
Committee Meeting

of

SENATE JUDICIARY COMMITTEE

Senate Bill No. 171

*(Repeals the death penalty and replaces it with life imprisonment
without eligibility for parole in certain circumstances)*

and

Senate Bill No. 2471

*(Eliminates the death penalty and replaces it with life imprisonment
without eligibility for parole)*

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: May 10, 2007
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senator John H. Adler, Chair
Senator John A. Girgenti, Vice Chair
Senator Nia H. Gill
Senator Raymond J. Lesniak
Senator Paul A. Sarlo
Senator Nicholas P. Scutari
Senator Bob Smith
Senator Gerald Cardinale
Senator Joseph M. Kyrillos Jr.
Senator Robert J. Martin

ALSO PRESENT:

Patricia K. Nagle
*Office of Legislative Services
Committee Aide*



Meeting Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey

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(This is an excerpt from the Senate Judiciary Committee meeting of May 10, 2007, pertaining to the Senate Committee Substitute for Senate Bill Nos. 171 and 2471.)

SENATOR JOHN H. ADLER, (Chair): We now have one piece of legislation to consider, which this Committee is going to consider by way of a substitute bill. And so I'm going to ask Ms. Nagle to describe the substitute bill that we're going to consider today, which is different than the original S-171 and S-2471.

Ms. Nagle.

MS. NAGLE (Committee Aide): The Committee has before it a substitute for those two bills. This substitute amends the murder statute, and it does eliminate many of the subsections, including Subsection C, which was the death penalty sentencing phase. It keeps as eligible for the new sentence, which would be life without parole, those persons who were potentially eligible for the death sentence under the current -- as they are under the current scheme, under 2C:11-3, would continue to be the persons eligible for this new sentence of life without parole, assuming that there is one aggravating factor found.

So it's perhaps too simplistic to say, but in some sense that is being substituted. Life without parole is being substituted for the possibility of a death sentence. In other words, the same persons would be eligible for that.

The substitute then eliminates many of the subsections of that statute, because they deal very -- they deal pretty exclusively with, in fact, capital sentencing. There are some very technical amendments made to, for

example, jury selection, etc., references made to the capital statute which would no longer be necessary.

There are several new sections added. An inmate would have 60 days, if this were to be enacted and signed into law, to -- who is currently serving a death sentence -- to have that sentence changed to life without parole. They would make application to the sentencing court.

There is a new section providing for restitution for murder -- for a person convicted of murder -- restitution for nearest surviving relatives, making it mandatory. Currently, it is permissive.

And there -- as I guess I mentioned, there are some technical amendments conforming, and also a repealer of other sections in the criminal code which, again, deal exclusively with the imposition of the death penalty.

SENATOR ADLER: Thank you very much.

This may be the most serious measure we're to consider this year or maybe for many years in New Jersey. We are talking about life and death, the life and death of New Jersey residents, and potentially the life and death of heinous villains who have caused death to others.

I hope the people in this audience treat this matter with the seriousness it involves. I would ask members of the audience not to exclaim or applaud. We respect the views of everyone in this room. And they may be different and they may be very passionate from their own perspectives. I would ask the members of the audience to be seated -- unless you're a member of the press, or a sergeant at arms, or a State Trooper, or I guess a former senator -- you should be seated, please.

I'd like Senator Lesniak, as the original sponsor of the bill, to take us through the bill.

I will tell you, the bill that Ms. Nagle described -- that's the bill we are to consider today. So while people might suggest changes, we're going to consider this bill on its merits. I know there will be a temptation to try to carve out exceptions for particularly heinous acts. I think any murder is a tremendously heinous act. And whether it is of a police officer, a child, a spouse, a vulnerable elderly person, a firefighter-- To me, that life lost is an unbelievable tragedy. And I don't want us to be in the position today of considering bills that make exceptions for certain types of murders or under certain circumstances. Because I think each one of these lives lost is a tremendous blow to society overall and particularly to the families and the friends of a victim.

Having said that, Senator Lesniak.

SENATOR LESNIAK: Thank you, Mr. Chairman.

Three years ago, I introduced legislation to abolish the death penalty, to ensure that the system of justice administered by our State is effective, consistent, and just. Today, the Senate Judiciary Committee has an opportunity to make that a reality.

One hundred twenty-nine days ago, the New Jersey Death Penalty Study Commission submitted its report to the Governor and to us. That report confirmed that the death penalty actually costs more than life in prison without parole, that there is a very real risk of executing an innocent person, that it stands in direct contrast to our evolving standards of decency, and that it cannot be proven to deter crime. It also confirmed

that the death penalty is a cruel hoax on the family members of murder victims.

In short, this report reaffirmed what many New Jerseyans already believe: The death penalty in this state has failed to ensure that our system of justice is effective, consistent, and just. In the Commission's opinion, the death penalty is fatally flawed and should be replaced with a stronger and more certain punishment of life in prison without any possibility of parole.

I want to thank Chairman Adler for his leadership in bringing us here today to give New Jersey an opportunity to lead the nation by recognizing that the death penalty has no reason to exist in a civilized society.

I also want to acknowledge the leadership of my good friend Bob Martin. He has been steadfast and courageous in doing what is right on this and many other issues.

We should also thank Senator Shirley Turner, whose bill last year placed a moratorium on executions and created the Study Commission.

Make no mistake, the bill we consider today will be one of the toughest sentencing laws in the country. In addition to abolishing the death penalty, it broadly expands the list of crimes for which life without parole sentence would be a mandatory sentence. It also requires that an inmate sentenced under the statute will have to spend their entire life in a maximum-security prison.

The bill to create the Death Penalty Study Commission was supported by 75 percent of the Senate and nearly 70 percent of the

Assembly, many Republicans and many Democrats. Members of the Commission included a distinguished retired Supreme Court Justice who had voted to uphold capital punishment; a Republican police chief who supported the death penalty; two sitting county prosecutors who had sought the death penalty; the father of a murdered daughter; religious leaders; victims' advocates; and other murder victims' family members. This was an unbiased, exhaustive, and bi-partisan study that was supported by an 11-1 vote, with one abstention.

In addition to the Study Commission, the County Prosecutors Association supports this bill. It is important to note that not a single law enforcement officer testified before the Commission in favor of the death penalty.

To reiterate, there is no credible evidence that the death penalty deters anything. There is, however, plenty of evidence that mistakes are made in capital cases, not only throughout our country, but also right here in New Jersey. Larry Peterson told the Study Commission the following: "I want you to remember that I spent 17 miserable years behind bars after being convicted of a murder someone else committed. DNA evidence allowed me to walk out of prison a free man. As long as the death penalty exists in New Jersey, the next innocent person may not."

The most difficult aspect of abolishing the death penalty is assessing its impact on families of murder victims, for there is no right way or wrong way to feel when a family member is murdered.

Committee members have before them a letter signed by more than 50 family members whose views differ greatly on the death penalty but who stand united in telling us to end it. Here is what they say: "To be

meaningful, justice should be swift and sure. Life without parole, which begins immediately, is both of these. The death penalty is neither.” There is no closure for them, no moving on, just more attention to the murder and less on the needs of victims’ families. To make matters worse, there is currently a serious lack of funding for the family members of murder victims. That all changes with what we are doing today.

The death penalty cannot be fixed. The time has come to abolish it. All the safeguards in the world cannot ensure that an innocent person will not be executed. All those safeguards will just add to the costs of unending appeals.

Our State has not imposed the ultimate punishment since 1963, and we should never impose it again.

Some of my colleagues argue that we should maintain the death penalty for cases of terrorism. I disagree. Terrorists want to be martyrs. Let’s not give them another reason to commit heinous acts by singling them out for the death penalty. Additionally, there have been numerous arrests for terrorism that have proved to be mistaken. The same chance exists, with the same lengthy appeals process, to execute an innocent person. As a society, we’re better than that.

Thank you.

Thank you, Mr. Chairman.

SENATOR ADLER: Thank you, Senator Lesniak.

We have a lot of folks signed up to testify, and we’re going to try to take them in groups of two or three. And some people are for, and some people are against, and they have different reasons to be for or against this proposed legislation.

The first panel of three I'd like to have come up is James Abbott, who is a West Orange Police Chief; Gary Hilton; and Hudson County Prosecutor Edward DeFazio.

If you three gentleman could come to the front table.

Mr. DeFazio, do you feel capable of beginning the discussion for us?

E D W A R D J. D e F A Z I O, ESQ.: Well, let me just say, it's an honor to be here before all of you Senators today. And I do really appreciate being permitted to go first.

My name is Ed DeFazio. I'm the Hudson County Prosecutor. I was a member of the Death Penalty Study Commission as the representative of the County Prosecutors Association of New Jersey.

The county prosecutors concur with the conclusion of the Death Penalty Study Commission. Our membership was not unanimous on that decision, but the vast majority of county prosecutors do support the substitution of life without parole for the death sentence.

The reasons for that were very individual to the individual county prosecutors. But I stand ready to answer any questions on that.

Obviously, I'm not going to go into the personal opinions of the various county prosecutors when we discussed the matter.

So if anybody has any questions about it, I'll try to answer them the best I can.

SENATOR ADLER: Maybe if you could briefly just explain personally, from your own perspective, as a county prosecutor who deals with a wide array of, I'm sure, awful crimes in Hudson County that you and your folks in your office have to prosecute -- if you could tell me why you've

reached the conclusion that capital punishment is not the right vehicle of punishment for New Jersey.

MR. DeFAZIO: Well, let me first say that I've been the County Prosecutor for almost five years. But before I was the County Prosecutor, I was a member of the County Prosecutor's Office for approximately 20 years. I have tried murder cases, I have tried death penalty cases.

So having said that, my personal reason is that 25 years of history, since the death penalty statute has come into effect in New Jersey, has shown us that nobody has been executed, people linger on death row for extraordinary periods of time. I think that that erodes public confidence in the criminal justice system. And as Senator Lesniak noted in the letter from the victims, I think that punishment, of course being fair, has to be swift and sure. That's not what we're getting. And I don't think we're going to be able to effectuate that in the State of New Jersey.

I think that opinion that I gave you is held by many of the county prosecutors.

SENATOR ADLER: Senator Scutari, followed by Senator Sarlo.

SENATOR SCUTARI: Yes, thank you, Mr. Chairman.

What was the vote of the county prosecutors?

MR. DeFAZIO: I'm not going to discuss the specific vote, but the vast majority of the county prosecutors concurred with the recommendation of the Study Commission. And I will add this much: It was not, in any way, based on partisan lines.

SENATOR SCUTARI: The appellate process that is long and exhaustive, with respect to the death penalty when it's being sought-- Would you agree that if Mr. Peterson hadn't had that exhaustive amount of appeals, and he had been sentenced to life without parole, would the truth have come out, or would his appeals have exhausted and he would have been in jail for the rest of his life?

MR. DeFAZIO: Well, I think the truth would have come out. You have the post-conviction relief process -- goes on whether somebody is serving a life sentence or has been sentenced to death. So I believe he would have been released.

Now, I just want to make one point, if I may, Senator. There has never been, in the State of New Jersey, an exoneration of anybody on death row. And I just want to make that point. And I think that that is a testament to the quality of representation that defendants in New Jersey get. And I think it's a testament to the fairness of county prosecutors and to the vigilance of the courts. So I just wanted to make that point. Nobody has been exonerated in New Jersey. Larry Peterson was not on death row.

SENATOR SCUTARI: Do you have a position on whether or not the death penalty can exist in any form or fashion within the State of New Jersey and be utilized in a way that it would actually be utilized?

MR. DeFAZIO: History tells me that that's not going to happen. I think in theory we can all come up with certain circumstances -- or many of us would come up with certain circumstances where we would believe that somebody would be executed. But in New Jersey, based on what we've seen, I don't think that, as a practical matter -- reality, I don't think it would happen. If you're getting to a point about terrorism -- I

understand Senator Lesniak's point that terrorists would want to be martyrs. Take Timothy McVeigh for example. Timothy McVeigh -- quite frankly, I'm glad he got executed. I don't have a problem with it, whatsoever. But you have to remember, Timothy McVeigh wanted to be executed. And I think that in the terrorist's mind, they want to be in the limelight, or martyrs, or whatever term we want to use.

And there's another side to the terrorism. Maybe I'm going too far, Senator. If I am-- But you have to remember that in a terrorism case, chances are it's going to be federally prosecuted. Timothy McVeigh was federally prosecuted. And I think that if there was, God forbid, a terrorism act in New Jersey that caused fatalities, it would be federally prosecuted.

SENATOR SCUTARI: You brought up the Federal prosecution of people under Federal death penalty statutes. And I'm certain you're aware that there is one going on in New Jersey right now, with respect to witness tampering and the ordering of hit of a witness. Do you see witness intimidation as a growing problem in New Jersey?

MR. DeFAZIO: Witness intimidation is a problem in New Jersey. Yes, it is. Growing problem? I think it's been a problem, and it will continue to be a problem to varying degrees in different jurisdictions.

SENATOR SCUTARI: Do you believe that the Federal government's seeking of the death penalty in that circumstance -- that would be something that you would -- that your office would no longer have at its disposal if the bill passes in its current form?

MR. DeFAZIO: That's correct.

SENATOR SCUTARI: Is that a drawback?

MR. DeFAZIO: I don't believe so, because if the substitute were to be life in prison without parole in a maximum security prison, I think we effect the necessary punishment under those circumstances.

SENATOR SCUTARI: It has been written, at least, that the individual who had performed the actual hit, under the Federal witness tampering case that we're speaking about, was leveraged into testifying against the person who ordered the hit based upon the fact that he would have faced the death penalty for what he did. And in exchange for not facing that death penalty, he has agreed to testify against the person who ordered the hit. You would lose that leverage if this bill passes in its current form.

MR. DeFAZIO: That's perhaps the case. Although I would have to think that we would still have leverage with the life without parole statute as well.

SENATOR SCUTARI: Other states obviously have the death penalty. What do they do better than New Jersey in order to actually have executions take place of parties that are convicted?

MR. DeFAZIO: I don't know if I would use the word *better*. (laughter) I think that the level of representation that people get in other states is not commensurate to what they receive in the State of New Jersey.

I just want to say, I have -- and I don't want to sound here like I'm an expert, but frankly, I've been around a while now. And I've done this, and I see what's going on. And we are lucky, here in the State of New Jersey, to have the criminal justice system that we have. So I think a lot of it has to do with the quality of representation.

SENATOR SCUTARI: Is there any way, in your estimation, that the death penalty could exist in New Jersey, basing it on any models of any other states, or any model that you could come up with? Not giving history as your guideline -- but as you, dealing with a blank slate to determine the procedures that would go forward, with the necessary safeguards. Is there any way that it could, in your estimation, given your experience -- that the death penalty could exist and serve the purpose?

MR. DeFAZIO: I think it would be extremely difficult in New Jersey because of various statutory provisions. For instance: proportionality review. I mean, that has become so complex and so confusing that, quite frankly, even the courts don't understand it anymore. I don't-- The models of the proportionality review, I, quite frankly, can't even comprehend.

SENATOR SCUTARI: Well, say we had a blank slate. Would that be one thing that would need to be fine-tuned or eliminated, or is that a necessary safeguard?

MR. DeFAZIO: Well, I think that the people of New Jersey want to make sure that we are sure and that we're guaranteeing that this process can be as fair as possible. And I think if you eliminate something like proportionality review, you probably are impacting, in some degree, to that guarantee that we are correct, that we are doing the right thing, and that there is not error. And as I said, I think, in large part, our system has guaranteed that nobody who's gotten the death penalty has been exonerated in New Jersey. But then the other side of that is we have this incredibly cumbersome system.

SENATOR SCUTARI: Is there any way to make it less cumbersome and continue to ensure that it's still fair?

MR. DeFAZIO: That would be such a massive undertaking that I don't think the people of New Jersey would be prepared to go down that road. I think that we have come to the point here where we should accept the fact that we are better off with eliminating the death penalty and substituting it with life without parole.

SENATOR SCUTARI: You indicate that your estimation would be -- it would be massively cumbersome. But would it be possible?

MR. DeFAZIO: Would it be possible? I think it would be possible, Senator. I think that, obviously, when you have reasonable people dealing with a difficult issue -- I think anything is possible.

SENATOR SCUTARI: Just not practical?

MR. DeFAZIO: I don't think it's practical. I really don't.

SENATOR SCUTARI: Thank you very much.

MR. DeFAZIO: Thank you.

SENATOR ADLER: Senator Sarlo, followed by Senator Cardinale.

SENATOR SARLO: Thank you, Mr. Chairman.

Thank you, Prosecutor, for being here this morning.

We heard your personal beliefs, and we've heard those thoughts and beliefs of the prosecutor community as a whole.

Without -- and I know Senator Scutari asked you how the vote actually went down. Without asking you to provide any of that information, can you just give us a little bit of information on those prosecutors who did support it, and some of the reasoning behind why they did support it? I know it was the vast majority of those around the state

who supported abolishing it. But I would like to just get the other opinion, if we could -- if the members of this Committee could hear that.

MR. DeFAZIO: Well, the other opinions, quite frankly, were based on the thought that we, as prosecutors, should not take the position to eliminate the death penalty because perhaps it would be taken as a sign that we were being soft on crime, to use that expression -- which I don't especially care for, but I'm using it.

I think that was the real reason why the minority of our membership felt that we should not get involved with recommending the repeal of the death penalty.

SENATOR SARLO: Thank you.

MR. DeFAZIO: Thank you.

SENATOR ADLER: Senator Cardinale, then--

Before the other Senators ask questions, I'm going to have the other two panelists testify.

I apologize to you, gentlemen. I couldn't get to you. But while you were out of the room, we started with questions.

Senator Cardinale.

SENATOR CARDINALE: Thank you, Mr. Chairman.

Thank you for your opening statement. I listened very carefully. Your statement speaks loud and clear to the frustration that you feel with the present system.

I want you to know, even though I come to a different conclusion, I share your frustration. But I depart from your conclusion because I'm hopeful that rather than throw the baby out with the bath water, we can reform the system. Now, you spoke, in answer to Senator

Scutari's questions, to the fact that you think it's very difficult. You said it could be done if we had reasonable people getting around the table. Do you think we're dealing with reasonable people when we talk to the judges, the justices of the State of New Jersey on this topic?

MR. DeFAZIO: I think -- and I'm assuming the justices of the Supreme Court are definitely people who come to--

SENATOR CARDINALE: On this issue?

MR. DeFAZIO: --who come to different opinions on this very issue.

I don't always agree with the decisions of the Supreme Court of New Jersey, but I respect them, and we follow them, because that's what we're sworn to do.

SENATOR CARDINALE: We all have to respect them, and we all agree to follow them. But we do have remedies.

There was a member of your Commission who departed from the view of the Commissioners -- former Senator. I think he's in the room. I think I saw him a little while ago. And I read with interest the remarks that were attributed to him. I get a sense that he shared the frustration that you've expressed, and that I feel, and he attributed our problems to -- his term -- *liberal judges*. When I read that, of course I was a little wistful. And I said to myself, "When John was a Senator, he had the opportunity to change the Supreme Court." If he had voted differently on one nominee, we would have had a different court. But he didn't, and that's history.

But looking forward, is it not incumbent on us to try to deal with the will of the people of the State of New Jersey, which was expressed in a public vote by a three-to-one margin, in 1992? They essentially

endorsed the death penalty versus the notion by our justices at that time, that somehow this might be cruel and inhuman punishment. Not the difficulties of the system, but just the sort of morality of whether or not the death penalty should be exercised.

What justification can you give me for that Commission saying we should ignore that vote of the people?

MR. DeFAZIO: Well, Senator, I think that since 1992 there has been a change in public opinion. We heard testimony before our Commission about various polls. And for all sorts of reasons, support for the death penalty has eroded. And in fact, if you look nationally, the number of executions across the country have been steadily going down over the past number of years. That's for all sorts of reasons. So I think there has been a change.

And I think something that you have to remember, Senator, is, when you ask people the question about the death penalty, in relation to life without parole being the substitute, the support for the death penalty comes down even further when they realize that it's going to be a mandatory life without parole in those cases where the defendant would have gotten the death penalty.

SENATOR CARDINALE: I hear what you're saying. But the polling information I have seen on the question that you raise doesn't support what you're telling me. But if you believed that, as a Commission, why did you not suggest to us we put this question on the ballot, rather than us reverse the will of the people by a simple act of the Legislature, signed by the Governor? Wouldn't it be more logical? If the conclusion of the Commission -- if you were sure that the conclusion of the Commission

would be supported by the public, why not put it on the ballot? We could put it on the ballot this year. We have time. We're all up for election. What better time to put this on the ballot when it will be hotly contested in legislative races all over the state?

SENATOR ADLER: Mr. DeFazio, before you answer, I'm going to ask the other witnesses to summarize their experiences in law enforcement and their view on this issue.

And frankly, Senator, without being disrespectful to you, I think that's really a question you really should be posing to us in consideration of this legislation today. And I'm sure you'll make that suggestion later on. But I don't think it's necessary for us to have dialogue about whether we have a representative form of government in which elected officials should make decisions, or whether we have a pure democracy in which the people get to vote on all the issues.

SENATOR CARDINALE: Senator, it's not the question I'm asking.

SENATOR ADLER: Senator.

SENATOR CARDINALE: You're using your right as Chair when you--

SENATOR ADLER: Senator, I'm going to ask you to stop now.

SENATOR CARDINALE: (indiscernible) that you don't like the way the questioning is going.

SENATOR ADLER: So, Mr. DeFazio, if you would just wait for a second. We have two other witnesses: Chief Abbott, of West Orange; and Gary Hilton.

If you gentlemen would care to summarize your perspectives on this issue.

JAMES P. ABBOTT: My name is James Abbott, I'm the Chief of Police of West Orange, New Jersey. I was Governor Richard Codey's Republican appointee to the New Jersey Death Penalty Study Commission, and I am here to share my experience about the work of our Commission and my own evolving position on the death penalty.

As a law enforcement officer, I've dedicated my life to making the people of New Jersey safer. Police officers get up every day knowing that our primary goal is to protect the public. It is up to us to make sure that people who commit crimes are caught and taken off the streets so they can't do more harm. I'm also aware that as law enforcement officers, we put our lives on the line every time we go to work. Police officers face the dangerous reality that someone may try to kill us, simply because of who we are and what we stand for.

People who support the death penalty often say it's needed to protect people like us. That seems like a logical argument, and I must admit it made sense to me too before I joined the Study Commission. However, I submit if this were true, then why is there not one inmate on death row after 26 police officers have been murdered in the line of duty since the death penalty was reinstated?

I supported the death penalty at the time of my appointment and did not think I would ultimately vote to end it in favor of life without parole. But what I learned throughout our six months of study opened my eyes to the reality of the death penalty. It turned out that what sounded good in theory was actually a complete failure in practice. Most

importantly, what I learned about the death penalty convinced me that there was simply no way to fix it and make it right.

As a Police Chief and proud Republican, you should have no doubts that I support tough-on-crime policies and harsh punishment. Make no mistake, the bill before you is just that. I have no empathy or sympathy for killers, absolutely none.

My commitment, like all of you I'm sure, is with the families of murder victims. It was those very families, including some whose loved ones were police officers killed in the line of duty, that changed my mind about the death penalty. I had no idea how much families suffer facing years of death penalty appeals and reversals. We've had capital punishment for 24 years, and we haven't executed anyone. For every person that's been sentenced to death, there's a family waiting for the promised punishment to be delivered. They go to court year after year, only to find in the end that the person will never be executed. The reality is that there is no closure in capital cases, just more attention to the murderer and less to the victim. Unfortunately, it's easier for most of us to name notorious killers than it is their victims.

As I sat on the Commission, I heard from these families, one after another. Their cries of pain were devastating. Many of them supported capital punishment when their loved one was killed, and it was only the direct experience of suffering through the process that prompted them to change their minds and beg us to recommend replacing it with life without parole. I heard from mothers, fathers, daughters, and sons who spoke of families being divided, lives lived in limbo, and childhoods abruptly ended by a never-ending court process. The death penalty was

supposed to help families like these, and virtually everything I heard told me that it was tearing them apart.

At first I thought this problem was unique to New Jersey. But in the months since the Study Commission made its recommendations, I've taken the time to learn more about the death penalty in other states. It doesn't seem to work any better anywhere else. Even in Texas, the death penalty capital of the United States, it still takes years, and millions more dollars, for an execution to be carried out. It doesn't seem like any state has found a way to carry out the death penalty quickly, cheaply, and accurately.

After the Commission released our report, I began giving media interviews and talks about my experience. One thing I've been asked a lot is whether, as a Police Chief, I would still support the death penalty for the killing of a police officer. My consistent reply is that while it may be an appropriate form of retributive justice, if I were ever to be killed in the line of duty, I would never, ever want my wife or children to have to suffer the way the families who testified before me have. Instead, I would want to know that the person who did it was behind bars for life so they could never kill again and that my family had the services they needed to heal and the financial support they needed to live without further sacrifice. Our Commission learned that those kinds of services are sorely lacking and that they could be improved with the financial savings from ending the death penalty.

I should also note that our Commission found no evidence that the death penalty deters murder, even in the case of the killing of a police officer. That makes sense to me, as anyone who is already at the point of killing a police officer is clearly not thinking logically about the

consequences. The South, who executes the most perpetrators of murder, also regularly leads the nation in the number of police officers killed in the line of duty.

Finally, I want to speak briefly to the makeup of the bipartisan Commission and the integrity of our process. I already told you that I didn't go into my work on the Commission thinking I would vote to end the death penalty. The same was true for many of my fellow Commission members. Sitting around me were two sitting county prosecutors, the Attorney General, distinguished religious leaders, a retired Supreme Court Justice who had upheld that sentence, and several family members of murder victims, including a man who lost his daughter to murder and a woman who became a victim's advocate after the loss of her nephew to murder.

This was nothing if not a fair and balanced group of individuals. And for any elected official or citizen to suggest otherwise is reprehensible. Our analysis was also transparent, credible, and comprehensive. We held five public hearings at which anyone could testify. The hearings were public and well-advertised. People on all sides of the issue were able to testify. The only witnesses who were allowed to testify more than once were pro-death penalty witnesses. The breadth of knowledge and the passion of all the witnesses who testified were inspiring and informative.

As I said, I learned a lot about the death penalty in the last year. If I could leave you with the one most important lesson for you to think about as you deliberate on this legislation, it is: I learned that you can continue to support the death penalty and also support its end. That is

the position I have come to now. Philosophically, I still favor the death penalty. I believe that it is an appropriate means of retribution and a just punishment for some crimes. But I also know that, in practice, it does more harm than good. So while I maintain my theoretical views, as I'm sure some of you also will, I also stand before you to say that New Jersey is better off without an irreparable system of capital punishment. Life in prison without parole is a better alternative. It is harsh, it ensures public safety, and it puts victims' families first. With the study concluded, and the overwhelming verdict in, it is time to do what is in the best interest of the people of New Jersey. And I hope you will vote for Senate Bill 171.

Thank you.

SENATOR ADLER: Chief, thank you.

Mr. Hilton, welcome.

GARY J. HILTON SR.: Good morning.

My name is Gary Hilton, Sr., and I retired from the New Jersey Department of Corrections after 33 years of service. For a period of approximately 17 years, I served as the Department's Assistant Commissioner for Operations, Deputy Commissioner, Chief of Staff. And at the point of my retirement, I had the privilege to serve as Acting Commissioner.

While serving as Assistant Commissioner, I was personally responsible for overseeing the development of the procedures for the Capital Sentence Unit at the New Jersey State Prison, as well as developing procedures and protocol for the implementation of the lethal injection penalty.

I have never been, nor am I today, opposed to the death penalty on the basis of a moral consideration. Obviously, during an earlier period of my professional life, I supported and believed that the death penalty had a proper and appropriate position in our criminal justice system. It has only been with the passing of time, firsthand observation, and careful deliberation that I've come to a clear and firm opinion that the death penalty is poor public policy and ill-advised correctional practice.

When the death penalty was reinstated in New Jersey, it was a different time in New Jersey's sentencing history. This is no longer the case today. In addition to a sentence of life without parole, New Jersey now has an 85 percent parole ineligibility statute, which essentially means anyone sentenced to a life sentence for murder must serve 63-and-a-half years before eligibility.

The State -- New Jersey's experience with long-term incarceration, or natural-life incarceration, is not new. It is not new to New Jersey. Today, there are approximately 1,000 or more persons serving some form of life sentence, or the practical equivalent, in the New Jersey State Prison at Trenton, which is the state's most secure facility. The bottom line is clear, no one sentenced to life without parole can be paroled.

New Jersey's experience, similar to the national experience in dealing with inmates serving actual or practical forms of life sentences has been that these inmates pose no additional challenge, nor require any special resources beyond that of any other inmate classified for maximum security confinement. There is a substantial body of empirical research which supports this notion.

Anyone who might suggest to this Committee that life in a maximum security prison is a lark, and inmates pass the time of day in sun-drenched yard areas, and immerse themselves in creative art or literary interests, is simply misinformed. By its very nature, the maximum security prison environment is cold, dangerous, and frightening. As difficult and overbearing as life in a maximum security prison is for the younger and middle-aged inmate, I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum security prison.

Within the maximum security prison environment, the majority of inmates accede to the security controls, limited movement, long hours of self-confinement, and the uncompromising rules, regulations, and repetitive schedule. Generally, they accept the daily routine of imprisonment in order to make what they view as the best of a bad situation. For those inmates who choose to act in a violent or disruptive manner, or incite others to do so, the management -- the maximum security environment has specially structured living units to effectively control and manage these recalcitrant individuals. At the New Jersey State Prison at Trenton, these specially structured units include the disciplinary administrative segregation units and the Management Control Unit. These are tested and proven classification options for disruptive inmates. Within the last year, I had the opportunity to tour the New Jersey Prison, including the closed-custody units, and can report to you that the State Prison at Trenton is an extremely well-managed and extremely secure facility.

In conclusion, I ask that you carefully review and consider what I have had to say, both about the general realities of life in a maximum

security prison and the specific realities of growing old and eventually dying in maximum security confinement. Upon such reflection, I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution.

I'm going to take a moment just to make a point in a graphic manner. My definition of *life without parole* means the only way an individual leaves prison is in a rubber bag and a tag on their toe. No ifs, ands, or buts.

I trust my observations have been of assistance to you this morning. I look forward to answering any questions you may have.

SENATOR ADLER: Commissioner Hilton and Chief Abbott, thank you very much.

Understanding we have lots of witnesses from lots of different perspectives, I thank you for the relative brevity of your comments. But I understand you have real law enforcement experience from different perspectives. I think they're valuable to us.

Senator Cardinale, you asked a question to Mr. DeFazio. If you want to expand that to either of the two witnesses -- and then other members can ask questions of the two new witnesses as well.

SENATOR CARDINALE: Thank you.

Commissioner Hilton.

MR. HILTON: Yes, sir.

SENATOR CARDINALE: Your final parting shot is that your definition of *life without parole* means, in effect, it's a death sentence.

MR. HILTON: Death by incarceration, yes, sir.

SENATOR CARDINALE: Did the Commission come to the conclusion that were we to follow your recommended legislation, which is before us, that none of the nine people presently on death row in New Jersey would ever be released?

MR. HILTON: I was not a member of the Commission, sir.

SENATOR CARDINALE: Okay.

Do you have an opinion with respect to that?

MR. HILTON: I have a personal opinion that--

SENATOR CARDINALE: That none of them would come out?

MR. HILTON: And this is--

SENATOR CARDINALE: None of them would come out. Is that your opinion?

MR. HILTON: My personal opinion would be that their capital sentence be converted to life without parole. If I were king, that would be my rule.

SENATOR CARDINALE: Well, unfortunately, none of us are kings. And Legislative Services has given us an opinion that we cannot guarantee that. And the last time we had this kind of upset, there was a guy named Trantino, who had been sentenced to death for killing a couple of cops in a very heinous crime. It happened in Bergen County. I was very familiar with it. He got out. We changed our statute, and Trantino got out. There is no guarantee that if we changed our statute any of those nine would not get out, for your information.

Now, there are a couple of questions that have to be answered on this. There are some folks who have a real, deeply held moral conviction

that the death penalty is just a wrong thing to do. I'd like all three of you to tell me whether, from that perspective, you feel the death penalty is wrong.

MR. HILTON: Well, I'll start. I do not support the abolishment of the death penalty on a moral basis. I do so on the basis I think it's poor public policy, I think it aggravates the suffering of the victims' families. And another significant concern is the emerging progress being made in terms of new forensic evidence. We sit here today with little, if any, idea what kind of forensic evidence will be available three to five years down the road -- not to think of 10 or 15. I don't think we're a 90-percent society. I think there are cultures in this world where, if you're right 90 percent of the time, that's good enough. Our system of justice is not 90 percent. So for a combination of these reasons, I believe that the death penalty needs to be abolished and replaced by life without parole.

SENATOR CARDINALE: You've answered more than the question that I asked. So if I can ask each of the next two--

MR. HILTON: I apologize.

SENATOR CARDINALE: --to just answer the question that I asked. Because the Chairman will become impatient and will stop the questioning at some point. And we won't get all of the points across that need to be made for us to make an intelligent decision.

Do you have a moral objection to the death penalty.

MR. ABBOTT: No, I do not.

SENATOR CARDINALE: Mr. Prosecutor?

MR. DeFAZIO: No.

SENATOR CARDINALE: Okay. Then the objection that you're raising falls into the other category, the practicalities of the death penalty. Is that correct to say?

MR. DeFAZIO: Yes.

MR. ABBOTT: Yes.

MR. HILTON: Correct.

SENATOR CARDINALE: The practicalities of the death penalty, though, have to do with the system that we have set up. And while I was here when we did that -- and I voted for it -- some of us believed we didn't do a good enough job. Some of us voted for it in that form because we had the impression that the other branch of government, the judiciary, would follow the process -- the thought process, the public policy process, that we were trying to institute.

It seems to me, from what I've heard from at least two of you, is that you feel the practical problem is insoluble. But everything that you've told me reinforces my belief that it's only insoluble because we have a judiciary that's kind of headstrong and is looking for loopholes rather than justice.

Would you concur with that, Mr. Prosecutor?

MR. DeFAZIO: No.

SENATOR CARDINALE: No.

MR. HILTON: No.

SENATOR CARDINALE: Chief?

MR. ABBOTT: No.

SENATOR CARDINALE: Then tell me why you think it's impossible, practically, to get at it.

UNIDENTIFIED SPEAKER: (indiscernible).

SENATOR CARDINALE: Well, I'd like to find out what they think. That's what we're here for.

SENATOR ADLER: Well, Senator, in fairness, I think they've already testified at great length and gave a very articulate speech about what they believe and why they believe it. They've given their basis and their opinions. You've given your basis for questioning their opinions. It's been a very healthy dialogue, and I think you've made your points very, very competently, in a very fair way. But I think we're now going back over things a second time. To make Mr. DeFazio say again what he said very clearly the first time seems unfair to other witnesses who have their own personal perspectives from their own experiences as victims, as members of families who have lost loved ones, people who have moral basis for or against the death penalty. There are so many people here who want to speak. I think it's unfair to have these three gentlemen have a second go-round of what they've already said very clearly.

So I'm going to ask them not to answer that question. If you have different questions, maybe you can think about those questions while we go to other members of the Committee to ask questions. I'm not going to curtail your time to talk, because you've talked certainly more than anybody else at this point.

Maybe, Senator Lesniak, do you have questions?

SENATOR LESNIAK: Thank you, Mr. Chairman.

I would just like to add that-- I mean, the testimony was clear that this problem exists not only in the State of New Jersey but throughout the country. And I just concur with your statement that these three fine

law enforcement officers have made their point very clear and, I think, answered, in their testimony, Senator Cardinale's question.

SENATOR MARTIN: (PA microphone is not on) This is sort of like a comment too, but may (indiscernible) say something.

I read in a newspaper clip earlier this week, one of the justices of the New Jersey Supreme Court, who actually wrote a dissenting opinion in a recent case you're probably familiar with-- But he talked about the fact that when you have a death penalty case, the margin for error should be much less. In fact, I think he said something to the extent that it should almost be error-free or perfect in terms of process, which creates, it seems to me, a very difficult burden. On the other hand, I have a tendency to want to agree with him, since the ultimate penalty, of course, is something which is irreversible once it happens.

So I guess my comment or question to you is: To the extent to which the system may be cumbersome, as I think you described it -- but yet has these safeguards in it, which is part of the cumbersome process -- should we throw the baby -- or in this case, the procedural safeguards -- out in order to expedite the system? What would your thoughts be with respect to that?

MR. DeFAZIO: Well, Senator, that's a difficult judgement that has to be made. Clearly, I think in the State of New Jersey we want to make sure that we have all the procedural safeguards in place to guarantee that only people who are guilty are eligible for the death penalty and, if they get the death penalty, that we are, within a reasonable degree of certainty, sure that they're the ones who did it and that they deserve it.

But that's the problem. You hit the nail on the head, Senator. That's the problem we're trying to fix in this system. We don't want to make a mistake. But in order not to make a mistake, we have to be more certain, we have to be beyond reasonable doubt. It's beyond, beyond reasonable doubt.

UNIDENTIFIED SPEAKER: (PA microphone not on)
(indiscernible)

MR. DeFAZIO: No, go ahead.

SENATOR MARTIN: It's not just whether the person has committed a homicide, as I understand it. It's these other factors -- whether the aggravating factors outweigh the mitigating; the way in which proportionality, that would determine whether somebody who has committed a certain type of murder is not out of line with his -- with similarly situated persons when they've committed a similar crime. Those kinds of things are very, very difficult to be able to do simply, I assume. Is that true from your experience?

MR. DeFAZIO: Yes.

SENATOR MARTIN: Thank you.

SENATOR ADLER: Very briefly, then Senator Russo, who is one of the members of the Commission who dissented, has to testify now because he has to leave shortly. So if you could be very brief, I'd appreciate that.

SENATOR CARDINALE: Prosecutor, you got to the point that I was attempting to reach, and you seem to agree with the point that I was going to suggest. Namely that we reserve the death penalty, in the second phase, to a higher standard than our standard of reasonableness -- to

a standard of greater surety. But I heard in your original testimony that you also said you don't believe anybody on death row today in New Jersey is innocent or can make any claim of innocence. As a matter of fact, I've seen reports that they all admit that they are guilty. Now, maybe that's wrong, but that's only a report I read. And their current appeals are not based on whether they were guilty or not, but rather on various procedural matters -- not the kind that Senator Martin was talking about, which are used to determine guilt or innocence -- but rather whether the judge hiccupped at the wrong time in the trial, or some other similarly inane loophole. Do you kind of agree with that? I see you smiling.

MR. DeFAZIO: I think you're making a good point in that, Senator, it's the penalty phase of the proceeding that leads us to where we are. And the review at the penalty phase, and the proportionality review that goes after that certainly are of a, let us say, *heightened* standard. But I get your point that the appeals that are going on, as a rule, do not have to do with the guilt or innocence. That is correct.

SENATOR CARDINALE: Now, this proportionality -- is that part of the statute?

MR. DeFAZIO: Yes.

SENATOR CARDINALE: It is part of the statute?

MR. DeFAZIO: Yes. It's statute in case law, yes.

SENATOR CARDINALE: Can we change that in any effective way? Is there something we could pass that, in your opinion, would simplify proportionality?

MR. DeFAZIO: Could the Legislature pass-- The Legislature could pass a bill that would eliminate proportionality, if that's what they deemed appropriate.

SENATOR CARDINALE: Could we pass legislation that said the only type of appeal that would be considered after the sentence had been imposed would be whether they were guilty or innocent?

MR. DeFAZIO: No, you could not.

SENATOR CARDINALE: We couldn't do that. Why couldn't we?

MR. DeFAZIO: Senator, respectfully, what happens here-- Even when it goes through the State court appellate process, and even when you have a death penalty affirmed by the State courts after years and years, the case then goes to the Federal system. And in the Marshall case, it went through the entire State system and was affirmed, and then it was reversed in the Federal system. So it's not only a question-- I guess what I'm trying to get at is it's not only a question of amending our State statutes.

SENATOR CARDINALE: But in terms of our State process, which is the only thing we impact, we could do that. We might be subject to being overruled by the feds, but we could do that within our State process.

MR. DeFAZIO: There could be changes to the death penalty statute, no doubt about it.

SENATOR CARDINALE: Okay. I thank you very much for your testimony.

I'm finished, Mr. Chair.

MR. DeFAZIO: Thank you, Senator.

SENATOR ADLER: Gentlemen, we thank all three of you. For two of you, thank you for serving as Commissioners and issuing a report. For the three of you, thank you for your wise testimony, and thank you for your time today.

MR. DeFAZIO: Thank you very much.

SENATOR ADLER: Our next witnesses are former Senator John Russo and Professor Robert Blecker.

Gentlemen, welcome. And thank you both for being here.

Senator, first of all, thank you for your many months of service on the Study Commission. Maybe you could summarize your experience on that Commission and why you dissented. We've read your dissent. But why don't you summarize so we understand your perspective.

SENATOR JOHN F. RUSSO: Okay.

Thank you, Mr. Chairman.

Members of the Committee, my former colleagues, and some I didn't serve with, let me first say, as Prosecutor DeFazio said, I, too, have a little bit of experience in this area. I served 10 years as a Prosecutor. I served 19 years, I guess it was, in the Senate. I even sat where you do, Mr. Chairman.

And I've had a position on the death penalty, I guess, for 35 years or so. I prosecuted murder cases, I prosecuted death penalty cases. I experienced, firsthand, what it's all about. And I can tell you I took no satisfaction in either the fact that I had a conviction for a first degree murder case, nor do I take any satisfaction in the death penalty in general.

We passed the death penalty three times before this bill was signed that I sponsored, starting in 1975, I guess. It was vetoed three times

by Governor Byrne. I want to tell you that I have nothing but the utmost respect for Governor Byrne and anybody who disagrees with me on this issue. No one can be certain, on this issue, what the right thing is. We can only do what we think is the best thing with the information, and experience, and knowledge that we have. Governor Kean believed in it. He added the part about one who hires one to commit murder. That was not in my original bill.

But the thing I want to emphasize -- and, Senator Lesniak, you remember when we -- and you supported me on the bill, originally -- we tried to make this bill so tight, so tough, that mistakes just almost couldn't conceivably happen. And as Prosecutor DeFazio said, they have not happened in any death penalty case that's been -- that's come out of New Jersey. This isn't Texas, this isn't Kansas. And make no mistake also, you are not hearing, today, for the first time a choice between life without parole and the death penalty. That was discussed, argued, and debated in 1981, when this bill passed, and the three times before that. The Legislature rejected that as an alternative.

But the Legislature felt, and so do I-- And incidentally, let me tell you, should you decide that you don't agree with me, and you agree with-- And incidentally, that Commission was some really fine people. I got to know them, and they're really outstanding. But I could have -- and I said that to others -- I could have told you the vote the day we first walked into that room. I won't go into any details about who was appointed, why, where, whatever. I knew what the vote -- maybe within a vote or two. That Commission had an outcome that was not in doubt.

And by the same token, probably neither was mine. I knew how I was going to vote when I first walked in that room, because I have lived with this issue for many years. And we talk about victims. Though it had nothing to do with my support of the death penalty, I, too, had-- My father was a murder victim. But he would not-- The defendant would not have received the death penalty under my bill. And it was proper, because that bill was drawn so tight and so tough that we wouldn't ever have to have this problem.

The only thing is: It hasn't worked, we say, and so let's throw it out. Well, it hasn't worked not so much because of "liberal judges". We have a Supreme Court justice that voted for the majority in this Commission -- with the majority -- wonderful man, I think the world of him -- and who voted to uphold the death penalty as a judge. Yes, he did. He upheld the law. But I knew where he stood on this issue from day one. And I respected it, as I did Governor Byrne. And today, Senator Lesniak's comments on -- in voting -- or in supporting the opposition to this bill. This is not an easy one.

Some day-- And I will never forget this. When that bill passed, from that day I started thinking: "I dread the day when there's an execution." I would hope there never would be one. I would hope there would never be a need for one. Because I'm going to have to then look back and say, 'Hey, maybe it's because of something I did, a bill that I proposed.'" And we tried so hard to make this bill so tough.

And I would think that the thing to do is not to throw the bill out, although it won't break my heart if you do. There's no joy in it. It's no personal thing, even though I was the sponsor so many times. But

rather, let's see if we can clean it up, so to speak, as I think the questions directed to one of the prosecutors was. Let's see if we can make it work. I don't know that we can.

I do know though that having, in New Jersey, a situation where you have maybe -- some people have talked about terrorists. And incidentally, McVeigh was convicted, as I understand it, under the state, as well as the Federal statute, not just the Federal statute. But to have, in New Jersey, a brutally heinous crime and not have available a punishment that's commensurate with that crime, I think leads to the decay in law enforcement -- or in the public confidence in law enforcement.

We can talk about the possibility of a mistake. You haven't had one. Peterson, as I think Senator Lesniak -- it was pointed out by the Prosecutor -- was not a death -- that was not under the statute that we're debating today. We have not had a mistake. God willing, we never will have a mistake. And you know what? If because -- if this bill remains in effect, and we don't have an execution, no tears, because we have something that Justice Gregg (phonetic spelling) talked about in the Supreme Court decision -- that's in my dissenting opinion -- shows that there's a need -- the public has a need for a punishment that fits the crime.

What are we going to do if, for example -- using Fort Dix just as an example -- not to inflame. But what if something like that happens some day and, under the State statute, it's life without parole? And I just can't accept that the public will be willing to be acceptable to the law that allows that person to live.

A pedophile-- You know, we had a case in Ocean County. It involved a juvenile, where a pedophile brutalized and then murdered a

young boy -- the Warner case. The boy begged for his life. I will never forget those words. It came out in the newspaper how the murderer talked about what the little boy was saying, how he pleaded for his life. We can't do anything more than put him away? Forget the minor part. I agree. The death penalty should never apply to a minor.

And, Senator Adler, I agree with you. It should never be singled out depending on who the victim was. I'm close to the PBA, always have been. But don't tell me that the life of a man in blue is worth more than the life of a little girl in a blue dress who is raped and murdered. No. The death penalty should apply if it's going to apply, if we have one, based upon the facts of the case, not who the victim was.

We talked a lot about the cost of the death penalty. Come on. We can't equate life and death with dollars and cents. It doesn't have any-- You just can't do that. I never will.

And then the business about life without parole -- releasing the people who are on death row. I understand that. You can't take some sentence, five, 10, 15 years later, and change it because you changed the law. I don't believe you can. But that's another issue, and that's not the basis of how I feel.

We saw what the U.S. Attorney said the other day. I don't envy you folks if you have to vote on this thing this year. Because it looks like, with the comments of the U.S. Attorney, this will be a major political issue. And the death penalty should not be decided on politics. And anyone who votes for the death penalty is going to get crucified by those who are against it. And anyone who votes-- We know what's going to

happen. And the issue then will not be voted on based upon what's right or wrong, but rather on politics. And I think we all know that.

So my feeling has always been that that law should be as tough-- You know, maybe we could make it tougher. I mean, the Governor, and I, and the Legislature -- Ray and the rest of us -- and Gerry -- and tried to make it as tough as we could so mistakes wouldn't happen. They have not happened. Why haven't there been executions? Yes, there's been an attitude in the judiciary -- and I've said it -- against the death penalty. That should not be allowed. And I think it was Senator Cardinale who said I could have changed that with one vote.

Gerry, we all know how they feel before we pass on them in judiciary. You just cleared a bunch of people today, and some of whom you may regret. I hope not. I don't think so. But that could happen.

So all I'm saying is, this issue should be debated on its merits, not on money, not on politics. And the outcome, really, to me, personally, makes no difference. I've done what I believe in. I've said today what I believe in. It may not be popular, it may be popular.

You talk about polls. You put out a poll talking about these people in Fort Dix, for example, and then ask the public. I mean, it's going to be shocking. It will be overwhelmingly in favor of the death penalty. However, on the other hand, should someone be executed, and DNA or something proves they were innocent, the results will be the other way. The public will be against this.

So I don't know if these thoughts are of any help. But it's something I feel strongly about and have for so many years. I haven't

changed my view one way or the other. And I hope it's not because I'm stubborn. I just believe that what we did was right.

Thank you, Mr. Chairman.

SENATOR ADLER: Senator, thank you.

I'm going to let Professor Blecker speak, and then questions. I know Senator Lesniak has questions for Senator Russo. And I think Senator Girgenti does, as well.

Professor Blecker, hold on a second.

Senator Lesniak.

SENATOR LESNIAK: (PA microphone is not on) Senator Russo, I would like (indiscernible).

Thank you, Mr. Chairman.

As usual, Senator, your comments are direct, and sincere, and certainly very helpful, even though I disagree with you. They're always very helpful.

I do want to, however, take issue with two things you said and set the record, I believe, straight on that. I do believe that the three gentlemen who testified before you, the three law enforcement officers -- the Police Chief, the Prosecutor, and the Corrections Officer -- testified very clearly and stated very clearly that they went into the Commission's hearings either with an open mind or actually opposed to eliminating the death penalty. You may have thought otherwise that they had preconceived ideas. But it's in direct testimony (*sic*) to what they said. And I have a lot of respect for those gentlemen. And I believe that they were sincere when they said that.

Secondly, I hope and I pray -- and, again, I know you're a very practical person. But I hope and pray that the votes on this Committee, and in the Legislature, will be based on what each member thinks is the right thing to do and not in terms of what political gain they may get from that. And I believe that's the case, and I hope that's the case.

That's all, Senator.

SENATOR RUSSO: May I just respond on one thing?
(affirmative response)

The two prosecutors who -- one, of course, is from my own county and the other I got to know -- Prosecutor DeFazio. Prosecutor DeFazio impressed me as very sincere. And I thought his testimony today was very fair. You know, Governor Corzine is opposed to this death penalty. And I respect that view as much as I did Kean's -- I'm sorry, Byrne's. But he makes appointments. There were a number of people on that Commission that are coming up for appointment. Would that influence him? I don't know. I wouldn't want to be on that Commission having to make a judgement that might be against a Governor who I depended on for reappointment. Although, I think these people were -- had the ability to rise above it. But in all fairness, just as you hope that legislators won't be influenced by politics in this judgement, you and I know that they will be. Not all of them. Not you, not me, not Senator Adler, whatever. But it will be a very heavy political issue, no question.

SENATOR GIRGENTI: Thank you.

Senator, I just have one question for you. You've gone through the history of it. You were one of the sponsors originally of the legislation, I

know. What purpose does the death penalty serve -- if we say since 1963 no one has been executed in New Jersey -- in your opinion now?

SENATOR RUSSO: Sure. Let's find out: Why hasn't there been an execution, assuming there has been justified for execution-- And let's correct that instead of just saying, "Well, there hasn't been an execution. Let's abolish the bill." In other words, they beat us.

If the death penalty is justified, there should be an execution, and courts should uphold it.

Now, just the other day, the New Jersey Supreme Court upheld the death penalty conviction as I understand it.

It took a long time for this thing to work through the system. I'll never forget, when I first sponsored the bill, there was a murder up in Bergen County.

Senator Cardinale, you may remember. Victoria Zielinski was her name. I'll never forget it. And Edgar Smith was the murderer. Fifteen years on death row before he was finally executed. Look, there's no rush to judgement in these things.

I don't agree, for example-- I think Senator Cardinale suggested we abolish the appeals process to a certain extent. No way. I don't care how long it takes, I don't care how much money it costs, so long as we do the right thing. Because I don't want to have to live with it if we don't. And should the right thing be to abolish, so be it. I don't think that is the right thing. I think we ought to try to correct it so that if there's a justification for execution -- if there ever is a Fort Dix type thing, if there ever is a pedophile killing -- a child begging for his life -- that be available to us in those very, very, very extreme cases. We always said that. It had to

be an extreme case. Only the murder, not the accomplice, not a felony murder. Only the murder -- in a most extreme and grievous type of murder should there be consideration of an execution. I believe in that.

UNIDENTIFIED SPEAKER: Professor Blecker will speak, and then we'll ask questions.

Senator, you're not leaving yet, right?

Senator Russo.

SENATOR RUSSO: No, I will wait as long as you need me.

UNIDENTIFIED SPEAKER: Let's let Professor Blecker speak, and then we'll ask questions of both.

ROBERT BLECKER, ESQ.: Well, thank you for allowing me to speak.

First, some brief comments in response to the opening comments. It may be true that all lives lost are equal, but it's not true that the experience of dying is always equivalent. Someone who is shot in the head and instantly dies, someone who dies in his sleep through murder has not gone through the same kind of experience as someone who has been raped and tortured. And therefore, it is a perfectly appropriate aggravator to include the way in which someone died.

It is also not true that everybody has equivalent attitudes who kill. Again, from the point of view of the killer who preys mercilessly on the handicapped and the vulnerable, those too are appropriate aggravating circumstances. So if we are committed, as I am and my fellow retributivists are, to making sure that all, but only those, who deserve to die, die, then we quite appropriately separate, as aggravating circumstances we can, both the

attitude of the killer and the experience of the victim without it all implying that we think that lives are of different value.

The Commission's report, you've heard, was apparently thorough and unbiased. And that's been the spin and the bias in the press and around the world. The fact is contrary, however, sadly. Yes, they did hold hearings; yes, the hearings were extensive; and yes, they did allow various points of view. However, the Commission's report does not reflect those various points of view.

Senator Russo was the lone dissenter, and he chose to use that position to make, appropriately from his perspective -- and that's quite fine -- the personal statement that he still supported the legislation which he had been a prime mover on. He chose not to use that occasion to actually engage the Commission's report point-by-point. And it's very important for your perspective in deciding the public policy and making the decision as to whether to retain or abolish the death penalty, that you really do understand that the Commission's report was tainted with abolitionism from start to finish, that it's seven findings -- and then it's eighth additional recommendation -- consciously or unconsciously failed to recognize essential key perspectives in opposition.

So, since no one else was doing it, I felt obliged to do it. And I've circulated to you, and you have there, two documents both in blue covers. The first one is called: *But Did They Listen? New Jersey's Death Penalty Commission's Exercise in Abolitionism: A Detailed Reply*. And in that -- if you just turn to the table of contents on Page 3 -- you'll see in the 40 pages of single-spaced reply, roughly the same length as the Commission's report itself, I've gone through it, point-by-point, finding-by-finding. I've reviewed

every page of every testimony in all the public hearings and pointed out -- and this was especially designed for this Committee and for the Legislature -- and pointed out over these last few months -- and pointed out places -- significant places in which the retributive perspective, and also the deterrence perspective, was either distorted or understated.

Then there's a second document. And I'd like to just, in three or five minutes, highlight that for you. I'm hoping that you will take the time, before you make your decision, to actually review the counter, since there is a counter. And unfortunately, it was never issued.

The second document-- We've now heard-- And I'm very glad to hear Senator Russo point that out -- that it can be fixed. Yes, it can be fixed. It should be fixed. I testified before the Commission that it could be fixed. And I've made some concrete suggestions in the second document, *The Road Not Considered, Revising New Jersey's Death Penalty Statute*, in which, in a dozen or so ways, I've suggested a way to take the present statute as a starting point; and, in fact, revise it to make sure that super due process takes place -- to, primarily among them, drop the felony murder aggravator, especially the robbery-murder aggravator, and clarify the burden of persuasion to make sure that it's not only proof beyond a reasonable doubt that he did it, but proof to a moral certainty that he deserves it; and also acknowledging lingering doubt, and all sorts of other recommendations.

Now, obviously, if you choose-- This is the third way. And what remains so frustrating is that the Commission did not acknowledge -- even if they chose to reject it -- never so much as acknowledged in one sentence that their options were not just two, which were stand pat as is or simply abolish the death penalty and substitute life without parole. They

never once considered, if only to reject the other option, which was to refine -- to morally refine New Jersey's death penalty to make certain that only the worst of the worst would be subject to it and, with a degree of certainty, so that we could be confident, bordering on certain, that no person who didn't deserve to die would ever be executed.

Now, the principal -- some of the principal failings of the report -- and we've heard it already mentioned today. Senator Lesniak, once again, repeated what he had earlier said, that there is absolutely no evidence that the death penalty deters anybody. That statement flies in the face of human nature, common sense, and every study that I know. It imposes too great a burden on him and those who urge the end of the death penalty. The question of deterrence is not: Does the death penalty deter? Of course it sometimes deters some people, and it will never deter others. As the British Commission pointed out, we can number its failures just by looking at prison, but we can never number its successes. We can never know how many people, who otherwise would have killed, don't by virtue of -- and only by virtue of -- the threat of death.

The question really of deterrence is: Does it have a more marginally effective deterrent impact than its principal alternative, life without parole? And here, studies differ. The most sophisticated recent ones, the most recent six, show a significant greater deterrent effect of the death penalty. But they, too, have their critics.

What the Commission never considered -- excuse me -- but was brought to their attention and never acknowledged in the report, is basic human nature of risk aversion about death, the subconscious restraints that a -- in deterrence that a death penalty may impose.

When it turned to cost, it never acknowledged all the money saved from guilt -- the hundreds of thousands of dollars saved for every guilty plea obtained under threat of death. It never-- It talked about the intangible and emotional costs, and it never talked about the cost of not doing justice. You see, *justice* was a dirty word for this Commission. They did everything they could to avoid it in order to get unanimity or near unanimity. Because the moment that you start talking about justice and whether some people uniquely deserve to die -- the worst of the worst, the torture killers, the child killers, the child rapist killers -- the moment you start talking about that, then the Commission splits.

Then Commissioners like Kathleen Garcia -- who was clearly in support of the death penalty, and clearly thought that some people deserved to die -- would have been forced to issue her own separate statement, which she did anyway -- but her own separate statement dissenting on the grounds of justice. So justice never appears. And retribution is virtually dismissed. Retribution, which is the primary justification for the death penalty; retribution, which under the proposed new model penal code becomes the primary justification for all punishment. Retribution was dismissed by a majority of the Commission as simply irrelevant. And yet, retribution saturates the Death Penalty Study Commission's concerns.

If you look at their findings, Findings 1, 5, 6, and 7 concerning disproportionality, concerning legitimate penological intent, concerning irreversible mistakes, and concerning life without parole as an adequate substitute all concern the question of justice, all concern the question of whether somebody who is sentenced to life without parole is getting his or her just desserts when he or she is the worst of the worst.

Now, you've already heard testimony today by Mr. Hilton, who says how miserable life is in life without parole, and obliquely suggesting that those of us who appeared before the Commission and suggested otherwise are simply mistaken and ignorant. I've spent over 3,000 hours in six states over 22 years documenting life inside maximum security prisons and life on death rows. And what I have -- what I can show in picture, and can express to you now in word but cannot show in picture in New Jersey -- because the Department of Corrections would not allow me to take a camera inside the New Jersey State Prison, though five other departments of corrections have-- They did allow me a brief, two-hour tour, during which no inmates were exercising, strangely; no inmates were eating; no inmates were moving; etc. So I saw an empty facility, except for the cells. But, of course, what you do see inside the cells are color televisions, what you do see in the libraries are books, they do watch TV, they do root for the New Jersey Nets and watch the playoffs, they do socialize, they do have friendships, they do laugh, they do cry, they do cheer, they do grieve, in fact they do look up at a sky. Now, it was a bleak setting, and it is a bleak setting. But do pay very careful attention to what you've just heard. What you've just heard is that the average life sentence, regardless of life without parole, leaves someone ineligible for parole for 62.5 years -- or 63.5 years. A repeated robber who injured no one, who is given a life sentence; a drug dealer who killed no one, but possesses a heavy weight to sell, can be given a life sentence-- They all serve their sentence in conditions similar to, the same as, those mass murdering rapists of children, the worst, of the worst, of the worst.

In fact, the Department of Corrections in New Jersey, as it is in every state in the United States, by its formal mission statement disavows punishment. Punishment is no part of its mission statement. Its mission is to keep us safe from them, to keep staff safe from the inmates, and to keep the inmates safe from each other. The only place punishment occurs, as the present administrator confirmed to me in my tour -- my brief tour of the New Jersey State Prison recently, about three weeks ago -- the only place that punishment consciously takes place at the behest of the Department of Corrections is when somebody violates prison rules, once inside. What a person did outside, whatever the crime a person committed-- No matter how heinous that crime is, once inside prison, that person's experience of life in prison will be no different than, no worse than, and in fact may predictably be better than what the experience will be for much lesser criminals. So don't for a moment think that by substituting life without parole you have somehow achieved either justice, proportionality, or retribution. How odd and how disturbing that the Commission's report, discussing proportionality in detail, never once considers the question of whether life without parole is a disproportionately lenient sentence. Proportionality has two phases to it and two aspects to it. Is it too great than what's deserved, or is it too little from what's deserved?

I could go on, and on, and on. But just two more comments and then, hopefully, I'll get questions and an ability to respond further.

You've heard about the drop in support, even today, for the death penalty in New Jersey and elsewhere. Well, the Commission conveniently -- when they talked about an increasing trend of drop in support -- failed to acknowledge a couple of things. Number one, the major

polling question fundamentally distorts it. It asked the question of whether you would prefer murder -- or whether you prefer the death penalty or life without parole, with absolutely no chance of parole, for those convicted of murder. Well, what about a retributivist like me, who in 95 percent of murders would prefer life without parole? Most murderers do not deserve to die. Most of them deserve a life in prison. Very few, and only very few deserve to die. How am I supposed to answer that? Would I prefer the death penalty or life in prison for someone convicted of murder? It's almost always life in prison, not the death penalty.

But of course, what they didn't mention when they found increasing evidence of rejection of the death penalty is that Wisconsin -- and they used just the introduction of legislation by a single legislator in various states. They failed to mention that Wisconsin conducted a referendum, and 56 percent of the people of the state -- which had not had a death penalty in over a hundred years -- still supported it. And of course, they couldn't mention, because it hadn't happened yet -- but do be aware that after the Commission's very report came out, the next Quinnipiac Poll, in February 2007, reported that the people in New Jersey, by a very substantial majority -- something like 53 to 42 percent -- rejected the Commission's own suggestion that the death penalty be abolished. Yet they still reported a small preference for life without parole over death. The newspaper reported that is an inconsistency. It is no inconsistency. It is perfectly consistent. The people of New Jersey want, need, feel certain that the death penalty is sometimes deserved, and they want it retained. On the other hand, for most of the cases of murder, the people in New Jersey -- like me and my fellow retributivists -- understand and know that most cases of

murder -- people are not the worst, of the worst, of the worst, and don't deserve to die.

And then one final note, and then I quit, and that is-- You have before you an indiscriminate statute. When you read the Death Penalty Commission's report, pay careful attention to the Public Defender's separate concurrence. Now, she gave me a hard time when I was a witness, but that's okay, and that's expected. But she makes a very important point. If you simply substitute life without parole as a mandatory penalty for all other cases that are presently death-eligible, what you'll be doing is eliminating the jury's ability, case-by-case, to do justice. What you'll be eliminating is the jury's ability to look at mitigating circumstances. Because there will be no penalty phase. The net effect of it will be that, in an even more morally indiscriminate manner, you will once again be lumping huge classes of people together that will range from the very worst, of the worst, of the worst, who most deserve to die, to people who committed terrible crimes but are not even close to the same moral universe, who had backgrounds that would have deserved the sympathy and mercy from the juries. But those backgrounds will never be raised and will never be at issue.

So don't make a mistake of substituting what is presently a good first try, but needs refinement -- a death penalty statute -- for something that is more morally discriminate than what you presently have, the net effect of which will not be to increase justice, it will be, in fact, to further profane it.

SENATOR ADLER: Senator Scutari, sorry.

SENATOR SCUTARI: Senator Russo, we've had a death penalty in effect in New Jersey for the past 25, with the exception of recent

history -- with the moratorium that's gone -- which I personally did vote for. Why has no one been executed?

SENATOR RUSSO: Primarily-- First of all, it takes an awful long time to go through the whole system, as we found out in the cases I mentioned -- the Edgar Smith case; and Federal cases -- Carl Chessman wrote a book -- it took even longer.

We're dealing with some heavy stuff. We're dealing with life and death. It's going to take a long time. Add to that the fact that our judges basically have been somewhat philosophically opposed to the death penalty, until very recently. There seems to be a change as evidenced by that court decision just the other day upholding the death penalty.

I've always felt that eventually, some day, there will be an execution. I don't look forward to it, I would rather there not be. But there will be under this law. But this law is so tight, it requires so many things before that could happen. It's going to take a lot of time, not because it doesn't work in the sense that -- I hope it's not because it's not a good law. I mean, it was really drawn tight, as evidenced by the overwhelming support in the Legislature. It's just that it's going to take time to educate the courts, I guess.

SENATOR SCUTARI: It's my understanding that if the moratorium is lifted, one of the death-sentenced individuals in New Jersey might be facing an execution order in the near future. Is that correct, as far as you know, Professor?

SENATOR RUSSO: I'm not sure.

DR. BLECKER: That's my understanding also. There's at least one, and perhaps two, who have cleared the State process. I mean,

everyone has just given up because the New Jersey Supreme Court reversed the first 28 death penalties that they had before them. And they are, clearly, an abolitionist court. But on rare occasions, they have said yes.

And that's right. And it seems like the Commission just gave up. Commissioners like Kathleen Garcia said it will never happen. Well, why is everyone so willing to give up?

SENATOR SCUTARI: What can be done, if anything? Well, let me ask this question first. What is the average -- or what is your understanding, in terms of the time that it would take for an individual to go through the entire appellate process, ensure all of the safeguards, and then finally be sentenced to an execution?

DR. BLECKER: On average, across the country it has taken in excess of a dozen years. It's not uncommon for it to be 15 or 20 years. But on average, I believe it's something around 13 years.

By the way, the proportionality review that you were discussing earlier -- the United States Supreme Court has held -- is not constitutionally mandated. The death penalty may never be a disproportionate penalty. It must serve either attributive or deterrent ends. The proportionality review in which you compare an individual death sentence to others gotten or given in that jurisdiction; or perhaps in the most expansive view of a death -- proportionality review of others not given to death eligible individuals, is a review that this Legislature chooses to undertake on its own. It is not mandated by the United States Constitution.

SENATOR SCUTARI: Clearly, the State of New Jersey has gone out of its way, and in a far more detailed fashion than other states, to ensure that those sentenced to death have every opportunity to prove

innocence or to at least overturn their conviction for a sentence to death. And that is -- obviously takes a long period of time to ferret that out.

Without giving up those safeguards, is there a way to streamline the process without giving up the safeguards?

DR. BLECKER: Only somewhat. I think if you are committed to a just system that rightfully protects defendants against mistakes to a mere certainty, you're going to have to tolerate several years delay between sentence and execution. There is, by the way, a value in giving the sentence itself. That is to say, the sentence -- the death sentence itself operates symbolically as an occasion -- a solemn occasion in which we in society say, through our representatives of the jury, that you deserve to die. Even if it takes us a while, and it will. To answer your question again and reiterate the answer, even if it does take us years to carry out that sentence, what still remains, and what death penalty inmates have told me -- whom I've interviewed in depth and at length over the years -- is that the bite of that moment when the jury faced them and said, unanimously, "You deserve to die," that stays with them. And so there's a value to it, even during the delay.

SENATOR SCUTARI: The proportionality review, which you spoke of-- Is that, in your estimation, a necessary component that New Jersey employs to ensure fairness?

DR. BLECKER: Not to the degree that it does or needs to. The fundamental question of proportionality, which is a deeply held western cultural value -- it goes back to the Old Testament, it goes back to the ancient Greeks, it goes to the Magna Carta, it goes right through, century after century. It's really the relationship of crime to punishment.

Is our response the right and measured response? And in that respect, the United States Supreme Court has said that the Constitution precludes a grossly disproportionate response.

But the so-called *proportionality* reviews that we're talking about measures one person's sentence against another's. And it seems to me that you can retributively argue that as long as every individual who is condemned to death and is executed deserved to die, the fact that other people escaped the justice that they deserve and instead were consigned to a life in prison does not undermine the justice of killing someone who deserves to die. So that part of the proportionality review could, if the Legislature chose to, be eliminated or reduced, at least to preclude looking at people who were not given the death sentence as morally irrelevant.

We try to balance two things. We try to balance fairness and consistency. Consistency requires that we treat like cases alike. Fairness requires that we treat every individual human being as a concrete person worthy of respect and dignity. The problem is that there is a tension between those two. Because every situation is truly unique and infinitely rich. And in order to treat every person as a human being, we have to look at background, etc. So proportionality reviews tend to obscure the real, significant differences, case-by-case, that may occur in the backgrounds of individual defendants. That's the problem, that you're sacrificing fairness for the sake of consistency.

SENATOR SCUTARI: If that revision -- without throwing that completely out -- was made, how much time would that potentially save, in terms of the years that go by?

DR. BLECKER: I don't have the hubris or expertise to give you a concrete number. I don't know.

SENATOR SCUTARI: Senator, knowing now, 25 years later, what you do, and having served on the Commission, would you change anything about the bill that you had drafted back in the '80s?

SENATOR RUSSO: I honestly can't-- This might be a fault, but I honestly have not been able to find anything in it. Maybe that's pride of authorship. I don't know. I try to think to myself (indiscernible) (PA microphone malfunction) I try to think to myself, am I doing the right thing? I thought it last night before I came here today, as I do often. Am I doing the right thing? So far, the bill has actually really worked quite well other than the fact that there have been no executions, and that doesn't break my heart. In the sense that there have been no convictions of people who were later found not to be guilty--

We've talked a lot about the effect on victims. This was a big part, incidentally, in the Commission's hearings. This was a well-orchestrated event, incidentally. A lot of people were brought in from all over the country to tell how terrible -- what they went through as victims. Well, you know, you're going to go through almost the same thing anyway. People aren't going to succumb to life without parole in a submissive manner. They're going to go through appeals. This is going to go on and on. And it is tough on victims. But you know we're not here to feel sympathy so much for victims as we are to do the right thing for law enforcement and the right thing for the public in general.

Because, you know, as soon as-- As the Professor was talking, I was thinking of things like the Lancaster school murder, where the man

mowed down-- If you were to throw out a poll question in New Jersey, which I suggest someone might do in October -- no reflection on either party -- it will be like, 95 percent should get the death penalty if you go in and murder a bunch of children in the way that man did, and that would be a state event.

So proportionality is another issue. We talked about that a lot. There were some suggestions that maybe the death penalty was racist. I would never tolerate that, believe me. And the proportionality study by Judge Baime concluded there was no evidence of that at all in it.

SENATOR SCUTARI: Could you have envisioned, 25 years ago, that no one would have been executed under the law that you drafted?

SENATOR RUSSO: No, not at all. I thought there would be very, very few. That's what I had-- And I said that on the floor of the Senate during debates. I hoped there would be very few. I even hoped maybe there wouldn't be any, which means nobody deserved it. But if somebody deserved it, yes, I thought there would be some by now. I did not think the courts would allow this thing to go this far, this long.

And I think, if I might add, should the Legislature not overturn this bill in view of what the Supreme Court just decided recently, we're going to face executions pretty soon, and then we'll see if it works or not. But I think we'll see that it does.

SENATOR SCUTARI: You had the benefit of listening to the testimony of victims' families. Is it your contention that the victims themselves would have a different view of things than the victims' families did, if the victims could speak -- since they're no longer--

SENATOR RUSSO: If the victim could speak? Gee, I don't know. It's so hard to say.

SENATOR ADLER: Senator, before you answer the question, as sort of a background, the next two panels of witnesses are going to be victims' families. And as you can imagine, victims' families come from different walks of life around the state and bring different perspectives to the notion of capital punishment. We're going to have two panels, one of which will be folks who have lost family members who support the death penalty and oppose the bill that we're considering today, and the other panel will be folks who have lost family members who support the bill and oppose the death penalty.

So that very, very troubled community is understandably divided on moral grounds, on family history grounds, on whatever other grounds. They're going to speak to that issue in a second.

Rather than having Senator Russo speculate about what their family members -- victims might say, I'd rather have those folks speak on their own.

SENATOR RUSSO: Senator Adler, can I just add one point to that?

Be careful. I don't know who is going to testify today. But in the Commission-- If you could hear from every victim -- or every victim's family -- all, indiscriminately, that might be one thing. But people -- some of them are speaking from the heart, some of them may or may not be. I don't want to say too much.

SENATOR ADLER: Senator Scutari, if you want to follow up with Senator Russo.

Thank you, Professor.

SENATOR SCUTARI: I want to reiterate what I think one of your contentions is: is that if the bill is passed in its present form, that will not eradicate the difficulties that people have, because there will be continuous amounts of appeals on this issue anyway.

SENATOR RUSSO: Yes, Senator.

SENATOR SCUTARI: As you said, they're not going to go in voluntarily and not appeal that sentence.

SENATOR RUSSO: Life in prison without parole will not involve as long a process or as many appeals -- because there are certain appeals that are -- like the Federal court's involvement, and so forth. But there will be. And there will be a lot of effect on the same victims' families as there have been on all of us who have been involved on that end of it over the years -- and the people in this room today. So that's not going to end.

SENATOR SCUTARI: Thank you very much.

SENATOR RUSSO: Thank you, Senator.

SENATOR CARDINALE: Thank you, Mr. Chairman.

Senator Russo, you've made a number of allusions to the fact that you believe the -- my words, not yours -- that the Commission was sort of rigged.

SENATOR RUSSO: Was what?

SENATOR CARDINALE: Rigged.

By the time of the appointments, it was a foregone conclusion what the outcome would have been.

What was the process by which the Commission proceeded to decide which avenues to explore and which avenues not to explore?

SENATOR RUSSO: First of all, let me say this: I didn't mean to suggest that any member of that Commission was rigged in the sense of he was going to do something regardless of the evidence of the facts. I meant to say that, for example, if you picked a Commission, and you put Senator Cardinale and myself on it, you've rigged it the same way. We have strong views on this issue before we go into the hearings. Hopefully, we'll keep an open mind. But that's what I meant. Many of the people there had views that -- I knew how they were going to come out. This is not an issue that people just learned about today. These people felt sincerely in the view that they had. And these were real good, decent people, especially the Chairman. But I knew where they stood, because they thought about it for many, many years. And it came from their heart -- not because they did anything improper. And hopefully I was in the same category. I believe in what I said in that dissenting opinion and what I've said today.

SENATOR CARDINALE: My question is: How did they go about deciding which avenues to pursue, which witnesses to call, who not to call, what time to give to one aspect, and what time to give to another? What was the process?

SENATOR RUSSO: Okay. First of all, I should have mentioned that we had the benefit of something that you have here. We had a tremendously supportive staff -- the Judiciary Committee staff that did most of that work, especially Gabe over there. He doesn't like the limelight. But they did that work for us. They dug out what the issues -- for our consideration and allowed us to choose them. They dug out the

witnesses. The Chairman then made the decisions, but we talked about it.

The process was really quite fair, Senator Cardinale, in the sense that the Chairman would allow us to express our views. I'm just saying that the views of many members of the Commission were pretty well engrained before we went in there, including my own. But the Chairman, after discussion -- based upon what the Judiciary Committee's staff brought before us -- would then set up a procedure. I have no complaints or problems with that at all. I thought he tried -- the Chairman, Reverend Howard, tried to do really as fine a job as he could, and he did.

SENATOR CARDINALE: The Professor has indicated that the Commission did not consider fixing the statute, that they looked at two alternatives. Alternative one was to leave things as they are. Alternative two was to abolish the death penalty. They didn't look at anything in between. How was that determination made?

SENATOR RUSSO: I don't know how to answer how. But that frustrated me, too, because I said many times at the hearings that we should be talking about how to make it better, how to make it work. Yes, we did not. Maybe the Commission or the Chairman felt there wasn't any way to improve upon it. I think there was. I think there is. I think the Professor is absolutely right, and it frustrated me, too. But we didn't. All I can say is we didn't.

SENATOR CARDINALE: To remind you of something that's come up here, you also said on the floor that it would be a long time before there would be an execution when you argued in favor of that bill, that it would not -- we would not have executions right away. You were right.

I thank you.

I'd like a question or two for the Professor, if I may.

Have there been similar commissions in other states?

DR. BLECKER: Yes, there have.

SENATOR CARDINALE: And have those commissions in other states looked at a greater variety of options?

DR. BLECKER: In terms of revising the death penalty, the most famous commission actually was in Britain, and it was the most thoughtful and the most complete -- from 1948 to 1953. No one has done a better job than that. The commissions are just-- This is-- New Jersey is really one of the leaders in this regard. It's starting up now. There are moves to make study commissions to constitute them to do this. But there isn't a long history of this yet. There are organizations that have done it. The Constitutional -- I'm sorry, I'm just blanking on the name of it. But there have been groups of recommendations. Illinois did it. And the irony with Governor Ryan is that he had the opportunity to actually enforce and use the commission's recommendations to discriminately, rather than indiscriminately, look at those on death row and segment out those who, under the new, revised proposed standards, wouldn't have deserved it. He didn't do it. He just blanketly and indiscriminately released all those on death row. But the Illinois commission is a leading example. The British commission is the best example.

SENATOR CARDINALE: Your criticism of this Commission is that it did not explore, among other things, all of the options, and particularly left out the option of correcting the existing statute. In Illinois, did they consider the option of correcting their existing statute?

DR. BLECKER: Yes.

SENATOR CARDINALE: They did.

DR. BLECKER: And they proposed.

SENATOR CARDINALE: And would you say from those that you have looked at -- others studying this question-- You've mentioned Britain, you've mentioned Illinois. Is it general practice that the commission look at all of the options where such commissions are formed, or is it more general that they only do what New Jersey did and consider *A* and *B*?

DR. BLECKER: There's not a huge body of history to draw from, but from what I know, the more standard practice is to refine first, to start with what you have, and see whether you can improve it, especially if you're committed to a notion of justice.

SENATOR CARDINALE: Now, Senator Russo said that he thought the process by which the Commission went about calling witnesses and looking at questions was, essentially, satisfactory. You attended many of these meetings?

DR. BLECKER: No, I just attended the one that I testified at. But I reviewed every page, every moment of testimony from it. I reviewed the entire transcript from all of the hearings.

SENATOR CARDINALE: Do you have an opinion as to whether they-- Well, you've expressed your opinion already. That's kind of a redundancy.

DR. BLECKER: Well, I think--

SENATOR CARDINALE: Is it fair to say that you believe the Commission sought to proceed in such a way that the outcome was preordained?

DR. BLECKER: No, I don't mean to-- If I indicated that I thought they didn't allow the various perspectives to be aired, then I misspoke. The Commission responsibly allowed various perspectives to be aired. And the detailed transcripts of the hearings will reflect that. What they then did in their final Commission report was to essentially either understate or ignore whole bodies of -- and deep traditions of perspectives in this great debate. But the record is there. In that respect, I'm not criticizing them. They did allow both sides to make the record. They just simply ignored one side when it came time to issue the report.

SENATOR CARDINALE: Okay.

Thank you very much.

I have no further questions.

SENATOR ADLER: Gentlemen, thank you very much. I know both of you came some distance to be here.

I know, Senator, you're going off to another distance to do something great.

And I know, Professor, you're going to give exams for your law students at NYU.

So thank you both for taking the time to be with us today. I appreciate it.

SENATOR RUSSO: Thank you very much, Mr. Chairman, and members of the Committee.

DR. BLECKER: Thank you.

SENATOR ADLER: As I indicated, Senator Lesniak, some moments ago -- or excuse me, to Senator Scutari, a few moments ago, we have a division of opinion among family members of victims. And I'd like

to have some representative witnesses come forward to tell their perspectives on what we should do, based on their family history. We know that some of the murders that we might hear a little bit about were unbelievably heinous, involving the sorts of evil people that Professor Blecker was talking about moments ago, who really are the worst of the worst in our society. And yet we have a divided opinion among people who lost loved ones based on the worst of the worst.

For the first panel, I'd like to have Marilyn Flax and Sharon Hazard-Johnson. And I would really ask -- the audience has been just terrific up to now -- to show particular regard to the folks coming up now, for the next several minutes, because they have suffered enough having lost loved ones. I hope we'll continue to show the respect for these witnesses that we've shown earlier in the day.

Ms. Flax and Ms. Hazard-Johnson, if you'd come up to the front set of tables.

Ladies, thank you. On behalf of the members of this Committee and the people of New Jersey, we can't imagine what you've already suffered, having lost loved ones. I think we're all familiar, Ms. Flax, with the horror of your family loss. Yours as well, Ms. Hazard-Johnson.

If you could tell us why you think we should not change the statute -- maybe based on your own experience -- but really give us a perspective, as Senator Russo indicated, of what's right for public policy. If you could give us your perspective on what we should do going forward for society, I would really appreciate that so much.

Could you use the microphone? Just push the button on.

Thank you so much.

MARILYN FLAX: I wrote something down, which I'd like to read. And it will answer some of the questions that you're asking of me.

For those who don't know me, my name is Marilyn Flax. I'm the widow of Irving Flax.

You would have thought that after 18 years there would be no need for me to stand before you discussing the death penalty. However, my husband's killer, John Martini, knew. For when he was captured, his first words were, "You got me. Let them give me the death penalty. They don't f-in' kill them in New Jersey." How could such an evil, calculating killer think he could escape the most serious of penalties when the death penalty was designed for murderers like himself? After all, he killed at least five others before he took my husband's life. He tried to escape from jail twice. He threatened to kill his own attorney.

You speak of deterrents. If New Jersey had followed through with the penalty, would my husband be alive? Obviously, Martini thought more of his punishment, not his crime.

I have listened about the debate of cost of the death penalty. How dare you put a dollar amount on justice. There is no dollar amount high enough for my husband's life. Has anyone thought of the ramifications of abolishing the law: cost factors, changing of sentences of already convicted prisoners? For example, if a death row inmate now gets life, then what happens to the lifers? Certainly, they should not have the same sentence as most of the brutal murderers. Lifers now will appeal their sentences and will start a mushroom effect throughout the criminal population that are in our prisons right now. We will have more career criminals out on the street. Talk about cost factor -- are we nuts?

I have been abused by a system that should take care -- more about the innocent, not the guilty. I was ignored by ex-Governor Codey when I wrote a heart-wrenching letter to him. No response. I went down to Trenton to meet with Governor Corzine. Me and Sharon Hazard-Johnson had an appointment with him. We were told we would not be meeting with him when we drove all the way to Trenton, that we would meet with his General Counsel instead.

After that meeting, I called several times to set up a meeting with the Governor. My calls were not returned. I went down to speak to a commission started by ex-Governor Christine Todd Whitman to discuss how to trimline the appeals process. I never heard anything about that commission.

My next trip to Trenton was when there was a new commission now studying the death penalty. What a waste of time and raw emotion. There were 20-plus speakers. I and Sharon Hazard-Johnson were the last to speak. I had to listen to people from out-of-state to hear what they thought, religious leaders -- and I thought there was separation between church and State -- special interest group members that don't think there is a shade of gray. By the time it was my turn, I was so disgusted and emotionally burnt out, I said almost nothing. You see, ladies and gentlemen, crime victims don't go out in groves. We're a select few whose killers deserve the death penalty.

I was so angry when I left that day when I realize liberal politicians are running the State. What has occurred is not justice for victims like myself, but a charade of a system. I find those in favor of

abolishing the death penalty guilty of unfair, inhumane treatment to me and other survivors of the most violent crimes.

SENATOR ADLER: Ms. Flax, thank you.

Ms. Hazard-Johnson, if you could--

And thank you. Bringing the portrait of your brutality murdered parents is, for us, a grim but appropriate reminder of a loss you suffered and the lives taken whenever a murder occurs. So I thank you for the symbolism of that portrait. We welcome your testimony.

S H A R O N H A Z A R D - J O H N S O N: I also have a written statement that I would like to read.

But to answer your question, what I think you should do with this bill is abolish it today, right here, right now.

I brought my parents today because they are the victims of what happened in my family. I am a victim survivor. The victims are always forgotten. That's why I bring them into this room today. But I also, out of simple respect, want to say the names of other victims: Cheryl Alston, Carol Peniston, Keith Donaghy, Irving Flax, Latasha Goodman, Kristin Huggins, Megan Kanka, Gary Marsh, Edward Potter (phonetic spelling), Irene Schnaps, Teresa Bowman, Michael Eck, Giorgio Gallara, Jeremy Giordano, Maria Marshall, Officers John McLaughlin and John Norcross, Melissa Padilla, Mildred Place, "Dede" Rosenthal, Officers Gary Tadesco and Peter Voto, and Richard and Shirley Hazard, my parents.

I say their names not to say that I'm speaking for them today or their families, but I say their names just to respect them and to remind you that there are victims involved here. These were people who were viciously murdered by people who have no spirit, no gut, no soul, and are sitting on

death row. Most of the murderers of the people whose names I just mentioned are off death row.

When Brian Wakefield, who murdered my parents, got on death row-- Actually, before the trial started, there were 13 people on death row. By the time he got on, he was number 10. Today, he's number nine.

My name is Sharon Hazard-Johnson. My parents were murdered by death-row inmate Brian Wakefield on January 18, 2001, in their home in Pleasantville, New Jersey. During the course of a home invasion robbery by Brian Wakefield, they were savagely beaten, stabbed, and set on fire. Their pet collie, Heidi, was also beaten in the attack.

In March 2004, an Atlantic County jury, after careful consideration of all the aggravating and mitigating factors involved in Wakefield's trial, sentenced Brian Wakefield to death for the murders of my parents. On May 7, 2007 -- just three days ago -- the New Jersey Supreme Court upheld the death sentence and the proportionality of the death sentence of Brian Wakefield.

I urge all the Committee members on this panel to carefully review the New Jersey Supreme Court's decision regarding Brian Wakefield. Because it shows the careful, constitutional consideration they gave to his appeal. It also provides a comprehensive look at New Jersey's capital punishment law and its procedures. I intend to send you all a copy.

I testified before the New Jersey Death Penalty Study Commission, as did murder victim survivor Marilyn Flax, whose husband was kidnapped and murdered by death row inmate John Martini. Other murder victims' family members testified as well. However, Marilyn and I made a rare appearance -- or rare appearances as the only survivors whose

family members' murderers are currently on New Jersey's death row. And in Marilyn's case, her husband's murderer has exhausted all of his appeals.

It is our opinion that the question before this Senate panel -- this Senate Judiciary panel is whether you will stand with the likes of killers such as Brian Wakefield; and John Martini; Jesse Timmendequas, Megan Kanka's killer; Ambrose Harris, who brutally kidnapped, raped, and murdered Kristin Huggins within miles of this chamber; and Donald Loftin, who murdered several people in separate crimes; or whether you will stand with the victims and their survivors, such as myself, Marilyn Flax, the Huggins, the Kankas, and the Marsh families, and others as well, and permit justice and the law to prevail for the sake of every law-abiding citizen of New Jersey and for respect for the laws of our land.

It has been said by so-called *victims' rights advocates* who are against the death penalty that capital punishment only serves to victimize murder victims' family members further due to lengthy appeals and the uncertainty of the process. They claim that because no one has been executed since the death penalty was reinstated in 1982, New Jersey's death penalty is just not working. Well, this is just not true.

But as I sit before this Committee today, I can state that the Hazards, the Flaxs, the Kankas, the Marsh families, and others are being victimized once again. We are being victimized by the actions of this legislative body and the Governor.

In regard to the New Jersey death penalty not working, John Martini -- who kidnapped and murdered Marilyn Flax's husband, Irv -- has currently exhausted all of his appeals, both in the State and Federal courts. Nothing stands in the way of John Martini's execution except the Governor.

We also learned that the Department of Corrections, last year, provided the execution procedures to Governor Corzine's office for him to sign off on. And, to date, no action has been taken.

Accordingly, the death penalty in New Jersey is actually at a point where an actual execution should take place. However, it's the sole action -- or lack thereof at this particular time -- of Governor Corzine and the legislators, who put in place a completely unnecessary moratorium on the death penalty, that prevents capital punishment from working.

Marilyn Flax and I feel further victimized by the fact that the fate of our loved ones and their survivors are not worthy of a meeting with the Governor as did, with all due respect, the Rutgers Women's Basketball Team and Don Imus issues were. In my opinion, this lack of courtesy by the Governor toward Marilyn Flax and I is a clear indication that he just does not care about or want to hear from the families of murder victims whose murderers sit on New Jersey's death row.

During the Death Penalty Study Commission's hearings, I was present when Senator Lesniak, a member of this Committee, spoke against capital punishment, declaring that he was worried as to the execution of an innocent inmate. Firstly, there is no doubt of the guilt or innocence of all nine of New Jersey's remaining death row inmates. Megan Kanka's killer confessed to her murder. Brian Wakefield confessed to the murder of my parents. And the physical evidence in all these cases was overwhelming.

Secondly, during the Commission's hearings, there was no testimony whatsoever that anyone sentenced to death under the current New Jersey death penalty statute is or might be innocent. Barry Scheck, a noted lawyer, also appeared to speak about how innocents were sent to

death row throughout the country, yet Mr. Scheck could not provide one single example of a New Jersey death row inmate being exonerated.

Furthermore, Mr. Scheck failed to mention to the Commission Virginia inmate Roger Coleman, who was executed in 1992. Coleman had been Mr. Scheck's poster child as an innocent individual who he claimed was wrongly executed. As it turned out, in 2006, DNA tests on the crime materials proved that Coleman was indeed guilty of the rape and murder for which he was executed.

Why did Mr. Scheck fail to mention this to the Death Penalty Commission? Any death penalty advocates and alleged victims' rights advocates claim that abolition of the death penalty will stop the endless and costly death penalty appeals, which further victimize crime victims' families. If this is the case, why is there not set forth in this legislation you're proposing by this Committee a limit on appeals for those sentenced to life without parole? In fact, the Death Penalty Commission hearings -- at the Death Penalty Commission hearings, Senator Martin, a member of this Committee, testified that he did not want to limit the appeals for those sentenced to life without parole. Why? Current life inmates in New Jersey repeatedly appeal their sentences. Currently, Thomas Koskovich and Jayson Vreeland, known as the pizza killers from Sussex County, are serving life sentences. They continue to appeal their sentences, and most recently appeared in the Sussex County Court House, more than 13 years after their crime, for motions for new trials. Where is the finality and the end to this endless appeals that the anti-death penalty advocates think about? And where is the cost savings?

Furthermore, I note that there is nothing in the proposed legislation that abolishes Governor Corzine or any further governors' ability to grant clemency or pardon of someone serving a life sentence without parole. Senator Martin specifically spoke up against such a provision at the Death Penalty Study Commission hearings. Accordingly, those of you who advocate abolishing the death penalty and replacing it with life imprisonment without parole are not telling the public the whole story in that your proposed legislation -- in that in your proposed legislation, this current Governor, or any future governor, can and, we all know, will grant clemency or pardon inmates serving under such a sentence. Without such a provision, you are selling the public a false bill of goods.

It has also been said by advocates who propose abolition of the death penalty in New Jersey that the moneys spent on the death penalty can be placed in victims' rights programs. If Senator Turner truly believes the money saved from death penalty litigation should be put in victims' rights programs, why is there no offering of an amendment requiring budget cuts in the State Public Defender's Office, and that those funds would be put into the victims' rights programs? Where are the savings?

The death penalty in New Jersey is currently working. And the only person today who stands in the way of its operation is the Governor. Governor Corzine has taken the course to stand by the likes of John Martini, Brian Wakefield, rather than myself, and Marilyn Flax, and our victims. What is proposed before this Committee, one, does not limit the appeals of those sentenced under life without parole; two, does not abolish clemency and pardon; three, it does not provide for additional victims' rights funding. In fact, the Commission report stated they couldn't, with

any reasonable degree of accuracy, determine any amount of savings. And four, there's no provision for additional punishment of an inmate who commits yet another murder while serving life imprisonment without parole.

You should all remember that Florida serial killer Ted Bundy was escaped from jail when he murdered three young girls. Prisoners do escape. And I am certain that all of you recall the name Joanne Chesimard, who murdered a New Jersey State Trooper, escaped from prison here in New Jersey, and now allegedly works as a terrorist in Cuba.

There are those who say life imprisonment without parole is a greater punishment than the death penalty. If this is true, why do inmates under death sentences continually appeal their sentences?

This week, it's alleged that terrorists here in New Jersey plan to commit murder and mayhem. What are you trying to do to this state and its citizens?

There are those who say that legislators who vote against the death penalty as a moral question should not be challenged. Ironically, many of these same lawmakers who say they should not be criticized for being against capital punishment routinely criticize other lawmakers for being against abortion.

I want to thank, in advance, those members of this Committee who will not vote to abolish the death penalty in New Jersey. I also want to thank Assembly Minority Leader Alex DeCroce. He was the only one who fed back to us and did take time to meet with me for several hours to hear my concerns. He let us know that there is at least one person willing to take their time to hear from victims and listen to victims' family members.

The death penalty kills guilty murderers, people who had a chance at life. Abortion kills innocent people who will never get their chance at life. If you are truly concerned about killing innocent people, you would abolish this bill right here and right now, and get to work to make a real difference in the lives of your citizens.

If the death penalty is broken, fix it, don't get rid of it. What kind of an attitude is that for somebody that's in charge of what happens in the state? "It's broken, get rid of it. Let's not even look into it. Let's not try to fix it. Let's not try to find out what went wrong." What kind of an attitude is that for people who are in charge of the laws of the land?

Abortion kills innocent people. Get rid of it.

And I have one other thing to say. This is not my position. I say execute when it fits the crime; when a vicious person willfully and intentionally murders innocent human beings, people minding their own business, people they don't know, people who don't know them -- execute them. Don't put us through this muck.

And I want to tell all of you that I'm sick and tired of being here. I'm sick and tired of coming out and talking to you, and these commissions, and these false committees -- these committees that are formed as, in my opinion, stall tactics. This has taken more out of my life. My husband is 20 years my senior. He needs me. I don't need to be here. I don't want to be here. I want to go back and have a life.

Kill this bill.

SENATOR ADLER: Ms. Hazard-Johnson and Ms. Flax, thank you. It's enough that you've suffered. But for you to try to do what you think is right for justice for your loved ones, and for your communities, and

for New Jersey-- While many of us have different perspectives on this important issue, the fact that you would take the time to share your own experiences with us is very, very powerful testimony about the character of you, and your love for your husband -- your late husband, your late parents. We very much respect the strength of your passion, the strength of your intellect. You're sharing a bit of your soul and a bit of your pain with us.

Thank you very much for your testimony.

UNIDENTIFIED SPEAKER: If I may just--

SENATOR ADLER: No, no, thanks. We're going to--

I have a certain sequence of folks.

But thank you so much for being here.

UNIDENTIFIED SPEAKER: Only because it's--

SENATOR ADLER: No, no, thank you. Thank you so much though.

UNIDENTIFIED SPEAKER: Only because it's important to--

SENATOR ADLER: Thank you.

UNIDENTIFIED SPEAKER: --supplement the Martini issue.

SENATOR ADLER: Ma'am, thank you.

Our next witnesses, who are also the family members of victims of brutal murders, are Bill Piper, and Vicki Schieber, and James Wells.

Ladies, thank you so much for being here today.

UNIDENTIFIED SPEAKER: The question was asked--

SENATOR ADLER: Thank you.

UNIDENTIFIED SPEAKER: --why an execution hasn't happened.

SENATOR ADLER: Thank you.

UNIDENTIFIED SPEAKER: I can tell you why.

SENATOR ADLER: Thank you, ma'am. I appreciate you being here very much.

Mr. Piper, Mr. Wells, and Ms. Schieber.

UNIDENTIFIED SPEAKER: Mr. Chairman.

SENATOR ADLER: Just a second, Senator.

Mr. Piper -- I'm not sure which is which -- Mr. Piper, Ms. Schieber, and Mr. Wells.

Mr. Piper, if you'd begin, please.

UNIDENTIFIED SPEAKER: Mr. Chairman.

SENATOR ADLER: Yes.

UNIDENTIFIED SPEAKER: I'm confused. Was that woman--

SENATOR ADLER: She wasn't a family member.

UNIDENTIFIED SPEAKER: She was not a family member.

SENATOR ADLER: No, I would not do that to a family member. Oh my goodness.

UNIDENTIFIED SPEAKER: I wanted to make sure--

SENATOR ADLER: I think we know each other well enough.

UNIDENTIFIED SPEAKER: --the point was clarified.

SENATOR ADLER: Thank you for your confusion.

B I L L P I P E R: Is this on? (referring to PA microphone) Yes.

Chairman Adler, members of the Committee, thank you for having me here to testify.

My name is Bill Piper. I live in Pennington, New Jersey, in Hopewell Township. I'm here to address the issue of the death penalty

from my perspective as a family member of a murder victim in a case that did result in life without parole sentence in Pennsylvania.

Many times, at hearings similar to this, I've heard speakers asked by committees whether life without parole would have allowed them healthy grief in coming to terms with their loved ones' death. And most of those people said that they imagined it would. I can say -- and unfortunately from personal experience -- that life without parole does exactly what it should for us as victims.

Number one: It removes the perpetrator of crime from the rest of society forever. And, number two, it permits victims' families to come to terms with the tragedy of murder and loss however we're best psychologically able without -- and this is the important thing, I think -- without having politicized, demoralizing questions thrown into the mix on, at times, very, very public levels. It allows grief to be private, which is what it should be.

In 1999, my mother was murdered in Pennsylvania, where life without parole is an option, one that was fortunately taken in 2002. Since then, I've been able to live a pretty normal life because it was decided. I can let sorrow be sorrow and miss my mother, but not that differently from missing my father who died of natural causes, in bed, in 1986. Life without parole works.

Before the near closure of life without parole, things were different. Because of the nature of the crime -- my mother, then 74, was raped and murdered by a probably random nighttime intruder -- the prosecution strongly considered pursuing the death penalty. The next three years were spent traveling, communicating back and forth to Altoona,

Pennsylvania for pretrial hearings, advising the prosecution's request on the desirability of the death penalty, etc., and each time back there hearing more forensic facts about my mother's death, or about the murderer and his limited affect in his near-mental retardation.

Ultimately, about a month before the killer's scheduled trial, the DA told my sister and me that he would pursue whichever course we wanted. As both a long-time opponent of capital punishment, and as a person traumatized by a loved one's murder, I could not condone giving consent to an execution. I spent three years in the emotionally untenable position -- while traumatized by a loved one's murder -- not only being asked to participate in a state execution, but also of being morally obligated to speak out against the execution as a benefactor of the person who raped and murdered my mom. I tell you, I felt violated by having been given both of those responsibilities simultaneously.

That came to an end when my sister, against her wishes, and those of most of my family, assented to accepting the sentence of life without parole. The prosecution laid out quite clearly for the family what could be involved in taking the case to trial and pursuing the death penalty option. It was because it was made clear that life without parole means what it says -- or means what it says in Pennsylvania -- and that the killer would never leave prison, that the sentence was reluctantly accepted.

I think the reason, ultimately, that my sister recommended accepting life without parole was to save my son, who was then 6 -- 3 at the time of his grandmother's murder -- from growing up into his late adolescence -- or perhaps his entire life -- with this shadow of appeals processes hanging over his development.

Unfortunately, it was too late to save my family from the damage already done by the introduction of the death penalty into the process. Even though the death penalty was not ultimately used in the case of my mother's killer, it still wreaked havoc on our lives. We became victims not only by having a beloved family member murdered, but also by having to work with a district attorney's office and other family members on deciding the use of the death penalty, which split our family, with my wife and me being opposed and most of the others for it.

After my mother's death, as you can imagine, my wife and I had become closer to my sister, aunt, uncle, and cousins. We depended on each other and provided for each other real emotional support. And our shared grief brought us together. But then that decision making polarized us in ways that were inexpressibly hurtful to all of us. It put a violent end to a fragile new closeness and drove a wedge between us that has yet to heal. My aunt and uncle have refused contact with me. One of my cousins will send me a Christmas card but doesn't respond to my Christmas card. And my sister has just begun to answer my son's e-mails and has gotten back in touch, but we're unable to speak about this. So my son has lost not only his grandmother, but also his extended family on his father's side.

As murder victims' families, we don't have very many people who can understand what we went through. Most people don't want to talk about it, of course. And it's a very isolating experience to have gone through that. And I think it was too bad that because of the judicial process being what it was, we lost some of the people who could have at least been supportive.

I'm almost done.

Despite this pain, as I said when giving my victim's impact statement at the hearing, I'm not a victim, anymore, of this; because the finality of life without parole has allowed me to grieve more normally. I don't harbor good feelings for the murderer at all. I don't know him. There's only a limitless sorrow over the whole catastrophe, especially the end of my mother's life, who was a kind, nearly innocent woman committed to her family and friends. And I ask that we honor my mother's kindness and mercy by sparing other people this trauma. It's in our hands.

Thank you.

SENATOR GIRGENTI: Thank you very much.

Vicki Schieber.

VICKI SCHIEBER: My daughter Shannon was murdered at the age of 23 by the Center City Rapist, in Philadelphia. She was a graduate student at the Wharton School of Business, finishing her final year, when a man pried open her apartment door and viciously raped her and murdered her.

Here in New Jersey, especially in southern New Jersey, you've probably heard a lot about this case due to the frequent press coverage. We would ultimately learn there were four women in that same three- or four-block area where my daughter lived who were sexually assaulted in the 10, 12 months prior to that -- to this crime -- while using the same MO, and another one after she died.

However, in 2002, it was announced that a DNA link had been made to a series of sexual assaults in Fort Collins, Colorado. Troy Graves was arrested on April 23, 2002, and he ultimately pled guilty to assaulting,

raping, and murdering Shannon, and to 13 other sexual assaults in two states.

Losing a loved one to murder is a tragedy of unimaginable proportions. And the effects of the trauma on the wider community extend beyond the initial family. The common assumption is families like mine -- we would be very much supporting the death penalty. Prosecutors said to us, "We will seek the death penalty for your family to help you find justice, and/or we will seek the death penalty in order to have closure and healing for you."

I believe many elected officials like you here today have the best of intentions when you argue the death penalty is necessary for murder victims' families. But I'm here today to tell you these assumptions are wrong. They are not only false, but they are very harmful to victims' families. The death penalty has failed victims' families in virtually every way. And many of us, including those who support the death penalty in theory, have come to support its end. I say this on behalf of many families who have either always opposed the death penalty or have arrived at the position after experiencing years of its damaging consequences.

But let me be very clear that I do not speak for all victims' families. No one can make that claim, because the murder is so horrendous and so particularly personal to the family. But the number of families who have been harmed by this system and are ready to give it up is a growing number around this country. However, the assumption that all, or even most, homicide survivors support the death penalty is absolutely wrong. And the pain created by the system for many of us is very real.

Sometimes this is difficult to understand if you've never dealt with the system of loss of a loved family member to murder. So let me explain the biggest problems briefly. The legal process -- we've heard about already -- is very overwhelming. You're thrust into that complicated web of court proceedings. You have little power other than to sit there, and listen, and wait for a speedy outcome. And the death penalty exacerbates that very process. And finally, the capital appeals go on for decades, and the murderer's name -- and this is what we had particularly difficult problems with -- the murderer's name is splashed across the headlines, while the offended sit helplessly waiting for the next ruling, not knowing if the sentence will ever be applied.

Now, I've been on both sides of this equation. It took nearly four years of agony before my daughter's murderer was found, which is only a fraction of the time of what some of the murder families have to wait for in New Jersey for an execution to occur. My daughter's assailant -- and this is very important -- was apprehended on April 23, 2002. By the end of July of that year, he was in a maximum security prison serving a life without the possibility of parole sentence. That was in only 10 weeks and involved-- It would have been shorter, but there was a hearing sentence in two different states.

I can't imagine what that would have been like if I was still sitting here, nine years later, waiting for his sentence and wondering if it would ever be carried out. Never again will I have to spend emotional energy questioning what punishment will transpire for the man who stole my daughter's life.

No one should affirm, from the opposition of the death penalty by my family, that we don't want the murderers caught, prosecuted, and put in jail for the rest of their lives. We believe Shannon's killer is where he belongs today, and he serves his prison sentence, and we rest assured that he will never again perpetrate this crime on any other families. We have great faith in the security of this prison system.

Some have told us that the pain and the delay could be fixed by making the death penalty cheaper and faster. We talked about that. But Kirk Bloodsworth and over a hundred exonerees are living, breathing examples that that's not a solution. We cannot make the system faster and cheaper for homicide survivors and also protect innocent people from conviction and execution. That's why many of us believe that it's very hard, if not impossible, to fix this system.

While I said earlier I do not speak for all families, I am joined today by many New Jersey citizens who've lost a family member to murder and support replacing the death penalty with life without parole.

I submit this letter you've received today with more than 50 residents' names, of the State of New Jersey, who express support for the legislation today. Many of these families are here today to avow witness to this letter, and I now ask them to stand and come forward with me.

I'd like to conclude with these very courageous people behind me by saying -- especially to those of you who support the death penalty or are ambivalent about it -- that you have an important opportunity here to help create a new, helpful paradigm for the victims of our society. You may continue to believe that murderers should be executed, and there's likely little that I can say to change your mind. But I do ask that you consider the

death penalty is not simply an abstract concept. It is a real-life consequence on the very people it purports to help. And replacing it with life without parole is a better option, regardless of your feelings about capital punishment in the abstract. If that's your goal, as I believe it should be -- as I do for the rest of these victims -- we recommend an end to the death penalty in New Jersey.

Thank you.

SENATOR GIRGENTI: Thank you very much.

And I thank all of you for coming to Trenton today.

Mr. James Wells.

J A M E S H. W E L L S JR.: Good evening, Chairman and the Committee members.

My name is James Wells. I'm speaking for both sides of the fence: one, as a recently retired law enforcement officer, and also a victim -- a survivor of a murder victim.

I live in Union, New Jersey. I am the National Chairman of the New Jersey Chapter of the National Association of Black Law Enforcement Officers, which I will refer to as NABLEO. I'm here to share with you NABLEO's position on the death penalty.

I am also the father of a murder victim. My son, Jafari, was shot and killed November 2005. I share my painful reality with you because I want you to know that I speak with the knowledge of what it's like to experience the most terrible losses, the death of a child in a senseless murder. I believe my personal experience more fully informs this testimony.

NABLEO's mission is to establish and secure the enhancement and promotion of ideals and goals of the black law enforcement officers

throughout the country for education, political advancement, and charitable endeavors. As part of their goal, we advocate on issues that directly impact the services of the men and women of color and the communities that they serve.

As law enforcement officers, our primary goal is to protect the public. We all agree that convicting and punishing offenders is critical in achieving that goal. But on one extreme form of punishment, the death penalty, we have different views. Some of us have no moral opposition to the death penalty and believe it may have a place in society. Others oppose it for sincere ethical or moral reasons. We share, however, a belief that the death penalty has failed us.

After careful consideration, NABLEO members have concluded that it should be replaced with the sentence of life without parole. The death penalty is an absurdly expensive and unworkable punishment that saps our financial and human resources, and diverts time, energy, and attention that could instead be invested in real solutions to crime and violence.

Countless millions of dollars have been spent since New Jersey reinstated the death penalty in 1982. One estimate places the figure at more than a quarter-of-a-billion dollars in the pursuit of the death penalty for a handful of murderers. These precious resources could have been used to hire more police officers or to fund other critical needs, such as gun violence prevention programs, drug and mental health programs, youth and family services, and education.

The death penalty is also a distraction from justice. We will never know how many crimes have gone unpunished with perpetrators

remaining at large because of our investment in this failed policy. Most death sentences in this country are never carried out. In New Jersey, 25 years of the death penalty has led to nothing but pain for the families of the victims and decrease of public faith in the criminal justice system. In short, the futile and wasteful mixed message of capital punishment contributes nothing to making New Jersey safer.

Finally, the death penalty risks executing the innocent convicted of crimes they didn't commit. Right here in New Jersey, there have been recent cases of wrongful conviction for serious crimes, such as murder and rape. The serious mistakes made in these cases underscore the reality that with the death penalty, mistakes cannot be undone.

NABLEO members are deeply concerned about violent crime and are committed to the goals of protecting the public and bringing offenders to justice. But the death penalty is not an effective law enforcement tool, in practice. It is a distraction from justice. Life without parole is a serious punishment that would keep our citizens safe from violent offenders.

I would like to end with a personal statement as a parent of a murder victim. As you know, the New Jersey Death Penalty Study Commission recommended that the State replace the death penalty with life without any possibility of parole. More than a dozen victims' families like mine testified before the Commission that the death penalty process compounded their pain by putting them through a long, extended process of trials, reversals, and retrials, and that life without parole would have been a more merciful sentence for them.

I can understand and appreciate their perspective. Having lost my child to murder, I know how hard it is to heal. Words cannot express how hard. Being tied to the criminal justice system, and through it the killer, for decades, is painful, harmful, and cruel to the families.

One person described the death penalty as a false promise, not only because cases go on and on, but also because it cannot bring our loved ones back. As someone whose life has been changed forever because of the cowardly act of murder, I could not agree more with that statement. For the sake of the families of murder victims, please end the false promise of the death penalty.

Thank you.

SENATOR ADLER: Mr. Wells, Ms. Schieber, Mr. Piper, let me express, on behalf of the members of this Committee, and really the people of New Jersey, as I did with the previous family members of murder victims, our thanks that you've managed to share your pain in a way that tries to improve public policy.

For you and the previous two witnesses, it's enough that you lost a family member -- or in one person's case two family members -- so terribly. The fact that you would try to make good on their loss for the benefit of society really speaks volumes of your soul, of the character of each one of you.

So thank you, all three of you, for taking time to be with us today. I really do appreciate it very, very much.

MR. WELLS: Thank you.

SENATOR ADLER: Our final witness for testimony is Bishop John Smith.

Your Excellency, good afternoon.

If you would push the button to turn on the microphone.

Thank you, sir.

BISHOP JOHN M. SMITH: Thank you very much, Mr. Chairman, members of the Senate Judiciary Committee, for this opportunity to give testimony.

Two days ago, on Tuesday, May 8, 2007, the New Jersey Board of Catholic Bishops met at Sacred Heart Cathedral Basilica in the city of Newark. During our meeting, the Bishops once again reaffirmed our united opposition to the death penalty. The Bishops -- all the Bishops of the Catholic Church in the State of New Jersey have asked me to represent them in your assembly this afternoon and to speak in favor of Bill S-171, which I understand has had certain amendments.

Today, I bring a very simple message. The death penalty, in our opinion, is not consistent with evolving standards of decency. Because the State of New Jersey has other means to redress the injustices caused by crime, and to effectively prevent crime by rendering the ones who have committed these offenses incapable of doing any more harm, and because we recognize the dignity of all human life, we continually, and consistently, and vigorously oppose the use of the death penalty.

The New Jersey Catholic Bishops spoke to this issue in their statement of February 4, 2005. The United States Catholic Conference of Bishops, representing all the Catholic Bishops of our nation, on Holy Thursday 2005, launched a national campaign to end capital punishment in the United States of America, stating, "The death penalty diminishes all of us. It's use ought to be abandoned, not only for what it does to those who

are executed, but also to what it does to us as a society. We cannot teach respect for life by taking human life.”

We are guided by our belief that every person has an inalienable right to life, because each human being is made in the image and likeness of God, who alone is the absolute Lord of life from its beginning until its natural end.

We acknowledge that the subject of capital punishment is controversial and filled with emotion. All murders are violent and shocking; some are even savage and barbaric. They all stir emotions of revulsion and anger. We grieve with the victims of murder for their brutalization and their loss of life. We commiserate with the family and friends of victims who must suffer with the loss of loved ones throughout their entire lives. We affirm that the State has the duty to punish criminals and to prevent the repetition of crime. We believe that greater efforts must be made to bring the criminal to repentance and to possible rehabilitation. We also believe that our society has sufficiently developed to protect itself and to redress the injustices caused by criminals without resorting to the use of the death penalty. One alternative is life in prison without the possibility of parole.

The catechism of the Catholic Church acknowledges the right of public authorities to impose criminal punishment proportionate to the gravity of the offense if this is the only possible way of effectively defending human lives against unjust aggressors. If, however, nonlethal means are sufficient to defend and protect people’s safety from the aggressor, the authorities will limit themselves to such means, as these are more in keeping

with the concrete conditions of the common good and more in conformity with the dignity of the human person.

We believe that because the State of New Jersey has other means to redress the injustices caused by crime, and to effectively prevent crime by rendering the one who has committed the offense incapable for doing more human harm, and because we recognize the dignity of all human life, we continue to consistently and vigorously oppose the use of capital punishment.

Let me conclude by recognizing the need for the improvement of our criminal justice system and for greater societal commitment to crime prevention and victim assistance. As pastors and teachers we, the Catholic Bishops of the State of New Jersey, implore you not to impose the death penalty in our state.

Senators, the Catholic Bishops of the State of New Jersey ask you to release favorably Senate Bill 717.

Respectfully submitted to you by all the Catholic Bishops of the State of New Jersey.

SENATOR ADLER: Your Excellency, thank you for taking the time to speak to us today and to represent the other Catholic Bishops and the Archbishop. We appreciate very, very much your time and the wisdom of your comments.

Let me start by thanking the members of the public who came here today, many of whom were prepared to testify. And because I think we have enough very clear testimony from people already -- people of faith, people who are survivors whose family members are the victims of homicides, people who have studied this from a constitutional and legal

perspective -- I think we have gotten such a sufficient amount of information that I believe we're prepared to consider Senator Lesniak's bill as described as a substitute bill.

But I thank the people who came here today to testify. I particularly thank people who also provided written testimony. Please know that we have had a chance, during the last many hours, to review your written submissions. And we thank you for taking the time to share your opinions -- that are divergent opinions, but that are sincere, profoundly felt opinions on a question of life and death. I thank the public.

I also thank you for your decorum today, understanding this is an issue that might evoke great passion. The fact that people came here with a seriousness of purpose speaks to their commitment to New Jersey, to their families, to their communities. So I thank you for all that.

I had a chance to confer with Senator Lesniak in the back, and then again just a few minutes ago. He does not want a consideration of any amendments to his bill. He is satisfied with the substitute bill, as described by Ms. Nagle, as the bill he wants considered today.

So, people, I would ask you to restrict your comments as we talk about the bill, and as we have a vote today, to Senator Lesniak's substitute bill for consideration today. You're certainly free to talk about other options, but we are now voting-- If there's a motion and a second, we'll be voting on Senator Lesniak's bill.

Senator Lesniak.

SENATOR LESNIAK: Mr. Chairman, first of all, thank you not only for bringing this issue to the forefront today, but also for your

demeanor and professional way that you've handled such a very sensitive and difficult issue for all of us in this room and throughout the state.

I move the bill.

SENATOR ADLER: Is there a second please?

UNIDENTIFIED SPEAKER: Second.

SENATOR ADLER: Second.

Senator Kyrillos, a point of order.

UNIDENTIFIED SPEAKER: (PA microphone is not on)
(indiscernible)

SENATOR ADLER: Sure.

SENATOR KYRILLOS: Thank you, Mr. Chairman.

I'm sorry the motion was made. It was made very quickly, so I appreciate this leeway.

This is obviously a very, very difficult subject. And I agree with Senator Lesniak, that you've handled the chairmanship today very well.

And we've heard from a lot of sincere and very heartfelt people on both sides. And this is a question that we all wrestle with, and we don't find an easy answer.

I have heard it said that there is a seeming consensus on this issue, that there's a consensus out there in society, and I just don't agree with that, Mr. Chairman. Perhaps there's a consensus in this room -- majority consensus. Perhaps there was a consensus on the Commission. There may even be a consensus in this Legislature.

But I find it amazing that we hitch our feelings to one Rutgers University public opinion survey, which surprised us in its survey research,

and then portrayed things as if there was a strong will to move forward out there in the State of New Jersey. And I just don't think it's true.

I think that we've heard enough today to know that there are many people who do not object to the death penalty on moral grounds, necessarily, but are hugely frustrated with the state of the law in New Jersey and with the capital punishment process.

I wish I had a chance to read this paper by Professor Blecker of New York Law School entitled: *The Road Not Considered, Revising New Jersey's Death Penalty* -- the third way, as he put it -- not embracing the status quo, not leaping forward in what I consider a very quick fashion, but look at how we can refine the process that we have on the books today. I would like you to consider -- Senator Lesniak to consider -- holding the bill today so that we can look at other options and see if, indeed, there is a different way. Because I have a different view than, I think, many people do.

Now, I have a substitute bill as Senator Lesniak does. My first preference would be to hold all bills today. My bill is very similar, but it allows for the death penalty in three situations. And I know you've said you don't want to have anything else considered today, Senator Lesniak doesn't. You've told me that publicly and privately. And that's fine. You can, at the appropriate time, when we're voting on bills, table this if you wish. But I think that we should allow for the death penalty in the case of a murder of a law enforcement officer. I think we should allow for it in the case of a child killed during the committing of a sex crime. I think it should be allowed when there has been murder by terrorism. That is my view, if we can't just freeze frame this process today.

So I'd like to move my substitute bill as well.

SENATOR ADLER: Senator Martin.

SENATOR MARTIN: You made a comment earlier, Mr. Chairman, about whether we get into the issue, or maybe should not get into the issue, of what is the role of a legislator. Are we all about simply doing what may be a consensus of the public's view at any one point in time, or are we going to assume leadership roles and try to do what we think is right based upon, perhaps, a greater understanding of an issue, having seen and studied a Commission report -- which I think they did an extraordinary job of trying to get as much information available in coming to some particular findings -- and then conducting this hearing today, and then trying to make an informed decision? Or is this alternatively about a delicate system where we simply take a tea leaf reading of what the public's view may be?

In this case, I don't think the public, as strong as their emotions are about this issue, may be as knowledgeable about the process that has to be put into place in New Jersey in order to have a fair and just system in dealing with this extremely difficult issue.

I have some familiarity myself, but I would rely on the Commission, which basically has come to a conclusion born out by 25 years now -- since 1982, when the statute was first put in place -- that it is incredibly difficult to get the system right.

The third rail that Professor -- or the third way that Professor Blecker may have suggested, I think, is unachievable. And, again, I would point to our Supreme Court, which has tried to refine this issue. You heard today from the head of the -- or representative of the State prosecutors, who

basically say that you cannot meet these two goals. Assuming that the death penalty is justifiable -- that in order to allow it to go forward, but yet have sufficient safeguards so that we really do have a fair and just system, may not be possible. And it seemingly has been impossible in New Jersey.

I would suggest to those who may have some questions about how to vote today, or next week, or whenever the Legislature -- the Senate may take this up, that there are-- You could be like me, who has a moral objection to the death penalty. But I think the case has been made strongly that you can, as several of the witnesses said today -- can feel that the death penalty may be warranted, but we cannot create a system that provides enough procedural safeguards. And that results in a travesty for so many, including the victims' families, many of which testified today about this sense -- I don't like the word *closure*, but that's probably the word that describes it. They never achieve finality in trying to have their lives put in place and have rest for their departed loved one as long as they keep having to come back, time after time, proceeding after proceeding. The frustration of the woman who spoke in favor of the death penalty -- even she -- you could sense how difficult this becomes as years go by. And there's just no sense of relief, no sense of peace based upon the system that's in place, and necessary to put in place so, as Senator Russo says, we don't make some mistakes.

I think that we have enough information, as leaders, to be able to move the bill today. I rely most strongly on the Commission's findings. They're specific. If you just give me one minute-- There's six of them that I think are really difficult to say that they're wrong, based upon the information that's provided.

“There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent. The costs of the death penalty are greater than the costs of life in prison without parole. There’s increasing evidence that the death penalty is inconsistent with evolving standards of decency.” And we just heard that from the Bishop. “Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing. 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.” And finally, as also mentioned by the Bishop, “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.”

I think that’s so. I think Senator Lesniak, who has been a champion in this, has recognized this. And I think his bill will accomplish that purpose. And so I will be supporting the legislation.

Thank you.

SENATOR ADLER: Thank you, Senator Martin.

Senator Cardinale.

SENATOR CARDINALE: Thank you, Mr. Chairman.

Only in New Jersey could the headlines read “Terrorist attack on Fort Dix foiled,” and Friday read, “Senator poised to abolish the death penalty for terrorism.”

We’ve had quite a hearing. We’ve heard that the appointing authority of this Commission has a position. We’ve heard from a member of the Commission, a former Senate President, that he could tell what the

final outcome was going to be when he saw who had been appointed. We heard from someone who analyzed the report of that Commission. We heard and received written commentary from that individual which is extraordinarily thorough and which takes point-by-point issue with the findings of that Commission. He titles one of his treatises, *The Road Not Taken*.

I don't think every member of the Commission -- of the Committee here has had an opportunity to thoroughly digest those reports. I only first saw them today. I've only had an opportunity to scan them. But I heard his testimony. It is extraordinarily credible testimony. He raised my level of appreciation for law professors. I've generally had a fairly low evaluation of those folks, present company excluded from that remark. (laughter)

You know, we heard a lot of testimony saying that life without a possibility of parole brings more comfort to victims' families. I think that's an illusion. Because we've heard an awful lot of testimony that those can also be appealed. And I appreciate that, for the victims' families, these endless appeals are a very serious emotional drain. They are. There's no way around it. But we cannot short circuit the appeals. Wouldn't it be better for us, even if the Commission didn't do it, to explore the ways that our present law could be improved so that closure is brought about more readily without giving up the safeguards which we have in New Jersey against convicting innocent persons? We've heard a lot of testimony.

No one has suggested that any of the nine folks on death row could prove their innocence -- have a glimmer of a chance of proving their

innocence, have a real glimmer of a chance of proving that they don't deserve the death penalty.

That law was very carefully crafted so that very few people would be convicted -- excuse me, sentenced to death. It's worked. Very few people have been sentenced to death. Those that have been sentenced to death are the most heinous actors.

I'm really troubled by the thought that-- And I'm not an advocate of putting everything up to a public vote. But we had serious questions in the early '90s about the death penalty. They were raised by what seemed to be a trend in our courts. That trend was a trend toward obviating what was the law, abandoning the intent of our law. And so we put this question to the people of the State of New Jersey. And, you know, it wasn't a 60-40, it wasn't a 55-45 vote. It was a three to one vote by the people of the State of New Jersey. Yes, you can take a poll. And if you put the questions differently, I'm sure you can come out with some different solutions, different results. And I think that's what's been done in some instances. But we don't find-- Even in the polling that's been done -- other than by one or two cases where the bias is obvious -- the people of New Jersey still support the death penalty. Maybe not by the same numbers; but we'll only know that if we have a secret ballot.

What would be the harm? We have not passed the time to put it on the ballot for this year. We could put it on the ballot for this year and see if the public agrees with the advocates of abolishing the death penalty. I think that would be a very positive step for us to take on this extraordinarily controversial question.

There are people of good conscience on both sides of this debate. I have the greatest respect for Senator Lesniak. We don't always appear to have the greatest respect for one another, but I think we do. He's very well motivated. I happen to think he's wrong. Why not test this in the court of public opinion? Why not then put that forth to our judiciary? Why not then take that opinion and craft a better bill?

Now, somebody says it's very difficult to do that. I've been accused of trying to make the law simple for many years. But I think there is a simple solution. We only need tinker with the penalty phase of our present law. We needn't make it easier to convict someone of the crime. That phase seems to be working out fine. No one is objecting to that phase of our trial system. But if we tinkered with that-- And I'm not sure I have all the answers. But one of the answers I've heard from others is, "Why don't we raise the standard for imposition of the death penalty?" I think we kind of have tried to do that through the court process. I think the court has tried to raise that standard without changing the statute. Maybe we can do that -- raise that standard so that we can assure everyone that only those who deserve -- and that's the suggestion of the law professor who spoke here -- only those who really deserve the death penalty get it. I think that's fair, it's just.

I have very long been convinced that our system of justice in this state has one-- It's a pretty good system, but it has one very serious flaw. It seeks loopholes rather than seeks justice. We need to reverse that. We need to seek justice. That's what the people of New Jersey deserve. That's what even criminals deserve. They deserve justice.

We've heard that life in prison without parole-- We're not putting all these folks in solitary confinement. I'm sure I'm not the only one in this room who's visited our prisons from time to time. I've seen exercise rooms, I've seen the TV sets, I've seen a lot of things that are, for some of those individuals, perhaps a better life -- with the exception of losing their freedom -- than they enjoyed in other places. Is that really punishment? Is that really the kind of punishment that a child rapist, who kills that child-- Is that the kind of punishment that that person deserves? I don't think so.

I think we need to give our prosecutors another tool, a tool that could be invaluable to protect all the rest of us. If I were a prosecutor -- and I'm not even a lawyer -- but if I were a prosecutor, I would like to have the tool of having captured a terrorist who has caused the death of individuals -- to be able to dangle in front of that fellow the thought that perhaps cooperation, giving information that would save the lives of countless other people who are subject to subsequent terrorist acts -- to have the tool of saying to that individual, "If you cooperate, maybe you will not get the death penalty, maybe you will get something less." We would be taking that tool out of the hands of prosecutors by passing this bill. We shouldn't do that.

I think Senator Kyrillos' suggestion is a very modest and sensible one. We should take some more time to study this issue and see if we can't -- with all due respect to Senator Lesniak and the work he's put into this -- see if we can't come up with a better solution for the people of New Jersey.

Thank you, Mr. Chairman.

SENATOR ADLER: Senator, thank you very much.

We have a motion and a second.

Can we have a roll call vote on the motion on this bill?

MS. NAGLE: Senate Committee sub for S-171 and S-2471, Senator Adler.

SENATOR ADLER: First, let me commend the members of the Committee for the seriousness of their questions, and their comments, and the sincerity of their beliefs -- and particularly the Sponsors' bill, Senator Martin and Senator Lesniak.

I know, Senator Lesniak, you've spent a lot of time on this, and you feel it deeply in your soul. And I admire you for it.

This is a hard question, and it's particularly hard when we see the faces, the portraits of real people who have suffered heinous murders. And I know for them -- for the family members who have gone to court and seen the actual face of evil in the face of the murderer, it must be enormously difficult to contemplate how to go on in their lives. And so I admire you for trying to go on. And I wish I could extend a little bit of my soul to heal your souls a little bit. I don't think the penal system can do that. I think only time can do that. And I wish all of you well with that.

As I look at this issue, and look at New Jersey, and look at other states, and other countries, I'm struck first by the notion of deterrence. And it occurs to me, as I look at other states and other countries, that those states that use capital punishment the most, and those countries that use capital punishment the most, have far higher murder rates. And that strikes me as ironic on one hand, but maybe also telling. As I look at the types of countries that abolished the death penalty over a

number of years-- As much as I think this is the greatest land in the world, I think we can learn from those countries that have abolished the death penalty.

I heard the discussion between Senator Cardinale and Professor Blecker about the very thorough study by Great Britain of capital punishment in that country. The result of that study was that Great Britain abolished capital punishment -- in Great Britain. And murder rates are lower there now than they were when capital punishment was one of the available means of punishment in the United Kingdom. That tells me something.

When I see the sorts of countries that still use capital punishment freely, I don't want America -- I don't want New Jersey, certainly, to be like them. I look at Kazakhstan, and Uzbekistan, and Belarus, Lesotho, Libya. Those are not my role models of justice.

And while we should set our own standard of what justice is, I think we can sometimes learn from our neighbors, from our friends, and from enemies around the world. And I look at those countries that have lower capital murder rates, and none of them have capital punishment. That tells me something.

I took very seriously the words of his Excellency, Bishop Smith, when he talked about evolving standards of decency. For me, a decade ago, 15 years ago, I was certainly strong for capital punishment. I thought it was part of being tough on crime. I thought it was one way to make our society safer. As I think about it today, I no longer believe that. I'm like many New Jersey residents and many American citizens who have moved away from the death penalty, who want predictable, serious, severe punishment

for evil doers, for the people described by Senator Cardinale moments ago, and Senator Kyrillos moments before that. I don't think there's anyone sitting on this panel, anyone in this room that doesn't want just punishment for evil doers. And yet I don't think I, anymore, want New Jersey to be responsible for death. I think that doesn't soothe our soul, I think that pains our soul as a society. And I think ultimately this Legislature has to be keepers of the civic soul. And I don't want our society to engage in death.

And so with great regard for the pain of those who have suffered, I think I'm doing what is right to try to ease the pain for New Jersey and to soothe our soul.

I vote yes.

MS. NAGLE: Senator Girgenti.

SENATOR GIRGENTI: I also have to say that this is probably one of the most difficult decisions I've had to make as a legislator in the years I've been here.

You know, as Chairman of the Law and Public Safety and Veterans' Affairs Committee, I meticulously poured over the New Jersey Death Penalty Study Commission's findings. The conclusions are difficult to refute.

Since it's reinstatement in 1982, capital punishment has not proven to be a viable deterrent. We have not executed anyone since 1963. And the seemingly endless cycle of appeals puts a further burden the taxpayer. Considering our current fiscal climate, this is something we can no longer afford to fund.

New Jersey's a progressive state. We recognize that there are evolving standards of decency and that the death penalty is congruent to our present environment. Therefore, I vote in favor of releasing the bill.

MS. NAGLE: Senator Gill.

SENATOR GILL: I vote in favor of releasing the bill.

On a moral basis, I do not support the death penalty. On an empirical basis of the evidence produced, it shows that the death penalty is not a deterrent. If the death penalty was a deterrent, perhaps we would not have the terrorists at Fort Knox -- Fort Dix -- because we still do have the death penalty in New Jersey. We have the death penalty in New Jersey, but it's not a deterrent, because it has not, in any way, decreased the death toll in cities like the city of Newark.

So I think that not only does the theoretical basis demonstrate that the death penalty does -- is not a deterrent, the actual facts of everyday life in New Jersey shows that it does not.

So the Commission's study is not something that I think would surprise a lot of us who, one, have been paying kind of attention to the way that the statistical data has been moving; and also just to look at the State of New Jersey with the death penalty. And it has not deterred the crime.

I was particularly -- I don't want to say *moved*, but I was particular moved by the Bishop's -- Catholic Bishop's position and how that was articulated, as well as the victims from both sides.

I have never been for the death penalty on moral grounds. That has been confirmed, based upon the statistical and empirical data. And it also has been confirmed by the issue of bringing -- if you could ever bring closure. You may never be able to bring closure, but at least this

process will be swift, predictable punishment, which may -- for those of us who practice criminal law-- And we know that sometimes the clients complain that serving time in prison is worse than a death penalty sentence. And I think -- wasn't it Martin to be executed?

Not you. (laughter)

SENATOR MARTIN: (PA microphone not on) (indiscernible)

SENATOR GILL: Some people may have said it, but it wasn't you.

But I think there was a death penalty -- person who was convicted and sentenced to the death penalty.

UNIDENTIFIED SPEAKER: Martini.

SENATOR GILL: Yes, Martini, who said, "Please give me the death penalty, because the death penalty, in death, is better than serving time in prison for the rest of our lives" -- for the rest of his life.

So it is punitive, but it is-- Life imprisonment is punitive, but the punishment is not barbaric.

So I vote--

And I commend Senator Lesniak for his tenacity and his ability to convince those of -- who may not have been predisposed to this. So I think this bill is a testament to his leadership and his ability to understand the legislative process in bringing people together for a very meaningful public policy issue.

So I commend you.

And I vote yes.

MS. NAGLE: Senator Lesniak.

SENATOR LESNIAK: Thank you, Senator.

I vote yes.

MS. NAGLE: Senator Sarlo.

SENATOR SARLO: Thank you, Mr. Chairman.

I, too, as I sat here today, must admit probably today will be one of the most significant votes that I have taken in the time I've served here in the Legislature in the past six years, and perhaps one of the most significant votes I will ever take as a legislator going forward.

I must admit, as I still sit here now, after hearing some pretty powerful testimony on both sides, I am still torn between a law enforcement tool and a judicial system that has not been effective in bringing closure to some very serious crimes, and those who make a very strong compassionate, moral argument about life.

But Prosecutor DeFazio, I think, did an unbelievable job today in outlining why the death penalty in New Jersey is not working. He talked about deterrence, he talked about the Federal prosecution of those crimes that are related to terrorism -- he talked about the deterrent. And Senator Gill made a very, very important comment about what just happened at Fort Dix. And if it was such a deterrent, why would people continue to try to perform those acts on our military bases?

As a member of the Law and Public Safety Committee, we sit here, month in and month out, grappling with how we deal with gang violence escalating throughout our state, not just in the urban areas, but in the suburban areas. Each and every day, another kid falls victim to gang violence. So it's not a deterrent when it comes to gang violence.

I don't think anybody here could ever be labeled weak on crime. I'm not afraid of being labeled weak on crime. I constantly have

supported bills to upgrade penalties for a whole host of offenses. The easy way for me today would be simply to say I'm abstaining on the bill. But I believe this is too significant of a vote to abstain. I still sit here torn. I'm still not sure how I will vote on the floor of the Senate. But I believe -- and this is no disrespect to my colleagues who are sitting here. We have some of the most influential Senators in our entire caucus sitting here -- some very, very brilliant minds. But I believe that this is a decision that should be made by the Legislature as a whole, which reflects our population as a whole -- a very diverse state. And it would be foolish not for me to send this bill forward to allow the entire Legislature the opportunity to vote on this very, very important issue.

So I sit here torn, not sure where I want to end up on it. But I believe the work that Senator Lesniak has done on this, the work of this Committee, and the excellent hearing we had today deserves that this bill will continue to move forward.

And I go back to Prosecutor DeFazio. He really turned my head this morning with his testimony on this, why we should abolish the death penalty.

So I'm going to vote yes to continue the process and move it forward, and I reserve the right on the floor of the Senate to perhaps go in a different direction. But today I think the right policy decision is to continue to move forward.

MS. NAGLE: Senator Scutari.

SENATOR SCUTARI: First, I want to commend Senator Lesniak for all the hard work he's done in making a bill -- a very strong one -- an excellent bill in its form.

I've struggled with this issue since we first started to talk about it, even to the point when we first talked about the moratorium on the death penalty. I voted in favor of that because I thought at that point in time the death penalty was not working because it had never been done.

One of the things that I keep hearing is the fact that deterrence has not occurred as a result of New Jersey having capital punishment. But perhaps one of those reasons is that we've never utilized it. So it's never had an opportunity to be a deterrent.

There's a large majority of the states in the United States that still have capital punishment. Still, I have been persuaded by the law enforcement community, in terms of the fact that they believe it would be a massively cumbersome -- and that's a quote from today's proceeding -- a "massively cumbersome" endeavor to try and fix our current capital punishment system. But I did receive an answer that said that it was thought to be possible, but just not practical.

Why can't we have a death penalty that ensures that the defendants truly are guilty in a reasonably expedient fashion? Why can we not have a tool for law enforcement to utilize?

Our law should have a measure of punishment in it. I'm still not certain right now if the law, as it stands that Senator Russo had put forward 25 years ago, is that one. New Jersey has been known -- and I'm happy to feel the same way -- that it's a progressive state in that our thoughts do evolve and change over time to reflect the moral values of where we live and our citizenry. These are extraordinarily important issues.

I'm not certain at this time whether or not the death penalty, in its current system, works. I am certain that this is a bill and a topic that

deserves the full discussion of the Senate. I join with Senator Sarlo in my reservation with respect to a positive vote today. And I'm going to reserve my decision on an ultimate outcome of this bill. But for today's purpose, I will vote in the affirmative to release the bill.

MS. NAGLE: Senator Smith left a vote in the affirmative.

Senator Cardinale.

SENATOR CARDINALE: (PA microphone not on)
(indiscernible)

MS. NAGLE: Senator Kyrillos.

SENATOR KYRILLOS: You know, Mr. Chairman, it surprises me when so many say with such utter confidence that the death penalty is not a deterrent. Obviously it's not a deterrent to all people, because there are a lot of murderers out there, unfortunately. I guess jail time, life imprisonment, is not a deterrent either, because that's where they are now. I'm not sure any of us would want to say, "Let's not throw the bad guys in jail." Of course it's a deterrent to some people. The Professor put it quite right, I think. It flies against human nature to make a sweeping comment and to believe that it does not deter at least some people and therefore save innocent life.

Now, it's a tough issue, as I've mentioned, Mr. Chairman. And I put forward a bill, and people didn't want to consider it today -- not even bother to try to table it today -- a bill that would retain the death penalty for terrorists, and child molester and murderers, and people who kill police officers. But I can assure you that someone -- whether I'm present that day or not -- and I'm quite sure I will be present -- will offer these amendments

on the Senate floor, and so they will come up. Because they're very important questions.

So with great reluctance that this is a very speedy process, seemingly, I vote no.

MS. NAGLE: Senator Martin.

SENATOR MARTIN: Yes.

MS. NAGLE: The substitute is released.

SENATOR ADLER: Ladies and gentlemen, thank you so much for your courtesy throughout this long morning and afternoon.

We are adjourned.

(CONCLUDED)

APPENDIX

**Testimony before the Senate Judiciary Committee
May 10, 2007**

Submitted by: James Abbott, Police Chief, West Orange, NJ

In favor of S-171

My name is James Abbott and I am the Chief of Police of West Orange, New Jersey. I was Governor Richard Codey's Republican appointee to the New Jersey Death Penalty Study Commission, and I am here to share my experience about the work of our commission and my own evolving position on the death penalty.

As a law enforcement officer, I have dedicated my life to making the people of New Jersey safer. Police Officers get up every day knowing that our primary goal is to protect the public. It is up to us to make sure that people who commit crimes are caught and taken off the streets so they can't do more harm.

I am also aware that as law enforcement officers, we put our lives on the line every time we go to work. Police officers face the dangerous reality that someone may try to kill us simply because of who we are and what we stand for. People who support the death penalty often say it's needed to protect people like us. That seems like a logical argument, and I must admit it made sense to me too, before I joined the study commission. However, I submit; if this were true, then why is there not one inmate on death row after 26 Police Officers have been murdered in the line of duty since the death penalty was reinstated.

I supported the death penalty at the time of my appointment and did not think I would ultimately vote to end it in favor of life without parole. But what I learned throughout our six months of study opened my eyes to the reality of the death penalty. It turned out that what sounded good in theory was actually a complete failure in practice. Most importantly, what I learned about the death penalty convinced me that there was simply no way to fix it and make it right.

As a Police Chief and proud Republican, you should have no doubts that I support tough on crime policies and harsh punishment. Make no mistake the bill before you is just that.

I have no empathy or sympathy for killers, absolutely none. My commitment, like all of you I'm sure, is with the families of murder victims. It was those very families, including some whose loved ones were police officers killed in the line of duty that changed my mind about the death penalty.

I had no idea how much families suffer facing years of death penalty appeals and reversals. We've had capital punishment for 24 years and we haven't executed anyone. For every person that's been sentenced to death, there's a family waiting for the promised punishment to be delivered. They go to court year after year, only to find in the end that the person will never be executed. The reality is that there is no closure in capital cases, just more attention to the murderer and less to the victim. Unfortunately, it's easier for most of us to name notorious killers than it is their victims.

As I sat on the commission, I heard from these families, one after another. Their cries of pain were devastating. Many of them supported capital punishment when their loved one was killed, and it was only the direct experience of suffering through the process that prompted them to change their minds and beg us to recommend replacing it with life without parole. I heard from mothers, fathers, daughters, and sons who spoke of families being divided, lives lived in limbo, and childhoods abruptly ended by a never-ending court process. The death penalty was supposed to help families like these. And virtually everything I heard told me that it was tearing them apart.

At first I thought this problem was unique to New Jersey. But in the months since the study commission made its recommendations, I've taken the time to learn more about the death penalty in other states. It doesn't seem to work any better anywhere else. Even in Texas, the death penalty capital of the United States, it still takes years and millions more dollars for an execution to be carried out. It doesn't seem like any state has found a way to carry out the death penalty quickly, cheaply and accurately.

After the commission released our report, I began giving media interviews and talks about my experience. One thing I have been asked a lot is whether, as a Police Chief, I would still support the death penalty for the killing of a Police Officer. My consistent reply is that while it may be an appropriate form of retributive justice, if I were ever to be killed in the line of duty, I would never, *ever* want my wife or children to have to suffer the way the families who testified before me have. Instead, I would want to know that the person who did it was behind bars for life, so they could

never kill again, and that my family had the services they needed to heal and the financial support they needed to live without further sacrifice. Our Commission learned that those kinds of services are sorely lacking and that they could be improved with the financial savings from ending the death penalty.

I should also note that our commission found no evidence that the death penalty deters murder, even in the case of the killing of a police officer. That makes sense to me, as anyone who is already at the point of killing a police officer is clearly not thinking logically about the consequences. The south, which executes the most perpetrators of murder, also regularly leads the nation in the number of police officers killed in the line of duty.

Finally, I want to speak briefly to the make up of the bipartisan Commission and the integrity of our process. I already told you that I didn't go into my work on the Commission thinking I would vote to end the death penalty. The same was true for many of my fellow commission members.

Sitting around me were two sitting county prosecutors, the Attorney General, distinguished religious leaders, a retired Supreme Court justice who had upheld death sentences, and several family members of murder victims, including a man who lost his daughter to murder and a woman who became a victims' advocate after the loss of her nephew to murder. This was nothing if not a fair and balanced group of individuals and for any elected official to suggest otherwise is reprehensible.

Our analysis was also transparent, credible and comprehensive. We held five public hearings at which anyone could testify. The hearings were public and well advertised. People on all sides of the issue were able to testify. The only witnesses who were allowed to testify more than once were pro-death penalty witnesses. The breadth of knowledge and the passion of all the witnesses who testified were inspiring and informative.

As I said, I learned a lot about the death penalty in the last year. If I could leave you with the one most important lesson for you to think about as you deliberate on this legislation, it is this:

I learned that you can continue to support the death penalty and also support its end. That is the position I have now come to. Philosophically, I still favor the death penalty. I believe that it is an appropriate means of retribution and a just punishment for some crimes. But I also know that in practice it does more harm than good. So while I maintain my theoretical views, as I'm sure some of you also will, I also stand before you to say that New Jersey is better off without an irreparable system of capital punishment.

Life in prison without parole is a better alternative. It is harsh, it ensures public safety, and it puts victims' families first. With the study concluded and the overwhelming verdict in, it is time to do what is in the best interests of the people of New Jersey. I hope you will vote for Senate Bill 171.

Testimony

to

New Jersey Senate Judiciary Committee

by Gary J. Hilton, Sr.

May 10, 2007

Good morning Chairman Adler, and distinguished members of the Senate Judiciary. My name is Gary Hilton, Sr. I retired from the New Jersey Department of Corrections in 1998 after 33 years of service. During my career I held positions of warden at the New Jersey State Prison at Trenton, the Correctional Institution for Women, and on an interim basis at the Youth Correctional and Reception Center at Yardville and the East Jersey State Prison at Rahway. For a period of approximately 17 years, I served as the Department's Assistant Commissioner for Operations, Deputy Commissioner, Chief of Staff, and at the time of my retirement I had the privilege to serve as the Acting Commissioner

I have a long history and familiarity with New Jersey's death penalty. While serving as Assistant Commissioner I was responsible for overseeing the development of procedures for the Capital Sentence Unit at the New Jersey State Prison at Trenton, as well as developing procedures and protocols for the

implementation of the lethal injection penalty. During my tenure at the Department's Central Office I was responsible for overseeing approximately 27,000 sentenced offenders, 40,000 parolees and a staff of approximately 9,000. I believe my direct experience within the New Jersey Department of Corrections makes me uniquely qualified to comment on life without parole as an alternative to the death penalty.

I never have been, nor am I today, opposed to the death penalty on the basis of a moral consideration. During an earlier period of my professional life I supported and believed that the death penalty had a proper and appropriate position in our criminal justice system. It has only been with the passing of time, first-hand observation, and careful deliberation that I have come to a clear and firm opinion that the death penalty is poor public policy and ill-advised correctional practice.

When the death penalty was reinstated in New Jersey in 1983 it was a very different time in New Jersey's sentencing history. We did not have the alternative of life without parole. Indeed, the standard punishment for murder at that time was a life sentence with a parole eligibility of 30 years.

This is no longer the case today. In addition to a sentence of life without parole, New Jersey now has an 85% parole ineligibility statute, which essentially means anyone sentenced to a life sentence for murder must serve 63 1/2 years before parole eligibility. This represents a significant change in the sentencing laws in comparison to the 1983 period.

As dramatic as these sentencing changes have been in New Jersey, the State's experience with long-term incarceration or natural life incarceration is not new. That is because some inmates were older when sentenced to a maximum 30 year sentence before parole eligibility

or others were sentenced to multiple consecutive sentences. Inmates in these cases were effectively incarcerated for the rest of their natural lives. They will not leave confinement until the occasion of their death.

Today there are approximately a thousand or more persons serving some form of life sentence, or the practical equivalent, in the New Jersey State Prison at Trenton, which is the State's most secure maximum security institution. Most of these inmates, while technically eligible for parole, will in a practical context never be released because of age or consecutive sentences. The bottom line is clear; no one sentenced to life without parole can be paroled!

The New Jersey experience, similar to the national experience in dealing with inmates serving actual or practical forms of natural life sentences, has been that these inmates pose no significant additional

challenges nor require any special resources beyond that of any other inmate classified for maximum security level confinement. There is a substantial body of empirical research to support this notion (see Johnson and Dorbrznska, 2005).

Anyone who might suggest to this Committee that life in a maximum security prison is a lark and that inmates pass the time of day in sun-drenched yard areas and immerse themselves in creative art or literary interests is simply misinformed. By its very nature the maximum security prison environment is a cold, dangerous and frightening place.

As difficult and overbearing as life in a maximum security prison is for the younger and middle-aged inmate, I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum security prison. From my own experience I know that inmates facing life without

parole or the practical equivalent generally lose meaningful visiting and other contact with family and friends within the first 5 to 10 years of confinement.

Maximum security prisons must always be viewed as potentially dangerous and violent environments. Confinement in a maximum security prison fundamentally differs from confinement in medium or minimum security facilities in that the maximum security prison's perimeter is always fortified with deadly force.

Within the maximum security environment the majority of inmates accede to the tight security controls, limited movement, long hours of cell confinement, and the uncompromising rules, regulations and repetitive schedule. Generally, they accept the daily routine of imprisonment in order to make what they view as the best of a bad situation.

For those inmates who choose to act in a violent or

disruptive manner or incite others to do so, the maximum security environment has specially structured living units to effectively control and manage these recalcitrant individuals.

At the New Jersey State Prison at Trenton, these specially structured living units include the Disciplinary and Administrative Segregation Units and the Management Control Unit. These are tested and proven classification options for disruptive offenders.

Within the last year I had the opportunity to tour the New Jersey State Prison at Trenton, including the close custody units, and can report to you that the facility is an extremely well-managed and a very secure operation. Through a combination of physical plant improvements and technology, I believe that the New Jersey State Prison at Trenton is more controlled and secure than at any point in its long and distinguished history.

In conclusion, I ask that you carefully review and consider what I have had to say about both the general realities of life in a maximum security prison and the specific realities of growing old and eventually dying in secure confinement. Upon such reflection, I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution.

I trust my observations have been of value to this distinguished Committee, and I welcome an opportunity to respond to your specific questions.

MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE. IT IS AN HONOR TO APPEAR BEFORE YOU TODAY, AND A PLEASURE IN SEEING SOME OLD FRIENDS FOR WHOM I SERVED IN MY 11 YEARS WITH THE LEGISLATURE.

YOU HAVE HEARD MUCH TESTIMONY ON THIS ISSUE SO I WILL NOT TAKE YOUR VALUABLE TIME SINCE YOU ARE AWARE OF THE MANY FACTORS BUT I SIMPLY WISH TO MAKE FOUR QUICK POINTS FOR YOUR CONSIDERATION OF THIS LEGISLATION.

FIRST, WHEN YOU CONSIDER ALL OF THE FACTORS IN OUR CURRENT POLICY OF A DEATH PENALTY, ONE WHO IS TRULY OBJECTIVE MUST COME TO THE CONCLUSION THAT THERE IS "NO RATIONAL BASIS FOR THE DEATH PENALTY" AS A MATTER OF PUBLIC POLICY.

HAVING STUDIED AND BEEN A PRACTITIONER OF PUBLIC POLICY FOR MANY YEARS WHERE ONE CAN SEE SOME RATIONALITY IN ALMOST ANY ISSUE, IT IS DIFFICULT IF NOT IMPOSSIBLE TO SEE ANY RATIONAL BASIS IN THE CONTINUANCE OF THIS POLICY, BEGINNING WITH MY STUDY OF THE COSTS SOME 11 YEARS AGO.

THIS IS PARTICULARLY TRUE WHEN THERE IS AN EFFECTIVE ALTERNATIVE OF LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF PAROLE. FOR THOSE WHO SAY, THAT THERE WOULD BE SOME WAY TO GET OUT OF PRISON EVEN WITH THAT SENTENCE SHOULD LOOK TO CALIFORNIA WHO, IN OVER 25 YEARS, NO ONE WHO HAS BEEN SENTENCED UNDER THAT LAW HAS EVER BEEN PAROLED.

SECONDLY. ALTHOUGH THERE IS NO RATIONAL BASIS, THERE IS AN EMOTIONAL BASIS. FOR ME TO SIT HERE, AND NOT RECOGNIZE THE GRIEF OF FAMILIES WHO HAVE LOST A LOVED ONE SHOWS NEITHER A REALITY TO THEIR PAIN NOR A SENSE OF COMPASSION ON MY PART.

HOWEVER, IN READINGS AND FIRST HAND KNOWLEDGE OF FAMILY MEMBERS WHO HAVE LOST A LOVED ONE, MANY HAVE SAID THEY DO NOT WISH TO DISHONOR THEIR LOVED ONE BY KILLING ANOTHER PERSON IN THE NAME OF THEIR LOST LOVED ONE.

FURTHER, I HAVE BEEN TOLD BY FAMILY MEMBERS THAT ONCE THAT FINAL DETERMINATION IS MADE THAT THE PERSON WILL SPEND THE REST OF THEIR LIFE IN PRISON, THEY ARE FREE FROM CONTINUING TO ATTEND HEARINGS AND ARE ABLE TO MOVE ON TO MEETING THE NEEDS OF THEIR FAMILY AND ON TO THE REST OF THEIR LIVES KNOWING THAT THERE NEVER WILL BE CLOSURE IN THEIR PROFOUND LOSS. I HOPE MY WORDS WOULD ALLOW THEM TO SEE MY LOVE FOR EACH OF THEM AND COMPASSION FOR THEIR LOSS.

THIRDLY, WE ARE ALL AWARE OF THE VIOLENCE IN OUR SOCIETY, AND MOST AGREE THAT KILLING ANOTHER HUMAN BEING IS ANOTHER FORM OF VIOLENCE FOR WE KNOW THAT VIOLENCE BEGETS VIOLENCE BEGETTING MORE VIOLENCE. THERE IS THE IDEA THAT VIOLENCE CAN BRING REDEMPTION OR PEACE. I READ OF A PERSON ON DEATH ROW IN ANOTHER STATE WHO SAID HE WAS A LIVING TESTIMONY AGAINST THAT MYTH OF

REDEMPTIVE VIOLENCE. THIS MAN SAID THAT THE FAMILY OF HIS VICTIM ARGUED THAT HE SHOULD NOT BE EXECUTED FOR WHAT HE DID AND THAT HE WAS NOT BEYOND REDEMPTION, AND AS A RESULT HE DID NOT RECEIVE THE DEATH PENALTY, AND HAD A SPIRITUAL REDEMPTION.

AN INTERESTING STATISTIC IS THAT DURING THE LAST 20 YEARS, THE HOMICIDE RATE IN STATES WITH THE DEATH PENALTY HAS BEEN A FULL 101 PERCENT HIGHER THAN IN STATES WITHOUT THE DEATH PENALTY. IN CHICAGO, FOR INSTANCE, THAT CITY SAW ITS LOWEST MURDER RATE SINCE 1965 EVEN THOUGH ILLINOIS HAD COMMUTED ALL OF ITS DEATH SENTENCES TO LIFE WITHOUT PAROLE.

FOURTH, AND FINALLY, I HAVE HAD PERSONAL EXPERIENCES THROUGH OUR KAIROS PRISON MINISTRY OF SOME WHO HAVE BEEN ALLOWED TO LIVE AND HAVE HAD A SPIRITUAL REGENERATION. ALTHOUGH THEY WILL NEVER SEE THE LIGHT OF DAY, OUTSIDE THE PRISON, THEY ARE HELPING AND MENTORING YOUNG MEN WHO WILL BE PAROLED TO GO STRAIGHT. WE HAVE MANY SUCH CASES AND KARLA FAYE TUCKER OF TEXAS WHO WAS MAKING TAPES TO SEND TO SCHOOLS AND GROUPS ON THE OUTSIDE HELPING TO TURN LIVES AROUND BEFORE HER OWN EXECUTION.

I SPENT AN AFTERNOON ON OUR OWN DEATH ROW, AND SPOKE TO INDIVIDUALS WHO ARE WRITING LETTERS TO THE OUTSIDE IN THE HOPES THAT A MEMBER OF THEIR FAMILY WILL NOT FOLLOW IN THEIR FOOTSTEPS. BY EXECUTING SUCH INDIVIDUALS, WE ARE LOSING A VALUABLE RESOURCE FOR CHANGE TO THIS CYCLE OF

VIOLENCE.

IN CONCLUSION, I BELIEVE YOU HAVE THE UNIQUE OPPORTUNITY OF BRINGING ABOUT A SIGNIFICANT "SEA CHANGE" IN NEW JERSEY WHICH CAN HAVE A RIPPLE EFFECT THROUGHOUT THE COUNTRY BY RECOMMENDING THAT THE PRESENT LAW BE CHANGED TO LIFE IMPRISONMENT WITHOUT PAROL.

THANK YOU FOR YOUR TIME TODAY.

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

(A Working Draft for The Senate Judiciary Committee)

Prof. Robert Blecker
New York Law School
May 10, 2007

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

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

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

Here, instead, we take a road the Commission did not explore at all, and apparently did not even seriously consider: Neither embrace New Jersey's death penalty statute as is, nor reject it wholesale. The Commission could have used their mandate to *refine* the present statute more nearly to ensure that the worst of the worst, and only the worst of the worst receive society's ultimate sanction – whether that sanction is life, or death. By simply substituting life without parole for death, however, the Commission perpetuates the very arbitrariness its own report so vehemently criticizes.

The majority of witnesses and all but one Commissioner would simply abolish the death penalty, and substitute life without parole. The few witnesses who spoke in favor of the death penalty and lone dissenting Commissioner seemed inclined to leave the present statute intact. [fn3]] Some abolitionists probably shied away from suggesting revisions or further restrictions, expecting complete victory through outright repeal or fearing that by removing the worst parts they might solidify the rest. Death penalty proponents probably shied away from proposing revisions lest they seem to condemn the present statute itself.

At the next to last hearing, however, one witness repeatedly called the Commission's attention to a "most badly neglected" option, thus far "substantially ignored." [fn4] "You have a rare opportunity to rethink, revise, refine New Jersey's statute," the witness exhorted Commissioners.

For the sake of retributive justice – to make more certain that the worst crimes received the harshest punishments – the Commission should have proposed an amended, morally refined statute. Hopefully the Legislature will reject their facile recommendation simply to abolish the death penalty and substitute life without parole. Perhaps the People of New Jersey and other states who look to this experience for insight and wisdom will, with their own statutes as a starting point, embark on the real journey of reform.

A MORALLY REFINED DEATH PENALTY STATUTE

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

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

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

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

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

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

B. Modify the Aggravating Circumstances.

1. Eliminate the Felony Murder Aggravator

First and foremost, New Jersey and all other states with a death penalty should abolish capital felony murder. Felony murder – the most common death penalty situation – covers many different types of killers and killings. Across the United States, robbery (and burglary) have put more killers on death rows than all other aggravating

circumstances. Instinctively and morally, most of us feel what the present death penalty statute reflects -- that killing for a pecuniary motive, whether as a professional assassin, or a spouse who hires him in order to collect a life insurance policy, commits an aggravated murder.

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. Killing an innocent witness to escape detection does aggravate murder -- but again, not because it accompanies robbery.

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

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

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

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

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

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

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

2. Refine the escape aggravator. Naturally, we love our own freedom. Knowingly or intentionally killing another person to "escape detection, apprehension, trial, punishment or confinement" should be punished as murder. This motive alone, however, does not aggravate murder. Many jurisdictions also make death-eligible a close

cousin -- "killing a witness". But that too, is too broad. At first blush it may seem morally supportable to most severely punish those robbers who intentionally kill their victims to eliminate them as witnesses. The special sanction operates either to deter or condemn the calculating killer who marginally increases his odds of escape at the price of an innocent citizen's life.

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

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

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

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

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

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

5. Eliminate the "narcotics trafficking network" aggravator. Murders of fellow drug dealers are murders, but certainly not *especially* worthy of the ultimate sanction. Participants in that deadly game understand the rules and still choose to involve themselves. If anything, internal drug gang killings are, all other things equal, less bad than many other intentional killings.

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

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

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

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

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

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

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

The statute here, might well give specific examples, such as “**killing an especially vulnerable victim**” – singling out children, the elderly and handicapped -- whose intentional killing especially deserves to be condemned. Are the lives of some victims more valuable than the rest? No. Perhaps we imagine greater pain attaching as a helpless victim experiences his own helplessness. Ultimately, however, we advocates of a generic “especially vulnerable victim” aggravator, support this distinction not so much because

the victims' lives are more valuable, but because their deaths reveal the cowardly and despicable nature of their killers who prey on the vulnerable.

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

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

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

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

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

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

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

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 unclear weight), the present statute requires them to decide whether the aggravating circumstance(s) “outweigh(s) beyond a reasonable doubt any one or more mitigating factors.”

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

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

D. Add lingering doubt and moral certainty. The statute must help insure against factual and moral mistake. Only the worst of the worst of the worst should be condemned to die. Therefore, after jurors are instructed that they *may* vote for death only if they are convinced “beyond a reasonable doubt that the aggravators substantially outweigh the mitigators,” they should be further instructed: “Although you may be convinced beyond a reasonable doubt that the defendant committed capital murder, if you have even a lingering doubt, *a residual doubt* of the defendant’s guilt, you should reject the death penalty.”

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

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

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

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

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

III. Make the process more victim centered

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

The Commission achieved consensus: Spare aggravated murderers an empty threat of death in order to spare victims families the real agony of disappointment, reversals, dashed hopes, while repeatedly reliving their horrible loss during successive phases of a seemingly endless and frustrating (re)trial and appellate process.

Spare the killer to spare the victim.

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

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

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

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

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

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

Death penalty proponents typically dismiss these living wills. And thus far they are inadmissible. But if we truly become more victim-centered, they should be admitted. The statute should be amended: “Once victim character evidence is raised, either side may present evidence that the victim either supported or opposed the death penalty with such qualifications as the victim made apparent during his/her life. The judge shall examine such evidence from either side in camera, and shall permit it only if it clearly and convincingly shows that the victim at some moment would have supported or opposed the death penalty under the circumstances of this particular killing. The jury should be further instructed that they are not bound to effectuate the victim’s living will, but should give such weight to it as they think right.”

C. The Victim at the execution: The execution itself should be more victim-centered. After the condemned makes his final statement (or perhaps immediately before), the family should have the option of displaying a brief audio-visual record of the victim at play, in the embrace of family or friends, including optionally crime scene

photos, the victim's funeral, burial and gravesite. We should drive it home so that all who witness this killing recall why we execute this helpless human being, as we do it.

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

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

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

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

IV. Make the Punishment more Real and Transparent

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

B. Reject lethal injection. Present controversy swirls around lethal injection as the method of execution. Does the paralytic agent mask the pain experienced by the condemned? Should doctors be compelled/prohibited from participating? Of course abolitionists oppose *any* method of execution. And the doctor controversy has won them a stay in more than one state. Those who support lethal injection can reply that administered properly, it's painless. Besides, the present doctor-participation controversy is make weight. Lethal injection as punishment is not a medical procedure. Doctors may be soldiers and police officers without violating their Hippocratic oath. In the course of their duties they may kill. So too they may be executioners.

But this counter argument has not taken hold, for good reason. Unless botched, lethal injection resembles, in fact appears, feels, and seems medical. That is its fundamental flaw. The Condemned dies in a gurney, wrapped in white sheets with an IV in his veins, surrounded by his closest kin. The execution chamber should not resemble the final scene at a hospice. How we kill those we condemn should not resemble how we kill those we love.

The legislature should reject lethal injection in favor of a method that is clearly, distinctly punitive.

C. Reject Mandatory Life Without Parole

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

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

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

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

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

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

d. Special Punishment for Specially Heinous Murder

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

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

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

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

CONCLUSION

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

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

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

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

The People’s representatives have an opportunity to pick up where the Commission left off. The legislature can and should have a sustained debate. It would be a mistake simply to adopt the Commission’s proposals, assuming that the public hearings and Commission report adequately considered the alternatives. If New Jersey becomes the first state in the modern era legislatively to abolish the death penalty, surely it should do so only after fully considering alternatives other than standing pat, or abolishing the death penalty entirely. Consider “the third alternative”, as the Star Ledger called it: morally refining their statute to more nearly do justice, so that all but only those who deserve it shall die.

ENDNOTES

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Fn 1 Bob Braun *Star-Ledger* 010807

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

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

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

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

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

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

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

BUT DID THEY LISTEN?
The New Jersey Death Penalty Commission's Exercise In
Abolitionism: A Detailed Reply

(A Working Draft for New Jersey Legislators)

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May 9, 2007

But Did They Listen? A Summary

Created by the State Legislature to consider all aspects of the death penalty as administered in New Jersey and invited to propose appropriate legislation, the Death Penalty Commission held hearings, accepted written submissions, and issued its final report nearly unanimously urging the Legislature to abolish the death penalty and substitute life without parole in a maximum security facility.

Apparently open to the question, unbiased in its approach, and thorough in its deliberation, a careful comparison of witness testimony and an in-depth analysis of the Commission's final report reveals consistent anti-retributive bias, distortion, and worst of all, inattention to basic well established perspectives framing the great debate.

A careful review of the Commission's work product should leave an impartial observer with the nagging feeling that however a thoughtful citizen ultimately comes out on the death penalty, this Commission failed in its legislative mission and deprived the People and their representatives an adequate basis for a well-informed decision.

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INTRODUCTION

On January 2, 2007, the New Jersey Death Penalty Study Commission, with one dissenting vote, declared themselves “pleased” to submit their report and recommendations to the Governor. The Commission had reached consensus: The legislature should simply abolish the death penalty and substitute life without parole. Although they personally supported capital punishment, some Commissioners voted to abolish it, despairing that the state’s “liberal” Supreme Court would ever allow an execution to take place. Why dangle false hope before irate and grieving victims’ families?

The Commission majority, however, probably concluded as they began – with an abiding conviction that the death penalty violated human dignity.

Legislation establishing the Commission had directed them to “study all aspects of the death penalty” – a literally impossible task. During five public hearings, the Commission orchestrated a parade of witnesses – some invited legal experts or religious leaders, others family members of the slain – to expose weaknesses and problems with the (non)administration of the death penalty and to rebut an occasional advocate who did defend the punishment in oral and written statement.

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

But had they? We who feel certain that justice demands the death of a mass murdering child rapist did not feel respectfully regarded. The Chair, Rev. 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. And the official transcript of the hearings does record our testimony, but, reviewing the Commission report and its recommendations, we can’t help but wonder: Although we spoke and wrote, did they listen?

Although locally and internationally hailed as comprehensive and complete, 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.

Under cover of the Commission’s recommendation and report, New Jersey may well become the first state in the modern era legislatively to abolish the death penalty. Whether or not elected representatives in other states follow the lead, they owe it to the People to balance the equities, and focus firmly on the most basic question which the Commission essentially avoided: Justice. This witness attempted without much effect through personal appearance and written submission to inform the Commission. A commitment to justice and an informed debate, therefore, now compels this counter-report.

THE COMMISSION'S FINDINGS

Responding to seven specific questions from the legislature, the Commission based its final recommendation to abolish the death penalty on seven specific findings.

Let's take them one by one.

FINDING (1) There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

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

Rehabilitation

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

The 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 their purposes, and ours here, the death penalty can not be justified as rehabilitation.

Incapacitation

If we execute a murderer, s/he'll never kill again. If instead we imprison him or her for life without parole, s/he may kill fellow prisoners, or staff. Still, we cannot justify taking prisoners' lives solely because we cannot safely confine them. 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. Although "deterrence" was the sole "penological intent" specifically listed by the New Jersey state legislature, 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.

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” and “not empirically supportable”. (Gibbons) “It’s clear that the death penalty has never been a deterrent.” (Lesniak) 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.” (Russo)

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 (1948-1953) observed in its lengthy and detailed report, “We can number its failures, but we cannot number its successes.” We can never know how many people who would have otherwise committed murder stopped themselves because of the threat of punishment.

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.) More sophisticated abolitionists, then, make the more modest claim that the death penalty is no more powerful as a deterrent 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.

During their hearings, the Commission did focus on deterrence. 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. Those studies themselves are controversial and subject to challenge. The Commission heard from Columbia Law School Professor Jeffrey Fagan, a leading abolitionist expert on deterrence. The final report extensively quotes and cites his testimony, which skillfully critiques and qualifies the studies, diminishing their persuasive power:

“According to Professor Jeffrey Fagan . . . many of these studies use incomplete data or are otherwise flawed. 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.”

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

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, they must have believed that the remote threat of death could restrain passionate homicidal impulses of rejected lovers where court-issued restraining orders failed. Perhaps their “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.

Many undeterrable passion killings are manslaughter and 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 killing is worse 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.

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. Thus, as the 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.

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 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". Thus the Commission also noted that, "as a practical matter, the length of time convicted murderers . . . serve on death row argues against the usefulness as a deterrent." In the tradition of Bentham, the Commission saw potential killers as either passionate and unrestrainable, or rational and consciously calculating.

Punishment, however, may restrain human beings subconsciously. As the Royal Commission noted, "the deterrent force of capital punishment operates not only by affecting the 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."

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. While the Commission expounded on this highly speculative subconscious brutalization hypothesis, it completely ignored subconscious forces *supporting* deterrence cited by the British Commission which this witness personally brought to their attention.

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." 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. 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. But, again, conveniently 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. (See "A Road Not Considered") This witness urged the Commission orally and in writing to do this, providing a blueprint for a morally refined death penalty regime. The *Newark Star Ledger* headlined and highlighted my testimony -- "Prof wants execution saved for 'the worst of the worst'." Bent on abolitionism, the Commission completely ignored the plea. Instead, sandwiched between sustained scholarly attacks on deterrence from Prof. Fagan and Director Dieter, the Commission did quote Kent Scheidegger, a leading death penalty supporter and legal director of the Criminal Justice Legal Foundation. The death penalty "does have a deterrent effect and does save innocent lives if it is actually enforced," Scheidegger observed. 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."

The Commission report did not cite Scheidegger's specific examples of blatant Judicial abolitionism cloaked as analysis. Nor did it wonder aloud how the first 28 death sentences could have been so defective that the New Jersey Supreme Court reversed each of them. This abolitionist majority would never criticize the Court for subverting the will of the people. It was enough, when it came to deterrence, to use Scheidegger to buttress the claim that, however studies may show a more effective deterrent effect of the death penalty regularly administered in Texas, in New Jersey the numbers were too scant, and condemnations too rare to conclude anything much on behalf of deterrence.

So, although the latest, most recent, most sophisticated studies *do* suggest that on balance, a death penalty regularly administered, more effectively deters murder than 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 Prof. Lillquist, an agnostic on the death penalty.

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

"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 man has will he give for his life'. In any secondary punishment, however terrible, there is hope: But death is death."

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 drug 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.”

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 has no death penalty. “What did you do?” And 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.”

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 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 they could have tried to emulate. He drew their attention to Fitzjames Stephen’s observations on human nature, all of which they conveniently avoided mentioning in their final report, perhaps because they are so difficult to rebut.

Instead, moved by Prof. 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”.

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

Again, we can number the failures of deterrence, but never count its successes. 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*.” (emph. added)

Should logic, human nature and commonsense only 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?

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

Retribution

Deterrence alone, however, ought never justify death as punishment.

Retribution -- literally "pay back" -- persists as punishment's essential justification, *and* limit. We retributivists refuse to condemn and execute a helpless person simply to terrify others. Retributivists would only execute a person because s/he deserves to die. However repulsive to a majority of the Commission, the primary justification for the death penalty, retribution, remains the primary legitimate "penological intent".

Retribution could have split the Commission between abolitionists who detested the death penalty and those like Ms. Garcia who wanted it badly but in frustration felt forced to give up and give in to the abolitionists. If the New Jersey Supreme Court would never allow an execution, 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, they barely acknowledged the retributive lens and never employed it, or rebutted those of us who would. But they cannot avoid retribution and still fulfill their legislated mandate. They cannot avoid retribution and serve the public good.

Retribution is really implicated directly or indirectly (metaphorically in the case of "costs") in all seven questions the legislature put to them. 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* .

(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. (emph. added)

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, 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, the moral sufficiency of life without parole -- they refused to allow retribution's rightful role. Without retribution acting as a counterweight, they could assume their conclusions, avoid the hard work, and simply call for abolition.

Commission Witnesses Disparage Retribution

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” (Carluccio). “Killing because someone else has killed”, was not “consistent with the mores of a civilized society”. (DelTufo) “We cannot teach respect for life by taking life.” (Bishop Smith) But this well worn argument -- that we debase life by taking life -- if it proves anything, proves too much. “When we imprison kidnapers, do we thereby debase liberty?” this witness asked in writing and oral testimony before the Commission. When we impose fines on thieves, do we debase property? Punishment is at base 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.)

The basic retributive measure -- like for like -- “as he has done, so shall it be done to him” (*Leviticus 24*); “giving a person a taste of her own medicine”; “fighting fire with fire” -- primally satisfies.

Reciprocity is not hypocrisy.

During the hearings, critics such as Judge John Gibbons also disparaged retribution as “atavistic” and a “synonym” for “vengeance.” Apparently our earlier public debate, sponsored by the New Jersey League of Women Voters, failed to enlighten the former Chief Judge of the 3rd Circuit and ardent abolitionist, as he once again equated retribution with vengeance or revenge.

“Those who insist on equating retribution with revenge” this witness countered in his twenty minutes before the Commission, must “recognize [deterrence] for what that is. Because if retribution is pure revenge, then deterrence is pure terrorism As Hobbes, the first and greatest modern utilitarian, declared disparaging retribution and proposing deterrence in its stead, ‘The ayme of punishment is not revenge but terror.’ . . . Now, we’ve come to appreciate that deterrence is not pure terror. You should also appreciate that retribution is not pure revenge.”

“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.

“Retribution provides the basis for limiting punishment as well as for affirming it,” he insisted in his oral testimony before the Commission. “We 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.”

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.”

But this retributivist never actually said or implied that ‘retribution is proportional to murder’. The Commission’s restatement flatly distorts my position repeatedly expressed: Murder *only rarely* calls for the death penalty. As Pennsylvania was the first

state explicitly to recognize in 1794 by splitting off 1st degree murder from other murder, and as the U.S. Supreme Court has rightfully held since, the death penalty may not be used for the vast majority of murders. Death is a wildly disproportionate response for felony murder where there is neither an intent to kill nor reckless disregard for human life.

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

Let's get the record straight. Revenge *may be* a potentially unlimited disproportionate 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 they did specifically arrive at the question of proportionality, their report somehow virtually ignored retribution.

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

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

According to 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, but "his death 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. Following Kant's lead, again, contemporary retributivists reject general deterrence as an insufficient justification for punishment -- for then 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." (Carluccio). "An emotional response not based on reason." 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. 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: “Every family devastated by the murder of a loved one ha[s] 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.” (Lesniak)

Emotive retributivists’ urge to punish, however, stems directly from a projected empathy with the victim’s suffering. “Our heart adopts and beats time to his grief,” declared Adam Smith in *A Theory of Moral Sentiments*, (1759). “So is it likewise animated with that spirit . . . to drive away and destroy the cause of it.” Retributive death penalty supporters, haunted by the victim’s suffering, cannot forget or forgive: “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,” Adam Smith explained in the first great work of modern retributive psychology. “His blood . . . calls aloud”.

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 they feel for a particular person, a more enlarged compassion which they feel for mankind.”

This witness pointed all this out to the Commission in writing and oral testimony. The Commission report, however completely ignored emotive retributivism, instead drawing summarily upon the testimony of Prof. Lillquist, a professed agnostic on the death penalty: “The retributivist viewpoint is in accordance with the philosophy of Immanuel Kant that, for the most heinous forms of wrongdoing, the penalty of death is morally justified or perhaps even required.”

Treating retributivism as a monolith – as duty stripped of emotion -- allowed the Commission to expropriate emotion when useful. They could express their understanding and sympathy for families of victims who had allowed their anger at those who killed their loved ones to get the best of them. And they could apparently show 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.

Before issuing its first finding -- that the death penalty served no penological intent -- the Commission declared itself split on whether retribution itself was to count at all. Up front before they buried it, the Commission’s final report treated retribution – poison to some of them – respectfully if gingerly, declining to repeat witnesses’ silly, specious claims of retributive hypocrisy, or the equation of retribution with vengeance. Instead here, and only in this part, did the report quote this witness. “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.’”

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” -- the Commission effectively shifted the burden of persuasion onto those who would maintain the present statute rather than those who would change the law.

The burden should be on those who insist that the death penalty always deserves retributive ends. If they had really faced the retributive question, and placed the burden where it should lie, abolitionists on the Commission would have had to establish that life without parole *and not death* gives the most heinous killers their just deserts. But rejecting retribution as repulsive and the death penalty was immoral, the Commission majority simply begged the question and shifted the burden.

Suppose the obvious, that retributively death is not 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 Committee should have reached these questions in their later findings. They never did.

Instead they cleverly phrased their first finding to place the burden of persuasion on those who insist that justice sometimes demands death. So we have the burden, yet they exclude most of our case.

“No compelling evidence”. What a strange burden of persuasion they impose upon us. We would shoulder it – “compelling evidence” – evidence which compels us to demand the death penalty: ‘The voice of our brother’s blood’ (the Bible); ‘like members of the same body, we feel and resent each other’s injuries’ (Solon); ‘it is right to hate certain criminals’ (Fitzjames Stephen.)

Ironic, if not hypocritical for the Commission to impose this “compelling” emotional burden upon retributive death penalty advocates, while restricting retribution, if at all, to the Kantian ‘rational.’

How would the Commission members who did not even so much as acknowledge emotive retributivism and distinguish it from abstract duty, themselves 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 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 separate from future costs and benefits.

If the Commissioners do not feel the intuitive urge to punish appropriately, if for them the past does not count as a covenant to be kept, if many of them simply reject from the outset retribution as “a legitimate penological intent” – if intuitive emotion was to weigh as nothing, how could they possibly ever feel “compelled” by it?

Instead, in their first finding, the Commission majority, completely ignored centuries of traditional retributivism. They ignored the current resurgence of retributive thought in the academy and among the people. Perhaps least defensible of all, they 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 more or less severe than that *deserved* by an offender in light of the gravity of the offense, the harm to the crime victim, and the *blameworthiness* of the offender.” (emph. added) Legislatures are to “consult their own moral judgment” and apply their own “intuitions of desert” to design punishments within “the retributive range.”

Instead of discussing whether retribution subsumed all other justifications, the Commission briefly acknowledged themselves “divided about whether retribution is an appropriate penological intent” *at all!*

Thus by its first finding, this anti-retributivist New Jersey Death Penalty Commission majority cleverly employed an impossibly burdensome standard – ‘compelling evidence that death rationally serves a legitimate penological intent’ – retribution ultimately excluded, emotive retribution completely ignored.

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.

Financial costs of the death penalty

“A precise conclusion cannot be reached,” the Commission Report stated up front. Yet, as the report noted, the death penalty does incur enhanced costs from investigation to appeal. The Public Defender’s office estimated that abolishing capital punishment would save almost \$1.5 million per year. The Department of Corrections estimated that eliminating the death penalty would save the state slightly more than \$1 million per death row prisoner over each inmate’s lifetime. The Administrative Office of the Courts (AOC) estimated the death penalty cost about \$100,000 for each proportionality review. 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).”

The vast majority of criminal cases result in plea bargains which save the people time, effort, and costs of trial and appeal, as well as protecting against the possibility that an unpredictable and errant jury will ignore the evidence and decide based upon sympathy for the accused. In return for pleading guilty, defendants 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 or fear that he might be killed, once released thirty years later. Overwhelmingly, however, first degree murderers plead guilty and accept life without parole only to avoid the death penalty. Each guilty plea saves the people hundreds of thousands of dollars.

The abolitionist Defense bar could hardly be counted upon to subtract money saved by guilty pleas extracted under fear of death. The Attorney General did note this huge potential cost saving, 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. Abolish the death penalty and predictably there will be more murder trials and many fewer pleas of guilt with life sentences.”

Nobody attached a hard number here like \$93 thousand, or \$1.2 million. Instead the Commission cleverly further softened this savings: “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.”

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 provides 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? putting more time into other cases? 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 unmeasurable “cost savings from eliminating the death penalty.” 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.”

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.

“That has never been subtracted by any study” this witness informed the Commission orally and in writing. Only Kansas, which the Commission mentions without investigation, acknowledged this failure of its own cost study, albeit in a footnote. “Once included in the cost assessed, 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 informed the Commission. “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.”

“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. Repeat it enough and it seems to gain weight.

But the Commission entirely ignored costs of *not doing justice* -- a retributive question cloaked as a financial one. Can we blame Commissioners for ignoring the ‘cost’ of not doing justice who 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 this straightforward 2nd “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.”

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.” 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 to 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.*” (emph. added)

So, non-quantifiable emotional costs *do* count. How about the cost of not doing justice? How about the cost to parents who realize their child’s rapist murderer now plays basketball, or watches 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 in bed inside New Jersey State Prison, lost in a first run movie or good book?

In some cases, abolishing the death penalty -- retributively, the only just, proportional punishment -- abolishes justice. Even the minority of Commissioners such as Ms. 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 would eliminate any hope of doing justice, because of the current abolitionist mood on the state high court.

Avoiding emotive retributivism, the Commission report completely ignores all emotional costs of not doing justice, of contemplating that because you tortured and killed my child, you can spend your time playing basketball and watching TV.

FINDING (3): There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

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’s ban cruel and unusual punishment is “informed by the evolving standards of decency of a maturing society.”

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.

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 we strongly support or would abolish the death penalty, in common we absolutists reject today’s public opinion as the arbiter of death’s decency or indecency. *Absolutist abolitionists* feel certain that society violates human dignity if under cover of law, we methodically kill fellow human beings who pose no grave threat to us as we slay him. *Absolutist proponents*, on the other hand, 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. Obligated 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. Death does not become the decent punishment because we agree. We mostly agree because sometimes death alone does justice.

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

Absolutist opponents, 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.” (Frank). 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 concrete alternative punishment, at least in New Jersey, more people prefer life without parole to death.

But carefully consider the question asked: “*For cases of murder*, do you prefer the death penalty or do you prefer life in prison *without the chance* of parole?” Note the fallacy of that standard question? How it doubly distorts. First, “for cases of murder” or Gallup’s “which is the better penalty for murder . . .?”

Discriminating, informed, retributivist advocates would reserve the death penalty only for *aggravated* murder – the now standard “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 don’t deserve to die? How should we answer this question? Do we “prefer” death or life without parole “*for cases of murder*”?

We 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?

Secondly, consider the last part of the question: “*without the chance of parole*” or Gallup’s “with absolutely no possibility of parole.” Abolitionists delight in emphasizing that we who sometimes favor death cannot be “absolutely certain” an innocent person will never be executed – and thus 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 LWOP contains “no chance” of parole.

This standard poll question further distorts, because most citizens will equate “absolutely no possibility of parole” with ‘no possibility of release.’ Few people will 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 has no 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.”

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

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 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: “Do you realize that when the more specific questions are asked, 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?” (DeFazio)

“Yes,” Murray replied. Commissioner DeFazio followed up: “Underlying all of this is the theory that the punishment should fit the specific crime.”

“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.” (Moczula) The pollster conceded. “That’s correct. None of the polls . . . in New Jersey had asked that question.” 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?’”

“No, we did not ask that question.” (Murray).

Ironic, then, how the same pollsters who claimed that theoretical or abstract support for the death penalty substantially diminishes when concrete alternatives of life without parole are presented – make certain to keep the crime itself abstract, and also imply falsely that the alternative of life without parole is certain and most severe.

As we’ll see later, in its final hearing, the Commission orchestrated 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.

In the end, the Commission’s 3rd finding avoided deep questions of whether more recent public opinion becomes thereby more mature. They ignored serious flaws in polling regimes. Instead, they obscured concrete details of both crime and punishment, determined to find death indecent, but unwilling to reveal their abolitionist absolutism lest they lose the votes of death penalty advocates on the Commission, sufficiently disgusted and worn out by long delays.

So, instead, the Commission majority artfully managed their conclusion, finding **“increasing evidence that the death penalty is inconsistent with evolving standards of decency.”**

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

The death penalty was used less these days, they 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. They 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.” 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 not deterrence.

Retributive support for the penalty shows people who urge it do so because they think it the only decent response.

The Commission report noted the “number of witnesses from the religious community” who “uniformly urged abolishing the death penalty.” Apparently counting religious beliefs of religious leaders in a secular society did not bother them. Nor did they refer to the embarrassing fact that while ordinary Americans generally affiliate religiously, they often split with the 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. They pointed to the high Court striking down the death penalty for a robbery getaway driver who did not kill or intend

anyone be killed (*Enmund*), a rapist of an adult woman who did not otherwise injure his victim (*Coker*), juveniles who killed (*Roper*), and mentally retarded murderers (*Atkins*).

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. Pointing to legislation nationwide, the Supreme Court Justices had buttressed their 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, 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 consensus against the death penalty in general has not yet emerged, there are suggestions of such a trend."

"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 of Illinois, George Ryan, convicted felon, emptying that state's death row. 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." Of course the Commission conveniently failed to mention that the Court struck down the statute by a single vote, 4-3, basing their decision not at all upon "evolving standards of decency" but solely on the unique and uncommonly stupid unrelated "jury deadlock" provision.

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." [emphasis added]

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 legislation introduced (sometimes by a single legislator) also weighed heavily toward abolition. Also a decline in death penalties meted out, which to them showed rejection, rather than prosecutors' and juries' greater care and moral discrimination, as well as moratoria such as their own, pausing to study the issue.

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

In Massachusetts, a long-standing abolitionist state, a unanimous jury of 12 recently decided death in a federal prosecution. Nor mention of the recent referendum in Wisconsin, another state without the penalty for more than a century, where 56% of the people voted to reinstate it. This official state referendum -- this great poll -- undermined their conclusion so they ignored it. Nor did they mention how many juries declined death, although all but one or two jurors voted for it.

As it turned out, had the Commission's report come out later, they 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 jury gave the death penalty to a cop killer in New York, the Georgia

Legislature extended the death penalty even where a lone juror held out, and overwhelming majorities in Britain and Poland wanted to restore the death penalty. A Wisconsin legislator introduced legislation to restore it, a most recent poll in New York showed substantial majority supporting its return, and in New Jersey itself, the Quinnipiac poll showed a substantial majority opposed the Commission's own recommendation to abolish the death penalty!

But without such evidence and ignoring what bad news they had, they simply imposed a featherweight burden on themselves and blithely announced their 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 eliminates the issue from this discussion. Bent on 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.

To avoid moral disproportionality, based on class and correlated with race, this witness urged them to modify the state statute, rejecting a drug-dealing aggravator, and abolish capital robbery felony murder. This witness urged them to eliminate the felony robbery and drug aggravators. 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 and robbers and business rivals. The robbery-murder and drug aggravator guarantee that killings committed by the innercity poor will disproportionately show up among the condemned.

But since the Commission was determined from the start to abolish the death penalty wholesale, why focus on any part, however immoral and racially skewed? Because for many years race has played no discernable role in the administration of the death penalty in New Jersey or most any state, and thus the Commission could not use the issue of race against the death penalty, they ignored this race effect in *defining* capital crimes, and moved past the issue quickly.

THE COMMISSION'S FINDINGS 5-7

From different angles, although rarely explicitly, the Commission's findings 5,6, and 7 return us to the original question – not public perception, not costs and benefits – but justice, really the primary penological justification for any punishment.

To do justice is to punish proportionately. 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 people deserve to die. This would have split Commissioners, dividing those who desperately desired that vicious killers die, if only the courts would allowed us to kill them, from the Commission majority who, not feeling retributive anger, either rejected retribution entirely, or thought retribution could be satisfied without death.

But their 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.

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

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.

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,” or in another translation, “according to the measure of his wickedness”. (emph. added) 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.”

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 of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights.” 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 -- 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. (*O'Neil*) 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 "cruel and unusual".

A hundred years later, in a leading case (*Harmelin*) 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. "There is no objective standard of gravity." These two Justices saw 'proportionality' as a pretext for other Justices to impose their own "subjective values".

But the other Justices disagreed. "Courts 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*. Michigan, with no death penalty, could not constitutionally reserve the same punishment for drug possession as it had for first degree murder.

"The Eighth Amendment does not require strict proportionality between crime and sentence," declared Justice Kennedy, joined by O'Connor and Souter, upholding *Harmelin*'s life sentence but occupying the current Constitutional middle ground. "Rather, it forbids only *extreme sentences that are 'grossly disproportionate'* to the crime." In the "rare case" where "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," a judge should compare "the sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions" before striking down a state legislature's proportionality measure. More recently in *Ewing* (2003), 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.

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

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 the Court struck down the death penalty (5-4) in *Furman v. Georgia*, (1972), inaugurating the modern era of death penalty jurisprudence, Justices Brennan and Marshall held capital punishment *per se* cruel and unconstitutional. For these and like-

minded absolutist opponents, death as punishment 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”, “like being struck by lightning” (Stewart), applied chaotically to a “capriciously selected, random handful” – in no proportion and thus cruel and unusual punishment. Justice Douglas separately condemned the death penalty as “disproportionately imposed and carried out on the poor, the Negro, and members of unpopular groups.” (emph. added)

After thirty-five states responded to *Furman* by re-enacting new death penalty statutes, the United States Supreme Court warned them again: “The punishment must not be grossly out of proportion to the severity of the crime.” (*Gregg*). However, “we cannot say the punishment of death is invariably disproportionate to the crime,” the Court concluded, restoring the death penalty to the United States. “This is an extreme sanction, suitable to the most extreme of crimes.”

Death was “indeed a disproportionate penalty for the crime of raping an adult woman,” Justice White declared for a plurality in *Coker*. 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,” Justice Burger, joined by Rehnquist conceded. Whether death is a proportionate response for serial child-rapists remains an open question, soon to be tested.

Five years after *Coker*, the Court in *Enmund*, 5-4, held 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. Dissenting, Justice O’Connor stated common ground for the Court: “The penalty imposed in a capital case [must] be proportional to the harm caused and the defendant’s blameworthiness.” A few years later, 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.

Harm and blameworthiness – essential components of proportionality -- require a particularized consideration of each crime and each criminal. Thus, as 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.

If New Jersey abolished the death penalty and substituted life without parole as the Commission recommends, 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 “eliminates the risk of disproportionality in capital sentencing.” 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 they did intend to focus on the real problem of disproportionality in punishment. How, then, can they 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 their call for abolition under cover of a “risk of disproportionately,” the Commission pointed out that many other aggravated murderers had not been sentenced to death. Under any likely death penalty regime, some will live who deserve to die, and some will die who deserve to linger in prison. This disproportionately does trouble us retributivist advocates. The current statute 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. Bent on eliminating the death penalty entirely, however, the Commission ignored any possible revision.

Refined definitions have their limit. Juries will spare individual murderers whose killings qualify for death when their 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”.

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

A bit cheeky, then, of Commissioners who can’t 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 for 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, and not 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: An Ultimately Troubling Question, Perhaps Insoluble.

That deep phenomenon – “moral luck.” Should New Jersey confine the death penalty to murder? Many years ago, a killer 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 determine a lesser punishment? The problem of moral luck – whether attempted mass murders, like Richard Reid, the shoe bomber, who come perilously close to blowing up a plane in flight, should be treated any more leniently than murder itself?

Both the Ancient Greeks and the Ancient Hebrews – twin sources of Western culture -- were torn by the problem, psychologically and jurisprudentially. 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. It may be impossible to demand state-wide consistency while respecting local autonomy. At best, we acknowledge the problem of moral luck, conduct proportionately 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.

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”. They 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 7th finding. 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.

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.

Of all disproportionality, the worst imaginable -- 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 excuse executing the innocent for other public benefits such as deterrence, retributivists can't abide it.

Commissioner Segars put the question directly: "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?"

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: 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? "Capital 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.

Even if a few innocents were executed, "on certain empirical assumptions, capital punishment may be morally required not for retributive reasons, but in order to prevent the taking of innocent lives." Considering the literature and logic of deterrence, these authors concluded that "At the very least, those who object to capital punishment, and 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." 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."

Even from a strictly non-retributive utilitarian perspective, then, if the overarching goal is to minimize the deaths of innocents, the death penalty may be the only way to go.

People make mistakes which change the course of human events. Few mistakes are fully reversible. Life itself; growing old? Not reversible. Life in prison? It can be terminated, but not reversed. Yet death *is* different, irreversibly different. As Barry Scheck pointed out, although DNA testing may help insure that only the guilty are condemned, it is "not a panacea". And "inevitably, we make mistakes," (Lillquist).

Still we cannot yet identify and demonstrate among the 1000 executed during the modern era, 1977-2007, any actually innocent person executed. 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 repeated in the hearings: "Innocent people being executed...throughout this country." (Lesniak).

Abolitionists on the Commission produced witnesses from other states with moving accounts of how they were "exonerated" while imprisoned, even sentenced to die. 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.

Witness Colon, whose testimony Commissioner Segars found "compelling", listed Benny Demps as one of "four right from the top" on Florida's death row who, like him, were "innocent" yet condemned. I witnessed the people of Florida put Benny Demps to death. His victims, the Puhlicks, were good, upstanding folk. Dubbed "the flower lady" in the neighborhood, she dreamed of retiring to Florida with her contractor

husband. They worked hard – he at a defense plant -- 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 an accomplice had just robbed a house nearby, taken the safe to this 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, then climb back in. Next the real-estate agent cousin. 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 the bullets meant for her husband who lived to corroborate what the forensic evidence proved with near absolute certainty.

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

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

Suppose Demps as he claimed, did not personally stab the victim inside the prison? Had Florida executed an "innocent" man? Hardly. It may be politically incorrect, 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 57 people he shot when he was 19. If Itchy had been executed for the murder for which he serves a life sentence but likely did not commit, 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." Whether or not he stabbed that fellow prisoner to death, it defiles the seriousness of innocence to claim, as the Commission witness did, 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.” By parity of 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 Commission report noted, not having executed *anybody* in 24 years, this state 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 sentenced to death in New Jersey.” (DeFazio). New Jersey’s death row houses no factually innocent condemned. Nor did New York’s before that Court of Appeals found a tiny part of its statute unconstitutional. Nor does anybody on Oregon’s death row even *claim* factual innocence. And when Ohio’s legislature offered free DNA testing to all its 201 death row inmates, how many took this option to clear them? Not one.

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, and most nearly everything about life 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, which the Commission finding euphemistically calls “a small number of persons guilty of murder”.

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 Q & A, 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?”

“No. The remote, remote possibility of executing an innocent person is the cost of doing *justice*.”

“The point is innocent,” Ms Segars pressed. “That’s the point.”

Your “children are innocent” this witnesses replied. “And yet you will expose them to a risk of death for your own convenience” by walking the double stroller down Broadway or some other street where there is a slightly greater chance that a truck will jump the curb and kill them. 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 expose convicted murderers we most despise to a tiny chance of unwarranted death.

Reverend Howard used his prerogative as Chair firmly to dismiss this comparison as “apples and oranges,” and shut down the discussion.

But these same folks, so eager to press us for some callous-sounding quantifiable risk we’re 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 their central concern, the Commission's 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."

Our concern goes well beyond those two or three dozen factual innocents who were, 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. [See "The Road Not Considered."] Instead, the cumulative effect of the Commission's parade of exonerated convicted criminals with tales of their "innocent" colleagues, may have given undecided Commissioners a misimpression that false condemnation of true innocents across the country is 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.

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."

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

"There is no such thing as closure. There can only be justice," Commissioner Garcia had declared on behalf of victims' families. "My concern is, if the death penalty were to be eliminated in the State of New Jersey, will these families truly receive justice?"

Abolitionist witnesses early in the hearings characterized life without parole as "very dire punishment" (DeTufo). "My mother was beaten, sodomized, tortured and finally strangled," an abolitionist survivor testified. (Place). "If the killer were given life without parole, and I mean a true life sentence, I would not be here."

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 with no parole? How do they experience life day to day, those who might otherwise deserve to die?

While this Commission hardly focused their attention on whether and when death was undeservedly severe and thus 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 Prof. 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*.”

Yes, assuming Society retains this punishment – Europe has rejected it – those serving life without parole will die *in* prison. But they will not 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 do this (substitute life in prison for death), they will really, actually leave that prison in a pine-box and in no other way?”

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

This witness, almost alone, begged the Commission to turn their 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, I implore you, do not make your decision in a vacuum. Understand the actual day-to-day experience of those who live out their lives in prison. Are they constantly being punished? Are they miserable?”

The New Jersey Department of Corrections official website declares their “mission”: “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.”

Punishment? It’s no part 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 abolitionist 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 T.V.?

Consistent with New Jersey’s Administrative Code, and what the Corrections public information officer assured me, my oral testimony suggested that well-behaved LWOPers in New Jersey, as in other states, could end up inside an even less restrictive medium security prison.

“You have heard heart wrenching testimony from the victim’s families, saying ‘if only you had life without parole, we could move on with our lives,’ this witness intoned. “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.”

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. At this point the Chair ended the exchange.

Apparently responding to my plea, in its final hearing, the Commission sought assurance from the department of Corrections that those serving LWOP do live a tough life inside maximum security prison. “Can you tell us what is the meaning of a sentence of life without parole?” Commissioner Coleman asked James Barbo, Director of Operations of New Jersey Corrections. “One of the prior speakers indicated that in some jurisdictions -- and he even suggested that he would expect the same to be true in New Jersey -- that persons sentenced to life without parole virtually live under hotel conditions. Can you comment on that?”

“I worked in New Jersey State Prison for 11 years, and I wouldn’t describe it at all as a hotel,” the Operations chief assured the Commission. “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. And 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.”

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 LWOP is justice, or that “life at New Jersey State Prison is very debilitating to inmates.”

“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. “And what other kinds of things can you talk about in terms of their day-to-day existence?”

“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.”

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 endor(sing)” 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. 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, LWOP 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. Really? How about being raped then tortured to death?

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

"There is real and powerful retribution in having an individual spend the rest of their life and die in prison," insisted Hilton. "I wanted to drive that point home. That's what it means, no ifs, ands or buts."

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

Ranking corrections officers across the country standardly 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.

"Let me emphasize again," this witness had testified earlier, "I've not documented life in New Jersey prisons. I intend to try."

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.

Although the Department knew my mission was to absorb and assess the quality of daily "life inside" -- perhaps coincidentally -- during my entire tour they scheduled from 11AM to 1PM, 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 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 found 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 TV's did adorn them. And 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 TV 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 "by 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 seemed so 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: Hilton had insisted in "reality" that "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." He recalled 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.

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. Perhaps some Commissioners imagined a life without parole, where elderly prisoners afraid to leave their cells, finally felt 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 seemingly less pleasant than similar maximum security prisons in other states so far visited. That tour, however, leaves unanswered the essential question: Is LWOP proportionate punishment for today's death eligibles? Is it punishment enough?

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 New Jersey State Prison may vary in length, but they are consciously uniform in intensity. Prisoners serving life without parole get the same privileges as every other inmate.

While disavowing any mission to punish, the Administrator did concede 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 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, 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 vicious 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 TV, 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 Prof. Jeremy Blumenthal calls it. 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. Long term, people's sense of well-being, their enjoyment of life returns to the status quo ante. Self-reporting studies among these groups and others reveal the nearly universal human tendency for "hedonic adaptation" with the passage of time. Long term, social and physical support systems and other factors combine to lessen the impact of harsh environments. Studies of death row inmates show what my own extensive interviews confirm -- contrary to popular belief, a "general sense of well-being" (Blumenthal) pervades this "new normal."

Obviously, however, the Commission believed the Department's testimony that life spent inside New Jersey State Prison is terribly harsh. However 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. The Commission, however, has recommended specific legislation, perhaps from a sense of political appeal, or maybe from a sense of justice, that would preclude Corrections from transferring a death-eligible LWOPer 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."** (emph. added)

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

ADDITIONAL RECOMMENDATION: A person convicted of [aggravated] murder shall be required to pay restitution to the nearest surviving relative of the victim.

“You Shall Accept No Ransom . . .”

The Commission took it upon itself, as they 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 New Jersey State Prison.

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 Corrections 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.

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. 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 came to *proving* capital homicide, it changes tone when punishing it, refusing to allow murderers to live, who deserved to die: “And these things shall be a statute and ordinance to you throughout your generations,” declared the Old Testament, emphatically laying down the law: “You shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death”.

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” in lieu of the death penalty, Numbers XXXV:33 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”.

At roughly the same time the Hebrews assembled the Bible, the ancient Greeks, also repulsed by blood pollution and rejecting the blood price, expressed the ultimate value of human life concretely: The convicted murderer must die. 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 repulsive and retrograde.

CONCLUSIONS

State Abolition May Produce Federal Executions

Important decisions produce unintended consequences. If the 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 Ronnel Wilson to death for murdering two local undercover police officers.

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.

Abolition May Extend the Reach of Life Without Parole

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." 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." Because "death is different", states with a death penalty provide super due process for everyone charged capitally. This special care includes a separate penalty phase where the jury weighs additional aggravating circumstances against mitigating circumstances, after the state has proved at least one aggravating circumstance at trial. As the Public Defender points out, under the Commission's recommended procedure, life without parole becomes mandatory upon a finding of an aggravating factor. The defendant can no longer offer mitigating factors,

and the sentencer no longer has discretion to reject the new ultimate penalty, based upon compelling circumstances of the individual defendant.

New Jersey already mandates life without parole for the murder of police officers and children under 14 during a sexual assault. "To expand unnecessarily the categories of cases in which discretion is totally removed from the sentencing equation would be a grave mistake." 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." 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.

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 mere "replacement" of the death penalty with life without parole."

The Public Defender acknowledged that "prosecutors would have 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." It would be "easy" for prosecutors to seek life without parole. 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. . . The jury would have already found the defendant guilty of murder, robbery and felony murder. In reality, there would be no issue left to deliberate."

The Moral Logic of LWOP Questioned

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 -- both 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 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 possible become? If we are going to keep the killer alive, why strip him of all hope?

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

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.

Retributivists would heed the Public Defender's warning. The Commission's proposal to abolish the death penalty and "substitute" mandatory life without parole, 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.

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.

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 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, the dissenter neither returned phone calls, nor reacted to my prepared statement specially e-mailed to him after my testimony. Essentially defending "his" statute, without really engaging the commission on its fundamental assumptions, 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.

Of all additional statements, Commissioner Kathleen Garcia's separate concurrence 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 victims." Nevertheless, given the long-standing bias of "liberal judges" especially on the state's highest court, "it has long been evident that the New Jersey Supreme Court will continue to ensure that no person, regardless of how horrendous the crime committed, will ever be executed." Thus, given that 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".

Has she thrown in the towel prematurely? One death penalty has fully cleared the state high court and seems ready to proceed to execution of sentence. Many victims'

survivors believe that justice will be done and would retain the penalty to await the outcome. Why not await a changing court that more nearly reflects the will of the people, and in the meantime move forward by morally refining the statute to more narrowly focus 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. 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. States such as New Hampshire tenaciously cling to their death penalty yet execute no one. Why? Because symbolic significance attaches when society's representatives on a jury choose death. Several prisoners have told me, years later, how the jury declaration that they were not fit to live still pains them.

Other Commissioners ignored this witness's plea to count the death penalty's symbolic significance. Commissioner Garcia 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 survivors if the sentence they receive and embrace, no matter what that may entail, is never served."

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 die?

A majority of the people of New Jersey feel that justice requires a death penalty. Perhaps their representatives will really consider the question, refine the statute and join their constituents in punishing with death those who most deserve to die.

Prof. Robert Blecker
May 9, 2007

Robert Blecker, a *cum laude* graduate of Harvard Law School (1974) and a Harvard University Fellow in Law and Humanities (1976-1977) teaches Criminal Law; Constitutional History; and the Death Penalty at New York Law School.

Testimony of Bill Piper
May 10, 2007

Dear Chairman Adler and the Members of the Committee,

Thank you for allowing me to testify today. My name is Bill Piper, I live in Pennington, New Jersey and I am here to address the issue of the death penalty from my perspective as a family member of a murder victim in a case that resulted in a life without parole sentence.

Many times throughout hearings similar to this I've heard speakers asked by committees whether life without parole would have allowed them healthy grief and coming to terms with their loved one's death. Most said they imagined it would. I can say, unfortunately from personal experience, that life without parole does exactly what it should for victims:

- it removes the perpetrator of crime from the rest of society forever
- it permits victims' families to come to terms with the tragedy of murder and loss however we are best psychologically able, without having politicized and moralizing questions thrown into the mix on at times very public levels.

In 1999 my mother was murdered in Pennsylvania, where life without parole is an option, one that was fortunately taken in 2002. Since then, I've been able to live a pretty normal life, letting sorrow be sorrow and missing my mother, but not that differently from missing my father, who died of natural causes in bed in 1986. Life without parole works.

Before the near closure of life without parole, things were different. Because of the nature of the crime (my mother, then 74, was raped and murdered by a probably random nighttime intruder), the prosecution strongly considered pursuing the death penalty. The next three years were spent traveling and communicating back and forth to Altoona, PA for pre-trial hearings, advising at prosecution's request on the desirability of the death penalty etc., each time hearing more forensic facts about my mother's death or about the murderer and his limited affect. Ultimately, about a month before the killer's scheduled trial, the DA told my sister and me that he would pursue whichever course we wanted.

As both a long time opponent of capital punishment and a person traumatized by a loved one's murder, I could not condone giving assent to an execution. I spent three years in the emotionally untenable position, while traumatized by murder, not only of being asked to participate in a state execution, but also of being morally obligated to speak out against that execution as a benefactor of the person who raped and murdered my 74 year old mother. I felt violated by having been given both the responsibilities of executioner and rescuer.

That came to an end when my sister, against her wishes and those of most of my family, assented to accepting the sentence of life without parole. The prosecution laid out quite clearly for the family what could be involved in taking the case to trial and pursuing the death penalty option. It was because it was made clear that life without parole means

what it says and that the killer would never leave prison that the sentence was reluctantly accepted.

I think the reason, ultimately, that my sister recommended accepting life without parole was to save my son, then 6, from growing up into his late adolescence or beyond in the shadow of appeals and reminders of his grandmother's horrific death. Life without parole saved him from that.

Unfortunately, it was too late to save my family from the damage already done by the introduction of the death penalty into the process. Even though the death penalty was not ultimately used in the case of my mother's killer, it still wreaked havoc on our lives. We became victims not only by having a beloved family member murdered, but also by having to work with the district attorney's office and other family members on deciding the use of the death penalty, which split our family, with my wife and me being opposed to the use of the death penalty and other family members for it.

After my mother's death, as you can imagine, my wife and I became closer to my sister, aunt and uncle, and cousins. We depended on each other and provided each other with real emotional support. Our shared grief and shared experience brought us together.

But then our decision-making about the use of the death penalty polarized us in ways that were inexpressibly hurtful to all of us, putting a violent end to a fragile new closeness and driving a wedge between us that has yet to heal. My aunt and uncle have refused contact, and my sister only recently began answering our son's e-mails. Our son has lost not only his grandma but also his aunt and other family. As murder victims' family members we have few people who can understand our experience. To lose the few people who could have gone through it with us was devastating to us, and I believe to them as well.

Despite this pain, as I said when giving my victim's impact statement, I am not a victim anymore, because the finality of life without parole has allowed me to grieve more normally. The murderer is not my friend, I harbor no warm feelings toward him at all, I don't know him; there is only a limitless sorrow over the whole catastrophe...especially the end of a kind, nearly innocent, woman's loving commitment to family and friends. I ask that we honor my mother's kindness by sparing others this trauma. It's in our hands.

VICTIMS' FAMILIES AND THE DEATH PENALTY

Testimony to the New Jersey Senate Judiciary Committee

May 10, 2007

**Vicki Schieber
Mother of Shannon Schieber (1974-1998)**

My daughter Shannon was 23 when she was murdered in 1998 by a serial rapist in Philadelphia. Here in New Jersey, and especially in Southern New Jersey, many of you likely saw the frequent press coverage of the crime. Shannon had grown up in Maryland, graduated from Duke University, and was finishing her first year of graduate school at the Wharton School of Business. Shannon was home by herself, up late studying for her final exams, when the assailant pried open a balcony door on her second floor apartment and attacked her as she was preparing to take a bath.

We would ultimately learn that in the same neighborhood, this assailant had broken into at least four other apartments and sexually assaulted single white female residents in the 11 months prior to Shannon's death. Although the Philadelphia police now claim they had linked the prior four cases, they had not warned the community of the danger that lurked there for young women like our daughter. It was not until some nine months after Shannon was dead that the police would notify the community that she was killed by a serial attacker who might still be prowling in their neighborhood. He would attack again in August 1999 in Philadelphia. Although it took the Philadelphia Police more than 17 months to successfully process the DNA evidence in these various cases, all six were ultimately linked.

From late August 1999 until late September 2001, we would hear nothing more of this stalker, rapist, and murderer. Then it was announced that a DNA link had been made between Shannon's case and a series of sexual assaults that had taken place in Fort Collins, Colorado during the spring and summer of 2001. The assailant struck again in early April 2002 in Fort Collins. Police finally arrested Troy Graves on April 23, 2002. Ultimately he pled guilty to assaulting, raping, and killing Shannon. He also pled guilty to 13 other sexual assaults in the two state crime sprees.

Losing a beloved family member to murder is a tragedy of unimaginable proportions. As my husband and I wander through the normal things that we all do in our daily lives, we see constant reminders of Shannon and what we have lost. We have thousands of memories of our precious girl and we cherish every one of them. But there will never again be any new memories. That reality will never become easy.

The effects of murder on the family and even on the wider community extend well beyond the initial shock and trauma. The common assumption in this country is that families who have suffered this kind of loss will support the death penalty. Prosecutors will sometimes say to a grieving family, "We will seek the death penalty in order to seek justice for your family." Or, "seeking the death penalty will help you find closure after your terrible loss."

Providing closure to victims' family members is so frequently invoked in discussions of victims and the death penalty that victims' family members jokingly refer to it as "the c word." But I can tell you with all seriousness that there is no such thing as closure when a violent crime rips away the life of your child.

I believe that many elected leaders like you have the best intentions when they invoke words like "closure" or argue that the death penalty is necessary for families like mine. But I am here today to tell you that these assumptions about what victims need are not only false. They are harmful. **The death penalty has failed victims' families in virtually every way, and many of us – including many who support the death penalty in theory – have come to support its end.**

I say this on behalf of many, many victims' families who have either always opposed the death penalty or have arrived at that position after experiencing its damaging consequences. Let me be clear -- I do not pretend to speak for all victims' families. No one testifying before you today can make that claim. Murder is so horrendous and the loss of a loved one is so personal that there is simply no right or wrong way to feel. But the number of families who have been harmed by the death penalty and are ready to give it up is growing. The assumption that all or even most homicide survivors support the death penalty is absolutely **wrong**. And the way that the death penalty has exacerbated the pain for many of us is **very real**.

For those who have not experienced a loss to murder, this may be difficult to understand or may even seem counter-intuitive. So let me explain.

First, the legal process in any murder trial can be overwhelming. Victims' families are thrust into the middle of a complicated web of court proceedings where we have little power but to listen, wait, and hope for a speedy and fair outcome. The death penalty process exacerbates the difficulty of this process *exponentially*.

Capital appeals go on for decades after the initial trial, with most cases being reversed at some point, sometimes multiple times. With each court decision, the murderer's name is splashed across the headlines while the family waits helplessly for the next ruling, wondering when the sentence will be carried out. This continuing focus on the offender forces victims to relive the crime over and over again. Healing is put on hold for years at best – but very often for much longer. The pain of this emotional roller coaster can be astonishing in its magnitude. Where are the victims in this process? How are they served?

I have been on both sides of the waiting equation. My husband and I waited in agony for nearly four years while my daughter's killer remained at large. Those four years are only a fraction of the time most New Jersey families have to wait for an execution to occur, but they were torturous. My daughter's assailant was caught on April 23, 2002. By the end of July of that year he was sent to a maximum security prison for the remainder of his life. I can't imagine what my life would be like today if we were still waiting for his sentence to be served, or wondering if it will be carried out at all. Never again will I have to spend my emotional energy questioning what punishment will transpire for the man who stole my daughter's life from me.

The more homicide survivors I meet, the more I am convinced that this is a better outcome. Indeed, if imposition of the death penalty is really necessary for victims' families, then what of the 99% who are not offered it? What about the families of victims of the many heinous cases in which the death penalty is not sought or imposed at all? What about the families of victims in the many cases in which it is imposed but then reversed on appeal? What about the families of victims that morally oppose the death penalty but are forced to endure capital trials regardless of their beliefs? What about the families who are divided by their views on capital punishment? In other words, if the widespread assumption is that the death penalty is justice for the families of murder victims, why do we keep failing to achieve justice for the families? Why do we keep hurting and dividing families while also ignoring their needs?

No one should infer from our opposition to the death penalty that my husband and I do not want these murderers caught, prosecuted, and put away for the remainder of their lives. My husband and I believe Shannon's killer is where he belongs today, as he serves his prison sentence, and we rest assured that he will never again perpetrate his sort of crime on any other young women.

Some people have told me that the pain and delay I speak of could be fixed by making the death penalty cheaper and faster. But Kirk Bloodsworth, who is here today, and well over 100 other death row exonerees are the living, breathing reasons why that solution is no solution at all. New Jersey should be proud that you are more careful than states like Texas or Alabama. But as careful as you are, the risk of executing an innocent person is real everywhere. And if Kirk had been in Texas or Alabama instead of Maryland, he might now be dead, instead of here to testify before you. For everything you must do to reduce the risk of executing the next Kirk Bloodsworth, you have to make a system that is that much more harmful to families like mine. You cannot make the system faster and cheaper for homicide survivors and also protect innocent people from conviction and execution. You must choose, and that is an awful choice to make for a system that is so clearly failing on all counts.

While I said earlier that I do not speak for all families, I am joined by many New Jerseyans who have lost a family member to murder and who support replacing the death penalty with life without parole. I submit to you this letter, signed by nearly fifty residents of this state and expressing support for the legislation before you today. Many such family members are here today to bear witness to the words in this letter. I ask them now to stand with me.

I would like to conclude by saying, especially to those of you who support the death penalty or are ambivalent about it, that you have an important opportunity to help create a more helpful, healthier paradigm for victims and all of society. You may continue to believe that murderers should be executed, and there is likely little I can say to change your mind. But I ask you to consider that the death penalty is not simply an abstract concept for you to support or oppose. It has real life consequences on the very people it purports to help, and replacing it with life without parole is a better option regardless of your feelings about capital punishment in the abstract.

If your goal is, as I believe it should be, to do what is best for victims, you should recommend an end to the death penalty in New Jersey. Thank you.

Statement of Most Reverend John M. Smith
Bishop of the Catholic Diocese of Trenton
To the New Jersey Senate Judiciary Committee
May 10, 2007

Two days ago, on Tuesday, May 8, 2007 the New Jersey Board of Catholic Bishops met at Sacred Heart Basilica – Cathedral in Newark. During our meeting the Bishops once again reaffirmed our united opposition to the Death Penalty. The Bishops have asked me to represent them today and on their behalf to speak in favor of S-171.

Today, I bring a simple message:

The death penalty is not consistent with evolving standards of decency.

Because the State of New Jersey has other means to redress the injustice caused by crime and to effectively prevent crime by rendering the one who has committed the offense incapable of doing harm and because we recognize the dignity of all human life, we continue to consistently and vigorously oppose the use of the death penalty.

The New Jersey Catholic Bishops spoke to this issue in their statement of February 4, 2005. The United States Conference of Catholic Bishops, on Holy Thursday of 2005, launched a campaign to end capital punishment in the United States, stating: “The death penalty diminishes all of us. Its use ought to be abandoned not only for what it does to those who are executed, but what it does to us as a society. We cannot teach respect for life by taking life.”

We are guided by our belief that every person has an inalienable right to life, because each human being is made in the image and likeness of God, who alone is the absolute Lord of life from its beginning until its end (cf. The Book of Genesis 1:26-28).

We acknowledge that the subject of capital punishment is controversial and emotional. All murders are violent and shocking; some are savage. They all stir emotions of revulsion and anger.

We grieve for the victims of murder, for the brutalization and loss of life.

We commiserate with the families and friends of victims who must suffer with their loss through the years.

We affirm that the state has the duty to punish criminals and to prevent the repetition or occurrence of crime.

We believe that greater efforts must be made to bring the criminal to repentance and rehabilitation.

And we believe that our society is sufficiently developed to protect itself and to redress the injustice caused by the criminal without resorting to the use of the death penalty. One alternative is life in prison without the possibility of parole.

The *Catechism of the Catholic Church* acknowledges the right of public authorities to impose criminal punishment proportionate to the gravity of the offense, "if this is the only possible way of effectively defending human lives against the unjust aggressor. If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person."

Because the State of New Jersey has other means to redress the injustice caused by crime and to effectively prevent crime by rendering the one who has committed the offense incapable of doing harm and because we recognize the dignity of all human life, we continue to consistently and vigorously oppose the use of capital punishment.

Let me conclude by recognizing the need for improvement of our criminal justice system and for a greater societal commitment to crime prevention and victim assistance. As pastors and teachers we urge the State of New Jersey not to impose the death penalty in our state. Senators, the Catholic Bishops of New Jersey ask you to release favorably Senate Bill 171.

Most Rev. John J. Myers
Archbishop of Newark

Most Reverend Andrew Pataki
Bishop of the Byzantine Catholic Eparchy
of Passaic

Most Reverend Joseph A. Galante
Bishop of Camden

Most Reverend Joseph Younan
Bishop of Our Lady of Deliverance Diocese

Most Reverend Paul G. Bootkoski
Bishop of Metuchen

Most Reverend Edgar M. da Cunha
Auxiliary Bishop of Newark

Most Reverend Arthur J. Serratelli
Bishop of Paterson

Most Reverend Thomas A. Donato
Auxiliary Bishop of Newark

Most Reverend John M. Smith
Bishop of Trenton

Most Reverend John W. Flesey
Auxiliary Bishop of Newark

Comments on the death penalty by the United States Conference of Catholic Bishops included as part of a November 15, 2000 statement "Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice."

Renewing Our Call to End the Death Penalty

In these reflections, we bishops have focused on how our faith and teaching can offer a distinctive Catholic perspective on crime and punishment, responsibility and rehabilitation. These reflections do not focus on the death penalty as our primary concern. In this context, however, we wish to renew our call for an end to capital punishment.

The administration of the death penalty is often seen as a major sign of some of the failings within the American criminal justice system. Capital punishment is cruel, unnecessary, and arbitrary; it often has racial overtones;¹ and it fails to live up to our deep conviction that all human life is sacred: "Our witness to respect for life shines most brightly when we demand respect for each and every human life, including the lives of those who fail to show that respect for others. The antidote to violence is love, not more violence."²

In this call we add our voices to the prophetic witness of Pope John Paul II—who, when he last came to our nation, appealed for an end to capital punishment:

The new evangelization calls for followers of Christ who are unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitively denying criminals the chance to reform (cf. *Evangelium Vitae*, no. 27). I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary.

We join our appeal to the position of the universal Church. The promulgated text of the *Catechism of the Catholic Church* declares,

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in conformity with the dignity of the human person. (no. 2267)

And we join with those who are working to end the death penalty—in their witness at prisons as people are executed, in state capitals across our land, in courtrooms and prisons around the nation, and in Congress, where efforts to abolish or limit the death penalty are being debated. We support calls for a moratorium on executions and welcome the courage of leaders who have implemented or are working to address the clear failings of the death penalty.

We know this is not an easy matter. Catholic teaching has developed over time and there have been diverse views on the application of these principles. However, as we begin this

new millennium, Pope John Paul II, the U.S. Catholic bishops, and the *Catechism of the Catholic Church*³ together express the strong conviction that capital punishment should no longer be used since there are better ways to protect society, and the death penalty diminishes respect for human life.

We are encouraged by small but growing signs that support for the death penalty is eroding and that capital punishment is being reconsidered. People are asking if we are really safer in states where executions are so regular that they hardly rate news coverage. People are asking whether we can be sure that those who are executed are truly guilty, given the evidence of wrongful convictions and poor representation in death penalty cases. We welcome legislation to address these issues as a way to focus on the unfairness of the death penalty. But most of all, we are asking whether we can teach that killing is wrong by killing those who have been convicted of killing others. It is time to abandon the death penalty—not just because of what it does to those who are executed, but because of how it diminishes all of us.

We cannot overcome what Pope John Paul II called a "culture of death," we cannot reverse what we have called a "culture of violence," and we cannot build a "culture of life" by state-sanctioned killing. As we said before and renew today:

We cannot overcome crime by simply executing criminals, nor can we restore the lives of the innocent by ending the lives of those convicted of their murders. The death penalty offers the tragic illusion that we can defend life by taking life.⁴

We ask all Catholics—pastors, catechists, educators, and parishioners—to join us in rethinking this difficult issue and committing ourselves to pursuing justice without vengeance. With our Holy Father, we seek to build a society so committed to human life that it will not sanction the killing of any human person.

Notes

1. Though holding only one-half of 1 percent of death row inmates, the federal government recently concluded a study of its nineteen people on death row. The conclusion is that despite serious efforts to ensure fairness in seeking the death penalty for defendants convicted of federally eligible crimes, fourteen of the inmates are African American, five are Caucasian, and one is Hispanic (U.S. Department of Justice, *Survey of the Federal Death Penalty System: 1988-2000* [Washington, D.C., 2000]).
2. U.S. Catholic Bishops, *Living the Gospel of Life: A Challenge to American Catholics* (Washington, D.C., 1998), 15.
3. For the complete text on the treatment of the death penalty, see *Catechism of the Catholic Church*, 2nd. ed. (Washington, D.C.: United States Conference of Catholic Bishops, 2000), nos. 2263-2267, see also, no. 32.
4. Administrative Board, United States Conference of Catholic Bishops, *A Good Friday Appeal to End the Death Penalty* (Washington, D.C.: United States Conference of Catholic Bishops, 1999), 3.

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STATEMENT OF DAVID A. RUHNKE
New Jersey State Senate, May 10, 2007

Thank you for the opportunity to testify today.

By way of background, I am a criminal defense attorney in private practice. I have been a member of the New Jersey bar for more than 30 years, am a past president of the Association of Criminal Defense Lawyers of New Jersey, and, commencing in approximately 1983, have devoted a significant part of my practice to the trial of capital cases. Over the past 24 years I have tried 15 capital cases to a verdict, six in the state courts of New Jersey and nine in the federal courts, principally the federal courts of New York City. I lecture frequently to defense lawyers around the country on the topic of defending capital cases. I am considered an expert on the federal death penalty in particular, and presently serve on a part-time basis as Resource Counsel, a position funded by the Administrative Office of the United States Courts, advising lawyers on federal capital cases. I have testified in state and federal courts as an expert in the preparation and trial of capital cases.

One of the issues under review by the Committee is whether the *ex post facto* clauses of the federal or New Jersey constitutions would invalidate an effort to substitute sentences of life without parole for the sentences of death now in effect for the nine present residents of death row. The answer is a simple no. *Ex post facto* analysis focuses on whether subsequent legislation that increases the level of punishment can be applied to crimes that pre-date the legislation. For example, if I committed an armed robbery on January 1, 2006, for which the maximum penalty was 20 years, and on January 2, 2006 the legislature increased the penalty to 30 years, I could not be subject to the increased penalty. The operative word is "increased." In the cases of the men currently on death row, the maximum sentence they initially faced was death. Legislation that substitutes a sentence of lifetime imprisonment, with no possibility of release, has not increased the maximum punishment, but has lessened it. In the eyes of the law at least, life-without-parole is a lesser sentence than death.

The New Jersey Supreme Court's opinion in *State v. Fortin*, 178 N.J. 540, 843 A.2d 974 (2004) illustrates this point. What happened in *Fortin* is that the defendant, in a capital

case, tried to waive an *ex post facto* challenge to application to his case of the life-without-parole legislation enacted six months before his capital trial, but years after the commission to the offenses. This was a tactical decision designed to assure the jury that Fortin, if spared the death penalty, would never be released. In that case, everyone – prosecution, defense and the trial judge – agreed that the life-without legislation had increased the potential punishment for capital murder and that, therefore, legitimate *ex post facto* concerns were present. What is of overriding significance in *Fortin* is that death remained the maximum available punishment so that the increase in the punishment for the lesser-included offense of capital murder (murder plus an aggravating factor) was in no way the substitution of a *lesser* offense. By contrast, legislative commutation of existing sentences of death in favor of life-without is the substitution of lesser punishment and, therefore, does not offend principles of *ex post facto*.

The same analysis applies to *Trantino*. At the time of Trantino's crimes, the maximum punishment for murder, short of death, was a life term with parole eligibility after 25 years minus commutation and other credits. When the United States Supreme Court struck down the death penalty in 1972, Trantino's sentence of death (along with the sentences of every resident of New Jersey's then death row) was vacated. Thus, at the time the issue of enhanced punishment came up, Trantino was no longer under a sentence of death and, therefore, any increase in the previously existing maximum sentence for murder was a plain *ex post facto* problem. Once again, in the present situation, the legislation proposed to *decrease* the maximum sentence from death to life.

Questions have been raised regarding the prosecution of crimes involving terrorism and whether a state death penalty might have a valid role to play in such prosecutions. The arrests made in Camden earlier this week underscore this concern. The current federal death penalty is broad indeed and, without question, would reach any offense involving terrorism that results in death. For example, a terrorist attack on the State House that resulted in deaths would be covered by the federal criminal code and the federal death penalty if appropriate. In fact, the federal provision punishing the use of arson, explosives, or weapons of mass destruction resulting in death would also cover any conceivable terrorist attack in this State. The reality, as well, is that terrorism prosecutions are more likely to be handled by federal law enforcement agencies because of issues of national security and the circumstance that the investigative assets of the federal government far exceed those of state agencies.

I would be pleased to answer any questions. Thank you.

STATEMENT OF RONALD J. TABAK
New Jersey State Senate, May 10, 2007

I am pleased to testify here today.

For background only, I am Special Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. I am Co-Chair of the Death Penalty Committee of the American Bar Association Section of Individual Rights and Responsibilities. I have authored several *amicus curiae* briefs on capital punishment issues on behalf of the American Bar Association. I have also testified on behalf of the American Bar Association regarding particular issues concerning capital punishment. I have also represented several death row inmates, including two whose cases I argued in the United States Supreme Court. I am the author of numerous articles about capital punishment and habeas corpus.

My testimony today is offered only on my own behalf, not on behalf of my law firm or any other organization.

I am testifying today to address the contention that the proposed death penalty repeal bill's provision for re-sentencing death row inmates to life without parole could violate the federal constitution. This contention has no basis in federal constitutional law and is, instead, contrary to that law.

The contention is premised on the view that it could violate the United States Constitution to re-sentence a death row inmate to a lesser sentence than death where the particular sentence is imposed pursuant to a statute enacted *after* the offense. However, that premise is contradicted by the United States Supreme Court's holding in *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). In *Dobbert*, the Supreme Court held that a sentence – in that case, a death sentence – imposed pursuant to the enactment of a statute that did not exist at the time of the offense does not violate the *ex post facto* clause if the relevant statutory provision is "ameliorative" – that is, does not increase the punishment that was available for the crime at the time it was committed. This is so even if, as in *Dobbert* (and unlike in New Jersey), the statute on the books had already been held unconstitutional prior to the time of the crime. Indeed, the Florida Supreme Court had held, prior to the crime, that the Florida death penalty had been abolished, that even the category of "capital offenses" had ceased to exist and that there was no possible procedure under existing Florida law for imposing the death penalty. *See id.* at 297, 301. Yet, because the death penalty remained on the books at the time of the crime, the Supreme Court held that it was constitutional to sentence the inmate to death under a later-adopted statute.

Clearly, since it is constitutional to use a later-adopted law to sentence an inmate to the *same* sentence that was on the books at the time of the offense where the existing statute had already been held unconstitutional, it is also constitutional to sentence an inmate to a *lesser* sentence than was not only on the books at the time of the offense but was actually imposed on that inmate and was never held unconstitutional.

Moreover, the contention is also at odds with the Supreme Court's decision in *Schick v. Reed*, 419 U.S. 256 (1974). There, the Court rejected a challenge to the President's pardon that reduced a sentence from death to life without parole, where the statutory scheme under which the prisoner had been sentenced to death was held invalid following the commutation and the only alternative to death under the statute that existed at the time of the crime was life *with* possibility of parole. The Court pointed out that the President can commute sentences as long as in doing so, he does not violate the Constitution or "aggravate punishment". *See id.* at 264, 267. Clearly, the Court believed the President had done neither by reducing the death sentence to life without parole, even though life without parole had not been a potential sentence at the time of the crime.

In New Jersey, those now on death row, under the proposed statute, could be sentenced to life without parole -- a lesser sentence than the death sentence to which they could have been subjected as of the time of the crime and to which they have indeed been sentenced. Thus, the proposed law would be "ameliorative", irrespective of the fact that life without parole was not an available sentence at the time of the crime. The crucial factor is that the legislature would be acting, in passing the bill, to *lessen*, and certainly not to increase, the punishment that these inmates faced at the time they committed their crimes and to which they have indeed been sentenced.

Under the binding, well-established Supreme Court precedents, this proposed law would definitely be held to be in accordance with the United States Constitution.

Since I am not a member of the bar of New Jersey, I will defer to others to testify about the applicability of the New Jersey Constitution to this situation.

Thanks you for the opportunity to testify.

New Jersey and the Cost of the Death Penalty

Testimony before the New Jersey Senate Judiciary Committee

Jonathan E. Gradess
Executive Director
New York State Defenders Association

Trenton, NJ
May 10, 2007

Introduction

My name is Jonathan Gradess, and I am executive director of the New York State Defenders Association. In 1981, our Association, which had been founded as a not-for-profit corporation in 1967, was funded by the State of New York to function as a backup center and clearinghouse to improve the quality of public defense representation. We have a contractual obligation to review, assess and analyze the public defense system of New York State and to make recommendations for improvement to the Governor, the Judiciary, the Legislature and others. In 1981, we commenced a nationwide study to examine what New York would need in the event it chose to reinstate the death penalty. We quickly discovered that cost was a major issue to consider and provided a report in 1982 to New York's Division of Budget, Assembly Ways and Means Committee, and Senate Finance Committee.

I was the lead author of Capital Losses: The Price of the Death Penalty for New York State, one of the first studies of cost and the death penalty published in this country. More than 5,000 copies of Capital Losses have been distributed to budget analysts, legislators, government officials, bar associations, the media, state associations of counties, prosecutors, judges, defense lawyers and scholars. It has been widely cited and broadly used as a model for analyzing the costs of capital litigation.

I have continued to collect data and study the question of the cost of capital litigation. I have appeared as an expert witness before the United States Senate Committee on the Judiciary, the Missouri Legislature, and the Kansas Legislative Research Service. I have been a consultant to the United States General Accounting Office in its required study of the cost of the implementation of the federal death penalty. I was also consulted by the American Bar Association's Ad Hoc Committee to Assess the Cost Impact of the Death Penalty on the Justice System. Our staff, under my supervision, assisted the American Bar Association in its efforts to assess the cost of post-conviction representation. I have been an expert witness on the cost of the death penalty in two capital cases, and have published several articles on cost in the popular press.

What is this debate really about?

The issue of cost and the death penalty is a controversial one. On the one hand, among the general public, there is a widespread misconception that the death penalty costs less than life without parole – a myth that has been debunked by cost studies across the nation.

On the other hand, among lawmakers and public officials, the truth about cost is slightly more apparent. But the response to this fact by some lawmakers in other states has been, “There is no price on justice. This is not a dollars-and-cents kind of issue.”

And they are right. There is no price on justice. But the question of the cost of the death penalty is not about counting dollars. It’s about counting lives. And the diversion of resources to fund a capital punishment system is also about counting lives.

- The \$11 million New Jersey spent to execute no one last year could have put 160 new police officers on the streets protecting your communities.
- It could have instituted new gang prevention programs like the one in Rochester, NY, reported to have cut that city’s murder rate by a third in just one year, or further expanded your own Operation CeaseFire, also reported to have had dramatic effects.
- The \$11 million New Jersey invested in just one year of the death penalty could have provided grief counseling to more than 850 victims of violent and traumatic crimes. Given that many criminal defendants were once victims themselves, helping victims heal also helps reduce crime.

The authors of New Jersey’s 2005 cost study concluded that in the two decades that capital punishment has diverted money and resources from local and State treasuries, New Jersey has spent over \$250 million above the cost had the 1982 statute provided for life without parole instead of death.¹

¹ Forsberg, Mary E., “Money for Nothing? The Financial Cost of New Jersey’s Death Penalty,” New Jersey Policy Perspective, 2005.

I'll talk more about where those numbers come from later. But first I want to ask: What did that quarter of a billion dollars buy you? Nine people remain on your death row. Each of their death sentences cost your state \$28 million to achieve.

Your quarter billion dollars has bought no executions through a system that has monopolized your courts and delayed justice for victims' families. And this death penalty system has diverted millions of crime fighting dollars that could save lives and protect the public.

The diversion of resources

As you deliberate on the bill to abolish New Jersey's death penalty, it is imperative that you not think about costs in the abstract. Recognize there are not two spigots from which money flows forth. You cannot have a death penalty with all its attendant costs *and* all the other things citizens need. New Jersey, like all states, must choose.

New Jersey will begin budget negotiations in the weeks ahead. As you grapple with your property tax crisis, as police and firefighters and teachers come before you and demand that their pensions not be cut, as New Jersey counties seek money to improve crime lab facilities, ask yourself whether you are truly committed to the high cost of capital punishment.

When crime ridden neighborhoods demand better lighting on their streets, or police units plead for more soft body armor or bullet proofed cars to protect their lives, or families of murder victims fight for desperately needed services, remember New Jersey's commitment to the death penalty.

Against a backdrop of cuts threatening to cause New Jerseyans enormous pain, the death penalty will continue to diminish the lives of your citizens and make your state less safe. Death penalty proponents like to condemn the cost argument as the ravings of Chicken Little. But I am here to tell you that the sky is falling in New Jersey and it has nothing to do with those of us who are describing the process. The sky is falling because of a shortsightedness that barter away policing tools to pay for hours of appellate review, that trades the needs of crime victims to purchase New Jersey judicial time to hear death penalty cases, that yields to an *image* of

execution in exchange for the *reality* of highways, homes and health care. There is only one money spigot, and you, the lawmakers of New Jersey, will have to decide whether it will turn it on to *actually* protect its millions of citizens or, maybe, to one day execute one or two of them.

Conclusions about cost generally

As a result of my work in New York and elsewhere, I conclude that:

- There is a widespread misconception among the general public that life in prison is more expensive than the death penalty.
- Capital cases cost more than non-capital cases.
- Criminal justice systems with death penalties face higher design and maintenance costs than criminal justice systems without capital punishment.
- The main aspect of capital litigation driving up cost occurs *up front*, during trial and penalty phases of capital proceedings.
- The exponential consequences of the cost of the death penalty will create continuing resource drains from other critical functional areas of the criminal justice system.

These generalizations are backed up by a quarter century of state studies ranging from California to Alaska, from Kansas to Georgia, from Florida to Indiana. New Jersey is not alone, and New Jersey's findings on cost are in line with these other studies.

Why is the death penalty so expensive?

Those who have studied the cost of the death penalty conclude it is inordinately expensive. Life without parole is also expensive, though considerably less so. One critical difference is that death penalty costs are accrued up-front, at the trial level, and life without parole costs are spread out over many years. The expenditure of millions of dollars all at once hits taxpayers harder than when paid over 40 or 50 out years.

The death penalty combines the most expensive parts of both punishments: lengthy and complicated death penalty trials followed by, in most instances and certainly here in New Jersey, incarceration for life. In most cases where the death penalty is sought, it is never imposed. And even when it is imposed, it is rarely carried out. And even when it *is* carried out, 20 or more

years have already passed. So by the time you've had one execution, you've paid for the most expensive trial you can imagine, followed by the most expensive kind of incarceration you can imagine, and many times followed by the most expensive retrials you can imagine.

Death cases are more expensive at every point in the legal process. They typically involve:

- more pretrial preparation;
- a greater number of pre-trial motions;
- the utilization of more experts;
- in-depth investigation into the background of the defendant to prepare mitigation for the sentencing phase and to inform trial strategy;
- more defense attorneys appointed and prosecutors assigned;
- a longer and more complicated jury selection process;
- more frequent juror sequestration;
- both a guilt phase and a penalty phase trial;
- trials which are 3 to 5 times longer than in typical murder cases.

And all of those additional resources are accrued before a single appeal is filed.

The public logic that imagines life without parole as the more expensive punishment is fashioned in a vacuum. It assumes that execution eliminates future correctional costs. This narrow analysis doesn't take into account that most capital cases actually *don't* result in execution, either because the jury chooses life without parole instead of death or because at some point later in the process either the guilty verdict or the death sentence is reversed. A study at Columbia University found that 68 percent of death penalty cases nationally are overturned on appeal, and a full 82 percent of those reversals end in a life sentence.² Thus, a typical death penalty case accrues all the costs of its expensive trial, some number of appeals, and then all of the costs of a life sentence. Nationally, only about 12 percent of people who have been sentenced to death have been executed.³

² James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

³ See U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2003," appendix Table 4 (2004).

This reversal rate can easily go up the less careful the system. So states like Texas, which execute significantly greater numbers of people, still spend millions more per case than they would if their system didn't include a death penalty, not to mention the much greater risk of executing an innocent person. Efforts to do the death penalty "on the cheap" only end up creating a more costly system in the end.

New Jersey doesn't want to emulate Texas for a number of reasons. New Jersey's death penalty system, like New York's before the statute was overturned in 2004, is more careful, though not without its flaws. Such care and thorough review means an *even* larger set of expenses in every case – and that's *without* many of the innocence reforms recommended by the Illinois and Massachusetts Commissions, which would add yet more expense and time to the process. This thoroughness also means few death sentences and even fewer, if any, executions. The question, then, is not whether New Jersey's death penalty is more expensive or whether there is a price on justice, but what you actually gain for all the extra cost. Because a death penalty that is never carried out is just another name for life-without-parole at an exponentially greater cost.

Costs in New Jersey

Earlier in my testimony I listed figures about cost in New Jersey taken from a 2005 study by New Jersey Policy Perspective. The study found that New Jersey has spent over \$250 million on its death penalty since 1982, *over and above* the cost had the 1982 law created life without parole as a sentence for first degree murder instead of the death penalty. These costs included:

- \$7.8 million per year for prosecution, or \$180 million since 1982
- \$2.6 million per year for defense, or \$60 million since 1982
- \$282,609 per year for identified court costs, or \$6.5 million since 1982
- \$295,652 per year for Department of Corrections costs, or \$6.8 million since 1982

The total of over \$253.3 million since 1982 comes to \$11 million per year, and \$4.2 million per death sentence. But of the 60 death sentences handed down since 1982, only nine remain intact, with no executions having taken place. Each of the death sentences that remain has

thus cost New Jersey over \$28 million to secure. And more of these death sentences could be overturned in the future.

The report did not include the costs of jury selection or additional jury costs as a result of longer trials, or the actual costs of executions, and noted that there is considerable reason to believe that the actual figure is much higher.

New Jersey is not unique

Since 1982, a majority of states in one form or another have, either informally or formally, studied the cost of the death penalty and come to recognize its high and disproportionate cost. Many states have formally examined the question of whether the death penalty is more expensive than life imprisonment, concluding that the latter is less expensive. Other states have budgeted for the high cost of the death penalty. In some states, press studies reveal the issue; elsewhere, governmental bodies issued reports. Each of the studies, though sometimes differing in their level of sophistication and in the assumptions they make, have come to the same conclusion as the New Jersey cost study. The best analyses compare a system in which the death penalty is employed to a system dealing with similar crimes in which a life sentence is used instead. It is important to note that the costs of the death penalty usually don't appear as budget line items. Prosecutors or judges might be paid the same regardless of whether they are doing death penalty cases, but time is money. If a prosecutor or judge works longer on a death case, then those hours are not available for other work. If death penalty cases take more time, then that time difference is a net cost measured in the hours of all the participants.

Findings in other states

North Carolina: Duke University's study of the cost of North Carolina's death penalty remains one of the most comprehensive in the country. It found that, based on the number of executions at the time, the state was spending \$2.16 million more per execution over the costs of a system where the maximum sentence was life imprisonment.⁴

Florida: For years, Florida has been plagued with its effort to implement a death penalty. In 1988, a study of the cost of the death penalty in Florida revealed that the per case cost for

⁴ P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).

execution was \$3.1 million per case, while the cost of life imprisonment under then extant actuarial tables was slightly more than \$515,000.⁵ More recently, the *Palm Beach Post* found that Florida spends \$51 million a year additional on its death penalty, compared to what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out from 1976 to 2000, the cost for each execution is \$24 million.⁶

California: Twenty years ago, Margo Garey, after a statewide survey, concluded in a well-researched and well-written law review article⁷ that, “A criminal justice system that includes the death penalty costs more than a system that chooses life imprisonment as its ultimate penalty.” A study by the *Sacramento Bee* concluded that the death penalty costs California an extra \$90 million per year and that over 80 percent of those costs (\$78 million) are spent on initial trials.⁸

Texas: According to the *Dallas Morning News*, a single death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single maximum security cell for 40 years.⁹

Indiana: Fiscal notes in the state of Indiana going back to the late 1980s project state savings of millions of dollars per year by the elimination of the death penalty. More recently, the Indiana Criminal Law Study Commission projected that with a 20 percent reversal rate (which is extremely low), the future of the state’s death penalty would cost \$51 million, or 38 percent more than life without parole.¹⁰

Kansas: In 1987, the Kansas Legislative Research Department in conjunction with legislative hearings conducted by the Kansas Legislature on the cost of the death penalty concluded that the cost of the reimposition of the death penalty in Kansas would cost \$11,419,932 per year above then current costs, excluding post-conviction appeals following direct review.¹¹ More recently, after the reintroduction of capital punishment in Kansas, a legislative study commission found that a single death penalty case would cost \$1.26 million, or

⁵ Von Drehle, “The Death Penalty, A Failure of Execution,” *The Miami Herald*, July 10-13, 1988.

⁶ S. V. Date, “The High Price of Killing Killers,” *Palm Beach Post*, Jan. 4, 2000, at 1A.

⁷ M. Garey, “The Cost of Taking a Life: Dollars and Sense of the Death Penalty,” 18 *U.C. Davis L. Rev.* 1221 (1985).

⁸ S. Maganini, “Closing Death Row Would Save State \$90 Million a Year,” *Sacramento Bee*, March 28, 1988, at 1.

⁹ C. Hoppe, “Executions Cost Texas Millions,” *Dallas Morning News*, March 8, 1992, at 1A.

¹⁰ Indiana Criminal Law Study Commission, January 10, 2002 (assuming that only a modest 20% of death sentences are overturned and resentenced to life).

¹¹ Memorandum from Kansas Legislative Research Department Regarding Costs of Implementing the Death Penalty – House bill 2062 (February 11, 1987).

70 percent more than a comparable non-death penalty case. The study also looked at trial and appeal costs and found that death trials cost 16 times more than non-death trials (\$508,000 instead of \$32,000), and that appeals cost 21 times more in death cases.¹²

Missouri: In 1990, a five year moratorium bill was under legislative review and the question at issue was the scope of a study to be performed during the moratorium. I was asked to testify concerning the addition of a cost analysis to the bill after it was determined that Schuyler and Texas counties in Missouri were threatened with bankruptcy as a result of certain death penalty prosecutions. This phenomenon of course is not unique to Missouri, and there is evidence of local governments concerned about property taxes in California, Nevada and the deep South urging prosecutors to defer capital prosecutions because of their cost.

Maryland: In 1983, the General Assembly, Public Defender and Chief Judge of the Court of Appeals were asked by the House Appropriations Committee to provide information on the fiscal impact of processing death penalty cases in the state. They concluded that filings that resulted in sanctions of death averaged higher costs for each justice component than filings where the outcome was a non-death sentence.¹³ Today, 23 years later, I am consulting on the high cost of Maryland's death penalty, and only ten days ago the *Baltimore Sun* reported on prosecutorial recalcitrance to capitally charge based on cost.

Federal: The cost of the death penalty has not escaped the attention of the federal government. As I mentioned earlier, I was called to testify before the Senate Judiciary Committee and also to assist the General Accounting Office. For the last 20 years, the federal government has been concerned about the increasing costs of the death penalty. Recently, the Judicial Conference of the U.S. looked at the question and concluded that defense costs in federal cases would quadruple the costs in death cases compared to non-death cases. The report also found that prosecution costs were 67 percent higher than defense costs, *without* counting investigation.¹⁴

¹² Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, State of Kansas, December 2003.

¹³ See, "Committee to Study the Death Penalty in Maryland, Final Report, The Cost and Hours Associated with Processing a Sample of First Degree Murder Cases for Which the Death Penalty was Sought in Maryland Between July 1979 and March 1984" (1985).

¹⁴ See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998).

Who generally pays for these costs? One study at Dartmouth University found that the costs are primarily borne by counties and most often paid for by raising taxes. The Dartmouth study estimated that over 15 years, the death penalty would cost counties an extra \$1.6 billion.¹⁵

As stated earlier, counties have faced bankruptcy because of a single case.¹⁶ Prosecutors across the country have also noted that a single death penalty case could bankrupt their office. The emphasis on county budgets means the decision to seek death in any case is directly affected by the county's ability to afford the process. This economic disparity is one of the factors that leads to arbitrariness in the death penalty system. In New Jersey, you already know that geographical disparity can also produce a race effect.

Conclusion

The death penalty is flawed and filled with legal landmines that will continue to explode in New Jersey and across the nation. New Jersey's law has already been suspended, first by the courts, and then by this legislature. The death penalty can never escape its capricious nature. It can't be made swift, efficient, or effective. Mistakes are a permanent graft on the institution itself. Tinker as you will, you will not and cannot make it fair.

And therein lies the choice you face as you decide whether or not to keep it. The death penalty is on its way out. There is growing public fear that an irreversible mistake will happen, if it has not already. The perception of arbitrariness, bias, and unfairness are eroding public confidence in the criminal justice system as a whole. And there is widespread understanding that the death penalty does not deter. Someday, the death penalty will be laid to rest, along with flogging, burning at the stake, and corporal punishment – all once a part of our nation's history. You will do a great service to the people of New Jersey, and our nation, if you implement your study commission's recommendations and help it quickly along its inevitable course.

¹⁵ K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

¹⁶ See generally, R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty," (revised edit., 1994) (available from the Death Penalty Information Center).

At the core of this debate is a harsh reality. There is not a bottomless pit of funding from which to keep the public safe and serve the needs of victims' families. It is true, there is no price on justice. But you can finance programs with a track record of improving public safety. If you have \$250 million to spend on law enforcement over the next 20 years, ask yourself this: is its most expensive *symbol* really your best answer?

**Testimony of Jennifer Thompson to the New Jersey
Senate Judiciary Committee
May 10, 2007**

My name is Jennifer Thompson and I am from Winston Salem, North Carolina. You may be wondering, "What's a woman from North Carolina doing in New Jersey?" I'm here because I believe my experience – my one time certainty in a situation - is uniquely relevant if this Committee and any of its members are certain that New Jersey is incapable of executing an innocent person. I would gladly travel to dispel that myth. Allow me to explain.

In 1984, I was raped at knifepoint. I did not know whether I would live or die that night. I have always been a determined person and so I decided that if God should be so kind as to let me live, I would do everything in my power to memorize my attackers' face. Throughout the course of the rape, I struggled to look into the face of the person who was destroying my life. I needed to know what his hair looked like, was his skin dark or light. Did he have any scars, tatoos, piercings, things he could not alter later? His voice, his age, weight and height all mattered. Information the police would need.

I survived that night, as did his second victim who he raped one hour later less than a mile from my house. My hate for him was secondary to my need to find him and get him off the streets. Ronald Cotton became the primary suspect and in January of 1985, the state of North Carolina convicted him of first degree rape, first degree sexual offense and first degree breaking and entering. He received life and fifty years.

It was an amazing moment for me. It was the criminal justice system at it's best. The good guy gets justice and the bad guy gets punished. This is the way it is suppose to work. Ronald Cotton would never touch his mother again. Never find love and get married. He would not know the joy of parenthood or taste of freedom again. I hated him with a blind hate. I prayed daily to my God to please have Ronald Cotton killed in prison but before he dies, let him know the incredible fear of being raped. To have your soul and spirit taken from you and crushed before your eyes. This all but consumed me.

As the years went by, my life took on a steadiness. I graduated college, fell in love, got married and gave birth to triplets in the spring of 1990. Life was good and I was busy. By the spring of 1995, I was informed that Ronald Cotton was requesting a DNA test to be performed. My blood sample from 1984 had disintegrated. Would I give a new blood sample? I did not hesitate as I knew what the test would show. It would show what I knew all along. Ronald Cotton was the monster who had raped me. I went that day to the lab to have blood drawn.

By June the results were in. And standing in my kitchen, the news was delivered. We had been wrong. Ronald Cotton was innocent. A man named Bobby Poole was the rapist, a serial rapist.

The shame was oppressive. The guilt was heavy. I was afraid of revenge, retaliation, vengeance. A full two years later and after intense suffering, I met with Ronald Cotton to ask for forgiveness. Without hesitation he gracefully forgave me. With mercy, he held my hand and told me not to be afraid of him. He gave me healing that night. He is now my friend. Without him, I would still be broken and fractured. He taught me I should not allow that one horrible act to control my life. Bobby Poole does not deserve that kind of power and control.

Three years later, in the year 2000, I was invited to speak at a press conference on behalf of a man named Gary Graham who was to be executed by the state of Texas. Graham's lawyers said he was innocent.

My immediate response to the request was, "no, of course I can not come. I am an ardent supporter of the death penalty. After all, this is America. We do not execute our fellow citizens unless we know, not beyond a shadow of a doubt, but without any doubt that they are guilty. I believe that if you take a life then you should be prepared to give up your own."

I was assured that I was entitled to my opinion and all that was needed from me was to tell my story. The following day, I boarded a plane to Houston and began to read about the Graham case. I was immediately alarmed at the description of the eyewitness evidence. There were some serious red flags in this case. Fear shot through me like a bolt of lightning. This could be an innocent man. I was challenged for the first time in my life about my belief in the death penalty. I began to wonder - how many other cases might involve human error, as mine did? Certainly it seemed wrong to execute this man if the account I was reading was accurate - and I believe it was.

In Texas I met twelve others there on Gary Graham's behalf, men and women, black and white. They had all been wrongfully convicted. One man was Kirk Bloodsworth, here today.

Some say that death row exonerations are rare enough that we should not end the death penalty because of innocence. Some say that, with the proper procedures for eyewitness lineups and other precautions against wrongful conviction, you can reduce the risk to an acceptable level. But, I ask you - what is acceptable? I cannot look at Kirk Bloodsworth and support the death penalty - I just can't. His life is too valuable.

Please allow me a word on eyewitness identification procedures. They are critically important to the criminal justice system. I know New Jersey is a leader in that regard and you should feel very proud of that. I wish every state was like

New Jersey. The fact that you are here today examining an issue that many states won't examine because of politics or indifference speaks to this State's desire for justice. I know that law enforcement here embraced the new lineup procedures. I know you have an excellent and well-funded public defender's office. I know that your courts carefully review death cases. But, I am here to tell you what I know is true - *you can reduce but you cannot eliminate the risk of error in the death penalty system.* No set of procedures can completely guard against human error. Believe me, I was certain that Ronald Cotton was the man who raped me - *certain.*

I have thought about this issue more than most. I could have been murdered that night that I was raped. Here is what I have concluded. I believe - as I have always believed - we should reserve no sympathy for killers. None. They choose to kill and should be held responsible for their choice. But, this is not 1960 or even 1990. This is 2007.

In 2007, we know that innocent people are sometimes sentenced to death.

In 2007, we know of at least four cases of executed persons who might have been innocent.

In 2007, we know of several state scandals involving crime labs.

I ask you - how can you know that no one in a New Jersey lab will ever act with sinister intentions or do sloppy work? You can't know, of course.

David Shepard, Nate Walker, McKinley Cromedy, Earl Berryman, Jimmy Landano, Larry Peterson, and other innocent men and women have been wrongfully convicted of serious crimes such as rape and murder right here in *New Jersey*, where you try so very hard to get it right. These wrongfully convicted New Jerseyans have suffered a great deal and there is no way to go back and undo what has been done to them. But we can honor them. One way to honor them is to acknowledge that we are not perfect. We are human. We make mistakes and some of us even act with malice. To deny that would be criminal.

Because human error is inevitable in all criminal justice systems and because the execution of an innocent person is also inevitable if the death penalty continues as a policy, this committee should vote to replace the death penalty with life without parole.

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Testimony before the New Jersey Senate Judiciary Committee
Submitted by: KIRK BLOODSWORTH
May 10, 2007

My name is Kirk Bloodsworth, and I am the first death row inmate to be exonerated by DNA evidence after spending almost nine years in prison for a crime I did not commit. I thank you for the opportunity to speak here today.

I am here to tell you my story in order to stress to you that as a human system, the death penalty will always be prone to mistake. In matters of life and death, one mistake is one too many. I could just as easily be dead today had the right set of circumstances not come about to ensure that the truth came out.

In 1984, my life changed dramatically. I was arrested for the brutal rape and murder of nine-year-old Dawn Hamilton. I was only 23-years-old, I was newly married, I was working full-time, and I had served four years in the United States Marine Corps. I had never been arrested before in my life.

In the summer of 1984, Dawn Hamilton was tragically raped and murdered in Baltimore County, Maryland. I had never met Dawn or her family and knew nothing about the crime. Unfortunately, I resembled the composite sketch of the last man seen with Dawn, and the police came to interview me. I cooperated fully with their investigation and allowed them to take a

picture of me, obtain hair samples, and the like. My picture was selected by witnesses, and I was identified in a line-up as the man last seen with the victim.

At trial, several witnesses again identified me as the man last seen with the victim. Despite testimony from family and friends that I was with them at the time of the murder, the jury convicted me in March of 1985. Words cannot describe the emotions I felt when the courtroom erupted in applause at my conviction. Only then did I start to realize that this was not a dream, but a real-life nightmare. I was then facing execution for a crime I knew I did not commit.

Because the prosecution did not fully disclose exculpatory evidence to my attorneys, my conviction was overturned by the Maryland Court of Appeals, and I was granted another trial. At the second trial, the prosecution presented many of the same witnesses, and I was once again convicted of the rape and murder of Dawn Hamilton. At my second trial, I chose to be sentenced by the judge, who sentenced me to two consecutive life sentences. Although there was some relief that I would not be executed, the thought of spending the rest of my life in prison for a crime I didn't commit was horrific. I appealed my second conviction, and lost.

As I stated earlier, my life changed dramatically when I was 23. I was facing first execution and then spending the rest of my life in prison. I was separated from family and friends, and I was branded a child rapist and killer. I cannot describe to you how difficult of an ordeal this was to endure. Perhaps the worst part of it was that my mother, whom I loved and who stood beside me the whole time, died while I was in prison. I did not attend her funeral, but I was allowed to

view her body, in handcuffs and shackles. She knew and believed the entire time that I could not have committed this crime.

At the time of my first trial, DNA testing was not very advanced. However, by 1992, DNA testing was breaking new ground. My attorneys requested that the evidence from my case be released for testing, and the Baltimore County prosecutors agreed. In May of 1993, a laboratory found that the semen stain on Dawn Hamilton's underwear could not possibly have come from me. The FBI confirmed those results a month later. I was eventually released on June 28, 1993, after spending 8 years, 11 months, and 19 days behind bars. Without the testing of DNA evidence in my case, I would still be behind bars.

In September of 2003, nearly ten years after my release, the Maryland State's Attorney found a match to the DNA evidence in my case. It matched a man I had served time with. He has since been convicted and sentenced for the rape and murder of Dawn Hamilton.

Unfortunately, I am one of the lucky ones. To date, of the over 100 people sentenced to die and later exonerated, less than 10% of them have had DNA testing available in their cases. The truth is, most murders do not involve any biological evidence to be tested. Even worse, we now know that even DNA is not foolproof. Last year a man was exonerated of a rape and murder in New York, and the DNA evidence that exonerated him was known by the jury at the time of his trial. The jury knew that the DNA didn't match, but they convicted him anyway. It took 17 years for the prosecution to retest the DNA and find a match.

It would be easy to say that my case is an isolated case, or that mistakes happen elsewhere but not here in New Jersey. But I am one of 123 people exonerated from death row, and one of 200 people who have been exonerated by DNA. Clearly, this is a system that makes mistakes—I am living proof of that. I was wrongfully convicted not once, but twice. And I was wrongfully convicted in Maryland – a state that, like New Jersey, is not known for heavy use of the death penalty. There is no state or judicial system that is above the reality that human beings are imperfect, and the risk of error never goes away. Our entire system of criminal justice—prosecutors, victims’ families, prisoners and, most of all, the public—is poorly served by a system that not only gets it wrong, but whose mistakes are deadly.

If it can happen to me, it can happen to anyone. I repeat. If it can happen to me, it can happen to anyone.

Thank you very much for the opportunity to speak here today.

**TESTIMONY IN SUPPORT OF BILL S.171
FOR THE SENATE JUDICIARY COMMITTEE MEETING, MAY 10, 2007
Presented by The Reverend Roy Riley, Bishop, New Jersey Synod
Evangelical Lutheran Church in America**

Thank you for the opportunity to testify today in support of Bill S.171, which would abolish the use of the death penalty in New Jersey. I am the Rev. Roy Riley, Bishop of the New Jersey Synod of the Evangelical Lutheran Church in America (ELCA). The New Jersey Synod includes clergy, rostered leaders and the 191 congregations of our church body on the territory of New Jersey.

I am also offering this testimony on behalf of the New Jersey Council of Churches, which is made up of 16 Protestant denominations in the state. In addition, I am representing the Council of Religious Leaders of New Jersey, which gathers the Denominational leadership of major Christian, Moslems and Jewish religious groups in New Jersey. Although there is great diversity in the way faith is expressed and lived out in our state, there is wide consensus among those represented by these two organizations that the death penalty is an inappropriate and immoral response to violent crime. On behalf of both groups I urge the Committee to vote favorably on S.171, so that it may be passed on to the State Senate for action.

As Bishop of the New Jersey Synod, I must speak out of the commitments and actions of our church. The Evangelical Lutheran Church in America and its predecessor church bodies have a long history of opposition to the use of the death penalty. Most recently, our 1991 national Churchwide Assembly adopted a Social Statement which "urges the abolition of the death penalty, and supports alternative and appropriate punishment for capital crime, including the possibility of life sentence without parole." This statement followed a four-year process of discussion and dialogue in the congregations, institutions and agencies of our church across the United States. A variety of voices and viewpoints were examined and considered from throughout our church. The Assembly that approved the final statement was made up of clergy and lay members of our congregations, with the majority of votes being held by laity. Social statements must have at least a two-thirds majority in order to be adopted. The statement opposing the death penalty received significantly more than that two-thirds majority.

In protecting society from people who may pose a danger to others, government needs to establish means to remove offenders from the general population. We believe that at this time in history, it is possible to provide security to the community through our system of criminal justice. However, as a church, we believe in principles of restorative justice. Incarceration and other forms of punishment must deny individuals the possibility of committing further crimes, but also must allow the possibility of rehabilitation and restoration. The death penalty places its focus on retribution, and limits the possibilities for change or rehabilitation.

Further, our position against the death penalty is rooted in research that has shown that the death penalty has not and cannot be made fair. Despite many attempts to provide legal

Dear Members of the New Jersey Death Penalty Study Commission,

We are family members and loved ones of murder victims. We desperately miss the parents, children, siblings, and spouses we have lost. We live with the pain and heartbreak of their absence every day and would do anything to have them back. We have been touched by the criminal justice system in ways we never imagined and would never wish on anyone. Our experience compels us to speak out for change.

Though we share different perspectives on the death penalty, every one of us agrees that New Jersey's capital punishment system doesn't work, and that our state is better off without it.

To be meaningful, justice should be swift and sure. Life without parole, which begins immediately, is both of these; the death penalty is neither. Capital punishment drags victims' loved ones through an agonizing and lengthy process, holding out the promise of one punishment in the beginning and often resulting in a life sentence in the end anyway. A life without parole sentence for killers right from the start would keep society safe, hold killers responsible for their brutal and depraved acts, and would start as soon as we left the courtroom instead of leaving us in limbo.

At the same time, a system of life without parole in place of the death penalty would save scarce funds. As New Jersey taxpayers, we have spent over \$250 million since capital punishment was reinstated in New Jersey in 1983. What has it bought us? Not a single execution, years worth of appeals and overturned sentences, and a system so broken that fixing it is probably impossible.

Those dollars could be spent in better ways if death-eligible killers were sentenced to life without parole. \$250 million dollars could put more police on our streets and provide them with the very best equipment available. Law enforcement programs that work might have prevented the tragedies we suffered at only a fraction of the cost. \$250 million could mean more counseling and aid to children orphaned by these horrible murders, or to other services we so desperately need as we attempt to get on with our lives.

Only a handful of arbitrarily selected murderers are sentenced to death. Is it worth the price?

It is vitally important that our state address the needs of surviving family and friends as we struggle to heal. We know that elected officials who promote the death penalty often do so with the best intentions of helping family members like us. We are writing to say that there are better ways to help us. The death penalty is a broken and costly system. New Jersey doesn't need it, and victims' families like ours don't want it.

Signed:

Bande A. and Sandra Addison, Maplewood, New Jersey 07040
We lost our brother, David S. Addison, to murder.

Hon. Ras Baraka, former city councilman, Newark, New Jersey
I lost my sister, Shani, to murder.

Jane Barnabei, Somers Point, New Jersey 08244
I lost my brother, Walter Southard, to murder.

Craig Barnabei, Somers Point, New Jersey 08244
I lost my uncle, Walter Southard, to murder.

James E. Clark, Sicklerville, New Jersey
I lost my uncle and cousin to murder.

Valorie Caffee, Ewing, New Jersey 08638
I lost my uncle, Frank Pindle, to murder.

Dorothy L. Clark, Carney's Point, New Jersey 08069
I lost my brother and my niece to murder.

Kelly and Celeste Fitzgerald, Chatham, New Jersey 07928
I lost my cousin, Ann, to murder.

Edith Frank, Morristown 07960
My nephew, Raymond Gilbert, was murdered.

Kim Gaddy, Irvington, New Jersey 07111
I lost my niece, Wytonya Thompson, to murder.

Kathy Garcia, Moorestown, New Jersey 08057
I lost my nephew, Jimmy Myers, to murder.

Mike and Marilyn Geiger, Medford, New Jersey 08055
We lost our daughter, Amanda, to murder.

Kathy Gluchoski, West Milford, New Jersey 07480
I lost my sister, Deborah Appleton, to murder.

Pat Goebel, Atco, New Jersey 08004
My son, Stephen, was murdered Oct. 29, 2001.

Kathy Hainsworth, Oakyn, New Jersey 08107
I lost my brother, Joseph C. Gaus, to murder.

Eddie and Karen Hicks, Galloway Twp., New Jersey 08205
We lost our eldest daughter, Jamila, to murder.

Maureen King, Oceanport, New Jersey 07757
I lost my husband, Patrick King, to murder.

Patrick and Todd King, Oceanport, New Jersey 07757
We lost our father, Patrick King, to murder.

Sheila and Michael Massoni, Hackensack, New Jersey 07601
We lost our daughter (Michael's stepdaughter), Morgan Kelly Cameron, to murder.

Val Mazur, Edgewater Park, New Jersey
I lost my daughter, Alisha "Nikki" Karaska to murder.

Eileen Croker McCann, Wyckoff, NJ 07481
I lost my brother, Dennis Croker, to murder.

Bryan Miller, Haddonfield, New Jersey 08033
I lost my brother, Mike, to murder in Washington DC.

Mitzie Myers, Chesterfield, New Jersey 08515
I am the mother of Jimmy Myers, a victim of murder.

Fr. Tom Newton, Cherry Hill, New Jersey 08034
I lost my great aunt, Margaret Coogan, to murder.

Sandra Nutbrown, Burlington, New Jersey 08016
I lost my mother, Mildred Place, to murder.

Bill Piper, Pennington, New Jersey 08534
I lost my mother, Arlene, to murder.

Lorry W. and June Post, Mount Laurel, New Jersey 08054
I lost my daughter (June's stepdaughter), Lisa, to murder.

Lois Teer Seeligsohn, Collingswood, New Jersey 08107
I lost my cousin, Margaret DeVault, to murder.

Mary Snyder, Cape May, New Jersey 08204
I lost my grandmother, Inez Jeanette Strom, to murder.

Rina Terry, W. Collingswood, New Jersey 08107
I lost my father to murder.

Robert and Madeline Ucciferri, Cherry Hill, NJ 08002.
Our son Bobby was murder in 2002.

Molly Weigel, Pennington, New Jersey 08534
I lost my mother-in-law, Arlene, to murder.

James Wells, Union, New Jersey 07083
I lost my son, Jafari R. Wells, to murder.

Marlinda Williams, Trenton, New Jersey 08611
I lost my niece, Rasheeda, to murder and also my step-daughter, Keisha, to murder.

Robin Lindsey Whitely, Short Hills, New Jersey 07078
I lost my brother, Walter J. Pratt, to murder

Thank you Chairman Adler and the Members of the Committee,

My name is David Shepard and I live in Newark. In 1984 I was wrongfully convicted of rape and served 11 years in prison before becoming the first person exonerated in New Jersey based on DNA evidence. That was in 1995.

I am happy to answer any questions you may have about my case but the purpose of my testimony today is to address a subject that has been raised in this and other hearings. What is life in prison really like?

Anyone who would say that life in prison is not terribly, terribly hard has never spent real time in prison. You have all heard the line "prison is a country club." I'll never understand how that country club myth got started. My God, it is nothing like that – nothing at all. Visiting a prison is very different from living the experience. I know. I lived it right here in New Jersey. In New Jersey State Prison and in the Youth Correctional Center in Yardville.

Prison life is hell. The worst part is the isolation – no friends, no support, no family.

Prisoners need to always watch their back. It is a dangerous place. You live in constant fear. Simply changing the channel on a TV set could put you at risk. You never know when someone will go after you.

In prison, you do not have a name; just a number. Your identity is literally taken from you.

So is your dignity.

It is the loneliest place in the world.

You are not respected. You must strip before visits and strip every time you go anywhere.

There is no privacy in prison. None. Absolutely none.

The only recognizable food is lunch meat. The food is the same everyday. I would bet they still serve corned beef on Mondays. No change, just the same bad and barely edible food each and every day.

You get two hours a day out of your cell. Work detail may give you more time. Weekends are toughest for those who work as you cannot leave for your job, which breaks up the boredom a little. The cells are 4x6 and you are in them for most of your life.

I would laugh about the people who say prison is a country club except that it is such a dangerous lie. Our young people should fear prison and we should not protect them from the truth or lie to them out of anger that prisoners get any rec time or can watch television. Prison is hell. Believe me. We need to tell the kids that.

Those who are in for long terms generally consider it a lifetime. I have only imagined how much worse it would be knowing you will NEVER get out, as with life without parole.

You have heard some suggest that it isn't that bad because prisoners can make art or play basketball in the prison rec yard. Think about it, really think about it. Think about what it must be like to know that you will NEVER hold a baby again or see the ocean again or smell a flower again or eat at a restaurant again. Think about all the things we take for

granted – our freedom – and think about what it would be like to know you will NEVER enjoy those freedoms again. None of them.

I do not believe there could be a worse punishment and I don't care what prison you are talking about. Even when inmates are seriously sick and hospitalized, they remain shackled. They remain in custody. They are not free. They do not have their dignity.

Dental care takes months and you are expected to take Tylenol and tough it out. Medical care is spotty and the wait for a doctor can be 2 weeks. Many people in our prisons are seriously mentally ill. They have a different set of problems.

Today, I am simply here to tell you the truth about prison life in New Jersey. This is hard for me and very painful but I felt I had to do it to help end the death penalty. That is the least I can do for the other innocent men and women out there.

Here are photos of two of New Jersey's exonorees. Nate Walker is in a hospital right now, struggling to recover from a series of strokes. Some of you may have met Nate, who is an extraordinarily good, kind, and hardworking man, parent, and friend. He was wrongfully convicted of rape and sentenced to life plus 50 years. He served 12 years in prison before a blood test excluded him as the rapist.

This is Jimmy Landano. Jimmy might have been executed if the death penalty had been in effect when he was wrongfully convicted of murdering a police officer. Jimmy, who served more than 20 years for a crime he did not commit, died of a heart attack after only a few years as a free man. His case involved many common problems that are seen in wrongful

conviction cases, including prosecutorial misconduct, improperly concealed evidence, and lying snitches.

The stories of Jimmy and Nate and others are in this booklet. I believe it an incomplete story and that there are other innocent persons in prison today.

But numbers are really beside the point. What matters – what really matters – is that we honor these two men and the rest of the exonorees by learning from our mistakes. One important lesson is that the death penalty is too final and therefore too risky.

Thank you.



Innocence Lost in New Jersey



Cover Photos: Nate Walker (top) and David Shepard (right) – © John C. Goodwin (201) 768-0777,
Prince (Clarence) Moore (left) and Rene Santana (center) – Courtesy of Centurion Ministries

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INNOCENCE LOST IN NEW JERSEY

In the middle of July 2005, the news hit the media that a prosecutor in Missouri was reopening an old murder case, admitting that Larry Griffin, the man convicted of the murder, in all likelihood was not guilty. This would be good news for Larry Griffin, except for one fact: the State of Missouri executed him in 1995. Reopening the case is a notable event, however, since pro-death penalty advocates have long claimed that no evidence existed of the execution of an innocent person; despite news reports and investigations into at least twenty executions where there was substantial doubt about the guilt of the condemned. It is to the credit of Missouri that the prosecutor is taking this brave step.

Until recently, the idea that individuals might be convicted of crimes which they did not commit was considered fanciful, the stuff of novels and television dramas. The public was confident that the American judicial system operated fairly and accurately, especially here in New Jersey, and only the guilty were ever imprisoned or executed. The last fifteen years, however, has seen an erosion of that confidence, as more and more individuals, convicted of crimes from rape to murder, have been proven to be actually innocent.

Some of these exonerations were due to new technological advances, such as new refinements in DNA; but even more were due to the efforts of various projects dedicated to proving innocence. A new study, "Exonerations in the United States," by

Professor Samuel Gross at the University of Michigan Law School and published in April 2004, found that DNA exonerations increased from one or two a year in 1989 to an average of 21 per year since 2001, while non-DNA exonerations increased from approximately nine a year to 22 a year.



Photo: Earl Berryman - Courtesy of Centurion Ministries

In the last twenty years, 41 projects dedicated to proving innocence have sprung up throughout the nation, resulting in hundreds of exonerations of individuals wrongfully imprisoned throughout the nation. Three of the most well known projects are the Cardozo Innocence Project in New York, the Center on Wrongful Convictions and the Death Penalty at the Northwestern University School of Law in Chicago, and Centurion Ministries, founded by Jim McCloskey and based in Princeton, New Jersey. Centurion Ministries, the first of the innocence projects, has been instrumental in freeing 36 individuals, seven of whom were imprisoned in New Jersey.



Photo: Nate Walker - © John C. Goodwin (201) 768-0777

It is impossible to know exactly how many individuals have been wrongfully convicted of serious crimes, given the difficulty of establishing innocence after conviction. The University of Michigan study examined exonerations of 328 individuals in the fifteen years from 1989 to 2004 and suggested that the total number of miscarriages of justice may well be in the thousands, possibly even the tens of thousands. Dr. Edmund Huggins, (dredmundhuggins.com) who keeps a database on line, lists 316 people who were convicted and imprisoned

Photo: Larry Peterson - Courtesy of the Innocence Project



oned for crimes of which they were eventually exonerated. Northwestern University's list of exonerations is above 700. Death Penalty Information Center reports that 121 people sentenced to death since 1973 have been exonerated, some within hours of their scheduled executions. It

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Photo: Damasco Vega – Courtesy of Centurion Ministries



should be noted that all of these numbers are current as of the writing of this report: however, innocent individuals continue to be released, and the number may have changed as of the date of publication.

It is especially difficult to catalogue wrongful convictions of more minor crimes. Given the length of time it takes an individual to reverse a wrongful conviction, only long or death sentences tend to be closely examined, although Professor Gross noted that such errors must occur, stating that a poor individual accused of a minor crime which he has not committed but who cannot afford bail will often plead guilty in return for a shorter sentence or time served. As an example, Professor Gross cites the problem in Tulia, Texas, where a single dishonest undercover narcotics agent lied about 39 cases and charged the defendants with drug deals that never happened. Thirty-one of those defendants pled guilty to crimes that they did not commit. After the facts came out, defendants, who had mostly served their sentences, were pardoned.

The specific reasons for wrongful convictions can be and are detailed below. While changes to the system can lessen the numbers of wrongfully convicted individuals, the problem remains one that is difficult to solve.



Photo: David Sheppard – © John C. Goodwin [2011] 768-0777

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INSTANCES OF WRONGFUL CONVICTIONS IN THE STATE OF NEW JERSEY

This report is an examination of wrongful convictions in the State of New Jersey, of the reasons for wrongful convictions, of specific examples, and of cases which could easily have resulted in wrongful convictions.

It is difficult to know just how many exonerations, let alone wrongful convictions, have occurred in this state. There is no central database: the researcher has to rely upon the innocence organizations, the chance of finding newspaper articles, cases reported in legal journals, and anecdotal accounts to piece together the names and stories of the wrongfully convicted. However, many newspapers do not keep computerized files going back more than a few years, and many legal cases are unreported. So it is acknowledged by the authors of this report that some - probably many - individuals who were wrongly convicted of crimes will be missing from this report. More disturbing, it is more than probable that many individuals wrongfully convicted of crimes remain in prison without any possibility of establishing their innocence.

The cases listed below are illustrative of the problem, but not meant to be exclusive.

For purposes of this report, a wrongful conviction means that a person was totally innocent of the crime of which he/she were convicted. In other words, that individual must have had nothing to do with the events leading up to the conviction. If an individual was convicted of murder but committed manslaughter, he/she will not be listed here. This report will also categorize individual cases into different categories. Individuals listed as exonerated must fit one of the following criteria: release after appeal and acquittal on retrial; release after appeal and the prosecution declines to retry; clemency on the basis of innocence; or motion by prosecutor to set aside conviction.

Also listed in this report are cases of possible or probable innocence where the indictment or conviction remains in place, and the prosecution intends or may still seek retrial. In some of these cases, the authors have no doubt as to the innocence of the accused but since legal proceedings are continuing, the individuals do not technically qualify as exonerated. In all of the cases in this category, there is at least substantial doubt that the individual committed the crime for which

he/she was convicted. Included in this category are any cases in which a possibly or probably innocent individual ultimately pled guilty to a lesser charge in exchange for time served in order to avoid the risk of additional time in prison.

There is a third list - that of exonerations before trial - where an individual wrongly accused of a crime was cleared before trial but suffered either confinement or public humiliation from the arrest. It should be noted that in most cases where the police hone in on the wrong person but realize the mistake before trial, especially when custody lasts a short time, there will be generally be little publicity and no legal cases. The cases listed here are the rare exceptions where an arrest or release made its way into the press.

In a number of cases listed here as possibly or probably innocent, the prosecution sought the death penalty. The prosecution sought to kill Larry Peterson, Ron Long, Michael Behn, and Nathaniel Harvey. Nathaniel Harvey is the only one in this group currently on death row. A number of the exonerated, however, were convicted of murder at a time when New Jersey did not have the death penalty. Jimmy Landano, wrongly convicted of killing a police officer, often stated his conviction that had a death penalty existed, he would have been executed.

It is chilling that death was so often sought in cases where the evidence of guilt was far from overwhelming and underscores the risk, if New Jersey continues with the death penalty, of executing an innocent person.

- The Exonerated

Earl Berryman

Essex County

Kidnapping, rape

Sentence: 50 years

Time to exoneration: 10 years

Centurion Ministries case

In March 1983, Christina DosSantos was driving home at around 2:30 a.m. when two men forced their way into her car. They then drove her to a shopping center where they picked up a third man.

From there, they headed to a burned out building where she was forced from the car and raped. Two days later, she went to the police to report the rape, and she was shown a book of photographs. After viewing the photographs in the "A" sleeve, she moved on to the "B" sleeve where she made three identifications, Earl Berryman, Anthony Bludson, and Michael Bunch. She did not examine any of the other photographs in the "C" through "Z" sleeves. The detective mailed letters to the three suspects' last known addresses, but the letter addressed to Berryman was returned. The police took no further action for more than a year. After learning that the police had been looking for him, Berryman went to the station to find out why. He was then charged with kidnapping, robbery, and rape.

Berryman had a steady employment history and no prior criminal record. The only evidence against him was the identification of the victim. He denied committing the crime, had never driven a car, and claimed he had never met the other two men charged.

The victim's identification was especially questionable given the victim's descriptions of the men's heights and the actual heights of the defendants. Bunch, who allegedly held a knife and allegedly was the first into the car, was described by the victim as around 5'10" tall. He was in actuality, 6'4" tall. The victim described Bludson, the second man, as approximately the same height as Bunch or 5' 10". However, Bludson was the shortest of the three, approximately 5'5" tall. Berryman, described by the victim as the third man and the shortest of the three in her opinion, was actually 5'10" tall or between Bludson and Bunch, a fact that the federal district court noted in a later decision.

Bludson, who had a different attorney from either Bunch or Berryman and was tried separately, was acquitted when his lawyer pointed out the discrepancies between the victim's various descriptions of her attackers.

In Bunch's and Berryman's trial, however, their attorney did not cross-examine the victim about her identification. The jurors, thus, never learned how the victim had initially described the attackers, how that description changed, how she even changed testimony under oath. What the jurors did learn, thanks to the defense attorney, was that Bunch had a record and was under investigation for a bank rob-

bery/murder, facts that had no relevance to this particular crime but had every possibility of prejudicing the jury against both defendants.

In his summation, the prosecution hammered at Bunch's prior record and then linked Berryman to Bunch, despite the lack of any evidence besides the victim's questionable identification that the two even knew each other, stating, "Bunch is guilty and you ask yourselves how could Alice Campos be so right about Bunch and so wrong about Berryman? It is impossible. Both of them are guilty."

Berryman was convicted in July 1985 and sentenced to an aggregate term of 50 years with parole ineligibility for 25 years. Centurion Ministries took on the case in 1990. In 1995, the federal district court, stating that it had "substantial doubt" of Berryman's guilt and ordered him released. Michael Bunch had died of AIDS contracted in prison before the decision came down.

McKinley Cromedy

Middlesex County

Rape

Sentence: 50 years

Time to exoneration: 7 years

From court documents and newspaper articles

On August 28, 1992, an intruder entered the apartment of a white female student enrolled at Rutgers University in New Brunswick, raped and robbed her. She immediately reported the rape, described the attacker, and was taken to Roosevelt hospital where rape samples were taken.

On April 23, 1993, she saw an African-American man whom she believed to be the rapist. She called the police, who immediately picked up McKinley Cromedy. Within fifteen minutes of seeing Cromedy on the street, the victim identified him in a "show-up" from behind a one-way mirror. At trial, defense counsel sought a "cross-racial" identification charge, in other words, counsel asked the judge to instruct the jury to consider the potential for error when an eyewitness identifies someone of another race. The trial judge refused to give the instruction, and Cromedy was convicted of rape. The New Jersey

Supreme Court reviewed the case and set forth a rule that a cross-racial identification charge should be given to the jury in cases such as Cromedy's. Cromedy's case was remanded for retrial.

Prior to retrial - to bolster its case - the prosecution sent out the DNA for testing. The results came back - and the DNA in the rape kit did not match Cromedy. The prosecutor, however, initially refused to drop charges until she could speak to the victim to ascertain whether there could be any other reason for the non-match. Still, the results were clear. Cromedy was innocent. He was released from prison in 1999, having made legal history - the judge in a case where an eyewitness identifies an individual of another race must now explain the possibility of mistake to the jury.

George De Los Santos
Essex County
Murder
Sentence: Life
Time to exoneration: 7 years
Centurion Ministries case

George De Los Santos was convicted of the 1975 murder of a Newark used car salesman. He and another man, Harvey, were initially identified by an eyewitness as fleeing the scene. The case against both men crumbled, however, when the credibility of the eyewitness was demolished. It turned out that the second man had an ironclad alibi, which put him in California at the time of the commission of the crime. The only evidence, aside from the discredited eyewitness, was that of Delli Santi, a jailhouse informer, who testified to a "cell confession" from De Los Santos.

Despite the shaky evidence, De Los Santos was convicted. His case was taken up by Jim McCloskey and Paul Casteleiro, who took the case to federal court.

Delli Santi denied that the prosecutor had shown or discussed the case with him, a fact which Federal District Judge Fredrick Lacey determined to be a lie since Delli Santi placed Harvey - who clearly had been in California - in the confession. Describing Delli Santi's testimony, Judge Lacey wrote, "Even a casual reading of his testimony demonstrates that it reeks of perjury."

Not only did Delli Santi lie on the stand, he was a habitual informant for the police, so much so that he feared for his life if he were to go to prison. Yet this habit of informing was not disclosed to the defense, as is required for a fair trial.

The prosecutor, Kevin Kelly, never disclosed that he had any knowledge that Delli Santi was a constant police informant. Yet, a note in Kelly's file in his own handwriting stated, "Delli Santi is in the habit of giving testimony."

Judge Lacey ordered De Los Santos released unless he received a new trial. George De Los Santos was released in 1983.

John Dixon
Essex County
Rape
Sentence: 45 years
Time to exoneration: 10 years
Innocence Project case

In December 1990, a woman was dragged into an alley, raped, and robbed. Three days later, she picked John Dixon out of a photo array. On January 4, 1991, she again identified Dixon. He was arrested on January 18, 1991.

Dixon claimed that his public defender brushed off his requests for DNA testing, telling him he had no defense and would get 50 years in prison if he went to trial. On his attorney's advice, he then pled guilty. When he appeared for sentencing, he tried to withdraw his plea and asked for DNA testing. The judge questioned the relevance of the testing to the case and denied the motion. Dixon was sentenced to 45 years, with 15 years of parole ineligibility, consecutive to a 15-year sentence he was serving on a Union County robbery. His appeal was handled by a pool attorney, who only raised the issue of an excessive sentence.

Dixon continued to ask for DNA testing, writing letters to his attorney, the Public Defender, and the Administrative Office of the Courts. In 1996, he sued to force testing, but the case was dismissed.

In 1999, the Innocence Project hired Paul Casteleiro to take on

Dixon's case. Finally, testing was conducted in 2000, and it was determined that Dixon's DNA did not match that of the rapist.

In November 2001, Dixon was freed. In an article in the New Jersey Law Journal, Casteleiro estimated that the rape charge added an extra seven years to Dixon's time in prison.

Curtis Knight

Essex County

Sentence: Life

Time to exoneration: 12 years

From newspaper articles

In September 1988, Glenn Brown also known as Hassan, was bludgeoned to death at a housing project in Newark. On December 8, 1988, Curtis Knight and another man were indicted for the murder.

Knight had moved to California with his family. He was arrested by the FBI in California on the murder warrant and an unlawful flight warrant.

At trial, Marie Robinson claimed to be an eyewitness to the attack, although she had not come forward until eleven days after the attack. She claimed that she had been with two women, one of whom was named Kim Loyal, when she saw two men enter the building from the back. She left the women to watch what was going on, and claimed she saw Knight attack Brown with a pipe.

There were problems with her testimony, including substantial differences each time she told the story, and the fact that the victim's medical injuries did not match her description. There were two other witnesses, neither of whom identified Knight as the perpetrator.

Prosecutors, however, concealed the fact that Robinson, who faced charges for drugs, received a promise of leniency in exchange for her testimony. In fact she didn't mention that she'd seen Knight hit Brown with the pipe until the judge at her sentencing stated that he could put her in jail or give her probation, depending on whether there was anything of a positive nature that she could tell the probation officer.

Also concealed from the defense was a statement by Kim Loyal that she had been on the scene the day of the murder but did not see Robinson or Knight.

Another State witness, Terrence Worthy, had apparently previously given a statement to the police that the victim, Brown, had perpetrated a murder. This information was also withheld from the defense. In a brief to the Appellate Division, the defense stated that this fact demonstrated "bad blood" between Worthy and Brown and suggested that Worthy may have committed the killing and incriminated Knight to deflect suspicion from himself.

Knight was convicted and sentenced to life in prison. After the conviction, he sought a new trial, with the evidence of a new eyewitness who claimed that Knight was not the killer but who had not previously come forward. The trial judge denied the motion.

The Appellate court threw out Knight's conviction, citing the prosecution's concealment of evidence that cast doubt on his guilt, and stating that Knight's guilt was "far from overwhelming." The Supreme Court agreed.

Charges against Curtis Knight were dismissed in 2001.

Jimmy Landano

Essex County

Murder and robbery

Sentence: Life plus 7-15 years consecutive

Time to Exoneration: 23 years

Centurion Ministries case

In 1976, gunmen robbed the Hi-Way Check Cashing Service in Kearny, New Jersey, in the course of which, a Newark police officer was shot and killed. Jimmy Landano was arrested along with three other individuals, and charged with various counts of murder and robbery.

The other three defendants, Allen Roller, Victor Forni, and Bruce Reen, were members of the Breed motorcycle gang. In exchange for dismissing other charges including another charge of armed robbery, Roller agreed to testify against Landano. He testified that although Landano was not a member of the gang, he had been recruited for the robbery. He claimed that Landano had fired the fatal shots at the officer. Roth, the owner of the check cashing service, testified that he had identified Landano from a photo - and he was the only witness to firm-

ly and positively identify Landano as one of the perpetrators of the robbery. Joseph Pascuiti, the only individual to actually see the shooting, said that he saw a dark haired man with curly hair. (Forni, at the time, had curly hair and a very slight mustache.) Other witnesses tentatively identified Landano. Most of the witnesses identified a picture of Landano without a mustache. At the time of the killing, Landano sported a large, bushy, and very obvious mustache. Yet, none of the witnesses mentioned it.

A jacket was found in the get-away car, allegedly worn by the killer. At trial, Landano tried it on and demonstrated that it was much too small for him. Landano testified at trial that he had been on Staten Island and in Manhattan the day in question. His fiancée and her friend corroborated his story.

While the jury was out for a lengthy time, indicating some indecision about his guilt, still Landano was convicted and sentenced to life in prison.

Landano brought motion after motion trying to establish his innocence. Time and time again, his motions were denied. In 1989, the federal district court reviewed the evidence and granted a habeas appeal for Landano. The Third Circuit reversed.

Still, the evidence that Forni, not Landano, was the killer was accumulating. In March 1978, a report identified a fingerprint on the car used in the coin shop robbery as belonging to Forni. A ballistics test traced an expended shell at the scene to a weapon belonging to Forni.

In 1994, the Appellate Division reversed Landano's conviction and sent it back for a new trial, citing multiple examples of prosecutorial misconduct. That misconduct was laid out in a 54 page decision, concluding that Landano could persuasively argue "that Roller was an unmitigated liar, that Roth's firm identification was tarnished by self-interest, and that Pascuiti and Demichelli had ruled him out as a suspect in the case."

The misconduct included massive withholding of vital information. The Appellate Division found that the prosecution deliberately concealed evidence that Forni, Roller, and Reen had participated in two armed robberies of a Perth Amboy coin shop which showed an on-going criminal venture among the three men and, according to a federal district judge, created a "powerful suggestion that Roller was lying to protect Forni." The prosecution also failed to disclose that one witness,

Roth, was being investigated for loan sharking and money laundering, but after he testified against Landano, Roth was not charged with a crime. The prosecution also concealed that Portas, another eye witness, initially identified another individual as the perpetrator but finally picked out Landano's photo after a detective pointed him out as the man the police wanted. The prosecution concealed that an unknown individual (Basapas/Pasapas) had picked out the picture of Victor Forni as the man driving the get away car. The prosecution also concealed the fact that the other eyewitnesses in the case were shown Landano's picture and rejected it, stating that the perpetrator had curly hair.

Landano was retried in 1998, and the jury took less than an hour to acquit him. From the time of his release to his death in 2002, Jimmy Landano dedicated himself to helping the wrongfully convicted and to opposing the death penalty.

Margaret Kelly Michaels

Essex County

Sexual abuse of minors

Sentence:47 years

Time to exoneration:9 years

From court documents and newspaper articles

Margaret Kelly Michaels was arrested in June 6, 1985 and charged with sexual offenses against children in the Wee Care Nursery School. In 1988, she was convicted of 115 counts of sexual offenses involving twenty children and was sentenced to an aggregate term of forty-seven years in prison with fourteen years of parole ineligibility.

In 1984, Michaels was hired as a teacher's aide at the Wee Care Nursery School. After three weeks, the school decided to make her a teacher for the three year old class. On April 15, 1985, she gave notice to take a job at another day care facility. No children had ever complained of any difficulties with her while she was teaching at the school, nor did any employee of the school notice any inappropriate behavior or any fear by the children of being with her

The Michaels case occurred at a time when the entire country was panicked into believing that ritualized sexual abuse routinely occurred at child care centers. There were hundreds of cases around the coun-

try, most of which have since been thrown out of court, and the day care abuse cases have been compared to the Salem witch trials.

The Michaels investigation started after a child, while his temperature was being taken by a pediatrician, commented without more detail that his teacher did the same thing to him. The interviews soon expanded to all the children who had any contact with Michaels.

Interviewers refused to take no for an answer. When children said that nothing had happened, the investigators determined that the children were withholding the truth because they were afraid of Michaels. Investigators taught children the names of body parts with anatomically correct dolls, and social workers suggested what might have happened. The New Jersey Supreme Court noted that "children were asked blatantly leading questions that furnished information the children themselves had not mentioned." Children were subject to "repeated, almost incessant, interrogation." Techniques included "mild threats, cajoling and bribing. Positive reinforcement was given when children made inculpatory statements, whereas negative reinforcement was expressed when children denied being abused...."

The catalogue of accused crimes against Michaels rose to an almost farcical level. The children accused her of licking peanut butter off their genitals, of playing a piano while naked, of inserting silverware, a sword, a lightbulb, and Legos into their private parts, of amputating penises, of changing a child into a mouse, of putting a car and a tree on top of a child.

Yet, despite allegations of anal and vaginal penetration of the children by forks, knives, and other implements, no physical evidence ever corroborated the children's testimony.

In 1993, the Appellate Division found that Michaels trial had produced an unjust result and reversed, requiring an evidentiary hearing as to whether any of the tainted testimony by the children could even be introduced in court if the prosecution decided to retry the case. In 1994, the prosecution appealed to the New Jersey Supreme Court, asking that the Court not require a pretrial hearing on the reliability of the children's testimony. Noting that the record was filled with "egregious prosecutorial abuses" and that the children's evidence was unreliable, the Supreme Court upheld the decision. The charges against Michaels were dismissed.

Rene Santana

Essex County

Murder

Sentence:

Time to exoneration: 11 years

Centurion Ministries case

On Monday morning, December 16, 1974, two or three armed men wearing ski masks forced their way into the apartment of Remigio Sanchez in what appeared to be a robbery attempt. Moments after the break-in, one of the robbers, Provenco "Columbia" Acevedo was struck in the head with a baseball bat by Sanchez. An exchange of gunfire followed, and Sanchez was shot. Columbia died that day; Sanchez died a month later. The other man or men fled.

Two other individuals were initially charged and the charges withdrawn: Gilberto Crespo, Columbia's brother-in-law, and Carlos Pepin.

After those individuals were released, the state arrested Rene Santana and Jose Roderiguez. The State's theory was that Santana was the second man in the apartment and Roderiguez was the driver of the getaway car.

Santana had an alibi. The crime occurred Sunday night/ Monday morning. On Sunday afternoon, Santana spent several hours with his estranged wife and their children. His wife testified to his presence. (The afternoon hours were important because Crespo and Pepin, the former suspects in the case, claimed Santana had been in Newark casing the site of the robbery.) In the evening, he stayed with his friend and his friend's wife in Corona, Queens, a borough of New York City, both of whom testified on his behalf. The husband also testified that he had spent all of Monday with Santana in Brooklyn.

Prior to the trial, the prosecution repeatedly failed to produce evidence to the defense, to the extent that the judge delayed the trial and issued several rebukes. The withheld evidence included statements by two witnesses who were present with Sanchez at the time of the break-in; medical records, statements, and addresses of critical witnesses. According to Jim McCloskey, who investigated the case, the State was trying to tidy up the testimony. Where witnesses first stated that three men invaded the apartment, and one stayed outside at the car, the testimony in court was that two men, allegedly Santana and Columbia, went into the apartment, and Rodriguez remained outside. The third man mysteriously disappeared from the State's case.

At trial, the only difference in the evidence against Rodriguez and Santana was the testimony of Roberto Gutierrez. Eighteen months after the crime, Roberto Gutierrez came forward to claim that he had seen Santana leave the scene and remove his ski mask. When asked by the defense, Gutierrez testified that he had no criminal arrests except for traffic violations. The defense asked that his record be checked, the prosecutor agreed to do so, and inform the court if there was any record of a deal in exchange for Gutierrez's testimony.

Gutierrez's arrest record was never mentioned again. The jury came back with a verdict of not guilty for Rodriguez and guilty for Santana.

Eight years later, it came out that Gutierrez had a criminal record. Not only did he have a record, but there were outstanding warrants and charges against him, which remained open and active until the Friday before his testimony on behalf of the State and against Santana. On that Friday, "coincidentally" the day that the State decided to call Gutierrez as a witness, all outstanding charges were dropped and the bench warrants cancelled. Ten years after the conviction, filled with remorse, Gutierrez visited Santana at Rahway State prison and apologized for falsely identifying Santana as the killer.

Testimony in a post-conviction relief evidentiary hearing commenced on February 10, 1986, and continued for several days. On February 18, 1986, the prosecution consented set aside the verdict on the trial on the condition that Santana plead guilty to two counts of assisting the robbery and be sentenced to time served. Santana agreed and was released from prison.

David Shepard

Essex County

Rape, robbery, weapons violations

Sentence: 30 years

Time to exoneration: 10 years

From "Actual Innocence" by Scheck, Neufeld, Dwyer

In 1983, a woman was abducted by two men from a shopping mall in Woodbridge, forced into the back seat of her car, driven to Hillside, and raped. The attackers then stole her car. The victim heard one of the men use the name Dave.

Items from her car were found near the Newark airport, where David Shepard worked. He was picked out of a line-up by the victim, and she identified his voice as that of one of the assailants. Testing was done on the sperm samples, but did not exclude Shepard. At the trial, his family testified that he had gone to work as usual and returned at the usual time. The bus driver on his normal bus could not remember whether Shepard had been on the bus. Shepard's attorney urged him to take a plea bargain that would give him a ten year sentence. He refused.

He was convicted and sentenced to 30 years in prison.

In 1992, having heard about DNA, Shepard petitioned to be tested, and the prosecution did not oppose it. All DNA testing excluded Shepard from being either of the rapists.

Based on the DNA results, the court ordered a new trial. The prosecution dismissed all charges, and Shepard was released. At the time, there was no compensation for anyone wrongfully convicted unless wrongdoing by the police or prosecution could be proven. There was no "wrong doing"; Shepard's conviction was the result of a mistaken identification. There also were no programs from the Department of Corrections to assist in finding work for an individual released from prison because his innocence had been established.

After a long search, Shepard finally found a job cleaning, only to have the New Jersey Department of Social Services take \$150 from his pay for support money for his child while he had been in prison for a crime he didn't commit. Ultimately, Paul Casteleiro lobbied the New Jersey legislature, and helped pass a bill which compensated exonerated individuals who spent more than 18 months in prison.

Lawrence Simmons

Passiac County

Murder

Sentence: Life

Time to exoneration: 23 years

From newspaper articles

In 1977, Dr. David Doktor was killed as he left his home at 1:30 a.m. to answer an emergency call at Barnet Memorial Hospital. The doctor was beaten to death in what police believed was a robbery gone bad.

Three men, Lawrence Simmons, Donald Phillips, and Donald Wilson were arrested as suspects. Wilson, in exchange for a grant of immunity, testified against both Simmons and Phillips. In 1978, both were convicted and sentenced to life in prison.

Simmons' case was reversed on appeal. He stayed in prison while he was retried twice, both trials resulting in hung juries. He was offered two plea bargains in the 1990's that would have let him out of prison in exchange for pleading guilty to the murder charged. He refused. He was quoted in *The Star Ledger* as saying, "I would never plead guilty to anything just to get out of jail." His attorney stated that Simmons would have stayed in prison the rest of his life rather than take a plea deal.

In 2000, he was released from jail when the Passaic County Prosecutor's Office decided not to retry him.

Damaso Vega

Middlesex County

Murder

Sentence: Life

Time to exoneration: 7 years

Centurion Ministries case

In 1982, Damasco Vega was convicted of the 1980 murder of 16-year-old Maria Rodriguez and sentenced to life in prison.

All appeals were denied until Jim McCloskey and Paul Casteleiro entered the case and brought a motion for a new trial. In 1989, Judge Robert Figarotta reviewed the evidence to determine whether Vega deserved a new trial.

The primary evidence was the recantation of testimony by three prosecution witnesses, Echavarria, Pizarro, and Soto. Echavarria had given one description of the killer to the police. A year and a half later, under pressure from the police, he changed the description and identified Vega. Before Judge Figarotta, Echavarria recanted that testimony, denying that Vega was the person he had seen.

Pizarro had previously stated that Vega had confessed to him the night after the murder. On the stand, he stated that the confession had never taken place and he had made the statement under police pressure.

Soto, the victim's sister, had previously testified that the victim had a relationship with Vega, but at the hearing, she recanted that testimony.

The judge also reviewed various notes and reports by a Detective Lipka, which shed light on the movement and substantiation of various individuals, including Pizarro. The report, however, had been modified before being given to the defense, and Detective Lipka's testimony contradicted some of the information in his notes.

In reviewing all the evidence before him at the hearing for a new trial, Judge Figarotta stated, "There are many aspects of this case which truthfully terrify me to think that these things can still occur within our justice system." He then ordered a new trial for Vega.

Vega was released in 1989.

Nathaniel Walker

Union County

Rape

Sentence: Life Plus 50 years

Time to exoneration: 11 years

Centurion Ministries case

In 1974 a woman was abducted on the streets of Elizabeth and taken to Newark where she was raped and sodomized. In 1975, she picked Nathaniel Walker out of a line up as the rapist.

The matter went to trial in 1976. Walker should have been able to prove his innocence. The victim testified that the rapist only had one testicle. Walker had medical evidence of two testicles. The victim said the rapist was circumcised, and Walker had medical evidence that, to the contrary, he was uncircumcised. Even more impressive: he had an alibi. He had been at work at the time of the rape. He had punched the time clock, and fellow workers testified to his presence.

A simple blood test, in those pre-DNA days, could have proven his innocence even more definitively by showing that Walker did not even have the same blood type as the actual rapist. Walker had type A blood, and the rapist type B. But neither his attorney nor the prosecutor thought it important to even check that his blood type matched the semen of the rapist.

Walker was convicted. At his sentencing, he stood and interrupted the sentencing judge to proclaim his innocence.

In 1986, after losing all his appeals, Walker turned to James McCloskey of Centurion Ministries, and McCloskey had the blood sent out for testing. After the blood samples definitively proved Walker's innocence, the prosecutor joined Walker's new lawyer, Paul Casteleiro, in asking that the case be dismissed.

The judge who finally released him praised the criminal justice system for correcting a wrong, even though Walker spent eleven years of his life locked up for something he didn't do.

Nathaniel Walker was released in 1986. He currently works for New Jerseyans for Alternatives to the Death Penalty, advocating on behalf of the wrongfully convicted and against the death penalty.

William Olman
Burlington County
Murder
Sentence: Life
Time to exoneration: 3 years
From newspaper articles

On October 6, 1981, Patty Hoffman's body was found face down in shallow water. She had been strangled.

Eighteen months later, the prosecution honed in on William Olman, who was already in prison for an unrelated fire bombing and arson. The State's case centered on the statements of two jailhouse snitches, who claimed that Olman had confessed to them.

Barred from the trial were certain defense witnesses who would have testified that another man had confessed to the murder. The fact of Olman's unrelated conviction was also relayed to the jury. He was convicted and sentenced to life.

The Appellate Division reversed the conviction, and Olman received a new trial in 1986 at which he was acquitted.

Louis Benevente
Unknown County
Robbery
Time to exoneration: 22 years

Benevente was convicted of robbery in 1919 and exonerated in 1931 after it was shown that the eyewitness had committed perjury to cover up his own crime. The state later compensated him \$5,000 for his ordeal

George Parker

Aggravated Manslaughter

Sentence: 20 years

Time to exoneration: 6 years

From "In Spite of Innocence", by Radelet, Bedau, and Putnam

In 1980, George Parker was convicted of aggravated manslaughter, largely on the testimony of two eyewitnesses. One of the eyewitnesses was subsequently convicted of the murder; both were convicted of perjury. The other evidence against Parker was his initial confession, made to protect the real killer with whom he was in love. He was awarded a new trial in 1986, after the convictions of the two women eyewitnesses.

George Merritt

Union County

Murder

Sentence: Life

Time to exoneration: 10 years

From "In Spite of Innocence" by Radelet, Bedau, and Putnam

In Plainfield in 1977, a race riot resulted in the beating to death of a police officer. George Merritt and eleven other individuals were charged with murder. The case against Merritt rested solely on the testimony of one eyewitness. In three state trials, Merritt was convicted, and his conviction upheld on appeal. However, in 1980, Merritt brought an action in federal court for habeas. It was granted because the prosecution had failed to disclose to the defense the existence of a police report that contradicted the eye witnesses' account.

The State decided not to try the case again, and Merritt was released.

Ralph Cooper, Collis English, McKinley Forrest, John McKenzie, James Thorpe, Horace Wilson

Mercer County

Robbery-Murder

Time to Exoneration: 4 years

From: "In Spite of Innocence" by Radelet, Bedau, and Putnam

Known as the "Trenton Six", all of the men, who were black, had solid alibis but were convicted of robbery-murder in 1948 and sentenced to death. Five of the six had signed separate and inconsistent confessions, and no other evidence linked them to the crime. In a second retrial in 1951, Forrest, McKenzie, Thorpe, and Wilson were acquitted. Cooper and English were reconvicted, convictions which were reversed on appeal. Cooper was released after pleading no-contest; English died in prison. Evidence at the 1956 perjury trial of a physician indicated that the confessions were coerced.

John Edward Schuyler

Murder

Time to Exoneration: 7 years

From: "In Spite of Innocence" by Radelet, Bedau, and Putnam

Convicted of first-degree murder based entirely on circumstantial evidence, John Schuyler was sentenced to death. The conviction was affirmed on appeal. In 1914, after the real murderer confessed, Schuyler was pardoned and released.

James Sweeney

Murder

Time to Exoneration: 2 years

From: "In Spite of Innocence" by Radelet, Bedau, and Putnam

Convicted of first degree murder through mistaken eyewitness testimony, perjury, and circumstantial evidence, James Sweeney was sentenced to life in prison. He was exonerated and freed in 1928 by the Board of Pardons when the true culprits confessed.

– Probable or Possible Innocence

John Artis

Passiac County

Murder

Sentence: Life

From newspaper articles and court documents

See Rubin "Hurricane" Carter.

Rubin "Hurricane" Carter
Passiac County
Murder
Sentence: Life
From newspaper articles and court documents

In one of the most controversial criminal cases of the 1960s, on June 17, 1966, two men entered the Lafayette Grill in Paterson, New Jersey, and shot four people, killing three. Rubin "Hurricane" Carter, a onetime contender for the middleweight boxing crown, and John Artis, an acquaintance of Carter's, were charged with the murders. In a highly publicized and racially loaded trial, the prosecution hinged its case upon the testimony of two criminal informants. Carter and Artis were convicted and sentenced to life. Carter appealed.

In 1974, Selwyn Raab, a reporter for *The New York Times*, published a front-page story about the case. A host of celebrities including Muhammad Ali, Jesse Jackson, and Bob Dylan, came to Carter's defense. In March 1976, the New Jersey Supreme Court unanimously overturned the convictions, ruling that the prosecution withheld key evidence. A new trial was ordered, and Carter and Artis were released on bail.

At the second trial, the prosecution presented the theory that Carter and Artis carried out the murders in retribution for the murder of a black patron at a bar earlier that evening. Carter and Artis were convicted again and sent back to prison.

John Artis was released on parole in December 1981, after serving a total of 15 years in prison.

On November 7, 1985 Judge H. Lee Sarokin of Federal District Court in Newark granted Carter's writ of habeas corpus and overturned the convictions from the second trial on the basis of "grave constitutional violations" by the prosecution. Carter was released from prison on November 8, 1985.

Michael Behn
Middlesex County
Capital murder
Sentence: Life
From court documents and newspaper articles

In 1997, Michael Behn was convicted of the murder of antique coin dealer Robert Rose in 1995. The State had sought the death penalty against Behn, who had no prior criminal record, but the jury deadlocked on whether Behn had committed the murder by his own conduct, thereby precluding the possibility of a death sentence. He was sentenced to life, with thirty years parole ineligibility.

Robert Rose had been found in his shop, shot four times in the head. Behn had visited Rose's shop a few hours before the murder. He stated that he had purchased \$40,000 worth of rare coins and left at around 5:30 p.m. and that he had used cash that he had on hand to hide from tax authorities. He presented evidence to that effect.

The State's theory was that Behn had returned, killed Rose, and left with the coins for which he had been negotiating earlier in the day, leaving other valuable coins in the shop. Although the State presented evidence from Rose's wife that Rose had intended to go back to the shop to meet with "Mike", Rose's son and two other individuals presented evidence that Rose was meeting with someone other than Mike.

Behn also had an alibi for the time that Rose was killed.

According to attorney Paul Casteleiro, who is currently representing Behn and who obtained a new trial for him on a post-conviction relief appeal, the last individual in the shop before Rose went home for dinner, was a person who had been convicted of manslaughter in Philadelphia.

Critical to the case was the question of Behn's .22 caliber rifle. Behn had reported it stolen about a year before the murder. There was conflicting evidence as to whether the murderous shots had been fired from the type of weapon reported stolen by Behn. One of the State's own experts stated that the murder weapon could have been either a .22 caliber Marlin or a .22 caliber Jennings semi-automatic weapon. A second State's witness, however, testified that the murder weapon could only have been a Marlin rifle. That evidence was countered by a defense expert.

It was the prosecution's expert on bullet lead analysis, however, that was devastating to the defense. Charles Peters, of the Federal Bureau of Investigation took the stand and testified that every box of bullets has a unique composition of trace elements, and that the composition of bullets from the victim's body matched the composition of bullets found in the defendant's possession, and therefore either came from

the box in Behn's possession or were manufactured on the same day. The prosecution stated in summation that there was a 99.99987% probability that the bullets that killed Rose came from the same group as the bullets found in Behn's possession.

According to a story in *The Los Angeles Times*, the jury found this evidence particularly persuasive. One juror stated that the bullet analysis was an important factor in his decision to convict. The sentencing judge called the evidence of the lead bullet analysis "particularly significant."

The only problem was that the chemical analysis was faulty and based on mistaken premises.

In March 2005, the Appellate Division of New Jersey reviewed evidence from Erik Randich, a metallurgist at the Lawrence Livermore National Laboratories. Beginning in 1999 and through 2000, Randich conducted tests that proved Peters' testimony to be false. There is no basis for the assertion that bullets which are compositionally indistinguishable come from the same lead source and were packaged on the same day. Dr. Randich found examples of bullets having the same composition despite being produced more than ten years apart. His research was supported by the affidavit of William A. Tobin, the former Chief Forensic Metallurgist of the FBI Laboratory who stated that the FBI was the only forensic lab in the U.S. to do comparative bullet lead analysis and that analysis was flawed and invalid for any meaningful criminal inference

The Appellate Division reversed Michael Behn's conviction. He is currently awaiting a new trial.

Michael Bunch

Essex County

Kidnapping, rape

Sentence:50 years

From court documents and interview with attorney

Michael Bunch was arrested with Earl Berryman. Despite his criminal record, he did not fit the description of any of the assailants. The district court noted that he was an unusually tall man, which the victim made no mention of in her description of the kidnappers/rapists. He might also be on the exonerated list had he not died in prison. (See Earl Berryman above.)

*Nathaniel Harvey
Middlesex County
Capital Murder*

Sentence: Death

From court documents, newspaper articles, and interview with attorney

Nathaniel Harvey, currently on death row in New Jersey, was sentenced to death for the brutal murder of Irene Schnaps, who was found beaten and strangled in her garden apartment in Plainsboro in 1985. However, Harvey's current attorney has raised substantial doubt on the question of Harvey's guilt.

Schnaps was murdered sometime between 11 p.m. on June 15, 1985, and the morning of June 16, 1985. She had significant bruising on her neck and her skull was smashed. For some unknown reason, the killer had moved the body in the apartment, even placing it on a clean sheet. The killer also apparently examined audiotapes, where the victim kept a diary. The apartment did not appear to have been broken into by a stranger or a robber. There was no sign of a forced entry, and no sign that of an attempted but bungled robbery. Valuables were untouched, but sheets and other bedclothes had been removed. Sheets and clothes with reddish stains were found apparently washed but sitting untouched in the laundry room. The sheets and clothes were never tested for the victim's blood. The sheets and clothes are among the items sought to be tested for DNA by Harvey's current attorney.

The murder weapon was never found. A sneaker impression was found in blood.

The initial suspect was a neighbor of Schnaps, Peter Stohwasser, who had been harassing her for dates. Police also determined that Stohwasser had been arrested for stalking a former girlfriend. He had also harassed and stalked his ex-wife and her parents, slashing their tires and pouring acid on a car.

Stohwasser had no alibi and made conflicting statements about when he had last spoken to the victim. Stohwasser was given - and failed - a lie detector test.

A quilt was found in Stohwasser's apartment with blood stains on it. The quilt, which tested for blood with results that could not exclude the

victim as being a contributor to the blood, was returned to Stohwasser when, despite the strong evidence against Stohwasser, the police turned their attention to Nathaniel Harvey.

Nathaniel Harvey was arrested in October 1985 for a series of unrelated crimes - burglaries and a rape. On audiotape, he confessed to those crimes. Police also claimed that he confessed to the Schnaps murder, but not on tape. Harvey has consistently denied that he confessed to the murder.

Among the other evidence used to convict him was the following:

- a sneaker belonging to Harvey's son, which approximated the size and style of the sneaker print on the scene.
- a Seiko watch in the trunk of Harvey's car;
- testimony of an expert for the State that one African-American hair found on the victim's back compared microscopically to Harvey's control samples. However, the prosecution in two trials failed to ever produce the physical hair and has since admitted to losing the hair. Eric Kleiner, Harvey's current attorney, questions whether that hair ever even existed. (It should be noted that other crime evidence has also been lost - including the tested sections of the quilt.)
- DNA testimony by prosecution's expert, Phillip Beasley, who focused on four PGM SUB enzyme results on the box springs and cardboard samples that were removed from the crime scene. The prosecution claimed that Harvey's PGM SUB enzyme type was consistent with those samples. Yet Eric Kleiner claims that the DNA was misinterpreted. He employed a nationally known DNA expert to show that the DNA testimony was both incomplete and incorrect, and a correct reading of the results actually excludes Harvey as a contributor of the blood on the box springs.

After spending hours digging through files, Kleiner filed several briefs with the trial court requesting testing of the sheets found in the apartment laundry room. He further requested an evidentiary hearing, or a new trial. The trial judge ruled against Harvey's motion, stating that the petition "is not a device for investigating possible claims nor an opportunity to second-guess trial counsel's tactical decisions."

Harvey remains on death row pending review by the New Jersey Supreme Court.

Ronald Long

Atlantic County

Capital Murder and Felony Murder

Sentence: Death plus 61 1/2 years, to be served consecutively

Resentenced to 30 years to life, concurrent to the 61 1/2 years

From court documents and newspaper articles

On December 11, 1982 at around 8:30 p.m., a gunman, allegedly using a silver .25 caliber gun, shot and killed Albert Compton, the night manager of the Holiday Liquor Store. There were no witnesses to the killing, but one witness on the street identified a man in a red baseball jacket as being in the vicinity of the store around the time of the crime. Ron Long was identified as wearing a red baseball jacket that day. Earlier the same evening, at 6 p.m., a gunman with a .25 caliber gun shot Alfred Carmichael at an apartment within walking distance of the Holiday Liquor Store. The same night, Albert Gracco, an Atlantic City service station attendant was robbed and shot in the neck by a shell from a .25 calibre handgun at approximately 3:30 a.m.

Ronald Long surrendered to police on January 7, 1983 and was charged with three crimes, the murder of Compton and the shootings of Gracco and Carmichael. The State strongly believed that the same man had shot all three individuals and that same man was Ronald Long. But there were problems with this theory.

Gracco gave a description of his assailant as a black male in his early twenties about five feet, eight inches, wearing a long trench coat, which did not match Long or match with the description of a red jacketed man near the liquor store. Gracco failed to pick Long out of either photographic line-up or a live line-up. The charges for the Gracco shooting were then dismissed.

The critical witnesses at the trial were several individuals who identified Long as being near or at the scene but whose stories changed repeatedly, and a jail house snitch, who received a reduction in sentence from 35 to 17 1/2 years for his testimony that Long had confessed. Carmichael's story changed three or four times as to whether he had been shot and who had shot him. Also testifying was the mother of Long's cousin, who also claimed that he confessed to her - a claim made at a time when a detective was threatening to investigate her own son as having a role in the shootings.

Long was convicted and sentenced to death. The New Jersey Supreme Court reversed the death sentence, but Long was resented to a lengthy term in prison.

Significant questions remain about Long's guilt in this case.

William Perona, who visited the liquor store prior to the murder, had seen a suspicious black male in the store who did not fit Long's description. His initial statement put the time of his visit to the store as after 8:20 - which was a critical time period for the defense because Compton was shot between the time, at 8:20, when the lottery results went up and 8:35, when Compton was discovered. The State had Perona hypnotized, after which he changed the time that he arrived at the store to around 8 p.m. The court would not allow an expert on hypnosis to testify on the fact that hypnosis can alter memory of an event - and thereby reduced or eliminated exculpatory evidence of another possible perpetrator on the scene around the time of the crime.

Ballistic tests show that the three different bullets used in the three shootings on the night in question were from the same gun. It therefore follows that if Long shot Compton and Carmichael, he also shot Gracco. However, Gracco identified someone else as the shooter. Further, a Newport cigarette butt was recovered at the Gracco shooting. Although Long was not being tried for the Gracco shooting, still, the prosecutor introduced evidence that Long smoked Newports. This trial occurred prior to the use of DNA evidence; Long has since requested DNA testing of the cigarette butt. The State claims to have lost it.

The main line of defense at trial had been the relationship between the Gracco shooting and the other two shootings that night, and that Long did not shoot Gracco. In giving instructions to the jury, however, the trial judge shot that defense down, stating, "There are a few red herrings in this case. You know what I mean, someone drug a little something in front of you to get you off the scent." In the Supreme Court decision that reversed the death sentence but allowed the conviction for felony murder to stand, Justice Handler dissented, arguing for reversal of all charges and a new trial on guilt, pointing out that with the red herring charge, the judge, supposed to be an impartial arbiter, entered the case on the side of the prosecution by making light of the defense's critical arguments and evidence.

Long has repeatedly filed for post-conviction relief in state and federal court, but he remains in prison.

Clarence Moore
Rape
Sentence: Life
Centurion Ministries case

On January 14, 1986, a young woman was raped and sodomized over a period of several hours. She described her attacker as a black male between 5'8" and 5'10", muscular with some facial hair on the sides of his face. She was unable to give the police sufficient detail to develop a composite sketch, so she used hypnotically enhanced memory to recall her attacker's features. She then identified Clarence Moore as her attacker.

The case went to trial in 1987. During the trial, Moore did not testify. His wife, Cheryl Moore, testified that they had a new baby who had "failure to thrive." She further stated that she would have noticed Moore's absence since he was helping her pump milk every hour, as she had a breast infection.

The only evidence against Moore was the identification by the victim, an identification made only after hypnosis. However, in summation, Prosecutor Steven Rosenfeld argued that Moore's choice of a white woman for a wife demonstrated his preference for white women. He went on to state that Cheryl Moore's breast infection would leave Moore needing sexual release. His final statement was that for the jury not to believe the victim was to perpetrate a worse assault on her.

Moore was found guilty on all counts. Since he had a record from the late 1960s and early 1970s, he was sentenced as a "persistent offender" to an extended term of life imprisonment with twenty-five years of parole ineligibility.

The New Jersey Appellate Court noted the outrageous comments but affirmed the conviction. The New Jersey Supreme Court declined to review the case. It was at that point that Centurion Ministries stepped in, hiring Paul Casteleiro to take the case to federal court. A three judge panel of the Third Circuit reviewed the case and determined that the prejudice from the prosecutor's remarks was so great that Moore had not had a fair trial. The court ordered Moore freed but allowed the possibility of a new trial.

In July 2001, Moore was freed from prison. His wife had divorced him, one child had died; his home and business had been sold. The State, however, is still attempting to retry him. Currently the question of the reli-

ability of hypnotically enhanced identification is before the New Jersey Supreme Court and must be resolved before a new trial can be set.

Larry Peterson

Burlington County

Capital murder

Sentence: Life

Innocence Project case

In 1989, the State of New Jersey sought a verdict of death for Larry Peterson who, the prosecution charged, was guilty of a brutal rape and murder. The jury, instead, found him guilty of felony murder, and Peterson was sentenced to life in prison, despite his steadfast claims of innocence. He remained in prison for seventeen years. For ten years, Peterson asked for DNA testing, and for ten years, the prosecution refused. In 2004, the New Jersey Appellate Court ordered DNA testing of material from the scene. When the DNA clearly showed that someone other than Peterson had committed the murder, the prosecution still refused to concede that the State had made a terrible - almost fatal - error.

On August 24, 1987, Jacqueline Harrison's body was found in a field in Lake Valley Acres. She'd been raped and brutally murdered, a stick shoved up her vagina and another one down her throat. The investigation focused on Larry Peterson when Ms. Harrison's friend and a former boyfriend phoned the prosecutor to report that Peterson had fresh scratch marks on his arms. Peterson went to the prosecutor's office, denied any involvement in the murder, and stated he was with a woman, Susan Ruble, the entire night. Investigators were unable to confirm his alibi, so Mr. Peterson remained the focal point of the investigation.

Investigators talked to three individuals, Robert Elder, Wesley Bishop, and Arthur Grooms, about a car ride with Peterson the prior week. During the initial interviews, none of them claimed that Peterson had made any incriminating statements. In subsequent interrogations lasting for many hours, Elder and Grooms provided taped statements that Peterson had confessed to the crime. Elder, in fact, claimed that Peterson had masturbated on the victim's clothes. In Bishop's taped statement, he said that Peterson had had a fight with a guy, whom he beat and strangled. The interrogations leading up to the

taped statements, however, were not recorded. Both Elder and Grooms statements, which mirrored each other, had been provided after hours of interrogation by the same police officer, a Sergeant Fitz-Patrick. Bishop was interrogated by different officers, Investigators King and Randall, and his recorded statement differs sharply from the Elder and Grooms account of the conversation in the car.

The evidence against Peterson at trial consisted of the statements of these three men, although Bishop changed his story to say that Peterson confessed to the rape and murder, and the testimony of a jail-house snitch who said that Peterson had confessed while in a court holding cell. To corroborate the incriminatory statements supposedly made by Peterson to the witnesses, the state introduced "scientific" evidence, consisting of six pubic hairs found on the victim that "matched" Peterson. The forensic "expert" testified that there had been no semen found except on Harrison's jeans and underpants, thereby corroborating Elder's story that Peterson had masturbated on the victim's clothes. There was also testimony about scratches on Peterson's arm, which the prosecution claimed had been made by Harrison.

Peterson's case was finally taken up by The Innocence Project out of New York. Attorney Vanessa Potkin filed a petition for post-conviction relief, asking for the DNA testing under a new New Jersey law that allows for such testing, at inmate expense, when the identity of the perpetrator is at issue and the testing may be helpful. The trial judge denied the application, stating that the identity of the perpetrator was not at issue because of all the evidence against Peterson. The Appellate Division reversed and ordered that the test be allowed.

The DNA testing finally conducted in 2004, conclusively showed that none of the forensic evidence implicated Peterson - and in fact it did implicate an "unknown male." The six pubic hairs - that the State had claimed were Peterson's - belonged to the victim. Semen in the victim's vagina did not match Peterson - and was in fact attributed to the "unknown male" whose DNA was under the victim's fingernails and whose DNA was also found in her mouth. The semen on the victim's clothes belonged to the victim's consensual sexual partners.

The prosecution refuses to accept that Peterson is innocent. Peterson has been released on bail after seventeen years in prison, but he still faces retrial.

– Exonerated before trial

James Andros

Atlantic County

Murder

Time from arrest to dismissal of charges: 20 months

On March 31, 2001, James Andros, a veteran and decorated Atlantic City police officer, arrived at a bar at around 9 p.m. and remained there until 4 a.m. the next morning. He then drove home to find his wife, Ellen, sitting upright in a chair by the computer. At 4:27 a.m., he called 911, crying that his wife was purple. Medics who arrived at 4:30 a.m. found her face blue and her extremities cold and concluded that she'd been dead for some time. She'd also logged onto AOL and sent an e-mail to a friend at 1:48 a.m., but forty minutes later, AOL logged her off for inactivity.

A coroner's assistant couldn't record a body temperature because she'd forgotten her thermometer.

Still, there was a substantial gap between the probable time of death, approximately 3 a.m., and the time that Andros arrived at home. Andros' location at the time of his wife's death was fully documented by a number of witnesses.

Police, however, collected interviews with relatives suggesting that the Andros marriage was troubled. The medical examiner, Elliot Gross, then did an autopsy and concluded that Ellen Andros had been smothered. Three weeks after his wife's death, Andros was arrested and charged with murder. He was suspended without pay from the Atlantic City police force, and the custody of his two daughters, then 5 and 3, was given to his in-laws.

Andros' lawyers maintained that Ellen had died of natural causes. An expert hired by the defense reviewed the autopsy and concluded that Ellen had died of a rare heart problem. Gross reviewed his own work and agreed that he'd made a mistake. He defended himself by stating that no one had told him of the time discrepancy: that had he known that Andros had an alibi until 4 a.m., he might have come to a different conclusion.

A few weeks before trial was scheduled to begin and nearly twenty months after being charged with his wife's murder, Andros received a call from his lawyer, who told him to sit down. Andros' first thought was that the State was going to seek the death penalty.

Instead, Andros learned that all charges had been dropped. He was immediately reinstated in the Atlantic City police department, although he had to go out on disability caused by stress from the ordeal. It took several months for him to regain custody of his children.

Frederick L. Busch

Mercer County

Rape

Time from arrest to dismissal of charges: two years

In 1987, Frederick L. Busch was working as a busboy, supporting his girlfriend and five children. However, he was arrested and charged with rape after some of his clothes and work papers were found at the site of the rape. The victim also identified him as the rapist.

Busch's explanation for the clothes - that he and his girlfriend had had a fight and he hid his clothes under a couch in the abandoned house where the rape occurred after being locked out of a relative's home - was unconvincing. The prosecutor's office commented that the case against Busch was overwhelming.

Busch spent two years in jail awaiting trial. His girlfriend moved in with another man, and the state wanted to put his children up for adoption.

In April of 1989, the State decided to cement its case by sending Busch's DNA out for testing - the first case in the State. However, when the results came back, they showed that Busch was not the rapist.

He was released in 1989.

Edwin Diaz, Jason Yantin

Essex County

Rape

Time from arrest to dismissal of charges: two years

On May 12, 1998, a 15-year-old was raped at the main library in downtown Newark. On June 17, 1998, a sixteen year old girl was raped at the same library. The first victim picked Jason Yantin out of a book of mug shots, and he was arrested five days later. He was in the book for a crime unrelated to sexual offenses. The second victim picked Edwin Diaz from a book of sexual offenders. He was in the book because he had been

charged - but not convicted - of sexually assaulting a former girlfriend.

After his arrest, Newark Police Director Joseph Santiago publicly labeled Diaz a "sexual predator."

In July of 2000, two years after the arrests, DNA cleared both men.

Jerome Mills

Essex County

Capital murder

Time from arrest to dismissal of charges: nine months

In 1982, 17-year-old Christopher Jarvis was abducted and murdered in downtown Newark. Six months later, three witnesses identified Jerome Mills as somebody who resembled the abductor. Mills was arrested and charged with capital murder.

Mills spent nine months in jail. An investigator for the public defender's office developed numerous leads to show that he was innocent. For example, Mills had been in a car accident shortly before the murder, and he was wearing a neck brace and convalescing at home at the time. He took and passed a polygraph.

Due in part to the efforts of a detective for the prosecutor's office, the prosecution decided it had the wrong man. Mills was cleared.

Ryan K. Rose

Mercer County

Rape

Time from arrest to dismissal of charges: two weeks

In the period between April 2002 and May 2003, there were four rapes in the city of Trenton, by a man labeled the bus stop rapist. Ryan K. Rose was arrested on May 16, 2003 and charged with 17 counts of felony assault. Four of the five victims picked Rose out of a photo line up, using the new line-up techniques designed to lessen the chances of a wrongful identification. Police also found a car that resembled one used by the rapist near Rose's home.

Mayor Douglas Palmer and Police Chief Joseph Santiago held a press conference to announce the capture of the rapist. A judge set



bail at \$4 million dollars and refused to reduce it, despite Rose's defense attorney's attack on the identifications. After his arrest, Rose lost his job as a truck driver.

Then the DNA came back.

Rose's DNA sample cleared him of being the rapist. Another man, in jail in Pennsylvania, was the perpetrator.

Rose was released on May 29, 2003.

REASONS FOR WRONGFUL CONVICTIONS

– Eyewitness Error

Eyewitness error has often been cited as the most common reason for wrongful convictions, in New Jersey and elsewhere. In June of 2000, the Northwestern Center on Wrongful Convictions did an analysis of cases where DNA established innocence and found that 76.1 percent of those cases were based in whole or in part on eyewitness identification testimony. *Actual Innocence* by Barry Scheck, Peter Neufeld and Jim Dwyer, a book examining cases of wrongfully convicted individuals, found eyewitness testimony to be the cause of the conviction of an innocent person in 81 percent of the cases. The book also reports on several eyewitness experiments. In one staged in 1974, a local NBC news station showed a film clip of a simulated crime and asked viewers to pick out the criminal from a line-up. Only 14.3 percent identified the correct person. Over 85 percent of the viewers got it wrong. In a similar simulated experiment at California State University at Hayward, 40 percent of students picked the correct "criminal", but 60 percent incorrectly identified the perpetrator.

Professor Gross's study, "Exonerations in the United States", noted that eyewitness misidentification played a role in the false conviction in 88 percent of the rape exonerations and in 49 percent of the murder exonerations. The reason for the high rate of eyewitness error as the cause of wrongful convictions in rape cases is obvious: in a non-homicidal rape, the victim can testify and is the main witness against a defendant. A murder may leave no surviving eyewitness. Further, a rape, unlike other crimes, leaves DNA evidence which can be tested to reinforce or demolish the evidence given by the eyewitness. In the majority of murder cases, DNA

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is not available. The same is true for robbery or other crimes where the perpetrator does not leave any bodily fluids behind.

In New Jersey cases, mistaken or misleading eyewitness identification played a major role in a number of wrongful convictions. David Shepard, Nate Walker, McKinley Cromedy, and Earl Berryman were wrongfully identified and sent to prison on the basis of those identifications. Eyewitness identification played an important part in the Jimmy Landano case. Michael Bunch, a man convicted of rape along with Earl Berryman, would also be in this group if he had not died of AIDS in prison in 1995.

In 2001, in the State of New Jersey, Attorney General John Farmer became concerned about the phenomenon of wrongful convictions. In a memorandum to prosecutors, police chiefs, and other law enforcement chiefs noting that 90 percent of wrongful convictions involved one or more mistaken eyewitness identifications, Farmer established new eyewitness procedures along lines recommended by Gary Wells, professor of psychology at the University of Iowa, a national expert on eyewitness misidentification. The new guidelines replaced traditional line-ups, where a group of individuals would be shown simultaneously to the witness, with sequential line-ups, allowing the witness to see only one picture or one person at a time. Photos were to be handled the same way: one photo to be shown at a time. The guidelines also suggested that procedures be conducted "double blind," in other words, the investigator conducting the line-up should not know the identity of the suspect in order to avoid the possibility that body language may suggest which individual is under suspicion.

In a telephone interview with the researcher of this report, Gary Wells stated that using these new line-up procedures could cut wrongful identifications in half. However, tests by academics suggest that eyewitness identifications under old procedures are wrong at least sixty percent of the time. Cutting that error rate in half would mean that only thirty percent of eyewitness identifications are mistaken, an improvement but little comfort to those still wrongfully identified and convicted.

The possibility of error under the new system was dramatically demonstrated in Trenton in 2003. The city had been plagued by a serial rapist responsible for four sexual assaults between April 2002 and May 2003. Based on four eyewitness identifications conducted using

the new line-up procedures recommended by the Attorney General, the Trenton police arrested Ryan Rose as the serial rapist. Authorities were so confident of the identification that the mayor and chief of police called a press conference to announce the arrest of the perpetrator. Two weeks later, the DNA test came back, exonerating Rose and linking a Levittown, Pennsylvania man to the crimes.

– False Testimony

“Exonerations in the United States” found perjury to be a leading cause of false convictions for murder - “perjury by the real killers, and by supposed participants or eyewitnesses to the crime; perjury by jailhouse snitches and other police informants; and perjury by police officers and state forensic scientists.”

Actual Innocence further breaks down the category of false testimony in determining the causes of wrongful convictions in 74 DNA exonerations. Nineteen percent had testimony from jailhouse snitches or informants. False witness testimony contributed to the conviction in 20 percent of the cases; prosecutorial misconduct in 45 percent of cases; police misconduct in 50 percent of cases. (For purposes of this report, false testimony refers to perjury by jailhouse snitches, police informants, and the real killers.)

A jailhouse informant, or snitch, is an individual incarcerated with the defendant in a particular matter who will, in court, testify that the defendant confessed his crime to the informant. In exchange for his testimony, the informant receives a lesser sentence or privileges in the prison. *Actual Innocence* details the ease with which an individual in jail can fabricate testimony in order to get a lighter sentence. In the 1980s, Vernon White, who had testified that at least a dozen individuals had confessed their crimes to him, took twenty minutes to make five phone calls to get enough details that he could easily fake that he had heard the confession of a suspect. *Actual Innocence* tells the story of how the testimony of two jailhouse snitches and that of the real killer contributed to the wrongful convictions of Ron Williamson and Dennis Fritz for a rape murder in Oklahoma. Ron Williamson came within days of execution.

Bruce MacFarlane, Deputy Attorney General for the Province of Manitoba, Canada, in his paper, “Convicting the Innocent” writes that “Jailhouse informants are the most dangerous of all witnesses” and presents recommenda-

tions of procedures to screen the reliability of all such informants.

In New Jersey, jailhouse snitches or informants have contributed to the convictions of many of the individuals named below. George De Los Santos was convicted by testimony that, in the words of the judge reversing Los Santos' conviction, "reeked of perjury."

– False Confessions

Confession, through the ages, has been held to be indisputable proof of guilt. It remains a strong weapon in the hands of the prosecution. However, not every person who confesses to a crime is actually guilty. False confessions are a significant cause of wrongful convictions. "Exonerations in the United States" estimates that false confessions contributed to wrongful convictions in 21 percent of murder cases and 8 percent of rape cases.

False confessions occur for a variety of reasons. The most vulnerable, because of age, mental illness, or mental retardation, are more likely to confess to crimes that they did not commit. Innocent individuals may confess to protect someone they love, as did George Parker.

In a 2002 case of Thomal Cook, the New Jersey Supreme Court took the unusual position of suggesting that in-custody interrogations, not merely the confession, be recorded. Such recording would assist the courts in determining just what happened during an interrogation, whether a confession was voluntary or coerced. Such a step would not only protect defendants from undue pressure, it would protect police from false allegations of coercion, and it would improve the overall quality of interrogation techniques. The Court cited its concern over the possibility of false confessions, and cautioned against too much faith in the truth of confessions unless independently corroborated. However, the Court declined to immediately set forth a rule that all interrogations be taped, instead it set up a committee to study the feasibility and make recommendations on recording custodial interrogations.

The committee report resulted in the recommendation of a new rule on October 17, 2005. On that date, the New Jersey Supreme Court promulgated a rule requiring that the entire interrogation of a suspect be taped. The new rule will be phased in, beginning in January 2006, for homicide, and expanding by January 2007 to include crimes punishable

by more than five years in prison. Failure to tape the entire interrogation could result in the exclusion of any confession from evidence.

– Prosecutorial and Police Misconduct

Prosecutorial misconduct occurs when a prosecutor conceals evidence that could demonstrate the innocence of the defendant, when a prosecutor pressures witnesses to testify against a defendant, when a prosecutor makes remarks in open court that could inflame a jury to convict for some reason other than the evidence, or most egregious of all, manufactures evidence or permits perjury in order to obtain a conviction.

Police misconduct can be all of the above, but can also include physical or psychological coercion leading to a false confession or false testimony.

All of the above have occurred in New Jersey.

One example is the De Los Santo case, in which the jailhouse snitch testified on the stand that he had never testified before in a criminal case. However, the opposite was the truth. The informant had testified against so many individuals that he feared that he would be killed in prison. The prosecutor wrote in his notes that the informant was in the habit of testifying but never informed the defense. The informant also fully recanted to Jim McCloskey, admitting that he had lied.

In the case of Margaret Kelly Michaels, interrogators continually re-interviewed children, bribing, cajoling, and mildly threatening, until the children gave the interrogators the testimony they wanted.

In the Landano case, the concealment by the prosecution of evidence that another man was guilty was so egregious that a federal district judge ordered federal marshals to raid offices of the New Jersey prosecutor and police for any files related to Landano.

There is also the problem of missing or destroyed evidence. In the Harvey case, the blood covered quilt belonging to the victim's neighbor, the initial suspect in the case, and swatches of material, were destroyed. There is also, in the Harvey case, the problem of the missing hair. A prosecution witness had tied Harvey to the murder by claiming that an African-American hair had been found on the victim. The hair was never produced, and now the State claims that it is lost. In the Long case, the prosecutor tied Long to a murder by claiming that a cigarette butt of the

same brand smoked by Long was found on the scene. Current DNA technology might be able to test the saliva on the butt to determine whether Long was the smoker, but the butt has since disappeared.

Prosecutorial misconduct can be as simple as prejudicial statements to the jury. In the Clarence Moore case, where the only evidence against him was an identification by a witness under hypnosis, the prosecutor told the jury that Moore was guilty because he had a taste for white women. Moore was married to a white woman.

A highly publicized example of prosecutorial misconduct occurred in Somerset County, New Jersey. In May 2005, Isaac Wright, Jr., who had spent seven years in New Jersey state prison before being released because of prosecutorial conduct accepted a settlement of \$487,500 from the State, after Somerset County had spent more than \$1.5 million defending itself in the lawsuit. The case had been tangled up in the legal system for 15 years. Wright's conviction was one of an undetermined number of cases that were tainted by the misconduct of Nicholas L. Bissell, Jr., who was the Somerset County prosecutor for 13 years until he committed suicide in a Nevada hotel room to evade a prison sentence on tax evasion charges. Somerset County Superior Court Judge Leonard Arnold had ruled that Bissell knew that Somerset county law-enforcement officials had illegally seized evidence, committed perjury, and used other illegal methods. Bissell had also stolen hundreds of thousands of dollars from the county's criminal forfeiture accounts. There was never a comprehensive investigation to determine whether other defendants had also been wrongfully convicted.

– Junk Science

Science remains a great tool for uncovering the truth about a crime. When an expert testifies on behalf of the prosecution, that evidence can be hard to contradict. Forensic evidence has the weight of science behind it. However, forensic evidence can be the reason, or a contributing reason, for a wrongful conviction. Sometimes, the so-called expert is incompetent and makes mistakes. Sometimes, an expert simply lies or falsifies evidence, in order to support the police. And sometimes, "scientific evidence" is introduced which has no actual basis in science.

A recent and disturbing study by Jonathan Koehler, a professor of behavioral decision making at McCombs School of Business, University of Texas, and Michael J. Saks, law professor at Arizona State University,

published in *Science* in September 2005, of 86 DNA exoneration cases found that science testing errors and false or misleading testimony by "forensic scientists" played a part in 63 percent of the wrongful convictions. Only eyewitness error was a more common factor.

The most egregious acts occur when an expert lies or fabricates evidence simply to support the prosecution. The Koehler and Saks study found that 27 percent of the cases reviewed involved false testimony by expert witnesses. Some incidents of false testimony by forensic experts have been well-publicized in the past few years. In Oklahoma, Joyce Gilchrist would routinely falsify forensic evidence on behalf of the State. In West Virginia, state police forensic expert Fred Zane routinely lied on the stand about DNA tests that he had not performed. In Illinois, Pamela Fish failed to reveal that blood typing excluded a man who was convicted of rape.

In New Jersey, there are also instances of perjured testimony about so-called science. In the Harvey case, the investigator for the State lied on the stand, telling the jury that the first suspect in the case had passed a polygraph test. That initial suspect had failed the test.

New Jersey also has had instances of simple incompetence that have led to wrongful arrests, if not convictions. The most notorious recent case occurred in Atlantic County. In March 2001, Jim Andros, a police officer for Atlantic City, arrived home a little after 4 a.m. after a night of drinking to find his wife dead. Elliot Gross, the medical examiner, determined that the wife had been suffocated. Andros was arrested; custody of his two daughters was given to his wife's parents. A few weeks before he was to stand trial, two independent forensics experts determined that Mrs. Andros had died, not from suffocation, but from bleeding in her coronary artery, a rare condition that can affect women with no previous history of heart trouble. Gross agreed with the report, and the prosecutor dismissed all charges.

Other mistakes have been noted by medical examiners. In Cumberland County, Dr. Larry Mapow claimed that a murder victim had been killed by blunt force; it was the family of the victim who hired their own expert and discovered the victim had died from two gun shots to the head.

DNA, the great investigative tool of the last fifteen years, can also be misleading. The public has now become convinced that the innocent can always be protected through the use of DNA. However, DNA is

only available for the small percentage of cases in which the killer leaves blood, semen, or other evidence behind. In many cases, there is no DNA. Many of the wrongful or questionable convictions contained in this report were not or can not be resolved by DNA.

While DNA is the single tool most responsible for the public's increasing awareness of the problem of wrongful convictions, DNA, as a scientific method, cannot illuminate the truth unless it is properly used and interpreted. In Texas, many convictions were questioned after it was shown that a DNA lab had been contaminated. In New Jersey, there are also questions about the use of DNA. Prosecutors stand by the conviction in the Nathaniel Harvey murder case, relying on DNA evidence used at the trial. However, experts for the defense have read those tests and stated that the DNA results were incorrectly read and reported, and that a correct reading of the DNA excludes Harvey.

An insidious problem is the expert who testifies with scientific certainty when there is no real basis for that science. In Arizona, Ray Krone, the 100th man released from death row, was found guilty and sentenced to death, the jury relying in large part on testimony by a so-called expert witness who matched Krone's teeth to teeth marks on the victim. The fact that DNA test of saliva found on the victim's breast failed to match Krone did not change the jury's decision. Not until ten years later when the DNA results on semen found on the victim matched the saliva and incriminated another man did the district attorney admit making a mistake and release Krone.

In New Jersey, the now discredited science of hair matching was used to help convict Larry Peterson of rape and murder in a capital case that did not result in a death sentence. An expert witness claimed that hairs found on the victim and at the scene were a match for Peterson. DNA tests within the last year have established that those hairs belonged to the victim.

In the Michael Behn case in New Jersey, in which the state also sought the death penalty, the prosecution presented evidence that chemical composition of the bullet used in the murder was identical to the chemical composition of ammunition found in Behn's home. However, studies conducted by a metallurgist and former FBI metallurgist from 1999 to 2001 demonstrated that the so-called science was totally unreliable, that bullets from different batches of lead could have the identical chemical make-up, and bullets from the same batch could

have a different chemical make-up. (In one Texas case, this type of “scientific” matching of bullets contributed to the conviction of a defendant who has since been executed.)

– Defense Attorney Incompetence

Attorney incompetence is often a contributing cause to wrongful convictions. Nationally, attorney incompetence is a serious problem. In other states, attorneys have slept through trials, have gotten drunk during lunch, have failed to ask a single question in the entire trial, have failed to put alibi witnesses on the stand, and individuals with this type of representation have been executed.

Although New Jersey has a good public defender system, lawyers within the system have large caseloads and vary as to competence. The Public Defender also pools out clients where there is more than one individual charged. Until last September, pool attorneys for the Public Defender earned \$25 an hour, out of court, and \$30 an hour, in court, in non-capital cases and \$50 an hour for capital cases. Currently, pool attorneys earn \$50 an hour out-of-court and \$60 an hour in-court for non-capital cases and \$75 an hour in capital cases. (The average hourly rate for an attorney in private practice in New Jersey starts at around \$150 an hour and goes up to around \$400 an hour.)

In many of the cases in this report, lawyer incompetence contributed to the convictions of the individuals. The most blatantly incompetent lawyer was the attorney for Earl Berryman and Michael Bunch, who failed to bring up the conflicting and questionable identifications made by the only witness. However, the attorney for Nate Walker failed to request a simple blood test that would have proven his innocence. John Dixon’s attorney told him not to get DNA testing and told him to plead guilty.

– Presumption of Guilt

In “Convicting the Innocent” an article on the causes of wrongful convictions, published in *Criminal Justice Ethics*, Jim McCloskey, founder of Centurion Ministries, explained that, despite the popular myth that a defendant is innocent until proven guilty, just the opposite is true. The average law-abiding American citizen believes that the police and the prosecution have carefully investigated the case, and the accused would not be on trial unless he were guilty. This prejudice

explains why in so many cases, an individual is found guilty despite logical holes in the prosecution's case, despite questionable identification, and despite alibi witnesses.

– Focus on Winning, Not Justice

New Jersey courts have long propounded the general principle that the primary duty of the prosecutor is not to convict but to see that justice is done. It is a principle that is all too often ignored.

There are many prosecutors and police, who faced with the evidence that an imprisoned individual is actually innocent, will agree to undo the wrong. Nathaniel Walker had such a prosecutor. However, there are all too many prosecutors for whom winning is everything. It is that drive to win and refusal to admit mistake that underlines much of the prosecutorial misconduct discussed above. Understanding this drive explains, but does not excuse, why some prosecutors, despite DNA evidence, despite evidence that witnesses lied, despite evidence that other individuals may have committed the crime, refuse to dismiss charges or even to agree to a new trial. Jimmy Landano battled for 23 years to prove his innocence, despite strong proof that another man was the real killer. The prosecution tried to prevent DNA testing for Larry Peterson and for John Dixon, holding up Dixon's confession and the evidence against Peterson as establishing their true guilt. Larry Peterson remains on the probable innocence list of this report, despite DNA demonstrating that he was not the killer, because the prosecution still refuses to admit mistake.

A PARTIAL LIST OF SOURCES

- Barry Scheck; Peter Neufeld; and Jim Dwyer. *Actual Innocence, When Justice Goes Wrong and How to Make it Right*, Signet, 2001.
- Michael Radelet; Hugo Bedau; and Constance Putnam. *In Spite of Innocence*, Northeastern Press, 1992.
- Jim McCloskey. "Convicting the Innocent," *Criminal Justice Ethics*, 1989.
- Jonathan Koehler, and Michael Saks. "The Coming Paradigm Shift in Forensic Identification Science" *Science*, 2005.
- Samuel R. Gross; Kristen Jacoby; Daniel Matheson; Nicholas Montgomery; and Sujata Patel. "Exonerations in the United States, 1989-2003," University of Michigan, 2004.
- Bruce MacFarlane. "Convicting the Innocent," presented at heads of Prosecution Agencies in the Commonwealth Conference, Darwin, Australia, May 7, 2003.
- Centurion Ministries, www.centurionministries.org.
- The Innocence Project, www.innocenceproject.org.
- Northwestern University School of Law, Center on Wrongful Convictions, www.law.northwestern.edu/depts/clinic/wrongful/exonerations/NewJerseyList.htm.
- Gary Wells, interview and homepage, www.psychology.iastate.edu/faculty/gwells/homepage.htm
- Memorandum of the Attorney General, John Farmer.
- "DNA Frees Arizona Inmate after 10 years in prison," *The Arizona Republic*, April 9, 2002.
- "Inmate Ordered Freed or Retried for Murder," *The Star-Ledger*, October 26, 1995.
- "Inmate Freed in Murder of Paterson MD," *The Star-Ledger*, June 13, 2000.
- "Tears of Joy! Jailed Man Wins fight for Freedom," *The Star-Ledger*, July 8, 1995.
- "First Exoneration, Next Compensation?" *New Jersey Law Journal*, February 23, 2004.
- "Cleared in Wife's Death, He seeks Justice," *The Philadelphia Inquirer*, May 11, 2003.

"A Brand-New World for Freed Inmate," *The Times of Trenton*, July 27, 2001.

"DNA Tests Clear 2 Men Before Their Rape Trials," *The Star-Ledger*, August 3, 2000.

"Inmate Kept Jailed Despite Negative DNA Result," *The Star-Ledger*, December 14, 1999.

"Death Row Inmate Putting his Hopes in DNA," *The Star-Ledger*, April 11, 2004.

"Fighting for His Life," *The New York Times*, May 15, 2005.

State v. Behn, 375 N.J. Super. 409 (App. Div. 2005).

State v. Cook, 179 N.J. 544 (2004).

State v. Cromedy, 158 N.J. 112 (1998).

State v. Knight, 145 N.J. 233 (1996).

State v. Michaels, 136 N.J. 299 (1993).

State v. Peterson, 364 N.J. Super. 387 (App. Div. 2004)

Berryman v. Morton, Civil Action No. 94-3828 (D.N.J. June 30, 1995)

Brief in Support of Petition for Post-Conviction Relief, Santana v. State, Indictment No. 240-75 (Law Div. 1985)

Letter to Attorney General Cary W. Edwards, re: Santana v. State, Indictment No. 240-75 (1986).

Transcript, State v. Santana, Indictment No. 240-75 (Law Div. February 18, 1986).

Transcript, State v. Walker, Docket No. 1266-74 (Law Div. November 5, 1986).

Transcript, State v. Vega, Indictment No. 569-81 (Law Div. November 15, 1989).

Brief on behalf of Defendant Larry Peterson, State v. Peterson, Docket No. A-3437-02T1 (App. Div. 2003).

Landano v. Rafferty, Civil Action No. 85-4777; 89-2454 (D.N.J. 1989).

State v. Landano, Docket No. A-6169-91T2 (App. Div. 1994).

De Los Santos v. O'Lone, Civil Order 82-1717 (D.N.J. 1983).

THE AUTHORS

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Scott Christianson, Ph.D. is the award-winning author of several books including *Innocent: Inside Wrongful Conviction Cases* (2003) and *With Liberty for Some: 500 Years of Imprisonment in America* (1998). His articles have appeared in *The New York Times*, *Washington Post* and other journals. He often appears on TV and radio. He has held several top positions in New York state criminal justice agencies and not-for-profit organizations and taught at several universities. Some of his work has been cited by the United States Supreme Court. For more information, see www.scottchristianson.org.

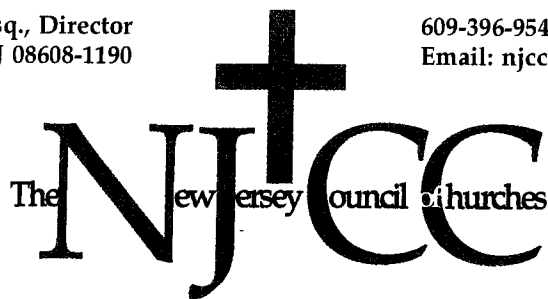
ORGANIZATIONS CALLING FOR AN END TO THE DEATH PENALTY IN NEW JERSEY^a

- American Baptist Churches of New Jersey
- American Civil Liberties Union (ACLU) (Newark)
- American Constitution Society, Rutgers Law School Chapter
- American Friends Service Committee Criminal Justice (Newark)
- American Jewish Congress, New Jersey Chapter
- Amnesty International Group #379 (Atlantic County)
- Amnesty International Group #41 (Burlington and Camden Counties)
- Amnesty International Cape May
- Amnesty International, Eatontown
- Amnesty International, Haddonfield
- Amnesty International, Hoboken
- Amnesty International, Holy Angels (Demarest)
- Amnesty International Group 67 (Mercer County)
- Amnesty International, Ocean City
- Amnesty International, Princeton
- Amnesty International, Rockaway
- Amnesty International, West Orange
- Archdiocese of Newark (Roman Catholic)
- Archdiocese of Newark Respect life Office
- Berakah Pax Christi (Rutherford)
- Bergen County Green Party (Ridgewood)
- Bergen County Pax Christi
- Beyond Just Faith, St. Teresa of Avila (Summit)
- Black Ministers Council of New Jersey
- Board of Church and Society, GNJC, UMC (Ocean, Trenton, Hamburg)
- Call to Action New Jersey (Berkeley Heights)
- Campaign to End the Death Penalty (New York)
- Catholics Against Capital Punishment (Bethesda, MD)
- Catholicvote.org (Far Hills)
- Catholic Charities, Archdiocese of Newark
- Catholic Charities of Camden
- Catholic Citizenship
- Catholic Worker, New Jersey (Elizabeth)
- Center for Family, Community, and Social Justice (Princeton)
- Central Conference of American Rabbis
- Cherish Life Circle, Sisters of Mercy (Brooklyn)
- Christ Congregation (Princeton)
- Church of the Nativity, (Fair Haven)
- Church of the Sacred Heart, (Camden)
- Church of Saint Ann Parish, (Lawrenceville)
- Church of St. Rose Parish (Belmar)
- Church Women United (Montclair)
- Citizens United for Alternatives to the Death Penalty
- Coalition for Peace and Justice (Linwood)
- Cooper Plaza Neighborhood Association (Camden)
- Credo Pax Christi
- Cumberland County Green Party
- Dems for Life, NJ chapter, (Vineland)
- Dominican Sisters of Caldwell
- Essex Pax Christi
- Essex Ethical Society Social Action Committee
- Episcopal Diocese of Newark
- Episcopal Diocese of New Jersey (Trenton)
- Episcopal Peace Fellowship, New Jersey chapters
- Equal Justice, USA
- Ethical Culture Society of Bergen County (Teaneck)
- Evangelical Lutheran Church in America, NJ Synod
- Federation of Dominican Sisters USA
- Felician College Pax Christi (Lodi)
- Felician Sisters of Lodi, New Jersey Province
- For Whom the Bells Toll (Oakhurst)
- Garden State CURE
- Gay Political Action and Support Network (Edison)
- General Baptist Convention of New Jersey
- Grace Lutheran Church (Mendham)
- Gray Panthers
- Greater Camden Unity Coalition
- Greater New Jersey Conference, The United Methodist Church (Ocean)
- Greater Princeton Interfaith Coalition against the Death Penalty
- Greek Orthodox Metropolitan Ephraem of New Jersey
- Green Party, Cape May and Atlantic Counties
- Green Party of New Jersey
- Green Party of Rutgers University

^a New Jersey organizations or national organizations with New Jersey chapters or members. Home offices are in parentheses.

- Interfaith Prison Ministry (Princeton)
- Journey of Hope...From Violence to Healing
- Latino Leadership Alliance of New Jersey
- League of Women Voters of New Jersey (Trenton)
- Little Sisters of the Assumption (Walden)
- Living Arts Club (Westville)
- The Logos Foundation (Chatham)
- Loughlin and Latimer, Esqs. (Hackensack)
- Lutheran Office of Governmental Ministries (Trenton)
- Marianist Family Retreat Center, Cape May Point
- Mission and Society Work Team, Leonia United Methodist Church (Leonia)
- Missionary Sisters of the Immaculate Conception of the Mother of God, Paterson
- Montclair Clergy Association
- The Moravian Church in America
- Morris County Pax Christi
- Murder Victims Families for Reconciliation, NJ (Mt. Laurel)
- Murder Victims Families for Human Rights
- National Organization for Women, New Jersey
- New Jersey State NAACP
- New Jersey Association of Black Psychologists
- New Jerseyans for Alternatives to the Death Penalty (Trenton and Chatham)
- New Jersey Association on Correction (Trenton)
- New Jersey Catholic Conference (Trenton)
- New Jersey Coalition to Abolish the Death Penalty
- New Jersey Commission on Civil Rights
- New Jersey Council of Churches (Trenton)
- New Jersey Peace Action
- New Jersey Synod Peace and Justice Team
- New Yorkers Against the Death Penalty
- Northern New Jersey Quakers
- Office of Family Life/Respect Life, Diocese of Trenton
- Office of Pastoral Care, Diocese of Trenton
- Office of Pro-Life Activities, Diocese of Metuchen
- The Orthodox Church in America
- Pax Christi, Monmouth County
- Pax Christi, New Jersey
- Pax Christi, Southwest New Jersey
- Pax Christi, Seton Hall Prep
- Pax Christi St. Augustine Prep (Richland)
- Pax Christi, Summit
- Pedro's People (Cape May)
- People's Organization for Progress (Newark)
- Presbyterian Church, USA Synod of the Northeast
- Presbyterian Church, USA, Palisades Presbytery
- Priests for Life
- Princeton Coalition Against Capital Punishment
- Princeton Ethical Humanist Fellowship
- Princeton Interfaith Coalition
- Princeton Prison Project
- Prison Ministry, Trinity Church (Princeton)
- Prisoners Self Help Legal Clinic (Newark)
- Pro-Life Office, Diocese of Camden
- Province of the Immaculate Conception, Paterson
- The Quixote Center
- Reformed Church in America, Synod of the Mid-Atlantics
- Religious Society of Friends, Barnegat Meeting
- Religious Society of Friends, Dover/Randolph Meeting
- Religious Society of Friends, Haddonfield Meeting
- Religious Society of Friends, Manasquan Meeting
- Religious Society of Friends, Medford Meeting
- Religious Society of Friends, Middletown Meeting
- Religious Society of Friends, Montclair Meeting
- Religious Society of Friends, Moorestown Meeting
- Religious Society of Friends, Mount Holly Meeting
- Religious Society of Friends, New Brunswick Meeting
- Religious Society of Friends, Plainfield Meeting
- Religious Society of Friends, Princeton Meeting
- Religious Society of Friends, Quakertown Meeting
- Religious Society of Friends, Rahway/Plainfield Meeting
- Religious Society of Friends, Dover Randolph Meeting
- Religious Society of Friends, Ridgewood Meeting
- Religious Society of Friends, Seaville Meeting
- Religious Society of Friends, Shrewsbury Meeting
- Religious Society of Friends, Somerset Hills Meeting
- Religious Society of Friends, Chatham-Summit Meeting
- Religious Society of Friends, Trenton Meeting
- Religious Society of Friends, Woodbury Meeting

- Respect Life Office, Diocese of Paterson
- Ridgewood United Methodist Church
- The Riverside Club, National Association of Negro Business and Professional Women's Clubs, Inc. (Bridgewater)
- Roman Catholic Diocese of Trenton, Office of Jail and Prison Ministry
- Roman Catholic Diocese of Trenton
- Roman Catholic Diocese of Metuchen
- Roman Catholic Diocese of Paterson
- The Romero Center (Camden)
- Rutgers Ignite: Students Against the Death Penalty
- Rutgers Law School ACLU Chapter (Newark)
- Rutgers Law School National Lawyers' Guild
- Sisters for Christian Community of the Jubilee Network, New Jersey
- Sisters of Charity of St. Elizabeth (Convent Station)
- Sisters of Christian Community, Jubilee Network
- Sisters of Mercy (Keansburg)
- Sisters of Mercy of the Americas, New Jersey Regional Community Leadership Team (Watchung)
- Sisters of St. Dominic of Caldwell
- Sisters of St. Dominic of Caldwell, Associate Members
- Sisters of St. Joseph of Peace at St. Michael's Villa
- Sisters of St. Joseph of Peace, New Jersey
- Social Responsibilities Council, Unitarian Society of Ridgewood
- Somerset County ACLU
- St. Anthony of Padua Committee Against the Death Penalty (Red Bank)
- St. Barnabus Catholic Church Respect Life Committee (Bayville)
- St. Joseph's Catholic Church Social Concerns Committee (Demarest)
- St. Mary's Renew Group (Colts Neck)
- St. Mary's Men's Ministry, (Colts Neck)
- St. Paul's Roman Catholic Church (Princeton)
- St. Peter Claver Church Parishioners for Peace and Justice (Montclair)
- St. Peter's College Pax Christi (Jersey City)
- St. Peter's Prep Pax Christi (Jersey City)
- Stockton College Peace Action
- Students for Alternatives to the Death Penalty, Rutgers Law School (Newark)
- Trenton Peace Action
- Union/Somerset/Middlesex County Pax Christi
- Unitarian Universalist Association General Assembly
- United Church of Christ, Central Atlantic Conference (New Jersey)
- United Church of Christ, New Jersey Association
- New Jersey Conference, United Methodist Church Task Force to Abolish the Death Penalty (Demarest and Atlantic City)
- United Nations Association of the United States of America (New Jersey Division)
- Women's International League for Peace and Freedom, Northern New Jersey Chapter
- Workmen's Circle/Arbeter Ring (Elizabeth)



TO: Governor Jon Corzine
Members of the New Jersey Legislature

On behalf of the sixteen Protestant denominations and 2,400 local churches of the New Jersey Council of Churches, we write today with a prayerful request. We are asking that we take this opportunity in New Jersey's history to abolish the death penalty in our state.

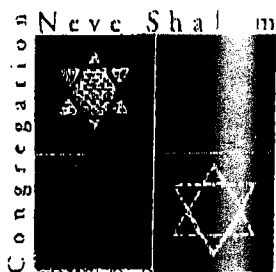
The Christian bodies that are members of the NJCC believe that Holy Scripture requires us to oppose violence and death as a form of punishment. We believe a disproportionate number of poor people and people of color are caught up in a legal process that is irreversibly final and can never be perfected. We believe that the Christian faith must oppose that which denies its central belief in forgiveness and reconciliation. The death penalty is a contradiction to our faith in a Creator who affirms the sacredness of life.

We applaud the recommendation of New Jersey's Death Penalty Study Commission that the death penalty be eliminated and ask that you take the steps necessary to pass S-171/A-795 to make that the reality for our state.

COUNCIL MEMBERS

- African Methodist Episcopal Church New Jersey Conference • African Methodist Episcopal Zion Church New Jersey Conference •
 - American Baptist Churches of New Jersey • Christian Church Northeastern Area Association •
- Christian Methodist Episcopal Church Seventh Episcopal District • Evangelical Lutheran Church in America, New Jersey Synod •
- Episcopal Church Diocese of Newark • Episcopal Church Diocese of New Jersey • General Baptist State Convention of New Jersey •
 - Moravian Church Northeast Province • Presbyterian Church (USA) Synod of the Northeast •
- Reformed Church in America Synod of the Mid-Atlantic • Religious Society of Friends New York Yearly Meeting • The Salvation Army •
 - Union American Methodist Episcopal Church • United Church of Christ Central Atlantic Conference •
- United Methodist Church Northern New Jersey Conference • United Methodist Church Southern New Jersey Conference •

11-8-00



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 Phone 732-548-2238 Fax 732-548-2335
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April 23, 2007

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To Whom It May Concern:

This letter is being written to comment on the attitude of the Jewish religion to the death penalty now on the books in the State of New Jersey.

It is clear that the bulk of the Jewish religion opposes the death penalty as inherently immoral -- that is, one does not kill in order to prevent killing. Certainly, early on in the Jewish religion, the Torah says: "an eye for an eye" and "whoever spills blood, his blood shall be spilled." This would seem to support the legitimacy of the death penalty. But as the Jewish religion evolved - specifically in the Talmud, which is the primary book where religious attitudes were developed and refined, the death penalty was impossible. For example, the Talmud itself says that if one court in "seventy years" executes one person, it is to be regarded as a "killing court." The Talmud requires witnesses to a homicide to warn a potential murderer, and for the murderer to specifically reject the warning -- only in those virtually impossible circumstances could an execution continue. In other words, the laws which were on the books for the death penalty, were essentially overlooked and circumvented because the rabbi's of the later Jewish tradition which shaped Judaism as we know it, perceived that the death penalty was immoral.

In contemporary society, there are certainly individual Jews who would be in favor of the death penalty. However, virtually all Jewish religious leaders, knowing the sources and development of our religion, opine that the death penalty is not in consonance with the Jewish religious tradition. This is especially so when there are other as effective methods of punishing the perpetrator of the heinous crime of murder.

Sincerely,

Gerald L. Zelizer
 Rabbi

ADDITIONAL APPENDIX MATERIAL
submitted to the
SENATE JUDICIARY COMMITTEE
for the
May 10, 2007 Meeting
on Death Penalty Bills

Submitted by Celeste C. Fitzgerald, Director, New Jerseyans for Alternatives to the Death Penalty:

Editorial, "Now End the Death Penalty," *The Star-Ledger*, January 4, 2007.

Editorial, "Inhumane, ineffective," *The Record*, January 4, 2007.

Editorial, "End the death penalty: Ultimate punishment should be life in prison," *The Record*, May 8, 2007.

Editorial, "Death penalty: Put it to rest," *Asbury Park Press*, January 6, 2007.

Editorial, "End the Death Penalty," *Asbury Park Press*, May 8, 2007.

Editorial, "Curtains for the Death Penalty," *Daily Record*, May 8, 2007.

Editorial, "Death knell for capital punishment," *Courier News*, May 8, 2007.

Editorial, "Heed panel's call: End death penalty," *The Jersey Journal*, January 3, 2007.

Editorial, "Time to bury the death penalty in New Jersey," *Courier News*, January 4, 2007.

Editorial, "End the Death Penalty," *The Times*, January 4, 2007.

Editorial, "Rethinking the Death Penalty," *The New York Times*, January 5, 2007.

Editorial, "Do away with it: New Jersey Should Abolish the Death Penalty," *Daily Record*, January 5, 2007.

Editorial, "Life Without Parole: Repeal N.J. death penalty," *The Philadelphia Inquirer*, January 5, 2007.

Editorial, "Cancel death penalty in N.J.," *Gloucester County Times*, January 7, 2007.

Editorial, "Death Penalty's Time Has Come to An End," *Home News Tribune*, January 7, 2007.

Editorial, "End N.J.'s Death Penalty: Let reason rule," *The Press of Atlantic City*, January 8, 2007.

Editorial, "State should scrap the death penalty," *Herald News*, January 8, 2007, ©2007 North Jersey Media Group Inc.