COURT OF APPEALS
OF THE
STATE OF NEW YORK

People of the State of New York,

Respondent

- against –

Robert Shulman

Defendant-Appellant.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("the Association") was established in 1870 in part to secure the rule of law. The Association is a professional association of more than 22,000 attorneys that continues to work to maintain high ethical standards for members of the legal profession and to promote integrity in the justice system. The Association has a long-standing involvement in following the development of constitutional jurisprudence in this state and has done considerable work relating to the Constitution of the State of New York, especially in matters involving rights and liberties.[1] In particular, the Association has devoted itself to defending the Constitution of the State of New York in law reform matters.

Much of the Association's work is accomplished through approximately 170 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. Thus, the Association has long been concerned with capital punishment and its application. The Association has taken the lead in the analysis of practical and legal issues relating to the death penalty. See, e.g., Committee on Capital Punishment Panel Presentation, Capital Punishment in the Age of Terrorism, 41 Cath. Law. 187 (2003); Committee on Capital Punishment, Dying Twice: Conditions On New

1 The Association, for example, analyzed the substantive provisions of the state constitution in a report detailing its recommendations on the public referendum on whether to convene a state constitutional convention. See Task Force on the New York State Constitutional Convention, Report of the Task Force on the New York State Constitutional Convention, 52 Record Assoc. Bar 523-643 (1997). A significant portion of that report was dedicated to an analysis of the state constitution's bill of rights.

York's Death Row, 22 Pace L. Rev. 347 (Spring 2002) (also at 56 Record Assoc. Bar N.Y. 358); Committee on Capital Punishment, The Pataki Administration's Proposals to Expand the Death Penalty, 55 Record Assoc. Bar N.Y. 129 (2000) [Hereinafter "Bar Ass'n Pataki Rpt."]; Committee on Civil Rights, Legislative Modification of Habeas Corpus in Capital Cases, 44 Record Assoc. Bar N.Y. 848 (1989); Committee on Civil Rights, The Death Penalty, 39 Record Assoc. Bar N.Y. 419 (1984).

The Association and its programs and publications have long noted the need for private attorneys to provide assistance in capital representation. See, e.g., Committee on Representation in Capital Cases, The Crisis in Capital Representation, 51 Record Assoc. Bar 169 (1996); John C. Godbold, Pro Bono Representation of Death Sentenced Inmates, 42 Record Assoc. Bar 859 (1987). To that end, a number of members of the Committee on Capital Punishment -- as well as hundreds of other Association members -- have directly represented death row inmates around the country. See Committee on Representation in Capital Cases, The Thurgood Marshall Awards: The Politics of the Death Penalty, 53 Record Assoc. Bar 120 (1998) (transcript of a ceremony honoring 317 New York attorneys, most of whom are Association members, for their representation of death-sentenced defendants).

The Association addresses the Court as amicus curiae to illuminate an issue that might otherwise go unexplored because of the complexity of the case and practical

constraints on the parties' own briefing. The Association files this brief to urge that the due process clause bars implementation of this state's death penalty provisions.[2]

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In New York jurisprudence, as under the United States Constitution, death is different. When the legal system takes a life, the judiciary must say what the New York State Constitution requires in these unique circumstances. See People v. Broadie, 37 N.Y.2d 100, 124, 371 N.Y.S.2d 471, 487 (1975).

The procedural due process standards must be high. See, e.g., People v. Hansen, 99 N.Y.2d 339, 345 (N.Y. 2003) ("[I]n order to insure that death is not imposed in an arbitrary or capricious manner, a heightened standard of due process is applicable with regard to the sentencing procedures in death cases."). In addition, the due process clause of the New York State Constitution, Art. 1, § 6, has been read consistently to prohibit governmental overreaching through the concept of "substantive due process." Substantive due process standards must be met as well, and that is the issue addressed by this brief. *See* N.Y. Const. Art. 1 § 6; U.S. Const. XIV.

New York's view of substantive due process is more robust than that adopted for the federal constitution by the United States Supreme Court. In recent years, the Supreme Court has consistently narrowed its death penalty jurisprudence and crafted

[2] The Association, as reflected in the reports cited, has many other concerns regarding the death penalty but, in order to minimize the burden on the Court, confines itself here to this issue. Although the main focus of this brief is on New York's Constitution, the brief also argues that New York's death penalty statute violates federal due process under the same reasoning.

exceptions for several categories of defendants in an effort "to insure that only the most deserving of execution are put to death." Atkins v. Virginia, 536 U.S. 304, 319 (2002). Illustrative of this trend is Atkins v. Virginia, in which the Supreme Court declared unconstitutional the execution of mentally retarded criminals. 536 U.S. at 320. See People v. Smith, 753 N.Y.S.2d 809 (2002).

New York courts, in appropriate cases, employ strict scrutiny analysis to ensure that the liberty interest of citizens is protected when state actions encroach on their fundamental rights. In such cases, the government must justify its action by showing that the challenged policy advances a "compelling state interest" by the "least restrictive means" necessary to achieve that interest. The more fundamental the right, the higher the standard that the courts have required the State to meet.

The death penalty should be judged by the strict scrutiny test under both the federal and the New York constitutions. See People v. Harris, 98 N.Y.2d 452, 503 (2002) (stressing the need for heightened reliability wherever a potential execution is concerned, reasoning that "[a]ny error that increases the risk of an unwarranted conviction, which would bring the defendant a step closer to death, must be subject to the heightened reliability standard"). New York's death penalty provisions, see, e.g., N.Y. Crim. Proc. Law §§ 250.40, 270.55, 400.27, 450.70, can pass due process muster only if the State can demonstrate that they are the "least restrictive means" to achieve a "compelling state interest." The death penalty, when compared to the alternative sentence of life without parole, cannot survive this strict scrutiny test.

The Governor and the Legislature asserted three interests that the death penalty may serve: deterrence of future serious crime, incapacitation of dangerous criminals, and retribution against those who have committed evil deeds. However, they cannot carry their burden of showing that the death penalty is the least restrictive means to any of these ends. First, the death penalty does not deter crime, and it is clearly not the least restrictive means to that end. Second, the State can and does accomplish the goal of incapacitating criminals through the harsh sentence of life imprisonment without the possibility of parole. Third, even if retribution is a legitimate aim for government, that same harsh sentence also serves the retributive function, without risking the serious injustice of execution of the innocent. Further, these conclusions are confirmed by the overall weight of accumulated human experience. Other jurisdictions succeed in achieving the State's asserted ends without the use of the death penalty.

The Court will fulfill its constitutional role by ruling that New York's death penalty violates Art. 1, § 6, as well as federal due process, because the punishment fails to achieve its asserted ends by the least restrictive means available.

ARGUMENT

New York's death penalty statute violates the due process provision of the New York Constitution, as well as the due process provision of the federal constitution. N.Y. Const. Art. 1, § 6; U.S. Const. amend. XIV. As discussed below, first, this Court should apply strict scrutiny analysis to substantive due process claims that involve the fundamental right to life. Second, applying that test, New York's death penalty statute

violates the due process clause because the punishment does not achieve the asserted deterrence and retribution goals of the Legislature and Governor with the least restrictive means. Finally, accumulated experience from other countries, states and sources, supports the conclusion that the death penalty is not the least restrictive means to achieve the goals of punishment.

I. THE STRICT SCRUTINY STANDARD APPLIES TO NEW YORK SUBSTANTIVE DUE PROCESS CLAIMS INVOLVING THE DEATH PENALTY.

Although capital punishment was added to New York law by the democratic process, this Court must test the action of the political branches for consistency with the constitutional requirements of due process and strike it down if it impermissibly interferes with the citizenry's fundamental rights. See Town of Orangetown v. Magee, 88 N.Y.2d 41, 49-50, 643 N.Y.S.2d 21, 26 (1996) ("The key factor in [substantive due process cases] is not whether the State was justified [in its action] but rather whether the State obeyed the strictures of the Constitution in doing so."); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 38, 371 N.Y.S.2d 404, 418 (1975) ("[a]lmost any restriction upon or deprivation of right … if compelled by government, must accord with … substantive due process").[3]

[3] See also Mark G. v. Sabol, 93 N.Y.2d 710, 723, 695 N.Y.S.2d 730, 736 (1999) (recognizing the validity of a substantive due process claim against New York City's foster care system, but denying monetary redress); People v. Koertge, 182 Misc.2d 183, 701 N.Y.S.2d 588, 591 (N.Y. Dist. Ct. 1998) ("Under substantive due process analysis, courts will strictly scrutinize a statute or other government action and require a showing of compelling interests in its deliberate acts -- whether legislative, executive or judicial -- that purposely affect fundamental rights of individuals.").

As discussed below, first, New York's substantive due process standard is more expansive than the federal standard. Second, this Court should impose the strict scrutiny standard for cases involving the fundamental right to life, which applies in capital cases.

A. New York's Substantive Due Process Standard Is More Expansive than the Federal Standard.

New York courts give a broader reading of the state constitution's due process clause than federal courts give to the due process clause in the United States Constitution. Although the United States Supreme Court has never decided what standard should be applied to a substantive due process challenge to the death penalty under the U.S. Constitution,[4] state constitutional jurisprudence develops separately from federal constitutional law. The United States Constitution fixes only minimum standards and leaves to the states the task of affording additional or greater rights under their constitutions. See People v. Adams, 53 N.Y.2d 241, 250, 440 N.Y.S.2d 902, 906 (1981); People v. P.J. Video, 68 N.Y.2d 296, 301, 508 N.Y.S.2d 907, 910 (1986); People v. Alvarez, 70 N.Y.2d 375, 378-79, 521 N.Y.S.2d 212, 213 (1987); Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 49 Record Assoc. Bar 285, 289 (1987).

[4] In a footnote in Furman v. Georgia, 408 U.S. 238, 359 n. 141 (1972), the United States Supreme Court in dicta eschewed the use of a substantive due process analysis in its own evaluation of Georgia's former death penalty statute in favor of Eighth Amendment "cruel and unusual punishment" analysis. However, the Court noted that its Eighth Amendment analysis "parallels in some ways" substantive due process analysis, which "reiterates [that] punishment may not be more severe than is necessary to serve the legitimate interests of the State." Id. Amicus Curiae maintains that New York's death penalty violates federal as well as state due process requirements. See Ursula Bentele, Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process?, 40 Hous. L. Rev. 1359 (2004) (arguing that the death penalty violates federal substantive due process).

Indeed, "the [United States] Supreme Court as well as its individual justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review." People v. Scott, 79 N.Y.2d 474, 505, 583 N.Y.S.2d 920, 939 (1992) (Kaye, J., concurring).

The courts of New York State give New York State Constitution provisions a more expansive reading than parallel federal constitutional provisions despite similar, or even identical language. See, e.g., Cooper v. Morin, 49 N.Y.2d 69, 79, 424 N.Y.S.2d 168, 174 (1979) ("We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.").[5] The presence of parallel language in the New York State Constitution "signifies its special meaning to the People of New York; thus, the failure to perform an independent analysis under the State

[5] See also Vincent Martin Bonventre, State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule, 56 Alb. L. Rev. 119, 119-20 (1992) (describing New York's "rich tradition of independent constitutional adjudication, of safeguarding individual liberties beyond federal requirements, and of exerting considerable influence on other courts, and the United States Supreme Court").

Constitution would improperly relegate many of its provisions to redundancy." Scott, 79 N.Y.2d at 496; 583 N.Y.S.2d at 934 (majority opinion).[6]

Specifically, this Court noted that "under our own State due process clause, this Court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provisions." People v. Isaacson, 44 N.Y.2d 511, 519, 406 N.Y.S.2d 714, 718 (1978). "This independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution as well as the long history of due process protections afforded the citizens of this State and, more generally, in fundamental principles of federalism." Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 159-60, 408 N.Y.S.2d 39, 44 (1978) (citations omitted). This Court gives effect to this broader reading of the state's due process clause in a variety of contexts.[7] It should also do so now.

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[6] In determining whether the New York State Constitution affords greater rights than the United States Constitution, the courts may use noninterpretive analysis, proceeding from the judicial perception of sound policy, justice and fundamental fairness. See P.J. Video, 68 N.Y.2d at 303, 508 N.Y.S.2d at 911-12. Noninterpretive analysis attempts to discover state statutory or common law defining the scope of the individual right in question, the history and traditions of the state in its protection of the right, any identification of the right as being of peculiar state or local concern, and any distinctive attitudes of the state citizenry concerning the scope or definition of the right. Id. In that regard, this Court has proudly proclaimed "New York's long tradition" of protecting individual rights. Id.

[7] See, e.g., People v. Vilardi, 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990) (finding that, in the context of a prosecutor's duty to turn over exculpatory evidence to the accused, New York's due process clause requires considerations of "fair play" not contemplated in federal decisions on the subject); Fosmire v. Nicoleau, 75 N.Y.2d 218, 226, 551 N.Y.S.2d 876, 880 (1990) (Jehovah's Witness patient of sound mind has personal, common law right coextensive with liberty interest under New York State due process clause to refuse treatment); Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986) (mentally ill patients who have been committed can refuse to be medicated with prescribed drugs unless without them they would be a danger to themselves or others); Cooper, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (employing the due process clause to find that a pretrial detainee has a liberty interest in contact visitation); Sell v. United States, 123 S. Ct. 2174, 2185 (2003) (holding that involuntary administration (Cont'd.)

B. **New York State Imposes the Strictest Scrutiny for the Fundamental Right to Life.**

Death penalty cases involve the fundamental right to life, so New York courts should apply a strict scrutiny analysis under the New York Constitution. See People v. Harris, 98 N.Y.2d 452, 503 (2002); see also Ford v. Wainwright, 477 U.S. 399, 409 (1986) (stating that an insane inmate scheduled to be executed was "stripped of his fundamental right to life"). This strict scrutiny analysis includes a least restrictive means test. See, e.g., Rivers v. Katz, 67 N.Y.2d 485, 497-98, 504 N.Y.S.2d 74, 81 (1986).

"In analyzing cases under the State Constitution, [this Court] has not wedded itself to any single methodology, recognizing that the proper approach may vary with the circumstances." Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 251, 566 N.Y.S.2d 906, 915 (1991) (collecting cases). This approach applies to this Court's substantive due process analysis. Due process "is not a technical conception with fixed content unrelated to time, place or circumstances," Isaacson, 44 N.Y.2d at 520, 406 N.Y.S.2d at 718 (internal quotation marks and citation omitted), but rather imposes on courts the duty to foster "that fundamental fairness essential to the very concept of justice." People v. Leyra, 302 N.Y. 353, 364 (1951). Although New York generally affords legislative enactments a strong presumption of constitutionality, see People v. Davis, 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 742 (1977), this Court also requires the State to make a "requisite

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of antipsychotic drugs is permitted only in the limited circumstance where it is the sole available means and it significantly furthers state interests).

showing of extraordinary circumstances" in order to justify acts that abridge fundamental rights. See In re Marie B., 62 N.Y.2d 352, 358, 477 N.Y.S.2d 87, 90 (1984).

New York standards for evaluating substantive due process claims vary according to the right or interest involved. See, e.g., Mark G. v. Sabol, 93 N.Y.2d 710, 723-26, 695 N.Y.S.2d 730, 736-38 (1999) (noting that the "contours of the substantive component of the Due Process Clause in the context of child welfare cases" differ from that in other cases). Cf. Broadway Catering Corp. v. New York State Liquor Authority, 106 Misc. 2d 1025, 1026, 436 N.Y.S.2d 909, 910 (N.Y. Sup. Ct. 1980) (noting that "a procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case") (citation omitted). Where the right at stake is merely economic, New York utilizes the deferential "rational relationship" test comparable to "rational basis" scrutiny under equal protection analysis. See, e.g., Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 131-32, 531 N.Y.S.2d 782, 787 (1988) (zoning ordinance); Rochester Gas & Electric Corp. v. Public Serv. Comm'n of the State of New York, 71 N.Y.2d 313, 320, 525 N.Y.S.2d 809, 811-12 (1988) (economic legislation).

Cases asserting a deprivation of more "fundamental rights" trigger far stricter scrutiny, and the more fundamental the right, the more demanding are the requirements of due process. See Golden v. Clark, 76 N.Y.2d 618, 563 N.Y.S.2d 1, 4 (1990) (noting that "cases which involve fundamental rights… require heightened scrutiny"); In re Quinton A., 49 N.Y.2d 328, 337, 425 N.Y.S.2d 788, 793 (1980) (finding that the strict scrutiny test is invoked "where the challenged law … impinges on some fundamental

constitutional right such as liberty") (citations omitted). See also People v. Fox, 175 Misc.2d 333, 337, 669 N.Y.S.2d 470, 473 (N.Y. County Ct. 1997) ("Cases involving … a 'Fundamental Right' have been analyzed by using the 'strict scrutiny' standard."); Rourke v. New York State Dept. of Corr., 159 Misc.2d 324, 327-28, 603 N.Y.S.2d 647, 650 (N.Y. Sup. Ct. 1993) ("[I]t is hard to imagine that New York would not continue to apply a 'strict scrutiny' standard of review [in balancing] the state's competing interests and the fundamental rights of the individual.").

Strict scrutiny analysis in cases involving fundamental rights employs the "least restrictive means" test. Under this test, a court must determine whether a "compelling state interest" was advanced by the challenged state action, and whether the action "was the least restrictive method available to effectuate the 'compelling state interest.'" People v. Santiago, 51 A.D.2d 1, 10, 379 N.Y.S.2d 843, 853 (N.Y. App. Div. 2d Dep't 1975) (citation omitted). See Rivers v. Katz, 67 N.Y.2d 485, 497-98, 504 N.Y.S.2d 74, 81 (1986) (holding that substantive due process requires a court to determine whether a forced drug treatment for a mentally ill patient "is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including . . . any less intrusive alternative treatments"). See also People v. Foley, 94 N.Y.2d 668, 682, 709 N.Y.S.2d 467, 475 (2000) ("Content-based speech restrictions are presumptively invalid and will not survive strict scrutiny unless the government can show that the regulation promotes a compelling State interest and that it chose the least restrictive means to further the articulated interest."); Ware v. Valley Stream High Sch. Dist., 75 N.Y.2d 114, 128, 551 N.Y.S.2d 167, 176 (1989) (finding that in order to survive

strict scrutiny, a government action that impinges on fundamental religious rights must advance "the compelling interests of the State by the least restrictive means"). Numerous other New York State courts have used the least restrictive means test in analyzing state actions impinging on fundamental rights.[8]

The State's deprivation of a citizen's right to life through the death penalty statute triggers this strict scrutiny analysis because the more fundamental the interest that is at stake, the higher the level of scrutiny by the court. There is no interest more fundamental than the right to life. See, e.g., In re O'Connor, 72 N.Y.2d 517, 530-531, 534 N.Y.S.2d 886, 892 (1988) (finding the premise that "[e]very person has a right to life" is central to the issue of when the State may deprive an incompetent patient of medical care); People v. Smith, 63 N.Y.2d 41, 71-79, 479 N.Y.S.2d 706, 720-25 (1984) (striking down the last

[8] See, e.g., Town of Islip v. Caviglia, 73 N.Y.2d 544, 575, 542 N.Y.S.2d 139, 157 (1989) (restating the "least restrictive means" analysis for all regulations that "affect expression"); Ware v. Valley Stream High Sch. Dist., 150 A.D.2d 14, 19, 545 N.Y.S.2d 316, 319-20 (N.Y. App. Div. 2d Dept. 1989) ("[F]undamental rights … may be impinged upon through the least restrictive means, when in so doing, the State is advancing a compelling interest which is essential to the accomplishment of an overriding governmental purpose.") (internal citations omitted), aff'd in relevant part, 75 N.Y.2d 114, 551 N.Y.S.2d 167 (1989); In re Harry M., 96 A.D.2d 201, 206, 468 N.Y.S.2d 359, 364 (N.Y. App. Div. 2d Dept. 1983) (finding that "only the least restrictive alternative consistent with the legitimate purposes of [protecting the public from a mentally retarded person] may be imposed"); In re Sylvia M., 82 A.D.2d 217, 238, 443 N.Y.S.2d 214, 226 (N.Y. App. Div. 1st Dept. 1981) (holding that a statute to govern the termination of parental rights must be drawn "as narrowly as possible to effectuate" the goal of placing children with qualified parents); Rourke, 159 Misc. 2d at 327-28, 603 N.Y.S.2d at 650 (applying the "least restrictive compelling-interest test" to a religious challenge to a Department of Corrections hair length policy); In re Andrea B., 94 Misc. 2d 919, 924-25, 405 N.Y.S.2d 977, 981 (N.Y. Fam. Ct. 1978) (stating in context of a forced psychiatric hospitalization that "substantive due process requires adherence to the principle of the least restrictive alternative"); Powlowski v. Wullich, 81 Misc. 2d 895, 899, 366 N.Y.S.2d 584, 589 (N.Y. Sup. Ct. 1975) ("Any restraints imposed upon [pretrial detainees] in excess of those reasonably related to [the purpose of assuring attendance at trial] constitute a deprivation of due process unless they are justified by a compelling necessity and constitute the least restrictive method of achieving the legitimate state purpose.") (internal citations and quotation marks omitted).

vestige of New York's previous death penalty statute "mindful of the singular gravity of the death penalty" and the "fundamental respect for humanity") (citations omitted).

New York courts, like other courts, recognize that the death penalty is unique in its severity and irrevocability. Hence, capital cases require more scrutiny than more conventional forms of punishment. See, e.g., Smith, 63 N.Y.2d at 72-73, 479 N.Y.S.2d at 721 (reiterating that "death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two") (internal quotation marks and citation omitted).[9] See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment.").

Moreover, although New York has employed a death penalty over the course of its political evolution, its courts scrutinize each case according to the principle of "in favorem vitae," or in favor of life. See People v. Hovey, 5 Barb. 117, 1849 WL 5057 (N.Y. Sup. Gen. Term 1849) (reciting "the familiar principle that statutes which are highly penal in their nature should always be strictly construed in favorem vitae").[10]

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[9] See also People v. Cole, 152 A.D.2d 851, 852, 544 N.Y.S.2d 228, 229 (N.Y. App. Div. 3d Dept. 1989) ("[T]he death penalty is unique in its severity and irrevocability") (internal quotation marks and citation omitted); People v. Cates, 104 A.D.2d 895, 897, 480 N.Y.S.2d 512, 514 (N.Y. App. Div. 2d Dept. 1984) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.") (citation omitted); People v. Arthur, 175 Misc.2d 742, 747-55, 673 N.Y.S.2d 486, 493-498 (N.Y. Sup. Ct. 1997) (reviewing the history of "heightened scrutiny" for capital cases); People v. Gordon, 175 Misc.2d 67, 70, 667 N.Y.S.2d 626, 627 (N.Y. Sup. Ct. 1997) (finding it "axiomatic that a death penalty case is qualitatively different from all other kinds"); People v. Velez, 88 Misc.2d 378, 401, 388 N.Y.S.2d 519, 534 (N.Y. Sup. Ct. 1976) (describing the "death is different" principle).

[10] The general principle of "in favorem vitae" has regularly been invoked in New York to vindicate the common law right of the accused in a capital case to exercise twenty peremptory challenges in order (Cont'd.)

When the penalty is death, "courts should endeavor … to err on the side of a tender regard for [the accused's] rights." People v. Chapleau, 121 N.Y. 266, 272 (1890).

For example, in Messner v. People, 45 N.Y. 1 (1871), this Court reversed a conviction because, at the time of sentencing, the trial court clerk failed to ask the defendant "if he has anything to say why the judgment of death should not be pronounced on him." The Court reasoned "that in this case, being capital, we would examine the minutes and questions presented therein in a manner somewhat more liberal" than in a more conventional case. Id.

"[I]n order to insure that death is not imposed in an arbitrary or capricious manner, a heightened standard of due process is applicable with regard to the sentencing procedures in death cases." People v. Hansen, 99 N.Y.2d 339, 345 (N.Y. 2003). This principle of intensive judicial review in the death penalty context pervades New York jurisprudence. See, e.g., People v. Rosario, 9 N.Y.2d 286, 291, 213 N.Y.S.2d 448, 452 (1961) (cautioning that the Court of Appeals is particularly "slow to disregard error as harmless" in a capital case); People v. M'Kay, 18 Johns. 212, 1820 WL 1570 (N.Y. Sup. Ct. 1820) (recalling the "humane principle" in cases "affecting life" that courts are not "authorized to dispense with a process" and that they must "consider the prisoner as standing upon all his rights"); People v. Kelhoffer, 181 Misc. 731, 737-38, 48 N.Y.S.2d 771, 777-78 (N.Y. County Ct. 1943) (describing the M'Kay Court as operating under the

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to ensure an unbiased jury. See, e.g., People v. Schaller, 224 A.D. 3, 5, 229 N.Y.S. 492, 494-95 (N.Y. App. Div. 1st Dept. 1928); Freeman v. People, 4 Denio 9, 47 Am. Dec. 216, 1847 WL 4116 (N.Y.

(Cont'd.)

principle that "because the case was a capital one … it should give the defendant the benefit of the doubt").[11]

This imperative in favor of life reflects the troubled history of the death penalty in New York. In particular, this history includes widespread popular revulsion at the botched electrocution of William Kemmler upon introduction of the electric chair in 1890, repeated examples of jury nullification in death penalty cases during the 1920's and 1930's,[12] and the State's dubious distinction of having "executed eight people who were later conclusively proven to be innocent, by far the largest number of wrongful state executions in the nation." Michael Lumer and Nancy Tenney, The Death Penalty in New York: A Historical Perspective, 4 J.L. & Pol'y 81, 84-95 (1995).

Given this tradition, New York's conception of substantive due process requires strict scrutiny of the absolute and irrevocable deprivation of the right to life. See, e.g.,

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Sup. Ct. 1847). See also 4 William Blackstone, Commentaries *353.

[11] See also Lindsay v. People, 63 N.Y. 143 (1875) (affirming a conviction in a capital case only after "a deliberate and full examination of the record" and having resolved that "the trial was carefully conducted by the presiding judge" who made "every decision … tender of the rights of the accused, and that the leanings were in his favor to the extent of giving him the benefit of every doubt"); People v. Bishop, 66 A.D. 415, 73 N.Y.S. 226 (N.Y. App. Div. 4th Dept. 1901) (invoking the court's "inherent powers" to reverse a capital conviction secured by a juror who had exhibited a disturbing affinity for capital punishment); Barker v. People, 3 Cow. 686, 15 Am. Dec. 322, 1824 WL 2277, *1 (N.Y. Sup. Ct. 1824) ("Though the legislature have an undoubted power to prescribe capital punishment, and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights, would, even as a punishment, be, in many cases repugnant to rules and rights expressly established.").

[12] See e.g., People v. Van Arsdale, 175 Misc. 980, 982-83, 26 N.Y.S.2d 11, 13-14 (N.Y. County Ct. 1941) (noting that one would have to be "naïve indeed to believe that [popular] discussion of the [death] penalty has not practically eliminated murder in the first degree from the indictment, after a large number of prospective jurors have expressed their disapproval of the law in this respect").

People v. Jackson, 14 N.Y.2d 5, 8, 247 N.Y.S.2d 481, 483 (1964) (noting that a trial court's error is "especially … grave" because "this is a capital case"). As such, the death penalty statute violates the constitution unless the government can show that it advances a compelling state interest and that no less restrictive method is available to effectuate that state interest. See Commonwealth v. O'Neal, 369 Mass. 242, 245-46, 339 N.E.2d 676, 678-79 (Mass. 1975) (finding in an analysis of the Massachusetts death penalty statute, that under that state's constitution, "in order for the State to allow the taking of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end").

II. NEW YORK'S DEATH PENALTY STATUTE DOES NOT PASS THE STRICT SCRUTINY TEST, AND THEREFORE IT VIOLATES THE DUE PROCESS CLAUSE.

New York's death penalty statute violates the due process clause of the New York Constitution because it does not achieve the goals of the Legislature and the Governor with the least restrictive means. Under similar reasoning, the death penalty violates due process under the federal constitution. See Ursula Bentele, Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process?, 40 Hous. L. Rev. 1359 (2004) (explaining how the death penalty violates federal substantive due process).

In adopting the death penalty statute, the Legislature and the Governor offered three state interests that would be advanced by the statute: (i) deterrence of crime, (ii) incapacitation of criminals, and (iii) retribution. See generally Governor's Program Bill 1995 Memorandum [Hereinafter "GPB Memo."] at 4-6. For the reasons discussed

below, the State is unable to show that the death penalty, as opposed to a sentence of life without parole, is the least restrictive method available for achieving any of these interests. First, the death penalty does not deter crime and is not the least restrictive method of deterrence. Second, the death penalty is not the least restrictive method for incapacitating criminals. Third, retribution is not a compelling state interest nor is the death penalty the least restrictive method of retribution.

A. The Death Penalty Does Not Deter Crime, Let Alone by the Least Restrictive Method.

The New York State Legislature and Governor offered deterrence of crime as one of the primary justifications for the death penalty. See James Galliher and John Galliher, A "Commonsense" Theory of Deterrence and the "Ideology" of Science: The New York State Death Penalty Debate, 92 J. Crim. L. & Criminology 307, 316-17 (2002) (quoting statements of several New York legislators during the death penalty debate). The Governor's Program Bill Memorandum refers to the death penalty as serving as a "maximum deterrent." GPB Memo. at 6. In support of this contention, the Governor and the Legislature relied on a claimed correlation between the lack of a death penalty in New York State and the New York State murder rate observable in murder statistics for the years 1965-1993. Id. at 4-5.

In assessing the constitutionality of legislation, this Court should consider the basis of the Legislature's factual assertions. See Smith, 63 N.Y.2d at 76, 479 N.Y.S.2d at 723 n. 7 (rejecting the argument that courts must ignore such concerns). As the "fit" between the ends asserted and the means chosen becomes looser, the challenged policy is

more and more arbitrary, and thus inconsistent with substantive due process. Some of the reasons the death penalty does not serve the deterrence rationale are discussed below.

1. There is No Statistical Correlation Between the Death Penalty and the Murder Rate in New York.

The statistics relied upon by the Governor and the Legislature do not demonstrate any correlation between the existence of a death penalty statute and the murder rate. By 1965, the starting point for the Governor's statistics, New York had already all but abandoned the death penalty for the vast majority of murders, leaving capital sentencing provisions in place only for the narrow categories of killing of peace officers in the line of duty and of killing by a person serving a life term in prison. See Act of June 1, 1965, ch. 321, 1965 Laws 1021. As a result, any asserted correlation between that selective death penalty and the overall homicide rate is statistically unsound.

Even assuming that this limited death penalty could have had affected the murder rate generally, the State's statistics from 1965-1995 do not bear out any such finding. A chart showing the Governor's own numbers for the New York State murder rate and the total number of murders from 1965-1993, as well as the same statistics for 1994-1995, is set forth below.[13]

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[13] The period covered by these statistics that were available to the Governor and Legislature contains five dates that would presumably be of significance if any link between the death penalty and the murder rate existed: (1) June 1, 1965, when the legislature limited the scope of the state's death penalty; (2) June 29, 1972, when the United States Supreme Court found Georgia's death penalty statute to be a form of cruel and unusual punishment; (3) June 7, 1973, when this Court struck down New York's remaining death penalty statute on similar grounds in People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793 (1973); (4) November 15, 1977, when this Court struck down New York's revised death penalty statute in People v. Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735; and (5) July 2, 1984, when this Court closed the door to the State's renewed attempt to invoke the death penalty for murders committed in prison in People v. Smith, 63 N.Y.2d 41, 479 N.Y.S.2d 706. The resulting (Cont'd.)

NEW YORK STATE MURDER RATE 1965-1995[14]

YEAR	MURDER RATE PER 100,000	TOTAL NUMBER OF MURDERS
1965	4.7	837
1966	4.9	876
1967	5.6	1009
1968	6.8	1231
1969	7.8	1406
1970	10.0	1490
1971	10.0	1832
1972	11.3	2057
1973	11.5	2086
1974	10.7	1931
1975	11.0	1981
1976	11.0	1978
1977	10.7	1913
1978	10.2	1818
1979	11.7	2094
1980	12.7	2228

moratorium on the death penalty came to an end in March of 1995, when the New York death penalty was reinstated.

[14] The numbers for 1965-1993 are drawn from GPB Memo. at 4-5 (citing New York State Division of Criminal Justice Services, 1993 Annual Report). The numbers for 1994 and 1995 are drawn from the New York State Division of Criminal Justice, 1998 Crime and Justice Annual Report, at <http://criminaljustice.state.ny.us/crimnet/ojsa/cja_98/cjsec1a.pdf > [Hereinafter "NYSDCJ 1998 Rpt."].

NEW YORK STATE MURDER RATE 1965-1995[14]

YEAR	MURDER RATE PER 100,000	TOTAL NUMBER OF MURDERS
1981	12.6	2171
1982	12.3	2061
1983	11.1	1965
1984	10.0	1777
1985	9.5	1690
1986	10.7	1936
1987	11.3	2012
1988	12.6	2257
1989	12.6	2266
1990	14.8	2624
1991	14.2	2567
1992	13.1	2382
1993	13.1	2386
1994	10.9	1980
1995	8.6	1551

During the thirty-year period between 1965 and 1995, the murder rate in New York fluctuated, but no particular trend emerged. In fact, the murder rate decreased in 1974, even though this Court initially struck down the death penalty statute one year earlier in People v. Fitzpatrick. Furthermore, a five-year decrease from 1981 through 1985 culminated with the lowest murder rate since the 1960's. After 1985, the murder

rate increased again in each of the following five years, 1986 through 1990, but once again that increase was immediately followed by a period of decreasing murder rates that started in the years 1991 through 1995, before the death penalty was reinstated.[15]

The fluctuating nature of the murder rate in New York State during the time there was no death penalty makes clear that no correlation exists between the death penalty and the murder rate in New York. Two commentators have even noted that the New York legislators who supported the death penalty effectively ignored the majority of research on deterrence because of an absence of scientific research to support their position.[16] See Galliher and Galliher, A "Commonsense" Theory of Deterrence, supra, 92 J. Crim. L. & Criminology at 321. Accordingly, the Legislature and the Governor had no evidence to conclude that the death penalty is an effective deterrent to crime, let alone the least restrictive method of deterring crime.

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[15] Although the murder rate continued to drop drastically from 1995 to 1998, see NYSDCJ 1998 Rpt., going well below the rates during the years there was no death penalty, the drop continued a downward trend in serious crime that began before the death penalty was reinstated, see Clifford Krauss, New York City Crime Falls But Just Why Is a Mystery, N.Y. Times, Jan. 1, 1995, at 1-1, and occurred on a national basis, regardless of whether states used the death penalty or not. See Associated Press, Nationwide Crime Drop: 4% Decrease Marks 6th Consecutive Decline, Newsday, May 18, 1998. Some commentators have argued that changes in police tactics and the makeup of the population incarcerated during this time period contributed to lower crime rates. See Fox Butterfield, Reason for Dramatic Drop in Crime Puzzles the Experts, N.Y. Times, Mar. 29, 1998, at 1-5. Moreover, we note that these later murder rate statistics were not before the Legislature when it adopted the death penalty in 1995.

[16] The extent of the use of scientific evidence by the death penalty supporters was that some legislators made periodic references to one study by Isaac Ehrlich. Galliher and Galliher, A "Commonsense" Theory of Deterrence, supra, 92 J. Crim. L. & Criminology at 321. However, the Ehrlich study has been widely discredited by experts (and one Supreme Court Justice). See Craig J. Albert, Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data, 60 U. Pitt. L. Rev. 321, 354-65, 363 (1999) (noting that Ehrlich's "data do not support any conclusion that executions deter homicides").

2. There Is No Statistical Correlation Between the Death Penalty and the Murder Rate Generally.

There is no correlation between the death penalty and the murder rate. As one scholar has noted, "Despite many studies conducted over the past fifty years, no evidence has been found to support the hypothesis that the death penalty deters the commission of crimes more effectively than life imprisonment." Bentele, Does the Death Penalty. . . Violate Substantive Due Process?, supra, 40 Hous. L. Rev. at 1381.[17]

A comparison of the murder rates of states without the death penalty to the murder rates of states with the death penalty shows that the death penalty is not an effective deterrent. According to a survey by the New York Times, the "dozen states that have not chosen to enact the death penalty … have not had higher homicide rates than states with the death penalty." Raymond Bonner and Ford Fessenden, Absence of Executions: A Special Report; States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, at A1 [Hereinafter "Times Rpt."]. The Times reported that over the last 20 years, "the homicide rate in states with the death penalty has been 48% to 101% higher than in states without the death penalty." Id.[18] The Times specifically noted that the non-death penalty states have achieved these low murder rates

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[17] Professor Bentele noted, "The few studies purporting to show some net deterrent effect have been thoroughly discredited in the research community for their faulty methodologies and failure to stand up under attempted replication." Bentele, Does the Death Penalty . . . Violate Substantive Due Process?, supra, 40 Hous. L. Rev. at 1382.

[18] See also Crime in the United States 1999 (U.S. Dept. of Justice Bureau of Justice Statistics 2000). In 1993, USA Today similarly reported that the average 1993 murder rate in states with the death penalty was 56% higher than in states without. Death Penalty a Failure, USA Today, Mar. 8, 1995, at 8A.

despite having demographic profiles similar to those with the death penalty. Id. For example, Massachusetts enjoys a lower murder rate than its neighbor Connecticut; North Dakota's is lower than South Dakota's; and West Virginia's is lower than that of Virginia. Id. More importantly, the Times found that over the 20-year period, "homicide rates had risen and fallen along roughly symmetrical paths in the states with and without the death penalty." Id. This erratic pattern suggests that the death penalty has played no role in increases and decreases in the rates of serious crime over time. "It is difficult to make the case for any deterrent effect from these numbers," concluded S.U.N.Y. criminologist Steven Messner. Id.

Countless studies have reached similar conclusions. See, e.g., Ernie Thompson, Effects of Execution on Homicides in California, 3 Homicide Studies 129 (1999) (finding a slight increase in homicides in Los Angeles after California reinstated the death penalty in 1992 following a 25-year moratorium); William Bailey, Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment, 36 Criminology 711 (1998) (finding a significant increase in stranger killings after Oklahoma reinstated the death penalty in 1989 following its own 25-year moratorium); Keith Harries and Derral Cheatwood, The Geography of Execution: The Capital Punishment Quagmire in America (Rowman & Littlefield Publishers 1997) (finding no evidence of a deterrent effect after examining counties in states with and without the death penalty, matched based on geographic, historical, demographic, and economic variables).

Even a consideration of a decline in the murder rate nationwide since the implementation of the death penalty in New York does not support an argument that the death penalty deters. A decrease in the national and New York murder rate for the last several years is attributed to a national trend of decreasing crime rates rather than to the small number of death sentences and zero executions in New York. See Jeffrey L. Kirchmeier, Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States, 73 Colo. L. Rev. 1, 65-66 (2002) (discussing how during the late 1990's a flourishing economy helped cause national crime levels to drop to a new low).

This aggregation of data does not support the conclusion of the Legislature and the Governor. Instead, it reaffirms that the "state of knowledge … show[s] no correlation between the existence of capital punishment and lower rates of capital crime." Gregg v. Georgia, 428 U.S. 153, 233 (1976) (Marshall, J., dissenting).

3. Criminal Justice Authorities Endorse the Findings of Social Science that the Death Penalty Does Not Deter Violent Crime.

Despite the Legislature's and Governor's claims concerning the deterrent effect of the death penalty, criminal justice authorities conclude that the death penalty does not deter. A 1995 poll of randomly selected police chiefs in the United States revealed that: (1) police chiefs rank the death penalty last as a method for reducing crime; (2) the death penalty rates as the least cost-effective method for controlling crime; (3) police chiefs do not believe that the death penalty significantly reduces the number of homicides; and (4) police chiefs do not believe that murderers think about the range of possible punishments.

Richard C. Dieter, On the Front Line: Law Enforcement Views on the Death Penalty 5 (Death Penalty Information Center 1995).

Prosecutors have expressed similar doubts concerning the efficacy of the death penalty. In a 1995 survey by the New York Law Journal, although the majority of New York State's district attorneys said that they personally support the death penalty, half of them said that it either will not deter crime or they are unsure whether it will do so. Edward A. Adams, Prosecutors Want Death Penalty: Half of D.A.'s Are Not Persuaded That Penalty Is a Deterrent, N.Y.L.J., Mar. 3, 1995, at 1. More tellingly, the report concluded that the "more experience prosecutors have with murder cases, the greater the odds that they personally oppose the death penalty or have serious reservations about its usefulness." Daniel Wise, Prosecutors Want Death Penalty: Qualms Voiced About Costs, Time, Training of Lawyers, N.Y.L.J., Mar. 3, 1995, at 1. The district attorneys in the six counties that obtained 72% of the murder convictions for the year of the survey all opposed the death penalty or expressed doubts about it. Id.[19] One district attorney summarized the problem with the deterrence rationale, stating, "[p]eople who commit these type of crimes don't calculate ahead of time." Id.[20]

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[19] See also Times Rpt. (cataloging the opposition to capital punishment of lead prosecutors in Detroit, Michigan; St. Paul, Minnesota; Honolulu, Hawaii; and Milwaukee, Wisconsin); Robert Morgenthau, What Prosecutors Won't Tell You, N.Y. Times, Feb. 7, 1995, at A25 ("Take it from someone who has spent a career in federal and state law enforcement… [p]rosecutors must reveal the dirty little secret they too often share only among themselves: The death penalty actually hinders the fight against crime").

[20] See also Smith, 63 N.Y.2d at 77, 479 N.Y.S.2d at 724 ("Initially, a culprit rarely expects to get caught.").

Indeed, to the extent that human science can ever prove propositions about generalities of human behavior, the studies show that the death penalty does not have any deterrent effect at all.[21] If the State, with all of its fact-finding and investigating capabilities is unable to discover evidence that the death penalty deters more than life imprisonment, a court must find that the State has not satisfied the least restrictive means test. See Bentele, Does the Death Penalty. . . Violate Substantive Due Process?, supra, 40 Hous. L. Rev. at 1384. Accordingly, the government's deterrence justification for the death penalty must fail.

B. The Death Penalty Is Not the Least Restrictive Method for Incapacitating Criminals.

The Legislature's second justification for the death penalty statute was the incapacitation of criminals. One of the sponsors of the death penalty bill, Assemblyman Eric N. Vitaliano, focused on the goal of incapacitation during the Legislature's debates concerning the reenactment of the death penalty. Claiming that there is a "power-assisted revolving door on our prison cells," Assemblyman Vitaliano focused on the ability of the death penalty to block the prison doors. N.Y. State Assembly, Record of Proceedings, Mar. 6, 1995, at 6. As evidence of the need for the death penalty, Assemblyman Vitaliano discussed the short average sentences for homicide convictions. However, the

[21] See generally Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 Mich. L. Rev. 1177, 1222-24 (1981) (Despite the inherent limitations in proving social science propositions to a mathematical certainty, "the failure of the death penalty as a deterrent has been proved to a moral certainty," i.e., "there is now enough research that fails to reveal deterrence that for the purposes of moral argument one must proceed as if the death penalty does not deter.").

reasons he cited for these short sentences -- plea bargains and convictions on lesser charges -- are not eliminated by New York's death penalty statute. Plea bargaining remains available in the early stages of potentially capital cases, see Bar Ass'n Pataki Rpt. at 140-41, and juries will continue to convict defendants on lesser charges when the evidence (or lack thereof) so leads them.

In addition, Assemblyman Vitaliano's discussion of criminals who had been released after a short number of years was not limited to those who were subject to first-degree murder charges and therefore eligible for the death penalty. Even without the death penalty, parole boards were not in the habit of cavalierly freeing those convicts who were subject to first-degree murder charges.[22]

Importantly, Assemblyman Vitaliano's comments refer to a time frame during which New York had no strict "life without parole" sentencing provisions. See Smith, 63 N.Y.2d at 76, 479 N.Y.S.2d at 723 (noting that under New York's then-extant statutory sentencing scheme, "[i]n New York, a life sentence is not the necessary equivalent of life imprisonment"); compare N.Y. Penal Law § 60.06 (providing the sentencing option of life without parole for first degree murder defendants). By ensuring that murderers are sentenced to life behind bars, the State can sufficiently incapacitate murderers to fulfill

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[22] See Division of Program Planning, Research and Evaluation, Characteristics of Inmates Discharged 1996 (New York State Department of Correctional Services 1998) at App. B; Division of Program Planning, Research and Evaluation, Characteristics of Inmates Discharged 1991 (New York State Department of Correctional Services 1992) at App. B; Division of Program Planning, Research and Evaluation, Characteristics of Inmates Discharged 1990 (New York State Department of Correctional Services 1991) at App. B. See also NYSDCJ 1998 Rpt., Contributing Agency Reports: Division of Parole, Table 2, at <http://criminaljustice.state.ny.us/crimnet/ojsa/cja_98/parole.pdf> (recording that (Cont'd.)

the State's aim. Thus, the State can solve the problem of short sentences for homicides, as non-death penalty states have done. See, e.g., Iowa Code §§ 902.1, 902.2 (providing for the sentence of life without possibility of parole).

The State may argue that life without parole does not prevent a convicted murderer from committing further murders while in prison. However, this argument is flawed. As a statistical matter, inmates who are eligible for parole are just as likely to commit acts of violence as life-without-parole inmates.[23] Long-term inmates tend to display better prison adjustment, avoid trouble and spend their time more constructively than do short-term inmates.[24] So, prisoners who are not eligible for the death penalty

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of all inmates paroled in New York State between 1996 and 1999, fewer than 1% had been convicted of crimes that had resulted in death).

[23] See Jon Sorensen and Robert D. Wrinkle, No Hope for Parole: Disciplinary Infractions Among Death Sentenced and Life-Without-Parole Inmates, 23 Crim. Just. & Behav. 542 (1996) (comparing the disciplinary records of 93 death-sentenced and 323 life-without-parole inmates with the records of 232 life-with-parole inmates and finding similar disciplinary infraction levels between the two groups). In fact, multiple studies report that prisoners who were once sentenced to death but were subsequently released "indicate a low base rate of post-release violent recidivism." See Mark D. Cunningham and Thomas J. Reidy, Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing, 16 Behav. Sci. Law 71, 80-82 (1998) (summarizing multiple studies). For example, the vast majority of those death-row inmates whose sentences were commuted following Furman v. Georgia were not involved in predatory crime within the prison walls in the years that followed. See James W. Marquart, et al., The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923-1990 (Univ. Texas Press 1994), at 98-127.

[24] Sorensen and Wrinkle, No Hope for Parole, supra, 23 Crim. Just. & Behav. at 543; Timothy J. Flanagan, Time Served and Institutional Misconduct: Patterns of Involvement in Disciplinary Infractions Among Long-Term and Short-Term Inmates, 8 Crim. Just. 357 (1980). See also Times Rpt. (quoting spokesperson for the Michigan Department of Corrections concluding that life-without-parole inmates "are generally quieter, not as insolent, more likely to obey the rules and less likely to try to escape. Their motivation is quite clear: to get into a lower security classification.. . . After a long period of good behavior, they can live in a larger cell, which is part of a larger, brighter room, eat with 250 other prisoners, and watch television."); Mark D. Cunningham and Thomas J. Reidy, Don't Confuse Me With The Facts: Common Errors in Violence Risk Assessment at Capital Sentencing, 26 Crim. Just. & Behav. 20, 26-27 (1999) (reviewing studies with similar conclusions).

commit the majority of prison violence. According to Justice Department statistics, states without the death penalty have achieved relative success in limiting prison violence compared to death penalty states, experiencing fewer than half as many attacks on prison staff and other inmates as states with capital punishment provisions. See Kathleen Maguire and Ann L. Pastore, eds., Sourcebook of Criminal Justice Statistics – 1996 (U.S. Dept. of Justice Bureau of Justice Statistics 1997) at Table 6.60.[25] As a result, the use of the death penalty cannot be justified as the least restrictive means to combat in-prison violence.

In sum, there are several other options to achieve the goal of incapacitating criminal offenders. The State cannot show that the death penalty is the least restrictive method of achieving this compelling goal.

C. Retribution Is Not a Compelling State Interest Nor Is the Death Penalty the Least Restrictive Method of Retribution.

The Governor's and the Legislature's final justification for the death penalty was retribution against criminals. GPB Memo at 4. The jurisprudence of New York, however, displays discomfort with using the criminal law to inflict retribution. See Smith, 63 N.Y.2d at 76-77, 479 N.Y.S.2d at 723-24 (rejecting retribution as reason to

[25] Specifically, the average number of inmates killed in 11 jurisdictions without the death penalty (ten states and the District of Columbia reporting) was 0.45 in 1994 and 0.82 in 1995. In contrast, the average number of inmates killed in states with death penalty provisions (32 states reporting) was 1.34 in 1994 and 1.47 in 1995. Similarly, the average number of attacks on prison staff members in the 11 jurisdictions without the death penalty (ten states and the District of Columbia reporting) was 81.82 in 1994 and 81 in 1995. Again in contrast, the average number of attacks on prison staff members in states with death penalty provisions (27 states reporting) was 176.56 in 1994 and 171.30 in 1995.

depart "from constitutional command in the case of life-term inmates" and describing the objective of New York's penological system as requiring consideration of the offender as well as the offense); People v. Oliver, 1 N.Y.2d 152, 160 (1956) ("There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution."); People v. Hale, 173 Misc. 2d 140, 174, 661 N.Y.S.2d 457, 476 (N.Y. Sup. Ct. 1997) (finding that "retribution is not a valid penological goal standing alone").[26] Although courts have disagreed over the validity of retribution as a state interest, any interest in retribution cannot overcome the presumption in New York in favor of the preservation of human life. See In re O'Connor, 72 N.Y.2d at 530-531, 534 N.Y.S.2d at 892 ("Every person has a right to life.").

As the DNA testing and subsequent release of numerous death row inmates has recently shown, the death penalty inevitably results in the death of some innocent people. See, e.g., Kirchmeier, Another Place Beyond Here, supra, 73 Colo. L. Rev. at 39. A 2000 Columbia University study of 5,760 capital cases nationwide recently concluded that "serious error -- error substantially undermining the reliability of capital verdicts -- has reached epidemic proportions throughout our death penalty system. More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed." James S. Liebman, et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (The Justice Project 2000).

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[26] Roscoe Pound noted, "[I]n order to deal with crime in an intelligent and practical manner we must give up the retributive theory." Roscoe Pound, Criminal Justice in the American City – A Summary, in CRIMINAL JUSTICE IN CLEVELAND 559, 586-87 (Roscoe Pound & Felix Frankfurter, eds., Cleveland Foundation 1922).

To carry its burden, the State must show that its interest in retribution is so weighty as to overcome the severe doubts about the risk of executing innocent defendants. Because the State cannot show that it can effectively ameliorate the danger of wrongful executions, retribution is an unacceptable governmental objective as a justification for the death penalty. See Bentele, Does the Death Penalty . . . Violate Substantive Due Process?, supra, 40 Hous. L. Rev. at 1386 (stating that "[c[ontinued use of a system that will execute the innocent is contrary to our fundamental notions of ordered liberty, 'shocks the conscience,' and therefore violates substantive due process").

Even assuming that retribution is a compelling state interest, the death penalty is not the least restrictive method of achieving retribution. A sentence of life without parole achieves the same interest in vindicating society's injury.

"When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment." Furman v. Georgia, 408 U.S. 238, 304 (1972) (Brennan, J., concurring). This conclusion is particularly true here in New York, where, as of June 2000, district attorneys sought the death penalty in only 7.7% of the first-degree murder cases. Gene Warner, Life or Death Issue Statistics Show There Is a Dramatic Disparity in the Way District Attorneys Across New York State Seek the Death Penalty, and That in Itself Could Be Grounds for Appeal, Buffalo News, June 27, 2000, at A1. There is no indication that society's retributive interest is better satisfied vis à vis the select group of capital cases than it is for the remaining 92.3% of first degree murder cases.

Many surviving victims of capital-eligible crimes report no retributive satisfaction from imposition of the death penalty on the accused. See, e.g., Thomas J. Walsh, On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty, 49 Clev. St. L. Rev. 23, 38 (1996). The execution itself gives media attention to the perpetrator and in some sense has less retributive effect than the severe punishment of spending a life behind bars.

Finally, there are other incapacitation options besides the death penalty that serve the goals of retribution. "[T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's term of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." Sumner v. Shuman, 483 U.S. 66, 83-84 (1987). The studies on violence rates among long and short-term prisoners, cited above, further demonstrate how much inmates desire the minimal privileges available to them within prison and how powerful a tool of punishment is their removal. The State has offered no analysis as to whether alternative forms of life imprisonment might serve the ends of retribution in a less restrictive manner than death.

In conclusion, the State cannot show either that its retributive interest is compelling or that the death penalty is the least restrictive means to achieve it. Additionally, the State cannot show that the death penalty is the least restrictive means for deterrence and incapacitation purposes. New York's death penalty violates due process.

III. OTHER STATES, INTERNATIONAL COMMUNITIES AND OTHER SOURCES SHOW THAT NEW YORK'S DEATH PENALTY FAILS THE LEAST RESTRICTIVE MEANS TEST AND VIOLATES DUE PROCESS.

The Government fails to meet the burden of justification imposed by the due process clause of showing that the death penalty is the least restrictive means available to achieve the goals of punishment. As discussed above, the arguments of the Governor and Legislature are at odds with the facts as revealed by objective investigation. The death penalty fails the least restrictive means test, and, in fact, is not even an effective means of achieving the goals of criminal justice. As discussed below, the experience in other states, the experience in other countries, and history show that the death penalty is not the least restrictive means available to achieve any of the goals of the criminal justice system

A. Twelve Other States Without the Death Penalty Achieve the Same Governmental Interests as States With the Death Penalty.

In the United States, there are a number of examples of why the death penalty is not an effective means to achieve the goals of the criminal justice system. There are currently twelve states without the death penalty, as well as the District of Columbia.[27] As noted above, the non-death penalty states have lower murder rates than states with the death penalty. Those states manage to punish and incapacitate their criminals without capital punishment. Accordingly, the death penalty is not the least restrictive method for achieving the interests of deterrence, incapacitation and retribution, as the death penalty is clearly unnecessary for that purpose in these other states.

[27] The states are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

In addition, two states with more recent experience with death penalty application imposed a moratorium on capital punishment, anchoring the trend of an increasing number of states that have recognized the severe flaws of the practice.[28] This trend and the states without the death penalty demonstrate that states can achieve their interest in

[28] See Kirchmeier, Another Place Beyond Here, supra, 73 Colo. L. Rev. at 43-48 (discussing various jurisdictions passing death penalty moratorium resolutions). In addition to Maryland's temporary moratorium, the Republican Governor of Illinois, George Ryan, declared a moratorium on executions in his state, see Ken Armstrong and Steve Mills, Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions, Chi. Trib., Jan. 31, 2000, at 1, following a five-part series of influential reports by the Chicago Tribune that concluded that "[c]apital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken." Ken Armstrong and Steve Mills, Death Row Justice Derailed; Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment Into its Least Credible, Chi. Trib., Nov. 14, 1999, at 1. The legislatures of New Hampshire and Nebraska also took steps, although ultimately unsuccessful, to end the death penalty in those states. More recently, the investigative arm of the Virginia General Assembly voted unanimously to conduct a study of that state's death penalty. Frank Green, Death Penalty Study OK'd, DNA Tests, 21-Day Rule; Bill Would End Va. Executions, Richmond Times-Dispatch, Nov. 11, 2000. In 2003, the "National Death Penalty Moratorium Act of 2003" was submitted before Congress for the express purpose of "plac[ing] a moratorium on executions by the Federal Government and urg[ing] the States to do the same." S. 132, 108th Cong. (2003). In pertinent language, the bill argues that "Congress should consider that more than ever Americans are questioning the use of the death penalty and calling for assurances that it be fairly applied. Documented unfairness in the Federal system requires Congress to act and suspend Federal executions. . . . Additionally, substantial evidence of unfairness throughout death penalty States justifies further investigation by Congress. . . . The high rate of error throughout all death penalty jurisdictions suggests that there is a grave risk that innocent persons may have been, or will likely be, wrongfully executed. . . . The death penalty is disparately applied in various regions throughout the country, suggesting arbitrary administration of the death penalty based on where the prosecution takes place." Id. at §§ 1(B), 1(C), 3(B), 3(F). The American Bar Association has also called on all capital punishment jurisdictions to enter into a death penalty moratorium. Section of Individual Rights and Responsibilities, A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions (American Bar Association 2000) [Hereinafter "ABA Rpt."]. A large number of local governments and private bar associations have followed suit, passing resolutions calling for an end to the death penalty. ABA Report, App. B; Quixote Center, Over 1100 Groups Joining the Call for a Moratorium on Executions, at <http://www.quixote.org/ej/ej_tally_of_moratorium_signers_by_st.html> (listing at least 43 local governments and bar associations calling for a moratorium on executions). In addition, numerous editorials published nationwide have also called for a death-penalty moratorium or called into question the implementation of the death penalty. See ABA Rpt. at 7; Quixote Center, supra (listing a large number of major newspapers calling for a moratorium on executions).

deterrence, incapacitation and retribution by a less restrictive method than the death penalty.

B. The Death Penalty is Not Necessary Because the World Community Has Rejected the Death Penalty.

New York, in enacting a death penalty statute in 1995, swam against an international tide of abolition of the death penalty. See Stephanie Grant, A Dialogue of the Deaf: New International Attitudes and the Death Penalty in America, 17 Crim. Just. Ethics 19 (1998); Kirchmeier, Another Place Beyond Here, supra, 73 Colo. L. Rev. at 67-71, 83-88 (discussing the international trends regarding the death penalty). This evidence is entitled to special weight in the context of New York, which long has been the most diverse state in terms of the national origin of its population, and whose courts have long displayed a cosmopolitan willingness to recognize the importance of accommodating this diversity.

The United States, with Japan, is one of only two advanced industrial nations to retain the death penalty. The death penalty is impermissible, either by law or practice, in more than 100 countries (except for exceptional violations, such as treason); thirty-eight nations have included bans on capital punishment in their constitutions;[29] and at least forty-three nations are signatories to at least one of three international treaties calling for

[29] These nations are: Andorra, Angola, Austria, Cambodia, Cape Verde, Colombia, Costa Rica, Croatia, Czech Republic, Dominican Republic, Ecuador, Finland, Germany, Guinea-Bissau, Haiti, Luxembourg, Macedonia, Marshall Islands, Micronesia, Monaco, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Panama, Paraguay, Portugal, Romania, Sao Tome and Principe, Seychelles, Slovak Republic, Slovenia, Sweden, Uruguay, and Venezuela.

abolition of the death penalty.[30] The United Nation's Commission on Human Rights in April 1998 called for a moratorium on the death penalty. See U.N. Commission on Human Rights, Status of the International Covenants on Human Rights, Question of the Death Penalty (approved Apr. 3, 1998) E/CN.4/1998/L.12. "The long-range trend around the world continues to be toward abolition of the death penalty." Kirchmeier, Another Place Beyond Here, supra, 73 Colo. L. Rev. at 67 (noting that much more than half of the countries in the world have abolished the death penalty in practice).[31]

This international consensus further demonstrates that the death penalty cannot be the least restrictive method for achieving deterrence, incapacitation and retribution, as none of these other nations needs the death penalty to achieve these interests. Indeed, the use of the death penalty in the United States has not reduced the U.S. murder rate below that of non-death penalty countries.[32]

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[30] The following nations have signed at least one of three treaties (the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty): Andorra, Australia, Austria, Belgium, Brazil, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Uruguay, and Venezuela.

[31] See generally, Toni M. Fine, Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment, 30 Colum. Hum. Rts. L. Rev. 421 (1999); Michael J. Dennis, The Fifty-Fifth Session of the U.N. Commission on Human Rights, 94 Am. J. Int'l 189 (2000).

[32] For example, according to the U.S. Department of Justice, the U.S. murder rate for the years 1981-1996 is nearly six times higher than that of England, a country that does not administer the death penalty. Patrick A. Langan and David P. Farrington, Crime and Justice in the United States and in England and Wales, 1981-96 (U.S. Dept. of Justice, Bureau of Justice Statistics 2000). In neighboring Canada, the murder rate actually decreased in the years following abolition of the death penalty in (Cont'd.)

In recent years, as countries have struggled to emerge from periods of internal strife or repression, they have abolished the death penalty at a rapid pace. In June 1999, for example, Boris Yelstin, then Russia's President, commuted the death sentences of 716 inmates held on Russia's death row.[33] Russia joined numerous other former Soviet-bloc countries that have also abandoned capital punishment. South Africa took the step of abolishing its death penalty as a means of overcoming the violence in its own past. See Ursula Bentele, Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa, 73 Tul. L. Rev. 251 (1998). Further, the European Union made abolishing the death penalty a condition of membership and its parliament has passed resolutions condemning capital punishment in the United States. European Lawmakers, Activists Call on United States to Abolish Death Penalty, Associated Press, Oct. 21, 2000; Tom Hundley, Europe Seeks to Convert U.S. on Death Penalty: Executions Erode Role as Moral Leader, Many Activists Say, Chi. Trib., June 26, 2000.

In addition, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions issued a report on the administration of the death penalty in the U.S. See Elizabeth Olsen, U.N. Report Criticizes U.S. for 'Racist' Use of Death Penalty, N.Y. Times, Apr. 7, 1998, at A1. The Report found a "significant degree of unfairness and

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1976. Mark Warren, The Death Penalty in Canada: Facts, Figures and Milestones, at <http://members.nbci.com/ccadp/deathpenalty-canada.htm>.

[33] Angela Charlton, Yeltsin Commutes All Russian Death Sentences, Associated Press, June 3, 1999.

arbitrariness" in the U.S. administration of the death penalty. Id. By retaining the death penalty, the United States keeps company with several countries that in other instances the United States has condemned for human rights violations. According to Amnesty International, in 1998, America combined with China, Congo, and Iran accounted for 86% of the world's executions.[34] French National Assembly President Raymond Forni has called the United States' death penalty "a stain on the largest democracy in the world." European Lawmakers, Activists Call on United States to Abolish Death Penalty, Associated Press, Oct. 21, 2000.

Thus, other countries have shown that the death penalty provides no benefit over other punishments. This accumulated evidence from around the world stands as another barrier to any argument that New York's death penalty statute is the "least restrictive means" of combating crime.

C. The Reasoning of Major Religions and Philosophers Further Supports that the Death Penalty Fails the Least Restrictive Means Test.

The untenable nature of the State's justifications for the death penalty is further demonstrated by the teachings of religious leaders and secular philosophers. Many religious organizations worldwide oppose the use of the death penalty. See generally, The Death Penalty: The Religious Community Calls for Abolition; Statements of Opposition to Capital Punishment (American Friends Service Committee 2000) (a

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[34] Amnesty International, Facts and Figures on the Death Penalty, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/current?openview>. Also, among world countries, the United States is the leading executioner of juveniles, having executed at least 160 juveniles since 1973. See National Coalition to Abolish the Death Penalty, America's Shame—Killing Kids, at <http://www.ncadp.org/html/fact1.html>.

compendium of official statements by major religious organizations in opposition to the death penalty) [Hereinafter "AFSC Rpt."].[35] Despite inherent doctrinal differences between such figures, their reasoning further supports that the death penalty is not the least restrictive means of advancing the State's asserted interests in deterrence, incapacitation and retribution.

Many religious leaders frame their outlook in terms compatible with the requirements of substantive due process. For example, the late John Cardinal O'Connor of New York explained that under Catholic doctrine, "[i]f bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person." Ronald J. Tabak, et al., Symposium: Are Executions in New York Inevitable?, 22 Fordham Urb. L. J. 557, 568 (1995). This rationale comports with the

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[35] See also Robert F. Drinan, S.J., Will Religious Teachings and International Law End Capital Punishment?, 29 St. Mary's L.J. 957, 960 (1998) ("The near unanimity of the churches in America against the death penalty is impressive."); Damien P. Horigan, Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty, 41 Am. J. Juris. 271, 276 (1996) (arguing that opposition to the death penalty is a "natural outgrowth of nonviolent religions").

For example, in reaction to the U.S. Supreme Court's decision in Gregg v. Georgia, the American Baptist Churches in the U.S.A. passed a resolution condemning capital punishment. American Baptist Churches in the U.S.A., Resolution on Capital Punishment, AFSC Rpt. at 7. Also, the spiritual head of the Catholic Church, Pope John Paul II, speaking in Missouri, similarly called for an end to the death penalty stating, "I renew the appeal … for a consensus to end the death penalty." Associated Press, Pope Pleads for End to Death Penalty, Chi. Trib., Jan. 27, 1999 at 1. See also James J. Megivern, The Death Penalty: An Historical and Theological Survey (1997) (examining the Catholic Church's opposition to capital punishment); National Conference of Catholic Bishops, Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice, (United States Catholic Conference 2000), at <http://www.nccbuscc.org/sdwp/ criminal.htm> ("Renewing Our Call to End the Death Penalty").

substantive due process requirement that the State employ only the "least restrictive means" to achieve its compelling governmental purpose. Similarly, four major Jewish organizations have adopted resolutions to the effect that "[e]xperience in several states and nations has demonstrated that capital punishment is not an effective deterrent to crime."[36] The United Methodist Church took the U.S. Supreme Court to task for restoring the death penalty despite the "lack of evidence that it reduced violent crime."[37] The Episcopal Church rebutted the incapacitation argument, advising, "there are incarceration alternatives for those who are too dangerous to be set free in society."[38] The American Friends Service Committee criticized the concept of retribution as a compelling state interest, stating that "[w]e find it particularly shocking that the Supreme Court would give credence to retribution as a basis for law."[39] The Unitarian Universalist Association adopted a general resolution that denounces capital punishment as

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[36] Union of American Hebrew Congregations, Opposing Capital Punishment, AFSC Rpt. at 27. See also The Rabbinical Assembly, Resolution on Capital Punishment, AFSC Rpt. at 25 (stating that "no evidence has been marshaled to indicate with any persuasiveness that capital punishment serves as a deterrent to crime"); Central Conference of American Rabbis, Capital Punishment, AFSC Rpt. at 11 (same); American Jewish Committee, Statement on Capital Punishment, AFSC Rpt. at 8 (same).

[37] United Methodist Church, Capital Punishment, AFSC Rpt. at 28-29. See also Mennonite Central Committee, Death Penalty, AFSC Rpt. at 20 ("[T]he most sophisticated studies have not been able to establish a deterrent effect. If capital punishment is a deterrent, its effect is so miniscule that even the most sophisticated techniques have not been able to measure it.").

[38] The Episcopal Church, Capital Punishment, AFSC Rpt. at 13. See also Mennonite Central Committee, Death Penalty, AFSC Rpt. at 21 (expressing a preference for a range of less restrictive alternatives to the death penalty).

[39] American Friends Service Committee, Statement on the Death Penalty, AFSC Rpt. at 7-8.

"inconsistent with respect for human life; for its retributive, discriminatory, and non-deterrent character."[40]

The sources that illustrate the weaknesses of the State's justification for the death penalty are not limited to exclusively religious organizations.[41] Many writers have raised similar concerns that support the argument that the death penalty deserves strict scrutiny and is not the least restrictive means of achieving the goals of punishment.[42] Capital punishment does more than incapacitate an individual; it imposes psychological torture, which is incompatible with the concept of the least restrictive means.[43]

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[40] Unitarian Universalist Association, Capital Punishment, AFSC Rpt. at 27-28.

[41] For example, the secular American Ethical Union adopted a resolution that concludes that the death penalty is "wholly unacceptable, whether imposed to prevent repetition of a crime by an individual, as a deterrent to others, or as social retribution." American Ethical Union, Resolution on Capital Punishment, AFSC Rpt. at 7. The American Philosophical Association, Eastern Division has also called for an immediate end to the use of the death penalty based upon reasons such as the lack of deterrent value of the death penalty. William E. Mann, Letter Sent to the President of the United States, William Jefferson Clinton, on June 5, 1997, on Behalf of the Eastern Division of the APA, 71 Proc. & Addresses of the Am. Phil. Ass'n (May, 1998).

[42] See Norman L. Greene, The Context of Executive Clemency: Reflections on the Literature of Capital Punishment, 28 Cap. U. L. Rev. 513, 555 (2000); Brief Amicus Curiae of Law and Humanities Institute in Support of Petitioner, 1999 WL 1259921 at *20, Bryan v. Moore, 120 S. Ct. 1184 (2000) (No. 99-7283) ("Just as the 'fictions of the law' permit legal resolution to occur in many cases, so fiction about the law helps adjudicators to fathom [questions concerning the death penalty] even where positivistic and empirical experience" would provide an available window on reality).

[43] See Arthur Koestler, Reflections on Hanging vii; Albert Camus, Reflections on the Guillotine, in The World of Law II; The Law as Literature. A Treasury of Great Writings About and in the Law-from Plato to the Present 512, 529 (Ephraim London, ed., 1960); Leonid Andreyev, The Seven That Were Hanged (2001) (documenting the anticipation and execution of seven people); E.L. Doctorow, The Book of Daniel 311-15 (1971) (recounting the electrocution of a fictional stand-in for Julius Rosenberg); Theodore Dreiser, An American Tragedy 790-810 (1964) (relating the experience of capital punishment through the view of a death row inmate); Theodore Dreiser, An American Tragedy 790-810 (1964) (relating the experience of capital punishment through the point of view of a death row inmate); Steve Earle, Over Yonder (Jonathan's Song), on TRANSCENDENTAL BLUES (E Squared Records 2000) (recounting in song an inmate's final hours); Victor Hugo, The Last Days of a Condemned Man (Geoff Woolen trans., 1992) (documenting the final days of a person sentenced to be executed); Franz Kafka, In the Penal Colony: Stories and Short Pieces 309 (Willa & Edwin Muir

(Cont'd.)

Thus, this Court should apply strict scrutiny analysis to examine the constitutionality of New York's death penalty and find that the State cannot carry its heavy burden of showing that the death penalty is the least restrictive means of achieving compelling governmental ends. New York's death penalty is inconsistent with the dictates of due process, and therefore this Court should hold that the punishment is unconstitutional.

CONCLUSION

For the forgoing reasons, the Association respectfully requests that this Court hold that New York's death penalty statute violates the due process clause of the New York State Constitution, as well as that of the federal constitution, and reverse the death sentence in this case.

Respectfully submitted,

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trans., 1968) (describing a torturous form of execution); Norman Mailer, The Executioner's Song 1010 (1993) (describing the post-execution treatment of Gary Gilmore's body); Richard Wright, Native Son 381-82 (Harper & Row 1966) (1940) (providing a fictional account of a death row inmate's attempt to remove himself from life so as to avoid the pain of execution).

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Brief of Amicus Curiae, Association of the Bar of the City of New York, have been served by first class mail, postage prepaid, upon:

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