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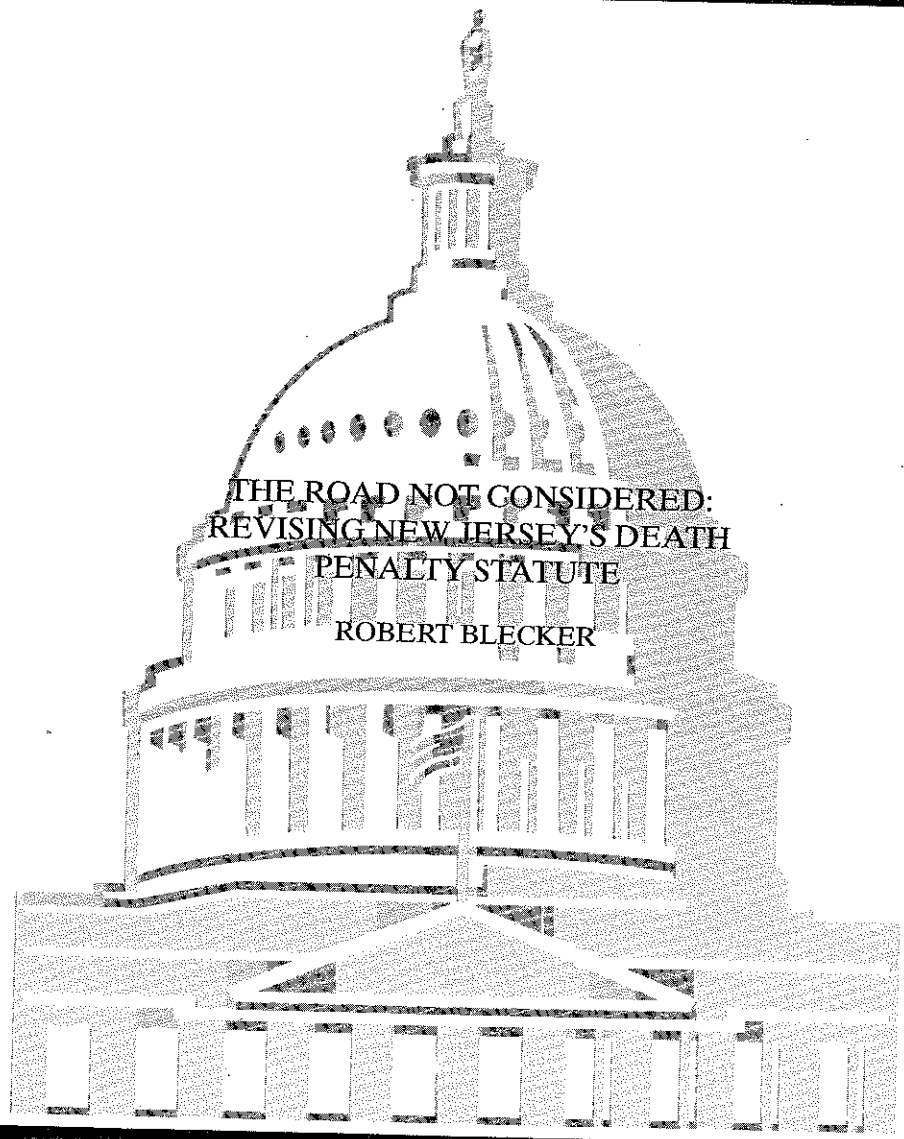

# THE ROAD NOT CONSIDERED: REVISING NEW JERSEY'S DEATH PENALTY STATUTE

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VOLUME 32 2008 NUMBER 2

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

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On December 17, 2007, New Jersey made national and international headlines, becoming the first state in the modern era to legislatively abolish the death penalty.[1] Abolitionists celebrated: Italy lit up its Colosseum, and voices across the United States proclaimed New Jersey a "beacon" and model for other states to imitate.[2]

Of course the People's representatives did not represent the popular will. A substantial majority of New Jersey residents still want to retain the death penalty for those who they believe really deserve it.[3] For example, when focused upon Jesse Timmendequas, condemned to die for raping and murdering

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[1] Act of May 10, 2007, ch. 204, 2007 N.J. Laws 204.

[2] *Rome Lights Up Colosseum to Celebrate U.N. Vote on Death Penalty, Abolition in New Jersey*, Dec. 19, 2007, INT'L HERALD TRIB., http://www.iht.com/articles/ap/2007/12/19/europe/EU-GEN-Italy-Death-Penalty.php; American Civil Liberties Union, *ACLU Says NJ's Historic Rejection of Death Penalty Reflects Shift in Public Opinion*, http://www.aclu.org/capital/general/33233prs20071217.html (last visited Apr. 12, 2008).

[3] Regina Sass, *Poll: New Jersey Split on Death Penalty*, ASSOC. CONTENT, Dec. 12, 2007, http://www.associatedcontent.com/article/478179/poll_new_jersey_split_on_death_penalty.html.

little Megan Kanka, nearly 80% of the state supported his execution.[4]

No matter. Under cover of recommendations by a death penalty study commission, which the Governor carefully selected to abolish capital punishment, the lame duck legislature simply rubberstamped the Commission's report.[5] However, the Commission had another option. They could have used their mandate to *refine* the existing statute. I appeared before them as an expert witness, proposing concrete reforms, and urging them to consider alternatives. Nonetheless, my plea fell on deaf or hostile ears.

The Commission's thoroughly biased final report did not so much as mention, if only to decline, that option to refine the statute. I personally contacted several key members of the legislature, urging them to consider revising the statute, and with the exception of a couple of senators who trumpeted some of those changes in a hasty press conference, again it fell on deaf ears. I appeared before legislative committees, demonstrating the pervasive bias in the Commission's report[6] and urging them at least to consider revisions for the sake of justice.[7] Again, a plea ignored.

New Jersey's abolition is a done deal; but other states are now preparing to act.[8] Hopefully, they will use this time of national

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[4] State residents remain split on capital punishment. In a Quinnipiac University poll taken last week, voters were opposed to ending the death penalty by a margin of 53 percent to 39 percent . . . . Nearly 80 percent said they support keeping the death penalty for the most violent cases.

Deborah Howlett, *Corzine Ends Death Penalty In New Jersey*, STAR LEDGER, Dec. 17, 2007, http://www.nj.com/news/index.ssf/2007/12/nj_death_penalty_is_expected _t.html.

[5] N.J. DEATH PENALTY STUDY COMMISSION REPORT 2 (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; 2005 N.J. Laws 321; Michael Rispoli, *Corzine Signs Death Penalty Ban into Law*, DAILY RECORD (Morristown, N.J.), Dec. 18, 2007, at 2.

[6] Robert Blecker, *But Did They Listen?: The New Jersey Death Penalty Commission's Exercise in Abololitionism: A Reply*, 5 RUTGERS J.L. & PUB. POL'Y 9 (2007).

[7] *Hearing Before the N.J. Leg. Death Penalty Study Comm.* (Oct. 11, 2006) (statement of Robert Blecker), *available at* http://www.njleg.state.nj.us/legislativepub/pubhear/dpsc101106.pdf.

[8] Laura Smitherman, Civiletti Heads MD Panel on Death Penalty; Issues to Be Examined Include Racial Disparities, DNA Evidence, BALTIMORE SUN, July 11, 2008, at 3B.

reflection to modify their own statutes as currently written, with an eye toward reform rather than wholesale abolition. Then, under a more enlightened regime, with greater moral and factual confidence, we may execute not all, but only those who deserve to die.

## A MORE MORALLY REFINED DEATH PENALTY STATUTE

### *I. WHO DESERVES THE ULTIMATE SANCTION: THE WORST OF THE WORST*

#### *A. Modify the* Mens Rea *for "Aggravated" Murder*

##### 1. Eliminate "Knowingly Causing Serious Physical Injury"

New Jersey currently defines murder as purposely or knowingly causing death or serious bodily injury resulting in death.[9] Many other states, however, classify causing the death of a person whom you intend to seriously physically injure but not to kill as no more than voluntary manslaughter and certainly not aggravated murder.[10] Of course, proving beyond a reasonable doubt that the defendant purposely killed the victim he claims only to have purposely injured can be challenging. Thus the New Jersey legislature avoided the problem by amending its initial death penalty statute to include intentional or knowing infliction of serious bodily injury.[11]

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

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[9] N.J. STAT. ANN. § 2C:11-3(a)(1) to -3(a)(2) (West 2005 & Supp. 2008).

[10] WAYNE R. LAFAVE, CRIMINAL LAW 738 (4th ed. 2003).

[11] N.J. STAT. ANN. § 2C:11-3(a)(1) to -3(a)(2).

2. Add "Recklessly with a Depraved Indifference to Human Life"

Nor should *intent to kill* be necessary for society's ultimate sanction. Even leading abolitionists such as Thorsten Sellin, the reporter for the Model Penal Code, acknowledged what the U.S. Supreme Court has reaffirmed—killing *recklessly with a depraved indifference to human life* may be every bit as heinous as premeditatedly killing a targeted victim.[12]

The Old Testament condemns to death the person who lets loose a vicious ox to wreak havoc among the multitude.[13] Nineteenth century cases cite other examples of a "depraved mind" murder: A person opens the door of a lion's cage, poisons a well, rides an unruly horse into a crowd, or engages in target practice by shooting into a passing train.[14] In these instances, the perpetrators act with cold reckless disregard. Neither purposely nor knowingly killing a specifically intended victim, these callous killers simply do not give a damn.

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

*B. Modify the Aggravating Circumstances*

1. Eliminate the Felony Murder Aggravator

First and foremost, states with a death penalty should abolish capital felony murder. Felony murder—the most common death penalty situation—covers many different types of killers and killings. Across the United States, robbery (and burglary) have probably put more killers on death rows than all other aggravating circumstances.[15] Instinctively and morally, most of us feel that a

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[12] *See* Tison v. Arizona, 481 U.S. 137, 158 (1987) (affirming the death penalty for a major participant in a robbery whose "culpable mental state" was "a reckless indifference to human life.") (emphasis added).

[13] *See Exodus* 21:29.

[14] N.Y. PENAL LAW § 125.25 n.18 (McKinney 2004 & Supp. 2008), *construed in* People v. Suarez, 844 N.E.2d 721, 730 (N.Y. 2005).

[15] Bureau of Justice Statistics, Homicide Trends in the U.S.: Trends by Race, http://www.ojp.gov/bjs/homicide/race.htm (last visited Apr. 18, 2008).

person who kills for a pecuniary motive, whether as a professional assassin, a spouse who hires him to collect a life insurance policy, or a business rival who pays to eliminate the competition, does commit an aggravated murder.[16]

Robbers almost always rob for money. But they less often kill for it. A robbery alone simply does not elevate an intentional or depraved indifference reckless killing to the worst of the worst. The robbery felony murderer who sticks up a 7-11 store where the clerk grabs a gun from under the counter and the robber kills him, is not the same type of criminal as Charles Ng who maintains a torture chamber in his basement, kidnaps women with their children, videotapes their torture over weeks, exposes them to unspeakable misery, rapes and then murders and mutilates them.[17] They do not inhabit the same moral universe.

Charles Ng unquestionably deserves to die. The robbery-felony-murderer, however, without other aggravating circumstances, though commonly death-eligible, arguably does not deserve to die. Nor does burglary, a crime by definition against premises and not person, in and of itself aggravate a murder. In any case, legislatures that insist on retaining a burglary aggravator for their ultimate sanction should confine it to home invasions because we so greatly value safety in our own homes.

In short, "intentional" or "knowing" felony murder should be abolished as a capital offense. Nor should it remain, as the New Jersey legislature left it, as the basis for mandatory life without parole.

2. Refine the Escape Aggravator

Naturally, we love our own freedom. Knowingly or intentionally killing another person to "escape detection, apprehension, trial, punishment or confinement" should be punished as murder.[18] The love of liberty alone, however, does not *aggravate* murder.

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[16] N.J. STAT. ANN. 2C:11-3(b)(4)(d) to -3(b)(4)(e) (West 2005 & Supp. 2008).

[17] Fanny Carrier, *U.S. Man Chooses Death by Electric Chair*, AFP, Sept. 11, 2007; Larry Hatfield, *Ng Jury to Consider Sentence: Found Guilty in 11 Deaths*, S.F. EXAMINER, Feb. 25, 1999.

[18] N.J. STAT. ANN. 2C:11-3(b)(4)(f).

Many jurisdictions also make death-eligible a close cousin: "killing a witness."[19] But that too, is too broad. Killing an innocent witness to escape detection does aggravate murder; but again, not because it accompanies robbery. At first blush it may seem morally supportable to punish most severely those robbers who intentionally kill their victims to eliminate them as witnesses. The special sanction operates either to deter or condemn the calculating killer who takes an innocent citizen's life to marginally increase his odds of escape.

These statutes, however, make no distinction between killing innocent witnesses—such as robbery victims and bystanders who surrender their money yet are killed to prevent possible future testimony—and killing the robber's co-felons (or paid informants cooperating with the government) who "flip the script" to pin it on their partners in crime.

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

### 3. Refine and Consolidate the "Pecuniary Motive"[20] Aggravators

Like most other states with a death penalty, New Jersey rightly condemned paid assassins who kill for profit.[21] But do we thoroughly condemn killing as a business decision?

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

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[19] N.M. STAT. ANN. § 31-20A-2, -20A-5 (LexisNexis 2000); IDAHO CODE ANN. § 19-2515(9)(k) (2004 & Supp. 2008).

[20] N.J. STAT. ANN. § 2C:11-3(b)(4)(d).

[21] *Id.*

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

4. Refine "the Grave Risk of Death to Another Person"[22] Aggravator

This aggravator applies to mass murderers, such as terrorists, spray shooters and the like, who knowingly endanger groups of innocent citizens. As presently written, this over-inclusive aggravating factor tends to become a catchall.[23] Prosecutors may be tempted to use or threaten the ultimate sanction to coerce a guilty plea and avoid the uncertainty and expense of trial. Imagine, for example, a drug deal gone bad, and the fleeing defendant shoots his way out of a den full of armed drug dealers. Perhaps we can do no better than substitute a "multiple victim" aggravator, leaving it to prosecutors and juries to sort it out case by case.

5. Eliminate the "Narcotics Trafficking Network" Aggravator

Those who intentionally kill fellow drug dealers commit murder, but certainly do not become *specially* worthy of society's ultimate sanction. Participants in that deadly game understand the rules and still choose to involve themselves. If anything, internal drug gang killings are, all other things being equal, less reprehensible than many other intentional killings.

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[22] N.J. STAT. ANN. § 2C:11-3(b)(4)(b).

[23] *Id.*

6. Refine and Revise "the Public Servant"[24] Aggravator

Most states single out cop killers for capital punishment.[25] Supporters may point out that the police put their lives on the line for us. Those who would kill a police officer would kill anyone, and an attack on law enforcement is an attack on law itself, threatening the whole criminal justice system.

Murderers who kill police *because* they are police do wage war on the people, and thus deserve our ultimate sanction. An armed robber, who does not initiate the gun battle, but only returns fire at a pursuing police officer, may be a murderer, but not the worst of the worst, and without more, does not deserve to die. As they say on the street, "it's different when you do someone who's trying to do you."[26]

New Jersey should have dropped the qualifier "while performing his official functions,"[27] while retaining the second clause, "because of the victim's status as a public servant"[28] thus specially condemning the killer's motive. Also, states should expand their "public official" victim aggravator specifically to cover *killing a juror*, a good citizen drafted to serve the community, unarmed and for no pay.

7. Retain and Emphasize "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim"[29]

This is *the* core aggravator. Torture provokes near universal condemnation, even among killers themselves, providing retributivist advocates with our strongest case. Unquestionably, a sadist who tortures his helpless victim to death just for the fun of it belongs among the worst of the worst. Absent extraordinary mitigating circumstances, he deserves to die.

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[24] N.J. STAT. ANN.§ 2C:11-3(b)(4)(h).

[25] Richard C. Dieter, *2002 Presidential Candidates' Views on the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/article.php?&did=235.

[26] Interview with David Itchy Brooks, convicted murderer, in Central Facility, Lorton Correctional Complex, Lorton, Va. (1988).

[27] N.J. STAT. ANN § 2C:11-3(b)(4)(h).

[28] *Id.*

[29] N.J. STAT. ANN. § 2C:11-3(b)(4)(c).

So too the rapist murderer: "torture" should specifically include rape. We should also condemn as "depraved, horrible and inhumane" terrorists who kill. Cruelty—the essence of what we most condemn—has long included not only taking pleasure in killing, but also a cold, callous indifference to human life.[30] A person who sets off a bomb or sprays bullets into a crowd, not caring who or how many innocent people die; a pharmacist who dilutes unsuspecting cancer patients' chemo-therapy to make extra money; a man who rapes three children, ages nine, seven, and five, while he is HIV positive and knows it, all should be condemned as the worst of the worst. The United States Supreme Court specifically held that such a depraved indifference towards life may be sufficiently heinous to warrant death.[31] A statute here should provide specific examples, such as "killing an especially vulnerable victim," namely children, the elderly, and the handicapped, whose intentional killing especially deserves to be condemned.

Are the lives of these victims more valuable than the rest? No. Perhaps we imagine greater pain and suffering attaching as a helpless victim experiences his own helplessness. Ultimately, however, we support a generic "especially vulnerable victim" aggravator not because these victims' lives are more valuable, but because their deaths reveal the cowardly and despicable nature of their killers, who prey on them.

Retributively, this advantage taking—extreme selfishness combined with extreme cowardice—qualifies these murderers as the worst of the worst. Perhaps the "outrageously wanton or vile" aggravator,[32] and this aggravator alone, should constitute an entire death penalty statute. Of course the danger persists that every murder will be so characterized, and an overzealous prosecutor aided by a rightly indignant jury could stretch it beyond the truly most aggravated. But with some specific statutory examples, and a developing jurisprudence, this aggravator can function as it should.

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[30] BLACK'S LAW DICTIONARY 405 (8th ed. 2004).

[31] Tison v. Arizona, 481 U.S. 137, 158 (1987).

[32] N.J. STAT. ANN. § 2C:11-3(b)(4)(c).

## II. WHO IS THE "WORST OF THE WORST": JURY DECISION-MAKING

### A. *Clarify the Burden of Persuasion to Rebut Mitigating Circumstances*

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

New Jersey's statute clearly announced "[t]he state shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors."[33] But then the statute was vague, noting "[t]he defendant shall have the burden of producing evidence of the existence of any mitigating factors but shall not have a burden with regard to the establishment of a mitigating factor."[34]

Therefore, after the defendant *produced* some evidence suggesting mitigation, the prosecutor had a burden to rebut the mitigator, and establish its absence, but by what weight? Suppose an individual juror believed it substantially possible but less likely than not—say 40% likely—that the defendant acted under "unusual and substantial duress"[35] or with "significantly impaired capacity" not amounting to insanity.[36] Should that juror find that mitigation has been established? Surely the defendant has more than met the burden of production. But has the prosecutor met the burden of persuasion to rebut that mitigator? What if the mitigator is 30% likely, 10% likely? A statute should be more clear.

### B. *Weighing Aggravating Against Mitigating Circumstances—Add to the Prosecutor's Burden*

Once the jury finds aggravating circumstances beyond a reasonable doubt and mitigating circumstances (by some vague weight), the New Jersey statute required the jury to decide

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[33] N.J. STAT. ANN. § 2C:11-3(c)(2)(a) (1999) (repealed by N.J. Pub. L. No. 2007, c.204).

[34] *Id.*

[35] N.J. STAT. ANN. § 2C:11-3(c)(5)(e).

[36] N.J. STAT. ANN. § 2C:11-3(c)(5)(d).

whether the aggravating circumstance(s) "outweigh(s) beyond a reasonable doubt any one or more mitigating factors."[37]

Death penalty statutes should demand greater certainty before a jury condemns a defendant to death. The jury should have to find "beyond a reasonable doubt that aggravators *clearly* (or substantially) outweigh the mitigators." Barely tipping the scale should not be enough.

### C. *Substitute "May" for "Shall": Make the Death Penalty Permissive*

New Jersey's statute spoke in quasi-mandatory language: "If the jury finds that aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court *shall* sentence the defendant to death."[38] Notwithstanding that aggravators substantially outweigh mitigators, neither the jury or the court should ever feel legally bound to vote "death" by some mechanical weighing process.

### D. *Add Lingering Doubt and Moral Certainty*

A capital statute must help insure against factual and moral mistakes. Only the worst of the worst should be condemned to die. Therefore, after jurors are instructed that they *may* vote for death only if they are convinced "beyond a reasonable doubt that the aggravators substantially outweigh the mitigators," they should be further instructed: "Although you may be convinced beyond a reasonable doubt that the defendant committed capital murder, if you have even a lingering doubt, *a residual doubt* of the defendant's guilt, you should reject the death penalty." The U.S. Supreme Court recently held that the U.S. Constitution does not require proof beyond a "residual doubt"[39]—but justice does.

Jurors should also be instructed: "Although you have no lingering doubt about the defendant's guilt, before voting for death you must also be convinced *to a moral certainty* that the defendant *deserves* to die." This standard explicitly demands an

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[37] N.J. STAT. ANN. § 2C:11-3(c)(3).

[38] N.J. STAT. ANN. § 2C:11-3(c)(3)(a) (emphasis added).

[39] Oregon v. Guzek, 546 U.S. 517 (2006).

intuitive, emotional certainty that cannot be quantified. Intuitive, emotional, perhaps even irrational, but very real.

This extraordinary burden should better allow an individual juror who has found aggravated murder beyond any real doubt, nevertheless to withstand peer pressure and hold out for a sentence of life in prison, although he can neither identify nor articulate the basis for mercy. In sum, jurors should be instructed, "[o]nly if you *feel certain* that he [committed the crime] and deserves to die for it should you be allowed but never compelled to find death."[40]

### *E. Protect Against the Stealth Juror: Nearly Unanimous Condemnation*

With this Herculean burden operating to preserve the lives of all but our worst offenders, the courts should compensate for the inevitable failure of the jury selection process to weed out abolitionist jurors who, contrary to their oaths, are unwilling *under any circumstances* to vote death. Under these heightened standards of persuasion, an 11-1 (or perhaps 10-2) jury should be empowered to condemn the worst among us to suffer society's ultimate punishment.

## *III. MAKE THE PROCESS MORE VICTIM-CENTERED*

Through conflicting testimony and clashing perspectives, one simple fact united the New Jersey Study Commission and probably much of the legislature. The long delayed death penalty imposed unjust suffering upon the victims' families above and beyond the devastating effect of the murder itself. Some legislators who supported the death penalty in principle ultimately joined its opponents to repeal it, convinced that neither the current New Jersey Supreme Court nor the present Governor would ever allow anyone to be executed.[41]

Legislators spare aggravated murderers an empty threat of death to spare victims' families the real agony of disappointment. Why force them to relive their horrible loss during successive

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[40] COMM'N REPORT, *supra* note 5, at 69.

[41] COMM'N REPORT, *supra* note 5, at 94 (statement of Kathleen Garcia, Comm'r, N.J. Death Penalty Study Comm'n).

phases of the seemingly endless and frustrating (re)trial and appellate process? The legislature would spare the killer to spare the victim's family.

But we should not confuse the *victim* with the victim's family. Among the living, the family often suffers most. The family most pointedly reflects our anger and grief. But with murder, the victim is dead while the family members live. Yet, when someone is murdered, we are all the victim's family. "And for the greater security of the weak," declared Solon, the great ancient lawgiver, "citizens, like members of the same body, [should] feel and resent one another's injuries."[42]

"The voice of our brother's blood"[43] moves retributivist death penalty supporters like myself. We feel the past counts, and the community remains polluted if the law responds inadequately. We *feel* the need to act on behalf of the victim. Yet the process of determining and administering punishment fundamentally disconnects the crime—murder of an innocent victim—from the experience of punishment for that crime. Whether in the courtroom at sentencing, or while awaiting death on death row, or serving life in the general prison population, even during the execution ritual itself, crime and punishment are severed. I suggest several victim-centered modifications.

### A. *Add Film and Video of the Victim During the Sentencing Phase*

During the penalty phase, the defense must attempt to humanize the defendant. The killer's friends and/or family may recount his good deeds, or emphasize the convicted killer's own traumatic suffering or abuse as a child. The jury has the benefit of viewing the living defendant in court. To allow the jury to strike a moral balance in deciding life or death during the penalty phase, the U.S. Supreme Court has upheld "victim impact" statements.[44]

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[42] A.H. CLOUGH, PLUTARCH'S LIVES OF THE NOBLE GRECIANS AND ROMANS 85 (Project Guttenberg, 1996); *cf.* Robert Blecker, *Resolving the Death Penalty: Wisdom from the Ancients, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 169 (James R. Acker et al. eds., 2d ed. 2003).

[43] *Genesis* 4:10.

[44] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

The People may call the victim's family as witnesses to humanize the victim and communicate their own sense of loss.[45]

Amending its death penalty statute in 1999, New Jersey specifically distinguished the victim from the family by permitting a "survivor of a homicide victim to display a photograph of the victim, taken before the homicide, at sentencing."[46] A single photograph hardly suffices. Death penalty trials should as much as possible bring the victim to life and link the terrible crime with the terrible punishment.

### *B. Permit the Introduction of "Living Wills"*

Justifiably, the U.S. Supreme Court held that although the victim's family may portray the victim and their own sense of loss, they may not offer an opinion as to whether the killer should be put to death.[47] The victim's opinion of the killer's fate, however, *should* count.

Abolitionists have devised a "living will" or "declaration of life," which may read,

> I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered.[48]

Death penalty proponents generally dismiss these living wills and thus far, they are inadmissible at trial. If we truly desire to become more victim-centered, however, we should admit living wills. A statute could declare:

> Once victim character evidence is raised, either side may present evidence that the victim either supported or opposed the death penalty with such qualifications as the victim made apparent during the victim's life. The judge shall examine such evidence from either side in camera, and shall permit it only if

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[45] *See id.* at 825–26.

[46] N.J. STAT. ANN. § 2C:11-3(c)(6) (1999) (repealed by N.J. Pub. L. No. 2007, c.204).

[47] *Payne*, 501 U.S. at 809.

[48] *See generally* The Washington Coalition to Abolish the Death Penalty, http://www.abolishdeathpenalty.org/Resources.htm (follow "Declaration of Life Form" hyperlink) (last visited Aug. 5, 2008).

> it clearly and convincingly shows that the victim would have supported or opposed the death penalty under the circumstances of the particular killing. The judge should further inform the jury that they are not bound to effectuate the victim's living will, but should give such weight to it as they deem reasonable.

### *C. A More Victim-Centered Execution*

After the condemned makes a final statement (or perhaps immediately before), the victim's family should have the option to display a brief audio-visual record of the victim. This demonstration may portray the victim at play or in the embrace of family or friends, and may also include crime scene photos and scenes from the victim's funeral, burial and gravesite. We should drive it home to all who witness a state-sanctioned killing that we execute the condemned for the sake of the past. The legislature by statute should do its best to reconnect the ultimate crime with the ultimate punishment.

### *D. Compensating the Victim's Family*

From earliest times, the victim's families could accept a "blood price" in lieu of retaliation.[49] Western Civilization advanced, when the ancient Hebrews rejected the death penalty for property crimes and at the same time abolished the blood price: "You shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death."[50] The ancient Greeks also independently rejected the blood price at about the same time.[51] A murderer could no longer buy his way out of punishment for homicide.

The Study Commission recommended applying all cost savings from abolishing the death penalty to victims' services. The final report declared, "A person convicted of murder . . . shall be required to pay restitution to the nearest surviving relative of the victim."[52] Imagine a family coming to depend upon monthly

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[49] Blecker, *supra* note 42, at 187.

[50] *Id.* at 181.

[51] *Id.*

[52] COMM'N REPORT, *supra* note 5, at 76.

stipends from the killer of their loved one? If not obscene, this particular recommendation feels retrograde and wrong.

The Government has failed every murder victim and, by extension, their family in the extreme. While the legislature should mandate financial support to families of murder victims, this support should never come directly from the killer.

## *IV. MAKE THE PUNISHMENT MORE REAL AND TRANSPARENT*

### *A. Public Executions*

Because they are conducted in the name of the People, executions should be public. If the people cannot stomach witnessing death sentences carried out, they ought to abolish them. This highly controversial proposal may, of course, be severed from other proposed reforms.

### *B. Reject Lethal Injection*

Present controversy swirls around lethal injection as the preferred method of execution. Does the paralytic agent mask the pain experienced by the condemned? Should doctors participate? Of course, abolitionists oppose *any* method of execution. This medical controversy won them a national moratorium on lethal injection until the United States Supreme Court held that method constitutional for now.

Supporters of lethal injection reply that lethal injection is painless when administered properly.[53] Some supporters also counter that the present doctor participation controversy is make-weight. Lethal injection as punishment is not a medical procedure. This counter argument has not been influential for good reason. Unless botched, lethal injection resembles, in fact appears, feels, and seems medical. That is its fundamental flaw. The condemned dies in a gurney, wrapped in white sheets with an IV in his veins, and surrounded by his closest kin. The execution chamber should not resemble the final scene at a hospice. Killing the condemned should not resemble how we allow a lethal but

[53] *See* Baze v. Rees, 217 S.W.3d 207 (Ky. 2008), *aff'd* 128 S.Ct. 1520 (2008). During oral argument, both petitioner and respondent agreed on this point. *See* 2008 WL 63222 (2008).

legal morphine drip to put out of their misery those we love. Therefore, legislatures should reject lethal injection in favor of a method such as the firing squad, that clearly and distinctly punishes.

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

By abolishing the death penalty, the New Jersey legislature obviously believed that life without parole sufficiently punished the worst of the worst. Abolishing the death penalty and substituting mandatory life without parole as punishment for aggravated murder, however, does not always bring justice. Overly broad substantive aggravating factors result in overly broad application of society's now-ultimate sanction. Worse, as Commissioner Segars, New Jersey's Public Defender and a fierce death penalty opponent, rightly noted in a separate statement: "Under the guise of 'replacing' the death penalty with life without parole, the proposed statutory scheme . . . inevitably captur[es] many cases that never would have been prosecuted capitally or resulted in death verdicts."[54]

The death penalty carries with it "super due process" requirements of a separate penalty phase with proven aggravators carefully weighed against mitigators, and always gives the jury the option of mercy. On the other hand, a mandatory life without parole statute often automatically operates upon a finding of an aggravating factor. Rarely, if ever, may the defendant offer mitigating evidence. Once the jury finds that aggravating factor, it has no discretion and must sentence the defendant to life in prison with no opportunity for parole.

Legislatures considering abandoning death penalty statutes should heed the New Jersey Public Defender's warning: "Replacing the death penalty scheme with a mandatory life without parole scheme is not in the best interests of justice."[55] The defendant should be allowed to raise mitigating circumstances in a separate penalty phase conducted before a judge or a jury.

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[54] COMM'N REPORT, *supra* note 5, at 89.

[55] COMM'N REPORT, *supra* note 5, at 92 (statement of Yvonne S. Segars, Comm'r, N.J. Death Penalty Study Comm'n).

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

Despite being an ardent supporter of the death penalty, New Jersey Commissioner Kathleen Garcia ultimately voted to repeal the statute. She noted that "the New Jersey Supreme Court will continue to ensure that no person, regardless of how horrendous the crime(s) committed, will ever be executed."[56] She declared that the death penalty in New Jersey was a "joke" perpetrated on the families of the victims.[57] She could have been speaking for other states as well.

Even if a death sentence is never administered, however, formally condemning someone to death who deserves to die lends value in itself. The jury's verdict of death remains a solemn ritual of denunciation. Advocates on both sides of the debate have long recognized that death is different.[58] Thus, a death sentence, even if never actually carried out, marks for special condemnation for the worst of the worst.

Although abolitionist courts and governors may block executions, legislatures can continue to specially condemn the most heinous murderers by statutorily specifying that harsher punishment shall attach on death row. Where a legislature does abolish the death penalty, if the state's statute continues to define and single out the worst murderers for the worst punishment (i.e. life without parole inside a maximum security facility), that unique punishment should be *experienced* uniquely. If a state abolishes the death penalty, its legislature could replace it with life without parole *in a special punitive setting*, reserved for the worst of the worst. The condemned could serve their sentences under conditions no better than what the Department of Corrections

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[56] *Id.* at 93.

[57] *Id.* at 94.

[58] *See* Furman v. Georgia, 408 U.S. 238, 286, 289 (1972) (Brennan, J., concurring) (stating "[d]eath is a unique punishment" and, as a punishment, "[d]eath . . . is in a class by itself"); *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell & Stevens, JJ.) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (noting the "qualitative difference between death and other penalties").

designates as "punitive segregation," presently reserved for inmates who violate internal administrative prison rules, however trivial the original crimes they committed.

The New Jersey Study Commission started down this path by specifying that all and only those serving life without parole must do their time *entirely* in maximum security.[59] *Where* the worst murderer serves a sentence, however, does not determine *how* that person experiences daily life inside. Special punitive conditions should attach forever to those serving life without parole. These specially condemned worst of the worst should always remain a class apart from general population. The past counts.

## *V. CONCLUSION*

These proposals do nothing more than scratch the surface. Statutory revision requires collective wisdom. Hopefully the people of other states will look to New Jersey's disappointing experience in abolishing the death penalty and embark instead on a real journey of reform. Rather than simply abolish capital punishment entirely without real discussion or debate, or leave their death penalty statutes untouched, perhaps, instead they will travel a road not considered, by morally refining their own statutes to more nearly do justice.

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[59] The Commission recommended "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." COMM'N REPORT, *supra* note 5, at 67.