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# Amici Curiae Brief of New York law school professors in *People v. Harris*: Constitutionality of the New York Death Penalty Statute Under the State Constitution's Cruel and Unusual Punishments and Antidiscrimination Clauses

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# ***AMICUS BRIEF***

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**COURT OF APPEALS**  
of the  
**STATE OF NEW YORK**

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**PEOPLE OF THE STATE OF NEW YORK,**

*Respondent,*

- against -

**DARREL K. HARRIS,**

*Defendant-Appellant.*

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**BRIEF OF *AMICI CURIAE*\***

**Anthony Amsterdam, Ursula Bentele, Vivian Berger, John Blume,  
Peggy Davis, Deborah Denno, Markus Dubber, Stephen Ellmann,  
Deborah Fins, Eric M. Freedman, Stephen Garvey, Jack Greenberg,  
Randy Hertz, Sheri Lynn Johnson, Richard Klein, James Liebman,  
Peter Neufeld, Barry Scheck, and Bryan Stevenson**

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\* EDITOR'S NOTE: The attorneys for the *Amici Curiae* are Professors Anthony G. Amsterdam and Randy Hertz of New York University School of Law. This brief was submitted to the New York Court of Appeals in *People v. Harris*, 2002 WL 1461372, (N.Y., June 9, 2002), the first case of a defendant sentenced to death under the New York capital punishment statute enacted in 1995. The Court of Appeals reversed Mr. Harris's sentence without reaching arguments against the constitutionality of capital punishment raised in this brief. The brief appears here in substantially the same form as the version filed with the Court of Appeals, including the original citation format. All rights reserved to the authors.

INTEREST OF THE *AMICI*

*Amici* are teachers in New York law schools who have studied the operation of the death penalty for the purpose of teaching the subject, writing about it in scholarly journals, or representing persons accused or convicted of capital crimes. Most of us have worked in the field both as academics and as *pro bono* counsel for condemned inmates. Collectively, we have had first-hand experience in hundreds of death cases, in dozens of jurisdictions, extending over more than a third of a century.

Our experience has convinced us that capital punishment cannot be administered with the fairness, reliability, and freedom from discrimination that a penalty so grave and irreversible requires. This is no accident or transitory condition; it is the consequence of certain innate attributes of the penalty of death. The purpose of our brief is to analyze those attributes and explain why they are fundamentally at war with the Cruel and Unusual Punishments Clause and the Antidiscrimination Clause of New York's Bill of Rights. We hope to persuade the Court that it should not temporize with the death penalty in the face of this basic incompatibility but should hold the 1995 death penalty statute altogether unconstitutional.



## PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

*Amici* submit that the Death Penalty Act of 1995 violates Article I, §§ 5 and 11 of the New York Constitution – New York’s Cruel and Unusual Punishments Clause and its Antidiscrimination Clause. We recognize that this contention is counterintuitive. At first blush, it encounters three apparently insurmountable objections: that almost every American court (including the Supreme Court of the United States) has upheld the death penalty against seemingly identical constitutional challenges; that this Court surmised in *People v. Broadie*, 37 N.Y.2d 100 (1975), that Article I, § 5 was indistinguishable from the federal Constitution’s Eighth Amendment; and that a decision invalidating capital punishment under the New York Constitution would appear to overstep the boundary that separates this Court’s proper function from the Legislature’s.

But when examined, each of these objections proves unfounded. *Broadie*’s Eighth-Amendment-look-alike construction of Article I, § 5 (which was unnecessary to the Court’s holding and was largely contained in an Appendix to the *Broadie* opinion) misunderstood the essential function of New York’s Cruel and Unusual Punishments Clause because it overlooked the question that is key to reading the Clause correctly. *Why was a guarantee against cruel and unusual punishments written into the New York Constitution by the Convention of 1846 when such a provision had never before been thought a necessary addition to New York’s Constitution, and only a quarter-century after an identical provision was explicitly rejected in the preceding Constitutional Convention of 1821 as self-evidently useless?* The answer to that question requires an examination of the historical circumstances under which the 1846 Convention adopted Article I, § 5 – circumstances altogether ignored in the *Broadie* Appendix (see 37 N.Y.2d at 123). And these circumstances, which make Article I, § 5 unique among American cruel-and-unusual-punishments clauses, explain in turn why this Court can and should reach a different constitutional judgment on the death penalty than the vast majority of American courts.

Those courts have all started from a simple, initially appealing premise: that a constitutional prohibition against cruel and unusual punishments, written at a time when capital punishment was a visible, accepted feature of the criminal law, must have been intended either to preserve the death penalty or to abolish it. This either/or choice almost ineluctably leads to a decision that the death penalty *per se* was constitutionally endorsed, because of the implausibility of supposing that such a salient form of punishment would have been outlawed *sub silentio*. But an examination of the historical context in which Article I, § 5 was adopted in 1846 demonstrates that it was added to the New York Constitution *not* to embody such an either/or choice, but precisely to create a third alternative. Article I, § 5 was written with a view to taking the issue of the ultimate permissibility of capital punishment and similar harsh criminal penalties out of the stormy theater of political judgment – where debates over the death penalty

had proved divisive and intractable to reason – and to place that issue in the keeping of the Court of Appeals of New York, which the Constitutional Convention of 1846 was in the process of creating.

And that is why the third conspicuous objection to our argument invoking the reasoned judgment of this Court upon the constitutionality of capital punishment – the objection that a court has no business second-guessing the Legislature on the subject of the death penalty – also fails to stand up under scrutiny. The very aim of Article I, § 5 was to put the final question of the acceptability of the death penalty beyond the reach of politics and submit it to the judgment of this Court, in the light of reason and experience examined over time. In this respect, Article I, § 5 is similar to the parallel provision of the Constitution of South Africa which the South African Constitutional Court reviewed in *State v. Makwanyane*, 1995 [3] S.A.L.R. 391, and under which that court struck down the punishment of death because the accumulated experience of the civilized nations of the world had found it inhumane, purposeless in its savage cruelty, and uncontrollably prone to arbitrary and discriminatory dispensation. The inequality inescapable in meting out a sentence too appalling to apply with any prospect of dispassion or of regularity is, as we shall see, the most striking lesson of contemporary American experience with statutes like – (though usually better regulated than) – the Death Penalty Act of 1995; and it brings the Antidiscrimination Clause of Article I, § 11 of the New York Constitution into play along with Article I, § 5, to prohibit the infliction of capital punishment under the 1995 Act.

#### I.

#### ARTICLE I, §§ 5 AND 11 OF THE NEW YORK CONSTITUTION REQUIRE THIS COURT TO REVIEW THE DEATH PENALTY ACT OF 1995 UNDER MORE EXACTING STANDARDS THAN THOSE OF THE PARALLEL PROVISIONS OF THE FEDERAL CONSTITUTION

“The doctrine that State courts should interpret their own State Constitutions, *where appropriate*, to supplement rights guaranteed by the Federal Constitution, is not in dispute.” *People v. Scott*, 79 N.Y.2d 474, 518 (1992) (dissenting opinion of Judge Bellacosa). See the several *Scott* opinions and, e.g., *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152 (1978); *People v. Johnson*, 66 N.Y.2d 398, 406 - 407 (1985); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 NEW YORK UNIVERSITY LAW REVIEW 1, 11 - 18 (1995). “Courts and commentators have identified many considerations and concerns upon which a State court may rely when determining that its Constitution accords greater protection to individual liberties and rights than the protection guaranteed by the Federal Constitution.” *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302 (1986). Interpretive analysis considers both “whether language in the State Constitution is sufficiently unique to support a broader interpretation of the

individual right under State law” and “whether the history of the adoption of the text reveals an intention to make the State provision coextensive with, or broader than, the parallel Federal provision.” *Id.* at 302 - 303. Noninterpretive analysis takes account of “the history and traditions of the State in its protection of the individual right” and “any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.” *Id.* at 303. See Judith S. Kaye, *Dual Constitutionalism In Practice And Principle*, 42 RECORD OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK 285, 299 - 309 (1987).

The Cruel and Unusual Punishments Clause of Article I, § 5 of the New York Constitution has “its own unique history” (*People v. Scott*, *supra*, 79 N.Y.2d at 486) – an “appropriate basis, unique to New York” (*id.* at 507, dissenting opinion of Judge Bellacosa) – that sets it apart from the Eighth Amendment to the federal Constitution, notwithstanding their “identical constitutional texts” (*ibid.*). This history is reviewed in Part I.A below. Article I, § 11 of the New York Constitution differs from the federal Equal Protection Clause in both language and constitutional history. These differences and their pertinent implications are examined in Part I.B. In Part I.C we show that the specific concerns of Article I, § 5 and Article I, § 11 are mutually reinforcing – and are complemented by a set of principles, traditions and attitudes that have consistently informed this Court’s interpretation of the New York Constitution’s Bill of Rights. Thus, Part I as a whole identifies and documents the state constitutional standards under which we will invite the Court’s scrutiny of the 1995 Death Penalty Act in Part II.

*A. Article I, § 5 Was Designed to Submit the Issue of the Acceptability of Extreme Criminal Punishments to the Reasoned Judgment of this Court*

Article I, § 5 provides:

“Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”

This guarantee was written into the Constitution by the Convention of 1846 and has since been carried forward unchanged.

As we have already noted, the Appendix to *People v. Broadie*, 37 N.Y.2d 100 (1975), observes that the language of Article I, § 5 was copied from the Eighth Amendment to the federal Constitution; that the drafting committee reported this fact to the Convention; and that the Convention approved the text without debate – whereupon, the Appendix seems to conclude, Article I, § 5 is to be read “in conformity with the Federal constitutional provision,” *id.* at 123, disregarding the distinctive circumstances of its adoption.<sup>1</sup> With the utmost

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1. This is not entirely clear. What the Appendix says, precisely, is that Article I, § 5 “*seems to have been included* without debate in the Bill of Rights [of the 1846 Constitution] in conformity with the Federal constitutional provision.” 37 N.Y.2d at 123 (emphasis added). However, the

respect, *amici* submit that this conclusion was ill-informed and incorrect, and that the Court should take a fresh look at the historical materials relating to the 1846 Convention – which are given only cursory examination in the *Broadie* Appendix – to discern how Article I, § 5 needs to be read in its proper state constitutional context. What those materials show, summarily, is that:

Article I, § 5 was adopted amidst bitter legislative and social controversy over the future of the death penalty in New York. An attempt to abolish capital punishment by legislation had narrowly failed in 1841, and proponents of abolition made two more contentious efforts to pass their bill in the years preceding the Convention.

In this setting, the Constitutional Convention of 1846 chose neither to endorse nor to prohibit the death penalty. Avoiding potentially divisive political and religious controversy, the Convention crafted a Solomonic solution. It created a constitutional boundary, *outside the arena of political debate*, beyond which the Legislature could not go in authorizing harsh criminal punishments. This was Article I, § 5. And it committed the determination of the boundary line to a new judicial tribunal which the Convention was creating with the aim of providing principled, independent constitutional review of legislation. That tribunal was and is this Court.

The rules that this Court should apply in interpreting Article I, § 5 were not debated in the Convention, whose records scarcely mention the new constitutional provision.<sup>2</sup> But the underlying values and perceptions shared by

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Appendix then goes on to refer extensively to the federal Eighth Amendment precedents in explicating the meaning of “cruel and unusual punishments,” so we take the sense of the Appendix to be that those precedents should – at least as a general matter – serve as a point of reference for the interpretation of Article I, § 5.

2. See JOURNAL OF THE CONVENTION OF THE STATE OF NEW-YORK, BEGUN AND HELD AT THE CAPITOL IN THE CITY OF ALBANY ON THE FIRST DAY OF JUNE, 1846 (1846) [hereafter, “1846 CONVENTION JOURNAL”]; SHERMAN CROSWELL & RICHARD SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION, 1846 (1846) [hereafter, “C&S 1846 CONVENTION DEBATES AND PROCEEDINGS”]; WILLIAM G. BISHOP & WILLIAM H. ATTREE, DEBATES AND PROCEEDINGS OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1846 (1846) [hereafter “B&A 1846 CONVENTION DEBATES AND PROCEEDINGS”]. All the Convention records show on their face is: (1) that the cruel and unusual punishments clause now in Article I, § 5 was contained in the fifth section of a bill of rights and liberties reported to the Convention by the Standing Committee on Rights and Privileges of the Citizens of this State (see REPORT OF MR. TALLMADGE FROM STANDING COMMITTEE NO. 11, Convention Doc. No. 39 [June 30, 1846], at 2); (2) that it was included as the seventh section in the report of a subsequently appointed select committee to which various bill-of-rights provisions had been referred (see B&A 1846 CONVENTION DEBATES AND PROCEEDINGS, at 1053; 1846 CONVENTION JOURNAL, at 1319 - 1322, 1332 - 1333); (3) that the cruel-and-unusual punishments provision was adopted without floor discussion (see C&S 1846 CONVENTION DEBATES AND PROCEEDINGS, at 429, 815; B&A 1846 CONVENTION DEBATES AND PROCEEDINGS, at 550, 1062; 1846 CONVENTION JOURNAL 723, 1369 - 1371); and (4) that the standing committee report cited the Eighth Amendment of the federal Constitution as the source of the proposed Article I, § 5 or as a cognate provision (Doc. No. 39, *supra*, at 2.) (The statement in the *Broadie* Appendix, 37 N.Y.2d at 123, that “[t]he committee report indicates that the language of the clause was copied from the Eighth Amendment” is an extrapolation from item number (4). To be exact, the committee report sets out, in small print

all parties to the widespread discourse concerning reform of New York's criminal justice system in the 1840's are abundantly clear from the historical record. There was widespread recognition of the need to establish safeguards against the arbitrary, capricious and unequal infliction of harsh criminal punishments; and the death penalty was perceived as a peculiar locus of potential arbitrariness, caprice and inequality.

In short, Article I, § 5 was the distillation of a decade's controversy into a guiding principle that all parties to that controversy could accept: that severe criminal punishments should no longer be arbitrarily or unevenly exacted. The organ that was expected to interpret this principle and to decide whether any particular penalty could be authorized or inflicted consistently with it – the newly-created Court of Appeals – was made independent of the Legislature (replacing a tribunal comprised of state senators) so as to assure that its judgment in such matters would be principled and not submissive to political pragmatism. From these premises follows a reading of Article I, § 5 (and of its implications for the present case) that makes far better sense of the relevant constitutional history than does the *Broadie* Appendix's cursory assimilation of Article I § 5 to the federal Eighth Amendment. Specifically, this Court is not obliged to follow the Eighth Amendment decisions of the Supreme Court of the United States – *Gregg v. Georgia*, 428 U.S. 153 (1976), and *McCleskey v. Kemp*, 481 U.S. 279 (1987) – which uphold the uncontrollably irregular and arbitrary administration of the death penalty in deference to a supposed legislative judgment that the penalty's penological utility justifies its unavoidably capricious cruelty. That kind of abdication to political judgment – reflecting the extremely limited function of the U.S. Supreme Court in matters of state criminal law – would be faithless to the core purpose of New York's state constitutional prohibition of cruel and unusual punishments.

We now turn to a more thorough exposition of these premises and conclusions:

### *1. The Controversy Over Capital Punishment and Criticisms of the Criminal Law in the 1840's*

In the early 1840's, a movement to abolish the death penalty in New York came close to succeeding in the New York State Legislature.<sup>3</sup> The debate over

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above each proposed section of the bill of rights and liberties, a terse comment (like "Added," or "Mostly new," or "Art. 7, sec. 1, slightly modified") or a reference (like, in the case of Article I, § 5, "Art. 8 of U.S. Constitution"), which may indicate the provenance of the proposed section. It is, of course, plain that the text of the Cruel and Unusual Punishments Clause of Article I, § 5 as adopted is identical to that of the federal Eighth Amendment. But the original committee draft that was the subject of the comment "Art. 8 of U.S. Constitution" was not: it read "cruel *or* unusual punishments" instead of "cruel *and* unusual punishments." The "or" was changed to "nor" and then to "and," without explanation, at successive stages.

3. In 1832, the Assembly had appointed a committee to report on the advisability of abolishing capital punishment in New York. The report was apparently composed under the

capital punishment was particularly sharp in the 1841 legislative session. The Assembly had appointed a select committee, chaired by John L. O'Sullivan, which reported back a sweeping indictment of capital punishment and an emphatic recommendation that it be abolished.<sup>4</sup> The result was a bill providing both for abolition and for significant new limitations on the Governor's clemency powers. It passed on a first vote by a margin of 57 to 52. Two days before the session's end, after tenacious lobbying on both sides – in which New York's churches figured prominently – the Assembly reversed itself, voting 52 to 46, with 11 abstentions, against the abolition bill.<sup>5</sup>

Again in 1845, and once more in 1846 on the eve of the Convention, reports were made by legislative committees recommending abolition. The report of 1845,<sup>6</sup> authored by four Assembly members who would all be in attendance as delegates to the Convention the following year, added that abolition "cannot safely be effected without restraining the pardoning power of the Executive by a constitutional restriction."<sup>7</sup> For this reason, the authors of the 1845 Report advocated deferring action on an abolition bill until after the Constitutional Convention.<sup>8</sup> They concluded their report by looking ahead to the Convention:

"Your committee therefore conclude with the expression of the confident hope that the Convention which is expected to meet in 1846, will make adequate provision in the organic law, so that the Legislature

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influence of the preeminent anti-gallows advocate of the day, Edward Livingston, and it recommended abolition. See New York Assembly Doc. No. 187 (March 7, 1832). A bill abolishing the death penalty was introduced and debated in 1832; bills, committee reports and petitions on the subject proliferated during the following decade and a half. See David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787 - 1861*, 63 AMERICAN HISTORICAL REVIEW 23 (1957), at 31 - 43; PHILIP ENGLISH MACKEY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776 - 1861* (1982), at 79 - 233.

4. REPORT IN FAVOR OF THE ABOLITION OF CAPITAL PUNISHMENT, MADE TO THE LEGISLATURE OF THE STATE OF NEW YORK, New York Assembly Doc. No. 249 (April 14, 1841) (hereafter, the "O'SULLIVAN REPORT"). O'Sullivan, a notable literary critic and freelance reformer, was then the editor of the *United States Magazine and Democratic Review*.

5. NEW YORK LEGISLATURE, JOURNAL OF THE ASSEMBLY, 1841, at 1179 - 1180, 1362; 2 JABEZ DELANO HAMMOND, *THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK* (1852), at 345; Davis, note 3 *supra*, at 38 n.54. The role of religious controversy in the passionate debate over capital punishment in the 1840's is thoughtfully analyzed in LOUIS P. MASUR, *rites of EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776 - 1865* (1989), at 117 - 159; see particularly *id.* at 145 ("Both in 1841 and 1842 the orthodox clergy played a crucial role in the [New York abolition] bill's defeat. An *Evening Post* correspondent observed that 'there is a violent opposition to this reform from a quarter where least of all it might have been looked for – the pastors of the various denominations of churches.'"). See also MACKEY, note 3 *supra*, at 125, 145 - 146, 154 - 163, 181 - 187.

6. REPORT OF THE SELECT COMMITTEE ON THE PETITIONS TO ABOLISH CAPITAL PUNISHMENT, New York Assembly Doc. No. 249 (May 12, 1845) (hereafter, the "1845 REPORT").

7. *Id.* at 6. The author-delegates were Roderick M. Morrison, Samuel A. Brown, G.O. Chase, and A.W. Danforth.

8. We will discuss in detail below the widespread sentiment of the 1840's that capital punishment was interlocked with a sweeping power of executive clemency, arbitrarily exercised, and that reforms curbing both needed to be conjoined. See particularly Part I.A.3.c *infra*.

may put an end to a practice which is unnecessary to the great purposes of public justice, and utterly repugnant to the philosophy and humanities of the age.”<sup>9</sup>

The 1846 Report was issued in the month before the Convention was gaveled to order.<sup>10</sup> Signed by a majority of four (out of five) members of a select committee of the Assembly, the report noted that, just weeks earlier, Michigan had enacted legislation abolishing the death penalty, and it urged that “the great State of New York, which has always been so prompt and prominent in all movements of social, political, or legal reform, and with many of its most conspicuous citizens the earliest and most steadfast advocates of this humane reform, should immediately follow the enviable lead of the State of Michigan.”<sup>11</sup> The committee majority nevertheless reported “[s]ome difference of opinion . . . [among its members on the question] in what manner the action of the Legislature should be taken” and accordingly proposed two alternatives: outright abolition and replacement of the death penalty by life imprisonment in solitude and at hard labor; or abolition dependent upon the approval of the voters in a referendum, with the death penalty to be replaced by life imprisonment “without power of pardon, except by a special act of the Legislature.” These two options were coupled with a proposed constitutional amendment abrogating the Governor’s pardon power and forbidding the Legislature to pass special acts of pardon for a period of twenty years following conviction – or thereafter without a two-thirds vote of both the Senate and the Assembly – in the case of crimes previously punishable by death.<sup>12</sup>

And again in 1847, on the heels of the Constitutional Convention, yet another select committee of the Assembly was to issue a scathing criticism of the death penalty and urge its abolition.<sup>13</sup> Just days before its report, the Michigan law abolishing the death penalty – the first complete abolition law in the nation – had gone into effect.<sup>14</sup> Later in 1847 an abolition bill would once more come within a few votes of passing the New York Assembly.<sup>15</sup>

This series of legislative reports calling for abolition was not an isolated phenomenon. Discontent with the system of criminal punishment was widespread in New York in the 1840’s and contributed to the perception, shared

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9. 1845 REPORT, at 6 - 7.

10. REPORT OF THE SELECT COMMITTEE ON THE SUBJECT OF CAPITAL PUNISHMENT, New York Assembly Doc. No. 213 (May 13, 1846) (hereafter, the “1846 REPORT”). The authors of the 1846 Report note that in the course of preparing the report the committee had received 113 petitions containing 7,580 signatures favoring abolition, and a single petition bearing 112 signatures favoring retention of the death penalty.

11. *Id.* at 51 - 52. The Michigan statute took effect the following year. See note 14 *infra*.

12. 1846 REPORT, at 53 *et seq.*

13. See REPORT OF THE SELECT COMMITTEE ON THE ABOLITION OF CAPITAL PUNISHMENT, New York Assembly Doc. No. 95 (March 5, 1847) (hereafter, the “1847 REPORT”).

14. See Davis, note 3 *supra*, at 43. The Michigan law had been passed the preceding May.

15. NEW YORK LEGISLATURE, JOURNAL OF THE ASSEMBLY, 1847, at 1618 - 1619, 1687.

on all sides of the debate about capital punishment, that fundamental reform was needed. The roots of this discontent were deep and complex. They included a new concern against arbitrary and unequal administration of the law – animated partly by the intensifying anti-slavery spirit sweeping the Northern States in the '30's and '40's<sup>16</sup> and partly by the anti-rentist fervor peculiar to New York State in the latter decade;<sup>17</sup> the emergence of the penny press, which exposed anomalies and injustices in the criminal courts to a new kind of public scrutiny;<sup>18</sup> and the reverberations of a widespread movement within the legal profession, both in the United States and in Europe, to reform oppressive features of the penal law.<sup>19</sup>

In New York, the penal law had been comprehensively redrafted in 1829 to replace a patchwork of common law and *ad hoc* statutory provisions with a more rational code.<sup>20</sup> The new penal code implemented for the first time in New York a system of offenses distinguished by degrees, and prescribed sentencing ranges. The sixteen capital offenses still on the statute books were reduced to three (murder, arson in the first degree, and treason).<sup>21</sup> Murder (of which there was still only one degree) was limited to cases in which the accused harbored a premeditated design, acted with a depraved or abandoned heart, or killed in the course of a felony.<sup>22</sup> Some 120 other offenses were defined, including four degrees of manslaughter, four of arson, three of burglary, and four of forgery.<sup>23</sup> Each offense, by degree, was assigned a sentencing range, within which the courts were vested with discretion.

New York's penal reforms of the late 1820's prefigured the more systematic proposals of the Criminal Law Commissioners, a distinguished group of English lawyers charged with devising a thorough reclassification of criminal offenses

16. See, e.g., WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760 - 1848* (1977), at 150 - 275; DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993), at 58 - 107; RICHARD H. SEWELL, *A HOUSE DIVIDED: SECTIONALISM AND CIVIL WAR, 1848 - 1865* (1988), at 17 - 30; WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830 - 1900* (1982), at 48 - 53.

17. See Part I.A.2.d *infra*.

18. See note 39 *infra* and accompanying text.

19. See 4 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 [GRAPPLING FOR CONTROL]* (1968), at 303 - 343.

20. See Ernest Henry Breuer, *The New York Revised Statutes - 1829*, 55 *LAW LIBRARY JOURNAL* 33 (1962). The criticisms leading to this reform stressed the "disparities and incongruities" of the prior penal regime (see 3 *STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS* (CHARLES Z. LINCOLN, ed., 1909), at 174), which had often prescribed a single penalty for crimes defined so broadly that they included offenses ranging from highly culpable to trifling (*id.* at 173).

21. 2 N.Y. REV. STAT., pt. IV, ch. I, tit. I, § 1 (1829).

22. 2 N.Y. REV. STAT., pt. IV, ch. I, tit. I, § 5(1) - (3) (1829).

23. 2 N.Y. REV. STAT., pt. IV, ch. I, tit. II, art. I, §§ 6 - 19; pt. IV, ch. I, tit. III, art. I, §§ 1 - 8; pt. IV, ch. I, tit. III, art. II, §§ 10 - 18; pt. IV, ch. I, tit. III, art. III, §§ 22 - 29, 33 - 35, 37 - 38, 40 (1829).



and punishments.<sup>24</sup> The Commissioners described the concerns that drove their mission in their first Report, issued in 1834:

“For the legal definitions of offences are frequently of so large a description, and the criminal acts they include differ so widely in the mischief they occasion to society, that, without a definite scale, marking different degrees of criminality, appropriate punishments cannot be previously defined. Thus, in the instance of the offence of burglary, the punishment of death is applicable, without distinction, to a numerous class of offences, the extremes of which have little resemblance, in point of moral guilt, or the injury sustained, to each other. The consequence of which imperfection in the law is, great uncertainty in the application of punishment, whereby the motive to abstain from the commission of offences is weakened.”<sup>25</sup>

For reformers on both sides of the Atlantic, two discontents were paramount.<sup>26</sup> First, the old system of capital sentences for a wide range of felonies, combined with more or less capricious use of the executive power of commutation and pardon, was clearly bankrupt. Punishment levied so uncertainly was seen as undercutting one of the system’s primary rationales, deterrence.<sup>27</sup> Second, as a more general matter, the vagueness of criminal statutes was seen as conducing to arbitrariness in their enforcement, which turned too much on such collateral considerations as the offender’s record of past misconduct, the solicitations of prosecutors, and the temper of the local jurisdiction (particularly in light of the most recent capital cases).<sup>28</sup> The result, as English critics of disparate sentencing observed succinctly, was a system in which the administration of justice was “less a matter of principle than a lottery.”<sup>29</sup> The 1847 New York Assembly select committee report struck the

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24. See Sir Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1288 (1979).

25. *Id.* at 1292 (quoting the FIRST REPORT FROM HIS MAJESTY’S COMMISSIONERS ON CRIMINAL LAW (537), 26 Parl. Papers 105 (1834), at 153). Note the striking parallel to Governor Clinton’s criticism of New York law prior to the 1829 revision, cited in note 20 *supra*.

26. American reformers were familiar with the work of their British counterparts. For example, the report of the New York Assembly select committee that recommended abolition in 1846 quotes a passage from Charles Spear’s *ESSAYS ON THE PUNISHMENT OF DEATH* (1844), in which Spear refers to a recent document “presented to the British parliament” (1846 REPORT, at 42) – probably the SEVENTH REPORT OF HER MAJESTY’S COMMISSIONERS ON CRIMINAL LAW (448), 19 Parl. Papers 1 (1843).

27. See O’SULLIVAN REPORT, at 75 (“The maxim of all penal jurisprudence, that it is far more the *certainty* than any *severity* of punishment that deters from crime, is too familiar to all to claim more than this allusion.”).

28. Radzinowicz & Hood, note 24 *supra*, at 1293.

29. *Id.* at 1307 (quoting the “Seventh Criminal Law Report,” 30 *Law Magazine* (1st series) 1, 46 (1843), at 47). The Commissioners’ reform proposals featured a system of graded offenses with specific sentencing ranges. Their initial aim was to “restrict judicial discretion to its narrowest limits,” but this goal was moderated as the membership of successive Commissions

same chord in condemning the “odious inequalities”<sup>30</sup> that had become commonplace in the annals of capital punishment.

Any careful reading of the arguments being made for and against the death penalty in the 1840’s establishes, quite remarkably, that the New Yorkers of this period had already come to an acutely troubling awareness of the problem summed up 150 years later by Justice Harry Blackmun’s trenchant observation that the “goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing.” *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (opinion dissenting from the denial of certiorari). The core of the problem (which is discussed at greater length in Part II *infra*) is that without considerable discretion in the implementation of the death penalty, any system for administering capital punishment produces results that are inhumane in their rigid and inflexible severity; but, conversely, the discretion necessary to ameliorate this inhumanity leads inevitably to arbitrary and unevenhanded application of the extreme penalty.<sup>31</sup>

The O’Sullivan Report of 1841 observed that “[t]he *uncertainty of conviction*, by juries, for capital offences, has grown almost into a proverb”;<sup>32</sup> and an 1842 petition to the Assembly urging replacement of capital punishment with life imprisonment “beyond the reach of Executive or Legislative clemency,” argued that “it is always extremely difficult, and often impossible, to obtain capital convictions from juries in cases of clear and undoubted guilt, an evil which is daily extending and augmenting.”<sup>33</sup> The gubernatorial prerogative of clemency was seen as problematic in the same way and for the same reasons as jury nullification: clemency was a power that could not humanely be abridged

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changed. 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, at 1297 - 1298.

30. 1847 REPORT, at 56.

31. See 1846 REPORT, at 17:

“An institution so horrible in its nature and so momentous and eternal in its consequences as the death punishment, should be entirely based upon the strict principles of justice – and no plea of expediency nor citation of precedents should avail in its defence if it cannot be proved to be equitable as between man and man, and righteous towards the criminal.”

32. O’SULLIVAN REPORT, at 71. See also *ibid.* (“[J]uries are always, and will always be, powerfully swayed in their judgment, as well as in their feelings, by that horror of shedding the blood of their fellow man . . . In the clearest cases, it is seen that they *will not* convict . . .”); *id.* at 72 - 75; 1845 REPORT at 6 (“The reluctance of jurors to convict is becoming more and more apparent from every day’s experience; and the solemn obligation of their oaths is weakened and impaired by the severe conflict between their convictions of guilt and their yearnings to save the life of the prisoner committed to their hands.”).

33. *Memorial for the Abolition of Capital Punishment*, New York Assembly Doc. No. 146 (March 26, 1842), at 1; see also *Petition of A.G. Stevens and Other Citizens of Lockport, Praying for the Passage of a Law to Abolish Capital Punishment*, New York Assembly Doc. No. 59 (February 13, 1843), at 2 (arguing that misgivings about capital punishment among jurors had made “the conviction, although on often times good and rational testimony, of those now deemed capital offenders, far less certain than they otherwise would be”).

so long as capital punishment was authorized;<sup>34</sup> but its exercise unavoidably rendered the administration of the death penalty capricious, uneven, and unpredictable. As the 1847 Assembly select committee report put the matter:

“The law that is never sure, must be always unequal, often grossly unjust; we mean, not unjust in reference to guilt, but in partiality and distinctions. Let any one compare the many executions with the many pardons or commutations and see if there be any justice, or pretence of justice, in half of them. Here is a double wrong. If the law be divine, the penalty righteous and salutary, men have not even a discretionary power, after proving the guilt. And when disregarding this, they exercise not discretion, but caprice, policy, and passion, hanging a murderer today, and pardoning one to-morrow, and hanging the next, lest two successive pardons be dangerous, and pardoning the next, lest so many executions seem sanguinary; it is using a mild word to call it unjust. Such legislation is a bold and cruel mockery. It mocks itself and common sense, and the peoples’ safety, and the criminal’s deserts, and the God of equal justice. It trifles fearfully with the sacredness of life, whether you take one side or the other, of the great question.”<sup>35</sup>

Moreover, as the committee noted:

“[T]his terrible defect belongs to the very nature of the law. It is not accidental; it is not temporary or local. It is inherent, universal and unavoidable. It grows out of severity. Such a law *cannot be* uniformly executed. Neither the executioner, nor the people who are in fact the executioners will bear it. They will rather commit the most palpable inconsistencies. They will hang men as they have often done, in the face of the pardoned convict, and pardon others within sight of the loaded gallows. Instances may be found, along the whole line of blood.”<sup>36</sup>

Hence, it was fully understood in the 1840’s that death sentences could neither be regularly enforced without impairing the penalty’s acceptability nor regularly remitted without impairing its justification – a paradox expressed by twin passages in Governor Seward’s 1841 Message to the Legislature: on the one hand, “all agree that [the] . . . too great frequency [of capital punishment] operates as an encouragement, rather than a preventive of crime”;<sup>37</sup> on the other hand, “[t]he efficacy of the administration of justice must necessarily be impaired by a too frequent exercise of the pardoning power.”<sup>38</sup>

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34. See O’SULLIVAN REPORT, at 131, quoted in note 89 *infra*.

35. 1847 REPORT, at 55.

36. *Id.* at 55 - 56.

37. 3 STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS (CHARLES Z. LINCOLN, ed., 1901), at 863.

38. *Id.* at 861. Proponents of the death penalty agreed with this last point but believed that sentences of life imprisonment would also invite frequent, arbitrary exercises of the commutation

## 2. *Four Notorious Cases*

In the decade preceding the 1846 Convention, New Yorkers' attitudes regarding the system of criminal justice were convulsed by four highly controversial cases that, in different ways, brought home the dangers of a harsh, unequal and capricious administration of capital punishment. The cases, and the meanings drawn from them by contemporary observers, illuminate the heightened concern against arbitrariness that became a common theme for all parties to the raging death-penalty debate.

### *a. The Murder of Helen Jewett*

With the rise of the penny press in the early 1830's, New Yorkers were exposed for the first time to a steady diet of sensational news about crime; and no case was more sensational than the murder of Helen Jewett.<sup>39</sup> Jewett, the daughter of a Maine shoemaker, worked as a courtesan in one of New York City's "elegant Fifth Ward" brothels. It was there she formed her fateful liaison with Richard Robinson, scion of an old Connecticut family working as a clerk for a Yankee cloth merchant. Early on a Sunday morning in April, 1836, Jewett's body was discovered in her room at the brothel, covered in blood, and partly consumed by flames. A hatchet lay outside the door to the room, beside a

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power and would extend the opportunity for them. See *Remonstrance of Inhabitants of the Town of Salina, Against the Passage of a Law to Abolish Capital Punishment for the Crime of Murder*, New York Assembly Doc. No. 133 (March 24, 1842), at 2 ("Time, before which every thing bows, will in a few years have buried in a partial oblivion the crime of the offender; friends will become importunate; the kindness, good nature, or weakness of another generation will be called in requisition, until the heart of clemency is laid open, and the murderer stalks forth in defiance of the laws of God . . . . By the present laws of the State, certain offences are now punished with incarceration for life; and your remonstrants regret to say, that it is a common remark, that the offender stands a better chance of pardon where the term is life, than where the sentence is from three to seven years."). In a dissent to the 1846 Assembly select committee report urging abolition of the death penalty, Assemblyman John Miller observed that under the common-law regime prevailing in New York until only a few years earlier, "[m]ore than 160 offences were rendered capital"; "[s]o far as it could prevail against the natural convictions of men, this law either elevated theft to the rank of murder, or reduced murder to that of theft. It was opposed, therefore, to the spontaneous judgments of society, and so far as it operated did violence to them; hence, as a natural result, came pardons and commutations." REPORT OF THE MINORITY OF THE SELECT COMMITTEE ON CAPITAL PUNISHMENT, New York Assembly Doc. No. 214 (May 4, 1846), at 11.

39. EDWIN G. BURROWS & MIKE WALLACE, *GOUGHAM: A HISTORY OF NEW YORK CITY TO 1898* (1999), at 538 - 541. Reflecting on the significance of the penny papers, Burrows and Wallace write: "The penny press offered New Yorkers a broadly encompassing look at the range of groups that had clambered into visibility during the previous democratizing decades. It did not speak to or for any one of them in particular. It did not reflect, and help shape, a single constituency, as did the era's many religious, ethnic, racial, and radical papers. It was not limited by eighteenth-century print culture's pinched definition of urbanity and restrictive repertoire of urban types and settings. Instead, it addressed something that had never quite existed before except in republican theory: a "public" at large, a civic demos. In doing so, it offered New York's citizenry the technical and textual means to grasp their city's growing miscellaneity." *Id.* at 527 - 528.

blue cloth cloak identified as Robinson's. Robinson had been seen in her company just hours before.<sup>40</sup>

Charged with murder, Robinson stood trial amidst a frenzy that may fairly be regarded as one of the original prototypes of the high-profile criminal-case media circus. Crowds of cheering clerks, rowdy supporters of the defendant, jammed the courtroom, while thousands more milled about outside, awaiting news of the proceedings. Robinson was represented by three of New York's most celebrated lawyers, whose fees were being paid by his employer.<sup>41</sup>

The prosecution's case was strong, if circumstantial. Jewett's co-workers testified in force to having seen Robinson on the premises that night. His cloak had been found near the murder weapon. His roommate swore that he had been out late. A search of Robinson's rooms produced a miniature portrait taken from Jewett's room, together with a pair of trousers stained with fresh paint, the same color as a recently whitewashed fence just outside the brothel.<sup>42</sup>

In response, the defense labored to impeach the testimony of the prostitutes, finally securing an instruction from the presiding Judge, Ogden Edwards,<sup>43</sup> that the jurors should not credit the women's evidence "unless corroborated by testimony drawn from more creditable sources," and that testimony by women "who led such profligate lives" could not alone support a conviction.<sup>44</sup> This strategy worked: Robinson was acquitted inside of 15 minutes.

In a scathing editorial a few days later, the *New York Sun* denounced the verdict as illustrating class privilege and the ease with which the ends of justice may be perverted by money:

"[A]ny good-looking young man, possessing or being able to raise among his friends the sum of fifteen hundred dollars to retain Messrs. Maxwell, Price and Hoffman for his counsel, might murder any person he choose, with perfect impunity."<sup>45</sup>

Ten years later the murder of Helen Jewett was still a current topic: between 1845 and 1846, a vivid recounting of the case appeared in the pages of the *National Police Gazette*, one of the widest-circulating periodicals of the day.<sup>46</sup>

#### *b. John Colt's Execution-Day Suicide*

In 1841, John Colt, a dissolute brother of the gun manufacturer, was convicted of murdering a young printer named Samuel Adams and was

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40. *Id.* at 538.

41. *Id.* at 540.

42. *The Trial of Richard P. Robinson For the Murder of Helen Jewett, New York City, 1836*, in 12 AMERICAN STATE TRIALS 426 (JOHN D. LAWSON, ed., 1919), at 426 - 482.

43. Judge Edwards was the grandson of Jonathan Edwards and a cousin of Aaron Burr. Burrows & Wallace, note 39 *supra*, at 541.

44. *The Trial of Richard P. Robinson*, note 42 *supra*, at 485.

45. "The Trial of Robinson," *New York Sun*, June 9, 1836, p. 2.

46. Burrows & Wallace, note 39 *supra*, at 699.

sentenced to death. At his trial, Colt had presented evidence of self-defense, widely deemed by public opinion to be credible.<sup>47</sup> Nevertheless, the jury returned a guilty verdict, carrying a mandatory death sentence.<sup>48</sup> A year later, his sentence having been affirmed, Colt awaited execution while Governor Seward considered petitions for clemency.<sup>49</sup>

Seward finally denied clemency, but his private reflections, aired later by his son, showed how agonizing the decision had been:

"It will never be known, and cannot be conceived, how much I have heard, read, thought, and felt, on that painful subject."<sup>50</sup>

On the day appointed, Colt cheated the executioner by shooting himself with a pistol smuggled to him by a friend. The events were chronicled by hourly editions from the penny press and were followed by swelling crowds outside the prison walls where the execution was to take place. Lydia Maria Child, a journalist and author keeping watch among those crowds, later shared her impressions of the case with a correspondent:

"For a fortnight past, this whole city has been kept in [a] state of corroding excitement, either of hope or fear . . . . The public were, moreover, divided in opinion as to the legal construction of his crime. Moral distinctions became wofully [*sic*] confused. . . . [E]very experiment of this kind shakes public respect for the laws."<sup>51</sup>

Considering the Colt case in the light of contemporary debates about the clemency power, it is obvious that Governor Seward and others at the time must have perceived that the grant of clemency to Colt, no matter how meritorious his case for it, would have fostered the widespread, cynical belief that the rich and

47. See *The Trial of John C. Colt for the Murder of Samuel Adams, New York City, 1842*, in 1 AMERICAN STATE TRIALS (JOHN D. LAWSON, ed., 1914), at 455 - 513.

48. Under a comprehensive redrafting of the criminal code a decade before Colt's prosecution (see text accompanying notes 20 - 23 *supra*), sixteen capital offenses had been reduced to three: murder, first-degree arson, and treason. 2 N.Y. REV. STAT., pt. IV, ch. I, tit. I, § 1 (1829). Each of these crimes carried an automatic death sentence. Murder liability was limited to cases in which the accused had a premeditated design, acted with a depraved heart, or committed the killing in the course of a felony. *Id.*, tit. I, § 5.

49. Seward remarked of these petitions: "[m]y table groans with letters from gentlemen and ladies of acknowledged respectability and influence; among the former are gentlemen of the press, and of every profession, recommending, urging, and soliciting the pardon of John C. Colt." WILLIAM H. SEWARD & FREDERICK W. SEWARD, AUTOBIOGRAPHY OF WILLIAM H. SEWARD FROM 1801 TO 1834, WITH A MEMOIR OF HIS LIFE, AND SELECTIONS FROM HIS LETTERS FROM 1831 TO 1846 BY FREDERICK W. SEWARD (1877), at 629.

50. *Id.* at 632.

51. LYDIA MARIA CHILD, LETTERS FROM NEW YORK (1843), at 236 - 237. George Templeton Strong, a fervent supporter of capital punishment, reflected with uncharacteristic equivocation on the Colt case: "[New Yorkers] could not make up their minds fully that it was quite right to hang him. They knew an example must be made, for the security of life in the city, that Colt must die for the public good, yet they could not satisfy themselves altogether that he deserved to die." GEORGE TEMPLETON STRONG, 2 DIARY OF GEORGE TEMPLETON STRONG (ALLAN NEVINS & M.H. THOMAS, eds., 1952), at 191.

privileged are invariably accorded benefits that would never be forthcoming to prisoners without means. The moral to be drawn was equally plain: even in straining to act according to principle, the executive who exercises a power so intrinsically arbitrary inevitably acts arbitrarily.

*c. The Trial of Commander Mackenzie*

In December, 1842, a Naval Court of Inquiry was convened on board the U.S.S. *North Carolina*, lying at the Navy Yard in Brooklyn, to inquire into the execution of three sailors on the U.S.S. *Somers* on the high seas, imposed as summary punishment for an attempted mutiny. The inquiry focused on the actions of Commander Alexander S. Mackenzie – an officer with some 30 years of service in the Navy – and, like the trials of Robinson and Colt, the proceedings aroused fervent interest in the penny press and its New York readership.<sup>52</sup>

It appeared that one of the young officers on board the *Somers* had been Philip Spencer, the son of prominent New York lawyer and politician, John Spencer.<sup>53</sup> Philip Spencer's reputation as something of a rowdy and a dandy, who did not submit easily to command, had preceded him; and from the outset he had gotten on poorly with the Commander. For his part, Mackenzie had the reputation of an inflexible martinet, with a penchant for brutal discipline. The penny press reports of the case particularly dwelt on this aspect of his record, and in the course of the trial, Mackenzie responded pointedly to the charges.<sup>54</sup>

Testimony was taken from most of the 120 officers and seamen who had served on the *Somers*, and these facts were established: The alleged mutiny originated as a conspiracy among Spencer and two ordinary seamen, which Spencer communicated one night to the purser's steward, one Wales. Wales notified the purser, who told Lieutenant Gansevoort, who apprized the Commander; and Spencer was put under surveillance.<sup>55</sup> A short time later,

52. See HARRISON HAYFORD, ed., *THE SOMERS MUTINY AFFAIR* (1959).

53. John Spencer had served as a member of Congress and as a member of the State Assembly. He was elected Secretary of State of New York in 1832 and played a prominent role in the implementation of statutory reform in the early 1830's. In the 1840's he served in President Tyler's cabinet, as Secretary of War. See *The Trial of Commander Alexander S. Mackenzie for Murder, Before a Naval Court of Inquiry, Brooklyn, New York, 1842*, in 1 *AMERICAN STATE TRIALS* 531 (JOHN D. LAWSON, ed., 1914), at 532 n.2.

54. *The Trial of Commander Alexander S. Mackenzie*, note 53 *supra*, at 584 - 585:

"It . . . concerns my professional honor to prove that on board the *Somers* and the other vessels I have had the honor to command, there has been no cruelty, no disregard for the personal comfort or for the feelings of those under my command, none of the weakness or incapacity which might provoke insubordination, or give it encouragement to go on: no want of humanity."

55. Guert Gansevoort was a cousin of Herman Melville, and it is thought that conversations many years later with his cousin about the case may have inspired, or at least informed, Melville's composition of *Billy Budd, Sailor (An Inside Narrative)*. See EDWARD M. BYRNE, *MILITARY LAW* (3d ed. 1981), at 18; HAYFORD, note 52 *supra*, at 198.

Spencer was placed in irons and an investigation was undertaken under Lieutenant Gansevoort's supervision.

A search of Spencer's locker revealed a piece of paper (hidden in a razor case), on which were written (in Greek letters) details concerning both the parties to the conspiracy and their mutinous plans. On the basis of this evidence, six more men were arrested and held for trial on charges of mutiny upon return to the United States. The wisdom of deferring the trial until the *Somers* made land was, however, called into question when,

"during the confinement of the prisoners, sullenness, discontent, inattention to duty, disobedience to orders, often – as seamen know, and naval records establish – the precursors of open acts of violence, were manifested by the crew."<sup>56</sup>

Feeling impelled to act immediately, Commander Mackenzie addressed his officers by a letter, soliciting their counsel. They began to examine witnesses, in an effort to determine the extent of the conspiracy. After a day, they made a unanimous recommendation to the Commander:

"In answer to your letter of yesterday, requesting our counsel as to the best course to be pursued with the prisoners, Acting Midshipman Philip Spencer, Boatswain's Mate Samuel Cromwell, and Seaman Elisha Small, we would state, that the evidence that has come to our knowledge is of such a nature, that, after as dispassionate and deliberate a consideration of the case as the exigency of the time would admit, we have come to a cool, decided, and unanimous opinion, that they have been guilty of a full and determined intention to commit a mutiny on board of this vessel of a most atrocious nature, and that the revelation of the circumstances having made it necessary to confine others with them, the uncertainty as to what extent they are leagued with others still at large, the impossibility of guarding against the contingencies which 'a day or an hour may bring forth,' we are convinced that it would be impossible to carry them to the United States, and that the safety of the public property, the lives of ourselves, and of those committed to our charge, requires that (giving them a sufficient time to prepare) they should be put to death, in a manner best calculated, as an example, to make a beneficial impression upon the disaffected."<sup>57</sup>

Mackenzie followed his officers' advice and executed Spencer and his two accomplices forthwith.

In a statement to the Court of Inquiry, Mackenzie defended his actions by reference to incidents of insubordination in the wake of the first arrests; the officers' uncertainty about the extent of the mutiny; the strain upon the officers of constant vigilance against its prospect; the dangers posed in case a storm

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56. *The Trial of Commander Alexander S. Mackenzie*, note 53 *supra*, at 537.

57. *Id.* at 538. (Sic: the grammatical failings are in the original.)



should arise and distract the officers further; the difficulty of keeping the prisoners incommunicado; and finally, the fact that by the execution of the ringleaders the conspiracy would be deprived of its only members capable of navigating the ship.<sup>58</sup> Upon completion of the inquiry, the Naval Court issued a judgment completely exonerating Mackenzie, finding “that the immediate execution of the prisoners was demanded by duty and justified by necessity.”<sup>59</sup> A court martial was subsequently convened, at which Mackenzie was acquitted of murder charges preferred against him notwithstanding the Naval Court’s recommendation. The case was profoundly unsettling to many contemporary observers. Melville’s epitaph summed up the sense of unease: “Three men, in a time of peace, were then hung at the yard-arm, merely because, in the Captain’s judgment, it became necessary to hang them.”<sup>60</sup> James Fenimore Cooper and others believed that the military authorities had covered up for a powerful fellow officer:

“That the Department has favored Mackenzie I take to be indisputable. Why was he left in command of the brig, containing all the witnesses. Every officer should have been taken out of her the instant she arrived, or the men transferred beyond their influence. Then Mackenzie’s letter! – it asks for promotion, for two thirds of his witnesses! The world cannot show a [parallel] to such stupidity, or such corruption.”<sup>61</sup>

*d. The Delaware County Incident and the Anti-Rent Movement*

The death of Stephen Van Rennselaer in 1839 reawakened conflicts that had been simmering beneath the surface of New York politics since the 17th century. Van Rennselaer had been content to play the part of a benevolent patriarch in exercising his quasi-feudal prerogatives as the owner of some 436,000 acres in Albany and Rennselaer Counties, on which over 3000 family farms were operated as leaseholds: he had liberally granted extensions and exemptions to his tenants.<sup>62</sup> His heirs, owed more than \$400,000 in past due rents, were less inclined to leniency, particularly in light of the provision of Van Rennselaer’s will designating those arrears for the payment of his debts.<sup>63</sup> Thus the stage was

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58. *Id.* at 610 - 611.

59. *Id.* at 612.

60. HERMAN MELVILLE, *WHITE-JACKET, or THE WORLD IN A MAN-OF-WAR*, in 5 WRITINGS OF HERMAN MELVILLE (HARRISON HAYFORD, HERSHEL PARKER & G. THOMAS TANSSELLE, eds., 1970), at 303.

61. James Fenimore Cooper, *Letter to [Commodore] William Branford Shubrick, February 5, 1843*, in 4 LETTERS AND JOURNALS OF JAMES FENIMORE COOPER 357 (JAMES FRANKLIN BEARD, ed. 1964), at 362.

62. See DAVID M. ELLIS, *LANDLORDS AND FARMERS IN THE HUDSON-MOHAWK REGION 1790 - 1850* (1946), at 232 - 233.

63. See New York Assembly Doc. No. 261 (1841), at 5, for an estimate of rent owed to Van Rennselaer’s estate; and see Van Rennselaer’s posthumous “To the Public,” *Albany Argus*,

set for the “Helderberg War” — the most serious outbreak of anti-rentist unrest in New York history, and the catalyst for the 1846 Convention’s abolition of the last vestiges of the feudal system in the State.<sup>64</sup>

After efforts to implement a legislative solution had faltered,<sup>65</sup> farmers on the Van Rennselaer estate announced their intention to carry on long-term resistance against all attempts by the heirs to enforce claims of rent, attachment, or eviction.<sup>66</sup> The farmers took to disguising themselves as American Indians at gatherings to protest or impede the actions of sheriffs pursuing the landowners’ interests.<sup>67</sup> In response, the Legislature remained impassive, acknowledging in 1844 that “no committee and no Legislature has found the time to devise the particular mode in which relief could be granted.”<sup>68</sup> There was little impetus to devise such relief, as most legislators were “firmly convinced that the [farmers’] degradation and hardship existed in the imagination.”<sup>69</sup>

The following year the Legislature moved more aggressively — but to contain the farmers. It passed an “Act to Prevent Persons Appearing Disguised and Armed,”<sup>70</sup> which in terms extended beyond persons “disguised and armed” to those merely “disguised”:

“Every person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent him from being identified, shall appear in any road or public highway, or in any field, lot, wood or enclosure, may be pursued and arrested in the manner hereinafter provided . . . .”<sup>71</sup>

When the new law was widely defied in continuing anti-rentist agitation, the Legislature backed it up by passing an “Act to Enforce the Laws and Preserve Order,”<sup>72</sup> subjecting those who impeded the service of process to a sentence of up to a year in prison and, thus, effectively felonizing what the law against appearing in disguise had made merely a misdemeanor.

December 6, 1839, pp. 2 - 3, for his instructions regarding payment of his debts.

64. See ELLIS, note 62 *supra*, at 234; NEW YORK CONSTITUTION, 1846, Article I, §§ 11 - 15.

65. Those efforts continued throughout the period of unrest leading up to the Convention. Some reforms were adopted. The practice of distress for rent (by which landlords could retain a tenant’s goods or hinder a tenant from removing possessions while rent was due) was abolished in 1846. In that year, too, the Legislature implemented a small measure of tax relief for tenants. But the farmers’ ultimate objective — conversion of long-term leaseholds into fee simple estates — remained elusive. See generally SELECT COMMITTEE REPORT ON ANTI-RENT TROUBLES (March 28, 1846), in 4 STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS (CHARLES Z. LINCOLN, ed., 1909), at 342 - 343; N.Y. LAWS, 1846, chs. 274, 327.

66. See “The Manor Question,” *Albany Argus*, May 6, 1841, p. 2 (resolving that “the anti-rent inhabitants of the County of Albany go into a ten-year contest with the Patroon of the colony of Rennselaerswyck, or until a redress of grievances be obtained”).

67. See ELLIS, note 62 *supra*, at 242.

68. New York Assembly Doc. No.183 (1844), at 5.

69. *Id.* at 15.

70. N.Y. LAWS, 1845, ch. 3.

71. *Id.*, § 1.

72. N.Y. LAWS, 1845, ch. 69.

In August of 1845, the Sheriff of Delaware County and his deputies attempted a foreclosure against a local farmer with rent in arrears. As cattle were being rounded up for auction, the Sheriff and his men were set upon by over 200 anti-rentists disguised as Indians. In the melee that followed, an Undersheriff was killed by gunfire issuing from the mob.<sup>73</sup>

Governor Silas Wright declared Delaware County to be in a state of insurrection; hundreds of arrests were made. In short order, more than 30 indictments were handed down for the murder of the Undersheriff, in which more than 80 men were named. Two weeks after the Undersheriff's death, trials began, resulting in the convictions of those men for crimes ranging from murder to manslaughter in the fourth degree, as well as for appearing disguised and armed.<sup>74</sup>

Among the persons charged with murder, two Delaware County men — Edward O'Connor and John Van Steenburgh — were singled out for the death sentence.<sup>75</sup> The State all but conceded that it was unable to identify the gunmen. But, because mere participation in the protest constituted a felony under the anti-insurrection laws passed earlier that year, everyone implicated in the affair was subject to the felony-murder provision of New York's murder statute. Hanging all of the anti-rentists was inconceivable, as Governor Wright later declared; yet the prosecutors believed that some should die; and O'Connor and Van Steenburgh were nominated.

Ultimately, Governor Wright commuted the sentences of O'Connor and Van Steenburgh to life in prison. He found in the record no proof that either man had acted as a leader of the mob or fired during the fatal volley of gunshots. He had received letters urging clemency from all of the jurors who had convicted Van Steenburgh and O'Connor.<sup>76</sup> In a letter to the Sheriff of Delaware County explaining his decision, Wright reflected of Van Steenburgh that:

“[h]is conviction . . . appears to me to rest upon the broad ground of his being present, armed and disguised, and engaged in the commission of the felony. . . . If this be so, he stood upon a par with all those indicted and in custody who were present, armed and disguised . . . ; and there does not appear to be any more reason for visiting upon him the extreme severity of punishment, than upon any one of the others, who

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73. See HENRY CHRISTMAN, *TIN HORNS AND CALICO: A DECISIVE EPISODE IN THE EMERGENCE OF DEMOCRACY* (1945), at 176 - 177; “Anti-Rent Outrage and Murder in Delaware County,” *Albany Argus*, August 11, 1845, p. 2.

74. “Van Steenburgh Convicted of Murder” *Albany Argus*, October 4, 1845, p. 2; “Edward O'Connor Convicted of Murder” *Albany Argus*, October 14, 1845, p. 2.

75. The facts of the case and its aftermath are narrated in full by Governor Wright in his *Letter to the Sheriff of Delaware County* (November 22, 1845), in 4 *STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS* (CHARLES Z. LINCOLN, ed., 1909), at 309 - 327.

76. *Id.* at 316 - 320. The juries at both trials had been instructed that the defendants' presence, armed and disguised, at the scene of the killing of the Undersheriff, required a murder conviction under the felony-murder law. *Id.* at 309, 317 - 319.

were permitted to plead to minor offences, and to receive lighter punishment."<sup>77</sup>

A year later, following the election of John Young as Governor, O'Connor and Van Steenburgh, alongside dozens of their anti-rentist comrades, were pardoned and released from prison.

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Taken together, these four cases underscored a salient perplexity shared alike by proponents and opponents of capital punishment in New York in the years just before the Constitutional Convention of 1846: how to administer the death penalty according to rational, non-arbitrary criteria while assuring that the circumstances, character, and record of individual offenders were fully considered before the irreversible sanction was applied.<sup>78</sup> Contemporary observers on both sides of the debate agreed that the criminal justice system had failed adequately to consider the circumstances of John Colt's actions in sentencing him to death. And it was manifest even to the jurors who had passed judgment against O'Connor and Van Steenburgh that these men had been capriciously caught up in the net of a penal scheme too crude to do them justice. Richard Robinson's acquittal in the face of charges that would surely have led to the execution of a more "common" criminal exposed how money and political influence could turn a criminal trial into a game of roulette in which the wheel was rigged. Similarly, Commander Mackenzie's acquittal stirred anxious reflection about the impunity of power and position, as well as about arbitrary, summary decisionmaking where the death penalty is involved.

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77. *Id.* at 315.

78. Experience had shown, and New Yorkers had learned by the mid-1840's, that neither the expansion nor the elimination of discretion in the judicial system would assure a fair and equitable administration of the death penalty. In 1826, prior to the criminal-law revisions of 1829 (see text accompanying notes 20 - 23 *supra*), Governor Clinton had informed the Legislature that:

"the whole system requires careful revision and considerable amelioration. As little latitude as possible ought to be left to judicial discretion. The crime ought to be as accurately described, and the punishment as distinctly declared, as the wisdom and language of men will permit. Under the administration of our present imperfect code, the same offence frequently receives a different degree of punishment in different criminal courts."

3 STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS (CHARLES Z. LINCOLN, ed., 1909), at 128 - 129. And again in 1827:

"There is one capital defect which pervades the whole system, and that is the extensive latitude which is given to judicial discretion in the dispensation of punishments. . . . There is [*sic*] of course great disparities in punishments; again the specific statutory punishments are sometimes so unequal in their application to crimes, that injustice bordering on cruelty, may result."

*Id.* at 173. Yet only three years later, in 1830, Governor Throop's annual message to the Legislature emphasized the converse evil of *too little* judicial discretion: Governor Throop had found it necessary, he said, to use the pardon power in cases where, "from want of sufficient latitude of discretion in the courts, sentences too severe were necessarily imposed." 3 STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS (CHARLES Z. LINCOLN, ed., 1909), at 284.

### 3. *The 1846 Convention's Solomonic Solution*

In the wake of these widely publicized episodes, and against a background of divisive legislative and religious controversy over the death penalty, the Constitution-makers of 1846 did not attempt to resolve the issue of capital punishment and its discontents definitively, on the spot. Instead, by writing what is now Article I, § 5 into the State's fundamental law, they articulated a principled standard against which any penal regime in New York was to be tested in the future – a constitutional restriction upon the power of the Legislature to enact penal laws so cruel that they would inevitably be applied selectively, unevenly, capriciously.

In constitutionalizing that standard, the 1846 Convention broke decisively with a precedent just 25 years old, defended at the time by the Chief Justice of the New York Court of Impeachment and Correction of Errors, Ambrose Spencer. At the Constitutional Convention of 1821, the consensus, as expressed by Chief Justice Spencer, had been that a state constitutional guarantee against cruel and unusual punishment was “quite useless,” because “if the Legislature pass laws inflicting punishment, the punishment whatever it be, will not be considered by them as cruel.”<sup>79</sup> The Convention of 1846 found this reasoning unpersuasive, for reasons readily apparent from its adoption of a Cruel and Unusual Punishments Clause at the same time that it made three major sets of changes in New York's scheme of constitutional governance:

#### *a. Limiting the Legislature*

In the first place, the 1846 Convention was no longer disposed to endorse the comforting assumption of legislative omnicompetence that underlay Chief Justice Spencer's ready acceptance of the notion that judicial review of legislative judgments was not only futile (because – as we shall see in a moment – in 1821 the State's highest court was composed of state senators) but also fundamentally *needless*. To the contrary, one of the paramount themes of the 1846 Convention was an imperative felt across party lines of the need to limit the powers of the Legislature and to make it less subject to manipulation by privileged private interests. A leading commentator, Peter Galie, offers this assessment of the Convention and its achievement:

“The 1846 Constitution has been called the ‘People's Constitution’ with good reason. No previous constitutional convention in New York had done as much to involve the people directly in the process of governing, and none had been so democratically chosen. It was not dominated by

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79. See REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1821 (1821), at 171 - 173; *cf. Broadie*, 37 N.Y.2d at 122 - 123. Cruel and unusual punishments had been subject to statutory prohibition under paragraph 8 of the New York Bill of Rights since 1787, a provision held over and continued in statutory revisions enacted in 1801, 1813, and 1828. *Broadie*, 37 N.Y.2d at 122.

brilliant or outstanding personalities; rather, it consisted of ordinary public officials, party activists, and citizens. . . . The 1846 Constitution represents the apogee of participatory democracy in New York. . . . [T]he general direction of constitutional change after 1846 was to reverse this devolution of power to the people.”<sup>80</sup>

The Convention reduced the terms of state senators to two years and required that all legislative appropriations of debt exceeding a million dollars be submitted to a popular referendum — effectively removing the subject from the legislative domain.<sup>81</sup> It adopted provisions to abridge “log-rolling” (the combination of unrelated matters in a single bill by legislators seeking to evade public scrutiny of their efforts on behalf of special interests) and legislative control of the Erie Canal. Taken together, Galie concludes, these measures

“reflected a profoundly altered view of the role of the legislature in the polity. No longer was the legislative will identified with the people’s will, and no longer could elections alone be relied on to ensure that public policy would be made with rectitude and intelligence.”<sup>82</sup>

Naturally, this altered view of legislative competence unsettled the basic premise of Chief Justice Spencer and his colleagues that there was nothing wrong with a system in which the Legislature’s enactment of a punishment *eo ipso* immunized it against the charge that it was cruel and unusual.

*b. Judicial Reform*

The 1846 Convention abolished the Court of Impeachment and Correction of Errors (on which all members of the State Senate sat), and established the Court of Appeals in its place. The Court of Impeachment and Correction of Errors had been a remnant of the colonial idea, derived from the English paradigm, of the legislature as the single, sole, supreme embodiment of legislative and judicial power.<sup>83</sup> Within that paradigm, the 1821 Convention’s notion of the uselessness of a constitutional provision binding the Legislature not to enact cruel and unusual punishments made perfect sense. If the State’s supreme judicial authority was substantially identical to its senior legislative body, and if that body was expected not to enact cruel and unusual punishments, then there was surely no need to provide for the judicial enforcement of a cruel-and-unusual-punishments restriction upon the Legislature.

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80. See PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* (1995), at 110, 112.

81. *Id.* at 101 - 112.

82. *Id.* at 105.

83. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776 - 1787* (1969), at 154 - 161, discussing the mingling of judicial and legislative functions in the colonial governments and in the state governments that succeeded them.

But the 1846 Convention rejected that paradigm as a model for New York's government.<sup>84</sup> Speaking in favor of the proposed Court of Appeals, Charles H. Ruggles, chair of the Convention's Committee on the Judiciary, highlighted the need for a new mode of judicial review:

"The necessity of revising and reorganizing our judiciary system was one of the principal causes of calling the Convention. This necessity had existed for several years . . . . Dissatisfaction had long existed with regard to the construction of the present court for the correction of errors. . . . Its connection with the legislative branch of the government was justly regarded by many as a fault in its organization; and particularly so with respect to the decision of all causes in which the constitutionality of an act of the legislature was drawn in question. In all such cases the point in dispute must necessarily have been prejudged in passing the law. . . ."<sup>85</sup>

Significantly, discussion at the Convention focused on the need to insulate the new Court of Appeals from political influence. Robert C. Nicholas, a delegate from Ontario County, expressed the sense of the Convention succinctly: "Of all the curses that could befall us, a political judiciary would be the greatest . . . ."<sup>86</sup> The question debated was how to avert this curse. The Convention's Committee on the Judiciary proposed that four of the eight judges of the Court be chosen in statewide popular elections, in order to minimize any risk of bias or partiality arising from a prospective judge's acquaintance with actual or potential parties to litigation. This risk, Chairman Ruggles argued, was real enough when a single judge stood for local election, but not when the judicial district was the entire state.<sup>87</sup> Samuel Tilden, a young lawyer at the time and a delegate from New York City, commended statewide election on the grounds that it would yield judges who "would be more independent members of the court," and at the same time would attract "the ablest lawyers of the state."<sup>88</sup> The Convention's intent was clear: the new Court of Appeals should transcend the ancient tensions between popular government and judicial supremacy, by being at once rooted in the democratic franchise of the general electorate and, at the same time, accountable to nothing other than law, equity, and constitutional principle.

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84. The 1846 Constitution consolidated law and equity in a reorganized Supreme Court, created a Court of Appeals to replace the Court of Impeachment and Correction of Errors, and otherwise commended the task of defining the new Court's jurisdiction to the Legislature. NEW YORK CONSTITUTION, 1846, Article VI, §§ 2, 3, 25. The Judiciary Act of 1847, § 8, provided that the Court of Appeals "shall have full power to correct and redress" all errors "which may happen" in the Supreme Court. FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847 - 1932 (1985), at 36.

85. C&S 1846 DEBATES AND PROCEEDINGS, at 371.

86. *Id.* at 546.

87. BERGAN, note 84 *supra*, at 20.

88. *Id.* at 32; C&S 1846 DEBATES AND PROCEEDINGS, at 550.

*c. Reforming the Clemency Power*

Finally, the 1846 Convention grappled with issues relating to gubernatorial clemency that had emerged from the capital punishment debates of the preceding decade. Both the O'Sullivan Report of 1841 and the 1845 Report, in urging abolition of the death penalty, had advocated elimination of the clemency power as an indispensable concomitant. They described the power to pardon and commute as a vestige of the penal system that New York had inherited from monarchical countries, justifiable only as a "necessary tempering corrective to the else intolerable inhumanity of . . . [those] systems."<sup>89</sup> It followed that, if life without parole supplanted death as the ultimate punishment, there would be no further need for executive clemency. The gubernatorial clemency power would then be exposed for what it was: a "little remnant of monarchy,"<sup>90</sup> superfluous and subversive in a democratic system of government.<sup>91</sup>

Advocates of abolition were not alone in criticizing the institution of executive clemency in the 1840's. Governor Seward himself was well aware of the hazards of "[i]nconsiderate clemency," and made strenuous personal efforts to "restrict the exercise of the pardoning power, within narrower limits than have been heretofore observed."<sup>92</sup> He insisted that his own grants of clemency had:

"been confined to those cases where the conviction was erroneous; where the punishment adjudged was manifestly too severe; where important disclosures conducive to public justice were made; where the insanity of the prisoner showed that a higher than any human power, had interposed between society and the offender against its laws; where diseases threatening life might be removed by a restoration to liberty; and a small number in which the appeal for mercy, was commended by

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89. See O'SULLIVAN REPORT, at 131:

"An essential part of the proposed reform [doing away with capital punishment] is the removal from the hands of the Executive Chief Magistracy of the State, of the power of pardon. Satisfied that this power ought to be entirely abolished in all cases, — a power which we have borrowed from the institutions of countries where it had its origin in the paramount monarchical sovereignty of the Chief Magistrate, and where it was a necessary tempering corrective to the else intolerable inhumanity of their systems of penal justice, — the propriety of its abolition in the case of a punishment expressly designed to be perpetual, and to operate as a civil and social death, seems to the judgment of the committee a point on which no variance of opinion can anywhere exist."

90. C&S 1846 DEBATES AND PROCEEDINGS, at 234.

91. The proposal was that capital punishment should be replaced by life imprisonment with no prospect of abridgment and with civil death; this made it necessary, as well as proper, that the power of executive clemency be eliminated, in order to assure the implementation of a lifelong punishment that was genuinely meant to be lifelong. See the O'SULLIVAN REPORT, at 131, quoted in note 89 *supra*. The 1845 report accordingly concluded that abolition of the death penalty "cannot safely be effected without restraining the pardoning power of the Executive by a constitutional restriction." 1845 REPORT at 6. See also the *Remonstrance* quoted in note 38 *supra*.

92. 3 STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS (CHARLES Z. LINCOLN, ed., 1909), at 861.



the sex, the tender youth or extreme age of the prisoner, or by the temptations which prompted, or the mitigating circumstances which attended the commission of crime, and was supported by evidences of penitence and reformation.”<sup>93</sup>

Notably, Governor Seward’s exercise of the clemency power within a scope so “restricted” yielded pardons – by his own count – in 87 felony cases during 1839 and 1840 (with rights of full citizenship, by contrast, restored to only six of that number, “found to have been unjustly convicted”).<sup>94</sup> Among the 16 murder convictions that had been reported to him within the same two-year period, one had resulted in a pardon, and the death sentences in three others had been commuted to imprisonment for life.<sup>95</sup> All together between 1830 and 1846, there were 65 capital murder convictions in New York, 15 commutations to life imprisonment, and one pardon.<sup>96</sup>

These numbers reflected the profound dilemma in which those charged with implementing a penal system that includes extreme and harsh punishments are necessarily implicated. A failsafe mechanism like executive clemency is indispensable to temper the unbearable prospect of executing innocents, the insane, the too young, the too old.<sup>97</sup> But once in place, the mechanism produces visibly arbitrary and inconsistent outcomes, inasmuch as clemency decisions are inevitably subject to the vagaries of politics and are seen to be so. The 1847 Assembly select committee report described the problem with acuity and passion in the passage we have quoted at page 16 *supra*, urging: “Let any one compare the many executions with the many pardons or commutations and see if there be any justice, or pretence of justice, in half of them. . . . Such legislation is a bold and cruel mockery. It mocks itself and common sense, and the peoples’ safety, and the criminal’s deserts, and the God of equal justice.”

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93. *Id.* at 861 - 862.

94. *Id.* at 862. In the same two-year period, the Governor had issued pardons in another 62 non-felony cases. *Ibid.* Between 1820 and 1838, the total number of pardons varied but was never fewer than 88 (in 1829) and rose to over 300 twice (in 1820 and 1821), and over 200 three more times (in 1822, 1826 and 1828). *Ibid.*

95. Nine executions had occurred, and two condemned inmates were awaiting execution at the time of Governor Seward’s message. One conviction had been reversed by the Court of Errors. *Id.* at 862 - 863. The numbers given by Governor Seward may be compared with those submitted to the 1846 Convention by Governor Wright, showing that in 1845 some 159 pardons had been granted (out of 693 requests), including two commutations of death sentences to life imprisonment. State of New York, Constitutional Convention Doc. No. 44 (July 2, 1846), at 4.

96. 1847 REPORT, at 67 - 68.

97. The authors of the 1847 report cited the research of Robert Rantoul, Jr., of Massachusetts, in support of the proposition that the rate of execution in capital cases varied inversely with the conviction rate. Rantoul observed that in 1826, when the execution rate for prisoners convicted of capital crimes in England was 100%, only 34 of the 188 defendants in capital cases were convicted – a conviction rate of about 18%. By contrast in 1842, when the execution rate had dropped to 63%, the conviction rate rose to 33%. Rantoul concluded that “[t]he proportion of convictions increases as you abandon an inhuman punishment and punishment is efficient to prevent crime, much rather in proportion to the certainty of its infliction, than the degree of its severity.” 1847 REPORT, at 96.

Issues bearing on the clemency power were aired extensively but left largely unresolved at the 1846 Convention. Delegates criticized the secrecy of clemency proceedings, while worrying that requiring notice to interested parties might serve to discourage the exercise of mercy in otherwise appropriate cases.<sup>98</sup> A proposal to increase legislative participation in clemency decisions was rejected, but concern was expressed that the clemency power represented an exercise of executive patronage that needed cabinining.<sup>99</sup> Yet, the delegates to the 1846 Convention were unable to escape the conclusion that some power of executive clemency was necessary. Speaking on the Convention floor, Mr. Simmons gave eloquent voice to the reasons why, while simultaneously expressing the common misgivings about the power's potential for capricious use:

"It would frequently happen that there was a latent equity and strength or moral justice in a case; and it might be so strong as to threaten to shake the stability of the laws, if no remedy was provided; for if there was no such power lodged anywhere, juries would exercise it themselves. It was nothing more or less than the natural equity which belongs to every case, as contradistinguished from the naked, rigid, hard dictates of law; but in criminal cases it has not been reserved to courts of equity, and reduced to rules – for it has been arbitrarily exercised, and kept in the hands of the Executive. Now it would be very desirable if these pardons after conviction could be reduced to some rule."<sup>100</sup>

In the end, the Convention took only modest action. It adopted a measure requiring an annual report by the Governor concerning applications for clemency and their outcomes<sup>101</sup> – a palliative characterized by one delegate as "the only additional check that could be safely imposed."<sup>102</sup>

#### 4. *The Meaning of Article I, § 5 in Context*

Meeting at a time of deep and fierce divisions on the subject of the death penalty, the members of the 1846 Convention did not undertake to deal directly with that issue. Instead, they articulated a principled standard against which any

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98. C&S 1846 DEBATES AND PROCEEDINGS, at 232 - 233.

99. *Id.* at 236.

100. *Id.* at 235.

101. The Convention also amended the existing Constitution's clemency provision by reserving the right to the Legislature to regulate the procedure for applying for clemency. See NEW YORK CONSTITUTION, 1846, Article IV, § 5 ("The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons. . . . He shall annually communicate to the Legislature each case of reprieve, commutation or pardon granted; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.").

102. C&S 1846 DEBATES AND PROCEEDINGS, at 234.

penal regime in the State of New York would be tested in the future, and they put that standard in the keeping of their new, non-political Court of Appeals. The setting of their action explains it.

Twenty-five years earlier, a constitutional Cruel and Unusual Punishments Clause had been deemed superfluous by the 1821 Convention. But in the ensuing quarter-century, New Yorkers had repeatedly, increasingly been exposed to the spectacle of how a harsh and arbitrary penal regime produces judgments of egregious irrationality. And they saw, too, how a system that relies on the caprices of gubernatorial clemency can act only at random to mitigate this irrationality.

A transformation had occurred in New York politics and, more basically, in New York's vision of the kind of institutions necessary to assure the fair and equal administration of justice in a democratic state. The 1846 Convention's adoption of a constitutional ban against cruel and unusual punishments, in the face of the 1821 Convention's rejection of that ban as "useless," bespeaks the transformation. The 1846 Convention well understood that an attempt to rule one way or the other on the permissibility of the death penalty would stir political, social, and religious controversies so acute as to imperil the broad consensus all delegates hoped would sustain the new Constitution through ratification.<sup>103</sup> At the same time, the Convention took clear action to establish the future course of criminal justice policy. It created a constitutional limitation on the Legislature's power to create punishments. And it created this Court, a constitutional forum for the interpretation of the scope and meaning of the limitation – a forum immune from the storm and stress of political contention and from the manipulations of passion and private interest.

The 1846 Convention embodied two fundamental values in Article I, § 5: that punishments are to be applied humanely, without needless cruelty; and that punishments are to be applied rationally and evenhandedly, without arbitrary selectivity. Their sum is that a punishment is constitutionally Cruel and Unusual if it is so excessively harsh that it cannot be regularly and evenhandedly imposed consistently with contemporary standards of decency. The Convention left it to

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103. Louis Masur explains why the capital punishment debate was a lightning rod amid the religious and political storms of the 1840's. This was a time when, "propelled by Christian politics and conservative fears, commentators assaulted democratic freedoms and inalienable rights with the weapons of moral government and inescapable obligation. Given what was at stake, nothing less than the language and direction of politics and society, it is not surprising that capital punishment, an issue that fractured debate along the fissures of individual reform versus divine revenge, gained considerable attention." MASUR, note 5 *supra*, at 149 - 150. For a sense of the tone of the debate, see, e.g., *Petition of A.G. Stevens and other citizens of Lockport*, note 33 *supra*, at 4 - 5: "It is plain to a philosophic and intelligent mind, why the clergy belch forth their red hot lava against this change and its advocates. . . . They . . . contend that if this command (as they understand it) is disobeyed, you can disobey all, and thereby fritter away all the propriety of the argument in favor of vassalage to their opinions. . . . ¶ Your petitioners have battled the clerical argument more than its intrinsic merits require, because of the numbers and unwarranted influence which they have; and because the body of them seem combined to oppose this change . . . ."

this Court to determine, in the light of experience over time, whether capital punishment (or any other extreme sanction) could be administered within these limitations. As we will see in Part II, *infra*, an additional century and a half of experimentation has sharply clarified that question as it bears upon the penalty of death.

*B. Article I, § 11 Forbids Procedures That Condone  
Racial Discrimination in the Enforcement of Basic Rights,  
Including the Right Not to be Subjected to Excessive Punishments*

Article I, § 11 provides:

“No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”

This Article was added to the Constitution by the 1938 Convention and has not been changed since.

The text of Article I, § 11 consists of two sentences, one roughly paralleling the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, the other – the Antidiscrimination Clause – conferring additional protection against the selective denial of civil rights to classes of persons because of race or religion. The Antidiscrimination Clause explicitly reaches unofficial as well as official discrimination: it commits the State to assuring that the enjoyment of fundamental rights by all persons in New York will not be abridged as the result of racial or religious bias, whether on the part of public authorities or private individuals.

This aim of the Antidiscrimination Clause is both confirmed and explained by its constitutional history. The delegates to the 1938 Convention had experienced two profoundly shattering events that shaped their vision of the duty of equality that a humane and civilized society owes to each of its citizens.

The first event was the Great Depression, which “struck the Negro population with disproportionate severity. Negroes lost their jobs at twice the rate of whites, and gained reemployment at only one-half the rate of whites.”<sup>104</sup> Particularly after the so-called Harlem Riot of 1935, an awareness grew that African-Americans as a racial caste had been consigned to poverty and hopelessness by discriminatory practices in every sector of society – practices no less pervasive or oppressive for being non-governmental.<sup>105</sup> The second

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104. II REVISED RECORD OF THE [1938] CONSTITUTIONAL CONVENTION OF NEW YORK, at 1067 (remarks of Robert F. Wagner).

105. See *ibid.* (remarks of Robert F. Wagner, relying on a comprehensive 1937 survey of New York’s urban black population by a legislative commission):

“The Negro population has never been accorded equal opportunities for employment either by industry, commerce or public utilities. . . .

shattering event was the onset of Nazi German persecution of the Jews, at that stage still appearing to be as much a matter of non-governmental prejudice and gangsterism as of governmental action.<sup>106</sup>

Vastly different in many ways, these two cataclysmic events nevertheless had in common the destructive visitation of a virulent and widespread bigotry upon a racially-defined class of persons through the tacitly concerted action of “private” individuals and groups, condoned – when not instigated or actively abetted – by government authorities.<sup>107</sup> The Convention understood that it was writing a Constitution in the face of this new kind of challenge to democratic government. As Senator Robert F. Wagner summed the matter up:

“In the 18th and 19th centuries, . . . [the essential problem of government] was how to establish the will of the majority in representative government. In the world of today, the problem is how to protect the integrity and civil liberties of minority races and groups. The humane solution of that problem is now the supreme test of democratic principles, the test indeed, of civilized government.”<sup>108</sup>

In response to this challenge, the Convention was not content simply to copy the federal Constitution’s guarantee of equal protection of the laws. It added the “wholly original” Antidiscrimination Clause to assure that prevalent, insidious racial and religious prejudices, whether governmentally supported or simply popular, would not leach away basic rights pertaining to citizenship,<sup>109</sup> including those guaranteed by the other provisions of the Bill of Rights.<sup>110</sup>

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“Thus barred from vast sectors of industry and trade, the Negro has been forced into marginal or low income employment at best.

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 “The miserable condition of Negro housing throughout the urban centers of the State is familiar to all of us. Low income plays its part; but beyond that, residential restrictions under existing practices in the community establish in fact a harsh monopoly, leading inevitably to extortionate rentals for indescribably bad, indecent and unhealthful residential facilities. . . .”

See also II *id.* at 1145 (remarks of Edward F. Corsi).

106. See, *e.g.*, II *id.* at 1066 (remarks of Robert F. Wagner), 1140 - 1142 (remarks of Hamilton Fish, Jr.), 1144 - 1145 (remarks of Edward F. Corsi); *cf. id.* at 1148 (remarks of William S. Bennet).

107. Senator Wagner described New York’s African-American population as “suffering from discrimination and prejudice so deep-seated as to be taken for granted by the community at large.” II *id.* at 1067.

108. II *id.* at 1066 (remarks of Robert F. Wagner).

109. II *id.* at 1065 (remarks of Harry E. Lewis). Delegates noted that the Supreme Court of the United States had restricted the reach of the Fourteenth Amendment’s Equal Protection Clause to “discriminations practiced by the states and their subdivisions[,] . . . not . . . [by] individuals,” *ibid.* (remarks of Harry E. Lewis); and see, *e.g.*, II *id.* at 1087 - 1088 (remarks of Murray Goodtrad). (Mr. Goodtrad had proposed a Bill of Rights provision containing a more detailed specification of forbidden discriminatory practices than the provision reported to the Convention by the Bill of Rights Committee chaired by Judge Lewis. The Committee rejected this detailed approach, apparently because – as another Committee Member, Chauncey M. Hooper, explained – the members “felt that if we were to attempt to include in the Constitution the specific provisions of the Goodtrad proposal and other proposals, when it came to a question of construction by the

We have emphasized the obvious – that the Antidiscrimination Clause of Article I, § 11 reaches beyond “state action” in the federal constitutional sense<sup>111</sup> – because this indisputable proposition serves to put the United States Supreme Court’s decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), into proper perspective from the outset. *McCleskey* rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing.<sup>112</sup> Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by official decisionmakers,<sup>113</sup> the *McCleskey* majority opinion first translated this principle into a requirement that, “to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose” (481 U.S. at 292) and then held that “an inference drawn from the general statistics [concerning capital sentencing patterns] to a specific decision in a trial and sentencing is simply not comparable to” statistical proof of racial discrimination in other contexts (481 U.S. at 294). Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (481 U.S. at 292 - 299). In other words (as one of us wrote elsewhere), the *McCleskey* majority limited the federal Equal Protection Clause to treating “the superficial, short-lived situation where we can point to one or another specific decision-

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courts they might be considered limitations, . . . and anything that might occur that was not so specified might not be considered as a violation of the principle which is attempted to be enunciated [by the “broad language of the committee’s proposal”],” II *id.* at 1091; see also Mr. Hooper’s remarks in II *id.* at 1092, referring to Judge Lewis’s statement upon presenting the Committee’s provision to the Convention, in II *id.* at 1064.)

110. The Antidiscrimination Clause was amended on the third reading of the bill that became Article I, § 11 by inserting the phrase “in his civil rights” after the word “discrimination.” This amendment was proposed by Harry E. Lewis, the Chair of the Bill of Rights Committee that had drafted the bill, who managed the bill on the floor and endorsed or initiated both of the amendments to it that were adopted by the Convention. (See II REVISED RECORD OF THE [1938] CONSTITUTIONAL CONVENTION OF NEW YORK, at 1139, 2626 - 2627.) Judge Lewis explained the inserted phrase by saying: “The words ‘civil rights’ are defined as those rights which appertain to a person by virtue of his citizenship in a state or community, and the civil rights are the rights which are found in the Constitution, in the Civil Rights Law and in the statutes.” II *id.* at 2626. Asked whether he was satisfied that “the use of the expression ‘civil rights’ also includes constitutional rights,” he reiterated: “I have stated it for the Record: I said those rights vested in the Constitution, in the Civil Rights Law and in the statute, and it is so defined by authority.” II *id.* at 2627. See *People v. Kern*, 75 N.Y.2d 638, 651 (1990).

111. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

112. The Supreme Court assumed that the study of the Georgia sentencing pattern presented by *McCleskey* was statistically valid (*McCleskey*, 481 U.S. at 291 n.7) and showed “a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision” (*ibid.*).

113. See *McCleskey*, 481 U.S. at 291 & n.7, relying on the *Washington v. Davis* and *Arlington Heights* cases cited in note 111 *supra*.

maker and show that his decisions were the product of conscious bigotry,” while leaving untreated “the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia’s prosecutors and judges and juries – without collusion and in many cases without consciousness of their own racial biases – combine to produce a pattern that bespeaks the profound prejudice of an entire population.”<sup>114</sup>

There are signs that the *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was neither peculiar to Georgia nor transitory, but was inevitable under any modern-day American procedure for imposing the death penalty.<sup>115</sup> Thus, the Court saw that its only real choices were to outlaw capital punishment entirely *or* to tolerate racial bias in the dispensing of death sentences.<sup>116</sup> As we shall see in Part II.A.1 below, this is an accurate (though aphoristic) recognition of one of the basic tradeoffs that an American court in our time needs to make in deciding whether capital punishment passes constitutional muster.<sup>117</sup> Whether this Court would feel

114. Anthony G. Amsterdam, *Race and the Death Penalty*, 7 CRIMINAL JUSTICE ETHICS 2 (1988), at 86.

115. The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished *de facto* if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. See, e.g., 481 U.S. at 319 (“*McCleskey*’s wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society”); *id.* at 312 - 313 (“At most, the . . . [empirical study presented by *McCleskey*] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment ‘has its weaknesses and the potential for misuse.’ . . . Specifically, ‘there can be “no perfect procedure for deciding in which cases governmental authority should be used to impose death.”’”); *id.* at 312 n.35 (“No one contends that all sentencing disparities can be eliminated.”); *id.* at 315 n.37 (“The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent’s call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not ‘plac[e] totally unrealistic conditions on its use.’”); *id.* at 319 (“The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for *race* – the only “factor” at issue in *McCleskey*] in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not ‘plac[e] totally unrealistic conditions on its use.’”); and see *id.* at 310 - 311 n.32.

116. In addition to the passages cited in the preceding footnote, see, e.g., 481 U.S. at 313 - 314 n.37 (“JUSTICE BRENNAN’s eloquent dissent of course reflects his often repeated opposition to the death sentence. His views, that also are shared by JUSTICE MARSHALL, are principled and entitled to respect. Nevertheless, since *Gregg v. Georgia*, 428 U.S. 153] was decided in 1976, seven Members of this Court consistently have upheld sentences of death under *Gregg*-type statutes providing for meticulous review of each sentence in both state and federal courts. The ultimate thrust of JUSTICE BRENNAN’s dissent is that *Gregg* and its progeny should be overruled.”); *id.* at 319 (“*McCleskey*’s arguments [about racial discrimination] are best presented to the legislative bodies. . . . Capital punishment is now the law in more than two-thirds of our States.”).

117. The post-*Furman* experience that we review in Part II.A.1 unmistakably shows two

obliged to follow *McCleskey*'s resolution of the tradeoff if the only guarantee of racial equality in the New York Constitution were the Equal Protection Clause of Article I, § 11, with its close textual similarity to the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution<sup>118</sup> is potentially a very complex question.<sup>119</sup> But the inclusion of the Antidiscrimination Clause in

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things. First, the most strenuous judicial efforts have completely failed to curb the dominating influence of race prejudice and other arbitrary considerations in the discretionary sentencing process authorized by contemporary American capital-punishment statutes. Second, because the most strenuous judicial efforts are not merely futile but very costly and frustrating, courts eventually quit making them, more or less forthrightly.

118. The Equal Protection Clause of Article I, § 11 lacks the explicit state-action terminology ("nor shall any State . . . deny . . . the equal protection of the laws") of section 1 of the Fourteenth Amendment to the federal Constitution. But although a similar textual difference in the Due Process Clauses of the two Constitutions was found to be significant in *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152 (1978) (recognizing that the state Due Process guarantee admits of "a more flexible State involvement requirement," *id.* at 160), this Court has disregarded that difference between the state and federal Equal Protection Clauses. *E.g.*, *Matter of Esler v. Walter*, 56 N.Y.2d 306, 313 - 314 (1982); *People v. McCray*, 57 N.Y.2d 542, 550 (1982); *Under 21 v. Koch*, 65 N.Y.2d 344, 360 n.6 (1985). Whether the latter decisions are still good law in the wake of *People v. Kern*, 75 N.Y.2d 638 (1990) (overruling *McCray*; choosing to rely on *both* the Equal Protection Clause and the Antidiscrimination Clause of Article I, § 11 in preference to the federal Equal Protection Clause as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986); reiterating that the state Equal Protection Clause has a state-action ingredient, 75 N.Y.2d at 653; but finding that ingredient satisfied when the discriminatory behavior of a private litigant's attorney occurs in the course of state judicial proceedings, in the exercise of a power conferred by state law, and with the appearance of support by state authority, see *id.* at 656 - 658), is not easy to say.

119. In order to decide whether to adopt the rule of *McCleskey v. Kemp* as the law of the Equal Protection Clause of Article I, § 11, this Court would have to address a series of questions that are difficult individually and still more difficult in combination.

The first question would be the one noted at the end of footnote 118 *supra*, concerning the effect of *Kern* on earlier cases incorporating the state-action requirement of the federal Equal Protection Clause into the state Equal Protection Clause. In the light of *Kern* and of the textual difference between the two Constitutions, should the state Equal Protection Clause be read as incorporating a *state-action requirement identical to that of the federal Equal Protection Clause* or, rather, as embodying a "more flexible State involvement requirement" (*Sharrock*, 45 N.Y.2d at 160)?

Assuming that the state Equal Protection Clause were read as incorporating the identical state-action requirement found in the federal Equal Protection Clause, a second question would arise. Should this Court follow the evolution of Supreme Court cases from *Washington v. Davis* (note 111 *supra*) through *McCleskey* which translate the federal state-action requirement into a rule that the harsher treatment of a racial minority group by state-administered procedures must be shown to be the product of a conscious "discriminatory purpose" (*McCleskey*, 481 U.S. at 292) on the part of an identified state actor in a particular case (*ibid.*) before it can be held to constitute a denial of equal protection? Notably, the Supreme Court cases interpreting the federal Equal Protection Clause in 1938 – when the authors of Article I, § 11 chose to incorporate any federal Equal Protection concepts that they did incorporate – required nothing more to establish a State's denial of equal protection than that the State's governmental machinery exhibited a consistent pattern of unfavorable treatment of a racial minority group which was not obviously referable to any race-neutral cause. See, *e.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Hale v. Kentucky*, 303 U.S. 613 (1938). It was only after 1938 that the Supreme Court began to shift the focus of federal Equal Protection law from unequal *treatment* to invidious *mentation*.

Assuming that the Equal Protection Clause of Article I, § 11 were read as requiring a case-



Article I, § 11 makes it unnecessary for this Court to wrestle with that question, because the Antidiscrimination Clause explicitly and completely eliminates – in

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by-case showing of invidious mentation on the part of identified state decisionmakers, a third set of questions would arise. Could the requisite mentation be inferred from an observed pattern of *racially biased outcomes* in the whole class of cases submitted to the decisionmakers, after those outcomes were examined for possible alternative explanations and found inexplicable on any ground but race? (Cf. *People v. Jenkins*, 75 N.Y.2d 550, 556 (1990).) Could such an inference be drawn in some settings but not others? If so, was *McCleskey* right in deciding that the inference could be drawn from racially biased outcomes in matters like jury selection and employment practices but not from racially biased outcomes in capital sentencing because “[t]here is no common standard by which to evaluate all defendants who have or have not received the death penalty” (481 U.S. at 295 n.14)? Is this logic tenable under a capital-sentencing statute which (as *McCleskey* elsewhere acknowledges with respect to the Georgia statute) was held constitutional on the theory that it “met the concerns articulated in *Furman* [v. *Georgia*, 408 U.S. 238 (1972),]” because ““while some jury discretion still exists, “the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application”” (481 U.S. at 302 - 303)? Or is *McCleskey*’s logic too “muddled,” too incoherent a “departure from prior law on the subject,” to warrant importation into the constitutional law of New York (*P.J. Video, Inc.*, 68 N.Y.2d at 305)?

Finally, if *McCleskey*’s logic were found coherent, this Court would then have to consider whether the values driving that logic are consistent with the “legal and cultural traditions” (*id.* at 309) and the “[s]ound policy concerns and fundamental fairness” (*People v. Van Pelt*, 76 N.Y.2d 156, 162 (1990)) that should inform construction of the New York Constitution. The calculus of values in the *McCleskey* majority opinion has been criticized on grounds that warrant this Court’s independent evaluation. See the dissenting opinions in *McCleskey* and, e.g., SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION* (1989), at 159 - 227; ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000), at 194 - 216; Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARVARD LAW REVIEW 1388 (1988); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL LAW REVIEW 1016 (1988); Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW AND HUMAN BEHAVIOR 183 (1991); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Toleration of Racial Bias in Criminal Justice*, 51 WASHINGTON & LEE LAW REVIEW 509 (1994). Basically, *McCleskey* tolerates an acknowledged risk of racial bias in life-or-death sentencing decisions (see, e.g., 481 U.S. at 282 - 283, 291 n.7, 308 - 309, 312) because it considers this risk inherent in the process of discretionary capital sentencing (see, e.g., *id.* at 309 - 313) and regards “the traditional discretion that prosecutors and juries necessarily must have” in capital sentencing as “the very heart of our criminal justice system” (*id.* at 314 n.37). See also, e.g., *id.* at 297 (“[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused”); *id.* at 313 (“Where discretion that is fundamental to our criminal justice process is involved, we decline to assume that what is *unexplained* is invidious. In the light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”); *id.* at 312 (“a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice’”). However, New York law has no settled tradition of discretionary capital sentencing; New York used the practice only belatedly, briefly, and for some offenses between 1933 and 1963 (James R. Acker, *New York’s Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALBANY LAW REVIEW 515 (1990), at 517 - 524); while New York has, conversely, always taken particular pride in assuring equal justice to all its citizens, as befits its character as the melting pot made famous by the inscription on the Statue of Liberty. See, e.g., the references to the “melting pot” concept in the floor discussion at the 1938 Convention: II REVISED RECORD OF THE [1938] CONSTITUTIONAL CONVENTION OF NEW YORK, at 1066 (remarks of Robert F. Wagner), 1088 (remarks of Murray Gootrad), 1145 (remarks of Edward F. Corsi).

the cases to which it applies – the state-action requirement which is the doctrinal and conceptual starting point for *McCleskey*'s entire chain of logic.

Under the plain language of the Antidiscrimination Clause, it is unconstitutional in New York for *either* the State *or* any private individual to cause a class of persons to "be subjected to any discrimination in . . . [their] civil rights" as a result of their race, color, creed or religion. Both the constitutional convention record<sup>120</sup> and this Court's decision in *People v. Kern*, 75 N.Y.2d 638 (1990), make plain that the "civil rights" to which the Antidiscrimination Clause refers embrace, at the least, all of the guarantees of the other Bill of Rights provisions in Article I<sup>121</sup> – including the guarantee against cruel and unusual punishments contained in Article I, § 5. And it is logically plain that a class of persons defined by race or religion is being subjected to discrimination in their civil rights whenever they are *denied the enjoyment of the right on an equal footing with other people, even though their treatment is not so harsh that it would be deemed a denial of the right if everybody, equally, were treated that way*.<sup>122</sup> In connection with Article I, § 5's guarantee against cruel and unusual punishments, then, the operation of Article I, § 11 is to forbid inflicting upon a racially or religiously defined class of persons any punishment which is so harsh that it is not usually inflicted upon persons other than those in the class.

*C. Article I, § 5 and Article I, § 11 Are Consistent with the General Principle of the New York Constitution's Bill of Rights to Forbid Procedures that Create an Undue Risk of Irremediable Violations of Basic Rights*

New York's Bill of Rights is not a grab-bag of enthusiastic exhortations about a motley of unconnected values. It is a coherent charter for the protection of New Yorkers' basic rights and is informed by an intelligible set of common principles which this Court has voiced with increasing clarity in the past two decades, as state constitutional law has increasingly emerged out of the shadow of federal constitutional adjudication. Foremost among those principles is that New York's rules of governance must be cast in a form that avoids an undue risk of undetectable violations of fundamental rights. With impressive consistency,

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120. See note 110 *supra*.

121. *Kern* holds that the right to jury service implicit in Article I, § 1 is a "civil right" within the Antidiscrimination Clause. There is no conceivable ground on which that right can be distinguished from any other guaranteed by the Bill of Rights, when the question is whether the several rights "appertain to a person by virtue of his [or her] citizenship in a state or community" (*Kern*, 75 N.Y.2d at 651, quoting the remarks of Harry E. Lewis set out in note 110 *supra*).

122. A reading that would require their treatment to amount to an *absolute*, rather than a relative, denial of the civil right in question in order to constitute a violation of the Antidiscrimination Clause "reduces . . . [the] Clause to a mere redundancy" (*Kern*, 75 N.Y.2d at 651) insofar as the text explicitly forbids discrimination by both private persons and "the state or any agency or subdivision of the state." So read, (to paraphrase *Kern*) the Clause would prohibit discriminatory state action harmful to an individual or group only where the same action would have been prohibited *per se*, without respect to the discrimination and without need for the Clause – a manifest constitutional absurdity.

this Court has read the several guarantees of the state Bill of Rights as designed to interdict the occurrence of denials of the rights that the Bill confers by assuring that, in the practical, day-by-day administration of the State's affairs, those rights are hedged about by objective, regular procedures to secure that the rights will be respected.

That is why this Court refused to import into the New York Constitution the decisions of the United States Supreme Court muddying the standards for the issuance of search warrants in putative obscenity cases (*P.J. Video, Inc.*, 68 N.Y.2d at 303 - 307), muddying the standards for determining the sufficiency of informants' information to support a judgment of probable cause (*Johnson*, 66 N.Y.2d at 406 - 407), muddying the rules that protect publishers against the debilitating costs of litigating libel actions (*Immuno AG. v. J. Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991)), and muddying the *cordon sanitaire* that assures the right of criminal appeal against subversion by recriminatory sentence enhancement (*Van Pelt*, 76 N.Y.2d at 161 - 163).<sup>123</sup> It is why this Court has cast state constitutional rules like those of *People v. Isaacson*, 44 N.Y.2d 511 (1978), and *People v. Scott*, 79 N.Y.2d at 488, 490 n.5, in forms that do not permit individuals to be denied the benefit of rights on the ground that they are personally unworthy of the basic decencies accorded to everybody else. It is why this Court has attended not only to correcting denials of rights on a case-by-case basis but to creating systemic safeguards which minimize the likelihood that such denials will occur and go uncorrected. See, e.g., *People v. Bigelow*, 66 N.Y.2d 417, 437 (1985); *P.J. Video*, 68 N.Y.2d at 305 - 307; *People v. Diaz*, 81 N.Y.2d 106, 111 - 112 (1993). It is why this Court has been sensitive to the concern that visible, unexplained inequalities in the enforcement of the basic rights of different racial groups should not be permitted to tarnish New York's administration of justice. (*People v. Jenkins*, 75 N.Y.2d 550, 558 (1990); *Kern*, 75 N.Y.2d at 656 - 657.) Examples could be multiplied.<sup>124</sup> Plainly, this Court

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123. Indeed, when this Court has chosen to import federal constitutional rules into the New York Constitution, one of its principal reasons for doing so has been a practical concern for the clarity of uniform standards. See, e.g., *People v. Alvarez*, 70 N.Y.2d 375, 379 - 380 (1987); *People v. Reynolds*, 71 N.Y.2d 552, 557 (1988). And where a federal rule regulates a subject with as much clarity as the nature of the subject permits, the Court has seen no reason to depart from it. See, e.g., *People v. Bora*, 83 N.Y.2d 531 (1994).

124. See, e.g., *People v. Dunn*, 77 N.Y.2d 19 (1990) (rejecting a rule that would leave the use of drug-sniffing dogs entirely to police discretion, without constitutional constraint); *People v. Class*, 67 N.Y.2d 431 (1986) (rejecting a rule that would give the police unconstrained discretion to enter vehicles and examine their identification numbers whenever they have grounds to stop the driver for a traffic infraction); *People v. Gokey*, 60 N.Y.2d 309 (1983) (rejecting a rule that would give the police unconstrained discretion to conduct warrantless searches of containers in the immediate control of any arrested person); *People v. Belton*, 55 N.Y.2d 49 (1982) (refusing to adopt an open-ended extension of the power of search incident to arrest with no "distinct spatial boundary" [*id.* at 53]); *People v. Millan*, 69 N.Y.2d 514 (1987) (rejecting a rule that would deny taxi passengers standing to challenge a search when its fruits are used to prosecute them pursuant to a statutory presumption of constructive possession, because such a rule "offends fundamental tenets of fairness inherent in New York criminal jurisprudence" [*id.* at 520]).

has understood the thrust of the New York Bill of Rights as a whole to be to promote “the protection of the individual rights of our citizens” (*P.J. Video, Inc.*, 68 N.Y.2d at 304),<sup>125</sup> by avoiding flaccid constitutional standards that have the effect of “heightening the danger that our citizens’ rights . . . might be violated” (*id.* at 305), and by seeking to “provide and maintain ‘bright line rules’” (*ibid.*), to the extent practicable, to secure the enjoyment of the rights against invisible and therefore uncorrectable abridgments.

This set of principles is, of course, resonant with the constitutional histories of both Article I, § 5 and Article I, § 11 as we have reviewed them. Article I, § 5 was written to make this Court responsible for setting limits to the State’s power to punish. It was written by a Convention profoundly convinced that neither discretionary nor political decisionmaking could be trusted without strict limits, and it was meant in particular to submit the penalty of death – a subject of intractable political controversy – to the test of reasoned judicial judgment. Article I, § 11 was written to prevent the erosion of basic constitutional rights through the operation of widespread racial and religious prejudices. It was written by a Convention that understood that “the problem . . . [of] how to protect the integrity and civil liberties of minority races and groups . . . is now the supreme test of . . . civilized government.”<sup>126</sup> In the following pages we explain why capital punishment, in the discretionary form enacted by the 1995 Death Penalty Act, manifestly flunks both tests.

## II.

### EXPERIENCE HAS SHOWN THE DEATH PENALTY CANNOT BE ADMINISTERED CONSISTENTLY WITH THE COMMANDS OF ARTICLE I, §§ 5 AND 11

#### *A. Contemporary Capital Punishment Systems Are Doomed to Kill People Arbitrarily, Unreliably and Unfairly, as a Result of the Inescapable Tensions That Have Made a Shambles of the Federal Constitutional Law of Death*

The federal Eighth and Fourteenth Amendment jurisprudence relating to the death penalty is notable for its incoherence and the number of constitutional values that have had to be successively subordinated to make space for capital punishment.<sup>127</sup> The Supreme Court of the United States has tried to regularize

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125. See also *Immuno AG.*, 77 N.Y.2d at 250, announcing a clear-cut rule of state constitutional law lest “insufficient protection . . . be accorded to central values protected by the law of this State.”

126. See text at note 108 *supra*.

127. See text accompanying notes 114 - 122 *supra*; note 220 and text accompanying notes 252 - 255 *infra*. The federal constitutional experience is reviewed in, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARVARD LAW REVIEW 355 (1995); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICHIGAN LAW REVIEW 1741 (1987); Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme*

and civilize the punishment of death by recalibrating its procedural mechanisms time and again. It has succeeded only in turning the relevant federal constitutional doctrines into a mirror of the arbitrariness and irrationality they were meant to control.

*Amici* urge this Court not to follow that route to lingering catastrophe under the New York Constitution. Instead, we hope that the Court will review the federal experience by comparing its results with its stated goals. Such a comparison starkly illuminates the innate intractability of the death penalty to any form of regulation that could keep it consistent with the aims of Article I, §§ 5 and 11 of the state Constitution.

The intractability results, in large part, from three sets of tensions:

- American society has reached a stage of concern for humanity at which it can no longer tolerate the mechanistic infliction of the death penalty upon all persons convicted of the same statutorily defined offense, without consideration of innumerable case-specific circumstances. But the sentencing discretion necessary to permit that consideration inevitably leads to arbitrary and unequal application of a penalty too severe to be imposed on defendants who arouse even the slightest empathetic feelings in the sentencer.
- The risk of putting an innocent person to death is unavoidable in the fallible human processes of investigation and adjudication but is so abhorrent that systems for administering the death penalty vacillate between torturous procrastination and peremptory denial. In some cases, they extend death-row incarceration for years under conditions of agonizing uncertainty in an effort to minimize the risk of a miscarriage of justice; then, in reaction to those delays, they put on periodic displays of brusqueness that dismiss the risk of error with inadequate examination and so increase the frequency of deadly mistakes.
- The sanguinary prospect of executing any considerable number of persons has become so unacceptable to public opinion that the death penalty cannot be applied in even a small fraction of the cases in which it is authorized in any jurisdiction. The consequence is not only a capricious and uncertain delivery of death sentences but a thorough undermining of the justifications that are supposed to support capital punishment in theory.

Parts II.A.1, II.A.2 and II.A.3 below take up these three tensions, respectively.

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*Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONSTITUTIONAL LAW QUARTERLY 455 (1996); Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in AUSTIN SARAT, ed., *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 4 (1999); Franklin E. Zimring, *The Executioner's Dissonant Song: On Capital Punishment and American Legal Values*, in *id.* at 137; WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1991).

1. *Between a Ruthless Savagery and Irrational, Race-Biased Selectivity*

Justice Harry Blackmun, who voted to uphold the death penalty both in *Furman v. Georgia*, 408 U.S. 238, 405-414 (1972), and in *Gregg v. Georgia*, 428 U.S. 153, 227 (1976),<sup>128</sup> persisted for 22 more years in trying to reconcile capital punishment with the federal Constitution as construed in those cases. In 1994, he recognized the hopelessness of the attempt. Dissenting from the denial of *certiorari* in *Callins v. Collins*, 510 U.S. 1141, 1143 -1145 (1994), he wrote:

“Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman* . . . , and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman* . . . , can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

“It is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other or to assume that an acceptable balance between them already has been struck. In the context of the death penalty, however, such jurisprudential maneuvers are wholly inappropriate. . . .

“To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that ‘degree of respect due the uniqueness of the individual.’ *Lockett* . . . at 605 . . . . That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.

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128. See also *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) (opinion by then Circuit Judge Blackmun), *vacated and remanded*, 398 U.S. 262 (1972).

“On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. . . .

“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. . . . Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants ‘deserve’ to die? – cannot be answered in the affirmative. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.”

Justice Lewis F. Powell, Jr., apparently came to a similar conclusion within four years after writing the majority opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987). As we have noted, *McCleskey* held, 5-to-4, that a statistically established pattern of racially biased death sentencing presented no judicially cognizable violation of either the federal Equal Protection Clause or the federal Cruel and Unusual Punishment Clause.<sup>129</sup> When interviewed by his biographer after his retirement from the Court, Justice Powell was asked “whether he would change his vote in any case” and replied: “‘Yes, *McCleskey v. Kemp*.’”<sup>130</sup> So far as the biographer could make out, the “heart of the matter” for Powell in 1991 – incidentally, the year in which Warren McCleskey was executed<sup>131</sup> – was that “[t]he death penalty should be barred, not because it was intrinsically wrong but because it could not be fairly and expeditiously enforced.”<sup>132</sup>

The conclusions to which Justices Blackmun and Powell were eventually driven are the lessons of a long history, confirmed by recent experience. For

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129. *McCleskey* is discussed in notes 111-119 *supra* and accompanying text.

130. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994), at 451.

131. Mr. McCleskey was put to death in Georgia’s electric chair on September 9, 1991.

132. JEFFRIES, note 130 *supra*, at 452.

more than two hundred years the American public, speaking through the verdicts of its juries, has been stubbornly reluctant to enforce the death penalty as a regular, routine punishment for even the most serious of crimes. Efforts to accommodate the law to this reluctance began at the end of the Eighteenth Century, when Ohio (in 1788) and Pennsylvania (in 1794) initiated the movement toward dividing the crime of murder into degrees and restricting the death penalty to first-degree murder. This was a reform that was partly humanitarian and partly aimed at ending the impunity conferred on murderers when juries acquitted those whose guilt was clear but whose crimes and character were not found sufficiently wretched to deserve throttling.<sup>133</sup>

We have seen that the debates about capital punishment in New York in the 1840's featured the problem of jury nullification and its inevitability when a death sentence was the automatic consequence of conviction.<sup>134</sup> In the same period, other American jurisdictions began the sweeping movement to discretionary capital sentencing chronicled in *Woodson v. North Carolina*, 428 U.S. 280, 291 - 292 (1976) (opinion of Justices Stewart, Powell, and Stevens).<sup>135</sup> This gave juries a legally approved way "to respond to mitigating factors by withholding the death penalty" (*id.* at 291); it was aimed at eradicating the lawless practice by which "[j]uries [had] continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime" (*ibid.*). In 1976, *Woodson* concluded that America's repudiation of "the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense" (*id.* at 301) had progressed so far as to require federal constitutional invalidation of mandatory capital punishment as repugnant to "the evolving standards of decency that mark the progress of a maturing society" (*id.* at 301). See *id.* at 293 - 305.<sup>136</sup> Not just juries but the Supreme Court of the United States had now come to recognize that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" (*id.* at 304) is intolerably inhumane.

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133. See Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 759 (1949), at 768 - 773; Louis Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 124 (1952), at 125.

134. See text accompanying notes 32 - 38 *supra*. Throughout the antebellum period in New York and other American States the nullification problem was widely observed and cited as a reason for abolishing the death penalty. See Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 BOSTON UNIVERSITY LAW REVIEW 32 (1974), quoting contemporary sources including an editorial in the *Providence Journal* which reflected that "[u]nless the prisoner, from his color or extraction, is cut off from ordinary sympathy, he is almost sure of an acquittal" (*id.* at 32).

135. See also HUGO ADAM BEDAU, ed., *THE DEATH PENALTY IN AMERICA* (3d ed. 1982), at 10.

136. *Accord: Lockett v. Ohio*, 438 U.S. 586, 602 - 605 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110 - 116 (1982); *Sumner v. Shuman*, 483 U.S. 66, 73 - 85 (1987).



The problem with this now-constitutionally-required discretion, though, is that – as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at 312 – “the power to be lenient [also] is the power to discriminate.” The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing also sways jurors, and often prosecutors as well, to forgo the extreme punishment of annihilation unless their outrage at a crime overwhelms their empathy for the defendant.<sup>137</sup> Neither outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases.<sup>138</sup> So capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide “a unique opportunity for racial prejudice” and other invidious discriminations to operate in ways that courts cannot effectively restrain.<sup>139</sup> The result is an inescapably arbitrary and discriminatory dispensation of life and death.

The Supreme Court of the United States attempted to deal with this problem in *Furman v. Georgia*, 408 U.S. 238 (1972). “*Furman* held that Georgia’s then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not.” *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). Reacting to the random slaughter, *Furman* introduced an Eighth Amendment rule that “if a State wishes to authorize capital punishment it . . . must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion). But the rule has proved merely

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137. See, e.g., GROSS & MAURO, note 119 *supra*, at 110 - 115; Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STANFORD LAW REVIEW 1447 (1997); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL LAW REVIEW 655 (1989); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 INDIANA L. J. 1103 (1995), at 1122 - 1135.

138. GROSS & MAURO, note 119 *supra*, at 112 - 114; Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the “Will of the People,”* 3 PSYCHOLOGY, PUBLIC POLICY & LAW 303 (1997), at 329 - 332; William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1067 (1983), at 1068 - 1070; Pillsbury, note 137 *supra*, at 692 - 693, 707 - 710; Lynn N. Henderson, *Legality and Empathy*, 85 MICHIGAN LAW REVIEW 1574 (1987), at 1584 - 1585; and see, e.g., David C. Baldus and George Woodworth, *Recent Evidence of Racial Discrimination in the Administration of Capital Punishment in the Commonwealth of Pennsylvania* (February 22, 2000) (report to the Judiciary Committee of the Senate of the Commonwealth of Pennsylvania), at 13 - 14 (in a ten-year period in Philadelphia, non-African-American defendants were sentenced to death at the same rate [16% or 17%] by juries that included five or more African-American jurors and by juries that included four or fewer African-American jurors; but African-American defendants were sentenced to death at a 26% rate by juries that included five or more African-American jurors, as compared to a 39% rate for juries that included four or fewer African-American jurors).

139. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

cosmetic;<sup>140</sup> the quest to rationalize capital sentencing, illusory;<sup>141</sup> the fatal lottery, uncontrollable.<sup>142</sup>

Race discrimination is both the most detectable symptom and the most invidious consequence of the unamenability of life-and-death sentencing choices to rational regulation. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure.<sup>143</sup> None of the statutes upheld by *Gregg* and its progeny as formally sufficient to cure the *Furman* arbitrariness/discrimination problem<sup>144</sup> has come close to eliminating it. To the contrary,

140. See Steiker & Steiker, note 127 *supra*, particularly at 426 - 438.

141. See, e.g., Craig Haney, Lorelei Sontag & Sally Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 JOURNAL OF SOCIAL ISSUES 149 (1994); Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZONA STATE LAW JOURNAL 335 (1996), at 352 ("[My] reflection, drawn from experience on the trial court, is that the unmanageable death discretion condemned by *Furman* has not disappeared at all but has simply moved from reviewable sentencing decisions to unreviewable prosecutorial decisions in early stages of prosecutions. Specifically, the charging discretion between first and second degree murder, the choice to seek or not seek the death penalty, the caprice with which plea bargains are offered, and the political advantages for prosecutors invoking the death penalty illustrate the reappearance of the same discretion condemned by *Furman*. These arbitrary decisions directly impact exposure to death; none of these areas is legislated or judicially reviewable. As the O.J. Simpson case illustrates, the death option lies wholly within the unruléd and unreviewable whim of individual prosecutors.").

142. The root of the difficulty is that no system of sorting death-eligible cases in the light of all of the factors that are potentially relevant to a choice between life and death can avoid highly subjective judgments prone to suasion by emotion and bias, see CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed., augmented, 1981), and that each and every one of the circumstances that might be used to do the sorting remains "demeaningly trivial compared to the stakes," HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966), at 448 - 449.

143. The various States reacted to the 1972 *Furman* decision by enacting two principal types of capital-sentencing statutes: "mandatory" statutes making the death penalty automatic upon conviction of a designated crime; and "guided discretion" statutes specifying preconditions and procedures for a sentencer's choice of the death sentence, and also usually specifying "aggravating circumstances" and "mitigating circumstances" to be considered as bearing on the choice. A 1976 study compared death sentences imposed under both of these types of statutes with those imposed under the "unguided discretion" statutes invalidated in *Furman*. Looking at the 493 people who had been on death rows in 28 States just before *Furman* was decided and then at the 407 people sent to death rows in the same 28 States during their first three years of operating under post-*Furman* statutes, this study found that the percentage of nonwhite death row inmates had actually risen, from 53% to 62%. Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMPLE LAW QUARTERLY 261 (1976), at 275 - 276. Although more than half of the nation's murder victims in the post-*Furman* period were nonwhite, 87% of the victims of the persons condemned to die in States selected to compare mandatory-death-sentence jurisdictions with guided-discretion jurisdictions were white. *Id.* at 282. Under mandatory-death-sentence statutes, 81% of the victims of death row inmates were white; under guided-discretion statutes, 92% of the victims of death row inmates were white. *Id.* at 285 [table7]. In 1976, of course, the Supreme Court invalidated the mandatory-death-sentence type of statute in *Woodson* and upheld the guided-discretion type of statute in *Gregg*. See the following footnote.

144. As thoughtful commentators have noted, the Court endorsed the new statutes without the benefit of any empirical evidence that they were being, or were capable of being, administered in an even-handed, predictable, nondiscriminatory manner. BARRY NAKELL & KENNETH A. HARDY,

capital sentencing decisions under the so-called “guided discretion” type of statute sustained in *Gregg*<sup>145</sup> – the general model for New York’s 1995 death penalty law<sup>146</sup> – have consistently been found to turn primarily on the race of the victim and secondarily on the race of the defendant, usually in combination.<sup>147</sup> Death sentences are relatively rarely sought or imposed for

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THE ARBITRARINESS OF THE DEATH PENALTY (1987), at 76 - 77; David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL LAW REVIEW 1638 (1998), at 1650 [hereafter, “Baldus (1998)”]. When later confronted in *McCleskey* with evidence of racially biased sentencing patterns under the statutes, a majority of the Court essentially refused to reopen the subject, ignoring the plea of four dissenting Justices that the question “whether a State has chosen an effective combination of guidance and discretion in its capital sentencing system as a whole cannot be established in the abstract, as the Court insists on doing, but must be determined empirically, as the Baldus study has done.” *McCleskey*, 481 U.S. at 320, 334 n.9 (dissenting opinion). See also the works cited in paragraph 5 of note 119 *supra*, criticizing the *McCleskey* majority’s treatment of the factual data.

145. See note 143 *supra*.

146. The New York statute has a number of unusual features, but none that can be expected to *confine* capital-charging and capital-sentencing discretion. Rather, its death-notice provision, C.P.L. § 250.40, is more explicit than most statutes of the “guided discretion” type in giving prosecutors totally unregulated discretion to seek or forgo a death sentence.

147. Some of the studies of the influence of race upon the processing of potentially capital cases have focused on the exercise of prosecutorial discretion to seek a death sentence or refuse a noncapital disposition. See, e.g., Elizabeth Lynch Murphy, *Application of the Death Penalty in Cook County*, 73 ILLINOIS BAR JOURNAL 90 (1984), at 92 - 93 (Cook County, Illinois study, 1977 - 1980: prosecutors sought the death penalty disproportionately often in cases of African-American and Hispanic defendants convicted of killing white victims); Leigh B. Bienen, Neil Alan Weiner, Deborah W. Denno, Paul D. Allison & Douglas Lane Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS LAW REVIEW 27 (1988), at 240 & n.710 (New Jersey study, 1982 - mid-1988: prosecutors filed death notices disproportionately often in cases involving white victims and African-American defendants, disproportionately rarely in cases involving African-American victims and white defendants). Other studies examine both the exercise of prosecutorial discretion and the exercise of discretion by juries in sentencing convicted capital offenders to death or imprisonment. See, e.g., Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AMERICAN JOURNAL OF CRIMINAL JUSTICE 17 (1995), at 24 - 27 (Kentucky study, 1976-1991: prosecutors sought the death penalty disproportionately often in white-victim cases and sought it at the highest rate in the subset of cases involving white victims and African-American defendants; in penalty trials, juries disproportionately often imposed the death sentence on African-Americans convicted of killing white victims); Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAVIORAL SCIENCES & THE LAW 61 (1995), at 70 - 78 (Missouri study, 1977-1991: prosecutors filed capital charges and obtained capital convictions disproportionately often in cases involving white victims and African-American defendants; after conviction in cases at the lowest level of aggravation, prosecutors disproportionately often sought the death penalty, and sentencers disproportionately often imposed it, in cases involving white victims and African-American defendants). (It is a commonplace in such research that race discrimination at one stage of the process may obscure the effects of race discrimination at another. For example, if prosecutors systematically decline to press capital charges in murder cases involving black victims unless the nonracial features of the crime are particularly aggravated [as compared with the sorts of murder cases involving white victims in which prosecutors regularly press capital charges], the universe of cases presented for trial and sentencing is skewed from the start. Thus, juries which appear to be meting out death sentences at the same rate to killers of white victims and of black victims are actually electing death for killers

killing African-American victims.<sup>148</sup> In prosecutions for killing white victims, they are commonly sought and imposed with disproportionate frequency upon African-American defendants.<sup>149</sup> Thus, the lives of African-Americans are doubly devalued.<sup>150</sup>

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of black victims only in cases characterized as a class by a higher level of aggravation than is present in the cases where juries elect death for killers of white victims. See, e.g., *id.*, at 63, 76 - 78; Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 SOUTH CAROLINA LAW REVIEW 245 (1988), at 326 - 329.) Still other studies look at the outcome of the entire charging/trial/sentencing process. See, e.g., Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991), at 22 - 28 (Florida study, 1976 - 1987: defendants convicted of killing white victims were disproportionately often sentenced to death; within the set of cases involving white victims, African-American defendants were disproportionately often sentenced to death); GROSS & MAURO, note 119 *supra*, at 66, 68 - 69 (Illinois study, 1976 - 1980: defendants convicted of killing white victims were disproportionately often sentenced to death; within the set of cases involving white victims, African-American defendants were disproportionately often sentenced to death).

148. In addition to the studies cited in note 147 *supra*, see, e.g., M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 JOURNAL OF CRIMINAL JUSTICE 279 (1987), at 281 - 283 (Louisiana study, 1976 - 1982: defendants convicted of killing African-American victims are infrequently sentenced to death); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 743 (1990 - 1991), at 765 & table 2 (Texas study, 1980 - 1986: because cases involving African-American victims are prosecuted far less vigorously at the pre-sentencing stages, very few African-American-victim cases reach the capital sentencing stage); Ted Rohrlich & Fredric N. Tulsy, "Not All L.A. Murder Cases Are Equal," *Los Angeles Times*, 12/3/96, available at 1996 WL 12762076 (Los Angeles, California study, 1990 - 1994 [statistical analysis conducted by Professor Richard A. Berk]: few African-American-victim cases are prosecuted capitally and very few death-eligible convictions obtained). Earlier studies are collected in Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 777 (1990 - 1991), at 780 n.9.

Decisions by prosecutors to charge a capital offense, refuse a noncapital disposition, or seek a death sentence at a penalty trial after conviction are a principal locus of the race-of-the-victim bias reported in the studies. See the authorities in the preceding paragraph and in note 147 *supra*. All of these decisions involve subtle, case-specific judgment calls (see, e.g., E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQUETTE LAW REVIEW 649 (1996), at 658 - 675) that are made "without objective criteria, and in an 'essentially unreviewable' manner" (see e.g., Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL LAW REVIEW 1811 (1998), at 1813), by an overwhelmingly white corps of prosecuting officials (*id.* at 1815 - 1820). One needs not attribute consciously discriminatory motives to these officials to understand the reasons for their observed behavior: there is an array of obvious political as well as empathic factors at work which make cases involving African-American victims particularly unlikely candidates for the investment of the level of resources necessary to prosecute a capital case to a final judgment of death. See, e.g., GROSS & MAURO, note 119 *supra*, at 114 - 115; Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARVARD LAW REVIEW 456 (1981), at 466 - 468; Bowers, note 138 *supra*, at 1069; Thomas Johnson, *When Prosecutors Seek the Death Penalty*, 22 AMERICAN JOURNAL OF CRIMINAL LAW 280 (1994) (testimony to the Amnesty International USA Commission to Examine the Death Penalty).

149. See note 147 *supra* and note 161 *infra*. As one of us and a co-author have pointed out, the reason why a bias against black defendants is not even more apparent is that most murders committed by black defendants involve black victims; few white defendants are convicted of

In 1990, the highly-respected federal General Accounting Office (GAO) conducted a review of the then-extant studies of the administration of the death penalty in various States<sup>151</sup> to determine whether the race of the victim and the defendant were affecting capital sentencing.<sup>152</sup> GAO employed a rigorous

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murder for killing black victims; and very few defendants convicted of killing a black victim get the death penalty. AMSTERDAM & BRUNER, note 119 *supra*, at 200. See also Baldus (1998), at 1656 - 1657; Radelet & Pierce, note 147 *supra*, at 20 - 21; Murphy, note 147 *supra*, at 93. The practice of punishing interracial homicide with extreme severity is the classic attribute of a caste system, see Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 Social Forces 369 (1949); and the concomitant tolerance shown for intraracial homicide within subordinated castes is equally classic, see *id.* at 379 - 380; GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (50th Anniversary ed. 1996), vol. II, at 551 ("As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. . . . The sentences for even major crimes are ordinarily reduced when the victim is another Negro.").

150. See, e.g., Zeisel, note 148 *supra*, at 466 - 468; Kennedy, note 119 *supra*, at 1441 - 1443; William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980), at 573 - 574. Recent experimental evidence suggests a part of the reason for this pattern. In a simulation study of capital sentencing, "those who sentenced a Black defendant were significantly more likely to undervalue, disregard, and even improperly use mitigating evidence as opposed to those who sentenced a White. The differential use of mitigating evidence helped account for the imposition of over 20% more death sentences on Black than White defendants. . . . The disparities were particularly evident in the conditions where the defendant/victim characteristics were cross-racial, resulting in a one-third higher percentage of death sentences for a Black defendant convicted of killing a White victim (54%) than for a White defendant who killed a Black victim (40%)." Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW AND HUMAN BEHAVIOR 337 (2000), at 353.

151. Well-controlled, exhaustive research on the subject is costly and time-consuming, so the studies differ in scope, quality, and the aspects of the capital-prosecution process they examine. See Baldus (1998), at 1658. Nevertheless, several major studies of the effects of race upon the process are acknowledged to be of exemplary quality. See, e.g., Brief *Amici Curiae* of Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel, and Professor Franklin E. Zimring in Support of Petitioner Warren McCleskey, in *McCleskey v. Kemp*, No. 84-6811, at p. 3, describing the Georgia study done by Professor David Baldus and his colleagues as "among the best empirical studies on criminal sentencing ever conducted." In publishing this study, the Baldus team observed that "there is persuasive evidence that, in many jurisdictions, defendants who killed white victims receive more punitive treatment than those whose victims were black" (DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990), at 266); that "[t]o a surprising degree, the results of our study of Georgia's capital-sentencing system both before and after *Furman* parallel the findings reported for other jurisdictions" (*id.* at 265); and that "this consistency in results, despite the weaknesses and limitations of virtually every study, tends to validate the findings of each" (*ibid.*). Other researchers make the same point. E.g., GROSS & MAURO, note 119 *supra*, at 109-110 ("[R]acial discrimination in the imposition of the death penalty under post-*Furman* statutes . . . based on the race of the victim . . . is a remarkably stable and consistent phenomenon. . . . Our conclusion rests on several different sets of data, from different states, analyzed in different forms; this provides 'convergent validation' of our hypothesis and makes it particularly unlikely that a fortuitous association or a peculiarity of the research design could have misled us."). See also note 153 *infra*.

152. UNITED STATES GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Report to Senate and House Committees on the Judiciary, February 1990 [GAO/GGD-90-57]) [hereafter, "GAO REVIEW"].

selection and evaluation process.<sup>153</sup> It concluded that 82% of the studies selected as worthy of review had shown that the race of the victim affected charging or sentencing decisions or both.<sup>154</sup> The finding that a person suspected of killing a white victim would be more likely to be sentenced to death than a person suspected of killing a nonwhite victim was "remarkably consistent" across studies employing different methods and of varying degrees of quality.<sup>155</sup> Disparities associated with the race of the victim could not be explained by the operation of any other factor:

"Legally relevant variables, such as aggravating circumstances, were influential but did not explain fully the racial disparities researchers found. . . . The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence death penalty sentencing (*e.g.*, region, jurisdiction), differences remain in the likelihood of receiving the death penalty based on race of victim."<sup>156</sup>

The GAO review found that the "race of offender influence is not as clear cut and varies across a number of dimensions."<sup>157</sup> "[S]ometimes the race of defendant interacted with another factor" – rural/urban venue, for example – and the interplay between the race of the victim and the race of the defendant made the effect of the latter difficult to interpret.<sup>158</sup>

An independent review of the studies included in the GAO report and later studies through 1996 confirms GAO's conclusion that race-of-the-victim disparities in capital charging and sentencing are ubiquitous under all forms of post-*Furman* guided-discretion statutes and in every region of the country. Surveying studies in 27 of the 37 States which have imposed death sentences since *Furman*, this review reports that in more than 90% of those jurisdictions

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153. GAO compiled a bibliography of all potentially relevant studies and solicited additional material from 21 criminal justice researchers and directors of organizations whose work related to capital sentencing. *Id.* at 1 - 2. Out of over 200 potentially relevant references, GAO chose 53 studies based on data collected after *Furman* that evaluated the influence of race in the death-sentencing process. *Id.* at 1 - 2. Duplicative and non-empirical studies were eliminated, leaving 28 studies conducted by 21 sets of researchers in different regions, almost half of which were determined to be of high or medium quality by a team of three social science analysts. *Id.* at 2 - 3. (These experts examined and separately rated the design, sampling, measurement, data collection, and analytic techniques of each study, as well as rating its overall quality. *Id.* at 2 - 3.) In addition, a statistician reviewed the researchers' application of their chosen analytic techniques to determine whether they were applied correctly and whether the researchers' analyses fully supported their conclusions. *Id.* at 2. The findings of the studies were integrated and compared using evaluation synthesis – meaning, essentially, that the studies' relevant findings about the effects of race were extracted and compared. *Id.* at 1 - 2. Although the quality of the studies varied, GAO determined that "the body of research concerning discrimination in death penalty sentencing is both of sufficient quality and quantity to warrant the evaluation synthesis approach." *Id.* at 2.

154. GAO REVIEW, at 5.

155. *Ibid.*

156. GAO REVIEW, at 6.

157. *Ibid.*

158. *Ibid.* See note 149 *supra*.

(including three that border on New York),<sup>159</sup> there are findings of capital-charging or capital-sentencing bias against defendants accused of killing white victims (or findings of bias in the ultimate proportion of death sentences meted out to those defendants). Like the GAO, this comprehensive survey concluded that the findings about race-of-the-defendant disparities were mixed;<sup>160</sup> States in which African-American defendants were found to be sentenced to death with disproportionate frequency include two that border on New York.<sup>161</sup> (Under New York's prior capital sentencing regimes, even when they were theoretically mandatory, it appears that both the race of the defendant and the race of the victim influenced the various decisions – legal and extra-legal<sup>162</sup> – that

159. Baldus (1998) at 1742 - 1745 [Appendix B]. Statistically or practically significant race-of-the-victim disparities – in the sense that a death sentence was more likely to be sought or obtained for murdering a non-African-American victim than for murdering an African-American victim – were found in the following 25 States for some time period after 1972: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington. No race-of-the-victim effects were found in Nevada; a practically significant reverse effect was found in Delaware; in the remaining 10 States, no studies had been done or sample sizes were too small to support an estimate. *Ibid.*

160. *Ibid.* The reason why race-of-the-victim discrimination may “wash out” the appearance of race-of-the-defendant discrimination or even create an appearance that white defendants are being treated more harshly than African-American defendants is explained in note 149 *supra*.

161. Baldus (1998) at 1742 - 1745 [Appendix B]. Statistically or practically significant race-of-the-defendant disparities – in the sense that a death sentence was more likely to be sought or obtained against an African-American defendant than against a white defendant – were found in the following States for some time period after 1972: Alabama, Delaware, Indiana, Maryland, Mississippi, New Jersey, Pennsylvania, South Carolina, Texas, and Washington. And see UNITED STATES DEPARTMENT OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM, 1988 - 2000, September 12, 2000, online at <<http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>>.

For example, a rigorous and comprehensive study of capital sentencing in Philadelphia, Pennsylvania during the 10-year period from 1983 to 1993 found that African-American defendants were significantly more likely to be sentenced to death than non-African-American defendants when all other pertinent sentencing variables were taken into account. Baldus (1998). Different methods of controlling for nonracial variables produced somewhat different measures of the impact of race; but three representative findings can be used to illustrate the pervasiveness and magnitude of the phenomenon:

- (1) When the entire range of discretionary decisions involved in processing a capital case to final disposition was considered in a universe of more than 500 death-eligible cases, African-American defendants on average faced 3.1 times greater odds of receiving a death sentence than non-African-American defendants. *Id.* at 1690, 1761 [table E2].
- (2) At the jury-sentencing stage, the fact that the defendant was African-American had on average as much impact on the decision to return a death verdict as the existence of the statutory aggravating circumstances that the defendant tortured the murder victim or created a great risk of death to another person in addition to the murder victim, PA. C.S. § 9711(d)(7) and (8). *Id.* at 1758 - 1759 [table E1].
- (3) Had the 94 African-American defendants sentenced to death by Philadelphia juries received death sentences at the same rate as non-African-American defendants, 27 of them would have received life sentences. *Id.* at 1766 [table G1].

162. Among the extra-legal decisions that could avert a theoretically mandatory death sentence was the one famously described by Chief Judge Cardozo, who said of the then-extant

determined whether a death sentence would actually be inflicted for a capital offense.<sup>163</sup>)

Yet, “[r]acial disparity is but one of a host of inequalities that inheres in the death penalty.”<sup>164</sup> Legal execution has always and everywhere been the unique privilege of the destitute and the deprived, the personally ugly and the socially unacceptable<sup>165</sup> – those whom prosecutors and jurors have especial difficulty

distinction between first- and second-degree murder in terms of premeditation and deliberation that it was a “dispensing power . . . given to [the jury] . . . in a mystifying cloud of words,” “merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy.” BENJAMIN N. CARDOZO, *LAW AND LITERATURE, AND OTHER ESSAYS AND ADDRESSES* (1931), at 100.

163. Between 1890 and 1963, 21% of the people executed in New York were African-American, although African-Americans constituted between 1% and 8.45% of the State’s population during these decades and did not exceed 6 % until 1960. (African-Americans reached the 8.45% figure in 1960; and from that year until the last execution conducted in New York – in 1963 – 8 of the 10 persons executed were African-American.) Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 *JOURNAL OF LAW & POLICY* 81 (1995), at 102 - 103 & n.115. (Furthermore, the names of many of the people executed during the early 20th century who are listed as “white,” appear to be Italian, Central European, and Eastern European, suggesting that recent immigrants and their descendants were also common targets of capital prosecution and execution. *Id.* at 103 - 104; see DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE* (1997). This, too, was but a replay of one of the oldest themes in America’s use of the death penalty, as Louis Masur notes in discussing the prevalence of immigrants, migrants, and blacks among the persons executed between 1776 and 1812. “Juries most likely found it easier to convict outsiders – defined as foreigners, minorities, and those literally not from the immediate community – of capital crimes, and governors felt less pressure to commute the death sentence of those with few ties to the community.” MASUR, note 5 *supra*, at 39.) Looking again at the defendants executed between 1890 and 1963, one finds that 90.4 % of their victims were white and only 6.3 % were African-American. *Id.* at 105. During this entire period, only one white person was executed for the murder of an African-American victim, whereas 96 African-Americans were executed for murdering white victims. *Ibid.*

164. William J. Brennan, Jr., *Foreword: Neither Victims Nor Executioners*, 8 *NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY* 1 (1994), at 2.

165. See, e.g., Michael DiSalle, *Trends in the Abolition of Capital Punishment*, 1 *UNIVERSITY OF TOLEDO LAW REVIEW* 1 (1969), at 12 - 13 (“It is the poor, the illiterate, the underprivileged, the member of the minority group, who is usually sacrificed by society’s lack of concern”); RAMSEY CLARK, *CRIME IN AMERICA* (1970), at 335 (“It is the poor, the sick, the ignorant, the powerless, and the hated who are executed”); *Furman v. Georgia*, 408 U.S. 238, 251 - 252 (1972) (concurring opinion of Justice Douglas) (“One searches our chronicles in vain for the execution of any member of the affluent strata of this society”); CLINTON DUFFY & AL HIRSHBERG, 88 *MEN AND 2 WOMEN* (1962), at 256 - 257; LEWIS E. LAWES, *TWENTY THOUSAND YEARS IN SING-SING* (1932), at 302. This remains the case today. See, e.g., INTERNATIONAL COMMISSION OF JURISTS, *REPORT OF A MISSION: ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (June 1996) at 127 (“Almost all accused charged with a capital offence . . . are indigent as well as often illiterate or uneducated.”); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFFALO LAW REVIEW* 329 (1995), at 334 & n.18 and sources cited. As a consequence, even if adequate defense representation is made available, the lawyers for capital defendants as a class face extraordinary difficulties in making their clients’ lives understandable to prosecutors and sentencing juries. See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *SANTA CLARA LAW REVIEW* 547 (1995); James M. Doyle, *The Lawyers’ Art: “Representation” in Capital Cases*, 8 *YALE JOURNAL OF LAW AND THE HUMANITIES* 417 (1996), at 429 - 431.



seeing as a fellow human being.<sup>166</sup> Worse, the choice between imprisonment and death essentially depends on whether *a particular* prosecutor or *the particular* jury perceives sufficient value in the defendant's life to offset the horror that the defendant's crime arouses in *this* prosecutor and *this* jury. Such judgments are inherently recondite, idiosyncratic, and temperamental, varying wildly from county to county<sup>167</sup> and courtroom to courtroom.<sup>168</sup> How could it be otherwise? Despite all legislated formulas for calibrating the appropriateness of extermination, the core of what it *means* to say that aggravating circumstances "outweigh" mitigating circumstances on a set of scales that mete out life and death is incommunicable in any terms that could assure consistency from jury box to jury box.<sup>169</sup> Death surpassing human understanding, the question who deserves to suffer death is necessarily opaque to shared human reasoning. And such lights as jurors may believe they have on the question can be random, even perverse, fortuities.<sup>170</sup>

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166. See notes 137 - 139 *supra* and accompanying text. There is recent evidence that the socio-economic class of the victim also enters into the sentencing calculus, operating in the expectable direction. See BALDUS, WOODWORTH & PULASKI, note 151 *supra*, at 157, 184, 188 (Georgia study, 1973 - 1978); Baldus (1998), at 1676 & n.113 (Philadelphia study, 1983 - 1993): cases involving victims of low socioeconomic status were less likely to proceed to a penalty trial and were less likely to result in death sentences.

167. The gross geographic disparities already evident in the first few years of administration of the 1995 New York death-penalty law are noted in the Brief for Defendant-Appellant Darrel Harris, at 98 - 99 n.77. Similar disparities have been found under other post-*Furman* statutes (see, e.g., Bienen *et al.*, note 147 *supra*, at 180 - 182, 231 - 232 & n.707 (New Jersey study, 1982 - mid-1988); NAKELL & HARDY, note 144 *supra*, at 152 - 153 (North Carolina study, 1977 - 1978); Bowers, note 138 *supra*, at 1071 - 1074, 1079 - 1080, 1083 - 1086 (Florida study, 1973 - 1977; 1976 - 1977); and see AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA (April 2000), at 8; Lori Montgomery, *Death Penalty Foes Focus on Race*, The Washington Post Online (visited May 10, 2000), <<http://www.washingtonpost.com-dyn/metro/md/A36086-2000May9.html>> (Maryland)), although the New York statute's death-notice provision (C.P.L. § 250.40) will doubtless exacerbate the problem in this State. See note 146 *supra*.

168. See, e.g., DUFFY & HIRSHBERG, note 165 *supra*, at 25; Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASHINGTON UNIVERSITY LAW QUARTERLY 573 (1985), at 585 - 591. Studies of the administration of varying sorts of post-*Furman* statutes continue to find that sentences of life and death are being imposed by juries in factually indistinguishable cases. See, e.g., Paternoster & Kazyaka, note 147 *supra*, at 358, 360 - 361, 365 - 366, 372 - 374 (South Carolina study, 1977 - 1981); Sorensen & Marquart, note 148 *supra*, at 774 - 776 (Texas study, 1980 - 1986).

169. Some of the problems are discussed in Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW AND HUMAN BEHAVIOR 575 (1997).

170. It is well known, for example, that jurors regard a capital defendant's lack of remorse as a factor favoring a death sentence. This banal phenomenon has the profoundly perverse effect that capital defendants against whom the prosecution's evidence of guilt is weakest - defendants who may be encouraged by competent and conscientious counsel to contest their guilt at the guilt-or-innocence stage of the trial - are particularly disadvantaged at the penalty stage. See, e.g., Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL LAW REVIEW 1557 (1998), at 1574 - 1577; Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL LAW REVIEW 1599 (1998), at 1616. The inevitability of at least some

As a federal constitutional matter, a majority of the United States Supreme Court has accepted the discriminatory and capricious administration of capital punishment as “inevitable”<sup>171</sup> with the candid admission that “it is difficult to imagine guidelines that would produce the predictability sought by the dissent [of four Justices] without sacrificing the discretion essential to a humane and fair system of criminal justice.”<sup>172</sup> Justice Scalia, for his part, would resolve the insoluble tension between Draconian ruthlessness and random or discriminatory selectivity in meting out death sentences by sacrificing that discretion:

“Pursuant to *Furman*, and in order ‘to achieve a more rational and equitable administration of the death penalty,’ . . . we require that States ‘channel the sentencer’s discretion by “clear and objective standards” that provide “specific and detailed guidance,”’ . . . . In the next breath, however, we say that ‘the State *cannot* channel the sentencer’s discretion . . . to consider any relevant [mitigating] information offered by the defendant,’ . . . and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not ‘deserve to be sentenced to death.’ . . . The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.”<sup>173</sup>

“I cannot continue to say, in case after case, what degree of ‘narrowing’ is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. . . . Since I cannot possibly be guided by what seem to me incompatible principles, . . . I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”<sup>174</sup>

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erroneous convictions in capital prosecutions (see Part II.A.2 *infra*) makes the problem worse. And it is only one aspect of the larger problem that the penalty-phase procedure, which is supposed to acquaint the jury with those “factors which may call for a less severe penalty [than death]” (*Lockett*, 438 U.S. at 605 (plurality opinion)) often fails to do so because “the story of the crime and the defendant [is initially] . . . developed during the guilt phase of the trial”; and “[s]ince stories – once developed – are resistant to reconstruction, jurors may thereafter be unreceptive to new penalty phase evidence intended to create a different understanding that would serve as the basis for deciding on punishment.” Bowers, note 138 *supra*, at 1069. See also William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL LAW REVIEW 1476 (1998).

171. *McCleskey*, 481 U.S., at 312: “At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.”

172. *Id.* at 314 n.37.

173. *Walton v. Arizona*, 497 U.S. 639, 656, 664 - 665 (1990) (concurring opinion).

174. *Id.* at 673.

Both of these results, we submit with respect, are unacceptable under the New York Constitution.<sup>175</sup> Both are based on the logic that we noted at the outset of this brief. If one *assumes* that a Constitution has enshrined capital punishment as a given, then one cannot insist that it be administered both humanely and even-handedly, without race discrimination and wanton caprice. The lesson of experience is altogether too clear that these two sets of constitutional values cannot be realized together in administering the death penalty. Thus, under a constitution meant to perpetuate the death penalty, it follows that at least one set of constitutional values must be thrown overboard. But once it is understood, as we have shown in Part I of this brief, that the framers of the pertinent constitutional provisions seriously intended both sets of values to be enforced, and did *not* intend to immunize the death penalty from their requirements – but rather meant to leave to independent judicial determination the question *whether* the death penalty could be continued under a constitutional regime in which both sets of values *are* enforced – the outcome is very different. It is the death penalty that can no longer be indulged.

2. *Between Multiplying Executions of the Innocent and Protracting the Torment of the Condemned*

In taking life, society performs an act whose nature we cannot begin to comprehend. All that can be said with certainty about it is that on this earth it cannot be undone. Mistakes we make in choosing who gets put to death are irreversible. So the risk of executing innocent people weighs heavily upon a system that administers the death penalty.

The risk cannot be eliminated. Human fallibility guarantees that every capital-punishment regime will sooner or later execute some innocent men and women. The question is how big a risk – how many wrongful executions – our consciences can tolerate. To contemporary American consciousness, the prospect of executing more than a few innocents has become intolerable. So the persons who run contemporary capital-punishment systems are obliged to deal with that prospect either by attempting to minimize the risk or by pretending it does not exist, or both.

The first approach entails an expansion of postconviction procedures for the correction of error in capital cases until decade-long waits for execution become the norm. This subjects death-row inmates to an agonizing roller-coaster ride from hopelessness to hope and back a half dozen times or more over the years. It also strains the resources of the judicial system to the point at which their thinness can be seen as justifying a retrenchment. The second approach – which may take the form of an *apologia* for the retrenchment – entails a wilful blindness to the prospects of fatal miscarriages of justice. It corrodes the rule of

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175. And of course this Court does not have Justice Scalia's privilege of disregarding the federal constitutional rule of *Woodson*, *Lockett*, and their progeny.

law by replacing vigilance to correct deadly errors with a false comfort that they simply cannot happen – or at least not much.

We will see shortly how the tension between these two approaches wracks the efforts of any court system to hold capital punishment accountable to constitutional principles. First, some observations are necessary concerning the magnitude of the risk of executing the innocent. There are reasons, both obvious and unobvious, why this cannot be calculated with any confidence. Among the obvious reasons:

(1) The same imperfections in the investigative and adjudicative processes that produced the mistakes will usually keep them from being detected, particularly since

(2) it is only in very rare cases that anybody has the motivation and resources to continue to worry away at issues of guilt or innocence after an execution has made those issues moot for all practical purposes,<sup>176</sup> and

(3) the official agencies and private individuals whose efforts, judgments and information played a part in securing the conviction of an executed person will naturally have a strong resistance to acknowledging the exonerative significance of any evidence of innocence that does happen to surface after execution;<sup>177</sup> and

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176. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD LAW REVIEW 21 (1987), at 85: "Once the defendant is dead, the best source of evidence is gone, as is the main motive to reinvestigate. Further, the limited resources of those who might challenge the deceased's guilt are quickly absorbed by the legal battles involved in trying to save the lives of others on death row." It is usually only when the execution of a death sentence has been blocked on some other ground that facts later come to light establishing the innocence of the individual thus fortuitously spared from execution. For example, after the 1972 decision in *Furman v. Georgia* and the 1976 decision in *Woodson v. North Carolina* rendered various death-penalty statutes unenforceable (see text accompanying notes 128 - 139 *supra*), evidence emerged that at least six people who had been convicted and condemned to die under those statutes were victims of mistaken identity. United States Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Staff Report, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, 103rd Congress, 2d Session (November 1994) [G.P.O., ISBN 0-16-046237-1], at 2, 5, 7:

*Lawyer Johnson* (Massachusetts): Convicted 1971, released 1982. Murder. Charges dropped when a previously silent witness came forward and implicated the state's chief witness as the actual killer. *Id.* at 5.

*David Keaton* (Florida): Convicted 1971, released 1973. Murder of off-duty deputy sheriff during robbery. Charges dropped after the actual killer was convicted. *Id.* at 2.

*Wilber Lee and Freddie Pitts* (Florida): Convicted 1963, released 1975. Double murder. Gubernatorial pardon granted after another man confessed to the crimes. *Ibid.*

*James Richardson* (Florida): Convicted 1968, released 1989. Murder. Released after a new prosecutor reexamined the case and concluded Richardson was innocent. *Id.* at 7.

*Johnny Ross* (Louisiana): Convicted 1975, released 1981. Rape. Released when blood type found to be inconsistent with the rapist's. *Id.* at 5.

177. The authors of the most extensive extant studies of mistaken convictions in capital cases

(4) the same is ordinarily true of any agencies and individuals whose failure to discover or disclose potentially exculpatory information before the execution may have contributed to the fatal outcome.<sup>178</sup>

Among the unobvious reasons are the difficulties of defining what should count as “innocence” and as a satisfactory demonstration of it when there are no procedures for that purpose and when the only remaining relevance of the subject is its implications for the comfort level of the system’s administrators. For example, *before conviction*, it is no less important to the law defining guilt-or-innocence of capital murder that the defendant have been sane at the time of the killing than that he or she have been the person who committed it. *After execution*, though, should our consciences be less queasy that the executed person was put to death because of a mistaken determination of sanity than that he or she was put to death because of mistaken identity?

Postponing such questions for the moment, let us start by looking only at cases of mistaken identity – what are often called “wrong man” cases, in contrast to “wrong *mens*” cases. This is the category of capital mistakes that has captured public attention in recent years,<sup>179</sup> in the wake of disclosures that a considerable

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have written that “our investigations failed to disclose a single case in the twentieth century where a government official in this country admitted that an execution carried out under his authority, or to his knowledge in his jurisdiction, took the life of an innocent defendant.” Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61/4 LAW & CONTEMPORARY PROBLEMS 105 (Autumn 1998), at 106; see also *id.* at 115. With the passage of time and changes in government personnel, it becomes easier for officials to admit mistakes. For example, in 1984, the Governor of Massachusetts finally issued a proclamation clearing the names of James Halligan and Dominic Daley, who were executed in 1806 for a crime to which another man subsequently confessed. *Boston Globe*, March 19, 1984, p. 16. But by the time that defensiveness fades, so, usually, does any public interest in the case which might motivate a continuing inquiry sufficiently intensive to uncover the fact that a long-executed man or woman was a victim of mistaken identity. *Causes célèbres* like those of Leo M. Frank, who was exonerated by the dogged efforts of a team of reporters (see Wendell Rawls, Jr. “After 69 Years of Silence, Lynching Victim is Cleared,” *New York Times*, March 8, 1982, p. 19) more than two-thirds of a century after his capital conviction was upheld by the courts (see *Frank v. Mangum*, 237 U.S. 309 (1915)) and he was killed by a Georgia lynch mob, are the rare exceptions to this rule. (Frank was pardoned by the Georgia Board of Pardons and Paroles in 1986 after the Anti-Defamation League of B’nai B’rith and other Jewish organizations filed a meticulously researched and documented petition with the Board. See LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (2d ed. 1987); ROBERT SEITZ FREY & NANCY THOMPSON-FREY, *THE SILENT AND THE DAMNED: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (1988).) Another fortuitous exception is the recent brief attention that the presidential candidacy of Texas Governor George W. Bush has attracted to the question whether “on his watch” (but not before it), Texas has put to death any innocent persons. See Sara Rimer & Raymond Bonner, “Bush Candidacy Puts Focus on Executions,” *New York Times*, May 14, 2000, pp. 1, 30; Raymond Bonner & Sara Rimer, “A Closer Look at Five Cases that Resulted in Executions of Texas Inmates,” *New York Times*, May 14, 2000, p. 30.

178. See MICHAEL L. RADELET, HUGO A. BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992), at 275.

179. For example, the first announcement of the decision by Illinois Governor George Ryan to impose a moratorium on executions in that State effective January 31, 2000 emphasized that the Governor “acted because of the state’s troubling track record of exonerating more Death Row inmates than it has executed and in response to a recent [Chicago] Tribune investigation that exposed the death-penalty system’s flaws.” *Chicago Tribune*, January 30, 2000, p. 1 (reporting the

number of individuals have been erroneously convicted and sentenced to death since 1972 for crimes committed by somebody else.<sup>180</sup> Under post-*Furman* statutes, at least 47 death-sentenced people have had their convictions overturned and the charges against them dismissed or dropped because of later-developed evidence that they did not commit the crimes for which they were condemned.<sup>181</sup> At least another 30 people, with their convictions and death sentences reversed or vacated on grounds permitting reprosecution, have been acquitted at retrial – often as a result of new evidence that they had not committed the crime.<sup>182</sup> At least 5 additional people have been tacitly acknowledged by official agencies to have been sentenced to death for crimes they probably did not commit.<sup>183</sup> At least 5 people have had their death sentences commuted because of doubt about their guilt.<sup>184</sup> And in at least 10 more cases,<sup>185</sup> compelling evidence of innocence has led to compromise noncapital dispositions after a condemned person's release from death row.<sup>186</sup>

The most disturbing thing about these cases is that in many of them the eventual exoneration of the death-sentenced convict came about as a result of fortunate happenstance.<sup>187</sup> But for the vagaries of chance, these people would

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announcement by gubernatorial spokesperson Dennis Culloton). By contrast, consider President Clinton's first public response to a report issued by the United States Department of Justice on September 12, 2000, finding that federal cases involving nonwhite defendants had disproportionately often been approved for capital prosecution and resulted in death sentences: "For his part, President Clinton called the report 'astonishing,' and said he would wait for [Attorney General] Reno's comments and recommendations before making a decision on the moratorium requests. He also pointed out that none of the cases studied by Justice involved wrongful convictions." ABC News, "Report Shows Death Penalty Disparity," September 12, 2000, online at <<http://abcnews.go.com/sections/us/DailyNews/feddeathpenalty000912.html>> (visited September 16, 2000).

180. Earlier cases are documented in, e.g., RADELET, BEDAU & PUTNAM, note 178 *supra*, at 282 - 356; Bedau & Radelet, note 176 *supra*, at 91 - 172; JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); EARL STANLEY GARDNER, THE COURT OF LAST RESORT (1952); EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932); HERBERT B. EHLMANN, THE CASE THAT WILL NOT DIE: COMMONWEALTH VS. SACCO AND VANZETTI (1969); Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 831 (1990 - 1991), and works collected in *id.* at 832 n.3.

181. See Inventory One in Appendix A.

182. See Inventory Two in Appendix A.

183. See Inventory Three in Appendix A.

184. See Inventory Four in Appendix A.

185. See Inventory Five in Appendix A.

186. The numbers in this paragraph clearly understate the magnitude of the problem of "wrong-man" errors in capital prosecutions (see Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61/4 LAW & CONTEMPORARY PROBLEMS 125 (Autumn 1998) [hereafter, "*Lost Lives*"], at 129 - 131) but will suffice for present purposes.

187. RADELET, BEDAU & PUTNAM, note 178 *supra*, at 271 - 272; Bedau & Radelet, note 176 *supra*, at 64 - 71; Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFFALO LAW REVIEW 469 (1996) [hereafter, "*Risks of Death*"], at 497 - 500. In only 8 of the 97 cases in Appendix A were the convictions reversed on appeal for insufficiency of the evidence or as against the weight of the evidence, and in only about 20 was the rectification

have been put to death.<sup>188</sup> It is therefore implausible to suppose that their cases are distinguishable, except by random strokes of good luck, from similar cases in which innocent people *were* put to death.<sup>189</sup> The common comforting response to all of the cases of condemned inmates who have been released from death row in time – that these cases “show that the system works” to avert erroneous executions – is simply wishful thinking.<sup>190</sup> As a number of news commentators (who should know) observed in recounting the January, 1999 exoneration of an Illinois condemned inmate, Anthony Porter, through the investigative efforts of students working with Journalism Professor David Protess of Northwestern University,<sup>191</sup> a system that needs to depend upon the adventitious interest of an undergraduate journalism class to prevent the execution of the innocent is infected with a frightening fragility.

The reasons why mistakes of fact are particularly likely to be made in determining guilt or innocence in capital prosecutions<sup>192</sup> have to do with both the nature of the crimes for which the death penalty is authorized and the stress exerted on the system by the penalty itself. Even compared to other homicides,<sup>193</sup> potentially capital homicides tend to be community-disturbing crimes,<sup>194</sup> in which the police investigation and prosecutorial decisionmaking are conducted under intense, distorting pressure.<sup>195</sup> Public fear and outrage generate a need for prompt – and therefore sometimes premature – police clearance of the crime by arresting an identified suspect.<sup>196</sup> And once the

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of the error or errors that led to appellate reversal the sole reason for an acquittal following the reversal. Most often, evidence resulting in the death-sentenced inmates' exoneration emerged during years of appellate and postconviction litigation of other issues.

188. We illustrate this point by four representative case studies in Appendix B.

189. Radelet & Bedau, note 177 *supra*, at 116 - 118.

190. See Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61/4 LAW & CONTEMPORARY PROBLEMS 193 (Autumn 1998), at 214 - 215.

191. See Pam Belluck, “Convict Freed After 16 Years on Death Row,” *New York Times*, February 6, 1999, p. A7.

192. That criminal trials in general are no more infallible than human cognizance in general needs no demonstration, though there are some classic demonstrations of the point (see, e.g., BORCHARD, note 180 *supra*; FRANK & FRANK, note 180 *supra*), as well as recent powerful reminders (see, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS LAW REVIEW 1317 (1997)).

193. Regarding the occurrence of errors in New York homicide prosecutions generally, see Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965 - 1988*, 18 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 807 (1988), reporting a study of homicide convictions from 1965 to 1988 that were subsequently set aside. In 35 cases, the charges were ultimately dismissed; in 17 cases, the defendant was acquitted at retrial; in 7 cases, the charges were ultimately resolved by conviction of a nonhomicide offense.

194. They also tend to be more difficult to solve than other homicides because more frequently committed by a person who is a stranger to the victim. See *Lost Lives*, at 127 & n.10.

195. *Risks of Death*, *passim*; *Lost Lives*, at 125; 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (3d ed. 1998), at 101 - 102 [§ 2.6].

196. See *Risks of Death*, at 476 - 478:

authorities have publicly identified the perpetrator and committed themselves to a theory of how and why s/he committed the offense, the idea of *changing* their accounts of who did it and under what circumstances is a peculiarly unattractive course.<sup>197</sup> It not only runs counter to the ordinary human penchant to become invested in a version of reality that one has desperately puzzled out; it is also potentially damaging to the community's confidence in law enforcement and embarrassing to the professional reputation and personal pride of the officers and prosecutors on the case.<sup>198</sup> As one thoughtful commentator has summed up a

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"If the police do hear about a robbery, or a rape, or a burglary, for which the identity of the criminal is not immediately obvious, their investigation will usually be perfunctory . . . . Police detectives do not have the time to conduct detailed investigations of every reported felony, and in the usual run-of-the-mill case there is little pressure on them to do so. The net result is that in general the felonies that are prosecuted are likely to be those in which the evidence of guilt is strongest.

"Homicides are different. First, almost every homicide is reported . . . . Second, most homicides known to the police are cleared . . . . A study of robbery investigations in Chicago in 1982 - 83 . . . provides an excellent illustration: 13% of all robberies reported to the police were solved within two months . . . , compared to 57% of robbery-killings. This difference cannot be explained by superior evidence - on the contrary, robbery homicides will usually have weaker evidence, since the victim is dead - but must be due to a systematic difference in the investigation by the police.

" . . . In a typical ordinary homicide - a killing of a friend as a result of a drunken fight - the killer is known from the start. But the police get the hard murders as well as the easy ones, and there is much more pressure to solve these cases than non-homicidal crimes. The relatives of the victim care more, the prosecutor cares more, the public is much more likely to be concerned, and the police themselves care more. Death produces strong reactions - in this context, a desire to punish and to protect. . . .

"For the most part, the pressure to solve homicides produces the intended results. The police spend more time, they are more persistent, they have more resources at their disposal, and they catch more of the criminals. An investigation that would be closed without arrest if it were a mere robbery, may end in a conviction if the robber killed one of his victims. But that same pressure can also produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and - if they believe they have the killer - perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying, and to the extent that it attracts public attention - factors which also increase the likelihood that the murder will be treated as a capital case."

197. See *Risks of Death*, at 489 - 492.

198. See McCann, note 148 *supra*, at 670 - 671:

"[I]n the minds of some commentators and part of the public, the initial charge brought by the prosecutor, at that stage at which he or she was least informed, is misperceived as being garbed with a pristine quality, and any reduction therefrom appears to cast the district attorney in an adverse light and to compromise the integrity of the criminal justice system. The prosecutor may fear adverse publicity . . . . Concern must arise that in the glare of public attention that would be natural in a capital punishment case, a less-than-ethical prosecutor would proceed on a capital punishment charge, possibly to conviction, when a lower charge in fact ought justly to have been pressed instead."

See also Johnson, note 148 *supra*, at 280. Of course, there are exceptions to the rule; police and prosecutors may drop unfounded charges when incontestable evidence of innocence makes a prosecution hopeless. See Patricia Hurtado, "Man Freed, DA Admits He Wasn't Attacker," *Newsday*, August 18, 2000, p.A30.



major aspect of the problem, homicide investigations, like burglary investigations, often start with the handicap that there are no eyewitnesses to give an account of the events that can guide investigators at the outset,<sup>199</sup>

“[b]ut the upshot is different. There are very few erroneous burglary convictions based on misidentifications, but because there are also few burglary prosecutions based on noneyewitness evidence, there are few errors of any sort. There are also comparatively few convictions; the clearance rate for reported burglaries is only thirteen percent. But killers must be pursued, and, in the absence of eyewitness evidence, the police are forced to rely on evidence from other sources: accomplices; jailhouse snitches and other underworld figures; and confessions from the defendants themselves. Not surprisingly, perjury by a prosecution witness is the most common type of evidence that produces erroneous capital convictions, and coerced or otherwise false confessions are the third most common cause.”<sup>200</sup>

The death penalty itself inescapably sensationalizes capital prosecutions,<sup>201</sup> making them a super-high-stakes suspense drama to be played out to the finish under klieg lights. It puts a premium on blame-shifting perjury by witnesses,<sup>202</sup> turns capital cases into a competitive Olympiad that prosecutors must play to win,<sup>203</sup> and infuses trials and jury deliberations with a unique emotionality that

199. See also McCann, note 148 *supra*, at 663 - 664.

200. *Lost Lives*, at 137. A telltale sign of the pressure that exists to clear capital cases and to make capital charges stick despite the absence of reliable evidence of guilt is the remarkable extent to which capital prosecutions rely upon testimony by jailhouse informers that the defendant confessed to the informer. See Ken Armstrong and Steve Mills, “Death Row Justice Derailed,” *Chicago Tribune*, November 14, 1999, p. 1; Ken Armstrong and Steve Mills, “The Inside Informant,” *Chicago Tribune*, November 16, 1999, p. 1. The case study of a wrongful capital conviction based on this kind of testimony – which experienced prosecutors know to be dubious but find themselves forced to use because they can neither fail to prosecute nor fail to make an all-out effort to win capital cases – is described in SCHECK, NEUFELD & DWYER, note 192 *supra* at 126 - 157. For a prosecutor’s description of the complex and fallible judgments involved in assessing the reliability of the various kinds of evidence on which capital prosecutions may have to be based, see McCann, note 148 *supra*, at 662 - 666.

201. See FELIX FRANKFURTER, *OF LAW AND MEN* (1956), at 81: “When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly.” It is no accident that stories of capital trials dominate popular fiction – novels, movies, theater, TV – as well as the electronic and print news.

202. See *Risks of Death*, at 481 - 484. Perjury was found to be the leading cause of erroneous convictions in the capital prosecutions studied by Bedau and Radelet, note 176 *supra*, at 56 [table 6]. A related phenomenon is that the existence of the death penalty may inhibit the disclosure of information which would avert the conviction of an innocent person caught in a web of incriminating circumstances. When an apparently guilty but actually innocent individual is prosecuted for a crime committed by somebody else, the real perpetrator – or a relative or friend of the real perpetrator to whom he or she has admitted the crime – is sometimes moved to step forward and reveal the truth, particularly in a cohesive community. But this is less likely to happen when the revelation will expose the real perpetrator to the risk of a death sentence.

203. As one former prosecutor has noted, the pressure to seek and obtain a death sentence depends not only on the “media’s portrayal of the case” at hand but on circumstances external to it:

heightens the natural tendency of jurors to be less critical in scrutinizing grounds for evidentiary doubt when they are passing judgment on a gruesome crime that “puts a tongue in every wound” to cry for vengeance.<sup>204</sup>

The same pressures that lead to “wrong man” mistakes in capital prosecutions are even more likely to lead to “wrong mens” mistakes,<sup>205</sup> for reasons well described in Charles Black’s insightful book, *Capital Punishment: The Inevitability of Caprice and Mistake*. Questions such as whether a defendant harbored the specific mental state defined as an element of capital murder, or whether s/he acted under extreme emotional disturbance, or whether his or her taking of the victim’s property following the killing was an afterthought or a sufficient ground for inferring the *mens rea* of the predicate felony for capital robbery-murder, are notoriously refractory inquiries, unlikely to be made with consistent factual accuracy even insofar as they are factual at all.<sup>206</sup> And ironically, the more the elements of capital murder are fine-spun and delicately nuanced, to meet the United States Supreme Court’s requirement that death-penalty statutes must “genuinely narrow” the class of murders eligible for a death sentence,<sup>207</sup> the greater is the likelihood that factual mistakes will occur in

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“For example, there might be a significant case recently lost which compels the prosecutor to seek to regain public confidence.” Johnson, note 148 *supra*, at 280.

204. See *Risks of Death*, at 495 - 496. See also McCann, note 148 *supra*, at 669:

“Prosecutors concerned with justice are troubled by fact patterns that can tempt the conscience of the jury. Such a situation arises when a child has been kidnapped, sexually assaulted and slain, or a vulnerable victim has been tortured before being killed, or a respected police officer has been murdered on duty, but the evidence supporting the charge against an unattractive or minority accused falls short of proof beyond a reasonable doubt. An articulate prosecutor senses that a closing argument artfully orchestrated to stoke the passions of the jury but not so fevered as to trigger reversal will surely tempt those jurors to convict, overriding doubts that ought to persist due to deficiencies of the evidence.”

205. See Givelber, note 192 *supra*, at 1327 - 1328. These two categories do not exhaust the roster of mistakes in capital prosecutions that can lead to executing persons whom the law does not define as proper subjects of capital punishment (see Radelet & Bedau, note 177 *supra*, at 108 - 112) or persons who have not been properly determined to come within that category (see Anthony G. Amsterdam, *Capital Punishment*, 5 STANFORD MAGAZINE 42 (1977), at 43-44), but they suffice to make our present point.

206. CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed., augmented, 1981), at 22 - 30, 54 - 78. As Black notes (at 27), “it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.” And many of the decisive judgments involved – like the application of the rules governing the defense of extreme emotional disturbance – involve evaluative elements (see, e.g., *People v. Casassa*, 49 N.Y.2d 668, 676 - 680 (1980)) – which add to the imprecision of the determination required of prosecutors and jurors (see, e.g., Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICHIGAN LAW REVIEW 1199 (1998)). In the making of such judgments, as Black observes, “[m]istake’ and ‘arbitrariness’ . . . are reciprocally related. As a purported ‘test’ becomes less and less intelligible, and hence more and more a cloak for arbitrariness, ‘mistake’ becomes less and less possible – not, let it be strongly emphasized, because of any certainty of one’s being right, but for the exactly contrary reason that there is no ‘right’ or ‘wrong’ discernible.” BLACK, *supra*, at 28.

207. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Arave v. Creech*, 507 U.S. 463, 474 (1993).

making findings of these elements.<sup>208</sup> If a capital-punishment system seeks to be careful about catching and correcting such mistakes – in addition to cases of mistaken identity, and cases in which the procedural requisites for a valid conviction and sentence have not been observed – it will have to provide an exacting and protracted set of postconviction reviews before each irrevocable judgment is carried out.

Contemporary American death-penalty regimes have responded to this need in two ways, by handwringing and handwashing, often in succession or alternation. In the handwringing mode or phase, courts strain to scrutinize death row inmates' claims of error with the deliberation befitting matters of life and death, while trying to continue to do the rest of the court's business more-or-less as usual. The result is that capital appeals and postconviction proceedings drag on for a decade or more, finding "constitutional error in capital convictions and sentences" with "shocking frequency"<sup>209</sup> throughout this period. Twenty-year delays between the imposition and the execution of a death sentence have recently spawned a debate between United States Supreme Court Justices as to whether there may be some federal Eighth Amendment limit to this process<sup>210</sup> or whether, as Justice Thomas succinctly put it, "those who accept our death penalty jurisprudence as a given [must] also accept the lengthy delay between sentencing and execution as a necessary consequence."<sup>211</sup>

However this may be, delays of less than 20 years may yet be long enough to raise the question whether the person being put to death is any "longer the same person he [or she] was when he [or she] committed [the] . . . crimes."<sup>212</sup>

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208. The elements of capital murder spelled out in the numerous subdivisions of Penal Law § 125.27(1)(a) abound in elaborate mental-state issues of the sort that generate murky factual inquiries "in the close cases which actually come to court in great number" (BLACK, note 206 *supra*, at 58). For one pedestrian example, see James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE LAW REVIEW 41 (1996), at 67 (a husband assaults and kills his wife, whom he has assaulted before; whether this is a witness killing within § 125.27(1)(a)(v) depends on untangling murky, multiple motivation).

209. Brennan, note 164 *supra*, at 3 (1994). Justice Brennan's observation has been powerfully confirmed by a recent, comprehensive study of appellate and postconviction outcomes in cases involving capital convictions and death sentences. See JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973 - 1995*, online at <http://justice.policy.net/jpreport/index.html>.

210. See *Knight v. Florida*, 120 S. Ct. 459 (1999) (opinion of Justice Thomas, concurring in the denial of certiorari; opinion of Justice Breyer, dissenting from the denial of certiorari); and see *Lackey v. Texas*, 514 U.S. 1045 (1995) (memorandum of Justice Stevens, respecting the denial of certiorari).

211. *Knight*, 120 S. Ct., at 460 (opinion of Justice Thomas, concurring in the denial of certiorari).

212. *State v. Richmond*, 180 Ariz. 573, 581, 886 P.2d 1329, 1337 (1994). This problem was at the root of the controversy over the execution of Karla Faye Tucker in Texas in 1998: many people who had previously been staunch supporters of capital punishment but who believed in the redeemability of human beings discovered to their dismay the inconsistency between the two concepts. See, e.g., Gustav Niebuhr, "Tucker Case May Split Evangelical Christians," *New York Times*, February 4, 1998, p. A20. That inconsistency was difficult to ignore in Tucker's case because the woman whom Tucker had become was undeniably saintly in all of the ways

And protracted appeals with their uncertainties are problematic in other ways that should be pertinent to a constitutional guarantee against cruel and unusual punishments. They leave inmates "facing the agony of execution over a long extended period of time."<sup>213</sup> This torment has been judged intolerable by courts around the world, in the few countries that still use the death penalty at all.<sup>214</sup> In part, the point is simply that "[t]he devastating, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death" alone.<sup>215</sup> In part, it is that years spent oscillating back and forth from hope to desolation as successive court dates and decision days loom up and pass is quite uniquely – though, in theory, quite benignly – calculated to destroy the human spirit.<sup>216</sup> In part, it is that there is an excruciating helplessness in counting time while knowing that in two years, and then in a year, and finally in a week, a day, an hour, people are going to walk into your cell and take you out and strap you down and kill you, and that there is absolutely nothing you can do about it except to pray some faceless court will intervene. All together, "a man is undone waiting for capital punishment well before he dies."<sup>217</sup>

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recognized by traditional American religious faiths. Other death-row inmates undergo as great or greater processes of personal maturation but it remains unnoticed because it takes less traditional forms. Indeed, when it is accompanied by dedication to unpopular – or even merely unorthodox – religious faiths, it is likely to be viewed with incomprehension, suspicion, and hostility.

213. *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C. 1, 29, 4 All E.R. 769, 783 (P.C. 1983) (en banc).

214. In addition to the *Pratt* case, see, e.g., *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney General*, [1993] 1 Zimb. L. R. 239 (Zimbabwe); *Smt Treveniben v. State of Gujarat*, 1 S.C.J. 383 (India 1989); *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. [series A] 439 (Eur. Ct. H.R. 1989) (blocking extradition of German national to the United States on capital charges because, *inter alia*, condemned inmates' prolonged death-row confinements in the U.S. constitute inhuman and degrading punishment).

215. ALBERT CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION AND DEATH* 173 (1961), at 200. Camus writes (in *id.*, at 199):

"[B]eheading is not simply death. It is just as different, in essence, from the privation of life as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is in itself a source of moral sufferings more terrible than death. Hence, there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

216. See, e.g., ROBERT JOHNSON, *CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH* (1981), at 80 - 98; Louis Jolyon West, *Psychiatric Reflections on the Death Penalty*, 45/4 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 689 (1975), at 691, 694; STEPHEN H. GETTINGER, *SENTENCED TO DIE: THE PEOPLE, THE CRIMES AND THE CONTROVERSY* (1979), at 91 - 97; C. Michael Lambrix, *The Isolation of Death Row*, in MICHAEL L. RADELET, ed., *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 198 (1989), at 199 - 201.

217. CAMUS, note 215 *supra*, at 205.

But the same process that wears down the condemned inmate also wears down the courts, albeit in a different way. Realistically, at some point, judges can no longer keep investing the vast amounts of time that are necessary to give careful scrutiny to all of the potentially valid claims of all of the inmates on a populous death row.<sup>218</sup> A judicial system does have other business to do than ceaselessly search for mistaken convictions in the cases of death-row prisoners – however inevitable and distressing such mistakes may be. And so the

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218. In 1998 Chief Justice Gerald Kogan of the Florida Supreme Court reported in his State of the Judiciary Address that capital appeals were taking close to 50 % of the court's time while comprising only 3 % of the cases on its docket, and that when executions were imminent, "it brings the court to a virtual standstill." (The Chief Justice, who had long favored the death penalty in principle – and frequently sought it as a prosecutor before going on the bench – said he had come to the view that capital punishment consumes too much of the justice system's resources and, "as a viable penalty, . . . does not work at this time and has not worked in the State of Florida for many, many, many years.") Mark D. Killian, "Chief Justice Shares Parting Thoughts with Judges," 25/14 *Florida Bar News* 6 (July 15, 1998) [quotations are Chief Justice Kogan's words]. Also in 1998, retiring North Carolina superior court judge Gordon Battle observed that his court was spending over half its time on death cases. (Judge Battle said that, while he was not opposed to capital punishment in principle, he favored "[d]oing away with it . . . [in order to] take a tremendous load off the criminal justice system.") Todd Nelson, "Retiring Judge Opposes Death Penalty," *Raleigh News & Observer*, January 11, 1998, p. B7. A decade earlier, the California Supreme Court was already spending more than half its time on death cases (Stephen Magagnini, "Closing Death Row Would Save State \$90 Million a Year," *Sacramento Bee*, March 28, 1988, p. A1), and the chief judge of the Eleventh Circuit estimated that a capital appeal equalled 30 other cases in terms of time and effort (Fred Bayles, "10 Years after Gilmore, Death Row USA Grows and Grows," *Associated Press*, January 13, 1987). Of course the numbers alone do not fully account for the stresses that death cases impose on the courts. See Dave Von Drehle, "Fairness Was Fatal Blow to Fast Executions," *Miami Herald*, July 11, 1988, p. 1A, at 8A (describing courts at work at midnight on last-minute stay applications).

The appellate and postconviction costs of capital cases are the smaller part of the drain those cases cause the system. They come on top of the heavy costs of prosecuting capital cases from arrest to judgment – in many more cases than result in death sentences. Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL LAW REVIEW 1431 (1998), at 1439 - 1440. See PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA (Terry Sanford Institute of Public Policy, Duke University) (May 1993), at 97 - 100 (estimating that in 1993 the extra cost of processing cases capitally, rather than noncapitally, was more than two million dollars for each death sentence likely to be executed); Christy Hoppe, "Executions Cost Texas Millions," *Dallas Morning News*, March 8, 1992, p. 1A, at 12A, and Christy Hoppe, "\$2.3 Million to Burn: Is This Justice?," *Chicago Tribune*, March 24, 1992, p. 8 (estimating that in 1992 the processing of each capital case cost Texas an average of \$2.3 million, while imprisoning a person for 40 years in a maximum-security cell cost about \$750,000); Dave Von Drehle, "The Death Penalty: A Failure of Execution – Bottom Line: Life in Prison One-Sixth as Expensive," *Miami Herald*, July 10, 1988, p. 12A (estimating that in 1988 each execution cost Florida \$3.2 million); Magagnini, *supra* (estimating that capital trials are six times more expensive than other murder trials); and see the analyses in PUBLIC DEFENSE BACKUP CENTER, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (April 1982). In addition, the resources that law firms and other legal-services providers must invest in death cases severely drain the capacity of the bar to do other *pro bono* work. See Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE LAW REVIEW 1 (1994), at 16 (noting that the proceedings that led to the release of John Henry Knapp from Arizona's death row in 1992, after a plea to a lesser charge [see Appendix A, Inventory Five, *infra*], required the expenditure by his volunteer attorneys of \$2 million in lawyer hours and \$100,000 in out-of-pocket costs).

handwashing stage of the handwringing/handwashing cycle in capital punishment practice almost inexorably comes about.

The long procrastinations and multi-stage spectacles preceding executions then start to be viewed as both a wasteful drain on scarce court resources and a painful symptom of weakness in judges' staunch resolve to make the threat of capital punishment real by actually killing people.<sup>219</sup> So, by either legislative directive or judicial self-denying ordinance, the courts are given the task of defending themselves against the claims of condemned inmates. This now becomes their focus, instead of defending condemned inmates against the risks of fatal errors.<sup>220</sup>

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219. See, e.g., *Wainwright v. Spink*, 442 U.S. 901, 902 (1979) (opinion of Justice Rehnquist dissenting from the denial of a motion to vacate a stay of execution) ("I respectfully suggest that there may be a tendency on the part of individual judges or courts . . . not merely to resolve all constitutional questions fairly admitting of doubt in favor of a . . . petitioner under sentence of death, but to create or assume such doubts where in fact there are none."); *Coleman v. Balkcom*, 451 U.S. 949, 956, 957 - 958 (1981) (opinion of Justice Rehnquist, dissenting from the denial of certiorari) (This "case . . . reflects the increasing tendency to postpone or delay the enforcement of . . . constitutionally valid statutes. . . . ¶ [T]hroughout this exhaustive appeal process, any single judge having jurisdiction over the case may of course stay the execution of the penalty pending further review. . . . Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error. . . . ¶ Although this Court has determined that capital punishment statutes do not violate the Constitution . . . , and although 30-odd States have enacted such statutes, apparently in the belief that they constitute sound social policy, the existence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet virtually nothing happens except endlessly drawn out legal proceedings. . . ."); Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARVARD LAW REVIEW 1035 (1989), at 1035 ("The Supreme Court has made clear that death is a constitutionally valid sanction for some offenders, and a clear majority of citizens favors its use. Yet capital punishment remains controversial. Because death is an irreversible punishment, courts have developed standards to ensure accurate and evenhanded imposition of capital sentences. But our present system of multi-layered appeals has led to excessively repetitious litigation and years of delay between sentencing and execution. This delay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system."); *Stephens v. Kemp*, 464 U.S. 1027, 1032 (1983) (opinion of Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, dissenting from an order staying an execution) ("This is a contest over the application of capital punishment - a punishment repeatedly declared to be constitutional by this Court. . . . Once again, . . . a typically 'last minute' flurry of activity is resulting in additional delay of the imposition [*sic*] of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow.").

220. Consider the suite from *McCleskey v. Zant*, 499 U.S. 467 (1991), through *Sawyer v. Whitley*, 505 U.S. 333 (1992), to *Schlup v. Delo*, 513 U.S. 298 (1995), to the Antiterrorism and Effective Death Penalty Act of 1996, amending 28 U.S.C. § 2244(b)(2), to *Felker v. Turpin*, 518 U.S. 651 (1996). In *McCleskey*, the Supreme Court stressed the *desiderata* of "finality" (e.g., 499 U.S. at 490 - 491) and husbanding "scarce federal judicial resources" (*id.* at 491) in refusing to permit consideration of the merits of a condemned inmate's second federal habeas corpus petition, which had raised a newly-discovered claim that unconstitutional, clandestine police procedures were used to obtain the evidence on which he stood convicted. Whether or not this claim was valid legally and factually, the Court held that it would be an "abuse of the writ" of habeas corpus to entertain the claim on a second petition, because *McCleskey's* lawyers could have discerned a ground for investigating it and raising it in their first petition but did not. The *McCleskey* opinion

We appreciate that this is a dreadful thing to say. But it must be said because it is the lesson of history that our children's children will read if courts accept a regime of capital punishment without facing up to the reality that they are thereby putting themselves in thrall to its corrosive, all-corrupting influence. Not because of any failings on the part of individual judges, but because of this pervasive corrupting influence, a human being like Gary Graham will sooner or later be stuck on a gurney and shunted into oblivion despite abundant evidence of his factual innocence,<sup>221</sup> with no judicial hearing on the merits of the largest part of this evidence but, rather, with elaborate exegeses of the subtle doctrines that preclude the courts from reaching the merits, simply because much of the evidence emerged after the innocent man's conviction.<sup>222</sup> Insensibly, insensately, and with all good intentions, a death-sentencing system in the end comes down to judges spending more time and energy wrestling with rules about

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left open the possibility that an "abused" claim of this sort might be entertained under certain circumstances to avert a "miscarriage of justice." But in *Sawyer* the Court held that a death-sentenced prisoner cannot establish a "miscarriage of justice" simply by showing that a constitutional violation prejudiced him in "the ultimate discretionary decision between the death penalty and life imprisonment" (505 U.S. at 343); rather, s/he must "show by clear and convincing evidence that but for constitutional error . . . , no reasonable juror would have found him [or her] eligible for the death penalty under [the applicable state] . . . law" (*id.* at 350). *Schlup* held that the restrictive rule of *Sawyer* did not apply to belatedly discovered evidence of *innocence of the crime* – i.e., classic "wrong man" error of the sort we discussed in text accompanying 179 - 191 *supra*. But then the 1996 statute did away with *Schlup* and extended the *Sawyer* rule to "wrong man" cases of innocence as well. In *Felker*, the Court faced various separation-of-powers challenges to a related court-closing provision in the statute; it upheld Congress's power to curb one set of judicial remedies for an allegedly innocent death-sentenced inmate, on the ground that Congress had not curbed *another* set of potentially available judicial remedies; then it effectively served notice that, in administering the *other* set of remedies, the Court itself would impose on itself the same curbs that Congress had imposed on the first set of remedies – thus putting the curbs into effect whether Congress could constitutionally enact them or not.

Or consider *Herrera v. Collins*, 506 U.S. 390 (1993), and *Jacobs v. Scott*, 513 U.S. 1067 (1995) (per curiam). In *Herrera*, the Court held that there is no federal constitutional rule against a State's executing a condemned inmate who seeks but is denied any judicial forum to prove on the basis of after-discovered evidence that he is actually innocent of the crime for which he is being put to death. This result was insulated from an appearance of undue harshness by the reservation that an exception to it might be recognized in a case in which a condemned inmate made an "extraordinarily high" threshold showing of actual innocence. 506 U.S. at 417. Then in *Jacobs* the Court refused to stay the execution of a man convicted of murder on the basis of a confession which the prosecution later conceded to be false and branded as a fabrication after the prosecutor had "changed [his] . . . mind about what actually happened" and prosecuted someone else as the murderer. 513 U.S. at 1068 (opinion of Justice Stevens, dissenting from the denial of a stay). A majority of the Court saw no reason to explain this decision, pursuant to which Jesse DeWayne Jacobs was put to death two days later. See "Texas Carries Out a Much-Disputed Execution," *New York Times*, January 5, 1995, p. A16.

221. Concerning the evidence at the time of Graham's execution, see, e.g., Amy Dorsett & Kate Hunger, "Capital Questions: As Execution Date Nears, Proof of Houston Man's Guilt in Slaying Hinges on a Single Witness," *San Antonio Express-News*, June 11, 2000, p. 1A [record # 493771]; Julian Borger, "Will Bush Heed a Cry From Death Row?," *The Guardian* [U.K.], June 8, 2000, online at <http://www.guardianunlimited.co.uk/international/story/0,3604,329322,00.html>.

222. See *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999).

why they *cannot* consider condemned inmates' claims of error than they spend adjudicating the justice of those claims.<sup>223</sup>

The risk of executing innocent people accordingly increases.<sup>224</sup> And if judges are concerned to reduce that risk, there may well occur, at some point, another abreaction to the reaction against thoroughgoing, meticulous review of death-row inmates' claims of error – another swing in the handwringing/handwashing cycle. But there is no way out of the cycle, because there can be no comfort either in accepting any significant number of erroneous extinctions of

223. See, e.g., Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 UNIVERSITY OF CHICAGO LEGAL FORUM 315, at 316 - 317 ("Federal habeas litigation is now overwhelmingly concerned with the procedural posture of an inmate's constitutional claims rather than with the merits of those claims."); Stephen Reinhardt, *The Anatomy of an Execution: Fairness v. "Process,"* 74 NEW YORK UNIVERSITY LAW REVIEW 313 (1999), at 317 - 319; Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in AUSTIN SARAT, ed., *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 148 (1999).

224. While advances in DNA technology have resulted in the exposure of a number of erroneous convictions in individual death cases, see, e.g., SCHECK, NEUFELD & DWYER, note 192 *supra*, DNA testing cannot provide a *general* safeguard against even "wrong man" errors in capital prosecutions. DNA testing can come into play only in the small subset of cases in which biological material from the perpetrator is found at the crime scene or biological material from the victim is found on a suspect. See, e.g., *Prepared Statement of Prof. Barry C. Scheck, Co-Director, Innocence Project, Benjamin N. Cardozo School of Law; Commissioner, NY State Forensic Science Commission; Commissioner, NJ Commission on the Future of DNA Evidence; Co-Author, Actual Innocence, Before the Senate Judiciary Committee*, FEDERAL NEWS SERVICE, June 13, 2000 ("most homicides do not involve biological evidence that can be determinative of guilt or innocence"); Edward Lazarus, "The Limits of DNA Justice," *Washington Post*, June 16, 2000, p. A-29 ("the universe of cases where DNA testing can provide such magic-bullet results is very small: basically, only rape or rape-murder cases, in which the exchange of genetic material necessarily occurs"). DNA testing, like all technologies, is subject to an array of failings, from faulty specimen handling to wrong interpretation of the results. See, e.g., Barry C. Scheck, *DNA and Daubert*, 15 CARDOZO LAW REVIEW 959 (1994); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VANDERBILT LAW REVIEW 791 (1991), at 795 - 797; Anthony Pearsall, *DNA Printing: The Unexamined "Witness" in Criminal Trials*, 77 CALIFORNIA LAW REVIEW 665 (1989), at 670 - 676. And technically untrained jurors and judges are not well positioned to resolve disputes about these failings. In short, today's DNA technology is catching and correcting a few of yesterday's mistaken capital convictions; tomorrow, certainly, society will have still more reliable and refined technologies; step by step, our accuracy in determining guilt in a broader range of cases is increasing. But this very fact emphasizes the risks of error that we took before the latest of our past improvements and the only slightly lessened risks of error that remain before we make improvements yet to come. As then-Harvard-law-professor Felix Frankfurter noted in his sober study of the Sacco-Vanzetti case: "grave injustices, as a matter of fact, do arise even under the most civilized systems of law" because "[a]ll systems of law . . . are administered through men, and therefore may occasionally disclose the frailties of men." FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927), at 108. (Frankfurter spoke "from considerable experience as a prosecuting officer, whose special task for a time it was to sustain on appeal convictions for the Government." *Id.* at 104.) Hence the continuing relevance of the insight of Count Marquis de Lafayette, that "[t]ill the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the penalty of death." Charles Lucas, *Recueil des Débats des Assemblées Législatives de la France sur la Question de la Peine de Mort*, pt. 2, at 42 (1831), quoted and translated by Charles C. Burleigh, in PHILIP ENGLISH MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787 - 1975* (1976), at 98.



human life or in paying the extraordinary costs necessary to avoid them.<sup>225</sup> So, damned if it will and damned if it won't, the legal machinery for enforcing the death penalty is forever fated to veer erratically between an indecisive procrastination and a peevish impatience,<sup>226</sup> both of which exacerbate the horror that has bred them.

3. *Between Committing Mass Slaughter and Condoning  
A Purposeless, Fitful Trickle of Blood-Lettings*

Perhaps the single most striking feature of the penalty of death in the United States and in the world today is the extent to which its use is avoided even where it is legally authorized. No State in this country and no nation in the world except perhaps China is any longer willing to apply the penalty regularly in any class or subclass of cases that are similarly situated with respect to the supposed justifications for capital punishment.<sup>227</sup> To the contrary, wherever the death penalty continues to be used at all,<sup>228</sup> its legal and its public acceptance are

225. See Jack Greenberg, *Capital Punishment as a System*, 91 YALE LAW JOURNAL 908 (1982); Franklin E. Zimring, note 127 *supra*. Zimring's conclusion is inescapable: "The death penalty in the United States can only be principled if it is not efficient; it can only be expeditious if it is morally and procedurally arbitrary." *Id.* at 147.

226. See, e.g., Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61/4 LAW & CONTEMPORARY PROBLEMS 171 (Autumn 1998), at 191:

"I suspect that we as a society may be working out our ambivalence about capital punishment in the way we often wrestle with deeply troubling and divisive substantive issues: by submerging our anguish in a demand for satisfying process. At least, then, we can be sure that if anyone does suffer the death penalty, he or she will be guilty of a capital crime and eligible for a capital sentence under applicable law. It may be that the proponents of the death penalty perceive this, too, and thus redouble their criticisms of habeas for the very reason that careful federal adjudication of capital cases may mask some lack of resolve where executions are concerned."

227. From a global perspective, 86 countries have abolished the death penalty by law (73 for all crimes, 13 more for all but exceptional cases such as military crimes); 22 countries that retain the death penalty on the books have not used it for more than ten years; 87 countries have used it within the past ten years, but only 31 of them executed anyone in 1999. See Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries*, ACT 50/05/00, April 2000; Amnesty International, *Death Sentences and Executions in 1999*, ACT 50/06/00, April 2000, both online at <<http://www.amnesty.org>> (visited October 6, 2000). In 1999, Amnesty International knew of a total of 1813 executions throughout the entire world, 1077 of them in China. *Ibid.* During that year, 85% of all known executions were carried out in China, Iran, Saudi Arabia, the Democratic Republic of Congo, and the United States. See also UNITED NATIONS, REPORT OF THE SECRETARY GENERAL, STATUS OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS: QUESTION OF THE DEATH PENALTY, U.N. ESCOR, Committee on Human Rights, 54th Session, Item 13 (1998) [U.N. Doc. E/CN.4/1998/82], at 10.

228. A majority of countries in the world have abolished the death penalty by law or abandoned it entirely in practice. See the preceding footnote and, e.g., WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed. 1997); *State v. Makwanyane*, 1995 (3) S.A.L.R. 391 (C.C.) (judgment of President Chaskalson). We agree with *amicus* Bar Association of the City of New York that the norms of the international community should command the respect of this Court in interpreting the New York Constitution. See, e.g., Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TULANE LAW REVIEW 251 (1998). But, to spare this Court redundant

obtained by sparse and spotty application – by imposing it in only a fraction of the cases in which it is potentially applicable.<sup>229</sup>

This extreme reluctance to resort to the penalty bespeaks the civilized world's repudiation of it. Surely there can be no other criminal penalty, no other legal sanction of any sort, which people responsible for enforcing the law are so widely unwilling to enforce. And a penalty that has proved too barbaric for any country in the world to accept even-handedly and with a fair amount of rational consistency can have no claim to acceptance at all under a constitution like New York's, with its prohibitions against the arbitrary and discriminatory infliction of cruel punishments.

But that is only half the point. The other half is that when the death penalty is applied with such infrequency and inconsistency, its supposed justifications themselves evaporate. They become visible hypocrisies, and the few condemned prisoners who are put to death now die in the name of theories that their executioners cannot rationally maintain.

Consider the five theoretical justifications that a contemporary industrial society<sup>230</sup> could conceivably imagine for punishing its murderers with death rather than life imprisonment: retribution, denunciation, incapacitation, cost efficiency, and deterrent efficacy.<sup>231</sup>

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briefing, we leave detailed discussion of the international picture to the City Bar.

229. BALDUS, WOODWORTH & PULASKI, note 151 *supra*, at 229 - 239; David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL LAW REVIEW 1582 (1996), at 1589. For example, see Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 NEW YORK UNIVERSITY LAW REVIEW 1283 (1997), at 1326 - 1335 (California study, 1988 - 1992: death sentences were imposed in 11.4% of cases of conviction of death-eligible murder; numerous additional cases were identified in which there was sufficient evidence for a conviction of death-eligible murder but the defendant was convicted of a lesser degree following a guilty plea or trial); BALDUS, WOODWORTH & PULASKI, note 151 *supra*, at 233, 243 - 244 (Colorado study, 1979 - 1984: 4 death sentences were imposed in 179 cases of death-eligible murder); Murphy, note 147 *supra*, at 91 (Cook County, Illinois study, 1977 - 1980: 18 death sentences were imposed in 230 cases of conviction of death-eligible murder); Keil & Vito, note 147 *supra*, at 22 - 23 (Kentucky study, 1976-1991: 43 death sentences were imposed in 577 cases of death-eligible murder); Bienen, Weiner, Denno, Allison, & Mills, note 147 *supra*, at 159 - 160, 163 (New Jersey study, 1982 - mid-1988: 25 death sentences were imposed in 404 cases of death-eligible murder); Baldus, *supra*, at 1599 [table 3] (New Jersey data, 1983 - 1995: 43 death sentences were imposed in 341 cases of conviction of death-eligible murder); Paternoster & Kazyaka, note 147 *supra*, at 278 - 279, 323 (South Carolina study, 1977 - 1981: 26 death sentences were imposed in 302 cases of death-eligible felony-murder). These are accounts of death sentences *imposed*; far fewer are upheld after appellate and postconviction reviews, see LIEBMAN, FAGAN & WEST, note 209 *supra* (reversible error found by courts in 68% of cases of capital sentences between 1973 and 1995); and fewer still are executed. See, e.g., William C. Bailey, *Murder, Capital Punishment, and Television: Execution Publicity and Homicide Rates*, 55 AMERICAN SOCIOLOGICAL REVIEW 628 (1990), at 632 - 633. For a summary of the international figures, see note 227 *supra*.

230. We put aside the justifications for capital punishment in a society that lacks the technological ability or economic base to support facilities for long-term imprisonment. See Hugo Adam Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH LAW REVIEW 201, at 232.

231. In upholding capital punishment against federal Eighth Amendment challenges, the lead

(a) *Retribution* is the term commonly used to designate one or more of a connected set of ideas: that society should retaliate in kind (or at least in proportion) to the terrible crime of murder; that death is the just desert of those who commit this crime (or of some subset of murders); and/or that by exacting capital punishment, society forestalls private vengeance – prevents its aggrieved, angry citizens from “taking the law into their own hands.” This Court has said that retribution alone is not a goal which can sustain harsh penal laws against challenge under the Cruel and Unusual Punishments Clause of Article I, § 5.<sup>232</sup> But even if it were, retribution obviously could not justify the infliction of death upon a small subset of murderers for crimes that are indistinguishable from those for which most murderers are sentenced to life imprisonment<sup>233</sup> – or that are distinguishable from life-sentenced murders only by idiosyncratic, case-specific

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opinion in *Gregg v. Georgia* identified “retribution and deterrence” as the “two principal social purposes” that a legislature could find served by punishing offenders with death instead of life imprisonment. *Gregg*, 428 U.S. at 183 (opinion of Justices Stewart, Powell, and Stevens). The opinion noted in a footnote that “incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future” is “[a]nother purpose that has been discussed.” *Id.* at n.28. These three justifications are the ones most commonly advanced to support the death penalty (see, e.g., Jacques Barzun, *In Favor of Capital Punishment*, 31/2 THE AMERICAN SCHOLAR 181 (1962); WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1991); Walter Berns, *Defending the Death Penalty*, 26 CRIME & DELINQUENCY 503 (1980); Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, in JAMES R. ACKER, ROBERT M. BOHM & CHARLES S. LANIER, eds., AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 149 (1998); Ernest van den Haag, *The Death Penalty Once More*, 18 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 957 (1985)); we add two others that are sometimes invoked as well.

232. *Broadie*, 37 N.Y.2d at 114, citing *People v. Oliver*, 1 N.Y.2d 152, 160 (1956). The reason for this rule is obvious. Unless there is some acceptable calculus by which the justness of a punishment can be *measured* against the evil of a crime, the retributive justification would defy all limitation and make the constitutional guarantee against cruel and unusual punishments a nullity. The clause cannot possibly mean that the government is permitted to do anything a lynch mob or a murder victim’s unreconciled survivors would do to the murderer, in order to forestall them from doing it. The principle of *lex talionis* has long since ceased to provide a limiting calculus: no contemporary system of law operates on that principle; all recognize that “it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft.” CAMUS, note 215 *supra*, at 199. See also STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH (1987), at 73 - 75; RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA (1991), at 256 - 257; Marvin E. Wolfgang, *We Do Not Deserve to Kill*, 13 THOMAS M. COOLEY LAW REVIEW 977 (1996), at 983. So the only available limiting principle is the general one of proportionality. And while this calls for assigning the most severe punishment recognized by law to the most egregious offenses, it says nothing about what the most severe punishment recognized by law should be. NATHANSON, *supra*, at 76 - 77; PATERNOSTER, *supra*, at 258 - 259.

233. The existence of a life-without-parole sentence as an alternative to death – and the federal constitutional requirement of *Woodson* that some alternative to a death sentence be made available (see text at notes 135 - 136 *supra*) – “tacitly assume that long-term incarceration is retributive enough.” Hugo Adam Bedau, *Recidivism, Parole, and Deterrence*, in BEDAU, note 135 *supra*, 173, at 174. And when a death sentence is ruled out, the infliction of a sentence of lifelong incarceration “is no less an expression of society’s outrage . . . and its resolve to punish maximally, than a mandatory death sentence.” *People v. Smith*, 63 N.Y.2d 41, 77 - 78 (1984).

factual details that strike a particular prosecutor and jury as incrementally increasing the ugliness of an already very ugly crime.<sup>234</sup>

(b) *Denunciation* has to do with branding the most heinous of crimes with the horror that society feels toward them. This justification for capital punishment supposes that the pronouncement of a death sentence satisfies an expressive or symbolic need to separate the worst murders from the mass of less heinous crimes and to inscribe them with a marker of unique atrocity.<sup>235</sup> Like retribution, the justification depends upon assurance that the system for selecting those who will be put to death is capable of (i) sorting the worst murders from the others, (ii) consistently imposing capital sentences for the worst murders, and (iii) consistently avoiding capital sentences for the others. No one familiar with the realities could believe that American capital-sentencing systems do this or are capable of doing it.<sup>236</sup> So, again like retribution, denunciation is a theory wholly out of touch with "the capital punishment system as it is now administered."<sup>237</sup>

(c) *Incapacitation*. Incapacitation seems to be no part of the rationale for death sentences under New York's 1995 law, since that law provides alternative punishments of death, life imprisonment without parole, or life imprisonment for first-degree murder and does not make the choice between these sentences turn on any inquiry into a defendant's likely future dangerousness under conditions of confinement (or otherwise). In any event, a penal system that (i) maintains large maximum-security prisons, (ii) relies on lifelong incarceration in them to protect the public from exposure to the overwhelming majority of persons convicted of first-degree murder, and yet (iii) plucks out a few such persons to be put to death without turning their selection on the question whether they pose any more-than-ordinary risk of recidivism,<sup>238</sup> cannot plausibly invoke incapacitation as a reason for these random, rare blood-lettings.

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234. At the least, a retributive justification for punishment would necessarily call for the principled application of that punishment to all similar crimes and exclude a penalty "as unjust if its actual imposition depended on such factors as race, economic status, ability to acquire adequate legal representation, or other facts which have nothing to do with a person's culpability." NATHANSON, note 232 *supra*, at 47; see Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICHIGAN LAW REVIEW 1177 (1981), at 1181 - 1185. Thus, the arbitrary selectivity inevitable in the administration of the death penalty under contemporary conditions (see Parts II.A 1 & 2 *supra*) makes any retributive justification of capital punishment untenable. The short of it is that while the lawmakers may believe that society's worst murderers deserve death, the only systems that our society can provide for putting that belief into practice fall far short of being able to identify the worst murderers in an unbiased, reliable and principled manner. NATHANSON, note 232 *supra*, at 51 - 58.

235. Walter Berns's writings cited in note 231 *supra* elaborate this theory. See also David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLORIDA LAW REVIEW 1 (1998), at 32 - 34.

236. See Parts II.A 1 & 2 *supra*.

237. Greenberg, note 225 *supra*, at 927.

238. Follow-up research on death-sentenced inmates who were spared from execution shows that as a group they are no more aggressive, violent, or dangerous in prison than the average inmate incarcerated for a noncapital offense. James W. Marquart & Jonathan R. Sorensen, *A*

(d) *Cost efficiency.* Even if the annihilation of human life could be justified on grounds of fiscal economy as a matter of constitutional theory,<sup>239</sup> that theory would not fit the facts. For the fact of the matter is that once long-term incarceration becomes the *ordinary* punishment for a society's most serious criminal offenses – so that facilities are in place for regularly trying, convicting, sentencing, and incarcerating the perpetrators of such offenses in large numbers – the cost of conducting the *extraordinary* proceedings necessary to secure and execute a sentence of death in a smattering of cases vastly exceeds the cost of processing those few cases in the same way as all the others, including the cost of imprisoning convicted offenders for the term of their natural lives.<sup>240</sup>

(e) *Deterrence.* The question whether the death penalty deters the commission of crimes for which it is authorized or inflicted is one of the most exhaustively studied factual issues in social science. If the penalty had any appreciable net deterrent effect, that effect would have shown up repeatedly in the numerous investigations that have been conducted.<sup>241</sup> Instead, study after study after study has failed to find any evidence to support the hypothesis of deterrence.<sup>242</sup> A literal handful of studies that have claimed to discern some net

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*National Study of the Furman-Commuted Inmates: Assessing the Threat to Society From Capital Offenders*, 23 LOYOLA OF LOS ANGELES LAW REVIEW 5 (1989); Jon Sorenson & Robert D. Wrinkle, *No Hope for Parole: Disciplinary Infractions Among Death-Sentenced and Life-Without-Parole Inmates*, 23/4 CRIMINAL JUSTICE & BEHAVIOR 542 (1996); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA OF LOS ANGELES LAW REVIEW 59 (1989), at 124; Hugo A. Bedau, *Death Sentences in New Jersey 1907 - 1960*, 19 RUTGERS LAW REVIEW 1 (1964), at 46 - 47. This conclusion is consistent with the observations of experienced corrections officials. See GREAT BRITAIN, ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949 - 1953, REPORT (H.M.S.O. 1953) [Cmd. 8932], at 489 (quoting the testimony of Sanford Bates, retired Director of the Federal Bureau of Prisons); LEWIS E. LAWES, *LIFE AND DEATH IN SING SING* (1928), at 150 - 153.

239. The theory is hard to imagine, since it would extend to killing all long-term inmates – not just those convicted of first-degree murder – if their keep was thought too expensive.

240. See note 218 *supra*.

241. Lempert, note 234 *supra*, at 1205 - 1206, 1222 - 1224. See also Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUPREME COURT REVIEW 317 (1976), at 337 - 338, concluding: "This then is the proper summary of the evidence on the deterrent effect of the death penalty. If there is one, it can only be minute, since not one of the many research approaches – from the simplest to the most sophisticated – was able to find it." As David Baldus has noted: "[T]he research is of very high quality, and there is much of it. It employs alternative research designs, and has been widely replicated in many states over many different years; and there is a nearly complete consensus on the findings of this body of research – with the notable exceptions of Isaac Ehrlich and Stephen Layson" – namely: "that if there is any marginal deterrent effect from the death penalty, it is beyond our capacity to measure and document." David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 INDIANA LAW JOURNAL 1033 (1995), at 1034. (Concerning Ehrlich and his student, Layson, see note 243 *infra*; concerning the consensus in the scientific community that capital punishment has no measurable deterrent effect, see note 242 *infra* and Radelet & Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (1996).

242. See, e.g., Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 UNIVERSITY OF PITTSBURGH LAW REVIEW 321 (1999) (summarizing previous studies by several researchers and presenting new data); Dane Archer, Rosemary Gartner & Marc Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence*

deterrent effect have been thoroughly discredited in the research community on account of their methodological ineptitude and failure to stand up under attempted replication.<sup>243</sup>

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*Hypothesis*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 991 (1983) (summarizing previous studies by several researchers and presenting new data); William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment and Deterrence: A Review of the Evidence and an Examination of Police Killings*, 50/2 JOURNAL OF SOCIAL ISSUES 53 (1994) (summarizing previous studies by several researchers and presenting new data; the bibliography at 72 - 74 includes references to the previous studies of these authors, several of which are generally recognized as classics: e.g., Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 JOURNAL OF SOCIAL FORCES 774 (1988); William C. Bailey, *The Deterrent Effect of Capital Punishment During the 1950s*, 13/2 SUICIDE AND LIFE-THREATENING BEHAVIOR 95 (1983); William C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 827 (1983); William C. Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 SOUTHERN CALIFORNIA LAW REVIEW 743 (1979); William C. Bailey, *Deterrence and the Death Penalty for Murder in Utah: A Time-Series Analysis*, 5 JOURNAL OF CONTEMPORARY LAW 1 (1978)); William J. Boyes & Lee R. McPheters, *Capital Punishment as a Deterrent to Violent Crime: Cross Section Evidence*, 6 JOURNAL OF BEHAVIORAL ECONOMICS 67 (1977); Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 927 (1983), and Brian E. Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINNESOTA LAW REVIEW 743 (1977); Gary Kleck, *Capital Punishment, Gun Ownership, and Homicide*, 84/4 AMERICAN JOURNAL OF SOCIOLOGY 882 (1979); Stephen J. Knorr, *Comment: Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 235 (1979); Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STANFORD LAW REVIEW 61 (1975); KILMAN SHIN, DEATH PENALTY AND CRIME: EMPIRICAL STUDIES (1978); Zeisel, note 241 *supra*, at 336 - 337. Earlier generations of studies are summarized in GERALD GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE (1956); THORSTEN SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tentative Draft No. 9 (May 8, 1959); FRANKLIN ZIMRING, PERSPECTIVES ON DETERRENCE (National Institute of Mental Health, January 1971). For comprehensive reviews of the literature, see Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in JAMES R. ACKER, ROBERT M. BOHM & CHARLES S. LANIER, eds., AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 157 (1998); ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (1989), at 117 - 148; FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986); Lempert, note 234 *supra*, at 1196 - 1224; Gordon P. Waldo, *The Death Penalty and Deterrence: A Review of Recent Research*, in ISRAEL L. BARAK-GLANTZ & C. RONALD HUFF, THE MAD, THE BAD, AND THE DIFFERENT: ESSAYS IN HONOR OF SIMON DINITZ 169 (1981); David C. Baldus & James W. L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE LAW JOURNAL 170 (1975).

243. By the early 1970's, there had been fifty years of published studies dealing with the deterrent efficacy of the death penalty in the United States, most notably the early investigations of Bye, Sutherland, Kirkpatrick, and Vold, and the later investigations of Sellin, Schuessler, and Savitz. "Based on this evidence, most criminologists came to agree . . . that 'the presence of the death penalty in law and practice has no discernible effect as a deterrent to murder.'" Peterson & Bailey, in ACKER, BOHM & LANIER, note 242 *supra*, at 159. See also, e.g., Norval Morris & Franklin Zimring, *Deterrence and Corrections*, 381 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 137 (1969), at 143. In 1975, just in time to be featured in the briefs supporting the death penalty in cases pending before the United States Supreme Court at that time and in the following year, Isaac Ehrlich published an econometric study purporting to find a deterrent effect: Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMERICAN ECONOMIC REVIEW 397 (1975). This study has since been completely

discredited (see, e.g., Samuel Cameron, *A Review of the Econometric Evidence on the Effects of Capital Punishment*, 23/1-2 JOURNAL OF SOCIO-ECONOMICS 197 (1994); William C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 827 (1983), at 829 & n.17; Richard M. McGahey, *Dr. Ehrlich's Magic Bullet: Economic Theory, Econometrics, and the Death Penalty*, 26 CRIME & DELINQUENCY 485 (1980); Lawrence R. Klein, Brian Forst & Victor Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in ALFRED BLUMSTEIN, JACQUELINE COHEN & DANIEL NAGIN, eds., *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 336 (1978); Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AMERICAN ECONOMIC REVIEW 445 (1977); Zeisel, note 241 *supra*, at 333 - 336) as "flawed conceptually and methodologically" (Lempert, note 234 *supra*, at 1215) – its central conclusion "strictly a statistical artifact" (William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE LAW JOURNAL 187 (1975), at 200) that failed to survive critical examination or the numerous attempts made to replicate it (see the works collected in James Alan Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOYOLA OF LOS ANGELES LAW REVIEW 29 (1989), at 29 - 30 n.3). The Klein-Forst-Filatov review of Ehrlich was commissioned by the Panel on Research on Deterrent and Incapacitative Effects, National Research Council of the National Academy of Sciences; and after considering its strongly negative evaluation of Ehrlich's econometric methodology, the Panel concluded that "research on the deterrent effects of capital sanctions is not likely to provide results that will or should have much influence on policy makers." BLUMSTEIN, COHEN & NAGIN, *supra*, at 12. See Baldus, note 241 *supra*, at 1035. A subsequent paper by Ehrlich (Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 JOURNAL OF POLITICAL ECONOMY 741 (1977)) was similarly flawed (see, e.g., Stephen S. Brier & Stephen E. Feinberg, *Recent Economic Modeling of Crime and Punishment*, 4/2 EVALUATION REVIEW 147 (1980); McGahey, *supra*, at 496 - 497; Lempert, note 234 *supra*, at 1218 - 1221). Ehrlich's most recent study (Isaac Ehrlich & Zhiqiang Liu, *Sensitivity Analyses of the Deterrence Hypothesis: Let's Keep the Econ in Econometrics*, 42 JOURNAL OF LAW & ECONOMICS 455 (1999)) is largely aimed at rehabilitating the role of a *a priori* theory in guiding sensitivity analyses of model specifications. Responding to criticisms that econometric techniques for studying deterrence (and other issues) allow too much room for ideological biases and groundless assumptions to enter into the selection of the explanatory variables included in the regression (see Edward E. Leamer, *Let's Take the Con Out of Econometrics*, 73 AMERICAN ECONOMIC REVIEW 31 (1983); Walter S. McManus, *Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs*, 93 JOURNAL OF POLITICAL ECONOMY 417 (1985)), Ehrlich's 1999 paper undertakes to develop a theory-grounded alternative to the critics' approach to model specification. The result leaves Ehrlich inconclusive on the issue of deterrence: "Whether the deterrence hypothesis is valid has clearly not been proven by our analysis because we are able to implement only partially the market model underlying this theory" *Id.* at 486. A few econometric studies that followed Ehrlich's early lead and reported findings of deterrence were marred by the same sorts of failings and have not been viewed as credible in the research community. See Michael Sesnowitz & David McKee, *On the Deterrent Effect of Capital Punishment*, 6/1-2 JOURNAL OF BEHAVIORAL ECONOMICS 217 (1977), and James A. Fox, *The Identification and Estimation of Deterrence: An Evaluation of Yunker's Model*, 6/1-2 JOURNAL OF BEHAVIORAL ECONOMICS 225 (1977), at 232, 237 - 238, criticizing James A. Yunker, *Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence*, 5/1 JOURNAL OF BEHAVIORAL ECONOMICS 45 (1976); see McGahey, *supra*, at 497 - 499, criticizing Dale O. Cloninger, *Deterrence and the Death Penalty: A Cross Sectional Analysis*, 6/1-2 JOURNAL OF BEHAVIORAL ECONOMICS 87 (1977); see Cameron, *supra*, at 206 - 207, and Fox & Radelet, *supra*, criticizing Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SOUTHERN ECONOMIC JOURNAL 68 (1985); and see William C. Bailey & Ruth D. Peterson, *Murder and Capital Punishment: A Monthly Time-Series Analysis of Execution Publicity*, 54 AMERICAN SOCIOLOGICAL REVIEW 722 (1989), criticizing Steven Stack, *Publicized Executions and Homicide, 1950 - 1980*, 52 AMERICAN SOCIOLOGICAL REVIEW 532 (1987).

This does not mean, certainly, that no single would-be murderer has ever been turned from his or her purpose by the calculation that, if apprehended, brought to court, and convicted, he or she would be exposed to a risk of death which was unacceptable compared to a risk of long-term imprisonment that would have been acceptable on the same chain of assumptions. Perhaps there are such cases, and the reason they do not affect the general murder rate is that they are relatively few<sup>244</sup> and are offset by the number of murders that the death penalty affirmatively incites.<sup>245</sup> The important point is simply that – as the British Royal Commission on Capital Punishment concluded soberly a half-century ago – analysis of the issue of deterrence should not proceed on the basis of “exaggerated estimates of the uniquely deterrent force of the death penalty.”<sup>246</sup> Most murders by far, even when they are intentional, are not the product of a finely calibrated cost-benefit evaluation;<sup>247</sup> and the strongest claim that can be made for the theory of capital punishment as a deterrent is that there are some subcategories of intentional murder, “carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.”<sup>248</sup>

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244. See Daniel Glaser, *Capital Punishment – Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 TOLEDO LAW REVIEW 317 (1979), at 324; McGahey, note 243 *supra*, at 501.

245. See, e.g., Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 927 (1983), at 938 - 939. The death penalty can incite murders by suicidal types like Gary Gilmore (see Haney, note 165 *supra*, at 599; and see generally West, note 216 *supra*, at 695 - 697; George F. Solomon, *Capital Punishment as Suicide and as Murder*, 45/4 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 701 (1975); Bernard L. Diamond, *Murder and the Death Penalty: A Case Report*, 45/4 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 712 (1975)), by thrill-seekers drawn to play the high-stakes game of deadly desperado (see Forst, *supra*, at 940 n.48; and see generally Karl Taro Greenfeld, *Life on the Edge: Is Everyday Life Too Dull? Why Else Would Americans Seek Risk as Never Before?*, 154/10 TIME MAGAZINE, September 6, 1999), and by other mentally deranged individuals who are drawn to death like moths to a flame (see William J. Bowers, *The Effect of Executions is Brutalization, Not Deterrence*, in KENNETH C. HAAS & JAMES C. INCIARDI, CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 49 (1988), at 56). Gilmore had long been obsessed with Goya's painting of an execution by firing squad (the famous *Third of May, 1808*, in the Prado) and drew repeated sketches of it. He traveled from Michigan (an abolitionist State) to Utah (the only State in the nation that conducts executions by firing squad), and committed a capital murder there, leaving unmistakable evidence of his identity at the crime scene. He subsequently elected to forgo appeals from his death sentence and be executed voluntarily.

246. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949 - 1953, note 238 *supra*, at 24.

247. See DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH* ROW (1995), at 209, and the scientific literature cited in the following footnote.

248. *Gregg*, 428 U.S. at 186 (opinion of Justices Stewart, Powell, and Stevens). The text of the lead *Gregg* opinion assumes that there are “many” such cases, although it also acknowledges that there are other subcategories of “murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect” (*id.* at 185) and it says in a footnote that “[w]e have been shown no statistics breaking down the total number of murders into the categories described above” (*id.* at 186 n.34). Most researchers are of the view that the circumstance of rational choice which is the precondition of any theory of deterrence in fact “applies at best only to a small subset of homicides.” Jon K. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE LAW JOURNAL 359 (1976), at 363; see, e.g., MARVIN E. WOLFGANG & FRANCO



But if this is so, the calculus cannot fail to be affected by the infrequency with which contemporary American society is actually willing to execute its convicted murders. "A hypothetical killer who calculates his [or her] chances of being executed before committing homicide [today] must calculate that he or she is quite unlikely to be put to death."<sup>249</sup> Even making the most optimistic assumptions about the death penalty's deterrent powers (assumptions altogether unsustainable on the scientific evidence), a system that can bring itself to execute only occasional scapegoats "delivers little in the way of deterrence."<sup>250</sup> The implication, as Professor William Bowers has written,

"is that for the death penalty to have unique deterrent effects [as contrasted with life imprisonment], a form of capital punishment may be required that would be objectionable to even its more ardent proponents – something more arbitrary and excessive than we have yet experienced. And, of course, such use of the death penalty would violate constitutional guarantees of due process and protections against cruel and unusual punishment, not to mention public acceptance. The irony is evident: it is not the absence of the death penalty but its presence, sufficient to be a unique deterrent, that would, in the long run, surely undermine the legal order."<sup>251</sup>

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Professor Bowers wrote these words fifteen years ago. What has since become clear from the federal constitutional experiment with capital punishment is that dithering with death *also* is a sure way to undermine the legal order. This

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FERRACUTI, THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY (1967), at 141; Lempert, note 234 *supra*, at 1193 - 1195; Archer, Gartner & Beittel, note 242 *supra*, at 995; Daniel Glaser, *The Realities of Homicide Versus the Assumptions of Economists in Assessing Capital Punishment*, 6/1-2 JOURNAL OF BEHAVIORAL ECONOMICS 243 (1977), at 254 - 257; William C. Bailey & Ruth D. Peterson, *Police Killings and Capital Punishment: The Post-Furman Period*, 25 CRIMINOLOGY 1 (1987), at 2, 22; and see DOROTHY OTNOW LEWIS, GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS (1998), at 293 ("Aggravating circumstances focus for the most part on the grotesqueness of the crime or crimes. Was the victim tortured or raped or mutilated? Was there more than one victim? . . . The gruesomeness of a murder is directly proportional to the craziness of the murderer."). The Gregg opinion further assumes that "many of the post-Furman statutes reflect . . . a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent" (*id.* at 186). This assumption has in turn failed to survive the test of the political forces it unleashed. See Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in AUSTIN SARAT, ed., THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81 (1999).

249. Greenberg, note 225 *supra*, at 927; see also Bowers, note 245 *supra*, at 51 - 52.

250. Baldus, note 229 *supra*, at 1590; see also Bailey, note 229 *supra*, at 633.

251. WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864 - 1982 (1984), at 129.

is what Justice Blackmun, after two decades of efforts to constitutionalize the death penalty, finally recognized in *Callins*.<sup>252</sup>

One begins by upholding the constitutionality of capital punishment on the assumption that various procedural safeguards – including the requirement that an appellate court “compare[ ] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate” – will cure American society’s two-hundred-year history of inflicting the death penalty arbitrarily and discriminatorily. *Gregg*, 428 U.S. at 198 (opinion of Justices Stewart, Powell, and Stevens). One then discovers that appellate proportionality review is cumbersome and so not really necessary in a capital sentencing regime. *Pulley v. Harris*, 465 U.S. 37 (1984).

One comforts oneself that one has announced constitutional rules requiring death-sentencing procedures to “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). But this is not really practicable, so one is forced to accept procedures that commit the ultimate life-or-death decision to the subjective, unguided and unreviewable judgment of particular juries. *Zant v. Stephens*, 462 U.S. 862 (1983).

Soon afterwards, one discovers that the only way to get juries willing to impose death sentences is to death-qualify them in ways that make them more conviction-prone than ordinary juries. So one proceeds to hold that this much incursion on the constitutional right to a fair trial by an impartial jury is not too great a cost to pay for capital punishment. *Lockhart v. McCree*, 476 U.S. 162 (1986).<sup>253</sup>

Later, one discovers that the only way to keep capital punishment going in the face of constitutional challenges to its racially discriminatory dispensation is to insulate it from fact-based Equal-Protection and Cruel-and-Unusual-Punishment review, despite its admitted creation of “a risk that racial considerations enter into capital sentencing determinations.”<sup>254</sup> So one proceeds to provide the necessary insulation. *McCleskey v. Kemp*, 481 U.S. 279 (1987).<sup>255</sup>

252. See text accompanying note 128 *supra*.

253. The *Lockhart* majority *explicitly* “assume[d] for purposes of this opinion that . . . ‘death-qualification’ in fact produces juries somewhat more ‘conviction-prone’ [that is, more disposed to resolve factual issues going to *guilt* – not punishment – in favor of the prosecution] than ‘non-death-qualified juries.’” 476 U.S. at 173.

254. *McCleskey*, 481 U.S. at 282 - 283.

255. Again, the *McCleskey* majority *explicitly* “assume[d that] the study [offered by McCleskey to support his claim of racial discrimination in capital sentencing] is valid statistically” and “demonstrate[s] a risk that the factor of race entered into some capital sentencing decisions.” 481 U.S. at 291 n.7. But the Court nevertheless held that a death-sentenced inmate is not entitled to obtain the judicial examination of statewide or county-wide sentencing patterns to determine whether this admitted risk has materialized in fact.

One starts by professing that “careful instructions on the law and how to apply it” will alleviate the problem of unfettered jury discretion in capital sentencing, and that “[i]t would be virtually unthinkable to follow any other course.” *Gregg*, 428 U.S. at 193 (opinion of Justices Stewart, Powell, and Stevens). But before long, one must pretend that capital sentencing instructions having all the clarity of a Rorschach blot are unambiguous and quite sufficient to control capital sentencing discretion, *Buchanan v. Angelone*, 522 U.S. 269 (1998); and then one must of course refuse to listen when a capital sentencing jury itself says that such instructions are unfathomable, *Weeks v. Angelone*, 120 S. Ct. 727 (2000).

Bit by bit, execution by execution, one comes inescapably to bend the ordinary rules of law and rationality to accommodate the penalty of death instead of demanding that the penalty of death conform to the ordinary rules. And in the end, every principle of reason and of constitutional order on which one has depended to serve as a rein against the inherent arbitrariness of capital punishment gets co-opted and perverted by the forces of unreason and disorder that capital punishment feeds on and exudes.

### B. Conclusion

*Amici* urge this Court not to embark on a course so destructive of the rule of constitutional law. Article I, §§ 5 and 11 of the New York Constitution were written to assure that the people of this State would not be subjected to penal laws so excessively harsh that they cannot be regularly, evenhandedly, and nondiscriminatorily applied without doing violence to contemporary standards of decency. America’s experience with the death penalty since these constitutional provisions were adopted demonstrates unmistakably that capital punishment can no longer be administered consistently with them. This Court should not now start to “tinker with the machinery of death”<sup>256</sup> but should hold the death penalty unconstitutional and put a clean end to it.<sup>257</sup>

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256. Justice Blackmun in *Callins*, 510 U.S. at 1145.

257. See Stewart F. Hancock, Jr., Annelle McCullough & Alycia A. Farley, *Race, Unbridled Discretion, and the State Constitutional Validity of New York’s Death Penalty Statute – Two Questions*, 59 ALBANY LAW REVIEW 1545 (1996).

## APPENDIX A

CASES OF INNOCENT AND PROBABLY INNOCENT PERSONS  
SENTENCED TO DEATH SINCE 1972

*Sources for this appendix include:*

- United States Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Staff Report, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, 103rd Congress, 2d Session (November 1994) [G.P.O., ISBN 0-16-046237-1] [hereafter, "Staff Report"]
- MICHAEL L. RADELET, HUGO A. BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) [hereafter, "Radelet"]
- Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD LAW REVIEW 21 (1987) [hereafter, "Stanford"]
- Death Penalty Information Center, Report, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (Washington, D.C., July 1997) [hereafter, "DPIC"]
- Death Penalty Information Center, *Additional Cases of Innocence* (updated March 17, 2000), online at <<http://www.deathpenaltyinfo.org/innoc.html>> (link via "Recent Cases of Innocence and Possible Innocence" to <<http://www.essential.org/dpic/dpicrecinnoc.html>>) (visited September 15, 2000) [hereafter, "ADD"]
- JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973 - 1995, online at <<http://justice.policy.net/jpreport/index.html>> (visited September 15, 2000) [hereafter, "Liebman"]<sup>1</sup>

## INVENTORY ONE:

*Death-sentenced individuals who have had their convictions set aside  
and the charges against them dropped or dismissed*

*James Creamer* (Georgia): Convicted 1973, released 1975. Murder. In the course of a post-trial investigation of the case by the *Atlanta Constitution*, it came to light that the prosecution had withheld and destroyed evidence; a

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1. *Amici* were involved in a number of the cases referenced in this appendix. Where that is so, some of the facts recounted in the capsule summaries of the cases in the cited sources have been modified – usually by fleshing out opaque or ambiguous phrasing – to conform to *amici*'s own knowledge. Similar modifications have been made in composing the descriptions of the four cases discussed in Appendix B, which counsel for *amici* have researched extensively.

witness admitted that her trial testimony was untrue; and another man confessed to the killing for which Creamer had been convicted and sentenced to death. The conviction was set aside in federal habeas corpus proceedings and the charges were then dropped. DPIC, at 12.

*Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith* (New Mexico): Convicted 1974, released 1976. Murder in the course of kidnaping, sodomy, and rape. The fact that three of “the four bikers” were from Michigan led the *Detroit News* to reinvestigate the case at a cost of between \$50,000 and \$75,000. News reporters discovered that the testimony of the prosecution’s star witness was a fabrication, concocted in collaboration with the police. Then a drifter in South Carolina stepped forward and confessed to having committed the crimes; the murder weapon and a car used in the crimes were traced to the drifter. The bikers were granted a new trial by the trial court; subsequently, a judge of the court dismissed the charges. Staff Report, at 4; Stanford, at 118; Radelet, at 55 - 57.

*Delbert Tibbs* (Florida): Convicted 1974, released 1977. Rape of a 16-year-old girl and murder of her companion. Conviction set aside by the Florida Supreme Court as against the weight of the evidence. After obtaining a ruling by United States Supreme Court that double jeopardy did not bar retrial, the prosecution nevertheless dropped the charges on the ground that the original investigation “was tainted from the beginning . . . and the investigators involved knew it.” Staff Report, at 4; Stanford, at 163.

*Earl Charles* (Georgia): Convicted 1975, released 1978. Double murder. Extraordinary motion for new trial granted and conviction vacated by the state trial court on the basis of newly discovered evidence substantiating Charles’s alibi. After investigating the new evidence, (developed through the unremitting efforts of Charles’s mother), the state’s attorney announced that he would not oppose the motion or retry the case if the motion were granted. Charles later won a \$75,000 settlement from the City of Savannah (in lieu of a \$417,000 damage award against an individual detective) in a civil suit for police misconduct in rigging the case against him. Staff Report, at 4; Radelet, at 235 - 247; Liebman, Appendix C, Georgia/Charles.

*Jerry Banks* (Georgia): Convicted 1975, released 1980. Two murders. First conviction set aside by the Georgia Supreme Court on the ground of prosecutorial nondisclosure of potentially exculpatory material; second conviction and second death sentence (1976) set aside by the Georgia Supreme Court in 1980 on the ground of ineffective assistance of counsel shown through newly discovered evidence, including previously undeveloped testimony that the fatal slugs could not have come from Banks’s gun. With the acquiescence of the state’s attorney, the trial court then dismissed the charges for lack of sufficient evidence of guilt to warrant retrial. Ultimately, Banks’s estate obtained a settlement from the county in a suit for mishandling the case. Staff Report, at 4;

Stanford, at 94 - 95; Radelet, at 176 - 188; Liebman, Appendix C, Georgia/Banks.

*Charles Ray Giddens* (Oklahoma): Convicted 1978, released 1981. Murder. Conviction set aside by the Oklahoma Court of Criminal Appeals for insufficient evidence; Giddens was then released. Staff Report, at 5.

*Anibal Jarramillo* (Florida): Convicted 1981, released 1982. Two murders. Conviction set aside by the Florida Supreme Court for insufficient evidence; Jarramillo was then released. Staff Report, at 5.

*Neil Ferber* (Pennsylvania): Convicted 1982, released 1986. Murder. A polygraph test disclosed that the trial testimony of a jailhouse informant recounting a confession by Ferber was perjurious; during a reinvestigation of the case by the district attorney, the informant recanted; on this basis, the district attorney requested that the trial court grant Ferber a new trial; it did; the prosecution then dropped the charges and Ferber was released. Staff Report, at 5; Radelet, at 215 - 217; Stanford, at 113.

*Clifford Henry Bowen* (Oklahoma): Convicted 1981, released 1986. Triple murder. Conviction set aside in federal habeas corpus proceedings on the ground of prosecutorial nondisclosure of potentially exculpatory material. During postconviction proceedings, substantial new evidence was developed pointing to another man as the real killer and supporting Bowen's alibi. The prosecution then dropped the charges and Bowen was released. ADD, at 4 [case # 81].

*Joseph Green Brown* (Shabaka Waglini) (Florida): Convicted 1974, released 1987. Murder. Conviction set aside in federal habeas corpus proceedings on the ground that the prosecution had knowingly countenanced false testimony at trial. The prosecution then dropped the charges and Brown was released. Staff Report, at 5.

*Vernon McManus* (Texas): Convicted 1977, released 1987. Murder. After a new trial was ordered, the prosecution was unable to persuade a crucial witness to testify against McManus on retrial; it then dropped the charges and McManus was released. Staff Report, at 6.

*Willie Brown and Larry Troy* (Florida): Convicted 1983, released 1988. Murder of a fellow prison inmate. Convictions set aside by the Florida Supreme Court on the ground that the prosecution had improperly conducted a pretrial deposition. While the men were on death row, a prison visitor fell in love with Brown; she reinvestigated the case at a cost of \$70,000; the reinvestigation produced evidence that the principal prosecution witness at trial had lied. The prosecution then dropped the charges against both men and they were released. Staff Report, at 6; Radelet, at 291.

*Randall Dale Adams* (Texas): Convicted 1977, released 1989. Murder. The Texas Court of Criminal Appeals set aside Adams's conviction on grounds of prosecutorial nondisclosure of potentially exculpatory evidence and ordered Adams's release pending a new trial. The prosecution then dropped the charges because of substantial evidence of Adams's innocence, much of it discovered during the making of Errol Morris's film, *The Thin Blue Line*, documenting the dubious nature of Adams's conviction and death sentence. Staff Report, at 7; Liebman, Appendix C, Texas/Adams.

*Robert Cox* (Florida): Convicted 1988, released 1989. Murder. Conviction set aside by the Florida Supreme Court for insufficient evidence; Cox was then released. Staff Report, at 7.

*Clarence Brandley* (Texas): Convicted 1980, released 1990. Rape-murder of a high-school girl. Conviction set aside by the Texas Court of Criminal Appeals on the ground of prosecutorial nondisclosure of potentially exculpatory material and suggestive investigative procedures likely to create false evidence. The prosecution then dropped the charges and Brandley was released. Brandley's case is the subject of NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* (1991). Staff Report, at 7; Liebman, Appendix C, Texas/Brandley.

*Dale Johnston* (Ohio): Convicted 1984, released 1990. Murder. Conviction reversed by the Ohio Supreme Court on the ground of prosecutorial nondisclosure of potentially exculpatory material. The prosecution then dropped the charges and Johnston was released. Staff Report, at 7.

*John C. Skelton* (Texas): Convicted 1982, released 1990. Murder by detonating dynamite in the victim's truck. Conviction set aside by the Texas Court of Criminal Appeals for insufficient evidence; Skelton was then released. Staff Report, at 7.

*Gary Nelson* (Georgia): Convicted 1980, released 1991. Murder. During postconviction proceedings, a review of the prosecution's files revealed nondisclosure of potentially exculpatory material; the state's attorney acknowledged that "[t]here is no material element of the state's case in the original trial which has not subsequently been determined to be impeached or contradicted"; the prosecution then dropped the charges and Nelson was released. Staff Report, at 7; Liebman, Appendix C, Georgia/Nelson.

*Bradley P. Scott* (Florida): Convicted 1988, released 1991. Murder. Conviction set aside by the Florida Supreme Court for insufficient evidence; Scott was then released. Staff Report, at 8.

*Jay C. Smith* (Pennsylvania): Convicted 1986, released 1992. Triple murder (death sentence later reduced to life). Conviction set aside by the Pennsylvania Supreme Court on the ground of prosecutorial nondisclosure of potentially

exculpatory material; the prosecution then dropped the charges and Smith was released. DPIC, at 13.

*Kirk Bloodsworth* (Maryland): Convicted 1984, released 1993. Rape-murder of a young girl. Initially granted a new trial, Bloodsworth was resentenced to life imprisonment. Later, DNA testing established his innocence and he was released. Staff Report, at 8.

*Walter McMillian* (Alabama): Convicted 1988, released 1993. Murder. After affirmance of the conviction and death sentence on direct appeal, volunteer postconviction counsel entered the case and began a reinvestigation in the course of which, three prosecution witnesses recanted their trial testimony. McMillian's conviction was set aside by the Alabama Court of Appeal on the ground of prosecutorial nondisclosure of potentially exculpatory evidence; the prosecution agreed that the case had been mishandled; it dropped the charges and McMillian was released. Staff Report, at 8; Liebman, Appendix C, Alabama/McMillian.

*Federico M. Macias* (Texas): Convicted 1984, released 1993. Murder. Conviction set aside in federal habeas corpus proceedings on grounds of ineffective assistance of counsel and possible innocence. A grand jury refused to reindict because of lack of evidence. Staff Report, at 8.

*Andrew Golden* (Florida): Convicted 1991, released 1994. Murder. Conviction set aside by the Florida Supreme Court for insufficient evidence; Golden was then released. Staff Report, at 8.

*Joseph Burrows* (Illinois): Convicted 1989, released 1994. Murder. Conviction set aside by the Illinois courts after the prosecution's two chief witnesses recanted their testimony, and one of them confessed to the murder. The prosecution then dropped the charges and Burrows was released. DPIC, at 14; Liebman, Appendix C, Illinois/Burrows.

*Alejandro Hernandez* (Illinois): Convicted 1985, released 1995. Rape-murder of a 10-year-old-girl. After the conviction on which he had been sentenced to death was set aside by the Illinois courts, Hernandez was retried twice. The first retrial produced a hung jury; the second, a conviction and a sentence of 80 years imprisonment. The latter conviction was reversed by the Illinois Supreme Court. In the interim, another man had confessed to the crime and was implicated by DNA testing. The prosecution then dropped the charges and Hernandez was released. (See the entry for *Rolando Cruz* in Inventory Two, *infra*.) DPIC, at 14 - 15.

*Dennis Williams* (Illinois): Convicted 1979, released 1996. Double murder. An investigation initiated and largely carried out by journalism students led to evidence exonerating Williams and his three co-defendants, including exculpatory DNA test results and a confession by the actual killer. The



prosecution then dropped the charges and Williams was released. (The state's attorney for Cook County issued an apology to Williams and his co-defendants.) DPIC, at 15 - 16.

*Verneal Jimerson* (Illinois): Convicted 1985, released 1996. Double murder. Jimerson was a co-defendant of Dennis Williams (the subject of the preceding entry) but was tried years later because a prosecution witness recanted her original accusation and was only persuaded to testify against Jimerson by a subsequent police promise of substantial consideration. In 1995 Jimerson's conviction was reversed by the Illinois Supreme Court on the ground that this witness had been permitted to testify falsely at trial with regard to the consideration she was promised and that the prosecution had suppressed potentially exculpatory material. In the interim, the exonerating evidence described in the Williams entry had surfaced; Jimerson was released on bond and the prosecution then dropped the charges (with an apology). Jimerson subsequently received a formal pardon. DPIC, at 15; Liebman, Appendix C, Illinois/Jimerson.

*Roberto Hernandez Miranda* (Nevada): Convicted 1982, charges dropped 1996. Murder. Conviction set aside by the Nevada Supreme Court on the ground of ineffective assistance of counsel. The prosecution then dropped the charges. (Because Miranda was a Cuban immigrant who had originally come to the United States during the Mariel boatlift, he was subsequently detained, then released, by the INS pending a deportation hearing.) DPIC, at 16.

*Gary Gauger* (Illinois): Convicted 1993, released 1996. Murder of his parents (death sentence later reduced to life). Conviction set aside in federal habeas corpus proceedings; the trial judge who had sentenced Gauger to death then dismissed the charges with the acquiescence of the prosecution, and Gauger was released. DPIC, at 16.

*Troy Lee Jones* (California): Convicted 1982, released 1996. Murder. Conviction set aside by the California Supreme Court on the ground of ineffective assistance of counsel. The prosecution then dropped the charges and Jones was released. DPIC, at 16, Liebman, Appendix C, California/Jones.

*Ricardo Aldape Guerra* (Texas): Convicted 1982, released 1997. Murder of a police officer. Conviction set aside in federal habeas corpus proceedings on grounds of police and prosecutorial misconduct calculated to deny Guerra a fair trial. The prosecution then dropped the charges and Guerra was released. DPIC, at 16 - 17.

*Benjamin Harris* (Washington): Convicted 1985, released 1997. Murder. Conviction set aside in federal habeas corpus proceedings on the ground of ineffective assistance of counsel. The prosecution decided not to retry Harris but attempted to have him involuntarily committed as dangerously insane. A jury declined to commit him. ADD, at 1 [case # 70].

*Robert Lee Miller, Jr.* (Oklahoma): Convicted 1988, released 1998. Rape-murder of two elderly women. Conviction set aside and a new trial granted in 1995. Following the emergence of DNA evidence pointing to another person as the perpetrator of the crimes, a state judge held that there was insufficient evidence to justify Miller's continued incarceration. The prosecution then dropped the charges and Miller was released. ADD, at 2 [case # 73].

*Curtis Lee Kyles* (Louisiana): Convicted 1984, charges dropped 1998. Murder. Conviction set aside in federal habeas corpus proceedings on the ground of prosecutorial nondisclosure of potentially exculpatory material. After three retrials resulting in hung juries, the prosecution dropped the charges. (Kyles remained confined on unrelated charges.) ADD, at 2 [case # 74].

*Shareef Cousin* (Louisiana): Convicted 1996, charges dropped 1999. Murder. Conviction reversed by the Louisiana Supreme Court on the ground of prosecutorial nondisclosure of potentially exculpatory material. The prosecution then dropped the charges. (Cousin remained confined on unrelated charges.) ADD, at 2 [case # 75].

*Anthony Porter* (Illinois): Convicted 1983, released 1999. Double murder. An investigation conducted by three journalism students, a journalism professor, and a private investigator working with them led to evidence of Porter's innocence, including another man's videotaped admission of the killings for which Porter had been sentenced to death. (Porter had come within two days of execution and survived only because a state trial court, on a successive postconviction petition, ordered an inquiry into his mental competency to be executed. He has a reported IQ of 51. It was while the competency inquiry was pending that the evidence of Porter's innocence surfaced.) Porter was released on motion of the state's attorney, who filed charges against the other man and then dropped those against Porter. ADD, at 2 - 3 [case # 76]; Liebman, Appendix C, Illinois/Porter.

*Steven Smith* (Illinois): Convicted 1986, released 1999. Murder, at a tavern, of the assistant warden of the Pontiac Correctional Center. Conviction set aside by the Illinois Supreme Court for insufficient evidence; Smith was then released. ADD, at 3 [case # 77].

*Ronald Keith Williamson* (Oklahoma): Convicted 1988, charges dropped 1999. Rape-murder. Conviction set aside in federal habeas corpus proceedings on the ground of ineffective assistance of counsel. After DNA tests exculpated Williamson and a co-defendant and implicated another man – a former suspect in the case whose involvement had not been thoroughly investigated earlier – the prosecution dropped the charges against Williamson and his co-defendant. (Williamson was hospitalized for bipolar depression.) ADD, at 3 [case # 78].

*Ronald Jones* (Illinois): Convicted 1989, charges dropped 1999. Rape-murder. Conviction reversed by the Illinois Supreme Court on the ground of prosecutorial misconduct. Later, after DNA testing excluded Jones as the perpetrator, the

prosecution dropped the charges and Jones received a formal pardon. (Jones remained confined under detainers for possible extradition on unrelated charges.) ADD, at 3 [case # 79]; Liebman, Appendix C, Illinois/Jones.

*Clarence Richard Dexter* (Missouri): Convicted 1991, released 1999. Murder of his wife. Conviction set aside by the Missouri Supreme Court on the ground of prosecutorial misconduct in repeatedly advertent to Dexter's invocation of his right to remain silent. New defense counsel preparing for retrial investigated the case more thoroughly than original trial counsel and discovered that blood evidence refuted the conclusions of a prosecution expert witness whose testimony had incriminated Dexter at the first trial. The prosecution expert conceded that his previous findings overstated the case against Dexter. The prosecution then dropped the charges and Dexter was released. ADD, at 4 [case # 80]; Liebman, Appendix C, Missouri/Dexter.

*Steve Manning* (Illinois): Convicted 1993, charges dropped 2000. Murder. Conviction reversed by the Illinois Supreme Court. The conviction had been based largely on the testimony of a cellmate informant recounting confessions by Manning. Secret tape recordings of the two men's conversations, made at the request of the FBI, revealed no such confessions. Rather than retry the case in the face of these recordings, the prosecution dropped the charges. (Manning remained confined on unrelated charges.) ADD, at 5 [case # 85].

*Jack Mazzan* (Nevada): Convicted 1979, released 2000. Murder. First conviction reversed on appeal. Second conviction and death sentence (1986) set aside by the Nevada Supreme Court on a third state postconviction petition on the ground of prosecutorial nondisclosure of potentially exculpatory material. The prosecution then dropped the charges and Mazzan was released. Liebman, Appendix C, Nevada/Mazzan.

#### INVENTORY TWO:

*Death-sentenced individuals who were acquitted at a retrial  
after their capital convictions were reversed or vacated*

*Jonathan Treadway* (Arizona): Convicted 1975, released 1978. Sodomy-murder of a six-year-old child. Conviction reversed on appeal on the ground of improper admission of a prior criminal act by Treadway. Treadway was acquitted at retrial: jury members reported they found the prosecution had presented insufficient evidence that Treadway was even in the child's home. Staff Report, at 4; Stanford, at 164.

*Gary Beeman* (Ohio): Convicted 1976, released 1979. Murder. Conviction reversed on appeal on the ground of improper restriction of Beeman's right to cross-examine a prosecution witness. Beeman was acquitted at retrial when five

witnesses testified that the prosecution's principal witness had confessed to the murder. Staff Report, at 4; Stanford, at 96.

*Larry Hicks* (Indiana): Convicted 1978, released 1980. Two murders. New trial granted by the trial judge on the ground that Hicks, who was of less than normal intelligence, had not understood the proceedings at the trial well enough to assist in his defense. Hicks was acquitted at retrial after evidence was presented confirming his alibi and establishing that eyewitness testimony against him at his first trial was perjurious. Staff Report, at 4; Stanford, at 125.

*Anthony Brown* (Florida): Convicted 1983, released 1986. Murder. Conviction reversed on appeal because Brown's defense counsel had not been notified of a key deposition taken by the prosecution. Brown was acquitted at retrial after his former co-defendant, the prosecution's principal witness at the first trial, admitted that his testimony at that trial had been perjurious. Staff Report, at 5; Stanford, at 100 - 101.

*Perry Cobb and Darby Williams* (Illinois): Convicted 1979, released 1987. Double murder. Cobb and Williams were acquitted at retrial after an assistant state's attorney provided information impeaching the credibility of the state's chief witness. Staff Report, at 5.

*Anthony Ray Peek* (Florida): Convicted 1978, released 1987. Murder. Conviction set aside on a showing that expert testimony presented at the initial trial was false. Peek was acquitted at his second retrial. Staff Report, at 6.

*Juan Ramos* (Florida): Convicted 1983, released 1987. Rape-murder. Conviction reversed by the Florida Supreme Court on the ground of improper admission of evidence. Ramos was acquitted at retrial. Staff Report, at 6.

*Jerry Bigelow* (California): Convicted 1980, released 1988. Murder. Conviction reversed by the California Supreme Court. Bigelow was acquitted at retrial. Staff Report, at 6.

*Richard Neal Jones* (Oklahoma): Convicted 1983, released 1988. Murder. Conviction reversed by the Oklahoma Court of Criminal Appeals on grounds of improper admission of hearsay and inflammatory photographs, and of prosecutorial misconduct. Jones was acquitted at retrial. ADD, at 4 [case # 82].

*Jesse Keith Brown* (South Carolina): Convicted 1983, acquitted 1989. Murder. Conviction twice reversed by the South Carolina Supreme Court. At a third trial, Brown was acquitted of the capital murder charge though convicted of related robbery charges. Staff Report, at 7.

*Timothy Hennis* (North Carolina): Convicted 1986, released 1989. Three murders. Conviction reversed by the North Carolina Supreme Court on the ground of improper admission of evidence. Hennis was acquitted at retrial. Staff Report, at 7.

*Charles Smith* (Indiana): Convicted 1983, released 1991. Robbery-murder. Conviction reversed by the Indiana Supreme Court on the ground of ineffective assistance of counsel. Smith was acquitted at retrial after presenting evidence of perjury by the witnesses against him. (A man who claimed to be the getaway driver had had the charges against him dropped in exchange for his testimony against Smith.) ADD, at 1 [case # 69]; Liebman, Appendix C, Indiana/Smith.

*Muneer Deeb* (Texas): Convicted 1985, released 1993. Contract murder. Conviction reversed by the Texas Court of Criminal Appeals on the ground of improper admission of evidence. Deeb was acquitted at retrial. Staff Report, at 8; DPIC, at 13.

*Gregory R. Wilhoit* (Oklahoma): Convicted 1987, released 1993. Murder of his estranged wife in her sleep. Conviction reversed by the Oklahoma Court of Criminal Appeals on the ground of ineffective assistance of counsel. Wilhoit was acquitted at retrial after forensic experts testified that a bite mark found on the dead woman was not his. Staff Report, at 8; DPIC, at 33.

*James Robison* (Arizona): Convicted 1977, released 1993. Murder by detonating a bomb in a reporter's car. Conviction reversed in 1980. Recharged in 1990, Robison was acquitted at retrial. DPIC, at 13.

*Clarence Smith* (Louisiana): Convicted 1985, released 1994. Murder. Conviction reversed by the Louisiana Supreme Court on grounds of instructional error. Smith was acquitted at retrial. DPIC, at 14.

*Adolph Munson* (Oklahoma): Convicted 1985, released 1995. Murder. Conviction set aside by the Oklahoma Court of Criminal Appeals on the ground of prosecutorial nondisclosure of potentially exculpatory material. Munson was acquitted at retrial. (Some of the forensic evidence at the initial trial was presented by Dr. Ralph Erdmann, who was subsequently convicted of seven felony counts involving misrepresentation of facts in other cases and stripped of his license.) DPIC, at 14; Liebman, Appendix C, Oklahoma/Munson.

*Robert Charles Cruz* (Arizona): Convicted 1981, released 1995. Double murder. Convictions twice set aside; two more trials ended in mistrials; Cruz was finally acquitted at a fifth trial. (The chief prosecution witness, a convicted burglar and drug dealer, had been given immunity for his testimony.) DPIC, at 14.

*Rolando Cruz* (Illinois): Convicted 1985, released 1995. Rape-murder of 10-year-old Jeanine Nicarico. Convictions in 1985 and again in 1990 were set aside, the second time by the Illinois Supreme Court in 1994. Another man, Brian Dugan, who had already pleaded guilty to two rapes and murders, including that of an 8-year-old girl, authorized his lawyers to tell the prosecutors he had murdered Nicarico. An assistant state attorney general resigned because she thought the evidence showed Cruz was innocent. Other law enforcement

officials also protested the continued efforts to prosecute Cruz. Cruz was finally acquitted at a 1995 retrial, by a directed verdict. DPIC, at 14.

*Sabrina Butler* (Mississippi): Convicted 1990, released 1995. Murder of her nine-month-old child. Conviction reversed by the Mississippi Supreme Court. Butler was acquitted at retrial. (She had found her baby not breathing, performed CPR, took him to the hospital. The police interrogated her and she was prosecuted. It is now believed the baby may have died of cystic kidney disease or sudden infant death syndrome [SIDS].) DPIC, at 15.

*Carl Lawson* (Illinois): Convicted 1990, released 1996. Murder. Conviction reversed on appeal, in part because Lawson's public defender had been an assistant prosecutor at the time of Lawson's arrest. A second trial resulted in a hung jury. Lawson was acquitted at a third trial. DPIC, at 16.

*Robert Hayes* (Florida): Convicted 1991, released 1997. Rape-murder of a co-worker. Conviction based in part on faulty DNA evidence reversed by the Florida Supreme Court. Hayes was acquitted at retrial. (The victim had been found clutching hairs, probably from her assailant. The hairs were from a white man; Hayes is African-American.) ADD, at 1 [case # 71].

*Randall Padgett* (Alabama): Convicted 1992, released 1997. Murder of his estranged wife. Conviction reversed by the Alabama Court of Criminal Appeals. Padgett was acquitted at retrial after evidence was presented that the murder had been committed by a woman. ADD, at 2 [case # 72].

*Lee Perry Farmer* (California): Convicted 1992, released 1999. Murder. Conviction set aside in federal habeas corpus proceedings on the ground of ineffective assistance of counsel. Farmer was acquitted of capital murder at retrial but was convicted of burglary and being an accessory to murder; he was credited with time served and released. (Another man confessed to the murder.) ADD, at 8 ["Probable Innocence" cases, item 9].

*Warren Douglas Manning* (South Carolina): Convicted 1989, released 1999. Murder of a police officer. Convictions twice set aside; two more trials ended in mistrials; Manning was finally acquitted at a fifth trial. ADD, at 5 [case # 83].

*Alfred Rivera* (North Carolina): Convicted 1997, released 1999. Double murder. Conviction reversed by the North Carolina Supreme Court on the ground of improper exclusion of defense evidence. Rivera was acquitted at retrial. ADD, at 5 [case # 84].

*Eric Clemmons* (Missouri): Convicted 1987, acquitted 2000. In-prison murder. Conviction set aside in federal habeas corpus proceedings when substitute counsel entered the case and obtained rehearing of a Court of Appeals decision affirming the denial of relief. Clemmons was acquitted at retrial after the presentation of new exculpatory evidence. ADD, at 5 - 6 [case # 86].

*Joseph Nahume Green* (Florida): Convicted 1993, released 2000. Murder. Conviction reversed by the Florida Supreme Court on the ground of improper admission of evidence. Green was acquitted at retrial, by a directed verdict. ADD at 6, [case # 87].

*William Nieves* (Pennsylvania): Convicted 1994, released 2000. Murder. Conviction reversed by the Pennsylvania Supreme Court on the ground of ineffective assistance of counsel. Nieves was acquitted at retrial. See George Strawley, "Overturned Death Sentence," *Associated Press*, October 20, 2000, available at WL APWIRE database, 10/20/00 APWIRE 19:02:00.

### INVENTORY THREE:

*Death-sentenced individuals who have been tacitly acknowledged  
by official agencies to have been convicted and sentenced to death  
for crimes they probably did not commit*

*Larry Dean Smith* (Oklahoma): Convicted 1978, released 1984. Murder by arson in connection with a robbery. After the United States Supreme Court vacated the death sentence, the Attorney General of Oklahoma recommended that the murder conviction be set aside but that Smith's conviction of robbery be affirmed on remand. The Oklahoma Court of Criminal Appeals declined to uphold the robbery conviction, and Smith was released. DPIC, at 19.

*Henry Drake* (Georgia): Convicted 1977, released 1987. Murder. Drake's first conviction, resulting in a death sentence, was vacated; he was convicted again and this time sentenced to life. Six months later the parole board freed him, convinced of his innocence by testimony from his alleged accomplice and the medical examiner. Staff Report, at 5.

*William Jent and Earnest Miller* (Florida): Convicted 1980, released 1988. Murder. Conviction set aside in federal habeas corpus proceedings on the ground of prosecutorial nondisclosure of potentially exculpatory evidence. Jent and Miller were then released after pleading guilty to second-degree murder. They repudiated their plea immediately upon leaving the courtroom and were later awarded compensation by the Pasco County Sheriff's Department that had helped convict them. Staff Report, at 6.

*Earl Washington* (Virginia): Convicted 1984, pardoned 2000. Rape-murder. DNA testing conducted after Washington's claims had been rejected on federal habeas corpus established that he did not rape the victim. In 1994, Governor Wilder commuted Washington's death sentence to life imprisonment because of doubt about his guilt. DPIC, at 20; ADD, at 10 ["Possible Innocence" cases, item 3]. On October 2, 2000, Governor Gilmore granted Washington an absolute pardon, saying that a jury presented with modern DNA evidence "would have reached a different conclusion" in his case. Francis X. Clines, "Virginia Man Is

Pardoned In a Murder; DNA Is Cited," *New York Times*, October 3, 2000, p. A.20.

#### INVENTORY FOUR:

*Death-sentenced individuals whose sentences have been commuted because of doubt that they committed the crimes for which they were condemned*

*Ronald S. Monroe* (Louisiana): Convicted 1978, sentence commuted to life 1989. Murder. The victim's husband was later charged with murdering his third wife in a manner similar to the manner in which his second wife – supposedly Monroe's victim – had been murdered. While the husband was in jail awaiting trial for his third wife's murder, he made statements to a cellmate admitting that he had killed his second wife in the same way. He was convicted of the third wife's murder, and it was subsequently revealed that he had assaulted his first wife in a similar manner and left her for dead. The Governor of Louisiana commuted Monroe's death sentence because of doubt about his guilt. ADD, at 9 - 10 ["Possible Innocence" cases, item 1].

*Herbert Bassette* (Virginia): Convicted 1979, sentence commuted to life without parole 1992. Murder. After Bassette's conviction, questions arose concerning the reliability of the testimony presented at trial. A police statement indicated that one of the witnesses had implicated someone other than Bassette. The Governor of Virginia commuted Bassette's death sentence because of doubt about his guilt. DPIC, at 19 - 20; ADD, at 10 ["Possible Innocence" cases, item 2].

*Donald Paradis* (Idaho): Convicted 1981, sentence commuted to life without parole 1996. Murder. Volunteer postconviction counsel from New York developed substantial evidence that Paradis was not present at the scene of the killing and that the killing was not committed in Idaho, although the murdered woman's body was found there. Some trial witnesses recanted their testimony. After the presentation of this information, the Governor of Idaho commuted Paradis's death sentence. DPIC, at 21; ADD, at 10 ["Possible Innocence" cases, item 4].

*Joseph Payne* (Virginia): Convicted 1986, sentence commuted to life without parole 1996. Murder by arson of a fellow prison inmate. The chief witness against Payne received a 15-year reduction in sentence in return for his testimony. At one point after Payne's conviction, this witness admitted that his trial testimony was perjurious. Three hours before Payne's execution, and after Payne agreed not to appeal, the Governor of Virginia commuted Payne's death sentence. DPIC, at 21; ADD, at 10 - 11 ["Possible Innocence" cases, item 5].

*Henry Lee Lucas* (Texas): Convicted 1984, sentence commuted to life 1998. Murder. Lucas confessed to the murder of an unnamed hitchhiker in 1979. He



later confessed to hundreds of other murders, including those of Jimmy Hoffa and of Lucas's fourth grade teacher, who is still alive. Two investigations by successive Texas Attorneys General concluded that Lucas almost certainly did not commit the murder for which he was sentenced to die. Following a recommendation of the state pardons board, the Governor of Texas commuted Lucas's death sentence. ADD, at 11 ["Possible Innocence" cases, item 6].

#### INVENTORY FIVE:

*Death-sentenced individuals whose cases were eventually resolved  
by a compromise, noncapital disposition after the emergence of  
compelling evidence of innocence*

*John Henry Knapp* (Arizona): Convicted 1974, released 1992. Arson murder of his two children. On a third state postconviction petition, Knapp was granted a new trial in 1987 on grounds of police and prosecutorial misconduct and newly discovered scientific evidence about the cause of the fire. After a third trial ended in a hung jury, Knapp – who steadfastly maintained his innocence – pleaded no contest to second degree murder in 1992 and was released pursuant to his plea agreement with the prosecution. Knapp's case is the subject of ROGER PARLOFF, *TRIPLE JEOPARDY* (1996). Staff Report, at 6; Liebman, Appendix C, Arizona/Knapp.

*Sonia Jacobs* (Florida): Convicted 1976, released 1992. Murder of two police officers (death sentence reduced to life by the Florida Supreme Court on the ground that the sentencing judge had erred in assessing mitigating factors). While Jacobs was in prison she began to correspond with a childhood friend, film director Micki Dickoff. Dickoff reinvestigated the case and discovered a significant amount of material suggesting that the state's chief witness had lied and was probably the real killer. The prosecution then allowed Jacobs to make an *Alford* plea to second degree murder – a plea in which she did not admit guilt – and she was immediately released. ADD, at 6 - 7 ["Probable Innocence" cases, item 2].

*Mitchell Blazak* (Arizona): Convicted 1974, released 1994. Double murder. Blazak's conviction was set aside in federal habeas corpus proceedings on the ground that the trial judge had failed to conduct the requisite inquiry into Blazak's competency to be tried. The federal court's opinion also noted that the testimony of the prosecution's principal witness, a con man who had been arrested for felonies in two States and was granted immunity in exchange for his testimony, was "a mass of contradictions." There was some evidence that a deputy sheriff named Michael Tucker had planted hair evidence incriminating Blazak. Rather than retry the case, the prosecution offered a no-contest plea which allowed Blazak to be released within the year. Three days after Blazak

was released, Tucker was arrested for car theft. DPIC, at 20; ADD, at 7 ["Probable Innocence" cases, item 3].

*Anthony Scire* (Louisiana): Convicted 1985, released 1994. Contracting the murder of a police informer. The charge against Scire was that he had hired Clarence Smith – the subject of the sixteenth entry in Inventory Two, *supra* – to commit the murder. The convictions on which both Scire and Smith had been sentenced to death were reversed by the Louisiana Supreme Court. At retrial, Smith was acquitted; Scire pleaded guilty to manslaughter while maintaining his innocence; he was sentenced to time served and immediately released. DPIC, at 20; ADD, at 7 ["Probable Innocence" cases, item 4].

*Kerry Max Cook* (Texas): Convicted 1978, released 1997. Murder. After Cook's original conviction was set aside in 1991 he was retried twice. The first retrial resulted in a hung jury, the second resulted in another conviction and death sentence. The Texas Court of Criminal Appeals reversed the second conviction on the ground of prosecutorial misconduct and barred the further use of key testimony presented at the 1994 trial. Prior to the start of his fourth trial in 1999, Cook pleaded no contest to a reduced murder charge and was released, while maintaining his innocence. Recent DNA tests from the victim matched an ex-boyfriend, not Cook, tending to contradict the ex-boyfriend's testimony. DPIC, at 18; ADD, at 8 - 9 ["Probable Innocence" cases, item 10].

*Joseph Spaziano* (Florida): Convicted 1976, resentenced 1998. Murder. Spaziano's conviction was based primarily on the testimony of a teen-age drug addict, whose memory of the relevant facts had been hypnotically refreshed. This witness recanted his testimony after Spaziano had spent almost two decades on death row, litigating other issues; and the state trial judge granted Spaziano a new trial. Spaziano then pleaded no contest to second-degree murder and was sentenced to time served. (He remained confined on another charge.) ADD, at 7 - 8 ["Probable Innocence" cases, item 6].

*Victor Jimenez* (Nevada): Convicted 1987, released 1999. Double murder. After a new trial was ordered by the Nevada Supreme Court on grounds of police misconduct including false testimony, Jimenez entered a special plea to second-degree murder without admitting guilt and was required to serve an additional 18 months in prison. The plea bargain included his agreement not to sue those responsible for putting him on death row. ADD, at 7 ["Probable Innocence" cases, item 5].

*Paris Carriger* (Arizona): Convicted 1978, released 1999. Murder. A witness who testified for the prosecution at the trial resulting in Carriger's conviction and death sentence later admitted that his testimony was perjurious and that he himself was the murderer. By the time Carriger's conviction was set aside in federal habeas corpus proceedings, this witness had died. Carriger then entered a plea to a lesser offense in exchange for a time-served sentence and was

immediately released from prison. ADD, at 8 [“Probable Innocence” cases, item 7].

*Andrew Lee Mitchell* (Texas): Convicted 1981, released to a halfway house 1999. Mitchell’s capital conviction was set aside by the Texas Court of Criminal Appeals on the ground that the sheriff’s department had suppressed statements from law enforcement officers who reported seeing the victim alive two hours after the alleged murder. Released, then rearrested, Mitchell pleaded guilty to conspiracy to commit murder; he was sentenced to 31 years imprisonment and, after being given credit for time served, was released to a halfway house. DPIC, at 17; ADD, at 8 [“Probable Innocence” cases, item 8].

*Lloyd Schlup* (Missouri): Convicted 1985, resentenced 1999. Murder of a fellow prison inmate. Schlup’s conviction was set aside in federal habeas corpus proceedings on the ground of ineffective assistance of counsel; the habeas courts found that this claim was cognizable on a successor petition because Schlup had presented new evidence – developed during a decade of postconviction litigation – that made it more likely than not that no reasonable juror would have found beyond a reasonable doubt that he was the perpetrator of the murder. On the second day of retrial, Schlup pleaded guilty to second degree murder, to avoid any possibility of another death sentence. DPIC, at 18; ADD, at 9 [“Probable Innocence” cases, item 11].

**APPENDIX B****CASES STUDIES IN HOW EVIDENCE OF INNOCENCE COMES TO LIGHT  
FOLLOWING A CAPITAL CONVICTION AND DEATH SENTENCE**

We describe four representative cases in which evidence of innocence fortuitously came to light after a defendant had been convicted of a capital offense and sentenced to die. The first two are cases in which the official disposition constitutes an acknowledgment of the condemned defendant's innocence; the second two are cases in which the official disposition does not.

**EARL CHARLES (Georgia)**

Convicted 1975, released 1978

At approximately 4:30 p.m. on October 3, 1974, two African-American men entered the Savannah Furniture Company store in that city and robbed it at gunpoint.<sup>1</sup> They shot and killed the proprietor, 76-year-old Max Rosenstein and his 42-year-old son, Fred. One of the men struck Max's wife, 70-year-old Myra Rosenstein, in the face with a heavy tape dispenser, injuring her seriously. But she was left alive – as was another eyewitness, the store's bookkeeper, Bessie Corcelius – when the men fled with about \$1000 in cash.

For a while the ugly crime remained unsolved. But forty days later a Savannah police detective, F.W. Wade, broke the case by obtaining warrants for the arrest of Earl Charles and Michael Williams. Charles was a 21-year-old African-American man who had grown up in Savannah. He had been convicted of burglary and shoplifting and had spent 14 months or so in youth homes and jails during the preceding five years. At some point in September or October, 1974, he had left Savannah with Williams, his next-door neighbor; and since that time the two young men had not been seen in the region.

Charles and Williams were detained by police officers in Port Richey, Florida in connection with an unrelated matter on November 15, 1974, one day after the issuance of the warrants in the Rosenstein murder case. A warrants check put the Port Richey police in touch with their Savannah counterparts, and on December 19, Detective Wade accompanied Ms. Rosenstein and Ms. Corcelius to Florida to testify at an extradition hearing. During that hearing, both women identified Charles in a makeshift lineup as the gunman who had slain Max and Fred Rosenstein. Charles was accordingly extradited to Savannah for trial. (The women did not identify Williams, so Williams was released.)

At Charles's trial in May, 1975, Ms. Rosenstein and Ms. Corcelius again identified him as the killer. The prosecution supported their testimony with that of one James Nixon. Nixon, who had been in the company of Charles and Williams at the time of their detention in Port Richey – and who had been

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1. All information in the summary of the Earl Charles case is from MICHAEL L. RADELET, HUGO A. BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992), at 235 - 245 unless otherwise noted.

arrested for rifling a cash register on that occasion – testified that while he and Charles were together in the jail in Florida, Charles had bragged about shooting two people in a Savannah furniture store.

Charles's defense was an alibi. One Robert Zachery, the manager of a gas station in Tampa, Florida (300 miles from Savannah) testified that he had employed Charles and Williams at the station in September and early October, and that they had worked on the day of the Rosenstein killings. Zachery fired Charles and Williams later in October when they told him that the gas station had been robbed and \$1000 taken by bandits who locked Charles and Williams in a storage closet. Suspicious that Charles and Williams may have taken the money themselves and fabricated this tale of banditry, Zachery felt obliged to protect his own interests by letting them go. Nevertheless, at the time of Charles's trial the following May, Zachery took three days off from work and drove to Savannah at his own expense to testify for his former employee. His alibi testimony was supported by gas station time cards and payment vouchers (authenticated by Zachery's supervisor) showing that Charles worked at the station on October 3, 1974. It was also supported by the testimony of Michael Williams's girl friend and her sister that they had seen Charles in Tampa in the late morning on that day. However, Charles's alibi was confounded when Detective Wade took the stand for the prosecution and testified that, when Wade first went to Tampa to investigate the case, Zachery had told Wade that Charles was not at work on the day of the murders.

A jury convicted Charles and voted that he should be sentenced to die. The presiding judge imposed the death sentence, and Charles's mother became hysterical and had to be taken from the courtroom by police officers. She was, however, a survivor. Convinced of her son's innocence, she persisted in seeking any shred of evidence that might prove it. She visited the furniture store and pleaded with Ms. Rosenstein and Ms. Corcelius to concede that their eyewitness identifications of her son might have been incorrect. She paid for ads in the Tampa newspaper soliciting further support for her son's alibi. She phoned Robert Zachery repeatedly, imploring him to come up with something more that could help establish the alibi.

Zachery felt he had done everything he could do for Charles; he could think of nothing more to do, and he was frustrated. After one of Ms. Charles's calls, he mentioned to a friend, Tampa Deputy Sheriff Lemon Harvey, how distressing and annoying these calls were to him. Harvey had known about Zachery's trip to Savannah to testify for Charles, and he had heard about Charles's conviction of the double murder. But the second-hand accounts he had heard had been confusing with regard to the dates involved, so Harvey had been under the impression that the Rosenstein murder date was *after* Charles and Williams had been fired from their gas station job. He now learned from Zachery that that was not the case.

As luck would have it, Robert Zachery was a prudent man, and Lemon Harvey a meticulous one. When Earl Charles and Michael Williams had first been hired by the Tampa gas station back in September, 1974, Zachery had been reluctant to trust these youths-from-out-of-town and had asked his friend, Harvey, to keep his eye on them and the station. Harvey had done so, regularly beginning his duty shift in the gas station parking lot. He kept scrupulous notes in his log book about whether Charles and Williams were working as they were supposed to. Now, with the scenario of events cleared up in his mind, Lemon checked his log book. What he found was an entry for October 3, 1974, duly recording that Earl Charles and Michael Williams were pumping gas in Tampa at the precise time when somebody else was killing Max and Fred Rosenstein in Savannah.

Zachery then called Ms. Charles; Ms. Charles called Earl Charles's lawyer; Earl Charles's lawyer called the district attorney; and the district attorney ordered the case reinvestigated. The results of the reinvestigation demolished any grounds for continued belief in Earl Charles's guilt.<sup>2</sup> It appeared that Savannah Detective F.W. Wade had obtained the original warrant for Charles's arrest by concocting false evidence; that Wade had coached prosecution witness Nixon and procured his false testimony against Charles by promising Nixon consideration (which Nixon disclaimed in his trial testimony);<sup>3</sup> and that Nixon's own testimony about Zachery's statements to Nixon were perjurious.<sup>4</sup> It also appeared that Ms. Rosenstein and Ms. Corcelius had twice failed to identify photographs of Charles in mug-shot displays early in the police investigation; that Ms. Corcelius had twice made demonstrably incorrect identifications of other persons as the Rosensteins' killers (once identifying two out-of-uniform soldiers who had irrefragably been on their army base at the time of the killings, later identifying a man who had been in Raiford Prison in Florida at the time); and that fingerprints found in the Savannah Furniture Company store after the killings had been compared with Charles's prints and found not to match.

Charles's postconviction counsel filed an extraordinary motion for a new trial with the trial court on the basis of these developments. The district attorney announced that he would not oppose the motion and would not retry Charles if the motion were granted. The trial court granted the motion and vacated Charles's conviction. Thereafter, Charles brought a civil-rights action and

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2. This process is described in *Charles v. Wade*, 665 F.2d 661, 663 (5th Cir. 1982).

3. Interviewed by Charles's postconviction counsel, Nixon recanted his trial testimony and said that it had been fabricated at Wade's instigation and given in return for Wade's promises of leniency in Nixon's own troubles with the law.

4. After Wade's investigative trip to Tampa during which he interviewed Zachery, Wade wrote a seven-page report. Disclosed for the first time in the course of the district attorney's reinvestigation, this report contained no indication that Zachery had ever said that Charles was not at work on the day of the Rosenstein killings. Moreover, another detective who had accompanied Wade to Tampa recalled no mention by Wade of any statements by Zachery damaging to Charles's alibi — a remarkable omission if Wade's trial testimony that Zachery had disconfirmed Charles's alibi was true.

obtained an award of more than \$400,000 against Wade for Wade's part in the whole affair. Charles was denied damages against the City of Savannah on the ground that it was not responsible for Wade's actions. Pending appeal by all parties, the action was settled by Savannah's paying Charles \$75,000 on Wade's behalf.

**LARRY HICKS (Indiana)**

Convicted 1978, released 1980

One Saturday night in February 1978, Larry Hicks, recently home from work and tired, reluctantly agreed to help some neighbors move furniture into a new apartment. The neighbors were two women and Bernard Scates, the live-in boyfriend of one of the women. The group also enlisted the help of two other acquaintances with the promise of drinks and a few dollars. The moving party apparently became drunk and quarrelsome, and Hicks, fed up, left around midnight and spent the rest of the night at home with his girlfriend.<sup>5</sup>

Sunday morning, the bodies of two men were found in an alley. They had been stabbed to death. Police followed a trail of blood to an apartment where they found an intoxicated man, Bernard Scates, covered with blood and two women trying to clean blood from the floors and walls. Questioned, the three first denied any knowledge of the killings, then said that Larry Hicks had done them. Under further questioning, Scates admitted to having helped Hicks stab the two men.<sup>6</sup>

Scates reportedly told cellmates a few days after his arrest that Hicks was not the killer. Shortly thereafter, Scates died in his cell.<sup>7</sup> His death was recorded as a suicide but there is some indication of foul play.<sup>8</sup> The prosecution against Hicks proceeded.

At trial, the only significant evidence against Hicks was the testimony of Scates's girlfriend; the other woman had changed her story repeatedly.<sup>9</sup> There was a major inconsistency in the prosecution's version of the case: Scates's girlfriend testified that the killings were committed in the course of a fight that occurred around midnight, but the county coroner testified that the deaths must have occurred some time after six o'clock the following morning.<sup>10</sup> Nevertheless, the jury convicted Hicks. He was sentenced to death and consigned to the Indiana State Prison.

On May 15, 1979, Indianapolis attorney Nile Stanton was visiting a client at the prison. On his way out, he was stopped by Larry Hicks, who was returning

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5. "Playboy Casebook: The Man Who Didn't Do It," *Playboy Magazine*, August 1980, p. 62 [hereafter, "August 1980"].

6. "Playboy Casebook: The Ordeal of Larry Hicks," *Playboy Magazine*, May 1981, p. 66 [hereafter, "May 1981"].

7. August 1980, at 62 - 63.

8. May 1981, at 66.

9. August 1980, at 63.

10. August 1980, at 63.

to his death row cell after a visit with the chaplain. Hicks was concerned that he had not heard from his court-appointed attorney although his execution was scheduled for June 1. Hicks told Stanton he was innocent.<sup>11</sup>

Stanton was naturally disinclined to get involved. This was "[j]ust what [he] . . . didn't need. . . . An indigent slum-kid murderer who 'didn't do it.'" However, he was puzzled that Hicks' attorney had not gotten a stay of execution, since appeals in capital cases in Indiana are automatic. After confirming with the prison warden that no stay order had been received, Stanton decided to look further into the case.<sup>12</sup>

As he learned more about Larry Hicks, he began to lend more credence to Hicks's claim of innocence. Although Hicks had grown up in the slums of Gary, Indiana, Hicks had no criminal or juvenile record. Despite a low-normal IQ he had stayed in school and was finishing the eleventh grade when he was arrested. He did not do drugs and rarely drank, and he had worked consistently since his early teens. His employer and his teachers praised his character and his efforts.<sup>13</sup>

These facts challenged Stanton's presumption that Hicks was just another slum-kid murderer and impelled Stanton to dig deeper. At his own expense, he arranged to have Hicks take two polygraph tests. Hicks passed. Stanton, now convinced that Hicks was telling the truth, contacted the Playboy Foundation for help with the case.<sup>14</sup> (At this time, Playboy Magazine sponsored a project called the Playboy Defense Team that provided legal assistance in some cases of apparently wrongful convictions and other injustices in criminal prosecutions.)<sup>15</sup>

A stay was issued and, in January 1980, an editor and an investigator from the Playboy Defense Team met with Stanton and began an investigation.<sup>16</sup> Playboy eventually added an editorial assistant to the defense team, and Stanton hired two more private investigators and put a paralegal and a law clerk on the case.<sup>17</sup> Their intensive investigation disclosed that (1) the knife put in evidence at Hicks's trial was not the murder weapon; (2) one of the two dead men had not been killed where Scates's girlfriend claimed, nor had he been stabbed in the back as the prosecution claimed; (3) other persons had been at the apartment on the night of the killings but had not been questioned by the police; (4) the police had lost much of the evidence collected at the crime scene; and (5) the chief homicide detective had sought to reopen what he described in a report as a completely bungled investigation, but was ignored by other police officials and the prosecutors.<sup>18</sup>

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11. August 1980, at 62.

12. August 1980, at 62.

13. August 1980, at 62.

14. August 1980, at 62; May 1981, at 66.

15. See Vicki Quade, "The Bunny is Serious: Playboy Helps Some of the Legal System's Innocent Victims," 70 AMERICAN BAR ASSOCIATION JOURNAL 38 (September 1984).

16. August 1980, at 62.

17. May 1981, at 66.

18. May 1981, at 66 - 67.



In March of 1980, Stanton filed a motion for a new trial, on the ground that Hicks had not understood what was going on at the first trial because of his low intelligence. The judge who had presided over the first trial agreed.<sup>19</sup> The prosecutors rejected Stanton's request that the charges be dropped or that the matter be placed afresh before a grand jury. They insisted on taking it to trial again.<sup>20</sup> With the support of the defense team recruited and retained by Playboy, Niles Stanton defended Larry Hicks at retrial in November 1980, and Hicks was acquitted<sup>21</sup> – spared from execution “not by any failsafe feature of the criminal-justice system but because someone else's lawyer heard his unusual story and bothered to check it out” after a chance encounter in a prison hallway.<sup>22</sup>

**SONIA JACOBS (Florida)**

Convicted 1976, released 1992

On the morning of February 20, 1976, Florida Highway Patrolman Phillip Black and his friend, a vacationing Canadian constable named Donald Irwin, approached a green Camaro parked at a rest stop on Interstate 95. The occupants of the car were asleep: Walter Rhodes in the driver's seat, Jesse Tafero beside him, Sonia Jacobs – Tafero's girlfriend – and her two small children in the back seat. Looking into the car, Black noticed a handgun at Rhodes's feet.<sup>23</sup> Black took the gun and ran a radio check on it and Rhodes. While he was doing the check, Rhodes got out of the Camaro.<sup>24</sup> Discovering that Rhodes was on parole for armed robbery, Black returned to the Camaro and attempted to question Tafero and Jacobs but both refused to answer.<sup>25</sup> (Tafero was in violation of his parole for having left the State two years earlier.<sup>26</sup>) Black then ordered Tafero and Jacobs out of the car. Tafero was slow to respond, so Black pulled him out, struggling. Irwin helped Black subdue Tafero and then held Tafero against the side of the patrol car while Black radioed for backup. Tafero began struggling again, and Black drew his gun.<sup>27</sup>

What happened next was in controversy for years. Differing accounts of it were given by Rhodes, Tafero, Jacobs, and two truck drivers who witnessed the incident. From all of these accounts and other sources, it is clear only that several shots were fired and both police officers fell to the ground. Rhodes,

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19. August 1980, at 63.

20. May 1981, at 67.

21. James H. Kimbrough, “Larry Hicks” [Regional News, Indiana distribution], *United Press International*, November 21, 1980; May 1981, at 67.

22. August 1980, at 62.

23. *Jacobs v. State*, 396 So.2d 713, 715 (Fla. 1981); *Tafero v. State*, 403 So.2d 355, 358 (Fla. 1981); *Jacobs v. Singletary*, 952 F.2d 1282, 1285 (11th Cir. 1992).

24. *Jacobs v. State*, 396 So.2d, at 715.

25. Peter Marks, “Inseparable Sunny Jacobs and Micki Dickoff Were Decades and Worlds Apart when Murder, a Death Sentence and the Essence of Friendship Brought Them Back Together,” Part II, *Newsday*, September 8, 1992 [hereafter, “Marks”].

26. Marks.

27. *Jacobs v. State*, 396 So.2d, at 715; *Singletary*, 952 F.2d, at 1285; Marks.

Tafero, Jacobs and the children ran from the Camaro, left the scene in the trooper's vehicle, drove to a retirement community where Rhodes commandeered another car at gunpoint, and (with Rhodes at the wheel and the car-owner held hostage) crashed that car into a police roadblock, where they were apprehended.<sup>28</sup> Patrolman Black and Constable Irwin died of gunshot wounds.

The murder of the two police officers was one of the most shocking crimes in Broward County's history.<sup>29</sup> Prosecutors filed capital murder charges against Tafero and Jacobs and tried the two separately. Rhodes was permitted to plead guilty to second-degree murder and was given two life sentences instead of death in exchange for testifying against Tafero and Jacobs. Rhodes was the principal prosecution witness at both trials,<sup>30</sup> testifying that Jacobs had fired the first shot at Black from the rear seat of the Camaro. Then, Rhodes said, Tafero grabbed the gun from Jacobs and fired additional shots at Black before turning the gun on Irwin.<sup>31</sup> At Jacobs's trial a woman named Brenda Isham also testified that Jacobs had confessed the murders to Isham while the two of them were being held in the county jail and that Jacobs had "said she would do it again."<sup>32</sup> Both Jacobs and Tafero were convicted and sentenced to death.<sup>33</sup>

There was at least one major problem with the version of events presented by the prosecution at the trials of Jacobs and Tafero. After they and Rhodes had been arrested, Paraffin tests indicated that only Rhodes, not Jacobs or Tafero, had fired a weapon.<sup>34</sup> And with the passage of time, the version of events that sent Jacobs and Tafero to death row came into further question. In Florida's Avon Park Correctional Center in 1979, Rhodes made an affidavit recanting his trial testimony and reciting that he alone had shot both officers, with a gun that he had hidden under his shirt when exiting his car.<sup>35</sup> He later repudiated this

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28. *Jacobs v. State*, 396 So.2d, at 715 - 716; *Tafero*, 403 So.2d, at 358 - 359; *Singletary*, 952 F.2d, at 1285; Marks; Bryanna Latoof, "Assistant State Attorney to Witness Execution," *St. Petersburg Times*, March 8, 1988, p. 3.

29. Marks.

30. See *Jacobs v. State*, 396 So.2d, at 716; *Tafero*, 403 So.2d, at 358 - 359; *Singletary*, 952 F.2d, at 1285, 1287, 1289.

31. *Singletary*, 952 F.2d, at 1288; Marks.

32. Associated Press, "Inmate Wants Conviction for 2 Slayings Overturned," *St. Petersburg Times*, September 7, 1989, p. 5B; Marks.

33. Marks.

34. Marks; *Singletary*, 952 F.2d, at 1289. Other physical evidence was inconclusive: tests conducted by the State's ballistics expert showed only that it was possible for a gun to have been fired from the rear seat of the car, and the medical examiner was unable to draw any conclusions about the origin of the shots from his examination of the victims. *Ibid.*

35. Rhodes explained "in the interest of justice and to purge myself before my creator," that he had hidden a gun under his shirt when he got out of the car. "As Patrolman Black tried to face me, I fired a shot into the left side of his chest," wrote Rhodes. "The bullet went through him and hit the chrome windshield molding of the patrol car. I fired four more shots through his head and various parts of his body . . . . As I swivelled to the left, I observed Constable Irwin attempting to grap [sic] the service revolver from Patrolman Black's grip. Thus I fired twice through his head." Marks.

recantation-and-confession, then repeated it twice (once in a letter to the district attorney, and once in a sworn statement to the Governor in support of clemency for Tafero) but repudiated it again both times.<sup>36</sup> In 1989, Brenda Isham also recanted her testimony against Jacobs.<sup>37</sup> Three years later, in federal habeas corpus proceedings, the United States Court of Appeals for the Eleventh Circuit agreed with a federal magistrate judge that Isham's testimony at Jacobs's trial had been "fabricated"<sup>38</sup> but held that because the prosecution "neither knew nor should have known that Isham would commit perjury"<sup>39</sup> (even though "the prosecution strongly pressured Isham to testify"<sup>40</sup>), the perjury did not violate Jacobs's federal constitutional rights.<sup>41</sup>

Meanwhile, the Florida Supreme Court had reversed Jacobs's death sentence and ordered her resentenced to life imprisonment because of a penalty-stage error by the trial judge.<sup>42</sup> In the course of the appeal leading to this result, the court *sua sponte* had ordered the trial judge to reveal any information he considered in his sentencing decision that was not known to Jacobs. The trial judge disclosed and turned over to Jacobs's counsel for the first time a presentence investigation report to which was attached a confidential polygraph examination of Rhodes<sup>43</sup> in which Rhodes made statements differing significantly from his testimony at trial.<sup>44</sup> (At trial, Rhodes had testified that Jacobs fired the first shot in the barrage and definitely shot Patrolman Black. The polygraph report revealed that Rhodes was unsure whether Jacobs had ever fired the gun. At trial, Rhodes testified he saw Tafero take the gun from Jacobs. In the polygraph report, Rhodes is quoted as saying only that Tafero had retrieved the gun from the back seat. At trial, Rhodes testified he had asked Tafero what had "happened at first" during the shooting, and Tafero replied, "Sonia took care of it." In the polygraph report, Rhodes is described as stating positively that "no discussion concerning the shooting ever took place."<sup>45</sup>) The Florida courts rejected Jacobs's contention that the nondisclosure of these

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36. Marks; Lane Kelley & Barbara Walsh, "Woman Freed After 17 Years, Guilty Plea," *Orlando Sentinel*, October 10, 1992, p. D1.

37. Marks; *Singletary*, 952 F.2d, at 1287.

38. *Singletary*, 952 F.2d, at 1289; and see *id.* at 1296. The magistrate's finding is described in *id.* at 1286. See also Associated Press, "Judge Says Woman's Sentence Should Stand," *St. Petersburg Times*, September 8, 1989, p. 10B.

39. *Singletary*, 952 F.2d, at 1287.

40. *Singletary*, 952 F.2d, at 1286 n.2.

41. *Singletary*, 952 F.2d, at 1287. "We have previously ruled that only knowing use of perjured testimony constitutes a due process violation." *Id.* at 1287 n.3.

42. The Supreme Court held that the trial judge had erroneously overridden the jury's recommendation of a life sentence for Jacobs in the mistaken belief that he could not consider nonstatutory mitigating circumstances and after incorrectly finding three aggravating circumstances instead of two. *Jacobs v. State*, 396 So.2d, at 717 - 718. Jacobs's conviction was affirmed, however.

43. *Jacobs v. State*, 357 So.2d 169 (Fla. 1978).

44. *Singletary*, 952 F.2d, at 1285.

45. *Singletary*, 952 F.2d, at 1287 - 1288.

potentially impeaching statements by Rhodes had violated her rights under *Brady v. Maryland*<sup>46</sup> and its progeny.<sup>47</sup> But in federal habeas corpus proceedings, the Eleventh Circuit Court of Appeals in 1992 sustained Jacobs's *Brady* claim and vacated her conviction.<sup>48</sup>

A new force had entered the case by the federal habeas stage. In her childhood, Sonia Jacobs had been an inseparable friend of Micki Dickoff, now a film-maker. Dickoff learned about Jacobs's incarceration through Dickoff's parents who happened to live in Florida. Dickoff decided to write to Jacobs, and the two women rekindled their friendship. After numerous visits to Jacobs in prison, Dickoff became convinced of Jacobs's innocence and undertook to reexamine the case. She reviewed trial transcripts, affidavits, and newspaper stories, at times with the help of her roommate Christie Webb, an attorney in Los Angeles. She visited the scene of the crime. Dickoff's assistance eventually played a significant role in exposing two major flaws in the prosecution's case against Jacobs.<sup>49</sup>

First, Jacobs and Tafero both contended that Rhodes had done all the shooting. At Jacobs's trial, a ballistics expert testified for the prosecution that a bullet which struck the Patrolman's vehicle had originated from the rear area of the Camaro, though not necessarily from inside the car. Hence, if Rhodes had never been in the rear area, he could not have been the shooter. Rhodes's testimony was that he had been standing, arms raised, at the front of the Camaro throughout the episode. Two truckers who had witnessed the shooting gave conflicting testimony as to Rhodes's location. The first trucker, Robert McKenzie, was about 150 feet away from the scene, seated in his tractor-trailer taking a rest. The second, Pierce Hyman, pulled his rig up next to McKenzie's at some point early in the confrontation. Hyman's testimony placed Rhodes at the front of the Camaro, where Rhodes said he was. But McKenzie testified that he saw Rhodes move around the front of the Camaro to the back. It required Dickoff's film expertise to explain the discrepancy. McKenzie had testified that as the dispute heated up, he moved his truck closer to get a better view. Hyman had testified that for several moments McKenzie's moving truck blocked his view. Dickoff realized that this set of events jibed with a phenomenon well known in filmmaking: if an object is moved from one point to another without any indication to the viewer that it is moving, the change in position will simply not register on the viewer. Since Hyman's view of Rhodes had been blocked while Rhodes moved, Hyman failed to register the change in Rhodes's position from the front to the rear of the Camaro. Dickoff eventually created a series of

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46. 373 U.S. 83 (1963).

47. *Jacobs v. State*, 396 So.2d, at 716; *Singletary*, 952 F.2d, at 1286.

48. *Singletary*, 952 F.2d, at 1298. The Eleventh Circuit also held that three statements made by Jacobs to the police had been admitted at trial in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

49. Marks; Claire Safran, "Blood Sisters," *Reform Judaism*, Fall 1996, p. 31 [hereafter, "Safran"].

computer-generated diagrams displaying the action; and these were presented to the Eleventh Circuit in the federal habeas appeal in which that court ruled for Jacobs on her *Brady* claim.<sup>50</sup>

Dickoff's second major contribution came after the prosecution announced that it would retry Jacobs in the wake of the Eleventh Circuit ruling vacating her conviction.<sup>51</sup> At Dickoff's suggestion, Jacobs's lawyers now requested a printout of Rhodes's polygraph test, as distinguished from the report on the test containing Rhodes's *Brady* statements. The printout revealed that Rhodes had lied in his accounts of aspects of the shootings. Confronted with this new evidence, the prosecutors offered Jacobs an *Alford* plea<sup>52</sup> which would result in her immediate release with credit for time served. The case was resolved on that basis, and Sonia Jacobs was freed on October 9, 1992,<sup>53</sup> two and a half years after the execution of her boyfriend and co-defendant Jesse Tafero,<sup>54</sup> who had also been convicted largely on the basis of Rhodes's now-discredited testimony.

### RONALD S. MONROE (Louisiana)

Convicted 1978, sentence commuted to life 1989

On the night of September 10, 1977, Lenora Collins was stabbed to death in her bedroom.<sup>55</sup> Two of her children, 11-year-old Theodise and 12-year-old Joseph, had been in the bedroom with her. The children awoke to their mother's screams and saw a man thrusting a knife repeatedly into her neck and chest. As they were later to describe the terrible events of that night, the man then turned to Theodise, said "I'm going to kill you," and sunk the knife into her back, through a lung.<sup>56</sup>

Theodise and Joseph became the principal witnesses at the trial of their neighbor, 22-year-old Ronald S. Monroe, for the murder of their mother.<sup>57</sup> The Collins family and Monroe's family each lived in one half of a duplex. A short time before Lenora's death, her mother had purchased the entire residence and had informed the Monroes they would have to relocate.<sup>58</sup> On September 9,

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50. Marks; Safran, at 36.

51. Safran, at 36.

52. See *North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea is the equivalent of a traditional plea of *nolo contendere*: it authorizes the entry of a judgment of conviction without admitting factual guilt.

53. Safran, at 36; Kelley & Walsh, note 36 *supra*.

54. See Marks; Rick Barry, "Pedro's Fire Could Burn Old Sparky," *Tampa Tribune*, March 30, 1997, p.1.

55. *Monroe v. Butler*, 883 F.2d 331, 332 (5th Cir. 1988); Ron Howell, "The Convoluted Collins Case Once Again: The Man Convicted of her Murder Has Asked the Supreme Court for a Stay of Execution," Part II, *Newsday*, August 13, 1988, p. 2 [hereafter, "Howell"].

56. Howell.

57. *State ex rel. Monroe v. Butler*, 531 So.2d 1079 [at 1079] (La. 1988) (concurring opinion of Justice Lemmon) [hereafter, "Lemmon concurrence"]; Howell.

58. Joe Gyan Jr., "Filings in Monroe Case Cite Stinson Jealousy," *Baton Rouge Morning Advocate*, August 22, 1989, p. 6A [hereafter, "Gyan"]; Howell.

1977, a registered letter was delivered to the Monroes notifying them to vacate the premises. Ronald Monroe, who himself lived a few blocks away with his wife and infant child, was at the duplex on one of his frequent visits to his mother and he signed for the letter.<sup>59</sup>

The eviction gave the prosecution a motive for the crime.<sup>60</sup> This and the testimony of the two children identifying Monroe as the murderer were enough to convince a jury to convict Monroe and sentence him to death, even though (1) Theodise and Joseph gave radically different descriptions of the clothing they had supposedly seen Monroe wearing at the time of the killing;<sup>61</sup> (2) no physical evidence connected Monroe to the killing;<sup>62</sup> and (3) Monroe had no history of violence, except for a \$10 fine for fighting in 1976.<sup>63</sup>

In 1978, Monroe's first conviction was reversed because the trial judge had committed an error in jury selection.<sup>64</sup> In 1980, Monroe was convicted again and was again sentenced to die in Louisiana's electric chair.<sup>65</sup>

In July 1980, six months after Monroe's second conviction, a detective named Joseph Gallardo from the Pontiac, Michigan Police Department, contacted the New Orleans police to convey information regarding the murder of Lenora Collins. Detective Gallardo had been investigating one George Stinson for the murder of Stinson's common-law wife in Pontiac. During this investigation Gallardo received a tip suggesting that Stinson had also murdered his previous wife, Lenora Collins. Both women had been stabbed in the neck and chest.<sup>66</sup>

Two months later, Gallardo contacted the New Orleans police again. Gallardo had recently interviewed Stinson's cellmate, Francis Lee McWilliams, and McWilliams said Stinson had confessed to the Michigan murder and stated that "the same thing happened" to his former wife in New Orleans. According to McWilliams, Stinson said he had threatened his stepchildren into identifying their neighbor as the murderer.<sup>67</sup> During McWilliams's meeting with Gallardo,

59. Howell.

60. David Boul, "Louisiana Moving to Execute Innocent Man, Activists Fear," *Atlanta Journal & Atlanta Constitution*, July 9, 1988, p. A1 [hereafter, "Boul"].

61. Robert A. Jordan, "Editorial: Louisiana's Handling of Monroe Makes Case Against Death Penalty," *Atlanta Constitution*, August 16, 1989, p. A11 [hereafter, "Jordan"].

62. Boul; *Monroe v. Butler*, 485 U.S. 1024, 1025 (1988) (opinion of Justice Marshall, dissenting from the denial of *certiorari*) [hereafter, "Marshall dissent"]. The murder weapon had never been found. Howell; Boul.

63. Howell; Jordan.

64. *State v. Monroe*, 366 So.2d 1345 (La. 1978).

65. Howell.

66. Marshall dissent, at 1025; Howell.

67. Marshall dissent, at 1025 ; Howell; Boul; *Monroe v. Butler*, 690 F.Supp. 521, 522 (E.D. La. 1988). "A summary that Officer McKenzie [Detective Gallardo's contact in the New Orleans Police Department] made of his notes contained the following information: ¶ 'While in jail, Stinson got to bragging about how he murdered wife in Mich. To cellmate. ¶ Stinson also bragged that he had killed his first wife in New Orleans on 9/10/77 and threatened his stepchildren into identifying neighbor as killer . . . ¶ Det. Gallardo also got information from a second source that

McWilliams produced notes he had written shortly after his conversation with Stinson, which included these:

“What happened to your wife in New Orleans? ‘The same thing that happened to this one.’ ‘You mean you knocked her off too?’ ‘Ya,’ he said with a positive nod of his head.

“You know behind this case here; they may start investigating you on that New Orleans case. ‘They already got some guy for that. I was cleared [sic].’”<sup>68</sup>

When Stinson was questioned by the Pontiac police about his statements to McWilliams, he admitted telling McWilliams that his wife in New Orleans had died the same way, but he denied having said that he was the murderer.<sup>69</sup> However, in September 1980 McWilliams passed a polygraph test on this information.<sup>70</sup>

The New Orleans police never followed up on the information, considering the murder of Lenora Collins a closed case.<sup>71</sup> Nor did they notify Monroe’s lawyers about the information.<sup>72</sup> Stinson was convicted of the Pontiac murder in 1981.<sup>73</sup> But it was only in December 1983 that Detective Gallardo talked to Monroe’s attorneys and told them about Stinson. The information he gave them then included a report that, while Stinson was out on bail, Stinson had allegedly tried to intimidate a teen-age neighbor who was set to testify at Stinson’s murder trial.<sup>74</sup>

In January 1984, less than eight hours before Monroe’s scheduled execution, a federal district court stayed the execution at the instance of a team of high-priced lawyers acting *pro bono*.<sup>75</sup> That court subsequently held that the failure of the New Orleans police to disclose Detective Gallardo’s information when it came to their attention violated Monroe’s constitutional rights.<sup>76</sup> However, because this information was not known to the police until after Monroe’s conviction, the federal district judge did not require that Monroe be given a new

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Stinson had killed New Orleans wife Collins.” *Id.* at 522 n.1.

68. Lemmon concurrence, at 1080; see also Gyan.

69. Lemmon concurrence, at 1080. Stinson would later testify to the same effect in a hearing before a federal magistrate in Monroe’s case in 1984. See *Monroe v. Butler*, note 55 *supra*, 883 F.2d, at 332 - 333; Howell. Cross-examination of Stinson on the point was thwarted when he invoked the privilege against self-incrimination.

70. Gyan; Boul.

71. Lemmon concurrence, at 1080; Gyan.

72. Marshall dissent, at 1025 - 1026; *Monroe v. Butler*, note 67 *supra*, 690 F.Supp. at 522.

73. Boul; Jordan; Olivia Ward, “Louisiana’s Injustice May Be Lesser Evil,” *Toronto Star*, September 5, 1989, p. A19. Stinson served six years for this murder and was paroled in 1987. Howell; Jordan.

74. Gyan; see also Howell.

75. United Press International, “Affidavits Halt Man’s Execution,” *San Diego Union-Tribune*, January 5, 1984, p. A6; see note 87 *infra* and accompanying text.

76. See *Monroe v. Butler*, note 67 *supra*, 690 F.Supp. at 523 - 524; *Monroe v. Blackburn*, 748 F.2d 958, 960 (5th Cir 1984).

trial but only that the Louisiana state courts reconsider his motion for a new trial. In December 1984, the United States Court of Appeals affirmed this ruling.<sup>77</sup>

With the passage of time, independent investigation on the part of Monroe's lawyers turned up more information about Stinson. Back in state court, they proffered evidence that in 1959 Stinson had stabbed still another wife – apparently his first – in the neck and chest and left her for dead.<sup>78</sup> She was Marie Lendo Lee, a Baton Rouge woman, who described Stinson as a “terribly jealous” husband. Ms. Lee reported that, when Stinson learned she wanted a divorce, he screamed “I’m going to kill you and kill myself”; he then stabbed her in the face and arm; and after she fell to the ground he went to his sister’s home and told his sister: “I just killed Marie . . . . I’ve got to get away.”<sup>79</sup> Nevertheless, the Orleans Parish Criminal District Court again denied Monroe’s motion for a new trial.<sup>80</sup> It ruled that his new evidence – that Stinson’s first and third wives had been stabbed by Stinson in the same way that Ms. Collins, his second wife, was stabbed to death, and that all three stabbings had occurred shortly after the women had decided to leave Stinson<sup>81</sup> – was not sufficient to meet Louisiana’s new-trial standard<sup>82</sup> (*i.e.*, that the newly-discovered evidence would probably have changed the jury’s verdict<sup>83</sup>). The Louisiana Supreme Court twice refused to review this ruling, the second time in 1988<sup>84</sup> after Monroe’s lawyers had come up with still additional indications that George Stinson had the disposition and the power to coerce Theodise Collins to testify perjurally against Ronald Monroe. (Barbara Davis, a neighbor of the Collins family in 1977, revealed that “[w]hen she (Theodise) was 11 years old and I [(Barbara)] was 12, she told me that her stepfather George Stinson was having sex with her about once a month. . . . He would give her \$20 each time.” Theodise told Barabara that Stinson had threatened Theodise: “She said, ‘If I tell anyone, he’ll hurt me and my family.’”<sup>85</sup>)

In the end, the courts never could discern enough evidence of Monroe’s innocence to warrant giving him judicial relief. But reviewing the whole record on his application for executive clemency, the Louisiana state pardons board

77. *Id.* at 960, 962.

78. Lemmon concurrence, at 1080.

79. Gyan.

80. Marshall dissent, at 1026 - 1027.

81. Jordan. Lenora Collins had ended her relationship with Stinson approximately five months prior to her murder. Lemmon concurrence, at 1079 - 1080; Howell.

82. See *Monroe v. Butler*, note 55 *supra*, 883 F.2d at 332.

83. See *Monroe v. Butler*, note 67 *supra*, 690 F.Supp. at 526 n.6; Howell.

84. *State ex rel. Monroe v. Butler*, note 57 *supra*.

85. Gyan. However, at a 1984 hearing Theodise Collins reaffirmed her testimony that Ronald Monroe was the killer and denied that Stinson had intimidated her. See *Monroe v. Butler*, note 55 *supra*, 883 F.2d at 333 & n.1. And in 1989 Theodise, then twenty-four, in a meeting with Louisiana Governor Buddy Roemer, asserted she was sure Monroe was the killer and denied ever having been sexually abused by Stinson. Associated Press, “La. Death Sentence Commuted,” *Newsday*, August 18, 1989, p. 15.



recommended in August 1988 that Monroe's death sentence be commuted.<sup>86</sup> This outcome was the product of four-and-a-half years of legal work on Monroe's behalf by the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, which had been recruited by the NAACP Legal Defense Fund to represent Monroe without charge and which had devoted more than \$ 1,000,000 in lawyers' time and expenses to the case by 1988.<sup>87</sup> The pardons board's recommendation came within a week of Monroe's scheduled execution, but Governor Buddy Roemer chose not to act on it until all court proceedings were concluded. Finally, after several more stays, on August 17, 1989, Governor Roemer commuted Monroe's sentence to life without parole,<sup>88</sup> the first commutation of a death sentence in Louisiana since Louisiana's reinstatement of capital punishment after *Furman v. Georgia*.<sup>89</sup>

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86. Associated Press, "La. Board: Don't Execute Convicted Killer: Noting Doubts, It Seeks Change to a Life Term," *Atlanta Constitution*, August 23, 1988, p. 4; Staff Reports, "Louisiana Supreme Court Issues Stay of Execution," *Atlanta Journal & Atlanta Constitution*, August 24, 1988, p. A6.

87. See Howell.; Boul; Peter Applebome, "Death Row Takes On a Higher Profile," *New York Times*, August 21, 1989, p. A10.

88. Applebome, note 87 *supra*; Associated Press, note 85 *supra*; and see *State v. Jones*, 639 So.2d 1144, 1150 - 1151 (La. 1994). The Governor stated that "While there is guilt for Ronald Monroe, in an execution in this country, the test ought not be reasonable doubt, the test ought to be is there any doubt." *Id.* at 1151.

89. Marsha Shuler, "Lawyers Ponder Next Move," *Baton Rouge Morning Advocate*, August 18, 1989, p. 1B. The Louisiana death-penalty statute under which Monroe was condemned to die had been enacted in 1976 (see *State v. Jones*, note 88 *supra*, 639 So.2d, at 1148) after Louisiana's first post-*Furman* death-penalty statute was invalidated in *[Stanislaus] Roberts v. Louisiana*, 428 U.S. 325 (1976).