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Constitutional Concerns About Capital Punishment: The Death Penalty Statute in New York State

By Richard Klein, Esq.*

INTRODUCTION

On September 1, 1995, a New York State statute became effective that provided for the death penalty¹ for a newly enacted section of the N.Y. Penal Code of Murder in the First Degree.² By adopting the death penalty, New York became the thirty eighth state (along with the Federal Government)³ to allow for the execution of individuals convicted of murder. No one has received the death penalty in New York since 1963.

New York law has long provided for a death penalty; as early as 1655 a death sentence could be inflicted for such crimes as stealing a fence for the second time.⁴ The First Deputy Capital Defender of New York has stated that New York ranks first among all states for the highest number of people whose innocence was unquestionably proven after their executions.⁵ Hanging was the first method used by the state, but in 1888 the electric chair became the means of

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1. N.Y. PENAL LAW § 60.06 (McKinney 1995). The Criminal Procedure, Correction, Judiciary, County and Executive Laws were all amended by the death penalty legislation.

2. N.Y. PENAL LAW § 125.27 (McKinney 1995).

3. See John Milgrim, *Jury to Weigh Upstate Federal Death Penalty Law*, 215 N.Y.L.J. 1 (1996). Since the 1988 "drug kingpin" federal death penalty statute, only eight individuals have been actually sentenced to death row. *Id.* at 1.

4. Abraham Abramovsky, *The Death Penalty: An Unnecessary Measure*, 212 N.Y.L.J. 3 (1994).

5. *Going Through the Motions*, WOODSTOCK TIMES, February 15, 1996, at 12 (Statement of Randy Treece, first deputy capital offender).

state-dictated death.⁶ The newly-enacted statute calls for death to be accomplished by the more "humane" means of "intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead."⁷ This article will first provide a background and overview of Supreme Court death penalty decisions, and then examine the New York case law. The new statute will then be analyzed and the probable challenges to the constitutionality of the law will be discussed and assessed.

I. SUPREME COURT DECISIONS REGARDING CONSTITUTIONAL CHALLENGES TO CAPITAL PUNISHMENT

The first major Supreme Court case which substantially impacted upon death penalty legislation was the 1972 case of *Furman v. Georgia*.⁸ Prior to *Furman*, there had not been a Supreme Court ruling as to whether or not the death penalty statutes that were then in place in forty-one states constituted cruel and unusual punishment.⁹ The court had just one year prior to the

6. N.Y. LAWS § 489(5) (1888). Also known as the Electrical Execution Act of 1888, it was enacted in response to the recommendation of the Gerry Commission. The Commission examined different methods of execution (guillotine, garrote, shooting and hanging) and found electrocution to be the most "potent" agent known for the "destruction of human life." *Id.*; see generally Michael Madow, *Forbidden Spectacle: Executions, the Public, and the Press in 19th Century New York*, 43 BUFF. L. REV. 461 (1995); see also *In Re Kemmler*, 136 U.S. 436 (1890) (electrocution held unconstitutional).

7. N.Y. CORRECT. LAW § 658 (McKinney 1995). The State has had difficulty determining the location for the infliction of the death penalty. The initial site chosen -- in Chemung County, near the upstate city of Elmira-- was changed to an as yet to-be-determined facility because the community in Chemung County was concerned that the "death house" might have a negative impact on economic development in the area. *Death Chamber Won't Be in Elmira Bad for the Economy*, DAILY FREEMAN, March 25, 1995, at 4.

8. 408 U.S. 238 (1972).

9. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*,

Furman decision, when considering a claim that the imposition of the death penalty was in violation of the due process clause, held that "committing to the untrammelled discretion of the jury the power to pronounce life or death is not offensive to anything in the Constitution".¹⁰ The Court's decision in *Furman* constituted 243 pages¹¹, with each Justice writing separately. There was a one sentence *per curiam* opinion that simply stated that, "The imposition and carrying out of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹² However, the Court made it clear that it was not making a decision based on whether or not the death penalty was *per se* cruel and unusual punishment, but only on the way it was actually imposed in the three state statutes that were before it.¹³

The Justices based their holdings primarily upon the premise that the death penalty, in each state, was imposed in an arbitrary manner.¹⁴ As Justice Stewart put it, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual, it's just done randomly."¹⁵ Justice Douglas lamented that, "People live or die dependent upon the *whim* of one man or of twelve."¹⁶ There had been no guidelines or restrictions as to who was to get the death penalty. Rather, the individual state and sentencing authority was free to give it in one case and not to give it in another case.¹⁷ For instance, the Georgia statute that was

28 ARIZ. L. REV. 143 (1986); See also Mark Tushnet, *Constitutional Issues: The Death Penalty* (1994).

10. *McGautha v. California*, 402 U.S. 183, 207-208 (1971).

11. *Id.*; see also B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* 220 (1979). The *Furman* case is the longest Supreme Court decision ever written, with each of the nine judges giving separate opinions. *Id.* at 220.

12. *McGautha*, 402 U.S. at 240.

13. *Id.* at 311. Justice Brennan and Marshall did declare that they viewed the death penalty *per se* to be unconstitutional. *Id.* at 270. Brennan opined that a death sentence does "not comport with human dignity", *Id.* at 363, and Marshall declared that the penalty was excessive, unnecessary and immoral, *Id.* at 363.

14. *Id.* at 310.

15. *Id.* at 309 (Stewart, J., concurring)

16. *Id.* at 253 (emphasis added).

17. See *id.* at 255-257

the primary focus of the Court read, "The punishment shall be death unless the jury recommends mercy, in which event, punishment shall be imprisonment for life."¹⁸ There were no other specifications to indicate who should get the death penalty and who should not. If there was any rhyme or reason for the sentences given, the one factor that seemed to determine the outcome in some cases was the race of the defendant -- clearly an impermissible factor.¹⁹ This consideration was influential in the Supreme Court's holding that, at this point in the history of the United States, the death penalty was unconstitutional.²⁰

As a result of the *Furman* decision, all death sentences ceased after 1972.²¹ As states rushed to rewrite their statutes in an attempt to comply with the Court's holding, the Model Penal Code ("MPC") formed a basis-- a model-- for states to formulate their own statutes.²² The MPC approach included some aggravating factors (which might warrant the use of capital punishment) and mitigating factors (which would oppose the use of capital punishment) in determining whether or not the death penalty would be imposed.²³ Examples of aggravating factors included: especially cruel and heinous murders; a defendant's prior conviction of a violent felony and/or homicide; a murder which was committed while the defendant was engaged in the commission of a violent felony; a murder which was committed by a convict under sentence of imprisonment; and multiple murders occurring at the time of the killing.²⁴ A majority of these aggravating factors are now enshrined in state statutes and, in essence, maintain that these murders are worse than the "average, run of the mill" murders and are, therefore, appropriate for the death penalty. The MPC specifically

18. *Id.* at 309.

19. *Id.* at 250.

20. *See id.* at 240-241.

21. *See generally* Carole S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357 (1995).

22. MODEL PENAL CODE § 210.6 (McKinney 1980) (The MPC's death penalty statute had actually been in existence since 1959).

23. MODEL PENAL CODE § 210.6(3)(h) (McKinney 1980).

24. *Id.*

listed mitigating circumstances as well.²⁵ Perhaps the most significant factors to be considered in mitigation were the defendant's lack of prior criminal activity, whether the defendant acted under extreme mental and/or emotional disturbance, and whether the defendant's actions, when an accomplice to a murder which was committed by another, were considered to be minor.²⁶

By 1976, four years after the *Furman* decision, the Court was ready to look at the new statutes that had been passed by states in response to the *Furman* decision.²⁷ The Court held in *Gregg v. Georgia* that the death penalty was not *per se* cruel and unusual punishment.²⁸ The Court ruled that "the social utility of the death penalty requires us to conclude in the absence of more convincing evidence that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."²⁹ The Georgia statute that was before the Court had two protections for separating those who could get the death penalty from those who could not. The first were categories of aggravating³⁰ and mitigating³¹ factors similar to those in the MPC. The other was mandatory appellate review of death penalty sentences to determine whether or not the convictions were warranted and whether or not the aggravating and mitigating circumstances were being correctly applied.³²

One year after the *Gregg* case was decided, the Supreme Court in *Coker v. Georgia*³³ ruled that the death penalty for a rape conviction would not be constitutional; the rape had not resulted in

25. MODEL PENAL CODE § 210.6(3) (McKinney 1980).

26. *Id.*

27. *Furman*, 408 U.S. at 238, 417(1972) (Powell, J., dissenting). Thirty five states had as of 1976 enacted statutes providing for the death penalty. The effect of *Furman* had been to strike down 39 of the 40 state statutes which had provided for the death penalty. Rhode Island was the only state's statute that was not impacted upon by *Furman*. *Id.* at 417.

28. 428 U.S. 153 (1976).

29. *Id.* at 186.

30. MODEL PENAL CODE, *supra* note 23, at 4.

31. MODEL PENAL CODE, *supra* note 23, at 4.

32. *Gregg*, 428 U.S. at 195.

33. 433 U.S. 584 (1977).

the death of any individual and the death penalty as a sentence would therefore be excessive and disproportionate.³⁴ The *Coker* decision has been interpreted to mean that the only time the death penalty will not be deemed cruel and unusual punishment is when someone intentionally takes the life of another.³⁵

The next important Supreme Court decision was the 1978 case of *Lockett v. Ohio*.³⁶ Here, the Court held that *any* relevant, mitigating factor which the judge and jury might wish to consider upon sentencing had to be admissible.³⁷ In other words, a state statute could not limit the range of mitigating factors. As a result, a death penalty statute had to encompass a broad, catch-all provision permitting the defendant to introduce into evidence any appropriate material relating to either the circumstances of the offense or to the background of the defendant.

Certainly one of the most controversial cases of the Court in recent years was the 1987 case of *McCleskey v. Kemp*.³⁸ In *McCleskey*, an African-American male had killed a white police officer during an armed robbery and was, as a result, convicted and sentenced to death. The defense's expert witness, David C. Baldus, testified to a statistical study conducted in Georgia which found that when the race of the victim was white, the defendant was eleven times more likely to get the death penalty than if the victim was black.³⁹ Additionally, in cases where the defendant was black and the victim was white, there was a twenty-two times greater likelihood of the black defendant getting the death penalty than

34. 433 U.S. at 592 (plurality opinion).

35. The lone exception or weakening of that ruling, perhaps, was in 1987, when the Supreme Court held in *Tison v. Arizona* that the death penalty could be available if the defendant has caused the death of someone else, not intentionally, but rather through reckless indifference for human life. 481 U.S. 137 (1987). For the most part, however, the death penalty was indeed reserved for those who have caused and who have committed an intentional murder. *Id.* at 158.

36. 438 U.S. 586 (1978) (plurality opinion).

37. *Id.* at 605.

38. 481 U.S. 279 (1987).

39. *Id.* at 286. Over 2,000 murder cases in Georgia were surveyed. *Id.*; see also Baldus, Pulaski & Woodworth, *infra* note 85, at 13 (blacks who kill whites are more likely to go through the system than if the victim was black).

when a white individual had killed a black individual.⁴⁰ In his final analysis, Baldus asserted that had McCleskey killed a black individual instead of a white individual, given all the other factors of the case, he would not have gotten the death penalty in Georgia.⁴¹

Despite such remarkable statistics in support of the equal protection and due process claims, the Supreme Court held that the Georgia death penalty statute was constitutional.⁴² The Court went on to state that although the statistical evidence might be valid and was done in an appropriate manner, imperfections in statistics are inevitable and some degree of inequality is inherent in our criminal justice system.⁴³ It would be unreasonable, the Court concluded, to expect any death penalty system not to have some kind of bias. Furthermore, the bias shown by these statistics did not constitute a *constitutionally unacceptable* risk of racism influencing the death penalty decision making process.⁴⁴ The Court decided to tolerate the possibility of prejudice and strangely concluded that some risk of bias was Constitutionally permissible.⁴⁵

A second rationale on which the Court based its decision was the "floodgate theory."⁴⁶ The Court explained that if it were to react to statistics that focus on the race of the victim, there would be challenges not just in death penalty cases, but in all kinds of cases which might show that when the victim of a crime was white the defendant would get sentenced to a greater number of years than if the victim were black.⁴⁷ The Court was just not willing to open up

40. *Id.* at 327.

41. *Id.* at 325. In support of his claim, Baldus proffered a highly reliable statistical study which indicates that, after taking into account some 230 non-racial factors that might legitimately influence a sentence, the jury more likely than not would have spared McCleskey's life had his victim been black. *Id.*

42. *Id.*

43. *Id.* at 292.

44. *Id.* at 313.

45. *Id.*; See Ursula Bentele, *The Death Penalty in New York: Past, Present...Future?*, Edward V. Sparer Public Interest Law Forum, Brooklyn Law School, March 9, 1995, 4 J.L. & Pol'y 73, 77 (1995).

46. *McCleskey*, 481 U.S. at 314.

47. *Id.*

this whole "can of worms". Justice Brennan's dissent bitterly characterized this concern as a "fear of too much justice".⁴⁸

Much of the criticism surrounding the *McCleskey* decision has focused on the Court's tolerance of bias within the criminal justice system. The dissent concentrated on the fact that, once again, this dual system of justice, where race enters into the decision of who gets the death penalty and who doesn't get the death penalty, is alive and well and is even being sanctioned by the Court.⁴⁹ In a recent biography of Justice Powell, the Justice was asked, "What opinion of yours do you most regret?" His answer was, "The *McCleskey* opinion."⁵⁰ He was then asked, "What opinion would you most like to change of yours?" Once again he replied, "*McCleskey*".⁵¹

The 1994 case of *Callens v. Collins* highlighted the metamorphosis of Justice Blackmun's opinion on capital punishment.⁵² A believer in the death penalty for much of his career,⁵³ Justice Blackmun found that he was forced to conclude that the death penalty experiment in this country had failed.⁵⁴ "I have had enough," he said. Blackmun continued:

From this day forward, I shall no longer tinker with the machinery of death. For more than twenty years I have endeavored indeed, I have struggled along with the majority of the Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. The problem is that the inevitability of factual, legal, and moral error

48. *Id.*

49. *Id.* at 343-345.

50. See *Supreme Court: Cable T.V. Regulations Review Ordered; Other Developments*, FACTS ON FILE, July 21, 1994; See Marcia Coyle, *Powell Recants Death Penalty View*, NAT'L L.J., June 13, 1994, A 12 (col. 1) [hereinafter Coyle].

51. See *Supreme Court*, *supra* note 50, at 8.

52. 510 U.S. 1141, 1143 (1994).

53. For example, Blackmun joined with the majority in *Gregg* to uphold the constitutionality of the Georgia death penalty statute.

54. *Callins*, 510 U.S. at 1145.

gives us a system that we know must wrongly kill some defendants.⁵⁵

Presently, we are left with a situation that might not make a great deal of sense. On the one hand, we have the Court holding in *Furman* that unfettered and unlimited discretion by a judge or jury is not permissible.⁵⁶ Subsequent to *Furman*, however, the Court in *Woodson v. North Carolina*⁵⁷ and *Roberts v. Louisiana*⁵⁸ held that a state's mandatory death penalty statute that neither provides discretion nor considers the individual circumstances of the defendant, is also unconstitutional.⁵⁹ The only thing that was permissible was a happy medium, a guided type of discretion limiting the amount of, but still mandating, the use of discretion. However, the Supreme Court in *Lockett v. Ohio* held that the jury that does the sentencing has to be able to consider *any* factor whatsoever.⁶⁰ The problem with this decision is that it creates a cycle that eventually leads us back to the way things were in *Furman*. If you allow a jury to consider *whatever* factors they feel are proper in mitigation, and thereby permit leniency and unlimited mercy, then the jury is, once again, basically free to give someone the death penalty in one case and not give a different individual the death penalty in another comparable instance. The power to be lenient may also be the power to discriminate.

II. THE DEATH PENALTY IN NEW YORK

The first significant case dealing with the New York death penalty statute after the *Furman*⁶¹ decision was *People v.*

55. *Id.*

56. *Furman*, 408 U.S. at 238.

57. 428 U.S. 280 (1976).

58. 428 U.S. 325 (1976).

59. *Id.* at 304.

60. *Lockett*, 438 at 604; *see also* *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (Supreme Court held death sentence to be vacated because state court refused to consider mitigating circumstances).

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

Fitzpatrick.⁶² The New York statute had given absolute discretion to the jurors to determine who should be put to death,⁶³ and the New York Court of Appeals held that statute to be unconstitutional because of the *Furman* decision.⁶⁴ The legislature proceeded to rewrite the death penalty law, this time including a portion that called for the *mandatory* death penalty for the killing of a police officer or for a guard in a correctional facility.⁶⁵ The Court of Appeals in *People v. Davis* held this rewritten statute to be unconstitutional because members of the jury lacked the ability to consider any mitigating factors.⁶⁶

The one part of the 1974 statute that wasn't dealt with in *Fitzpatrick*, and the one part of many state statutes that the Supreme Court hadn't responded to, concerned "lifers."⁶⁷ What about inmates who kill someone while incarcerated and serving a life sentence; isn't this different? Doesn't this permit a mandatory death penalty? If not, how can you deter these people? If all they could get is more jail time, and they are already sentenced to a maximum of life in prison, they simply won't be deterred from committing a murder because they have nothing to lose. The U.S. Supreme Court had specifically left unresolved the question of whether a mandatory death sentence is appropriate when dealing with "lifers."⁶⁸ The New York Court of Appeals in *Davis* had not

62. 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973), *cert. denied*, 414 U.S. 1033 (1973).

63. N.Y. PENAL LAW, former § 125.30, § 125.35.

64. *Fitzpatrick*, 32 N.Y.2d at 512-513, 300 N.E.2d at 145, 346 N.Y.S.2d at 802.

65. N.Y. PENAL LAW § 125.27 (McKinney 1974); *See People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977). Taken together, § 125.27 and § 60.02 proscribe the sentence of death for anyone killing a police officer in the line of duty or an employee in a correctional facility. *Id.* at 29-30.

66. 43 N.Y.2d 17, 32, 371 N.E.2d 456, 400 N.Y.S.2d 2d 735, 743 (1977).

67. "Lifers" are convicts who are sentenced to life imprisonment.

68. Vivian Berger, "Black Box Decision" on Life or Death--If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 Case W. RES. L. REV. 1067, 1092 (1991) [hereinafter Berger] ("Several times, the Court expressly reserved the issue whether a mandatory death sentence could be justified in the case of an inmate convicted of murder while serving a sentence of life imprisonment.")

touched upon that provision either.⁶⁹ However, the Court of Appeals in *People v. Smith* held that there had to be consideration of *individualized* sentencing and that you cannot have a mandatory death penalty statute even when you are dealing with people who are serving the rest of their life in prison.⁷⁰ The Court therefore struck down the one remaining provision of the New York State statute in 1984.⁷¹ There was no subsequent capital punishment statute until Governor Pataki signed the current law in 1995.

III. CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY IN NEW YORK STATE

The New York death penalty statute is a very well crafted one. It reflects a careful consideration of Supreme Court decisions and precedents, and is unlikely to be deemed unconstitutional by the Supreme Court.⁷² That, however, does not close the books on the death penalty dilemma. Generally, a state's highest court is completely free to give more civil rights, more liberties, and more protections under their state constitution than the U.S. Supreme Court might choose to allow under the U.S. Constitution.

Initially in this country, only the states' highest courts would look at constitutional challenges to legislation.⁷³ It wasn't until the

69. *Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973), *cert. denied*, 414 U.S. 1033 (1973).

70. 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984). (Court held a mandatory death penalty provision unconstitutional under the Federal Constitution); *See Sumner v. Shuman*, 483 U.S. 66 (1987) (the Supreme Court similarly found that a mandatory death penalty for "lifers" who kill was unconstitutional).

71. *Id.*

72. An example of the "liberality" of the law is the provision that to receive the death penalty one must have been over the age of eighteen at the time of the commission of the crime, even though the Supreme Court has held that it is constitutional to impose the penalty on those who were merely sixteen. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *But see Thompson v. Oklahoma*, 487 U.S. 815 (1988) (death penalty may not be imposed on a fifteen year old).

73. Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1487-1489 (1990) (The U.S. Supreme Court dominated constitutional interpretation throughout

Supreme Court held the Eighth Amendment applicable to the states through the Fourteenth Amendment's due process clause, that the review of state legislation on a federal level occurred.⁷⁴ However, there is now a definite, growing trend to request that a state's highest court look at state legislation to examine whether it is violative of the state's constitution.⁷⁵ In *Smith*, the New York Court of Appeals commented that "In view of our conclusion that New York's statute contravenes the Federal Constitution, we do not reach the issue of the State Constitution's similar prohibition of cruel and unusual punishment..."⁷⁶ This is a clear indication that the Court might well find New York's new death penalty statute constitutional under the United States Constitution, but then, once that is determined, the Court will apply a more rigid consideration of the statute's validity under the state constitution. Even though the state constitution's language prohibiting cruel and unusual punishment mirrors that of the U.S. Constitution, clearly the New York Court of Appeals could find that in New York, a statute providing for the death penalty is inherently cruel and unusual punishment.

The California Supreme Court⁷⁷ and the Massachusetts Supreme Judicial Court⁷⁸ have found that under their state constitutions, their death penalty legislation did constitute cruel and unusual punishment. All of the judges currently sitting on the New York State Court of Appeals are appointees of a Democratic governor who has consistently vetoed the death penalty.⁷⁹ This will change,

most of the 20th century. During this period, state courts were essentially forced out of the business of interpreting their own constitution).

74. *Id.*

75. *Id.* at 1490.

76. 63 N.Y.2d at 78-79, 468 N.E.2d at 898, 479 N.Y.S.2d at 725.

77. See *People v. Anderson*, 6 Cal.3d 628, cert. denied, *California v. Anderson*, 406 U.S. 958 (1972).

78. *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (Mass. 1980). Subsequent to these decisions, amendments to the states' constitutions re-established the death penalty. See James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitution*, 42 VAND. L. REV. 1299, 1331 (1989).

79. See Marc Humbert, *For 18 years, Carey and Cuomo Struck Down Death Penalty Bill*, The Associated Press Political Service, March 5, 1995,

however, as of January 1, 1997 when the first Judge appointed by Governor Pataki will join the Court.⁸⁰

The current administration of Governor George Pataki has emphasized the deterrent effect of the death penalty.⁸¹ This rationale for the death penalty may well place a burden on state prosecutors to show that there is a greater deterrence that comes from a death penalty sentence than would come from life without parole.⁸² This presents two problems. The great number of studies about the possible deterrent effect of capital punishment has failed to reach any consensus about the deterrent effect of the death penalty. Moreover, since New York State has never previously had a statute providing for a sentence of life without parole,⁸³ it is impossible to assess how much of a deterrent effect such a sentence would have independent of a death penalty provision.

available in WESTLAW, 1995 WL 6711116. Mario Cuomo vetoed death penalty legislation twelve times. *Id.*

80. In April of 1996, Judge Richard Simons announced his retirement from the Court. Governor Pataki will therefore have the opportunity to appoint an individual who clearly supports the death penalty statute. The selection process provides for the selection of up to seven finalists to be presented to the Governor by a panel of twelve experts appointed jointly by the Legislature, Chief Judge Judith Kaye, and the Governor. "*Pataki Gains Pick as Court Loses Judge*, New York Times, April 6, 1996 at 28. One of Governor Pataki's top advisers on judicial matters has said that the Governor will choose someone who has a "respect for the fact that there are difficult questions of public policy that are better made in the Legislature than the Judiciary." *Id.*

81. N.Y. CORRECT. LAW, ART. 22-B (McKinney 1995) (Historical and Statutory Notes). Governor Pataki stated, as he signed the death penalty statute in to law, that:

The citizens of New York State have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. The citizens of New York State are convinced the death penalty will deter these vicious crimes and I, as their Governor, agree.

Id.

82. Edward A. Adams, "Prosecutors Want Death Penalty: Half of DA's are Not Persuaded that Penalty is a Deterrent", 214 N.Y.L.J. 1 (1995) [hereinafter Adams]. In fact, one half of the district attorneys throughout the state do not believe that the death penalty would deter crime. *Id.* at 1.

83. See N.Y. PENAL LAW, *infra* note 100, at 16.

On September 1, 1995, the new crime of murder in the first degree took effect.⁸⁴ Murder in the first degree may occur in one of in three different circumstances: (1) by the status of the victim: if the victim was a police officer, correctional officer, or a prospective witness against the defendant in a criminal proceeding, or if there were multiple victims; (2) by the status of the defendant: if the defendant was previously convicted of murder, if the defendant has two prior designated felony convictions, or if the defendant was serving a life sentence at the time; (3) by the type of crime: contract killings, serial murders, or if during the course of a violent felony or flight therefrom, the defendant had killed someone.⁸⁵ Approximately eighty percent of the death penalty sentences imposed in this country arise from a killing which is an outgrowth of the commission of a felony.⁸⁶

The New York Criminal Procedure Law now provides for what is commonly characterized as "death-qualified" jurors in a capital punishment prosecution.⁸⁷ Only those who in good conscience would be able to impose a sentence of death in an appropriate case are able to sit as jurors for the guilt phase of the trial as well as for the sentencing segment.⁸⁸ The Supreme Court has ruled that the

84. N.Y. PENAL LAW § 125.27 (McKinney 1995).

85. Murder committed during the course of a felony is not to be confused with the "felony murder" provisions of second degree murder. N.Y. PENAL LAW § 125.25(3). To constitute murder in the first degree, the murder committed during the course of a felony must have been intentional and either actually committed by the defendant or ordered by the defendant. N.Y. PENAL LAW § 125.27. N.Y. PENAL LAW § 125.25 is unaffected by the new Murder in the First Degree statute.

86. David C. Baldus, Charles A. Pulaski, Jr. & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138 (Spring 1986) [hereinafter Baldus, Pulaski & Woodworth].

87. N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1995) (providing for a challenge to a juror if his/her views would preclude him/her from "rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law in the determination of a sentence [of death]"); see also Russel Neufeld, *Problems Defending Under New York's New Death Penalty Law*, 4 J.L. & Pol'y 143, 144-145 (1995).

88. See N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1995). Similarly, if a potential juror would not consider any mitigating evidence and vote for the

requirement that jurors be death-qualified does not violate the U.S. Constitution,⁸⁹ even though such jurors tend to be more prosecution-oriented than the public at large, give less weight to the presumption of innocence, and are inclined to be more accepting of police officer testimony. The New York Court of Appeals may well find that the defendant's due process rights, under the state constitution, are violated by requiring that all jurors sitting to determine the guilt or innocence of a defendant be "death-qualified."

In addition to the general due process concerns that arise from requiring juries to be death-qualified, in New York there is an additional element. Surveys have shown that African-Americans, Hispanics and women tend to be more strongly opposed to the death penalty than the population at large.⁹⁰ The trial jury, therefore, is not likely to be as reflective of those groups as would more typically be the case. There may not be the cross-section of the community that is required, and where the defendant is a member of a minority, he or she may be denied a jury of his or her peers.

New York could have, and perhaps should have, chosen to have the jury for the trial phase selected in the normal manner with the standard criteria to be used for granting challenges for cause.⁹¹

death penalty in a capital case, that juror is to be excluded. Neufeld, *supra* note 86, at 14.

89. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *see also* *Wainwright v. Witt*, 469 U.S. 412 (1985) (The Court held that although a juror can't be challenged for cause solely on the basis of his or her views on the death penalty, if those views "substantially impair the performance of his or her duties as a juror in accordance with his instructions and his oath," such a challenge would be allowed).

90. *See* Robert J. Robinson, *Irreconcilable Differences: Yet More Attitudinal Discrepancies Between Death Penalty Opponents: A California Sample*, 22 PEPP. L. REV. 1365 (1995).

91. N.Y. CRIM. PROC. LAW § 270.15(2)-(4) (McKinney 1995); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1995); N.Y. CRIM. PROC. LAW § 360.25 (McKinney 1995). An additional departure in the new statute regarding the jury selection process in a capital case is the possibility of sealing the record of the voir dire process. Hopefully, the sealing of the record would lead to increased openness and honesty by prospective jurors in their response to counsel's

Then, were there to be a conviction, a second jury which would be death-qualified could have made the determination whether or not the death sentence would be appropriate. The current statute, by mandating that the same jury sit for both the trial and sentencing phase absent some showing of "extraordinary circumstances" and "good cause", has established the need for the initial trial jury to be death qualified.⁹²

The New York statute does, however, provide that before the trial jury can begin to consider sentencing after reaching a verdict of guilty of murder 1, each juror must be individually questioned by the judge, outside the presence of the other jurors, to ascertain whether the juror has the "state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding".⁹³ If the judge were to conclude that any juror did have such a state of mind, the juror is to be discharged and replaced by one of the alternates who sat for the trial testimony.⁹⁴

The concern is not, however, just the denial of the due process rights for the defendant. There is also the issue of the equal protection claim for those groups that may be excluded from serving as jurors in death penalty cases. The Supreme Court has held that the exclusion of certain groups from being able to sit as jurors is a violation of their equal protection rights.⁹⁵ Even though

questioning. One would also expect that in accordance with C.P.L. § 270.15 the court will make extensive use of written questionnaires of prospective jurors.

92. The Supreme Court has not required that there be separate trial and sentencing stages. In *McGautha v. California*, 402 U.S. 183 (1971), the Court did state that bifurcated trials constituted a superior mechanism for capital cases, but that there was no constitutional mandate for such bifurcation. *See id.* at 221. The primary advantage of separate guilt and sentencing determinations is that the defendant who chooses to exercise his Fifth Amendment right and not testify at the guilt phase will then be able to testify at the sentencing stage. *Id.*

93. *See* N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney 1995).

94. *See* N.Y. CRIM. PROC. LAW § 270.30(1) (McKinney 1995) (The Court has the discretion to have as many alternates selected as is deemed appropriate; the number is not limited to six as is generally the rule).

95. *Strauder v. West Virginia*, 100 U.S. 303 (1879); *see also* *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Castaneda v. Partida*, 430 U.S. 482 (1977).

in the New York death-qualified scenario there is not a total exclusion of any racial, ethnic or gender group, the *de facto* bias against these groups may be of constitutional dimension.⁹⁶

The composition of a jury is of extreme importance in the New York scheme for it is the jury alone that determines if there is to be a death sentence.⁹⁷ Whereas in some states the jury merely makes a recommendation to the court that the court may choose to follow or ignore,⁹⁸ in New York the jury determination controls.⁹⁹ There is no provision for an independent determination to be made by the judge; the judge cannot say "I've heard the jury's recommendation, but I don't think that death is the appropriate sentence in this instance."¹⁰⁰

An important feature of the new statute is the provision, for the first time in New York, for the sentence of "life without parole."¹⁰¹ The jury, upon finding the defendant to be guilty of murder in the first degree must then determine if the appropriate sentence is to be death, or life without parole. The jury must weigh the aggravating factors¹⁰² against any mitigating factors presented by the defendant and only if the jury unanimously and beyond a reasonable doubt

96. See O'Connor, *New York's Death Penalty Law: An Overview*, PUB. DEF. BACKUP CENTER REP., March/April 1995, at 4, 5 [hereinafter O'Connor].

97. See N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 1995). Whereas the maximum number of alternate jurors permitted to sit had previously been set at six, C.P.L. § 270.30(1) now gives the judge in a capital case discretion to select as many alternates as are deemed appropriate.

98. Baldus, ET AL., *supra* note 85, at 13.

99. The Supreme Court in *Spaziano v. Florida*, 468 U.S. 447 (1984), held that the defendant does not have a constitutional right to a jury determination of the appropriate sentence in a capital case. However, in *Proffitt v. Florida*, the Court acknowledged that jury sentencing "can perform an important societal function." 428 U.S. 242, 252 (1976); see also C.P.L. § 400.27(10).

100. The "verdict" which results from the sentencing deliberations is subject, as are all verdicts, to the provisions of § 330.30 of Criminal Procedure Law, relating to motions to set aside verdicts; see also N.Y. CRIM. PROC. LAW. § 440.20(1) (McKinney 1995) (providing additional grounds for setting aside a sentence of death).

101. N.Y. PENAL LAW § 70.00(5) (McKinney 1995).

102. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995) (In the New York statute, each of the circumstances which defines first degree murder in § 125.27(a) of the Penal Law is an aggravating factor).

determines that an aggravating factor or factors substantially outweigh the mitigating factors, can the jury determine that death is the appropriate sentence.¹⁰³ Upon reaching its verdict, the jury must specify the aggravating and mitigating factors that it considered.¹⁰⁴

A problem in the New York statute is presented by what the judge is required to say to the jurors before they are to begin deliberations on the possible sentence. The court must instruct the jurors that if they fail to reach a unanimous verdict, then the court *must* sentence the defendant to a prison term which will permit the defendant to be paroled.¹⁰⁵ The constitutionality of such a required instruction to the jury has never been considered by the United States Supreme Court, and an argument is certain to be made that the instruction may in some way coerce jurors who don't think the death penalty sentence is appropriate to nevertheless agree to such a sentence. The defendant has just been convicted of murder in the first degree and if a juror knows that the defendant may be paroled should the jury fail to reach a unanimous decision and that unanimity for a sentence of only life without parole is unattainable, the juror who does not believe that the aggravating factors outweigh the mitigating, may nevertheless conclude that the only way to ensure that the defendant will not face society as a free man will be through the imposition of a death sentence.¹⁰⁶

Another odd aspect of the sentencing provisions of the statute is that were the jury to determine that the defendant should serve a

103. See, e.g., CONN. GEN. STAT. § 53(a) (1983) (Some states prohibit the death sentence if one or more mitigating factors are found to exist.); C.P.L. § 400.27(11)(a).

104. N.Y. CRIM. PROC. LAW § 400.27(11). There are only two aggravating factors which the jury can consider at the sentencing phase which were not part of the prosecution's case at the guilt phase: 1) the defendant's commission of two prior designated felonies within ten years preceding the first degree murder; and 2) whether the murder was a result of a premeditated act of terrorism. *Id.*; see also N.Y. CRIM. PROC. LAW § 400.27(a) and (b) (McKinney 1995).

105. N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 1995).

106. The judge cannot sentence a defendant convicted of murder in the first degree where the jury has not unanimously determined either the death penalty or life without parole to be the appropriate sentence to anything other than an indeterminate sentence of between twenty and twenty-five years to life. *Id.*

substantial prison term but then be eligible for parole, the jury cannot make this recommendation to the judge. The statute provides no such option for the jury. Only if the jury were to be deadlocked and divided as to whether the death penalty or life without parole was appropriate, can the judge then impose the indeterminate sentence providing for the possibility of parole after the defendant serves the minimum of twenty years in prison.¹⁰⁷

Furthermore, a major argument might also be that the statute, as actually carried out, is arbitrary and in direct conflict with the holdings in *Furman* and *Gregg*. This challenge may arise due to the philosophical differences that exist among the District Attorneys in different jurisdictions and geographic locations. For instance, Robert Johnson, the Bronx District Attorney, has made it clear that at this point in time, he is not likely to seek the death penalty in any case.¹⁰⁸ Mr. Johnson's personal decision is well within his power because the statute provides District Attorneys with the discretion to seek the death penalty or not.¹⁰⁹ What this means on a statewide level, however, is that perhaps there is a degree of arbitrariness in who gets the death penalty and who does not.¹¹⁰ If two defendants are similarly situated and commit the same type of murder, but one person happens to do it in the Bronx and the other does it a half a mile away in Westchester County

107. N.Y. CRIM. PROC. LAW § 400.27(11)(c) (McKinney 1995).

108. On March 7, 1995, the date that Governor Pataki signed the new legislation, Johnson stated that, "It is my present intention not to utilize the death penalty provisions of the statute." *Death Penalty Raises Issue of Obligation of Prosecutor*, N.Y. TIMES, March 17, 1996 at 33; See also Neufeld, *Problems Defending Under New York's New Death Penalty Law*, 4 J.L. & Pol'y at 145, FN 8; see also Daniel Wise, *DA's on the Death Penalty, Prosecutors Want Death Penalty, Qualms Voiced About Costs, Time, Training of Lawyers*, 213 N.Y.L.J. 1 (1995); see also *How the Survey was Conducted*, 213 N.Y.L.J. 12 (1995). A phone survey of 56 of the state's 62 D.A.'s was conducted by the New York Law Journal to discover their views on the death penalty. Questions included their personal views on the death penalty and whether they would seek it for eligible crimes in their jurisdictions. *Id.*; see also Joseph Dolman, *New York Newsday Interview with Robert Johnson The Bronx D.A. Who Says No*, N.Y. Newsday, March 16, 1995, at A33.

109. N.Y. CRIM. PROC. LAW § 250.40 (McKinney 1995).

110. Daniel Jeffreys, *New York Invites its Murderers to Take a Seat*, THE INDEPENDENT, August 31, 1995, at 4-5.

where the D.A. is very pro-death penalty, the latter defendant is going to get the death penalty and the former is not. Therefore, because of the geographic disparity, there might very well be a strong argument made that the N.Y. statute does not have the kind of consistency in the application of the death penalty that was mandated in *Furman* and *Gregg*.¹¹¹ The statute mandates that in any case in which the death sentence has been imposed, the Court of Appeals must assess whether the sentence is "excessive or disproportionate to the death penalty imposed in *similar* cases considering both the crime and the defendant."¹¹²

It is not terribly likely that the New York Court of Appeals will strike down the entire statute because of a finding that the infliction of the death penalty *per se* violates the cruel and unusual prohibition of the New York State Constitution. The plurality in *Gregg*¹¹³ emphasized the need for each state to evaluate the moral consensus regarding the death penalty, and for a state court considering a cruel and unusual claim to look toward the evolving standard of decency.¹¹⁴ In New York, there is widespread support among the citizens for the death penalty; in July of 1994, seventy-four percent of those surveyed favored a law that would provide for a sentence of death for an individual who killed another.¹¹⁵

111. The District Attorney of New York County has stated that he will at times seek the death penalty if appropriate even though he is strongly against capital punishment. *Death Penalty is Ruled Out By Morgenthau in 3 Slayings*, N.Y. TIMES, February 29, 1996, at 1. Indeed the D.A.'s criticism of the death penalty has been strong:

Capital punishment is a mirage that distracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives.

Id. at B4.

112. N.Y. CRIM. PROC. LAW § 470.30 (3)(b)(McKinney 1996) (emphasis added).

113. *Gregg v. Georgia*, 428 U.S. 153, 172 (1976).

114. *Id.* at 186-187; *see also* *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *Estelle v. J.W. Gamble*, 429 U.S. 97, 102 (1976) (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (1968)).

115. Adams, *supra* note 81, at 12. This 74% figure is the same as the nationwide percentage of people supporting the death penalty. *Id.*

Although popular sentiment may control the view of the Court of Appeals, it is interesting to note that the new Supreme Court in South Africa struck down that country's death penalty provision, holding: "The question before us is *not* what the *majority believes* a proper sentence for murder should be. It is whether the *Constitution allows* the death sentence."¹¹⁶

Another way in which the state's death penalty statute may be challenged regards the execution of a mentally retarded individual. The New York Criminal Procedure Law defines mental retardation as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior that was manifested before the age of eighteen."¹¹⁷ Generally, the accepted definition of mentally retarded, as defined by the American Association on Mental Retardation, is someone with an IQ of less than seventy-five.¹¹⁸ Although the Supreme Court has held it constitutional for mentally retarded individuals to receive the death penalty,¹¹⁹ the New York courts might not.

Generally, the statute precludes the imposition of the death penalty for the mentally retarded.¹²⁰ If a hearing is held, and it is determined that an individual is mentally retarded, he cannot receive the death penalty.¹²¹ However, the statute also provides an exception. If a mentally retarded person is incarcerated at the time

116. See Michael Sparks, *New Power Applied: South African Court Strikes Down Law*, 81 A.B.A.J. 19 (1995).

117. C.P.L. § 400.27(12)(e).

118. See generally Suzanne Lustig, *Searching for Equal Justice: Criminal Defendants with Mental Retardation*, N.J. LAW., July 1995, at 32.

119. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (The Supreme Court permitted the execution of an individual who was functioning at the level of a seven year old). The Court, however, has held that a state may not execute an individual deemed to be incompetent. N.Y. CORRECT. LAW § 656(1) designates an individual to be incompetent when lacking the "mental capacity to understand the nature and effect of the death penalty and why it is carried out."

120. Pregnant women and incompetent individuals also are not to be put to death. N.Y. CORRECT. LAW § 652, § 657.

121. C.P.L. § 400.27(12)(c) and (d). Even if the court is, after a hearing, not convinced that a defendant was indeed retarded, the jury doing the sentencing phase can consider such evidence in mitigation. *Id.*

that the killing was committed, he *can* receive the death penalty.¹²² The amount of time for which the individual had been incarcerated is of no importance; if a retarded, incarcerated individual kills, he can receive a sentence of death.¹²³

If the Court were to look at the statute's treatment of the mentally retarded with an equal protection perspective, a statute providing that mentally retarded persons could get the death penalty if they were incarcerated as contrasted to those mentally retarded persons who kill but are not incarcerated at the time of the killing, may be found to be unconstitutional. The rationale for absolving the retarded from the death penalty because their low level of intellectual functioning in some sense made them less culpable, would seem to apply equally to *all* those who are retarded according to the standard determining retardation outlined in the statute.

The Georgia Supreme Court struck down that state's provision permitting execution of mentally retarded individuals as violating the prohibition against cruel and unusual punishment.¹²⁴ The New York Court of Appeals might well reach a similar conclusion. However, there is a provision in the New York statute that provides for severability.¹²⁵ If any provision of the statute is found to be unconstitutional, that provision can be severed from the rest of the statute and it would not impact the main body of the statute.¹²⁶

122. C.P.L. § 400.27(12)(d).

123. Apparently, this provision was one of the last minute decisions, reflecting the results of horse-trading, bickering and appeasement of a powerful interest group that insisted on special protections if one of their members was killed.

124. *Burgess v. State*, 264 Ga. 777, 789-790 (1994).

125. C.P.L. § 400.27 (McKinney 1996) (Historical and Statutory Notes).

126. *Id.*

IV. MISCELLANEOUS CONSTITUTIONAL CHALLENGES

A. *Void for Vagueness*

The New York death penalty statute avoids the "especially heinous, atrocious or cruel" phraseology that the Supreme Court found unconstitutionally vague in *Maynard v. Cartwright*.¹²⁷ Also avoided was the "outrageously or wantonly vile, horrible and inhuman" language deemed unconstitutional in *Godfrey v. Georgia*.¹²⁸ However, the statute *does* make it an aggravating factor if the defendant's conduct was intended to inflict torture upon the victim, torture being defined as "depraved infliction of extreme pain" and depraved occurring when "the defendant *relished* the infliction."¹²⁹ Such language lacks clarity and specificity and may be deemed unconstitutionally vague.

B. *Lack of Objectivity in the Decision to Seek the Death Penalty*

There may be an economic incentive for some District Attorneys to seek the death penalty.¹³⁰ This may not be the case in the downstate counties, but could well be true in a poorer upstate county, where a D.A.'s office barely gets by with the amount of funds that the county gives to that D.A. to run the office. The statute provides that if the D.A. does opt for the death penalty then the state will reimburse the D.A.'s office for expert witness

127. 486 U.S. 356 (1988).

128. 446 U.S. 420, 428-429. The plurality opinion stated that "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.*

129. N.Y. PENAL § 125.27(1) (McKinney 1996) (emphasis added).

130. See generally Daniel Wise, *supra* note 107, at 18; Marcia Coyle, *Returning to Court With Help: It's The Next Step in Capital Retrials*, 13 NAT'L L.J. 1, col. 1 (December 24, 1990); Fred Strasser, *\$1,000 Fee Makes Death Row's 'Justice' a Bargain For The State*, 12 NAT'L L.J. 33, col. 1 (June 11, 1990).

testimony and for investigators for the sentencing phase.¹³¹ Moreover, there is the Capital Prosecution Extraordinary Assistance Program which gives money to D.A. offices if they're particularly hard-strapped because of the prosecution of death penalty cases.¹³² There could be an argument made in some counties that the D.A. wasn't acting fairly, objectively and impartially in determining to seek the death penalty, but was instead motivated by a financial incentive.

V. CONCERNS ABOUT MITIGATION IN DEATH PENALTY PROSECUTIONS

The obligation of a lawyer in a death penalty case is particularly unique because a lawyer has to, from the get go, think about possible defeat. It may be a gross generalization, but nevertheless it's fair to state that one of the weakest parts of a trial attorney's representation is dealing with the sentencing phase of a prosecution. An attorney rarely thinks about sentencing before the trial starts, hoping, if not expecting, that an acquittal may occur. In those cases where the jury does return with a guilty verdict, lawyers rarely devote much time preparing for a sentencing hearing in the thirty days before the sentencing would be due to occur. The added problem in a capital prosecution is the need for the lawyer to switch roles before the jury. He is no longer the advocate for the defendant's innocence; instead, his argument must focus on why life without parole is the more appropriate sentence for the defendant's crime than the death penalty would be.

Lawyers often regard preparing for sentencing as more appropriately a social worker's responsibility or a probation officer's job. However, in a capital case, it is absolutely incumbent upon counsel to consider developing mitigating factors upon first beginning representation. The statute gives the District Attorney one hundred and twenty days after the indictment to decide

131. N.Y. COUNTY LAW § 707 (McKinney 1996).

132. N.Y. EXEC. LAW § 837-1 (McKinney 1996).

whether or not to seek the death penalty.¹³³ Those 120 days can be an invaluable period in which the defense lawyer can try to influence the D.A.'s decision by bringing forth mitigating evidence to show that in the particular case, the death penalty is simply not appropriate.¹³⁴ In essence, the lawyer has to start getting information to use in mitigation both to influence the D.A., as well as to prepare for that day if and when a guilty verdict is returned and the sentencing phase is about to commence.

For example, the New York State statute says that the defendant's mental or emotional state may be a factor to consider in mitigation.¹³⁵ This is not the *extreme* emotional disturbance that would characterize the action of the defendant as first degree manslaughter rather than murder; the language just states "emotional disturbance" can be a factor in mitigation.¹³⁶ That's broad, loose language that certainly calls for the lawyer inquiring into his or her client's background and upbringing and where called for, carrying out extensive investigation. Motions for discovery to find out what the D.A. has uncovered might certainly be helpful and important. Other factors that the New York State statute lists in mitigation are: 1) no significant prior criminal record involving the use of violence; 2) if the defendant acted under the influence of alcohol or drugs; 3) whether the defendant's participation in the murder was "minor"; and 4) whether the

133. N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 1995); *See also* Neufeld, *supra* note 86, at 13.

134. In the first capital case that the Manhattan District Attorney had, the decision not to seek the death penalty was almost certainly influenced by the efforts of defense counsel to present mitigating evidence to D.A. Robert Morgenthau. Literally thousands of pages of background information about the two defendants involved were provided by Russell Neufeld, the director of the Capital Defense Unit of the Legal Aid Society. Neufeld explained: "The mitigation factors were tremendous. [The defendant] had physical and psychiatric problems so serious that if we had read in the paper that he had been a victim of some horrible crime, people would have screamed and said that child-protective services had failed him." *Death Penalty is Ruled Out by Morgenthau in 3 Slayings*, N.Y. TIMES, February 29, 1996, at B4.

135. C.P.L. § 400.27(9)(e) (McKinney 1995).

136. *Id.*

defendant acted under duress or domination of another.¹³⁷ Additionally New York has the catch-all provision mandated by the *Lockett* decision¹³⁸ which states that "... any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, the defendant's character, background or record" can be introduced and considered in mitigation.¹³⁹ This provision is extremely broad and basically mandates that the lawyer search far and wide to develop factors in the background of the defendant that can be used in mitigation. As a death penalty expert with the N.A.A.C.P. Legal Defense Fund commented, "You've got to become you clients's biographer."¹⁴⁰

The critical import of the gathering of evidence that might be of value in mitigation is illustrated by the recent development of the "mitigation expert." One such expert who has been involved in 100 capital prosecutions has defined the job of the mitigation specialist as showing the jury that "behind this killer there is a human being."¹⁴¹ In one recent case in which the jury did find that the mitigation considerations outweighed the aggravating factors, and thus spared the life of the defendant, the expert had spent close to 300 hours examining 1,000 pages of school, social services, medical and prison records, and had interviewed 30 social workers, teachers and relatives.¹⁴²

Plea bargaining is certainly something that's been impacted upon by this law.¹⁴³ That one hundred-and-twenty-day window that the D.A. has to decide whether or not to seek the death penalty could

137. C.P.L. § 400.27(9).

138. *Lockett v. Ohio*, 438 U.S. 586, 605.(1978).

139. C.P.L. § 400.27(9)(f).

140. Comments of George Kendall, quoted in James Traub, *The Life Preserver*, *The New Yorker*, April 8, 1996, at 49.

141. Daniel Wise, *Mitigation Experts Portray Human Being in the Killer*, 215 N.Y.L.J. 1 (1996). This expert has worked on capital cases for the last 7 years and has degrees in criminal justice, social work, and paralegal training. *Id.* at 4.

142. *Id.* at 4. One critical factor uncovered was how the defendant had been abused as a young child by his drug-addicted mother. *Id.*

143. Neufeld, *Problems Defending Under New York State's New Death Penalty Law*, 4 J.L. & POL'Y at 144.

very well be a period that subjects the defendant to all kinds of pressures to plead guilty. Someone can get the death penalty under this statute only if they have a jury trial. You cannot plead, even to the charge of first degree murder, and get the death penalty.¹⁴⁴ A defendant charged with murder in the first degree may say: "I don't want to contest this, I don't want to go to trial, I'm going to plead to the charge of murder in the first degree." However, if the D.A. wants the death penalty in that case, there must be a jury trial. It doesn't matter if the judge wants to accept the plea; if the D.A. feels that the death penalty is appropriate, the D.A. does not have to consent and permit the entry of that plea, even though it is to the highest count charged.

The Supreme Court has held that there is no constitutional right for a defendant to engage in a plea bargain.¹⁴⁵ The pressure on the defendant during that period of hundred-and-twenty-days is great, obviously, to do what it takes to avoid the possibility of death if the D.A. has offered a plea. The Supreme Court in *North Carolina v. Alford*, acknowledging the pressures that exist to avoid the risk of death, held that this very pressure on a defendant to plead guilty would enable him to constitutionally enter a plea of guilt while denying that he in fact did commit the crime.¹⁴⁶

Historically, the most common grounds employed to reverse death penalty sentences are ineffective assistance of counsel claims.¹⁴⁷ The primary reason for this is that in many southern states a cap has been placed on fees that a court-appointed attorney

144. N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1995) (A defendant may enter a plea of guilty for the crime of murder in the first degree if such a plea is offered with the permission of the court and the consent of the People).

145. *North Carolina v. Alford*, 400 U.S. 25, 27 (1970).

146. 400 U.S. 25 (1970) (The plea is commonly known as an "Alford plea"); see also Brenda J. Buote, *Defendant Sentenced to Four Years in Prison for Attack on a Man in Wheelchair*, BALTSUN, August 20, 1995 ("The plea means that the defendant does not admit guilt but acknowledges that it is in his interest to accept the agreement."); see also *Report on the 1993 Supreme Court Bench Bar Conference on Issues in Criminal Cases*, MASS. LAW. WKLY., January 30, 1995 (discussion regarding Alford plea and its place in modern criminal law).

147. But see Marianne Lavelle and Marcia Coyle, *Effective Assistance: Just a Nominal Right?*, NAT'L L.J., June 11, 1990, at 42.

can collect in a felony case.¹⁴⁸ It does not matter how many hours a counsel may put into a case, it does not matter if the case goes to trial or not; there's a maximum, typically in the range of one thousand dollars, that a lawyer can get for a felony case. This means that a lot of lawyers do not want to take death penalty cases because they will have to be putting in so many more hours than they would in other kinds of cases without any additional compensation. In one instance, the administrative law judge in Kentucky simply could not get any lawyer to volunteer to be assigned to represent someone in a death penalty case. Every lawyer that the judge felt was competent to handle a capital case had refused to undertake such representation. As a final option, the judge posted a notice on the courthouse door that said, "Please help, desperate."¹⁴⁹ What kinds of lawyers can be expected to respond to a "desperate" message on the courthouse door? The overall quality of representation afforded defendant in death penalty cases has been appalling.¹⁵⁰

New York State, however, has attempted to provide effective assistance of counsel through the creation of a Capital Defender Office¹⁵¹ and, at least in these early years, there may be adequate funding available to the office.¹⁵² An excellent staff has been hired,

148. See Lynn Tuohy, *CCLU Suit Lays Bare a Public Defense System in Crisis*, HRTFCNT, January 8, 1995 ("I have trouble finding a lawyer to take on a pending capital case because the maximum compensation was \$1,250").

149. Andrew Wolfson, *High Court Sidesteps Low Fees Paid Lawyers in Murder Cases*, Courier-J. (Louisville, Ky.), June 6, 1992, as reported in WESTLAW, 1992 WL 7839500; Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 INDIANA L.J. 363, 365 (1993).

150. See Ronald J. Tabak, *Report: Ineffective Assistance of Counsel and Lack of Due Process in Death Penalty Cases*, 22-WTR Hum. Rts. 36 (1995); see also Judge Joseph W. Bellacosa, *Ethical Impulses From the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE L. REV. 1 (Spring 1994) [hereinafter Bellacosa] (Judge Bellacosa is an Associate Judge of the New York Court of Appeals).

151. N.Y. JUD. LAW § 35-b (McKinney 1995); see also *Going Through the Motions*, WOODSTOCK TIMES, February 15, 1996 at 12.

152. *Id.* For the 1996-1997 Fiscal year, the Capital Defenders Office is scheduled to receive \$7.2 million after requesting \$9.7 million.; see also Jon R. Sorensen, *State Paid Team to Defend Capital Cases*, BUFF. NEWS, November

and the Office is directed by an individual who is widely respected by those concerned about the quality of counsel in capital cases.¹⁵³ The death penalty statute requires that all indigent defendants be provided with two counsel, an experienced lead lawyer, and an associate counsel.¹⁵⁴ But there is reason to be greatly concerned about funding in the years ahead.

In years of fiscal restraint when budgets have been cut in New York for the general representation of indigents charged with crime, as well as for those providing legal services for prisoners,¹⁵⁵ it would be unlikely for the Capital Defender Office to be immune from a drastic curtailment of funding. There is no significant constituency that will fight for the defense of indigents accused of murder in the first degree. Michael Finnegan, Counsel to Governor George Pataki, has, in fact, criticized the proposed reimbursement rates for counsel in capital cases, stating that such payment to counsel would "squander millions of scarce state dollars."¹⁵⁶

The New York law requires the Court of Appeals to review every case in which there is a sentence of death imposed, even

24, 1995 at A13. The Capital Defender's Office has a reported budget of 3.2 million dollars.

153. Kevin Doyle, the Capital Defender, has commented that he is "committed to the intense litigation of every capital case." Daniel Wise, *State's Capital Defender With a Calling*, 214 N.Y.L.J. 1, col. 3 (Sept. 11, 1995) at 1. Mr. Doyle has warned District Attorneys that "every capital case will be litigated with an intensity and depth with which they are not familiar, and will be commensurate with the societal attempt to take a human life." James Traub, *The Life Preserver*, The New Yorker, April 8, 1996 at 47. Doyle cautioned that those prosecutors who fail to acknowledge this fact, "will, I'm certain, have a different view in a very short period of time." *Id.* At least one judge on the Court of Appeals has expressed grave concerns about quality representation of indigents in death penalty cases. See Bellacosa, *supra* note 148, at 27.

154. N.Y. JUD. LAW § 35-G(2) (McKinney 1996).

155. Gary Spencer, *Pataki Restores Funds to Defenders Group*, 215 N.Y.L.J. 1, col. 3 (January 18, 1996); Gary Spencer, *Costs of Legal Services for Prisoners Debated*, 214 N.Y.L.J. 1, col. 3 (October 19, 1995); Gary Spencer, *Bar Associations Marshall Forces to Lobby Legislature on Bills Relating to Lawyers*, 207 N.Y.L.J. 1, col. 4 (February 27, 1992).

156. Daniel Wise, *Pataki Urges Capital Case Pay Cut*, N.Y.L.J., March 13, 1996 at 1.

when the defendant does not wish to file an appeal.¹⁵⁷ The Court, in addition to focusing on the standard issues of concern on appeal, is directed to examine whether the sentence was disproportionate to sentences imposed in similar cases¹⁵⁸ and whether or not prejudice, passion or the race of the defendant or victim¹⁵⁹ affected the sentencing determination.¹⁶⁰ The Court's decision must specify which aggravating and mitigating factors were established by the trial record, thereby simplifying review by federal courts of a petition for habeas corpus.¹⁶¹ As another safeguard¹⁶² against an

157. N.Y. CRIM. PROC. LAW § 470.30 (McKinney 1995). There is no intermediate level of review, the case goes directly from the trial court to the Court of Appeals. The Supreme Court in *Gregg v. Georgia*, 428 U.S. at 198, had mandated appellate review in order for a death penalty statute to be found constitutional. The statute also provides for funding for an indigent defendant to make a second appeal based, for example, on a claim of newly discovered evidence. C.P.L. § 470.30.

158. The New York statute requires this proportionality review even though the Supreme Court in *Pulley v. Harris*, 465 U.S. 37 (1984), held that such analysis was not constitutionally mandated by either the Eighth or Fourteenth amendments; N.Y. CRIM. PROC. LAW § 470.30(3)(b) (McKinney 1995).

159. C.P.L. § 470.30(3)(b); *see also* *McCleskey v. Kemp* 481 U.S. at 291 (The concern about the victim's race reflected concern about the issues raised in *McCleskey*).

160. N.Y. JUD. LAW § 211-a (McKinney 1995) was amended to require the trial court clerks to prepare whatever report the Court of Appeals may direct to assist in this analysis.

161. The writ of habeas corpus was codified by Congress in 1948 as a form of collateral review to serve as a means of federal court supervision of state court decisions in areas that impact upon a federal constitutional claim; *See* N.Y. CRIM. PROC. LAW § 470.30(3)(b) (McKinney 1995).

162. Special treatment and concern for the rights of the defendant in a capital prosecution does not seem to apply pre-conviction. In *People v. Rodriguez and Sanchez*, No. 10663/95, State Supreme Court Judge Herbert Altman ruled that there was no "heightened due process" for such defendants and the concept of "stricter scrutiny" was limited to the sentencing phase of the capital case. However, Article 450 has been amended to enable only counsel in capital cases to obtain a stay in the proceedings while appealing to the Court of Appeals regarding the trial court's determination relating to the mental retardation of the defendant.

improper death sentence, the Court is empowered to look at and consider unpreserved error.¹⁶³

VI. THE EXECUTION

The American Medical Association limits the role of doctors' involvement in any execution to that of certifying that the inmate has in fact died. The New York Statute therefore provides for two "execution technicians" to administer the poison.¹⁶⁴ One intravenous tube is to be inserted in each forearm, seven syringes are to be used and the technicians must be state certified to administer fluids intravenously-- such as nurses or physicians' assistants (both of whom have ethical standards similar to those of doctors) or laboratory technicians would qualify.¹⁶⁵ Absolute anonymity is promised for the executioners: "The names of the execution technician or technicians shall *never* be disclosed,"¹⁶⁶ and each is expected to get a fee of five hundred dollars.¹⁶⁷

What if the inmate is not dead when the doctor examines him to certify that death has occurred? The American Medical Association emphasizes that the purpose of the profession is to *save* lives, to try to resuscitate if feasible, and certainly not to tell the execution technician to, for example, inject more potassium chloride. Such a dilemma is why some state medical associations, such as the Illinois State Medical Society, consider *any* involvement of a

163. N.Y. CRIM. PROC. LAW § 470.15 (McKinney 1996).

164. See N.Y. CORRECT. LAW § 658 (McKinney 1995) ("The punishment of death shall be inflicted by lethal injection, that is by the intravenous injection of a substance in a lethal quantity into the body of a person convicted until such person is dead"); N.Y. CORRECT. LAW § 664 (McKinney 1995).

165. See N.Y. CORRECT. LAW § 658 (McKinney 1995). The injection requires skill, and if the syringe is inserted into tissue rather than a vein, extraordinary pain and torture can result. Searching for adequate veins can take up to sixty minutes.

166. N.Y. CORRECT. LAW § 660(1) (McKinney 1995) emphasis added.

167. In New Jersey, execution technicians get a fee of \$500 each. Tom Hester, *Jersey Execution Chamber is Ready for the Three Waiting on Death Row*, STAR LEDGER (Newark, N.J.), July 29, 1992, as reported in WESTLAW, 1992 WL 11077134.

doctor in an execution to be unethical.¹⁶⁸ The New York statute is confusing in that it states that a doctor "may" be present at the execution (therefore not requiring the presence of a physician) yet mandating that the death of the inmate be certified by "the physicians present."¹⁶⁹

CONCLUSION

More than thirty years after the State of New York last executed an individual, the State is now positioned to once again inflict the death penalty. The politicians in the executive branch, with the vigorous endorsement of most in the legislature, have heralded the new day. The judiciary branch is yet to be heard from.

The new murder in the first degree statute reflects the horse-trading and compromises that accompanied its passage by the legislature. Nowhere, perhaps, is response to political pressure more obvious than in the law's providing for the death penalty for a mentally retarded individual only if he was incarcerated in a state or local correctional facility at the time of the murder.¹⁷⁰

168. Eric Zorn, *Doctors Don't Need to be the Agents of Execution for the State*, CHI. TRIB., March 2, 1995 (Refers to opposition of doctors participation in executions by the American Medical Association, American College of Physicians, the Illinois State Medical Society, the American Nurses Association, the World Medical Association, the National Center for Correctional Health Care Studies and the Physicians for Human Rights); see *Doctors Try New Tack in Gacy Case*, CHI. DAILY L. BULL., May 5, 1994, at 1; see also Michelle Stevens, *Let Physicians Bypass Executions*, CHI. SUN-TIMES, March 27, 1995 at 23. Doctors in Illinois are very serious about their Hippocratic oath and do not want anything to do with the execution of another human being. State Senator Arthur Berman has introduced legislation that would eliminate a provision in the criminal code that requires a licensed physician to pronounce the death of an executed defendant. Furthermore, the bill would prohibit a licensed physician and other health care workers from carrying out any part of the execution procedure.

To avoid a physician's participation in the procedure, a carefully trained technician could give the lethal injection and a coroner could officially pronounce the death. See Stevens, *Let Physicians Bypass Executions*, at 23.

169. N.Y. CORRECT. LAW § 664, § 661(1)(McKinney 1995).

170. See C.P.L., *supra* note 120, at 20.

There are serious concerns about the constitutionality of the statute. The requirement of a death-qualified jury for the guilt/innocence phase will surely raise equal protection and due process questions.¹⁷¹ The lack of geographical consistency throughout the state due to vastly different policies proclaimed by local district attorneys will lead to claims of arbitrary enforcement of the death penalty.¹⁷² At least one aggravating factor may be void for vagueness¹⁷³ and the Court of Appeals may find the death penalty *per se* to constitute cruel and unusual punishment under the New York State Constitution.¹⁷⁴

One factor most difficult to assess is the extent to which the Court of Appeals will dare to reach a decision bound to arouse the fury of the politicians. At a time when the courts are under increasing and vigorous attack for being too concerned with the rights of defendants and for standing in the way of appropriate punishment of the clearly guilty,¹⁷⁵ it would take great courage and fortitude to deem a popular statute unconstitutional.

171. *See supra* note 87, at 13.

172. *See* Jeffreys, *supra* note 109, at 18.

173. *See supra* notes 125-126, at 21.

174. *See* Smith, *supra* note 76, at 11.

175. *See e.g.*, *Memorandum of the New York County Lawyers' Association Re: Joint Resolution Concerning the Independence of the Judiciary*, March 6, 1996 (the threat to an independent judiciary by recent intemperate and personal attacks is as serious as when the federal Constitution adopted the principle of separation of powers).