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The Wages of Ambivalence: On the Context and Prospects of New York’s Death Penalty

FRANKLIN E. ZIMRING†

INTRODUCTION

This note aims to be a modest contribution to a vast and neglected topic: the political science of capital punishment. Five years ago, I published statistical evidence illustrating that the states that actually conducted executions during the 1980s were a self-selected subset of those jurisdictions that sentenced prisoners to death.¹ Ten of the states that had been in the top twelve in rates of execution in the 1950s (when execution rates were under state rather than federal control) were also among the thirteen states that conducted executions in the 1980s.² The inference I drew was that if the local culture was strongly supportive of executions in a state, the barriers to execution that existed in the 1980s were overcome.³

If states that really wanted executions in the 1980s conducted executions, what then explained the fact that sixty-five percent of all the jurisdictions in the United States that maintained a death penalty conducted no executions during the 1980s?⁴ The implication I drew from the statistical pattern was that these states, too, were a self-selected subset of death penalty jurisdictions with larger levels of ambivalence about putting human beings to death.⁵ Judges and public officials were less apt to wholeheartedly support executions, the political climate was less apt to demand executions, and opposition to the practice was more likely among lawyers and

† William G. Simon Professor of Law, University of California at Berkeley School of Law; Director, Earl Warren Legal Institute. Michael Laurence was, as usual, enormously helpful in the research that produced this article. Sam Kamin and William Nelson provided able research assistance.

2. Id. at 740 (table 4).
3. Id. at 740-41.
5. Zimring, supra note 1, at 740-41.

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the citizenry.\textsuperscript{6}

This note begins with a brief statistical update on execution patterns in the 1990s and their implication for what I shall call the ambivalence hypothesis. A second section analyzes the relevance of regional patterns to the prospects for New York's death penalty. Section III examines the recent history of New York as a predictor of the future. Section IV is concerned with the limits of historical data in predicting executions and discusses two ways that the historical pattern might be overcome.

The general conclusion of this analysis is clear. New York's new death penalty\textsuperscript{7} is a textbook case of mixed feelings and moral uncertainty. This ambivalence has influenced both the shape of the death penalty law and the likelihood that the legislation will lead to an execution in New York, soon or ever. Twenty more years in New York without an execution would be no surprise.

\section{Patterns of Execution in the 1990s}

The first five years of the 1990s are the laboratory that this section will use to provide new tests of execution data as an indicator of ambivalence about the death penalty. While the first half of the decade witnessed many executions, a careful analysis of patterns of recent executions provides important additional evidence of continuity in execution policy in the American states. This in turn supports the broad outlines of the ambivalence hypothesis.

Whatever else one might say about the first half of the 1990s, it was an undoubtedly active period for state-level execution policy. The five years beginning January 1, 1990 brought witness to 137 executions, an average of over twenty-five per year.\textsuperscript{8} The number of executions during this five year period was greater than the total number of executions experienced in the United States between 1977 and 1989.\textsuperscript{9} The number of states in the United States conducting executions also expanded rapidly in the 1990s. A total of eleven states with no previous post-\textit{Gregg v. Georgia}\textsuperscript{10} executions conducted at least one prior to December 31, 1994.\textsuperscript{11} The numerical total of newly executing states in the five years beginning

\begin{itemize}
\item \textsuperscript{6} Id.
\item \textsuperscript{7} N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996).
\item \textsuperscript{8} NAACP LEGAL DEFENSE AND EDUCATION FUND INC., \textit{DEATH ROW, U.S.A. REPORTER} 733 (1994) (hereinafter, \textit{DEATH ROW, U.S.A.} (1994)).
\item \textsuperscript{9} There were 120 executions between 1977 and 1989. \textit{Id.}
\item \textsuperscript{10} 428 U.S. 153 (1976)(upholding Georgia's death penalty statute).
\item \textsuperscript{11} The eleven states are: Arizona, Arkansas, California, Delaware, Idaho, Illinois, Maryland, Nebraska, Oklahoma, Washington & Wyoming. \textit{DEATH ROW, U.S.A.} (1994), \textit{supra} note 8, at 734-39.
\end{itemize}
January 1, 1990 was equal to the list of newly executing states during the whole of the 1980s, so that the pace of expansion per year was about twice as fast over the first five years of the 1990s by that measure.

There are, however, two indications that the rate of newly executing states expanded much more abruptly than an overall comparison with the 1980s would suggest. First, the five years prior to 1990 had witnessed only two newly executing states, a rate of initiation one-fifth as great as that during the early 1990s. Secondly, the pool of death penalty states with no previous executions had been shrinking over time. The eight states that began execution in the first half of the 1980s were twenty-seven percent of the thirty states that had death penalties but had not yet executed prior to 1980. The eleven states that began to execute in the first five years of the current decade were forty-six percent of the twenty-four states that could have had a first execution. By this measure, the practice of capital punishment has broadened in unprecedented fashion in the 1990s.

Does this larger number of executing states signal that executions are now broadly distributed across the states in the United States with death penalty laws? The degree to which executions are evenly spread throughout the United States is not great. And when the focus shifts from the count of states with some execution history to the rate of executions, the continuity in regional and historical concentration in executions is still large.

Table 1 begins the tale of continuity in executions by contrasting the 1990-1994 execution record of death penalty states with some execution during the 1980s and those with none.

12. Alabama, Georgia, Indiana, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, Utah & Virginia commenced post-Gregg v. Georgia executions during the 1980s. Id.
13. Missouri and Utah. Id. at 734-36.
14. Zimring, supra note 1, at 732 (table 1).
TABLE 1. EXECUTIONS IN DEATH PENALTY STATES, 1990-1994, BY EXECUTION HISTORY

<table>
<thead>
<tr>
<th>Death Penalty States that Conducted Executions in the 1980s</th>
<th>Death Penalty States that Conducted No Executions in the 1980s</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Percentage Conducting Executions, 1990-1994</strong></td>
<td></td>
</tr>
<tr>
<td>92</td>
<td>46</td>
</tr>
<tr>
<td><strong>Percentage Conducting No Executions, 1990-1994</strong></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>54</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
</tr>
<tr>
<td>100% (13)</td>
<td>100% (24)</td>
</tr>
</tbody>
</table>

The table shows that the immediate past is highly predictive of executions in the 1990s. Of the thirteen states with executions in the 1980s, twelve conducted executions in the 1990s (Mississippi is the lone exception). Fewer than half the death penalty states with no prior executions conducted an execution in the first half of the 1990s. Small states like Nevada and Utah are among the executing recidivists, while large states with big death row populations such as Ohio, New Jersey, and Pennsylvania did not execute in the first half of the 1990s. So more than size was operative to separate the executing and nonexecuting states.

Long-term execution history also seems more important than size in explaining which death penalty states execute. By December 1994, all of the thirteen states with the highest per capita rate of execution during the 1950s had executed at least two prisoners, while two states (Ohio and Pennsylvania) which were among

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19. Id. at 736-38.
20. Id. The thirteen states with the highest per capita rates of execution during the 1950s are: Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Nevada, South Carolina, Texas, Utah & Virginia. Zimring, supra note 1, at 738.
the highest ten in the number of condemned prisoners had not yet conducted a first execution.\textsuperscript{21}

Furthermore, the concentration of executions in a relatively small number of death penalty states remains high in the 1990s. During the 1980s, four of the thirteen states with any executions (Texas, Florida, Louisianan and Georgia) accounted for almost three-quarters of all executions.\textsuperscript{22} During the early 1990s, an even smaller fraction of the executing states, five out of twenty-four (Arkansas, Florida, Missouri, Texas and Virginia), produced seventy-two percent of the executions.\textsuperscript{23} The significant cluster during the 1980s involved thirty-one percent of the executing states.\textsuperscript{24} In the 1990s, the cluster was among five states that were twenty-one percent of the executing jurisdictions.\textsuperscript{25}

A. Southern Dominance

Two regional concentrations are particularly remarkable in the 1990s. Each continues a pattern observed in the 1980s. The outstanding regional characteristic of executions in the 1990s is Southern dominance. The consistent tradition of heavy concentration of executions in the South extends well back into American history.\textsuperscript{26} The manifold changes in execution patterns in the 1990s have done little to dilute the dominance of Southern states. Of the 137 United States executions in the first half of the 1990s, 112 or eighty-two percent, took place in Southern states.\textsuperscript{27} The number of Southern states participating in this practice increased, but the pattern of regional hegemony continued without significant change.

While Southern states lead others in many aspects of capital punishment, the disproportion in executions is much greater than in earlier phases of capital sentencing. The sixteen Southern states had fifty-six percent of all condemned prisoners in April 1995, with 1,672 of a total of 3,009.\textsuperscript{28} The rate of executions per one hundred

\textsuperscript{22.} DEATH ROW, U.S.A. (1990), supra note 4, at 71-73.
\textsuperscript{24.} DEATH ROW, U.S.A. (1990), supra note 4, at 67, 71-73.
\textsuperscript{26.} See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 26-49 (1986).
\textsuperscript{28.} NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, U.S.A. REPORTER 773-
Southern death row inmates in the first half of the 1990s was 2.5 times as great as the rest of the nation.  

B. The Northeastern Drought

An equally dramatic regional pattern—and this one carries direct implications for New York—is the absence of executions in the Northeastern states. Throughout the period from Gregg v. Georgia's approval of guided discretion in death sentencing to the early months of 1995, nobody was executed in any of the states in the Northeastern United States. For most of the nineteen years since Gregg v. Georgia, three states in the Northeast did not have a death penalty—New York, Maine and Massachusetts. But very large states with high rates of homicide did have death penalty laws virtually identical to those found in some Southern states. Pennsylvania had one of the five highest death row populations in 1990, but no executions in the first five years of the decade. New Jersey and Connecticut also have longstanding capital punishment legislation and nontrivial death row populations.

The particular explanations for thirty years without an execution vary from state to state. A Massachusetts death penalty was invalidated by that state's Supreme Judicial Court. Recurrent vetoes of death penalty legislation by Governors Carey and Cuomo are the usual explanation for New York's lack of a death penalty prior to 1995. New Jersey's Supreme Court has been scrutinizing the records of death sentence cases on a regular basis in ways which reduce both the numbers on death row and increase the time through the system for death cases. The ambivalence hypothesis would urge viewing all these different phenomena as part of the same process. The original study concluded:

29. Id.
30. Id. at 781.
The most plausible model of the impact of execution history as a policy force is that the lack of a clear historical mandate for execution in a state results in a reduction of the enthusiasm of elected officials and political elites for execution, at the same time that it increases the levels of opposition to execution in a particular state. High historical rates of execution are associated with more general pressure for execution and less undifferentiated pressure in opposition. How the difference in opposition pressure gets expressed may vary from state to state and over time. As the aggregate anti-execution pressure goes up, the probability of blocking executions increases. Which point in the process responds to a particular level of pressure may vary depending on the personalities of office holders or accidents of timing, but as long as the overall chances of nonexecution are determined by aggregate pressure levels, the regularities revealed in the previous section can be expected.\(^8\)

The ambivalence hypothesis sees different forms of resistance to executions as the product of the same general climate and uncertainty. The same local context that produces gubernatorial vetoes renders strict judicial scrutiny more likely if the governor does not veto the law, and produces more reluctance about prosecuting death cases among big city district attorneys. In this view, particular obstacles to execution should not be viewed as isolated phenomena that do not predict other impediments to execution.

My view of the period 1990-1994 is consistent with the earlier statistical findings. One of the major findings of my research note published in 1990 was an extraordinary continuity between the execution behavior of states in the 1950s and the legislative and execution pattern in those states in the years following Gregg v. Georgia.\(^7\) While the prevalence of execution broadened in the first five years of the 1990s, the geography of executions in the United States continued to follow traditional patterns, and the incidence of executions in the 1990s was, by one measure, even more concentrated in the high execution states of the South than during the 1980s.\(^8\) The question to be addressed next is what these continuities predict about death sentences and executions in the state of New York in the first years of the twentieth-first century.

II. NEW YORK IN REGIONAL CONTEXT

What can we add to our ability to predict outcomes in New York by looking at the behavior of other states in the region? Certainly much in New York is unique. But regional patterns may

36. Zimring, supra note 1, at 741.
37. Id. at 739-40.
38. See supra text accompanying notes 26-29.
help to explain why New York was prone to the events that have occurred. The particular circumstances of capital punishment legislation in New York over the years since Gregg v. Georgia are unduplicated anywhere else in the United States. For the twenty years between 1975 and 1995, the Empire State had only two governors, Hugh Carey and Mario Cuomo. Until Cuomo lost the 1994 election, these governors had won five consecutive statewide elections despite a total of eighteen separate vetoes of death penalty enactments passed by the legislature. By the time a Republican governor who pledged to sign death penalty legislation was elected, the governors of New York had probably vetoed more death penalty bills than the governors of all the other states in the United States combined over the entire course of the twentieth century.

There are two ways to regard this extraordinary story when thinking about the likely future of New York's new death penalty. On the one hand, the Carey-Cuomo interlude can be viewed as an isolated historical occurrence in New York's political history—as a set of actions that reflect the character of these two governors as individuals, but does not provide any indication of feelings about the death penalty in government or in the general population. In this view, once the obstacles of gubernatorial opposition had been removed, the previous history of stalemate by veto tells observers nothing about the likelihood or timing of executions in New York's future.

A second approach to New York's recent history would argue that the peculiar ecology of pass-then-veto death penalty legislation in New York grew out of a set of social and governmental circumstances that are likely to influence the course of future events as well. Further, this second perspective might also suggest that the long period prior to 1995 with its recurrent vetoes and without a death penalty is now an important part of New York history, an era which helped to shape current attitudes and may continue to alter the behavior of persons with the power to influence the administration of the death penalty in New York.

As between these two accounts, it seems prudent to assume that Hugh Carey and Mario Cuomo were not the consecutive products of random chance. Indeed, it would require substantial political innocence to believe that the repeated vetoes of death penalty legislation were historical events that did not in any way identify New York as a jurisdiction with ambivalent feelings about the death penalty. Could a governor who repeatedly vetoes death pen-

ality legislation be reelected twice in Texas, in North Carolina, or in Arkansas? If not, then the fact of the postponement-by-veto may tell us that other obstacles to execution are likely to take root in the same soil that encouraged gubernatorial veto. And the recent history of gubernatorial opposition may have itself influenced the atmosphere in which future decisions about capital punishment are made.

Holding as I do to the notion that New York’s previous history is a prediction of future trends, some hypotheses about future impact become the next task. What influence might New York’s recent history have on its future death penalty decision making? When should observers expect to see the state approach a decision about whether to proceed with an execution?

Let me summarize my conclusions, then review some relevant evidence. If New York is typical of the other states with death penalty laws on their books, it should be at least a decade before any defendant who does not wish to die would be at risk of execution. If New York’s experience is typical of the states in its region, then about two decades should pass until the execution of a nonvolunteer subject would be on the near horizon. Finally, if New York’s recent history has produced additional impetus against execution, then executions in the foreseeable future may not happen at all. Not in the foreseeable future is my best guess on the available evidence.

Some historical data to support these assertions comes from the delays to first execution experienced by states with death penalties after Gregg v. Georgia was decided by the Supreme Court in 1976. The crudest measure would be the median gap between the Gregg judgment and first execution for states with a death penalty statute in effect in June 1976. The median states, the seventeenth and eighteenth states out of the thirty-five with post Furman v. Georgia death statutes; they did so in 1992, sixteen years after the Gregg decision.

A more refined measure would compute the delay to execution only for large metropolitan states because a high volume of homicide cases produces many more potential death penalty cases and might reduce the time delay between a death penalty law and the first execution. Table 2 shows the delay between the date of the Gregg v. Georgia decision and the first execution in those of the ten most populous states with death penalties for murder.

40. 408 U.S. 238 (1972).
TABLE 2. DELAY FROM THE GREGG V. GEORGIA DECISION TO FIRST EXECUTION, STATES WITH THE TEN LARGEST POPULATIONS

<table>
<thead>
<tr>
<th>U.S. States with the Largest Populations</th>
<th>Year of First Execution</th>
<th>Time Lapse from Gregg or Passage of Death Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. California</td>
<td>1992</td>
<td>16 years</td>
</tr>
<tr>
<td>2. Texas</td>
<td>1982</td>
<td>6 years</td>
</tr>
<tr>
<td>3. New York*</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>4. Florida</td>
<td>1979</td>
<td>3 years</td>
</tr>
<tr>
<td>5. Pennsylvania</td>
<td>1995</td>
<td>19 years</td>
</tr>
<tr>
<td>6. Illinois</td>
<td>1990</td>
<td>14 years</td>
</tr>
<tr>
<td>7. Ohio</td>
<td>No executions, as of August 1996</td>
<td>20 years or more</td>
</tr>
<tr>
<td>8. Michigan**</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>9. New Jersey***</td>
<td>No executions, as of August 1996</td>
<td>15 years or more</td>
</tr>
<tr>
<td>10. North Carolina</td>
<td>1984</td>
<td>8 years</td>
</tr>
</tbody>
</table>

* No death penalty until 1995.
** No death penalty.
*** Death penalty statute, effective 1980.

Eight of the largest states had death penalty statutes. The median delay to first execution is between fourteen and fifteen years for these metropolitan states. The three large states which conducted a first execution less than a decade after Gregg are in the South. The minimum delay to execution outside the South was fourteen years in Illinois. For a non-Southern state with a large population, a fifteen-year delay between the effective date of a 

death penalty statute and the first execution would, on historical patterns, be a minimum guess.

But measuring New York's prospects against all states outside the South understates the potential influence of regional tendencies on death penalty policy. On every measure of death penalty severity, the Northeastern states fall well under the national norms. Of the three states in the region with longstanding death penalties, only Pennsylvania has conducted an execution, and that came nineteen years after Gregg v. Georgia. New Jersey and Connecticut have not yet executed. The chances of arriving on death row and of staying there are also lower in the Northeast. New Jersey, the ninth largest state in the union, had nine persons on its death row in April 1995, while North Carolina, the tenth largest state, had 155. Ohio, the Northern state closest to New Jersey in population that has a death penalty had a death row population of 142. The state of Connecticut had a death row population of five in 1995. Only Pennsylvania has a ratio of death row population to state population close to non-Southern national averages.

One final indication of the different policy climate in the Northeast concerns the risk of executions. One measure of the risk of execution for those on death row compares the ratio of executions to death row populations. Table 3 shows death row populations by region for 1990, executions by region for 1990-1994, and the number of death row occupants for each execution.

44. Id. at 913.
TABLE 3. 1990-1994 EXECUTIONS AS A PROPORTION OF 1990 DEATH ROW POPULATIONS

<table>
<thead>
<tr>
<th></th>
<th>South</th>
<th>Northeast</th>
<th>Rest of the United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death Row Population, May 1990</td>
<td>1,355</td>
<td>139</td>
<td>848</td>
</tr>
<tr>
<td>1990-1994 Executions</td>
<td>112</td>
<td>0</td>
<td>25</td>
</tr>
<tr>
<td>Ratio</td>
<td>12 to 1</td>
<td>--</td>
<td>34 to 1</td>
</tr>
</tbody>
</table>

Aggregated to the regional level, condemned prisoners in the South faced a five-year risk of execution that was approximately one in twelve. In the Northeast, the risk was zero. Outside the South and Northeast, the risk was one in thirty-four.

There are two ways of putting this information in perspective. First, if Northeastern prisoners had been executed at the rate of other non-Southern states, four executions should have occurred in the three states with death row populations. Even pushing Pennsylvania's lone 1995 execution back into the earlier period would leave the region with an execution risk about one-fourth of the other Northern states.

A second perspective on regional influence comes from the Southern ratios. Controlling for all the other regional influences that reduce death sentences, the Northeast's death row population would still be expected to produce twelve executions at prevailing Southern rates during a period when no executions occurred.

By all available measures, the processes that determine rates of execution predict much more resistance to execution in the Northeast than in other non-Southern states. There are variations in pattern within the region, of course. Pennsylvania generates much higher rates of death sentences than Connecticut and New Jersey. But a low rate of execution risk has been uniform in the region since Gregg v. Georgia.50

If this history is predictive of future events, those who hoped that the major obstacles to execution in New York had been removed when the legislation became effective are likely to be disap-


pointed. To the extent that New York follows regional patterns, the path to executions will be anything but smooth. But the importance of regional patterns can, of course, be overstated. The unit of government that is most importantly involved in the death penalty is the state. Texas and Oklahoma occupy the same subregion, but Texas has conducted twenty-three times as many executions.\textsuperscript{51} This is only one example of vastly different execution policies at work in contiguous states. So the next important level of analysis in considering the prospects for capital punishment in New York is the particular circumstances of the state of New York. What elements of New York history, criminal justice, and social conditions are relevant to its prospects for capital punishment?

III. NEW YORK AS A PARTICULAR CASE

This is not the proper place to recount the full history of the death penalty in New York, let alone to catalog many of the other distinctive features of New York that are of potential relevance to capital punishment policy. But summary statistics are in order. Taking its execution policy in the 1950s as a baseline measure of the state’s policy, New York was twenty-second of the thirty-six states that conducted executions in the 1950s in its per capita rate of executions.\textsuperscript{52} That per capita rank puts New York in the company of other larger Northern states such as Ohio (twenty-first), Pennsylvania (twenty-fifth), and New Jersey (twenty-third).\textsuperscript{53} But this low rate of executions per 100,000 persons understates the significance of the practice in the state in the period. Because New York was the nation’s most populous state in the 1950s, it conducted the fourth highest number of executions during the decade, a larger number than occurred in Florida or Mississippi.\textsuperscript{54} The number of executions statewide is a better measure of both publicity about executions and potential for the expression of public concern than the per capita rate of execution. Where public support for executions is not solid, a recurrent pattern of execution may generate a substantial level of conflict and controversy. New York was one of four states that were in the top half of all death penalty jurisdictions in the number of executions in the 1950s, but in the bottom half of executing jurisdictions in per capita rate. The other three states were Pennsylvania (eight out of thirty-six versus

\begin{footnotesize}

\textsuperscript{52} Zimring & Hawkins, supra note 26, at 136 (table 7.2).
\textsuperscript{53} Id.
\textsuperscript{54} Id.

\end{footnotesize}
twenty-five out of thirty-six), Ohio (seven out of thirty-six versus twenty-one out of thirty-six), and New Jersey (fifteen out of thirty-six versus twenty-three out of thirty-six).\textsuperscript{55} These four states, all with death penalties, to date have performed an aggregate total of two executions since \textit{Gregg v. Georgia}.\textsuperscript{56} These high-volume/low-rate states cluster in the Northeast, so that it is difficult to separate regional characteristics from the influence of tensions produced by frequent but controversial executions.

There are two aspects of New York as a particular case that are of incontrovertible importance in predicting death penalty futures. One is the moral and political legacy of the twenty years without a death penalty after 1975. The second is the death penalty law itself—a distinctive statutory enactment quite different from the copycat statutes enacted in most states to minimize litigation hazards.

The twenty-year tug-of-war on the death penalty altered the environment in which a death penalty would eventually be enacted in many ways. The long period without any law in effect means that current prosecutors, judges, and other system actors have almost without exception spent their careers in a justice system without a death penalty. The system to process such cases had to be designed from scratch. The 1995 legislation was thus not the reinstatement of a New York death penalty, but its invention.

While capital punishment was in no sense part of the status quo in New York, a debate about the death penalty had become by 1995 a longstanding event inside government. Particularly during the Cuomo years, a two-sided political debate on the morality and necessity of capital punishment was a standard element in state politics. This ongoing debate within the political establishment is rare if not unknown in state-level political processes in the United States. Instead, discussion of the death penalty is quietly avoided in jurisdictions that have long abolished it and two-sided debate is usually precluded in death penalty states by the feeling that capital punishment is an overwhelming political necessity. The ongoing debate in New York was the most visible and sustained at any level of government in the United States since 1980.

This recent tradition of debate inspired more than one incumbent prosecutor to oppose the proposed death penalty and to reserve the option of not seeking death on a wholesale basis.\textsuperscript{57} The

\textsuperscript{55} Id.


only other settings I know of where prosecutors oppose death penalties are states where the penalty has long been abolished.58

In New York, however, the long public opposition of governors to a death penalty gave some legitimating precedent to the declaration of personal views. Opposition to capital punishment, while never politically expedient, could at least be regarded as the moral high ground in political debate. The long history of public criticism of capital punishment also created sensitivity in the political process to issues such as effective defense representation, careful definitions of capital crimes, and scrutiny to avoid racially-influenced patterns of sentencing.

In drafting and debating a death penalty, the New York legislature eventually passed a law that established a minimum standard for a legally acceptable death sentencing system that is substantially higher than any set forth by a state legislature anywhere else. In this sense, one of the important legacies of the Carey-Cuomo years was in the structure and details of the New York statute passed despite their opposition.

There can be little doubt that the new law with its substantive novelty and high minimum standards is itself a substantial barrier to any early executions in the Empire State. The relatively narrow definition of capital murder both reduces the potential case flow and highlights what might seem like arbitrary distinctions between capital and noncapital killing. Provisions dealing with what has been called "racial justice" draw attention to potential injustice and generate new issues for extensive state-level litigation and delay.

But no element in the new system undermines the executioner's prospects as much as the extensive provisions for defense representation.59 In theory, thorough and effective representation at trial and on appeal should reduce the rate of initial capital sentencing, but might hasten the conclusion of the collateral review process for cases that survive initial scrutiny. In practice, however, good lawyers are capable of stalemating the death penalty at all stages when conducting legal contests in sympathetic environments. Effective legal representation and the resources to support it seem quite probable under the New York system. A sympathetic judiciary, at least at the appellate level, is a high probability.

58. The Hennepin County district attorney testified against a bill to introduce a death penalty to Minnesota eighty years after it had been abolished. Donna Halvorsen, Senate Panel Rejects Death-Penalty Bill; Backers May Try to Tack Issue Onto Crime Bill, Put it to Voters, STAR TIN, Feb. 25, 1992, at B1.
There are real doubts that the death penalty process in New York can survive the legal representation it provides to capital defendants.

The judicial and administrative decision makers who will stand in judgment in New York capital cases are also products of the Carey-Cuomo era in two respects. They have grown used to a system without death cases and have functioned in a political environment where opposition to capital punishment was respectable. State appellate judges will confront an environment where death penalties are sought only in some counties. These seem like circumstances which invite the strictest scrutiny for particular cases where a capital sentence is pursued and obtained.

So a number of features of New York—the statute, the political climate vis-à-vis executions, and the attitudes and expectations of those who administer the system—interact to make this state perhaps the least likely metropolitan state that has passed a capital statute to conduct an execution. If history is a reliable guide, any execution in New York is so far off that it is beyond the visible horizon. As far ahead as we can see, executions seem unlikely.

It is not clear that this prognosis would generate depression even among many of those who voted in the legislature for the new death penalty. In many ways, the death penalty law itself was the symbolic victory desired, and the remote prospect of an execution was not a major issue. This may be one reason why the minimum standards set out in the statute were accepted with equanimity by the supporters of the death penalty. The major focus of the effort was producing a legislative result. The campaign issue was a death penalty, not executions.

IV. Two Alternative Scenarios

There is, of course, nothing inevitable about the dominance of historical patterns on capital punishment policy in New York or anywhere else. The death penalty in the 1990s is a journey into the unknown, so the predictability of future events is easy to overstate. This section will briefly discuss two scenarios that might produce a greater likelihood of New York State experiencing an execution within the next decade. The first scenario concerns the pressure exerted by a capital defendant who either requests a death sentence or, having received one, asks to drop all appeals. The second scenario is a change in the procedures for considering capital appeals and collateral attacks that might push some New York offenders onto a faster track for execution, say 2006 instead of 2016. In my view, the first scenario is more likely than the second.

The 1995 NAACP statistical summary of executions and death
row inmates lists thirty-six of the 277 executions reported as cases where the defendant abandoned appeals prior to execution, a rate of one for every eight executions. The degree to which these dropped appeals accelerate the execution process varies widely, as does the condemned prisoners’ motivations, but the existence of a defendant who no longer wishes to pursue an appeal could present a state with an opportunity to execute long before the ordinary appellate timetable would have run. For this reason, the defendant who drops their appeal can be important in initiating executions ahead of any predicted order. Indeed, this was the process that launched the modern era of executions in 1977.

It appears that the influence of defendants who drop appeals is particularly important in states without previous executions where there is no strong support for executions. Table 4 uses the NAACP data to classify whether the first execution in a state is either a dropped appeals case or a fully contested case.

TABLE 4. DID THE FIRST DEFENDANT EXECUTED DROP HIS APPEALS?  

<table>
<thead>
<tr>
<th></th>
<th>Non-Southern State</th>
<th>Southern State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of First-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Executeds who Dropped</td>
<td>54</td>
<td>23</td>
</tr>
<tr>
<td>Their Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of First-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Executeds Who Did Not</td>
<td>46</td>
<td>77</td>
</tr>
<tr>
<td>Drop Their Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100% (13)</td>
<td>100% (13)</td>
</tr>
</tbody>
</table>

More than half of the first executions in the non-Southern states were of defendants who dropped appeals while less than a quarter of the first executions in Southern states were so classified. Presumably, the much larger concentration of dropped appeals in the non-Southern setting means that these defendants were more often the actual cause of executions starting in the North before they would have started without the abandoned appeals.

The first scenario that might hasten the executioner in New York is the case of an aggressive volunteer who demands to be executed. How likely is that to occur? It is certainly not impossible that an aggressive volunteer will be presented in New York, but what happens then?

There are three reasons why New York might not have a persistent execution volunteer. In the first place, most of the execution cases where appeals are dropped are not of the aggressive "Gary Gilmore" 63 variety. Secondly, the odds of a true volunteer would be a function of the number of death sentences in the state, and there are indications that the number of new death sentences each year will be low in New York.

Thirdly, dropped appeal cases tend to cluster rather than to

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be evenly distributed across death row populations. All five of Nevada’s executions are listed as volunteers, as are two of the four executions in Utah. By contrast, many states with large death rows have had no successful volunteers. Two elements that seem to prevent the dropping of appeals are realistic prospects of victory in the courts and effective assistance of counsel. Thus, New York’s favorable climate for death penalty appeals and the generous provisions of defense services both should reduce the chances that an aggressive volunteer will insist on execution.

Still, there is no assurance that New York’s answer to Gary Gilmore will not pop up in the early years of the new death penalty. The opportunities for publicity and prominence in a New York environment might act as a spur for an aggressive volunteer. How, then, might the system respond? Without doubt, New York judges will subject the mental capacity and sufficiency of legal counsel of such a volunteer to extensive scrutiny. The reactions of a New York governor would depend in part on who happens to be governor. But even a pro-capital punishment governor might wish to avoid the spotlight that gubernatorial clemency decision making as a last chance would represent. So judicial diversion of death penalty volunteers might serve the interests of even a law-and-order governor.

With all these qualifications, I would still rank a volunteer episode as the largest chance New York has of coming close to an execution in the next decade. The odds favor some such defendant presenting himself and the reactions of the courts and executive branch are difficult to predict. For this reason, I would expect that contingency planning for a volunteer case will be a mid-term priority of a centralized capital defender program.

The second scenario will be called a “pattern break” here for want of a better label. A proponent of this view would characterize the last fifteen years as a struggle to overcome the historical restraints on execution policy in the United States that have been in place since the mid-1960s. Federal legislative and Supreme Court inroads are major chapters in this war on tradition, and the increase in execution volume in the United States to over fifty in 1995 can be taken as evidence that the revolution is finally succeeding. Under these circumstances, it might be argued, previous state and regional patterns will not be predictive of executions in the same ways that was true when a stalemate pattern was in effect.

This capital punishment version of the end of history misreads the events of the early 1990s if it reads regional and state proclivities as now less important than was the case in the prior decades. The major changes that have been achieved by those attempting to
reduce the barriers to execution have come in federal habeas corpus controls. While this might reduce the average time from conviction and sentence to execution in the aggregate, it will probably increase the divergence in pattern from state to state and make the particular patterns of state-level sentiments and structures more important rather than less important as the federal safety net is stretched thin. A diminished role for habeas corpus might reduce time to execution everywhere, but not in equal measure. The real acceleration will take place in states like Texas where the federal influence was the major restraining influence and where federal judges are sympathetic to decontrolling executions. Almost literally, the last place that changes in federal standards for oversight will make a major difference is in New York, a setting where highly ambivalent elites have constructed elaborate state-level restraints that have yet to be tested. Federal decontrol will expand the divergence in death penalty outcomes state by state. Such was clearly the pattern discussed in Section I during the first five years of the 1990s. It is the high-execution-rate states where the majority of the increase in execution activity is also concentrated. States like New York will get to the back of the line and stay there for many years.

The changes necessary to accelerate executions in New York would be in the hearts and minds of those who administer the local criminal justice system. To date, this is the sort of state-level change that has not occurred as the federal restraints on executions have been eased. The pressure for executions has increased the flow, but the flow has still been concentrated in those states which have been the traditional channels of high execution activity. All of the indicators discussed in Section III suggests that New York is operating now at some distance from the attitudes and institutions that permits high levels of execution to occur.

CONCLUSION

The title of this article was inspired by the admonition in Paul’s letter to the Romans: “The wages of sin is death.” In New York the wages of ambivalence appear to be a protracted period in limbo: New York seems destined to spend many years with a death penalty but no executions. This state of limbo will still represent a symbolic victory of those who passed the 1995 legislation, and this feeling of vindication on their part may take some pressure off judicial and legislative institutions even without executions.

If New York goes twenty years without an execution, the end

64. Romans 6:23.
of such an execution limbo will be far enough removed from 1996 so that larger shifts in policy about the death penalty in the United States will probably determine the eventual course of events in New York.65

As a matter of principle, limbo in execution policy is an unsatisfactory condition. That does not mean, however, that execution limbo is not preferable to the possible alternatives achievable in the near future. For those interested in avoiding executions, the current New York death penalty statute seems well designed to promote that goal. To the extent that ambivalence was a dominant emotion in the death penalty debate of 1994-1995, the New York law is as much the product of Governor Cuomo’s efforts as those of Governor Pataki. It would be better by far to have no death penalty. But a statute that contains a fair measure of self-critical principles and procedures may be the best hope in New York for muddling through a mean season of American criminal justice.

65. For one hopeful account of these changes, see ZIMRING & HAWKINS, supra note 26, at 148-66.