

Pumping Oxygen into the Room

By Jonathan E. Gradess and Shari Silberstein

Introduction

On June 24, 2004 the New York State Court of Appeals ruled in *People v. LaValle* that the death penalty as then configured in New York was unconstitutional.¹ A legislative rejection of the death penalty followed, making New York the first state in the modern era of capital punishment to do away with its death penalty. This made New York a test case for policymakers, researchers, and others to observe the effects of ending the death penalty. Would crime rates soar? Would prosecutors find themselves unable to adequately do their jobs? Would life without parole absorb the wasted costs—both time and money—previously sunk into the death penalty? These assertions and others had been made by death penalty proponents for decades, in every state that was debating the future of its death penalty. New York's experience—and that of the five other states that since followed—proved those fears wrong. The sky did not fall. Social institutions did not crumble. Most encouraging, however, was that the end of the death penalty created space for genuine collaboration among previously entrenched adversaries within the criminal justice system. In the words of one prosecutor, the death penalty sucked all the air out of the room. With its demise came opportunities to replace this failed policy with better ones, from holistic and preventative responses to crime in New York to increased funding for victims' services in other states that followed New York's post-abolition example.

Background: The Death Penalty's Long "Off-Ramp"

New York has had a long and winding, some might say tortured, relationship with the death penalty. It was the last state to reinstate the death penalty in the post-*Gregg*² era, doing so in 1995, nearly 20 years after the U.S. Supreme Court began allowing it again. It was also the first state to abandon it, just 10 years later, making New York home to the shortest death penalty experiment in the modern era.

But New York's ambivalence with capital punishment began centuries earlier. In the middle of the 19th century an Assemblyman from Brooklyn ran for and won his seat solely on the issue of abolishing the death penalty³ and almost succeeded. Yet New York became a national leader in executions (beating out even Texas in the pre-*Gregg* era), carrying out 606 electrocutions between 1891 and 1963.⁴ In 1965, sentiment swung back the other way again



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when the Bartlett Commission called for abolition of the death penalty.⁵ A compromise law for a limited death penalty was passed in 1967. That law was struck down on constraint of *Furman v. Georgia*⁶ in *People v. Fitzpatrick*,⁷ so in 1974, the next year, the Legislature passed yet another limited death penalty statute, this time providing mandatory capital punishment for those who kill police officers or correctional officers, and for those sentenced to life in prison who kill while incarcerated.⁸ A 1977 Court of Appeals decision in *People v. Davis*⁹ effectively eliminated the first two categories, leaving the 1974 death penalty in place only for murder committed in prison by someone serving a life sentence.

Then, an annual legislative/gubernatorial dance began in New York. The legislature, spurred on by two pro-death penalty legislators, passed a death penalty reinstatement bill every year.¹⁰ Every year, the sitting governor vetoed the bill.¹¹ This pageant continued for 17 years, punctuated only briefly in 1984 by *People v. Smith*, which struck the third and only remaining provision of the 1974 death penalty law.¹²

The growing sentiment against the death penalty among lawmakers was sheltered during all these years by gubernatorial valor. The governor's *inevitable veto* allowed politically vulnerable legislators to mask their ambivalence about the policy, knowing that their vote for it would not lead to its actual reinstatement. Even in this environment, New York twice came close to a genuine threat of reinstatement during this period, in 1978 and in 1989. Both times saw the pro-death penalty vote creep high enough that it almost overrode the governor's veto.¹³

This death penalty cat and mouse game between governor and legislature continued until 1994, when George Pataki ran for Governor, campaigning almost exclusively on the death penalty. He defeated 12-year incumbent Mario Cuomo and came to Albany having "reserved" Chapter 1 of the Laws of 1995 for the capital punishment statute for which he had so vigorously campaigned.

In late 1994 a blue-ribbon committee called New Yorkers for Fairness in Capital Punishment came together to shape the best of what was by then an inevitable death penalty. The group included members who both supported and opposed the death penalty; all agreed on basic minimum standards and principles of fairness in how a death penalty process must be carried out. They asserted



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eleven such principles and were responsible for barring the death penalty for the intellectually disabled, for creating a Capital Defender Office, for a proportionality review process, and for racial justice and other critical due process protections.¹⁴

Interestingly, the group also flagged as unconstitutional the jury instruction that would eventually be the statute's demise in *LaValle*, calling it "irrational and coercively skewed in the direction of death sentences."¹⁵ Neither the Governor nor the legislature paused over the group's bill memo or over much else for that matter. After a brief period of drafting and negotiation, the death penalty reinstatement bill passed in March and took effect on September 1, 1995.¹⁶

When the Court of Appeals, nine years later, ruled in *People v. LaValle*¹⁷ that the deadlock jury provision of the statute was unconstitutional, it made life imprisonment without parole the maximum punishment for first-degree murder. The Governor, Senate Majority Leader, and Assembly Speaker all pledged that a legislative fix would be quick, easy, and forthcoming,¹⁸ but that did not happen.

Popular and legislative opinion had reversed itself on the death penalty, driven in large measure by the drumbeat of evidence from around the country that the system was irreparably broken. From the parade of death row exonerations in Illinois to studies of racial disparities and the death penalty's high cost over life imprisonment, it had become clear to New Yorkers that capital punishment generated little return for the enormous amount of resources, attention, and risk of mistake that it carried.¹⁹

Indeed, this futility was a defining feature in the death penalty debate during the ten months that the question was before the legislature. Between 1995 when the death penalty began and 2004 when it ended there were 864 cases investigated as capital by district attorneys in which death was precluded for 786 defendants.²⁰ New York, for all its fanfare, demonstrated the inevitable national pattern of death penalty implementation: high cost with low return, loud hurrahs at death penalty reinstatement, and stifled ambivalence actually using it.

New York spent an inordinate amount of money on what in the end were only 58 death noticed cases and far fewer death sentences—seven total. All those cases were appealed to the Court of Appeals; none were sustained.²¹ New York spent a minimum of \$24 million per case²² to achieve what in the end were very costly life without parole sentences. The question hung heavily in the pre-abolition air: had there not been a better way all along?

During the summer of 2004 the Assembly Majority Conference made clear that it wanted no action taken to fix the now suspended death penalty. That fall the Speaker of the Assembly called for hearings, which were held during the winter of 2004-2005. Although only two were originally scheduled, it took five full days of testimony to accommodate the crowd of witnesses.²³ One hundred

seventy (170) witnesses testified; virtually all condemned the death penalty as policy.²⁴

The issue finally came to a vote in April 2005. The New York State Assembly Codes Committee handily rejected legislation to repair the broken jury instruction, killing the bill and effectively placing New York among the other twelve states without the death penalty. The issue came back before the courts a final time in 2007, after which death row was cleared and dismantled, and New York's status as an abolitionist state solidified. When the dust settled, New York's death penalty was laid to rest by a combination of judicial and legislative initiative.²⁵

Impact of Abolition: The Sky Is Still There

The authors have attended and been intimately exposed to the rhetorical debate fostered by proponents of the death penalty in New York and other states. Although the arguments vary slightly from place to place, the primary argument usually highlights one or more emblematic crimes that "demand" the death penalty to make the broader case that abolition will bring unbridled murder and mayhem to the streets of their state. Corollaries to this prediction include the myth that abolition will drive an increase in the murders of law enforcement, and that prosecutors will be unable to secure maximum sentences without the threat of the death penalty.²⁶

The 1995 reinstatement of the death penalty in New York State was built in part on this false premise, namely that without the death penalty, crime in New York State would continue to escalate.

Laying to rest the tired deterrence debate, the National Research Council of the National Academies conducted a review of more than three decades of deterrence research and concluded in 2012 that studies claiming a deterrent effect on murder rates from the death penalty are fundamentally flawed and should not be used to inform judgments about the effect of the death penalty on homicide.²⁷

New York's real world experience, as well as that of the other states that have since ended the death penalty, confirms the research. None of those states has seen a spike in murders since abolition, and many have seen the crime rates continue on the same downward trajectory that began prior to abolition.

New York's violent crime rate reached a twenty-five year high in 1990 (1180.9 per 100,000—see table below),

Violent Crime Rate per 100,000						
	1990	1994	1995	2004	2007	2012
New York	1180.9	965.6	841.9	440.4	414.4	406.8
National	758.2 (1991)	713.6	684.5	463.2	471.8	386.9

Source: Uniform Crime Reporting Statistics – UCR Data Online

when New York did not have a death penalty. Violent crime, including murder and non-negligent manslaughter, began declining in the four years that followed, while New York continued to be without a death penalty. By the time George Pataki was elected in 1994, the violent crime rate had declined by almost 20% (965.6 per 100,000), still with no death penalty in the state to account for this drop. When the death penalty was reinstated in 1995, the rate had declined further (841.9 per 100,000). This post-1990 downward trend in New York mirrored national statistics where the violent crime rate peaked in 1991 (758.2 per 100,000) before beginning a downward trend that reached 684.5 per 100,000 in 1995. By 2012, after New York had been without a death penalty for eight years, violent crime was less than one-half of its 1995 rate and the national average was down 42%. In other words, the presence or absence of the death penalty had no correlation to the crime rate.

The data around law enforcement murder shows the same thing. The killing of a police officer in the line of duty is a tragedy whenever it occurs. That tragedy is compounded by a false belief that the existence or non-existence of a death penalty statute is a defining factor in these deaths, because such rhetoric prevents the implementation of real world solutions that would actually save officers' lives: better training; more staffing; and protective equipment that would cost a fraction of the cost of a death penalty case but which often goes unpurchased due to tight budgets. Indeed, in the nine years during which New York had the death penalty and the ten years since it has been eliminated, New York police officer deaths by gunfire have remained, on average and unfortunately, consistent.²⁸

These experiences are not unique to New York. New Jersey abolished the death penalty in 2007.²⁹ A year later, the New Jersey *Star-Ledger* conducted a review of prosecutors to assess the impact of abolition on whether or not it hindered their ability to prosecute cases. They found the following: "A year later, prosecutors and defense lawyers agree the demise of the death penalty has had no discernable impact on the way would-be capital cases are prosecuted in New Jersey." One prosecutor was quoted saying, "We have not viewed [abolition] as an impediment in the disposition of murder cases," and another said that abolition had not hindered prosecutors in pursuing tough sentences.³⁰

Looking at the death penalty debate in New York between 1974 and 1994, it is now clear that it represented twenty years of ill-informed rhetoric. The promised dangers that would arise without a death penalty never materialized. Neither did the crime-free New York that death penalty proponents promised capital punishment would bring. In the wake of *LaValle* and *Taylor*, the challenge is and has been to find a better, less costly, smarter, more effective way to respond to and reduce violence. This response, which has largely been limited to courtrooms and

legal sentences, must be more comprehensive—providing crime survivors with the resources and assistance they need to address the trauma and rebuild their lives, engaging communities in programs that prevent crime before it occurs, instead of after it is too late, and strengthening justice models that can hold people accountable for their harm in ways that are constructive rather than destructive.³¹ Fortunately, abolition has opened doors to implementing some of these approaches.

Impact of Abolition: New Opportunities

In the aftermath of the death penalty, first in New York, and then in the states that followed in its path,³² the authors of this report have been part of a national and state dialogue about the value of the moment, thinking through how best to redirect the wasteful resources long spent on futile efforts to execute.

In the wake of abolition in New York and then New Jersey a few years later, David Kaczynski, then Executive Director of New Yorkers for Alternatives to the Death Penalty (NYADP), wrote an agenda-setting piece for the national abolition movement:

Since 1995, more than \$200 million in tax dollars was wasted on New York's death penalty system. But we should not allow ourselves to forget what the 1995 law hoped to accomplish—a reduction in crime and violence. Even as we learn that the death penalty is not the answer to our crime problem, it goes without saying that abolishing the death penalty is not the answer either. If lawmakers were once willing to invest more than \$20 million a year in an unproven crime-reduction program, they should now be willing to invest at least that much in programs that have demonstrated effectiveness in preventing crime from occurring in the first place.³³

Kaczynski's piece focused on crime prevention, but it was easily extrapolated to other issues. For example, proponents of the death penalty also touted it as a salve to heal the wounds of victims' families. Four decades of the modern death penalty gave us ample evidence that capital punishment was often an obstacle for victims' families rather than a solution,³⁴ but eliminating the obstacle alone was neither going to reverse the negative impact nor resolve the original problem it sought to address.

In other words, New York's elimination of the death penalty sparked a new vision for abolition entirely: more than the absence of the death penalty, it was also the presence of a new paradigm driven by those solutions that were previously stymied by the death penalty's disproportionate pull of money, attention, time, and polarization, such as adequate victims' services and effective crime prevention. This idea became a rallying cry for not

only NYADP, but also for its national partner, Equal Justice USA (EJUSA), and abolition groups in other states.

The most concrete result of this new model was the idea that the savings from repealing the death penalty ought to be reallocated to programs that helped families of murder victims to cope with their loss and rebuild their lives. New Jersey was the first state to repeal the death penalty and attempt such a reallocation. The abolition movement rallied behind a 2009 bill to create a grants program for nonprofits providing traumatic grief counseling to homicide survivors, but the bill was not ultimately enacted.

When Illinois repealed the death penalty in 2011, the legislation signed into law created the Death Penalty Abolition Fund, administered by the Illinois Criminal Justice Information Authority (ICJIA) and to be funded with money previously earmarked for death penalty prosecutions.³⁵ This Fund would be used for increased training of homicide detectives and enhanced services for families of homicide victims.³⁶ In April 2013, the Fund requested proposals for comprehensive services to victims' families.³⁷ In FY14, the fund awarded over \$1.9 million for such programs over the next four years.³⁸

Maryland provides the most public example of the reallocation of death penalty costs to victims' family services. The 2013 bill that repealed the death penalty in Maryland included a provision for the reallocation, similar to the Illinois bill. The provision was stripped out of the repeal bill before it was passed. However, death penalty repeal advocates led by EJUSA and Maryland Citizens Against State Executions returned to Annapolis in 2014, building a coalition with crime victims' advocates, including both victims who had supported the repeal effort and those who had not. Together, the coalition successfully lobbied for a \$500,000 earmark in the state budget for programs for families of homicide survivors, as well as companion legislation that passed unanimously to provide consideration of future support. Family members of homicide victims are a particularly underserved population of crime survivors, and Maryland may be the first state in the country to provide them a line item in the statewide budget.³⁹ Throughout the testimony and other public debate on the budget and the bill, it was repeatedly noted that the source of the new funding was repeal of the death penalty the year before.

In addition to the reallocation of resources, campaigns to end the death penalty also provided opportunities for broader education about the flaws in the larger criminal justice system. Former Illinois Governor George Ryan explained that discovering the number of wrongful convictions present in death penalty cases opened his eyes to those risks in all cases. If these kinds of mistakes are happening in the cases where everyone is paying attention, he asked, what is happening in the lower level cases that aren't in the spotlight?⁴⁰ In New Jersey, the champion of the death penalty repeal bill went on to introduce other

criminal justice reforms in subsequent years. His experience learning about the death penalty played a significant role.

In New York, similar justice reforms are also moving forward. The political price of Governor Mario Cuomo's strong moral stand on the death penalty is often said to have forced the creation of a prison empire. While this is simplistic, it bears a substantial grain of truth. Significantly at present his son, Governor Andrew Cuomo, is dismantling some of those same institutions. Joint groups of prosecution and defense on discovery and sentencing are working. The Rockefeller drug law has been reformed. A new Office of Indigent Legal Services designed to improve the representation of the poor has been created. These reforms would have been far more difficult to implement during the reign of the death penalty in New York given both the heightened adversarial tension that capital punishment silently imposes and the practical reality of its high cost.

The New Paradigm in New York

At the heart of the paradigm undergirding these post-abolition efforts was the basic principle that an effective justice system needs to work for all of the impacted parties, rather than continue as a zero-sum game that pits the interests of one party against another. To this end, it was essential to foster dialogue between diverse parties to find common ground. With a spirit of authentic collaboration and dialogue to guide the discussions, a set of shared values emerged among all affected parties for preventing crime, helping victims of crime to heal and rebuild, and restoring communities afflicted by violence to peace and health. To build this new paradigm for criminal justice it was necessary to unite those most affected by violence around common ground solutions that addressed their real and immediate needs, reduce the likelihood of violence, and benefit all involved.

NYADP began this pursuit by looking at former "adversaries" as colleagues, holding stakeholder meetings across New York that were co-facilitated by EJUSA. The group sessions brought together crime survivors and their advocates, people who were formerly incarcerated and their advocates, district attorneys and corrections officials, defense attorneys, restorative justice practitioners, and mental health advocates. Discussions continued individually beyond the local listening sessions, including through a Family and Friends of Homicide Victims (FFHV) group led by Marie Verzulli, NYADP's victim and survivor advocate.⁴¹

It should be noted that everyone involved was (and is) saddled with the contemporary model of adversarial criminal justice. They faced returning to their offices and their jobs when the talks finished. There were flashpoints and some disagreement, and a healthy concern for threats to budgets and existing authority. But what emerged from the dialogue was a shared belief held by those enmeshed

in our criminal justice system that much about the current system is fundamentally flawed. Among the beliefs shared by a majority was that:

- The death penalty is illusory and wasteful in practice (even among those who supported it theoretically) and its resources could be better deployed elsewhere;
- Crime victims and survivors need a voice and funded, robust, trauma-informed healing services;
- Community-based violence prevention is key to transforming the system;
- Proactive, early grassroots responses to violence are a more effective deterrent than anything currently provided by our criminal justice system;
- The criminal justice system has grown to a bloated bureaucracy frequently incapable of meaningful interpersonal intervention;
- Education, job training, substance abuse treatment, and employment have a greater impact on public safety than incarceration and punitive sanctions.

What was remarkable about these discussions with such a diverse group was that they were led by a group previously focused solely on ending New York's death penalty. Yet with the death penalty off the table and with NYADP's primary commitment to violence prevention, safety, and healing, everyone was able to talk about the big picture without interference. The death penalty so often acts as a lightning rod, entrenching each person in his or her emotional or political position in favor or against. People remarked that the absence of capital punishment so changed the nature of discussions that "it was like pumping oxygen into a big room."⁴²

In the years that followed these initial dialogue sessions, NYADP focused its work in the Capital District of New York to partner with nascent and longstanding grassroots organizations and leaders to reduce violence, expand opportunities for healing and trauma-informed care, and build healthy communities.

This organizing brought numerous results. In 2009, New York implemented the \$4 million Operation Snug (GUNS spelled backwards) in 10 cities across New York.⁴³ Based on the successful "CeaseFire Chicago" initiative, a model which reduced shootings in target areas by between 16-35 percent, the program deploys formerly incarcerated people to interdict violence at the street level by preventing revenge killings and stopping violence before it starts. Neighborhood residents, religious leaders and law enforcement work together with skilled, grassroots violence interrupters to change behaviors.⁴⁴ Originally established with programs in Albany, Buffalo, Niagara Falls, Rochester, Syracuse, Yonkers, Mt. Vernon and Manhattan, Queens and Brooklyn in New York City, the program

continues, and it promises greater potential for reducing violence than capital punishment ever did.⁴⁵

In Schenectady, NYADP co-chaired the Community Empowerment Partnership, a broad coalition to address community violence (sparked by the suicide of four high school girls of color over a three-month period).⁴⁶ The Partnership held a series of widely attended meetings and events.⁴⁷ One pinnacle event was a public lecture featuring Syracuse Police Chief Frank Fowler, who presented his community-based Trauma Response Team to 130 community members and the police chiefs of Schenectady, Albany, and Troy. The lecture inspired Schenectady District Attorney Bob Carney to design a program for teen-aged males at high risk of gang involvement, which was funded and launched as the Schenectady Anti-Violence and Empowerment Program (SAVE). Although no longer operating, the community and the district attorney's office maintain an underlying commitment to trauma-informed responses to violence. In fact, NYADP is working hand-in-hand with the Schenectady District Attorney and the Albany Police Department to carry out Project Safe Neighborhoods as part of the Give Program (Gun Involved Violence Elimination) which calls on the DA and local police to work with community groups and formerly incarcerated people to hold forums with parolees to introduce them to available services, to point out potential sanctions, and to build relationships with successfully reintegrated formerly incarcerated people to reduce recidivism.

The Partnership inspired the NYADP-run program, *Limits of Loyalty*, an educational panel that brings together a diverse group of people impacted by the criminal justice system on all sides (law enforcement, crime survivors, former offenders, and their families).⁴⁸ The panel exposes high and middle school children to a frank discussion of what personal responsibility is, how we connect with others, and how our life decisions can have a ripple effect on our family, friends, neighbors, community and eventually the world.⁴⁹ The panel includes people with compelling personal stories as well as those with institutional responsibility for keeping community members safe.⁵⁰ Designed to stimulate students to think about the moral dimensions of bystander behavior, the presentation begs questions from the audience: "When does loyalty to my own values trump loyalty to my friend?" "What is my responsibility to act or to speak up when I witness other people being hurt?" "What is the responsibility of all—including community members and those in authority—to build a community based on respect and trust?" In making itself accessible to young people, many of whom are abused, bullied, and broken, the clear message that we must save and love one another, put down guns and pick up personal courage, give a voice to the voiceless, and build the peaceful community is heard. After full participation in this program over time, the Schenectady County District Attorney stated it was the best crime prevention program he had seen in his 25 years as a DA.

NYADP's victims support group, called Family and Friends of Homicide Victims (FFHV), continues today to work with community based victims service providers, to promote restorative justice practices, to advocate for programs to assist those left behind after murder, and to strive to help other survivors and each other to regain a sense of safety.⁵¹ FFHV educates numerous agencies in New York State to understand the meaning of victimization and the essential need for procedures, systems, and approaches that are trauma-informed and make paramount the need for healing.⁵² Members may or may not agree on the death penalty in theory, but they believe that our time, money, and resources devoured by the death penalty are better spent on victims services, community-based prevention programs, and investing in our youth.

What ties together all of these initiatives is the remarkable reality that an anti-death penalty organization had so successfully transformed itself to be a go-to resource for police, prosecutors, victims' service providers, and other agencies in how to reduce violence, promote healing, and build healthier communities. The unique vision to tackle those root causes of trauma and hurt that the death penalty was ill-suited to address has made New York a model for what is possible in a post-death penalty world.

Looking Ahead

National organizations have embraced this model of holistic thinking to promote a justice system that is responsive to all impacted parties. Advocacy groups in multiple states have been testing out models for collaborative, common ground criminal justice reform, organizing disparate constituencies like crime survivors, people incarcerated, and their families.⁵³ More will begin to do so in the coming years. In 2012, a group of innovative foundations recognized the potential in this small but growing movement and supported a series of national convenings to bring together advocates from the victims assistance field and the criminal justice reform field to explore the new paradigm and break down the silos in which criminal justice work is performed.⁵⁴ Meeting in Los Angeles, San Francisco, Phoenix, and Philadelphia between 2012 and 2014 the group defined core principles that it shared and examined what a new justice system might look like.⁵⁵ The post-abolition successes in New York and Maryland were both shared as case studies for the larger group discussion. In sum, and paraphrasing the group's work:

We want a justice system that embraces the values of safety, accountability, prevention, justice, and healing. We want proper investment in crime prevention while strengthening community responses to violence. This includes greater investment in services that help crime survivors to address trauma and rebuild their lives, and programs so those who

have committed crimes can be held accountable for the harm done and can rebuild their lives as well. This new intentional vision of safe and healthy communities will address racial discrimination in the justice system, both in terms of who is incarcerated and which crime survivors are served. Such a new paradigm will reflect the diversity of crime survivors, amplifying their diverse voices and perspectives in public policy debates and decisions. Our new justice system will recognize that people are more than the very worst thing that has happened to them and more than the very worst thing they have done to another, and will act in pursuit of healing and making all people whole.⁵⁶

Conclusion

Post-abolition in New York some ideas have been born in the spirit of a new paradigm while others remain inchoate. What is indelibly clear is that constraints presented by the death penalty as a moral impediment to cross agency dialogue have been removed. Adversaries are working collegially in many places throughout New York in violence interruption, crime prevention, community organization, and grassroots victim initiatives. The death penalty is a potent, highly visible symbol, but an ineffective way to resolve violence. With this wrong-headed approach out of the way, more effective responses can be expanded and flourish.

Endnotes

1. *People v. LaValle*, 3 N.Y.3d 88, 99 (2004) (holding New York's death penalty statute unconstitutional and that until the Legislature amends a portion of the statute dealing with instructions to the jury in death penalty cases the death penalty could not be imposed as a punishment).
2. *See Gregg v. Georgia*, 428 U.S. 153 (1976).
3. *See* J. O'SULLIVAN, REPORT IN FAVOR OF THE ABOLITION OF THE PUNISHMENT OF DEATH BY LAW (2d ed. 1974).
4. SCOTT CHRISTIANSON, CONDEMNED: INSIDE THE SING SING DEATH HOUSE 1 (2000).
5. *See* STATE OF N.Y. TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE: SPECIAL REPORT ON CAPITAL PUNISHMENT (1965).
6. *See Furman v. Georgia*, 408 U.S. 238, 239 (1972) (holding capital punishment as then capriciously practiced in the United States violates the Eight Amendment).
7. *See People v. Fitzpatrick*, 32 N.Y.2d 499, 503 (1973).
8. *See* 1974 N.Y. Laws 367.
9. *See People v. Davis*, 43 N.Y.2d 17, 23 (1977).
10. Known colloquially as the Volker/Graber bill and named for its Senate and Assembly co-sponsors, the bill was often summarily debated with proponents and opponents asserting, by rote, tired old propositions much like senior professors sometimes do in teaching the same course annually. As the national death penalty expanded, shaped by a new dynamic Eighth Amendment jurisprudence, the New York debate remained fairly predictable

growing increasingly outdated as year in and out a veto was all but assured.

11. Governor Hugh Carey vetoed death penalty bills from 1978-1982 and Governor Mario M. Cuomo vetoed the death penalty from 1983-1994. Emily Hart, *New York Without a Death Penalty: 1976-1995*, N.Y. HISTORY REV. (Aug. 21, 2011), http://nyhrarticles.blogspot.com/2011_08_01_archive.html.
12. The post-*Furman* death penalty statute contained three victims making defendants eligible for death: those who kill police officers or correctional officers in the line of duty and people serving life who commit murder. This latter third prong of the bill, not affected by the 1977 *Davis* decision, was struck down in *People v. Smith*, 63 N.Y.2d 41, 50 (1984), presaging by three years the U.S. Supreme Court's decision in *Sumner v. Shuman*, 483 U.S. 66, 67 (1987) (stating that the mandatory death sentence was unconstitutional as the 8th and 14th amendments require heightened reliability in death-penalty determinations through individualized-sentencing procedures).
13. Although a 1986 conference held at The College of Saint Rose in Albany had spawned efforts to organize a movement against the death penalty in New York, it was not until 1989 that this one vote margin had helped remove public complacency. Because no one genuinely expected a death penalty reinstatement bill to pass, New York had not organized a death penalty abolition movement. The solid work of vote counting had been carried on for years by the stalwart lobbyist for the Civil Liberties Union, Barbara Shack. At that time her group, New Yorkers Against the Death Penalty, became the New York State Coalition to Abolish the Death Penalty. Later incorporated and chaired by Bishop Howard Hubbard, this organization changed its name and again became New Yorkers Against the Death Penalty in the early 1990s. Its first Executive Director, Damaris McGuire, was at the helm when Governor Pataki was elected in November of 1994.
14. See 1995 N.Y. Laws 1.
15. Bill Memorandum in Opposition to S2649 filed by New Yorkers for Fairness in Capital Punishment on February 26, 1995. The longer excerpt states, "The Governor's bill provides a deliberating penalty phase jury with 2 options: death or life imprisonment without parole. The jury must be specifically instructed that if they fail to reach an agreement on these options, the judge will sentence the defendant to a minimum of 20 years to life. This sentencing scheme is irrational and coercively skewed in the direction of death sentences." *Id.*
16. 1995 N.Y. Laws 1.
17. See *People v. LaValle*, 3 N.Y.3d 88, 99 (2004).
18. Andrew Smith & Andrew Metz, *They Can't Be Put to Death*, NEWSDAY, June 25, 2004, at A02.
19. Between 1995 and 2005, 148 people charged with first-degree murder had been incarcerated on sentences of life without parole (LWOP), while seven people had been sentenced to death and none executed. *The Death Penalty in New York State: Hearing Before The New York State Assembly Standing Committees on Codes, Judiciary and Correction*, at 33-34 (2005).
20. CAPITAL DEFENDERS OFFICE, Caseload Summary, http://www.nycdo.org/caseload_041231_answers.pdf (last visited Nov. 12, 2014).
21. In 2002 in *People v. Harris*, 98 N.Y.2d 452, 496-497 (2002), Darrell Harris's life was spared by a decision which upheld his conviction but vacated the sentence under *Hynes v. Tomei*, 92 N.Y.2d 613, 620 (1998). *Hynes* had struck as unconstitutional the plea bargain provisions that permitted those who plea bargained to receive life without parole while subjecting defendants who exercised their right to go to trial with the death penalty. *Hynes*, 92 N.Y.2d at 629-630. A year later in *People v. Cahill*, 2 N.Y.3d 14, 35 (2003), the court reduced Mr. Cahill's conviction to second degree murder on the ground his case lacked the aggravating factor required to make it capital. *Id.* In *People v. Mateo*, 2 N.Y.3d 383, 394 (2004) the Court, again on constraint of *Hynes v. Tomei*, reversed the death sentence, as the offending plea provisions had still been in the statute when his death notice was filed. *Id.* The remaining four death sentences that went to the Court of Appeals were all resolved by the decision in *LaValle*. *LaValle* itself struck down the death penalty due to the "deadlock provision" in jury instructions holding additionally that the provision was not severable from the death penalty statute and would need corrective action by the Legislature. *LaValle*, 3 N.Y.3d at 128-134. Both Robert Schulman and Nicholson McCoy were spared directly by the *LaValle* ruling. *Id.* McCoy was resentenced to life in prison before his case reached the Court and in *Schulman* prosecutors conceded *LaValle* error. See *People v. Shulman*, 6 N.Y.3d 1, 17 (2005). In *People v. Taylor*, 9 N.Y.3d 129, 147-148 (2007) the court in a 4-3 decision ruled the death sentence unconstitutional on the authority of *LaValle*.
22. See Andrew Tilghman, *Costly Price of Capital Punishment*, TIMES UNION, Sept. 21, 2003 at A1. However, the Tilghman estimate was by 2005 extrapolated to \$170 million (\$170 million divided by 7 cases equals \$24 million per case). The Gradess testimony points out limitations of the Times Union estimate suggesting an amount much higher when comprehensively calculated. *The Death Penalty in New York State*, *supra* note 19, at 1-3.
23. *The Death Penalty in New York State*, *supra* note 19, at 1.
24. This paralleled the position of New Yorkers polled on the question. In February 2005, 56 percent of surveyed New York voters preferred a sentence of life in prison (either without parole or with the possibility of parole) over the death penalty for people convicted of murder. Only 34 percent of New Yorkers said they supported the death penalty, a significant drop from the 48 percent who supported it in 1994. Michael Slackman & Majorie Connelly, *Pataki's Rating Declines Sharply in Poll of State*, THE NEW YORK TIMES, February 15, 2005; SIENA RESEARCH INST., SIENA NEW YORK POLL: DEATH PENALTY: NY SPLIT; FAVOR LIFE WITHOUT PAROLE 1 (2005), available at https://www2.siena.edu/uploadedFiles/Home/Parents_and_Community/Community_Page/SRI/SNY_Poll/SNY_05Mar_ALL.pdf. A Siena Institute poll released March 8, 2005 found that statewide death penalty support had dropped again, to 29 percent.
25. Although some observers characterize New York's abolition of the death penalty as "judicially imposed," that analysis misses a critically important ingredient in what actually occurred. Of the three chairs who conducted the legislative death penalty hearings in New York, two had formerly voted in favor of capital punishment. Following the extensive hearings before three separate Assembly committees, when the bill to fix the jury instruction appeared before the Assembly Codes Committee, it was defeated with those two legislators and others voting to kill it. Unlike states where repeal occurs only in the legislature or only by court action, the demise of the death penalty actually took place in New York after two branches of Government gave full and thorough deliberation to its viability and formally rejected it. *The Death Penalty in New York State*, *supra* note 19, at 1-3.
26. In addition to the prime argument that the death penalty will reduce murders, other arguments for the death penalty include that it provides healing and closure to victims' families and the death penalty will save the money spent on long-term incarceration of those convicted. Because the purpose of this paper is to detail the positive effect of death penalty abolition on New York's criminal justice system, we do not here detail the bountiful evidence refuting these stale hypotheses. On the subject of victims, the interested reader is directed on a journey. See generally SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (2010) (explaining a just society seeks to heal the wounds that crime has caused, not simply punish offenders); Hugh McQuaid, *Families of Murder Victims Call on Legislature to Abolish Death Penalty* CT NEWS JUNKIE (Feb. 9, 2011), http://www.ctnewsjunkie.com/archives/entry/families_of_murder_victims_call_on_legislature_to_abolish_death_penalty/ (discussing the death penalty's impact on murder victims'); see *infra* note 34; Murder Victims' Families for Reconciliation, available at <http://www.mvfr.org>, and Murder Victims' Families for Human Rights, available at <http://www.mvfr.org/>; NEW YORK STATE DEFENDERS ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982)

- (demonstrating that since the first death penalty cost study was performed in New York, a myriad of studies across the nation have made clear that the cost of the death penalty far exceeds the costs of life in prison.); DEATH PENALTY INFORMATION CENTER, COSTS OF THE DEATH PENALTY (2014), available at <http://www.deathpenaltyinfo.org/costs-death-penalty>; Johnathan E. Gradess & Andrew L. B. Davies, *The Cost of the Death Penalty: Directions for Future Research, in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 397–418 (Charles S. Lanier ed., 2009).
27. See DANIEL NAGIN & JOHN V. PEPPER, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMICS, DETERRENCE AND THE DEATH PENALTY (2012).
 28. See OFFICER DOWN MEMORIAL PAGE: REMEMBERING ALL OF THE LAW ENFORCEMENT'S HEROES, available at <http://www.odmp.org/search?state=new-york&cause=Gunfire>.
 29. See Larini, Rudy, *A Year Later, State Assesses Justice Without Death Penalty*, THE STAR-LEDGER, December 15, 2008, at 1.
 30. *Id.*
 31. See generally HERMAN, *supra* note 26 (discussing more on crime survivors' needs as a separate component of justice from whatever does or doesn't happen to the offender); TED WACHTEL, RESTORATIVE JUSTICE CONFERENCING: REAL JUSTICE AND THE CONFERENCING HANDBOOK (2010); LES DAVEY, INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE JUSTICE AND PRACTICES, available at http://www.iirp.edu/pdf/betho6_davey2.pdf (providing an overview of restorative justice).
 32. New York was the first of six states to come to the new wisdom that the death penalty is out of date, cruel, costly, unfair, racist, and dangerous, draining resources from vital other forms of violence prevention and victim service. The five that followed were New Jersey (2007); New Mexico (2009); Illinois (2011); Connecticut (2012) and Maryland (2013).
 33. David Kaczynski, *Taking the Next Step*, DAILY GAZETTE, Dec. 23, 2007.
 34. Brief for N.J. Crime Victims' Law Ctr. as Amicus Curiae Supporting Defendant-Appellant, at 1, *People v. Taylor*, 9 N.Y.3d 129, 137 (2007). The late great Catherine Abate represented the New Jersey Crime Victims' Law Center as *amicus curiae* in the Court of Appeals in *People v. Taylor* and on behalf of a class of New Jersey families of murder victims who had endured nearly a quarter century of capital punishment. The New Jersey families sought to shed "the light that only hindsight can provide" about how the death penalty harmed surviving families, and wished to spare future crime victims in New York State from the similar pain of prolonged waiting for an illusory punishment. In pertinent part the brief stated:

Please, make no mistake. We hope for abolition not out of any respect or sympathy for killers. We are neither bleeding hearts nor reformers advocating for the accused. We are simply pained pragmatists who have watched the system try to work with the best and most noble intentions and continually fail, prolonging our pain and delaying our healing. *Id.*
 35. See Funds for Victims Families, ILLINOIS COALITION TO ABOLISH THE DEATH PENALTY (2009), <http://us2.forward-to-friend2.com/forward/preview?u=6a0597f83fcd4ae04c1c16ef&id=4a07f47260>.
 36. *Id.*
 37. *Id.*
 38. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY 2014 GRANTS TRACKER (2014), available at <http://www.icjia.state.il.us/public/excel/AttachmentA/DPA/DPA%20SFY14.xls>.
 39. We consulted several victims' assistance advocates and they were not aware of any state that has earmarked funds in the state budget specifically for services to family members of homicide victims. Private correspondence with Steve Derene, National Assoc. of VOCA Assistance Admins., Dan Levey, Parents of Murdered Children, Susan Howley, National Center for Victims of Crime (on file with the author).
 40. George Ryan, Speech to the National Coalition to Abolish the Death Penalty, Annual Conference, San Francisco, California (2000).
 41. See NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.nyadp.org/content/family-and-friends-homicide-victims-ffhv-meet-albany> (last visited Nov. 12, 2014).
 42. Nothing here should be misconstrued to suggest that NYADP created a new form of process arising from abolition. Scores of grassroots leaders and groups exist in this country who work across disparate constituencies to find common ground. NYADP's unique contribution has been the observation of how much space was provided for genuine collaboration by the elimination of capital punishment as an obstacle. Its desire to collaborate with others to harness the potential of its absence was a function of a freedom to put its money, what there was of it, where its mouth had always been. NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, TURNING IDEAS INTO ACTION 1 (2010), available at <http://www.nyadp.org/content/turning-ideas-action>.
 43. See CURE VIOLENCE NEW YORK, available at <http://cureviolence.org/partners/us-partners/snug/>.
 44. GREG BERMAN & EMILY GOLD, CTR. FOR CT. INNOVATION, BUREAU OF JUSTICE ASSISTANCE: U.S. DEP'T OF JUSTICE, FROM CHICAGO TO BROOKLYN: A CASE STUDY IN PROGRAM REPLICATION 1–2 (2011), available at <http://cureviolence.org/partners/us-partners/snug/>.
 45. NYADP was involved in both lobbying for this program and in urging its extension to Schenectady as a violence prevention model. See CURE VIOLENCE NEW YORK, *supra* note 43.
 46. See Sara Foss, *Anti-Death Penalty Group Turns Focus to Preventing Violence, Aiding Victims*, DAILY GAZETTE, Nov. 14, 2010.
 47. *Id.*
 48. *Limits of Loyalty*, NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, http://www.nyadp.org/content/regional-meetings_initiatives (last visited Nov. 12, 2014).
 49. *Id.*
 50. *Id.*
 51. *Family and Friends of Homicide Victims*, NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.nyadp.org/content/family-and-friends-homicide-victims>.
 52. See *id.*
 53. BRIDGING THE DIVIDE: A NEW PARADIGM FOR ADDRESSING SAFETY, CRIME, AND VICTIMIZATION 2 (2014), available at <http://www.safetyandjustice.org/files/Bridging%20the%20Divide%20-%20Full%20Report.pdf>.
 54. *Id.* at 2, 26.
 55. *Id.* at 29–30.
 56. *Id.* at 3.

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