. *Id.*

37. See *id.* § 470.30(3).

the court must impose that decision.³⁹ If the jury is unable to agree on a sentence, however, the judge must impose a statutorily-dictated sentence.⁴⁰ All death sentences are subject to mandatory and automatic direct review by the New York Court of Appeals.⁴¹ Any sentence imposed “under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor” will be overturned.⁴²

C. The Jury’s Role In New York Capital Trials

The importance of fairness and reliability in New York’s capital sentencing scheme is perhaps best seen in the role of the jury. States vary in the degree of responsibility they allocate to the judge and jury in capital cases.⁴³ New York is among the majority of death penalty states who vest capital sentencing authority in the jury.⁴⁴ In fact, in New York capital cases a jury trial is mandatory and the jury makes both the factual⁴⁵ and evaluative⁴⁶ determinations.⁴⁷

Although the U.S. Supreme Court has decided that jury sentencing in a capital case is not constitutionally required,⁴⁸ the Court has conceded the “important societal function” of jury verdicts.⁴⁹ Namely, the jury verdict provides a “significant and reliable objec-

38. See *id.* § 470.27(11). The jury must submit to the court a written report with its sentencing determination, the mitigating factors each juror found established, and all mitigating and aggravating factors considered in deliberations. See *id.* § 400.27(11)(b); N.Y. COMP. CODES R. & REGS. tit. 22, § 218.2 (2008).

39. See N.Y. CRIM PROC. LAW § 470.27(11)(d) (McKinney 2004) (stating that if a jury finds unanimously for death, the court shall impose the death penalty); *id.* § 470.27(11)(e) (McKinney 2004) (stating that if a jury finds unanimously for life imprisonment without the possibility of parole, the court shall impose that sentence). But see *id.* § 330 (describing the circumstances in which the court may set aside a death sentence).

40. See *id.* § 400.27(11)(c).

41. See *id.* § 450.70(1).

42. *Id.* § 470.30(3)(a).

43. See, e.g., William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006).

44. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).

45. By finding aggravating factors in the guilt phase.

46. By finding mitigating circumstances in the penalty phase.

47. In New York, the “criminal jury is more than a finder of fact; it is a microcosm of democratic government.” Matthew Tulchin, *An Analysis of the Development of the Jury’s Role in a New York Criminal Trial*, 13 J.L. & POL’Y 425, 490 (2005).

48. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976).

49. *Id.*

tive index of contemporary values”⁵⁰ and reflects the “conscience of the community.”⁵¹ The provisions of New York’s 1995 statute mandating jury sentencing in capital cases⁵² and further conditioning a death sentence on unanimous jury approval⁵³ underscore the New York capital jury’s important role as the ultimate arbiter of death.⁵⁴

D. The Anticipatory Deadlock Provision

To further the goal of reliable jury verdicts in capital cases, the New York statute provides additional due process protections through enhanced sentencing information. New York is one of only eight states⁵⁵ to require that before a capital jury begins sentencing deliberations the trial court must instruct the jury on the consequences of deadlock.⁵⁶

According to the Supreme Court, the Eighth Amendment does not require a jury instruction on the consequences of deadlock.⁵⁷

50. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). “Indeed, 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.

51. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *see also Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, J., dissenting) (“[I]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”).

52. *See* N.Y. CONST. art. I, § 2 (“A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.”); *see also* N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1974).

53. *See* N.Y. CRIM. PROC. LAW § 400.27(11)(a).

54. *Jones v. United States*, 527 U.S. 373, 382 (1999) (“[I]n a capital sentencing proceeding, the Government has ‘a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.’” (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988))).

55. Delaware, Idaho, Louisiana, Missouri, New York, Oregon, Pennsylvania, and Wyoming. *See People v. LaValle*, 817 N.E.2d 341, 367, 377 nn.4-5 (N.Y. 2004). In Delaware and Louisiana this requirement resulted from a judicial ruling. *See Whalen v. State*, 492 A.2d 552 (Del. 1985); *State v. Williams*, 392 So. 2d 619 (La. 1980). In Idaho, Missouri, Oregon, Pennsylvania, and Wyoming, this instruction was a legislative requirement. *See* IDAHO CODE ANN. § 19-2515(7) (2004); MO. ANN. STAT. § 565.030(4)(4) (West 2004); OR. REV. STAT. § 163.150(2)(a) (2004); 42 PA. CONS. STAT. ANN. § 9711 (West 2004); WYO. STAT. ANN. § 6-2-102 (2004).

56. *See* Randi Schwartz, *New York State Constitutional Decisions: 2004 Compilation: Due Process: Court of Appeals of New York: People v. LaValle*, 21 *TOURO L. REV.* 30 (2005) (discussing the rationale behind states’ requirement of anticipatory deadlock instruction).

57. *See Jones v. United States*, 527 U.S. 373, 381-82 (1999). “We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that ‘[t]he very object of the jury system is to secure

The New York Court of Appeals, however, has rejected this federal construction as a matter of state constitutional law,⁵⁸ finding it “unfaithful” to the “heightened standard of reliability” required by the due process clause of the New York Constitution.⁵⁹ As the Supreme Court has itself observed, the finality of a death sentence renders such punishment “qualitatively different from a sentence of imprisonment, however long.”⁶⁰ New York’s practice of providing capital jurors with all information relevant to the sentencing process⁶¹ is based on the “qualitative difference” of a death sentence and the consequent need for reliable sentencing decisions.⁶²

New York’s anticipatory deadlock instruction,⁶³ however, is unique.⁶⁴ New York trial courts must inform capital jurors that if the jury is unable to reach a unanimous sentencing decision, the court will impose a sentence of life imprisonment, with the possibility of parole after the defendant has served a minimum of twenty to twenty-five years.⁶⁵ This outcome, where jury deadlock results in a sentence more lenient than either sentence available for jury consideration, does not exist in any other states’ anticipatory deadlock scheme.⁶⁶ In fact, in 2004 the New York Court of Appeals identified this unique deadlock instruction as a flaw in New York’s death penalty statute.⁶⁷

unanimity by a comparison of views, and by arguments among the jurors themselves.” *Id.* at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)); *see also* Laurie B. Berberich, *Jury Instructions Regarding Deadlock in Capital Sentencing*, 29 HOFSTRA L. REV. 1301, 1311-16 (2001).

58. *See* *People v. LaValle*, 817 N.E.2d 341, 364-65 (N.Y. 2004). “[O]ur Due Process Clause requires that jurors be informed of the consequences of their actions.” *People v. Taylor*, 878 N.E.2d 969, 977 (N.Y. 2007).

59. *LaValle*, 817 N.E.2d at 365.

60. *See* *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

61. *See* *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (finding “it desirable for the jury to have as much information before it as possible when it makes the sentencing decision”); *LaValle*, 817 N.E.2d at 365.

62. *Woodson*, 428 U.S. at 305; *Taylor*, 878 N.E.2d at 983 (citing *LaValle*, 817 N.E.2d at 366) (recognizing the “irrevokable [sic] nature of capital punishment as well as ‘the concomitant need for greater certainty in the outcome of capital jury sentences’”).

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

64. *See* *LaValle*, 817 N.E.2d at 357.

65. § 400.27(10).

66. *See* *LaValle*, 817 N.E.2d at 357; Berberich, *supra* note 57, at 1327-28; *see also* § 400.27(10).

67. *LaValle*, 817 N.E.2d at 357.

E. New York's Death Penalty Found Unconstitutional

1. People v. LaValle

In 1997, Stephen LaValle raped and stabbed a Suffolk County school teacher to death with a screwdriver.⁶⁸ A jury found LaValle guilty of first-degree murder and sentenced him to death.⁶⁹ On review, in a four-to-three decision,⁷⁰ the New York Court of Appeals upheld LaValle's conviction but vacated his death sentence.⁷¹ The court held that section 400.27(10)'s deadlock instruction violates the New York Constitution's due process clause.⁷² By informing jurors that failure to reach unanimous agreement will result in the defendant's release from prison in as little as twenty years, the anticipatory deadlock instruction forces jurors to factor the defendant's future dangerousness into their sentencing decision.⁷³ Future dangerousness is not a statutory aggravating factor for a capital jury to consider under New York penal law.⁷⁴ Section 400.27(10) therefore creates "an unconstitutionally palpable risk" that a member of a potentially-deadlocked jury, who would otherwise vote for life without parole, will vote for death, not because of an individualized determination that the prisoner deserves death,⁷⁵ but to prevent the defendant from receiving a parole-eligible deadlock sentence.⁷⁶

The *LaValle* court declared that in order for New York's capital punishment statute to be functional, the State Legislature must en-

68. See Stashenko, *supra* note 4.

69. See Paul Shechtman, *A Term with Constitutional Proportions*, N.Y.L.J., Sept. 7, 2004, at S5.

70. The four majority votes were those of Chief Judge Judith S. Kaye, and Judges George Bundy Smith, Carmen Beauchamp Ciparick, and Albert Rosenblatt. Judges Robert S. Smith, Victoria A. Graffeo, and Susan Phillips Read dissented, charging the majority with creating new rights for the defendant as a means of obstructing the death penalty. *LaValle*, 817 N.E.2d at 369.

71. LaValle is currently serving a sentence of life without parole. Stashenko, *supra* note 4.

72. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

73. *LaValle*, 817 N.E.2d at 361; see, e.g., John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999).

74. N.Y. PENAL LAW § 125.27(1)(a) (McKinney 2003) (listing statutory aggravating factors); see also *LaValle*, 817 N.E.2d 341 at 357-58.

75. See *LaValle*, 817 N.E.2d 341 at 359 ("Under New York's deadlock instruction the choice [of a juror in deciding between death or life without the possibility of parole] is not, as it should be, the result of a reasoned understanding that it was the appropriate one.").

76. *Id.* at 358.

act amending legislation.⁷⁷ Until such amendment, all first-degree murder prosecutions must proceed as non-capital cases.⁷⁸ Capital punishment is effectively on hold in New York pending legislative action to amend or repeal the statute.

2. People v. Taylor

Despite the New York Court of Appeals's 2004 decision invalidating New York's death penalty, in 2007, one man, John Taylor, remained on New York's death row.⁷⁹ On May 24, 2000, Taylor and accomplice Craig Godineaux robbed a Wendy's restaurant in Queens, New York.⁸⁰ They shot five people to death and injured two more.⁸¹ Taylor was held personally responsible for killing two of the victims and liable for the deaths of the three others whom he ordered his accomplice to kill.⁸² The jury convicted Taylor of twenty counts of murder, including six counts of first degree murder.⁸³

Before jury selection, Taylor moved to strike his death penalty notice, arguing that New York's death penalty statute⁸⁴ was unconstitutional because the deadlock instruction deprived him of due process.⁸⁵ The trial judge, Steven W. Fisher, denied the motion, citing Taylor's failure to overcome beyond a reasonable doubt the presumptive validity of a legislative statute.⁸⁶ Fisher also refused to instruct the jury that upon deadlock he would sentence Taylor to 175 years with no possibility of release from prison.⁸⁷ Judge Fisher did, however, modify the deadlock instruction by adding to the jury charge:

[T]he six [counts] of first degree murder, and the two counts of first degree attempted murder on which you have convicted the

77. *Id.* at 367.

78. *Id.*

79. Feuer, *supra* note 3.

80. *See* People v. Taylor, 747 N.Y.S.2d 318, 320 (N.Y. Sup. Ct. 2002).

81. *Id.*; *see also* Michelle O'Donnell, *Death Row Case May Decide More than an Inmate's Fate*, N.Y. TIMES, Feb. 26, 2006, at A1.

82. *Taylor*, 747 N.Y.S.2d at 320. On January 22, 2001, Godineaux pleaded guilty to each count of the indictment in which he was named, and on February 21, 2001, he was sentenced to life imprisonment without parole. *Id.* at 320 n.2.

83. *See* People v. Taylor, 878 N.E.2d 969, 973-74 (N.Y. 2007).

84. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2004).

85. People v. Taylor, No. 50367, slip. op., 2002 WL 31064487, at *1 (N.Y. Sup. Ct. Sept. 4, 2002); *see also* Tom Perrotta, *Defense Asks Court to Separate Issues in Taylor Appeal*, N.Y.L.J., Feb. 3, 2006, at col. 3.

86. *Taylor*, 2002 WL 31064487, at *1.

87. *See Taylor*, 878 N.E.2d at 974.

defendant, are *precisely the type of crimes* that *almost always* induce a judge to give the *maximum sentence permissible*.

. . . [T]he maximum sentence I could give and *would almost certainly impose* in this case, would be a sentence of 175 years to life⁸⁸

The jury sentenced Taylor to death on three counts of first degree murder and Taylor appealed his conviction and sentence.⁸⁹ *Taylor* was the sixth and final death sentence under the 1995 statute heard by the Court of Appeals.⁹⁰

Taylor submitted his appeal on the premise that any death sentence based on the statute found unconstitutional in *LaValle* was similarly defective.⁹¹ Prosecutors from the Queens County District Attorney's Office responded that the Court of Appeals could distinguish *Taylor* from *LaValle* because Judge Fisher's jury charge had cured the anticipatory deadlock instruction defect identified in *LaValle*.⁹² Upholding Taylor's death sentence, prosecutors argued, would not overrule *LaValle* but rather "clarify" that the death penalty statute is not unconstitutional as applied in all cases.⁹³ The prosecution asked the Court to admit that it had gone "too far" in finding the statute's deadlock provision unconstitutional and inseverable from the rest of the statute.⁹⁴

On review, the Court of Appeals refused to "condone a trial court's remaking of an unconstitutional statute."⁹⁵ Although Taylor's death sentence pre-dated the *LaValle* decision, the statute under which Taylor was sentenced had been determined facially unconstitutional and non-severable. Thus, the deadlock provision was immune to judicial reformulation.⁹⁶ The Court further observed that the deadlock instruction given in *Taylor* created its own problems of "non-neutrality" because the trial court injected its opinion as to the weight of the mitigating circumstances into the

88. *Id.* at 975 (emphasis added).

89. *See id.* at 974.

90. *See* Joel Stashenko, *Court Mulls Repercussions of Altering Death Ruling: Kaye Calls D.A.'S Claims of Error 'Fighting Words'*, N.Y.L.J., Sept. 11, 2007, at S1.

91. *See* Perrotta, *supra* note 85; *see also* O'Donnell, *supra* note 81.

92. *See* Robert Gavin, *Case Stirs Death Debate: Proceeding Headed for State's Highest Court Offers Possibility of Execution*, TIMES UNION (Albany), Sept. 9, 2007, at A1; Perrotta, *supra* note 85; *see also* O'Donnell, *supra* note 81.

93. *See* Nicholas Confessore, *New York's High Court Hears Death Penalty Arguments*, N.Y. TIMES, Sept. 11, 2007, at B3.

94. *Id.*

95. *People v. Taylor*, 878 N.E.2d 969, 981 (N.Y. 2007).

96. *See id.* at 978.

sentencing instruction.⁹⁷ Judge Fisher's instruction that the crimes committed by Taylor were "precisely the type . . . [that] induce a judge to give the maximum sentence permissible" signaled to the jury that, in the judge's personal opinion, the defendant merited no leniency.⁹⁸ By telling the jury that upon deadlock, he would probably impose a sentence of more than 175 years, Judge Fisher could be interpreted as telling the jury "they too should give the maximum sentence permissible—death."⁹⁹ Members of a capital jury who likely have never served on a trial, let alone a capital case, and tend to lack legal training, will naturally be influenced by and defer to what they perceive to be the judge's expertise. The Court of Appeals noted that Judge Fisher's instruction failed to present the jury with the balanced and neutral sentencing information that is particularly necessary when a defendant's life is at stake.¹⁰⁰

For these reasons, on October 23, 2007, the Court of Appeals upheld *People v. LaValle*,¹⁰¹ reiterating *LaValle*'s central holding: the current anticipatory deadlock provision of CPL section 400.27(10) is invalid under the New York State Constitution's Due Process Clause,¹⁰² and this unconstitutional provision cannot be severed from the statute.¹⁰³ The Court vacated Taylor's death sentence and remanded the case to the trial court for resentencing.

97. *See id.* at 983 n.22.

98. *See id.*

99. *See id.*

100. *See id.*

101. *See generally id. Taylor*, like *LaValle*, was a four-to-three decision. Judge Carmen Beauchamp Ciparick, who authored the *Taylor* majority opinion and Chief Judge Judith Kaye, reaffirmed their support for the *LaValle* decision. They were joined by Judge Theodore T. Jones, who was nominated by Governor Elliott Spitzer and replaced Judge George Bundy Smith in February 2007. Judge Robert Smith, a dissenter in *LaValle*, concurred with the *Taylor* decision on the principle of *stare decisis*. The two remaining dissenters from *LaValle*, Judges Susan Read and Victoria Graffeo, dissented in *Taylor*, along with Eugene F. Pigott Jr., who was nominated by former-Governor George Pataki and joined the Court in September 2006, replacing Albert Rosenblatt. Both George Bundy Smith and Rosenblatt were members of the majority in *LaValle* and majority voters in each of the Court of Appeals' capital cases vacating the death sentence. *See* New York Court of Appeals, *Judges of the Court*, available at <http://www.courts.state.ny.us/ctapps/judges.htm>.

102. *See Taylor*, 878 N.E.2d at 976-78.

103. *See id.* at 977; *see also id.* at 982 ("In *LaValle* . . . the invalid portion of the statute was inextricably interwoven with the sentencing procedure and necessary to effectuate the Legislature's intent. . . . [A]ny attempt to sever the offending portion of the statute would result in a 'misshapen fragment of the original' drafted by a court's impermissible use of a legislative pen.").

Taylor has been resentenced to life imprisonment without parole.¹⁰⁴

F. Legislative Action Post-*LaValle*

Critics of the *LaValle* and *Taylor* decisions characterized the Court of Appeals as intruding into the legislative realm of policy-making.¹⁰⁵ Specifically, they accused the Court of using these cases to “advance a liberal agenda”¹⁰⁶ and injecting into its decisions “personal anti-death penalty ideologies.”¹⁰⁷ Others said the Court had properly confined itself to the task of legal interpretation, leaving law-making to the legislature.¹⁰⁸ In *Taylor*, the Court reiterated *LaValle*’s message: the legislature can resurrect the death penalty in New York through statutory amendment.¹⁰⁹ Despite “reservations” as to the Court’s willingness to approve any amended version of the death penalty,¹¹⁰ the senate resolved to “take corrective action” in hopes of restoring the death penalty in New York.¹¹¹

Accordingly, in 2004¹¹² and again in 2005,¹¹³ the State Senate, conceding the defeat of the death penalty statute in its current

104. See Metro Briefing, *Queens: Man Resentenced in Wendy’s Killings*, N.Y. TIMES, Nov. 30, 2007, at B4.

105. See John Caher, *Senate Republicans Blast Court as Activist*, N.Y.L.J., Mar. 2, 2005, at col. 4. (“I personally believe the Court of Appeals looked desperately to find something’ on which to reverse the death sentence, said Senator Dale M. Volker, a Republican from the Buffalo area and longtime champion of capital punishment.”).

106. *Id.*

107. Senator Dale Volker, *New York State Court of Appeals Blows It Again*, Oct. 23, 2007, http://senatorvolker.com/59/news/07-10-23/new_york_state_court_of_appeals_blows_it_again.aspx.

108. Joel Stashenko, *Citing Flawed Law, Split Panel Vacates Final Death Sentence*, N.Y.L.J., Oct. 24, 2007, at col. 4.

109. *People v. Taylor*, 878 N.E.2d 969, 984-85 (N.Y. 2007) (noting that passing an amended statute “is easy to do if the Legislature wants to do it”).

110. Caher, *supra* note 105

111. *Id.*

112. Senate Bill 7720, passed in Senate on August 11, 2004, expired without an assembly vote. See N.Y. CRIM. PROC. LAW. § 400.27 (McKinney 2007) (Practice Commentaries).

113. On February 25, 2005, Senate Bill 7720 was reintroduced as Senate Bill 2727 and passed in the Senate on March 9, 2005 in a vote of 37-22. See JOSEPH LENTOL ET AL., *supra* note 19, at 56 n.67; see also Russell G. Murphy, *People v. Cahill: Domestic Violence and the Death Penalty Debate in New York*, 68 ALB. L. REV. 1029, 1049 n.79 (2005) [hereinafter Murphy, *Cahill*]. Senate Bill 2727’s anticipatory deadlock instruction gives jurors three sentencing options for individuals guilty of first degree murder: death, life without parole, or life imprisonment with parole eligibility after a minimum of 20 years, with a deadlock sentence of life without parole. See JOSEPH LENTOL ET AL., *supra* note 19, at 56.

form,¹¹⁴ introduced legislation to amend the statute's sentencing provisions. Although various amendments to section 400.27(10) have passed in the Senate, none have gained approval in the Assembly.¹¹⁵ This failure to reinstate the death penalty indicates a change in political support among New Yorkers since 1995.¹¹⁶ The judicially-imposed moratorium on capital punishment in New York allowed the state legislature and general populace to consider whether capital punishment remains a viable and desirable punishment.¹¹⁷ Recent developments suggest that the majority of New Yorkers are loath to reinstate capital punishment.

From December 15, 2004 to February 11, 2005, the New York Assembly Standing Committees on Codes, Judiciary and Correction held five public hearings in New York City and Albany.¹¹⁸ The hearings discussed whether the state legislature should amend the death penalty statute to restore capital punishment in New York.¹¹⁹ Eighty-seven percent of the witnesses who testified at the

114. Even Senator Dale Volker, who helped draft the 1995 law and supports efforts to restore the death penalty in New York, admitted defeat when he described the Taylor decision as the "last nail in the coffin" for the death penalty statute. *See Stashenko, supra* note 108.

115. *See, e.g.*, notes 112-13 & 122 and accompanying text.

116. In New York's 1994 gubernatorial campaign, Republican candidate George Pataki, running against death penalty opponent Mario Cuomo, promised that if elected, his first priority would be the passage of a death penalty bill. *See* Ian Fisher, *The 1994 Campaign: Issues; Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at A.45. However, by February 15, 2006, a public opinion poll by the New York Times indicated that public support for Governor Pataki had "dropped to its lowest level since his first year as governor a decade ago." Michael Slackman & Marjorie Connelly, *Pataki's Ratings Decline Sharply in Poll of State*, N.Y. TIMES, Feb. 15, 2005, at A1. This poll also suggested that "attitudes [had] shift[ed] against death penalty." *Id.* According to the poll,

56 percent of registered voters surveyed said they preferred either life in prison without parole or life in prison with the possibility of parole over the death penalty for people convicted of murder. Only 34 percent said they supported the death penalty, a significant drop from the 47 percent who supported it in 1994, when Mr. Pataki made instituting the death penalty a critical component of his successful drive to unseat Gov. Mario M. Cuomo.

Id.

117. Press Release, N.Y. State Assembly, Assembly Releases Death Penalty Report, (Apr. 4, 2005), *available at* <http://www.assembly.state.ny.us/Press/20050404>.

118. *See generally* JOSEPH LENTOL ET AL., *supra* note 19.

119. Assembly Speaker Sheldon Silver explained that after the *LaValle* court struck down the death penalty, "we in the Legislature faced an important choice: act quickly or act deliberately. We chose the latter option and conducted a series of extraordinary public hearings to solicit the widest possible range of views on the death penalty in New York before deciding what action, if any, to take with respect to the statute." Press Release, N.Y. State Assembly, *supra* note 117; *see also* Murphy, *Cahill, supra* note 113, at 1049.

hearings opposed restoring the death penalty in New York, some favoring outright abolition.¹²⁰ Accordingly, following the hearings, the assembly rejected senate-sponsored legislation¹²¹ to amend CPL section 400.27.¹²² Nothing has changed in New York in the past few years to indicate that the legislature is any more likely now to reinstate the death penalty than it was in 2004.¹²³

II. OPTIONS FOR THE NEW YORK STATE LEGISLATURE

The *Taylor* decision means that the state of affairs established by the *LaValle* ruling continues in New York: because a deadlock instruction is statutorily mandated¹²⁴ and the current deadlock instruction is constitutionally prohibited,¹²⁵ capital punishment may not be implemented in its current form.¹²⁶ Rather than allow a statute to remain on the books, unconstitutional and inoperable, the New York State Legislature could decide to take one of two actions: amend the statute to address the constitutional infirmities that the Court of Appeals identified in *LaValle* and *Taylor*, or affirmatively abolish the death penalty. This section discusses considerations relevant to each option.

120. See Murphy, *Cahill*, *supra* note 113, at 1049; see generally JOSEPH LENTOL ET AL., *supra* note 19.

121. See *supra* note 113 (discussing S.B. 2727, 2007 Leg. 230 Legis. Sess. (N.Y. 2007)).

122. The assembly rejected Senate Bill 2727 in an eleven to seven vote. See DEATH PENALTY INFO. CTR, NEW YORK TAKES HISTORIC STEP TOWARDS ENDING THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/article.php?did=2214> (last visited Nov. 29, 2007); Patrick D. Healy, *Death Penalty is Blocked by Democrats*, N.Y. TIMES, Apr. 13, 2005, at B1. Again, on June 14, 2006 the Codes Committee voted thirteen to five against reinstating the death penalty. See DEATH PENALTY INFO. CTR, *New York Assembly Committee Blocks Death Penalty by Wider Margin*, <http://www.deathpenaltyinfo.org/article.php?did=2214> (last visited Nov. 29, 2007); see also Murphy, *Cahill*, *supra* note 113, at 1050 n.80.

123. As Judge Smith observed in *People v. Taylor*, “nothing else of significance has changed. No one suggests that any development in the last three years, either in the law or the law’s effect on the community, has changed the context in which *LaValle* was decided.” *People v. Taylor*, 878 N.E.2d 969, 984 (N.Y. 2007).

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

125. See *People v. LaValle*, 817 N.E.2d 341, 359 (N.Y. 2004) (“We hold today that the deadlock instruction required by CPL 400.27(10) is unconstitutional under the State constitution because of the unacceptable risk that it may result in a coercive, and thus arbitrary and unreliable, sentence.”). The *Taylor* court held that New York’s Due Process Clause requires that “jurors be informed of the consequences of their actions.” *Taylor*, 878 N.E.2d at 977 (citing *LaValle*, 817 N.E.2d at 367).

126. See *Taylor*, 878 N.E.2d at 977-78.

A. Statutory Amendment

Although the New York State Assembly has thus far not been receptive towards statutory amendment,¹²⁷ should its stance change, it is important to identify the reconstructed sentencing provision most likely to pass scrutiny with the Court of Appeals. Because there is not just one form that an amendment could take, the following sections review the elements required for a valid jury instruction in a capital case and then discuss potential reformulations of CPL section 400.27 that could satisfy these requirements.¹²⁸

1. *Elements of a Valid Jury Deadlock Instruction*

Any amendment to New York's capital punishment statute must incorporate several features in order to pass judicial scrutiny, both at the state and federal level.

First, in New York, an anticipatory deadlock instruction must be part of any constitutional death penalty scheme.¹²⁹ The Court of Appeals in *Taylor* neatly summarized the characteristics necessary for an amended deadlock provision: "a *non-coercive* sentencing statute that properly *informs* the jury of the *consequences* of their actions."¹³⁰ Eighth Amendment jurisprudence, as applied to an anticipatory deadlock provision, requires that jurors receive accurate and unambiguous information.¹³¹ Otherwise, jurors might speculate about the consequences of deadlock, which diminishes the reliability of the jury's verdict.¹³²

127. See *supra* Part I.F.

128. The idea for this section is based on a paper by Jonathan D. Zimet presented to the New York State Assembly Codes Committee as part of the 2004-2005 public hearings discussed above in Part I.D. See generally Jonathan D. Zimet, *Finding a Valid Deadlock Instruction in New York after LaValle*, 41 CRIM. L. BULL. 2 (2005). In discussing and evaluating various approaches that the Legislature might take in amending the statute, this section assumes that under any construction of the deadlock instruction, the trial court will deliver those instructions in a neutral and accurate manner.

129. When the *LaValle* court pronounced Section 400.27(10) of the New York Criminal Procedure Law unconstitutional, it also stated "the absence of any instruction is no better than the current instruction." *LaValle*, 817 N.E.2d at 365. "Like the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation, as the Legislature apparently feared when it decided to prescribe the instruction." *Id.*

130. *Taylor*, 878 N.E.2d at 979 (emphasis added).

131. See J. Mark Lane, *Is There Life Without Parole?*, 26 LOY. L.A. L. REV. 327, 358 (1993). The U.S. Supreme Court has held that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

132. See *LaValle*, 817 N.E.2d at 365-67.

Moreover, the deadlock instruction must not, in form or substance, coerce a jury decision in any particular way.¹³³ Most jurors lack the experience and legal knowledge necessary for understanding the substance and procedure of sentencing without guidance. Jurors naturally look to the judge for such guidance. The sentencing instruction must therefore offer a balanced and neutral perspective¹³⁴ to avoid influencing the jury decision.¹³⁵

A revised deadlock instruction must also avoid the coercive influence seen in the current version of CPL section 400.27 where the deadlock sentence is one which the sentencing jury cannot choose and “might [not] even . . . consider[] palatable.”¹³⁶ As discussed above,¹³⁷ this provision could engender fear amongst jurors that deadlock will result in a parole-eligible sentence.¹³⁸ A revised deadlock instruction can thus avoid coercion by including the deadlock sentence as one of the jury’s sentencing options.¹³⁹

2. Four Possible Reformulations of New York’s Deadlock Provision

This section proposes four ways of amending New York’s deadlock instruction. The advantages and drawbacks of each proposal are analyzed in light of the judicial requirements and legislative considerations discussed above.¹⁴⁰

a. Option 1

One possible reformulation (“Option 1”) of New York’s deadlock provision gives the jury two sentencing options, death or life without parole, and informs the jury that upon deadlock the trial court will sentence the defendant to life without parole.¹⁴¹ The

133. *See id.* at 362 (“A coerced verdict ‘ought not to be allowed to stand in any case, and least of all, in one involving a human life.’” (quoting *People v. Sheldon*, 50 N.E. 840, 846 (1898))).

134. The faulty charge given by the trial judge in *Taylor* illustrates the importance of accuracy and neutrality in capital sentencing instructions. *See supra* Part I.E.2.

135. *See LaValle*, 817 N.E.2d at 362 (citing the “heightened need for reliability in death penalty cases,” and emphasizing that “the goal of jury unanimity may not undermine sentencing reliability, particularly where the sentence is death”).

136. *Id.* at 364 n.19.

137. *See supra* Part I.E.1.

138. *See LaValle*, 817 N.E.2d at 357-58, 360.

139. Whether the deadlock sentence should or should not provide for parole-eligibility is debatable, as discussed in Part II.A.1.

140. *See supra* Part II.A.1.

141. This reconstruction of CPL 400.27(10) has been proposed by the New York State Senate in Bills to reinstate the death penalty for convicted murderers of police officers, corrections officers, and employees of the Department of Correctional Ser-

Court of Appeals approved this option in both *LaValle* and *Taylor* as an acceptable method of legislative amendment.¹⁴² By allowing the jury to impose the deadlock sentence during sentencing and providing that deadlock will not lead to the defendant's release, this option removes the potential for coercion.¹⁴³ If the jury is divided in deliberations, no juror will feel pressured to alter his vote simply to avoid deadlock. For a juror who favors life without parole, the deadlock sentence is the sentence he prefers. Similarly, a juror who favors death will not change his vote simply to reach unanimity. Whether he surrenders his vote and sides with jurors favoring life without parole or waits for deadlock the sentence will be the same. Rather than alter his position, this option encourages a death-prone member of a potentially deadlocked jury to engage his colleagues in dialogue in an attempt to persuade them of his views.¹⁴⁴ This open debate among jurors in sentencing deliberations is the very goal of jury-sentencing:¹⁴⁵ that the ultimate outcome of jury deliberations should reflect the views of the community.¹⁴⁶

One shortcoming of Option 1 is that the deadlock sentence fails to accord the defendant as much leniency as jurors or the legislature might desire. New York's current deadlock provision reveals a legislative intent that if the jury fails to agree on either of the harsher sentences of death or life without parole, the defendant should receive a third, more lenient sentence. On the other hand, the legislature only intended for jurors to have two sentencing op-

vices. See, e.g., S.B. 6414, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); Assem. B. 7799, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); S.B. 319, 2007 Leg., 230th Legis. Sess. (N.Y. 2007).

142. See *People v. Taylor*, 878 N.E.2d 969, 979 (N.Y. 2007) (stating that legislative correction, "may be as simple as enacting a sentencing statute that provides for life without parole if the jury cannot unanimously agree on death"); see also *id.* at 984 ("*LaValle* reads the Constitution to require an anticipatory deadlock instruction telling the jurors, in substance, that the consequence of a hung jury will be life without parole."); *People v. Cahill*, 809 N.E.2d 561, 603 (N.Y. 2003) ("The only constitutionally proper sentence for a judge to impose upon the failure of the jury to decide between death and life imprisonment without parole is the lesser sentence considered by the jury—life imprisonment without parole. Such a result ensures that the jury's verdict expresses the true conscience of the community and is not the result of uncertainty or coercion.") (Smith, J., concurring).

143. *LaValle*, 817 N.E.2d at 364 n.19.

144. See Reply Brief for Defendant-Appellant at 150, *LaValle*, 817 N.E.2d 341 (N.Y. 2004) (No. 71), 2004 WL 1352004, at *150.

145. *Jones v. United States*, 527 U.S. 373, 382 (1999).

146. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

tions, neither of which included parole-eligibility.¹⁴⁷ Through decisions such as *LaValle* and *Taylor*, the Court of Appeals has indicated that where the jury is only allowed two options, the deadlock sentence should be the same as the alternative to death.

b. Option 2

A second way that the legislature could amend the anticipatory deadlock provision (“Option 2”) is to give the jury three sentencing options, death, life without parole, and life with parole-eligibility, and inform the jury that upon deadlock the trial court will impose a parole-eligible life sentence.

Option 2 improves upon CPL section 400.27(10) in two ways. First, the deadlock sentence is one which the jurors themselves can choose. Second, this formulation retains a parole-eligible deadlock sentence, which conforms with the intent reflected in CPL section 400.27(10) that if the jury fails to agree unanimously on a sentence, the defendant should receive the most lenient sentence.

Nevertheless, Option 2 remains coercive. If the jury vote is split between death and life without parole, Option 2 might cause jurors in favor of the lesser sentence to change their vote to the harsher sentence to avoid a parole-eligible deadlock sentence.

c. Option 3

A third way to reconstruct New York’s capital sentencing instruction (“Option 3”) is to allow the jury the three sentencing alternatives of death, life without parole, and life with parole eligibility, with the provision that upon deadlock the court will sentence the defendant to life without parole.¹⁴⁸

Option 3 avoids the problems seen in the current statute in two ways. It allows the jury to choose a parole-eligible sentence, and also does not coerce a verdict. Jurors can decide whether the de-

147. See *Cahill*, 809 N.E.2d at 600 n.8. “[T]he legislative history clearly shows that the legislators intended that the jury consider only the options of death and life without parole, while disregarding the sentence of life with parole, which was solely within the realm of the trial judge’s power.” *Id.*

148. Option 3 reflects the reconstruction of Criminal Procedure Law Section 400.27(10) proposed by the New York State Legislature in various bills to amend the statute. See, e.g., Assem. B. 8157, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); S.B. 4632, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); Assem. B. 6605, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); Assem. B. 6007, 2007 Leg., 230th Legis. Sess. (N.Y. 2007); Assem. B. 2207, 2007 Leg., 229th Legis. Sess. (N.Y. 2007); Assem. B. 2209, 2007 Leg., 229th Legis. Sess. (N.Y. 2007); Assem. B. 2210, 2007 Leg., 229th Legis. Sess. (N.Y. 2007); Assem. B. 2212, 2007 Leg., 229th Legis. Sess. (N.Y. 2007).

defendant merits parole, but need not fear that deadlock will trigger parole-eligibility.

A problem with Option 3, however, arises when the jury is split: eleven jurors favoring a parole-eligible sentence and the remaining juror in favor of either life without parole or death. In this situation, one holdout juror can effectively impose a sentence that the majority of jurors found too harsh. If the government fails to convince all twelve jurors that the defendant merits life without parole, the legislature might see no reason for imposing this sentence upon deadlock. CPL section 400.27(10) mandates a lower deadlock sentence than even the jury could impose, indicating a legislative intent to construe deadlock in the defendant's favor. Although the U.S. Supreme Court does "not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved,"¹⁴⁹ if the New York State Legislature's original intent of leniency remains, the deadlock sentence in any reconstructed sentencing provision should not be greater than the minimum sentence the jury considers.

Furthermore, the eleven-to-one dynamic discussed above may pose due process problems. If the deadlock sentence is the greater of the two sentences between which jurors are split, the ultimate sentence will not reflect an individualized determination of the appropriate punishment. The Supreme Court says that as long as a jury finds facts¹⁵⁰ warranting a certain range of sentences, the judge can impose a sentence within that approved range.¹⁵¹ Under Option 3, however, the deadlock sentence is not based on the judge's personal determination, but on an automatic statutory provision. Therefore, in certain circumstances Option 3 mandates a sentence of life without parole even though the majority of jurors found sufficient mitigating evidence to warrant a parole-eligible sentence. The Supreme Court might not find fault with Option 3, since the automatic sentence here is life without parole, not death.¹⁵² Life

149. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

150. For example, aggravating circumstances.

151. *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (allows advisory jury recommendation with sentence determined by court); *Spaziano v. Florida* 468 U.S. 447, 466 (1984) (jury need not impose sentence; allows jury override).

152. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (finding mandatory death penalty statute unconstitutional because sentencer was not allowed to consider the defendant's character and record); *see Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circum-

without parole, however, is a permanent deprivation of liberty, and the New York Court of Appeals avowedly construes the protections of the state's due process clause more broadly than those of its federal counterpart.¹⁵³ The Court of Appeals might therefore decide that the Option 3 deadlock scheme violates the state's due process requirement of an individualized sentencing determination.

d. Option 4

New York's anticipatory deadlock provision could be reformulated in a fourth way ("Option 4") in an effort to more closely represent the will of the jury and with it, the will of society.¹⁵⁴ Option 4 could amend CPL section 400.27(10) to create three sentencing choices, death, life without parole, and parole eligibility, and instruct the jury that upon deadlock the trial court will either impose a sentence of life without parole or life with parole eligibility.¹⁵⁵ This deadlock sentence would depend on the results the jury reports to the court in a special verdict form.¹⁵⁶

Whether the deadlock sentence is life without parole or life with parole eligibility would depend on which sentence receives more votes. Because New York's capital punishment scheme prohibits a death sentence unsupported by a unanimous jury vote, any vote for death would be treated under Option 4's deadlock provision as a vote for life without parole. Under this scheme, the deadlock sentence is life without parole any time that the combined votes for death and life without parole outweigh those for parole eligibility. In the rare case that votes are evenly split between death and parole eligibility or the total votes for death and life without parole equal the number of votes for parole eligibility, the judge will impose a parole-eligible deadlock sentence. The rationale of Option 4 is to construe deadlock in favor of the defendant. CPL section

stances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

153. See *People v. LaValle*, 817 N.E.2d 341, 365 (N.Y. 2004).

154. See *supra* notes 50-51 and accompanying text.

155. See generally Zimet, *supra* note 128.

156. The jury will submit to the court a special verdict form detailing each juror's final vote and the factors she considered in reaching this determination. Special verdict forms are used in capital trials in Alabama, Georgia, Oregon, and Utah. *Id.* "In Utah, if the jury deadlocks between life without parole and parole-eligible life, the court is required to sentence the defendant to parole-eligible life, unless ten or more jurors voted for life without parole." *Id.* at n.122 (citing UTAH CODE ANN. § 76-3-207(5)(c) (West 2008)).

400.27(10) shows that the New York State Legislature intended the deadlock sentence to benefit the defendant. It is only fair that where jurors cannot reach unanimous agreement, the defendant should receive the least severe of all sentencing options.

The advantage of the method provided by Option 4 is that jurors have a non-coerced, individual vote and are encouraged to vote according to their own judgment because they know that their vote will count in the end. No juror will surrender her personal assessment of the appropriate sentence because the only way to ensure that the sentence she favors is applied, whether in sentencing or upon deadlock, is to vote for it. The ultimate sentence imposed will be no greater than that considered by the jury, and this sentencing structure ensures that the sentence properly reflects the jury's intent.

Option 4, however, invites juror speculation. In the pre-sentencing instructions, the trial court will not be able to definitively tell the jury which sentence the defendant will receive if the jury deadlocks. This uncertainty among jurors when deliberating might render the ultimate verdict unreliable.¹⁵⁷

Furthermore, the very absence of a "coercive" influence in Option 4 increases the probability of deadlock. Under Option 4, jurors entering the sentencing phase of a capital trial know that if they cannot agree the court will simply impose the sentence for which the majority of jurors vote. Allowing jurors to impose a verdict simply by failing to reach unanimity "dilute[s] the voting power of the minority."¹⁵⁸ Jurors in the majority, aware that unanimity is not necessary for their vote to prevail, will feel little need to engage in full sentencing deliberations. A deadlock sentence that effectively allows the majority to dictate the deadlock sentence "stifles debate and renders some juror's votes meaningless."¹⁵⁹ The sentencing scheme of Option 4 may discourage a capital jury from considering and fully discussing all sentencing opinions. A jury's potential failure to "engag[e] in thorough consideration of

157. *See id.*

158. Tulchin, *supra* note 47, at 491. While Tulchin advocates against allowing the use of majority verdicts in New York criminal trials, his discussion of non-unanimity is relevant to the above formulation of a deadlock sentence because by informing the jury that if they fail to unanimously agree, the court will impose the verdict rendered by the majority, it effectively permits the jury to circumvent the unanimity requirement as laid out in Criminal Procedure Law section 400.27(11).

159. *Id.* at 491-92 ("[S]tudies have . . . shown that jurors in trial requiring [only] a majority verdict do not listen to or respect each other's views as much as in cases requiring unanimous verdicts.").

the evidence and legal issues presented at trial”¹⁶⁰ increases the likelihood that the verdict returned by the jury upon deadlock is neither accurate nor reliable.¹⁶¹

B. Abolishing the Death Penalty in New York

The *LaValle* and *Taylor* decisions increased the already active and emotional debate in New York regarding the death penalty.¹⁶² The emotional appeal of the death penalty was seen in New York’s 1994 gubernatorial election in which George Pataki beat incumbent Governor Mario Cuomo in part through his promise that if elected he would sign a death penalty bill into law.¹⁶³ The tide of popular opinion within New York, however, has turned since 1995.¹⁶⁴ This was particularly evident at the 2004-2005 public hearings where 148 of the 170 people who testified objected to the death penalty.¹⁶⁵ Indeed, rather than simply allow the death penalty statute to remain nonfunctional, the legislature could follow New Jersey’s example by affirmatively abolishing the death penalty.

1. National Trends

New York is not the only state to question the wisdom of capital punishment. The intense controversy over capital punishment, marked by increasing doubts about its application and administration, is seen nationwide. Concerns of innocence, arbitrariness, and racial and socioeconomic biases in capital sentencing have caused state lawmakers to propose modifications to their capital punishment laws, impose moratoriums, or abolish the death penalty.¹⁶⁶

In January 2006, the New Jersey Legislature placed a statewide moratorium on capital punishment and appointed a commission to investigate and evaluate the effectiveness of New Jersey’s death

160. *Id.*

161. See generally AM. L. INST., ABA PRINCIPLES FOR JURIES AND JURY TRIALS (2007), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

162. The *de jure* moratorium on capital punishment imposed by *LaValle* led New Yorkers to question whether the statute is worth resurrecting. See generally JOSEPH LENTOL ET AL., *supra* note 19.

163. Patrick D. Healy, *New York Assembly Democrats Close off Death Penalty for 2005*, N.Y. TIMES, Apr. 13, 2005, at B1.

164. See *supra* text accompanying note 116.

165. JOSEPH LENTOL ET AL., *supra* note 19, at 3.

166. See, e.g., Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 61-62 & n.54, 62 nn.55-56 (2007), available at <http://law.fordham.edu/publications/articles/500flspub8851.pdf>.

penalty statute.¹⁶⁷ The commission reported that twelve of its thirteen members recommended abolishing the death penalty¹⁶⁸ and replacing it with a life sentence without the possibility of parole.¹⁶⁹ New Jersey formally abolished the death penalty on December 17, 2007.¹⁷⁰

Although no other state has gone so far towards abolition as New Jersey, several states have recently reconsidered the merits of capital punishment and imposing the death penalty less often.¹⁷¹ This trend, which death penalty scholar Jeffrey Kirchmeier terms the “moratorium movement,”¹⁷² is reflected in states imposing moratoriums on capital punishment,¹⁷³ creating death penalty study commissions,¹⁷⁴ and advancing abolitionist measures.¹⁷⁵

167. See DEATH PENALTY INFO. CTR., NEW JERSEY LEGISLATIVE COMMISSION RECOMMENDS ABOLITION OF STATE’S DEATH PENALTY, <http://www.deathpenaltyinfo.org/article.php?did=2208> (last visited Sept. 22, 2008).

168. By abolishing the death penalty, New Jersey would be the first state to do so in over thirty years. See Laura Mansnerus, *Panel Seeks End to Death Penalty for New Jersey*, N.Y. TIMES, Jan. 3, 2007, at A1. In 1982, ten years after the U.S. Supreme Court halted executions nationwide, New Jersey reinstated capital punishment. *Id.* No executions took place under New Jersey’s 1982 death penalty statute. Peter G. Verniero, *Appealed to Death*, N.Y. TIMES, Jan. 14, 2007, at 14NJ.

169. See M. WILLIAM HOWARD ET AL., NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 56 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf. In its Report, the New Jersey Death Penalty Study Commission found that “[t]here is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.” *Id.* at 24. In fact, the Commission decided that “[t]he alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.” *Id.* at 56.

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

171. See Robert Tanner, *Death Sentences In 2006 Fall To Lowest Level In 30 Years*, LAWRENCE J.-WORLD (Lawrence, Kan.), Jan. 5, 2007, available at http://www2.ljworld.com/news/2007/jan/05/death_sentences_2006_fall_lowest_level_30_years/ (“The number of death sentences handed out in the United States dropped in 2006 to the lowest level since capital punishment was reinstated 30 years ago.”).

172. See generally Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement In The United States*, 73 U. COLO. L. REV. 1 (2002). This movement is not necessarily abolition-oriented; “many in the modern movement only desire a moratorium on executions in order to attempt to fix the problems.” *Id.* at 21.

173. As seen in New Jersey and Illinois.

174. Colorado, Montana, Nebraska, New Mexico and North Carolina state Legislatures have created death penalty study commissions or advanced abolition measures. *A Divergent Path: A Death Penalty Shutdown, but Not in Texas*, DALLAS MORNING NEWS, Apr. 15, 2007, at 2P. Tennessee plans to create a commission to study the state’s death penalty statute. See Death Penalty Info. Ctr., Tennessee Legislature Overwhelmingly Approves Death Penalty Study (2007) (on file with author). Pennsylvania has convened a commission of judges, prosecutors, defense attorneys, law

For example, in 2000, then-Governor George Ryan ordered a moratorium on all state executions, noting that while Illinois had executed only twelve death row prisoners since the 1977 reinstatement of the death penalty in Illinois, thirteen had been exonerated.¹⁷⁶ Governor Ryan appointed a commission to study Illinois' death penalty system and recommend reform.¹⁷⁷ Before he left office in 2003, Ryan pardoned four prisoners facing execution and commuted the death sentences of the remaining 167 inmates on death row.¹⁷⁸ The Illinois commission concluded that abolishing the death penalty is the only way to prevent executing innocent people.¹⁷⁹ Illinois is currently in its eighth year of moratorium on state executions.

enforcement officers and victims' advocates to study the causes of wrongful convictions and make recommendations for preventing them in the state. DEATH PENALTY INFO. CTR., PENNSYLVANIA COMMISSION TO STUDY WRONGFUL CONVICTIONS (2007), <http://www.deathpenaltyinfo.org/article.php?did=2218> (last visited Sept. 22, 2008) (on file with author).

175. Over the past year, at least twelve other states considered legislation to repeal the death penalty. In February 2007, the Montana Senate gave preliminary approval to a bill abolishing the death penalty. See Gregg Sangillo, *Death and Innocence*, NAT'L J., Apr. 28, 2007, at 36, 38. In March 2007, legislation to repeal the death penalty in Nebraska failed in the state's judiciary committee by one vote. Similarly legislation to abolish Maryland's death penalty lost in a tied Senate Committee vote. See *id.*; DEATH PENALTY INFO. CTR., Law Enforcement Officials Gather in Maryland to Oppose Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=2209> (last visited Sept. 22, 2008) (on file with author). Furthermore, in 2008, bills to abolish the death penalty or impose a moratorium on executions were introduced in Alabama, Connecticut, Maryland, Nebraska, and Virginia. See DEATH PENALTY INFO. CTR., DEATH PENALTY IN FLUX, <http://www.deathpenaltyinfo.org/article.php?did=2289> (last visited Aug. 26, 2008) (on file with author).

176. Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 223 (2007) [hereinafter Proctor, *Reevaluating*].

177. Although the death penalty commission provided the Illinois Legislature with eighty-five suggestions for reforming the death penalty statute, none of these recommended changes were enacted. *Id.*

178. *Id.*

179. *Testimony Regarding the Future of Capital Punishment in New York State Before the New York State Assembly Comms. on Codes, Judiciary, and Corrections*, 2005 Leg., N.Y. (2005) (testimony of Robert Perry, Legislative Director, New York Civil Liberties Union), available at <http://www.nyclu.org/node/831> [hereinafter *Testimony*].

2. *Arguments For and Against Abolishing New York's Death Penalty*

Some accept or reject capital punishment for moral reasons. Retributivists cite religious and philosophical arguments¹⁸⁰ to show that the worst criminals deserve the most severe penalty, death.¹⁸¹ But retaliation and revenge are inimical to the public in a free and democratic society.¹⁸² The Supreme Court rejects “retribution as a permissible goal of punishment.”¹⁸³ Rather, the Court promotes deterrence, general and individualized, and incapacitation as just capital punishment objectives.¹⁸⁴ Examination of the efficacy, efficiency, and expedience of capital punishment is therefore important in deciding New York policy on the death penalty.¹⁸⁵ Considerations informing this debate include: capital punishment’s effectiveness as a deterrent to murder,¹⁸⁶ interests in the permanent incapacitation of the most violent criminals,¹⁸⁷ the expenses stemming from capital prosecution,¹⁸⁸ the disparate application of the death penalty within New York State,¹⁸⁹ the humanity of different methods of execution,¹⁹⁰ and the possibility of executing an innocent person.¹⁹¹

180. For discussion of religious and philosophical stances on capital punishment, see generally Larry Alexander, *The Philosophy of Criminal Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 815 (Jules Coleman & Scott Shapiro eds., 2002); E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION (2003); RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING (E. Owens et al. eds., 2004).

181. See generally Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335 (2004). But see Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005) (providing retributivist arguments against the death penalty); Perry, *supra* note 7, at 887-88.

182. See *Furman v. Georgia*, 408 U.S. 238, 343 (1972).

183. *Id.* at 344.

184. See *id.* at 343 (citing *Trop v. Dulles*, 356 U.S. 86, 111 (1958)).

185. See, e.g., Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, at 1 [hereinafter Liptak, *Does Death Penalty Save Lives?*] (“For the first time in a generation, the question of whether the death penalty deters murders has captured the attention of scholars in law and economics, setting off an intense new debate about one of the central justifications for capital punishment.”).

186. See *infra* Part II.B.3.

187. See *infra* Part II.B.4.

188. See *infra* Part II.B.5.

189. See *infra* Part III.E.1.

190. See *infra* Part III.E.4.

191. See *infra* Part III.E.3.

3. Does Death Deter?

For more than three decades, academics have struggled to determine whether capital punishment actually deters future murders.¹⁹² An especially relevant question in New York¹⁹³ is whether capital punishment is more successful than life without parole as a deterrent to violent crime.¹⁹⁴ The question of deterrence is really one of “marginal deterrence:” whether, all else being equal, the presence and use of capital punishment deters more homicides than the “next most severe” punishment of life imprisonment without the possibility of parole.¹⁹⁵ The answer to this question is relevant for states deciding capital punishment policy.¹⁹⁶ Evidence that capital executions deter violent crimes and therefore save innocent lives can counter moral concerns that state-imposed killing is unethical and unjustified.¹⁹⁷

Even if New York does not resurrect a full-fledged death penalty statute, some people argue that we should preserve death to punish the worst offenders like terrorists and cop killers.¹⁹⁸ In 2005, the senate introduced legislation to enact capital punishment for criminals who kill police officers.¹⁹⁹ Supporting the bill, then-Governor Pataki hoped to ensure that such criminals “face the maximum penalties.”²⁰⁰ The idea is not just one of retribution and permanent incapacitation, but of “deter[ring] criminals from killing

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

193. In New York, first degree murder prosecutions under the death penalty statute, section 400.27 of the Criminal Procedure Law, currently have a maximum penalty of life without parole. *People v. LaValle*, 817 N.E.2d 341, 368 (N.Y. 2004).

194. *Furman*, 408 U.S. at 345-48.

195. Perry, *supra* note 7, at 891 n.68 (quoting Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. & SOC. SCI. 151, 152 (2005)).

196. See Hashem Dezhbaksh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, AM. L. & ECON. REV., Aug. 2003, at 344, available at <http://www.cjlf.org/deathpenalty/DezRubShepDeterFinal.pdf> [hereinafter Dezhbaksh, *Deterrent Effect*].

197. See, e.g., Gary S. Becker, *On The Economics of Capital Punishment*, ECONOMISTS' VOICE, Feb. 2006, at 2, <http://www.bepress.com/ev/vol3/iss3/art4> (last visited Sept. 22, 2008); Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 750 (2005) [hereinafter Sunstein & Vermuele, *Is Capital Punishment Morally Required?*]; Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

198. Press Release, Joseph L. Bruno, N.Y. State Senate, Senate Calls on Governor, Assembly to Enact Death Penalty Bill (Apr. 25, 2007), available at <http://senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42c0/c76cc222ad5f5c2e852572c80063v653f?OpenDocument>.

199. S.B. 319, 2007 Leg., 230th Legis. Sess. (N.Y. 2007).

200. Winnie Hu, *Pataki Calls Special Session on Gun Laws*, N.Y. TIMES, Dec. 17, 2005, at B1.

the officers who serve to protect us.”²⁰¹ A 2007 case in Brooklyn, charging three defendants with murdering two police officers, spurred renewed efforts to reinstate the death penalty.²⁰² In July 2007, the New York State Senate passed legislation²⁰³ establishing the death penalty for first-degree murder where the victim is a police officer, peace officer, or correction officer.²⁰⁴ The bill provides the jury with sentencing options of death or life imprisonment without parole and a deadlock sentence of life without parole.²⁰⁵ Senator Joseph Bruno promoted this legislation as a way to “protect our communities, and our police officers, from violent criminals.”²⁰⁶ But prisoners in New York would actually have to be executed in order for the purported deterrent effect to materialize. A statute that has never been strongly enforced cannot claim to factor into a criminal’s decision of whether or not to commit a crime. If the argument in favor of executing cop killers centers on incapacitation, some argue that life imprisonment is sufficient.²⁰⁷ Bruno disagrees, citing the murder of ten law enforcement officials within thirty months as proof that “life imprisonment doesn’t work.”²⁰⁸

Proving a strong negative correlation between execution and homicide is not easy. For each of the recent studies claiming that executions save lives,²⁰⁹ there is a study to refute these results.²¹⁰

201. See Press Release, Bruno, *supra* note 198.

202. Dexter Bostic, Robert Ellis, and Lee Woods were charged in Brooklyn Criminal Court for killing two police officers. See Anthony M. DeStefano, *Pair Will Face Court Crowded with Cops*, NEWSDAY, July 13, 2007, at A02 [hereinafter DeStefano, *Pair Will Face Court*].

203. See S.B. 6414, 2007 Leg., 230th Legis. Sess. (N.Y. 2007).

204. S.B. 6414 is the same as Assem. B. 7799, 2007 Leg., 230th Legis. Sess. (N.Y. 2007), and S.B. 319 (prefiled Dec. 27, 2007, and introduced Jan. 3, 2007). *Senate Passes Death Penalty Legislation*, U.S. STATE NEWS, July 16, 2007; see also John Anese, *Pressure Grows to Make Cop Killing a Federal Death-Penalty Case: But Murder of Island Officer Remains in Hands of Brooklyn D.A. Hynes*, STATEN ISLAND ADVANCE, July 18, 2007, at A06; DeStefano, *Pair Will Face Court*, *supra* note 202;

205. *Senate Passes Death Penalty Legislation*, *supra* note 204; see also DeStefano, *Pair Will Face Court*, *supra* note 202.

206. *Senate Passes Death Penalty Legislation*, *supra* note 204.

207. Assemblyman Joseph Lentol believes life without parole is an adequate punishment because it deters violent crime and guards against the risk of executing an innocent person. See James M. Odato, *Death Penalty Bill Urged: Senate Renews Call for Law After Cop Shootings, Asks Spitzer to Get Assembly on Board*, TIMES UNION (Albany, N.Y.), Apr. 26, 2007, <http://timesunion.com/AspStories/storyprint.asp?StoryID=584145> (last visited Sept. 22, 2008).

208. *Id.*

209. See Becker, *supra* note 197, at 2; Dezhbaksh, *Deterrent Effect*, *supra* note 196; H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453 (2003) [hereinafter

The debate about whether capital punishment actually deters homicide is still unresolved. Even Gary Becker, winner of the 1992 Nobel Prize in economics, who believes capital punishment “is worth using for the worst sort of offenses,”²¹¹ admits that “current empirical evidence [is] ‘certainly not decisive.’”²¹²

Logic dictates that the greater the punishment the greater its deterrent effect. Accordingly, one might assume that as the most severe of all punishments, death has the greatest success in preventing violent crime. Based on the theory that “as the cost of an activity rises, the amount of that activity will drop,”²¹³ economists study changes in murder rates within and across states and counties, hoping to determine whether use of the death penalty affects homicide rates. For each inmate executed, such studies claim, five²¹⁴ to eighteen²¹⁵ homicides are prevented.

Mocan & Gittings, *Getting off Death Row*]; Sunstein & Vermuele, *Is Capital Punishment Morally Required?*, *supra* note 197.

210. See also *Deterrence and the Death Penalty: A Critical Review of New Evidence, Hearings on the Future of Capital Punishment in the State of New York Before the N.Y. State Assem. Standing Comm. on Codes, Assem. Standing Comm. on Judiciary & Assem. Standing Comm. on Corr.*, 2005 Leg. (N.Y. 2005) (statement of Jeffrey Fagan, Professor, Columbia Law School), available at <http://www.deathpenaltyinfo.org/FaganTestimony.pdf> [hereinafter *Hearings*]; Richard Berk, *New Claims about Executions and General Deterrence: Deja Vu All over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005), available at <http://preprints.stat.ucla.edu/396/jels.pap.pdf>; John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) [hereinafter Donohue & Wolfers, *Ethics and Empirics*]; Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006); Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003); John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS' VOICE, Apr. 2006, <http://www.bepress.com/ev/vol3/iss5/art3/> (last visited Sept. 22, 2008) [hereinafter Donohue & Wolfers, *No Evidence for Deterrence*].

211. Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

212. *Id.*

213. *Id.*

214. See Mocan & Gittings, *Getting off Death Row*, *supra* note 209, at 469 (finding a “significant” correlation between rates of execution, removal, and commutation, and homicide rates. For every execution that occurred, five fewer homicides occurred; for every additional commutation of a death sentence, five more murders occurred; and for each additional removal from death row, one additional murder was committed).

215. See Dezhbaksh, *Deterrent Effect*, *supra* note 196, at 344 (finding that “each execution results, on average, in eighteen fewer murders, with a margin of error of plus or minus ten . . . [and] results are not driven by tougher sentencing laws”). The results of this study were challenged as “not credible” by Professors Donohue and Wolfers. See Donohue & Wolfers, *No Evidence for Deterrence*, *supra* note 210, at 2.

Deterrence studies, however, often suffer from failure to isolate effects of execution policy on homicide from other possible reasons for changes in the rate of violent crime.²¹⁶ Changes in demographics, economic conditions, conviction rates, longer jail sentences, increased imposition of life without parole,²¹⁷ and harsher prison conditions²¹⁸ may just as easily deter murder as use of the death penalty.²¹⁹

Furthermore, statistical findings can be “skewed by data from a few anomalous jurisdictions” like Texas,²²⁰ for example, where executions are frequent and occur relatively soon after sentencing.²²¹ Sociologist Richard Berk conducted a nationwide deterrence study working under the premise that data from “outlier” states like Texas, with unusually high execution rates, might influence and overshadow statistical results. Using data from fifty states over a twenty-one year period,²²² Berk compared the average number of executions to the average number of homicides.²²³ By removing outliers like Texas, Berk found that where five or fewer executions occurred, there was no relationship between the execution and homicide rates.²²⁴

Another problem in proving deterrence is distinguishing between capital punishment’s effect on premeditated crimes and those that are unplanned and irrational. Deterrence studies are often based on the premise that “a rational offender . . . respond[s] to perceived costs and benefits of committing crime.”²²⁵ It is true

216. As Professor Donohue observed in a 2005 critique of modern deterrence studies, “existing estimates contain no (or inadequate) controls for [other] factors [that] might be driving the correlation between homicides and executions.” Donohue & Wolfers, *Ethics and Empirics*, *supra* note 210, at 821.

217. See Fagan, *Capital Punishment*, *supra* note 210, at 1831 (finding no marginal deterrent effect of the threat of execution compared to the threat of life imprisonment). “Offenders faced with the threat of execution are not substituting less risky varieties of crime for crimes that lead to murder and capital risk, nor are they abandoning the types of crimes that might lead to a capital offense.” *Id.*

218. See Katz, *Prison Conditions*, *supra* note 210, at 321-22, 331 (finding that poor prison conditions deterred crime, but that there was no statistically significant relationship between executions and violent crimes).

219. See Donohue & Wolfers, *Ethics and Empirics*, *supra* note 210, at 821; see also Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

220. See Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

221. *Id.*

222. The period was from 1977 to 1997.

223. Berk, *New Claims*, *supra* note 210, at 3 n.4 (finding that in most states the average number of executions fell below five while Texas had a total of twenty-nine, and finding that this disparity would heavily skew the results).

224. *Id.* at 11-14.

225. Mocan & Gittings, *Getting off Death Row*, *supra* note 209, at 454.

that, as the most severe penalty, capital punishment “represents a very high cost for committing murder.”²²⁶ For “rational offenders,” at least, the presence and use of the death penalty in a state should inhibit the commission of death-eligible crimes.²²⁷ Not everyone agrees, however, that potential murderers make these kinds of rational calculations, especially in death penalty states that rarely or never execute.²²⁸ A study by Jeffrey Fagan, Franklin E. Zimring, and Amanda Geller observed no decline in death-eligible homicides relative to non-eligible cases.²²⁹ The authors surmised that many murderers are “present-oriented” and so do not take into account the costs of detection.²³⁰

On the other hand, studies claim that commuting a death sentence or removing a prisoner from death row²³¹ decreases criminals’ perceived cost of committing a crime.²³² This study predicts that commutation or removal will result in a corresponding increase in homicides.²³³ Thus, in New York, where all seven death sentences imposed under the 1995 statute were overturned,²³⁴ one would expect the homicide rate to increase since prospective murderers would likely see the death penalty statute as ineffective and inconsequential. Instead, homicide has decreased state-wide since New York instituted capital punishment in 1995.²³⁵

226. *Id.*

227. *Id.*

228. Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

229. See Fagan, *Capital Punishment*, *supra* note 210, at 1859 (examining homicide rates nationwide since *Gregg v. Georgia*). The authors expected to find that an increased risk of execution in a death penalty state would lead to a proportionate decrease in death-eligible crimes and no effect on non-eligible crimes. Instead, they consistently found no “marginal deterrent effect of the threat or example of execution on those cases at risk.” *Id.* at 1860.

230. *Id.* at 1833.

231. Death sentences are commuted or removed, for example, when an appellate court declares a capital sentence unconstitutional or maintains conviction but overturns a death sentence.

232. Mocan & Gittings, *Getting off Death Row*, *supra* note 209, at 21. A study of homicide rates between 1977 and 1997 by Mocan and Gittings analyzed the relationship between execution, removal, and commutation rates of death row prisoners and the rate of homicide. The results showed five additional homicides resulting from each commutation of a death sentence, and one additional homicide for every removal from death row. See *supra* note 214 and accompanying text.

233. See Mocan & Gittings, *Getting off Death Row*, *supra* note 209, at 21.

234. See JOSEPH LENTOL ET AL., *supra* note 19, at 148; *People v. Taylor*, 878 N.E.2d 969, 977 (N.Y. 2007); Alfonso A. Castillo, *Shulman Taken off Death Row*, NEWSDAY, Oct. 26, 2005, at A26 (discussing overturning of Shulman, LaValle, and McCoy sentences).

235. See *infra* note 236 and accompanying text.

Joseph L. Bruno, New York Senate Majority leader and death penalty advocate, attributes the declining homicide rate in New York over the past decade to the death penalty's success as a strong deterrent to violent crimes.²³⁶ In support of this cause-and-effect theory, Bruno cites the decline in murders committed in New York, from 1,551 in 1995 to 922 in 2003.²³⁷ But no executions have actually occurred under New York's 1995 statute.²³⁸ Perhaps Bruno believes that the threat of capital punishment alone is a sufficient deterrent. If so, statistics for New York City undermines his argument. City homicide rates have continued to decline since the 2004 invalidation of the state death penalty statute. The number of recorded homicides in New York City decreased from 2,245 in 1990²³⁹ to 428 in 2007,²⁴⁰ and overall crime dropped 6.47% between 2006 and 2007.²⁴¹

Although violent crime has decreased state-wide since the death penalty was enacted in 1995, this trend occurred in areas like Manhattan, where the District Attorney's Office never even sought the death penalty.²⁴² In contrast, Monroe County, where prosecutors have sought the death penalty more often than prosecutors in any other New York county, has the highest homicide rate in the State.²⁴³ The uniform decline in crime within the state despite the disparate application of the death penalty²⁴⁴ indicates the influence of some other method of crime-prevention, such as the increased use of life without parole.²⁴⁵

236. See Murphy, *Cahill*, *supra* note 113, at 1049 n.79. According to Senator Bruno, since 1995 "[t]he number of violent crimes dropped from 151,731 in 1995 to 89,316 in 2003." *Id.* (internal quotation marks omitted).

237. See *id.*

238. See JOSEPH LENTOL ET AL., *supra* note 19, at 14; see also U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2006—STATISTICAL TABLES (2007) (detailing, in table nine, the number of persons executed by jurisdiction, from 1930-2006 and from 1977-2006), available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st09.htm>.

239. Al Baker, *City Homicides Still Dropping, to Under 500*, N.Y. TIMES, Nov. 23, 2007, A1.

240. See *id.* Four hundred twelve were actual murders, sixteen were crime victims who died from injuries sustained. See *id.*

241. See *id.* ("[T]he number of rapes, robberies, burglaries, grand larcenies and car thefts are all on the decline.").

242. See *Testimony*, *supra* note 179.

243. The City of Rochester, located in Monroe County, has the highest murder rate in the state. *Id.*

244. See discussion *infra* Part II.B.6

245. See, e.g., Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005) [hereinafter Shepherd, *Deterrence Versus Brutalization*].

In reality, there is simply not enough data to isolate the deterrent effect of capital punishment.²⁴⁶ From a statistical perspective, the low number of executions in the United States in the past two decades are insufficient “to permit strong conclusions” in either direction.²⁴⁷ In fact, states without the death penalty often have lower homicide rates than those states that use capital punishment.²⁴⁸ This empirical controversy remains unsettled; no study is conclusive²⁴⁹ and it seems likely that there will always be “residual uncertainty in social science and legal policy.”²⁵⁰ Moreover, the deterrence argument is theoretical²⁵¹ in New York where only seven people were sentenced to death under the 1995 statute and no one has been executed.²⁵²

4. *Incapacitation and the Availability of Life Imprisonment Without Parole*

Incapacitation is another goal of capital punishment. Death penalty proponents argue that death is the only way to ensure that our society is forever protected from the most violent criminals. Even prisoners sentenced to life without parole could, at some future point, obtain release either through a change in law or pardon from the governor.²⁵³ Also, without the death penalty, some argue, there is no way to stop a prisoner from killing while in jail. If the maximum possible sentence is life without parole, a prisoner serving a life sentence has nothing to lose by killing a fellow prisoner or

246. Liptak, *Does Death Penalty Save Lives?*, *supra* note 185.

247. Donohue & Wolfers, *No Evidence for Deterrence*, *supra* note 210.

248. *See Testimony*, *supra* note 179 (noting that homicide rates in states with the death penalty are between 48% and 100% higher than in states that do not use the death penalty); *see also* Shepherd, *Deterrence Versus Brutalization*, *supra* note 245, at 205-06 (documenting a “brutalization effect” of executions, observing an increase in homicides shortly after an execution, and finding no deterrent effect on murder rates in eight of the twenty-seven states to execute at least one person between 1977 and 1996, that executions deterred murder in only six of the twenty-seven states, and that murder levels actually increased in thirteen of the states).

249. As Jeffrey Fagan of Columbia University observed in a 2006 article describing flaws in recent deterrence studies, “[t]here is no reliable, scientifically sound evidence that . . . [capital execution] can exert a deterrent effect.” Fagan, *Death and Deterrence*, *supra* note 210.

250. Sunstein & Vermuele, *Is Capital Punishment Morally Required?*, *supra* note 197, at 750.

251. *See id.* at 748 (citing Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1192-93 (1981)).

252. *See* JOSEPH LENTOL ET AL., *supra* note 19, at 14.

253. *See id.*

prison employee.²⁵⁴ Despite these arguments, many see life without parole as a satisfactory replacement for the death penalty, both in terms of incapacitation and deterrence.²⁵⁵

5. *An Expensive System*

Both critics and supporters of the death penalty concede that the expenses stemming from a capital prosecution, the trial, appeals process, maintaining a capital defender's office, housing death row inmates, and the execution itself, are extensive. It is difficult to determine the total cost of capital punishment in New York because no executions have actually taken place under the 1995 death penalty statute.²⁵⁶ Nevertheless, between 1995 and 2003, New York State spent over \$160 million on processes related to capital punishment, despite the fact that not one execution resulted from this expenditure.²⁵⁷

Evidence shows that life without parole saves money: while capital prosecutions and appeals cost millions of dollars, life imprisonment can cost "less than one million dollars."²⁵⁸ Until the recent reversal of his death sentence, John Taylor was the sole occupant of New York's death row, located at the Clinton Correctional Facility

254. See *Furman v. Georgia*, 408 U.S. 238, 348 (1972).

255. See *Hearings*, *supra* note 210 ("[E]xamining declines in homicide rates in . . . New York since [the] state's peak homicide rate in the early 1990's, one can see the strong effects of such incapacitative sentences on murder rates. . . . [I]n New York, a state with no death penalty in April 1995 and no executions, homicide rates declined over the next decade by 65.5% since the peak in 1990."); see also *Testimony*, *supra* note 179 ("Social science research indicates that the death penalty does not have an additional deterrent value beyond that of a lengthy prison term."); Donohue & Wolfers, *Ethics and Empirics*, *supra* note 210; Donohue & Wolfers, *No Evidence for Deterrence*, *supra* note 210; Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529 (1990) [hereinafter Wright, *Life-Without-Parole*]; *The Right Choice*, TIMES UNION (Albany, N.Y.), Jan. 29, 2005, at A6 (noting N.Y. State Assembly Speaker Sheldon Silver's assertions that a sentence of life imprisonment, rather than death, "ought to be ample punishment for the worst criminals imaginable").

256. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., COSTS OF THE DEATH PENALTY AND RELATED ISSUES 5-6 (2005), available at <http://www.deathpenaltyinfo.org/NY-RCD-Test.pdf>.

257. See *id.* (internal citations omitted); see also *Testimony*, *supra* note 179 ("After the death penalty was reinstated in New York in 1995, the state spent an estimated \$170 million prosecuting a handful of cases."); Patrick D. Healy, *Death Penalty Seems Unlikely to be Revived*, N.Y. TIMES, Feb. 11, 2005, at B1 (noting that as of 2005, the total expenditure was estimated at \$175 million).

258. Wright, *Life-Without-Parole*, *supra* note 255, at 558 ("In Florida alone, court costs, attorney's fees, and incarceration of a death row inmate cost approximately 3.2 million dollars, while the state currently can incarcerate a criminal for life for 700,000 dollars.").

in Clinton County, which costs about \$300,000 per year to maintain.²⁵⁹ The additional costs of capital trials in New York, when compared to non-capital trials, is seen in Queens County, where “capital trials create 300% to 500% more work than noncapital trials[.]” and in Kings County, where resources had to be reallocated from prosecutors’ offices of other Boroughs in order to accommodate a capital appeal.²⁶⁰ Capital punishment advocates, however, claim that economic considerations support reinstating the death penalty.²⁶¹ The threat of the death penalty as a deterrent to violent crime, in addition to savings procured when “guilty defendants plead guilty to non-capital charges, rather than face . . . a capital trial and possible execution,”²⁶² create cost-saving mechanisms that are unique to a death penalty regime.

The nationwide decline in the number of capital cases prosecuted is partly attributable to the great expense.²⁶³ Georgia recently put seventy-two capital cases on hold because their public defender program did not have adequate funds to conduct a trial.²⁶⁴ And in October 2007, the New Mexico Supreme Court ordered a stay on a capital case until the legislature could allocate more funding to public defenders.²⁶⁵ Compensation for New Mexico’s state-provided defense counsel was found inadequate to ensure effective representation as required under the Sixth Amendment.²⁶⁶

In addition, expenses resulting from the prosecution of capital cases divert resources from crime prevention efforts, such as law enforcement. For example, Maryland Governor Martin O’Malley, who favors abolishing capital punishment in Maryland, claims re-

259. Stashenko, *Capital Defender*, *supra* note 4.

260. Amanda S. Hitchcock, *Using The Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 951 (2007) (citing Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2757 (2003) (noting that the exorbitant cost of capital trials may force counties to choose between these prosecutions and more basic needs like additional law enforcement officers, public nursing positions, and public employee raises)).

261. See JOSEPH LENTOL ET AL., *supra* note 19, at 27.

262. *Id.*

263. See Tanner, *supra* note 171.

264. Tim Jones, *Resistance to Death Penalty Growing: Questions About Justice, Expense Undermining Political Support for Capital Punishment*, CHI. TRIBUNE, Apr. 8, 2007, at 21.

265. Scott Sandlin, *Death Penalty out in Guard Killing, Inmates’ Defense Funds Fell Short*, ALBUQUERQUE J., Apr. 4, 2008, at C1.

266. See *id.*

placing the death penalty with life without parole would free up \$22.4 million.²⁶⁷ Governor O'Malley stated that this amount could be used to employ "500 additional police officers or provide drug treatment for 10,000" people.²⁶⁸ O'Malley sees these expenditures as preferable to the death penalty in terms of "sav[ing] lives and prevent[ing] violent crime."²⁶⁹

Based on a similar analysis, Colorado recently voted on a bill²⁷⁰ to abolish the death penalty and allocate the money saved from capital prosecution and trials to investigate unsolved murder cases.²⁷¹ Proponents of this bill estimate savings of "\$2 million a year [currently] spent on prosecuting and defending death penalty cases."²⁷² Reallocation of death penalty funds would also reduce the incidence of unsolved murders.

Following this logic, if New York were to repeal its capital punishment statute, it could reallocate funds formerly used to prosecute capital cases to crime prevention programs. Rather than spend taxpayer money on reinstating the death penalty, abolitionists argue that these resources should be used to strengthen police departments, fund crime-prevention programs,²⁷³ and improve crime-detection techniques.²⁷⁴

6. *Disparate Patterns of Prosecution*

New York State prosecutors have complete discretion in deciding when to seek the death penalty.²⁷⁵ Studies show disparate application of the death penalty,²⁷⁶ suggesting arbitrary prosecutorial

267. Jones, *Resistance*, *supra* note 264.

268. *Id.*

269. *Id.*

270. H.R. 1094, 2007 Leg., 1st Reg. Sess. (Colo. 2007).

271. See Steven K. Paulson, *Colo. House Committee Votes to Abolish Death Penalty*, INDEPENDENT RECORD (Helena, MT), Aug. 8, 2007, http://www.helenair.com/articles/2007/02/08/montana_top/000death.prt (last visited Sept. 22, 2008).

272. *Id.*

273. Examples of such programs are domestic and gang violence prevention programs. See NEW YORKERS AGAINST THE DEATH PENALTY, STATE SENATE VOTES QUICK FIX FOR FLAWED DEATH PENALTY LAW (2007), <http://www.nyadp.org/main/70620statesen> (last visited Sept. 22, 2008).

274. Examples of such improvements include updating the DNA database and improving on forensic methodology. *Id.*

275. Stephen B. Bright, *Why the United States Will Join the Rest of the World in Abandoning Capital Punishment*, in DEBATING THE DEATH PENALTY 152, 163 (Hugo Bedau & Paul Cassell eds., 2004).

276. See, e.g., CHRISTOPHER DUNN, THE DEATH PENALTY SKIPS ACROSS COUNTY LINES, (2003), <http://www.nyclu.org/node/815/> (last visited Sept. 11, 2007); Schoenberg, *supra* note 15, at 380-81 ("The New York Statute lacks guidelines regarding prosecutorial discretion, leaving prosecuting attorneys to decide whether to invoke

decisions based on race, geography, and socio-economic factors.²⁷⁷ For example, since the reinstatement of the death penalty in 1995, twice as many capital cases could have been prosecuted in Manhattan as in Queens, and yet Manhattan prosecutors have never sought the death penalty, whereas those in Queens have sought death in fourteen percent of death-eligible cases.²⁷⁸ This is just one example. A variable application of the law can be seen in the erratic prosecutorial statistics across New York's sixty-two counties.²⁷⁹ It appears, therefore, that the inclination of individual prosecutors and varying prosecutorial practices between counties create major discrepancies in the application of the death penalty across the state.²⁸⁰

Death penalty proponents may say judicial review corrects for any misconduct²⁸¹ or that inconsistencies are a necessary byproduct of our democratic system whereby prosecutors are elected and entrusted with pursuing only the most deserving cases.²⁸² However,

the death penalty in their particular jurisdictions. Thus, there is a strong argument that the statute will and has been applied in an arbitrary and discriminatory manner.”).

277. See Editorial, *Fatally Flawed: Court Has Chance to End Debate on Unfair Death Penalty Law*, POST-STANDARD (Syracuse, N.Y.), Sept. 10, 2006, at A8.

278. *Id.*

279. See *Testimony*, *supra* note 179 (“[B]etween 1995 and 2003, upstate New York counties reported approximately 20% of all homicides in the state, but these counties accounted for 65% of all capital prosecutions. During that period, 6 of the 62 counties in New York State accounted for 56% of all death penalty cases. Of the defendants sentenced to death in New York State during this period, 43% were from Suffolk County alone. In other words, the decision to seek the death penalty in any particular case in New York turned . . . on the county in which the crime occurred.”).

280. See generally Stewart F. Hancock, Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545, 1563 (1996) (“One inevitable consequence of unlimited prosecutorial discretion is that the critical decisions whether to charge a defendant with a capital crime . . . and seek the death penalty . . . will depend on the particular philosophical, ethical, religious or other views of the individual prosecutor.”); Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 668 (1996) (“The danger [of prosecutorial discretion is] . . . that the prosecutor will be guided not by the appropriate legal considerations of a particular case but rather by extraneous pressures that should not influence the charging decision as to whether to file for capital punishment.”); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1813-14 (1998) (“With this prosecutorial freedom, however, comes the danger that invidious considerations will prompt these death penalty decision makers.”).

281. “Opponents of the death penalty frequently argue that innocent persons may be killed however elaborate the appeals process.” Wright, *Life-Without-Parole*, *supra* note 255, at 558.

282. See JOSEPH LENTOL ET AL., *supra* note 19, at 11.

the inconsistent application of the 1995 death penalty law within the state has led some to question whether a system where the “happenstance of geography determines whether a defendant lives or dies at the hands of the state” can be just.²⁸³

7. *Questions of Innocence*

Another argument frequently advanced for abolishing the death penalty is the risk of executing an innocent person. One hundred and twenty-three prisoners across the United States were released from death row between 1973 and 2006,²⁸⁴ with an average nine years of incarceration before exoneration.²⁸⁵ Yet DNA testing doesn't render the criminal justice system foolproof. DNA evidence accounted for only fourteen of these releases.²⁸⁶ In the remaining cases, ultimate exoneration of death-sentenced prisoners stemmed from other evidence such as confession by the true culprit, the discovery that witness testimony was tainted or perjured, and forensic evidence such as fingerprinting.²⁸⁷

These facts may potentially cut both ways. For capital punishment supporters, these statistics are evidence that innocence is detected and corrective action taken by the system before it is too late.²⁸⁸ In fact, death penalty advocates might argue that for the sake of justice our system must risk occasionally punishing the innocent. Abolitionists, on the other hand, can cite these facts as evidence that other innocent defendants falsely convicted and sentenced to death were likely never detected. Furthermore, most would agree that the risk of depriving an innocent person of life simply in order to execute the guilty is not a legitimate aim, especially when life imprisonment is an available alternative.

283. *Fatally Flawed*, *supra* note 277.

284. Tanner, *supra* note 171; *see also* RICHARD C. DIETER, DEATH PENALTY INFO CTR., INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05b> (last visited Sept. 22, 2008). Between 1973 and 2004, 116 prisoners on death row had been exonerated. *Id.*

285. *Id.*

286. Tanner, *supra* note 171; *see also* DIETER, *supra* note 284.

287. DIETER, *supra* note 284.

288. Economist Gary S. Becker and Judge Richard A. Posner argue that advances in DNA identification and lengthy appeals processes protect against the risk of wrongful execution. *See* Becker, *supra* note 197, at 3; Richard A. Posner, *The Economics of Capital Punishment*, *ECONOMISTS' VOICE*, Feb. 2006, at 2, <http://www.bepress.com/ev/vol3/iss3/art3> (last visited Sept. 22, 2008).

8. *Methods of Execution*

In the past two years, the level of legal scrutiny over lethal injection has increased to the point where the method of execution is arguably the most controversial issue in death penalty debate. In 1977, the Oklahoma state medical examiner suggested an intravenous drip consisting of a lethal combination of chemicals as a more humane method of execution than the electric chair.²⁸⁹ The Oklahoma Legislature approved the method that year.²⁹⁰ Since then, thirty-six of the thirty-seven states to reinstate capital punishment since 1976 and the federal government have adopted lethal injection as the primary means of execution.²⁹¹

Since the introduction of lethal injection, courts across the country have heard challenges to the administration, implementation, and risk of error related to this method of execution. On September 25, 2007, the U.S. Supreme Court granted a writ of certiorari in *Baze v. Rees*,²⁹² a civil lawsuit filed by Kentucky death row inmates, Ralph Baze and Thomas Clyde Bowling, Jr., challenging Kentucky's lethal injection process as violating the Eighth Amendment's prohibition against cruel and unusual punishment.²⁹³ The *Baze* grant triggered nationwide stays on execution. As of Septem-

289. See JAMIE FELLNER & SARAH TOFTE, HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 1, 13 (2006), available at <http://hrw.org/reports/2006/us0406/us0406web.pdf>; see also Brief for Petitioners at 4-7, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3307732, *4-7.

290. See FELLNER & TOFTE, *supra* note 289; see also Denno, *supra* note 166, at 65-71.

291. See U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1996 BULLETIN tbl. 3 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp96.pdf>. Nebraska was the exception, employing electrocution as the sole means of execution. Although New Jersey abolished its death penalty in 2007, while capital punishment was in effect the state authorized lethal injection. See John Gramlich, *Lethal Injection Moratorium Inches Closer*, STATELINE, Oct. 18, 2007, <http://www.stateline.org/live/printable/story?contentId=249581> (last visited Sept. 22, 2008). Executions in New Jersey were put on hold in 2004 by the Appellate Division of New Jersey's Superior Court, finding that the state's Department of Corrections must review its lethal injection execution procedures before carrying out any further executions and prove to the Court that these procedures include protocol providing for a method by which to revive a prisoner when an execution goes wrong. See *In re* Readoption with Amendments of Death Penalty Regulations, 842 A.2d 207, 211 (N.J. Super. Ct. App. Div. 2004).

292. See *Baze v. Rees*, 128 S. Ct. 1520 (2008), *cert. granted*, *Baze v. Rees*, 128 S. Ct. 34 (2007); Petition for a Writ of Certiorari, *Baze*, 128 S. Ct. 1520 (No. 07-5439).

293. The *Baze* Petition asserts that the current method of lethal injection used in Kentucky "creates the unnecessary risk of pain and suffering" because of the drugs used and the methods in which these drugs are administered. See Brief for the Petitioners, *supra* note 289, at 41; see also DEATH PENALTY INFO. CTR., U.S. SUPREME COURT DECISIONS: 2007-08 TERM, <http://www.deathpenaltyinfo.org/article.php?&did=2415> (last visited Sept. 22, 2008).

ber 25, 2007, the three-drug protocol at issue in *Baze*²⁹⁴ was used to carry out lethal injections in thirty-six of the thirty-seven states that allowed the death penalty.²⁹⁵ Stays of execution in twelve states, either by governor or court order, were related to lethal injection challenges.²⁹⁶ But only seven of the twelve state holds were in response to the *Baze* grant; the other states' doubts about the three-drug protocol were sufficient to warrant stays even before the *Baze* grant.²⁹⁷ The nationwide stays on execution resulted in the longest hiatus on executions since *Furman*.²⁹⁸ In 2007, only forty-two executions took place nation-wide, the lowest in over a decade.²⁹⁹

On April 16, 2008, the U.S. Supreme Court upheld the ruling of the Supreme Court of Kentucky, finding that neither the risk of improper administration of the drug, nor the state's failure to adopt purportedly more humane alternatives, rendered the three-

294. The three drugs are sodium thiopental, pancuronium bromide, and potassium chloride. See Brief for the Petitioners, *supra* note 289, at 4-5. This lethal injection protocol consists of the intravenous injection of three drugs: first, an anesthetic, sodium thiopental, is administered, rendering the inmate unconscious; then, a paralyzing agent, pancuronium bromide; and finally, potassium chloride is injected, which induces cardiac arrest and stops the heart. See Denno, *supra* note 166, at 55.

295. At the time of the *Baze* petition, New Jersey was among the thirty-seven states whose death penalty statute provided for the use of the three-drug protocol. The New Jersey death penalty was abolished on December 17, 2007. See *supra* notes 170 & 291. Until February 2008, Nebraska was the only state in the country to carry out executions solely by the electric chair. See Gramlich, *supra* note 291. In *State v. Mata*, the Nebraska Supreme Court held that electrocution violates the state constitution's prohibition on cruel and unusual punishment. The Court upheld Mata's death sentence, finding the provision for the method of execution severable from the death penalty statute. Accordingly, Mata's death sentence is stayed until the state legislature devises a constitutional method of execution. *State v. Mata*, 745 N.W.2d 229, 261 (Neb. 2008).

296. The twelve states consisted of California, Delaware, Illinois, Maryland, Nebraska, Nevada (whose status was unclear because executions were effectively halted due to the lethal injection issue in *Baze v. Rees*), New Jersey, New Mexico (whose status was unclear because the State Supreme Court ruled that legislature must allocate more funds for indigent defense in capital cases), New York, North Carolina (whose status was unclear because executions were effectively halted due to the lethal injection issue in *Baze v. Rees*), Ohio (whose status was unclear because executions were effectively halted due to the lethal injection issue in *Baze v. Rees*, although one was allowed to proceed), and Tennessee (whose status unclear because executions were effectively halted due to the lethal injection issue in *Baze v. Rees*, although one was allowed to proceed and one volunteer execution was allowed). See DEATH PENALTY INFO. CTR., DEATH PENALTY IN FLUX, <http://www.deathpenaltyinfo.org/article.php?did=2289> (last visited Sept. 22, 2008); see also Gramlich, *supra* note 291.

297. Gramlich, *supra* note 291; see also Tanner, *supra* note 171.

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

299. Thirty-one executions took place in 1994. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE (2008), <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm> (last visited Sept. 21, 2008).

drug protocol used for lethal injection by Kentucky cruel and unusual punishment.³⁰⁰

III. RECOMMENDATION: ACTIONS SPEAK LOUDER THAN WORDS

This section evaluates the options of amending or abolishing the New York death penalty. The status quo is not acceptable. Not only should legislation reflect public opinion, but for practical purposes, the legislature must not allow the death penalty statute to remain a nullity. The current political debate over capital punishment shows greater support for abolition and more reasons to abolish than amend New York's death penalty statute. This Note therefore recommends that the legislature act to abolish the death penalty. If the majority of citizens decides that capital punishment is still desirable, however, that decision must be reflected in functioning state legislation.

A. Consequences of Inaction

The challenge of crafting a statute that will satisfy the Court of Appeals' exacting standards of due process is burdensome.³⁰¹ Inaction might appeal to members of the New York Legislature who oppose resurrecting the death penalty but do not want to deal with the backlash they might face by attempting to definitively repeal the statute. If the Legislature is truly divided on this policy issue, efforts to abolish may not seem worthwhile. There are, however, considerations that make it critical for the Legislature to ensure that whether New York has or does not have a death penalty is the decision of the legislature and not simply the result of judicial review.

B. The Role of the Legislature

First, it is the legislature's job, not that of the court, to decide public policy.³⁰² In finding CPL section 400.27(10) unconstitu-

300. *Baze v. Rees*, 128 S. Ct. 1520 (2008).

301. In fact, continuation of the status quo is certainly a possibility and may be the most likely prediction for New York, at least for the near future. Assemblyman Joseph Lentol predicts "there will never be an Assembly floor vote on this issue [of reinstating the death penalty] . . . if we did anything, it would be nothing, and that would kill the death penalty." Healy, *supra* note 257. Further, according to Assemblyman Ron Canestrari "[a] moratorium on the death penalty, or doing nothing to restore it, seems the best way to go." *Id.*

302. See *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) ("Courts . . . are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment,

tional, the Court of Appeals did not find capital punishment unconstitutional per se. The *LaValle* Court simply held that because one part of the statute, the deadlock provision, is unconstitutional and cannot be severed from the whole, the legislature must enact an amended version in order for the death penalty statute to function.³⁰³

The situation in New York created by the death penalty statute's invalidation is not very different from that of abolition: death row is closed, the Capital Defender Office is closed, and life without parole is the maximum permissible sentence for a prisoner convicted of first-degree murder.³⁰⁴ There are, however, two critical reasons that the status quo cannot continue.

C. Practical Consequences of Maintaining the Status Quo

1. *Overruling LaValle*

First, the Court of Appeals could ultimately gain enough new members to overrule the *LaValle* decision. If so, the death penalty would suddenly return to force in New York State. Now is the time to decide what the public wants. Rather than simply defer to judicial decisions, the legislature must react. If social values have evolved to the point that the death penalty is no longer acceptable to the public, the law should reflect this.

2. *The Role of Consensus in Supreme Court Jurisprudence*

The second practical consideration mandating legislative action is the role of consensus in U.S. Supreme Court jurisprudence. The Eighth Amendment is based on "evolving standards of decency that mark the progress of a maturing society."³⁰⁵ For Eighth Amendment purposes, the Supreme Court sees state legislation as the "clearest and most reliable objective" indication of these standards.³⁰⁶ To determine whether the Eighth Amendment prohibits a certain practice, the Supreme Court often looks to state legislation to see whether a majority consensus about that practice has developed among the states.³⁰⁷

founded on independence." (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

303. See *People v. Taylor*, 878 N.E.2d 969, 977 (N.Y. 2007).

304. See *supra* Part II.B.

305. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

306. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 301, 331 (1989)).

307. *Id.* at 313.

Even though New York does not currently have a functioning death penalty statute, for purposes of Eighth Amendment jurisprudence, the Supreme Court might still examine the New York statute for an indication of political will. In fact, the Court might rest any determination of consensus on state legislation, reasoning that the Legislature did not enact a new law because public opinion did not warrant new legislation.³⁰⁸ Unfortunately, the statute on the books in New York State no longer reflects a democratic consensus. In order for the Supreme Court to defer to the judgment of the New York Legislature, as reflected in state legislation, that judgment should be premised on reasoned deliberation and transparency. With regard to New York's death penalty statute, this is currently not the case.

D. Best Option for Amendment

It may be that the *LaValle* Court's imposition of a death penalty moratorium reflects the popular will. If that is the case, and the people of New York no longer support the death penalty, then the Legislature must act to abolish this law. If, on the other hand, amendment is desirable, of the four options for amendment discussed above,³⁰⁹ Option 1 is most likely to receive approval from the Court of Appeals. First of all, this is the approach indicated by members of the court on at least three occasions.³¹⁰ Allowing a capital jury to deliberate on two sentences, death and life without parole, and instructing the jury that upon deadlock the defendant will be sentenced to life without parole, is neither coercive, nor unjust. In New York, the capital trial can be seen as the government's case to win or lose. If the government cannot convince all twelve jurors that death is appropriate, it has lost its case, and so the death penalty may not be used. Deadlock means that the jurors who voted for death rejected life without parole as too lenient, and those who voted for life without parole rejected death as too harsh. No juror rejected life without parole as too harsh.³¹¹

The other three options discussed in Part II.A.2 are less likely to be approved by the Court of Appeals. Although Option 2³¹² improves upon CPL section 400.27(10) by allowing the jury to con-

308. *See id.* at 326 (Rehnquist, J., dissenting).

309. *See supra* Part II.A.2.

310. *See supra* note 142.

311. *See* Reply Brief for Defendant-Appellant at 147-48, *People v. LaValle*, 817 N.E.2d 341, (N.Y. 2004) (No. 71), 2004 WL 1352004, at *147.

312. *See supra* Part II.A.2.b

sider a parole-eligible sentence, it remains coercive because it presents the danger that members of a potentially deadlocked jury will vote for death in order to prevent the defendant's parole eligibility. Whereas Option 3³¹³ discards CPL section 400.27(10)'s coercive parole-eligible deadlock sentence, it creates due process issues by imposing life without parole upon deadlock even where most jurors find sufficient mitigating circumstances to warrant a parole-eligible sentence. Although Option 4³¹⁴ does not allow jurors to impose a death sentence without unanimous agreement, the Court of Appeals might find that the heightened need for reliability in a capital case mandates against a sentencing scheme that allows a deadlock sentence to be determined based on a non-unanimous jury vote. While no deadlock instruction should coerce a juror's vote, Option 4 goes too far in the opposite direction by increasing the likelihood of and even encouraging jury deadlock.

New York places importance on giving the defendant the benefit of the doubt, minimizing jury speculation and maximizing the jury's role in fashioning a sentence which is individualized and fair.³¹⁵ Option 1 provides an optimal mix of these considerations by imposing the least severe sentence considered and encouraging the jury to reach a unanimous verdict without fear of deadlock.

E. Abolition is Preferable to Amendment

The public hearings following the *LaValle* decision revealed a general unwillingness to reinstate the death penalty in New York.³¹⁶ The costs of time and money in administering capital punishment seen in New York and nationwide seem too great, especially given the viability of life without parole as a replacement for capital punishment.³¹⁷ The following sections argue that abolishing the death penalty in New York is preferable to amending the statute.

1. Life Without Parole

In debates over the efficacy, efficiency, and expedience of capital punishment, life without parole consistently emerges as a "legitimate alternative to capital punishment embraced by either end of

313. See *supra* Part II.A.2.c

314. See *supra* Part II.A.2.d

315. See *supra* Part II.A.1.

316. See *supra* Part I.F.

317. See *supra* Part II.B.5.

the political spectrum.”³¹⁸ For death penalty opponents, life without parole achieves the same goals as capital punishment, namely deterrence and incapacitation.³¹⁹ Death penalty advocates may also accept life without parole as a satisfactory alternative to capital punishment. Life without parole arguably serves as a marginal deterrent to violent crime.³²⁰ Also, life imprisonment is less expensive than the trial and appeals processes involved in capital punishment.³²¹ Most importantly, life without parole allows the permanent incapacitation³²² of the most dangerous criminals, but can be reversed if a defendant is later proved innocent.³²³

2. *The Federal Prosecution Loophole*

While discussion of the federal death penalty is beyond the scope of this paper, the prosecution of capital cases at the federal level in New York influences the debate as to what action to take regarding the New York State death penalty. Assuming that the public continues to support the death penalty for certain crimes, the possibility that such crimes will be prosecuted and the death penalty sought at the federal level may be an adequate alternative to a state capital punishment statute. State prosecutors could, in certain cases, cede jurisdiction to federal prosecutors who are authorized to seek capital punishment. Federal prosecution might be seen by law-enforcers, politicians, and the public alike as an adequate remedy where they feel that the offender deserves the ultimate punishment of death.³²⁴ Not everyone, however, will support

318. Wright, *Life-Without-Parole*, *supra* note 255, at 533.

319. *See supra* note 255 and accompanying text.

320. *Cf. supra* note 217.

321. *See supra* Part II.B.5.

322. Wright, *Life-Without-Parole*, *supra* note 255, at 557.

323. *Id.* at 558.

324. The use of federal prosecution of capital cases in New York, where state prosecutors are unable to pursue the death penalty, was seen most recently in the case of Ronell Wilson. Wilson was initially charged by the Richmond County District Attorney's Office, in the New York State Supreme Court in Staten Island, for the murder of two local undercover police officers. Following the *LaValle* decision, however, the Richmond County D.A. ceded jurisdiction to the United States Attorney's Office for the Eastern District of New York to ensure that the death penalty was available. *See United States v. Ronell Wilson: State Capital Defenders Assigned to Serve as Learned Counsel in Death Penalty Case*, N.Y.L.J., Feb. 15, 2005, at col. 3; *see also* Press Release, Office of Dist. Attorney, Richmond County, Prepared Remarks of Richmond County District Attorney Daniel M. Donovan, Jr. Regarding Federal Indictments of Stapleton Crew (Nov. 22, 2004), available at <http://rcda.nyc.gov/pressreleases/2004/pr112204.htm>; Press Release, U.S. Attorney's Office, Stapleton Crew Members Indicted for Racketeering Charges Include Murder of Two Undercover Police Officers (Nov. 22, 2004), available at www.atf.gov/press/fy05press/field/112204ny_stapleton.pdf. At-

ceding cases to federal prosecutors in order to “achieve a specific result.”³²⁵ Furthermore, the death penalty is rarely imposed by federal juries in capital cases in New York.³²⁶

3. *Public Opinion*

In discussing the form an amended statute could take, it is important to remember that reinstating the death penalty is contingent on support from both the legislature and the public.³²⁷ The future of capital punishment in New York thus turns on the will of the legislature and, more generally, the will of the people. Reports on public opinion and the relevant votes of the senate and assembly on this issue suggest that today it is unlikely that legislation to amend the death penalty could gain enough votes to reinstate the death penalty.

Public opinion has changed since 1995. The New York Assembly Codes Committee’s report on the 2004-2005 public hearings about New York’s death penalty revealed that many of the witnesses who testified “favored non-restoration or outright abolishment of the death penalty in New York.”³²⁸ This finding is consistent with a public opinion poll published by the New York Times in February 2005 which reflected a decline in public support for capital punishment:

Fifty-six percent of registered voters surveyed said they preferred either life in prison without parole or life in prison with the possibility of parole over the death penalty for people convicted of murder. Only 34 percent said they supported the death penalty, a significant drop from the 47 percent who supported it in 1994 when Mr. Pataki made instituting the death penalty a

torney General Gonzalez ordered the U.S. Attorney to seek the death penalty against Wilson, and a federal jury sentenced Wilson to death. See SUSAN SCHINDLER, *THE DEATH PENALTY TRUMP CARD: U.S. ATTORNEY GENERAL* (2007), <http://www.ny-adp.org/main/enews605> (last visited Sept. 22, 2008); Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission’s Exercise in Abolitionism: A Detailed Reply* 39 (N.Y. Law Sch. Legal Studies, Research Paper No. 07/08-1, 2007), available at <http://ssrn.com/abstract=1002434>.

325. Annese, *supra* note 204. As former District Attorney William L. Murphy said: “We have to operate under the laws within the state of New York.” *Id.*

326. See Schindler, *supra* note 324 (“In the 13 death eligible cases where a Federal jury in New York convicted the defendant, the jury refused to vote for a death sentence.”).

327. See Zimet, *Valid Deadlock Instruction*, *supra* note 128.

328. Murphy, *Cahill*, *supra* note 113, at 1049; see generally JOSEPH LENTOL ET AL., *supra* note 19.

critical component of his successful drive to unseat Gov. Mario M. Cuomo.³²⁹

More recently a 2006 poll showed that fifty-three percent of New Yorkers said they preferred life without parole, while thirty-eight percent supported the death penalty in first degree murder cases.³³⁰

4. *Legislative Will*

The change in public support for the death penalty is reflected within the legislature. It is important to look to the actions taken by the state legislature, which the Supreme Court upholds as “the best objective indicia of public attitude.”³³¹ Although public opinion polls can be useful, their conclusions can be easily misconstrued and altered depending on the questions selected, the form of these questions, the method of participant selection, the sample size, and other factors. The acts of our democratically elected representatives express the “will and consequently the moral values of the people.”³³²

Just as public support for the death penalty has changed since 1995, so has opinion shifted within the legislature. Several members of the New York State Legislature who once supported the passage of a death penalty law in New York have since reconsidered their positions. For example, New York State Assemblywoman Helen E. Weinstein, who was elected to the New York Assembly in 1980 as a death penalty proponent and who voted to enact the death penalty in 1995, decided not to support reenacting the death penalty after the *LaValle* decision. Weinstein reasoned “you cannot draft a death penalty law that does not have the possibility of convicting someone who is innocent.”³³³ Similarly, Assemblyman Joseph Lentol, who is chairman of the Assembly’s Codes Committee that held public death penalty hearings in 2004 and 2005, also reversed his previous support for capital punishment.³³⁴ Lentol, like Weinstein, concluded that the death penalty is too

329. Slackman & Connelly, *supra* note 116 (“The poll, of 1,822 people . . . had a margin of sampling error of plus or minus three percentage points and surveyed 1,481 people who said they were registered to vote.”).

330. DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org> (follow “New York” hyperlink, located halfway down initial chart) (last visited Sept. 21, 2008).

331. Proctor, *Reevaluating*, *supra* note 176, at 229-30.

332. *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972)).

333. Sam Roberts, *Switch by a Former Supporter Shows Evolution of Death Law*, N.Y. TIMES, Feb. 28, 2005, at B1.

334. Stashenko, *supra* note 108.

flawed: "I thought of the law as majestic and that there was very little chance of a mistake . . . [b]ut I've come to realize that no one's perfect, including judges and juries."³³⁵ According to Assemblyman Ron Canestrari of Albany County, who has also withdrawn his support for the 1995 death penalty statute, "there's very little evidence the death penalty has helped New York these 10 years."³³⁶ There seems to be a consensus, at least among members of the assembly, that whatever purposes the death penalty was supposed to serve, they are not served by the current system.

CONCLUSION

The Supreme Court has ruled that capital punishment is not an intrinsic violation of the Eighth Amendment's ban on cruel and unusual punishment.³³⁷ Given that the death penalty is not per se unconstitutional, the decision to have a death penalty rests with the legislature. The Supreme Court has recognized that "the constitutional test [of a capital punishment statute] is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards."³³⁸ Accordingly, it is a legislature's responsibility to pass laws that "respond to the will and . . . the moral values of the people."³³⁹ In New York, votes in the legislature about the death penalty are often close, reflecting the closely divided opinion of the public. Shifting positions taken by the state legislature mirror shifting public views.³⁴⁰ The state legislature is in the best position to communicate its citizens' determination as to the future of capital punishment in New York.

The United States legislative system's assignment of this responsibility to its political representatives has been identified as the method most likely to result in laws that express the will of the electorate. The Supreme Court therefore "relies on legislative acts

335. Michael Powell, *N.Y. Lawmakers Vote not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3.

336. Healy, *supra* note 257.

337. The Supreme Court has consistently held that capital punishment is not in itself a violation of the Eighth and Fourteenth Amendment, but that certain applications of the death penalty have been. In *Gregg v. Georgia*, the Court upheld capital punishment and refused to hold that it is per se "cruel and unusual punishment," effectively ending the debate, started just four years earlier in *Furman v. Georgia*, as to capital punishment's constitutionality under the Eighth Amendment. See *Gregg*, 428 U.S. at 153; *Furman*, 408 U.S. at 238.

338. *Gregg*, 428 U.S. at 175.

339. *Id.*

340. See discussion *supra* Part III.C.2.

. . . when it attempts to gauge American public opinion about the death penalty.”³⁴¹

Given the complex mixture of morals, ethics, questions of effectiveness, questions of equal protection, questions of spending on the death penalty versus spending on prevention, and the intricate swirl of conflicting emotions and personal convictions about this difficult and contentious subject, abolishing the death penalty seems most appropriate. New York’s death penalty statute, CPL section 400.27, rendered inoperable by the Court of Appeals, no longer reflects the results of a reasoned democratic consensus. If capital punishment is no longer a desirable or practical option for New York, the legislature must act to affirmatively abolish the statute.

As Judge Smith observed in his *Taylor* concurrence, by acting to either amend or repeal the death penalty statute, the legislature “would bring the capital punishment issue back into the realm of democratic decision-making, where it belongs.”³⁴² This decision should reside with the legislature.

341. Proctor, *Reevaluating*, *supra* note 176, at 213 n.16 (“Although poll results are closer to the primary source and thus intuitively reliable, the Court identifies legislative acts as the most objective, dependable indicator of national consensus.”).

342. *People v. Taylor*, 878 N.E.2d 969, 987 (N.Y. 2007) (Smith, J., concurring).

