

# EXECUTING CAPITAL PUNISHMENT VIA CASE STUDY: A SOCRATIC CHAT ABOUT NEW JERSEY'S ABOLITION OF THE DEATH PENALTY AND CONVINCING OTHER STATES TO FOLLOW SUIT

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## I. INTRODUCTION

“. . . [W]e have set an example for other states to follow.”<sup>1</sup>

– New Jersey State Assemblyman Joe Roberts, Speaker of the General Assembly

“Our death penalty has been cruel and unusual punishment both for the criminals on death row and the families of the victims.”<sup>2</sup>

– New Jersey State Assemblyman Wilfredo Caraballo, Co-Sponsor of Assembly Bill A3716 which eliminated Capital Punishment in New Jersey

For those who detest capital punishment, Christmas arrived early last year. On December 17, 2007, New Jersey became the first State to abolish the death penalty via enactments from both the executive and legislative branches of government.<sup>3</sup> The response, both domestic and abroad, has been overwhelmingly supportive.<sup>4</sup> In Rome, the Coliseum was lit to celebrate New Jersey's decision to end capital punishment.<sup>5</sup> Sister Helen Preajean, the inspiration for the movie “Dead Man Walking” and world renown death penalty opponent, said New Jersey is now “a beacon on the hill” for other

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1. Press Release, State of New Jersey Office of the Governor, Governor Corzine Signs Legislation Eliminating Death Penalty in New Jersey, (Dec. 17, 2007), <http://www.nj.gov/governor/news/news/approved/20071217a.html>.

2. *Id.*

3. *See id.* (“New Jersey is the first state in the nation to enact a law to end use of the death penalty since it was reinstated by the United States Supreme Court in 1976.”).

4. *See* Henry Gottlieb, *An End to Death Penalty Pretense*, N.J. LAW JOURNAL, Dec. 31, 2007, at 1.

5. *Id.* (“Rome lit up the coliseum, once used for gory executions, to celebrate New Jersey's decision to abolish capital punishment.”). *See also* John Farmer, *Rule of Law Prevailed or Did It*, STAR LEDGER, Jan. 13, 2008, at B2 (“New Jersey's abolition of capital punishment was greeted by international acclaim.”).

States to follow.<sup>6</sup> Commentators across the country have praised New Jersey Governor Jon Corzine for signing this bill and have encouraged state legislators in other states to do the same.<sup>7</sup> Intentionally or unintentionally, New Jersey has provided opponents of the death penalty from other States a case study on how to fairly and effectively eliminate capital punishment in their jurisdictions through the legal and political process.<sup>8</sup>

New Jersey was able to do so thanks to the work of the New Jersey Death Penalty Study Commission [hereinafter “the Commission”]; a blue ribbon panel of individuals appointed by the New Jersey Governor to study capital punishment and provide its findings to the State legislature and the Governor.<sup>9</sup> Commission members represent a wide array of professional and personal credentials pertaining to capital punishment and the crime of murder.<sup>10</sup> They are civil libertarians, defense attorneys, clergy, murder survivors, victims’ rights advocates and law enforcement personnel.<sup>11</sup>

The Commission recommended the death penalty be abolished in New Jersey in their landmark report, “The New Jersey Death Penalty Study Commission Report” [hereinafter “Commission Report”].<sup>12</sup> The findings documented in the Commission Report, that capital punishment is an inappropriate remedy to adjudicate murder, triggered the Garden State’s legislative abolition of capital punishment.<sup>13</sup>

The Commission Report provides a thorough analysis of the Commission’s findings and evidence obtained through the testimony of crime victims, defendants, attorneys, the judiciary, academics and others concerned about the way capital punishment is administered locally and across the country. It should be required reading for those seeking to abolish capital punishment in other states.

It is a Socratic document in that it provides an objective examination of the many issues that are raised when discussing capital punishment. It pulls no punches. It provides objective examinations of the arguments in favor of capital punishment. As importantly, it also provides an objective examination of the counter-arguments presented by those who favor capital punishment.

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6. See Press Release, *supra* note 1.

7. See *e.g.*, Gottlieb, *supra* note 4 (“the state became the trailblazer for others considering repeal.”). See also Editorial, *Death Penalty Needs Reform, If Not a Ban*, THE MERCURY NEWS, January 10, 2008, [http://www.mercurynews.com/opinion/ci\\_7930180?source=email](http://www.mercurynews.com/opinion/ci_7930180?source=email). (“As opponents of capital punishment, we favor following the path of New Jersey, which abolished the death penalty. . . .”). The Mercury News is a newspaper based in San Jose, California.

8. See *supra* note 7 and accompanying text.

9. See Press Release, State of New Jersey Office of the Governor, Governor Corzine’s Remarks on Eliminating Death Penalty in New Jersey (Dec. 17, 2007), <http://www.nj.gov/governor/news/news/approved/20071217b.html>.

10. See *id.*

11. *Id.* See also COMMISSION REPORT, *infra* note 12, at 3 (listing the names and biographical information of the Commission’s members.).

12. NEW JERSEY DEATH PENALTY COMMISSION REPORT, at 2 (Jan. 2, 2007) [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) [hereinafter COMMISSION REPORT] (“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. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of the victims of homicide.”).

13. See Press Release, *supra* note 9. See also Gottlieb, *supra* note 4.

The objective analysis of both sides of the capital punishment debate is what makes this report the most credible piece of work on the death penalty in years. While the Commission decisively concluded that doing away with capital punishment would be the right thing to do, it also acknowledged the power and persuasiveness of the arguments in favor of capital punishment.

Having a solid command of the arguments against capital punishment is important for the success of the anti-capital punishment initiative. However, for those seeking to abolish capital punishment in other states, ignoring the power of the argument in favor of capital punishment would be counterproductive and unwise. To be successful, foes of the death penalty must be aware of the arguments both in favor of abolishing capital punishment and the argument in favor of pursuing capital punishment. For foes of the death penalty, ignoring the counter arguments presented by the pro death penalty crowd would be like hiding their heads in the sand.

Recent legislation in nine other states have been introduced to execute capital punishment.<sup>14</sup> In studying the Commission Report and implementing its recommendations and strategies, we can make sure the Garden State does not become the last and that other States will emulate its efforts by abolishing the death penalty forever.<sup>15</sup> Examining New Jersey as a case analysis to stop capital punishment in other States is a relevant and necessary step to continue the trend to end the death penalty throughout our country.<sup>16</sup>

Before we begin our review of the Commission's findings, a brief discussion on the history of capital punishment, especially in the Garden State is fitting. This is not to provide the reader with a biography of capital punishment merely as it has impacted New Jersey. Rather, it is to provide the reader with the background information that has lead to New Jersey becoming the first State to abolish capital punishment via the political process.<sup>17</sup>

## II. THE DEATH PENALTY IN NEW JERSEY

The death penalty has been a part of life in New Jersey since before the American Revolution.<sup>18</sup> The last time a death row inmate died at the hands of the State was in 1963.<sup>19</sup> Due to "uncertainty about the United States Supreme Court's views on the constitutionality of the death penalty" further executions were suspended.<sup>20</sup> More than

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14. COMMISSION REPORT *supra* note 12, at 40 ("In the past two years legislation to abolish the death penalty has been introduced in the legislatures of Illinois, Kansas, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, Tennessee and Washington.").

15. See discussion *supra* note 7.

16. COMMISSION REPORT *supra* note 12, at 39 (discussing the national trend against capital punishment.).

17. See discussion *supra* notes 1-3.

18. See Diana E. Sullivan, *361 Executions Later, NJ's Death Penalty Faces Death*, NEW JERSEY LAWYER, Nov. 16, 2007, <http://www.njnews.com/articles/2007/11/17/a1-deathpenalty.prt> ("Dating back to the 1600's, executions were a staple of New Jersey's landscape . . . as the state executed 361 people, some by burning, many for murder, some for counterfeiting, some even for burglary.").

19. *Id.* See also COMMISSION REPORT *supra* note 12, at 5.

20. COMMISSION REPORT *supra* note 12, at 5. In the early 1970's "[t]he Supreme Court struck down a number of state death penalty statutes. . . ." *Id.* The Court held that, "the capital punishment laws violated the Eighth Amendment's ban on 'cruel and unusual punishment.'" *Id.* See also *Furman v. Georgia*, 408 U.S. 238,

360 people have been executed in New Jersey.<sup>21</sup> The underlying crimes that generated the death penalty were murder, burglary, counterfeiting, sex offenses like bestiality, and rape.<sup>22</sup> Even non-violent crimes like counterfeiting and theft were included in the mix of crimes that could lead to the hangman's noose.<sup>23</sup> The first execution occurred in 1690 when a Black slave was hanged for sexual assault.<sup>24</sup> Another Black slave was burned at the stake in 1717 for a homicide she allegedly committed.<sup>25</sup> As a percentage of the total population, the majority of persons who have been executed in New Jersey were Black.<sup>26</sup>

The electric chair arrived in the Garden State at the turn of the 20<sup>th</sup> Century.<sup>27</sup> The most famous execution occurred when Bruno Hauptman, the person who allegedly kidnapped and murdered aviation hero Charles Lindberg's baby, died in the electric chair.<sup>28</sup> Ironically, the person who prosecuted Hauptman, David Wilentz, is the father of former New Jersey Supreme Court Chief Justice Robert Wilentz—the judge whose rulings stopped executions in its tracks.<sup>29</sup> Chief Justice Wilentz was appointed to the bench by Governor Brendan Byrne.<sup>30</sup>

The irony here continues. In the early 1960's Byrne, then a young, up and coming Essex County Prosecutor, oversaw the capital prosecution of Fred Sturdivant.<sup>31</sup> His execution was carried out in 1962.<sup>32</sup> Fast forward to 1971, when Byrne became an Essex County judge. In that role he ruled that the death penalty was unconstitutional.<sup>33</sup> He did so even before the United States Supreme Court halted executions.<sup>34</sup>

For the next decade, New Jersey had no death penalty statutes on the books.<sup>35</sup> After his time on the bench was complete, Byrne was elected New Jersey Governor.<sup>36</sup> In that role, he vetoed every attempt to bring back capital punishment that arrived on his desk.<sup>37</sup> After Byrne, a Democrat, left the Governor's mansion, capital punishment legislation passed in New Jersey.<sup>38</sup> The New Jersey Supreme Court ruled New Jersey's death penalty laws constitutional.<sup>39</sup> No executions have occurred in New Jersey since,

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310 (1972).

21. See Sullivan, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* ("Blacks were disproportional prime targets.")

27. See Sullivan, *supra* note 18 ("The electric chair was introduced in 1907 with the execution of Saverio Di Giovanni, an Italian immigrant who, according to reports at the time spoke so little English he had little idea what was happening at his trial.")

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See Sullivan, *supra* note 18.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* See also COMMISSION REPORT *supra* note 12, at 6–7. New Jersey's death penalty is codified in the New Jersey Code of Criminal Justice. See also N.J. STAT ANN. §2C: 11-3 (LEXIS 2007).

39. COMMISSION REPORT *supra* note 12, at 7 ("The New Jersey Supreme Court has affirmed the

however.<sup>40</sup> Democratic Governor Jon Corzine signed the law that abolished capital punishment last December.<sup>41</sup>

### III. THE NEW JERSEY DEATH PENALTY STUDY COMMISSION'S FINDINGS: A CASE STUDY ON EXECUTING CAPITAL PUNISHMENT

Once the Commission was created by the State Legislature in 2005, its goal was to study all aspects of the death penalty in New Jersey.<sup>42</sup> When the study was complete, the Commission's members were required to submit a final report on the current status of capital punishment and "any recommended legislation, to the legislature and the governor."<sup>43</sup> The Commission was specifically charged with analyzing "several specific areas of capital punishment."<sup>44</sup> They are: 1) whether there is evidence that the death penalty serves a legitimate penalogical interest; 2) the costs of the death penalty; 3) whether the death penalty is consistent with society's standards of decency; 4) whether there is racial bias in the way the death penalty is administered; 5) "[w]hether the abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing"; 6) whether executing a small number justifies the risk of making an irreversible mistake; 7) alternatives to the death penalty, including life in prison; and 8) whether "[s]ufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims."<sup>45</sup>

### IV. THE COMMISSION'S FINDINGS

#### A. *"There is no compelling evidence that the New Jersey Death Penalty rationally serves a legitimate penalogical interest"*<sup>46</sup>

In general, supporters of capital punishment cite society's interest in deterring individuals from murdering their victims.<sup>47</sup> They also cite retribution against the murderer for committing this heinous act.<sup>48</sup> This commission was not entirely convinced by the evidence that was presented to support both justifications.<sup>49</sup> While

constitutionality of the death penalty statute."). See also *State v. Biegenwald*, 106 N.J. 13 (1987). See also *State v. Ramseur*, 106 N.J. 123 (1987).

40. *Id.* ("[D]espite holding that the death penalty is constitutional, the Court reversed the first 28 death sentences that were imposed . . .").

41. *Id.* In addition to abolishing capital punishment, Governor Corzine commuted the sentences of all death row inmates in New Jersey to life in prison without parole. *Id.*

42. COMMISSION REPORT, *supra* note 12, at 1 ("The enactment directed the Commission to study all aspects of the death penalty as currently administered in New Jersey and to report its findings, including any recommended legislation to the legislature and the Governor.").

43. *Id.*

44. *Id.*

45. *Id.* at 1-2.

46. *Id.* at 24.

47. *Id.*

48. COMMISSION REPORT, *supra* note 12, at 30. ("Proponents of the retribution argue that it upholds the dignity of a civil society and is useful to prevent people from being retributive on their own.").

49. *Id.* at 25 ("The measurement of any deterrent effect . . . is fraught with difficulty."). See also *id.* at 30

several very credible individuals with very impressive credentials presented research and evidence to support both the argument that capital punishment deters murderers from pursuing their craft and the argument that capital punishment fails to deter murder, the commission's most persuasive authority was the New Jersey Supreme Court.<sup>50</sup> In *State v. Ramseur*,<sup>51</sup> the Court acknowledged the passionate, persuasive arguments on both sides of the spectrum.<sup>52</sup> The problem, according to the Commission and the Court, is that the research and evidence supporters of capital punishment cite for the sake of deterrence is as compelling as the research and evidence for those who believe capital punishment fails to deter murder.<sup>53</sup> Thus, while there is an avalanche of evidence that the death penalty deters murder, there is also an avalanche of evidence that the death penalty does not.<sup>54</sup>

The Commission seems to have struggled with this dynamic. Due to the voluminous amount of evidence on both sides of the argument the Commission found the merits to the argument that capital punishment deters murder to be perplexing.<sup>55</sup>

The Commission members could not agree as to whether retribution for the crime of murder justified the death penalty.<sup>56</sup> Evidence was presented to the Commission that argued harsh punishments like the death penalty are justified for the most heinous of crimes, in this case murder. The Commission members again struggled with this dynamic. Some agreed that retribution is indeed in society's best interest for serious crimes.<sup>57</sup> The problem was that some commission members felt the appropriate retribution for murder was life in prison not the death penalty.<sup>58</sup> "Other members felt that the desire for retribution is trumped by the serious problems with the death penalty like cost, irreversible error and inconsistency with evolving standards of decency."<sup>59</sup> In regard to incapacitation of the offender, while the death penalty prevents a murderer from killing again, so would life in prison.<sup>60</sup> Thus, the Commission found there was inconclusive evidence that the death penalty was justified by society's interest in

(The commission was divided about whether retribution is an appropriate penological intent.)

50. *Id.* at 28 ("Nearly twenty years ago, The New Jersey Supreme Court discussed the inconsistencies among deterrence studies in *State v. Ramseur* . . . The Court's conclusions are still valid today.")

51. *See State v. Ramseur*, 106 N.J. 123 (1987). *See also* COMMISSION REPORT *supra* note 12, at 28.

52. *See Ramseur*, 106 N.J. at 123 ("The argument about deterrence is different. All except its legitimacy as a penological goal; the division and it is a sharp one, concerns an empirical question. Does the death penalty deter murder? The answers, the reasons, and the statistics conflict and proliferate . . ."). *See also* COMMISSION REPORT *supra* note 12, at 28.

53. *Id.* (quoting the Court's ruling in *Ramseur*, ". . . the legislature could reasonably find that the death penalty deters murder, just as it could find that it does not. Given the plethora of scientific analysis, "common sense" explanations of the penalty's deterrent effect based on logic . . . are neither persuasive nor important."). *See Ramseur*, 106 N.J. at 123.

54. *See supra* note 53 and accompanying text.

55. COMMISSION REPORT, *supra* note 12, at 24 ("The published studies on whether the death penalty functions as a deterrent to other murders are conflicting and inconclusive.")

56. *Id.* at 30 ("The commission was divided about whether retribution is an appropriate penological intent.")

57. *See id.*

58. *Id.* ("Life imprisonment without the possibility of parole similarly incapacitates an individual from committing further acts of violence outside the prison context.")

59. *Id.*

60. *See supra* note 58 and accompanying text.

retribution and incapacitation.<sup>61</sup>

*B. 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*<sup>62</sup>

According to the Office of the Public Defender, in New Jersey, doing away with capital punishment would save that agency approximately \$1.46 million annually.<sup>63</sup> Testimony was presented to the Commission which documented that capital punishment cases require more preparation and manpower than non-capital cases.<sup>64</sup> Some of the increased costs incurred by the Public Defender's Office in capital cases include salaries, transcripts costs, and investigative costs.<sup>65</sup>

The Department of Corrections presented evidence that a cost savings of between \$974,430 – \$1,299,240 per death row inmate over the inmate's lifetime would be enjoyed by the State if capital punishment were abolished.<sup>66</sup> Such costs include the expense of housing death row inmates in the special "Capital Sentence Unit of the New Jersey State Prison" which is about \$72,602 per inmate annually.<sup>67</sup>

Evidence was also presented to the Commission that the Courts would also benefit financially if capital punishment were eliminated. The bulk of the savings would be from the fact that more staff is needed to for capital cases.<sup>68</sup> In addition, more costs are incurred during the proportionality review of each capital case that is litigated.<sup>69</sup>

Alternatively, prosecutor's offices would enjoy few financial benefits if capital punishment were eliminated.<sup>70</sup> This is because, "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."<sup>71</sup> Thus, there would be no measurable cost savings.<sup>72</sup>

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61. COMMISSION REPORT, *supra* note 12, at 30.

62. *Id.* at 31.

63. *Id.* ("The Office of the Public Defender estimated that given its current caseload of 19 death penalty cases (as of August 2006), elimination of the death penalty would result in a cost savings of \$1.46 million per year.").

64. *Id.* ("... [T]he office incurs additional in capital murder trials for pretrial preparation and investigation; pretrial motions; jury selection (which takes four to six weeks in a capital case as opposed to one or two days in a noncapital case...").

65. *Id.*

66. *Id.* at 32 ("The Department of Corrections estimated that eliminating the death penalty would save the State \$974,430 to \$1,299,240 per inmate over each inmate's lifetime.").

67. COMMISSION REPORT, *supra* note 12, at 32 ("The department calculated that inmates enter the Capital Sentence Unit at an average age of 32, and estimated that, since no inmates has yet been put to death, each inmate would serve 30 to 40 years within the unit.").

68. *Id.* at 30.

69. *Id.* ("[E]liminating the death penalty would generate savings for the Judiciary in two areas: trial court costs and the costs of conducting the proportionality review of each death penalty case. The AOC estimated that each proportionality review costs an average of \$93,018 in additional cost for court staff.").

70. *Id.* at 32–33 (According to the New Jersey Attorney General's Office, "there would be little cost savings for prosecutors if the death penalty were to be abolished.").

71. *Id.*

72. *Id.* ("The Commission notes that estimating the cost to the prosecutors is difficult because the issue involves resources allocation.").

To the Commission's credit it did not just rely on financial testimony solely in New Jersey. The Commission also reviewed evidence obtained by other states that document the financial benefits to eliminating capital punishment.<sup>73</sup>

Interestingly, the Commission expended much energy at analyzing more than just the monetary costs of capital punishment. They also reviewed the emotional costs associated with the death penalty.<sup>74</sup> According to the survivors who presented testimony to the Commission, "the pain of being forced to relive the trauma of their loved ones murders during prolonged appeals" was unpleasant at best.<sup>75</sup> In addition, evidence was presented regarding "the adverse effects of executions on third parties: judges, jurors, judicial staff, correctional staff, journalists, clergy and spiritual leaders, as well as the families of the victim and the family of the condemned inmate."<sup>76</sup> According to Professor Matthew B. Johnson of John Jay College, "[e]xecutions create another set of victims."<sup>77</sup>

*C. "There is increasing evidence that the death penalty is inconsistent with evolving standards of decency"*<sup>78</sup>

Support for the death penalty has been waning in the Garden State over the past few years.<sup>79</sup> The Commission reviewed evidence that there is still a considerable amount of support for capital punishment in New Jersey however.<sup>80</sup> Alternatively, the Commission acknowledged that some polls show that support for the death penalty in New Jersey hovers around 36% to 44%.<sup>81</sup>

Not surprisingly testimony from the clergy revealed significant support to end capital punishment since "it is not consistent with evolving standards of decency."<sup>82</sup> Members of both the Christian and Jewish faiths presented testimony that the death penalty violates their core religious beliefs.<sup>83</sup> Rabbi Gerald Zelizer testified that the

73. COMMISSION REPORT, *supra* note 12, at 32–33. ("The Commission notes that there have been several studies in other states designed assess the cost of the death penalty. The commission recognizes that there are a number of factors that affect the conclusion of these studies and the studies do not necessarily correlate directly to the cost of the death penalty in New Jersey. Nevertheless, consistent with the Commission's findings, 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 associated with life without parole cases.")

74. *Id.* at 34 ("The Commission finds that these intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty.")

75. *Id.* at 33–34.

76. *Id.* at 34.

77. *Id.*

78. *Id.* at 35.

79. COMMISSION REPORT, *supra* note 12, at 35 (discussing testimony from the director of the Monmouth University Polling Institute, Patrick Murray, who stated that "support for the death penalty has declined in New Jersey in the past seven years.")

80. *Id.* ("[S]upport for the death penalty ranged from 70 to 75% among New Jersey Residents . . . [s]upport for the death penalty "in principle" has consistently been in the range of 60%.")

81. *Id.* at 35–36. ("In 1999, the Star-Ledger/Eagleton-Rutgers Poll found that 44% supported the death penalty. . . . 37% preferred life without parole.")

82. *Id.* at 36 ("A number of witnesses from the religious community testified before the Commission and they uniformly urged abolishing the death penalty.")

83. *Id.*



reason for this is “fear of executing innocent people; and secondly, the fact that there are other ways to deal with criminals.”<sup>84</sup>

The Commission acknowledged that at minimum the U.S. Supreme Court has, in the past, ruled that “an emerging national consensus against executing certain defendants convicted of murder: the mentally retarded and juveniles.”<sup>85</sup> The Commission however admitted that there is evidence to suggest that there is no national consensus that our nation’s citizenry supports the death penalty.<sup>86</sup> Nonetheless, the Commission remained optimistic.<sup>87</sup> They noted that in 2000, Illinois Governor George Ryan “imposed a moratorium on executions.”<sup>88</sup> Governor Ryan did so because 13 death row inmates were exonerated of the charges filed against them.<sup>89</sup>

In addition, New York’s death penalty was ruled unconstitutional in 2004.<sup>90</sup> Thus, far it has not been reinstated.<sup>91</sup> Further evidence, according to the Commission Report, was that 10 states have had legislation introduced to abolish capital punishment.<sup>92</sup> Lastly, the Commission noted that the death penalty’s usage has dropped nationwide.<sup>93</sup>

D. *“The Available Data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey”*<sup>94</sup>

The commission reviewed evidence to ascertain if there was any racial bias in the way capital punishment is administered in New Jersey.<sup>95</sup> The Commission concluded there was no evidence documenting such being the case at least in New Jersey.<sup>96</sup> The commission based its conclusions pursuant to a report submitted by the “Supreme Court’s Proportionality Review Project, that was spearheaded by retired New Jersey State Judge David S. Baime.”<sup>97</sup>

In New Jersey, the death penalty statute requires a proportionality review be done

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84. *Id.*

85. COMMISSION REPORT, *supra* note 12, at 37.

86. *Id.* at 39 (“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.”).

87. *See id.*

88. *Id.*

89. *Id.* (“In January 2000, Illinois Governor George Ryan, after 13 exonerations from death row, became convinced that capital punishment in the state was ‘fraught with error’ and imposed a moratorium on executions. He eventually pardoned four death row inmates and commuted the death sentences of 164 others to life imprisonment.”).

90. *Id.* at 39.

91. COMMISSION REPORT, *supra* note 12, at 39 (“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.”).

92. *Id.* at 40.

93. *Id.* (“Both in New Jersey and nationally the number of capital prosecutions has dropped. According to Richard Dieter of the Death Penalty Information Center nationally ‘since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row.’”).

94. *Id.* at 41.

95. *Id.*

96. *Id.* (“The Commission concludes that the available statistics do not support a finding that there is invidious racial bias in the application of the death penalty in New Jersey.”).

97. COMMISSION REPORT, *supra* note 12, at 41–42.

by the New Jersey Supreme Court when a capital defendant requests such.<sup>98</sup> This is done “to determine whether the sentence is disproportionate to the penalty imposed in similar cases.”<sup>99</sup> Judge Baine advised the Commission that “the objectives of the Proportionality Review Project are twofold.”<sup>100</sup> Initially, this program “monitors the administration of the State’s capital punishment laws.”<sup>101</sup> The emphasis here is determining fairness of the defendant’s sentence.<sup>102</sup> This is called “individual proportionality.”<sup>103</sup> The next step is to ascertain whether race or other irrelevant factors played a role in the sentence.<sup>104</sup>

According to Judge Baine, “there is no solid evidence that the race of a defendant affects the outcome of the case.”<sup>105</sup> However, he advised that “white victim cases advance to penalty trial at a higher rate than cases involving African-American or Hispanic victims.”<sup>106</sup> In addition, evidence was heard that documented the differences between the ways the death penalty is administered in different counties.<sup>107</sup> The Commission was disturbed by these findings.<sup>108</sup> The Commission acknowledged that the New Jersey Supreme Court is concerned over this problem.<sup>109</sup> The Court has heard arguments regarding this, however since the death penalty has been abolished, their review is now moot.<sup>110</sup>

In addition, the Commission noted that the sad history of the death penalty includes documented instances of bigotry.<sup>111</sup> The U.S. Supreme Court acknowledged this in *Furman v. Georgia*.<sup>112</sup> The numbers speak for themselves. Despite the fact that individuals of color have represented a minority of the population in America, the substantial majority of death row inmates as a percentage to the overall population have

98. *Id.* at 41 (“Subsection e. of New Jersey’s death penalty statute, N.J.S.A. 2C:11-3 requires the New Jersey Supreme Court to conduct, upon a capital defendant’s request, a proportionality review to determine whether the sentence is disproportionate to the death penalty in similar cases, considering both the crime and the defendant.”).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. COMMISSION REPORT, *supra* note 12, at 42.

104. *Id.* (discussing how the Court is to “determine whether there are at work in the system influences not germane to the legislative intent and design”).

105. *Id.*

106. *Id.*

107. *Id.* (“The Commission heard testimony suggesting the existence of variability among counties in the application of the death penalty which, if true would be troubling.”).

108. *Id.* (“The apparent variability . . . may result from any number of factors. Nevertheless, the commission is troubled by the degree to which the geographic location where the crime was committed appears to affect the ultimate disposition.”).

109. COMMISSION REPORT, *supra* note 12, at 44 (“The Commission also notes that the New Jersey Supreme Court, as part of its ongoing proportionality review, is concerned about this very issue.”).

110. *Id.* (“Abolishing the death penalty would moot that issue and at the same time solve the race of victim disparity that Judge Baine attributes to the County disparity problem.”).

111. *Id.* (“[T]he Commission recognizes that statistical evidence must be viewed in light of the reality that racial discrimination is part of the history of the death penalty in the 20<sup>th</sup> century.”).

112. *Id.* at 45 (“It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.”) (quoting Justice Thurgood Marshall). *See also* *Furman v. Georgia*, 408 U.S. 238 (1972).

been Black males.<sup>113</sup> The majority of inmates in New Jersey prisons are Black.<sup>114</sup>

*E. "Abolition of the Death Penalty will eliminate the Risk of Disproportionality in capital sentencing"<sup>115</sup>*

In order to ascertain if capital punishment is disproportionate to the crime, New Jersey courts perform an individual review of each capital case.<sup>116</sup> In analyzing whether "a death sentence is disproportionate" the New Jersey Supreme Court used a two tier system that consisted of "statistical collection and analysis."<sup>117</sup> This is called an "individual proportionality review."<sup>118</sup> Its' purpose is to provide a measure of objectivity when evaluating the inherent fairness of imposing capital punishment on a particular defendant.<sup>119</sup>

The Commission heard evidence that revealed a very disturbing fact about the way the death penalty is administered in New Jersey.<sup>120</sup> According to Ms. Robin Glenn, the person who reviewed and prepared cases for proportionality review, "[d]espite a numbing similarity in the circumstances of the large number of [murder] cases . . . there is no uniformity in the way the cases are charges and prosecuted. The resulting unfairness of one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison or were not been prosecuted capitally."<sup>121</sup> The Commission referred to Ms. Glenn's observation as "troubling."<sup>122</sup>

Two cases have been overturned due to a court's proportionality review.<sup>123</sup> The courts did so because when comparing the facts of the instant case to other similar cases it would have been inequitable to impose capital punishment because other defendants who did similar acts were not subjected to capital punishment.<sup>124</sup> Nonetheless, very

113. *Id.*

114. *Id.* ("[T]he percentage of African American persons in New Jersey's correctional institutions far exceeds the percentage of African Americans in the general population.")

115. COMMISSION REPORT, *supra* note 12, at 40.

116. *Id.* at 47 ("The State has developed a process to ensure that death sentences are not disproportionate . . . the State's death penalty statute permits each defendant sentences to death to request and receive both an individualized and a systematic review of the proportionality of his or her death sentence by the New Jersey Supreme Court.")

117. *Id.*

118. *Id.* ("The system consists of two parts. The first part is frequency analysis, a statistical measure of the numerical frequency with which similar cases have resulted in sentences of death. The second part is precedent seeking review, a judicial way of comparing the files in similar cases to determine whether a defendant's death sentence is freakish or aberrational or the result of impermissible influences.") (quoting In Re Proportionality Review Project, 161 N.J. 71,77 (1991)).

119. *Id.* at 48 ("The Court's individual proportionality review methodology is designed to diminish the extent to which subjectivity is part of the analysis of the case; however the system does not alleviate the need for human judgment.")

120. *Id.* at 46.

121. COMMISSION REPORT, *supra* note 12, at 46.

122. *Id.*

123. *Id.* at 48 ("To date, the Court has vacated two death sentences on the basis of individual disproportionality. In *State v. Papasavvas* . . . the Court vacated the death sentence . . . concluding after analyzing similar cases that Mr. Papasavvas was 'singled out unfairly' for the death penalty . . . . Also in *State v. DiFrisco*, the Court vacated the death sentence . . . in part based on proportionality review.") (citations omitted).

124. *Id.*

credible individuals including a retired judge to the U.S. Court of Appeals in the Third Circuit presented very pessimistic observations about the concept of proportionality review and whether capital punishment in New Jersey has been administered in a fair and impartial manner.<sup>125</sup> Even members of the New Jersey Supreme Court had reservations about the court's methods to make sure capital punishment is administered consistently.<sup>126</sup>

Thus, the Commission was left with no alternative but to conclude that "despite the best efforts of the State, the risk remains that similar murder cases are being treated differently in the death penalty context elevating the probability that the death penalty is being administered . . . arbitrarily."<sup>127</sup> The Commission found the lack of consistency in the way capital punishment was being administered to be "unacceptable."<sup>128</sup>

*F. "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 error."<sup>129</sup>*

Around the nation there have been documented, confirmed instances of death row inmates who have been exonerated of their capital crimes.<sup>130</sup> While there have been no exonerations of death row inmates in New Jersey, the Commission was concerned about "exonerations in other states and exonerations in New Jersey in non-capital cases."<sup>131</sup> According to defense attorney Barry Scheck, 14 death row inmates were exonerated thanks to DNA analysis.<sup>132</sup> In the words of Kate Hill Germond, the Assistant Director of Centurion Ministries, a New Jersey based group that works to free innocent inmates, "[a]bolishing the death penalty will not ensure [t]hat no innocent person will be convicted, but it would ensure no innocent person will be killed by the State."<sup>133</sup> The Commission heard from defendants who were wrongfully convicted and crime victims who misidentified their assailants.<sup>134</sup> The Commission noted the significant evidence that exists which documented one simple fact: that our criminal justice system is far from perfect.<sup>135</sup> It is this imperfection that is inherently built into criminal litigation

125. *Id.* ("[R]etired Third Circuit Court of Appeals Chief Judge John J. Gibbons suggested that in the individual proportionality review context the Court's decisions are arbitrary.")

126. *Id.* ("Moreover, two members of the New Jersey Supreme Court have questioned whether the Court's proportionality review jurisprudence adequately achieves the goal of consistency with respect to the application of the death penalty.")

127. COMMISSION REPORT, *supra* note 12, at 50.

128. *Id.*

129. *Id.* at 51.

130. *Id.*

131. *Id.*

132. *Id.* at 51–52 ("Attorney Barry Scheck, Co-Director of the Innocence Project at Cardozo School of Law in New York, testified before the Commission that 182 individuals in the United States have been exonerated with post conviction DNA testing, 14 of whom had been sentenced to death.")

133. COMMISSION REPORT, *supra* note 12, at 52–54.

134. *Id.*

135. *Id.* at 53 ("The criminal justice system is a human system. It . . . involves decisions made by human beings, not by computers. And inevitably, we make mistakes. Those who argue that we will never make a mistake in the criminal justice system in general and the death penalty process in general . . . are fooling themselves.") (quoting Professor Eric Lillquist of Seton Hall University).

that provides far too much risk that an innocent death row inmate will one day be executed.<sup>136</sup>

G. *“The Alternative of Life in Prison 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”*<sup>137</sup>

Most witnesses who testified in front of the commission supported abolition of the death penalty.<sup>138</sup> The Commission however also heard testimony from family members of victims who support capital punishment.<sup>139</sup> One concern that was expressed was that those on death row still continue to enjoy their lives while the loved ones of their victims struggle with their loss.<sup>140</sup> One witness in favor of capital punishment, Sharon Hazarf-Johnson said “because the death penalty has not been implemented in New Jersey, murderers in the State are making a mockery of the death penalty.”<sup>141</sup> Others who support capital punishment have acknowledged the fact that the murderer who killed their loved one will likely not be put to death.<sup>142</sup>

However, there were also family members who opposed capital punishment for a myriad of reasons.<sup>143</sup> The Commission found persuasive the fact that due to endless appeals, there is no sense of finality for the victims’ families. In addition it “drains resources and creates a false sense of justice.”<sup>144</sup> The Commission found that life without parole would provide the loved ones of murder victims the finality they seek.<sup>145</sup>

H. *“Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims”*<sup>146</sup>

Few would argue that the murder victim is not the only person victimized by homicide. The emotional trauma suffered by family members of homicide victims is

136. See *supra* note 135 and accompanying text.

137. COMMISSION REPORT, *supra* note 12, at 56.

138. *Id.* (“The overwhelming majority of witnesses testified that life without parole is the appropriate alternative to the death penalty.”).

139. *Id.*

140. *Id.* at 57 (“Patricia Harrison testified that the victims of her sister’s murder include herself, her five siblings, her parents, and her sister’s two daughters and that their grieving will likely ever end. She stated that the people who commit murder, including those in prison continue to receive some enjoyment from life while her sister was denied that opportunity 19 years ago.”).

141. *Id.*

142. *Id.* at 58 (“Several family members of murder victims shared the views of Jo Anne Barlieb . . . that she supports capital punishment for her mother’s killer but reluctantly recognizes that a death sentence is unlikely to be carried out.”).

143. COMMISSION REPORT, *supra* note 12, at 59 (“A large number of family members testified they oppose the death penalty on moral grounds.”).

144. *Id.* at 61.

145. *Id.* (“Replacing the death penalty with life without parole would be a certain punishment, not subject to the lengthy delays of capital cases, it would incapacitate the offenders, and it would provide finality for victims’ families.”).

146. *Id.* at 62.

deep and abiding.<sup>147</sup> Some family members of homicide victims have displayed symptoms of Post Traumatic Stress Disorder.<sup>148</sup> In addition to overcoming the shocking loss of their loved one, they must navigate through a criminal justice system that can be complex at best. There is a shortage of services for the loved ones of murder victims.<sup>149</sup> One of the Commission's conclusions is that the support system in place to help the loved ones of homicide victims left behind is totally inadequate. Thus, the Commission recommended that funds be made available to properly train mental health professionals, and enlarging access to support groups.<sup>150</sup>

## V. SUMMARY AND CONCLUSION

New Jersey's abolition of the death penalty through the political process is arguably one of the most important developments in Eighth Amendment jurisprudence in quite some time. The Commission Report is arguably one of the most important documents pertaining to the Eighth Amendment's prohibition against cruel and unusual punishment for a very simple reason. It provides those who wish to do away with capital punishment in other states with a step by step approach to abolish capital punishment, yet assuring justice for the defendant, his victims and their families.

First and foremost however, the political leaders of both the executive and legislative branches of government in states that still have capital punishment, need to be brave enough to empanel a commission of this nature. If elected leaders do not have the will or stamina to do away with capital punishment no commission, no matter how talented or competent will provide the motivation to execute capital punishment. Once the right political leadership is in place, The New Jersey Death Penalty Commission Report provides an objectively sound blue print that other states can follow when implementing a strategy to abolish capital punishment.

When designing a strategy to eliminate capital punishment in other states, those charged with this important obligation must educate themselves on the data, arguments and resources their adversaries possess. It is easy to get tunnel vision and concentrate solely on the merits of abolishing capital punishment. Having a solid command of counter arguments to the anti-death penalty movement allows one to anticipate potential problems and plan their own strategies accordingly.

The Commission members were not unanimous in the conclusions they presented to Governor Corzine.<sup>151</sup> Differences of opinion should be anticipated and embraced, the way the Commission did. It is important to understand that reasonable people who strongly believe in their positions on capital punishment, whether for or against can agree to disagree reasonably. Demonizing one's adversary solves nothing. The

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147. *Id.*

148. *Id.* at 63–65.

149. COMMISSION REPORT, *supra* note 12, at 63–65.

150. *Id.*

151. *Id.* at 79–83.

Commission Report illustrates what can be accomplished when reasonable people assemble and work for the common good. The strength in the Commission Report is in its objectivity and its handling of important, emotionally charged sub issues associated with the death penalty. New Jersey has started a trend that has been recognized across the world. This is good news. The better news would be that the trend continues in other states. The Commission Report supplies the anti-death penalty movement with the starting block to fairly and effectively accomplish just that.