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# The Road Not Considered

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**THE ROAD NOT CONSIDERED:  
REVISING NEW JERSEY'S DEATH PENALTY**

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## **THE ROAD NOT CONSIDERED: REVISING NEW JERSEY'S DEATH PENALTY STATUTE**

On January 2, 2007, after 5 days of public hearings and dozens of written submissions, the New Jersey Death Penalty Study Commission recommended – with only one dissenting vote – that the state abolish the death penalty and substitute life without parole served entirely in a maximum security facility. The Committee's nearly unanimous recommendations and final report deeply disappointed those of us who feel certain that the worst of the worst deserve to die and the People have an obligation to execute them.

Of course the abolitionist media within New Jersey, across the United States and around the world celebrated this recommendation to make New Jersey the first state in the modern era legislatively to abolish the death penalty. A *Newark Star Ledger* columnist characterized the Commission's final report as "well argued, intelligent, compassionate and persuasive", [fn1] while the *New Zealand Herald* continued the cheerleading, declaring that the Commission had spoken "with clarity, eloquence and forcefulness". [fn2] Arguments the Commission cited to support their blanket rejection of capital punishment – that the death penalty is not a uniquely powerful deterrent, that it is too costly, unfair, serves no penological purpose, and most importantly and least explored, that life without parole is an adequate and just substitute -- can be and were rebutted during the hearings.

The majority of witnesses and all but one Commissioner would simply abolish the death penalty, and substitute life without parole. The few witnesses who spoke in favor of the death penalty and lone dissenting Commissioner seemed inclined to leave the present statute intact. [fn3] The Commission, however, had another alternative to its recommendation to simply abolish the death penalty wholesale. They could have used their mandate to *refine* the present statute more nearly to ensure that the worst of the worst, and only the worst of the worst receive society's ultimate sanction – whether that sanction is life, or death. By simply substituting life without parole for death, however, the Commission perpetuates the very arbitrariness its own report so vehemently criticizes.

Some abolitionists probably shied away from suggesting revisions or further restrictions, expecting complete victory through outright repeal or fearing that by removing the worst parts they might solidify the rest. Death penalty proponents probably shied away from proposing revisions lest they seem to condemn the present statute itself. At the next to last hearing, however, one witness repeatedly called the Commission's attention to a "most badly neglected" option, thus far "substantially ignored." [fn4] "You have a rare opportunity to rethink, revise, refine New Jersey's statute," the witness exhorted Commissioners.

For the sake of retributive justice – to make more certain that the worst crimes received the harshest punishments – the Commission should have proposed an amended, morally refined statute. Hopefully the Legislature will reject the Commission's facile

recommendation simply to abolish the death penalty and substitute life without parole. Perhaps the People of New Jersey and other states who look to this experience for insight and wisdom will, with their own statutes as a starting point, embark on the real journey of reform. If so, perhaps these suggested amendments to the current statute will help guide them.

## **A MORALLY REFINED DEATH PENALTY STATUTE**

### **I. Who Deserves the Ultimate Sanction: The “Worst of the Worst”**

#### **A. Modify the *mens rea* for “aggravated” murder.**

New Jersey’s current statute defines murder as “purposely or knowingly causing death or serious bodily injury resulting in death.” Most jurisdictions consider it no more than “voluntary manslaughter” and certainly not aggravated murder, to cause the death of a person whom you intend to seriously physically injure but not to kill. Of course, proving beyond a reasonable doubt that the defendant purposely killed the victim he claims only to have purposely injured, can be very challenging. Thus New Jersey’s legislature avoided the problem by amending its initial death penalty statute to include intentional or knowing infliction of serious bodily injury.

As re-defined, however, “purposely or knowingly” as the culpable mental state is at once too broad, and too narrow. A defendant who intends to seriously physically injure should not ordinarily be death-eligible, or eligible for life without parole, unless s/he meant to torture and disable -- leaving the victim alive but deformed, motivated sadistically or by revenge or to send a message to others. Where murder warrants the death penalty, an intention to cause serious bodily injury resulting in death, without additional aggravation, should not suffice.

Nor should an intent to kill be necessary for society’s ultimate sanction. Even leading abolitionists like Thorsten Sellin, the reporter for the Model Penal Code, acknowledged what the U.S. Supreme Court has reaffirmed – killing *recklessly with a depraved indifference to human life* in general may be every bit as heinous as premeditatedly killing a targeted victim. [fn5] The Bible capitally condemns the person who lets loose a vicious ox to wreak havoc among the multitude. Nineteenth century cases cite other examples of a “depraved mind” murder: A person opens the door of a lion’s cage, poisons a well, rides an unruly horse into a crowd, or takes target practice by shooting into a passing train – neither purposely nor knowingly killing a specifically intended victim, just not giving a damn about human life.

Society should reserve its ultimate sanction, whether death or life with no possibility of parole, for those aggravated murderers who cause death *purposely or recklessly with a depraved indifference to human life*.

#### **B. Modify the Aggravating Circumstances.**

##### **1. Eliminate the Felony Murder Aggravator**

First and foremost, New Jersey and all other states with a death penalty should abolish capital felony murder. Felony murder – the most common death penalty situation

– covers many different types of killers and killings. Across the United States, robbery (and burglary) have put more killers on death rows than all other aggravating circumstances. Instinctively and morally, most of us feel what the present death penalty statute reflects -- that killing for a pecuniary motive, whether as a professional assassin, a spouse who hires him in order to collect a life insurance policy, or a business rival who pays to eliminate the competition, commits an aggravated murder.

Robbers almost always do rob for money. But they less often kill for it. A robbery, alone, simply does not elevate an intentional or depraved indifference reckless killing to the worst of the worst. Killing an innocent witness to escape detection does aggravate murder -- but again, not because it accompanies robbery.

Nor does burglary, a crime by definition against premises and not person, in and of itself aggravate a murder. In any case, a legislature that insists on retaining a burglary aggravator for its ultimate sanction should confine it to home invasions.

“Is ‘worst of the worst’ in your view, an objective or subjective determination,” Commissioner Scheinberg challenged the witness urging these refinements. “And do you feel that you speak for a consensus of who is worst of the worst?”

“This is not just a matter of opinion,” the Commission witness had replied. “Whether or not you abolish the death penalty, there will be common ground among most of us that some crimes are objectively worse than other crimes, and furthermore, that some murders are objectively worse than other murders. New Jersey has not yet adequately determined which they are.”

The witness conceded that vague boundaries separate the worst of the worst from the merely horrible. But a morally refined statute would operate together with “successive filtration systems of prosecutors deciding when to go for death, and ultimately juries deciding whether to give it, and appellate proportionality analysis deciding whether this qualifies as the worst of the worst relative to other similar cases.” The boundaries would remain subtle, and not fully captured in advance by legislation, this advocate of revision continued, “But there is a core.”

“The robbery felony murderer who sticks up a 7-11 Store and the clerk grabs a gun from under the counter and the robber kills him, is not the same person [as] Charles Ng who maintains a torture chamber in his basement, kidnaps women with their children knowing once he’s got the kids he’s got the [ir mothers], videotapes [their] torture over weeks, exposes them to unspeakable misery, rapes and then murders and then mutilates them. They don’t inhabit the same moral universe. Charles Ng unquestionably deserves to die. He is at the core. The robbery-felony-murderer, absent other aggravating circumstances, though presently death-eligible in New Jersey, does not deserve to die.

“So, the answer is yes. There is a core objectivity about this. The boundaries are subtle and difficult. New Jersey has gotten closer than it once was, can get a lot closer and hopefully will.”

“Intentional” or “knowing” felony murder should be abolished as a capital offense. Nor should it remain, as the Commission proposed would leave it, as the basis for a mandatory life without parole.

**2. Refine the escape aggravator.** Naturally, we love our own freedom. Knowingly or intentionally killing another person to “escape detection, apprehension,

trial, punishment or confinement” should be punished as murder. This motive alone – the love of liberty -- however, does not *aggravate* murder. Many jurisdictions also make death-eligible a close cousin -- “killing a witness”. But that too, is too broad. At first blush it may seem morally supportable to punish most severely those robbers who intentionally kill their victims to eliminate them as witnesses. The special sanction operates either to deter or condemn the calculating killer who marginally increases his odds of escape at the price of an innocent citizen’s life.

But these statutes make no distinction between ordinary witnesses -- robbery victims who surrender their money yet are killed to prevent possible future testimony, and bystanders who happen to observe it -- and the robber’s co-felons (or paid informants cooperating with the government) who “flip the script” to pin it on their partners in crime.

In short, the statute should, but does not distinguish between the innocent witness and the “snitch.” The snitch deserves witness protection, but his killer does not thereby deserve to die. If we are to confine the death penalty to the worst of the worst, the escape aggravator should be eliminated, and the statute should be narrowed to the intentional killing of an “unresisting innocent witness.”

**3. Refine and consolidate the “pecuniary motive” aggravators.** Like most every other state with a death penalty, New Jersey rightly condemns paid assassins who kill for profit. But do we thoroughly condemn killing as a business decision?

Unfortunately, like every other society, we are infected by class bias which sometimes blinds us to moral culpability. We never execute, and rarely prosecute ranking executives, no matter how callous and lethal their actions. Some of us retributivists see them for who they are and would punish them for what they do.

In order to deter such deadly behavior, and diminish class bias, but mostly because they deserve it, New Jersey should specifically condemn corporate safety directors and other decision makers – “red collar killers” I call them – who, with a depraved indifference to human life, run deadly workplaces or manufacture lethal products, poison a community’s streams or soil, knowingly and recklessly exposing unsuspecting employees, consumers, or local residents to a grave risk of death which kills them, all from that ‘purest’ of motives – the profit motive.

**4. Refine “the grave risk of death to another person” aggravator** so that it more clearly applies to mass murderers – spray shooters, terrorists and the like – who knowingly endanger groups of innocent citizens. As written, this aggravator is over-inclusive and may tend to become a catchall. Prosecutors may be tempted to use or threaten the ultimate sanction in order to coerce a guilty plea and avoid the uncertainty and expense of trial. Imagine, for example, a drug deal gone bad, and the fleeing defendant, shoots his way out of a den full of armed drug dealers. Perhaps we can do no better than substitute a “multiple victim” aggravator, leaving it to prosecutors and juries to sort it out case by case.

**5. Eliminate the “narcotics trafficking network” aggravator.** Murders of fellow drug dealers are murders, but certainly not *especially* worthy of the ultimate sanction. Participants in that deadly game understand the rules and still choose to involve

themselves. If anything, internal drug gang killings are, all other things equal, less bad than many other intentional killings.

6. Qualify the **young victim** “less than 14” aggravator by adding “unless the victim was part of a drug conspiracy or gang, and was killed by a rival gang member.” We should specially protect our children, but sadly some “children” chronologically have become violent vicious adult threats, no longer worthy of special protection, nor those who kill them of special condemnation.

7. Refine and revise “**the public servant**” aggravator. Most states single out cop killers for capital punishment. Supporters point out that the police put their lives on the line for us. Those who would kill a cop would kill anyone, and an attack on law enforcement is an attack on law itself, threatening the whole criminal justice system.

Those who kill police *because* they are police do wage war on the People, thus deserving our ultimate sanction. But an armed robber who does not initiate the gun battle, but does return fire at a pursuing police officer, although a murderer, is not the worst of the worst, and without more, does not deserve to die. As they say on the street, “it’s different when you do someone who’s trying to do you.”

Thus the first clause the police officer “while performing his official functions” should be dropped; the second clause, “because of the victim’s status as a public servant” defines it well, and should be retained. And expanded. That clause should specifically cover **killing a juror**, a good citizen drafted to serve the community, unarmed and for no pay.

Only a few states aggravate for killing jurors. New Jersey should be among them.

8. **Retain and emphasize “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim.”** This is *the* core aggravator. Torture provokes near universal condemnation, even among killers themselves, providing us retributivist advocates of the death penalty our strongest case. Unquestionably, a sadist who tortures his helpless victim to death – just for the fun of it -- belongs among the worst of the worst. Absent extraordinarily compelling mitigating circumstances, s/he deserves to die.

So too the rapist murderer: “Torture” should specifically include rape. And we should also sentence to die a terrorist who sets off a bomb in a crowded building.

Cruelty -- the essence of what we most condemn -- has long since meant not only taking pleasure, but also a cold callous indifference to human life. A person who shoots a machine gun into a crowd with no particular target, not caring who, or how many innocent people live or die; a pharmacist who dilutes patients’ chemo-therapy to make extra money, callously indifferent as to whether those denied their treatment live or die an agonizing death; a man who rapes three children 9,7,5 while he is HIV positive and knows it, not caring whether they live or die, all should be condemned as the worst of the worst. As recounted above, the United States Supreme Court specifically held that such a depraved indifference recklessness may be sufficiently heinous to warrant death.

The statute here, might well give specific examples, such as “killing **an especially vulnerable victim**” – singling out children, the elderly and handicapped -- whose intentional killing especially deserves to be condemned.

Are the lives of some victims more valuable than the rest? No. Perhaps we imagine greater pain and suffering attaching as a helpless victim experiences his own helplessness. Ultimately, however, we advocates of a generic “especially vulnerable victim” aggravator support this distinction not so much because the victims’ lives are more valuable, but because their deaths reveal the cowardly and despicable nature of their killers who prey on the vulnerable.

Retributively, advantage taking – extreme selfishness combined with extreme cowardice – qualifies as the worst of the worst.

Perhaps the “outrageously wanton or vile” aggravator, and this aggravator alone, should constitute the entire death penalty statute. Of course the danger persists that every murder can be so characterized, and an overzealous prosecutor could stretch it beyond the truly aggravated. But with some specific statutory examples, and a developing jurisprudence, this aggravator can function as it should.

## **II. Who is Worst of the Worst? Jury decision-making.**

### **A. Clarify the burden of persuasion to rebut mitigating circumstances.**

Once the jury finds the defendant guilty of aggravated murder, virtually every capital jurisdiction provides a separate penalty phase. Whereas the guilt phase focuses on what the killer did, the penalty phase focuses exclusively on what s/he deserves.

Currently and clearly the statute announces it: “The state shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors.” But then the statute becomes vague: “The defendant shall have the burden of producing evidence of the existence of any mitigating factors but shall not have a burden with regard to the establishment of a mitigating factor.”

So, after the defendant has *produced* some evidence suggesting mitigation, the prosecutor has a burden to rebut the mitigator, establish its absence – but by what weight? Suppose an individual juror believes it 40% likely that the defendant acted under “unusual and substantial duress” or with “significantly impaired capacity” not amounting to insanity. Should that juror find the mitigator has been established? Surely the defendant has more than met the burden of production. But has the prosecutor met the burden of persuasion to rebut that mitigator? What if, on balance, the mitigator is reasonably possible but less likely than not: 30% likely, 10% likely?

The statute should be clearer.

**B. Weighing aggravating against mitigating circumstances – add to the prosecutor’s burden.** Once the jury finds aggravating circumstances beyond a reasonable doubt and mitigating circumstances (by some vague weight), the present statute requires them to decide whether the aggravating circumstance(s) “outweigh(s) beyond a reasonable doubt any one or more mitigating factors.”

In common with many other states, New Jersey’s statute should demand greater certainty before a jury condemns a defendant to death. The jury should have to find “beyond a reasonable doubt that aggravators *clearly* (or substantially) outweigh the mitigators.” Barely tipping the scale should not be enough.

**C. Substitute “may” for “shall”: Make it permissive.** This statute speaks in quasi-mandatory language: “If the jury finds that aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court *shall* sentence the defendant to death.” Notwithstanding that aggravators substantially outweigh mitigators, the jury should never feel legally bound to vote “death” by some mechanical weighing process.

**D. Add lingering doubt and moral certainty.** The statute must help insure against factual and moral mistake. Only the worst of the worst of the worst should be condemned to die. Therefore, after jurors are instructed that they *may* vote for death only if they are convinced “beyond a reasonable doubt that the aggravators substantially outweigh the mitigators,” they should be further instructed: “Although you may be convinced beyond a reasonable doubt that the defendant committed capital murder, if you have even a lingering doubt, *a residual doubt* of the defendant’s guilt, you should reject the death penalty.” The U.S. Supreme Court recently held that the U.S. Constitution does not require proof beyond ‘residual doubt.’ But justice does.

Finally: “Although you have no lingering doubt about the defendant’s guilt – i.e. you have no residual doubt that s/he committed aggravated murder, before voting for death you must also be convinced *to a moral certainty* that s/he *deserves* to die.” This standard explicitly demands an intuitive non-rational, emotional certainty that cannot be quantified.

Intuitive, emotional, not-rational, but very real.

This extraordinary burden should better allow an individual juror who has found aggravated murder beyond any real doubt, nevertheless to withstand peer pressure and hold out for life, although s/he can neither identify nor articulate the basis for mercy.

And so, as the witness urging these very reforms summed it up that day in live testimony before the Commission, “Only if you *feel certain* that he did it and deserves to die for it should you be allowed but never compelled to find death.”

**E. Protect against the stealth juror:** With this Herculean burden operating to protect all but our worst monsters, we should compensate for the inevitable failure of the jury selection process to weed out abolitionist jurors who, contrary to their verbal assurances, are unwilling *under any circumstances* to vote death, thus violating their oaths. Under these heightened standards of persuasion, an 11-1 (or perhaps 10-2) jury should be empowered to condemn the worst among us to suffer Society’s ultimate punishment.

### **III. Make the process more victim centered**

Through the conflicting testimony and clashing perspectives, one simple fact united the Commission: Given its present (non)administration, the death penalty imposes unjust suffering upon the victims’ families above and beyond the devastating effect of the murder itself. Those Commissioners who supported the death penalty in principle ultimately joined its opponents to recommend its repeal from the practical recognition that the New Jersey Supreme Court would never allow anyone to be executed.

The Commission achieved consensus: Spare aggravated murderers an empty threat of death in order to spare victims families the real agony of disappointment,

reversals, dashed hopes, while repeatedly reliving their horrible loss during successive phases of a seemingly endless and frustrating (re)trial and appellate process.

Spare the killer to spare the victim.

But Commissioners confuse the *victim* with the victim's family. The family does suffer most among the living. The family most pointedly reflects our anger and grief. But with murder, the victim is dead; family members live. And then too, when one of us is murdered, we are all a victim's family: "In a well governed state", declared Solon, the great ancient lawgiver, "citizens, like members of the same body, should feel and resent each other's injuries." [Fn a]

"The voice of our brother's blood" moves us retributivist supporters of the death penalty. For us, the past counts, and we feel polluted if the community does not adequately respond. We feel the need to act for the victim. Yet the process of determining and administering punishment – whether in the courtroom, awaiting death on death row or serving life in general population, even in the execution chamber itself -- fundamentally disconnects the crime – the murder of an innocent victim -- from the experience of punishment for that crime. Several victim-centered modifications do suggest themselves.

**A. Add film and video of the victim during the sentencing phase.** During the penalty phase, the defense must attempt to "humanize" the defendant. The killer's friends and/or family may recount his good deeds, emphasizing his own traumatic suffering or abuse as a child. And of course the jury has the benefit of viewing the living defendant in court. To allow the jury to strike a moral balance in deciding life or death during the penalty phase, the U.S. Supreme Court has upheld "victim impact" statements. The People may call the victim's family as witnesses to "humanize" the victim and communicate their own sense of loss.

Amending its death penalty statute in 1999, New Jersey specifically distinguished the victim from the family by permitting a "survivor of a homicide victim to display a photograph of the victim, taken before the homicide, at sentencing." A single photograph is hardly enough.

**B. Permit the introduction of "living wills."** Justifiably, courts have consistently held that although the victim's family may portray the victim, and their own sense of loss, they may not offer an opinion as to whether the killer of their loved one should be spared, or die. But the victims are not the survivors. And the victim's opinions of the killer's fate *should* count.

Abolitionists have devised a "living will" or "declaration of life," typically reading "I hereby declare that should I die as a result of a violent crime, persons found guilty for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I have suffered."

Death penalty proponents typically dismiss these living wills. And thus far they are inadmissible. But if we truly become more victim-centered, they should be admitted. The statute should be amended: "Once victim character evidence is raised, either side may present evidence that the victim either supported or opposed the death penalty with such qualifications as the victim made apparent during his/her life. The judge shall examine such evidence from either side in camera, and shall permit it only if it clearly

and convincingly shows that the victim at some moment would have supported or opposed the death penalty under the circumstances of this particular killing. The jury should be further instructed that they are not bound to effectuate the victim's living will, but should give such weight to it as they think right."

**C. The Victim at the execution:** The execution itself should be more victim-centered. After the condemned makes his final statement (or perhaps immediately before), the family should have the option of displaying a brief audio-visual record of the victim at play, in the embrace of family or friends, including optionally crime scene photos, the victim's funeral, burial and gravesite. We should drive it home to all who now witness this state sanctioned killing that we execute this helpless human being for the sake of the past.

By statute we should do our best to reconnect ultimate crime with ultimate punishment.

**D. Compensating the victim's family** From earliest times, the victim's families could accept a "blood price" in lieu of retaliation. Western Civilization advanced, however, when the ancient Hebrews rejected the death penalty for property crimes and at the same time abolished the blood price. "You shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death". (Numbers XXXV:31). About the same time, independently, the ancient Greeks also rejected the blood price. Nobody could buy his way out of punishment for homicide.

The Commission has recommended applying all cost savings from abolishing the death penalty to victims' services. It declares in its final report: "A person convicted of murder would be required to pay restitution to the nearest surviving relative of the victim". Imagine a family coming to depend upon monthly stipends from the killer of their loved-one? If not obscene, this particular recommendation feels retrograde and wrong. It should be rejected.

Our government offers us an essential trade – protection for obedience. The Government has failed every murder victim and by extension their family in the extreme. Thus financial support is due the families of murder victims, but not directly from the killer.

#### **IV. Make the Punishment more Real and Transparent**

**A.** Because they are being done in the name of the People, **executions should be public**. If the People can't stomach witnessing executions, they ought to abolish them. At least, where possible, one juror and/or prosecutor, and/or sentencing judge shall personally witness the execution. This highly controversial proposal may of course be severed from other proposed reforms.

**B. Reject lethal injection.** Present controversy swirls around lethal injection as the preferred method of execution. Does the paralytic agent mask the pain experienced by the condemned? Should doctors be compelled/prohibited from participating? Of course abolitionists oppose *any* method of execution. And the medical controversy has won them a stay in more than one state. Those who support lethal injection can reply that administered properly, it's painless.

Some counter that the present doctor-participation controversy is make-weight. Lethal injection as punishment is not a medical procedure. Doctors may be soldiers and police officers without violating their Hippocratic oath. In the course of their duties they may kill. So too they may be executioners. But this counter argument has not taken hold for good reason. Unless botched, lethal injection resembles, in fact appears, feels, and seems medical. That is its fundamental flaw. The Condemned dies in a gurney, wrapped in white sheets with an IV in his veins, surrounded by his closest kin. The execution chamber should not resemble the final scene at a hospice. How we kill those we condemn should not resemble how we kill those we love.

The legislature should reject lethal injection in favor of a method that clearly and distinctly punishes.

### **C. Reject Mandatory Life Without Parole**

The Commission believes that life-without-parole is a horrible fate, properly reserved for the worst of the worst. Will abolishing the death penalty and substituting mandatory life without parole as punishment for aggravated murder bring justice? No! First, the too broad substantive aggravators will result in an overbroad application of society's new ultimate sanction. But worse, as Commissioner Segars, New Jersey's Public Defender and fierce death penalty opponent, rightly pointed out in her separate statement:

“Under the guise of ‘replacing’ the death penalty with life without parole, the proposed statutory scheme goes well beyond the Commission’s stated objective by inevitably capturing many cases that never would have been prosecuted capitally or resulted in death verdicts.”

Whereas the death penalty carries with it ‘super due process’ requirements of a separate penalty phase with aggravators once proven, then weighed against mitigators, always giving the jury the option of mercy, “under the Commission’s recommended procedure, imposition of life without parole is mandatory upon a finding of an aggravating factor, there is no opportunity for the defendant to offer mitigating factors, and there is no discretion on the part of the sentencer.”

Under the proposed scheme, “it would be so simple to go forward” and seek mandatory life without parole. Prosecutors would no longer worry about costs, or their odds of success, or even the irreversibility of the punishment. Criticizing the Commission’s embrace of “the political quid pro quo of a mandatory life without parole scheme for a far too broad class of cases,” Commissioner Segars urged the Commission to “eliminate[e] the felony murder aggravating factor even if it insists on the model of mandatory life without parole.”

Whether or not the legislature adopts the Commission’s recommendation to abolish the death penalty, as long as the new statute continues to define and single out the worst murderers for the worst punishment – life without parole inside max – that unique punishment should be *experienced* uniquely. As the public defender herself pointed out, under the state’s “No Early Release Act”, a New Jersey simple life sentence “carries a period of parole ineligibility of 63.75 years.” Ironic, then, that the same Commission which rejected the death penalty as in reality a sham, should “substitute” a more indiscriminate statute, equally a sham.

Life without Parole should never be mandatory. The defendant should be allowed to raise mitigating circumstances in a separate penalty phase conducted before judge or jury. The Public Defender rightly pointed this out; but she did not go far enough.

#### **D. Special Punishment for Specially Heinous Murder**

Commissioner Kathleen Garcia, although an ardent death penalty supporter, had voted to repeal the statute. “The New Jersey Supreme Court will continue to ensure that no person, regardless of how horrendous the crime(s) committed, will ever be executed,” she declared during the hearings. In New Jersey the death penalty was a “joke”, a “cruel hoax” perpetrated on the families of the victims.

“Even if it’s never effectuated, there remains a value in condemning someone to death who deserves to die,” one witness had insisted, recalling how a death row inmate had confided how twenty years later it still hurt to remember the jury’s condemnation. The jury’s verdict of death remained “a solemn ritual of denunciation.” In her separate statement appended to the Commission report, Commissioner Garcia returned to that exchange: “While [the] Professor’s testimony indicated the death penalty statute was of value even if it is never carried out, there can be no sense of justice for survivors if the sentence they receive and embrace, no matter what that may entail, is never served.”

The legislature could accommodate these stated concerns: Although the Courts may block executions, the Legislature could legislatively condemn the most heinous murder by attaching a truly meaningful punishment on death row, or if the death penalty is abolished with life without parole *in a special punitive setting*, reserved for the worst of the worst. The Commission started down that path by specifying that all and only those serving life without parole must do their time *entirely* in maximum security.

But where the worst murderer serves his sentence does not determine the daily experience. Specially punitive conditions could and should attach forever to those serving life without parole. These specially condemned worst of the worst should be a class apart from general population. The past counts. They should forever be punished specially, meaningfully, and for real, in conditions akin to today’s punitive segregation.

#### **CONCLUSION**

I suppose it’s obvious by now: I am “that witness.” The only witness from the academy to testify in support the death penalty, “more burdened than honored”, again I urge the legislature not to abolish but rather to refine the death penalty.

Legislators should take a careful look at this state’s death penalty statute and ask yourselves, ‘Can’t it be improved?’ It sure can, and it should be.

During the hearings Commissioners, including the Chair, Reverend William Howard, a model of decency and politeness, personally distanced themselves from retributive sentiments.

Obviously these proposed reforms, which I urged upon the Commission and they completely ignored, no more than scratch the surface. Revision requires a collective effort, and much further discussion and debate. But these proposals were a concrete starting point. I am not privy to the Commission’s deliberations, but neither its recommendations nor its final report, even so much as mentions, much less counters, the possibility of revision or reform.

The People's representatives have an opportunity to pick up where the Commission left off. The legislature can and should have a sustained debate. It would be a mistake simply to ignore the issue during an election campaign and then quickly adopt the Commission's proposals thereafter, without extended discussion or debate, on the pretext that the Commission's public hearings and final report adequately considered the alternatives. If New Jersey becomes the first state in the modern era legislatively to abolish the death penalty, surely it should do so only after fully considering alternatives other than standing pat, or abolishing the death penalty entirely.

Consider "the third alternative", as the Star Ledger called it. Morally refine the statute to more nearly do justice, so that by the hand of the People, all but only those who deserve it shall die.

#### ENDNOTES

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Fn 1 Bob Braun *Star-Ledger* 010807

Fn 2 *New Zealand Herald* 010807 "Time to end death penalty Their view 2007WLNR 302905

Fn 3 One Commissioner (Haverty) did ask, "when you're talking about replacing the death penalty with life without parole, are you essentially taking what is currently the death penalty statute and just simply changing the penalty to life without parole?" The witness confessed, "I really haven't thought about that." In the first three hearings no witness or Commissioner seriously raised the possibility of *revising* the death penalty statute, ironically, except for its author (Russo) who asked one witness, "Could . . . you suggest how the New Jersey law could be improved?" and then abandoned the momentary inquiry in his lone superficial dissent, choosing to stand pat with the original legislation he had sponsored.

Fn3: *The Star Ledger*, October 12, 2006: ***Prof wants execution saved for 'the worst of the worst'*** by Robert Schwaneberg who covered the hearings extensively.

Fn4 "We do not think there is a case for a death sentence unless a homicide has been committed purposely or knowingly or with recklessness so great as to manifest extreme or callous indifference to the value of human life. . . . the [traditional] delimitation is, in our view too narrow insofar as it excludes cases of wholly wanton recklessness". [MPC commentary, 1959]

Fn5 See *Tison v Arizona*, 481 U.S. 137 affirming a death penalty for a major participant in a robbery whose "culpable mental state" was "a reckless indifference to human life".

Fn 6 Royal Commission Report par. 471 “where death results from an act. . done with reckless indifference . . it is certain that so long as capital punishment is maintained there will be cases in [this] category which call for the infliction of the death penalty, and that no definition can be satisfactory which is not based on a recognition that this is so.”

Fn a Bonner, R.J. (1927) *Lawyers and Litigants in Ancient Athens*. Chicago: The University of Chicago Press. Cf. R. Blecker, “Roots *Resolving the Death Penalty: Wisdom from the Ancients*” reprinted from *America’s Experiment With Capital Punishment 2<sup>nd</sup> Ed*, Ch. 6 (Carolina, 2003)