

*PEOPLE V. CAHILL: DOMESTIC VIOLENCE AND THE
DEATH PENALTY DEBATE IN NEW YORK*

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INTRODUCTION

For much of its history, New York has been a death penalty state. In 1995, after much controversy, and with great fanfare, Governor Pataki signed a new capital punishment statute, New York Penal Law section 125.27.¹ This law and related statutes manifested a community commitment to capital punishment, a belief in its efficiency as a criminal justice tool, and an expression of democratic majoritarian will that it be carried out. Recently, several trial courts imposed the death penalty pursuant to this statute.

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¹ N.Y. PENAL LAW §125.27 became law when Governor Pataki signed the bill (N.Y.S. 2850, N.Y.A. 4843, 218th Sess. (1995)). On March 7, 1995, he observed:

The citizens of New York have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. The citizens of New York State are convinced the death penalty will deter these vicious crimes and I, as the Governor, agree. The legislation I approve today will be the most effective of its kind in the nation This law significantly buttresses the twin pillars of an effective criminal justice system—deterrence and true justice for those convicted of violent crimes. For too many years, too many New Yorkers have lived in fear of crime.

This . . . [law] alone won't stop crime but it is an important step in the right direction.

Governor's Memorandum on Approval of ch. 1, N.Y. Laws (Mar. 7, 1995), *reprinted in* [1995] N.Y. LEGIS. ANN. 23.

However, the New York Court of Appeals reversed the convictions and set aside the death sentences in each one of these cases.² And, in June 2004, in *People v. LaValle*,³ the Court declared the “deadlock instruction” provision of the New York death penalty statute unconstitutional and enjoined imposition of the death penalty in the state. No one has ever been executed under section 125.27.

One of the Court’s decisions, *People v. Cahill*, illustrates significant deficiencies in New York death penalty jurisprudence, deficiencies that raise issues about death penalty statutes in many other states.⁴ The New York Court of Appeals decision in *Cahill* allowed a ruthless, calculating, and cold blooded killer to escape the death sentence on facts that most New York citizens, whether death penalty proponents or opponents, would find required the criminal law’s ultimate punishment. In a state that relatively recently, and in great detail, statutorily recommitted itself to the death penalty, the result in *Cahill* illustrates serious shortcomings in New York Penal Law section 125.27 that should be remedied if and when the death penalty is reinstated.

Parts I and II of this article set forth the facts of *Cahill*, summarize the Court of Appeals’ decision reversing James (“Jeff”) Cahill’s first degree murder conviction, and explain the bases for setting aside his death sentence. Part III proposes four new or modified categories of death penalty-eligible offenses covering: (1) deliberate and premeditated murder based on careful reflection and planning; (2) the intentional killing of incapacitated or vulnerable victims; (3) any intentional killing committed during the commission of serious burglaries without regard to the underlying crime supporting the burglary charge; and (4) domestic violence murder. Part IV examines the debate generated by the Court of Appeals’ ruling in *LaValle* on whether capital punishment should be restored in New York.⁵ The article concludes by urging that any

² See *People v. Mateo*, 811 N.E.2d 1053, 1060 (N.Y. 2004); *People v. Cahill*, 809 N.E.2d 561, 567 (N.Y. 2003); *People v. Harris*, 779 N.E.2d 705, 711 (N.Y. 2002).

³ 817 N.E.2d 341, 359 n.15 (N.Y. 2004).

⁴ States that are firmly committed to the death penalty may wish to consider expanding their statutes to include any or all of the types of murders covered by the proposals in this article. The proposals may also be considered as additions to first degree murder statutes that do not impose the death penalty. The critical point of this article is that the categories of first degree murder presented in it apply to any killing that merits the most severe punishment under state law based on the nature of the killing involved, the blameworthiness of the killer, and the present and future threat posed to society.

⁵ In December 2004 and January 2005, public hearings were held in New York City and Albany, New York, on whether the death penalty should be reinstated and, if so, in what

form. Press Release, N.Y. State Assembly, Silver Announces Death Penalty Hearings (Nov. 23, 2004), at <http://assembly.state.ny.us/Press/20041123>. No such hearings were held prior to enactment of the 1995 death penalty statute and “there were no other opportunities for public review or comment.” James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation*, 17 PACE L. REV. 41, 47 (1996) (providing comprehensive review of historic, substantive, and procedural provisions of the 1995 statute). The 2004–05 hearings generated such significant (and unanticipated) interest that additional hearing days in both New York City and Albany were required to accommodate the number of witnesses wishing to testify. The questions raised were:

Select Questions to Which Witnesses May Direct their Testimony:

I. Should the Death Penalty be Reinstated in New York?

1. Is it possible to design a death penalty law which is fairly administered and consistently applied, free from impermissible racial, ethnic, or geographic bias and prevents the conviction of the innocent?
2. Is the death penalty an appropriate societal exercise of retribution against persons who commit intentional murder?
3. What evidence is there that New York’s death penalty or the death penalty in general, deters intentional murder more effectively than other sentencing options?
4. Are the results which New York has achieved over the past nine years in administering the death penalty worth the significant public resources which have been expended? Could those resources have been used more effectively for other crime control or public purposes?
5. Is the currently available sentence of life imprisonment without the possibility of parole an effective alternative to the death penalty in New York? Or is it imperative that this current sentencing option be supplemented with the death penalty?
6. What do the trends and experiences of other states and nations which have considered or implemented the death penalty or life imprisonment without parole teach us about whether capital punishment should be reinstated in New York?

II. If the Death Penalty in New York Were Reinstated, What Should It Provide for?

1. Did the 1995 statute provide appropriate safeguards to ensure that innocent persons would not be convicted and subject to the death penalty in New York? If not, what additional safeguards would be needed to meet that goal?
2. Have the close family members and loved ones of deceased murder victims been given appropriate input and involvement in decisions about seeking the death penalty and in the death penalty process under the 1995 law? How could the role of these family members and loved ones be improved?
3. Did the 1995 statute provide appropriate protections against convictions and the imposition of the death penalty by virtue of bias applicable to the race or ethnicity of death penalty defendants or murder victims? If not, what additional steps would be necessary to achieve the goal?
4. As noted above, New York’s death penalty law, as amended, provided a death penalty option for thirteen kinds of intentional murder. Should those categories be expanded, contracted or otherwise modified if the death penalty is reinstated?
5. New York’s law provided a system of capital defense through a Capital Defender Office and contracts with other institutional defenders and private attorneys. Has this system worked effectively? How might it be improved?
6. Under New York’s death penalty law, prosecutors were given unfettered discretion to seek or not seek the death penalty in any first degree murder case. Is such unlimited discretion appropriate? Did this system of prosecutorial discretion work effectively and fairly?
7. Three death sentences imposed under the 1995 law came from Suffolk County with one each coming from Kings, Queens, Onondaga, and Monroe counties. The chances that a defendant would be subject to a death penalty prosecution in New York over the past nine years varied widely, depending upon the county in which a defendant’s crime

new death penalty statute be revised to include at least one of the proposals contained in Part III of the article.

The people of New York, through their elected representatives, must, once again, make a choice on capital punishment. Recent Court of Appeals' decisions in death penalty cases leave New York without a workable death penalty law. Any legislative effort to

occurred. Is this a permissible result in a death penalty system? Should the imposition of the death penalty vary, depending upon the county in which a defendant is prosecuted?

8. Has the state provided sufficient financial resources to law enforcement, victims' services, defense providers and the judicial system to administer the death penalty over the past nine years? What changes in state funding for administering the death penalty could be considered?

9. What do the experiences of other states with death penalty laws and the federal government teach us about how any death penalty statute should be structured in this state?

10. What changes in evidentiary rules or the appellate process might be considered if the 1995 law were reinstated?

11. On August 11th [2004], the Senate passed Governor's program legislation which seeks to remedy the unconstitutional jury deadlock instruction identified by the Court of Appeals in the *LaValle* decision (S. 7720). The bill would seek not only to reinstate the death penalty for future cases, but would also purport to retroactively apply the new statute, both to crimes which occurred prior to the *LaValle* decision and crimes which occurred subsequent to *LaValle* but prior to the law's enactment, during a time period when no valid death penalty law was in effect in New York. The bill's retroactive provisions have been criticized as being violative of the *Ex Post Facto* clause of the United States Constitution and therefore invalid, particularly with respect to cases occurring subsequent to *LaValle*.

(a) Should the prospective provisions of S-7720, which seek to reinstate the death penalty be adopted without any further modifications to the statute?

(b) Are the retroactive provisions of S-7720 which seek to reinstate the death penalty with respect to prior crimes constitutionally valid? Should these provisions be adopted?

12. The 1995 statute generally barred the execution of mentally retarded persons but contained an exception for the first degree murder of a corrections officer committed by a prison or jail inmate. The United States Supreme Court, in its 2002 decision in *Atkins v. Virginia*, barred the execution of mentally retarded persons. How does the *Atkins* holding impact the 1995 law's limited provisions authorizing the execution of mentally retarded persons?

13. The 1995 statute contained extensive provisions related to a jury's consideration of a defendant's possible mental impairment when determining whether the death penalty should be imposed. How well did these provisions operate? Would these provisions need to be revised if the death penalty in New York were reinstated?

14. The 1995 law set eighteen as the minimum age for the imposition of the death penalty. Should that minimum age be modified if the death penalty is reinstated?

15. The 1995 law contained provisions for disqualifying jurors from death penalty guilt and penalty phase proceedings who harbored opinions for or against the death penalty which would preclude them from rendering an impartial verdict or exercising their discretion to determine an appropriate sentence. Has this provision, as it has been interpreted by New York's courts, been applied fairly and appropriately? Should this provision be modified in the event the death penalty is reinstated?

16. The 1995 statute established procedures for housing death sentenced inmates and carrying out death sentences. The State Department of Correctional Services has also implemented a number of policies in administering the 1995 law. Should any of these laws or policies be changed, in the event death penalty is reinstated?

revise the law must include “reforms” of death-eligible categories of murder that will make the statute meaningful, effective, and just.

I. THE MURDER OF JILL RUSSELL CAHILL

Early in the morning of April 21, 1998, during a heated argument, Jeff Cahill hit his wife, Jill Russell Cahill, in the head with a baseball bat.⁶ At least four blows were inflicted. To this day, no one knows the reasons underlying this confrontation.

There were marital problems and a separation agreement had been signed, even though the couple continued to live in their marital home. The assault occurred in the presence of the Cahills’ two young children. At some point, Jill Cahill cried out for their assistance because their “father was trying to kill her.”⁷

After the attack, rather than immediately calling for medical assistance, Jeff called his parents. Only after the arrival at the scene of Jeff’s parents, brother, and a family friend, who happened to be a doctor, were the police summoned. They found the victim “covered in blood, writhing in pain and moaning incoherently.”⁸

Defendant initially lied to the police about his actions. He claimed that Jill had attacked him with a knife and that he had struck back with the bat in self defense. As evidence, he pointed to “cuts and scratches on his body.”⁹ Jeff Cahill later confessed that he had attacked his wife while she was unarmed and that his wounds were self-inflicted.¹⁰

In June 1998, Jeff Cahill was indicted for first degree assault and criminal possession of a weapon. Regrettably, he was released on cash bail after answering to the charges. An Onondaga County Family Court then placed the Cahill children in the custody of their maternal grandparents and issued a protective order prohibiting Jeff from having any contact with his children. It also barred him from entering University Hospital in Syracuse, New York, where his wife was fighting to recover from his attack.¹¹

Jill Cahill’s struggle was a Herculean one. From initial emergency surgery to remove a blood clot from her brain, to subsequent procedures to reduce brain swelling and fight life-

⁶ The blows were so severe that Jill Cahill’s left temple was indented. *Cahill*, 809 N.E.2d at 567.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 567–68.

threatening infections, Jill held on to life. “By October of 1998—six months after the assault—Jill was able to recall the names of her children and had regained some ability to speak”¹² However, unknown to her or her family, Jeff Cahill was plotting the murder of his wife.

In July 1998, using forged documents, Jeff Cahill purchased, from Bryant Laboratories of Berkeley California, a quantity of potassium cyanide for General Super Plating, an East Syracuse business. Jeff Cahill then intercepted the delivery of the cyanide before it was dropped off at General Super Plating and convinced the delivery driver to give him the poison.¹³

Between July and October, Jeff Cahill “cased” out University Hospital and obtained a fake hospital identification card, a wig, glasses, and a uniform resembling one worn by hospital maintenance workers. About a week before he killed his wife, Jeff was seen in Jill’s hospital room disguised as a janitor. A nurse’s assistant questioned Jeff about his presence and he responded that he “just came down to say hi to Jill”¹⁴

On October 27, 1998, after regular visiting hours, Jeff Cahill again snuck into the hospital wearing the wig, fake glasses, maintenance worker clothes—he even carried a mop—and reentered Jill’s room. He then poisoned Jill Russell Cahill by forcing the stolen potassium cyanide down her throat “through her mouth or feeding tube.”¹⁵ A nurse found her at 10:00 p.m.; she was dead by the next morning.¹⁶

Jeff Cahill’s charges were consequently expanded to include an indictment for two counts of first degree murder pursuant to New York Penal Law sections 125.27(1)(a)(v) and (vii).¹⁷ The jury found him guilty of these and other charges and, in the penalty phase of the case, imposed a sentence of death on both counts.¹⁸

¹² *Id.* at 568.

¹³ *Id.*

¹⁴ *Id.* at 568 n.1.

¹⁵ *Id.* at 568.

¹⁶ *Id.*

¹⁷ *Id.* at 569. N.Y. PENAL LAW § 125.27 (McKinney 2004) provides in part that:

A person is guilty of murder in the first degree when: 1. [w]ith the intent to cause the death of another person, he causes the death of such person or of a third person; and (a) Either . . . (v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim’s testimony in any criminal action or proceeding . . . ; or . . . (vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of . . . burglary in the first degree or second degree

Id.

¹⁸ *Cahill*, 809 N.E.2d at 567.

II. THE NEW YORK COURT OF APPEALS DECISION IN *PEOPLE V. CAHILL*

Under the New York Constitution, the New York Court of Appeals is required to review cases in which the death penalty has been imposed.¹⁹ In such cases the Court acts as a “thirteenth juror” and makes an independent review of the facts.²⁰ The Court must determine whether the weight and credibility of the evidence is sufficient to convict the defendant beyond a reasonable doubt.²¹ No special deference to the jury’s decision is due in this process. However, this weight of the evidence review is made only if the evidence is legally sufficient to support the conviction in that admissible evidence was presented at trial on each essential element of the crime charged.²²

In *People v. Cahill*, the Court of Appeals made these analyses with regard to two separate first degree murder convictions. In 1998, New York law recognized twelve categories of intentional killings that supported a first degree murder charge and made the accused eligible for the death penalty.²³ In general, these categories involved killing a police officer, peace officer, correctional employee or a judge; repeat murders; multiple victim killings; killing by “lifetermers” in prison or after escape; contract killings; torture; and the two specific categories relied upon to charge Jeff Cahill with the murder of this wife—witness elimination and killings during the commission of dangerous felonies specifically listed in the statute (including burglary).²⁴

First, Jeff Cahill was convicted of “witness elimination” murder under Penal Law section 125.27(1)(a)(v). This section applies when the victim was a witness to a crime and the killing is done for the purpose of preventing the victim’s testimony at trial.²⁵ The prosecution’s theory, accepted by the jury in *Cahill*, was that Jeff Cahill had learned of his wife’s improving health and killed her to keep her from appearing at his assault and weapon trial.²⁶

Jeff Cahill was also convicted of committing intentional murder

¹⁹ N.Y. CONST. art. VI, § 3(b); *see also* *People v. Davis*, 371 N.E.2d 456, 466 (N.Y. 1977) (stating that in cases where the death penalty has been imposed, the Court “is vested with the power to and must review the facts.”).

²⁰ *Cahill*, 809 N.E.2d at 584; *see also* *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

²¹ *People v. Bleakley*, 508 N.E.2d 672, 674 (N.Y. 1987).

²² *People v. Crum*, 6 N.E.2d 51, 51 (N.Y. 1936).

²³ N.Y. PENAL LAW § 125.27 (1)(a) (i)-(xiii) (McKinney 2004).

²⁴ § 125.27(1).

²⁵ § 125.27(1)(a)(v).

²⁶ *Cahill*, 809 N.E.2d at 585.

during the course of committing, and in furtherance of, a serious felony, burglary in the second degree, as proscribed by Penal Law section 125.27(1)(a)(vii). Here, the prosecution successfully argued that the unlawful entry of Jill's hospital room with the intent to kill her was burglary, and that Jill was murdered in pursuance of that crime.²⁷

The Court of Appeals reversed both of these convictions, reduced the crime to second degree murder, set aside the death sentence, and returned the case to the trial court for re-sentencing.²⁸ On the witness elimination count, the Court determined that the statutory words "for the purpose of", in relation to the prevention of trial testimony, did not apply to a case in which witness elimination was an "insubstantial or incidental" motive.²⁹ It did not require that the defendant's sole purpose be the prevention of testimony; it would apply only if witness elimination was a "substantial reason" or "substantial factor" in a murder.³⁰

Applying this standard in a "weight of the evidence" review, a majority of the Court of Appeals found that Jeff Cahill's primary reason for killing his wife was that his "marriage and family life were being destroyed."³¹ The prosecution's time line theory linking the murder to Jeff Cahill's fear that a recovering Jill Cahill would testify against him in the assault and weapon trial was emphatically rejected. To the contrary, the evidence was found to show that Jeff Cahill obtained the poison that killed his wife long before she could effectively communicate.³² Evidence of the defendant's mother's knowledge of Jill's improving condition in October was inconclusive. Additionally, Jeff Cahill's confession to the assault was buttressed by strong corroborative evidence.³³

The reaction to this part of the reversal by the dissent, prosecutors, family members, and legislators was intensely negative. The dissent argued that the Court majority had substituted its judgment of the facts for that of the jury's and allowed its anti-death penalty bias to drive its conclusions.³⁴

²⁷ *Id.* at 593.

²⁸ *Id.* at 594.

²⁹ *Id.* at 583.

³⁰ *Id.*

³¹ *Id.* at 584–85.

³² *Id.* at 585.

³³ *Id.* at 586–87.

³⁴ *Id.* at 584. See Sean Kirst, *State Court Can't Overturn Two Cahill Jurors' Consciences*, THE POST STANDARD, Jan. 19, 2004, at B1 (citing Juror Nina LaFontaine as saying that "the abrupt change in [Jeff Cahill's] fate leaves her feeling betrayed" and questioning why we "ask 12 everyday citizens to make such a brutal decision . . . if the courts in the end will refuse to

Nonetheless, the constitutional mandate that the Court sit as a thirteenth juror, combined with the thinness of the facts and the Court's common sense construction of the "for the purpose of" language of the statute, suggest that it correctly decided this part of the appeal.

The second basis for finding Jeff Cahill guilty of first degree murder involved Penal Law section 127.27(1)(a)(vii), which punishes as first degree capital murder any intentional killing of the victim "in the course of committing . . . and in furtherance of . . . burglary in the . . . second degree."³⁵ The issue for the Court was whether Jeff Cahill's burglary of his wife's hospital room qualified as an aggravating factor justifying a death sentence on the facts of the case. The Court held that it did not.³⁶

The essential requirement for burglary in New York is that the accused have the intent to commit a "separate crime" when unlawfully entering or remaining in a dwelling or building.³⁷ Putting aside the questions of whether Jeff Cahill entered his wife's hospital room "unlawfully," and whether that room was a "dwelling" or "structure" for purposes of burglary, the Court focused exclusively on the predicate crime relied on in the case to establish burglary—murder based on Jeff Cahill's intent to kill his wife.³⁸

Because the prosecution used the same intent—intent to kill—to support both the burglary and murder charges ("the prosecution employs the identical mens rea to both define burglary and to elevate defendant's intentional murder to murder in the first degree"³⁹), the Court found an artificial, circular, and ultimately unlawful use of the first degree murder statute.

In keeping with controlling United States Supreme Court case law,⁴⁰ the aggravating factors set forth in Penal Law section 125.27 were designed to target a narrow range of murderers whose intentional killings were so heinous, outrageous, and socially destructive that only the death penalty would be an appropriate and just punishment. According to the Court of Appeals, the use of Jeff Cahill's intent to kill to prove burglary, while legally sufficient for that purpose, failed to establish the burglary as an independent

support it?").

³⁵ N.Y. PENAL LAW § 127.27(1)(a)(vii).

³⁶ *Cahill*, 809 N.E.2d at 589.

³⁷ *Id.* at 588 (citing *People v. Gaines*, 546 N.E.2d 913, 914 (N.Y. 1989)); N.Y. PENAL LAW § 140.25 (1)(b) (McKinney 1999).

³⁸ *Cahill*, 809 N.E.2d at 589.

³⁹ *Id.*

⁴⁰ *See infra* note 49 and accompanying text.

aggravating circumstance for purposes of a murder charge. “A candidate for first degree murder is the burglar who [intends]. . . to steal or rob or rape and *in addition* kills someone intentionally.”⁴¹ Such was not the case with Jeff Cahill. Because “the capital murder statute contemplates a felonious intent independent of the murder itself,”⁴² there was no legally sufficient basis for the jury to find Jeff Cahill guilty of first degree murder. “If the burglar intends only murder, that intent cannot be used both to define the burglary and at the same time bootstrap the second degree (intentional) murder to a capital crime. To do so would not narrow the class of those eligible for the death penalty”⁴³ In other words, according to the prosecution, Jeff Cahill had been prosecuted for “a crime that didn’t exist” in New York.

Jeff Cahill’s capital murder convictions were thus reversed, a simple count of murder in the second degree was entered by the Court, and the case was remitted to the trial court for resentencing. In January 2004, Jeff Cahill was sentenced to 12 ½ to 25 years for his assault with the baseball bat and 25 years to life on the murder count.⁴⁴ Judge Aloï labeled Cahill a “coward” who deserved “no mercy” whatsoever and ordered the sentences to be served consecutively.⁴⁵

III. PROPOSED REFORMS IN THE NEW YORK DEATH PENALTY STATUTE

The most pointed criticism of the Court of Appeals decision in *People v. Cahill* is that an anti-death penalty majority of the Court misconstrued Penal Law section 125.27 and imposed their own personal anti-capital punishment views. Whether correct—and fair and appropriate—or not, *Cahill* and other recent death penalty cases decided by the Court require legislative action. This section proposes four specific changes to Penal Law section 125.27 designed to carry out its legislative purpose, reaffirm the commitment of the people of New York to the death penalty, and establish a meaningful and effective capital punishment law in the state.⁴⁶

⁴¹ *Cahill*, 809 N.E.2d at 588.

⁴² *Id.* at 589.

⁴³ *Id.*

⁴⁴ Jim O’Hara, *Mom: Hearing Cahill’s Name “Sickens Us”; His Sentence: 37 ½ Years to Life*, POST-STANDARD, Jan. 15, 2004, at A1; see also *Cahill Resentenced*, News 10 Now, Jan. 14, 2004, available at http://news10now.com/content/all_news/central_new_york/?SecID=86&ArID=6776 (last visited May 30, 2005) [hereinafter *Cahill Resentenced*].

⁴⁵ See *Cahill Resentenced*, *supra* note 44.

⁴⁶ The proposed categories set forth in Parts III A., B., and D. share a common emphasis on

These proposals could apply to, and should be considered by, other states that impose the death penalty.

A. *Deliberate and Premeditated Intentional Killings*

For decades, a primary basis for imposing the death penalty in New York was the presence of an intentional, deliberate, and premeditated murder.⁴⁷ The omission of this basis from the 1995 capital punishment statute is not fully explainable, but it is difficult to conceive of a more compelling first degree deliberation and premeditation capital case than that presented in *Cahill*. In fact, the unavailability of premeditation and deliberation as a charging category explains why the prosecution in *Cahill* based its first-degree murder case on the witness elimination and burglary provisions of Penal Law section 125.27. These provisions, while arguably relevant, did not apply to what Jeff Cahill did in killing his wife as precisely as traditional deliberate premeditated murder.

Any changes to section 125.27 must satisfy the United States Supreme Court's standards for death penalty categories.⁴⁸ In the

particular types of intentional killings. As such, they are strongly supported by the deterrence justification for capital punishment. Each necessarily involves a thoughtful and purposeful process of decision-making in which the risks and consequences of the decision to kill may be weighed and balanced. Therefore, the threat of capital punishment presented by these categories has the potential to prevent murders that might otherwise occur in their absence.

⁴⁷ See James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 518 (1990); see also *id.* at 525 (citing 1965 N.Y. Laws, ch. 321, sec. 1, § 1045(4) (limiting the class of offenses that warrant the death penalty to "deliberate and premeditated" killings of peace officers, and situations where the offender is serving a life sentence).

⁴⁸ In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Court described basic constitutional requirements as follows:

Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder. (If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm). Second, the aggravating circumstance may not be unconstitutionally vague. We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. 'What is important at the selection stage is an *individualized* determination on the basis of the

most general sense, categories based on statutory aggravating circumstances are designed to narrow the class of murderers eligible for the death penalty to those that are the “worst-of-the-worst.” The requirements are that aggravating circumstances cannot apply to every defendant convicted of murder, must control and guide the jury’s discretion so as to avoid discriminatory sentencing, and must not be unconstitutionally vague.⁴⁹ So long as an aggravating circumstance category is specific and narrowing, it is likely to withstand constitutional challenge. In *Arave v. Creech*, the Supreme Court upheld an aggravating circumstance, “utter disregard for human life,”⁵⁰ because it had been judicially interpreted to apply to “the cold-blooded, pitiless slayer.”⁵¹

With these constitutional guidelines in mind, New York Penal Law section 125.27 should be amended to add the following as section (1)(a)(xiv):

(1)(a)(xiv) the killing results from a deliberate and premeditated design to effect the death of the person killed. As used in this subparagraph, “deliberate and premeditated design” means that the defendant engaged in a process of calm and careful reflection and planning, over a substantial period of time, prior to the killing sufficient to permit the jury to conclude that the defendant is a cold-blooded killer.⁵²

This proposal builds on New York’s long history of punishing first degree premeditated murder as a capital crime. However, it offers a more refined, precise, and detailed standard similar to that adopted in other states. For example, Florida, an aggressive death penalty jurisdiction, recognizes as an aggravating circumstance that a homicide was committed “in a cold, calculated and premeditated

character of the individual and the circumstances of the crime.’ That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

Id. at 971–73.

⁴⁹ See *Gregg v. Georgia*, 428 U.S. 153, 195 & n.46, 198, 200 (1976); *Walton v. Arizona*, 497 U.S. 639, 654 (1990); *Arave*, 507 U.S. at 474 ; see also *People v. Couser*, 674 N.Y.S.2d 887, 888 (Onondaga County Ct. 1998) (holding that aggravating circumstances must “generally narrow[] the class of persons eligible for the death penalty” and limit discretion of sentence “so as to minimize the risk of wholly arbitrary and capricious action”).

⁵⁰ 507 U.S. at 468; see also IDAHO CODE § 19–2515(9)(f) (Michie 2004) (stating that “[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.”).

⁵¹ *Arave*, 507 U.S. at 468.

⁵² This proposed subsection is based on the language of the deliberately premeditated murder crime that prevailed in New York up until 1965, the policy concerns of the Supreme Court with regard to specificity and narrowing, and the goal of targeting only the worst killers for the death penalty.

manner” pursuant to a preconceived plan, scheme, or design to take a human life.⁵³ Arkansas requires a “premeditated and deliberate purpose,” while Idaho makes a capital offense of any “murder . . . perpetuated by any kind of willful, deliberate and premeditated killing.”⁵⁴ Delaware’s death penalty statute, like Florida’s, is particularly instructive. It imposes capital punishment on a convicted first degree murderer who kills as a result of premeditation and “substantial planning . . . as to the commission of the murder itself and not simply as to the commission . . . of any underlying felony.”⁵⁵

The importance of a premeditation and deliberation category to a case like *Cahill* is obvious. Jeff Cahill’s six month plan to enter his wife’s hospital room and poison her, after savagely beating her in the head with a baseball bat, manifested such a level of cold-blooded disrespect for human life that only the death penalty would be a proportionate and proper penalty in a state committed to capital punishment. New York law was, and is, incomplete, unbalanced, and flawed without a provision accurately covering Jeff Cahill’s crime.

The provision proposed in this section meets the specificity, selectivity, and narrowness requirements of Supreme Court case law. Of equal importance, it is consistent with the will of the people of New York, expressed at the time in Penal Law section 125.27, that killers like Jeff Cahill—“the worst-of-the-worst”—be punished by the criminal law’s most extreme penalty.

B. Incapacitated Victims

The horror and shock of Jill Russell Cahill’s murder resulted in part because of her complete vulnerability. Despite her remarkable recovery, at the time of her death she was powerless to resist the actions of a strong and healthy man committed to killing her. Some states recognize that the status of the victim— elderly, mentally

⁵³ FLA. STAT. ANN. § 921.141(5)(i) (West 2001); *see also id.* § 782.04(1)(a)(1) (West 2000).

⁵⁴ ARK. CODE ANN. § 5-10-101(a)(4) (Michie Supp. 2003); IDAHO CODE §§ 18-4003, 18-4004 (Michie 2004).

⁵⁵ DEL. CODE ANN. tit. 11 § 4209(e)(u) (Supp. 2004). It is also noteworthy that the federal death penalty may be imposed for a deliberate and planned killing. *See* 18 U.S.C. § 3591 (a)(2)(A) (2000) (providing that an intentional killing is eligible for the death penalty if an aggravating circumstance listed in § 3592(c) is established); *id.* § 3592(c)(9) (recognizing “substantial planning and premeditation” as such a circumstance). *See generally* U.S. DEPT OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), *available at* <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

impaired, handicapped, infirm, disabled or incapacitated—justifies a separate category of aggravating circumstance for capital punishment purposes. Penal Law section 125.27 should be amended to add the following section:

(1)(a)(xv) the victim was especially vulnerable because of significant mental or physical disability and the defendant knew or should have known of the disability. For purposes of this section “disability” shall include mental or physical impairment, caused by disease, age, injury, functional disorder or congenital conditions; “impairment” shall mean that the victim was substantially limited in performing major life activities, or was incapable of adequately providing for his or her own health or personal care; and “vulnerable” shall mean that the victim was mentally or physically unable to take reasonable action in self-defense.⁵⁶

States that punish these types of killings as first degree capital murder find aggravating circumstances in the extreme abuse involved in the intentional killing of a helpless victim.⁵⁷ New York has applied the death penalty to intentional killings that represent especially severe social threats based on the status of the victim (i.e., murders of public officials and police officers) or the manner in which the killing is done (particularly cruel slayings by torture).⁵⁸ A death penalty category protecting the vulnerable, incapacitated, and defenseless victim is consistent with these policies. Such a provision would have facilitated the prosecution of Jeff Cahill and more accurately punished his actions in killing his wife.

C. Murder During the Commission of Burglary

A most controversial ruling in *People v. Cahill* was the majority’s determination that burglary could not be used as a predicate crime for first degree capital murder when the defendant’s sole intent in committing the burglary was to kill the victim in the burglarized premises. This gap in New York law can be easily remedied by legislative reaffirmation of the basic purposes of Penal Law section 125.27(1)(a)(vii).

This section currently punishes intentional murders in which:

⁵⁶ See, e.g., DEL. CODE ANN. tit. 11, § 4209(e)(p) (Supp. 2004); *id.* tit. 19, § 722(3)-(4) (1995); FLA. STAT. ANN. § 782.04(1)(a)(2)(i) (Supp. 2005); WYO. STAT. ANN. §§ 6-2-102(h)(x), 9-2-109(a)(iii) (Michie 2003) (stating “defendant knew or reasonably should have known the victim was especially vulnerable due to significant mental or physical disability.”).

⁵⁷ See *id.*

⁵⁸ N.Y. PENAL LAW §§ 125.27(1)(a)(i), (x), (xii) & (xiii) (McKinney 2004).

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree⁵⁹

As limited by the Court of Appeals, this section no longer covers a category of dangerous criminal activity—killings during the commission of burglary in the first or second degree—that the legislature found presented dangers to society exceeding those present in traditional second degree intentional murder. The presence of a burglary as a technically separate crime makes the defendant more dangerous and more culpable when he kills during the commission of that crime. The facts of *Cahill* are illustrative.

Burglary in the second degree in New York exists when a defendant unlawfully enters or remains in a building while possessing the intent to commit a crime and is armed with a deadly weapon or causes physical injury to a person.⁶⁰ Jeff Cahill entered his wife's hospital room a week before he killed her. The fact that he was detected and confronted by a nurse, and chose to leave without hurting anyone, does not diminish the heightened threat posed by his illegal presence in a hospital room after hours while presumably possessing the intent to commit a violent crime. The dangers created by this situation are simple and obvious—the actual or potential detection of the burglar creates the possibility that the burglar will commit whatever crimes are necessary to carry out his plan and escape. In *Cahill*, there was at least a threat that Jeff Cahill would have injured the nurse who found him in Jill's room for no other reason than to get out of the hospital. The burglary itself created that danger.

Therefore, on the premise that the commission of a burglary—any

⁵⁹ § 125.27(1)(a)(vii).

⁶⁰ See § 140.25(1)(a) & (b) (McKinney 1999). See also *id.* § 140.30 (McKinney 1999) (making it first degree burglary to unlawfully enter or remain in a dwelling with intent to commit a crime and the defendant is armed with a dangerous weapon or causes physical injury).

burglary—represents a distinct threat to society, and that a burglar who intentionally kills during the commission of this crime places himself in a narrowly drawn class of more culpable murderers, section (i)(a)(vii) should be statutorily modified to overrule *Cahill*. This can be accomplished easily and directly by enacting the following 2004 Governor's Program Bill:

An Act to amend the penal law, in relation to allowing burglary in the first or second degree in regards to murder in the first degree to be based upon the intention to commit any crime during the underlying burglary, including, intentional murder.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (vii) of paragraph (a) of subdivision 1 of section 125.27 of the penal law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter. *For the purposes of this subparagraph, the crimes of burglary in the first or second degree may be based upon the intention to commit any crime during the underlying burglary, including the intentional murder of the aforementioned victim;* or § 2. This act shall take effect immediately. Matter

in italics (underscored) is new.⁶¹

An alternative to the Governor's Program Bill was introduced in the New York Legislature after *Cahill* was decided. As proposed by Assemblyman Robin Schimminger, this subsection would have been modified to provide:

Section 1. Subparagraph (vii) of paragraph (a) of subdivision 1 of section 125.27 of the penal law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit [and] *or the victim was killed* in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime, or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; *this subparagraph shall apply so long as the elements of each listed predicate crime are present in the facts beyond a reasonable doubt and regardless of any reliance on an intent to kill to satisfy the intent, knowledge, or awareness requirements of such predicate crimes*; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter. Matter in italics (underscored) is new.⁶²

Section 125.27(1)(a)(vii) as written contained no limits on the types of crimes a burglar must have intended in order to be prosecuted pursuant to it. The presence of burglary is the

⁶¹ S. 3329 (N.Y. 2005); *see also* A. 11665 (N.Y. 2004) (sponsored by Schimminger et al.) and S. 7446 (N.Y. 2004) (sponsored by DeFrancisco et al.).

⁶² A. 17937 (N.Y. 2004).

aggravating circumstance that narrows the class of death-eligible killers.⁶³ These proposals avoid the extreme but natural extension of *Cahill*: the situation in which a defendant who unlawfully enters a dwelling with the intent to steal personal property and who then commits an intentional murder is eligible for the death penalty, but a defendant who unlawfully enters a dwelling with the intent to kill, and who then carries out that intent by committing murder, is not eligible for the death penalty.

D. Domestic Violence First Degree Murder

People v. Cahill is the quintessence of a domestic violence case. Jeff Cahill beat his wife with a baseball bat during an altercation clearly related to the disintegration of their marriage. A restraining order was issued against him in connection with that attack and he violated it at least twice by entering her hospital room prior to murdering his wife. Six months of planning preceded the murder. To this day there are questions about Jeff Cahill's activities leading up to the early morning confrontation in April 1998. Rumors of a "deep, dark secret" involving him continue. The New York Court of Appeals expressly recognized that Jeff Cahill committed the burglary of the hospital because he wanted his wife dead.

Domestic violence against women is a distinct and pervasive social problem in New York and nationally. For example, the National Crime Victimization Survey ("NCVS") reports that in 2001, eighty-five percent of the 691,710 non-fatal acts of intimate partner violence were committed against women.⁶⁴ In 2000, 1247 women were killed by an intimate partner, representing approximately one-third of all female murders.⁶⁵

The grim reality of domestic violence requires a criminal law response that targets the predictability of male against female

⁶³ See *Cahill*, 809 N.E.2d 561, 638 (Read, J., dissenting) ("The legislative goal of [section 125.27(1)(a)(vii) is] protecting the citizens of our state from burglars with murderous intent").

⁶⁴ U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS: CRIME DATA BRIEF (Feb. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

⁶⁵ *Id.* Additional data illustrates the problem. Forty-four percent of women murdered by their intimate partner had been seen in an emergency room at least once in the two years preceding the homicide and ninety-three percent of these had at least one injury visit. See Marie L. Crandall et al., *Predicting Future Injury Among Women in Abusive Relationships*, J. TRAUMA INJ. INFECTION & CRITICAL CARE 906, 906 (Apr. 2004). The New York State OPDV Domestic Violence Data Sheet reporting on studies of fifty-seven domestic homicides in NYS between 1990 and 1997 found that "75% of the victims had ended the [partner] relationship or stated an intention to end it at the time of their death." N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, DOMESTIC VIOLENCE DATA SHEET (last updated Feb. 14, 2003), available at http://www.opdv.state.ny.us/about_dv/dataweb2003.html.

intimate violence and punishes domestic violence killings as a distinct category of first-degree murder. The laws of Pennsylvania and Kentucky statutorily impose the death penalty for a narrow class of domestic violence killings and illustrate one approach to the problem.⁶⁶ These states make it first degree capital murder when a killing occurs in violation of a court order restraining the defendant for the protection of the victim.⁶⁷ For example, the death penalty may be imposed in Kentucky where:

[t]he offender murdered the victim when an emergency protective order or a domestic violence order was in effect, or when any other order designed to protect the victim from the offender, such as an order issued as a condition of a bond, conditional release, probation, parole, or pretrial diversion, was in effect.⁶⁸

The addition of such a provision to the list of capital murder aggravating circumstances contained in Penal Law 125.27 would recognize the special dangers present in intimate violence cases. It clearly would have applied to the actions of Jeff Cahill. The policy question presented is whether this approach is too narrow to adequately address the social phenomena associated with intimate partner violence.

The approaches of Minnesota and California in non-capital cases of domestic abuse are instructive and form the basis for an alternative proposal.⁶⁹ Drawing on provisions from various sections of domestic violence law in these states, the New York Legislature should consider adding the following provision to Penal Law 125.27. Capital murder may be charged where:

(1)(a)(xvii) the killing is preceded by, and is the product of, a pattern of domestic violence. As used in this subparagraph, “domestic violence” means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, “cohabitant” means two unrelated adult persons living together for a

⁶⁶ KY. REV. STAT. ANN. § 532.025(2)(a)(8) (Michie Supp. 2004); 42 PA. CONS. STAT. ANN. § 9711 (c)(iv), (d)(18) (West 1998) (“At the time of the killing the defendant was subject to a court order restricting the defendant’s behavior toward the victim . . .”).

⁶⁷ § 532.025(2)(a)(8); tit. 42, § 9711 (c)(iv), (d)(18).

⁶⁸ § 532.025 (2)(a)(8).

⁶⁹ MINN. STAT. ANN. § 609.185(a)(6) (West 2003); CAL. PENAL CODE § 13700(a)-(d) (West 2004). See generally, Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota’s Domestic Homicide Statute*, 78 MINN. L. REV. 1285 (1994).

substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabitating include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship; “abuse” means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another; and “pattern” means at least three (3) prior incidents of domestic violence. (It shall not be necessary that the defendant have been charged or convicted of such incidents). A violation of a protective order, restraining order, domestic violence order or similar injunction issued by a court of competent jurisdiction shall constitute an incident of “domestic violence.”⁷⁰

Both of these approaches—imposing the death penalty for killings committed in violation of court orders and murders resulting from a pattern of domestic abuse—have the merit of limiting the application of capital punishment to a narrow class of particularly horrific, and, perhaps, deterrable homicides. They focus on individuals who have proven to be dangerous in circumstances in which a pre-existing threat of violence towards the victims has been established. A community that believes in the effectiveness of the death penalty must consider proposals of this type if a state’s commitment to capital punishment is to be meaningful.

IV. *PEOPLE V. LAVALLE* AND THE DEBATE OVER THE DEATH PENALTY IN NEW YORK

In *People v. LaValle*, the New York Court of Appeals, by a four to three vote, declared the sentencing provisions of New York Criminal Procedure Law (“CPL”) section 400.27(10) unconstitutional.⁷¹ This section required a trial judge to instruct capital sentencing juries that the failure of the jury to reach a unanimous decision on a sentence of death would result in the court imposing a sentence of imprisonment for a minimum term of twenty to twenty-five years to

⁷⁰ See *supra* notes 61–62 and accompanying text.

⁷¹ *People v. LaValle*, 817 N.E.2d 341, 344 (N.Y. 2004).

a maximum term of life in prison.⁷² The provision was found to be a denial of due process and therefore declared unconstitutional under article I, section 6, of the New York Constitution because of the potential coercive effect of this “deadlock” instruction: juries might be pressured to agree to a death sentence out of fear that the judge would impose a lesser and more lenient sentence on an intentional killer who might then become eligible for parole.⁷³ (Ironically, Jeff Cahill received precisely this kind of sentence). Accordingly, the Court declared that “under the present statute, the death penalty may not be imposed” in New York.⁷⁴

Another great debate about capital punishment has thus begun.⁷⁵ In December 2004 and January and February 2005, public hearings were held in New York City and Albany on twenty-two specific questions raised by representatives of the Assembly Committees on Codes, Judiciary and Corrections.⁷⁶ Two fundamental issues were: (1) should the legislature restore the death penalty in New York by passing a constitutionally acceptable section 400.27(10); and (2) should the thirteen categories of first degree capital murder contained in section 125.27 be “expanded, contracted or otherwise modified if the death penalty is reinstated?”⁷⁷

At the time of this writing, public hearings on these questions were completed and a descriptive report issued.⁷⁸ Comparable public hearings were not held prior to the enactment of the 1995 statute. It is too soon to measure the likelihood of reinstatement, but the weight of testimony before the Assembly strongly favored non-restoration or outright abolishment of the death penalty in New York.

Legislation correcting the constitutional defect in CPL section 400.27(10) was passed by the New York Senate,⁷⁹ but was rejected

⁷² N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney Supp. 2005).

⁷³ *LaValle*, 817 N.E.2d at 357.

⁷⁴ *Id.* at 367.

⁷⁵ See generally DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? (Hugo Adam Bidau & Paul G. Cassell eds., 2004)

⁷⁶ See *supra* note 5; see also Notice of Public Hearing, Assembly Standing Committees on Codes, Judiciary and Corrections (January 21, 2005).

⁷⁷ See *supra* note 5, at question II(4).

⁷⁸ The Death Penalty in New York (A report on five public hearings on the death penalty in New York conducted by the Assembly standing Committees on Codes, Judiciary and Correction, December 15, 2004-February 11, 2005) (April 3, 2005).

⁷⁹ On March 9, 2005, the Senate passed S. 2727 by a vote of thirty-seven to twenty-two. The statute purports to correct the “dead lock” instruction by giving juries the option to impose a sentence of life imprisonment with a possibility of parole at the sentencing phase of a capital case and by requiring that juries be instructed prior to the sentencing phase that in the event of a deadlock the court would impose a sentence of life without parole. At a news

by the controlling Assembly Committee⁸⁰ Assembly versions of this legislation included proposals to add to section 125.27 the premeditation, domestic violence, and vulnerable victim death penalty categories set forth in this article. The Governor's Program Bill on murders committed during burglaries described *infra* in Part III was also before the legislature. Therefore, a process is under way that will move the debate about capital punishment in New York from the public forum of hearings to a considered legislative analysis of proposed new laws. *People v. LaValle* has thus accomplished what *People v. Cahill* did not—a full-blown state-wide discussion on whether the people of New York continue to believe in the effectiveness of capital punishment as public policy.

CONCLUSION

Recent decisions of the New York Court of Appeals reopened a debate about the death penalty that has been present in some degree since the Temporary Commission on Revision of the Penal Law and Criminal Code recommended abolition of the death penalty in New York in 1965. As of June 24, 2004, the date of the decision in *People v. LaValle*, there is no functioning death penalty statute in New York. *People v. LaValle* will continue to force the legislature to consider revising CPL section 400.27 to include a constitutionally valid “deadlock” instruction. Consequently, an opportunity will be presented for a continued legislative exploration of New York's capital punishment policies. That process has started with extensive public hearings and preliminary votes by the Assembly

conference held on March 1, 2005, Senate Majority Leader Joseph L. Bruno announced that a bill, S. 2727, providing for constitutionally valid deadlock instructions was to be favorably reported out of the Senate Codes Committee and was expected to be voted on within a week. The bill's sponsor, Senator Dale M. Volker, and Jill Cahill's sister, Debra Jaeger, appeared at the press conference. According to Senator Bruno, the “legislation is a program bill submitted by the Governor, a majority of New Yorkers support capital punishment and we believe it is a strong deterrent to violent crime and statistics bear that out . . . [and] . . . since . . . 1995, the number of murders in New York decreased from 1,551 to 922 in 2003. The number of violent crimes dropped from 151,731 in 1995 to 89,316 in 2003.” Press Release, Senate Republican Majority, Senate to Act on Death Penalty Legislation (March 1, 2005), at <http://www.senate.ny.us>.

⁸⁰ Patrick D. Healy, *New York Assembly Democrats Block Death Penalty for 2005*, N.Y. TIMES, Apr. 13, 2005, at 19. The Codes Committee voted eleven to seven against full Assembly consideration of the bill passed by the Senate, S. 2727, in March, 2005. The Assembly leader, Republican Charles H. Nesbitt, suggested that the bill might be attached as an amendment to unrelated legislation as a means of getting a floor vote. It is very likely that legislation restoring the death penalty will be submitted in future legislative sessions and that capital punishment will be an important issue in the 2006 campaign for Governor of New York.

2005]

Domestic Violence and the Death Penalty

1051

and Senate. The question yet to be answered is whether there is a continuing legislative and democratic majoritarian commitment to the death penalty in New York. If there is, the legislature should consider adoption of some, or all, of the proposals contained in this article in order to make New York's capital sentencing system more effective, more meaningful and, ultimately, more just.