



## The Star-Ledger

### A reluctance to kill the death penalty

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BY JOHN FARMER JR.

Can you abolish something that never really existed? That's the question raised by the nearly unanimous recommendation of the death penalty study commission that capital punishment be ended in New Jersey.

The commission's recommendation is based not on moral consensus but on legal exhaustion.

Retired Third Circuit Chief Judge John Gibbons stated the reality aptly: "Twenty-four years after the enactment of the New Jersey death penalty statute, no one has been executed by the State of New Jersey, and there are only nine people on death row. The result ... is that a sentence of death is in reality a sentence to incarceration in death row for decades, with the threat of execution overhanging the prisoner at all times, and the prolongation of painful uncertainty for the families of victims."

When I arrived in Trenton in 1986 to clerk for Justice Alan Handler, there were many more than nine people on death row. In the four years since the statute had been signed into law by Gov. Tom Kean, it had been employed vigorously; nearly 30 defendants had been sentenced to death. The first two death cases, State vs. Ramseur and State vs. Biegenwald, had been argued, but the decisions had not been written.

I specialized in death penalty jurisprudence in my work for the Supreme Court. I came to my work open-minded but generally opposed to capital punishment, for many of the reasons cited by the commission last week today for abolishing it. I did not believe that it deterred other murders. I believed that it was one of the final vestiges of medieval government by terror, and was thus, in the technical legal terms, "inconsistent with evolving standards of decency." I believed that any legitimate penological purpose could be served as well by a sentence of life in prison without parole.

My work for the court reinforced many of these beliefs. Although there was no question that capital punishment was constitutional under the U.S. Constitution, it also became clear to me that the New Jersey statute was deeply flawed in ways that would make its fair operation extremely difficult.

The flaw came about because of the way the statute was passed. As originally proposed, capital punishment would have applied only to murders that were committed "purposefully." Murders that were merely "knowing" -- the equivalent, according to Model Penal Code Commentary, of reckless manslaughter -- would not be subject to the death penalty.

Gov. Brendan Byrne vetoed the death penalty provision; homicides were then grouped together, for punishment purposes, as "purposeful or knowing." When the legislature revisited the issue under Kean, however, it neglected to distinguish between the two types of homicide. Thus, under the new statute, people could have been executed for conduct that would have constituted "mere" manslaughter under prior law.

This flaw would require the court to look particularly closely at the facts of individual cases to assure itself that the convictions were truly reliable and proportionate. The court would be accused -- unfairly in many cases -- of manipulating those facts in order to reverse death sentences.

Even as my doubts about the workability of New Jersey's capital punishment regime grew, however, the process of looking closely at the files of some two dozen murder cases -- reading the testimony, viewing the

photographic and other evidence -- unsettled completely my moral opposition to capital punishment.

Those images -- the woman in Asbury Park raped and strangled, with the side of her head caved in by Marko Bey; the 80-year-old Trenton woman raped by James Zola in her apartment and scalded so severely that her skin peeled off, and so many more -- haunt me to this day.

Such cases do not cry out for vengeance, but they do require that we take seriously the hard question of the appropriate punishment. The question, in other words, is not whether New Jersey's current capital punishment system works -- it doesn't, because it couldn't -- but whether death should exist as an ultimate punishment available in a more clearly defined system, and whether it is possible to design any system that will yield unerring results in capital cases.

Shouldn't the state have the ultimate sanction available to it, for instance, in cases of terrorism involving mass murders and incontrovertible proof? That sanction is available under federal law, but some cases of mass terror, like the Washington, D.C., area murders committed by sniper John Muhammad, are tried under state law. What if Timothy McVeigh bombed not the federal building but the State House? Do we really want to abolish capital punishment as a potential sanction for people who murder police officers or witnesses or assassinate state officials? Or for murderers, like Ambrose Harris, who murder fellow inmates? Shouldn't it be available, even if rarely used, for egregious cases as to which there is virtually no doubt?

The Death Penalty Study Commission's Report falls short, in my view, because it considers no alternative to the current statute and the current system but abolition. The report fails to distinguish flaws in the system that are unique to New Jersey's current system -- and might therefore be fixed legislatively -- from flaws that it believes are inherent in any death penalty system anywhere.

Thus, the commission's conclusion that the death penalty is "inconsistent with evolving standards of decency" does not rest on polling data regarding whether the public supports the death penalty; public support is consistently 60 percent or higher. Instead, the commission relies on data suggesting that New Jerseyans prefer a life sentence as a punishment. But that data may well be skewed by the perception that the current system delays and denies justice.

Similarly, the commission's conclusion that the death penalty is more costly rests on the fact that capital inmates have remained on the more expensive death row for decades. What if the length of their stay were shortened under an alternative system that applied to far fewer defendants?

Finally, the commission's finding that abolishing the death penalty would ease the suffering of victims' families turns in part on the families' exasperation with the current system. Jo Anne Barlieb, for instance, told the commission that "I'd support the death penalty if the State of New Jersey could limit the appeals process and actually utilize it." And Richard Pompelio, whose daughter's case was one of the files I reviewed those many years ago, has concluded, wearily, that "I have absolutely no doubt that there will never be an execution in the State of New Jersey. ... We are just sitting here playing with words and playing with taxpayers' dollars."

I favor the availability of capital punishment in the most extreme, Timothy McVeigh-type of case, but steps must be taken to improve the reliability of the criminal justice system: a narrower definition of capital murder, a higher burden of proof in capital cases, a ban on prosecutorial publicity-seeking, better use of DNA and forensics, centralized screening of cases by the attorney general's office, to name a few. In any event, we owe it to the victims of murder at least to consider the hard alternatives.

Every time a Megan Kanka or an Amy Williams is dragged off and butchered, the state has failed in its fundamental assurance of public safety.

As the state moves now to abolish the penalty it never enforced, let us hope that it provides at long last, by asking and answering the hard questions about crime and punishment, the healing assurance of justice.

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