THE EVOLUTION OF DEATH-ELIGIBILITY IN NEW JERSEY†

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The substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

—Oliver Wendell Holmes, Jr.

Law cheats morality.

—Alan B. Handler

I. INTRODUCTION: OF LAW, MORALITY, AND CAPITAL PUNISHMENT

The idea that law is an expression of moral principle, and not an instrument of autocratic fiat, dates in our culture to an obscure desert tribe's reluctance to trade its emblem of fun—a golden calf—for a two-tablet rule book, "written on both . . . sides" by the hand of God.[1] A hint of the tension that would result between law and morality was apparent from the consequences of this initial reticence: the tablets were smashed, the golden calf melted, and, notwithstanding the commandment that "[t]hou shalt not kill," "about three thousand men"[2] were put to the sword.[3] Then, when the afflicted tribe begged for forgiveness, "the Lord plagued the people, because they made the calf . . . ."[4] These events, it is fair to say, did little to clarify the theoretical relation of law to morality (although they certainly sounded the death knell for fun as a way of life).

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1 *Exodus* 32:15. Thus, when it came to writing laws, not even God could avoid the temptation to exhaust the allotted medium.

2 Give or take a few hundred Hamite revellers or so.

3 *Exodus* 32:15.

4 *Exodus* 32:35.

This tension between the moral commandment ("thou shalt not kill") and the legal commandment ("thou shalt be killed") has persisted throughout the millennia. Jesus Christ, for one, urged people to "judge not, that ye be not judged," and instructed that "[t]herefore, all things whatever ye would that men would do unto you, do ye even so unto them; for this is the law . . . ."[5] Humankind then being pretty much as it is now, he was promptly executed, and the question of the proper relationship of law and morality has been left for two millennia largely to legal scholars (to fill the tablets), legislators (to carry them down from Sinai, as it were), and judges (to melt our golden calves and visit plague upon us all).

This is the story of how the abiding tension between moral commandment and legal consequence played out some two thousand years later in an obscure Garden State on the other side of the world. In the course of the ten-year period beginning 1972, New Jersey abandoned, debated, and then re-embraced capital punishment. The question that haunted the debate throughout, and has persisted for legislators, the executive branch and the courts, has been which criminal defendants should be considered eligible to receive the ultimate sanction. Indeed, that issue has been among the most controversial addressed by the New Jersey Supreme Court in the past twenty-five years.

While the court's handling of such issues as fair housing and public school financing has generated intense debate, neither the *Mount Laurel* nor the *Abbott v. Burke* decisions nor their progeny have resulted in amendments to the state constitution designed to override the court's authority. By contrast, the court's decision in *State v. Gerald*—requiring the state to prove a defendant's intent to kill in order to subject her to capital punishment—was repudiated in 1993 when the voters adopted an amendment to the state constitution, whose expressed purpose was to overturn the court's decision. The New Jersey Supreme Court, conventional wisdom holds, is simply morally opposed to capital punishment, and has been manipulating legal doctrine in order to frustrate its imposition.

This Essay makes no attempt to enter the debate over the rectitude of capital punishment or the wisdom of the court's death penalty jurisprudence. There are two reasons for this. First, given the rancor of the debate and the intractability of both sides, I would sooner hemorrhage in the shark tank of the Camden aquarium than wade into that treacherous water. More important, however, such an approach would miss the true significance of the history of

[5] *Matthew* 7:1, 7:12.

the reenactment of capital punishment. Although the history of that debate sheds little light on the philosophical argument over capital punishment, it has much to teach us, I believe, about the nature and limits of law-making in the face of divine silence. This Essay attempts, therefore, to provide a framework for the discussion of the substantive issues by looking closely at the course of the debate leading to the reenactment of the death penalty statute. It is premised on the belief that because "[t]he life of the law has not been logic: it has been experience," New Jersey's capital punishment scheme "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. . . . [I]n order to know what it is, we must know what it has been, and what it tends to become."[6]

Accordingly, this Essay traces the evolution of the statutory definition of death-eligibility in New Jersey. It begins by discussing the history of death-eligibility in New Jersey, culminating in the New Jersey Supreme Court's invalidation of the state's prior death penalty statute in *State v. Funicello.* It then examines the recommendation of the Criminal Law Revision Commission regarding the adoption of a reformed penal code based on the Model Penal Code. Specifically, the Essay focuses on the "keystone" recommendation of the Commission that the reformed penal code depart radically from its predecessor and rank crimes according to a hierarchy of defined mental states. The Essay proceeds to examine the debate surrounding the passage of a new death penalty statute, and discusses how the debate over capital punishment became intertwined with the debate over penal code reform. The Essay concludes by considering the implications of the final statute for the structure of the Code onto which it was engrafted.

At bottom, this Essay studies the effect of normative advocacy on the process by which New Jersey's capital punishment scheme was developed. Because the debate in New Jersey over capital punishment was almost exclusively over the rectitude of capital punishment as a moral principle, scant attention was paid to whether the recently-enacted and already-amended penal code, with its peculiar configuration of mental states, was suited to the capital punishment statute that was engrafted onto it. Proponents of capital punishment argued as though any statute that called for the death penalty would "fit the crime." Opponents, on the other hand, made their case as though any statute that called for the death penalty would be equally offensive. As a consequence, the law that was

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[6] OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1948).

passed and signed in 1982 had a breadth that its strongest proponent would later disavow, and that challenged the integrity of the New Jersey Criminal Code in ways that the courts and the legislature have been forced in the years since to address. The rhetoric of normative advocacy may have clarified the public policy favoring capital punishment as an external moral principle, but it blinded the legislative process to internal distinctions of telling legal—and ultimately moral—significance.

II. DEATH-ELIGIBILITY IN NEW JERSEY: A HISTORY

Throughout New Jersey's history, considerations of public policy have favored the imposition of capital punishment in specified circumstances.[7] Indeed, the ten-year period from the State Supreme Court's invalidation of New Jersey's capital punishment scheme in 1972 until the enactment of the current statute in 1982 marks the only period in New Jersey history when the state has been without a prosecutable capital punishment statute. The court's repudiation of the old statute, moreover, did not represent a condemnation of the moral principle underlying capital punishment; rather, the court acted reluctantly to correct a system that introduced elements of irrationality and coercion by affording defendants the choice of pleading *non vult* and escaping death or going to trial and risking death if convicted. The court, in a per curiam opinion, noted that in *State v. Forcella*, decided four years earlier, the court had determined that if the United States Supreme Court forced New Jersey to abandon either the death penalty or the *non vult* plea, "the *non vult* plea rather than the death penalty would fall, and this because of the history of our statutes."[8] The Court nonetheless struck down the capital punishment statute because, in its view, the federal Supreme Court left it no choice.[9]

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7 *See* State v. Ramseur, 106 N.J. 123, 169, 524 A.2d 188, 210 (1987).

8 State v. Funicello, 60 N.J. 60, 66, 286 A.2d 55, 58 (1972) (citing State v. Forcella, 52 N.J. 263, 283, 245 A.2d 181, 191-92 (1968)). The *Forcella* court explained that "[t]he history of capital punishment in this state is well documented. In that light, we could hardly accept the extraordinary proposition . . . that the death penalty should fall if the introduction of the *non vult* plea created a constitutional impasse." 52 N.J. at 282-83, 245 A.2d at 191-92.

9 *Funicello*, 60 N.J. at 67, 286 A.2d at 58-59 ("[w]e therefore accept the conclusion that the United States Supreme Court has declared the death penalty to be unconstitutional under our statute"). Basing its holding on the United States Supreme Court's holding in United States v. Jackson, 390 U.S. 570 (1968), in which the Court construed the federal kidnapping statute "to mean that the death penalty could be imposed only by a jury verdict, so that if a defendant waived his Sixth Amendment

While the public policy supporting the external moral principles underlying capital punishment has been consistent, the categories of criminal defendants considered eligible for death have changed significantly over time. From 1709 to 1893, death was mandatory upon conviction of murder (and a serious punitive option upon conviction of almost anything else), and was imposed regardless of whether a defendant pled guilty or took the case to trial.[10] Furthermore, a defendant needn't have killed (indeed, you barely had to burgle) in order to be executed in those days. In addition to murder, under the first comprehensive criminal legislation passed in 1796, death was the penalty for just about everything except looking the wrong way at an alderman. Crimes punishable by death included: "treason, petit treason, a second offense of manslaughter, sodomy, rape, arson, burglary, robbery, or forgery, permitting a capital prisoner to escape, and aiding in the rescue of a capital prisoner."[11] The universe of death-eligible defendants was later narrowed by the eventual imposition of prison terms for most non-murder offenses, and by the eventual grading of murder charges, in 1839, as first- or second-degree.[12]

Because of the perceived harshness of subjecting to mandatory execution a defendant who accepted responsibility for his actions by pleading guilty,[13] the law was amended in 1893 to prohibit pleas of guilty to first-degree murder, thus ending "a ready and facile road to the gallows."[14] The 1893 amendment permitted defendants who accepted responsibility for their actions to enter a plea of *non vult*,[15] thereby subjecting them to punishment for second-degree murder (a prison term).[16]

The perceived harshness of mandatory execution led to fur-

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right to trial by jury, he would suffer no penalty beyond life imprisonment." *Funicello*, 60 N.J. at 65, 286 A.2d at 57-58.

10 State v. Ramseur, 106 N.J. 123, 169, 524 A.2d at 210 (1987) (citing L. 1898, c. 235, § 108; L. 1796, c. DC, § 3; *N.J. Revision* 1709-1877, Crimes, § 68, at 239). *See also generally*, Edward Devine, et al., *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L. J. 261, 269-70 (1984) (providing an historical analysis of the evolution of death penalty statutes in New Jersey).

11 Leigh B. Bienen, et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 66 (1988).

12 Act of Mar. 7, 1839, 1839 N.J. Laws 147.

13 The good news is, having accepted responsibility, you're going to Heaven; the bad news is, having pled guilty, you're going there *now*.

14 State v. Genz, 57 N.J.L. 459, 462, 34 A. 816, 817 (Sup. Ct. 1895).

15 In layman's terms, the plea amounts to "okay, you got me." The plea of *non vult* is otherwise defined as "a plea similar to *nolo contendere* . . . and carrying implications of a plea of guilty." BLACK'S LAW DICTIONARY 1059 (6th ed. 1990).

16 *See* State v. Forcella, 52 N.J. 263, 277-88, 245 A.2d 181, 188-94 (1968).

ther legislative refinement in 1916. The New Jersey legislature amended the statute to permit juries to recommend a sentence less than death upon returning a verdict of guilt of first-degree murder.[17] In In re *Waiver of the Death Penalty*, moreover, the court determined that a prosecutor had the discretion to waive the death penalty in any case.[18]

First-degree murder was defined beginning in 1898 to include homicides "perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which [are] committed in perpetrating or attempting to perpetrate certain felonies."[19] In other words, in order to secure a conviction for first-degree murder, the state was required to prove "premeditation, deliberation, and willful execution of the plan . . . . All other murder was presumptively second degree murder—a noncapital offense—regardless of the circumstances of the murder."[20] As the New Jersey Supreme Court explained in *State v. Di Paolo*,[21] the State was put to exhaustive proofs of a defendant's intent to kill in order to establish death-eligibility:

> [t]he first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word "deliberate" does not mean "willful" or "intentional" as the word is frequently used in daily parlance. Rather it imports "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word "willful" signifies an intentional execution of the plan to kill which had been conceived and

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[17] Pamph. L. 1916, c. 270. The law was further amended in 1919 to require the jury's recommendation to be based "upon . . . consideration of all the evidence." Pamph. L. 1919, c. 134.

[18] 45 N.J. 501, 502, 213 A.2d 20, 21 (1965). In *In re Waiver of Death Penalty*, the New Jersey Supreme Court addressed dictum from a decade before to the effect that even if a prosecutor had decided not to seek the death penalty, the jury, of its own choice, could impose "the extreme penalty" of death. *Id.* (quoting State v. Pontery, 19 N.J. 457, 468, 117 A.2d 473, 478 (1955)). Noting that such an approach caused unnecessary delays at trial, the court held:

> [w]here the indictment is for murder and a prosecutor elects not to seek the death penalty and so notifies the court and defense counsel . . . the trial judge on the *voir dire* shall not permit the examination of prospective jurors as to their views on capital punishment and the trial judge in his charge shall instruct the jury that if it finds a verdict of murder in the first degree it must be with a recommendation of life imprisonment.

Id. at 502-03, 213 A.2d at 21.

[19] *See* L. 1965, c. 212, § 1; R.S. 2:138-2; L. 1917, c. 238, § 1; L. 1898, c. 235, § 107.

[20] State v. Ramseur, 106 N.J. 123, 388, 524 A.2d 188, 324 (1987) (Handler, J., dissenting).

[21] 34 N.J. 279, 168 A.2d 401 (1961).

deliberated upon.[22]

Failure to prove these elements of intention resulted in a conviction for second-degree murder.

Thus, by 1972, the universe of death-eligible defendants had been narrowed to those convicted of willful, deliberate, and premeditated murder who had not entered a *non vult* plea. Also remaining on the books, though in desuetude, were statutes that subjected to a possible death penalty defendants convicted of kidnapping for ransom, treason, and assault on certain high government officials.[23] Of these, the number actually subjected to capital punishment was further reduced by prosecutorial discretion; by jury recommendations of lenity; or by gubernatorial clemency.[24]

Use of the device of the *non vult* plea as a means of narrowing the class of death-eligible defendants was held to be unconstitutional by the New Jersey Supreme Court in 1972 in *State v. Funicello.* As noted above, however, this conclusion was a reluctant response to federal edict. In *United States v. Jackson,*[25] the United States Supreme Court struck down as unconstitutional the federal kidnapping statute insofar as it authorized the death penalty. That statute provided that the death penalty could be imposed only by a jury verdict, so that "if a defendant waived his Sixth Amendment right to trial by jury, he would suffer no penalty beyond life imprisonment."[26] The Court held that because this scheme "needlessly encouraged" defendants to abandon their Fifth Amendment right against self-incrimination and plead guilty, the statute was unconstitutional.[27]

In *State v. Funicello,* however, the New Jersey high court held that *Jackson* did not apply to New Jersey's death penalty statute. The state supreme court relied on the statutory history, and noted that "the Legislature added the opportunity to plead *non vult* . . . as a humanitarian gesture, and to make plain that plea bargaining was permissible and approved for those defendants who wished to

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22 *Id.* at 295, 168 A.2d at 409 (citing State v. Ernst, 32 N.J. 567, 579, 161 A.2d 511, 517 (1960)).

23 *See generally* N.J. STAT. ANN. §§ 2A:118-1 (1995) (kidnapping); 2A:148-1 (treason); and 2A:148-6 (assault on government officials).

24 *See* Hugo A. Bedau, *Death Sentences in New Jersey: 1907-1960,* 19 RUTGERS L. REV. 1, 32 (1961).

25 390 U.S. 570 (1968).

26 State v. Funicello, 60 N.J. 60, 65, 286 A.2d 55, 57-58 (1972).

27 *Jackson,* 390 U.S. at 581 (stating that "the inevitable effect of any such provision [to make the death penalty applicable only to those who assert their Sixth Amendment right to contest their guilt before a jury] is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty") (footnote omitted).

acknowledge their wrongdoing and seek an opportunity to expiate it by rehabilitative confinement."[28] The United States Supreme Court reversed this decision in a memorandum opinion issued three years later, stating, without elaboration except for a citation to the *Jackson* opinion, "[j]udgment, insofar as it imposes the death sentence, reversed and the case remanded to the Supreme Court of New Jersey for further proceedings."[29] Viewing itself as bound by this ruling, the New Jersey Supreme Court ruled that "[a]ll pending and future indictments for murder shall be prosecuted on the basis that upon a jury's verdict of murder in the first degree, the penalty shall be life imprisonment."[30] Justice Francis, dissenting, complained that "[n]ever has such a humane legislative endeavor encountered such a cataclysmic rebuff or been converted to the accomplishment of a purpose wholly at odds with the legislative intention."[31] Nonetheless, the import of the court's decision was clear: As of January 17, 1972, for the first time in its history, New Jersey was without a death penalty.

III. CAPITAL PUNISHMENT AND CODE REFORM: THE BYRNE YEARS

A. *The First Veto*

Legislative reaction to the Court's decision in *Funicello* was prompt and persistent: "From 1972 and continuing unabated until the passage of the current statute in 1982, each session of the legislature saw a spate of bills calling for reinstatement of the death penalty."[32] Of these bills, only two—one predating passage of comprehensive criminal code reform, and one passed after adoption of

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[28] 60 N.J. at 92, 286 A.2d at 72 (Francis, J., dissenting).

[29] Funicello v. New Jersey, 403 U.S. 948 (1972). The judgments of the New Jersey high court and a similar North Carolina case "insofar as they impose the death sentence, [were] reversed and cases remanded for further proceedings" consistent with the Court in *Jackson*. Witherspoon v. Illinois, 391 U.S. 510 (1968); Boulden v. Holman, 394 U.S. 478 (1969); and Maxwell v. Bishop, 398 U.S. 262 (1970).

[30] *Funicello*, 60 N.J. at 68, 286 A.2d at 59.

[31] *Id.* at 85, 286 A.2d at 68-69 (Francis, J., dissenting). Justice Francis, recognizing that the state courts were bound by the United States Supreme Court's interpretation of the federal constitution, as in *Jackson*, noted his "privilege[ ] to disagree, and to express that disagreement." *Id.* at 86, 286 A.2d at 69 (Francis, J., dissenting). In doing so, the dissenting Justice cited the dissent of Justices White and Black in *Jackson*, wherein the federal Justices suggested an alternative course of "revers[ing] the judgment [of the district court directly appealed by the federal government], making it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury." United States v. Jackson, 390 U.S. 570, 592 (1967) (White, J., dissenting).

[32] Devine, et al., *supra* note 10, at 271.

the new penal code—passed both houses of the legislature and reached the Governor's desk prior to the adoption of the current statute. The first, Senate Bill 639, retained the statutory definition of first-degree murder, and reinstated the ability of defendants to enter pleas of guilty, *non vult*, or nolo contendere to first-degree murder. Instead of resulting in a mandatory death sentence, however, entry of a guilty verdict or plea would trigger a penalty phase trial, during which the jury's discretion would be guided by considering aggravating and mitigating factors in accordance with standards approved by the federal Supreme Court.[33]

Senate Bill 639 would seem to have resolved the "grisly" problem identified by the *Funicello* court, for a plea of *non vult* or guilty would result not in the imposition of the death penalty, but merely in a penalty phase presumably guided by the jury's discretion. Debate in both houses of the legislature focused, however, on the broader moral issue of whether the death penalty should exist in New Jersey, at all. Opponents of capital punishment, such as Senator Joseph Merlino (D-Mercer), argued that the state "should not sanction the taking of a life. A life is a life no matter who takes it."[34] Senator Merlino's views were echoed by Senator James Dugan (D-Hudson), who argued that "this bill debases the reverence for human life."[35] Proponents of the measure argued, however, that "the only thing to consider is does the punishment fit the crime?" and that "this bill would deter some people from committing murder, and if one life is saved, then reinstituting the death penalty will be worth it."[36]

Governor Byrne exercised his "pocket veto" of the legislation on March 3, 1978, and took the extraordinary step of issuing a statement because he deemed it "to be in the public interest to state my reasons for deciding not to sign the bill." Capital punishment, Governor Byrne declared, "is chiefly an emotional response to crime, especially when offered in the absence of any meaningful attempt at penal reform." The Governor acknowledged having "told this Legislature that I would sign a death penalty bill if it was accompanied in 1977 by a comprehensive penal code reform," but insisted that he could "not pretend that this bill alone is a solution

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[33] *See generally* Committee Statement to S. 639 (Nov. 15, 1976).

[34] Mike Piserchia, *Death Penalty Passes After Bitter Senate Debate*, NEWARK STAR LEDGER, Jan. 12, 1977, at 1, 21.

[35] *Id.*

[36] Statement of Senator Alfred Beadleston (R-Monmouth), *quoted in id.*; *see also* statements of Assemblyman Richard Codey, *quoted in* Mike Piserchia, *Death Penalty Approved*, NEWARK STAR LEDGER, Feb. 1, 1977, at 1, 7.

to our many problems in the law enforcement area."[37] Governor Byrne stated that he would sign no such legislation unless it was accompanied by a comprehensive reform of the state's criminal code.[38]

B. The Proposed Code Reform

A comprehensive reform of the criminal code was pending in the legislature when the Governor vetoed Senate Bill 639, and had been under study since 1968, when the legislature created the New Jersey Criminal Law Revision Commission, "which was given the responsibility of revising and codifying New Jersey's criminal law."[39] The Report of the Law Revision Commission, issued in October 1971, recommended the adoption of a modified version of the Model Penal Code, and serves to this day as an underpinning for the New Jersey Criminal Code.[40] Because Code reform did eventually become a reality largely along the lines recommended by the Commission, and because capital punishment was later engrafted onto the newly reformed code, the concepts underlying the Law Revision Commission's 1971 report are crucial to an understanding of the effect of the eventual adoption of the capital punishment statute.

The guiding principle underlying the Criminal Law Revision Commission's 1971 recommendation was a grading of offenses according to a hierarchy of culpable mental states. As the court noted in *State v. Ramseur*, the Code's "ranking of crimes by degree places those crimes committed with intentional conduct as the highest degree of crime, for which the defendant is most severely punished."[41]

Departing from preexisting law, under which "[m]ental elements for crimes [were] set forth by the use of terms such as 'unlawfully,' 'maliciously,' 'intentionally' and the meaning appropriate for the particular crime [was] left to the judiciary,"[42] the proposed Code adopted specific definitions for the degrees of

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37 Veto Message of Governor Brendan T. Byrne, March 3, 1978.

38 *See id.*

39 Committee Statement to Assembly Bill 642, May 10, 1976.

40 *See* 1971 Criminal Law Revision Commission Commentary to proposed § 2C:11-7, *reprinted in* JOHN M. CANNEL, NEW JERSEY CRIMINAL CODE ANNOTATED § 2C:11-3, at 282-85 (1995).

41 106 N.J. 123, 208, 524 A.2d 188, 230 (1987).

42 1971 Criminal Law Revision Commission Report, *reprinted in* CANNEL, *supra* note 40, comment to § 2:2-2, at 88. *See also* Committee Statement to Assembly Bill No. 642, May 10, 1976 (noting that with respect to the requisite mental states of the defendant, "[t]he development of such concepts, which have their roots in English common law,

culpable mental states. Accordingly, the proposed Code distinguished crimes committed "purposely," "with design" to engage in the specific conduct or cause the specific result charged, from arguably lesser degrees of culpability, which the Code defined, in descending order, as "knowingly," "recklessly," or "negligently."[43] The Code defined "knowingly" as "action taken with awareness of attendant circumstances and of the practical certainty that the conduct would cause the attendant result."[44] "Reckless" conduct, in turn, was conduct undertaken when the actor "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[45]

Having read—and perhaps, of necessity, having re-read—these definitions of culpable mental states, if you are not a Jesuit, you are no doubt asking yourself: "Huh?"[46] The Code drafters acknowledged that the distinctions among the various mental states could be fine, if not utterly scholastic. The distinction, for instance, between "purposely" and "knowingly," the 1971 Report acknowledged, could be considered "narrow:"

> Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or the result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. . . . The New Jersey cases [such as State v. DiPaolo] now embody such a concept of "purposely" although they do not employ such a term.[47]

Because the elements of first-degree murder embodied the concept of "purposely," the 1971 Report recommended that the Code revision restrict death-eligibility to murders committed "purposefully." "We have attempted . . . to ask ourselves . . . whether there are any cases in the murder category in which we are clear that a death sentence never ought to be imposed. . . . [W]e first do so for killings which are merely knowing or reckless."[48] The Com-

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has traditionally been left to the courts in New Jersey. [The Code reform] is the first attempt by the Legislature to put these concepts into statutory form.").

[43] *See generally* N.J. STAT. ANN. § 2C:2-2(b)(1)-(4) (West 1995) (defining the separate kinds of culpable mental states for criminal defendants).

[44] N.J. STAT. ANN. § 2C:2-1(b)(2).

[45] N.J. STAT. ANN. § 2C:2-2(b)(3).

[46] Me too.

[47] 1971 Final Report of the New Jersey Criminal Law Revision Commission, *reprinted in* CANNEL, *supra* note 40, comment to § 2C:2-2, at 91 (citing *Di Paolo*, 34 N.J. 279, 295, 168 A.2d 401, 409 (1961); State v. King, 37 N.J. 285, 181 A.2d 158 (1962); State v. Weleck, 10 N.J. 355, 373, 91 A.2d 751, 760 (1952)).

[48] 1971 Commentary to proposed § 2C:11-7, *reprinted in* CANNEL, *supra* note 40, Comment to § 2C:11-3, at 283.

mission acknowledged that because of the narrowness of the distinction between "purposeful" and "knowing" conduct, the decision to limit capital punishment to "purposeful" conduct was "not entirely rational."[49] The Commission further acknowledged that this delimitation frustrated the external moral judgment that:

> [a]s much cruelty, as much indifference to the life of others . . . is shown by sudden as by premeditated murders. In many cases there is no premeditation . . . but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.[50]

The Commission's rejection of the external moral principle was grounded, however, on two considerations of internal integrity. First, the Commission saw no reason for expanding the universe of death-eligible defendants beyond those eligible under the existing law. Because "purposely" committed murders closely approximated existing law, while the inclusion of "knowingly" committed murders would have expanded the application of the penalty, the Commission determined to limit application of the death penalty to "purposeful" murders. The Report concluded:

> [W]e believe that homicides committed purposely or knowingly belong in the ultimate category. Unlike the [Model Penal Code], however, we further grade this category. It is only purposeful killings which subject the defendant to capital punishment. We do this to follow the distinction made in existing law that only willful, deliberate, and premeditated killings are murders in the first degree.[51]

The Report then addressed the external moral argument: "Even though certain knowing homicides may be as bad or worse than some purposeful killings, we retain that distinction to limit the death penalty to cases where it is now available."[52]

Equally important to the decision not to include knowingly committed murders in the death-eligible category was the narrowness of the distinction between "knowing" killings and killings committed under the lower culpable state of "recklessness," equating not to murder at all but to manslaughter. The Report highlighted the fineness of this distinction, stating:

> [T]here is a kind of reckless homicide that cannot fairly be distinguished . . . from homicides committed knowingly. Reckless-

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49 *See id.*

50 *Id.* at 283 (quoting JAMES F. STEPHEN, 3 HISTORY OF THE CRIMINAL LAW 94 (1883)).

51 *Id.*

52 *Id.*

> ness presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness should be assimilated to knowledge. The conception employed is that of extreme indifference to the value of human life. The significance of purpose or knowledge is that . . . it demonstrates precisely such indifference. Whether recklessness is so extreme that it demonstrates similar indifference . . . must be left to the trier of the facts. If recklessness exists but is not so extreme, the homicide is manslaughter.[53]

Thus, the proposed Code's concept of "knowingly" in essence recognized a middle ground and bridged a perceived gap between the highest mental state—"purposely"—and a merely "reckless" mental state. In bridging that gap, however, "knowing" conduct could be difficult to distinguish from both "purposeful" conduct, at one extreme, and "reckless" conduct, at the other. As the Report acknowledged, reckless conduct "resembles acting knowingly in that a state of awareness is involved but the awareness is of risk that is of probability rather than certainty."[54] By refusing to include defendants who killed "knowingly" in the capital murder category, the Commission prevented the expansion of death-eligibility to defendants whose conduct would previously have been considered not first- or second-degree murder, but manslaughter. Conversely, had the Commission chosen to include knowing murders as death-eligible, the premise of the proposed Code revision—that severity of punishment should correspond with the degree of criminal intention—would have been undermined, inasmuch as the most severe sanction would have been available for killings committed with a lesser mental state.

C. The Reality of Code Reform

Governor Byrne's veto of the pre-Code reform capital punishment statute escalated the debate over whether New Jersey should have a capital punishment statute. The principal sponsor of the penal code reform bill in the Assembly, Eldridge Hawkins (D-Essex), had earlier rejected any effort to add a capital punishment provision to the Code reform bill. Assemblyman Hawkins stated that "[w]e are dealing with a life or death situation. . . . We are not

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[53] *Id.* at 251.

[54] 1971 Criminal Law Revision Commission Report, *reprinted in* CANNEL, *supra* note 40, comment to § 2C:2-2, at 88.

talking about possibly saving lives but also of taking lives. The Bible says, 'thou shalt not kill,' so don't think you are serving as God's arm if you pass this measure."[55] In addition, he noted, the penal code reform bill had passed the Assembly by the narrowest of margins—forty-one votes—and "any erosion of support for the measure that may be prompted by including a death penalty provision could kill the bill."[56]

As a result of the concern that, notwithstanding his earlier statements, the Governor might not sign a bill providing for capital punishment, the Criminal Code revision passed in August 1978 did not contain a capital punishment provision. Indeed, "Senate leaders separated capital punishment from the code so Byrne would not have to reject the entire code because of his objection to executions."[57]

The Code largely adopted the recommendations of the Law Revision Commission with regard to structuring crimes in a hierarchy according to the criminal's intent in the commission of the crimes. Because there was no capital punishment component, the Code did not address the distinction raised in the 1971 Law Revision Commission Report between purposeful and knowing murder. Rather, both were considered murder and deemed crimes of the first degree subject to a mandatory minimum term of imprisonment. Thus, one who purposely or knowingly caused death was subject to the highest penalty, up to life in prison.

Immediately upon passage of the Code, Senate President John Russo introduced a capital punishment amendment, which would have rendered death-eligible anyone convicted of "causing death" "purposely" or "knowingly." This amendment at least implicitly rejected the 1971 recommendation that capital punishment be limited to those who kill "purposely" because such a limitation was consistent with the prior law requiring that capital killings be intentional, and because the new-fangled mental state, "knowing," could apply to conduct that was merely extremely "reckless."

D. The Post-Reform Veto

Having separated capital punishment from the penal code reform to enable the penal code reform to pass, the legislature

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55 *Quoted in* Mike Piserchia, *Death Penalty Approved*, NEWARK STAR LEDGER, Feb. 1, 1977, at 7.

56 *Id.*

57 Stuart Marques, *Senate Votes Death Penalty After Stormy 3-Hour Debate*, NEWARK STAR LEDGER, June 2, 1978, at 1, 21.

moved quickly to pass Senator Russo's capital punishment provision. Again, despite the differences between the old statutory scheme and the code reform, debate over the capital punishment amendment focused on the general moral question of whether the state should administer capital punishment. Senator Francis Herbert (D-Bergen) claimed that capital punishment would be "a step backwards and we become one with the murderer. . . . The symbol of justice holds scales, not the hammer of retribution. Revenge is not the proper role of justice."[58] However, the principal sponsor of the measure, Senator John Russo (D-Ocean), argued that "capital punishment is basically needed in our society. If you want to have a society built on laws, you've got to have the punishment fit the crime."[59]

Despite prior indications that he would be willing to sign a capital punishment statute if it followed penal code reform, Governor Byrne vetoed the death penalty bill on October 5, 1978. Governor Byrne noted that "the new penal code contains tougher sentences for murder and other violent crimes" and argued that there was no proof that the death penalty would serve as a deterrent.[60] Above all, however, the Governor rested on moral first principles in rejecting the death penalty: "'There is every reason for public confidence in our criminal justice system without the restoration of a penalty of doubtful effectiveness and morality.'"[61] The Governor closed by quoting George Bernard Shaw: "'It is the deed that teaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind.'"[62] Governor Byrne's veto effectively killed the issue for the remainder of his term.

E. The Post-Veto Amendments to the Criminal Code

Because the issue of capital punishment was considered settled by 1979—at least so long as Brendan Byrne was Governor—the legislature set about fine-tuning the new Criminal Code. As adopted, the Code "did not make any provision as to killings committed with knowledge of the likelihood of death and indifference to that result."[63] This omission was addressed by the amendments

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58 *Id.*

59 *Id.*

60 Stuart Marques, *Governor Vetoes Death Penalty*, NEWARK STAR LEDGER, Oct. 6, 1978, at 1, 24.

61 *Id.*

62 *Id.*

63 *Id.*

adopted in 1979.[64] These amendments added the crime of aggravated manslaughter, which was ranked immediately below purposeful or knowing murder. Aggravated manslaughter was likewise punishable as a first-degree crime, but without any mandatory minimum term of imprisonment and carrying a prison term of ten to twenty years. The Code departed from the Commission's recommendations in including this aggravated manslaughter provision, for "the Commissioners had considered [aggravated manslaughter] as a species of [knowing] murder."[65] Instead, the Code provided that "criminal homicide constitutes aggravated manslaughter when the actor other than purposely or knowingly causes death under circumstances manifesting extreme indifference to human life."[66] This language was clarified in 1981 to provide that the conduct manifesting extreme indifference must be "reckless."[67] Thus, conduct deemed by the original Report to be "indistinguishable" from some kinds of "knowing" murder was now to be graded below "knowing murder" for purposes of punishment.

To make matters more confusing, the 1979 amendments further muddied the distinction between knowing murder and aggravated manslaughter by providing that murder was committed by knowingly causing death or "serious bodily injury resulting in death." This deviation ignored the 1971 Report's observations on the fineness of the distinction between aggravated manslaughter and knowing murder, and disregarded the Report's conclusion that "[t]he Code definition of murder accords no express significance to an intent to cause grievous bodily harm. . . . [S]uch a killing would generally constitute second-degree murder. We think, however, that such cases are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death."[68] Thus, the distinction between knowing murder and aggravated manslaughter—a fine distinction at best, according to the Commission Report—was rendered razor-thin by the Code's inclusion, in the definition of knowing murder, of a species of intent—the intent to cause serious bodily injury—that the Commission concluded was subsumed within the lesser offenses of manslaughter and aggravated manslaughter. This, combined with the Code's refusal to consider aggravated manslaughter as a spe-

64 *See generally* L. 1979, c. 178; *see also infra* notes 72-75 and accompanying text.

65 CANNEL, *supra* note 40, at 272.

66 *Id.*

67 *See generally id.* at 271-73.

68 CANNEL, *supra* note 40, at 251.

cies of knowing murder, rendered academic at best any distinction between knowing murder and aggravated manslaughter.

The addition of the serious bodily injury component to the knowing murder definition complicated the Code's structure in a further respect. Under the Code, one who knowingly caused serious bodily injury resulting in death was guilty of murder, a crime of the first degree with a thirty-year mandatory minimum term; on the other hand, one who knowingly caused serious bodily injury where death did not result committed aggravated assault, a crime of the second degree subject to five to ten years' imprisonment. Given that the actor's intentions are identical—knowing infliction of injury creating a substantial likelihood of death—the Code's philosophy of grading offenses according to intent would seem undermined by a maximum term of only ten years for aggravated assault.

Despite the legislature's deviations from the 1971 Report's recommendations, the Code's sentencing structure was at least arguably intact. Aggravated manslaughter, like knowing murder, was ranked as a crime of the first degree; the difference was the mandatory minimum imprisonment term attached to a conviction for knowing murder. Furthermore, despite the anomaly of a sentencing disparity between aggravated assault (five to ten years) and knowing murder (mandatory minimum thirty years) based on the fortuity of the victim's survival, there was a logic to the Code's ranking of offenses as follows: for purposely or knowingly causing serious bodily injury resulting in death, first-degree with a fifteen-year (amended to thirty) mandatory minimum; for recklessly causing death in circumstances manifesting extreme indifference to human life, first-degree with ten to twenty (amended to thirty) years imprisonment; for recklessly causing death, second degree with five to fifteen years imprisonment; for knowingly causing serious bodily injury where death does not result, second-degree with five to ten years imprisonment. It was this structure onto which the legislature endeavored, once Governor Byrne left office, to engraft a death penalty provision.

IV. The 1982 Act: Structure and Implications

While Governor Byrne's veto made passage of the death penalty impossible during his term, it did not quell the general support for reinstitution of the death penalty. Indeed, during the gubernatorial race to succeed Governor Byrne, both candidates committed themselves to signing a death penalty bill upon taking office. The

bill that eventually passed, L.1982, c.111, sponsored by Senate President John Russo (D-Ocean), represented what Senator Russo believed would be one of the most restrictive statutes in the country.

Testifying in support of the bill before the Senate Judiciary Committee, Senator Russo stated that death-eligibility in New Jersey was intended to be "not as broad" as in other states. New Jersey's proposed law "does not cover as many people as some of the other [states'] legislation does," the Senator stated, because in New Jersey the penalty proceedings can begin only after a defendant has been "found guilty unanimously and beyond a reasonable doubt of first degree murder, willful, premeditated murder."[69] Furthermore, the Committee Statement to Senate Bill 112 declared that "only a person who commits an intentional murder . . . would stand in jeopardy of the death penalty."[70]

While these statements were true of Senate Bill 639, the bill pocket-vetoed by Governor Byrne, and even arguably true of Senate Bill 880, the bill Byrne vetoed outright (because the veto occurred prior to the 1979 amendments), they failed to take account of the intervening adoption of the new Penal Code and the subsequent amendments, and therefore of the fact that under the Code an "intentional murder" was a "purposeful" murder, not a "knowing" murder. Furthermore, the failed bills did not take account of the 1979 amendments to the code, in which the legislature added the crime of aggravated manslaughter and in which, as the Senate sponsor and the aide to the Judiciary Committee explained, "the concept of murder under the Code is expanded to include, in addition to those persons who 'knowingly' or 'purposely' cause the death of another, those who 'knowingly' or 'purposely' cause serious bodily injury which results in death."[71]

The actual capital punishment bill before the committee similarly failed to acknowledge those distinctions. Disregarding the issues raised in the Criminal Law Revision Commission's decision to limit capital punishment to "purposeful" murders and to omit any reference to serious bodily injury, S-112 defined capital murder to include both "purposeful" and "knowing" causation of death or serious bodily injury resulting in death, so long as the defendant "committed the homicidal act by his own conduct or . . . as an accomplice procured the commission of the offense by payment or

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69 *See* New Jersey Capital Punishment Act: Hearings on S. 112 before the Senate Judiciary Committee (1982) at 1.

70 Senate Judiciary Committee Statement to S-112 (1982).

71 *See generally* 104 N.J.L.J. 457 (1979).

promise of payment . . . . "[72] Thus, the Code was amended so that the hierarchy of punishment was as follows:

Purposely causing death	Death
Knowingly causing death	Death
Purposely causing serious bodily injury resulting in death	Death
Knowingly causing serious bodily injury resulting in death	Death
Recklessly causing death circumstances manifesting extreme indifference	1st degree
Recklessly causing death	2nd degree
Purposely causing serious bodily injury	five to ten years
Knowingly causing serious bodily injury	five to ten years

The difficulties caused by the breadth of the capital murder definition chosen in S-112 follow from the Code's scholastic parsing of mental states. The difference between knowingly causing serious bodily injury resulting in death and recklessly causing death in circumstances manifesting extreme indifference to human life is difficult to discern at best. In neither case is death intended, and the intention to cause serious bodily injury despite the knowledge that death will almost surely result is nothing if not "reckless[ness] . . . manifesting extreme indifference to human life." As the 1971 Report suggested, "there is a kind of reckless homicide that cannot be fairly distinguished . . . from homicides committed knowingly."[73] That difference, a matter of scholastic hair-splitting when discussed in the 1971 Report and a matter of punitive degree in the pre-capital penal code, now became a difference in kind. As a result, one convicted of knowingly causing serious bodily injury resulting in death could be executed, while one convicted of recklessly causing death in circumstances manifesting extreme indifference to human life faced a maximum of thirty years in prison. As Justice Alan Handler pointed out, dissenting in *State v. Rose*:

> When the original Code revision was proposed, the Commentary took pains to point out that "[i]t is only purposeful killings which subject the defendant to capital punishment.". . . Thus, when the commentators equated what we know as aggravated manslaughter with knowing murder, any proffered distinction between them could have made a difference in degree only; this

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[72] N.J. STAT. ANN. § 2C:11-3(c). The statute was amended in 1993 to include drug kingpins as defined in N.J.S.A. § 2C:35-3. *See generally id.*

[73] 1971 Criminal Law Revision Report, *reprinted in* CANNEL, *supra* note 40, commentary to § 2C:11-2, at 251.

> was the situation from 1979, when aggravated manslaughter was adopted, until 1982. When the Legislature included "knowing" murder in the 1982 amendment reinstituting capital punishment, however, it transformed a difference in degree—and a tenuous one at that—into a difference in kind.[74]

Furthermore, the sole difference between knowingly causing serious bodily injury and knowingly causing serious bodily injury resulting in death—the fortuity of the victim's survival—now meant the difference between a prison term of five to ten years (as little as two years in real terms) and the imposition of the death penalty. Justice Clifford, writing for the Court in *State v. Gerald*, highlighted this difficulty in imposing a requirement that the State prove an intent to kill in order to subject the defendant to capital punishment. The justice explained:

> Where an actor commits an offense that is identical in all material respects except for the victim's unintended death, it is grossly disproportionate to subject that actor to the death penalty. Because the actor's conduct, mental state, and intended result in both instances are virtually identical, the victim's fortuitous survival in one case and unfortunate demise in the other cannot provide an adequate basis for subjecting one actor to a term of imprisonment and executing the other.[75]

The legislature addressed the problem of the disparity between aggravated assault and knowing serious bodily injury murder in 1986, when it amended the Code to add an intervening offense: attempted murder.[76] The amendment specified that "an attempt to commit murder is a crime of the first degree."[77] The amendment's success in bridging the gap between aggravated assault and knowing serious bodily injury murder is dubious, however, for "[w]here no death results, where the only result is the injury, the defendant cannot be charged with attempted murder by attempting to cause serious bodily injury resulting in death, because all attempts require an intent to cause a particular result and attempted murder requires an intent to kill."[78]

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74 112 N.J. 454, 565, 548 A.2d 1058, 1117 (1988) (Handler, J., dissenting).

75 *See* State v. Gerald, 113 N.J. 40, 86-87, 549 A.2d 792, 816 (1988).

76 L. 1986, c. 190.

77 *See* N.J. STAT. ANN. § 2C:5-4(a).

78 *See* CANNEL, *supra* note 40, commentary to § 2C:11-1; *see also* State v. Rhett, 127 N.J. 3, 7, 601 A.2d 689 (1992) ("[T]he Code requires that to be guilty of attempted murder, a defendant must have purposely intended to cause the particular result that is the necessary element of the underlying offense—death."); State v. Gilliam, 224 N.J. Super. 759, 763, 541 A.2d 309, 311 (App. Div. 1988) ("The crime of attempted murder should be limited to attempts to cause death. It should not be extended further,

The court attempted to resolve these incongruities in *State v. Gerald* by focusing upon the level of intent to kill required under the attempted murder statute and reimposing the historic standard in New Jersey, under which the State was required to prove a defendant's intent to kill.[79] At bottom, the court made clear, the problem lay with the academic distinctions among states of mind drawn by the Code. The court stated:

> Absent an intent to kill, the distinction between an actor's reckless, knowing or purposeful conduct is not significant enough to warrant imposition of the death penalty where the conduct is purposeful or knowing, compared to a term of imprisonment where it is reckless. Furthermore, inasmuch as the intentional infliction of serious bodily injury can occur without a high risk of death, even with the actor justifiably believing that death will *not* occur, that actor's state of mind might, under some circumstances, be less culpable than that of the actor whose mind exhibits "an extreme indifference to human life."[80]

The *Gerald* decision signaled the court's rejection of the notion that the fine distinctions among mental states embodied in the new Penal Code should mark the difference between life and death. Far from provoking debate about the utility of those distinctions, however, the *Gerald* decision provoked a constitutional revolt and a firestorm of rhetoric about the first principles of capital punishment. Reviled as "unsupportable in logic or in morality,"[81] "an absurd, never intended construction of our death penalty statute,"[82] the decision led to the proposal and adoption of a constitutional amendment, clarifying that it is not cruel and unusual punishment in New Jersey to impose death as the punishment for purposely or knowingly causing serious bodily injury that results in death. Then-Attorney General Del Tufo went so far as to assert "his belief that it was the Legislature's intent in 1982, when the death penalty was reinstated, that those who purposely or knowingly cause serious bodily injury resulting in death should be exposed to

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inviting jury speculation without adequate guidelines whether to some degree of possibility or probability death *may have resulted* from the serious bodily injury inflicted in fact upon the victim.") (emphasis added). *See also id.* (quoting, in the felony murder context, *State v. Darby*, 200 N.J. Super. 327, 331, 491 A.2d 733, 735 (App. Div. 1984) ("'Attempted felony murder' is a self-contradiction, for one does not 'attempt' an unintended result.'").

79 *See generally supra* notes 72-75 and accompanying text.

80 *Gerald*, 113 N.J. at 87-88, 549 A.2d at 816 (emphasis in original).

81 Statement of William Lamb (First Assistant Prosecutor, Middlesex County) on behalf of the County Prosecutors' Association before the Senate Judiciary Committee, May 26, 1992; *see also* Nolan, *infra* note 83, at 206 n.55.

82 *Id.*

capital punishment proceedings."[83]

Not surprisingly, given the history of the debate over the issue, opponents of the constitutional amendment focused largely not on the structure of the Code but on the question of whether the penalty should exist at all. The Committee heard testimony that the death penalty discriminates against minorities and the poor; that capital punishment degrades the society that imposes it; and that the proper focus of law enforcement should be rehabilitation—all arguments that could have been made irrespective of the issue of whether the state should be required to prove a defendant's intent to kill in order to execute her.[84]

Perhaps the most interesting position taken during the debate over the amendment, however, was that of John Russo, the original sponsor of the capital punishment statute, who refused to join the stampede to constitutionalize the fine distinctions embodied in the Code. Russo testified against adoption of the constitutional amendment, stating that it had always been his understanding, as sponsor of the 1982 Act, that capital punishment would "be applied in only those unusually savage and severe murder cases where the defendant intended the death of his victim."[85] "The one thing that will erode the death penalty in this State," Russo asserted, "is if we ever get to the point where . . . we have wholesale executions under circumstances that the public does not support, or if we ever make a mistake . . . ."[86] Despite Russo's opposition, the amendment was passed overwhelmingly. The end result of the debate over capital punishment that began with the court's decision in *Funicello* and escalated with Governor Byrne's vetos and the court's decisions was, therefore, the enshrinement in the state constitution of the broadest principle of death eligibility since the division of murder into first and second degrees in 1839.

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[83] Michael T. Nolan, Jr., *Hell-Bent on Intent: New Jersey Broadens the Class of Death Eligible Defendants*, 19 SETON HALL LEG. J. 195, 219 (1994) (citing *Amending the State Constitution to Provide that it is Not Cruel and Unusual Punishment to Impose the Death Penalty on Certain Persons, 1992: Public Hearing on ACR.20 (Assembly Concurrent Resolution 20) Before the Assembly Judiciary, Law and Public Safety Comm.*, 205th Leg. 1st Sess. at 1 (1992)).

[84] *See generally, e.g.*, testimonies of: Jean Barrett of the ACLU (positing that death penalty discriminates against poor and minorities); Karen Spinner, Director of Public Education and Policy for the New Jersey Society of Correction (stating that penalty "dehumanizes and degrades the entire society"); Reverend Charles Rawlings of the New Jersey Council of Churches (advocating societal focus on education, training, and rehabilitation). Nolan, *supra* note 83, at 220-23, 224-25, 229-34.

[85] *Public Hearing on SCR.48 Before the Senate Judiciary Committee*, 205th Leg. 1st Sess. at 9 (1992) [*Public Hearing on SCR.48*]; *see also* Nolan, *supra* note 83, at 221-24.

[86] *Public Hearing on SCR.48* at 8.

V. CONCLUSION

"Law cheats morality." With these words Justice Handler, dissenting in *State v. Ramseur*, lamented the futility of attempting "to reconcile the abstract justifications of death penalty jurisprudence with the pain and suffering of [the victims]."[87] "In no other issue . . .," the Justice concluded, "does the gulf between arcane legalism and brute reality appear wider."[88] In the debate over death-eligibility in New Jersey, however, morality has cheated law, for what was lost in the debate over the reenactment of capital punishment was not a sense of general moral principle but a recognition that not every incarnation of that principle is created equal. Both sides of the debate failed to appreciate the distinction between what Lon Fuller calls "the internal and external moralities of law"—between, in other words, the internal "morality" that preserves the integrity of a legal system and the external moral judgments that inform it.[89] Because the debate was engaged almost entirely at the level of first principles, no one noticed that the conduct rendered death-eligible was not just intentional conduct, but also conduct that had previously been considered second-degree murder or even manslaughter. No one noticed the incongruities that were being created within the criminal justice system.

Judges, juries, and legislators have struggled since to adjust for these incongruities, and may well have been successful, for capital punishment is, by all accounts and for whatever reasons, rarely imposed, and no one appears to be sitting on death row for a nonintentional homicide.[90] There is no question, however, that the technical inadvertence that attended the passage of the capital punishment statute has challenged the juries, the judges, and the

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87 State v. Ramseur, 106 N.J. 123, 468, 524 A.2d 188, 365 (1987) (Handler, J., dissenting).

88 *Id.*

89 The "internal morality" of a given law is the extent to which its enactment maintains the integrity of the legal system of which it is a part; the "external morality" of law connotes the more general moral principle reflected in the law's enactment. There are, in other words, two types of arguably moral questions to consider when talking about the "morality" of a law: the morality of its fidelity to legal structure; and the rectitude of the moral principle it embodies. *See generally* LON FULLER, THE MORALITY OF LAW (1964). Debate has raged in academia since the 1950s over whether what Professor Fuller calls the "internal morality" of law is really "morality" at all. No, really—it has. *See, e.g.*, Symposium, *The Morality of Law*, 10 VILL. L. REV. 631-78 (1965). *See also generally* Alan B. Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571 (1986).

90 As a former prosecutor, I am the last to attempt to psychoanalyze juries. I am, however, confident that their deliberations are not (thank God) socratic dialogues on the differences between "purposeful," "knowing," and "reckless" conduct.

legislature in ways that appear, in hindsight, unnecessary. Furthermore, the challenge to the New Jersey Supreme Court to assure that death sentences are proportionate has been complicated by the expansion of the category of death-eligibility to encompass disparate criminal conduct.

The true "moral" significance of the story of the evolution of death-eligibility lies, however, not in the nature of the law that resulted but in the nature of the public discourse that produced that law. The moral belief of opponents of capital punishment that it cannot be administered justly under any circumstances blinded them to the harder question of whether, assuming that New Jersey is to have capital punishment, the system can be made more fair. The moral belief of proponents of capital punishment, in turn, that "the only thing to consider is does the punishment fit the crime" led them to argue as though any system which exposes people who kill to capital punishment meets that criterion and passes muster.[91] No one questioned the wisdom or even the sense of allowing the finely-parsed differences between "purposeful," "knowing," and "reckless" states of mind to make the difference between life and death.

It is commonplace for contemporary, media-driven politics to lament the lack of political first principles in public discourse. Our politicians, it is argued, have too few core beliefs; they leave us too little to differentiate between them. This is perhaps understandable, given the proclivity of television and radio to present a "balanced" debate by offering the two most radical sides: a "dialogue" on the state of race relations, for instance, between Snoop Doggy Dog and the Grand Dragon of the Ku Klux Klan; or a "discussion" of the virtues of hunting between the national chairperson of Primates 'R' Us and the president of the Jersey City Chapter of Ducks Unlimited. No wonder our hard choices seem dull.

But the debate over death-eligibility in New Jersey in the 1970s and early 1980s illustrates an abiding and contrary political truth: nothing blinds like the ideological glow of "that vision thing." It admits of no degrees, sees no subtle shades of gray, grows impatient with the very details that define it. The quality of the public debate over death-eligibility suffered, in the final analysis, not because people believed too little, but because they believed too much, too fervently, on both sides. As the pressure builds within our culture to identify increasing numbers of "core beliefs," the history of death-eligibility points in a different direction, toward a

91 *See generally supra* notes 31-33 and accompanying text.

politics of induction, in which all beliefs—even core beliefs—are only as moral, only as necessary, as their particular expressions. Our laws issue from Trenton, not from Mount Sinai. Because of this, there are few beliefs so fundamental as not to allow for refinement of their details; the few that do remain, moreover, are the soul of wisdom.

"Whatever ye would that men would do unto you, do ye even so unto them."[92] Not a bad place to start. Or, for that matter, to end.

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92 *Matthew* 7:12.