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# But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Detailed Reply

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## INTRODUCTION

On January 2, 2007, the New Jersey Death Penalty Study Commission, with one dissenting vote, declared itself "pleased" to submit its report and recommendations to the Governor.[2] The Commission had reached consensus: The legislature should simply abolish the death penalty and substitute life without parole.[3] Although they personally supported capital punishment, some Commissioners voted to abolish it, despairing that the state's "liberal" Supreme Court would never

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[2] N.J. DEATH PENALTY STUDY COMM'N REPORT (2007) [hereinafter COMM'N REPORT] (introductory letter from Chairman Rev. M. William Howard, Jr.), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf (last visited Oct. 31, 2007).

[3] *Id.* at 1-2, 8.

allow an execution to take place.[4] Why dangle false hope before irate and grieving victims' families?[5]

The Commission majority, however, probably concluded, as it began, with an abiding conviction that capital punishment violated human dignity.

Legislation establishing the Commission had directed it to "study all aspects of the death penalty" – a literally impossible task.[6] During five public hearings, a parade of witnesses – some invited legal experts or religious leaders, others family members of the slain – exposed weaknesses and problems with the (non)administration of the death penalty and mostly rebutted an occasional advocate who did defend the punishment orally and in writing.[7]

"The people of the State of New Jersey have been greatly served," the Chair declared in the final report, sending the Legislature and Governor the near unanimous proposal to abolish capital punishment.[8] The Commission, he assured the public, had "shown respectful regard for the differing perspectives that exist."[9]

But had it? We who feel certain that justice demands the death of a mass murdering child rapist did not feel respectfully regarded. The Chair, Reverend William Howard, other members of the Commission and staff were gracious, helpful and polite, even in disagreement, welcoming retributivist advocates to speak and submit written statements.[10] And the official transcript of the hearings does record our testimony.[11] Yet reviewing the Commission report and its recommendations

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[4] *Id.* at 94 (statement of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n).

[5] *Id.* at 93-96.

[6] S. 709, 211th Leg., 321 (N.J. 2006).

[7] COMM'N REPORT, *supra* note 1, at 11-20.

[8] *Id.* at Statement from the Chairman.

[9] *Id.*

[10] *See, e.g., id.* at 27-51 (statement of R. Erik Lillquist).

[11] *Id.* at 29.

can't help but make us wonder: Although we spoke and wrote, did they listen?

Locally and internationally hailed as comprehensive and complete,[12] on many essential issues, the Commission's final report fails to engage the complexity of the great debate. Unbalanced and biased, it does not even mention any alternative to abolition or standing pat.

Now, immediately following the fall 2007 elections, under cover of the Commission's recommendation and report, New Jersey stands poised to become the first state in the modern era legislatively to abolish the death penalty. Other states may follow that lead. Some state legislatures might even reflect popular will and restore it. Abolish or retain the death penalty, the People's representatives should balance the equities and focus firmly on the most essential issue which the Commission avoided: Justice. This witness repeatedly attempted without much effect, through personal appearance and written submission and follow-up, to inform the Commission.[13] An abiding conviction that the people would have their legislature focus where the Commission failed, and a continuing commitment to justice after a better informed debate compels this counter-report.

## THE COMMISSION'S FINDINGS

Responding to seven specific questions from the legislature,[14] the Commission based its final recommendation to abolish the death penalty on seven specific findings, and added an eighth of its own.[15]

Let's take them one by one.

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[12] Schwaneberg, Robert, *Panel Calls for a Ban on NJ Executions: Corzine, Top Legislators BackLife w/o Parole*, STAR LEDGER, Jan. 3, 2007.

13 Public Hearing Before the N.J. Death Penalty Study Comm'n, 55 (Oct. 11, 2006) [hereinafter Pub. Hearing, Oct. 11, 2006] (testimony of Robert Blecker), available at http://www.njleg.state.nj.us/legislativepub/pubhear/DPSC 101106.pdf (last visited Oct. 31, 2007).

[14] S. 709, 211th Leg., 321. (N.J. 2006).

[15] COMM'N REPORT, *supra* note 1, at 1.

## FINDING (1) THERE IS NO COMPELLING EVIDENCE THAT THE NEW JERSEY DEATH PENALTY RATIONALLY SERVES A LEGITIMATE PENOLOGICAL INTENT.[16]

The Commission's first finding incorporated the legislature's awkwardly phrased question, but with a twist.[17] What is a "*legitimate penological intent*?" Penological "intent" must mean – "purpose," "goal," or "justification." Traditionally, punishment serves as retribution, deterrence, incapacitation, rehabilitation, and/or a method to express social solidarity.[18]

### Rehabilitation

Of course death, an irreversible extinction, cannot rehabilitate a person in this world. Some religious outlooks historically and today may see death as expiation, allowing the murderer to pay the price here and prepare to enter the Everlasting with a clean slate. The Commission well avoided this theological thicket. A secular society constitutionally committed to separating religion and law must assume death does not rehabilitate those we legally execute.

Relative isolation of *death-row*, however, might encourage the Condemned to contemplate their crimes, take responsibility, allowing them to grow remorseful and humane, whereas life in general population might undermine that growth, forcing prisoners into self-protection, and promotion of prison schemes to survive and thrive. Again, rightly, the Commission did not address this. For the Commission's purposes, and ours here, the death penalty cannot be justified as rehabilitation.

### Incapacitation

Executed murderers, of course, will never kill again. If instead we imprison them for life without parole, they may kill fellow prisoners, or staff. Still, we cannot justify taking prisoners' lives solely because we cannot safely confine them.

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[16] *Id.* at 24.

[17] *Id.* at 4.

[18] *Id.* at 1, 24.

We can and we should design and administer prisons to keep us safe from the prisoners we confine. Incapacitation alone cannot justify the death penalty.

**Deterrence**

The U.S. Supreme Court has held that the death penalty must either generally deter *or* serve retributive ends.[19] Although "deterrence" was the sole "penological intent" specifically listed by the New Jersey state legislature,[20] polls show that the American majority who support the death penalty (and probably, too, most of those who oppose it) do not find deterrence their primary issue.[21]

In essays and repeatedly in testimony before the Commission, abolitionists flatly insisted that the death penalty "really has no general deterrent effect", characterizing arguments supporting deterrence as "totally implausible"[22] and "not empirically supportable."[23] "It's clear that the death penalty has never been a deterrent."[24] At one public hearing, the Commission's lone dissenter momentarily joined his opponents and stretched their attack beyond reason: "I don't believe any penalty is a deterrent."[25]

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[19] Furman v. Georgia, 408 U.S. 238, 307 (1972) (Stewart, J., concurring); Gregg v. Georgia, 428 U.S. 227, 233 (1976).

[20] S. 709, 211th Leg., 321 (N.J. 2006).

[21] COMM'N REPORT, *supra* note 1, at 36.

[22] *See, e.g.*, COMM'N MEETINGS OF N.J. DEATH PENALTY STUDY COMM'N 9 (Aug. 16, 2006) [hereinafter COMM'N MEETINGS] (testimony of J. John J. Gibbons), *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/DPSC081606.pdf (last visited Oct. 31, 2007).

[23] *Id.* at 11.

[24] Public Hearing Before the N.J. Death Penalty Study Comm'n , 9 (Sept. 13, 2006) [hereinafter Pub. Hearing, Sept. 13, 2006] (testimony of N.J. Sen. Raymond J. Lesniak), *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/DPSC091306.pdf (last visited Nov. 8, 2007).

[25] *Id.* at 130 (testimony of John F. Russo, Comm'r, N.J. Death Penalty Study Comm'n).

Those death penalty opponents – abolitionists who make the patently ridiculous claim that "the death penalty simply does not deter anybody" – unnecessarily make their own position more difficult. Of course the death penalty deters some people. As the Royal Commission (1949-1953) observed in its lengthy and detailed report, "We can number its failures. But we cannot number its successes."[26] We can never know how many people who would have otherwise committed murder stopped themselves because, and only because of the threat of punishment.[27]

The deterrence question, really, is not whether the death penalty deters – sometimes it surely does -- but whether, on balance, it deters more effectively than its principal alternative, life (without parole). Better informed abolitionists, then, make the more modest claim that the death penalty no more powerfully deters than life in prison. They claim that studies either confirm this failure of deterrence, or at least fail to establish the death penalty's marginally more powerful deterrent effect.[28]

During their hearings, the Commission did focus on deterrence.[29] This much was common ground among the real experts: Several recent sophisticated studies seem to confirm a substantially greater deterrent effect of the death penalty – but only when used regularly.[30] Critics attacked these studies at the hearings.[31] The Commission report relied on Columbia Law School Professor Jeffrey Fagan's skillful and relentless critique, diminishing the studies' persuasive power.[32]

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[26] ROYAL COMM'N ON CAPITAL PUNISHMENT, 1949-1953 REPORT, 1953, [Cmd. 8932], at 20 [hereinafter ROYAL COMM'N].

[27] *Id.*

[28] COMM'N REPORT, *supra* note 1, at 24-26.

[29] *Id.* at 24-29.

[30] *Id.* at 27.

[31] *See, e.g., id.* at 26.

[32] *Id.*

For example, all but one of the studies group all types of murder together, claiming that all are equally deterred by the death penalty. However, many murders are not planned in advance but are committed impulsively or in a sudden outburst of rage. It is not logical, according to Professor Fagan, to believe that such defendants would respond rationally to threats of punishment. [33]

Murderers largely moved by momentary passion, the argument goes, give little thought to the consequences as they kill.[34] The very remote possibility of their own execution someday in the distant future cannot and does not stop them here and now.[35]

In 1999, however, when the New Jersey legislature amended the statute, adding the "violation of domestic violence restraining order" as an aggravating circumstance making the intentional killer death eligible,[36] legislators must have believed that the remote threat of death *could* restrain passionate homicidal impulses of rejected lovers where court-issued restraining orders failed. Perhaps the legislature's "penological intent" was retribution and not deterrence. Perhaps they added this aggravator because in their view – although not in mine – those who disobey court orders and kill shall die.[37]

Many undeterrable passion killings qualify as manslaughter but not murder. And only the very worst passion murderers – such as sadistic torture killers – deserve to die. For centuries we've believed, all other things equal, premeditated cold-blooded killings deserve greater punishment than passion killing. And although certain murderers – international or domestic terrorists who kill in order to achieve a martyr's death – are by definition undeterrable, other cold blooded killers, e.g. professional assassins, may be most deterrable and also deserve to die.

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[33] *Id.* at 25.

[34] *Id.*

[35] *Id.* at 24-25.

[36] S. 947, 208th Leg., 209(l). (N.J. 1999).

[37] *Id.*

Early deterrence advocates such as Jeremy Bentham portrayed human beings as rational and calculating, weighing costs against benefits, discounting future threats of pain by their uncertainty and delay.[38] Thus, as the NJ Commission Report emphasized, since "less than 1 percent of those who commit murder nationwide ultimately receive the death penalty and less than one-half of that small number are executed," the death penalty could not be expected to deter a would-be murderer who rationally considered the odds.[39]

But this ignores basic human nature: When it comes to dying, most people, except extreme action seekers, go to great lengths to avoid deadly risks. We willingly sacrifice near-certain pleasure to spare ourselves remote risks of disaster. There is nothing "irrational" about this. Nor, flipping it, do we act irrationally in making small but certain sacrifices in order to achieve remotely possible future rewards – buying a lottery ticket for $1 although the chances are one in a hundred million of winning $20 million.

Classically, punishment's effectiveness as a deterrent depends, in Bentham's words, not only upon its certainty, but also its celerity.[40] Thus the Commission also noted that, "as a practical matter, the length of time that convicted murderers . . . serve on death row argues against the usefulness of the death penalty as a deterrent."[41] In the tradition of Bentham, the Commission saw potential killers as either passionate and unrestrainable, or rational and dismissing as tiny any possibility of being put to death.[42]

Punishment, however, as the Royal Commission noted, may restrain human beings subconsciously.[43] "[T]he deterrent force of capital punishment operates not only by affecting the

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[38] JEREMY BENTHAM, THEORY OF LEGISLATION 326 (C.K Ogden ed., Richard Hildreth trans., Morrison and Gibb Ltd. 1950) (1864).

[39] COMM'N REPORT, *supra* note 1, at 24.

[40] BENTHAM, *supra* note 38, at 326.

[41] COMM'N REPORT, *supra* note 1, at 29.

[42] *Id.*

[43] ROYAL COMM'N, *supra* note 26, at 20.

conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder."[44]

Abolitionists counter with the death penalty's so-called "brutalization effect": Condemning to death, then killing helpless defendants, the Government subconsciously reinforces a belief in all potential killers that killing is alright.[45] While the Commission expounded on this highly speculative subconscious brutalization hypothesis,[46] it completely ignored subconscious forces *supporting* deterrence cited by the British Commission[47] which this witness personally brought to their attention.[48]

Instead, determined to marshal evidence against capital punishment, the Commission report cited Richard Dieter for the well-known but misleading observation that "states without a death penalty have far *lower* murder rates than the states with the death penalty."[49] Of course, Washington D.C., with its own criminal code and prison system, but without a death penalty, has had a much *higher* murder rate than neighboring Virginia or Maryland, both capital jurisdictions.[50] The abolitionist spin can omit this fact, however, because D.C. is a "district" and not a state. Furthermore, comparing *counties* within a state, the effective unit of death penalty prosecution, the death penalty's marginal deterrent effect increases.[51] But, again, conveniently

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[44] *Id.*

[45] COMM'N REPORT, *supra* note 1, at 27.

[46] *Id.*

[47] ROYAL COMM'N, *supra* note 26, at 20.

[48] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 50 (testimony of Robert Blecker).

[49] COMM'N REPORT, *supra* note 1, at 26.

[50] DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2005 (2006) (these statistics are based on both murder and nonnegligent manslaughter), *available at* http://www.fbi.gov/ucr/05cius/data/table_05.html (last visited Oct. 31, 2007).

[51] COMM'N REPORT, *supra* note 1, at 42-44 (quoting Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 9-11) (Oct. 11, 2007) (testimony of J. David S. Baime).

neither the Executive Director of the abolitionist Death Penalty Information Center nor the similarly abolitionist Commission chose to mention this inconvenient fact.

And if they were really about maximizing capital punishment's deterrent effect, confining themselves to rational, conscious decision-making, the Commission might have proposed refining and narrowing the death penalty to the worst of the worst, and thereafter more regularly seeking and applying it to a much smaller class of monsters.[52] This witness urged the Commission orally and in writing to do this, providing a blueprint for a morally refined death penalty regime.[53] *The Newark Star-Ledger* headlined and highlighted that testimony – "Prof wants execution saved for 'the worst of the worst'."[54] Bent on abolitionism, the Commission completely ignored the plea. Instead, sandwiched between sustained scholarly attacks on deterrence the Commission did quote Kent Scheidegger, a leading death penalty supporter and legal director of the Criminal Justice Legal Foundation.[55] The death penalty "'does have a deterrent effect and does save innocent lives if it is actually enforced'," Scheidegger observed.[56] But "New Jersey does not have an effective death penalty because our 'court of last resort is determined to block it and willing to twist the law to do so'."[57]

The Commission report did not cite Scheidegger's specific examples of blatant judicial abolitionism cloaked as analysis.[58]

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[52] Robert Blecker, *A Road Not Considered*, 32 SETON HALL LEGIS. J. (forthcoming 2008).

[53] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 50 (testimony of Robert Blecker).

[54] Robert Schwaneberg, *Prof Wants Execution Saved for 'the Worst of the Worst'*, NEWARK STAR-LEDGER, Oct. 12, 2006, at 37.

[55] COMM'N REPORT, *supra* note 1, at 27.

[56] *Id.*

[57] *Id.*

[58] Public Hearing Before the N.J. Death Penalty Study Comm'n, 8-9 (Oct. 25, 2006) [hereinafter Pub. Hearing, Oct. 25, 2006] (testimony of Kent Scheidegger), *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/DPSC102506.pdf (last visited Nov. 8, 2007).

Nor did it wonder aloud how this state's first twenty-eight death sentences could have been so defective that the New Jersey Supreme Court reversed each of them. The Commission's abolitionist majority would hardly criticize their comrades on the Court for subverting the will of the people. Instead the Report uses Scheidegger to concede that in New Jersey the numbers were too scant and condemnations too rare to conclude anything much on behalf of deterrence.[59]

So, although the latest, most recent, most sophisticated studies *do* suggest that on balance, a death penalty regularly administered, more effectively deters murder than does life without parole, suppose we join the Commission in putting these studies aside.

Assume that collectively without more, the data to this point fails to clearly and convincingly *prove* the death penalty operates as a marginally more effective deterrent than life in prison. What else could support or supplant this latest but not yet conclusive empirical evidence? We're thrown back to human nature – "our hunches about how humans behave," which even in the light of the attack on deterrence, "remain, for now, untouched," testified Professor Lillquist, an agnostic on the death penalty.[60]

This "commonsense argument from human nature, applicable particularly to certain kinds of murders and certain kinds of murderers" strongly suggests that threatened death generally deters better than threatened life.[61]

"No other punishment deters men so effectually from committing crimes as the punishment of death," observed Sir James Fitzjames Stephen, the great 19th century English judge and leading historian of the criminal law.

> This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction . . . 'All that a

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[59] COMM'N REPORT, *supra* note 1, at 27.

[60] COMM'N MEETINGS, *supra* note 22, at 35.

[61] ROYAL COMM'N, *supra* note 26, at 19.

> man has will he give for his life.' In any secondary punishment, however terrible, there is hope; [b]ut death is death.[62]

My years interviewing street killers inside maximum security prisons and on death rows confirm this, exploding the categorical myth that the death penalty *never* deters more effectively than life without parole. My oral testimony informed the Committee about "Joe," who specialized in robbing drug dealers in the D.C. area. While robbing a middle-level dealer in his house in Virginia, Joe and his partners discovered to their delight in addition to cocaine, their robbery victims also possessed kilos of heroin. Joe told his cohort to wait outside while he dealt with his victims, already tied up and duct taped. Joe had decided to kill them, he recalled. But at the last moment he changed his mind. Why had he let them live? "When I was doing time in Richmond, I used to see the electric chair when I swept the hall. And what flashed in my mind was that chair, and I didn't want that. I couldn't handle that. So I let them live."[63]

This only shows how the death penalty deterred this one killer at this one moment. It does not demonstrate the more important point that sometimes *only* the death penalty can deter where life in prison will not. But Joe continued, telling me of a similar situation in Washington, D.C., which does not have the death penalty. "What did you do?" He said matter-of-factly, "I killed them. Because I could face life inside this joint. I had done time here before, and I knew I could do it again. But that chair, man. That's something else."[64]

Of course this is but one anecdote – although the most direct kind of evidence on deterrence we can ever hope to have. But why should we consider it freakish? Other stories in the literature and my own interviews confirm it. For most people -- and especially for those who have already served time in prison

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[62] *Id.* at 753 (*citing* James Fitzjames Stephen, *Capital Punishments*, FRASER'S MAGAZINE, June 1864).

[63] Interview with "Joe," prisoner in the Lorton Central Prison in Washington, D.C.

[64] *Id.*

and do not fear repeating that experience – only the threat of death, and sometimes not even that, will restrain them.

This witness drew the Commission's attention to these anecdotes, to the British Commission report, a model of fairness and depth the Commission could have tried to emulate. He drew their attention to Fitzjames Stephen's observations on human nature, which the Commission conveniently avoided mentioning in its final report, perhaps because these truisms are so difficult to rebut.[65]

Instead, moved by Professor Fagan's scholarly critique, the Commission dismissed "a sea change in the scholarship on deterrence and the death penalty" as Scheiddeger called it, where "improved methods of econometrics" by and large "confirms what common sense has always told us."[66]

How to resolve the conflict among studies, undermined by data too sparse statistically to make the case for or against deterrence?

Absent overwhelming statistical proof, it might seem that commonsense and human nature would decide this issue. But not for this Commission, determined at the outset to abolish the death penalty: "Given the plethora of scientific analysis, 'common-sense' explanations of the penalty's deterrent effect based on logic . . . are neither persuasive *nor important*."[67]

When *should* logic, human nature and commonsense count? When all the evidence is to the contrary? Or never at all? If not here, where empirical studies apparently conflict, when *would* the Commission count logic, human nature and common sense?

In the end, regardless of the Commission's unsupported assertion, commonsense, human nature, logic, and anecdote strongly support what the most recent statistical studies suggest – death generally deters more effectively than life.

Deterrence alone, however, should rarely if ever justify death as punishment.

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[65] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 37.

[66] Pub. Hearing, Oct. 25, 2006, *supra* note 58, at 5.

[67] COMM'N REPORT, *supra* note 1, at 28 (emphasis added).

**Retribution**

However repulsive to a majority of the Commission,[68] retribution remains the primary justification for the death penalty, the primary "penological intent." Rejected by most professors these past few decades, retribution -- literally "pay back" -- persists as punishment's essential justification *and* limit. Retributivists refuse to condemn and execute a helpless person simply to terrify others. We retributivists would only execute a person who deserves to die.

Retribution could have split the Commission between abolitionists who detested the death penalty and those like Commissioner Kathleen Garcia who wanted executions badly but despaired that they would ever happen.[69] If the New Jersey Supreme Court would forever block the death penalty, then why force victims' families to have their deep wounds periodically picked open by the endless legal process?

The Commission should have seriously considered whether retributive justice ever demands death. Instead, the Commission barely acknowledged the retributive lens and never employed it, or rebutted those of us who would. But the Commission cannot avoid retribution and still fulfill its legislated mandate. It cannot avoid retribution and serve the public good.

All seven questions the legislature put to the Commission[70] really implicate retribution directly or indirectly (metaphorically in the case of "costs"). Four of the Commission's eight findings involve retribution essentially:

"(1) There is no compelling evidence that the New Jersey *death penalty rationally serves a legitimate penological intent.*"[71]

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[68] *Id.* at 30.

[69] *See id.*; *Id.* at 93-96 (statement of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n, concurring).

[70] S. 709, 211th Leg., 321. (N.J. 2006).

[71] COMM'N REPORT, *supra* note 1, at 1 (emphasis added).

"(5) Abolition of the death penalty will eliminate *the risk of disproportionality in capital sentencing*."[72]

"(6) The *penological interest in executing a small number of persons* guilty of murder is not sufficiently *compelling* to justify the risk of making an irreversible mistake."[73]

"(7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety *and address other legitimate* social and *penological interests*, including the interests of the families of murder victims."[74]

Instead of really focusing on retribution and allowing its great weight throughout, however, the Commission report handled retribution quickly up front right after deterrence, acknowledged an internal split among Commissioners,[75] and delicately mostly avoided it thereafter. As we'll see, when the Commission report reached questions 5, 6, & 7 – disproportionality, the penological interest in executing the worst of the worst, and the moral sufficiency of life without parole-- they avoided the question of justice. By disallowing retribution to act as a counterweight, the Commission could assume their conclusions, avoid difficult balancing, and simply call for abolition.

Early witnesses disparaged retributive support for the death penalty as vestigial hypocrisy. We "debase and degrade ourselves by resorting to the same conduct that we condemn for those who kill."[76] "Killing because someone else has killed" was not "consistent with ... the mores of a civilized society."[77] "We

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] COMM'N REPORT, *supra* note 1, at 29-30.

[76] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 116 (testimony of Dan Carluccio).

[77] *Id.* at 46 (testimony of Robert Del Tufo).

cannot teach respect for life by taking life."[78] But this well-worn argument -- that we debase life by taking life -- if it proves anything, proves too much. When we imprison kidnappers, do we thereby debase liberty, this witness asked rhetorically, in writing and oral testimony before the Commission?[79] When we impose fines on thieves, do we debase property? Punishment acts as a like kind response – inflicting justified pain upon a person who earlier inflicted unjustified pain (so, too, of course celebration – returning pleasure for past pleasure). Thus the basic retributive measure – like for like – "as he has done, so shall it be done to him;"[80] "giving a person a taste of her own medicine;" "fighting fire with fire" – satisfies at a primal level. Reciprocity is not hypocrisy.

During the hearings, Judge John Gibbons (and other critics) disparaged retribution as "atavistic" and a "synonym" for "vengeance."[81] Apparently our earlier public debate, sponsored by the New Jersey League of Women Voters, failed to enlighten the former Chief Judge of the Third Circuit, an ardent abolitionist, as he once again conflated retribution with vengeance or revenge.

"Those who insist on equating retribution with revenge" this witness countered at length in his twenty minutes before the Commission, must:

> recognize [deterrence] for what [it] is. Because if retribution is pure revenge, then deterrence is pure terrorism, as Hobbes – the first and greatest modern utilitarian – said in disparaging retribution and proposing deterrence. He said, "The aym of punishment is not revenge, it's terror." Now, we've come to appreciate that

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[78] Public Hearing Before the N.J. Death Penalty Study Comm'n, 5 (July 19, 2006) [hereinafter Pub. Hearing, July 19, 2006] *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/DPSC071906.pdf (citing Bishop John M. Smith) (last visited Nov. 8, 2007).

[79] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 35.

[80] *Leviticus* 24:19.

[81] COMM'N MEETINGS, *supra* note 20, at 11.

> deterrence is not pure terror. You should also appreciate that retribution is not pure revenge.[82]

Although they stem from a common desire to inflict pain on the source of pain, revenge may be limitless and misdirected at the undeserving, as with collective punishment. Retribution, however, must be limited and proportional – no more (or less) than what's deserved, this witness further protested.[83]

"[R]etribution provides the basis for limiting punishment as well as for affirming it," he insisted in his oral testimony before the Commission. "We, as advocates of the death penalty, are as concerned that those who do *not* deserve it do not get it, as we are that those who do, do."[84]

The Commission's final report, to its credit, did not repeat abolitionists' false equation of retribution and revenge, citing me instead and supposedly recounting my rejoinder:

> Professor Blecker stated that retribution should not be equated with revenge, which is not proportional and is unlimited. Rather, he said, retribution is proportional to the crime of murder. Retribution is based on the principle of *lex talionis*, or "an eye for an eye" – the belief that punishment should fit the crime.[85]

But this retributivist never actually said or implied that "retribution is proportional to murder." Literally non-sensical, the Commission's restatement badly distorts my position repeatedly expressed: Murder *only rarely* calls for the death penalty. Pennsylvania was first explicitly to recognize this in 1794, splitting off 1st degree capital murder from other murder.[86] And the U.S. Supreme Court has held for decades, the death penalty may not be used for the vast majority of murders.[87]

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[82] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 36.

[83] *Id.* at 34.

[84] *Id.*

[85] COMM'N REPORT, *supra* note 1, at 29-30.

[86] Furman v. Georgia, 408 U.S. 238, 336 n.55 (1972) (Marshall, J., concurring).

[87] *Id.* at 294 (Brennan, J., concurring).

Death is a wildly disproportionate response for felony murder where there is neither an intent to kill nor reckless disregard for human life.[88]

The Commission's unfortunate mischaracterization of retribution probably unintentionally stemmed from its desire to pass retribution by quickly and the Commission's failure to grasp this concept so alien to it yet central to the vast majority of the American public.

Let's get the record straight. Revenge *may be* a potentially unlimited disproportional response. Retribution demands a proportionate limited response. But at least the Commission here seemed to understand that the proportionality question could not be answered without considering retribution directly. Except when the Commission did specifically arrive at the question of proportionality, its report somehow virtually ignored retribution.[89]

Abolitionists who reject retribution -- who do not feel the urge to punish, or do feel it but suppress that feeling of righteous indignation as irrational and shameful -- cannot really grasp what moves us retributivists.

Retribution itself remains a complex doctrine. Retributivists split into different camps, disagreeing among themselves about the calculus of desert. Immanuel Kant, perhaps the best known retributivist, would count only the killer's *intent* or *motive*, holding that the only pure evil is an evil will.[90] Most retributivists, however, also factor in the actual *harm* willingly caused. All other things equal, murder is worse than attempted murder, and thus deserves greater punishment. In common, retributivists refuse to justify punishment by its future costs or benefits, resting justice -- limited, proportional punishment – exclusively on a criminal's *past* moral culpability.

Most retributive death penalty supporters, then, define the "worst of the worst" as deserving to die for the extreme harms they cause (rape-murder, mass-murder, child- murder, torture-

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[88] *See* Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

[89] COMM'N REPORT, *supra* note 1, at 29-30.

[90] IMMANUEL KANT, THE SCIENCE OF RIGHT 84 (William Hastie trans., Alex Catalogue of Electronic Texts) (1790).

murder) along with the attitude with which they cause it – sadistically or with a depraved callousness.

According to Immanuel Kant's classic retributivism, we impose punishment as an abstract duty without any emotion. By punishing, we dignify the transgressor, acknowledging the free will that produced the crime. The murderer must die; Kant insists, "his death, however, must be kept free from all maltreatment." Kant rejects offering the condemned an option to submit to dangerous medical experiments on condition that his life be spared if he survives, insisting that we always treat human beings as ends in themselves, and never merely as a means to our ends.[91] Following Kant's lead, again, contemporary retributivists reject general deterrence as an insufficient justification for punishment, especially death – otherwise we would be making an example of a person, in order to change others' future behavior.

More persistent and popular than Kant's retributivism from an abstract sense of duty, emotive/intuitive retributivism has deeper roots.

Abolitionists in the hearings consistently disparaged emotion: "We know that the death penalty is mostly an emotional response to heinous acts,"[92] and "[a]n emotional response not based on reason."[93] Although we may try to avoid it, however, emotion has always played a vital part in moving us to respond correctly.

"The voice of your brother's blood cries out to me from the ground," *Genesis* proclaims. [94] In other words, blood pollutes the land. Like the ancient Greeks and ancient Hebrews, contemporary emotive retributivists *feel* polluted if vicious murderers walk free, or frolic in confinement, failing to get their just deserts.

Abolitionist critics of retribution insisted at the hearings that emotion may never properly move us individually or collectively:

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[91] *Id.*

[92] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 112-13.

[93] *Id.*

[94] *Genesis 4:10.*

> My heart goes out to every family devastated by the murder of a loved one. They have every right to be angry and to express that anger. But I'm certain that deep down not one of them would want to act out of that anger. As a society, we should not act out of anger either,[95]

Senator Lesniak flatly asserted.

Emotive retributivists' urge to punish, however, stems directly from a projected empathy with the victim's suffering. "Our heart, as it adopts and beats time to his grief," declared Adam Smith in *A Theory of Moral Sentiments*, the first great work of modern retributive psychology, "so is it likewise animated with that spirit ... to drive away or destroy the cause of it."[96] Haunted by the victim's suffering, retributive death penalty supporters cannot forget or forgive the victim's fate: "We feel that resentment which we imagine he ought to feel, and which he would feel if in his cold and lifeless body there remained any consciousness of what passes upon earth," Smith further explained.[97] "His blood ... calls aloud".[98]

Embracing human dignity as our primary value, emotive retributivists since Adam Smith emphasize "a humanity that is more generous and comprehensive," "oppos[ing] to the emotions of compassion which [we] feel for a particular person, a more enlarged compassion which [we] feel for mankind."[99]

This witness urged these feelings upon the Commission in writing and oral testimony.[100] The Commission report, however completely ignored emotive retributivism, instead drawing summarily upon the testimony of Professor Lillquist, a professed agnostic on the death penalty: "The retributivist viewpoint is in accordance with the philosophy of Immanuel

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[95] *Id.* at 6.

[96] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 98-99 (Augustus M. Kelley 1966) (1759).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 128.

[100] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 34, 36.

Kant that, for the most heinous forms of wrongdoing, the penalty of death is morally justified or perhaps even required."[101]

Treating retributivism as a monolith – as duty stripped of emotion -- allowed the Commission to expropriate emotion when useful. Thus the Commission could express its understanding and sympathy for victims' families who had allowed their own fury at their loved ones' killers to get the best of them. And the Commission could display sensitivity to and solidarity with the emotional rollercoaster ride a death penalty never actually administered forced upon the victims' families, by calling for the abolition of the only hope these families had of ever seeing justice done.

Up front before they buried it, the Commission's final report treated retribution – poison to some of the commissioners – respectfully if gingerly, declining to repeat witnesses' silly, specious claims of retributive hypocrisy, or the misleading equation of retribution with vengeance.[102] Instead here, and only in this part, did the report quote me. "In the words of Professor Blecker: 'Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. Retributively, society intentionally inflicts pain and suffering on criminals because and to the extent that they deserve it. But only to the extent they deserve it . . . Justice, a moral imperative in itself, requires deserved punishment'."[103]

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[101] COMM'N REPORT, *supra* note 1, at 29.

[102] *See, e.g.*, Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 112 (testimony of Dan Carluccio).

[103] COMM'N REPORT, *supra* note 1, at 30.

## WHOSE BURDEN?

By its cleverly worded first finding – "there is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent"[104] – the Commission effectively shifted the burden of persuasion upon those who would retain the present statute rather than upon those who would change the law.

The burden, however, should be on those who insist that the death penalty always undermines the retributive goal of justice. If the Commission had really faced the retributive question, and placed the burden where it should lie, abolitionists on the Commission would have felt called upon to establish that life without parole *and not death* gives the most heinous killers their just deserts. Instead, rejecting retribution as repulsive and the death penalty as immoral, the Commission majority simply begged the question and shifted the burden.[105]

Suppose the obvious: Retributively, death is not always a grossly disproportionate response. Complex questions remain. Does death and death alone uniquely qualify as justice? And even then, where death is the only just punishment, do practical concerns of efficiency and policy trump retributive justice? The Commission should have focused upon these questions in its later findings. Instead, the Commission cleverly phrased its first finding to place the burden of persuasion on those who insist that justice sometimes demands death. So we have the burden, yet the Commission excludes most of our case.

And what a strange burden the Commission imposes upon us. We would shoulder it. "Compelling evidence" – evidence which compels us to demand the death penalty: "The voice of our brother's blood;"[106] "like members of the same body, [we]

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[104] *Id.* at 1.

[105] *Id.*

[106] *Genesis* 4:10.

should feel and resent each other's injuries;"[107] "it [is] highly desirable that criminals should be hated."[108]

It is ironic, if not hypocritical, for the Commission to impose this "compelling" emotional burden upon retributive death penalty advocates while allowing retribution, if at all, only as strictly rational and non-emotive.

How could Commission members, never so much as acknowledging emotive retributivism which does distinguish emotion from abstract duty, ever be "compelled" by it? Contemporary utilitarians declare it irrational to cry over spilt blood. Punishment for the sake of the past seems pointless to them – "what good will it do to inflict more pain?" Of course we retributivists reply that Justice, a moral imperative in itself, requires deserved punishment. Again, emotive retributivists, in fact all retributivists, draw from *the non-rational but real* feeling that the past counts, separately from future costs and benefits.

How could Commissioners who do not *feel* the intuitive urge to punish appropriately – for whom the past does not count as a covenant to be kept – who simply reject from the outset retribution as "a legitimate penological intent" – and give intuitive emotion no weight – ever feel "compelled" by it?

Thus the Commission majority completely ignored centuries of traditional retributivism. The Commission ignored the current resurgence of retributive thought in the academy and among the people. Perhaps least defensible of all, the Commission completely ignored the apparent future dominance of retributivism in the 21st century.

Explicitly incorporating retribution as punishment's primary justification, the proposed new Model Penal Code declares: "Under the new scheme, no utilitarian or restorative purpose of sentencing may justify a punishment outside the range of severity proportionate to the gravity of the offense, the harm to

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[107] Attributed to Solon, the ancient Greek law giver. *See* ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION 60 (1927).

[108] JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-2 (Macmillan 1883)).

the crime victim, and the *blameworthiness* of the offender."[109] Thus, the new Model Penal Code instructs legislatures to consult their own moral judgment and apply their own intuitions of desert to design punishments within the retributive range.[110]

Instead of discussing whether retribution, alone, outweighed the other justifications for the death penalty combined, the Commission briefly acknowledged themselves "divided about whether retribution is an appropriate penological intent," worth counting *at all*![111]

So by its first finding, this anti-retributivist New Jersey Death Penalty Commission majority cleverly imposed an impossibly burdensome standard – "compelling evidence that death rationally serves a legitimate penological intent" – retribution ultimately excluded, emotive retribution completely ignored.[112]

## FINDING (2) THE COSTS OF THE DEATH PENALTY ARE GREATER THAN THE COSTS OF LIFE IN PRISON WITHOUT PAROLE, BUT IT IS NOT POSSIBLE TO MEASURE THESE COSTS WITH ANY DEGREE OF PRECISION.[113]

### Financial costs of the death penalty

"A precise conclusion cannot be reached," the Commission Report stated up front. Yet the report did specify the death penalty's enhanced costs from investigation to appeal. The Public Defender's office estimated that abolishing capital punishment would save almost $1.5 million per year.[114] The Department of Corrections estimated that eliminating the death

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[109] Model Penal Code § 1.02(2)(a)(i) cmt. a at 16 (Discussion Draft April 17, 2006) (emphasis added).

[110] *Id.*

[111] COMM'N REPORT, *supra* note 1, at 30.

[112] *Id.* at 1.

[113] *Id.* at 31.

[114] *Id.* at 31.

penalty would save the state approximately $1 million per death row prisoner over each inmate's lifetime.[115] The Administrative Office of the Courts (AOC) estimated $100,000 extra for each mandated death penalty proportionality review on appeal.[116] The Commission did note in passing that the AOC was unable to compare death penalty trial costs with non-death penalty murder trial costs, because "many different variables in murder trials preclude such a comparison. These variables include the possibility of plea bargaining (which would negate the need for a trial altogether)."[117]

The vast majority of criminal cases result in plea bargains which not only save time, effort, and costs of trial and appeal, but also protect against an unpredictable and errant jury ignoring the evidence and acquitting a sympathetic accused. In return for pleading guilty, criminals almost always receive lesser charges or lighter sentences.

Without a death penalty as a threat, what would move an aggravated murderer to waive trial and appeal, and accept life without parole? Perhaps, in a rare case, remorse. Overwhelmingly, however, first degree murderers plead guilty and accept life without parole only to avoid the death penalty. Each such guilty plea saves the people hundreds of thousands of dollars.

The abolitionist Defense bar could hardly be counted upon to subtract public money saved by guilty pleas extracted under fear of death. The Attorney General had noted this huge potential cost saving from capital punishment, and the Commission did quote them: "Those defendants who are currently death-eligible would still face the possibility of life without parole or, at minimum, a very lengthy sentence, so a protracted trial to determine guilt would still be necessary."[118] Abolish the death penalty and predictably there will be more murder trials and many fewer pleas of guilt with life sentences.

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[115] *Id.* at 32. The Department of Corrections gave a range of $937,430 to $1,229,240.

[116] *Id.*

[117] *Id.*

[118] COMM'N REPORT, *supra* note 1, at 32-33.

Nobody attached a hard number here like $93,000 or $1.2 million. Instead the Commission cleverly further softened these enormous savings from a death penalty: "The Commission notes that estimating the cost to the prosecutors is difficult because the issue involves *resource allocation*. In other words, if prosecutors are no longer involved with a lengthy death penalty case because the death penalty has been eliminated, they will expend their efforts on other types of prosecutions and there will not be measurable cost savings."[119]

But then why is this not also true of the defense? Both offices, understaffed, would shift personnel. The criminal justice system, whether prosecution or defense, routinely generates more work to be done than resources to do it. If public defenders weren't doing death penalty trials and investigations, wouldn't they too shift their attention to other under attended cases, thus eliminating cost savings from abolition? Why the Commission's asymmetry? After giving hard numbers to the extra costs of the death penalty, and softening the extra savings from it, the Commission reiterated the many immeasurable "cost savings . . . from eliminating the death penalty."[120] But this double counting should not obscure that extra costs from having a death penalty are the same as cost savings from eliminating it.

"The Commission notes that . . . recent studies in states such as Tennessee, Kansas, Indiana, Florida and North Carolina have all concluded that the costs associated with death penalty cases are significantly higher than those associated with life without parole cases. These studies can be accessed through the Death Penalty Information Center."[121]

Access them. What do we find? While recent studies seem to show that it does cost more to maintain the death penalty than life without parole in an individual case, these studies omit the enormous cost saving for each guilty plea and life sentence the murderer accepts in order to avoid the death penalty.

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[119] *Id.* at 33 (emphasis added).

[120] *Id.*

[121] *Id.*

"That has never been subtracted by any study," this witness informed the Commission orally and in writing.[122] Only Kansas, which the Commission mentions without investigation, specifically acknowledged their own omission, albeit in a footnote.[123] Once included in the assessment, "it may turn out that the cost figures come out differently, that it's in fact cheaper to execute than it is to maintain life without parole," this witness suggested to the Commission.[124] And "even if it's more expensive ... justice isn't cheap. And if the death penalty is the only just alternative then we have to do it even though it may be expensive."[125]

"The Commission wishes to stress the fact that, although it is not possible to measure many of the cost savings that would result from eliminating the death penalty, these savings nonetheless exist."[126] Repeat it enough and it seems to gain weight.

The Commission, of course, entirely ignored costs of *not doing justice* -- a retributive question cloaked as a financial one. Can we blame Commissioners for ignoring this "cost" when they do not see the death penalty as the only just result? Should we criticize the Commission for avoiding the costs of not doing justice, and all other controversial non-financial, immeasurable almost metaphorical costs from its calculus? Arguably in its straightforward second "finding," the Commission should avoid philosophy and stick to finance: "The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision."[127]

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[122] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 41 (testimony of Robert Blecker).

[123] Legislative Division of Post Audit, State of Kansas, Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections 19 (2003).

[124] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 41 (testimony of Robert Blecker).

[125] *Id.*

[126] COMM'N REPORT, *supra* note 1, at 33.

[127] *Id.* at 1.

Fair enough. Avoid emotional costs entirely. Except behold! – as the Commission's "cost" analysis continued.

### Emotional and psychological costs of the death penalty

"The Commission heard from a number of family members of murder victims about the devastating emotional costs of the death penalty. Survivors testified to the pain of being forced to relive the trauma of their loved ones' murders during prolonged appeals."[128] Victims' families talked of the frustration of wanting and waiting for their loved ones' killers to die. Much of the victims' family bitterness and frustration came from the false promise of justice. The system would never deliver on its promise – endless stays and reversals from a state supreme court that would not allow an execution.

"A psychologist . . . testified about the adverse effects of executions on . . . judges, jurors . . . correctional staff, journalists, clergy and spiritual advisors, as well as the families of the . . . condemned . . . . *The Commission finds that these intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty.*"[129]

So, non-quantifiable emotional costs *do* count. Then how about the cost of not doing justice? In some cases, abolishing the death penalty -- retributively, the only proportional punishment – abolishes justice. Yet even the minority of Commissioners such as Kathleen Garcia, while bitterly denouncing life-without-parole as inadequate for vicious killers who deserve to die, refused to see justice not done as an *added* cost, since no murderer in New Jersey was being executed anyway. Steeped in the reality of victims' families suffering from false promise, she voted to eliminate any hope of doing justice, because of the current abolitionist mood on the state high court.[130]

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[128] *Id.* at 33.

[129] *Id.* at 34 (emphasis added).

[130] *Id.* at 93-96.

How about the cost to parents who realize their child's rapist murderer now lives in prison playing basketball or watching the New Jersey Nets play on a color TV? What does it cost to contemplate the person who tortured your child to death now lying on a prison bed, lost in a first run movie or good book?

Avoiding emotive retributivism, the Commission report completely ignores all emotional costs of not doing justice.

## FINDING (3): THERE IS INCREASING EVIDENCE THAT THE DEATH PENALTY IS INCONSISTENT WITH EVOLVING STANDARDS OF DECENCY.[131]

That mantra of the modern era: "Evolving standards of decency of a maturing society." Suppose we all subscribe to the U.S. Supreme Court's pronouncement: The meaning of the 8th Amendment ban on cruel and unusual punishment is informed by "the evolving standards of decency that mark the progress of a maturing society."[132]

Does it offend our maturing sense of dignity and decency to put to death the worst of our murderers? Does this boil down to a public opinion poll, rightly conducted? Can the public's sense of decency sometimes regress, or recede rather than mature?

Two very different viewpoints frame this great debate: All absolutists – whether they are retributivists unalterably committed to punishing with death all (but only) those who deserve it, or abolitionists unalterably committed to eradicating the death penalty – know intuitively and *feel* certain there is one right, "mature" answer to this great question – "is death ever justified punishment?"

Relativists or Utilitarians, on the other hand, would settle the question of capital punishment by comparing its costs and benefits, assessing its effectiveness as a crime control measure, while always taking into account public opinion and particular social context: Does death incapacitate the condemned and deter other would-be killers more cheaply and efficiently than life imprisonment without parole? If so, let's have it; if not, let's not.

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[131] COMM'N REPORT, *supra* note 1, at 35.

[132] Trop v. Dulles, 356 U.S. 86, 101 (1958).

Since Plato battled the sophists in the 5th century B.C., Western Culture's ancient traditions include the controversy over truth. The sophists denied objective truth; everything was opinion and appearance. Truth, justice, was whatever a person or society could be persuaded to act upon. Using the wisdom of Heraclitus that "you could not step in the same river twice," today's sophist-abolitionists look upon "evolving standards" as strictly a matter of public perception or opinion. There would be no moral fact of the matter. Evolving standards of a maturing society would amount to little more than potentially fluctuating public opinion. The prevailing tastes of today – the present – govern.

Moral facts, however, move us absolutists.

Whether strongly supporting or opposing the death penalty, in common absolutists reject today's public opinion as the arbiter of death's decency or indecency. *Absolutist abolitionists* feel certain that society violates human dignity when under cover of law we methodically kill fellow human beings who pose no imminent threat to us. *Absolutist proponents*, on the other hand, also feel certain – unfortunately and undeniably – that this very nasty world contains predatory, vicious people who engage in behavior so despicable and destructive, with an attitude so cruel or callous, that they deserve to die. Obliged to do justice, Society must execute them. By killing these vicious killers for their cruelty, we acknowledge their responsibility – and thereby whatever little humanity remains.

So, we absolutists – abolitionists and retributivists alike – embrace human dignity as our ultimate issue. We reject any suggestion that the death penalty's decency or indecency ultimately rests on shifting public opinion.

Absolutist opponents of capital punishment, however, happily make sophistic common cause with their utilitarian brethren: Public rejection alone, however temporary, should permanently Constitutionally damn the death penalty, they insist, while public support alone, however robust, can never make it Constitutional, even for a moment.

Let's follow the Commission, into a relativist, subjective world of "evolving standards" and public opinion. During the hearings witnesses insisted on the "growing national consensus

for abolition of the death penalty."[133] A professional pollster, Patrick Murray, testified that although a clear majority of those polled maintains an abstract preference for the death penalty, when given the alternative punishment of life without parole as an option, at least in New Jersey, more people prefer it to death.[134]

But carefully consider a standard poll question: "Which punishment do you prefer *for people convicted of murder*: the death penalty or life in prison with no chance of parole." Note the fallacy of that standard question? How it doubly distorts. First, 'for people convicted of murder' or Gallup's "which is the better penalty for murder?"[135] Discriminating, informed, retributivist advocates would reserve the death penalty only for *aggravated* murder – the "worst of the worst." Suppose we recognize, along with the U.S. Supreme Court and every death penalty jurisdiction in the U.S. that the vast majority of murderers do not deserve to die?[136] How should we answer this question? Do we "prefer" death or life without parole "*for cases of murder*"?

Real retributivists oppose the death penalty for most "cases of murder." Only for the most despicable murderers do we favor it. Should we answer "life" and allow their poll to count us as abolitionists?

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[133] Pub. Hearing, July 19, 2006, *supra* note 78, at 49 (testimony of Edith Frank).

[134] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 68 (testimony of Patrick Murray).

[135] QUINNIPIAC UNIVERSITY POLLING INSTITUTE, NEW JERSEY VOTERS AREN'T BANKING ON PROPERTY TAX CUTS, QUINNIPIAC UNIVERSITY POLL FINDS; DON'T SELL THE TURNPIKE, VOTERS SAY, Jan. 24, 2007 at #34, *available at* http://www.quinnipiac.edu/x1299.xml?ReleaseID=1006 (last visited Nov. 8, 2007) (emphasis added); *see, e.g.*, Carroll, Joseph, *Americans and the Death Penalty*, GALLUP, Dec. 15, 2004, *available at* http://www.gallup.com/poll/14371/Americans-Death-Penalty.aspx (last visited Nov. 7, 2007).

[136] *See generally* Gregg v. Georgia, 428 U.S. 153 (1976) and N.Y. PENAL LAW § 125.27 (McKinney 2003).

Secondly, consider the last part of the question: "*with no chance of parole*"[137] or Gallup's "*with absolutely no possibility of parole.*"[138] Abolitionists delight in emphasizing that we who sometimes favor death cannot be "absolutely certain" an innocent person will never be executed – and thus we should abolish the penalty rather than take infinitesimal if inescapable risks. Yet the very same opponents who would disable us from acting on near-certainty, blithely assure their fellow citizens that life without parole carries "no chance" of parole.

Most citizens will equate "absolutely no possibility of parole" with "no possibility of release." Few people would factor in executive clemency. And, while a parole board may almost never release a convicted mass murderer, even after he has aged and now seems gentle and no longer any threat to anyone, a future legislature may simply abolish life without parole altogether and apply it retroactively. Europe does not have life without parole, although you'd be hard pressed to know this from leading media news outlets whose editorials otherwise urge us to follow Europe's lead.[139]

Although by written statement and live testimony, this witness warned the Commission of these distortions, the Commission report simply ignored these warnings.[140]

The standard poll question further distorts and artificially diminishes support for the death penalty by making the aggravated murder itself little more than an abstract event. Polls discourage respondents from matching a concrete punishment to a specific crime. Of course abolitionist pollsters shy away from asking even the abstract question directly: 'Do you favor the death penalty for the *worst* murderers – for example a serial killer who rapes and tortures children?' Once made aware of the victim's suffering and the killer's viciousness, what punishment will the overwhelming majority match to

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[137] QUINNIPIAC UNIVERSITY POLLING INSTITUTE, *supra* note 135 (emphasis added).

[138] *Americans and the Death Penalty*, *supra* note 135 (emphasis added).

[139] *See, e.g.*, Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 48 (testimony of Robert Blecker).

[140] *See* COMM'N REPORT, *supra* note 1.

torturing and killing children? That question – do you favor the death penalty for the worst murderers? – the real question – abolitionist pollsters and the Commission must avoid.

During the hearings, two commissioners picked up on distorted polling and pressed Patrick Murray, the pollster. Commissioner DeFazio asked: "Do you realize that when the more specific questions are asked, and when I say 'more specific,' I mean fact sensitive questions are asked .... you would agree with me if the question was asked, 'Would you support the death penalty for Timothy McVeigh?' the percentage would rise astronomically?"[141]

"Yes,"[142] Murray replied. Commissioner DeFazio followed up: "underlying all of this is the theory that the punishment should fit the specific crime."[143]

Commissioner Moczula also inquired about the polling process, asking: "You did not ask in these polls, 'Do you favor the death penalty were it limited to particularly heinous or extraordinary murders?'; it was a general question on favoring the death penalty."[144] The pollster conceded. "That's correct. None of the polls . . . in New Jersey had asked that question."[145] And the Commissioner pressed again: "Did you ask the question, 'Do you favor the death penalty versus life without parole, but with the possibility of executive clemency?'"[146]

"No, we did not ask that question," Murray admitted.[147]

Ironic, then, how the same pollsters who claimed that theoretical or abstract support for the death penalty substantially diminishes when concrete alternatives of life

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[141] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 77 (testimony of Edward J. DeFazio, Comm'r, N.J. Death Penalty Study Comm'n).

[142] *Id.* (testimony of Patrick Murray).

[143] *Id.* at 79 (testimony of Edward J. DeFazio, Comm'r, N.J. Death Penalty Study Comm'n).

[144] *Id.* at 85 (testimony of Boris Moczula).

[145] *Id.* at 85 (testimony of Patrick Murray).

[146] *Id.* at 85 (testimony of Boris Moczula).

[147] *Id.* at 85-86 (testimony Patrick Murray).

without parole are presented – make certain to keep the crime itself abstract, and also imply falsely in their question that the alternative of life without parole is certain and most severe. As we'll see, the Commission did orchestrate witnesses to rebut any suggestion that considering the crime and its punishment concretely, an "informed citizenry" would overwhelmingly reject life without parole in favor of death.

But in its third finding, the Commission majority avoided deep questions of whether public opinion necessarily matures. It ignored serious flaws in polling regimes. And it obscured concrete details of both crime and punishment, determined to find death indecent but unwilling to express its abolitionist absolutism lest it lose the votes of death penalty advocates on the Commission, thoroughly disgusted and worn out by long delays.

So, instead, the Commission majority artfully managed its conclusion, finding "increasing evidence that the death penalty is inconsistent with evolving standards of decency."[148]

"Increasing evidence." What a burden of persuasion they would place upon themselves!

The death penalty was used less these days, the Commission noted, which of course could mean that prosecutors and juries were getting more discriminating in seeking death and imposing it, decently reserving the ultimate sanction for the ultimate crime. The Commission pointed, among other things, to a 2000 Quinnipiac poll which "found that only 40% of State residents believed that the death penalty deters other potential murderers."[149] This statement is either completely irrelevant to the question of decency, or if it is relevant cuts just the wrong way. The polls consistently indicate an overwhelming public support for the death penalty based upon just deserts, and in spite of a (mis)perceived failure to deter.

Persistent retributive support for the penalty shows that supporters feel certain that sometimes death provides the only decent response.

The Commission report noted the "number of witnesses from the religious community" who "uniformly urged abolishing the

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[148] COMM'N REPORT, *supra* note 1, at 35.

[149] *Id.* at 36.

death penalty."[150] Apparently specially counting beliefs of religious leaders in a secular society did not bother the Commission. Nor did the Commission refer to the embarrassing fact that while ordinary Americans generally affiliate religiously, they often split with the religious elites over this issue.

Noting "an emerging national consensus against executing certain defendants convicted of murder," the Commission somehow found support in United States Supreme Court opinions for increasing evidence of indecency.[151] They pointed to high Court decisions striking down the death penalty for a robbery getaway driver who did not kill or intend anyone be killed,[152] a rapist of an adult woman who did not otherwise injure his victim,[153] juveniles who killed,[154] and mentally retarded murderers.[155]

This witness had cited those very same Court opinions to the Commission, as evidence that the Supreme Court employed *retributive* thinking to *limit* punishment it found objectively disproportionately severe.[156] Citing recent legislation nationwide, the Supreme Court Justices had buttressed their own moral judgments of disproportionality by pointing to an emerging consensus against executing these relatively sympathetic defendants. These Court decisions, and the supposed emerging consensus which buttressed them, however, had nothing to do with the public attitude or moral fact of proportionality of death for the worst of the worst.

Even the Commission had to acknowledge this: "Although the Commission recognizes that similarly strong evidence of a

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[150] *Id.*

[151] *Id.* at 37.

[152] Enmund v. Florida, 458 U.S. 782 (1982).

[153] Coker v. Georgia, 433 U.S. 584 (1977).

[154] Roper v. Simmons, 543 U.S. 551 (2005).

[155] Atkins v. Virginia, 536 U.S. 304 (2002).

[156] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 34-35 (testimony of Robert Blecker).

consensus against the death penalty in general has not yet emerged, there are suggestions of such a trend."[157]

"Suggestions of a trend" – another lightweight burden these abolitionist Commissioners placed upon themselves. Determined to find "increasing evidence" of "inconsistency" and "suggestions of a trend," the Commission relied on isolated instances of opposition, starting with the infamous Governor George Ryan, convicted felon, emptying Illinois' death row.[158] Their "evidence" of a trend continued: "New York's death penalty statute (enacted in 1995) was struck down by that state's Court of Appeals in 2004 and the New York legislature has thus far failed to act to reinstate it."[159] Of course the Commission conveniently failed to mention that the Court struck down the statute by a single vote, 4-3, basing its decision not at all upon "evolving standards of decency" but solely on the unique and uncommonly stupid unrelated "jury deadlock" provision.[160]

Their evidence continued: "In the past two years legislation to abolish the death penalty has been *introduced* in the legislatures of 10 states: Illinois, Kansas, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, Tennessee and Washington."[161]

So, they would locate support for finding the death penalty constitutionally indecent in the failure of one state to reinstate a death penalty judicially struck down by a bitterly divided court on other grounds, and in legislation introduced (sometimes by a single legislator). The Commission saw a national decline in death penalties meted out as further evidence of rejection, rather than prosecutors' and juries' greater care and moral discrimination. And bootstrapping, they Commission also mentioned moratoria such as New Jersey's own, as evidence of rejection rather than a pause to study the issue.

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[157] COMM'N REPORT, *supra* note 1, at 39.

[158] *Id.*

[159] *Id.* (referencing People v. LaValle, 3 N.Y.3d 88 (N.Y. 2004)).

[160] People v. LaValle, 3 N.Y.3d 88 (N.Y. 2004).

[161] COMM'N REPORT, *supra* note 1, at 40 (emphasis added).

Of course the Commission once again conveniently omitted all counter-evidence.

In Massachusetts, a long-standing abolitionist state, a unanimous jury of 12 had recently decided death in a federal prosecution.[162] Nor did they mention the recent referendum in Wisconsin, another state without the penalty for more than a century, where 56% of the people voted to reinstate it.[163] This official state referendum – this great poll – undermined the Commission's conclusion, so the Commission ignored it.

As it turned out, had the Commission's report come out later, it could have pointed to serious efforts to repeal the death penalty in several legislatures which passed at least one house, or made it out of committee but were thereafter defeated. On the other hand a unanimous federal jury gave the death penalty to a cop killer in New York;[164] South Dakota executed its first condemned in 60 years;[165] and several state legislatures expanded death eligibles to include rapists of children who did not kill their young victims.[166] A Wisconsin legislator introduced legislation to restore capital punishment,[167] New

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[162] United States v. Sampson, 335 F.Supp.2d 166 (D. Mass. 2004).

[163] *See Capital Punishment: On Pain of Death,* MILWAUKEE JOURNAL SENTINEL, Nov. 10, 2006, at 18, *available at* 2006 WLNR 23486756. *See also* Vikas Bajaj et al., *THE 2006 ELECTIONS: STATE BY STATE; Midwest,* N.Y. TIMES, Nov. 9, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D03E1D61E3FF93AA35752C1A9609C8B63&sec=&spon=&pagewanted=all.

[164] Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives,* N.Y. TIMES, Jan. 31, 2007, *available at* http://www.nytimes.com/2007/01/31/nyregion/31death.html?n=Top/Reference/Times%20Topics/People/B/Brick,%20Michael.

[165] Monica Davey, *Execution in South Dakota, Delayed a Year by Debate on Method, Is First in 6 Decades,* N.Y. TIMES, July 13, 2007, *available at* http://www.nytimes.com/2007/07/13/us/13execute.html?n=Top/Reference/Times%20Topics/People/D/Davey,%20Monica.

[166] *See* State v. Kennedy, 957 So.2d 757, 780 (La. 2007).

[167] *WISCONSIN: Sen. Lasee Introduces Bill Regarding Death Penalty,* U.S. FEDERAL NEWS, Apr. 10, 2007, *available at* 2007 WLNR 6803854.

York's senate re-enacted a capital statute.[168] And perhaps most significantly, in New Jersey itself, the Quinnipiac poll showed a substantial majority of citizens opposed the Commission's own recommendation to abolish the death penalty![169]

But without such evidence and ignoring what bad news it had, the Commission simply imposed a featherweight burden on itself and blithely announced its finding.

## FINDING (4) THE AVAILABLE DATA DO NOT SUPPORT A FINDING OF INVIDIOUS RACIAL BIAS IN THE APPLICATION OF THE DEATH PENALTY IN NEW JERSEY.

Judge Baime's annual studies showing no racial bias in the administration of the death penalty in New Jersey effectively took race out of the Commission's arsenal, and thus largely eliminated the issue from this discussion.[170]

To avoid moral disproportionality, based on class and correlated with race, this witness urged the Commission to modify the state statute, rejecting a drug-dealing aggravator, and abolish capital robbery felony murder.[171] Keeping these morally irrelevant aggravators in a world where underprivileged inner city youths regularly commit economically motivated crimes guarantees that blacks and other minorities will be disproportionately death eligible. A deadly ethos governs the drug trade, directed within at thieves, robbers and business rivals. The robbery-murder and drug aggravator virtually guarantee that the inner city poor will disproportionately show up among the condemned.

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[168] Al Baker, *Republicans Seek a Bipartisan Vote on a Bill to Reinstate the State's Death Penalty, N.Y. TIMES,* Mar. 2, 2005, *available at* http://www.nytimes.com/2005/03/02/nyregion/02death.html.

[169] QUINNIPIAC UNIVERSITY POLLING INSTITUTE, NEW JERSEY VOTERS AREN'T BANKING ON PROPERTY TAX CUTS, QUINNIPIAC UNIVERSITY POLL FINDS; DON'T SELL THE TURNPIKE, VOTERS SAY, Jan. 24, 2007 at #34, *available at* http://www.quinnipiac.edu/x1299.xml?ReleaseID=1006 (last visited Nov. 8, 2007).

[170] COMM'N REPORT, *supra* note 1, at 41 (2007).

[171] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 57-58 (statement of Robert Blecker).

Bent on simply abolishing death as punishment, the Commission was in no mood to consider how to *redefine* capital crimes so as to radically reduce whatever race effect remained. Instead, the Commission ignored this race effect in *defining* capital crimes, and moved past the issue quickly.[172]

## THE COMMISSION'S FINDINGS 5-7

From different angles, although rarely explicitly, the Commission's findings Five, Six, and Seven return us to the original question – not public perception, not costs and benefits – but justice, really the primary penological justification for any punishment.

The Commission almost never used the word "justice" in its report. Explicitly considering the justice of retaining or abolishing capital punishment would have forced it to address whether some murderers deserve to die. This would have split Commissioners, dividing those who desperately desired that vicious killers die, if only the courts would allow us to kill them, from the majority of Commissioners who, not feeling retributive anger, either rejected retribution entirely, or thought retribution could be satisfied without death.

But the Commission's three findings from overlapping perspectives did really focus in upon justice:

**(5) Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.**

**(6) The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.**

**(7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.**

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[172] COMM'N REPORT, *supra* note 1, at 44.

## FINDING (5) ABOLITION OF THE DEATH PENALTY WILL ELIMINATE THE RISK OF DISPROPORTIONALITY IN CAPITAL SENTENCING.[173]

### Proportionality

Western culture at its core embraces proportionality. This most deeply held common value – that punishment must fit the crime – continues to dominate contemporary U.S. Supreme Court death penalty jurisprudence.[174]

For twenty-five hundred years, proportionality has acted as a deep constraint and sacred duty in meting out punishment. Originally, like-for-like, "an eye for an eye," *exact* 1:1 reciprocity supplied the simplest and most obvious measure of proportionality. But justice required less symmetric measures for some crimes, and some criminals: "If the guilty man deserves to be beaten," *Deuteronomy* declares, "the judge shall cause him to lie down and be beaten with a number of stripes *in proportion* to his offense,"[175] or in another translation, "according to the measure of his wickedness".[176] The Magna Carta (1215) continued our commitment to proportional punishment: "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude."[177]

The European Enlightenment embraced liberty and rationality. Instead of beating a person in proportion to the offense, the new punitive proportionality consisted in depriving the criminal of units of freedom. Thus, as Foucault described it, "the pain of the body itself is no longer the constituent element

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[173] COMM'N REPORT, *supra* note 1, at 46.

[174] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Ewing v. California, 538 U.S. 11 (2003); Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); Roper v. Simmons, 543 U.S. 551 (2005); *and* Weems v. United States, 217 U.S. 349 (1910).

[175] *Deuteronomy* 25:2 (English Standard) (emphasis added).

[176] *Deuteronomy* 25:2 (Darby).

[177] MAGNA CARTA §20 (1215) (England) *reprinted in* A.E. Dick Howard, Magna Carta Text and Commentary 40 (1978).

of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights."[178] The infant American Republic embraced this rational proportionality by building penitentiaries and substituting prison time for bodily punishment.

Although several early state constitutions specifically included proportionality principles – "All penalties ought to be proportioned to the nature of the offence," declared New Hampshire's in 1784[179] – the U.S. Constitution nowhere explicitly commands proportional punishment. The 8th Amendment, however, seems to imply it, by prohibiting "excessive bail", "excessive fines", and "Cruel and Unusual Punishment."

In 1892, declaring the 8th Amendment was "directed . . . against all punishments which *by their excessive length or severity* are *greatly disproportioned* to the offenses charged", Justice Field, dissenting, would have prohibited Vermont from sentencing a seller of unlicensed liquor to 54 years at hard labor.[180] Such a harsh punishment, "six times as great as any court in Vermont could have imposed for manslaughter" and "appropriate only for felonies of an atrocious nature", was "greatly disproportioned to the offense," and therefore "unusual and cruel."[181]

A hundred years later, in a leading case, the U.S. Supreme Court affirmed Michigan's right to mandate life without parole for simple possession of a little more than a pound of cocaine. "The Eighth Amendment contains no proportionality guarantee," insisted Justice Scalia, joined by Chief Justice Rehnquist.[182] Justice Scalia later noted that "there is no objective standard of gravity."[183] These two Justices saw

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[178] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 11 (Alan Sheridan trans., Vintage Books 1979) (1977).

[179] N.H. CONST. art. 18 (1784).

[180] O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (emphasis added).

[181] *Id.* at 339, 364.

[182] *Harmelin*, 501 U.S. at 965.

[183] *Id.* at 988.

'proportionality' as a pretext for their colleagues to impose their own "subjective values".

But the other Justices disagreed. "[C]ourts have not baldly substituted their own subjective moral values for those of the legislature," countered Justice White, joined by Blackmun and Stevens, dissenting in *Harmelin*.[184] Michigan, with no death penalty, could not constitutionally reserve the same punishment for drug possession as it had for first degree murder.

Justice Kennedy, joined by O'Connor and Souter, upheld Harmelin's life sentence but occupied the current Constitutional middle ground: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only *extreme sentences that are 'grossly disproportionate'* to the crime."[185] A judge should only perform "intrajurisdictional and interjurisdictional analyses" in the "rare case" where "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[186] More recently in *Ewing*, the court again split into three factions, a majority (5-4) affirming California's right to its popular "three strikes and you're out" life sentence for a career criminal whose latest crime was shoplifting three golf clubs.[187]

How can state legislatures impose the same punishment for petit theft or drug possession as for aggravated murder without violating basic standards of disproportionality? How can a Supreme Court tolerate this, and hold it constitutionally permissible? Only by ignoring retribution as a limit on punishment, and tolerating all but the grossest disproportionality.

The new Model Penal Code's official commentary attacks this standard of gross disproportionality that has taken root in federal constitutional law by reaffirming the essential connection between proportionality and retribution which should provide the floor *and* ceiling to a range of permissible

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[184] *Id.* at 1016 (White, J., dissenting).

[185] *Id.* at 1001 (citing Solem v. Helm, 463 U.S. at 288, 303 (1983)).

[186] *Id.* at 1005 (Kennedy, J., concurring).

[187] Ewing v. California, 538 U.S. 11 (2003). *See also* Lockyer v. Andrade, 538 U.S. 63 (2003).

punishments. Essentially unrevised for four decades, the Model Penal Code's "new approach" now calls for punishment "within a range of severity *proportionate* to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[188]

Proportionality plays a special role in death penalty jurisprudence. Here, the Supreme Court more readily limits state legislatures by invoking proportionality requirements implicit in the 8th Amendment.

When a bare majority of the Court struck down capital punishment in 1972 in *Furman v. Georgia*,[189] inaugurating the modern era of death penalty jurisprudence, Justices Brennan and Marshall would have held death as punishment *per se* cruel and unconstitutional. For these and like-minded absolutist opponents, the death penalty is an inhumane, morally disproportionate response to any crime, no matter how heinous.

Three other Justices in *Furman* found the death penalty unconstitutional because it was "freakishly imposed," "cruel and unusual in the same way that being struck by lightning is cruel and unusual," and applied chaotically to a "capriciously selected, random handful" – in no proportion and thus cruel and unusual punishment.[190] Justice Douglas separately condemned the death penalty as "*disproportionately* imposed and carried out on the poor, the Negro, and members of unpopular groups."[191]

After thirty-five states responded to *Furman* by re-enacting new death penalty statutes, [192] the United States Supreme Court warned them again: "the punishment must not be grossly out of proportion to the severity of the crime."[193] However, "we cannot say the punishment [of death] is invariably disproportionate to the crime," the Court concluded, restoring the death penalty to

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[188] Model Penal Code § 1.02(2)(a)(i) (Discussion Draft April 17, 2006).

[189] Furman v. Georgia, 408 U.S. 238 (1972).

[190] *Id.* at 309-310 (Stewart, J., concurring).

[191] *Id.* at 249-250 (Douglas, J., concurring) (emphasis added).

[192] Gregg v. Georgia, 428 U.S. 153, 155 (1976).

[193] *Id.* at 173.

the United States.[194] "[This] is an extreme sanction, suitable to the most extreme of crimes."[195]

Death was "indeed a disproportionate penalty for the crime of raping an adult woman," Justice White declared for a plurality in *Coker*.[196] Dissenting Justices in *Coker*, who would have permitted Georgia to execute rapists, agreed with the majority in principle: "I accept that the *Eighth Amendment's* concept of disproportionality bars the death penalty for minor crimes," Chief Justice Burger, joined by Justice Rehnquist, conceded.[197] Whether death is a proportionate response for serial child-rapists remains an open question, soon to be tested.

Five years after *Coker*, the Supreme Court in *Enmund*, held five to four that death was a disproportionate penalty for a getaway car driver who neither intended nor expected his co-felon to shoot and kill their robbery victim.[198] Dissenting, Justice O'Connor stated common ground for the Court: "[T]he penalty imposed in a capital case [must] be proportional to the harm caused and the defendant's blameworthiness."[199] A few years later, Justice O'Connor found herself in the majority in *Tison*, holding that a reckless and depraved indifference to human life without an intent to kill, could make death a proportional penalty for a felony-murder accomplice.[200]

Harm and blameworthiness – essential components of proportionality – require a particularized consideration of each crime and each criminal. Thus, as a constitutional punishment, death must not be grossly disproportionate to the crime, *and* it must not be disproportionate to the criminal's particular culpability, however measured.

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[194] *Id.* at 187.

[195] *Id.*

[196] Coker v. Georgia, 433 U.S. 584, 597 (1977).

[197] *Id.* at 604 (Burger, C.J., dissenting).

[198] Enmund v. Florida, 458 U.S. 782 (1982).

[199] *Id.* at 823 (O'Connor, J., dissenting).

[200] Tison v. Arizona, 481 U.S. 137 (1987).

If New Jersey abolished the death penalty and substituted life without parole as the Commission recommends,[201] the problem of proportionality would hardly disappear. Would multiple killers who rape and torture children receive proportional punishment by spending the rest of their lives in prison, no longer under a sentence of death? Would they get what they deserve? Any legislature considering abolishing or restoring the death penalty must face this.

So let's return to the Commission's finding itself: Of course abolishing the death penalty "eliminate[s] the risk of disproportionality in capital sentencing."[202] It eliminates capital sentencing entirely, so it eliminates disproportionality as well as everything else about the death penalty.

Surely the Commission would not trivialize the great challenge with such literalist cheap tricks. Assume the Commission did intend to focus on the real problem of disproportionality in punishment. How, then, can it fail *even to consider* whether eliminating the death penalty and substituting life without parole for aggravated murder thereby radically *elevates* the risk of disproportionality in the new non-capital sentencing regime?

Supporting its call for abolition under cover of a "risk of disproportionality," the Commission pointed out that many other aggravated murderers had not been sentenced to death.[203] Under any likely death penalty regime, some will live who deserve to die, and some will die who deserve to linger in prison. This disproportionality does trouble us retributivist advocates. The current statute[204] does fail to capture some of the worst of the worst. Thus, this witness testified at length and in writing, urging a set of statutory reforms to effectuate a more morally proportioned death penalty, further reducing the risk of executing those murderers who did not deserve to die.[205] Bent

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[201] COMM'N REPORT, *supra* note 1, at 2.

[202] *Id.* at 1.

[203] *Id.* at 46.

[204] N.J. STAT. ANN. § 2C:11-3 (West 2007). *See* COMM'N REPORT, *supra* note 1, at 6-10.

on eliminating the death penalty entirely, however, the Commission ignored any possible revision.

Refined definitions have their limit. Juries will spare convicted killers whose murders otherwise qualify for death because the murderer's own tragic past cries out for mercy. Abused as children, deformed by a cruel environment, some killers' compelling personal circumstances rightly move a jury to spare them. Real proportionality demands individualized justice – somewhat erratic, unpredictable, not fully accountable by the crime's definition or description. Plato and Aristotle called this irregular, individuated justice "equity."[206]

Today's penalty phase seeks an equitable, proportional justice, case by case, person by person.

A bit cheeky, then, of Commissioners who cannot imagine anyone deserving to die, to use the fact that we allow some terrible murderers to *live* as grounds to spare even those whom a jury, considering all personal circumstances, would still condemn.

Does it make sense to abandon completely any attempt at proportional, individual justice because we cannot always produce it? Confronted with the most egregious killings committed from the most despicable motives, should we not do what we can, although at other times in other cases, we failed to do what we should?

But give the Commission its due. Luck, rather than desert sometimes determines the outcome. At some level, this is true throughout life. Innocent victims of violent crime, innocent passengers or pedestrians live or die daily based upon happenstance. Wrong place, wrong time, wrong prosecutor, wrong jury – to some degree luck remains inescapably part of life, and death.

## Moral Luck

That deep phenomenon – "moral luck." Should New Jersey confine the death penalty to murder? Many years ago, a killer

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[205] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 67-69 (testimony of Robert Blecker).

[206] ARISTOTLE, THE NICHOMACHEAN ETHICS OF ARISTOTLE xlii (James E.C. Welldon, trans., London, Macmillan 1897).

told me the story of an "acquaintance" who raped a woman, chopped off her arms and legs, and threw her in the woods, bleeding to death.

Most everyone would agree that whatever a society's ultimate punishment, this vicious criminal deserved it. As luck would have it, a hunter came upon the victim, who was miraculously saved. Should this happenstance – that the victim lived – having nothing to do with the intention or behavior of the criminal dictate a lesser punishment? Should attempted mass murderers such as Richard Reid, the shoe bomber, who come perilously close to blowing up a plane in flight,[207] be treated any more leniently than those who do succeed in killing their victims?

The ancient Greeks and the ancient Hebrews – twin sources of Western culture –– were torn by the problem, psychologically and jurisprudentially.[208] No one has ever come up with a completely satisfactory solution. It is impossible to pay full attention to the criminal's act and attitude without also paying attention to the harm, even though a lesser harm may be morally divorced from the actor's intention. It is impossible to demand full consistency – treating like cases alike – and at the same time respect the individuality of each unique human being.

The luck of location – county variability, with which the Commission briefly wrestled – raises the same issue, but to a different level.[209] It may be impossible to demand state-wide consistency while respecting local autonomy. At best, we acknowledge the problem of moral luck, conduct proportionality reviews, and ask of each death sentence in isolation: was it deserved? If so, then although others too, in different places at different times, warranted but escaped society's ultimate sanction, we do what we ought, when we can.

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[207] Cathy B. Thomas, *Courage in the Air*, TIME, Sept. 9, 2002, at 108, *available at* http://www.time.com/time/covers/1101020909/aattendants.html.

[208] *See* Robert Blecker, *Roots Resolving the Death Penalty: Wisdom from the Ancients*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 169 (James R. Acker et al. eds., 2nd ed. 2003).

[209] COMM'N REPORT, *supra* note 1, at 43.

Demanding regularity under the guise of rejecting arbitrariness – luck – ultimately undermines our ability to give play to non-rational, but real, incomparables that make up equity, real justice. Each case is different and a commitment to individual justice must respect that real differences are not always rational or discernable in advance.

The Commission almost never explicitly addressed "justice." It never directly faced the central question of proportionality: whether a most vicious killer can ever "deserve to die" or does s/he always "deserve to live," albeit in prison? These terms of great emotional significance would have split Commissioners. Considering "justice," "desert" and real "proportionality" would have forced those Commissioners to dissent who did feel certain the worst of the worst do deserve to die, but reluctantly yielded to their feeling of helplessness in ever bringing about the justice of death.

Absolutist opponents would have been forced to reveal themselves for who they were, and acknowledge the truth: For them it was never an open question. Instead, these Commissioners were allowed to go through the motions of hearings, apparently making a record, while all the time committed to abolition.

Ultimately, however, they cannot responsibly avoid it; proportionality will justify, limit, or condemn capital punishment itself. But proportionality, too, will justify or condemn substituting life without parole as punishment for aggravated murder, a question the Commission seemed compelled to face in its seventh finding.[210] Subjecting drug dealers or career thieves to life in prison inflicts obscenely harsh and thus disproportional punishment. Sentencing child-killing rapists to that very same life, without chance of parole, inflicts obscenely lenient and thus disproportional punishment.

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[210] *Id.* at 56.

FINDING (6) THE PENOLOGICAL INTEREST IN EXECUTING A SMALL NUMBER OF PERSONS GUILTY OF MURDER IS NOT SUFFICIENTLY COMPELLING TO JUSTIFY THE RISK OF MAKING AN IRREVERSIBLE MISTAKE.[211]

Of all disproportionality, the worst imaginable is that the state might make a mistake and execute an innocent person. This nightmare, however improbable, haunts retributivist advocates no less than abolitionists. Whereas utilitarians – whether favoring or opposing capital punishment – can theoretically support executing the innocent for other public benefits such as deterrence, retributivists cannot abide it.

Commissioner Segars put the question strongly: "Isn't the fact that you could possibly execute even one innocent person worth the cost of deciding upon life without the possibility of parole to avoid that . . . possible human error?"[212]

She also drew attention to Sunstein and Vermeule's recent essay, *Is Capital Punishment Morally Required?*, where the authors link deterrence to the moral question of executing the innocent.[213] Given that most recent studies show the death penalty, on balance, probably deters more effectively than life without parole, doesn't the government by *not executing* the guilty bear responsibility, they ask, for the other innocent murder victims whose lives would have been saved by the greater deterrent power of death? [214] "[C]apital punishment requires a life-life tradeoff, and a serious commitment to the sanctity of human life may well compel, rather than forbid, that form of punishment," they concluded. [215]

Thus even if a few innocents were executed, "on certain empirical assumptions, capital punishment may be morally

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[211] *Id.* at 51.

[212] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 147 (Sept. 13, 2006) (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

[213] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2006).

[214] *Id.*

[215] *Id.* at 703 (abstract).

required, not for retributive reasons, but rather to prevent the taking of innocent lives."[216] Considering the literature and logic of deterrence, these authors concluded that "[a]t the very least, those who object to capital punishment, and who do so in the name of protecting life, must come to terms with the possibility that the failure to inflict capital punishment will fail to protect life."[217] In short, their "central concern is that foregoing any given execution may be equivalent to condemning some unidentified people to a premature and violent death."[218]

A strictly non-retributive utilitarian whose overarching goal was to minimize the deaths of innocents might well uphold the death penalty as the only way to go.

People make mistakes that change the course of human events. Few mistakes can be fully reversed. Life itself and the process of growing old: not reversible. Life in prison: terminable, but not reversible. Yet death *is* different, irreversibly different. Although DNA testing may help insure that only the guilty are condemned, it is "not a panacea,"[219] and, "inevitably, we make mistakes."[220]

Still we cannot yet identify and demonstrate among the thousand or so, executed during the modern era (1977-2007), any factually innocent person.[221] Yet, most tragically, we probably have killed at least one and perhaps a few who did not commit the murder for which they were condemned. This horrible fact hardly substantiates the hyperbole concerning innocence permeating abolitionist circles, and occasionally

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[216] *Id.* at 705.

[217] *Id.* at 708.

[218] *Id.*

[219] Pub. Hearing, July 19, 2006, *supra* note 78, at 19 (testimony of Barry C. Scheck).

[220] COMM'N MEETINGS, *supra* note 22, at 40 (statement of R. Erik Lillquist).

[221] *See* Kansas v. Marsh, 126 S. Ct. 2516, 2533 (2006) (Scalia, J., concurring).

repeated in the hearings: "innocent people [are] being executed . . . throughout this country."[222]

Abolitionists on the Commission produced witnesses from other states with moving accounts of how they were "exonerated" while imprisoned, sometimes having been condemned to die.[223] Some of these witnesses probably were factually innocent; perhaps all were. We don't know. We do know that these exonerees blithely listed other "innocents" along with themselves.[224]

Witness Roberto Melendez Colon, whose testimony Commissioner Segars found "compelling,"[225] listed Benny Demps as one of "four right from the top" on Florida's death row who, like him, were "innocent" yet condemned.[226]

I happened to witness the people of Florida put Benny Demps to death. His victims, the Puhlicks, were good, upstanding folk.[227] Dubbed "the flower lady" in the neighborhood, she dreamed of retiring to Florida with her contractor husband. They worked hard – he, as a carpenter and she, sometimes cleaning houses – to put the kids through college.

Mrs. Puhlick's cousin, a real estate agent, called them about a "handyman's special" that included a neglected orange grove. So the Puhlicks went to Florida and drove down the driveway to see their dream house. As luck would have it, Benny Demps and

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[222] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 9 (testimony of N.J. Sen. Raymond J. Lesniak).

[223] *Id.* at 103 (testimony of Roberto M. Colon); Public Hearing Before the N.J. Death Penalty Study Comm'n, 60 (Sept. 27, 2006) (testimony of Kirk Bloodsworth), *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/dpsc092706.pdf (last visited Nov. 8, 2007).

[224] Pub. Hearing, Sept. 13, 2006, *supra* note 24 *at* 103, 107-108 (testimony of Roberto M. Colon).

[225] *Id.* at 145 (testimony of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

[226] *Id.* at 108.

[227] Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?* 24 PACE L. REV. 107, 175-76 (2002) (*citing* Telephone Interview with the Puhlick Family (Apr. 11, 1999)) [hereinafter *Symposium*].

an accomplice had just robbed a house nearby, taken the safe to an abandoned orange grove to open it, when unexpectedly the Puhlick's car drove down that road. Demps pulled a gun, and announced a stickup.

Mrs. Puhlick fumbling nervously for her wallet, dropped a lipstick from her pocketbook. As she instinctively bent to retrieve it, Demps shot her in the stomach. Demps forced Mr. Puhlick to remove the spare tire from their car and climb back in. Next he forced the real-estate agent cousin in. And finally, Mrs. Puhlick, bleeding profusely, was forced into the trunk. Demps slammed the trunk shut. And before he left that orange grove, hearing the desperate cries of the three locked inside, Benny Demps riddled the trunk with bullets, killing Mrs. Puhlick and the cousin, both of whom absorbed bullets meant for her husband, who lived to corroborate overwhelming forensic evidence of Demps' guilt.

Eventually Demps was apprehended with the murder weapon in the trunk of his car.[228] The eyewitness identification – not a fleeting glance but a sustained encounter – further confirmed guilt beyond all shadow of a doubt.[229] Benny Demps was a cold blooded, depraved murderer. And so a Florida jury sentenced him to die.[230] But then in 1972 the U.S. Supreme Court decided *Furman,* holding unconstitutional the death penalty as administered across the country.[231] So the states released into general population all condemned, including Benny Demps.[232]

Now a lifer inside, Demps killed a fellow prisoner, perhaps a prison "snitch."[233] Because of his prior history, a Florida jury again sentenced Demps to die.[234] The evidence was enough to

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[228] Demps v. State, 272 So. 2d 803, 804 (Fla. 1973).

[229] *Symposium*, *supra* note 227, at 176.

[230] *Demps*, 272 So. 2d at 804; *see also Symposium*, *supra* note 227, at 176.

[231] Furman v. Georgia, 408 U.S. 238 (1972).

[232] Demps v. State, 761 So. 2d 302, 303 (Fla. 2000); *see also Symposium*, *supra* note 227, at 176.

[233] *Demps*, 761 So. 2d at 303.

[234] *Id.*

convict, barely.[235] This prison killing, in isolation, in my view did not deserve death. His earlier murders however, did qualify Benny Demps to die. And this time the People of Florida killed him.[236]

Suppose Demps, as he claimed, had not personally stabbed the victim inside the prison? Had Florida executed an "innocent" man? Hardly. It may be politically incorrect to declare, it may be legally incorrect, but morally not all "innocence" is equivalent. David "Itchy" Brooks serves a life sentence for a murder I believe he did not commit. But he detailed to me many of the fifty-seven people he shot when he was nineteen years old.[237] If Itchy had been executed for the murder for which he serves a life sentence but likely did not commit, Washington, D.C. would have executed an "innocent" man who nevertheless deserved to die.

Other notorious street thugs around the country may have been factually innocent of the particular murders for which they were convicted. In Lorton Prison they used to say, "Maybe you serve time not for what you have done all the time, but all the time you serve, you serve for what you've done."[238] Whether or not Demps stabbed that fellow prisoner to death, it defiles the seriousness of innocence to claim, as the Commission witness did,[239] that Florida executed an "innocent man." Killing a murderer like Benny Demps was justice – at least poetic justice.

Executing the *truly innocent* horrifies us retributivists. We must do nearly all we can to prevent it. "Abolishing the death penalty will not ensure [that] no innocent person will be convicted," the Commission conceded, "but it would ensure that no innocent person will be killed by the State."[240] By parity of

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[235] *Id.*

[236] Rick Bragg, *Florida Inmate Claimed Abuse in Execution*, N.Y. TIMES, June 9, 2000, at A14.

[237] Interview with David "Itchy" Brooks, Lorton, Va. (1986-1990).

[238] Robert Blecker, *Haven Or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified* 42 STAN. L. REV. 1149, 1166 (1990).

[239] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 107-8 (testimony of Roberto M. Colon).

[240] COMM'N REPORT, *supra* note 1, at 52.

reasoning, abolishing life in prison could not ensure that no innocent person will be convicted, but it would ensure that no innocent person will be imprisoned for life by the state. Of course, as the Commission report noted, not having executed *anybody* in twenty-four years,[241] New Jersey surely has not executed any innocent person during that period.

However grudgingly, abolitionist witnesses had to concede to Commission members, that there has "not been an exoneration of anyone who has been sentenced to death in New Jersey."[242] New Jersey's death row houses no factually innocent condemned.[243] Nor did New York's, before the New York Court of Appeals found a tiny part of its statute unconstitutional.[244] Nor does anybody on Oregon's death row even *claim* factual innocence. [245]

The point is, with well-funded defense counsel, and a carefully designed and administered death penalty, we can be nearly certain that the error rate will approach zero. But luck counts, and people sometimes make mistakes. Life itself is risky. We constantly measure and balance risks, including deadly risks – rejecting most, but taking a few.

Suppose we further balance the risk of making irreversible mistakes against the reward – the "penological interest" in executing the worst of the worst, who the Commission finding euphemistically calls "a small number of persons guilty of murder."[246]

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[241] *Id.* at 86.

[242] Pub. Hearing, July 19, 2006, *supra* note 78, at 23 (testimony of Edward J. DeFazio, Comm'r, N.J. Death Penalty Study Comm'n).

[243] *Id.*; Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 42 (testimony of Robert Blecker).

[244] *See, e.g.*, People v. Harris, 779 N.E.2d 705 (N.Y. 2002); People v. Cahill, 809 N.E.2d 561 (N.Y. 2003); People v. Mateo, 811 N.E.2d 1053 (N.Y. 2004); People v. LaValle, 817 N.E.2d 341 (N.Y. 2004); People v. Taylor, 747 N.Y.S.2d 318 (N.Y. Sup. Ct. 2002)).

[245] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 42 (testimony of Robert Blecker); Joshua Marquis, *Department: Parting Thoughts: A Just Punishment*, 62 OR. ST. B. BULL. 62 (2002).

[246] COMM'N REPORT, *supra* note 1, at 51.

How much weight should we give to the mistake of keeping alive those who most deserve to die? Most Commissioners would give the justice of condemning to death those who deserve to die no weight at all. Those who dismiss retributive justice as revenge, or see it as an irrational psychological curiosity, could never feel the "compelling" effect of death as ultimate justice to offset any risk, however small.

And how much risk was there, really that New Jersey will execute the truly innocent? What risk should we tolerate?

Abolitionists love to publicly press us proponents to quantify "tolerable error." During my question-and-answer session, Commissioner Segars demanded this:

> "Sir, I just need to understand that what I hear you say is that the execution of an innocent person is the cost of doing business if you want to uphold the death penalty? Yes, or no?" [247]
>
> "No. The remote, remote possibility of the execution of an innocent person is the cost of doing *justice*."[248]
>
> "The point is innocent," Ms. Segars pressed. "That's the point."[249]
>
> "[Your] children are innocent," this witnesses replied, "and yet you will expose them to a risk of death for your own convenience"[250] by walking with them in a double stroller down the street where there is a slightly greater chance that a truck will jump the curb and kill them.[251]

If we readily expose our own lives and those we love most to an infinitesimal risk of death for the sake of momentary convenience, surely for the sake of justice we should reluctantly

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[247] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 70-71 (testimony of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

[248] *Id.* at 71 (testimony of Robert Blecker) (emphasis added).

[249] *Id.* (testimony of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

[250] *Id.* (testimony of Robert Blecker).

[251] *See id.* at 70.

expose convicted murderers we most despise to a tiny chance of unwarranted death.[252]

Reverend Howard used his prerogative as Chair firmly to dismiss this comparison as "apples and oranges," and shut down the discussion.[253]

But these same folks, so eager to press us for some callous-sounding quantifiable risk we are willing to take, themselves avoid quantifying the real risk we should take in other serious situations. What risk would they tolerate that we might imprison for life a truly innocent person? Or consign to death whole families because we decline to spend the extra money to make our roads or autos safer?

By not balancing risks to maximize justice, not balancing errors against each other, almost completely ignoring retribution which should have been its central concern, the Commission report begs the question and simply declares, "executing a small number of persons guilty of murder" could not "justify *the risk* of making an irreversible mistake."[254]

Our concern goes well beyond those two or three dozen factual innocents in the United States at one time or other wrongly sentenced to death, although eventually released from death row. We include among those disproportionately condemned, the hundreds of *guilty* murderers who landed on death row although they did not deserve to die. Again, to greatly reduce the number, this witness suggested refining the statute, including elevating the burden of proof.[255] Instead, the cumulative effect of the Commission's parade of exonerated convicted criminals with tales of their "innocent" colleagues,[256] may have given undecided Commissioners a misimpression that false condemnation of true innocents across the country is

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[252] *Id.*

[253] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 72.

[254] COMM'N REPORT, *supra* note 1, at 51 (emphasis added).

[255] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 67-69 (testimony of Robert Blecker); Robert Blecker, *A Road Not Considered*, 32 SETON HALL LEGIS. J. (forthcoming 2008).

[256] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 103 (testimony of Roberto M. Colon).

common, instead of an extraordinarily rare phenomenon elsewhere and happily unknown in New Jersey during the modern era.

In the end, issuing its sixth finding, the Commission's one-sided report failed to discuss or measure, much less balance the remote risk of executing an innocent against the certainty of letting many live in prison who deserve to die.[257]

## FINDING (7) THE ALTERNATIVE OF LIFE IMPRISONMENT IN A MAXIMUM SECURITY INSTITUTION WITHOUT THE POSSIBILITY OF PAROLE WOULD SUFFICIENTLY ENSURE PUBLIC SAFETY AND ADDRESS OTHER LEGITIMATE SOCIAL AND PENOLOGICAL INTERESTS, INCLUDING THE INTERESTS OF THE FAMILIES OF MURDER VICTIMS.[258]

If the state abolishes the death penalty, will life without parole "sufficiently . . . address...legitimate . . .penological interests"?[259]

"[T]here is no such thing as closure. There can only be justice," Commissioner Garcia had declared on behalf of victims' families.[260] "My concern is, if the death penalty were to be eliminated in the State of New Jersey, will these families truly receive . . . justice?"[261]

Abolitionist witnesses early in the hearings characterized life without parole as "very dire punishment."[262] "My mother was beaten, sodomized, tortured and finally strangled," an abolitionist survivor testified.[263] "If the killer were given life

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[257] COMM'N REPORT, *supra* note 1, at 51-55.

[258] *Id.* at 56.

[259] *Id.* at 56.

[260] Pub. Hearing, July 19, 2006, *supra* note 78, at 32 (testimony of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n).

[261] *Id.*

[262] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 48 (testimony Robert Del Tufo).

[263] *Id.* at 12 (testimony of Sandra Place).

without parole, and I mean a true life sentence, I would not be here."[264]

But if that tortured victim could somehow watch what we do to her rapist murderer – would she approve? How *do* they *live*, those imprisoned for life who might otherwise deserve to die?

While this Commission hardly focused their attention on whether and when death was undeservedly severe and thus a disproportional response, retributivists insisting on "just deserts" also force the opposite proportionality question into debate: is death's substitute, life in prison, proportionately unpleasant for the most callous, sadistic killers?

Legislators convinced that prison life is nearly unbearable, that "life inside is worse than death," may abolish the death penalty, erroneously imagining they have maintained proportionality. An informed public, however, aware that sadists who rape and torture children end up watching television and playing ping pong may insist, that as administered, life without parole destroys the "moral proportionality" which only a death penalty can maintain.

Diverting attention from the quality of life inside prison to the length of time spent inside, leading abolitionist witnesses such as Professor Robert Johnson tried to heighten the hype surrounding life without parole with artful but misleading rhetoric: "A better name for this sentence might be *death by incarceration.*"[265]

Yes, assuming society retains this punishment – Europe has rejected it – those serving life without parole will die *in* prison. But very few will die *because* of prison.

We all live, condemned to die, somehow, somewhere. Some of us will die in old age in our sleep, or watching television. Should we call this "death *by* sleep" or "death *by* television"? Or is it simply *where* we die? "Death by home"; "death by hospital." "Death by bowling alley"? "Death by incarceration."

Even Commissioner Garcia, who would have kept the death penalty if only we administered it, embraced this powerful but misleading rhetoric: "How can we assure survivors that, if we

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[264] *Id.* at 15.

[265] Pub. Hearing, July 19, 2006, *supra* note 78, at 57 (testimony of Robert Johnson) (emphasis added).

[substitute life in prison for death], they will really actually leave that prison in a pine box and in no other way?"[266]

The question of justice – whether life without parole is a moral substitute for the death penalty – can be answered not by focusing on where the vicious killers die, but *how they live* while incarcerated.

This witness, almost alone, begged the Commission to turn its attention from the length of the punishment to the *quality* of the day-to-day experience for those serving life without parole: "[I] urge you . . . do not make your decision in a vacuum. . . . You have an obligation to understand . . the quality of life for those who serve life without parole."[267] We must determine whether death-spared lifers constantly feel punished, and whether their lives are made miserable inside.

The New Jersey Department of Corrections official website boldly declares their own "mission:" To "ensure that all persons committed to the state correctional institutions are confined with the level of custody necessary to protect the public and that they are provided with the care, discipline, training, and treatment needed to prepare them for reintegration into the community."[268]

Punishment? It's not a part of the Department of Corrections' officially stated mission. Nor was it in Tennessee, or Oklahoma (or Illinois) where this witness spent days documenting life inside maximum-security prisons, watching in disbelief as mass murderers played softball, volleyball, ping pong, and chess. How would surviving family members in New Jersey feel if they knew that child-killers serving life spent much of their days watching sporting events and soap operas on color television?

Consistent with New Jersey's Administrative Code, and what the Corrections public information officer assured me, my oral testimony suggested that well-behaved prisoners serving life

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[266] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 47 (testimony of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n).

[267] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 45 (testimony of Robert Blecker).

[268] N.J. DEP'T OF CORRS., MISSION STATEMENT, http://www.state.nj.us/corrections/about_us/html/mission.html (last visited Sept. 25, 2007).

without parole in New Jersey, as in other states, could end up inside an even less restrictive medium security prison.[269]

"[You have] heard . . . heart[-]wrenching testimony from the victim's families, saying . . . [i]f only you had life without parole . . . [w]e could move on with our lives," this witness intoned.[270] "Could they move on with their lives if they really understood what the quality of life is for those who do actually serve life without parole day[-] to[-] day? You owe it to yourself to find that out."[271]

After respectful but sharp questioning from Commission members hostile to a retributive point of view, my live testimony concluded: "[I] beg you, look into the conditions [of] life without parole and [you may] realize it's yet a crueler hoax " than a death sentence pronounced but never carried out.[272] At this point, the Chair ended the exchange.[273]

Apparently responding to my plea, in its final hearing, the Commission sought assurance from the New Jersey Department of Corrections that those serving life without parole do live a tough life inside maximum-security prison.[274] "[C]an you tell us what is the meaning of a sentence of life without parole?" Commissioner Coleman asked James Barbo, Director of Operations for the New Jersey Department of Corrections.[275] "One of the prior speakers indicated that in some jurisdiction[s] – and he even suggested that he would expect the same to be true in New Jersey – that persons sentenced to life without

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[269] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 46 (testimony of Robert Blecker).

[270] *Id.* at 47.

[271] *Id.*

[272] *Id.* at 56.

[273] *Id.*

[274] Pub. Hearing, Oct. 25, 2006, *supra* note 58, at 56 (testimony of James H. Coleman, Jr., Comm'r, N.J. Death Penalty Study Comm'n).

[275] *Id.* at 56.

parole virtually live under hotel conditions. Can you comment on that?"[276]

"[I] worked in New Jersey State Prison for [eleven] years, and I wouldn't describe it at all as a hotel," the Operations Director assured the Commission.[277] He continued:

> I was in on a Sunday afternoon just to see how things were going, and I was watching the mess move for dinner. And I was standing in the rotunda watching the units go by . . . [a]nd they were just taking that monotonous walk into the dining hall to get their meal and to come back. Their hair turned gray like mine did since I left. But there is a very debilitating, monotonous lifestyle in a prison. Yes, inmates have television access, they have educational programs, we have social services programs. But life at New Jersey State Prison is very debilitating to inmates.[278]

We all get older, at least those of us fortunate enough to live out our lives. Our hair turns grey if we are fortunate enough to keep it. Even as a metaphor, this hardly demonstrates that life without parole is justice, or that life at New Jersey State Prison is "very debilitating" to inmates.[279]

"One of the witnesses came in earlier in our testimony, and equated a life in prison as a day at the beach and volleyball camp," Commissioner Segars said, stretching my testimony a bit, but focusing the inquiry.[280] "And what other kinds of things can you talk about in terms of their day-to-day existence?"[281]

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[276] *Id.* at 58.

[277] *Id.* at 58. (testimony of James Barbo).

[278] *Id.* at 59.

[279] *Id.* at 58.

[280] Pub. Hearing, Oct. 25, 2006, *supra* note 58, at 61 (testimony of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

[281] *Id.* at 61.

"Well, there is recreation," the Operations Director replied literally, "but there is no volleyball. I can tell you that. There is the usual weight[-]lifting, basketball, that type of thing."[282]

Next up at that final day's hearing, Gary J. Hilton, former Warden at the New Jersey State Prison and one-time Acting Commissioner, testified, "thoroughly endors[ing]" and repeating Dr. Johnson's earlier "death by incarceration" trick, while assuring the Commissioners that New Jersey State Prison was extremely well-managed and extremely secure.[283] Retributive death penalty proponents can readily concede safe, secure prison management, yet have serious doubts that a prison experience justly punishes vicious killers well-behaved once inside.

Obviously, for abolitionist scholars and these ranking Corrections officials, life without parole was punishment enough. "I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum[-]security prison," Hilton assured the Commissioners.[284]

Really? How about being raped, then tortured to death?

"[C]arefully review and consider what Dr. Johnson and I have had to say about the realities of life in prison and dying in prison," the former Corrections Commissioner closed his testimony.[285] "I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution. I thank you."[286] At least Hilton had mentioned retribution, if only to assert that life in prison satisfied it.

The Chair left little doubt that these Corrections officials had done as they were asked: "The reason why we've invited you to speak about this is to characterize, as best you can, life in prison for the rest of your life. . . . Because it has been suggested by

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[282] *Id.* (testimony of James Barbo).

[283] *Id.* at 64-65 (testimony of Gary J. Hilton).

[284] *Id.* at 66.

[285] *Id.* at 67.

[286] Pub. Hearing, Oct. 25, 2006, *supra* note 58, at 67.

previous witnesses that there is something of a less punitive environment, and you're here today to correct that impression."[287]

"[T]here is real and powerful retribution in having an individual spend the rest of their life and die in prison," insisted Hilton.[288] "[I] wanted to drive that point home. That's what it means, no ifs, ands or buts."[289]

"I'd just like to add," said Director Barbo, "to me, the punitive aspect is the confinement."[290]

Ranking corrections officers across the country typically declare this to me. The Court punishes by sentencing. The purpose of prison is not punishment. The prisoner goes to prison *as* punishment, not *for* punishment. The punishment is the loss of liberty through confinement. Period. And confinement there would be. But these Corrections officials had far from established that a life in prison was proportional punishment for vicious killers who may deserve to die.

"I've spent hundreds of hours in five states now with video cameras – [I've had] full access to document . . . the daily life of people who serve life without parole. . . . I haven't gone into New Jersey [prisons]; I'm trying to," this witness had testified earlier.[291]

Unlike Oklahoma, Tennessee, Washington, D.C. and Illinois, the New Jersey Department of Corrections repeatedly refused me permission to interview prisoners, or bring in a video camera, or extensively document life inside. They did, however, allow me a brief tour of New Jersey State Prison, accompanied by a phalanx of ranking staff, including the Administrator herself, who did answer my questions, however curtly, as long as I made no reference to any testimony before the Commission.

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[287] *Id.* at 72-73 (testimony of Rev. M. William Howard, Jr., Chairman, N.J. Death Penalty Study Comm'n).

[288] *Id.* at 73 (testimony of Gary J. Hilton).

[289] *Id.* at 73.

[290] *Id.* at 72 (testimony of James Barbo).

[291] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 45 (testimony of Robert Blecker).

Although the Department knew my mission was to absorb and assess the quality of daily "life inside" – perhaps coincidentally – during my entire tour, which they scheduled from eleven a.m. to one p.m., no prisoner was feeding in the dining room they showed me, no prisoner was visiting, no prisoner was exercising in the gym or outdoors in the yard on a sunny spring day. As we walked down the prison corridors, inmates spotting a group of ranking staff with a stranger among them, pressed themselves against a wall to let us pass. Thus it was impossible to get a feel for life inside.

But it should be stated: This maximum[-]security prison facility itself did seem much less cheerful than most others this witness has documented. Industry, the Administrator informed me, has been removed from New Jersey State Prison, thus diminishing the inmates' opportunity to spend their days working outside their cells. The outdoor yard was broken into smallish sections with a basketball court and weights, but no track or volleyball court or softball field, often found in other states' maximum-security institutions. No grass or flowers or any greenery existed inside the prison for inmates to walk upon or touch. The exercise yard has been "concreted," the Administrator explained, because prisoners were planting weapons in the dirt.

The large gym lacked sports scenes painted on the walls of some other facilities, although the dining hall was decorated with large, well-painted murals. Small cells looked and felt bleak, but color televisions did adorn them. And as the Administrator (or Captain) informed me proudly, inmates routinely did get to watch first-run movies, sometimes before the public got to see them, piped in by the prison television system. And they did get all sorts of goodies from the Commissary.

Perhaps New Jersey State Prison, as former Warden Hilton had testified before the Commission, was "[b]y its very nature . . . a cold, dangerous and frightening environment." My brief tour left me unable to evaluate that characterization.

One particular statement Hilton had made to the Commission did seem at odds with everything prisoners and staff had told me during thousands of hours inside maximum-security prisons in six states these past twenty-two years: "As offenders age and become more infirm, they become more likely targets of abuse and intimidation by the younger population.

The prison culture has no respect or deference to its senior counterparts. Older inmates are routinely strong[-]armed for their meager personal assets – tobacco, hard candy, and coffee."[292] Hilton recounted how older inmates, terrified, would wait until the younger ones went to exercise before they felt safe enough to take a shower, forfeiting their own recreation time.[293]

While the Administrator pointedly refused to comment on her predecessor's Commission testimony, she did flatly deny that younger inmates routinely prey upon older ones. But Hilton's unrebutted testimony may have had its intended effect. Perhaps some Commissioners imagined a life without parole, where today's vicious killers, years later, would have morphed into elderly prisoners afraid to leave their cells, at last feeling the terror they had inflicted years before on their own unwilling victims, thus finally getting their just deserts. If Commissioners did rely upon this testimony, they were almost certainly misled.

Overall, my quick tour did confirm that New Jersey State Prison was no "beach club" and was seemingly less pleasant than similar maximum-security prisons in other states so far visited. That tour, however, leaves unanswered essential questions: Is life without parole proportionate punishment for today's death-eligibles? Is it punishment enough?

Most disturbing, in New Jersey State Prison, as with every maximum facility thus far visited, a well-behaved prisoner's daily life inside in no way reflects the gravity of the crime committed on the outside. Sentences inside the prison may vary in length, but they are consciously uniform in intensity. As the Administrator confirmed, convicted aggravated murderers serving life without parole get the same privileges as car thieves or any other inmate.

While disavowing any general mission to punish, the Administrator conceded that prisoners were punished who violated prison rules. They would be placed in the administrative segregation unit, deprived of privileges afforded the rest of the prison population. But once again, this "deserved

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[292] Pub. Hearing, Oct. 25, 2006, *supra* note 58, at 66 (testimony of Gary J. Hilton).

[293] *Id.* at 71-72.

punishment" had nothing whatsoever to do with the crime on the outside for which the inmate did time.

Impatiently waiting for me to leave at the end of the tour, offhandedly responding to my casual parting question, the Administrator gave a most revealing answer. Many inmates not serving life without parole, but with extended sentences for serious but lesser crimes at New Jersey State Prison, become eligible to transfer to less secure, ostensibly less restrictive facilities, yet relatively few apply. Why? "They become used to the structure, the routine, the security," the Administrator explained with a touch of pride.

This brief tour revealed nothing to make me doubt an inconvenient but essential truth: In a thousand ways every day, aggravated murderers who otherwise deserve to die, but now instead will live their lives inside without parole even under present conditions, do feel pleasure, satisfaction and relief. Everyday, like so many of us, they will watch the news, root for their favorite sports teams on television, watch movies, read books, play basketball, lift weights, and otherwise enjoy life's simple pleasures – eat palatable food, marvel at cloud formations, feel the warmth of the sun. In short, their lives assume new meaning, offer new satisfactions – they laugh, they cry, they hurt, they strive, they grieve. And celebrate.

Over-projecting a hellish life for lifers inside maximum-security prison, the Commission failed to consider their and our "psychological immune system," as Professor Jeremy Blumenthal calls it.[294] Well-known studies reveal that although we might expect lottery winners to be ecstatic and maintain their joy from sudden new wealth, while accident victims permanently paralyzed live very despondent lives thereafter, it turns out not to be.[295] Long term, people's sense of well-being, their enjoyment of life returns to the status quo ante.[296] Self-reporting studies among these groups and others reveal the nearly universal human tendency for "hedonic adaptation" with

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[294] *See* Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005).

[295] *Id.* at 167-168.

[296] *Id.* at 168.

the passage of time.[297] Long term, social and physical support systems and other factors combine to lessen the impact of harsh environments.[298] Studies of death row inmates show what my own extensive interviews confirm – contrary to popular belief, a "general sense of well-being" pervades this "new normal."[299]

Obviously, however, the Commission believed the Department's testimony that life spent inside New Jersey State Prison is terribly harsh. Responding perhaps to this witness's concerns of injustice from a too-pleasant life spend inside prison, and his claim that death-eligible convicts, well-behaved inside, could be transferred to even less punitive settings, the Commission departed from standard practice across the United States. Ordinarily the executive branch – especially the Department of Corrections – decides whether and when to transfer a well-behaved lifer to a less restrictive setting. This Commission, however, has recommended specific legislation, perhaps from a sense of political appeal, or maybe from a sense of justice, that would preclude the Corrections Department from transferring a death-eligible prisoner sentenced to life without parole to a less punitive setting: "Based on our findings, the Commission recommends that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, *to be served in a maximum security facility*."[300]

Meanwhile, many families of murdered victims will grieve the loss of their loved ones. They and we, their fellow citizens, feel haunted by the voices of these tortured victims, which call out to us for a justice no longer even threatened. Patricia Harrison counseled the Commission about the lasting effect of her sister's murder upon her grieving family: "Walk in my shoes or the shoes of the many living victims of this crime. Only then could you experience the unfairness and grief caused by missing

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[297] *Id.* at 168-169.

[298] *Id.* at 175.

[299] *Id.* at 169.

[300] COMM'N REPORT, *supra* note 1, at 67 (emphasis added).

a loved one while having the knowledge that the killer continues to enjoy life."[301]

## ADDITIONAL RECOMMENDATION: A PERSON CONVICTED OF [AGGRAVATED] MURDER SHALL BE REQUIRED TO PAY RESTITUTION TO THE NEAREST SURVIVING RELATIVE OF THE VICTIM.[302]

The Commission took it upon itself, as it had every right to do, to add this recommendation to their principal proposal to abolish the death penalty and substitute life without parole in a maximum-security facility – at present, the New Jersey State Prison.[303]

Who could quarrel with the popular and politically expedient recommendation to spend more money on victims' services? But the Commission went beyond this.

Exactly how was a convicted aggravated murderer sentenced to life without parole supposed to earn the money to pay the victims' families inside New Jersey State Prison, which had shut down industry? Prisoners pursue the very few jobs available, which more than generating money for Commissary, also gets them out of their cell. Would the Corrections Department implement the Commission's recommendation by saving the scarce, highly prized jobs for the worst killers, thus once again perversely undermining retributivism? Or would they transfer these aggravated murderers to facilities that offered better employment opportunities?

Beyond its practical problems, the Commission's proposal undermines fundamental moral principles of Western culture. From earliest times, a victim's family responded to homicide. They would retaliate if they could; or in lieu of that, they might accept a "blood price" as a settlement, buying the killer peace and the victim's survivors some measure of satisfaction.[304]

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[301] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 19 (testimony of Patricia Harrison).

[302] COMM'N REPORT, *supra* note 1, at 76.

[303] *Id.* at 76-77.

[304] *See generally* Blecker, *Roots Resolving the Death Penalty: Wisdom from the Ancients*, *supra* note 208 at 180.

All other pre-Biblical Near Eastern cultures allowed the victim's family or the community to settle up, accepting monetary compensation for their loss in lieu of punishment.[305] Seemingly, moral guilt was irrelevant. The slayer was simply worth more alive, perhaps as a slave – or by the Commission's proposal, a lifer inside. For utilitarians it has always been about costs and benefits. The blood price worked: no one complained, and anyway, "why cry over spilt blood?" Just put it behind us, profit from it, and move on.

Although the Old Testament favors defendants when it comes to *proving* capital homicide, it changes tone when punishing it, refusing to allow murderers to live, who deserved to die: "These things shall be a statute and ordinance to you throughout your generations," declared the Old Testament, emphatically laying down the law.[306] "[Y]ou shall accept no ransom for the life of a murderer who is [guilty], [but he shall] be put to death."[307]

Thus the ancient Hebrews recognized that money can never truly compensate for murder. They also embraced its moral corollary – that no property crime should be capital**.** By refusing to allow the killer to buy his way out, the Old Testament taught that individual human life is incommensurably valuable. Life has no price: no amount of money given could ever equal the value of an innocent life taken. Life was neither expressible nor dischargeable in monetary terms. Justice shall not be bought; the victim's family shall not be bought off.

"Accept no ransom"[308] in lieu of the death penalty, *Numbers* declares, "for blood pollutes the land, and no expiation can be made . . . , for the blood that is shed in it, except by the blood of [him] who shed it."[309]

At roughly the same time the Hebrews assembled the Bible, the ancient Greeks, also repulsed by blood pollution rejected the

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[305] *Id.*

[306] *Numbers* 35:29 (New Revised Standard Version).

[307] *Numbers* 35:31 (New Revised Standard Version).

[308] *Id.*

[309] *Numbers* 35:33 (New Revised Standard Version).

blood price, expressing the ultimate value of human life concretely: the convicted murderer must die.[310] In the spirit of equal justice under law, both the ancient Hebrews and the ancient Athenians decreed that nobody bought his way out of homicide—no financial settlement. When it came to death as crime and death as punishment, a single standard of justice prevailed, based upon anger and mercy, but never money. The ancients recognized that the dignity of the individual victim demanded the death of the killer.

Thus Western Civilization advanced by abolishing the blood price, and *extending* the death penalty to all who deserved it. What can be said for those abolitionists today on the Commission who claim human dignity as exclusively their own concern, while they also propose their preferred option of life without parole *plus* some direct monetary restitution from the killer to the victim's family? Perhaps this recommendation unconsciously gratifies the Commissioners' own primitive sense of retribution – literally "payback." But the thought of grieving families, especially poor ones, financially dependent upon and grateful for periodic payments from their loved one's murderer, strikes us more thoroughgoing retributivists as simply retrograde.

## CONCLUSIONS

### A. STATE ABOLITION MAY PRODUCE FEDERAL EXECUTIONS

Important decisions usually produce unintended consequences. If the state legislature abolishes the death penalty, of course no one will be condemned to death or capitally prosecuted under the revised statute. Increasingly, however, the federal government prosecutes aggravated murder under federal law, especially in those states without a death penalty. Sometimes the local prosecutor, stripped of a capital option under state law, turns to the federal government to seek death federally. Recently in New York, for example, at the initiation of the local prosecutor, a federal jury condemned

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[310] *See* Blecker, *Roots Resolving the Death Penalty: Wisdom from the Ancients*, *supra* note 208.

Ronell Wilson to death for murdering two local undercover police officers.[311]

Thus, ironically, if the New Jersey legislature abolishes the death penalty, the net effect, long term, may be to *restore* the death penalty to New Jersey.

## B. THE MORAL LOGIC OF LIFE WITHOUT PAROLE

At first glance, the underlying logic of life without parole seems plausible enough: "the greater includes the lesser." The community's greater power to kill its worst offenders necessarily includes a lesser, but still awesome power to imprison them for life without possibility of release.

Life without parole, however, is a very strange sentence when you think about it. And the more you *do* think about it the less stable becomes its moral support. While it may represent the jury's unanimous *second* choice – of those who would condemn the killer to die, and others who would leave open a possibility of redemption from a life spent inside a prison – the punishment itself seems at once too little or too much.

If a sadistic or extraordinarily cold, callous killer deserves to die, then why not kill him? We ought to steel ourselves against counting all potential *future* rehabilitation or remorse of the most vicious killers. The past cries out and demands it.

But if we are unwilling to irrevocably extinguish the personality of the condemned and the body that goes with it, why should we – like Odysseus at the Mast – forever place it outside of our own power to reassess? Why should we ignore the rich, mature, constructive, vital human being that even the most heinous killer may possibly become? If we are going to keep the killer alive, why strip him of all hope?

So, while life without parole may be the closest moral approximation states without a death penalty can reach, while life without parole may also be the only unanimous compromise verdict a bitterly divided jury can reach, and while life without parole may be the ultimate sanction this Commission recommends, still it does not feel exactly right.

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[311] Brick, *supra* note 164.

True, by one logic, the greater includes the lesser. But then, too, sometimes by doing less than we might we do more than we may.

## C. ABOLITION MAY EXTEND THE REACH OF LIFE WITHOUT PAROLE

Commissioner Segars, the Public Defender, while "embracing" the Commission's primary recommendation to abolish the death penalty, issued a separate statement opposing the substitution of mandatory life without parole "in countless cases in which the death penalty would never otherwise be imposed."[312] The Commission's proposal, the Public Defender explained, will "inevitably captur[e] many cases that never would have been prosecuted capitally or resulted in death verdicts."[313] Because "death is different,"[314] states with a death penalty provide super due process for everyone charged capitally.[315] This special care includes a separate penalty phase where the jury weighs additional aggravating circumstances against mitigating circumstances, after the state has proved beyond a reasonable doubt at least one aggravating circumstance at trial.[316] As the Public Defender points out, under the Commission's recommended procedure, life without parole becomes mandatory upon a finding of an aggravating factor.[317] The defendant can no longer offer mitigating factors, and the sentencer no longer has discretion to reject the new

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[312] COMM'N REPORT, *supra* note 1, at 89 (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n, concurring and dissenting in part).

[313] *Id.* at 89.

[314] People v. Harris, 779 N.E.2d 705, 711 (N.Y. 2002).

[315] COMM'N REPORT, *supra* note 1, at 89 (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n, concurring and dissenting in part); *see also* State v. Martini, 901 A.2d 941 (N.J. 2006); People v. Harris, 779 N.E.2d 705 (N.Y. 2002).

[316] *Id.*

[317] COMM'N REPORT, *supra* note 1, at 89 (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n, concurring and dissenting in part).

ultimate penalty, based upon compelling circumstances of the individual defendant.[318]

New Jersey already mandates life without parole for the murder of police officers and children under fourteen during a sexual assault.[319] "To expand unnecessarily the categories of cases in which discretion is totally removed from the sentencing equation would be a grave mistake."[320] The Commission's proposed legislation, then, creates yet another significant unintended consequence: "The number of [additional] defendants sentenced to life without parole will be far greater than the number currently being sentenced to death."[321] Thus, as the Public Defender pointed out, if the Commission really wanted to "replace" the death penalty with life without parole, it should give the sentencer discretion to *reject* life without parole even where an aggravating factor exists.[322]

The Public Defender was "particularly concerned" about the potential for abuse in applying the "felony murder" aggravator, which presently:

> makes it a capital offense to commit a knowing and purposeful murder during the commission of robbery, burglary, sexual assault, kidnapping, arson and carjacking. The vast majority of these cases are not prosecuted capitally. Even when they are, they infrequently result in death verdicts because jurors attribute lesser weight to this aggravating factor in relation to the mitigating factors offered by the defendant. Mandatory imposition of life without parole in every such case is the most troublesome example of how the Commission's proposed statute goes beyond the

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[318] *Id.*

[319] *Id.* at 90.

[320] *Id.*

[321] *Id.*

[322] COMM'N REPORT, *supra* note 1, at 90.

> mere "replacement" of the death penalty with life without parole.[323]

The Public Defender acknowledged prosecutorial "discretion under the Commission's model not to seek life without parole in certain cases even if aggravating factors apply to the alleged facts. However, most of the factors that would typically weigh against seeking the death penalty would be diminished with the new system."[324] It would be "easy" for prosecutors to seek life without parole.[325] Under the proposed legislation, concerns about extra trial and appellate costs, mitigating factors or a jury's reluctance to impose death "would all disappear. The so-called sentencing phase would be a formality in almost every [felony murder] case . . . . [T]he jury would have already found the defendant guilty of murder, robbery and felony murder. In reality, there would be no issue left to deliberate."[326]

Retributivists should heed the Public Defender's warning. The Commission's proposal to abolish the death penalty and substitute mandatory life without parole,[327] apparently merciful, really eliminates mercy in cases where it belongs. We who are committed to proportionate punishment and individualized justice should reject the Commission's morally indiscriminate proposal to abolish the death penalty entirely. This witness, on behalf of fellow retributivists committed to individualized proportional justice, urged the Commission to morally refine the death penalty, especially eliminating the felony murder aggravator.[328]

In that same spirit, we join the Public Defender, whether or not the death penalty is abolished, rejecting the merciless, indiscriminate mandatory life without parole for all those convicted of felony murder.

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[323] *Id.* at 91.

[324] *Id.*

[325] *Id.*

[326] *Id.* at 91-92.

[327] COMM'N REPORT, *supra* note 1, at 2.

[328] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 57-58 (testimony of Robert Blecker).

## D. THE SYMBOLIC VALUE OF DEATH: THE COURAGE TO PERSIST

The lone, brief dissent by a former legislator and primary drafter of New Jersey's current death penalty statute[329] did more harm than good, creating a false impression that all sides had been represented either by the report itself, or in dissent. The lone absentee at this witness's testimony,[330] the dissenter neither returned phone calls, nor reacted to my prepared statement specially e-mailed to him after my testimony. Essentially defending "his" statute,[331] without really engaging the Commission on its fundamental assumptions, he urged the state to "face up" to the problems with the administration of the current system without making a single specific proposal to modify the current regime.[332]

Of all additional statements attached to the Report, Commissioner Kathleen Garcia's separate concurrence[333] pained this retributivist most. Sometimes the most difficult splits are with those who take all but the last step with you. An ardent death penalty supporter in a more perfect world, during the hearings Commissioner Garcia repeatedly made clear that she had "as much compassion for these perpetrators as they had for their unfortunate victim(s)."[334] Nevertheless, given the long-standing bias of "liberal judges" especially on the state's highest court,[335] "[i]t has long been evident that the New Jersey Supreme Court will continue to ensure that no person,

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[329] COMM'N REPORT, *supra* note 1, at 79-83 (statement of J. John F. Russo, Comm'r, N.J. Death Penalty Study Comm'n, dissenting).

[330] COMM'N REPORT, *supra* note 1; Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 1.

[331] COMM'N REPORT, *supra* note 1, at 79 (statement of J. John F. Russo, Comm'r, N.J. Death Penalty Study Comm'n dissenting).

[332] *Id.* at 82.

[333] *Id.* at 93-96 (statement of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n, concurring).

[334] *Id.* at 94.

[335] *Id.*

regardless of how horrendous the crime(s) committed, will ever be executed."[336] Thus, because judges would find some way to refuse to enforce the law, and to end the endless "agony" of victims families waiting for justice to be done, Ms. Garcia on behalf of survivors' families voted to end this cruel "joke."[337]

Has she thrown in the towel prematurely? At least one death penalty has fully cleared the state high court and seems ready to proceed to execution of sentence.[338] Ironically, New Jersey may be the only state with lethal injection Constitutionally empowered to administer it. On September 25, 2007 the U.S. Supreme Court granted certiorari in a Kentucky case to consider whether lethal injection is cruel and unusual punishment because it poses an unconstitutional risk of a too painful death.[339] In their petition for certiorari, the lawyers for the condemned insisted that "without this court's intervention, inmates in Kentucky and the rest of the states that carry out lethal injections -- *except New Jersey* -- will die because the Departments of Corrections are not adequately prepared to reverse the effects of the chemicals."[340] Should the U.S. Supreme Court rule in favor of the condemned in this case, having already modified its lethal injection procedures, New Jersey may be the lone state constitutionally able to execute their condemned killers. If only they had the will.

Of course New Jersey's abolitionist Governor could step in to prevent any execution, but he may not want to bear the political price, content instead to stack the Commission with his

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[336] *Id.* at 93.

[337] COMM'N REPORT, *supra* note 1, at 94.

[338] State v. Martini, 901 A.2d 941 (N.J. 2006); Robert Schwaneberg, *Death Penalty Evokes Anguished Debate*, STAR-LEDGER, Sept. 14, 2006, at 18, *available at* http://www.sentencing.nj.gov/downloads/pdf/articles/2006/Sept2006/story05.pdf.

[339] Baze v. Rees, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 2007 WL 2075334 (U.S. Sept. 25, 2007) (No. 007-5439).

[340] Petititon for writ of Certiorari, Baze v. Rees, No. 07-5439, 2007 WL 2781088, at *vi, *23 (U.S. July 11, 2007) p. vi, p. 23 (*citing In re* the Matter of Readoption with Amendments of Death Penalty Regulations, 842 A.2d 207 (N.J. Super. 2004)) (emphasis added).

abolitionist appointees. No one's tenure lasts forever. Many victims' survivors still believe that justice will be done and would retain the penalty to await the outcome.[341] Why not await a changing Governor and state high court that more nearly reflect the will of the people on this issue, and in the meantime move forward by morally refining the statute to focus more narrowly on the worst of the worst?

Why prefer a system necessarily unjust in principle to another presently unjust in practice?

Besides, we should recognize the great symbolic significance of the death penalty, as this witness urged.[342] The Public Defender's separate statement acknowledged the "symbolic meaning" specially attaching to life without parole, although in fact, many other lifers will be ineligible for release until long after they die.[343] States such as New Hampshire tenaciously cling to their death penalty yet execute no one.[344] Why? Because symbolic significance attaches when society's representatives on a jury choose death. Prisoners have told me, years later, how the jury declaration that they were not fit to live still pains them.[345]

Other Commissioners ignored this witness's plea to count the death penalty's symbolic significance. Commissioner Garcia at least took it seriously, if only to reject it: "While Professor Blecker[] . . . indicated the death penalty statute was of value even if it is never carried out, there can be no sense of justice for

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[341] Pub. Hearing, July 19, 2006, *supra* note 78, at 52 (letter from Marilyn Flax, victim's survivor).

[342] Pub. Hearing, Oct. 11, 2006, *supra* note 13, at 55 (testimony of Robert Blecker).

[343] COMM'N REPORT, *supra* note 1, at 90 (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n, concurring and dissenting in part).

[344] N.H. REV. STAT. ANN. § 630:1 (2007); *Murder Cases Revive Doubts About New Hampshire Death Penalty*, THE UNION LEADER, July 17, 2007, at B8.

[345] *See, e.g.*, Interview with Rick Smith, prisoner on Oklahoma's Death Row in Lorton Central Prison, in Washington D.C. (Nov. 20, 2004).

survivors if the sentence they receive and embrace, no matter what that may entail, is never served."[346]

Alright. Suppose for the foreseeable future, as Commissioner Garcia insists, the courts will block executions. Why not satisfy the desires of victims' families for real justice? Why not attach special *punitive* conditions to daily life for those Condemned? Day to day, really, keep the connection between the monstrous crime and society's response. Design and administer a separate punitive setting, resembling administrative segregation today – but no longer reserved for those who violate prison regulations inside, however petty. Extend punitive segregation to those who committed the most vicious, callous and sadistic killings on the outside – permanently.

Abolitionists, of course, have embraced the Commission's report, trumpeting it as thoughtful and complete. Hopefully this reply should raise real doubts if it does not convince honest observers that the Commission majority, abolitionist and anti-retributive, conducted hearings and filtered evidence to beg the question: is justice served specially and uniquely by killing those who most deserve to be condemned?

A majority of the people of New Jersey feel that justice requires a death penalty.[347] Simply ignoring the popular will, however, a few days after the November 2007 elections, legislative leaders announced they would act on the Commission's report, complete "unfinished business" and rush abolition through a lame duck legislature by January of 2008.[348]

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[346] COMM'N REPORT, *supra* note 1, at 96 (statement of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n, concurring).

[347] Pub. Hearing, Sept. 13, 2006, *supra* note 24, at 68 (testimony of Patrick Murray).

[348] Tom Hester, *Abolishing N.J. Death Penalty to get Lame Duck Treatment*, NEWSDAY, Nov. 11, 2007, *available at* http://www.newsday.com/news/local/wire/newjersey/ny-bc-nj--legislativeprevie1111nov11,0,1502919.story (last visited Nov. 13, 2007). *See also*, Elise Young, *N.J. death penalty could be history*, RECORD, Nov. 9, 2007, *available at* http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXk2MDcmZmdiZWw3Zjd2cWVlRUV5eTcyMTkoODkmeXJpcnk3ZjcxN2Y3dnFlZUVFeXky (last visited Nov. 13, 2007).

New Jersey would become a "beacon on the hill," abolitionists proclaimed, and a model for other states.[349] Perhaps, instead, the people might press their representatives someday to really consider the question, refine the statute, and punish with death only those who most deserve to die.

[349] Tom Hester, *N.J. to Vote on Abolishing Death Penalty*, WASH. POST, Nov. 9, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/09/AR2007110901301.html (last visited Nov. 13, 2007).