

The Death Penalty In New York



A report on five public hearings on the death penalty in New York
conducted by the Assembly standing committees on Codes,
Judiciary and Correction, December 15, 2004 - February 11, 2005

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Introduction

On June 24, 2004, in People v. LaValle, the New York Court of Appeals struck down the required “deadlock” instruction provision of New York’s 1995 death penalty law, essentially invalidating the operation of the death penalty in New York.¹ The Court left intact, however, provisions of the law that authorized a sentence of life imprisonment without the possibility of parole to be imposed upon any defendant convicted of first degree murder. The Court’s actions in LaValle left the legislature with two possible options.

First, we could have acted quickly to:

- restore the death penalty;
- restore the death penalty in a modified form; or
- formally abolish capital punishment in New York, without any formal review of how the law had worked during its nine year history.

We chose a second option. We decided that, rather than act quickly, we would act deliberately. We decided to review New York’s death penalty statute in all of its dimensions and solicit the widest range of views possible before considering which action to take, if any.

As the vehicle for that review, we scheduled a series of public hearings on the death penalty by the three standing Assembly committees we chair, all of which have jurisdiction over portions of the various statutes that together comprise New York’s death penalty law. This report summarizes the testimony presented at those hearings.

New York’s Current Death Penalty Law

New York’s current death penalty statute has had a troubled history. In the past ten years, the state and local governments have spent over \$170 million administering the law. Yet, not a single person has been executed. Only seven persons have been sentenced to death. Of these, the first four sentences to reach the Court of Appeals were struck down on various grounds. One sentence was converted to a sentence of life imprisonment without the possibility of parole after the LaValle decision. Two sentences are awaiting review.

¹ People v. LaValle, 3 NY 2d 88 (2004). Under the 1995 death penalty law, jurors in penalty phase proceedings were given two sentencing options: death or life imprisonment without the possibility of parole. Jurors were also told that, in the event the jury was unable to unanimously agree on a sentence, the court would sentence the defendant to a maximum term of life and a minimum term of between 20 and 25 years incarceration. The LaValle court held that the possibility that a defendant could be paroled and released from prison after serving 20-25 years under the “deadlock” sentence created a substantial risk that jurors would be coerced into sentencing a defendant to death to avoid the possibility that the defendant could someday be released from prison if a unanimous verdict was not reached. *See* additional discussion under “A Brief History of the Death Penalty” below.

New York’s death penalty deadlock instruction, which is unique in the nation, was first proposed by Governor Pataki in program legislation which was passed by the Senate prior to the final legislative agreement to enact the death penalty in 1995 (*See* S. 2649 [1995]). The Governor’s deadlock instruction proposal was later included in the final death penalty law enacted by the legislature on March 7, 1995.

Opponents of capital punishment have continued to strongly oppose the death penalty. But death penalty proponents have been frustrated with the operation of the law as well. Moreover, much has changed in the past ten years. Public attitudes about the death penalty have evolved. The use of capital punishment in this country and throughout the world has changed. A wave of exonerations of sentenced inmates, some through the use of newly analyzed DNA evidence, has raised new concerns about wrongful convictions. In New York, the sentence of life imprisonment without the possibility of parole has become widely applied in first degree murder cases. That sentencing option did not exist in New York prior to 1995.

New York's Death Penalty at a Crossroads

Today we have the opportunity to review whether the death penalty should be enacted not only through the prism of our moral, ethical and legal beliefs, but with the benefit of the real-world experience which the past nine years of practice in New York has given us.

When we originally scheduled two days of public hearings on the death penalty, we expected a significant response. What we received was an outpouring of testimony and evidence about the death penalty that was stunning in its breadth, intelligence and passion. Legal scholars debated whether New York's current statute comported with constitutional due process and fundamental fairness. Religious leaders discussed the morality of capital punishment. Death row inmates who had been exonerated, some after many years of imprisonment, described how that experience had robbed them of years of their lives. Prosecutors testified both for and against the death penalty, described their views on its deterrent effect and outlined their struggles with New York's unique statutory design.

Experts testified about whether there are racial disparities in the administration of capital punishment in New York and around the country. And the family members of murder victims shared their enduring grief and talked about whether the death penalty was the appropriate response to the horrific crimes which had been perpetrated upon their families and loved ones.

After originally scheduling two days of hearings, it was necessary to add three more days to accommodate the large number of persons who asked to testify. The hearings were conducted between December 15, 2004 and February 11, 2005. Everyone who asked to testify at our hearings was invited to do so. A hearing notice² included 22 specific questions to which witnesses could direct their testimony. The hearing notice and accompanying publicity made clear that the Committees were seeking testimony from a wide range of sources, representing all views.³

² Attached in the appendix to this report.

³ The formal hearing notice, inviting the submission of testimony, was widely distributed to persons and organizations that might be interested in providing testimony or further publicizing the hearings. Among those who were sent hearing notices were the Governor and the commissioners or directors of all of the State's criminal justice agencies, the State Crime Victims Board, the Lieutenant Governor, Attorney General, Comptroller, New York's two United States Senators and all members of the Assembly, all of the State's elected district attorneys, public defenders, legal aid societies, assigned counsel plans and various law enforcement organizations such as the New York State Association of Chiefs of Police and the New York State Sheriffs' Association. Notice of the hearing was provided on the Assembly's official website, through Assembly press releases and advisories, and through the

146 witnesses testified in person for over 35 hours of oral testimony; written submissions were received by the Committees from 24 additional persons and groups.

The testimony of these 170 hearing witnesses fills more than 1,500 transcribed pages. Written submissions received by the Committees exceed 2,500 pages.

Of the persons who presented oral or written testimony, 148 opposed the death penalty, nine argued in favor of the death penalty, five argued in favor of the death penalty but suggested specific changes in the statute (other than those necessary to address the LaValle decision) and eight did not express an explicit view for or against the death penalty.

The Report on the Hearings

This report is not an exhaustive summary of the hearing transcripts. It is also not a comprehensive research study of the death penalty. It is not intended to present a position for or against the death penalty. Rather, the report is intended to objectively highlight the issues and controversies that were presented and discussed at these extraordinary public hearings.

The Committees invite interested parties considering this important policy question to read the transcripts of these public hearings and the written materials submitted to the Committees, as well as other relevant, published works concerning the death penalty in New York and elsewhere.

We express our gratitude to all of the persons and organizations who presented testimony at our hearings and would also like to thank the many members of our Committees who participated. The following pages present the views of the individuals and organizations who took the time to share with us their thoughts and deeply held beliefs about capital punishment. Hearing these voices has helped us come to important new insights about the death penalty. We hope reviewing the points these witnesses made will be equally illuminating for you.

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“Public Hearing Calendar”, which was mailed to all members of the State Senate. Notice of the hearings and the testimony presented was also widely publicized in the print and electronic media during the two months the hearings were conducted.

Executive Summary

On June 24, 2004, the New York Court of Appeals, in People v. LaValle, struck down the required deadlock instruction provision of New York's 1995 death penalty law, essentially invalidating the operation of the death penalty in New York. The Court left intact, however, provisions of New York law which authorize a sentence of life imprisonment without the possibility of parole to be imposed on any defendant convicted of first degree murder.

The Assembly Committees on Codes, Judiciary and Correction subsequently commenced a series of five public hearings to solicit the widest range of views possible on the death penalty in order to determine what action to take, if any, with respect to the statute. The hearings were conducted between December 15, 2004 and February 11, 2005. Every person who asked to testify at the hearings was invited to do so.

The Committees received oral testimony from 146 witnesses and written testimony from 24 witnesses. Of the witnesses who presented oral or written testimony, 148 opposed the death penalty, nine argued in favor of the death penalty, five argued in favor of the death penalty but suggested specific changes in the statute (other than those necessary to address the LaValle decision) and eight did not express an explicit view for or against the death penalty.

This report begins with an introduction which describes why we convened these hearings and how they were conducted. The introduction is followed by this Executive Summary and a brief section which traces the history of the death penalty in New York. The bulk of the report then summarizes the testimony presented at the hearings, grouped by subject area.

The testimony presented at these public hearings was extraordinary in its breadth, intelligence and passion. This report does not present a position for or against the death penalty. Rather, it is intended to objectively highlight the issues and controversies that were presented and discussed at the hearings. Those issues are briefly summarized below and discussed in much greater depth in the body of this report.

Section 1. Retribution, Deterrence and Incapacitation

Arguments for the death penalty generally focus on one of three broad grounds:

- The death penalty is appropriate societal retribution against those who commit certain intentional murders;
- The death penalty deters the commission of crimes subject to capital punishment; or
- The death penalty is necessary to ensure, by incapacitation, that persons who commit capital crimes never do so again.

The Committees received testimony on each of these points.

A. Retribution

A large number of family members of murder victims testified regarding their views about capital punishment. Many of these family members argued against the death penalty. Among those who argued against the death penalty were Carolyn McCarthy, a Long Island Congresswoman whose husband was killed and son seriously wounded in a 1993 attack on the Long Island Railroad; Bruce and Janice Grieshaber, whose daughter Jenna's murder helped lead to the enactment of "Jenna's Law", which, in 1998, barred the parole release of violent felons in New York; and Pat Webdale, whose daughter Kendra was pushed to her death in front of a Manhattan subway train and who subsequently advocated successfully for the enactment of New York's Assisted Outpatient Treatment Law for persons with mental illness, known as "Kendra's Law".

Kate Lowenstein, whose father, former Congressman Allard K. Lowenstein, was shot to death by a mentally ill former student, spoke in opposition to the death penalty arguing that "nothing we do to the killer will bring back our family member from being dead." Carole Lee Brooks, whose son David was murdered at age 28, urged the Committees to "honor my son and other victims of murder by acting with the highest regard of human life."

Several family members testified in favor of the death penalty, based on retributive principles. Debra Jaeger, whose sister Jill was brutally beaten and later murdered in 1998 by her estranged husband, asserted that the death penalty is needed as the ultimate penalty to punish such horrific killings. Joan Truman-Smith passionately told of the painful loss of her daughter, and her support for the execution of certain killers.

Jeff Frayler, on behalf of the New York State Association of Police Benevolent Associations, recalled the murder of NYPD police detectives Patrick Rafferty and Robert Parker in 2004, and said, "as the removal of capital punishment becomes more of a reality, [the killer's] lethal actions will probably guarantee him permanent lodging, clean clothing, food and, more importantly, his life". Professor Robert Blecker of New York Law School argued that the death penalty is appropriate retribution in just proportion to the seriousness of the crimes it punishes.

B. Deterrence

The Committees heard conflicting views and studies about whether the death penalty is an effective deterrent against murder. Professor Robert Blecker cited studies which he asserted indicate that the death penalty is a more effective deterrent than life imprisonment without parole. Sean Byrne from the New York State Prosecutors Training Institute and Michael Palladino of the Detectives Endowment Association argued that the vast decline in murder rates in New York since the enactment of the death penalty provides strong evidence that the death penalty has deterred persons from committing murder.

Professor John Blume of Cornell University testified that the "overwhelming weight of the scholarly research indicates that the death penalty does not deter persons from committing murder." Jeffrey Fagan, a Professor of Law and Health at Columbia University, provided an extensive analysis of death penalty deterrence studies and asserted that there is no reliable

evidence that the death penalty has deterred murder in New York. He asserted that, "Murder is a complex and multiply-determined phenomenon."

C. Incapacitation

Witnesses offered conflicting views about whether the currently available sentence of life imprisonment without the possibility of parole is sufficient to protect society from persons who commit intentional murder. Some witnesses asserted that a sentence of life imprisonment without the possibility of parole provides sufficient protection. Other witnesses argued that life without parole laws could always be changed in the future and therefore did not offer as much protection as the imposition of the death penalty.

Section 2: The Reliability of Capital Convictions

Barry Scheck, Co-Director of the Innocence Project at Cardozo Law School, testified that since 1995, 153 people in the United States convicted of serious crimes, including 14 on death row, have been exonerated by post-conviction DNA testing. Citing one study, he also asserted that since 1989, 329 convicted persons have been exonerated nationwide. Stephen Saloom of the Innocence Project testified that since 1973, 117 persons sentenced to death have had their capital convictions overturned and been released from prison.

A number of persons who were convicted of murder but later exonerated or pardoned and released testified before the Committees. Madison Hobley testified about his 16 years of imprisonment and time on Illinois' death row before being released. John Restivo said that he had been convicted of rape and murder in Nassau County and served 18 years in prison before DNA testing showed that another man had committed the crime.

Richard J. Bartlett, a former Assembly member and Albany Law School Dean, said that erroneous convictions are inevitable and, in a death penalty jurisdiction, sometimes cannot be demonstrated until it is too late. A number of witnesses also suggested statutory changes that could be made to New York's criminal laws which, they said, would reduce the likelihood of wrongful convictions in the future.

Professor Robert Blecker, arguing in favor of the death penalty, acknowledged that an innocent person may have been wrongly executed in recent years. But, he said, no instance of a wrongful execution has ever been proven. Sean Byrne of the New York Prosecutors Training Institute asserted that every defendant convicted under New York's 1995 death penalty statute is "indisputably guilty."

Section 3: Cost of the Death Penalty

A number of witnesses testified about the high cost of the death penalty and asserted that capital punishment is significantly more expensive than life imprisonment without the possibility of parole (“LWOP”).

Among the testimony presented at the hearing:

- Richard Dieter of the Death Penalty Information Center said that a North Carolina study concluded that it cost North Carolina \$2.6 million more per case for each conviction that resulted in a defendant's execution than for each similar case which did not.
- Mr. Dieter asserted that the cost of an execution in California is nearly \$90 million.
- James Liebman, a Columbia Law School professor, predicted that reinstatement of the death penalty would cost New York taxpayers about \$500 million over the next twenty years, with two or three executions during that time.
- Jonathan Gradess of the New York State Defenders Association said that New York has spent, based on conservative estimates, \$170 million in the past decade on death penalty prosecutions. With seven death sentences imposed, the law has thus cost taxpayers approximately \$24 million per death sentence.

Professor Robert Blecker argued, alternatively, that analyses which indicate the death penalty is a more expensive punishment than life imprisonment without parole fail to take into account the savings the death penalty generates because of crimes deterred. He also argued that these analyses fail to consider that guilty defendants in death penalty jurisdictions will often plead guilty, avoiding trial and appellate costs, rather than risk execution.

Sections 4 and 5: Aggravating Factors and Life Without Parole

New York’s death penalty law allows prosecutors to seek capital punishment when one of twelve statutory aggravating factors is present. Some witnesses suggested specific ways in which this list of aggravating factors should be expanded. Other witnesses argued the list should be reduced.

Most presenters supported the continued availability of life imprisonment without the possibility of parole as a sentencing option in New York. Several witnesses contended that LWOP is a sufficient penalty for the worst offenders. Some also argued that LWOP is a more severe sanction than execution.

Sections 6: Mental Retardation

A recent U.S. Supreme Court decision bars the execution of persons with mental retardation. New York's death penalty law permits such executions, but only when the defendant was a jail or prison inmate, the victim was an employee of the jail or prison engaged in official duties, and the defendant knew or reasonably should have known that the person was so employed. Witnesses who commented on this question concluded that, in view of the Supreme Court's ruling, a New York defendant found to be mentally retarded under these circumstances could not be executed for this crime, even if the death penalty were reinstated in New York.

Section 7: Mental Illness

Ron Honberg of the National Alliance for the Mentally Ill estimated that 20 percent of persons sentenced to death in the United States have a serious mental illness. Professor John Blume of Cornell University testified that severe mental illness can make a defendant appear to be more dangerous. Mr. Honberg testified that in New York, as in most other states with death penalty laws, mental illness is a statutory mitigating factor which the jury is directed to consider when deciding whether or not to impose the death penalty. However, Mr. Honberg said, there is a growing view among experts that juries inappropriately consider mental illness as an aggravating rather than mitigating factor in capital cases. Mr. Honberg cited studies which he said indicate that capital defendants with serious mental illness are more likely to be sentenced to death than non-mentally ill capital defendants.

Sections 8 and 9: Race and Socio-Economic Issues

Several witnesses asserted that there is evidence of racial discrimination in the use of the death penalty. They contended that in death eligible cases, death sentences are disproportionately imposed on black defendants.

A number of witnesses also presented detailed statistical evidence from New York and other states indicating that murder cases in which the victim was white are significantly more likely to result in death sentences than murder cases in which the victim was black. Among the evidence presented on this point:

- Attorney George Kendall said a 1990 United States General Accounting Office Study evaluating 28 race-and-the-death penalty studies found that, in 82 percent of the studies, the victim's race was a significant factor in determining whether a death sentence was imposed.
- Mr. Kendall cited a later study by Professors Baldus and Woodworth of three-fourths of the states with death sentenced defendants. In this study, he said, Professors Baldus and Woodworth found a similar correlation between victim race and the imposition of the death penalty in 93 percent of these states. In cases in which the victim was white, the defendant was much more likely to be sentenced to death than in cases in which the victim was non-white.

- Professor David Baldus of the University of Iowa found that of the seven defendants sentenced to death in New York, white victim cases outnumbered non-white victim cases by a 2 to 1 margin (62 percent vs. 29 percent).

Professor Robert Blecker argued that to the extent white victim cases were treated as capital crimes more often than black victim crimes, the reason had nothing to do with racism. Rather, he argued, it arises from the fact that prosecutors in suburban counties seek capital punishment more frequently than prosecutors in urban counties. "Capital murders are more frequently of white victims in suburban counties [and] more frequently of minority victims in urban counties," he said. Professor Blecker also maintained that this disparity arises in part from the fact that suburban counties have greater financial resources with which to prosecute capital crimes.

Several witnesses opposed to capital punishment claimed the death penalty is used disproportionately against poor and working-class persons. As a result of economic disadvantage, these witnesses said, these defendants are unable to retain qualified legal counsel and expert testimony. Other witnesses asserted that New York has provided skilled teams of counsel at the trial level and on direct appeal, as well as expert assistance at the trial phase.

Section 10: Prosecutorial Discretion; Geographic Inconsistencies

Prosecutors have broad discretion to designate who among those prosecuted for murder will be exposed to a possible death sentence. Several witnesses expressed concern about this broad discretion, and that it may be exercised in ways that reflect racial or class bias. Other witnesses asserted that New York prosecutors and juries have shown appropriate restraint and have made relatively limited use of the 1995 death penalty law.

A few witnesses expressed concern about geographic inconsistencies in the use of the death penalty. Statistics offered showed that the death sentence has been sought most frequently in Kings, Queens and Monroe counties. To some witnesses, it was illogical that for identical crimes committed under similar circumstances, the prosecutor in one New York county may seek a death sentence, while the prosecutor in an adjoining New York county does not. Other witnesses identified this as an appropriate matter for the exercise of discretion by locally-elected prosecutors.

Sections 12 and 13: Religious-based Views; National and International Use of the Death Penalty

Religious leaders and other persons of faith who offered testimony overwhelmingly opposed capital punishment. One religious organization strongly favored the death penalty.

Thirty-eight states have enacted the death penalty. The death penalty has been essentially halted by court rulings in two states: Kansas and New York. Twelve states and the District of Columbia do not authorize the death penalty. The states with the most executions since 1976 are Texas (340), Virginia (94) and Oklahoma (76). Thirteen people believed to be innocent were

recently released from death row in Illinois; that state currently has a moratorium on the use of the death penalty.

Dr. William Schulz, of Amnesty International USA, said the United States is one of the few industrialized nations that retain the death penalty. Frequently, he said, countries that are moving toward democracy abolish the death penalty. He said that China, Iran, Vietnam and the United States account for 84 percent of judicial executions worldwide. Sean Byrne of the Prosecutors Training Institute noted, however, that the largest democracy in the world (India), the most populated country in the world (China) and the largest country geographically (Russia) all allow capital punishment.

Sections 11, 14 and 15: Trials, Appeals and Post-Conviction Proceedings

Witnesses said that New York's Capital Defender Office and other organizations have helped provide effective defense representation in New York. Some witnesses urged that New York law be amended to ensure that two or more lawyers are appointed for all post-conviction stages, through consideration of executive clemency and up to execution.

A few witnesses urged that discovery laws be changed to ensure greater disclosure and earlier access by the defense to evidence and witness statements, in advance of capital trials. Several witnesses opposed current laws that allow prosecutors to strike jurors who are firmly opposed to capital punishment from both the guilt/innocence and sentencing phases of capital trials.

Professor William Bowers of the Capital Jury Project at Northeastern University submitted a study he authored with Professor Wanda Foglia concerning the sentencing behavior of capital juries. Based on his study, Bowers asserted that capital juries make premature sentencing decisions at the guilt phase of capital trials (before penalty phase evidence is presented), incorrectly believe they must impose a death sentence if certain aggravating factors are present and wrongly believe they are not responsible for the ultimate sentencing decision.

Schenectady County District Attorney Robert Carney expressed concern that appellate courts have used strained legal reasoning to reverse death sentences. This, he said, has the potential to negatively impact appellate precedent and the fair adjudication of non-capital cases. He supports capital punishment, but for pragmatic reasons, urged the Legislature not to restore it in New York.

Sections 16 and 17: Death Row and the Execution Process

New York's death row is located at the Clinton Correctional Facility. Two witnesses testified about what they said were unduly severe conditions at the facility. Several witnesses, including David Kaczynski, the brother of convicted "Unabomber" Ted Kaczynski and Robert Meeropol, the son of Julius and Ethel Rosenberg, who were executed for conspiracy to commit espionage in 1953, testified about the impact which execution or the potential for execution has on the close family members of persons subject to the death penalty.

Mr. Byrne of the Prosecutors Training Institute countered that conditions on New York's death row are neither substandard nor inappropriate and that death row inmates in New York live in a "humane environment" accredited by the American Correctional Association.

Section 18: Proposed Legislative Amendments to the Death Penalty Law

Sean Byrne of the New York Prosecutors Training Institute supports legislation to immediately address the Court of Appeals ruling in LaValle and restore the death penalty.

The State Senate has passed a Governor's Program Bill designed to address the LaValle ruling. The bill would require that capital case penalty phase jurors deliberate on three options: a death sentence, LWOP or a life sentence with parole consideration after between 20 to 25 years of imprisonment. Under the bill, if the jurors failed to reach unanimous agreement on one of these sentencing options, the judge would sentence the defendant to LWOP. The jury would be told, prior to penalty-phase deliberations, that in the event of a deadlock, the sentence would be LWOP.

The Governor's Program Bill would apply these same rules retroactively to crimes committed before enactment of the new law. As a result, the deadlock sentence for past crimes would be elevated from 20-25 years to life, to LWOP. Sean Byrne and Professor Blecker asserted that this change would not violate the *ex post facto* clause of the United States Constitution. Other witnesses asserted that the Governor's program bill would be vulnerable to a constitutional challenge on *ex post facto* or other grounds.

A Brief History of the Death Penalty in New York

The existence of the death penalty in New York dates to the Colonial period.⁴ During that time, many crimes were punishable by death. In the late 1700's and early 1800's, the number of crimes for which a defendant was eligible for the death penalty was reduced to murder, treason and arson of an occupied dwelling.⁵ In the mid-1800's, murder was divided into two categories or degrees, with only the first-degree crime punishable by the death penalty.

A 1937 amendment made the death penalty mandatory for first degree murder, unless the jury recommended life imprisonment.⁶ Legislation enacted in 1963 reversed the sentencing language so that murder in the first degree was punishable by life imprisonment, unless the jury recommended a death sentence.⁷ In addition, under the 1963 revision, if the defendant was under eighteen at the time the crime was committed or if the sentence of death was not warranted because of substantial mitigating circumstances, the court was required to discharge the jury and sentence the defendant to life imprisonment.⁸ Also of procedural importance, the amended 1963 law bifurcated the fact-finding and sentencing phases of trial to require a separate proceeding to determine whether the defendant should be sentenced to life imprisonment or to death (assuming the court had not already sentenced the defendant to life imprisonment as a matter of law).⁹

In 1965, legislation was enacted to limit the death penalty to murder in the first degree when the victim was a peace officer¹⁰ performing his or her official duties, when the defendant was serving a life sentence at the time the crime was committed, if the crime was committed when the defendant was serving an indeterminate sentence of at least fifteen years to life, or if the defendant was in immediate flight from penal custody or confinement when the crime was committed.¹¹ The 1965 law expressly prohibited the death penalty for persons under the age of eighteen when the crime was committed and also did not impose the death penalty when substantial mitigating circumstances existed.¹²

In 1967, the death penalty law was amended to include intentional murder, depraved indifference to human life murder and felony murder, and made a defendant convicted of such crimes eligible for the death penalty if either: (A) the victim was a peace officer killed while performing his official duties, or (B) the defendant was confined to a state prison for a term of life or an indeterminate term of at least fifteen years, or in immediate flight after escape from such custody when the crime was committed. The death penalty was only available in such cases if the defendant was more than eighteen years old at the time of the commission of the

⁴ STATE OF N.Y. TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT, March 19, 1965, at 81 (hereinafter referred to as the "1965 report").

⁵ Donnino, PRACTICE COMMENTARIES, N.Y. PENAL LAW § 125.27, McKinney's Consolidated Laws of New York (1998) at 381-82 (quoting 1965 Report).

⁶ N.Y. Sess. Laws 1937, ch. 67.

⁷ N.Y. Sess. Laws 1963, ch. 994.

⁸ Id.

⁹ Id.

¹⁰ The statutory definition of a "peace officer" under New York law has been significantly modified since the 1960's.

¹¹ N.Y. Sess. Laws 1965, ch. 321.

¹² Id.

crime and there were no substantial mitigating circumstances that rendered a sentence of death unwarranted.¹³ In 1968, the act of recklessly engaging in conduct evincing a depraved indifference to human life that results in the killing of another was removed from the list of death eligible crimes.¹⁴ And, in 1971, the legislature added the killing of an employee of a local jail, penitentiary or correctional institution performing his official duties to the list of crimes eligible for the death penalty.¹⁵

In 1972, the United States Supreme Court in Furman v. Georgia¹⁶ invalidated Georgia's death penalty law. In a one-page *per curiam* opinion, followed by several concurrences, the court held that the imposition of the death penalty in the three cases before it constituted cruel and unusual punishment in violation of the Constitution. In concurring opinions, Justices Brennan and Marshall argued that the death penalty was unconstitutional in all instances; other concurrences focused on the arbitrary nature with which death sentences had been imposed and some concurrences found that the death penalty had been imposed with unlawful racial bias against black defendants.¹⁷

In response to Furman, states enacted revised legislation tailored to satisfy constitutional concerns regarding the arbitrary imposition of capital punishment. These laws were of two major types. The first type provided for a mandatory death penalty for specified crimes and allowed for no judicial or jury discretion beyond the determination of guilt. Statutes of this kind were declared unconstitutional by the Supreme Court in Woodson v. North Carolina¹⁸ and Roberts v. Louisiana.¹⁹

The second type provided for “guided discretion” in sentencing, and statutes of this nature were upheld by the Supreme Court in three related cases: Gregg v. Georgia,²⁰ Jurek v. Texas,²¹ and Proffitt v. Florida.²² The Georgia, Texas, and Florida statutes validated by the Supreme Court allowed the sentencing court discretion in imposing death sentences for specified crimes and provided for bifurcated trial phases, where the first stage would determine the defendant’s guilt or innocence and the second stage would determine the defendant's sentence, after considering aggravating and mitigating factors. In 1978, the Supreme Court further articulated the constitutional requirements of sentencing by stating that a sentencing authority in a capital case must consider every possible mitigating factor to the crime.²³

Because the Furman decision declared unconstitutional various death penalty statutes, but not the punishment itself, on “cruel and unusual” punishment grounds, an effort was made in

¹³ N.Y. Sess. Laws 1967, ch. 791.

¹⁴ N.Y. Sess. Laws 1968, ch. 949.

¹⁵ N.Y. Sess. Laws 1971, ch. 1205.

¹⁶ Furman v. Georgia, 408 U.S. 238 (1972).

¹⁷ Id.

¹⁸ Woodson v. North Carolina, 428 U.S. 280 (1976).

¹⁹ Roberts v. Louisiana, 428 U.S. 325 (1976).

²⁰ Gregg v. Georgia, 428 U.S. 153 (1976).

²¹ Jurek v. Texas, 428 U.S. 262 (1976).

²² Proffitt v. Florida, 428 U.S. 242 (1976).

²³ Lockett v. Ohio, 438 U.S. 586 (1978).

New York, as in many other states, to enact a new death penalty statute that would comply with Furman and the Supreme Court's later death penalty holdings.

Beginning in 1975, legislation to restore capital punishment was passed over a period of twenty years by the legislature, but vetoed by Governors Carey (1975-82) and Cuomo (1983-94). None of the vetoes were overridden by the legislature. In 1995, the legislature passed a newly revised and expanded death penalty statute which was signed into law by Governor Pataki.²⁴ As amended through 2004, the law authorized the death penalty for thirteen categories of intentional murder, including murders committed in furtherance of other crimes like robbery, rape or burglary.

The 1995 Death Penalty Law

Since New York's most recent death penalty law was enacted on September 1, 1995, as noted earlier, seven persons have been sentenced to death in New York. The sentences of Darrell Harris, Angel Mateo and James Cahill were reversed after separate appeals to the New York Court of Appeals.²⁵ Appeals by two death row inmates, John Taylor and Robert Shulman, are now pending before the New York Court of Appeals.

On June 24, 2004, the Court of Appeals declared New York's death penalty statute unconstitutional in People v. LaValle.²⁶ Stephen LaValle had been convicted of the brutal rape, stabbing and murder of Cynthia Quinn in the village of Yaphank, in Suffolk County. Following the Court's holding in LaValle, the defendant was sentenced to a term of life imprisonment without the possibility of parole.

The constitutional flaw identified by the Court in LaValle arises in the penalty phase of a capital trial. Under New York law, if the jury is unable to unanimously decide between the two sentencing options presented, death or life imprisonment without parole, then the jury must be told that the judge will sentence the defendant to a third, less severe sentence that the jury may not select: life imprisonment with a possibility of parole after between twenty and twenty-five years of imprisonment.²⁷

By a 5-4 vote, the Court of Appeals in LaValle found that this “deadlock” instruction violated due process under the New York State Constitution.²⁸ The court ruled that the instruction created an unacceptable risk that jurors favoring life without parole would be induced to vote for execution, out of concern that the failure to reach unanimous agreement would result in a third, unacceptable outcome: life with a possibility of the defendant's release on parole after twenty or twenty-five years.

²⁴ N.Y. Sess. Laws 1995, ch. 1.

²⁵ See People v. Harris, 98 N.Y.2d 452 (2002); People v. Mateo, 2 N.Y.3d 383 (2004); People v. Cahill, 2 N.Y.3d 14 (2003).

²⁶ People v. LaValle, 3 N.Y.3d 88 (2004).

²⁷ N.Y. CRIM. PROC. LAW 400.27 (10).

²⁸ See LaValle supra at 128.

Additionally, the court ruled that it could not cure the statute by forbidding or eliminating this instruction because, in a capital case, as a matter of state constitutional due process, a penalty phase jury must be instructed as to the consequences of a deadlock. An instruction is required, the court ruled, because a failure to instruct under these circumstances could lead to inappropriate speculation by the jury that, absent unanimous agreement, the defendant could be released, and possibly endanger the community.²⁹

ISSUES PRESENTED AT THE PUBLIC HEARINGS

1. Traditional Rationales for the Death Penalty: Retribution, Deterrence and Incapacitation

Arguments in favor of the death penalty generally focus on one of three broad grounds:

- The death penalty is an appropriate exercise of societal retribution against those who commit certain intentional murders;
- The death penalty deters the commission of crimes subject to capital punishment; or,
- The death penalty is necessary to ensure, through incapacitation, that persons who commit such crimes will never do so again.

During the public hearings, the Committees received testimony on each of these points.

A. Retribution

Professor Robert Blecker of New York Law School argued in favor of the death penalty based on retributive principles. Retribution, Professor Blecker testified, means just punishment in the form of pain and suffering proportional to the seriousness of the crime. Proportional application of the death penalty must address the seriousness of the crime and the moral character of the defendant. The nature of murder and the victim's suffering invoke a profound emotional response from society, he said, that justifies society's application of the death penalty as retribution.

"Do not confuse retribution with revenge," Professor Blecker said. "Revenge can be limitless and misdirected or collectively applied to many who don't deserve it; retribution is limited, proportionate and directed only at the morally culpable actor."

Many witnesses appearing before the Committees expressed understanding and sympathy for retributive thoughts among survivors of murder victims, but argued that, in the end, execution of the killer does not take away the pain family members experience. Bud Welch, who lost a

²⁹ Id.; It should be noted that in one of the two cases now on appeal to the Court of Appeals, People v. Taylor, the prosecution argues that the specific instruction given by the trial court to the jury in that case avoided any coercive effect and therefore should result in the defendant's death sentence being upheld, notwithstanding the LaValle holding.

daughter in the 1995 Oklahoma City bombing, opposes the death penalty, in part because it provides no closure to family members of crime victims. In fact, Mr. Welch testified, the death penalty causes more pain and loss because it results in an additional killing.

The Committees heard similar sentiments expressed by Patricia Perry, who lost her police officer son, John William Perry, in the September 11, 2001 World Trade Center attack. S. Jean Smith and Sister Camille D'Arienzo also opposed the death penalty on these grounds.

A report from the League of Women Voters stated that when a family member is lost to murder, the healing process for some in the family includes recognition that executing the killer will not bring the loved one back. For some survivors, the report said, the death penalty brings closure while for others, it prolongs grief.

Kate Lowenstein and Bill Pelke who lost, respectively, a father and grandmother to murder, told Committee members that government efforts and resources used to exact vengeance against murderers should instead be used to help the people who live in the aftermath of these tragedies.

Kate Lowenstein's father was Allard K. Lowenstein, a former United States Representative from New York's Fifth Congressional district. Congressman Lowenstein was shot to death in his office by a mentally ill former student. Ms. Lowenstein spoke of the range of emotions she experienced after this devastating loss:

We have all been filled with a consuming anger and horror and fury at the killer. We want the murderer caught and punished. I know the rage and sense of justice that lead people to support the death penalty. I also know, from working with murder victim family members for the past four years, that what victim's families need is help to heal and learn how to live with a mangled heart. They need support and counseling. We need the killer to be caught and brought to justice. We do not need an execution.

...Those of us who have gone through it are forced to realize, maybe slowly, but inevitably that nothing we do to the killer will bring back our family member from being dead. The state offers victims the death penalty as if it is some kind of scale they can use to correct the loss, but you can't, and in the process of trying, we buy into a system that we all know by now, does no honor to the victims or to our society.

In a statement, Carolyn McCarthy, the U.S. Representative for the Fourth Congressional District in Nassau County, expressed opposition to the death penalty. Representative McCarthy's husband was murdered on a Long Island Railroad train in 1993; her son was seriously wounded in the same attack.

Carole Lee Brooks, whose son David was murdered at age 28, also testified against the death penalty. Ms. Brooks appeared as a representative of "Parents of Murdered Children," and noted that there is a national organization, "Murder Victim [Families] for Reconciliation." She

urged the Committees to “honor my son and other victims of murder by acting with the highest regard of human life.”

Janice and Bruce Grieshaber lost their daughter Jenna to murder several years ago. In 1998, their efforts in the State Legislature helped lead to the enactment of “Jenna’s Law”, which eliminated parole release for first time violent felons. The Grieshabers support life imprisonment without the possibility of parole, but oppose capital punishment.

Pat Webdale, whose daughter Kendra was pushed to her death in front of a Manhattan subway train, testified against capital punishment. Ms. Webdale’s advocacy led to the enactment of New York’s Assisted Outpatient Treatment law for persons with mental illness, known as “Kendra’s Law”.

Marguerite Marsh’s daughter Cathy, was murdered more than seven years ago. She died before her thirtieth birthday. The perpetrator of this crime was sentenced to life imprisonment without the possibility of parole under the 1995 New York law. Ms. Marsh is "satisfied" with the sentence. Ms. Marsh said she is “grateful that I will not have to bear the pain of going through appeal after appeal, and Cathy’s two little daughters will not have to grow up subjected to accounts of their mother’s murder over and over again in the newspapers and on TV.”

Other victims’ survivors told Committee members that the death penalty is necessary because otherwise the killer – unlike their family members – can continue to breathe and experience life.

Joan Truman-Smith, whose daughter was murdered in the 2000 “Wendy’s Massacre” in Queens, New York, told Committee members that nothing short of the death penalty is needed to ensure that justice is served:

Until it’s at your door, you are [not] going to feel the same thing I am saying . . .
Think of the crime these people committed and if the evidence fit[s] . . . kill them.

Debra Jaeger, whose sister Jill Cahill was murdered by her estranged husband in 1998, testified for herself and her brother David. Debra Jaeger told Committee members she believes the death penalty is needed as the ultimate penalty to punish such horrific crimes.

Sean Byrne of the NY Prosecutors Training Institute argued that the death penalty is appropriate retribution for the most violent crimes. Jeff Frayler, on behalf of the NYS Association of Police Benevolent Associations, agreed:

Just look at the faces of [three children], who, on September 10, 2004 had their lives forever altered when their father, Detective Patrick Rafferty, along with his patrol partner, Detective Robert Parker, was senselessly gunned down on a Brooklyn Street by Marlon Legere, who had previously served time on three separate occasions for other criminal activities. Legere, who was no stranger to the criminal justice system, committed these ruthless murders while two of New York’s finest were faithfully carrying out their public duties.

Unfortunately, as the removal of capital punishment becomes more of a reality, his lethal actions will probably guarantee him permanent lodging, clean clothing, food and, more importantly, his life.

Richard Harcrow of the New York State Correctional Officers and Police Benevolent Association asked, “Why should the felon who kills a dedicated law enforcement professional be comforted into thinking that they will not suffer the ultimate penalty for this crime?” Mr. Harcrow believes capital punishment is necessary so that, when a law enforcement official is killed in the course of his or her sworn duties, surviving family members will know that the death of their loved one “was not in vain.”

A few death penalty opponents warned that calls for retribution can turn to vengeance and a frenzy misdirected against innocent persons. Lawyer Myron Beldock represented Yusef Salaam who, along with hearing witness Karey Wise, was convicted but later freed in the rape and brutal beating of the “Central Park Jogger.” Beldock told Committee members that in some instances, the “court” of public opinion condemns suspects even before any prosecution begins.

Former New York City Public Advocate Mark Green expressed similar concerns about pretrial publicity. And to those who support the death penalty based on retributivist principles, Green asked rhetorically, “If someone tortured a victim, should the state then comparably torture the defendant?”

B. Deterrence

Testimony received by the Committees indicates that there are conflicting views and studies on whether or not the death penalty is an effective deterrent against murder. Some witnesses also addressed the question of whether, if the death penalty does deter, it deters more effectively than life imprisonment without the possibility of parole.

New York County District Attorney Robert Morgenthau noted that for punishment to serve as an effective deterrent, it must be “prompt and certain.” The death penalty, he said, “is neither”. District Attorney Morgenthau urged the Legislature not to reinstate capital punishment.

Professor John Blume of Cornell University Law School testified that the “overwhelming weight of the scholarly research indicates that the death penalty does not deter persons from committing murder.” He also noted that:

- Cornell University research indicates that states which have abolished capital punishment “by and large have lower murder rates than states that retain capital punishment”;
- The deadliest and most notorious serial killers, such as Ted Bundy, Donald Gaskins, John Gacey and Aileen Wornos, committed their crimes in states with active death penalties. “The threat of capital punishment, in short, was no deterrent to them”; and

- Professor Blume’s study of death row “volunteers” revealed that some individuals committed their crimes “for the purpose of being apprehended and sentenced to death.” Essentially, Professor Blume said, these persons committed their crimes in a death penalty jurisdiction “as a form of suicide.”

Professor Sam Donnelly of Syracuse University Law School noted that an increased police presence and new programs prosecuting gang members under organized crime laws have reduced murder rates in some upstate cities. Crime rates have been dropping in New York City since the early 1990s, and Professor Donnelly attributes this to community policing and improved crime control measures. He testified that, “Capital punishment is a distraction from the measures that can most effectively control murder and other crimes.”

Raymond A. Kelly, Jr. of the New York State Association of Criminal Defense Lawyers is an experienced criminal defense attorney. He is convinced, based on his experience representing many persons charged with homicide, that the death penalty is not a deterrent. Most murders, he argued, result from non-premeditated events that develop from competition between criminals over turf.

Most of the accused killers he has represented, Mr. Kelly said, did not believe they would be caught, and so would not have been deterred by harsher penalties. Once arrested, Mr. Kelly testified, many defendants he has represented would prefer a death sentence to life imprisonment without parole.

In separate testimony, Russell Neufeld agreed, based on twenty-five years representing criminal defendants, that in the overwhelming majority of homicide cases the killing was an unplanned, irrational act. These killings, he said, would not have been deterred if a death penalty were in place.

Sean Byrne of the New York Prosecutors Training Institute called the debate over whether the death penalty deters “diversionary and over emphasized.” “Nonetheless,” he noted several studies that, he said, “prove that capital punishment has a deterrent effect.” Mr. Byrne acknowledged that there are studies that reached the opposite view, but cited one study that, he said, shows that the death penalty “deters as many as 14 homicides for each person executed.”

Murders in New York declined, Mr. Byrne said, from 1,980 in 1994 to 923 in 2003, rates not seen since the 1960’s.³⁰ “To turn the prove-a-negative deterrence argument around,” he said, “death penalty opponents cannot prove that the re-enactment of the death penalty did not contribute to the rapid decline in murders in New York.”

Similarly, Professor Robert Blecker of New York Law School believes the death penalty deters some murders. In his written testimony, Professor Blecker cited several published articles which, he said, indicate the death penalty deters “most effectively.” “Those studies,” he said, “have their critics among the abolitionists – but on balance, the informed best guess is that a real death penalty operates as a marginally more effective deterrent than [life without parole].”

³⁰ The rate spiked higher in 2001 due to the World Trade Center attack on September 11.

Professor Blecker told the Committees that he has interviewed hundreds of prisoners over thousands of hours. On one occasion, he said, he learned that persons living near the nation's capital sometimes killed in Washington D.C., but not in Maryland or Virginia, because they were aware that Washington D.C., unlike Maryland or Virginia, did not have capital punishment.

Professor Jeffrey Fagan, a Professor of Law and Health at Columbia University has studied capital punishment in the U.S. and homicide rates in American cities "over the past three decades." New studies claiming that executions reduce murders, Professor Fagan wrote to the Committees, "are fraught with technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive up murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence". He added:

[C]areful analysis of the experience in New York State compared to others, lead[s] to a rejection of the idea that either death sentences or executions deter murder.

According to Professor Fagan, a published 1975 study by Professor Isaac Ehrlich claimed that executions in the 1950's and 1960's prevented approximately eight murders. Professor Ehrlich's study, Professor Fagan said, was noted in Gregg v. Georgia and is cited frequently by death penalty proponents. However, Professor Fagan claimed Professor Ehrlich's findings were disputed by articles published, for example, in the Yale Law Journal and by an expert panel appointed by the National Academy of Sciences. There have been several attempts to replicate Professor Ehrlich's study without success, Professor Fagan said.

Since 1995, Professor Fagan testified, there have been approximately a dozen studies that claim the death penalty acts as a deterrent. Professor Fagan said there are serious scientific flaws in these studies. According to Professor Fagan, all but one of these studies groups all types of murder in the same category. The claim is that regardless of motivation, the threat of the death penalty would be an equally effective deterrent. This logic, Professor Fagan said, fails when dealing with crimes of passion or jealousy.

According to Professor Fagan, many of the studies produce contradictory results. One study, he said, found that in some states it appears executions are as likely to produce an increase in homicides following an execution, as they are to produce a reduction in homicides. In addition, some states show an increase in homicides, or a "brutalization" effect, following an execution but at other times, a correlation to a deterrent effect is seen.

Professor Fagan asserted that there is no direct test of deterrence in any of these studies. The studies, Professor Fagan said, do not show that defendants are aware of the status of the death penalty in the state in which they are accused of committing the crime. The studies also do not show that defendants rationally decide to forego homicide and use less lethal forms of violence.

Professor Fagan said the research performed by Professor Berk shows that the proven deterrent effect of executions, if any, are confined to the state of Texas. This, he said, is shown

only during years in which there were more than five executions per year. Most states never reach these levels of executions per year. According to Professor Fagan, Professor Berk's research shows that when Texas is excluded, there is no evidence of a deterrent relationship between executions and homicides.

Professor Fagan asserted that recent deterrence studies fail to account for whether any of the presumed deterrent effect of the death penalty may be due to the much more frequently imposed sentence of life imprisonment without parole applicable in the jurisdictions studied. Professor Fagan said:

Murder is a complex and multiply-determined phenomenon [T]here is no reliable, scientifically sound evidence that execution can exert an effect that either acts separately and sufficiently powerfully to overwhelm . . . these patterns.

Michael Palladino of the Detectives Endowment Association argued that the death penalty deters crime, even though it is difficult to prove that proposition by statistical methods:

From my experience, I believe capital punishment is most definitely a deterrent. The problem is the difficulty in tracking or accurately measuring that statistic. However, what can be tracked is the crime and murder statistics when the death penalty is in favor. When capital punishment is law, the murder rate is lower.

Mr. Palladino described a surge of crime and murder in New York City beginning in the 1970s, through the 1980s and into the 1990s. He contends that with enactment of the death penalty, "the crime and murder rates began to quickly and steadily decline to rates not seen since the "good old days of the 60s." "The common denominator," he said, "linking those two lowest crime periods is capital punishment as a deterrent."

C. Incapacitation

Incapacitation is also a frequently-cited basis for the application the death penalty. Death penalty supporters argued to the Committees that capital punishment protects potential victims against future violence because, for example, there may not be perfect certainty that a sentence of life imprisonment without parole will be upheld for the duration of the prisoner's life. The death penalty, these supporters asserted, incapacitates the most egregious offenders and effectively removes the potential for them to harm anyone again.

Professor Blecker also advanced the view of some capital punishment supporters that prisons provide particularly insidious offenders with the further opportunity to murder innocent people.

Opponents of capital punishment argued to the Committees that persons sentenced to life imprisonment without parole are denied the opportunity to return to society, and so life without the possibility of parole ("LWOP") is sufficient protection for the public. Citing a recent study

by her organization, Kathryn Kase of the Texas Defender Service argued that predictions about who among convicted persons will be dangerous in the future are often wildly imprecise.³¹

Others argued there is no solid assurance that a life-without-parole sentence will never be changed or modified. Monroe County District Attorney Michael Green noted the case of a Monroe County man sentenced for rape and murder in the early 1960's. The man pled guilty to avoid the death penalty and was, D.A. Green claimed, sentenced to LWOP but, D.A. Green said, the law was later changed to allow for the possibility of parole. Recently, forty-two years after this crime, 8,000 people responded to a petition drive, and urged the Division of Parole to continue to deny this offender parole release.

2. Reliability of Capital Convictions

The Committees heard testimony from several witnesses concerning the reliability of capital trials. Barry Scheck, Co-Director of the Innocence Project at Cardozo Law School, said that since 1995, 153 people in the United States, including fourteen men under sentence of death, have been exonerated by post-conviction DNA testing. However, Mr. Scheck contended, there is evidence available for possible DNA testing (and potential exoneration of the defendant) in only 20 percent of all serious felony prosecutions.

Citing a University of Michigan study,³² Mr. Scheck testified that since 1989, there have been more than 329 post-conviction exonerations nationwide. Most were based on new information, not DNA evidence. Death row inmates, Mr. Scheck said, account for one half of one percent of America's prison population, yet 22 percent of all post-conviction exonerations.

Professor Sam Gross of the University of Michigan Law School advised the Committees that since 1989, 205 persons convicted of murder have been exonerated nationwide. Of these, he wrote, 74 persons sentenced to death had their capital convictions overturned and were released from prison. Attorney Stephen Saloom of the Innocence Project, and others, testified that 117 people have been released from death row and, they said, exonerated since 1973.

Mr. Scheck argued that unfavorable publicity and strong community sentiments promote a rush to judgment in cases involving violent crimes, sometimes leading to erroneous convictions. Over the course of modern history, Mr. Scheck said, scores of New Yorkers each decade have been found to have been wrongly convicted; many of these persons, Mr. Scheck said, would have faced the death penalty, had it been in effect in New York prior to 1995.

Mr. Scheck offered several proposals he said would help reduce instances of wrongful conviction and which should be enacted before lawmakers consider re-instituting the death penalty. Among the proposals:

³¹ See TEXAS DEFENDER SERVICE, Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness, (2004).

³² Samuel Gross et al., Exonerations in the United States, 1989 through 2003, 95 J. CRIM. L. & CRIMINOLOGY 2005 (on file with the Committees).

- Establish new procedures to decrease mistaken eyewitness identifications, while preserving the number of correct identifications;
- Reduce instances of false confessions by videotaping interrogations;
- Increase funding to improve the accuracy of forensic tests conducted by crime laboratories; and
- Adopt measures designed to assure fair investigations and trials.³³

Scott Christianson, a former Deputy Commissioner of the NYS Division of Criminal Justice Services, authored two books: Inside the Sing Sing Death House (2000) and Innocent: Inside Wrongful Conviction Cases (2003). Mr. Christianson noted that New York executed 614 persons from 1891 to 1963. Several studies, he said, have ranked New York high on the list of states with large numbers of wrongful convictions, including capital convictions. Mr. Christianson made several recommendations:

- State agencies, including the Court of Claims, should maintain records and annually report on wrongful convictions;
- A blue-ribbon panel should be appointed to review and address the problem;
- Police should use sequential line-ups and special record-keeping procedures; and
- Prosecutors should not be immune from civil liability.

The NYS League of Women Voters recently conducted a study of the death penalty. The League noted that poor quality investigations have led to many wrongful convictions. Marsha Weissman of the Center for Community Alternatives asserted that inevitable human error leads inexorably to the execution of innocent persons.

In written testimony, Professor Sam Gross of the University of Michigan Law School contended there has been a rapid increase in reported exonerations in the past fifteen years. According to Professor Gross, this likely reflects the combined effects of three trends:

First, the growing availability and sophistication of DNA identification technology has, of course, produced an increase in DNA exonerations over time. Second, the singular importance of the DNA revolution has made exonerations increasingly newsworthy; as a result, we are probably aware of a higher proportion of the exonerations that occurred in 2003 than in 1989. And third, this increase in attention has in turn led to a substantial increase in the number of false

³³ In testimony before the Committees, Professor Evan Mandery of John Jay College of Criminal Justice, Bettina Plevan of the Association of the Bar of the City of New York and attorneys Russell Neufeld and Colleen Brady also recommended several of these reforms.

convictions that in fact do come to light and end in exonerations, by DNA or other means.³⁴

According to Professor Gross, the average time between conviction and exoneration for those identified in this study was more than eleven years.

New York County District Attorney Robert Morgenthau testified that post-conviction exonerations often result from dogged efforts by public officials determined to ensure that a conviction was not obtained in error. District Attorney Morgenthau cited cases his office prosecuted in which the defendant was ultimately exonerated, years later. Regarding one case, he said, “[T]his exoneration came after the defendant had already served a substantial portion of his sentence but if this had been a capital case, it may well have come too late to do the defendant any good at all.”

Others offered testimony that exonerations come as frequently by happenstance, or without the cooperation of local officials. Thomas P. Sullivan, a member of the so-called “Ryan Commission” established by Illinois Governor George Ryan to investigate wrongful convictions under Illinois law, told the Committees thirteen persons were freed from Illinois’ death row before Governor Ryan appointed a commission to study the problem. In several cases, evidence that exonerated the defendant was uncovered not by lawyers or police officers, but by journalism students in an investigative clinic at Northwestern University.

Bishop Jack McKelvey of the Episcopal Diocese of Rochester also noted the extraordinary circumstance of journalism students uncovering evidence that exonerated condemned persons.

Professor William Hellerstein of Brooklyn Law School has represented several persons who were convicted of murder in New York, but later freed. Professor Hellerstein represented Eric Jackson, who was convicted in 1981 of causing the death of six firefighters in a Brooklyn supermarket fire. As a result of discovery information obtained as part of a civil lawsuit brought by the firefighters’ widows, Jackson was able to offer proof that the fire was not arson, and that he had been wrongly convicted. After several years of litigation, Jackson’s conviction was vacated and he was freed from prison.

Professor Hellerstein represented Nathaniel Carter, who was convicted in 1982 of murdering his mother-in-law. Professor Hellerstein testified that he was later able to uncover evidence that Carter’s ex-wife framed Carter for the murder. Professor Hellerstein’s motion to vacate Carter’s conviction was ultimately granted and Carter was freed.

Professor Hellerstein recently represented David Wong, who was convicted of murder in the 1986 stabbing death of a fellow inmate at New York’s Clinton Correctional Facility. Professor Hellerstein said students working with him at Brooklyn Law School uncovered evidence that another inmate, not Wong, committed the murder. On December 20, 2004, Professor Hellerstein testified, Acting Clinton County Judge Richard Giardino dismissed the

³⁴ *See* Gross *supra* 32.

indictment against Wong, ruling, according to Professor Hellerstein, that “the defense contends and, while not stating so specifically, the prosecution essentially admits that a trial at this juncture would likely result in an acquittal.”

Richard J. Bartlett, a former member of the N.Y.S. Assembly, a former chair of the New York State Penal Law Revision Commission and a former Dean of Albany Law School, testified before the Committees. Dean Bartlett is convinced that erroneous convictions are inevitable and these errors, he said, sometimes cannot be demonstrated until it is too late.

Stephen Dalsheim retired as Superintendent of New York’s Sing Sing prison after forty-two years with the Department of Correctional Services. Superintendent Dalshiem testified that during his twenty year tenure as warden, he met numerous governmental officials who were convicted of crimes related to their work:

This included a few commissioners, a few judges and quite a few police officers and detectives. Some of these men spoke quite freely to me, quite openly and they admitted placing false evidence and making false statements in order to get convictions. Believing strongly in their cases, they committed perjury in order to get convictions. Some said you have to be creative, especially when dealing with liberal judges. You have to build a solid case. Some said it was a common practice.

Now I don’t know how common it is but I know there were innocent people in prison and I met a few of them . . .

The Committees heard testimony from several individuals who were convicted of murder or other serious felony charges, but later freed. Madison Hobley, a former Illinois death row inmate, testified before the Committees. Mr. Hobley was convicted of starting a fire that killed his wife, his infant son and five other persons. Mr. Hobley testified that there was no physical evidence linking him to the crime. Mr. Hobley was freed from prison after sixteen years.³⁵

Ernest Shujaa Graham was freed from California’s death row after serving 15 years in prison. His first trial ended in a hung jury. He told the Committees that his conviction in the second trial was overturned, after it was shown that prosecutors had systematically excluded African-American jurors from the jury panel. A third trial resulted in a hung jury; he was acquitted after a fourth trial.³⁶

Robert McLaughlin and his father, Harold Hohne, also testified. Mr. McLaughlin served six and one-half years in a New York State prison before he was freed, after persistent efforts by his father and several volunteer attorneys. Mr. Hohne and Mr. McLaughlin explained that Mr. McLaughlin was misidentified by the single eyewitness in the case. Mr. McLaughlin received a

³⁵ Jodi Wilgoren, 4 Death Row Inmates Are Pardoned, THE NEW YORK TIMES, January 11, 2003.

³⁶ Cases of Innocence 1973 - Present, DEATH PENALTY INFORMATION CENTER, Washington, D.C., available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109>, (March 29, 2005).

\$1.93 million financial settlement to compensate him for his wrongful conviction.³⁷ Mr. Hohne was once a supporter of capital punishment, but this experience has caused him to change his view and oppose the death penalty.

Juan Melendez told the Committees that he is the 99th of 117 death row inmates exonerated and released since 1973. DNA evidence was not available in his case, he said, and only played a role in 14 out of the 117 cases where the defendant was exonerated. After several appeals to the Supreme Court of Florida, he was able to get his case into a different county, he said, where he was finally able to reverse the conviction and win his freedom.

Sammie Thomas was wrongly convicted of murder in Auburn, New York. Mr. Thomas told the Committees he was imprisoned for more than four years. After the Court of Appeals ordered the prosecution to turn over certain exculpatory documents, he said, Mr. Thomas was retried and promptly acquitted.

John Restivo was convicted of rape and murder in Nassau County and served 18 years in prison. In 2003, his conviction was overturned and Mr. Restivo was freed. DNA tests, he told the Committees, showed that another man committed the crime. He testified that, "I served 6,566 days in New York's toughest prisons for a crime I did not commit".

Yusef Salaam and Karey Wise were convicted of participating in the brutal rape and beating of a woman in New York's Central Park, a case which became known as the "Central Park Jogger" case. The two were freed when DNA evidence identified another man as the attacker. Mr. Salaam and Mr. Wise testified before the Committees. Mr. Salaam said he believes widespread publicity about the case prejudiced the jury and contributed to their erroneous convictions.

Several witnesses disputed contentions that the conviction of innocent persons is commonplace. Professor Robert Blecker of New York Law School acknowledged that an innocent person may have been executed in the modern era. But he noted that not one such instance of wrongful execution has been documented or proven.

Reports that up to 130 people have been released from death row due to innocence are exaggerated, he said. Professor Blecker's informed estimate is that in recent years, 30 people released from death row did not commit the crime. Professor Blecker testified that Professor James Liebman's study citing a 68 percent error rate in capital cases is erroneous because, Professor Blecker said, in many instances where a death sentence was overturned, a new death sentence was imposed after later appeals or after a new sentencing proceeding.

As currently constructed, Professor Blecker believes New York's death penalty law goes quite far toward protecting against the conviction of innocent persons. Professor Blecker offered two suggestions he said would help protect against persons not deserving the death penalty from being sentenced to death. First, he suggested that jurors be specifically instructed that they may

³⁷ McLaughlin v. State, N.Y.L.J. Oct. 27, 1989, at 25, col. 4; see also N.Y. TIMES, Oct. 19, 1989, at B28, col. 1.

extend mercy by sparing the defendant's life. Jurors, he said, should also be told that "righteous anger or indignation can help inform the morally correct verdict of life or death."

Professor Blecker also stated that penalty phase jurors should be instructed that they may spare the defendant's life if they harbor lingering or residual doubt about the defendant's guilt. Professor Blecker would require that judges instruct the jury that no death sentence may be imposed unless the jury is "convinced to a moral certainty" that the defendant deserves to die.

According to Sean Byrne of the New York Prosecutors Training Institute, every defendant convicted under New York's 1995 death penalty statute was "indisputably guilty." "Their attorneys," Mr. Byrne said, "routinely admitted their clients' guilt in opening statements of their trials." Furthermore, Mr. Byrne said, studies by prosecutors around the country have shown that the majority of persons allegedly "exonerated" in the United States, as reported in various studies, were "factually guilty" but were freed because key evidence proving their guilt was suppressed, or because retrial was not possible for other reasons.

3. Cost of the Death Penalty

The Committees heard testimony from witnesses who asserted that the financial cost of a state criminal justice system with a death penalty greatly exceeds the financial cost of a non-capital system, including a system that includes sentences of life imprisonment without parole. Many of these witnesses argued that if crime prevention is the goal, the money earmarked for capital prosecution could be better spent on improved policing, including crime prevention and investments in efforts to solve and punish crimes.

Other witnesses disputed these claims and contended that cost-savings generated by capital punishment were substantial.

Professor Blecker told Committee members that a fair analysis of the cost of the death penalty must credit the savings accrued from crimes prevented and deterred. Additionally, Professor Blecker asserted that substantial savings (which, in his view, decidedly tip the fiscal balance in favor of the death penalty) accrue from trials avoided, that is, when guilty defendants plead guilty to non-capital charges, rather than face the prospect of a capital trial and possible execution.

Regarding New York's expenditures to administer the capital punishment law, Sean Byrne of the NY Prosecutors Training Institute asserted that "[t]remendously more money is made available for the defense of capital cases (four to five times more) than for capital prosecution, but prosecutors appear to have been adequately funded to date." Mr. Byrne pointed out one key area that was overlooked by the 1995 law: funding for police agencies "that have to handle massive workload increases in capital cases."

Schenectady County District Attorney Robert Carney noted that expenditures for death penalty prosecution and defense have cost New Yorkers as much as \$200 million since 1995. "There are," he said, "many criminal justice initiatives that are effective in reducing crime that could be enhanced for a fraction of this money."

Testimony submitted by Thomas P. Sullivan, a former member of the Ryan Commission in Illinois, offered the view of one judge: “The death penalty has great popular appeal, but I don’t think the taxpayers have looked at the bottom line. The death penalty is damn expensive.”³⁸ Mr. Sullivan presented a state-by-state analysis of the cost of capital cases. He stated that it costs states from a third to as much as three times more for a death penalty case than to adjudicate a non-death penalty case.

Richard Dieter of the Death Penalty Information Center, who also is an adjunct professor at Catholic University Law School, believes the question of cost as it relates to the death penalty is a central issue. He argued that having the death penalty means sacrificing compensation for victims’ families, funds for more police and even more prison space. Mr. Dieter noted that the Ryan Commission in Illinois made eighty-five recommendations, most of which, he said, would make the Illinois death penalty even more expensive.

Mr. Dieter argued that most states have a symbolic death penalty. He said that in most jurisdictions, a significant majority of death sentences are overturned and life sentences are imposed instead. Thus, he asserted, most states that have the death penalty pay the significantly higher costs associated with trying a death penalty case, but frequently end up with a non-death sentence anyway.

Mr. Dieter also argued that expenses associated with the death penalty are “top heavy,” meaning that most costs occur quickly during the trial and early appeals, rather than being spread out over a long period of time, as in the case of a person who is sentenced to a life term for murder. Special procedures, including the fact that capital trials have two phases, add to the costs. Mr. Dieter asserted that with so significant a portion of the cost of capital cases coming early in the representation, the cost of death penalty cases quickly surpass those of non-death penalty cases, eclipsing even the costs associated with forty years or more of imprisonment for non-capital defendants.

Mr. Dieter testified that a two-year North Carolina study concluded that it cost North Carolina \$2.6 million more per case for each conviction that resulted in the defendant’s execution than for each similar North Carolina case that did not result in execution. Also, he asserted that the cost of an execution in California is \$90 million.

A Dallas Morning News report, he said, concluded that a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for forty years. A Miami Herald report, he said, estimated that Florida spends \$51 million a year more for death penalty cases than it would cost to punish all first-degree murderers with life in prison without parole.

Mr. Dieter added that the higher costs of capital prosecution are concentrated on a small group of people. He argued that instead, government should spend these funds on programs that might benefit a much larger group.

³⁸ Testimony of Thomas P. Sullivan, December 15, 2004 (quoting Fulton County, Georgia, Superior Court Judge Stephanie Manis, ATLANTA JOURNAL-CONSTITUTION, May 12, 2002).

Mr. Dieter contended that significant costs associated with trying a death penalty case are paid by county governments which, he asserts, can least afford them. These circumstances, Dieter argued, also have racial implications: wealthier counties with wealthier governments are more likely to seek the death penalty. So, he concluded, cost issues associated with the death penalty can lead to the arbitrary administration of capital punishment.

Mr. Dieter added that if New York reinstates the death penalty, an execution likely will not occur for at least ten to fifteen years. The cost will exceed hundreds of millions of dollars, and these expenditures will not necessarily make the streets safer. He also reasoned that taxpayer resources can be better used for crime prevention and to address other societal concerns.

James Rogers of the Association of Legal Aid Attorneys (“ALAA”) in New York City claimed the costs associated with the death penalty in New York are “astronomical.” In one case defended by ALAA members, he said, each side spent more than \$100,000 on jury consultants alone. Mr. Rogers pointed out that resources for the needs of the entire indigent defense system are lacking. He too asserted that monies diverted to death penalty cases could be better spent improving resources for the rest of the criminal justice system.

James Liebman, a Columbia University Law School professor, predicted that reinstatement of the death penalty, over a term of about twenty years, would cost New York taxpayers approximately \$500 million, likely with only two or three executions during that time. This, he calculates, means the added cost to taxpayers of each New York capital case that results in execution would be approximately \$200 million per execution.

Several witnesses asserted that capital punishment is more expensive than life imprisonment without parole. Mr. Sullivan of the Illinois Commission offered several reasons why, in his view, the cost of capital prosecutions is greater than the cost of non-capital LWOP prosecutions, including:

- Investigations are longer and more costly;
- Representation costs are higher;
- Every procedural phase is longer, involving more experts;
- Many jurisdictions require a separate sentencing phase;
- Appeals are generally automatic;
- There are usually extensive post-conviction proceedings in state and federal court; and
- Death row cells are more expensive and death row inmates require greater security.

Kathryn Kase, a criminal defense lawyer who has worked in both New York and Texas, described Waller County, Texas, a rural county outside Houston. Waller County, she said, has not prosecuted a capital murder in recent memory, although murders do occur in the county. Ms. Kase said the death penalty is not sought in Waller County because the county simply cannot afford it.

Questions about the cost of the death penalty overlap with questions about fairness and consistency. Ms. Kase asserted that in New York more populated counties with higher land values and, therefore, greater tax revenues, are more able to pay capital costs, and thus, she believes, more likely to seek the death penalty. Ms. Kase asserted that this reason for seeking or not seeking a death sentence is at odds with the United States Supreme Court decision in Gregg v. Georgia (death penalty may not be imposed arbitrarily or capriciously).

Since 1996, New York State has provided "Capital Prosecution Extraordinary Assistance" funds to some counties to partially offset the cost of capital prosecutions. In addition, under Judiciary Law Section 35-b, death penalty defense costs in New York are paid by the state.

Professor Bennett Gershman of Pace University Law School indicated that the cost for a recent eight-month capital murder trial in Westchester County (People v. Alvarez, which resulted in an LWOP verdict) was \$4 million. At the time, Professor Gershman wrote, the county budget was being cut and the District Attorney announced that she had insufficient funds to prosecute probation violators and other serious offenders.

Jonathan Gradess of the New York State Defenders Association argued that New York's system for defending poor persons is stretched beyond capacity, even without considering capital cases. Mr. Gradess said that a study prepared by his association shows that in the last New York capital case tried in 1984, before the passage of the present death penalty law, the prosecution outspent the defense by a ratio of ten to one. Mr. Gradess finds appropriations to fund death penalty prosecutions untenable in light of rising health care costs. He argues that diverting monies to execute one nineteen-year old, impoverished youth would place thousands of elderly New Yorkers at medical risk.

Mr. Gradess said conservative estimates are that New York has spent \$170 million in the past decade on death penalty prosecution and defense. With seven death sentences imposed, he said, the 1995 death penalty law has thus far cost taxpayers approximately \$24 million per death sentence.

Kate Lowenstein, the daughter of murder victim Allard K. Lowenstein, criticized the "millions of dollars" capital states spend to try to kill one person. She argued that such resources are better used to support law enforcement and investigate unsolved crimes. Similarly, Marsha Weissman of the Center for Community Alternatives suggested diverting these large amounts of money to education, crime prevention and family support programs.

4. Aggravating Factors and the Scope of New York’s Death Penalty Law

New York’s death penalty law allows prosecutors to seek capital punishment when one of twelve statutory aggravating factors is present.³⁹ Some witnesses thought this list of twelve qualifying factors should be expanded; others thought the list should be reduced.

Professor Russell Murphy of Suffolk University Law School accompanied Debra Jaeger during her testimony. As noted earlier, Debra Jaeger's sister, Jill Cahill, was killed by her estranged husband in 1998. In his written submission, Professor Murphy argued that the list of aggravating factors under New York’s death penalty law should be expanded in four respects.⁴⁰ First, Professor Murphy urged that deliberate, premeditated, cold blooded, calculated murders be added to the list of death-eligible killings.

Second, Professor Murphy recommended a new distinct aggravating category, allowing the death penalty when intentional murder is the “culminating event in a pattern” of domestic abuse or domestic violence. Third, Professor Murphy urged that the intentional murder of a “highly vulnerable or incapacitated victim” should qualify the defendant for capital punishment, when the defendant knew or should have known of that condition.

Fourth, to address one basis for the reversal of the death sentence of Jeffrey Cahill,⁴¹ the killer of Ms. Jaeger’s sister, Professor Murphy argued that burglary killings -- when killing alone was the object of the defendant’s entry -- should be added to the list of death eligible murders.

Onondaga District Attorney William Fitzpatrick, who prosecuted Jeffrey Cahill, agreed. District Attorney Fitzpatrick explained that Jeffrey Cahill brutally beat his estranged wife with a bat. Six months later, as she lay in a hospital bed slowly recovering, Jeffrey Cahill disguised himself as hospital janitor, entered her room and forced a lethal poison down her throat. District Attorney Fitzpatrick unsuccessfully argued in the Court of Appeals that the defendant’s entry into the room, when the underlying motive for entering was to commit murder, should qualify as an aggravating under the burglary-murder provision of the death penalty law.

Professor Blecker urged lawmakers to expand the categories of death-eligible murders in some ways, but narrow the categories in others. Among Professor Blecker’s suggestions:

³⁹ See Donnino, Practice Commentaries, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, N.Y. PENAL LAW § 125.27 (2004).

⁴⁰ A legislative package which would implement Professor Murphy's four recommendations and also address the Court of Appeals holding in LaValle has been introduced in the Assembly by Assemblyman Robin Schimminger (see A. 5523, A. 5524 and A. 5525 [2005 Legislative Session]).

⁴¹ In People v. Cahill, 2 N.Y.3d 14 (2003), the Court of Appeals held that while murder committed in the course of a burglary is death-eligible, a (death-eligible) first degree murder charge may not be brought when the object or purpose of the defendant’s unlawful entry was to accomplish the killing, not to commit a separate crime such as robbery or theft.

- Abolish the felony murder aggravator (murder committed in the course of crimes such as robbery or burglary) and expressly define rape murder as “torture murder” qualifying the defendant for death;
- Expand and redefine torture killings;
- Add killings that are particularly cruel;
- Eliminate death sentences for life-sentenced inmates who kill;⁴²
- Narrow the categories of law enforcement officer killings to encompass only those persons who kill police officials because they are police officials;
- Add killings of especially vulnerable persons;
- Refine the witness elimination killing rule to apply only to the killing of innocent witnesses (not co-perpetrators or “professional snitch” witnesses);
- Add “depraved indifference recklessness” as a mental state qualifying a murder defendant for death.

District Attorney Michael Green of Monroe County noted that only seven persons have been sentenced to death in the first ten years of the New York death penalty law. The death penalty, he said, has been sought at trial in only eighteen of more than 8,000 murders. District Attorney Green assured the Committees that prosecutors and juries have shown appropriate restraint in applying the death penalty to the worst offenders. In the interest of expediency, D.A. Green recommended that the Legislature address the deadlock issue LaValle presents, but not consider other changes to the death penalty law at this time.

Sean Byrne of the NY Prosecutors Training Institute agreed that amendment of the first degree murder statute in New York is “not immediately necessary.” “The immediate need facing the State,” Mr. Byrne wrote in his submitted statement, “is to remedy the flaw created by the Court of Appeals in LaValle so New York can again have a workable death penalty statute.”

Other witnesses testifying before the Committees urged a narrowing of the list of aggravating factors. Testifying for New Yorkers for Fairness in Capital Punishment, Michael Whiteman, a former counsel to Governors Rockefeller and Wilson, urged that New York’s list of aggravators be significantly scaled back.

Professor William Bowers of Northeastern University discussed several studies conducted in states outside New York by the Capital Jury Project. One recent study, Professor Bowers said, revealed that in capital cases, jurors mistakenly believed they were required to

⁴² Professor Blecker argued that this group is most likely to be deterred by punitive segregation or prison transfer, and that the death penalty should apply in this context only if another aggravating factor is present.

impose a death sentence if the crime was heinous, vile or depraved. The use of aggravating factors to mandate a death sentence is unconstitutional, Professor Bowers said, yet jurors frequently mistakenly believe a death sentence is required.

Representatives of several law enforcement groups testified for and against the death penalty, particularly as it relates to the killing of a law enforcement officer. In a letter to the Committees, Jeff Frayler of the New York State Association of Police Benevolent Associations urged that the death penalty be available for the killers of police officers, judges, witnesses and family members, contract and serial killers, heinous killers and persons who commit terrorist acts.

Michael Palladino of the Detectives Endowment Association also urged that the death penalty be retained. Mr. Palladino reported that in the past three years, six detectives of the New York City Police Department have been killed. Mr. Palladino reminded the Committees that the men and women of law enforcement place their lives at great risk every day to protect New Yorkers. The death penalty is needed, he said, to give these officers better odds of returning home to their loved ones at the end of a dangerous tour of duty.

Lou Matarazzo, former president of the Police Benevolent Association, noted that several years ago, thirteen police officers were murdered in one year on the streets of New York. Mr. Matarazzo believes the death penalty is needed to assure that police officers are protected.

Ron Stalling, a retired officer of the uniformed U.S. Secret Service representing the National Black Police Association, urged that the death penalty not be used in New York. Anthony Miranda of the National Latino Officers Association decried the killing of any official. But his association strongly opposes the death penalty because of inherent injustices in the criminal justice system.

Marsha Lee Watson of the NYS Correction and Law Enforcement Guardians Association testified in opposition to the death penalty. Ms. Watson believes all life is sacred. She believes the law should not elevate the value of a police officer's life above that of other individuals.

Randy Jurgenson, a retired NYPD homicide detective, does not believe capital punishment deters murder. Detective Jurgenson recalled a murder arrest he made more than 36 years ago. The defendants were convicted and sentenced to 25 years to life imprisonment. They have been continuously denied parole. This, and the additional sentence of LWOP now on the books, convinces him that the death penalty is not needed.

Charles Billups, on behalf of the Grand Council of Guardians, a coalition of New York's African-American police, correctional, parole and probation officers also voiced opposition to the death penalty in New York.

5. Life Imprisonment Without the Possibility of Parole (LWOP)

Most presenters at the Committee hearings supported the availability of life imprisonment without the possibility of parole (LWOP) as a sentence option in New York.

148 persons have reportedly been sentenced to life imprisonment without the possibility of parole since the enactment of the 1995 law.⁴³ This stands in sharp contrast to the seven defendants who initially received death sentences.

Several witnesses contended that LWOP is a sufficiently harsh penalty for the worst offenders. Some identified LWOP as a more severe sanction than execution. Bill Pelke, a founding member of Murder Victim Families for Human Rights, said LWOP is no “picnic”; “anybody who thinks that it’s some sort of country club,” he said, “has not been in a prison and seen people on death row.”

Catherine Abate, a former NY State Senator and former Commissioner of the NYC Departments of Correction and Probation, pointed out that opinion polls show a majority of Americans oppose the death penalty when offered the alternative of life imprisonment without the possibility of parole. Andrew Cuomo, former Secretary of the U.S. Department of Housing and Urban Development, told the Committees he believes public opinion has turned strongly away from the death penalty in recent years.

Professor Robert Blecker of New York Law School agreed that, like the death penalty, LWOP can be a deterrent. He mentioned several studies which, he asserted, show that capital punishment is a greater deterrent than LWOP. Professor Blecker believes execution is the ultimate threat. There are behaviors, he testified, that a person might not engage in for fear of dying, that a person would engage in even if it meant a possible loss of liberty.

Professor Blecker noted that persons sentenced to prison often have access to regular activities like reading, exercise, watching television and developing friendships. The people who are the worst of the worst, Professor Blecker testified, do not deserve all of these privileges.

John Dunne, a New York State Senator for twenty-three years and a former Assistant Attorney General for Civil Rights at the United States Department of Justice, voted “twelve times to establish the death penalty in New York.” During the hearing, Senator Dunne spoke of “struggl[ing] for more than forty years with this issue” and urged the Committees to “use those bloodless means that are associated with life imprisonment without parole, to cap our punishment for a first degree murderer with that sentence, and to use the resources thereby saved to improve the quality of life for all our citizens.”

6. Mental Retardation

In 1989, in Penry v. Lynaugh,⁴⁴ the U.S. Supreme Court, analyzing Eighth Amendment questions involving “evolving standards of decency,” determined that there was not a sufficient national consensus to require an end to the application of the death penalty to mentally retarded

⁴³ See Jonathan Gradess, testimony February 8, 2005; see also The Meaning of Life: Long Prison Sentences in Context, THE SENTENCING PROJECT, Washington, D.C. (reporting that as of May, 2004, New York had 110 people serving LWOP).

⁴⁴ 492 U.S. 302 (1989).

defendants.⁴⁵ Late in 2004 however, in Atkins v. Virginia,⁴⁶ the Court concluded that executing persons with mental retardation would violate the Eight Amendment prohibition against cruel and unusual punishment.

New York's death penalty law permits capital prosecution and the execution of mentally retarded persons, but only when the defendant was a jail or prison inmate, the victim was an employee of the jail or prison engaged in official duties, and the defendant knew or reasonably should have known that the person was so employed. Asked whether, in light of Atkins, New York's limited exception allowing the execution of mentally retarded prisoners would pass federal constitutional muster, Professor Blecker concluded that the U.S. Supreme Court has ruled on the issue, and no state may execute a mentally retarded person under any circumstances. No witness disagreed. Professor Blecker noted, however, that the high court had left it to each state to determine what, in fact, constitutes mental retardation.

7. Mental Illness

The Bureau of Justice Statistics estimated in 1998 that, on average, 283,000 persons with mental illness are incarcerated in jails and prisons in the United States.⁴⁷ Ron Honberg of the National Alliance for the Mentally Ill (NAMI) testified that, in his view, the criminal justice system in many of the nation's communities has become the *de facto* mental health treatment provider.

Mr. Honberg estimates that twenty percent of the persons sentenced to death in the U.S. have a serious mental illness. “[O]nly ... after [these] crimes were committed, was treatment provided, usually for the purpose of achieving competence to stand trial. Frequently, more money is spent executing people with severe mental illness than was [spent] on providing treatment.”

⁴⁵ According to the NYS Office of Mental Retardation and Developmental Disabilities:

People with mental retardation show delays in learning, a slower pace of learning, and difficulty in applying learning. Approximately 200,000 people in New York are thought to have mental retardation. Mental retardation can result from a variety of factors, among them premature birth, genetic abnormalities, malnutrition, exposure to toxic agents, and social deprivation. Assistance for people with mental retardation usually includes diagnosis and help early in their life, family counseling and training, education, job training, and housing services, available at http://www.omr.state.ny.us/hp_faqs.jsp#q9 (March 27, 2005); *See also* N.Y. MENTAL HYG. LAW § 1.03 (21) (defining “mental retardation” as “subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior”).

⁴⁶ 536 U.S. 304 (2004).

⁴⁷ N.Y. MENTAL HYG. LAW § 1.03 (20), defines “mental illness” as “an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.”

Professor John Blume of Cornell University Law School testified that severe mental illness can make a defendant appear more dangerous. In many cases, he said, jurors' perception of the defendant's dangerousness drives a juror's life or death decision. In addition, a mentally ill defendant is less likely to appear remorseful, as a result of medication or the illness itself, yet research shows that jurors' perceptions concerning a defendant's remorse (or apparent lack of remorse) can be a significant factor in the choice between life and death.

On a related topic, Professor Xavier Amador of Columbia University contended that the competency standard under New York law in most proceedings is much too low. "As a New York attorney described it," Professor Amador said, "if the defendant can tell the difference between a grapefruit and a judge[,] he's competent."

Due to the adversarial nature of criminal proceedings, Professor Amador explained, psychologists and psychiatrists are generally pitted against one another and pushed toward a "battle of the experts." This, according to Professor Amador, erodes the faith of judges and jurors in the ability of experts to offer objective testimony. The adversarial system, according to Professor Amador, is inappropriate and ill equipped to the task of uncovering the truth about a defendant's mental illness, and its relevance to his or her behavior.

Mr. Honberg testified that in the vast majority of death penalty states, including New York, mental illness is among the statutory factors that may be considered as mitigating against the death penalty. Yet, according to Honberg, there is a growing view among experts that in capital cases, jurors inappropriately view mental illness as an aggravating, rather than mitigating factor.

Mr. Honberg noted a report by Professor Chris Slobogin, whom Mr. Honberg identified as an expert on mental illness and the law. According to Mr. Honberg, Professor Slobogin's report cites several studies showing this trend. For example, he said, a study of 175 capital cases in Pennsylvania demonstrated that all aggravating and mitigating factors listed in that state's death penalty statute correlated positively with the eventual sentence, with the exception of extreme mental or emotional disturbance, which correlated positively with a death sentence. This, Mr. Honberg opined, means that if a defendant had a serious psychiatric diagnosis, he or she was statistically more likely to be sentenced to death. Mr. Honberg said other studies produced similar results.

According to Mr. Honberg, the research suggests two possible reasons jurors view mental illness as an aggravating, rather than mitigating factor. First, lay persons often perceive persons with mental illness as being abnormally dangerous. Jurors may view a capital defendant with schizophrenia as beyond redemption, and may conclude that no amount of treatment is likely to reduce what jurors perceive to be violent tendencies. According to Mr. Honberg, the opposite is true: psychiatric treatment has been shown to be very effective in reducing any risk of violence.

A second reason jurors may view mental illness as an aggravating rather than a mitigating factor may be cynicism. Mr. Honberg said, may jurors doubt that the mental illness really exists. Jurors may incorrectly believe the defendant is malingering, with counsel offering mental illness

as a subterfuge designed to aid the defendant in efforts to evade responsibility for his or her behavior.

Third, Mr. Honberg questioned the ability of capital defendants with active psychiatric symptoms to receive a fair trial or participate fully in their defense. Although laws in New York and elsewhere require that defendants be capable of intelligently participating in their defense, competency standards are low, Mr. Honberg said, and may be misunderstood and unevenly applied. An additional issue, according to Mr. Honberg, is the susceptibility of defendants with mental illnesses to coercion. Defendants, he asserted, may be coerced into making false confessions or waiving the right to counsel.

Attorneys face special challenges in defending capital cases when the defendant has a serious mental disorder. Mr. Honberg testified that it is common for individuals with schizophrenia and other severe mental illnesses to deny they are ill or need treatment. Often, this leads to the defendant's refusal to permit counsel to raise competency questions or assert an insanity defense.

For example, Professor Amador testified that accused serial bomber Ted Kaczynski attempted to dismiss his attorneys when he learned they planned to use evidence of schizophrenia in an effort to save him from execution.

Michael Whiteman of New Yorkers for Fairness in Capital Punishment testified that New York's death penalty law does not expressly allow defense lawyers to override a defendant's wishes and present mitigating evidence of severe mental illness. He urged that the New York law be amended to assure that mitigating evidence can be presented, even over the defendant's objection. Moreover, Mr. Whiteman believes "[a] documented past diagnosis or current judicial finding of significant mental illness should bar a death sentence."

Mr. Honberg and Professor Blume also testified about the emergence of so-called "volunteer defendants." These are defendants who insist on pleading guilty or who forego appeals in an attempt to hasten their execution. Professor Blume stated, based on his research, that seventy percent of "volunteer defendants" are persons who have been diagnosed with a mental illness. He testified that there is a high incidence of the most severe mental illnesses among "volunteer defendants", including schizophrenia, depression and bipolar disorder. Mr. Honberg testified that often, the desire among these defendants to die is symptomatic of the severity of their illnesses. Further, Professor Blume said, "volunteer defendants" frequently change their mind once they have received treatment.

In written testimony submitted for the National Alliance for the Mentally Ill, New York State, Ione Christian, Muriel Sheperd, Judith Beyer, J. David Seay and Robert Corliss urged that defendants with severe mental illness be exempt from the death penalty, under at least the following circumstances:

- Individuals with cognitive or functional limitations equivalent to those applied to defendants with mental retardation in the Atkins case would generally be exempt;

- Individuals who, at the time of their offenses, suffer from severe mental illness and act on impulses or beliefs that are the product of delusions, hallucinations or other manifestations of psychosis would be exempt; and
- Individuals whose severe mental disabilities manifest or worsen after sentencing to the extent that they are unable to understand the nature and purpose of the death penalty or to make rational decisions about legal proceedings relevant to the death penalty would be exempt.

8. Race and the Death Penalty

Several witnesses asserted that there is evidence in states throughout the nation of racial discrimination in the application of the death penalty. Many argued that in death eligible cases, the death penalty is more likely to be imposed on defendants of color than white defendants. Further, according to these witnesses, when the victim is white there is a much greater possibility that the defendant will be sentenced to death than when the victim is black.

According to witness George Kendall, the United States General Accounting Office (GAO) issued a report in 1990 evaluating 28 empirical race-and-the-death-penalty studies that have been conducted across the country. Mr. Kendall said that according to the GAO report, the victim's race was a significant factor in determining whether a defendant received a death sentence in 82 percent of the studies. For example, Mr. Kendall said, "those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks."

Mr. Kendall cited a later study conducted by Professors Baldus and Woodworth which expanded on the GAO review.⁴⁸ Professors Baldus and Woodworth found relevant data in three-fourths of the states with prisoners sentenced to death. Upon reviewing this data, Professors Baldus and Woodworth found that in 93 percent of these states, there was a correlation between the race of the victim and whether a death sentence would be imposed; that is, cases involving white murder victims were much more likely to result in a death sentence than cases involving a victim who was a person of color.

In nearly half of these states, the defendant's race also served as a predictor of who would be sentenced to death. Additional materials supplied by Mr. Kendall⁴⁹ showed that in capital states, the racial composition of the key decision maker -- the prosecutor -- is 97.5 percent white, one percent black, and one percent Latino.

Mr. Kendall identified several reasons why, in his view, it is difficult to eliminate the specter of racism from the death penalty:

⁴⁸ D. Baldus & G. Woodworth, Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing This Issue, (1997).

⁴⁹ See also, Richard C. Dieter, DEATH PENALTY INFORMATION CENTER, The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides, available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539> (collected on January 24, 2005).

- Our nation's long history of "tabloid reporting" of disappearances or killings of white victims followed by the arrest of a racial minority as a suspect. Such coverage, Mr. Kendall said, creates significant pressure on law enforcement to solve the case promptly and prosecute aggressively;
- A significant number of attorneys defending death penalty cases are white and some have not developed racial and ethnic sensitivities; and
- Some prosecutors routinely use peremptory challenges to remove racial minorities and women from capital juries.⁵⁰

Professor William Bowers of Northeastern University discussed recent findings of a study conducted by the "Capital Jury Project." The Capital Jury Project study involved interviews of actual jurors who heard capital cases in fourteen states. According to Professor Bowers, the study confirmed racial bias in capital sentencing determinations. The death penalty, he said, was much more likely to be imposed in inter-racial cases involving black defendants and white victims. In addition, Professor Bowers found, death penalty sentencing is frequently biased by the juror's race, and by the racial composition of the jury.

Lillian Rodriguez-Lopez of the Hispanic Federation testified before the Committees. Ms. Lopez-Rodriguez testified that "[w]hile Latino defendants have not been subject to the death penalty at the same rate as whites or African Americans," she believes Latino defendants are prosecuted through a racially-biased system in New York that weakens democracy and undermines respect for human rights.

Professor Edward Rodriguez of Seton Hall University School of Law noted that it is impossible to design a death penalty that is fairly administered and consistently applied and free from impermissible racial and ethnic bias. Of particular concern, he said, is "the discriminatory use of peremptory challenges," which he said is the "single most significant means by which racial prejudice and bias are injected into the jury selection system."

Other witnesses submitted testimony analyzing racial data and the use New York's death penalty law since September, 1995. Professor David Baldus of the University of Iowa offered the following from his study of the New York experience:

- Seven of 500, or one percent, of first degree murder case defendants, were sentenced to death;
- Death notices were filed in 58 of these 500 cases;
- Of the 58 cases in which prosecutors filed a death notice, 12 percent of the defendants were sentenced to death (seven cases);

⁵⁰ Richard Dieter cites cases in several states such as Pennsylvania, Alabama, and Georgia. In Philadelphia, he said, one assistant district attorney prepared a training tape for new prosecutors in which he offered advice on how to develop race-neutral reasons as a pretext for using preemptory challenges against black jurors.

- The first degree murder cases involving white victims were 3.3 times more likely to receive a death notice than those where the victim was non-white;
- Among the seven defendants who received the death penalty, white victim cases outnumbered non-white victim cases by a two to one margin (62 percent vs. 29 percent); and
- Black defendants were 59 percent of first degree murder cases and 43 percent of those sentenced to death.⁵¹

Several witnesses introduced similar statistics compiled by the New York State Capital Defender's Office.⁵² Based on these records, Ann Brandon of the League of women Voters reported that of the seven defendants sentenced to death under the 1995 New York law, three are black, three are white and one is Hispanic.

Several witnesses offered suggestions to reduce racial disparities in New York sentencing practices. Professor Baldus recommended that a detailed study be conducted of racial discrimination and the New York death penalty. Other recommendations included:

- Expanding jury pools to assure diversity;
- Requiring that jurors receive express anti-discrimination instructions;
- Assuring private, individualized pre-selection questioning of jurors, to assist the parties and the courts in uncovering possible biases;
- Providing a mechanism for the review and adjudication of discrimination claims;⁵³ and
- Assuring that death sentences will be vacated where race-of-defendant and/or race-of-victim disparity is shown, without requiring proof of discriminatory intent.

⁵¹ Professor Baldus asserted: "The reason for this gap is that a substantial majority of New York black defendant cases involve a black victim which draws down the death-sentencing rate for black defendants as a group."

⁵² Of 459 defendants indicted for first degree murder, 59% were Black, 19% were White and 21% were Hispanic. Death notices were filed in 50 cases; 48% were Black, 40% were White, and 10% were Hispanic. Race of the victim was known in 446 cases; 42% were Black, 31% were White, and 20% were Hispanic (the remaining victims were of multiple races). Race of the victim in the death-noticed cases equaled 30% Black, 48% White, and 14% Hispanic (Statement of Ann Brandon, The League of Women Voters of New York State).

⁵³ For example, Kentucky has adopted a Racial Justice Act which authorizes defendants to bring claims of racial discrimination in the charging of the jury or in the sentencing decision in his or her case. Professor Baldus claims this law "has made people, made prosecutors, much more sensitive to the racial consequences of what they have done."

Other witnesses contended that there is little or no evidence of racial bias in the use of the death penalty. For example, Sean Byrne of the New York Prosecutors Training Institute referred to a June, 2002 report of the U.S. Justice Department. The report, he said, analyzed more than 900 federal death-eligible cases, and reportedly found no evidence of racial bias. A study of proportionality review in New Jersey, he said, concluded that there was no evidence of bias against black defendants. A 2002 report by the New Jersey Supreme Court Special Master, David Baime, Mr. Byrne said, found no evidence of bias during the period of August, 1982 to May 2000. A recent Nebraska study concluded that race is not a factor in Nebraska death penalty cases, Mr. Byrne said.

Mr. Byrne also cited a report of the U.S. Bureau of Justice Statistics, "Capital Punishment 2003." Of the persons under a sentence of death in the United States in 2003, Mr. Byrne said, "56 percent are white, 42 percent are black, and 2 percent are other races."

Professor Blecker of New York Law School also offered statistical evidence to refute claims that there is racial bias in the death penalty system in the U.S. He testified:

Does a black killer stand a better chance of being executed because s/he's black? . . . Another way of asking it - if you're black, is Society more ready to execute you than if you're white? Happily the answer is clearly and unequivocally no! In the modern era (1977-2003) 510 [of] 3451 whites sentenced to death have been executed; 301 [of] 2903 blacks sentenced to death have been executed. In other words we have executed 14.8 percent of our white condemned, but only 10.4 percent of our black condemned. On average, during the modern era, it has taken us 8 months *longer* to execute a black, although this disparity has reversed the past two years. (Bureau of Justice Statistics, Nov. 2004).

The well-known 1990 study by Professor Baldus regarding Georgia's death penalty law, he said, instead shows there is little bias in Georgia's death penalty:

Specifically the odds that the average black defendant will receive a death sentence are 56 percent of those faced by a white defendant in a comparable case.

Professor Blecker thus claims that the bias in the modern era, if any, has been against white defendants, not in their favor, "although adjusted for case culpability, that bias too largely dissipates."

. . . Except to score debating points, rarely do informed abolitionists claim primary racism, i.e. a systemic *race-of-defendant* bias or impact. Now the attack is almost exclusively directed to the *race-of-victim* bias, or effect: Those who kill whites are sentenced to die more frequently than those who kill blacks, the evidence does consistently show. Why is that, and what does it mean? . . . [T]he Maryland study shows [the answer is] primarily found in the likelihood of a prosecutor seeking the death penalty. After that, there is no additional racial effect.

Why do prosecutors more frequently seek death where there are white victims than where there are black victims? The Maryland study, Baldus' Nebraska study, and Judge Baime's recent New Jersey study all show the same thing: [t]he county - the jurisdiction - in which the murder is committed and thus the particular prosecutor's office, primarily accounts for the disparity. In populous states, suburban prosecutors tend to seek death more frequently than urban prosecutors. Capital murders are more frequently of white victims in suburban counties; more frequently of minority victims in urban counties. Thus white victim cases more frequently get prosecuted capitally than black victim cases.

Finally, Professor Blecker argued that differences in the use of the death penalty between urban and suburban counties reflect fiscal concerns, not racial bias. Urban counties, he said, generally have less financial resources than suburban counties. Further, Professor Blecker said, New York's definition of capital murder includes intentional killings in conjunction with robbery and burglary, crimes which are disproportionately race and class biased.

Michael Palladino of the Detectives Endowment Association also disavowed the existence of racial disparities in the use of the death penalty:

[A] popular position of the opponents to capital punishment is that it is selectively enforced based upon race or ethnicity. I don't believe that for one minute. Capital punishment is an issue of old-fashioned good versus evil. It's about the just punishment for heinous and egregious acts of murder. It's about deterring such reprehensible deeds. Although we cannot definitively measure the statistic, if capital punishment prevents or deters just one horrible deed, if it saves just one innocent life, then it has performed its duty.

New York's death penalty law requires that, on appeal from any death sentence, the Court of Appeals must review the sentence and consider whether it is disproportionate to other murder convictions imposed in the state.⁵⁴ In its review, the court must determine:

- Whether the sentence imposed was influenced by an arbitrary or legally impermissible factor including, but not limited to, passion, prejudice, or in the case of the verdict and/or sentence, the race of the defendant or the race of the victim;
- Whether the sentence is excessive or disproportionate in comparison to similar cases, including consideration of the race of the defendant and the victim of the crime; and
- Whether the decision to impose the sentence was against the weight of the evidence.

In each first degree murder case that results in a conviction, the clerk of the trial court must review the record, consult with the prosecutor and defense lawyer, and prepare a data report to assist the Court in its proportionality analysis.

⁵⁴ N.Y. CRIM. PROC. LAW § 470.30; N.Y. JUD. LAW § 211-a.

Professor Baldus noted significant limitations with respect to New York's proportionality review requirement. First, the Court of Appeals does not receive data reports in all death-eligible cases. Second, the Court does not appear to have developed a system for professional analysis of its database. Third, it is unclear if the Court is developing a database of detailed and accurate narrative summaries of the cases, with input from both prosecutors and the defense, which is crucial to the actual review of cases for purposes of determining comparability. With the adoption of improvements along these lines, Professor Baldus said, the Court of Appeals would be better able to appropriately monitor and compare murder case sentences.

Sean Byrne urged that proportionality review by the Court of Appeals for potential racial bias be limited to an analysis of comparable first degree murder cases. Mr. Byrne noted that of 55 death notices filed under the statute since 1995, racial data is available on 47 cases. Calculating the percentages based on the 47 cases for which racial data is known, he says, 45 percent of the death noticed defendants in New York are black, 43 percent are white and 11 percent are Hispanic.

9. Claims of Class and Economic Discrimination

Several witnesses claimed the death penalty falls disproportionately on low income persons. Economic disadvantage, these witnesses claimed, means these defendants cannot obtain adequate legal counsel and are unable to afford expert assistance in their cases.

According to Robert Perry of the New York Civil Liberties Union, discrimination against the poor in the administration of the death penalty is well established. What most often determines the imposition of the death sentence is not the underlying facts of the case, he said, but the quality of the legal representation. Mr. Perry quoted Justice Ruth Bader Ginsberg as follows:

I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial. . . . People who are well represented at trial do not get the death penalty.

Sean Byrne of the New York Prosecutors Training Institute praised the work of New York's Capital Defender Office.⁵⁵ Mr. Byrne and several other witnesses noted that in New York capital cases, adequate resources and skilled defense lawyers have been made available to defendants.

Professor Blecker noted one aspect of the New York law that, he believes, disproportionately favors wealthy persons and those from upper economic classes. Perpetrators of killings accompanied by robbery or burglary are eligible for the death penalty, he said, yet corporate executives who make decisions knowing their actions will cause deaths are not.

⁵⁵ It should be noted that, in turn, Jonathan Gradess of the N.Y.S. Defenders Association praised the N.Y. Prosecutors Training Institute: "Prosecutors should not have to support capital punishment in order to achieve training and support for [their] staff. New York should keep the doors of NYPTI open, even if the death penalty comes off the ... books." Mr. Gradess continued, "The same should be true for the Capital Defender Office. Indigent defense services ... are in crisis, and that office should be used to help the state address that crisis."

Professor Blecker argues that such “red collar killers,” who, for example, forego improvements on potentially dangerous products or knowingly maintain potentially hazardous work sites, should, if death occurs, be eligible for capital punishment.

10. Prosecutorial Discretion and Geographic Inconsistencies

Under most death penalty statutes, prosecutors have broad discretion to designate who among those prosecuted for murder will be exposed to a possible death sentence. Several witnesses expressed concern that this discretion could be exercised in ways that reflect class or racial bias. Professor Acker, for example, argued that the broad discretion prosecutors have to seek an indictment for first degree murder (which can be made death-eligible by the filing of a notice) or second degree murder (which is not death eligible) on the same facts, and even in the same case, represents unbridled discretion that is inappropriate and constitutionally suspect.

On the other hand, Professor Blecker contended there is no evidence anyone sentenced to death under the 1995 law is innocent, and no evidence that the death penalty in New York has been sought in a way that discriminates based on race or class.

Since 1995, the death penalty has been sought most frequently in three New York counties: Kings, Queens and Monroe. Most counties, including some of New York’s most populous, have not seen any capital prosecutions. In Professor Blecker’s view, resting discretion with prosecutors reflects democratic principles, since prosecutors are elected officials. Professor Blecker argues that there is no problem with geographic differences in the use of the death penalty.

Other witnesses expressed concerns about geographic inconsistencies in the use of New York’s death penalty. To some, it is illogical that a killing occurring in one town may result in a death sentence while the same crime committed in another town, just across a county border, is not considered a capital crime.

Onondaga District Attorney William Fitzpatrick identified the geographic disparity argument as a classic “Catch-22.” It is unreasonable, he told the Committees, to, on the one hand, vest independently elected prosecutors with discretion to seek or not seek the death penalty, and, on the other hand, invalidate convictions and sentences based on differences in the exercise of that discretion.

Stewart Hancock, a retired judge of the New York Court of Appeals, expressed concern that in murder cases, each of New York’s sixty-two district attorneys is vested with vast discretion to seek upgraded first degree charges and file a “death notice” or not. Judge Hancock believes this formulation “virtually guarantees inequality and arbitrariness” in the application of the death penalty in New York.

The New York Court of Appeals has not directly addressed the issue of geographic inconsistencies in the use of the death penalty among New York’s counties. On an arguably

related issue, however, the Court of Appeals upheld an executive order by which Governor Pataki substituted Attorney General Dennis Vacco for Bronx District Attorney Robert Johnson, in a potentially capital case, because the Governor believed D.A. Johnson was unwilling to seek the death penalty.⁵⁶

11. Competence and Effectiveness of Defense Counsel

Several witnesses commented on the quality of representation by defense counsel in capital cases in New York and throughout the nation.

Sean Byrne of the New York Prosecutors Training Institute credited the Capital Defender Office, which was established in New York as a part of the 1995 death penalty law, indigent defense organizations like the Legal Aid Society and private counsel (appointed pursuant to section 35-b of the Judiciary Law) with providing “very capable” representation to New York capital defendants. Mr. Byrne and other witnesses contended that problems with underfunded and inadequate representation, arguably found in other states, are not present for capital cases in New York.

Mark Green is with the New Democracy Project and served as Public Advocate for the City of New York. Referencing When the State Kills, by Austin Sarat, Mr. Green noted that appointed lawyers provide inadequate representation in many capital cases. “Examples of incompetent and inexperienced counsel in capital cases abound,” he said, “which helps to explain why so many convicted defendants in capital cases are later exonerated.”

Michael Whiteman, former counsel to Governors Rockefeller and Wilson, argued in a memorandum that the New York statute is inappropriately silent on the right to appointed counsel in federal habeas corpus, state post-conviction proceedings and clemency proceedings.

Kathryn Kase, an attorney with experience in New York and Texas death penalty cases, recalled the Texas case of Calvin Burdine, whose lawyer, she said, slept through portions of his client’s capital trial. Burdine’s conviction and death sentence were nonetheless affirmed.⁵⁷ Ms. Kase noted that New York precedent might accept a similar result. In People v. Tippins,⁵⁸ she said, New York’s Appellate Division, Second Department ruled that the standards for effective assistance of counsel are not necessarily violated when a defense lawyer sleeps through portions of a criminal trial.

George Goltzer, a board member of the New York State Association of Criminal Defense Lawyers, acknowledged that death sentences throughout the country have been reversed because a lawyer was constitutionally or otherwise legally inadequate. But in other cases, he said, even the most experienced attorneys make “strategic errors, forget to raise an objection . . . miss an

⁵⁶ See Johnson v. Pataki, 91 N.Y.2d 214 (1997).

⁵⁷ See Ex parte Burdine, 901 S.W.2d 456 (Tex. Ct. of Crim. App. 1995) (Maloney, J., dissenting).

⁵⁸ 173 A.D.2d 512, 513, lv. denied, 78 N.Y.2d 1015 (1991).

issue, or have a bad day.” One defendant, he said, will get a new trial because his lawyer objected, preserving the issue for review on appeal, while another defendant will be executed because his trial lawyer did not promptly object to the error. Mr. Goltzer asserted that this is fundamentally unfair, particularly in capital cases.

12. Religious-based Views

Testimony concerning religious views on the death penalty was primarily in opposition to capital punishment. Several witnesses urged that long sentences and life without parole are a better alternative than the death penalty. Many witnesses identified their God as sovereign, wise and omnipotent; only God, these witnesses contended, can give life and take it away.

In addition, witnesses testified that mistakes can be made through human error possibly leading to an innocent person being executed. Several testified that the hope of an execution giving peace of mind is rarely, if ever, realized.

The Steering Committee of New York Religious Leaders Against the Death Penalty⁵⁹ (hereinafter “Steering Committee”), in its “Interfaith Statement on Capital Punishment” stated that “much more can and must be done by the religious community, in particular, and by society in general to comfort and care for grieving families of murder victims, without resorting to vengeful and violent solutions.”

One organization, the Brethren, a Christian Fellowship, voiced support for the death penalty. Three group members, Robert Walker, Tim Taylor and James Taylor III, spoke at the hearings. The Brethren believe the biblical phrase “vengeance is mine” means the government has the authority and responsibility to administer capital punishment for murder. The group does not believe capital punishment denies a criminal the opportunity for redemption. They believe God “has delegated to the Governments of men the responsibility to protect life, and to avenge its violent demise.” Group members testified that they “support capital punishment as a deterrent to evil; for the protection of the people of New York State.”

Many other speakers argued against the use of the death penalty as vengeance. The Steering Committee stated, “The death penalty is an act of vengeance that is contrary to our religious teachings, detrimental to building a civilized and violence-free society, and demeaning to all of us as citizens. Society has a right to protect itself, but it does not have a right to be vengeful.”

“[T]he death penalty system is replete with fatal flaws and constant errors,” the group said. “Too often it is not the crime itself but such factors as race, economics, and geography,

⁵⁹ Members of the “Steering Committee” include: Bishop Howard J. Hubbard, Roman Catholic Bishop of Albany; Rabbi Peter J. Rubinstein, Co-Chair Senior Rabbi Central Synagogue, Manhattan; Sr. Camille D’Arienzo, RSM, Co-Founder, the Cherish Life Circle, Brooklyn; Bishop Violet L. Fisher, Resident Bishop of the New York West Area of the United Methodist Church, Rochester; Rev. Thomas W. Goodhue, Executive Director, The Long Island Council of Churches, Hempstead; Rev. Daniel B. Hahn, Director, Lutheran Statewide Advocacy, Albany; The Rt. Rev. Jack McKelvey, Bishop of the Episcopal Diocese of Rochester.

politics, or the defendant's mental capacity that are ultimately significant in determining the application of the death penalty." The Steering Committee statement went on to explain, "Our legal system is a very good one, but it is nonetheless a human institution... Even a small percentage of irreversible errors is intolerable. The only way to prevent the execution of the innocent is not to execute anyone."

Roman Catholic Bishop Howard J. Hubbard of Albany and Dominick Lagonegro, Auxiliary Bishop of the Archdiocese of New York testified to the futility of vengeance. Bishop Hubbard stated, "[M]y experience and my faith lead me to conclude that while justice most certainly demands corrective punishment for those who have done grave harm, we as civilized people must not resort to vengeance, which is not only unhealthy for a society but ultimately unsatisfying for those who have been harmed."

Reverend Geoffrey A. Black of the New York Conference of the United Church of Christ stated, "Jesus teaches us to not return evil for evil. Of course this is not always the way of the world in which we live, but as Christians we are challenged not to conform to the ways of the world and the requirement of retribution is one of those ways."

Several speakers opposed the death penalty on grounds that it devalues human life. Wanda Goldstein of the Unitarian Universalist Congregation of the Catskills believes there is no system of jurisprudence that can "guarantee absolutely that no innocent person will ever be executed. Our system is designed by human beings; at every level it is human beings making the decisions. This is the strength of our system of justice. We rely upon the professionalism of our police force, prosecutors, defenders and judges, and upon the reasoned judgment of citizen juries."

Hal Weiner of the St. Saviour Chapter of the Episcopal Peace Fellowship said, "when we deliberately take a life, we are no better than the person we choose to deprive of it. We are saying that we know for a fact that this person is beyond redemption; no way that they will ever show remorse, be repentant, or show any sign of humanity. We are deciding that the person has nothing to contribute to society. There is no way to know that we are second guessing God. To God, every life is precious."

Bishop Dominick Lagonegro of the New York State Catholic Conference, Chaplains Apostle Committee, testified that "at the heart of Catholic social teaching is the knowledge that [a] human being is central, the clearest reflection of God among us. Every human being possesses a basic dignity that comes from God, not from any human quality or accomplishment, not from race or gender or age or economic status. Human life is inherently precious."

As a chaplain liaison, Bishop Lagonegro has visited correctional facilities, including Clinton Correctional Facility in Dannemora, which houses those inmates who have been condemned to death. He described this as "a very sobering experience, to put it mildly." He stated, "it is extremely challenging to bring hope when there is no room for rehabilitation. Our Chaplains advocate for basic human rights, a life of dignity and the possibility of healing and conversion. But all of these objectives are in a collision course with a death penalty law."

Strong opposition to the death penalty was voiced by, among others, Anzetta Adams, Baptist Ministers Conference of Greater New York; Bishop Jack M. McKelvey, Episcopal Diocese of Rochester; Rev. Daniel B. Hahn, Lutheran Statewide Advocacy; Rev. Thomas W. Goodhue, Long Island Council of Churches; Michael Kendall, Arch Deacon, Episcopal Diocese of New York; Ruth S. Klepper, Interfaith Impact of N.Y.S.; Rev. N.J. (Skip) L'Heureux Jr., Queens Federation of Churches; Rev. John Marsh, Unitarian Universalists for Alternatives to the Death Penalty; and Jim Morgan, Virgil to End the Death Penalty, Brooklyn.

Sister Camille D'Arienzo of the Institute of the Sisters of Mercy of the Americas and the Cherish Life Circle of Brooklyn stated, "If we exclude anyone from God's redemptive grasp, we reject God's promises and invalidate the power of Christ's crucifixion. Of course, as we learn of innocent people who have faced the death penalty, we remember that Jesus was an innocent victim of capital punishment."

The Committees heard testimony from several members of the Religious Society of Friends (also known as the Quakers). Lee Haring of the Bulls Head-Oswego Religious Society of Friends said they "try to work toward removing the causes of misery and suffering." The group urges members to support efforts to overcome racial, social, economic, and educational discrimination; bear testimony against all forms of oppression; exert influence for such treatment of prisoners as may help reconstruct their lives; and work for the abolition of the death penalty.

The Committees also heard opposition to the death penalty from Rabbi Marc Gruber, Rabbi Shlomo Blickstein and representatives of Reform Jewish Voice of New York. Rabbi Blickstein pointed out that the Bible is "obsessed with the possibility of a . . . wrongful execution . . ." He emphasized that " . . . circumstantial evidence is not admitted in the biblical Jewish court of law . . . and in capital cases the testimony of at least two eyewitnesses is required." Rabbi Gruber added a caution from the Sanhedrin, that one "who takes vengeance destroys his or her own house." "Capital punishment," Rabbi Gruber said, "will not address the problem of violent crime; it will only help us to be more callous in the face of killings."

13. National and International Trends in the Use of the Death Penalty

Thirty-eight states have enacted the death penalty. Since 1976, the following states have conducted the most executions: Texas (340 executions), Virginia (94) and Oklahoma (76). Connecticut, New Hampshire, New Jersey and South Dakota all have active death penalty laws but have performed no executions.

Twelve states -- Alaska, Massachusetts, Rhode Island, Hawaii, Michigan, Vermont, Iowa, Minnesota, W. Virginia, Maine, N. Dakota, Wisconsin -- and the District of Columbia have abolished the death penalty.

On December 17, 2004 the Kansas Supreme Court struck down that state's death penalty law.⁶⁰ The Court ruled unconstitutional a provision that appeared to require jurors to impose a

⁶⁰ Kansas v. Marsh, 102 P.2d 445 (2004).

death sentence if the jurors found aggravating and mitigating factors to have equal significance and weight.

Professor William Hellerstein of Brooklyn Law School identified states with the most exonerations of wrongly convicted defendants from 1989 to 2003. These are Illinois (54), New York (35), Texas (28), and California (22). He noted that these are among the states with death penalty laws.

Professor James Liebman of Columbia University School of Law testified concerning the research he conducted with colleague Jeffrey Fagan. Professors Liebman and Fagan examined the outcome of 6,000 death sentences imposed and reviewed in the United States. Professors Liebman and Fagan found that in the death penalty states they studied, the error rate for capital cases was 50 percent or more. Moreover, a person on death row had a greater chance of having his or her death sentence overturned than having it upheld on appeal. New Jersey had a reversal rate of 87 percent; Connecticut and New York had capital case reversal rates of 100 percent for the period studied.⁶¹

Robert Perry of the New York Civil Liberties Union testified concerning the Illinois moratorium. In 2000, Governor George Ryan declared a statewide moratorium on executions after it was established that thirteen people sentenced to death under Illinois' most recent death penalty law were not guilty of their crimes. A bipartisan commission appointed by Governor Ryan made eighty-five recommendations it said were necessary to help prevent such wrongful convictions.

Gerald Kogan, a retired Chief Justice of the Florida Supreme Court, testified concerning his experience with the death penalty in Florida. During Judge Kogan's tenure on Florida's high court, twenty-eight persons were executed in that state. In most of those cases, Judge Kogan voted to uphold the verdict and death sentence.

Judge Kogan acknowledged that "not only ... guilty people get convicted in a court of law, but there are innocent people who are also convicted." DNA evidence, he said, has brought an objective way to demonstrate certain wrongful convictions. According to Judge Kogan, twenty-five persons have been released from death row in Florida, not only due to DNA evidence, but also due to faulty eyewitness identifications and evidence of coerced confessions. Judge Kogan urged the legislature not to restore the death penalty in New York.

Professor James Liebman identified what he considers three distinct state death penalty models. First, he said, is the "Texas model." States following this model have a high number of executions. Procedural shortcuts are taken to save time and money. This results in poor trial and appellate procedures. These states run a higher risk of error, reversals and retrials.

The second model reflects the practices of California and Pennsylvania. These states make heavy use of their death penalty statutes but also make a concerted effort to control error at

⁶¹ It should be noted that the New York reversal rate cited here reflects only four cases, all of which were reversed on appeal.

both the trial and appellate stages. This results in few executions with a moderate risk of executing innocent persons.

For example, Professor Liebman said, California in the past twenty-seven years has had 650 people on death row. During that time, eleven persons have been executed. In the same period, Pennsylvania had 250 people on death row. But, according to Professor Liebman, Pennsylvania executed only three persons, each of whom requested that further appeals be withdrawn.

The third model, Professor Liebman said, is one that New York (“besides Monroe and Suffolk County”) appears to have been following. This involves relatively careful trial and appellate procedures and concomitant high costs. This also means low numbers of death verdicts and executions. Professor Liebman projected that if New York were to continue with this approach, it would likely see one or two executions each year.

Dr. William Schulz of Amnesty International, USA testified about international trends in the use of the death penalty. The United States, he said, is one of the few industrialized nations in the world that retains the death penalty. Countries like Argentina, Australia, France, Hungary and Mozambique have abolished the death penalty. China, Iran, Vietnam and the United States, he said, account for 84% of judicial executions worldwide.

Dr. Schulz contended that when countries move toward a more democratic form of government, they often abolish the death penalty. Countries such as Haiti, Paraguay and Romania, he said, recently abolished capital punishment. In 1991, the South African government declared a moratorium on the death penalty when it released Nelson Mandela and opened negotiations with the African National Congress. This resulted in the abolition of the death penalty in South Africa in 1995, Dr. Schulz said. Sean Byrne of the Prosecutors Training Institute noted, however, that the largest democracy in the world (India), the most populated country in the world (China) and the largest country geographically (Russia) all allow capital punishment.

Dorit Radzin of Human Rights Watch contends that by retaining the death penalty, the United States undermines its ability to promote democracy and human rights in other nations. According to Ms. Radzin, since 1990 more than thirty-five countries have abolished the death penalty. Ms. Radzin also pointed to international human rights law, as codified in the International Covenant on Civil and Political Rights, which, she said, favors the abolition of capital punishment, although it does not prohibit executions categorically. The United Nations Commission on Human Rights, she said, has approved resolutions opposing the death penalty.

Most European nations, Ms. Radzin said, have long opposed the death penalty. Protocol 13 to the European Convention on Human Rights went into effect in 2003, and calls for abolition of the death penalty in all circumstances, without exception, she said. Professor Blecker expressed the view that European political opposition to the death penalty does not reflect the views of the majority of the European people.

14. Prosecution, Jury Selection and the Capital Trial Process

Russell Neufeld, an attorney who has defended persons charged with capital crimes, noted that New York's death penalty law does not include different or expanded rules or procedures for the disclosure of information, or "discovery", in advance of trial when compared to other criminal cases. Mr. Neufeld argued that more expansive disclosure laws are needed to help avoid erroneous convictions.

Michael Whiteman, who served as counsel to Governors Rockefeller and Wilson and testified for New Yorkers for Fairness in Capital Punishment, agreed. His group, first formed in 1995, continues to believe "reliable trials require comprehensive pretrial discovery."

Several witnesses commented on the different procedures for jury selection in capital cases as opposed to other criminal cases. Professor James Acker of SUNY Albany argued that it is unfair that persons with strong convictions against capital punishment are not allowed to participate in any aspect of a capital trial. Professor Bennett Gershman of Pace University Law School agreed. Under Wainwright v. Witt,⁶² he said, prosecutors can "skew" the fact-finding process in the guilt/innocence phase by striking jurors who, though fair minded, oppose capital punishment.

Michael Whiteman shared these concerns as well. According to Mr. Whiteman, dismissal of a single qualified prospective juror due to his or her opposition to the death penalty should require reversal of any death sentence and a new trial.

During capital trials (as in most trials), judges generally give preliminary instructions explaining the trial process and the jurors' role in it. Jurors also receive instructions or information from the court as the trial proceeds. Additionally, jurors are instructed concerning the law and their duties at the close of evidence, before retiring to consider a verdict and, in capital cases, before the jury's penalty phase deliberations. Several witnesses commented on whether capital case jurors comprehend and are able to follow instructions given by the court.

Professor Bowers submitted a study he wrote with Professor Wanda Foglia. Based on that study, Professor Bowers contended that jurors make premature sentencing decisions at the guilt phase (before penalty phase evidence is presented), that jurors significantly underestimate how long a defendant will serve in prison if not sentenced to death, that jurors frequently do not understand the judge's instructions at the sentencing phase, and that jurors incorrectly believe they must impose a death sentence if certain aggravating factors are present. Furthermore, Professor Bowers contended, many jurors wrongly believe they are not responsible for the ultimate sentencing decision.

⁶² 469 U.S. 412 (1985).

15. Appeals and Post-Conviction Proceedings

Professor Bennett Gershman of Pace University Law School expressed concern that appellate rules, such as the “harmless error” doctrine, encourage prosecutors to deliberately engage in prejudicial conduct, in the expectation that an appellate court will overlook the misconduct. Professor Gershman also urged the Legislature to statutorily relax preservation rules, thereby assuring that appellate courts may consider trial errors even when defense counsel failed to register a contemporaneous objection.

Ronald Tabak chairs the Death Penalty Committee of the American Bar Association’s Section on Individual Rights and Responsibilities. Mr. Tabak testified on behalf of New York Lawyers Against the Death Penalty. He told the Committees that several reforms are needed to assure that trial, appellate and post-conviction courts can hear valid post-conviction claims. These reforms include: permit only “knowing and voluntary” waivers of issues and claims by trial and appellate counsel; apply appellate decisions retroactively when beneficial to the defendant; and permit successive applications for relief, including successive habeas corpus petitions, in capital cases. Professor Eric Freedman of Hofstra University Law School added that state law should recognize an enforceable right to effective assistance of counsel in all post-conviction proceedings.

Schenectady County District Attorney Robert Carney supports the death penalty in principle, but believes the Legislature should not restore it in New York. District Attorney Carney believes appellate courts use strained legal reasoning to reverse death sentences, and this has the potential to negatively affect both capital and non-capital trial and appellate case law.

District Attorney Carney notes, too, that due to the finality of capital punishment, lawyers defending these cases demand procedural changes, such as the videotaping of confessions, sequential photo arrays and double-blind identification procedures, which most prosecutors oppose. District Attorney Carney believes that momentum for these changes grows with a death penalty in place. Without capital punishment, he said, “the prosecutor’s brief against this trend is strengthened.”

Bettina Plevan of the Association of the Bar of the City New York noted that New York’s death penalty statute does not assure a right to counsel during every phase of a post-conviction proceeding in a death penalty case.⁶³ Ms. Plevan pointed out that often, post-conviction

⁶³ N.Y. JUD. LAW § 35-b provides for the appointment of counsel for accused persons unable to afford counsel in capital cases. Subdivision 12 of section 35-b provides as follows:

Nothing in this section shall be construed to authorize the appointment of counsel, investigative, expert or other services or the provision of assistance, other than continuing legal education, training and advice, with respect to the filing, litigation, or appeal of a petition for a writ of habeas corpus in any federal court; nor shall anything in this section be construed to authorize the appointment of attorneys, investigative, expert or other services in connection with any proceedings other than trials, including separate sentencing proceedings, of defendants charged with murder in the first degree, appeals from judgments including a sentence of death, and initial motions pursuant to section 440.10 or 440.20 of the criminal procedure law and any appeals therefrom.

proceedings are the forum in which new evidence emerges, particularly evidence of innocence. New York's failure to assure a right to counsel throughout all post conviction phases, she said, puts New York out of compliance with standards of representation developed by the American Bar Association.

Professor Eric Freedman of Hofstra University Law School agreed that New York's laws need to be amended to assure a right to counsel in all post-conviction litigation. According to Professor Freedman, the ABA Guidelines call for representation in capital cases by a team of lawyers and specialists at every stage of the case. But, he said, New York provides only a single lawyer for an initial C.P.L. Article 440 post-conviction motion.

Professor Freedman contended that post-conviction review helps uncover evidence of wrongful convictions and, particularly in capital cases, inappropriate sentences. Relief can be obtained in state collateral review proceedings, federal habeas corpus actions or via executive clemency. Appointed counsel, he said, is needed at each of these stages. Professor Freedman analogized the need for effective counsel in post-conviction proceedings to the holding of the United States Supreme Court in *Wiggins v. Smith*,⁶⁴ in which a death sentence was reversed because of ineffective sentencing representation by Wiggins's capital trial counsel.

16. Conditions on New York's Death Row

New York State's "death row" is known as the "Unit for Condemned Persons" or "UCP". Men on death row are housed at the Clinton Correctional Facility in Dannermora, located fifteen miles south of the Canadian border. No women are on death row in New York. However, a facility for death-sentenced women is maintained at the Bedford Hills Correctional Facility in Westchester County.⁶⁵

Professor Michael Mushlin of Pace University Law School testified before the Committees. In Professor Mushlin's opinion, the conditions on New York's death row are unduly harsh. He described New York's UCP as the most restrictive type of solitary confinement that is possible in a modern penal environment.

According to Professor Mushlin, New York's death row inmates are jailed in nearly complete isolation, locked in individual cells for twenty-three hours each day. All exercise is solitary, one hour or less per day, and occurs in an outdoor caged area regardless of weather conditions. The cells are illuminated 24-hours a day. There is uninterrupted video and audio surveillance.

Professor Mushlin also said that, Dr. Craig Haney, a professor of psychology at the University of California, Santa Cruz, has written that "conditions [such as these] that we know

⁶⁴ 539 U.S. 510 (2003).

⁶⁵ See generally Assoc. of the Bar of the City of N.Y., *Dying Twice: Conditions on New York's Death Row* (2001). Professor Michael Mushlin was Chair of the Committee on Corrections of the ASSOC. OF THE BAR OF THE CITY OF N.Y., which jointly engaged in the study of conditions on New York's death row with the Association's Committee on Capital Punishment.

we are likely to lead to cognitive, emotional and behavioral deterioration and . . . result in other forms of potentially disabling psychological harm.” Professor Haney continued by testifying that these “conditions can have a ‘direct effect on whether or not [a condemned prisoner] will continue to challenge the legal proceedings that led to their death sentence.’”

Professor Mushlin testified that some people sent to death row will not ultimately be executed . He also stated that some “will have their sentences changed or overturned, and will return to the general prison population or society.” There are thus practical reasons, Professor Mushlin said, why disabling death row conditions should be avoided.

Professor Robert Blecker believes that prison conditions for “the worst of the worst” should indeed be spartan, even severe. Punishment should not be only about duration, he told the Committees, but also about the quality of life while confined.

When a person is imprisoned for 70 years or LWOP, Professor Blecker said, “life takes on new meaning. There are new joys and satisfactions.” He testified that inmates exercise, read, watch television. Small things create new pleasures: new clothing, a toothbrush, snacks, friendship. According to Professor Blecker, many inmates sentenced to lengthy prison terms, including LWOP, are the worst of the worst, and the “worst among them don’t deserve” comforts and privileges.

Russell Neufeld has regularly visited a client on death row at the Clinton Correctional Facility. He testified that Professor Blecker’s description of less austere death row conditions in some states has no application to death row in New York. The conditions Mr. Neufeld described are similar to those described by Professor Mushlin. The inmates, he said, have no contact with other prisoners, and virtually no human contact. Only recently, Mr. Neufeld testified, has he been permitted to converse with a client directly, rather than shout through a Plexiglas partition.

Mr. Byrne of the Prosecutors Training Institute countered that conditions on New York’s death row are neither substandard nor inappropriate and that death row inmates in New York live in a “humane environment” accredited by the American Correctional Association.

17. Execution Process

New York law provides that the punishment of death shall be inflicted by lethal injection, defined as “the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead.”⁶⁶ Section 659 of the Correction Law provides that the commissioner “shall provide and maintain a suitable and efficient facility, enclosed from public view, within the confines of a designated correctional institution for the imposition of the punishment of death. That facility shall contain the apparatus and equipment necessary for the carrying out of executions by lethal injection.”

Pursuant to Correction Law Section 655, the Governor may reprieve the execution of a person sentenced to death. Pursuant to Correction Law section 654, the governor is authorized

⁶⁶ N. Y. CORRECT. LAW § 658.

to request the opinion of the attorney general, the district attorney, or the convicted person's counsel as to whether the execution of a person should be reprieved or suspended.

A few witnesses testified concerning the effects of execution on family members and others who interact with the condemned man or woman.

Robert Meeropol was born Robert Rosenberg. His parents were Ethel and Julius Rosenberg. The Rosenbergs were convicted of conspiracy to commit espionage and were executed at New York's Sing Sing Prison in 1953.

Robert Meeropol (who changed his name when he was adopted) was six years old when his parents were executed. Mr. Meeropol's testimony focused on the impact an execution has on the defendant's children. Mr. Meeropol grew up with a general sense of anxiety. He survived due to a supportive community and adoptive family. Nationally, Mr. Meeropol said, little attention is paid to the children of condemned persons. Mr. Meeropol opposed the death penalty and urged legislators to consider the impact on the children of condemned persons before enacting any death penalty legislation.

Bill Babbitt discovered evidence that his brother Manny was responsible for the death of a woman, Leah Schendel. According to Mr. Babbitt, Manny Babbitt suffered from post-traumatic stress disorder caused by his service in the Vietnam conflict. Bill Babbitt testified that he informed Sacramento Police, and advised the police that his brother suffered from a mental illness. Bill Babbitt says he was assured his brother would receive mental health treatment.

Manny Babbitt was apprehended, but Bill Babbitt was surprised when the District Attorney announced that he would be seeking the death penalty. Manny Babbitt was convicted and subsequently executed by the State of California. Bill Babbitt testified that he knows the community is a safer place with his brother off the streets, but, "I feel that I have my brother's blood on my hands."

Although his brother was not executed, David Kaczynski of New Yorkers Against the Death Penalty told of a similar experience. David Kaczynski is the brother of Ted Kaczynski, known as the "Unabomber". Mr. Kaczynski and his wife provided information to the FBI, which led to the arrest and eventual conviction of Ted Kaczynski. David Kaczynski testified that after his brother was arrested, he was shocked to discover that the Justice Department intended to seek the death penalty. "[I]t didn't seem to concern prosecutors," David Kaczynski testified, "that my brother was mentally ill with schizophrenia, or that executing him would discourage other families from following our example in the future." Ted Kaczynski is now serving a life sentence in federal prison.

Bianca Jagger, a member of the Leadership Council of Amnesty International, USA, witnessed the Texas execution of Gary Graham. Mr. Graham, she said, was sentenced to death based on the testimony of one eyewitness, and maintained his innocence up to and including the moment of his execution. "It is difficult to describe my horror at witnessing his death," she told the Committees. "I could see Gary Graham was tied to a hospital trolley and about to be killed. It reminded me of a modern day cross and I was there to witness the execution of a man I believe

to be innocent. I was in a state of disarray and I was revolted and terrified at the thought of witnessing another human being killed.”

As noted earlier, Stephen Dalsheim worked for the New York State Department of Correctional Services for 42 years, the last 20 as superintendent in charge of various prison facilities. Superintendent Dalsheim was responsible for many inmates sentenced to death, and was in charge of Sing Sing prison during numerous executions.

Superintendent Dalsheim testified that executions had a palpable effect on staff at the “death house”. Many of the officers who guarded death row drank excessively. Superintendent Dalsheim recalled one officer, who was in charge of the unit for condemned men and in charge of the procedures for carrying out executions. The officer took his job seriously, but also talked about having to kill people. He also told Superintendent Dalsheim that he was “never quite sure whether the person he was killing was guilty or innocent.”

18. Proposed Legislative Amendments to the Death Penalty Law

Several witnesses offered recommendations concerning legislation to address the LaValle decision, including Governor’s program legislation passed by the Senate in 2004 and 2005.⁶⁷

The legislation passed by the Senate is designed to address the LaValle decision in three ways. First, the bill would provide that, after finding a defendant guilty of murder in the first degree, jurors would be instructed that they must by unanimous vote determine one of three penalty phase options: death, LWOP, or life imprisonment with a minimum term of at least twenty and up to twenty-five years. Second, the jurors would be instructed that if they fail to unanimously agree on one of these three sentences, the judge would sentence the defendant to life imprisonment without parole.

Third, this legislation seeks to apply these new procedures not only to future cases, but also retroactively “to crimes committed prior to . . . the effective date” of the new law.⁶⁸

Comments on Senate Bill # 7720 (2004)/ Senate Bill # 2727 (2005)

Sean Byrne of the NY Prosecutors Training Institute contended that S. 7720/S. 2727 would correct the problem identified by the Court in LaValle, and that the correction could be applied retroactively as proposed by the bill. Mr. Byrne argued that applying the new law to older cases, including those committed after LaValle but before enactment of the new legislation, would not violate the federal prohibition against *ex post facto* laws, even though the deadlock

⁶⁷ Governor’s Program Bill No. 78, S. 7720 (Volker, *et al.*) was introduced in the Senate on August 9, 2004, and passed by the Senate on August 11, 2004. The bill was reintroduced during the 2005 legislative session on February 25, 2005 and passed by the Senate on March 9, 2005. (Governor’s Program Bill No. 27, S. 2727 (Volker, *et al.*). Assembly Bill 1452 (Nesbitt, *et al.*) contains nearly identical provisions. As noted earlier, Assemblyman Robin Schimminger has also introduced legislation that would enact similar amendments to address the LaValle decision and also make other changes to the death penalty law (A. 5523; A. 5524; A. 5525).

⁶⁸ See S. 7720, § 5; S. 2727, § 5.

sentence would be retroactively elevated, from a parole-eligible sentence of 20-25 years-to-life, to a sentence of life imprisonment without parole.

Mr. Byrne expressed confidence that these changes could constitutionally be applied retroactively because the changes are “ameliorative” and procedural (presumably, to correct the coercive nature of the present instruction). Professor Blecker agreed, “[b]ased on no well-developed expertise in retroactivity,” that retroactive application of the Senate bill appears to be constitutional under the decision of the U.S. Supreme Court in Dobbert v. Florida,⁶⁹

While Mr. Byrne supported the Senate-passed legislation, he also advocated an alternative approach:

[W]ith respect to first degree murders committed prior to the effective date of the corrective legislation, the deadlock charge should be amended to require that the court must charge the jury to determine whether the defendant should be sentenced to death, to life imprisonment without parole, or to an indeterminate term of imprisonment with a minimum term to be determined by the court, of between 20 and 25 years, and a maximum term of life. If the jury is unable to reach a unanimous verdict, the court must sentence the defendant to the indeterminate term, with a minimum between 20 and 25 years, and a maximum of life.⁷⁰

Mr. Byrne went on to suggest that first degree murders committed after the effective date of the legislation should be treated differently. For these future cases, he said:

[T]he deadlock charge statute should be amended to require that the court charge the jury to determine whether the defendant should be sentenced to death, or to life imprisonment without parole. If the jury is unable to reach a unanimous verdict [between these two options], the court must sentence the defendant to life imprisonment without parole.

Professor James Acker of the State University of New York at Albany expressed concern about the type of legislative changes discussed above. Professor Acker said any legislation that would give jurors only two options (death or LWOP) but judges three options (death, LWOP and 20-25 years to life) would be constitutionally suspect because, he said, prosecutors would be empowered to eliminate the opportunity for a parole eligible-sentence by filing a death notice.

⁶⁹ 432 U.S. 282 (1977).

⁷⁰ The deadlock instruction under this formulation is the same as the instruction struck down by the Court of Appeals in the LaValle decision. Mr. Byrne added, however, (in an apparent effort to address the coercive effect of the required deadlock instruction as found by the Court in LaValle) that, with respect to first degree murders committed before enactment of the new legislation, jurors should be instructed that they could consider, as a mitigating factor, that the defendant would not pose a risk if released in the future. In response to questioning, Mr. Byrne also said he believed a defendant could be permitted to waive this instruction, (if, for example, the defense concluded it might be prejudicial to raise the question of future dangerousness before the jury).

Professor Acker questioned whether constitutional principles of due process, equal protection and separation of powers would permit legislation that allows the prosecutor to unilaterally deny eligibility for possible, eventual release.

Professor Acker posited that giving three options to the penalty phase jury (death, LWOP and 20 to 25 years to life imprisonment) with LWOP on deadlock would be flawed as well. If a deliberating jury rejects death and, in its penalty phase vote, splits eleven to one in favor of a 20-25 years-to-life sentence, he asked, why should a deadlock sentence of LWOP (which was opposed by 11 of 12 jurors) be statutorily required? According to Professor Acker, “this proposed solution to jury deadlocks appears to be unprecedented in other state death penalty legislation that includes three sentencing options.”

Finally, Jonathan Zimet provided a memorandum in which he reviews several approaches the Legislature could take in an attempt to address the LaValle ruling.⁷¹ Mr. Zimet analyzed a variety of options but he made no specific recommendation. Mr. Zimet did conclude, however, that retroactively elevating the deadlock/ default sentence (for crimes committed before enactment of any amendatory legislation) from the previous deadlock sentence of 20 to 25 years to life, to a new deadlock sentence of LWOP, “would likely be invalidated under the Ex Post Facto clauses of the federal constitution.”⁷²

⁷¹ Mr. Zimet emphasized in a footnote that “the views and opinions expressed [in the memorandum] are solely those of the author”

⁷² This retroactive approach is proposed in the Governor’s program legislation passed by the Senate discussed earlier. In testimony before the Committees, Monroe County D.A. Michael Green also expressed concerns about the validity of this retroactive approach.

Appendix



**ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON JUDICIARY AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION**

HEARING ON THE DEATH PENALTY WITNESS LIST
(Persons Who Actually Testified)

#1

**NEW YORK CITY
WEDNESDAY, DECEMBER 15, 2004
10:00AM**

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
MEETING HALL, 42 WEST 44TH STREET**

1. Hon. Robert Morgenthau
District Attorney, New York County
2. Robert Blecker, Esq.
Professor, New York Law School
3. **Panel**
Barry Scheck, Esq., Co-Director
Innocence Project

Thomas Sullivan, Esq. (Ryan Commission)
Jenner & Block

Russell Neufeld, Esq.
Defense Attorney

Juan Melendez

Madison Holey
4. **Panel (Family members of murder victims)**
Joan Truman-Smith

Bill Pelke
Murder Victims Families for Human Rights

5. **Panel (Family members of murder victims)**
Kate Lowenstein
Murder Victims Families for Reconciliation

Patricia J. Perry

Bill Babbitt
6. **Panel**
Howard Hohne

Ernest Shujaa Graham
Campaign to End the Death Penalty
7. **Panel**
David Baldus, Esq.
Professor of Law, University of Iowa College of Law

Eric Freedman, Esq.
Hofstra University

Isaiah Skip Gant, Esq.
Federal Death Penalty Resource Counsel
8. **Panel**
Jennifer Cunningham, Esq.
Executive Vice President, 1199 SEIU Service Employees Int'l Union
9. **Panel**
Christina Swarns, Esq.
NAACP Legal Defense Fund

S. Jean Smith, Esq.
The Cherish Life Circle

Sister Camille D'Arienzo, Co-Founder
The Cherish Life Circle, Brooklyn

Rev. N.J. (Skip) L'Heureux Jr., Executive Director
Queens Federation of Churches

Michael Kendall
Arch Deacon, Episcopal Diocese of New York
Vice President of the Counsel of Churches in New York City

Dr. James Fitzgerald
Minister for Social Justice at the Riverside Church in New York City
10. Bishop Dominick Lagonegro
Archdiocese of New York
NYS Catholic Conference Chaplains Apostle Committee
11. Andrew Cuomo, Esq.

#2

NEW YORK CITY
FRIDAY, JANUARY 21, 2005
10:00AM
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
MEETING HALL, 42 WEST 44TH STREET

1. Bettina Plevan
President, Association of the Bar of the City of New York

Jeffrey Kirchmer
Association of the Bar of the City of New York

3. Michael Palladino
President, Detectives' Endowment Association, Inc.

4. Lou Matarazzo
Former President, Police Benevolent Association

5. **Panel**
Pat Webdale
Mother of murder victim

Carol Lee Brooks
Parents of Murdered Children, Queens

4. **Panel**
Ron Stalling
Retired officer, uniformed division of U.S. Secret Service

Anthony Miranda
Retired Sergeant, NYPD

Marsha Lee Watson
President, Guardians Association of State Correctional Officers

Randy Jurgenson
Retired homicide detective, NYPD

Rabbi Marc Gruber
Reform Jewish Voice of NYS

5. **Panel**
Robert Walker
Brethren

6. **Panel**
Colleen Brady
Legal Aid Society (NYC)

William Hellerstein
Professor, Brooklyn Law School

Jeffrey Fagan
Professor, Columbia University

Ursula Bentele
Professor, Brooklyn Law School

James S. Liebman
Professor, Columbia University School of law

7. **Panel**
Rev. Thomas W. Goodhue, Executive Director
The Long Island Council of Churches
- Rev. Chloe Breyer
Associate Minister, St. Mary's Episcopal Church
- Jim Morgan
Convenor, Virgil to End the Death Penalty, Brooklyn
- Hal Weiner
Convenor, St. Saviour Chapter Episcopal Peace Fellowship
- Evelyn Wyfka
Sister to Sister, Human Rights
8. **Panel**
Ron Honberg
Legal Director, National Alliance for the Mentally Ill
- Dr. Xavier Amador
Columbia University
9. **Panel**
Bennett Gershman
Professor, Pace University Law School
- Michael Mushlin
Professor, Pace University Law School
- Evan Mandery
Assistant Professor, John Jay College of Criminal Justice
10. **Panel**
Sundiata Sadiq
1st Vice President, NAACP, Ossining Chapter
- Robert Perry,
Legislative Director, New York Civil Liberties Union
- Dr. William Schultz
Executive Director, Amnesty International USA
- Edward Rodriguez
Associate Professor, Seton Hall University

11. **Panel**
Dorit Radzin
Advocacy Associate, Human Rights Watch

Delphine Selles
Campaign to End the Death Penalty
12. **Panel**
Claire Laura Hogenauer
Attorney-at-Law

Christine Japely
Assistant Professor, Norfolk Community College, CT

#3

ALBANY
TUESDAY, JANUARY 25, 2005
10:00AM
ROOSEVELT HEARING ROOM, ROOM C, 2ND FLOOR
LEGISLATIVE OFFICE BUILDING

1. **Panel**
William J. Fitzpatrick
Onondaga County District Attorney
2. Bishop Howard J. Hubbard
Roman Catholic Bishop of Albany, NYS Catholic Conference
3. **Panel**
Gerald Kogan
Retired Chief Justice, Florida Supreme Court

Stewart Hancock
Retired Justice, New York State Court of Appeals

David Kaczynski
New Yorkers Against the Death Penalty

James R. Acker
Professor, School of Criminal Justice, SUNY at Albany
4. **Panel**
Debra Jaeger
Sister of murder victim

Russell Murphy
Professor, Suffolk University School of Law
5. **Panel**
Janice Grieshaber
Bruce Grieshaber
Parents of murder victim
6. Michael C. Green
Monroe County District Attorney
7. Bishop Jack M. McKelvey
Episcopal Diocese of Rochester
8. Bill Kurtis
Court-TV/ Author
9. Richard J. Bartlett
Former member, New York State Assembly
Former chair, New York State Penal Law Revision Commission

10. **Panel**
Jeffrey Blake

Robert McLaughlin

Stephen Saloom
Policy Director, Innocence Project, NY
11. **Panel**
Dick Dieter
Death Penalty Information Center

Kathryn M. Kase
Texas Defender Association
12. **Panel**
Marguerite Marsh
Family member of murder victim

Robert Brignola

Diane-Marie Frappier
13. **Panel**
John Blume
Cornell University Law School

Steve Garvey
Cornell University Law School

Sherri Johnson
Cornell University Law School

Samuel J. M. Donnelly
Professor, Syracuse University School of Law
14. **Panel**
Ruth S. Klepper
Executive Director, Interfaith Impact of NYS

Anzetta Adams
Baptist Ministers Conference of Greater New York

Linda Chidsey
Clerk of Yearly Meeting, New York Religious Society of Friends

Sonia Ivette Dueno
Coordinator, Racial Economic & Gender Justice Fellowship Reconciliation

Tim Taylor
Brethren

James Taylor III
Brethren

#4

ALBANY
TUESDAY, FEBRUARY 8, 2005
11:00AM
ROOSEVELT HEARING ROOM, ROOM C, 2ND FLOOR
LEGISLATIVE OFFICE BUILDING

1. Robert Carney
District Attorney, Schenectady County
2. Sean M. Byrne
Executive Director, New York Prosecutors Training Institute
3. **Panel**
Michael Whiteman
Former Counsel to Governors Nelson Rockefeller and Malcolm Wilson

John Dunne
Former New York State Senator
Former Assistant Attorney General in Charge, Civil Rights Division,
U.S .Department of Justice
4. **Panel**
Cheryl Coleman
Former Albany County Assistant District Attorney/ Former Albany City Court Judge

Bud Welch
Father of Oklahoma City bombing victim

Robert Meerpol
Rosenberg Fund for Children

Jonathan E. Gradess
New York State Defenders Association
5. **Panel**
John Restivo

Sammie Thomas

Scott Christianson
Author

Nina Morrison, Innocence Project, New York City
6. **Panel**
Gary Abramson
Legal Aid Society of Orange County

Professor William Bowers
Capital Jury Project, Northeastern University

Marsha Weissman
Executive Director, Center for Community Alternatives

7. George Kendall
Holland & Knight
8. **Panel**
Raymond A. Kelly, Jr,
New York State Association of Criminal Defense Lawyers

Ronald Tabak
NY Lawyers Against the Death Penalty

Ann M. Brandon
Chair, Capital Punishment Study Committee, New York League of Women Voters
9. **Panel**
Rev. Daniel B. Hahn
Director, Lutheran Statewide Advocacy

Reverend Geoffrey Black
President, NYS Council of Churches

Barbara Zaron, Arleen Urell
Members, Steering Committee, Reform Jewish Voice of New York State
10. Barbara Barry
Tompkins County Coalition Against the Death Penalty
11. **Panel**
Dominic Candido
Clerk, Matinecock Monthly Meeting, Religious Society of Friends (Quakers)

Lee Haring
Religious Society of Friends, Oswego

Anita Paul
Schenectady Friends Meeting
12. **Panel**
Rev. John Marsh
Unitarian Universalists for Alternatives to the Death Penalty

Wanda Goldstein
Chair, Restorative Justice Group, Unitarian Universalists Congregation, Kingston

#5

NEW YORK CITY
FRIDAY, FEBRUARY 11, 2005
10:00AM

PACE UNIVERSITY
MICHAEL SCHIMMEL CENTER FOR THE ARTS
3 SPRUCE STREET
(BETWEEN PARK ROW AND GOLD STREET)
NEW YORK, NEW YORK

1. **Panel**

Catherine Abate
Former New York State Senator
Former Commissioner, NYC Departments of Correction and Probation
Former Chair, NYS Crime Victims Board

Bianca Jagger
Goodwill Ambassador for the Fight Against the Death Penalty, Council of Europe

Stephen Dalsheim
Superintendent (ret.), Sing Sing and Downstate Correctional Facilities

Charles Billups
Chairman, Grand Council of Guardians

2. Mark Green
Former NYC Public Advocate
President, New Democracy Project

3. **Panel**

Myron Beldock
Lawyer for Yusef Salaam

Yusef Salaam

Sharonne Salaam

Karey Wise

George Goltzer
Board of Directors, NYS Association of Criminal Defense Lawyers

4. **Panel**

Rabbi Shlomo Blickstein

William Mordhorst

5. John Payne
President, NYS Chapter Democrats for Life

6. **Panel**
Barbara Bernstein
Executive Director, New York Civil Liberties Union, Nassau County Chapter

Kenneth Diamondstone
Vice Chair Central Brooklyn Independent Democrats
7. Bell Gale Chevigny
Professor Emerita, Purchase College
8. **Panel**
Queen Mother Dr. Delois Blakely
Community Mayor of Harlem, President New Foundation
Harlem Women National Chairperson

Liliana Segura
Campaign to End the Death Penalty

Leonara Wengraf
Campaign to End the Death Penalty
9. **Panel**
Frederic Pratt
Legal Aid Society Capital Division

James Rogers
President, Association of Legal Aid Attorneys
10. Lawrence C. Moss
11. Darryl King
12. Linda Guillebeaux

**THE FOLLOWING PERSONS DID NOT TESTIFY IN PERSON BUT SUBMITTED
WRITTEN TESTIMONY TO THE COMMITTEES:**

1. Robert K. Corliss
Associate Director for Criminal Justice, National Alliance for the Mentally Ill of New York State (NAMI NYS)
2. Rudy Cypser (letter statement)
CURE-NY
3. Louise de Leeuw
Poughkeepsie Monthly Meeting of the Religious Society of Friends
4. Jose A. Garcia
Policy Analysis and Advocacy Coordinator
Puerto Rican Legal Defense and Education Fund (PRLDEF)
5. Alice Green, Ph.D.
Executive Director, Center for Law and Justice, Inc.
6. Samuel R. Gross
Professor of Law, University of Michigan
7. Jeff Frayler, President, New York State Association of PBAs, Inc.
8. Richard Harcrow
President, New York State Correctional Officers and Police Benevolent Association, Inc.
9. Evan Kelley
Capital Punishment Seminar, Fall 2004
10. Charles S. Lanier, Ph.D.
Co-Director, Capital Punishment Research Initiative (CPRI), University of Albany
11. Alexander Lesyk, Esq.
Northern Franklin County Public Defender
12. Karen E. Mallam
Poughkeepsie Monthly Meeting of the Religious Society of Friends
13. Carolyn McCarthy (letter statement)
United States House of Representatives
14. Roy Neville
Board of Directors, National Alliance for the Mentally Ill (NAMI-New York State)

15. Lillian Roberts
Director of New York City – District Council 37
16. Lillian Rodriguez-Lopez
Hispanic Federation
17. George Rosquist
Executive Director, Freedom NOW, New York City
18. Ajamu K. Sankofa, Esq.
Executive Director, New York City Chapter of Physicians for Social Responsibility
(NYC/PSR)
19. Reverend James Coy Sheehan
Roman Catholic Priest, Archdiocese of New York
20. Stephen Singer
Co-Chair, Criminal Courts Committee, Queens County Bar
Association
21. Scott Turow, Esq.
Attorney, Writer
22. Eugene G. Wanger
Co-Chair, Michigan Committee Against Capital Punishment
23. Women’s Bar Association of the State of New York (WBASNY)
Statement Regarding New York’s Death Penalty
24. Jonathan D. Zimet, Esq.



**ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON THE JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION**

NOTICE OF JOINT PUBLIC HEARING

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

NEW YORK CITY

**Wednesday, December 15, 2004
10:00 a.m.
Association of the Bar of the City
of New York
Meeting Hall, 42 West 44th Street**

ALBANY

**Tuesday, January 25, 2005
10:00 a.m.
Roosevelt Hearing Room
Room C, 2nd Floor
Legislative Office Building**

***Additional hearing dates and locations may be scheduled if sufficient interest exists and will be announced in a subsequent public hearing notice.**

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.

On June 24th, 2004, the New York Court of Appeals in People v. LaValle invalidated the deadlock instruction provision of New York's death penalty law, holding that the instruction created a "substantial risk of coercing jurors into sentencing a defendant to death" in violation of the Due Process clause of the New York State Constitution. The Court also held that the absence of any deadlock instruction would be constitutionally impermissible and that the Court was not judicially empowered to create a new deadlock instruction. The Court thus found that "under the present statute, the death penalty may not be imposed" under New York law, but that first degree murder prosecutions could continue to go forward as non-capital cases under the current statute. As noted above, New York's current first degree murder law authorizes a sentence of life imprisonment without parole to be imposed in any case.

The jury deadlock instruction was first proposed by Governor Pataki in program legislation which was passed by the Senate prior to the final legislative agreement on the death penalty. (See S-2649 of 1995). The Governor's deadlock instruction proposal was later included in the final death penalty law enacted by the Legislature on March 7th, 1995.

New York's death penalty law was in effect for slightly less than nine years before it was struck down this past June. In that time, it is estimated that the state and local governments have spent approximately \$170 million administering the statute. Not a single person has been executed in New York since the law's enactment. Seven persons have been sentenced to death. Of these:

- the first four sentences to reach the Court of Appeals were struck down on various grounds;
- an additional sentence was converted to a sentence of life imprisonment without parole after the LaValle decision; and
- two death sentences are awaiting review.

New York's death penalty statute has remained highly controversial since its enactment and continues to be roundly criticized. The question of whether the statute should now be revived and, if so, in what form, has also been the subject of intense interest and debate since the Court of Appeals decision in LaValle.

These hearings are intended to provide a public forum to review what New York's experience with the death penalty over the past nine years has been and what that experience has taught us. It is intended to solicit views on how the experience of other states, the federal government and other nations can help inform New York's actions on this issue. Finally, the hearings are intended to foster a public dialogue on the ultimate question of whether New York's death penalty law should be reinstated and, if so, what form any new law should take.

November 22, 2004

Joseph R. Lentol
Member of Assembly
Chair
Committee on Codes

Helene E. Weinstein
Member of Assembly
Chair
Committee on the Judiciary

Jeffrion L. Aubry
Member of Assembly
Chair
Committee on Correction

Note:

Persons wishing to present pertinent testimony to the Committees at the joint public hearings should complete and return the enclosed reply form as soon as possible. It is important that the reply form be fully completed and returned so that persons may be notified in the event of emergency postponement or cancellation.

Oral testimony will be limited to ten (10) minutes' duration and will be by invitation only. In preparing the order of witnesses, the Committees will attempt to accommodate individual requests to speak at particular times in view of special circumstances. These requests should be made on the attached reply form or communicated to the Committees' staff as early as possible.

Thirty (30) copies of any prepared testimony should be submitted at the hearing registration desk.

The Committees would appreciate advance receipt of prepared statements.

In order to further publicize these hearings, please inform interested parties and organizations of the Committees' interest in receiving testimony from all sources.

In order to meet the needs of those who may have a disability, the Assembly, in accordance with its policy of non-discrimination on the basis of disability, as well as the 1990 Americans with Disabilities Act (ADA), has made its facilities and services available to all individuals with disabilities. For individuals with disabilities, accommodations will be provided, upon reasonable request, to afford such individuals access and admission to Assembly facilities and activities.

SELECT QUESTIONS TO WHICH WITNESSES MAY DIRECT THEIR TESTIMONY:

I. Should the Death Penalty be Reinstated in New York?

1. Is it possible to design a death penalty law which is fairly administered and consistently applied, free from impermissible racial, ethnic or geographic bias and prevents the conviction of the innocent?
2. Is the death penalty an appropriate societal exercise of retribution against persons who commit intentional murder?
3. What evidence is there that New York's death penalty or the death penalty in general deters intentional murder more effectively than other sentencing options?
4. Are the results which New York has achieved over the past nine years in administering the death penalty worth the significant public resources which have been expended? Could those resources have been used more effectively for other crime control or public purposes?
5. Is the currently available sentence of life imprisonment without the possibility of parole an effective alternative to the death penalty in New York? Or is it imperative that this current sentencing option be supplemented with the death penalty?
6. What do the trends and experiences of other states and nations which have considered or implemented the death penalty or life imprisonment without parole teach us about whether capital punishment should be reinstated in New York?

II. If the Death Penalty in New York Were Reinstated, What Should it Provide for?

1. Did the 1995 statute provide appropriate safeguards to ensure that innocent persons would not be convicted and subject to the death penalty in New York? If not, what additional safeguards would be needed to meet that goal?
2. Have the close family members and loved ones of deceased murder victims been given appropriate input and involvement in decisions about seeking the death penalty and in the death penalty process under the 1995 law? How could the role of these family members and loved ones be improved?
3. Did the 1995 statute provide appropriate protections against convictions and the imposition of the death penalty by virtue of bias applicable to the race or ethnicity of death penalty defendants or murder victims? If not, what additional steps would be necessary to achieve that goal?
4. As noted above, New York's death penalty law, as amended, provided a death penalty option for thirteen kinds of intentional murder. Should those categories be expanded, contracted or otherwise modified if the death penalty is reinstated?

5. New York's law provided a system of capital defense through a Capital Defender Office and contracts with other institutional defenders and private attorneys. Has this system worked effectively? How might it be improved?

6. Under New York's death penalty law, prosecutors were given unfettered discretion to seek or not seek the death penalty in any first degree murder case. Is such unlimited discretion appropriate? Did this system of prosecutorial discretion work effectively and fairly?

7. Three death sentences imposed under the 1995 law came from Suffolk County with one each coming from Kings, Queens, Onondaga and Monroe counties. The chances that a defendant would be subject to a death penalty prosecution in New York over the past nine years varied widely, depending upon the county in which a defendant's crime occurred. Is this a permissible result in a death penalty system? Should the imposition of the death penalty vary, depending upon the county in which a defendant is prosecuted?

8. Has the state provided sufficient financial resources to law enforcement, victims' services, defense providers and the judicial system to administer the death penalty over the past nine years? What changes in state funding for administering the death penalty could be considered?

9. What do the experiences of other states with death penalty laws and the federal government teach us about how any death penalty statute should be structured in this state?

10. What changes in evidentiary rules or the appellate process might be considered if the 1995 law were reinstated?

11. On August 11th of this year, the Senate passed Governor's program legislation which seeks to remedy the unconstitutional jury deadlock instruction identified by the Court of Appeals in the LaValle decision (S-7720). The bill would seek not only to reinstate the death penalty for future cases, but would also purport to retroactively apply the new statute, both to crimes which occurred prior to the LaValle decision and crimes which occurred subsequent to LaValle but prior to the law's enactment, during a time period when no valid death penalty law was in effect in New York. The bill's retroactive provisions have been criticized as being violative of the *Ex Post Facto* clause of the United States Constitution and therefore invalid, particularly with respect to cases occurring subsequent to LaValle.

(a) Should the prospective provisions of S-7720, which seek to reinstate the death penalty be adopted without any further modifications to the statute?

(b) Are the retroactive provisions of S-7720 which seek to reinstate the death penalty with respect to prior crimes constitutionally valid? Should these provisions be adopted?

12. The 1995 statute generally barred the execution of mentally retarded persons but contained an exception for the first degree murder of a corrections officer committed by a prison or jail inmate. The United States Supreme Court, in its 2002 decision in Atkins v. Virginia, barred the execution of mentally retarded persons. How does the Atkins holding impact the '95 law's limited provisions authorizing the execution of mentally retarded persons?

13. The 1995 statute contained extensive provisions related to a jury's consideration of a defendant's possible mental impairment when determining whether the death penalty should be imposed. How well did these provisions operate? Would these provisions need to be revised if the death penalty in New York were reinstated?

14. The 1995 law set 18 as the minimum age for the imposition of the death penalty. Should that minimum age be modified if the death penalty is reinstated?

15. The 1995 law contained provisions for disqualifying jurors from death penalty guilt and penalty phase proceedings who harbored opinions for or against the death penalty which would preclude them from rendering an impartial verdict or exercising their discretion to determine an appropriate sentence. Has this provision, as it has been interpreted by New York's courts, been applied fairly and appropriately? Should this provision be modified in the event the death penalty is reinstated?

16. The 1995 statute established procedures for housing death sentenced inmates and carrying out death sentences. The State Department of Correctional Services has also implemented a number of policies in administering the 1995 law. Should any of these laws or policies be changed, in the event the death penalty is reinstated?

PUBLIC HEARING REPLY FORM

Persons wishing to present testimony at the joint public hearing on “The Death Penalty in New York” are requested to complete this reply form as soon as possible and mail, email or fax it to:

Seth H. Agata, Counsel
Assembly Committee on Codes
Room 508 – The Capitol
Albany, New York 12248
Email: agatas@assembly.state.ny.us
Phone: (518) 455-4313
Fax: (518) 455-4682

- I plan to attend the joint public hearing on “The Death Penalty in New York” to be conducted by the Assembly Committees on Codes, the Judiciary and Correction in New York City on December 15, 2004.
- I plan to attend the joint public hearing on “The Death Penalty in New York” to be conducted by the Assembly Committees on Codes, the Judiciary and Correction in Albany on January 25, 2005.
- I would like to make a public statement at the joint hearing in ___ NYC or ___ Albany. My statement will be limited to ten (10) minutes, and I will answer any questions which may arise. I will provide thirty (30) copies of my prepared statement.
- I will address my remarks to the following subjects:

- I do not plan to attend either of the above hearings.
- I would like to be added to the Committees’ mailing lists for notices and reports.
- I would like to be removed from the Committees’ mailing lists.
- I will require assistance and/or handicapped accessibility information.

Please specify the type of assistance required:

IF YOU PLAN TO ATTEND, YOU MUST BRING A FORM OF PHOTO IDENTIFICATION

NAME: _____

TITLE: _____

ORGANIZATION: _____

ADDRESS: _____

E-MAIL: _____

TELEPHONE: _____

FAX TELEPHONE: _____



**ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON THE JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION**

NOTICE OF JOINT PUBLIC HEARING

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

NEW YORK CITY

Friday, January 21, 2005

10:00 a.m.

**Association of the Bar of the City
of New York**

Meeting Hall, 42 West 44th Street

SPECIAL NOTE: This is an additional hearing date for the Assembly's hearings on the Death Penalty in New York. One previous hearing was held on the subject on December 15th, 2004 in New York City. An additional hearing will also be held in Albany on January 25th, 2005. Both of these hearing dates were announced in a previous hearing notice.

The Assembly has scheduled this additional New York City hearing because of the large number of people who have asked to testify at these hearings. The subject, purpose, questions and hearing procedures outlined below for the January 21st hearing are identical to those previously announced for the December 15th and January 25th hearings.

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.



**ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION**

**NOTICE OF JOINT PUBLIC HEARING
ORAL TESTIMONY BY INVITATION ONLY**

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

ALBANY

**Tuesday, February 8, 2004
11:00 a.m.
Roosevelt Hearing Room
Room C, 2nd Floor
Legislative Office Building**

NEW YORK CITY

**Friday, February 11, 2005
10:00 a.m.
Pace University
Michael Schimmel Center for the Arts
3 Spruce Street
(between Park Row and Gold Street)
New York, New York**

***These two hearings are a continuation of the New York City and Albany hearings previously held on December 15th, January 21st and January 25th and are being scheduled to allow persons who previously asked to testify at the earlier hearings and were not able to testify due to time constraints to present testimony to the committees. Oral testimony will be by invitation only.**

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.