

A Tale of Two Towns: Why Relying on Aggravating Circumstances to Support Capital Punishment among Law Enforcement Has Become So Aggravating

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Abstract

There has been much discussion concerning capital trial decisions which have focused on aggravating circumstances and the likelihood of obtaining a sentence of death after conviction, as well as discussions of murder cases that are not processed as capital cases, but which contain similar aggravating circumstances. Comparing the results of capital and non-capital cases with similar aggravating circumstances can reveal to us some of the most basic problems with the use of capital punishment in America. This paper will address this issue in two ways. First, we compare two strikingly similar time-proximate cases in different states (one with and one without a death penalty statute) that yielded very different results, and which highlight the most basic problems with considering aggravating circumstances as having primary importance in murder cases. We then discuss the utility of arguments in favor of capital punishment by those in law enforcement which stem from a traditional strong law enforcement ideology, in light of evolving arguments against capital punishment which have come to challenge this ideology with evidence of its weakness and effectiveness. We suggest that these challenges can move the strong consideration of aggravating circumstances as justification for capital punishment to the back burner in the death penalty debate and allow a more reasoned and practical approach with law enforcement toward removing their support for the claimed benefits of a death penalty statute.

Key Words: Capital punishment, aggravating circumstances, death penalty, law enforcement, cost, mitigation

1. Introduction

“Altogether, the Old Bailey, at that date, was a choice illustration of the precept, that “Whatever is is right”; an aphorism that would be as final as it is lazy, did it not include the troublesome consequence, that nothing that ever was, was wrong.”

--- From *A Tale of Two Cities*, Charles Dickens

The death penalty, when it enters any discussion, is subject to much debate. The issue often brings an initial emotional response. Even when subjected to more reasoned analysis the emotional layers of the issue still lurk in the shadows of the debate. Nowhere is this more prevalent than when proponents of the death penalty cling to their clarion call that the death penalty is needed to protect law enforcement. Within the ranks of law enforcement there is the same embedded response and emotional attachment to support of the death penalty. Despite criminological studies, statistical analysis of inequity in death sentences, and nationwide exonerations with the advent of DNA testing and advanced laboratory technology public support for the death penalty remains in the majority. Pew Research indicates public favor of the death penalty has declined from its height of 80% in the late 1980's to early 1990's to a present majority of 62% with public opposition at 32% (Ruby & Pond, 2007). Opposition is still a long way off from its mid to late 1960's high of 48% (Ruby & Pond, 2007). Death penalty proponents cling to their advocacy and effectively use law enforcement as political bait in the death penalty argument. Yet, at least among law enforcement executives, there is a retrenchment from the occupational support of the death penalty (Dieter, 1995; Dieter, 2009).

Rank and file attitudes toward the death penalty appear to remain in support, ambivalent, or at least silent, but there has not been a general groundswell of anti-death penalty sentiment from rank and file officers. If the law is as Aristotle stated, reason divorced from emotion, then the arguments of reason may be the most compelling to rank and file law enforcement officers, their fraternal organizations and unions. Toward this effort the authors have spent the past two years conducting training and outreach efforts with anti-death penalty groups seeking to engage law enforcement in their quest to abolish the death penalty and shift the expenses incurred in maintaining death penalty statutes in many states toward more reasoned goals. Groups we have worked with have advocated using these funds toward victim services, law enforcement training and safety, and treatment programs. Convincing law enforcement professionals of the viability of these cost alternatives versus the imagined benefit to their overall safety as trumpeted by death penalty proponents has been the biggest challenge. In terms of debating and clarifying the issue of officer safety we have explored the numbers in states like New York which abolished its death penalty in 2004 and North Carolina where there has been a de facto moratorium since 2006.

The numbers indicate no statistical increase in police officer homicides by felons post abolition or moratorium. In North Carolina there were 20 police officers murdered in the line of duty from 2000-2010 (Officer Down Memorial Page, 2011). From 2000-2005 11 of those officers were killed and from 2006-2010 9 officers were killed (Officer Down Memorial Page, 2011). Of the 20 officers killed 19 were by gunfire and 1 by intentional vehicular assault. Of those 20 cases 3 defendants were sentenced to death, 1 to a determinate number of years, 6 to life sentences and 1 declared incompetent for trial. Of the remaining suspects 4 were killed by police and 4 committed suicide. In the 12 cases where a suspect survived only 3 were given a death sentence, which is 25% of cases involving police officers killed from 2000-2010. Similarly, in New York State during the five year period (1990-1994) prior to reinstatement of the death penalty there were 15 police officers murdered in the line of duty. During the five year period (1995-1999) after reinstatement there were an additional 15 police officers murdered in the line of duty. The five year period (2005-2009) after the New York State Court of Appeals decision in *People v. Lavalle*, 3 NY3d 88 (2004) which effectively ended the death penalty in New York there were 11 police officers murdered in the line of duty. Prior research has indicated there is no correlation between officer safety and implementation of a death penalty statute (Bailey & Peterson, 1994). Still the political rhetoric is unchanged and the popular sentiment among law enforcement of death penalty's necessity for their collective safety is unimpeded.

Here we present two cases, intriguingly similar in many respects, which offer a practical view of what is wrong with the death penalty in the United States from a criminal justice perspective. First, these similar cases are bound not only by the scope of violence and the abject horror each case visited upon their respective communities, but by the multiple victim familial ties and the offender profiles as well. There are similarities in the communities too, though Cheshire, Connecticut is more affluent than Fishkill, New York. Still there is in both a sense of relative safety and small town cohesiveness, with both being predominantly white communities. In each case all the victims were white as were each of the offenders. These cases make for good launching points and objects of discussion when reaching out to law enforcement regarding the relative merits of a life without parole statute versus a death penalty statute within a state. A simple time-line comparison of the two cases from arrest to sentencing highlights not only the practical difference between sentences, but, upon deeper analysis, also reveals much more about the unintended consequences of simply having a death penalty statute involved in the mix. Since the use of the death penalty is the critical variable in the discussion, it is necessary to review arguments commonly raised by abolitionists to advance this discussion.

Typical arguments against the death penalty have been made by abolitionists on many levels with the most common being: 1) racial and ethnic discrimination, 2) false confession, 3) eyewitness issues, 4) uneven application of the penalty and 5) issues surrounding DNA evidence (either presence of or lack of). These arguments have been most persuasive, especially within the academic and legal community, yet the public consensus still remains in favor of capital punishment even though the strength of that support has waned in the past two decades, especially when alternatives are suggested. Law enforcement attitudes toward the death penalty typically reflect those of the general population but may also contain a more emotional laden response driven by experience and fraternal loyalty. The Marshall Hypothesis is particularly relevant when not only addressing the public attitude toward the death penalty but that of law enforcement as well.

Justice Thurgood Marshall believed discrimination and execution of the innocent would have more of an effect upon public attitude than arguments concerning deterrence, the retributive nature of the punishment or the moral dimensions of the punishment (Mitchell, 2006). In a U.S. Supreme Court case striking down the death penalty as unconstitutional as then applied Justice Marshall wrote the following in a concurring opinion, “...*the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.*” (Furman v. Georgia, 1972) Marshall’s attack on the death penalty was multi-faceted -- the immoral nature of the punishment, the discriminatory effect, and the expense (Mitchell, 2006). But how much do those arguments resonate with a general public mostly divorced from the stark realities of the criminal justice system much less actual death penalty practice? This is the actual dilemma conveyed within the Marshall Hypothesis.

Similar difficulty lies in presenting this evidence to the rank and file law enforcement officer. Discussion of any of the five factors listed above in support of abolition would not find its most receptive audience within the general ranks of law enforcement. Why this is true goes beyond the reach of this paper and is attributable to norms and attitudes within the law enforcement culture itself. A strong inference can be made that the nature of the above arguments are deemed to be offender-centered, thus less deserving of law enforcement’s attention. This is not to suggest that law enforcement does not care about these issues just that they may not perceive them to be as prevalent as they are or do not acknowledge the flaws inherent within the system of which they are trained to believe they are the foundation. It is likely that the exoneration of multiple incarcerated death row inhabitants has had an effect on public opinion. The downward trend in public support for the death penalty tracks the level of exonerations in the United States. From 1973 to 1991 there were 46 exonerations in the United States; from 1992 to 2010 there were 92 exonerations in the United States, a two-fold increase (Dieter, 1997).

We now see the basis of a cost/benefit analysis to be presented to law enforcement using practical models as discussed in this paper. This analysis can be highlighted in a presentation such as that outlined below where the legal requirement of aggravating factors for death penalty justification grinds the justice process to an expensive crawl in one case. The reality of cost, expediency and economy take on special relevance in a time of attack upon public sector pay, benefits and funding. Public law enforcement has enjoyed decades of growth in manpower and benefit gains only to witness over the past two years massive layoffs, cuts in training and equipment and talks of privatization. Rank and file law enforcement support toward abolition may be at a crucial point wherein examples such as those presented in this paper have the effect of shifting the opinion on a practical if not philosophical level with our nation’s law enforcement professionals. We now turn to a comparison of the two cases to be discussed.

2. *The Fishkill Morey Family Murders*

In the early morning hours of January 18, 2007 something went drastically wrong in the Morey household. The three Morey boys, Antonio, Adam and Ryan, were fast asleep. The parents, Tony and Tina, had been asleep but were awakened. The exact details of what occurred within that home located on Route 82 in the Town of Fishkill will never be known because by sunrise there would be no surviving members of the Morey family left to speak. Firefighters and police at the scene of a 911 call to a house fire would make the gruesome discovery, first of the bodies of the three Morey boys who were later removed from the burned residence and placed on a canvass tarp on the front lawn of the residence. Later that morning the charred remains of the boys’ parents Tony and Tina Morey would be found on top of each other under a living room sofa. They were burned so badly that at first investigators believed they had recovered one burned body and not two. Post-mortem examination and further investigation would reveal that Tony and Tina were each shot with a rifle and then burned beyond recognition in the rear first floor room family room of their small rented Cape Cod home. The youngest Morey boy, Ryan, was found downstairs by the front door, presumably where he ran seeking safety only to be bludgeoned and left for dead before succumbing to smoke inhalation. The oldest Morey boy, Tony Jr., having fought ferociously for his life, suffered 83 assorted stab wounds before being overcome by his assailant. The second Morey boy, Adam, would die unaware of the mayhem which occurred within his home; he was stabbed in the side of the head as he slept. The knife was plunged so hard into him that its tip would cut into his pillow. Investigators discovered a second crime scene when the family car was found on fire in a residential area approximately one mile from the Morey home. This was a crime of horrific proportions immediately passed on from regional news networks to national and international media coverage. A week later two suspects would be in custody for the murders.

Both suspects were friends of Tony and Tina Morey who were operating a low level drug dealing operation from their home. Sadly three innocent children died as a result of the sins of their parents.

3. *The Cheshire Petit Family Murders*

During the early morning hours of July 23, 2007 two career criminals, Steven Hayes and Joshua Komisarjevsky, entered a well maintained colonial style home in the affluent suburb of Cheshire, Connecticut. The Petit family residence located at 300 Sorghum Hill Road was invaded by two burglars who would assault and terrorize the family for hours while committing unspeakable crimes against the female members of the family, Jennifer Hawk-Petit and her two daughters, seventeen year old Hayley and eleven year old Michaela. Upon entering the home the intruders found a middle-aged male, Dr. William Petit, asleep in an enclosed porch to the rear of the home. Dr. Petit was attacked, beaten, tied and dumped unconscious in his basement. For the next several hours Komisarjevsky and Hayes would terrorize the women in the house, bounding and gagging them then leaving them alone while they obtained gasoline from a local gas station. They would return to the house with plastic gas containers and as the night turned into morning devised a plan wherein they would have the mother accompany one of them, Hayes, to her bank while she withdrew \$15,000.00. The other, Komisarjevsky, would remain behind with the two daughters. Mrs. Petit was threatened with harm to her husband and daughters if she did not comply with the intruders' demands. What would occur over the next few hours would be a family tragedy of epic proportions. Once he returned from the bank with Mrs. Petit, Hayes and Komisarjevsky, would burn their female victims alive while Mr. Petit struggled free in the basement and made it out of the house to a neighbor's residence. The Cheshire Police, alerted by the bank of what was occurring there at the time, would then respond to the Petit residence and surround it as the victims lay inside screaming as the fires engulfed them. Hayes and Komisarjevsky would make their attempt to escape in the family car only to be apprehended by police after crashing into a police cruiser few houses away. Jennifer Hawk-Petit, Hayley and Michaela Petit would perish in the fire.

We now move to an analysis of these cases. The following information is provided for comparison between the two towns involved in these cases.

4. *Town Demographics*

	<i><u>Fishkill</u></i> ¹	<i><u>Cheshire</u></i> ²
Area/Size	32 square miles	33 square miles
Population	21,450	28,543
Median Income	\$63,574.00	\$101,306.00
Per capita Income	\$22,662.00	\$33,903.00
Median House Price	\$303,782.00	\$344,000.00
% White	77.19%	89.4%
% Black	14.13%	4.67%
% below poverty level	5.4%	1.6%

The Town of Fishkill is located in Dutchess County, New York approximately 73 miles north of New York City. The Town of Cheshire is located in New Haven County, Connecticut approximately 91 miles north of New York City. Fishkill and Cheshire are 68 miles apart along Interstate 84 travelling west to east respectively. While Cheshire is home to two large state correctional facilities (Cheshire Correctional Institution and Manson Youth Institution) Fishkill is home to two large state correctional facilities (Fishkill Correctional Facility and Downstate Correctional Facility) and a small low to medium security female prison (Camp Beacon Correctional Facility). The Town of Fishkill is a middle to upper middle class area but is not as affluent an area as the Town of Cheshire. Still, Fishkill is considered relatively safe and an extended commuter suburb from New York City which is easily accessible along the Metro-North Commuter Rail line from the Beacon station. Cheshire, close to the academic and medical community within the City of New Haven, enjoys a higher comparative median home income.

¹ Source: www.city-data.com/city/Fishkill-NewYork/html

² Source: Connecticut Economic Resource Center, Inc. <<http://www.cerc.com/TownProfiles/>>

5. Case Timelines

5.1 Town of Fishkill Morey Family Homicides³

January 18, 2007

- Tony, Tina, Antonio, Adam and Ryan Morey murdered in their home and the home burned

January 24, 2007

- suspects Mark Serrano and Charles Gilleo arrested and arraigned

January 31, 2007

- both suspects indicted on 125 felony counts related to the murder of the Morey family

February 13, 2007

- both suspects arraigned on felony indictments in Dutchess County Court

May 15, 2007

- both suspects arraigned on new felony indictments in Dutchess County Court

December 4, 2007

- Mark Serrano convicted after trial of Murder 1st degree

March 2, 2008

- Charles Gilleo convicted after trial of Murder 1st degree

April 1, 2007

- Charles Gilleo sentenced to Life in Prison

April 7, 2008

- Mark Serrano sentenced to Life in Prison

February 23, 2010

- first appeal of both defendants denied by NYS Appellate Division, 2d Dept.

5.2 Town of Cheshire Petit Family Homicides⁴

July 23, 2007

- crime and arrests of suspects Joshua Komisarjevsky and Steven Hayes

July 24, 2007

- arraignment of both suspects

July 26, 2007

- six capital felony counts are filed against Komisarjevsky and Hayes, death penalty notice upon conviction filed with defense

October 30, 2007

- Komisarjevsky pleads not guilty and waives right to evidentiary hearing

November 1, 2007

- Hayes pleads not guilty to twelve counts of capital felony charges

January 19, 2010

- jury selection begins in Hayes trial

September 13, 2010

- Hayes trial begins

October 5, 2010

- Hayes found guilty

November 5, 2010

- penalty phase of trial begins

November 8, 2010

- jury returns verdict of death on all twelve capital felony charges

December 1, 2010

- Hayes sentenced to death

³Source: New York State Police Major Crimes Unit.

⁴Source: Hartford Courant, www.courant.com

March 16, 2011

- Komisarjevsky jury selection begins

May 11, 2011

- Komisarjevsky attorneys seek 3 month delay in selecting juror alternates based on inflammatory remarks of state senator on pending death penalty abolition bill

September 19, 2011

- Komisarjevsky trial begins

October 13, 2011

- Komisarjevsky convicted

December 9, 2011

- Komisarjevsky sentenced to death

January 12, 2012

- Komisarjevsky attorneys file a motion for a new trial based on a September 16, 2011 denial of a motion to change the trial venue from New Haven to Stamford citing a lack of the possibility for a fair trial

6. Capital Case Expense by State – New York and Connecticut Comparison

The New York State Capital Defender Office (CDO) was created by statute with the amendment of Judiciary Law section 35-b(3) pursuant to an Act to institute the death penalty in New York State under Senate bill 2850 and Assembly bill 4843, otherwise known as Chapter 1 of the Laws of 1995. New York's death penalty statute provided for lethal injection as the sole method of execution. The Capital Defender Office was overseen by a three person board of directors that was uncompensated but reimbursed for all reasonable expenses. The composition of the board excluded any attorney who served as a judge, prosecutor or in any law enforcement capacity. One member each was selected by the Chief Judge of the Court of Appeals, the temporary president of the Senate and the Speaker of the Assembly. Under the Act for the Death Penalty – Imposition and Procedures – Assignment of Counsel section 707 of the County Law was amended to provide for payment of expert fees upon the finding of an ex parte proceeding that such expert services are reasonably necessary for the prosecution of the case, whether on issues of guilt, sentencing or investigative services relating to a separate proceeding or mental retardation issues. New York Executive Law section 63-d was also amended to provide for assistance from the Office of the State Attorney General in the prosecution of a death penalty case requested by a local district attorney's office.

The New York Capital Defender Office was funded at 17 million dollars a year. During its ten year existence the office cost taxpayers in excess of 170 million dollars (Capital Defender Office, 2011). This cost is independent of the expense of capital trials carried out by local district attorney offices and any expense incurred by the Attorney General's Office in its Executive Law §63-d role of capital prosecutor assistance. From 1995 to 2004 there were 864 cases formally investigated seeking the death penalty by New York State district attorneys (Capital Defender Office, 2011). Death was precluded against 786 defendants and charges were dropped against 8 defendants (Capital Defender Office, 2011). As of 12/31/04 12 cases were still being evaluated by district attorneys for death penalty prosecution and in 58 cases notice was filed that the death penalty would be sought (Capital Defender Office, 2011). Of those 58 death-noticed cases the following dispositions were reached as of 12/31/04 (Capital Defender Office, 2011):

- 7 defendants sentenced to death by lethal injection after a penalty phase trial – 5 sentences vacated on appeal, 2 appeals pending
- 7 defendants sentenced to life without parole after a penalty phase trial
- 2 defendants accepted pleas to life without parole after guilt phase of trial but before penalty phase
- Death penalty notice withdrawn by the prosecution in 7 cases, 2 other defendants prosecuted non-capitally on First Degree Murder despite death penalty notice not being withdrawn by prosecution
- 1 defendant committed suicide prior to trial
- 24 defendants pled guilty prior to trial receiving sentences vary from 25 to life to life without parole
- 6 cases still were pending as of the last CDO report (post *Lavalle* and NYS Assembly inaction on the death penalty statute these cases would have been disposed as non-capital prosecutions)
- 1 defendant convicted on less than First Degree Murder and 1 defendant sentenced by the trial judge to 115 years to life after jury in penalty phase unable to reach agreement on sentencing.

In its ten year experiment with the death penalty New York State did not execute one sentenced individual; thus, the idea of a death penalty became nothing more than a fiction in New York State. The New York State experience reflected the collective sentiment of which the U.S. Supreme Court has stated over time that “death is different” when referring to the quality of punishment and its attendant procedural safeguards (Woodson v. North Carolina, 1976; Reid v. Covert, 1957).

Unlike the State of New York the State of Connecticut still has the death penalty in place as a punishment for Murder in the First Degree when charged as Capital Murder. The Connecticut death penalty costs amount to four million dollars annually according to a 2009 estimate by the General Assembly’s Office of Fiscal Analysis. While capital cases in Connecticut account for only .055% of the Division of Public Defenders Services caseload the annual cost for the Division to defend capital cases in 2008-2009 was \$2,497,065.00, which was 5.2% of the Division’s budget (Connecticut Division of Public Defender Services, 2009). The cost to house inmates on death row at Northern Correctional Institution is nearly double that of the average annual incarceration rate for non-death row prisoners, a comparable annual expense of \$100,385.00 to \$44,385.00 (State of Connecticut Commission on the Death Penalty, 2003). There are currently ten inmates on death row in Connecticut at an annual total housing cost as calculated by the Connecticut Commission on the Death Penalty to be in excess of \$500,000.00. Cost of the death penalty in the State of Connecticut over the past ten year period (2001-2010), based on the above numbers, amounts to \$40 million for public defender services and over one-half million dollars extra per inmate on death row.

This figure would be in excess of \$6 million over the next decade for those presently sentenced including the assumption that Joshua Komisarjevsky will be convicted and sentenced to death in 2011. The last execution to take place in Connecticut was on May 13, 2005 when self-confessed serial killer Michael Ross was put to death by lethal injection. This death sentence however was only carried out when Ross sought the death penalty and waived all appeals, motions and stays in place. He was a volunteer yet his 2005 execution incurred a \$316,000.00 price tag for the Connecticut Department of Corrections (Office of Fiscal Analysis, 2011). Prior to the Ross execution Connecticut last carried out the death penalty on May 17, 1960 when Joseph L. “Mad Dog” Taborsky was electrocuted. It is unlikely, given the prior forty-five year history until Ross willingly went to the death chamber, Connecticut would have carried out any execution to date without the assistance of Michael Ross. Yet, the State of Connecticut annually budgets upwards of \$5 million a year to keep this form of punishment in place.

6.1 Cost as a Mitigation Argument in the Hayes Sentencing Proceeding

Defense counsel for convicted multiple murderer Steven Hayes initiated an attempt at a novel argument during the punishment phase of the Hayes trial. On October 8, 2010 Public Defender Thomas Ullman served a Notice of Intent to Produce Expert Testimony during the Penalty Phase which included expert testimony relating to the economic comparison of the defendant’s offered plea of guilty versus the carrying out the penalty phase and execution of an individual. This was countered by a motion in limine from the prosecution seeking to exclude any evidence relating to the cost of execution as being irrelevant and improper mitigation evidence. The prosecution’s motion papers further stated that mitigating evidence of cost/benefit analysis was a public policy issue reserved for the legislature. The Connecticut statute is clear as to the grounds for arguing mitigation in a capital case. Section 53a-46a(d) of the Connecticut General Statutes provides as follows:

(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime, pursuant to subsection (b) of this section, the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

Though the rules of evidence are relaxed when presenting a mitigation defense, allowing hearsay evidence in the form of letters of support or letters as to the defendant’s background, the statutory requirement that the mitigating evidence relate to the defendant’s culpability is not minimized.

There is nothing in the statute to suggest that the cost of the death penalty or the fact that it is a drawn out process has any bearing on a jury's consideration during the sentencing phase of a Connecticut capital case. Nor is there a constitutional argument that the defendant was precluded from advancing a proper mitigation factors as argued in *Lockett v. Ohio*. The *Lockett* factors were limited to discretionary consideration of the defendant's prior record, age, lack of specific intent and character of the defendant (*Lockett v. Ohio*, 1978). The nature of the offense Hayes was convicted of, along with the fact he was caught in the act of fleeing the scene and the story received nationwide media coverage, made for a difficult task for his defense counsel to present mitigation evidence. Hayes was a middle-aged man with a lengthy criminal past. Still, the prosecution had the burden of presenting the aggravating factors with the requisite evidentiary exactitude not otherwise required for mitigation. Under Connecticut statute hearsay was not permitted in proving the statutory aggravating factors. The jury would have the final say in sentencing based on the proof of aggravating factors presented by the prosecution. This much is assured by the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) wherein the Court applied its ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to death penalty sentencing thereby disallowing judges to enhance statutory sentences beyond those reached by a jury based on facts determined beyond a reasonable doubt. The prosecution's motion papers sought to keep the sentencing portion of the trial squarely within the boundaries of the Connecticut General Statute and not allow a policy argument to be injected into a legal one.

6.2 Cost as a Policy Argument in Legislative Considerations in New York State

After the New York State Court of Appeals decision in *People v. Lavallo* the Assembly was left with a choice to either repair the defective death penalty statute or let it alone and stand as a judicially terminated criminal sentencing penalty. Rather than allow itself to submit to inaction the New York Legislature convened a series of five public hearings on the death penalty from December 15, 2004 to February 11, 2005. The result was a comprehensive report New York's eight year return to the death penalty. The Assembly Committee weighed its options prior to the public hearing and outlined three choices it confronted after the *Lavallo* decision: i) restore the death penalty; ii) restore the death penalty in a modified form; iii) formally abolish capital punishment in New York without any review of how it had operated since 1995 (NYS Assembly, 2005). But, as the report indicates, a second option was pursued which was a comprehensive examination of the death penalty itself and varying attitudes toward the death penalty in New York.

Testimony during the public hearings typically focused on many of the core issues surrounding the death penalty including the cost of the death penalty. The testimony of experts invited to appear seemingly aligned with their respective roles within the criminal justice system, with law enforcement favoring fixing the death penalty statute and defender services favoring repeal with a few notable exceptions. Robert Morgenthau, then the dean and longest serving among New York State prosecutors, stated that for punishment to be an effective deterrent it must be "prompt and certain" of which the death penalty he noted "is neither." (NYS Assembly, 2005) However, despite Morgenthau's statement against reinstatement Michael Palladino, president of the Detectives Endowment Association for the New York City Police Department, testified to his belief that the death penalty had reduced homicide rates in New York City from its previous highs in the 1970's, through the 1980's and into the first part of the 1990's (NYS Assembly, 2005). While his testimony was more anecdotal, based on nothing beyond personal experience and conjecture, he overlooked any contribution made by the officers he represented as a union official. His testimony was significant in this regard since he likely promoted a popular sentiment among his membership without, self admittedly, any statistical correlation to crime reduction other than the declining murder rates. His testimony stood in sharp contrast to that of Professor Jeffrey Fagan, Columbia University, whose research over three decades on the study on capital punishment led him to discuss the false proposition that the death penalty acts as a deterrent. Professor Fagan cited a dozen studies claiming the death penalty acts as a deterrent which he claimed possess "serious scientific flaws." (NYS Assembly, 2005)

Law enforcement testimony emerged from diverse segments of the profession with support for and opposition to the death penalty dividing the opinion. Opposition came mainly from groups representing minority officers, such as the National Latino Officers Association, the National Black Officers Association, and the NYS Correction and Law Enforcement Officers Guardians Association, with objections resting on factors such as faith and disparate application. Those in favor cited the necessity of the death penalty for officer safety purposes. Yet, nowhere in the report were any costs cited relative to the impact on policing with the lone exception of the comments of Sean Byrne, NY Prosecutor's Training Institute, who pointed to an overlooked element of the 1995 law.

Byrne, a pro-death penalty witness, as he addressed costs, claimed that funding for police agencies “that have to handle massive workload increases in capital cases” was not factored into the budget (NYS Assembly, 2005). Though funding was provided for defense services at the state level local municipal budgets were left to account for police services in pursuit of a capital prosecution. There is no data in New York to compare the added costs of police services among those agencies dealing with capital investigations but Byrne’s observation raises another funding issue in capital cases.

When it came to testimony regarding the cost of the death penalty the results were more one-sided with a panel of expert witnesses and practitioners citing the high the economic cost to sustain the death penalty in New York and other states. This common ground was shared by prosecutors, defense counsel and victim family members. Many who testified on this subject pointed to the enhanced law enforcement, safety and victim initiatives that could be implemented with the resources attributed to capital punishment. Noticeably absent in the report were the comments of police associations on this topic.

7. Conclusion

There are two studies completed by the Death Penalty Information Center (DPIC) which look at the attitudes and opinions of law enforcement toward capital punishment. These studies cited in an earlier footnote, focus on the views and attitudes of ranking law enforcement officials on the subject. There is no reliable study of the private attitudes and views of front-line officers regarding the death penalty in the United States. It is generally assumed, considering prior research on the police sub-culture, most front-line officers support the death penalty (Skolnick, 1994). This may well be the actual state of officer opinion. However, it is wrong not to pursue officer opinion on the issue of abolition. The physician’s creed of “first do no harm” should similarly have its corollary within the law enforcement profession. Practitioners within the criminal justice system have a deep ethical and moral obligation to their sworn duties. The imperfections of the criminal justice system, of which any practitioner is well aware, cannot ethically support a punitive sanction which requires the ultimate infallibility. Law enforcement professionals are ethical, duty committed individuals who now more closely resemble the communities they patrol. The discussion surrounding the death penalty debate in the United States has largely left law enforcement on the sideline with guest appearances when politically expedient.

On the part of law enforcement there has often been blind devotion to the politics of the debate rather than the more justiciable and pragmatic aspects of the debate. This reflects the problem as expressed by the American Bar Association in its 1997 call for a moratorium on the death penalty (Harris, 1997). Part of the rationale for this, aside from the ingrained culture of the profession, is the perception that anti-death penalty arguments emanate from offender-centered concerns. A natural resistance is met. However, law enforcement finds itself embroiled in a new political debate over public employee pay, benefits and pensions in which they are standing opposite many politicians who rely on their support for pro-death penalty arguments. If ever there was a time to raise the cost/benefit analysis as an argument for law enforcement support of a nationwide repeal of the death penalty it is the present. Equally persuasive is the 2009 decision of the American Law Institute (ALI) to withdraw the death penalty provisions of the Model Penal Code. The ALI position was that its actions were necessary “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system of administering capital punishment.” (American Law Institute, 2009) It is our position that by reaching out to line officers and their representative bodies with practical case studies such as that highlighted in this paper the death penalty discussions with law enforcement in the United States can thus be enhanced.

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