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Andrea Galbo

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# DEATH AFTER LIFE: THE FUTURE OF NEW YORK'S MANDATORY DEATH PENALTY FOR MURDERS COMMITTED BY LIFE-TERM PRISONERS

## Introduction

The United States Supreme Court has been grappling with the constitutionality of state death penalty statutes since its landmark decision in *Furman v. Georgia*.<sup>1</sup> Although the *Furman* Court did not rule on whether the death penalty was a per se violation of the eighth<sup>2</sup> and fourteenth<sup>3</sup> amendments to the United States Constitution, it did hold in a brief per curiam opinion that the imposition of the death penalty in the case at bar was cruel and unusual punishment in violation of those amendments.<sup>4</sup>

In response to *Furman*, most of the states revised their death penalty laws in the years following the decision.<sup>5</sup> Two basic types of statutes emerged: the "guided" discretion statute in which the sentencing authority was given factors to weigh in deciding whether to impose capital punishment<sup>6</sup> and the mandatory statute in which death was the automatic penalty for certain capital offenses.<sup>7</sup>

In a series of five decisions in 1976,<sup>8</sup> the Court reexamined the constitutionality of these newly-drafted death penalty statutes, up-

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1. 408 U.S. 238 (1972) (per curiam).

2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. U.S. CONST. amend. XIV states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." The eighth amendment is enforceable against the states through the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

4. *Furman*, 408 U.S. at 239-40 (per curiam).

5. See *infra* notes 55-66 and accompanying text for a discussion of the revised death penalty laws.

6. See, e.g., GA. CODE ANN. § 17-10-30(b), (c) (1982). See also *infra* notes 79-92, 115-22 and accompanying text for a discussion of these "guided" discretion statutes.

7. See, e.g., N.Y. PENAL LAW §§ 60.06, 125.27(1)(a)(ii), (iii) (McKinney 1975) (*infra* note 138). See also *infra* notes 61-68, 93-111 and accompanying text for a discussion of these mandatory statutes.

8. *Roberts v. Louisiana* (Roberts I), 428 U.S. 325 (1976) (opinion of Justices Stewart, Powell, and Stevens) [hereinafter Stevens opinion]; *Woodson v. North Carolina*, 428 U.S. 280 (1976) (opinion of Stewart, Powell, and Stevens) [hereinafter Stewart opinion]; *Jurek v. Texas*, 428 U.S. 262 (1976) (opinion of Stewart, Powell, and Stevens) [hereinafter Stevens opinion]; *Proffitt v. Florida*, 428 U.S. 242 (1976)

holding the "guided" discretion statutes of Georgia, Florida, and Texas<sup>9</sup> while striking down the mandatory laws of North Carolina and Louisiana.<sup>10</sup> It was apparent from these decisions that mandatory death penalty statutes passed after *Furman* would be given more careful scrutiny than those allowing for some consideration of factors unique to the defendant.<sup>11</sup>

The only category of mandatory statute for which the constitutionality issue was left open by the Court in its 1976 decisions and in subsequent death penalty cases was that of a mandatory death penalty for an "extremely narrow category of homicide" defined "in terms of the character or record of the offender."<sup>12</sup> Whether murder by a life-term prisoner would fit this category was specifically left open by the Court in its decisions between 1976 and 1978,<sup>13</sup> and was precisely the issue faced by the New York State Court of Appeals in *People v. Smith*.<sup>14</sup>

Before examining the decision of the New York State Court of Appeals in *Smith*, this Note analyzes the relevant Supreme Court death penalty decisions since 1972<sup>15</sup> in order to compare New York's mandatory death statute for life-term prisoners who murder with other state death penalty statutes that have been reviewed by the

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(opinion of Stewart, Powell, and Stevens) [hereinafter Powell opinion]; *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens) [hereinafter Stewart opinion]; see *infra* notes 79-106 and accompanying text.

9. *Jurek*, 428 U.S. 262 (Stevens opinion); *Proffitt*, 428 U.S. 242 (Powell opinion); *Gregg*, 428 U.S. 153 (Stewart opinion). See also *infra* notes 79-92 and accompanying text for a discussion of the three "guided" discretion statutes.

10. *Roberts I*, 428 U.S. 280 (Stevens opinion); *Woodson*, 428 U.S. 280 (Stewart opinion). See *infra* notes 93-106 and accompanying text for a discussion of the two mandatory statutes.

11. See *infra* notes 79-111 and accompanying text for a discussion of the scrutiny given to both the discretionary and mandatory death penalty statutes in these five decisions.

12. *Woodson*, 428 U.S. at 287 n.7 (Stewart opinion).

13. *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978) (Parts I and II of Chief Justice Burger's opinion constituted opinion of Court; Part III, which dealt with constitutionality of death penalty statute, was plurality opinion and will be so cited); *Roberts v. Louisiana* (*Roberts II*), 431 U.S. 633, 637 n.5 (1977) (*per curiam*); *Roberts I*, 428 U.S. at 334 n.9 (Stevens opinion); *Woodson*, 428 U.S. at 287 n.7, 292 n.25 (Stewart opinion); *Gregg*, 428 U.S. at 186 (Stewart opinion); see *infra* note 159 and accompanying text. This open question will be hereinafter referred to as the Supreme Court's lifer reservation.

14. *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 105 S. Ct. 1226 (1985); see *infra* notes 155-74 and accompanying text.

15. See *infra* notes 79-122 and accompanying text.

Supreme Court.<sup>16</sup> Since 1976, the Supreme Court has attempted to provide guidelines for a constitutionally valid death penalty statute, emphasizing the need for a consideration of mitigating and aggravating factors relevant to the individual offender and offense.<sup>17</sup> The New York State Court of Appeals struck down New York's mandatory death penalty statute for life-term inmates based on these guidelines.<sup>18</sup> However, both proponents<sup>19</sup> and opponents<sup>20</sup> of the death penalty have proffered a variety of moral, penological, and sociological arguments which explore issues beyond the constitutionality of these statutes. These issues were not considered in depth by the New York State Court of Appeals, which focused on decisions of the United States Supreme Court<sup>21</sup> and other federal and state courts<sup>22</sup> in its analysis of the mandatory death statute.

After considering both the legal and nonlegal arguments, this Note concludes that there can not and should not be a mandatory death penalty for life-term prisoners who murder in New York.<sup>23</sup> This type of statute is clearly unconstitutional because it does not allow for individualized consideration of the offender and the offense.<sup>24</sup> In addition, it is unreasonably discriminatory towards this class of defendants.<sup>25</sup> A discretionary death penalty statute, which provides for consideration of both mitigating and aggravating factors, is a more viable method of imposing a death sentence on a convicted felon.<sup>26</sup> Continuation of the imposition of the sanction of death on this small category of proven criminals is justifiable as long as it is not a mandatory punishment for all life-term prisoners but rather takes into account the uniqueness of the accused felon and the crime committed.<sup>27</sup> Accordingly, this Note recommends that the New York legislature draft a discretionary death penalty statute for life-term prisoners who murder.<sup>28</sup>

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16. *See infra* notes 79-122, 179-213 and accompanying text.

17. *See infra* notes 79-122 and accompanying text.

18. *See infra* notes 155-74 and accompanying text.

19. *See infra* notes 214-39 and accompanying text.

20. *See infra* notes 214, 240-60 and accompanying text.

21. *See infra* notes 160-02, 177-93 and accompanying text.

22. *See infra* notes 194-208 and accompanying text.

23. *See infra* notes 290-302 and accompanying text.

24. *Id.*

25. *Id.*

26. *See infra* notes 263-72, 287-89 & 290-302 and accompanying text.

27. *See infra* notes 273-302 and accompanying text.

28. *See infra* notes 287-89, 295-302 and accompanying text.

## II. Constitutional Requirements for Death Sentencing

### A. History of the Death Penalty in America

Both mandatory and discretionary death penalty statutes have been used in the United States since the eighteenth century.<sup>29</sup> At the time of the adoption of the Bill of Rights in 1791, all thirteen states followed the common law practice of mandating the death penalty for certain offenses such as murder, treason and arson.<sup>30</sup> Juries could circumvent this extreme sanction only by acquitting the defendant or finding him guilty of a lesser offense.<sup>31</sup> However, because the death penalty was mandatory, juries often acquitted a guilty defendant rather than sentence him to death.<sup>32</sup>

In response to this threat of "jury nullification," the states began to abandon these mandatory statutes in favor of statutes which gave some sentencing discretion to the court in capital cases. By the 1960's, the only enforceable mandatory death penalty statute<sup>33</sup> dealt with murder or assault with a deadly weapon by a life-term prisoner.<sup>34</sup> The remainder of the states either had adopted discretionary statutes which permitted the jury to respond to mitigating factors by withholding the death penalty<sup>35</sup> or had abolished it completely.<sup>36</sup>

The new discretionary statutes gave juries complete freedom to determine whether the death penalty would be imposed in capital cases.<sup>37</sup> Although there were challenges to the constitutionality of

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29. See generally THE DEATH PENALTY IN AMERICA 3-28 (H. Bedau 3d ed. 1982) [hereinafter cited as Bedau] (discussion of background and early development of death penalty in America); *Woodson*, 428 U.S. at 289-93 (Stewart opinion) (discussion of history of mandatory death penalty statutes in United States).

30. *Woodson*, 428 U.S. at 289 (Stewart opinion).

31. Bedau, *supra* note 29, at 9.

32. *Id.* at 9-10.

33. Prior to 1972, there were still a few obscure mandatory death statutes in the United States which were not enforced. Examples include trainwrecking resulting in death, perjury in a capital case which resulted in the death of an innocent person, and treason against a state government. *Woodson*, 428 U.S. at 292 n.25 (Stewart opinion).

34. *Id.*

35. See Bedau, *supra* note 29, at 10 for a discussion of the historical development of these discretionary statutes between 1809 and 1963.

36. See *id.* at 21-24 for a discussion of the abolition movement in the states between 1830 and 1970.

37. See, e.g., N.C. GEN. STAT. § 14-17 (1969) ("murder in the first degree . . . shall be punished with death: Provided, if at the time of rendering its verdict in open court,

these statutes, none were successful.<sup>38</sup> Moreover, as recently as 1971,<sup>39</sup> the Supreme Court rejected the argument that allowing jury discretion in imposing the death penalty violated the standards of fundamental fairness embodied in the fourteenth amendment due process provision<sup>40</sup> and asserted that “[t]he States [were] entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision . . . .”<sup>41</sup>

### B. *Furman v. Georgia*

In 1972, the constitutional status of discretionary sentencing in capital cases was placed in question by the Supreme Court’s opinion in *Furman v. Georgia*.<sup>42</sup> In *Furman*, the Supreme Court heard appeals from three defendants, all of whom had been convicted in state court and sentenced to death by juries empowered with complete discretion to determine whether it was the appropriate sanction for the crimes committed.<sup>43</sup> The three defendants challenged the constitutionality of the sentencing statute and appealed to the Supreme Court. In a brief per curiam opinion<sup>44</sup> accompanied by five concurring<sup>45</sup> and four dissenting<sup>46</sup> opinions, the Court held that the “imposition and

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the jury shall so recommend, the punishment shall be imprisonment for life in the State’s prison, and the court shall so instruct the jury . . .”).

38. See, e.g., *Williams v. Oklahoma*, 358 U.S. 576, 587 (1959); *Williams v. New York*, 337 U.S. 241, 252 (1949); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

39. *McGautha v. California*, 402 U.S. 183 (1971).

40. *Id.* at 207-08.

41. *Id.*

42. 408 U.S. 238 (1972) (per curiam).

43. William Henry Furman was convicted of murder, and his death sentence was upheld by the Georgia Supreme Court. *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969). Lucious Jackson, Jr. was convicted of rape, and his death sentence was upheld by the Georgia Supreme Court. *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969). Elmer Branch was convicted of rape, and his death sentence was upheld by the Texas Criminal Court of Appeals. *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969).

44. *Furman*, 408 U.S. at 239-40.

45. Justices Douglas, Brennan, Stewart, White, and Marshall concurred in the decision. See *infra* notes 49, 51-52 and accompanying text for portions of these concurring opinions.

46. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented. See *infra* notes 53-54 and accompanying text for portions of these dissenting opinions.

carrying out of the death penalty in [the cases at bar] constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>47</sup>

Although the Court did not hold that the imposition of the death penalty was a *per se* violation of the Constitution,<sup>48</sup> it did recognize that death was a unique penalty that could not be assessed under sentencing procedures which created a substantial risk of arbitrary and capricious application.<sup>49</sup> However, because each member of the majority wrote a separate opinion, the precise scope of the Court's holding was unclear.<sup>50</sup> Two Justices, concluding that the eighth amendment prohibited the death penalty altogether, voted to reverse the judgments of the state courts<sup>51</sup> while the other three concurring Justices, who were unwilling to hold the death penalty *per se* unconstitutional under the eighth and fourteenth amendments, voted

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47. *Furman*, 408 U.S. at 239-40 (per curiam).

48. Justices Douglas, Stewart, and White limited their opinion to the cases at bar. See *id.* at 240, 257 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring). Only Justices Brennan and Marshall found the death penalty to be a *per se* violation of the eighth and fourteenth amendments. See *id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

49. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned [should be condemned]"); *id.* at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 314 (White, J., concurring) ("past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime").

50. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974) [hereinafter cited as HARVARD NOTE]; see also *Furman*, 408 U.S. at 376 (Burger, C.J., dissenting) ("[t]he widely divergent views of the [eighth] Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command").

51. 408 U.S. at 305 (Brennan, J., concurring) ("[t]oday death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as punishment for crimes."); *id.* at 315 (Marshall, J., concurring) ("The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment.").

to invalidate the statutes on other grounds.<sup>52</sup> Adding to the ambiguity of the decision was the fact that the four dissenting Justices offered differing reasons for upholding the state statutes.<sup>53</sup>

### C. The States Respond to the *Furman* Decision

As Chief Justice Burger predicted in his dissenting opinion, the *Furman* decision created confusion concerning the form a constitutionally acceptable death penalty statute should take.<sup>54</sup> Because the decision invalidated "unguided" discretionary statutes for thirty-nine

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52. *Id.* at 256-57 (Douglas, J., concurring) ("[t]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 310 (Stewart, J. concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

53. *See id.* at 403 (Burger, C.J., dissenting, joined by Blackmun, Powell, and Rehnquist, JJ.) ("[t]he legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to a general abolition of the penalty, without adherence to the conceptual strictures of the Eighth Amendment"); *id.* at 404 ("[a]n Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision"); *id.* at 405 ("[t]he highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits"); *id.* at 414 (Blackmun, J., dissenting) ("[a]lthough personally I may rejoice at the Court's result, I find it difficult to accept or justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end."); *id.* at 414-65 (Powell, J., dissenting, joined by Burger, C.J., Blackmun, and Rehnquist, JJ.) (affirmative references to capital punishment in Constitution, prevailing Supreme Court precedents, limitations on Court's power imposed by doctrine of judicial restraint, and principles of federalism dictate against reversing death sentences in these three cases); *id.* at 467 (Rehnquist, J., dissenting, joined by Burger, C.J., Blackmun, and Powell, JJ.) ("[t]he most expansive reading of the leading constitutional cases does not remotely suggest that this Court has . . . [the power] to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court").

54. The Chief Justice observed that the actual scope of the Court's ruling "is not entirely clear," *id.* at 397 (Burger, C.J., dissenting), and that "the future of capital punishment in this country has been left in an uncertain limbo." *Id.* at 403. Six years later, looking back at the *Furman* decision, he remarked that "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett v. Ohio*, 438 U.S. 586, 599 (1978) (plurality opinion).



states,<sup>55</sup> legislatures that wanted to maintain death as a sanction for certain crimes had to revise their death penalty statutes.<sup>56</sup> To comport with *Furman's* holding that statutory schemes allowing for arbitrary and capricious death sentencing were unconstitutional,<sup>57</sup> state legislators had two options. First, they could make the death penalty mandatory so that upon conviction there would be no question regarding the imposition of the sentence. The second alternative was to provide guidelines for the court to use in determining whether the sanction of death should be imposed.<sup>58</sup>

In the four years following *Furman*, thirty-five states<sup>59</sup> enacted statutes. Seventeen states passed "guided" discretion statutes,<sup>60</sup> sixteen passed mandatory death statutes for various forms of criminal homicide<sup>61</sup> while two simply nullified the jury-discretion feature of their death statutes making capital punishment mandatory.<sup>62</sup> By 1973, eight<sup>63</sup> of the eighteen states with mandatory death statutes had included homicide committed by either an inmate serving a life

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55. See HARVARD NOTE, *supra* note 50, at 1690.

56. See generally *id.* at 1699-1719 for a discussion of the new death penalty statutes passed in response to *Furman*.

57. See *supra* notes 44-49 and accompanying text.

58. Bedau, *supra* note 29, at 250.

59. See, e.g., the first five statutes which were reviewed by the Supreme Court after *Furman*: FLA. STAT. ANN. §§ 782.04, 921.141 (West 1976) ("guided" discretion statute); GA. CODE ANN. § 17-10-30(b)(c) (1982) ("guided" discretion statute); LA. REV. STAT. ANN. § 14:30 (West 1974) (mandatory death statute); N.C. GEN. STAT. § 14-17 (1975) (mandatory death statute); TEX. PENAL CODE ANN. §§ 19.02, 19.03 (Vernon 1974); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981) ("guided" discretion statute). The remaining statutes are cited in *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976) (Stewart opinion). See also *infra* notes 61-65 and accompanying text for a further discussion of the mandatory statutes.

60. The states with "guided" discretion statutes were Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Missouri, Nebraska, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Washington. See *Gregg*, 428 U.S. at 179 n.23 (Stewart opinion).

61. See Bedau, *supra* note 29, at 12. Within two years of *Furman*, California, Idaho, Indiana, Kentucky, Montana, New Hampshire, Nevada, New Mexico, New York, Oklahoma, Rhode Island, and Wyoming passed mandatory statutes. *Id.* Louisiana, Mississippi, and Virginia followed. *Id.*

62. *Id.* The states were Delaware and North Carolina.

63. These eight states were Idaho, Indiana, Louisiana, Mississippi, Nevada, New York, Oklahoma and Wyoming. See Wolfson, *The Deterrent Effect of the Death Penalty Upon Prison Murder* in THE DEATH PENALTY IN AMERICA at 159 (H. Bedau 3d ed. 1982) [hereinafter cited as *Deterrent Effect of Death Penalty Upon Prison Murder*].

sentence<sup>64</sup> or an inmate convicted of a capital offense<sup>65</sup> in the category of crimes requiring the sanction of mandatory death. The rationale behind this classification was twofold: (1) the death penalty satisfied the public's need for vengeance, and it fit the punishment to the crime; and (2) the mandatory death penalty provided the deterrence needed to protect prison staff and inmates from threatened harm.<sup>66</sup>

The reenactment of mandatory death statutes for these and other categories of crimes reversed the historic trend away from this type of statute which had begun in the nineteenth century.<sup>67</sup> At the same time, the removal of all discretion in sentencing as a response to *Furman's* ban on arbitrary and capricious death sentencing reintroduced the potential problem of "jury nullification" which had concerned legislators in the nineteenth and early twentieth centuries.<sup>68</sup>

#### D. The Formulation of Guidelines for a Constitutional Death Penalty Statute

In 1976, after four years of silence on the death penalty, the Supreme Court began to clarify the *Furman* prohibition against arbitrary and capricious death sentencing. In that year, the Court reviewed "guided" discretion statutes in Georgia,<sup>69</sup> Florida<sup>70</sup> and

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64. IND. ANN. STAT. § 35-13-4-1(b)(6)(iv) (Burns 1973); LA. REV. STAT. ANN. § 14:30(3) (West 1974); MISS. CODE ANN. § 97-3-19(2)(b) (1984); NEV. REV. STAT. § 200.030(1)(b) (1973); N.Y. PENAL LAW §§ 60.06, 125.27(1)(a)(iii) (McKinney 1975); OKLA. STAT. ANN. tit. 21, § 701.1 (West Supp. 1973); WYO. STAT. § 6-54 (b), (v), (x) (Supp. 1973). Two additional states passed mandatory death statutes for murder by any prisoner. See R.I. GEN. LAWS ANN. § 11-23-2 (1981); VA. CODE §§ 18.2-10(a), 18.2-31(c), 53-291(1) (1975). However, with the exception of New York, all of these mandatory statutes have been either repealed or amended by the state legislatures or judicially invalidated, and are now discretionary. New York presently has no death penalty due to the recent decision in *Smith*. The legislature may pass a new discretionary or mandatory statute in the future. See *infra* notes 155-74, 209-11 and accompanying text.

65. See IDAHO CODE §§ 18-4003(1), 18-4004 (1973); IND. CODE ANN. § 35-13-4-1(b)(6)(iii) (Burns 1973); LA. REV. STAT. ANN. § 14:30(3) (West 1974); WYO. STAT. § 6-54(b)(iv) (1973).

66. See *Deterrent Effect of Death Penalty Upon Prison Murder*, *supra* note 63, at 159-60, where this rationale is discussed and challenged.

67. Bedau, *supra* note 29, at 12.

68. See *supra* notes 31-32 and accompanying text.

69. GA. CODE ANN. § 17-10-30(b)(c) (1982).

70. FLA. STAT. ANN. §§ 782.04.1, 921.141 (West 1976).

Texas<sup>71</sup> and mandatory laws in North Carolina<sup>72</sup> and Louisiana<sup>73</sup>. The Court was unable to agree on a unifying rationale in the five cases.<sup>74</sup> Nevertheless, it held that the death penalty was not a per se violation of the Constitution,<sup>75</sup> and that the concerns it had expressed in *Furman* regarding arbitrary sentencing could "be met by a carefully drafted statute that ensure[d] that the sentencing authority [was] given adequate information and guidance."<sup>76</sup> The

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71. TEX. PENAL CODE ANN. §§ 19.02(a), 19.03 (Vernon 1974); TEX. STAT. ANN. art. 37.071 (Vernon 1981).

72. N.C. GEN. STAT. § 14-17 (1969). After the *Furman* decision, the Supreme Court of North Carolina held unconstitutional the provision of the death penalty statute that gave the jury the option of returning a guilty verdict without capital punishment. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973). However, the court further held that this provision was severable, and the statute thus survived as a mandatory death penalty law. See *Woodson v. North Carolina*, 428 U.S. 280, 285-86 (1976) (Stewart opinion).

73. LA. REV. STAT. ANN. § 14:30 (West 1974).

74. There were three groups of Justices in the five cases. Justices Stewart, Powell, and Stevens wrote the opinion of the Court in all five. See *Roberts v. Louisiana* (Roberts I), 428 U.S. at 325-36 (1976) (Stevens opinion); *Woodson*, 428 U.S. at 280-305 (Stewart opinion); *Jurek v. Texas*, 428 U.S. at 262-77 (Stevens opinion); *Proffitt v. Florida*, 428 U.S. at 242-60 (1976) (Powell opinion); *Gregg v. Georgia*, 428 U.S. at 153-207 (1976) (Stewart opinion).

Justices Brennan and Marshall found the death penalty to be unconstitutional under all circumstances. They, therefore, joined Justices Stewart, Powell, and Stevens in striking down the two mandatory death statutes. See *Roberts I*, 428 U.S. at 336 (Brennan, J., concurring); *id.* (Marshall, J., concurring); *Woodson*, 428 U.S. at 305-06 (Brennan, J., concurring); *id.* at 336 (Marshall, J., concurring), and dissented when the Court upheld the "guided" discretion statutes of Texas, Florida, and Georgia. See *Jurek*, 428 U.S. at 277 (Brennan, J., dissenting); *id.* (Marshall, J., dissenting); *Proffitt*, 428 U.S. at 260 (Brennan, J., dissenting); *id.* (Marshall, J., dissenting); *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting).

Chief Justice Burger and Justices White, Blackmun, and Rehnquist did not find any of the statutes unconstitutional for varying reasons. They thus joined Justices Stewart, Powell, and Stevens in upholding the "guided" discretion statutes, see *Jurek*, 428 U.S. at 277 (Burger, C.J., concurring), *id.* at 277-79 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.); *Proffitt*, 428 U.S. at 260-61 (White, J., concurring, joined by Burger, C.J. and Rehnquist, J.); *id.* at 261 (Blackmun, J., concurring); *Gregg*, 428 U.S. at 207-26 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.); *id.* at 226-27 (Burger, C.J., joined by Rehnquist, J.); *id.* at 227 (Blackmun, J. concurring), and dissented when the two mandatory statutes were struck down. See *Roberts I*, 428 U.S. at 337 (Burger, C.J., dissenting); *id.* at 337-63 (White, J., dissenting, joined by Burger, C.J., Blackmun, and Rehnquist, JJ.); *id.* at 363 (Blackmun, J., dissenting); *Woodson*, 428 U.S. at 306-07 (White, J., dissenting, joined by Burger, C.J., and Rehnquist, J.); *id.* at 307-08 (Blackmun, J., dissenting); *id.* at 308-24 (Rehnquist, J., dissenting).

75. *Roberts I*, 428 U.S. at 331 (Stevens opinion); *Woodson*, 428 U.S. at 285 (Stewart opinion); *Jurek*, 428 U.S. at 268 (Stevens opinion); *Proffitt*, 428 U.S. 247 (Powell opinion), *Gregg*, 428 U.S. at 169 (Stewart opinion).

76. *Gregg*, 428 U.S. at 195 (Stewart opinion).

Court established guidelines for drafting this statute in the five decisions,<sup>77</sup> and while a clear mandate was not given to the states regarding the substance of their statutes,<sup>78</sup> it was apparent that the Court favored the "guided" discretion over the mandatory statutes.

In *Gregg v. Georgia*<sup>79</sup> and its companion cases,<sup>80</sup> seven members of the Court agreed that the imposition of the death penalty under the "guided" discretion statutes of Georgia, Florida and Texas did not violate the prohibition against cruel and unusual punishment in the eighth and fourteenth amendments.<sup>81</sup> Although the states were granted wide latitude in enacting death penalty laws as a result of these decisions, it was clear that the Court favored a statute which provided guidance for both the jury and sentencing authority.<sup>82</sup> Since the Georgia and Florida statutes required the jury and trial judge to consider statutory mitigating and aggravating factors before imposing a sentence of death, the Court concluded that imposition of the death penalty was not arbitrary.<sup>83</sup> The statute upheld in *Jurek v. Texas*<sup>84</sup> did not include a list of statutorily prescribed aggravating circumstances as did those in Georgia and Florida. Nevertheless, the Court held that because the statute narrowed capital offenses to five categories of murder and the jury was allowed to consider whatever evidence of mitigating circumstances the defense offered,<sup>85</sup> the death

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77. See *infra* notes 79-106 and accompanying text.

78. See *supra* note 74 and accompanying text.

79. 428 U.S. 153 (1976) (Stewart opinion).

80. *Jurek v. Texas*, 428 U.S. 262 (1976) (Stevens opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (Powell opinion).

81. *Jurek*, 428 U.S. at 276 (Stevens opinion); *Proffitt*, 428 U.S. at 259-60 (Powell opinion); *Gregg*, 428 U.S. at 169 (Stewart opinion); *id.* at 207 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

82. See SCHWAB, LEGISLATING A DEATH PENALTY 18-20 (1977) [hereinafter cited as LEGISLATING A DEATH PENALTY].

83. *Proffitt*, 428 U.S. at 247-253 (Powell opinion); see also FLA. STAT. ANN. § 921.141(5),(6) (West 1976); *Gregg*, 428 U.S. at 196-97, 206-07 (Stewart opinion); GA. CODE ANN. § 17-10-30(b), (c) (1982).

84. 428 U.S. 262 (1976) (Stevens opinion).

85. See TEX. PENAL CODE § 19.03 (Vernon 1974); TEX. STAT. ANN. art. 37.071 (Vernon Supp. 1981); *Jurek*, 428 U.S. at 268-71, 273. The Texas statute limited capital homicide to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed during a kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim was a prison employee. TEX. PENAL CODE § 19.03 (Vernon 1974). The Court felt that these were similar to aggravating circumstances because the jury had to find the defendant guilty of one of these categories of murder before imposing a sentence of death. *Jurek*, 428 U.S. at 269-70.

penalty was being imposed in a rational and consistent manner.<sup>86</sup>

Two additional components of the three statutes helped ensure their constitutionality. First, each contained a provision for an automatic, expedited appeal to the highest court of the state. The Supreme Court did not mandate an elaborate system of appellate review<sup>87</sup> like that found in the Georgia statute whereby each sentence was examined to determine whether it was proportional to other sentences imposed for similar crimes.<sup>88</sup> The Court did comment favorably, however, on the appellate procedures of all three states.<sup>89</sup> The second feature praised by the Court in *Gregg*<sup>90</sup> was the provision for a bifurcated hearing on the issues of guilt and penalty, whereby in a separate proceeding, the sentencing authority was apprised of all information relevant to the imposition of the death penalty and provided with standards to guide its use of the information.<sup>91</sup>

These three recommendations—a consideration of aggravating and mitigating circumstances related to the individual offender and offense; a provision for appellate review of the death sentence in the state's highest court; and a bifurcated hearing on the issues of guilt and penalty—were not mandatory requirements for a constitutionally valid death penalty statute. However, because all three procedures provided guidelines to assist the sentencing authority in exercising its judgment regarding the penalty of death, the Court implied that their presence would help ensure the constitutionality of the statute.<sup>92</sup>

For many of the same reasons that the "guided" discretion statutes of Georgia, Florida and Texas were upheld, the mandatory death penalty statutes of North Carolina<sup>93</sup> and Louisiana<sup>94</sup> were struck

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86. *Jurek*, 428 U.S. at 270-74, 276 (Stevens opinion).

87. See LEGISLATING A DEATH PENALTY, *supra* note 82, at 18-19.

88. See *Gregg*, 428 U.S. at 198 (Stewart opinion); see also GA. CODE ANN. § 17-10-30(b), (c) (1982).

89. *Jurek*, 428 U.S. at 269 (Stevens opinion); TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon 1981); see also *Proffitt*, 428 U.S. at 251, 258 (Powell opinion); FLA. STAT. ANN. § 921.141(4) (West 1976); *Gregg*, 428 U.S. at 198, 206 (Stewart opinion).

90. The Court did not discuss a bifurcated proceeding in either *Proffitt* or *Jurek*.

91. *Gregg*, 428 U.S. at 195 (Stewart opinion).

92. See *id.* ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. Rather, we . . . [want] to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns." (footnotes omitted)).

93. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (Stewart opinion).

94. *Roberts v. Louisiana* (Roberts I), 428 U.S. 325 (1976) (Stevens opinion).

down as violative of the eighth and fourteenth amendments.<sup>95</sup> The Court distinguished the two statutes both substantively<sup>96</sup> and procedurally<sup>97</sup> but found the differences to be of little constitutional significance.<sup>98</sup> The fact that Louisiana had narrowed first-degree murder to five categories of homicide was found to be an "inadequate response to the harshness and inflexibility of a mandatory death sentence statute."<sup>99</sup> In both cases, the Court held that the challenged portions of the statute were unconstitutional because: (1) they were morally unacceptable to society<sup>100</sup> as they did not reflect "the evolving standards of decency that mark[ed] the progress of a maturing society;"<sup>101</sup> (2) they failed to provide standards to guide juries in determining whether or not to impose the death penalty;<sup>102</sup> (3) there was no appellate review of death sentences;<sup>103</sup> and (4) no provisions were made for an examination of the individual character and record of a defen-

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95. *Roberts I*, 428 U.S. at 336 (Stevens opinion); *Woodson*, 428 U.S. at 305 (Stewart opinion).

96. See *Roberts I*, 428 U.S. at 331-32 (Stevens opinion). The crime of first degree murder covered by the statute in *Woodson* included any willful, deliberate, premeditated homicide and felony murder, see N.C. GEN. STAT. § 14-17 (1975), while Louisiana limited first degree murder to five categories of homicide: killing in connection with the commission of certain felonies, killing of a fireman or a peace officer in the performance of his duties, killing by a person with a prior murder conviction or under a current life sentence, killing with intent to inflict harm on more than one person, and killing for remuneration. See LA. REV. STAT. ANN. § 14:30 (West 1974). Only the first part of the statute was challenged in the case at bar. See LA. REV. STAT. ANN. § 14:30(1) ("First degree murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in . . . aggravated kidnapping, aggravated rape or armed robbery."). Section 14:30(2), which related to the killing of a fireman or peace officer, was challenged the following year in *Roberts v. Louisiana* (*Roberts II*), 431 U.S. 633 (1977) (per curiam). See *infra* notes 107-11 and accompanying text.

97. See *Roberts I*, 428 U.S. at 332 (Stevens opinion). In Louisiana, the jury in every first degree murder case had to be instructed on the crimes of first and second degree murder and manslaughter and be provided with the verdicts of guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, and not guilty. In contrast, instructions on lesser included offenses in North Carolina had to be based solely on evidence adduced at trial. *Id.*

98. *Id.*

99. *Id.*; see also *Woodson*, 428 U.S. at 289-96 (Stewart opinion).

100. *Roberts I*, 428 U.S. at 332 (Stevens opinion); *Woodson*, 428 U.S. at 301 (Stewart opinion).

101. *Woodson*, 428 U.S. at 301 (Stewart opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

102. *Roberts I*, 428 U.S. at 334-35 (Stevens opinion); *Woodson*, 428 U.S. at 302-03 (Stewart opinion).

103. *Roberts I*, 428 U.S. at 335-36 (Stevens opinion); *Woodson*, 428 U.S. at 303 (Stewart opinion).

dant by considering statutory aggravating and mitigating circumstances.<sup>104</sup> Because both mandatory statutes "treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death,"<sup>105</sup> the portions of the statutes challenged in the cases at bar were declared to be unconstitutional.<sup>106</sup>

The following year, the Court continued its attack on Louisiana's mandatory death statute<sup>107</sup> by striking down the section of the law which made the death penalty mandatory for the intentional killing of a fireman or peace officer engaged in the lawful performance of his duties.<sup>108</sup> The Court, basing its decision on the statute's failure to allow for consideration of particularized mitigating factors,<sup>109</sup> recognized that the murder victim's status as a peace officer performing his lawful duties was a powerful aggravating circumstance.<sup>110</sup> However, it concluded that it was incorrect to presume that no mitigating factors could exist when the victim was a fireman or peace officer.<sup>111</sup> In *Roberts v. Louisiana*, the Court reaffirmed its commitment to the individualized consideration of the offender and offense and implied once again that a mandatory death statute without provision for mitigating and aggravating circumstances would not meet its test of constitutionality.<sup>112</sup>

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104. *Roberts I*, 428 U.S. at 333-34 (Stevens opinion); *Woodson*, 428 U.S. at 303-04 (Stewart opinion).

105. *Woodson*, 428 U.S. at 304 (Stewart opinion).

106. *Roberts I*, 428 U.S. at 336 (Stevens opinion); *Woodson*, 428 U.S. at 305 (Stewart opinion).

107. *Roberts v. Louisiana* (*Roberts II*), 431 U.S. 633 (1977) (per curiam).

108. LA. REV. STAT. ANN. § 14:30(2) (West 1974) ("First degree murder is the killing of a human being: (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties.").

109. *Roberts II*, 431 U.S. at 637-38 (per curiam). Just as in *Roberts I*, Justices Stewart, Powell, and Stevens were joined by Justices Brennan and Marshall in striking down the mandatory death statute as violative of the eighth and fourteenth amendments. *Id.* at 633-38 (per curiam). Chief Justice Burger was joined by Justices White, Blackmun, and Rehnquist in dissenting opinions which would have upheld the statute. *Id.* at 638. (Burger, C.J., dissenting); *id.* at 638-42 (Blackmun, J., dissenting, joined by White and Rehnquist, JJ.); *id.* at 642-50 (Rehnquist, J., dissenting, joined by White, J.).

110. *Id.* at 636 (per curiam).

111. *Id.* at 636-37 (per curiam). The Court suggested that the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and moral justification might be considered as mitigating factors in the case at bar. *Id.* at 637.

112. *Id.* at 636-38.

In 1978<sup>113</sup> and again in 1982,<sup>114</sup> the imposition of sentences under certain "guided" discretion statutes also was found to be unconstitutional. An Ohio statute that limited the range of mitigating circumstances which the sentencing authority could consider<sup>115</sup> was declared unconstitutional<sup>116</sup> because the "Eighth and Fourteenth Amendments require[d] that the sentencer, in all but the rarest kind of capital case,[<sup>17</sup>] not be precluded from considering *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffer[ed] as a basis for a sentence less than death."<sup>118</sup> Applying this principle to Oklahoma's discretionary death statute, the Court again vacated a death sentence because the sentencer refused to consider all of the mitigating evidence presented by the defense.<sup>119</sup> The Oklahoma statute had provided for a bifurcated proceeding which included a penalty

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113. *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

114. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

115. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975) listed only the following three mitigating factors which must be established by a preponderance of the evidence: (1) the victim of the offense induced or facilitated it; (2) it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and (3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition was insufficient to establish the defense of insanity. *Id.*

116. Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens in finding the Ohio statute unconstitutional. *Lockett*, 438 U.S. at 597-609 (plurality opinion). Justices Blackmun and White found the death sentence invalid due to the actual role the defendant played in the murder. *Id.* at 612-13 (Blackmun, J., concurring in part and concurring in the judgment, and dissenting in part). Justice Marshall found the death penalty to be unconstitutional under all circumstances. *Id.* at 619-21 (Marshall, J., concurring in the judgment). Justice Rehnquist wanted to uphold the statute's constitutionality. *Id.* at 628-36 (Rehnquist, J., concurring in part and dissenting in part). Justice Brennan did not participate in the decision.

117. The Justices indicated that a life-term prisoner found guilty of murder might fit this category of "rare capital cases." *Id.* at 604 n.11 (plurality opinion). However, they declined to express an opinion as to whether or not special deterrence was needed for this type of criminal. *Id.*

118. *Id.* at 604 (plurality opinion) (italics in original). The Justices suggested that factors such as the defendant's character, prior record, age, lack of specific intent to cause death, and minor role played in the actual murder committed were mitigating factors that should have been considered by the sentencing authority. *Id.* at 608 (plurality opinion).

119. *Eddings*, 455 U.S. at 105 (plurality opinion). Justice Powell was joined by Justices Brennan, Marshall, Stevens, and O'Connor. *Id.* at 104-17. However, Justice Brennan wrote a separate opinion where he again stated his view that the death penalty was unconstitutional under all circumstances. *Id.* at 117 (Brennan, J., concurring). In addition, Justice O'Connor wrote a separate opinion in order to emphasize the variety of mitigating information that a trial court might consider.



hearing where the defense could present all mitigating and aggravating evidence.<sup>120</sup> However, because the trial judge only considered one mitigating factor, the defendant's age, before imposing the penalty of death,<sup>121</sup> the Court concluded that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."<sup>122</sup>

Since 1982, no capital punishment decision of the Supreme Court has had the far reaching effects on state penal laws as the cases decided in the 1970's.<sup>123</sup> Although a number of procedural issues

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*Id.* at 117-19 (O'Connor, J., concurring). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented, expressing the view that because the Oklahoma statute was constitutional under the eighth amendment, the Supreme Court was not authorized to determine whether the state court imposed an "appropriate" sentence. *Id.* at 120-28 (Burger, C.J., dissenting, joined by White, Blackmun, and Rehnquist, JJ.).

120. See OKLA. STAT. ANN. tit. 21, §§ 701.10, 701.12 (West 1983). Section 701.10 provides that after a defendant is found guilty of first degree murder, a separate sentencing proceeding be held to determine whether the defendant should be sentenced to death. It further states that all mitigating and aggravating evidence may be presented at this hearing. Section 701.12 lists eight aggravating circumstances: being convicted of a prior felony involving the use of violence; knowingly creating a risk of death to more than one person; committing murder for remuneration or employing one to do this; committing an especially heinous crime; murdering to avoid lawful arrest or prosecution; murdering while serving a sentence for a felony; posing a continuing threat to society due to the possibility that defendant would commit further acts of violence; murdering a peace officer or correctional guard in the performance of his official duties. *Id.* § 701.12. The statute is silent on what is meant by mitigating evidence. See *Eddings*, 455 U.S. at 106.

121. See *Eddings*, 455 U.S. at 106-10. The defendant was sixteen years old. However, the trial judge found that his age did not outweigh the three aggravating circumstances presented by the prosecutor which were enumerated in the Oklahoma statute: that the murder was especially heinous, atrocious, or cruel, that the crime was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Id.* at 106-08; see also OKLA. STAT. ANN. tit. 21, § 701.12(4)(5)(7) (West 1983).

The trial judge refused to consider the defendant's turbulent family history, including beatings by his father and severe emotional disturbance, which was presented by the defense counsel as mitigating evidence. See *Eddings*, 455 U.S. at 112-16.

122. *Eddings*, 455 U.S. at 113-14 (plurality opinion) (italics in original).

123. However, the effects of the most recent Supreme Court ruling in *Wainwright v. Witt*, 53 U.S.L.W. 4108 (U.S. Jan. 21, 1985), are yet to be felt. In *Wainwright*, the Court held that a trial judge may remove a potential juror who opposes capital punishment if he expresses views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions or oath." *Id.* at 4111. Prior to this ruling, a juror could only be removed if it was unmistakably

have been clarified since *Furman*,<sup>124</sup> new guidelines for a constitutional state death penalty statute have not been proposed.

### III. The Post-*Furman* Death Penalty in New York

In 1963, New York State became the last state in the nation to repeal a statute requiring mandatory execution for an intentional murder. On September 1, 1967, a revised Penal Code took effect which provided for a discretionary death penalty in three situations: where the victim was a peace officer, where the victim was a peace officer, where the victim was an employee of a state or local corrections facility, or where the defendant was already serving a term of imprisonment for life.<sup>125</sup> Following a conviction for murder in one of these

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clear that he or she would automatically vote against imposition of the death penalty. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968); see also Greenhouse, *Justices, in Death Penalty Ruling, Back the Exclusion of Some Jurors*, N.Y. Times, Jan. 22, 1985, at A14, col. 1 ("The 7-to-2 decision was one of the most significant decisions on the death penalty in recent terms."); Greenhouse, *Another Push for Capital Punishment*, N.Y. Times, Jan. 27, 1985, at 22E, col. 1 ("The new decision takes the Court a long step toward repudiating the premise of many earlier rulings, that because 'death is different,' special care must be taken at every stage in the process").

124. See 1983 UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT 2 (1984) [hereinafter cited as CAPITAL PUNISHMENT 1983]. For example, in *Pulley v. Harris*, 104 S. Ct. 871 (1984), the Court held that a proportionality review by a court with statewide jurisdiction of similar punishments meted out for similar crimes in the state was not required by the eighth amendment. For a recent study of proportionality review, see generally Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661-753 (1983). In *California v. Ramos*, 463 U.S. 992 (1983), the Court held that a required instruction to the jury that a life sentence without parole could be commuted by the Governor was not unconstitutional but "merely an accurate statement of a potential sentencing alternative." *Id.* at 1009. In *Barclay v. Florida*, 463 U.S. 939, *reh'g denied*, 104 S. Ct. 209 (1983), a death sentence imposed as a result of the trial judge's improper use of the defendant's prior criminal record was upheld by the Court. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court upheld the admissibility of psychiatric evidence predicting future dangerousness and approved the acceleration of the appeals process in capital cases. For a more thorough discussion of these four cases, see Pascucci, Strauss & Watchman, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1174-87, 1198-1201, 1205-14 (1983-84) [hereinafter cited as ABANDONING THE PURSUIT OF FAIRNESS AND CONSISTENCY]. The article criticizes these recent Supreme Court decisions for increasing the likelihood of unfair and inconsistent sentencing decisions. *Id.* at 1214-16.

Issues still pending before the Court include the effectiveness of counsel in capital cases, the practice by trial judges of overriding a jury's sentence recommendation, and the admissibility of research findings of racial discrimination in the imposition of the death penalty. See CAPITAL PUNISHMENT 1983, *supra*, at 2-3.

125. N.Y. PENAL LAW § 125.30 (McKinney 1967) (repealed 1974).

three situations, a separate penalty trial was to be conducted.<sup>126</sup> At this second stage of the bifurcated procedure, either party could present evidence about the defendant's background, any aggravating or mitigating circumstances, or the nature of the crime committed.<sup>127</sup> The imposition of the death penalty was left completely to the discretion of the jury, whose decision had to be unanimous.<sup>128</sup>

One year after the Supreme Court ruling in *Furman*,<sup>129</sup> the constitutionality of this discretionary death penalty statute was challenged in *People v. Fitzpatrick*.<sup>130</sup> The New York State Court of Appeals unanimously held the statute to be violative of the eighth amendment's prohibition on cruel and unusual punishment because the imposition of the death penalty was left to the untrammelled discretion of the jury.<sup>131</sup>

#### A. The New York Legislature Responds to *Furman*

After the Supreme Court denied certiorari in *Fitzpatrick*,<sup>132</sup> the New York Assembly Codes Committee began hearings on new death penalty proposals.<sup>133</sup> Governor Rockefeller strongly supported a mandatory death penalty for the murder of peace officers and prison guards.<sup>134</sup> In addition, a number of lawmakers believed that the Supreme Court objected to the optional nature of the death penalty and that a statute mandating capital punishment for certain kinds of murder would be constitutional.<sup>135</sup> A committee of the state attorneys general organization also subscribed to the view that a mandatory death penalty for specific offenses was the alternative

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126. N.Y. PENAL LAW § 125.35 (McKinney 1967) (repealed 1974).

127. *Id.*

128. *Id.*

129. See *supra* notes 43-53 and accompanying text.

130. 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1033 (1973).

131. *Id.* at 512-13, 300 N.E.2d at 145-46, 346 N.Y.S.2d at 802.

132. 414 U.S. 1033 (1973).

133. See *People v. Velez*, 88 Misc. 2d 378, 398, 388 N.Y.S.2d 519, 532 (Sup. Ct. N.Y. County 1976).

134. *Id.* at 398, 388 N.Y.S.2d at 533.

135. *Id.*; see also *Woodson*, 428 U.S. at 298-99 (Stewart opinion) ("The fact that some States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.").

most likely to withstand constitutional attack.<sup>136</sup> In response to the arguments of these three groups, the New York State Legislature, at its 1974 session, repealed the judicially invalidated death penalty statute<sup>137</sup> and enacted a new mandatory death penalty law.<sup>138</sup>

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136. *Velez*, 88 Misc. 2d at 398, 388 N.Y.S.2d at 533.

137. N.Y. PENAL LAW §§ 125.30, 125.35 (McKinney 1967) (repealed 1974), see *supra* notes 125-31 and accompanying text.

138. See N.Y. PENAL LAW § 60.06 (McKinney 1975) ("When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death."); see also N.Y. PENAL LAW § 125.27 (McKinney 1975):

*Murder in the First Degree* A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correction facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correction facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In an prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-1 felony.

*Id.*

## B. The New York State Court of Appeals Dismantles the Mandatory Death Penalty Law

New York's mandatory death penalty law soon was challenged both in a state trial court<sup>139</sup> and in the New York State Court of Appeals.<sup>140</sup> Both courts relied on post-*Furman* Supreme Court guidelines<sup>141</sup> to invalidate the challenged portion of New York's mandatory death statute.<sup>142</sup>

In *People v. Davis*, the section of New York's mandatory death statute relating to the intentional killing of a state or local corrections officer performing his official duties<sup>143</sup> was held to violate the eighth and fourteenth amendments to the United States Constitution.<sup>144</sup> The defendant in *Davis* had been convicted of the first degree murder of a New York City Department of Corrections officer and had been sentenced to death under Penal Law sections 60.06 and 125.27.<sup>145</sup> On appeal, the New York State Court of Appeals vacated the trial court's death sentence and remitted the case for resentencing<sup>146</sup> because "New York's statute, as presently written, in the absence of any provision in it for consideration of relevant and particularized mitigating factors, despite its narrow categories and various statutory

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139. *People v. Velez*, 88 Misc. 2d 378, 388 N.Y.S.2d 519 (Sup. Ct. N.Y. County 1976).

140. *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978).

141. See *supra* notes 79-111 and accompanying text.

142. For a discussion of *Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735, see *infra* notes 143-53 and accompanying text.

In *Velez*, the trial court declared New York's mandatory death sentence for the crime of first degree murder to be cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution. 88 Misc. 2d at 405, 388 N.Y.S.2d at 537. Because the New York Penal Law did not focus on the character and background of the convicted defendant or allow the judge or jury to consider mitigating or aggravating factors, the statute was held to be unconstitutional. *Id.* at 402-03, 388 N.Y.S.2d at 535. The trial court compared the New York statute to the two struck down in *Woodson* and *Roberts I*, *id.* at 401-03, 405, 388 N.Y.S.2d at 533-5, 537, and determined that Penal Law § 60.06 impermissibly prevented the court or jury from considering relevant sentencing information. *Id.* at 405, 388 N.Y.S.2d at 537. In addition, the court noted that "[d]eveloping standards of decency in a mature and stable society repudiate[d] an automatic death sentence, however heinous the condemned conduct may be." *Id.* at 402, 388 N.Y.S.2d at 535.

143. See N.Y. PENAL LAW § 125.27(1)(a)(ii), *supra* note 138.

144. *Davis*, 43 N.Y.2d at 37, 371 N.E.2d at 466, 400 N.Y.S.2d at 746.

145. See N.Y. PENAL LAW §§ 60.06, 125.27(1)(a)(ii), *supra* note 138.

146. *Davis*, 43 N.Y.2d at 37, 371 N.E.2d at 467, 400 N.Y.S.2d at 746.

defenses, [was] unconstitutional under recent holdings of the United States Supreme Court."<sup>147</sup>

The court of appeals noted that an individualized consideration of the character, record, and background of the particular offender was the most important aspect of the sentencing decision<sup>148</sup> and found it incorrect to presume that no mitigating circumstances could exist when the victim was a police or corrections officer.<sup>149</sup> Factors such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, extreme emotional disturbance and moral justification were all relevant to a sentencing decision involving the sanction of death.<sup>150</sup> The fact that the New York statute included mitigating factors as affirmative defenses<sup>151</sup> was insufficient to prevent it from being declared unconstitutional. Since these defenses did not allow for a consideration of the character or record of the defendant, their presence did not convince the court of appeals that the statute should be upheld.<sup>152</sup> As a result of this decision, New York's mandatory death statute for the murder of a police or corrections officer was invalidated,<sup>153</sup> leaving murder by a prisoner serving a life-term as the only crime with a mandatory sanction of death in New York.<sup>154</sup>

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147. *Id.* at 37, 371 N.E.2d at 466, 400 N.Y.S.2d at 746. Because New York's mandatory statute was seen to be similar to the Louisiana death statute struck down in *Roberts II*, that decision was held to be decisive. *Davis*, 43 N.Y.2d at 32, 371 N.E.2d at 463, 400 N.Y.S.2d at 743; see *supra* notes 107-12 and accompanying text.

The New York Court of Appeals did not pass on the constitutionality of the statute under the New York State Constitution. *Davis*, 43 N.Y.2d at 36 n.4, 371 N.E.2d at 466 n.4, 400 N.Y.S.2d at 746 n.4.

148. *Id.* at 35, 371 N.E.2d at 466, 400 N.Y.S.2d at 745.

149. *Id.* at 32, 371 N.E.2d at 464, 400 N.Y.S.2d at 743.

150. *Id.*

151. See N.Y. PENAL LAW § 125.27(2)(a), (b), *supra* note 138.

152. *Davis*, 43 N.Y.2d at 34, 371 N.E.2d at 464-65, 400 N.Y.S.2d at 744.

153. *Id.* at 37, 371 N.E.2d at 466, 400 N.Y.S.2d at 746. Note, however, that this was a 4-3 decision. In his dissenting opinion, Chief Judge Breitel stated his belief that "the New York statute appear[ed] to meet the latest tests for validity laid down by the United States Supreme Court." *Id.* at 39, 371 N.E.2d at 468, 400 N.Y.S.2d at 747. (Breitel, C.J., dissenting). "Because the New York statute defining first degree murder is so narrowly drawn, and because the statutory scheme takes into consideration possible mitigating factors by making them defenses to the substantive crime, it does not run afoul of constitutional limitations." *Id.* at 40, 371 N.E.2d at 468, 400 N.Y.S.2d at 748. Judges Jasen and Gabrielli concurred in the dissent and did not write separate opinions. See *id.* at 47, 371 N.E.2d at 473, 400 N.Y.S.2d at 753.

154. See N.Y. PENAL LAW § 125.27(1)(a)(iii), *supra* note 138; see also *Davis*, 43 N.Y.2d at 34-35 n.3, 371 N.E.2d at 465 n.3, 400 N.Y.S.2d at 745 n.3 ("The Supreme Court has reserved the question of whether or in what circumstances mandatory

### C. *People v. Smith*

In *People v. Smith*,<sup>155</sup> the New York State Court of Appeals was faced with the precise issue it left open in *Davis*: whether New York's mandatory death penalty for murder committed by a life-term prisoner<sup>156</sup> was constitutional.<sup>157</sup> However, unlike *Davis*, in which the court of appeals relied on the *Roberts II* decision,<sup>158</sup> the *Smith* court had no Supreme Court guidelines to apply because the Court had consistently recognized a lifer reservation thereby leaving open the possibility of a mandatory death statute for this category of homicide.<sup>159</sup>

death sentence statutes may be constitutionally applied to prisoners serving life sentences. . . . Hence, we do not pass on the constitutionality of section 125.27 (subd. 1, par. [a], cl.[iii]) of the Penal Law."')

155. 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 105 S. Ct. 1226 (1985).

156. See N.Y. PENAL LAW §§ 60.06, 125.27(1)(a)(iii) (McKinney 1975), *supra* note 138.

157. *Smith*, 63 N.Y.2d at 41, 468 N.E.2d at 879, 479 N.Y.S.2d at 708-09.

Lemuel Smith, a life-term prisoner at Green Haven Correctional Facility in Stormville, New York was found guilty by the Dutchess County Supreme Court of the 1981 first degree murder of a state corrections officer and sentenced to death in accordance with N.Y. PENAL LAW §§ 60.06 and 125.27(1)(a)(iii) (McKinney 1975). At the time of the murder, Smith was serving an indeterminate sentence of twenty-five years to life for two murders and one rape-kidnapping imposed under N.Y. PENAL LAW §70.30 (McKinney 1975). In addition, he acknowledged responsibility for three additional homicides and one rape although he was never indicted for them.

158. See *supra* notes 107-11 and accompanying text; *Smith*, 63 N.Y.2d at 75, 468 N.E.2d at 896, 479 N.Y.S.2d at 723.

159. *Lockett*, 438 U.S. at 604 n.11 (plurality opinion) ("We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence, as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder."); *Roberts II*, 431 U.S. at 637 n.5 (per curiam) ("We reserve again the question whether or in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences."); *Roberts I*, 428 U.S. at 334 n.9 (Stevens opinion) ("Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence . . . defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law."); *Woodson*, 428 U.S. at 287 n.7 (Stewart opinion) ("This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute."); *Gregg*, 428 U.S. at 186 (Stewart opinion) ("And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate."). See also *supra* note 154 and accompanying

In *Smith*, the court of appeals applied the guidelines established by the Supreme Court in its post-*Furman* decisions<sup>160</sup> and concluded that New York's mandatory death statute for lifers was unconstitutional "because of its failure to provide for the consideration of individual circumstances"<sup>161</sup> by requiring the sentencing authority to consider mitigating and aggravating factors.<sup>162</sup> The court of appeals next distinguished the recent lifer reservation in *Lockett v. Ohio*<sup>163</sup> from the case at bar.<sup>164</sup> In *Lockett*, the Supreme Court suggested that the need to deter certain kinds of homicide, such as murder by a prisoner serving a life term, might justify a mandatory death penalty.<sup>165</sup>

However, as the court of appeals noted, a life sentence is not the equivalent of life imprisonment in New York,<sup>166</sup> and thus the need for deterrence from further crimes expressed in *Lockett* did not justify a mandatory death statute in New York.<sup>167</sup> Because life-

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text where the *Davis* court reserved judgment on this section of New York's mandatory death statute.

160. See *supra* notes 79-122 and accompanying text. The New York Court of Appeals relied most heavily on the Supreme Court ruling in *Woodson*, 428 U.S. 280 (1976) (Stewart opinion).

161. *Smith*, 63 N.Y.2d at 78, 468 N.E.2d at 898, 479 N.Y.S.2d at 725.

162. *Id.* at 78-79, 468 N.E.2d at 898, 479 N.Y.S.2d at 725. The New York Court of Appeals again rejected the State's contention that the statutory affirmative defenses were mitigating factors. *Id.* at 78, 468 N.E.2d at 897-98, 479 N.Y.S.2d at 724-25. This argument had been rejected earlier in the *Davis* decision. See *supra* notes 151-52 and accompanying text. However, Judge Simons in dissent found that the New York statute met the constitutional requirements because it covered only intentional homicide and included within the definition of the offense an individualized consideration of the offender: he must be over eighteen years of age and have previously committed a crime serious enough to warrant a maximum sentence of life imprisonment. In addition, he noted that the statute covered an exceptional category of homicide where the jury was not required to consider mitigating factors. *Id.* at 83, 468 N.E.2d at 901, 479 N.Y.S.2d at 728.

163. 438 U.S. at 604 n.11 (plurality opinion); see *supra* note 159 and accompanying text.

164. *Smith*, 63 N.Y.2d at 75-77, 468 N.E.2d at 896-97, 479 N.Y.S.2d at 723-24.

165. *Lockett*, 438 U.S. at 604 n.11 (plurality opinion).

166. *Smith*, 63 N.Y.2d at 76, 468 N.E.2d at 896, 479 N.Y.S.2d at 723. Diverse crimes are classified as A-1 felonies and are punishable by a minimum sentence of fifteen years and a maximum sentence of life. N.Y. PENAL LAW § 70.00 (McKinney 1975); see, e.g., N.Y. PENAL LAW § 150.20 (McKinney 1975) (arson); N.Y. PENAL LAW § 135.25 (McKinney 1975) (kidnapping).

167. *Smith*, 63 N.Y.2d at 75-76, 468 N.E.2d at 896, 479 N.Y.S.2d at 723. The New York Court of Appeals noted that even if this deterrence was necessary in the case of a life-term inmate with no possibility of parole who could not otherwise be punished, it did not apply to this New York defendant because he was eligible for parole in nineteen years, when he would be only sixty-three years old. *Smith*, 63 N.Y.2d at 75-76, 468 N.E.2d at 896, 479 N.Y.S.2d at 723. Perhaps this is the reason the Supreme Court declined to hear the case.



term inmates in New York consisted of a wide variety of persons with diverse backgrounds and prior criminal experiences,<sup>168</sup> the court of appeals concluded that these life-term prisoners were not a "faceless, undifferentiated mass,"<sup>169</sup> and that "society ha[d] no less motivation to avoid irrevocable error in fixing the appropriate penalty for life-term inmates than other human beings."<sup>170</sup> The court suggested that a discretionary death penalty, which allowed for a consideration of the character and record of the individual offender as well as the particular offense, would meet constitutional standards without detracting from the deterrent value of capital punishment<sup>171</sup> because the defendant's status as a life-term inmate would always be a powerful aggravating circumstance.<sup>172</sup> The court noted that "[a] mandatory death statute simply [could] not be reconciled with the scrupulous care the legal system demand[ed] to insure that the death penalty fit the individual and the crime."<sup>173</sup> Relying on post-*Furman* Supreme Court death penalty cases and distinguishing the case at bar from one which might fall under the Supreme Court's lifer reservation, the New York State Court of Appeals invalidated the only remaining portion of New York's mandatory death penalty statute as violative of the eighth and fourteenth amendments to the United States Constitution.<sup>174</sup>

#### IV. The Supreme Court's Lifer Reservation: No Longer an Open Question?

##### A. The New York Statute Measured Against Supreme Court Guidelines

The *Smith* decision was consistent with results reached by other

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168. *Id.*

169. *Id.* (quoting *Woodson*, 428 U.S. at 304).

170. *Id.* at 76, 468 N.E.2d at 896-97, 479 N.Y.S.2d at 723-24.

171. *Id.* at 77, 468 N.E.2d at 897, 479 N.Y.S.2d at 724.

172. *Id.*

173. *Id.* at 78, 468 N.E.2d at 897, 479 N.Y.S.2d at 724.

174. Because the New York Court of Appeals decided the case on the basis of the Federal Constitution, it once again did not reach the issue of constitutionality under the New York State Constitution. *Id.* at 78-79, 468 N.E.2d at 898, 479 N.Y.S.2d at 725. See also *supra* note 147 and accompanying text for a discussion of the same ruling in *Davis*.

Note, however, that it was a 4-3 opinion and that the dissenting judges found the statute constitutional. See *Smith*, 63 N.Y.2d at 81, 468 N.E.2d at 899, 479 N.Y.S.2d at 726 (Simons, J., dissenting) ("I dissent . . . because [the] defendant has failed to establish that section 60.06 of the Penal Law fixing the penalty for first-degree murder . . . is unconstitutional."); *id.* at 92, 468 N.E.2d at 906, 479

state courts.<sup>175</sup> However, the constitutionality of this narrow category of mandatory death statute still has not been settled by the United States Supreme Court. The Court's repeated reservation of judgment implies that it might decide that this type of statute is constitutional. Nevertheless, it has not upheld any type of mandatory death statute since *Furman*.<sup>176</sup>

Although the Supreme Court has not specifically prescribed the requirements for a constitutionally valid death penalty statute, three themes have emerged in its post-*Furman* decisions: (1) the need to focus on the individual offender and offense;<sup>177</sup> (2) the desirability of expeditious appellate review;<sup>178</sup> and (3) the practicality of a bifurcated proceeding where guilt and penalty are considered separately.<sup>179</sup> Since New York's mandatory death statute contains none of these three provisions, it is difficult to see how it could survive Supreme Court scrutiny.

In defense of the New York statute, it might be argued that because of the singular nature of the crime covered by the statute<sup>180</sup> and because the crime includes by definition an individualized consideration of offender and offense,<sup>181</sup> the statute is constitutionally valid.<sup>182</sup> The statute specifically provides that a life-term prisoner can receive the death penalty for the crime of murder in New York only if he is over eighteen years of age<sup>183</sup> and has previously committed a crime of sufficient magnitude to warrant a sentence of life imprisonment.<sup>184</sup> The Supreme Court has implied that in this

N.Y.S.2d at 733 (Cooke, C.J., dissenting) ("I cannot agree, however, that section 60.06 of the Penal Law . . . is unconstitutional."); see also *supra* note 161.

175. *Id.* at 78-79 n.9, 468 N.E.2d at 898 n.9, 479 N.Y.S.2d at 725 n.9. See *infra* notes 195-208 and accompanying text for a discussion of these opinions.

176. See *supra* notes 93-111 and accompanying text.

177. See *supra* notes 79-122 and accompanying text.

178. See generally Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIM. 754-85 (1983), which discusses the radically different ways courts interpret capital judicial review; ABANDONING THE PURSUIT OF FAIRNESS AND CONSISTENCY, *supra* note 124, at 1186-1201, for a discussion of recent developments in state appellate review procedures which have increased the potential for unfairness and inconsistency in death sentencing.

179. See *supra* notes 79-122 and accompanying text.

180. See N.Y. PENAL LAW § 125.27(1)(a)(iii) (McKinney 1975), *supra* note 138.

181. *Id.* § 125.27(1)(a)(iii), (b).

182. See *Smith*, 63 N.Y.2d at 83 n.2, 468 N.E.2d at 897 n.2, 479 N.Y.S.2d at 728 n.2 (Simons, J., dissenting) (distinguishing subdivision of mandatory death statute invalidated in *Davis* because latter failed to take into account character of offender).

183. N.Y. PENAL LAW § 125.27(1)(b) (McKinney 1975), *supra* note 138.

184. *Id.* § 125.27(1)(a)(iii).

narrow category of homicide the jury might not be required to consider mitigating factors before imposing a sentence of death.<sup>185</sup> Yet it would be difficult to reconcile such a ruling with *Roberts II*, where the singular nature of the crime of intentionally killing a peace officer was not enough to validate the statute.<sup>186</sup> Although the *Roberts II* Court viewed the victim's status as a police officer as a powerful aggravating circumstance, it concluded that a consideration of mitigating evidence relating to the defendant was also required.<sup>187</sup> The importance of treating each person as an individual pervades the Court's post-*Furman* death penalty decisions.<sup>188</sup> New York's definition of the crime and limitation of the death sentence to a life-term prisoner over the age of eighteen seems inadequate to meet the test of constitutionality.

Two additional deficiencies in the New York statute are its limited appellate procedures and its failure to make provisions for a bifurcated proceeding. Although a defendant can directly appeal a jury verdict for first degree murder to the New York State Court of Appeals,<sup>189</sup> there is no appeal of the death sentence once guilt has been established.<sup>190</sup> Further, the sentencing authority is not required to weigh all of the aggravating and mitigating factors regarding the offender and the offense in a penalty hearing separate from the guilt phase of the trial.<sup>191</sup>

New York's mandatory death penalty statute for convicts serving life-term sentences on murder convictions thus resembles the death statutes previously struck down by the Supreme Court<sup>192</sup> more closely than those which have been upheld<sup>193</sup> and does not appear to follow any of the guidelines set forth by the Court in its post-*Furman* decisions.

## B. The Mandatory Death Penalty for Lifers in Other Jurisdictions

The New York State Court of Appeals noted in *Smith* that other federal and state courts similarly had determined that the mandatory

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185. See *supra* note 159 and accompanying text.

186. See *supra* notes 107-11 and accompanying text.

187. See *supra* notes 110-11 and accompanying text.

188. See *supra* notes 79-122 and accompanying text.

189. See N.Y. CONST. art. VI, § 3(b).

190. See N.Y. PENAL LAW § 60.06 (McKinney 1975), *supra* note 138.

191. *Id.*

192. See *supra* notes 93-111 and accompanying text.

193. See *supra* notes 79-92 and accompanying text.

imposition of death on a life-term prisoner who commits murder was unconstitutional.<sup>194</sup> For example, in *Shuman v. Wolff*,<sup>195</sup> a United States district court found Nevada's mandatory death statute, which required the death penalty for a life-term prisoner convicted of first degree murder, to be unconstitutional.<sup>196</sup> The district court held that "[i]mposing mandatory capital punishment for the life term prisoner who intentionally kills is to consider but one aspect of the character and record of the individual while ignoring totally the circumstances of the crime for which he is being sentenced."<sup>197</sup> The district court noted that the availability of the death penalty was a sufficient deterrent for the life prisoner and that its imposition need not be mandatory.<sup>198</sup>

In *State v. Cline*,<sup>199</sup> the Supreme Court of Rhode Island declared unconstitutional<sup>200</sup> a Rhode Island law which provided for a mandatory death sentence for *any* prisoner in a state correctional institution or a state reformatory for women who committed murder while in prison.<sup>201</sup> Because the statute did not allow consideration of any mitigating factors before a sentence of death was imposed, it was held to be violative of the eighth amendment.<sup>202</sup>

A mandatory death statute in California which failed to provide for a consideration of mitigating factors also was held to be unconstitutional.<sup>203</sup> Although the California statute applied only to a malicious assault resulting in the death of a non-inmate by a person serving a life sentence, the court did not find these aggravating circumstances sufficient to overcome the absence of mitigating factors.<sup>204</sup> The court noted that the classification of life-prisoner covered a broad range of culpabilities and that under California's indeterminate sentencing law all life prisoners had the possibility of release

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194. *Smith*, 63 N.Y.2d at 78-79 n.9, 468 N.E.2d at 898 n.9, 479 N.Y.S.2d at 725 n.9 (court of appeals justifies decision in case by pointing to other court rulings).

195. *Shuman v. Wolff*, 571 F. Supp. 213 (D. Nev. 1983) (appeal pending).

196. *Id.* at 217-18.

197. *Id.* at 217.

198. *Id.*

199. *State v. Cline*, 121 R.I. 299, 397 A.2d 1309 (1979).

200. *Id.* at 303, 397 A.2d at 1311.

201. *Id.* at 300-01, 397 A.2d at 1310.

202. *Id.* at 299-300, 303, 397 A.2d at 1309, 1311. The Rhode Island Supreme Court noted that "a review of the Supreme Court's pronouncements makes it clear that a death sentence imposed by a sentencer who is not statutorily authorized to consider mitigating circumstances is a nullity." *Id.* at 303, 397 A.2d at 1311.

203. *Graham v. Superior Court*, 98 Cal. App. 3d 880, 888, 160 Cal. Rptr. 10, 14 (1979).

204. *Id.* at 888, 160 Cal. Rptr. at 14.

on parole, regardless of the crime committed.<sup>205</sup> Accordingly, it was essential for the trial judge before imposing a sentence of death, to consider potentially mitigating factors such as the age of the defendant, his degree of direct involvement in the assault, the extent of premeditation and deliberation in the commission of the crime, the influence of drugs, alcohol, or mental illness, whether any form of duress existed, whether the defendant reasonably believed his act was morally justified, and whether there was any provocation.<sup>206</sup>

Moreover, the court noted that there was no need for a mandatory death penalty to protect the prison guards from assault by a life prisoner<sup>207</sup> because under California's indeterminate sentencing law, the state had available as a deterrent the postponement of the parole date.<sup>208</sup>

It is significant to note that most of the mandatory death statutes for life-term prisoners enacted after *Furman* are no longer in existence.<sup>209</sup> Some have been repealed or amended by state legislatures<sup>210</sup> while others have been held to be unconstitutional by state courts.<sup>211</sup> Therefore, despite the Supreme Court's reservation of judgment on the constitutionality of these statutes,<sup>212</sup> state legislatures and courts are interpreting the Court's guidelines to preclude a mandatory death sentence for life-term prisoners who commit murder.<sup>213</sup>

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205. *Id.* at 886, 160 Cal. Rptr. at 13. This situation is similar to that in New York. See *supra* notes 166-69 and accompanying text.

206. *Graham*, 98 Cal. App. 3d at 887, 160 Cal. Rptr. at 13.

207. *Id.*, 160 Cal. Rptr. at 13-14.

208. *Id.*, 160 Cal. Rptr. at 14.

209. See *supra* notes 64, 160-62 and accompanying text.

210. See IND. CODE ANN. § 35-13-4-1(b)(6)(iv) (Burns 1973) (amended and codified as guided discretion statute, IND. CODE ANN. §§ 35-50-2-3 to -9 (Burns 1984)); LA. REV. STAT. ANN. § 14:30(3) (West 1974) (amended and codified as guided discretion statute, LA. REV. STAT. ANN. § 14:30 (West Supp. 1985)); NEV. REV. STAT. § 200.030(1)(b) (1973) (currently discretionary statute applicable to any prisoner, NEV. REV. STAT. §§ 200.030(4)(a), 200.033, 200.035 (1983)); OKLA. STAT. ANN. tit. 21, § 701.1(7) (West 1973) (repealed 1976, currently codified as discretionary statute, OKLA. STAT. ANN. tit. 21, §§ 701.7, 701.9-701.15 (West 1983)); VA. CODE §§ 18.2-10(a), 18.2-31(c) (1975) (murder by any prisoner), 53-291(1) (murder of prison employee by inmate (§ 18.2-18.10 was amended in 1977; § 53-291(1) was repealed; the current discretionary statute is codified at VA. CODE §§ 18.2-10(a), 18.2-31, 19.2-264.2, 19.2-264.4 (1984 Supp.)); WYO. STAT. ANN. § 6-54(b), (v) (Supp. 1973) (current discretionary statute codified at WYO. STAT. §§ 6-2-101 to -103 (1983)).

211. See *supra* notes 160-62, 195-208 and accompanying text; see also Miss. CODE ANN. § 97-3-19(2)(b) (1984) (judicially amended to survive as guided discretion statute in *Jackson v. State*, 337 So. 2d 1242, 1253-57 (Miss. 1976, codified at Miss. CODE ANN. §§ 97-3-21, 99-19-103, 99-19-105, 99-19-107 (1984)).

212. See *supra* note 159 and accompanying text.

213. See *supra* notes 160-62, 195-208, & 210-11 and accompanying text.

## V. The Pros and Cons of a Mandatory Death Penalty for Lifers

A discussion of death penalty statutes invariably involves more than strictly legal considerations. Thus, even if New York's mandatory death penalty statute, which is of doubtful constitutionality as drafted, could survive Supreme Court scrutiny, the question would still remain whether it is necessary or desirable. The larger debate regarding capital punishment focuses on the moral, penological, and sociological arguments offered by proponents and opponents of the death penalty.<sup>214</sup> These factors also must be considered in relation to a mandatory death statute for life-term prisoners.

### A. In Favor of the Death Penalty

Proponents of capital punishment have raised a number of arguments in support of the death penalty. First, advocates contend that "the primary responsibility of society is the protection of its members so that they may live out their lives in peace and safety"<sup>215</sup> and that to protect its citizenry, society must use whatever means necessary, including the death penalty.<sup>216</sup> Because a life sentence in New York is not the equivalent of imprisonment for the duration of one's natural life, it is highly possible that a life-inmate could be released on parole.<sup>217</sup> Therefore, proponents argue that the death penalty is the only way to assure that lifers do not pose a continuing threat to society. Because some criminals are incorrigibly anti-social and therefore potentially dangerous to society for the remainder of their lives, advocates of capital punishment suggest that imprisonment is not a sufficient safeguard against commission of future crimes by

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214. See generally Copple, Krivosha, McDonough, *A Historical and Philosophical Look at the Death Penalty—Does It Serve Society's Needs?*, 16 CREIGHTON L. REV. 1-46 (1982-83) (reviews history of death penalty to determine if it is deterrent to crime; after considering factors other than constitutionality of capital punishment, authors conclude that life imprisonment is more justifiable means of punishment than death penalty); Schoenfeld, *The Desire to Abolish Capital Punishment: A Psychoanalytically Oriented Analysis*, 11 J. PSYCHIATRY & LAW 151-81 (1983) (discussion of theories of deterrence, rehabilitation, mistake, discrimination, and arbitrariness in imposition of death penalty; article finds flaws in arguments of abolitionists in these areas and concludes that death penalty is necessary in order to serve justice for majority of society).

215. Committee on the Judiciary, U.S. Senate, *Capital Punishment as a Matter of Legislative Policy* in THE DEATH PENALTY IN AMERICA at 311 (H. Bedau 3d ed. 1982) [hereinafter cited as Committee on Judiciary, U.S. Senate].

216. *Id.*

217. See *supra* notes 166-69 and accompanying text.

these persons.<sup>218</sup> Based on this concern, a mandatory death sentence is particularly appropriate for a life-term prisoner who commits murder. Additionally, it is argued that the death penalty is needed to maintain order and discipline in the prisons.<sup>219</sup> Without the death penalty as a sanction for assault or murder,<sup>220</sup> proponents argue that prison guards would be at the mercy of the inmates especially in the case of a life-term prisoner.<sup>221</sup>

Another justification for the use of the death penalty is the increasing public support for this method of punishment.<sup>222</sup> Polls indicate that since the *Furman* decision in 1972, Americans have increasingly supported capital punishment as a sanction for the crime of murder.<sup>223</sup> Some of the reasons offered for society's acceptance of the death penalty include the increase in violent crime in the

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218. See Committee on Judiciary, U.S. Senate, *supra* note 215, at 315.

219. *Smith*, 63 N.Y.2d at 94, 468 N.E.2d at 908, 479 N.Y.S.2d at 735 (Cooke, C.J., dissenting); See Committee on Judiciary, U.S. Senate, *supra* note 215, at 315.

220. See *Graham v. Superior Court*, 98 Cal. App. 3d at 887, 160 Cal. Rptr. at 13. This was the argument used by the People to justify a mandatory death sentence for a life-term prisoner. The California Court of Appeals rejected the argument because the life prisoner under California's indeterminate sentencing law was eligible for parole. This factor was determined to be sufficient protection for the guards who were involved in the decision to deny or grant parole. See *supra* notes 207-08 and accompanying text.

221. See Committee on Judiciary, U.S. Senate, *supra* note 215, at 315.

222. See generally Tyler & Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 L. & Soc'y REV. 21-45 (1982-83) (study of rationale underlying public support of death penalty). The authors conclude that basic political and social values, rather than crime-related concerns, are the predominant reasons for public support for or opposition to the death penalty. *Id.*

223. Gallup polls from 1936-1981 asking whether Americans favored the death penalty for murder resulted in the following percentages of Americans in favor of this sanction: 1936 - 61%, 1953 - 68%, 1956 - 53%, 1960 - 51%, 1965 - 45%, 1966 - 42%, 1972 - 57%, 1976 - 65%, 1981 - 66%. ISAACSON, PRO AND CON 68, 72 (1983) [hereinafter cited as PRO AND CON]. A Gallup poll taken in the fall of 1982 showed 72% of Americans in favor of capital punishment. Andersen, *An Eye for an Eye*, TIME, Jan. 24, 1983, at 28 [hereinafter cited as *An Eye for an Eye*].

The percentage of New Yorkers favoring the death penalty is somewhat lower than the national average. A New York Times poll taken in January, 1985 found that 47% of New Yorkers favored the death penalty. McFadden, *Poll Indicates Half of New Yorkers See Crime as City's Chief Problem*, N.Y. Times, Jan. 14, 1985, at A1, col. 1.

See generally Vidmar & Ellsworth, *Research on Attitudes Toward Capital Punishment* in THE DEATH PENALTY IN AMERICA at 68-92 (H. Bedau 3d ed. 1982). See Table 3-2-3 concerning attitudes toward the mandatory use of capital punishment for the selected crimes of murder, skyjacking, rape and mugging. *Id.* at 89. The

past twenty years,<sup>224</sup> the heightened concern for personal safety and property resulting from this increase,<sup>225</sup> public reaction to a series of assassinations and attempted assassinations of prominent national leaders and innocent victims<sup>226</sup> and the many years of the discontinuation of capital punishment.<sup>227</sup> Increased support for the death penalty has been accompanied by a marked increase in executions in the past few years. For example, in 1984 alone there were more executions than there had been since 1963.<sup>228</sup> The growing acceptance by society of the death penalty for the crime of murder easily might be used to justify a mandatory sentence for life-term prisoners. These inmates, who have already committed crimes serious enough to warrant sentences of life-imprisonment, are unlikely to receive sympathy from the great majority of American citizens.

Society's increasing acceptance of the death penalty is based in part on the theory of retribution<sup>229</sup> whereby an offender is expected to receive the punishment he deserves based on the community's perception of the gravity of his offense.<sup>230</sup> According to this theory, society expresses its outrage and revulsion towards those who violate the law through punishment.<sup>231</sup> As noted by the Supreme Court in *Gregg*,

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chart shows an increased support for a mandatory death penalty for murder of a policeman or prison guard and for first degree murder from 1973-77. *Id.*

224. Between 1960 and 1973 the U.S. homicide rate doubled, from 4.7 murders per 100,000 people to 9.4. The rate has leveled off and was at 9.8 per 100,000 in January of 1983. *An Eye for an Eye*, *supra* note 223, at 28.

225. *Id.* at 28-29.

226. Schwarzschild, *In Opposition to Death Penalty Legislation* in *THE DEATH PENALTY IN AMERICA* 364-65 (H. Bedau 3d ed. 1982) [hereinafter cited as *In Opposition to Death Penalty Legislation*].

227. *Id.*

228. Riley, *The Year in Law: 1984*, Nat'l L.J., Dec. 31, 1984, at 48, col. 1. As of mid-December, twenty inmates, including the first woman in twenty-two years, had been executed. Goodman, *Pace of Executions in U.S. Quickens*, N.Y. Times, Dec. 13, 1984, at A18, col. 1. Between December 14, 1983 and December 13, 1984 more than twice as many Americans had been executed than in the past twenty years. *Id.*; see also Bedau, *supra* note 29, at 56-62 (showing number of prisoners executed under civil authority in United States from 1930-80).

229. See *Furman*, 408 U.S. at 308 (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy . . .").

230. See *Smith*, 63 N.Y.2d at 88-89, 468 N.E.2d at 904, 479 N.Y.S.2d at 731 (Simons, J., dissenting).

231. Committee on Judiciary, U.S. Senate, *supra* note 215, at 315 (retribution "reflects the fact that criminals have not simply inflicted injury upon discrete individuals; they have also weakened the often tenuous bonds that hold communities together").



some crimes are considered to be so outrageous that society finds death to be the only acceptable punishment.<sup>232</sup> A subsequent murder by a life-term prisoner would, under this view, be one of those outrageous crimes for which society would want to exact the ultimate punishment of death.

A fourth justification for the use of a mandatory death penalty for life-term prisoners is deterrence. The Supreme Court has noted that it is appropriate for a state legislature to consider deterrence as a justification for imposing the death penalty especially when no other sanctions are available.<sup>233</sup> The Court further has stated that deterrence might be an acceptable reason for imposing a mandatory death sentence on a life-inmate convicted of murder.<sup>234</sup> In response to arguments that statistical evidence shows no real correlation between the existence of the death penalty and the frequency of capital crime,<sup>235</sup> proponents reply that the deterrent value is obvious.<sup>236</sup> "Of

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*But see* Amsterdam, *Capital Punishment* in THE DEATH PENALTY IN AMERICA 352-53 (H. Bedau 3d ed. 1982) [hereinafter cited as *Capital Punishment*] (arguing that retribution is achieved not only by death penalty but also by other sanctions); *In Opposition to Death Penalty Legislation*, *supra* note 226, at 369 (arguing that gratifying impulse for revenge is not business of democratic government).

232. *Gregg*, 428 U.S. at 184 (Stewart opinion).

233. *Gregg*, 428 U.S. at 183 (Stewart opinion) ("In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.") (footnote omitted); *id.* at 185-86 ("We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are 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. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.") (footnote omitted).

234. *Lockett*, 438 U.S. at 604 n.11 (plurality opinion); *see supra* notes 159, 163, 165 and accompanying text.

235. *See Gregg*, 428 U.S. at 184-85 (Stewart opinion) ("Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive.") (footnote omitted); *see also* Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Evidence* in THE DEATH PENALTY IN AMERICA at 138-59 (H. Bedau 3d ed. 1982) (article contains bibliography of other references on deterrent effect of capital punishment. *Id.* at 158-59). *But see* Committee on Judiciary, U.S. Senate, *supra* note 211, at 312. ("With regard to the statistical evidence, the first and most obvious point is that those who are, in fact, deterred by the threat of the death penalty and do not commit murder are not included in the statistical data."). *See generally* Forst, *Capital Punishment and Deterrence: Conflicting Evidence*, 74 J. CRIM. L. & CRIM. 927-42 (1983) (studies influence of death penalty on homicide rates).

236. PRO AND CON, *supra* note 223, at 67.

all permissible punishments, death is undoubtedly the most feared; almost all so sentenced plead for commutation to life imprisonment."<sup>237</sup> Regardless of whether the death penalty is truly a deterrent for a life-term prisoner with a predisposition towards further crime,<sup>238</sup> this argument is of limited application in New York due to the indeterminate sentencing system. The loss of parole for a life prisoner may serve as an alternative deterrent to subsequent murder by a life-term inmate.<sup>239</sup>

Proponents of capital punishment thus offer protection, public acceptance, and deterrence as the primary justifications for the death penalty. For them, the sanction of death is the only way to assure that society and its values are permanently protected from those who have murdered. In the case of a life-term prisoner who has already proven his proclivity for serious crime, the need for protection becomes even greater.

### **B. In Opposition to the Death Penalty**

Opponents of the death penalty emphasize the immorality and inequity of capital punishment, the possibility of executing either an innocent person or the wrong one and the death penalty's failure to deter serious crime such as murder.

Opponents would accept neither a mandatory nor a discretionary death penalty for life-term prisoners who commit murder. They argue that "[r]everence for human life is part of the moral foundation of a just society,"<sup>240</sup> and that it is wrong for the state to take away the life of a human being.<sup>241</sup> They point to evidence that increases in executions have resulted in a diminished respect for human life,<sup>242</sup> and consequently, in an increase in homicide.<sup>243</sup> It has been said that the death penalty creates an atmosphere of brutality that encourages violent behavior<sup>244</sup> which would be an especially serious problem in a prison environment.

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237. *Id.*

238. *See infra* notes 256-60 and accompanying text.

239. *See supra* notes 165-72 and accompanying text.

240. PRO AND CON, *supra* note 223, at 69.

241. *Id.* *See generally* CARRINGTON, NEITHER CRUEL NOR UNUSUAL 127-39 (1978) (discussing morality of capital punishment).

242. PRO AND CON, *supra* note 223, at 70.

243. "Recently, there were notable increases in the murder rate in Utah, Florida, and Indiana, during the six-month period following well publicized executions in those places." *Id.* For example, the homicide rate rose 14% in Florida in 1979 following the execution of John Spenklink. *Id.*

244. *See* THE FELLOWSHIP OF RECONCILIATION CAPITAL PUNISHMENT PROGRAM, INSTEAD OF THE DEATH PENALTY 1 (1984).

A second concern of opponents of capital punishment is the inequitable imposition of the death penalty.<sup>245</sup> A disproportionately large number of blacks have been executed in the United States<sup>246</sup> while the number of women put to death has been disproportionately low.<sup>247</sup> Furthermore, almost all prisoners on death row are poor<sup>248</sup> and relatively uneducated,<sup>249</sup> and there is the "ever present danger that anyone against whom, for any reason, conscious or unconscious prejudice exists will come off worse than a person against whom

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245. See *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring) (expressing view that it is cruel and unusual to apply death penalty selectively to minorities as has been case) "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws . . . ." *Id.* at 256-57. See generally BLACK, CAPITAL PUNISHMENT 84-91 (1974) (discussing negative impact of race and poverty on imposition of death penalty) [hereinafter cited as CAPITAL PUNISHMENT].

246. "At the time of *Furman* (1972) it was widely recognized that the system was unquestionably stacked against black defendants, especially in the 'death belt' of the South." *An Eye For An Eye*, *supra* note 223, at 38; see also *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring).

Between 1968 and 1975 the proportion of death row inmates who were black exceeded 50%; it dropped to 46% in 1976, 45% in 1977 and 41% in 1978. See CAPITAL PUNISHMENT 1983, *supra* note 124, at 4. Since 1978, the proportion of black death-row inmates has been two in five prisoners. In 1983, of the 1202 persons on death row, 500 were black. *Id.*

One of the legal challenges still in the federal courts is the argument that the death penalty is used most frequently when the victim is white. See Press, *Rate of Executions Picks Up in U.S.*, Christian Science Monitor, Dec. 15, 1984, at 3; see also *Kill Him*, 4-4, N.Y. Times, Jan. 10, 1985, at A22, col. 1 (editorial questioning January, 1985 execution of black man in Georgia and noting "[t]he system is racially biased; the death penalty is much more likely in cases where the victim was white rather than black").

247. At the time of *Furman* (1972) only four women were on death row. CAPITAL PUNISHMENT 1983, *supra* note 124, at 4. That number increased only slightly from 1972 until November, 1984, when there were sixteen out of a total of 1420 inmates on death row. *16 Women Await the Death Penalty in the U.S.*, N.Y. Times, November 3, 1984, at 46, col. 1. When Margie Velma Barfield was executed in North Carolina on Nov. 2, 1984, she became the first woman to be executed in the United States in twenty-five years. See Schmidt, *Woman Executed in the United States for First Time Since 1962*, N.Y. Times, Nov. 3, 1984, at 46, col. 1.

248. Bedau, *The Case Against the Death Penalty* in CRIMINAL LAW AND ITS PROCESSES at 514 (1983). A study of post-*Furman* death row inmates showed the following: 62% were unskilled, service, or domestic workers, while only 3% were professional or technical workers; 60% were unemployed at the time of their crimes. *Id.* In North Carolina, for example, the vast majority was represented by appointed counsel, most of whom had less than five years of legal experience. *Id.* at 514.

249. As of December, 1983 only 41% of the inmates on death row nationwide had completed high school, while one in ten had not graduated from the eighth grade. CAPITAL PUNISHMENT 1983, *supra* note 124, at 4.

such feeling does not exist."<sup>250</sup> A life-term prisoner who commits murder would be a potential victim of this "conscious or unconscious prejudice," as most people would not be sympathetically disposed toward a felon who has committed at least two serious crimes.

Another concern is that the death penalty imposes unreasonable risks of executing either the wrong person or an innocent person.<sup>251</sup> Additionally, there is the problem of changing norms of acceptable punishments.<sup>252</sup> For example, in 1977, the Supreme Court held that the death penalty was excessively harsh and, therefore, unconstitutional for the crime of rape.<sup>253</sup> However, 455 men were executed for this crime between 1930 and 1977.<sup>254</sup> In light of the everpresent danger of mistake or changing norms, opponents of capital punishment urge that the death penalty be eliminated for all categories of offenders and offenses.

That the death penalty has not been proven to deter crime is a fourth argument raised by opponents of capital punishment.<sup>255</sup> With regard to prison homicide,<sup>256</sup> studies show that the threat of a mandatory death penalty does not deter premeditated prison murder.<sup>257</sup> The uncertainty of actual punishment for a prison homicide, the doubtful constitutionality of mandatory death statutes, and the infrequent use of the death penalty since the 1960's have weakened

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250. Black, *Capital Punishment: The Inevitability of Caprice and Mistake* in CRIMINAL LAW AND ITS PROCESSES 513 (1983). See generally Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIM. 754-85 (1983) (concluding that prosecutor's decision to seek death penalty is significantly related to race of victim).

251. See Abramovsky, *People v. Smith—The Death Penalty in New York*, N.Y.L.J., Aug. 31, 1984, at 2, col. 3 [hereinafter cited as *People v. Smith—The Death Penalty in New York*]. See generally CAPITAL PUNISHMENT, *supra* note 245, at 9-22, which discusses the possibility of mistake in inflicting the death penalty and the arbitrary way in which it is imposed.

252. See *Capital Punishment*, *supra* note 231, at 350.

253. *Coker v. Georgia*, 433 U.S. 584 (1977).

254. *Capital Punishment*, *supra* note 231, at 350.

255. See generally Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIM. 827-59 (1983) (discussing deterrence by analyzing crime statistics in Chicago); McFarland, *Is Capital Punishment a Short-Term Deterrent to Homicide? A Study of the Effects of Four Recent American Executions*, *id.* at 1014-32 (studies short-term effects of executions of Gary Gilmore (1977), John Spengelink (1979), Jesse Bishop (1979), and Steven Judy (1981) on homicide rates).

256. See generally *Deterrent Effect of Death Penalty Upon Prison Murder*, *supra* note 63, at 159-73 (discussing failure of death penalty to deter homicide in prison).

257. *Id.* at 160-71.

whatever deterrent effect a death sentence might have had.<sup>258</sup> The Supreme Court's recognition of deterrence as the only possible justification for a mandatory death penalty for life-term prisoners who murder<sup>259</sup> is counterbalanced by studies denying that a mandatory death penalty has any deterrent effect on the prison population. Finally, it is significant that murders by life-term inmates have occurred at roughly the same rate in states with mandatory death penalty statutes, discretionary death penalty statutes, and no death penalty at all.<sup>260</sup>

The questionable deterrent value of the mandatory death penalty for lifers and the lack of data supporting its value for maintaining order in the prisons, together with the inability of the statute to satisfy Supreme Court guidelines, eliminate the mandatory death penalty as a viable sanction for life-term prisoners who murder in New York.

#### VI. Alternatives to a Mandatory Death Penalty for Life-Term Prisoners Who Murder

There are two feasible alternatives to New York's mandatory death statute for life-term prisoners who murder. First, the state legislators could rewrite the penal law as a "guided" discretion statute which comports with the Supreme Court guidelines.<sup>261</sup> The second alternative is for the legislature to establish a system of determinate sentencing under which a convicted criminal could be sentenced to life imprisonment without parole.<sup>262</sup>

In *Smith*, the New York State Court of Appeals implied that a discretionary death penalty statute, which allowed for a consideration of the character and record of the life-term inmate, as well as the circumstances of the particular murder committed, might meet with its approval.<sup>263</sup> The New York court observed that, because execution

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258. *Id.* at 170-71. Furthermore, it is interesting to note that even the unofficial death penalty, which is frequently used by one inmate within the prison as retaliation against another, has failed to deter crime despite its high degree of certainty. *Id.*

259. See *supra* notes 159, 163, 165, 234 and accompanying text.

260. Note, *The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder*, 55 N.Y.U. L. REV. 636, 658 n.145 (1980); see also *Deterrent Effect of Death Penalty Upon Prison Murder*, *supra* note 63, at 169 (note especially Table 4-4-5 comparing murders in U.S. prisons in 1973 in jurisdictions with mandatory, discretionary, and no death penalty).

261. The Supreme Court noted in *Gregg* that a carefully drafted statute which ensured that the sentencing authority was given adequate information and guidance would be acceptable. *Gregg*, 428 U.S. at 195 (Stewart opinion); see *infra* notes 263-72, 287-89, 295-302 and accompanying text.

262. See *infra* notes 273-85 and accompanying text.

263. See *Smith*, 63 N.Y.2d at 77, 468 N.E.2d at 897, 479 N.Y.S. 2d at 724; see also *People v. Smith—The Death Penalty in New York*, *supra* note 251, at 1,

was never the inevitable result of a criminal act,<sup>264</sup> a discretionary death penalty would differ little in deterrent value from a mandatory one.<sup>265</sup> The court of appeals refused to read into the statute a provision for a consideration of mitigating circumstances,<sup>266</sup> but it implied that it would uphold a discretionary statute.<sup>267</sup>

To comport with Supreme Court guidelines and to satisfy the court of appeals, the new statute should include three provisions:<sup>268</sup> (1) a listing of mitigating and aggravating circumstances to be considered by the sentencing authority;<sup>269</sup> (2) a bifurcated hearing on

col. 1 ("There is much in both the majority and two dissenting opinions to indicate that a differently constructed statute could win the approval of the current Court").

264. *Smith*, 63 N.Y.2d at 77, 468 N.E.2d at 897, 479 N.Y.S.2d at 724 ("In every case, including one where the death sentence is mandatory upon conviction, it is only the specter of execution which can serve as a general deterrent."). Even in the case of a mandatory death penalty, execution is never more than a possibility for an individual about to commit a crime. The culprit may never get caught, the grand jury may not indict for a capital offense, the District Attorney may consent to a guilty plea to a non-capital offense, the petit jury may return a verdict of not guilty, the appellate court may reverse the sentence, or the executive may commute the death penalty. *Id.*

265. *Id.*

266. *Id.* at 79, 468 N.E.2d at 898, 479 N.Y.S.2d at 725.

267. *See supra* note 263 and accompanying text.

268. *See supra* notes 79-122, 177-91 and accompanying text.

269. For a sample list of aggravating and mitigating circumstances which might be included in a discretionary death penalty statute, *see* MODEL PENAL CODE § 210.6 (3)(4) (1962).

(3) *Aggravating Circumstances*

(a) The murder was committed by a convict under a sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) *Mitigating Circumstances*

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant

the issues of guilt and penalty; and (3) some provision for an expedited review of the death sentence. Whereas a bifurcated proceeding and appellate review have never been mandated by the Supreme Court,<sup>270</sup> both provisions were present in the discretionary statutes upheld by the Court.<sup>271</sup> Although this type of statute would never be acceptable to opponents of capital punishment, it should satisfy most advocates of the death penalty because "any defendant's status as a life-term inmate would constitute a powerful aggravating circumstance and undoubtedly increase the likelihood that the sentencer would find the death penalty appropriate under all the circumstances."<sup>272</sup>

A second alternative to New York's mandatory death penalty is a system of determinate sentencing which would include a penalty of life imprisonment without parole.<sup>273</sup> Under this law, prison terms would not be reviewed or reduced by a parole board but would be set at the time the judge announced the sentence.<sup>274</sup> Nine states employ this approach today,<sup>275</sup> and by 1986, the federal government

believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

*Id.*

270. See *supra* note 92 and accompanying text; see also LEGISLATING A DEATH PENALTY, *supra* note 82, at 18-19.

271. See *supra* notes 87-92 and accompanying text.

272. *Smith*, 63 N.Y.2d at 77, 468 N.E.2d at 897, 479 N.Y.S.2d at 724.

273. A determinate sentencing system is intended to insure that criminals with similar records who commit the same crime receive the same sentence from all judges. See generally Gargan, *System of Fixed Sentences Proposed*, N.Y. Times, Jan. 15, 1985, at B3, col. 3 [hereinafter cited as *System of Fixed Sentences Proposed*].

274. PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 133 (1983).

275. *Id.* at 133-34. The states are Alaska, California, Colorado, Indiana, Illinois, Maine, Minnesota, New Mexico, and North Carolina. However, these states have a wide variety of determinate sentencing systems. *Id.* at 134. For example, at one end of the spectrum is Maine which abolished its parole board in 1975. *Id.* Except for the maximum sentences specified for each class of felonies, there is no established criteria for judges to guide them in their sentencing decisions. *Id.* At the other extreme is California which has detailed statutory sentencing standards. Under the Uniform Determinate Sentencing Law, judges can choose one of three "base terms" for persons convicted of a particular offense. The middle term is used for ordinary offenses, while the higher and lower ones are used when there are aggravating or

also will have determinate sentencing.<sup>276</sup>

The New York State Committee on Sentencing Guidelines, appointed by the governor and state legislature in 1983, recently announced its proposal for a determinate sentencing system in New York.<sup>277</sup> At the core of its recommendation is a table that assigns a range of sentences to each crime based on the offense committed and the prior criminal record of the offender.<sup>278</sup> Only under extraordinary circumstances would a judge be allowed to lengthen or shorten the sentence mandated by law.<sup>279</sup> In addition to this determinate sentencing system, Governor Cuomo has asked the legislature to pass a law establishing a sentence of life without parole, since in his view this sanction is a far more effective deterrent to the crime of murder than the death penalty.<sup>280</sup>

An analysis of a determinate sentencing system, which includes a penalty of life without parole, reveals both positive and negative factors. The positive features include the curtailment of judicial discretion, the reduction in sentencing disparities, the certainty of

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mitigating circumstances. *Id.* For a discussion and criticism of other determinate sentencing systems, see Zimring, *Sentencing Reform in the States: Lessons from the 1970's* in REFORM AND PUNISHMENT (M. Tonry & F. Zimring 1983).

276. See Riley, *U.S. Changes the Rules on Crime*, Nat'l L. J., Oct. 29, 1984, at 27, col. 1.

Congress passed a comprehensive anti-crime package in October, 1984, which provided for the establishment of a U.S. Sentencing Commission to set a narrow range of sentences by 1986 based on offense and offender characteristics. *Id.* Unless changed by Congress, the sentence ranges will be effective six months after they are established, and judges will be required to follow them unless they explain in writing why they did not. Both the government and the defendant will have the right to appeal sentences which depart from the guidelines. The U.S. Parole Board will be eliminated. *Id.*

277. See *System of Fixed Sentences Imposed*, *supra* note 273, at B3. The proposal was announced on January 14, 1985. *Id.*

278. *Id.* (simplified version of chart judges would actually use is reproduced in this article).

279. *Id.* The principal recommendations of the committee are as follows: (1) judges would be given a narrow range of sentences for each type of crime; (2) longer sentences would be required for convicted felons with a prior criminal record; (3) the prosecutor could appeal sentences he determined to be too lenient; (4) judges would be allowed to lengthen or shorten the mandated sentences in "extraordinary cases;" (5) the maximum amount of good time off would be reduced from one-third to one-quarter of the sentence; and (6) the parole board would be eliminated. *Id.*

280. See *Transcript of Cuomo State of the State Address to the Legislature*, N.Y. Times, Jan. 10, 1985, at B4 ("One proposal is . . . a deterrent to the ultimate crime of murder . . . It's life without parole, real life without parole. It's a penalty that criminals fear more than the death penalty. And we can have it this year if we're serious about a deterrent.').



punishment<sup>281</sup> and the elimination of parole for a life prisoner.<sup>282</sup> On the negative side, there may be an undermining of judicial authority and the potential for severe overcrowding in the state prisons<sup>283</sup> resulting in an unpredictable expense for the taxpayers.<sup>284</sup> Critics of determinate sentencing note that in most states where the system has been adopted, longer terms have resulted in overpopulation of the state prisons.<sup>285</sup> Furthermore, the removal of parole from a life sentence makes it difficult to ignore the need for deterrence underlying the Supreme Court's lifer reservation.<sup>286</sup> Once parole has become unavailable, the death penalty might be the only way to deter life-term inmates from committing murder. For these reasons, determinate sentencing is not an adequate alternative to New York's mandatory death penalty.

A discretionary death statute which considers the character of the individual offender as well as the nature of the offense appears to be a more viable alternative.<sup>287</sup> Both the United States Supreme Court<sup>288</sup>

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281. See *System of Fixed Sentences Proposed*, *supra* note 273, at B3.

282. Under this system convicted felons whose crimes are determined to be so heinous as to warrant a sentence of life imprisonment will not be returned to society. Death penalty opponents would argue that a sentence this severe would deter as many potential murderers as the death penalty. See *An Eye For An Eye*, *supra* note 223, at 34, 36.

283. See *System of Fixed Sentences Proposed*, *supra* note 273, at B3; see also *Sentencing Convicts By Chart*, N.Y. Times, Jan. 22, 1985, at A24 (editorial concerned about inability of state legislature to accurately predict number of prisoners who will be in prisons as result of this law) [hereinafter cited as *Sentencing Convicts By Chart*].

284. See *Sentencing Convicts By Chart*, *supra* note 283, at A24.

285. See *System of Fixed Sentences Proposed*, *supra* note 273, at B3; *Sentencing Convicts By Chart*, *supra* note 283, at A24. The Sentencing Commission wants its sentence chart to create a prison population of no more than 40,000 once current expansions are completed. *Id.* It is presently costing New York \$635,000,000 to add 8600 new cells. *Id.* Even a slight miscalculation in the proposed chart could add tens of thousands of new prisoners. *Id.*

286. See *supra* notes 159, 163, 165, 234, 259 and accompanying text.

287. Although a discretionary statute may be the best alternative, it is not likely to be passed while Mario Cuomo is Governor of New York. Like his predecessor, Hugh Carey, Governor Cuomo has threatened to veto any capital punishment statute that the legislature passes. *An Eye For An Eye*, *supra* note 223, at 28; see also *Cuomo Plan Seeks Revival of Spirit of the New Deal*, N.Y. Times, Jan. 10, 1985, at B5 (Governor Cuomo wrote that the death penalty "passes each year with more than a majority and will no doubt pass by a substantial margin again this year. I will veto it again.").

288. See *supra* notes 79-122 and accompanying text.

and the New York State Court of Appeals<sup>289</sup> have made it clear that this type of statute is constitutional. A discretionary statute would insure that the defendant's status as a life prisoner would be given appropriate weight as an aggravating circumstance while at the same time allowing consideration of any mitigating factors that might affect the sentencing decision.

## VII. Conclusion

The continued viability of a mandatory death penalty for life-term prisoners who commit murder is uncertain. The only rationale the Supreme Court has proffered to justify excepting a mandatory statute for life-term prisoners who murder has been deterrence.<sup>290</sup> Assuming that this rationale is viable,<sup>291</sup> it does not apply to a life-term prisoner in New York who is eligible for parole under the state's indeterminate sentencing scheme.<sup>292</sup>

Singling out this class of criminal for the penalty of mandatory death while not allowing this type of sanction for any other group is arbitrary and discriminatory. Thus, in light of the Supreme Court guidelines, it is difficult to see how New York's mandatory death statute for life-term prisoners who murder can or should be constitutionally acceptable.<sup>293</sup>

A discretionary death penalty statute with provisions for a consideration of mitigating and aggravating circumstances regarding the life-term prisoner and murder committed,<sup>294</sup> a bifurcated proceeding,

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289. See *supra* notes 171-72, 263-67 and accompanying text.

290. See *supra* notes 159, 165, 233-34, 259 and accompanying text.

291. The validity of this assumption is open to question. See *supra* notes 235, 256-60 and accompanying text.

292. See *supra* notes 166, 239 and accompanying text.

293. See *supra* notes 79-122 and accompanying text.

294. See MODEL PENAL CODE § 210.6(4) (1962), *supra* note 269. Some of these suggested mitigating circumstances appear to be particularly applicable to life-term prisoners. See, e.g., § 210.6(4)(b) ("The murder was committed when the defendant was under the influence of extreme mental or emotional disturbance."); § 210.6(4)(c) ("The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act."); § 210.6(4)(f) ("The defendant acted under duress or under the domination of another person."); see also *Roberts II*, 431 U.S. at 636-37 ("To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstance can exist when the victim is a police officer.") (footnote omitted). The Court went on to list factors which might mitigate this type of crime. See *supra* note 111. The Court's argument appears

and expedited review of the death sentence by the New York State Court of Appeals<sup>295</sup> would meet with the approval of both the court of appeals<sup>296</sup> and the Supreme Court.<sup>297</sup> In appropriate cases the sentencing authority would still have the option of imposing the death penalty, but it would not be a mandatory decision which ignored any mitigating factors unique to the defendant and the crime committed.<sup>298</sup> In addition, because the statute would be limited to felons<sup>299</sup> with prior criminal records serious enough to warrant a sentence of life imprisonment who commit the crime of first-degree murder, it would probably be approved by the state legislature.<sup>300</sup> Obviously, even the most constitutionally sound and carefully drafted statute will not satisfy opponents of the death penalty.<sup>301</sup> The issue as to the desirability of the death penalty in any form ultimately will be decided outside the legal arena. To the extent that the public supports such a penalty,<sup>302</sup> a "guided" discretion statute appears to be the most appropriate.

*Andrea Galbo*

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to apply equally to a life-term prisoner accused of first degree murder.

295. See *supra* notes 79-122, 177-79, 268-72 and accompanying text.

296. See *supra* notes 171-72, 263-67 and accompanying text.

297. See *supra* notes 79-122, 288 and accompanying text.

298. See *The Death Penalty's Hardest Case*, N.Y. Times, June 19, 1983, at 18E, col. 1. This editorial notes that Lemuel Smith's crimes are so horrendous that he is an excellent choice for execution. "His brutal crimes make him Exhibit A for capital punishment and a great burden for its opponents." *Id.* However, the editorial writer still concludes that a mandatory death penalty cannot be justified even for him. "There are degrees of uncertainty even about convicted murderers, and there can be mistakes about murders in prison. There can also be degrees of guilt, or insanity, in prison killers. It is simply wrong for society to deny itself, and juries, all discretion . . . ." *Id.* at col. 2.

299. At the present time there is no one on death row in New York. Lemuel Smith was the only inmate there at the time of the decision in *Smith*. See CAPITAL PUNISHMENT 1983, *supra* note 124, at 3. Additionally, no one has been executed in New York since 1963. See *An Eye for An Eye*, *supra* note 223, at 28.

300. *People v. Smith—The Death Penalty in New York*, *supra* note 251, at 2, col. 2. But see *supra* note 287.

301. See *supra* notes 240-60, 287 and accompanying text.

302. See *supra* notes 222-31 and accompanying text.