

NEW JERSEY'S NO EARLY RELEASE ACT: A BAND-AID APPROACH TO VICTIMS' PAIN AND RECIDIVISM?

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"No excuses. No exceptions. No early release."¹

I. Introduction

In 1993, seven-year-old Divina Genao was raped and mur-

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¹ See Michael Drewniak & Joe Donahue, *Laws on Crime Proving Costly but Popular*, THE STAR-LEDGER (Newark), Mar. 4, 1997, at 11. Then-Assemblywoman Diane Allen (R-Burlington) adopted this phrase as the Assembly's motto for the No Early Release Act. See *id.*

dered by Conrad Jeffrey, an offender released on parole just six weeks earlier.² Jeffrey was previously denied parole, but was nevertheless released upon his next eligibility date because the applicable New Jersey law mandated that he could not be denied parole twice for the same reason.³ In May 1995, Robert "Mudman" Simon, a motorcycle gang member, shot and killed a New Jersey police officer during a routine traffic stop.⁴ Mudman had been paroled from a Pennsylvania prison only months before the attack.⁵ In June 1995, Darnell Collins went on a shooting spree in two states and killed seven people.⁶ Collins was a drug addict out on parole.⁷ In October 1995, Charles "Crazy Eddie" Reddish, killed his girlfriend with an ax and raped her fourteen-year-old daughter.⁸ Having served sixteen months of a five-to-ten year sentence

² See Thomas Zolper, *Panel Set to Propose Tightening of Parole, More Monitoring to Cut Repeat Crimes*, THE RECORD (Northern N.J.), Dec. 11, 1996, at A1.

³ See *id.* This New Jersey law dictates that once the Parole Board has reviewed an inmate and denied parole, at subsequent review hearings it may only deny parole on the basis of "new" information that "indicates there is a substantial likelihood that the inmate will commit a crime if released." REPORT OF THE STUDY COMMISSION ON PAROLE (Governor's Study Commission on Parole, 1996) [hereinafter COMMISSION REPORT], at 21, (citing N.J. STAT. ANN. § 30:4-123.56(c) (West 1997)). The Governor's Study Commission on Parole determined that this limitation on the Parole Board's discretion is significant and inappropriate. See *id.* It recommended that "at second and subsequent parole hearings, the Parole Board should consider all relevant information and not only "new" information." *Id.* If the inmate has not acquired any institutional infractions since the last review, under the current statute the Board must grant parole, "even though the inmate may not be rehabilitated." *Id.*

The Legislature has since responded by passing a law on August 19, 1997, which eliminates the requirement of "new" information and allows the Board to deny parole upon a showing by a preponderance of the evidence that the inmate "has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole." See 1997 N.J. Sess. Law Serv. 213 (West).

⁴ See Michael Booth, *Parole System Reform Sought*, 147 N.J.L.J. 84, at 12 (Jan. 13, 1997). "Mudman" killed Sergeant Ippolito Gonzalez. See *id.*

⁵ See *id.* at 12. In 1994, Mudman murdered a 19-year-old woman because she refused to have group sex with his whole motorcycle gang. See Gloria Broder, *Keep Criminals in Jail Longer*, THE RECORD (Northern N.J.), Oct. 23, 1996, at L10. He was sentenced to ten-to-twenty years, and released on parole after serving approximately 12 years. See *id.*

⁶ See Booth, *supra* note 4, at 12.

⁷ See Booth, *supra* note 4, at 12. Collins was eventually killed by police in a shoot-out. See *id.*

⁸ See Assemblywoman Diane Allen (R-Burlington), Press Release, Feb. 7, 1996.

for another offense, Crazy Eddie was also out on parole when he committed these crimes.⁹ On April 15, 1996, the body of twenty-two-year-old Rebecca Russell was found on the side of the Garden State Parkway wrapped in plastic and strangled by an electrical cord.¹⁰ Her alleged killer was an acquaintance who had been convicted of aggravated sexual assault and released on parole after serving only seven months of a five-year sentence.¹¹

Accounts of violent crimes committed by offenders while serving the remainder of their sentences on parole are nightmares often repeated. In recent years, the nation and New Jersey, in particular, have attempted to codify legislative efforts to address the public's growing intolerance of violent predators.¹² For example,

⁹ See Natalie Pompilio, *Two Lawmakers Outline Bills to Fulfill Campaign Pledge, Reform Prisons*, PHILADELPHIA INQUIRER, Feb. 8, 1996, at B4.

¹⁰ See *Guest List: Legislative Report with Diane Allen and Carmine DeSopo* (Comcast television broadcast, May 14, 1996) [hereinafter Comcast Program]; see also John Froomjian, *Cape Woman, Other Crime Victims Seek Parole Reduction*, THE PRESS (Atlantic City), Sept. 19, 1996, at C5.

¹¹ See Comcast Program, *supra* note 10. James McGlinsey was convicted and sentenced to five years on October 8, 1993. See *id.* He received thirteen months of credit as time served while awaiting sentencing, for a total of twenty months, and was paroled on May 17, 1994. See *id.* On September 2, 1994, he was arrested and charged for attempting to strangle a seventeen-year-old girl. See *id.* But on March 24, 1995, McGlinsey was released from custody when the girl capitulated by saying that McGlinsey "was only trying to tickle her," and the charge was reduced to a simple assault. See *id.* As a result, the court found that simple assault was not enough reason to revoke parole. See *id.* Thirteen months later, he allegedly killed Russell. See *id.*; see also *Murder Victim's Parents Interrupt Whitman's Tour*, THE PRESS (Atlantic City), May 25, 1996, at C4.

¹² See, e.g., N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995). For instance, New Jersey enacted "Megan's Law" in October 1994, requiring three tiers of community notification of convicted sex offenders. See *id.* "Megan's Law" was the result of a campaign by the parents of slain 7-year-old Megan Kanka. See *Judge Imposes Life Sentences for Killer of Megan Kanka*, DOW JONES NEWS SERVICE, July 30, 1997. On July 29, 1994, Jesse Timmendequas, a twice-convicted sex offender, invited his neighbor, Megan Kanka, into his home to see a puppy. See *id.* He then "raped and beat her, strangled her with a belt, and dumped the body in a park nearby." *Id.* Timmendequas received a jury-imposed death sentence in June 1997 for the murder. See *id.* The judge later imposed two life terms for "felony kidnapping, aggravated sexual assault and felony murder," to be served if the death sentence is overturned. *Id.*

New Jersey also enacted the "Three Strikes and You're In" law, requiring thrice-convicted felons to serve a life sentence without parole. See N.J. STAT. ANN. § 2C:43-7.1a (West 1995). In order to be eligible for parole under this statute, the inmate must have served at least 35 years, be at least 70 years old, and be determined by the Parole Board not to be a danger to the community. See *id.* § 2C:43-7.1b(2)(e) (West 1995).

on June 9, 1997, the New Jersey Legislature passed the No Early Release Act.¹³ This law mandates that certain violent offenders

On the federal level, President Clinton signed the 1994 Crime Bill, which contained a "truth-in-sentencing" funding measure as an incentive for states to implement tougher sentences on violent offenders in exchange for additional federal funds. See 42 U.S.C.A. §§ 13701-09 (West 1997). In May 1996, Congress enacted a federal version of "Megan's Law." See 42 U.S.C. § 14071 (West 1997). There is also a current movement to amend the United States Constitution to allow crime victims to attend court proceedings, "make statements about a release, plea agreement, or sentence, and [be] notified when an offender escapes or is released from custody." Martha Raffaele, *Hundreds Rally for Victims' Rights Call for Amendment to U.S. Constitution*, THE RECORD (Northern N.J.), Apr. 21, 1997, at A3.

Various other states have also passed or introduced truth-in-sentencing mandates. For example, a 1995 Illinois law requires murderers to serve 100% of their sentences, and violent offenders to serve 85% of their sentences. See Tim Landis, *Real Time: Truth-in-Sentencing Law Changes Plea Negotiations*, ST. LOUIS POST DISPATCH, July 11, 1996, at 1. In New York, the Sentencing Reform Act of 1995 requires second-time violent offenders to serve 85.7% of a determinative sentence before becoming eligible for parole. See Spiros A. Tsimbinos, *Limitations on Parole and Its Possible Consequences*, 13 N.Y. CRIM. L. NEWS 1 (1996), at 1. In 1996, New York's Governor sought to make the law applicable to first-time violent offenders as well. See *id.* In Wisconsin, Governor Thompson recently proposed a bifurcated sentence which includes a prison term followed by a community supervision period of at least 25% of the prison term, but not longer than the maximum prison term allowable. See Jennifer Boese, *Bearing Down on the Budget: The Upcoming Biennium at a Glance*, WISCONSIN LAWYER, Apr. 1997, at 31. As part of that legislation, the Governor seeks to increase the maximum terms allowable for all classes of offenses. See *id.* A Class "B" felony sentence would increase from 40 to 60 years; a Class "BC" from 20 years to 30; a Class "C" from 10 years to 15; a Class "D" from 5 years to 10; a Class "E" from 2 years to 5; and controlled substances felonies would receive a 50% or one year increase, whichever is greater. See *id.* In the case of life sentences, the legislation mandated that judges must do one of three things: set a period of community supervision upon the completion of 20 years; set a date for parole eligibility beyond 20 years; or deny parole altogether. See *id.* In New Hampshire, the truth-in-sentencing statute requires offenders to serve their full minimum term. See Thomas K. Tarr, *Federal and State Probation Systems in New Hampshire—A Comparison*, FEDERAL PROBATION, Mar. 1997, at 71-72. One probation officer believes the state has created its own overcrowding problem by passing the statute. See *id.* In Arizona, Proposition 200, effective December 1996, abolished parole for offenders who committed a violent crime while under the influence of controlled substances. See 1997 Ariz. Legis. Serv. 200 (West).

¹³ See 1997 N.J. Sess. Law Serv. 117 (West) [hereinafter Chapter 117], reproduced as follows:

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. This act shall be known and may be cited as the No Early Release Act.

2. a. A court imposing a sentence of incarceration for a crime of the first or second degree shall fix a minimum term of 85% of the sentence during which the defendant shall not be eligible for parole if the crime is

a violent crime as defined in subsection d. of this section.

b. The provisions of subsection a. of this section shall not be construed or applied to reduce the time that must be served before eligibility for parole by an inmate sentenced to a mandatory minimum period of incarceration.

c. Notwithstanding any other provision of law to the contrary and in addition to any other sentence imposed, a court imposing a minimum period of parole ineligibility of 85 percent of the sentence pursuant to this section shall also, unless the court imposes a sentence of lifetime parole supervision pursuant to P.L., c. (C.) (now pending before the Legislature as Senate Bill No. 524 SCS), impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree, or a three-year term of parole supervision if the defendant is being sentenced for a crime of the second degree. The term of parole supervision shall commence upon the completion of the sentence of incarceration imposed by the court pursuant to subsection a. of this section unless the defendant is serving a sentence of incarceration for another crime at the time he completes the sentence of incarceration imposed pursuant to subsection a., in which case the term of parole supervision shall commence immediately upon the defendant's release from incarceration. During the term of parole supervision the defendant shall remain in release status in the community in the legal custody of the Commissioner of the Department of Corrections and shall be supervised by the Bureau of Parole of the Department of Corrections as if on parole and shall be subject to the provisions and conditions of section 3 of P.L., c. (C.) (now pending before the Legislature as this bill).

d. For the purposes of this section, "violent crime" means any crime in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S. 2C:11-1, or uses or threatens the immediate use of a deadly weapon. "Violent crime" also includes any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force.

For the purposes of this section, "deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.

e. A court shall not impose sentence pursuant to this section unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to him of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.

3. a. A person who has been sentenced to a term of parole supervision and is on release status in the community pursuant to section 2 of P.L., c. (C.) (now pending before the Legislature as this bill) shall, during the term of parole supervision, remain on release status in the community, in the legal custody of the Commissioner of the Department of Corrections, and shall be supervised by the Bureau of Parole of the Department of Corrections as if on parole, and shall be subject to the provisions and conditions set by the appropriate board panel. The appropriate board panel shall have the authority, in accordance with the procedures and standards set forth in sections 15 through 21 of P.L. 1979, c.441 (C.30:4-

complete eighty-five percent of their sentences before becoming eligible for parole.¹⁴

This note provides an overview of the No Early Release Act in Part II, and discusses statistics surrounding recidivism and parole.¹⁵ Part III details how No Early Release became the subject of legislative attention, as well as the debate surrounding its route through the Legislature and the Governor's approval.¹⁶ Next, Part IV analyzes the debate over the Act and the potential ramifications of its implementation, including a discussion of alternatives to incarceration.¹⁷ Finally, this note concludes that the No Early Release Act will succeed in reducing recidivism by mandating longer periods of incapacitation of violent offenders, provided that other rehabilitative measures are taken to counter their increased aggression towards the system.¹⁸

II. *The No Early Release Act*

The No Early Release Act (Act) applies to offenders who commit first and second degree violent crimes.¹⁹ The Act may

123.59 through 30:4-123.65), to revoke the person's release status and return the person to custody for the remainder of the term or until it is determined, in accordance with regulations adopted by the board, that the person is again eligible for release consideration pursuant to section 9 of P.L.1979, c.441 (C.30:4-123.53).

b. The Parole Board shall promulgate rules and regulations necessary to carry out the purposes of this act pursuant to the "Administrative Procedure Act," P.L. 1968, c.410 (C.52:14B-1 et seq.).

4. This act shall take effect immediately.

Id.

¹⁴ See *id.* § 2(a); see also Ron Marsico, *Dangerous Criminals Will Serve at Least 85% of Their Terms*, THE STAR-LEDGER (Newark), June 10, 1997, at 32. Governor Whitman touted the bill as a tool "to reduce recidivism and increase victims' rights." *Id.*

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part V.

¹⁹ See Chapter 117 §§ 2(a),(d). Earlier versions of the bill made the Act applicable only to first or second degree felons, violent and non-violent, serving sentences over five years. See *Death Sentencing Amendment, Criminal Bills Opposed*, N.J. LAWYER, Oct. 1995, at 9. Earlier versions also made the law retroactive. See *infra* text accompanying note 60.

The Act limits crimes of violence to those "in which the actor causes death, . . . serious bodily injury . . . or uses or threatens the immediate use of a deadly weapon," and "any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force." Chapter 117 § 2(d).

have several positive effects on the New Jersey criminal justice system.²⁰ First, the Act may serve as a deterrent to certain violent crimes.²¹ Second, it may provide retribution to victims of those crimes and their families.²² Finally, it may bring additional federal funding to the state of New Jersey under the Federal Violent Offender Incarceration and Truth-In-Sentencing Incentive Grants passed as part of the 1994 federal crime bill to offset increased correctional costs.²³

Under the Parole Act of 1979, New Jersey inmates are generally required to serve at least one-third of their imposed sentences, less credits for good behavior and work assignments, before becoming eligible for parole.²⁴ Therefore, an offender sentenced

"Serious bodily injury" is defined as according to the criminal homicide statute which deems it a "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." N.J. STAT. ANN. § 2C:11-1(b) (West 1995). For definitions of aggravated sexual assault and sexual assault, see N.J. STAT. ANN. § 2C:14-2 (West 1995).

²⁰ See *infra* Part IV and *infra* text accompanying notes 21-23.

²¹ See Marsico, *supra* note 14, at 32.

²² See Tom Hester, *Relatives of Victims Back Strict Sentences for Violent Criminals*, THE STAR-LEDGER (Newark), May 2, 1996, at 19.

²³ See 42 U.S.C.A. §§ 13701-09. The federal law appropriates over \$10 billion from 1996 to the year 2000. See *id.* § 13709. The funds are divided among states that show that their sentencing laws "provide sufficiently severe punishment for violent offenders . . ." *Id.* § 13701(b)(1). States must also have enacted truth-in-sentencing laws which require that persons convicted of certain violent crimes "serve not less than 85 percent of the sentence imposed" in order to be eligible for a share of the funds. *Id.* § 13704(a)(1).

Senator John Bennett (R-Monmouth) said that if the law is enacted, New Jersey will qualify for federal funds to assist in building more prisons if necessary. See Robert Schwaneberg, *Senate Bill Doubles Jail Time for Violent Crime*, THE STAR LEDGER (Newark), May 17, 1996, at 19. Assemblywoman Diane Allen said that under the federal law, "states that require prisoners to serve 85 percent of their sentences will be eligible to share approximately \$10 billion in federal aid." *Id.* She added that the United States Attorney General recently denied New Jersey's application for a share in the funding because New Jersey failed to have an 85 percent sentencing provision. See *id.*

²⁴ See N.J. STAT. ANN. § 30:4-123.51 (West 1997). The statute provides in relevant part:

- a. Each adult inmate sentenced to a term of incarceration . . . shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or one-third of the sentence imposed where no mandatory minimum term has been imposed less commutation time for good behavior . . . and credits for diligent application to work and other institutional assignments

for a first degree crime to a presumptive sentence of fifteen years is eligible for parole in five, but may be released earlier because of credits awarded for good behavior and work performance while in prison.²⁵

Parolees' recidivism²⁶ was one of the State Legislature's focal points leading to the Act's passage.²⁷ New Jersey inmates currently on parole relapse into crime at rates varying from twelve to fifty percent.²⁸ Although the increase of parole violations among the

Id. "[P]arole involves the release of offenders prior to the end of their maximum terms of imprisonment, followed by a period of supervision in the community." COMMISSION REPORT, *supra* note 3, at 1.

²⁵ See COMMISSION REPORT, *supra* note 3, at 1. Reports on exactly how much of a sentence is actually served before a New Jersey inmate is released on parole are conflicting. Compare Hester, *supra* note 22, at 19, with COMMISSION REPORT, *supra* note 3, at 10, and Schwaneberg, *supra* note 23, at 19. Senator John O. Bennett (R-Monmouth) and Assemblywoman Diane Allen (R-Burlington) maintain that violent offenders complete 33% of their sentences as a result of the present parole law and good time and work credits. See *id.* However, the Governor's Study Commission on Parole reported that on average, offenders serve 40% of their sentence. See COMMISSION REPORT, *supra* note 3, at 10. The New Jersey Department of Corrections reported that the "average inmate completes 42% of his sentence." Schwaneberg, *supra* note 23, at 19.

²⁶ See BLACK'S LAW DICTIONARY 1269 (6th ed. 1990). A recidivist is "a habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime." *Id.*

²⁷ See Assemblywoman Diane Allen, *Making Criminals Pay for Their Crimes*, Letter to the Editor, Feb. 26, 1996 (original on file with *Seton Hall Legislative Journal*). Allen advocated passage of companion bills to the Act that would provide for "educational and vocational training requirements" because "the recidivism rate is greater that [sic] 50% in New Jersey. Clearly, what we are doing now is not working." *Id.*

²⁸ See Thomas Zolper, *Keeping Violent Offenders Behind Bars; Anti-Parole Measure Weakened: Panel Leaves Out Current Prisoners*, Feb. 4, 1997, THE RECORD (Northern N.J.), at A3; see also Steve Adubato, *Bill that's Tough on Crime Should Raise Tough Questions*, THE RECORD (Northern N.J.), Mar. 2, 1997, at RO4. "While still on parole, about one in five . . . commits a crime." *Id.* See also *No Early Release Act: Hearing on S. 855 Before the Senate Law and Pub. Safety Comm.*, 207th Legis., 1st Sess. (N.J. 1996) [hereinafter *Hearing on S. 855*], at 12. Deputy Chief Howard O'Neil, testified to a 1995 Trenton Times report stating that "chances are at least one in four that [a] parolee will commit another serious crime." *Id.* It is also reported that current and former parolees in the state of New Jersey will recidivate at a rate of 60%. See Zolper, *supra* note 2, at A1.

But see CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995 (U.S. Dep't of Justice, Bureau of Justice Statistics, 1997) [hereinafter POPULATIONS IN 1995], at 130. Perhaps due to a different methodology, federal figures reflect rates significantly less, slightly under 12% in the year 1995. See *id.* Of 11,589 adults leaving the New Jersey parole program in 1995, only 11.99% (1,390) were returned to incarceration due to a new sentence having been imposed. See *id.* However, the federal figures also reflect rates at nearly 51% for total returns to incarceration, either due to new

several states has been steadily on the rise,²⁹ New Jersey's rate of total returns to incarceration is roughly twenty percent higher than the national average.³⁰

The No Early Release Act targets *violent offenders*.³¹ It is reported that over half of all violent crimes are committed by inmates released on parole.³² In 1996, a violent crime occurred in New Jersey once every twelve minutes and twenty-five seconds.³³ Also in 1996, in any given twenty-four hour period, one murder, five rapes, fifty-two robberies, fifty-eight aggravated assaults, and

sentence imposition or parole revocation. *See id.* Less than half of the 11,589 parolees, 43% (4,991), successfully completed parole. *See id.* Roughly 39% (4,479) were returned to incarceration due to revocation of parole. *See id.* It is not clear what percentage of the revoked parole group lost their parole status due to recidivism. *See id.* This vagueness may also explain the conflicting New Jersey rates. Compare Zolper, *supra*, at A3; Aduabato, *supra*, at RO4; and *Hearing on S. 855, supra* at 12, with POPULATIONS IN 1995, *supra*, at 130.

²⁹ See Robyn L. Cohen, U.S. DEPT. OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON (1991), at 16. In 1926, five percent of all state inmates violated parole: there were 44,192 "total admissions from court to State prisons." *Id.* 2,202 "[p]arole or other conditional release violators [were] returned." *Id.* With only slight fluctuation, the number increased with each year up to 1992: in 1936, 7.9%; in 1946, 11.9%; in 1956, 14.1%; in 1966, 19.3%. *See id.* The early 1970s saw a marked decrease in total parole violators. *See id.* 1968 reflects 20.6%, with a drop to 15% in 1971, and 13.5% in 1975. *See id.* The total went up to 15.8% in 1976, went back down to 14.7% in 1977, and began its upward climb again in 1978. *See id.* By 1991, the highest number of parole violators was reported: 30.9%. *See id.*

³⁰ *See id.* The 1992 national rate of parole violations among states was 29.8%. *Id.*

³¹ *See* Chapter 117 § 2.

³² *See* Schwaneberg, *supra* note 23, at 19. Senator Louis Kosco (R-Bergen), the Senate bill's co-sponsor, stated that "[f]ifty-four percent of violent crimes are committed by people out of prison on parole." *Id.*

³³ *See* CRIME IN NEW JERSEY (N.J. State Police Uniform Crime Reporting Unit, 1996) [hereinafter CRIME IN NEW JERSEY], at 11. This frequency does not include arson, manslaughter, or simple assaults, as they are not "index" offenses. *See id.* at 2. However, arson and manslaughter do fall under the authority of the Act. *See* Administrative Substitute, *infra* note 99; *see also* Chapter 117 § 2(d); *see also* Hester, *supra* note 22, at 19. An "index offense" is one that is reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports. *See* 42 U.S.C.A. § 13701(2). A part 1 violent crime includes: murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *See id.*

In New Jersey, a murder occurred once every 26 hours and 4 minutes and a rape occurred once every 4 hours and 27 minutes. *See* CRIME IN NEW JERSEY, *supra*, at 11. In addition, a robbery occurred once every 27 minutes and 57 seconds and an aggravated assault occurred once every 24 minutes and 48 seconds. *See id.* These data reflect "the annual ratio of crime to fixed time intervals." *Id.* The number of reported offenses included all criminal complaints police received from "victims or other sources, or discovered by the police during routine operations." *See id.* Unfounded complaints were excluded from the data. *See id.*

seven arsons occurred.³⁴ Despite the system's knowledge of these violent crime rates, the number of parolees in New Jersey increases every year,³⁵ making New Jersey's parole rate the second highest in the nation.³⁶ However, there is a grassroots effort among victims and their families to force violent offenders to remain behind bars for at least a majority, if not all, of their sentences.³⁷

III. Legislative History

In New Jersey, the push for legislation similar to the No Early Release Act began in 1989 when families of violent crime victims lobbied the state legislature to pass a bill denying parole to first-degree murderers.³⁸ However, the lobby was unsuccessful and

³⁴ See CRIME IN NEW JERSEY, *supra* note 33, at 10.

³⁵ See POPULATIONS IN 1995, *supra* note 28, at 127. On Jan. 1, 1995, there were 41,802 state inmates on parole. *See id.* On Dec. 31, 1995, the number increased by 13.4% to 47,411. *See id.* During the year, 17,198 new parolees entered the program, and 11,589 exited the program. *See id.* Only 406 were under intensive supervision, none were subjected to electronic monitoring, and none were in boot camps. *See id.* at 134. On Jan. 1, 1994, there were 35,775 inmates on parole. *See id.* By Dec. 31, 1994, the number increased 16.9% to 41,820. *See* JODI M. BROWN, ET AL., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 (U.S. Dep't of Justice, Bureau of Justice Statistics, 1996) [hereinafter POPULATIONS IN 1994], at 107. In 1992, the number of new parolees who entered the program was 8,879. *See* CRAIG PERKINS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1992 (U.S. Dep't of Justice, Bureau of Justice Statistics, 1994) [hereinafter POPULATIONS IN 1992], at 54. No data on an increase during the year was included in the report. *See id.* About 15,000 parole hearings are conducted yearly, and 60% of eligible inmates succeed in gaining release. *See* Patrick Graham, *Parole Reforms Unveiled; Panel Details 39 changes*, TRENTON TIMES, Jan. 10, 1997, at A1.

³⁶ *See* POPULATIONS IN 1995, *supra* note 28, at 127. As of 1995, there were 793 offenders on parole for every 100,000 residents in New Jersey. *See id.* Only Pennsylvania had a higher rate among states, 799 parolees per 100,000 residents, but the District of Columbia had a rate of 1,523 parolees per 100,000 residents. *See id.* In 1994, New Jersey's rate was 700 parolees per 100,000 residents. *See* POPULATIONS IN 1994, *supra* note 35, at 107. In that year, Texas had the highest rate among states in 1994, with 830 parolees per 100,000 residents. *See id.*

³⁷ *See infra* Part III.

³⁸ *See* Gloria Broder, *Put Limits on Parole*, THE RECORD (Northern N.J.), Sept. 6, 1989, at B6. Broder is the chairwoman of "End Violence Now," a victims' rights group that gathered signatures to petition the New Jersey Senate to release a bill denying parole to first-degree murderers from committee for a vote in the Senate. *See id.* Broder's letter to the editor described a murder committed by a parolee:

Francis Pennington received 25 years for a Newark murder in 1974. He was paroled in only six years . . . After again being caught for a series of

first-degree murderers remained eligible for parole after serving the mandatory minimum sentence of thirty years.³⁹ Then, in 1995, victims' interests in criminal justice reached the height of political concern when several highly publicized murders of New Jersey children influenced criminal sentencing reforms such as Megan's Law⁴⁰ and Joan's Law.⁴¹ In 1996, the effort for reform focused on

robberies and burglaries, he was given a 10-year sentence (he should have been made to finish his remaining 19-year sentence plus the 10 years). In only three years, he was again released on parole Immediately, he amassed an arsenal of weapons and committed many burglaries and robberies. He was arrested for threatening the life of a 23-year-old woman and her child if she reported a rape by his friend which he witnessed. He skipped his bail and within just a year of his second release, he walked into a Carlstadt bar and without provocation, killed Arlene Connors, mother of eight. He then asked her daughter to step over her body and empty the cash register.

Id.

³⁹ See N.J. STAT. ANN. § 2C:11-3b(1) (West Supp. 1997). But in 1996, an amendment to the homicide statute was added: if a convicted murderer killed a police officer on active duty because of his status as a police officer, the sentence is life without parole. See *id.* § 2C:11-3b(2).

⁴⁰ See N.J. STAT. ANN. §§ 2C:7-1 to -11; see also *supra* text accompanying note 12. "Megan's Law" requires community notification of released sex offenders. See N.J. STAT. ANN. § 2C:7-1. New Jersey has also enacted the "Violent Predator Incapacitation Act," part of which mandates community supervision for life on sexual offenders. See N.J. STAT. ANN. § 2C:43-6.4 (West 1995). A released sex offender is supervised as though he were on parole for life unless he can prove, upon petition to the court, that he "has not committed a crime for 15 years since [his] last crime or release from incarceration." *Id.* § 2C:43-6.4(c).

⁴¹ See Robert Hanley, *Law Signed Barring Parole of Child Molesters Who Kill*, N.Y. TIMES, Apr. 4, 1997, at B4. The Governor approved "Joan's Law" on April 3, 1997. See *id.* The law denies parole to offenders who sexually molest and kill children under the age of 14. The law states in relevant part that:

A person convicted of murder and who is not sentenced to death under this section shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

- (a) The victim is less than 14 years old; and
- (b) The act is committed in the course of the commission . . . of a violation of N.J.S. 2C:14-2 [sexual assault] or N.J.S. 2C:14-3 [criminal sexual contact].

The defendant shall not be entitled to a deduction of commutation and work credits from that sentence.

N.J. STAT. ANN. § 2C:11-3(3).

Twenty-four years ago, Rosemarie D'Allessandro's seven-year-old daughter, Joan, was abducted as she was out delivering Girl Scout cookies. See Paul Rogers, *Parole Barred for Child Molesters Who Kill: Joan's Law, a Tribute to Slain Hillsdale Girl*, THE RECORD (Northern N.J.), Apr. 4, 1997. Nude and battered, her body was found three days later in a ravine nearly fifteen miles from her home. See *id.* Joseph

compelling violent offenders to complete their entire sentences instead of being released on parole.⁴² Victims endorsed legislation that would prevent violent criminals from re-offending,⁴³ and stressed to legislators that stronger sentencing reforms were necessary to serve the purpose of restitution.⁴⁴

McGowan was convicted and sentenced, but was eligible for parole in 1987 after serving approximately 13 years of his 14-years-to-life sentence. See Tom Hester, *Mother of Slain Girl Seeks Curbs on Parole*, THE STAR-LEDGER (Newark), Sept. 19, 1996, at 27. D'Allessandro was a major advocate for mandating that child rapists and murderers serve mandatory life imprisonment with no parole. See *id.* Every few years, as she did in 1987, D'Allessandro faces the parole board to fight McGowan's release. See Hanley, *supra*, at B4. One article reports that D'Allessandro fought McGowan's release in 1994, and that he is eligible for parole again in 2003. See *id.* Another article reports she fought his parole in 1993, and intends to do so again in 2005. See Hester, *supra*, at 27.

⁴² See generally Chapter 117. The "No Early Release Act," was introduced in the New Jersey Senate by Senator John O. Bennett (R-Monmouth) on Feb. 26, 1996. See History for Bill S. 855, *infra* note 52. Senator James McGreevey (D-Middlesex) introduced a broader parole reform measure in 1995, S-1916. See *Death Sentencing Amendment, Criminal Bills Opposed*, *supra* note 17. This bill "would [have] require[d] a person convicted of a first or second degree crime to serve 85 percent of his or her sentence." *Id.* The bill applied to all first and second degree offenders, not just violent offenders. See *id.* The New Jersey State Bar Association opposed this bill because of its potentially catastrophic impact on the prison system. See *id.*

⁴³ See generally *Hearing on S. 855*, *supra* note 28 (detailing crime victims' desire for legislation to keep violent offenders behind bars). Maria Esteves, who lost two relatives to a drunk driver testified that she is sure their killer "will come out and commit another crime." *Id.* at 18. See also Tom Hester, *Group Marks Crime Victims' Week by Asking Stiff Terms, Compensation*, THE STAR-LEDGER (Newark), Apr. 9, 1996, at 16. Betty Ann Cornish's family also became involved in the push for the Act. See *id.* On Aug. 8, 1987, John Reese entered Cornish's apartment, assaulted her, and beat her "to death with the claw end of a hammer." *Id.* Reese was "sentenced to 40 to 98 years in prison." *Id.* In early 1996, her father, Richard Kramer, the head of Voices for Victims, along with several other victims' rights groups, lobbied the New Jersey Legislature to hear their sometimes life-long struggles to keep violent offenders incapacitated. See *id.*

⁴⁴ See, e.g., *Hearing on S. 855*, *supra* note 28. Karen Wengert, President of Friends of Amanda Foundation, asked the Committee if sentencing an aggravated manslaughter offender to 18 years with eligibility for parole in six years is justice to the victim's family who "will still feel the tremendous pain . . . while the killer resumes a normal life." *Id.* at 12-13. Maria Esteves testified that in 1991, she lost her eight-year-old daughter, Rosemary, and her uncle, Manuel, to a drunk driver as they were crossing the street. See *id.* at 17. A year after being released on bail, the offender drove on a suspended license and ran a red light. See *id.* at 18. By chance, Maria saw the police with him as his car was towed, and told the officer who he was. See *id.* The court held a bail revocation hearing, but permitted him to retain his bail status. See *id.* In 1993, he was convicted on two counts of reckless manslaughter and death by auto. See *id.* at 17. The offender never said he was sorry or admitted that he committed a crime. See *id.* His sentence was seven years for each homicide, served

A. Governor's Study Commission on Parole

In mid-1995, in response to a killing spree by two parolees, Governor Whitman formed the Governor's Study Commission on Parole to evaluate New Jersey's parole system and make recommendations for its improvement.⁴⁵ The Commission studied all aspects of the State's parole program, including the goals, functions and administration of the parole system.⁴⁶ Shortly after being established, the Commission identified defective areas and made recommendations to improve the system's overall effectiveness rather than completely abolishing the current system.⁴⁷ Concurrent with the Commission's evaluation, the Legislature drafted measures to extend periods of parole ineligibility for inmates.⁴⁸

concurrently, with no mandatory minimum. *See id.* Maria faced the parole board to prevent his early release in 1995, and was preparing to face it again on April 30, 1996. *See id.*

⁴⁵ *See* Zolper, *supra* note 2, at A1. The Commission's December 1996 report was the first evaluation of New Jersey's parole system since the enactment of the Parole Act of 1979. *See id.* Executive Order 39 established the Study Commission on Parole on July 25, 1995. *See* COMMISSION REPORT, *supra* note 3, at 1.

⁴⁶ *See generally* COMMISSION REPORT, *supra* note 3 (the Commission undertook a thorough examination of the State parole system). The Commission reported that the New Jersey parole laws serve at least three distinct functions:

- 1) to provide motivation and incentives for good behavior and rehabilitation in prison; 2) to authorize an appropriate authority to decide on a case-by-case basis when a prisoner can be released safely back into the community; and 3) to facilitate the successful reintegration of the offender into the community by providing supervision and support services upon release from prison.

Id. at 1. The fifteen-member panel included: Chair, James W. Holzapfel, Assemblyman; Vice Chair, Robert L. Clifford, Retired Justice, New Jersey Supreme Court; William H. Fauver, Jr., Commissioner of Corrections; Robert D. Lipscher, Administrative Office of the Courts; Peter Verniero, Attorney General of New Jersey; Ronald S. Fava, Passaic County Prosecutor; Stephen G. Raymond, Burlington County Prosecutor; Andrew B. Consovoy, State Parole Board Member; Captain Linda W. Vestal, Crime Victim/Citizen; Mario Papanozzi, Senate Public Member; Keith Durrell Moore, Senate Public Member; M. James Maley, Jr., Esq., Senate Public Member; Karl Weidel, Assembly Public Member; Anthony Sgro, Assembly Public Member; John Arthur Thomas, Assembly Public Member; and Ronald Susswein, Secretary to the Commission and Assistant Attorney General of New Jersey. *See id.* at Committee member page.

⁴⁷ *See* COMMISSION REPORT, *supra* note 3, at 2. The Commission noted that while other states may claim they have abolished parole in lieu of an alternative system, in reality, the Commission found that those states just call their programs by another name. *See id.*

⁴⁸ *See infra* Part III(b).

B. *Senate Action*

Ten months before the Commission released its report, the Legislature unveiled several bills carrying the title of the No Early Release Act.⁴⁹ In the Senate, Majority Leader John O. Bennett (R-Monmouth) introduced Senate Bill No. 855,⁵⁰ and in the Assembly, Assemblywoman Diane Allen (R-Burlington) introduced Assembly Bill No. 1549 as part of a package of bills entitled the 1996 Prison/Parole Reform Package.⁵¹ Senate Bill 855 was given its first reading and referred to the Senate Law and Public Safety Committee on February 26, 1996.⁵²

On April 24, 1996, New Jersey Senator Louis Kosco (R-Bergen), chairman of the Law and Public Safety Committee, conducted a hearing on Senate Bill 855.⁵³ Of the sixteen individuals who attended and gave testimony, all but two testified in favor of its release from Committee and passage on the floor.⁵⁴

⁴⁹ See History for Bill S. 855, *infra* note 52.

⁵⁰ See Tom Hester, *Group Marks Crime Victims' Week by Asking Stiff Terms, Compensation*, THE STAR-LEDGER (Newark), Apr. 9, 1996, at 16.

⁵¹ See *News from Assembly Members Diane Allen and Carmine DeSopo*, Press Advisory, Feb. 6, 1996, (original on file at *Seton Hall Legislative Journal*). Assemblyman Carmine DeSopo (R-Burlington) was co-sponsor of the Assembly's No Early Release Act. See *id.* The other bills in the package were: "The Education and Job Training Act," see *infra* note 89; "The Prison Priority Act" (eliminating cable TV, weight rooms and other automatic luxuries from existing prisons), and "The Reduce Frivolous Prison Inmate Lawsuits Bill" (intending to discourage the filing of frivolous civil actions by inmates). See *id.* The frivolous lawsuits bill was enacted on March 28, 1996 and took effect in June 1996. See 1996 N.J. Sess. Law Serv. 11 (West). The law calls for the forfeiture of progressive time credits if a civil lawsuit was filed by an inmate with the purpose to harass or retaliate against another person, disrupt or interfere with corrections operations, or for a malicious purpose, and a court determines it to be frivolous. See *id.* § 1(b).

⁵² See History for Bill S. 855, as reported by the Office of Legislative Services, Aug. 28, 1997, (original on file with *Seton Hall Legislative Journal*) [hereinafter History for Bill S. 855].

⁵³ See *Hearing on S. 855*, *supra* note 28, at cover. Members of the Committee present were Senator Louis Kosco; Senator James S. Cafiero, Vice-Chairman; and Senator John O. Bennett. See *id.*

⁵⁴ See *Hearing on S. 855*, *supra* note 28. Individuals who gave testimony at the hearing included the following: Assemblywoman Diane Allen (R-Burlington), see *id.* at 2-5; Senator John O. Bennett (R-Monmouth), see *id.* at 5-9; three Chiefs of Police, see *id.* at 10-12; members of the Friends of Amanda Foundation (slain Amanda Wengert's mother and grandfather), see *id.* at 12-15; Maria Esteves, see *id.* at 17-19; an Assistant Prosecutor, see *id.* at 19-24; Former New Jersey Attorney General W. Cary Edwards, see *id.* at 25-29; the president of End Violence Now, see *id.* at 29-31; an

The testimony focused on sending a message to society that if a crime is committed, its perpetrator will serve a majority of the sentence imposed.⁵⁵ Further testimony addressed the issue of vic-

Undersheriff, *see id.* at 32-33; Senator James E. McGreevey, *see id.* at 33-35; a member of the team "which examined sex offenders prior to the opening of the Adult Diagnostic Center at Avenel, N.J.," *id.* at 35-38; the New Jersey Association of Correction, *see id.* at 38-41; a private citizen representing religious interests, *see id.* at 41-46; and the New Jersey Taxpayers Task Force, *see id.* at 46-49.

Only two dissenters testified on this bill. *See id.* at 38-46. Karen Spinner testified about the bill's lack of retaining a period of supervised parole. *See id.* at 39-41. Ray Kalainikas, a religious-centered citizen, was the only other hearing participant to testify in opposition to the bill. *See id.* at 41-45.

Ms. Spinner was concerned that violent offenders would be released into the community without *any* parole supervision. *See id.* at 39, 41. As the bill was written when it faced the Law and Public Safety Committee, it authorized unsupervised release after inmates served the mandatory 85% because good time and work credits would add on to complete the sentence. *See S. 855* (1st Reprint). This earlier version of the bill did not eliminate good time or work credits; it merely put them on hold until 85% of the sentence is served. *See id.* For example, if an offender was sentenced to 15 years, he would have to complete 12 years and 9 months to become eligible for parole. *See id.* If the offender earned good time and work credits totaling three years, at the completion of 12 years and 9 months, the three years would attach, effectively completing the sentence and rendering the inmate eligible for release to the community. *See id.* Therefore, violent offenders would not only be eligible for parole, but most would be eligible for unsupervised release because they would technically complete their sentences. *See Hearing on S. 855, supra* note 28, at 41.

The other opponent, Ray Kalainikas, expressed concern about the conflicting statistics on the number of violent offenders in the prison population. *See id.* at 43. Kalainikas countered Assistant Prosecutor Robert Honecker, Jr.'s figure that 94% of the New Jersey prison population are violent, repeat offenders by referring to Assemblyman Holzapfel's representation that the figure was 50% or less. *See id.* at 21, 43. Kalainikas suggested releasing all non-violent offenders and redirecting the funds it costs to incarcerate them in order to rehabilitate violent offenders, a function the current corrections system does not achieve. *See id.* at 43-44. However, Senator Kosco made clear that the topic for discussion was the good and bad points of the No Early Release Act, not alternatives to it. *See id.* at 45-46.

But the Senator's views were not as adverse to the suggestion as he led the hearing participants to believe. *See Patrick Graham, Senate Oks Stiffer Terms for Violent Felons, THE RECORD* (Northern N.J.), May 17, 1996, at A6. Less than one month later, he told the press he was looking into drafting legislation to place nonviolent white-collar offenders in community service programs and drug offenders in drug treatment programs instead of prison. *See id.* Kosco stated, "People who are busted with a little bag of marijuana should not be placed in prison." *Id.* "The problem is we are putting the wrong people in jail." *Id.* Although there has been no such specific legislation targeting those two groups of offenders, Senator Kosco introduced legislation that expanded the age requirement for participation in the State's Stabilization and Rehabilitation Program (SRP). *See infra* Part IV(A).

⁵⁵ *See Hearing on S. 855, supra* note 28, at 25, 28. W. Cary Edwards testified to

tim retribution.⁵⁶ Finally, Senators Bennett and Kosco discussed the cost of violent crime on society.⁵⁷ Senator Bennett testified that crime costs Americans \$430 billion annually,⁵⁸ but asserted that incarceration is cost effective because keeping inmates in jail for longer periods of time reduces crime and prevents criminals from re-offending.⁵⁹

Although the bill which faced the Senate Law and Public Safety Committee was amended substantially before both houses passed it, the bill's premise of requiring violent offenders to com-

studies that show that people under twenty-five believe that if they commit a crime and are arrested, prosecuted and sentenced, they will "serve a minimal amount of time," so committing the crime and being caught for it doesn't matter. *See id.* at 26. He inferred that when young people see others committing heinous crimes and subsequently receiving release from prison after serving less than one-third of their sentence, the State destroys the credibility of the justice system, and perhaps even advocates criminality. *See id.* at 28. Gloria Broder, of "End Violence Now," had an alternative theory; she testified that instead of giving inmates time off of their sentences for good behavior, we should be giving them *more* time for misbehavior. *See id.* at 31.

⁵⁶ *See Hearing on S. 855, supra* note 28, at 12-13, 17-19. Senator Bennett discussed holding both offenders and the system accountable for the victims' and their families' suffering. *See id.* at 6-7. Specifically, he remarked that when a victim is killed, the family suffers a life sentence of pain, loss and grief. *See id.* at 6. Maria Esteves also discussed the loss she suffered when her eight-year-old daughter and uncle were struck and killed by a drunk driver. *See id.* at 17-19; *see also supra* note 44. She pleaded with the Committee panel to pass the bill because, "[o]ur family will never stop hurting." *See Hearing on S. 855, supra* note 28, at 17. In closing, Ms. Esteves held up a picture of her daughter and said she "can only imagine what she would have looked like today." *Id.* at 19.

Karen Wengert, who lost her own daughter to murder in 1994, testified about a recent aggravated manslaughter case where the offender was sentenced to 18 years, but the judge told him "he must serve six years before being released on parole." *See id.* at 13. She emphasized that in six years, the family will continue to suffer the tremendous pain "while the killer resumes a normal life." *See id.*; *see also* John McGourty, *Victims' Kin Demand Parole Reform*, TRENTON TIMES, Sept. 19, 1996, at A1. Karen Wengert's daughter, Amanda, was six years old when she "was kidnapped, raped and murdered by" her neighbor who had been previously convicted for molesting three other children. *See id.*

⁵⁷ *See Hearing on S. 855, supra* note 28, at 6, 16.

⁵⁸ *See Hearing on S. 855, supra* note 28, at 6. That figure includes the costs of police apprehension, prosecution, public defense, trials with judge and jury, probation, loss of property, victims' loss of work, victims' trauma and treatment, loss of life, and offenders' incarceration. *See id.* at 16, 46. Senator Kosco reminded the attendees that it is the taxpayer who pays the costs. *See id.* at 16.

⁵⁹ *See Hearing on S. 855, supra* note 28, at 6, 46. John Budzash, a member of the New Jersey Taxpayers Task Force, testified that taxpayers are better off if offenders are kept in jail longer because they won't repeatedly reenter the justice system and utilize its taxpayer-funded resources. *See id.* at 46.

plete eighty-five percent of their sentences before parole eligibility remained intact.⁶⁰

⁶⁰ See S. 855, 207th Leg. 1st Sess. N.J. (1996) (1st Reprint); see also *supra* text accompanying note 13. This reprint is reproduced as follows:

SENATE, No. 855 (1st Reprint) [Corrected Copy], *introduced February 26, 1996*:

An Act concerning prison sentencing an supplementing P.L. 1979, c. 441.

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

1. This act shall be known and may be cited as the "No Early Release Act."

2. a. Notwithstanding any commutation credits allowed for good behavior and credits earned for diligent application to work and other institutional assignments, or any other provision of law to the contrary, an inmate sentenced for a crime of the first or second degree involving violence to the custody of the Department of Corrections shall not be eligible for parole until the inmate has served not less than 85 percent of the court-ordered term of incarceration.

b. The provision of subsection a. of this section shall not reduce the time that must be served before eligibility for parole by an inmate sentenced to a mandatory minimum period of incarceration.

c. The Parole Board shall promulgate rules and regulations necessary to carry out the purposes this act pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.).

3. This act shall take effect immediately, and shall be applicable to any person sentenced for a crime of the first or second degree involving violence who becomes eligible for parole after the effective date.

Id.

One amendment to the bill addressed the prospective application of the law. See *Hearing on S. 855, supra* note 28, at 23-24. Second Assistant Prosecutor Robert Honecker testified: "I believe that the courts would declare that you could not go back and have this law imposed on individuals who have been sentenced prior to the enactment date of this legislation." *Id.* at 24. At the time, Megan's Law's retroactive effect was under the court's scrutiny. See *id.* at 23-24. But Senator Bennett, the bill's sponsor, remained intent on making the law retroactive to apply to offenders sentenced before the law's enactment. See *id.* at 24. He argued that if the bill were challenged on ex post facto, it might survive because the law amends the *probation* laws, not the *sentencing* laws. See *id.* But see *infra* Part III(c). During the hearing, Senator Cafiero testified:

So I think it behooves us, . . . that if there's anything in this bill that we can do to amend it, to clarify it, and protect it to make sure that it applies to those fellows, we ought to do it in some timely fashion, because everybody's going to be disappointed if those who are in are going to still get out in four-and-a-half years.

Id. Senator Kosco agreed, but added that he didn't know if it would sustain a court challenge. See *id.* at 25. However, he inferred his agreement by adding that the Office of Legislative Services Aide to the Committee would draw up the amendment before the conclusion of the hearing. See *id.*

On May 1, 1996, Senator Bennett and Assemblywoman Allen held a press conference to rally support for the bill.⁶¹ At the time, Governor Whitman had yet to take a position on the bill.⁶² Similarly, because of the potential costs involved in implementing such a law, the Department of Corrections had yet to take a position.⁶³

Shortly thereafter, the Senate approved the bill unanimously.⁶⁴ No debate was held on the Senate floor the day of the vote; perhaps the presence of victims' families in the Senate chamber squelched any debate.⁶⁵ The Senate acted in spite of then-Attorney General Deborah Poritz's request to resist passing such a law until the Governor's Study Commission on Parole issued its report.⁶⁶ In addition, Governor Whitman expressed concerns over the lack of prison beds to support the increased numbers of inmates.⁶⁷ After the Senate passed the bill, it was referred

⁶¹ See Hester, *supra* note 22, at 19. Megan Kanka's mother, slain state trooper Philip Lamonaco's widow, and a hit-and-run accident victim's mother-in-law stated their support for the bill at the press conference. See *id.*

On May 2, 1996, the Senate Law and Public Safety Committee amendments were reported and the bill was read for the second time. See History for Bill S. 855, *supra* note 52. Assemblywoman Allen sponsored the Assembly's version of the bill. See Assembly Bill 1541 (1st Reprint), amended date Mar. 3, 1997.

⁶² See Hester, *supra* note 22, at 19.

⁶³ See Hester, *supra* note 22, at 19. There were 23,529 state inmates in 12 adult prisons in New Jersey, but the prisons were constructed to house only 13,788 inmates. See *id.* Thus, the prisons were already operating at 50% above capacity. See *id.* One public defender was quoted as saying that "unless the state makes a concomitant effort to get non-violent offenders out of prison," the bill will impose enormous costs on the corrections system. See Schwaneberg, *supra* note 23, at 19.

⁶⁴ See History for Bill S. 855, *supra* note 52. Bills that arise out of emotional appeal are rarely rejected on full floor votes, as a negative vote from a legislator may wind up as political fodder for election campaigns. See generally Schwaneberg, *supra* note 23, at 19.

⁶⁵ See Schwaneberg, *supra* note 23, at 19. Maureen Kanka and Karen Wengert were both present at the vote. See *id.*; see also Graham, *supra* note 54, at A6. Their presence may have been a factor as to why the ex post facto issue was never addressed by the full Senate, even though some Senators who voted in favor of the bill questioned its constitutional validity. See Schwaneberg, *supra* note 23, at 19. For example, Senator Robert Martin (R-Morris), a Seton Hall University School of Law professor, said, "The more it looks like punishment, the closer it is to a constitutional infirmity." *Id.* Assistant Attorney General Jane Grall called the bill "obviously punishment." *Id.*; see also *infra* Part IV(C).

⁶⁶ See Graham, *supra* note 54, at A6.

⁶⁷ See Graham, *supra* note 54, at A6. At the time, the Department of Corrections did not have figures on how many inmates the bill would affect if it became law. See *id.* The Governor's budget included "\$713 million for a projected increase of about

to the Assembly for consideration on May 20, 1996, where it was transferred to the Assembly Law and Public Safety Committee.⁶⁸

C. *Governor's Study Commission on Parole Findings*

While the bill was pending in the Assembly, the Governor's Study Commission on Parole conducted a public hearing.⁶⁹ As part of its examination of the State's parole system, the Commission reviewed the pending bill, as well as a similar Senate bill requiring other offenders to serve at least fifty percent of their maximum sentences.⁷⁰ Generally, the Commission supported the Act's parole ineligibility concept, but made several observations.⁷¹

For example, although the Act would spare victims and their families the trauma of repeatedly facing parole boards, the Commission noted that it would merely prolong the inevitable release of violent offenders.⁷² Another observation the Commission made was that the bill ran counter to most of the Commission's recommendations.⁷³ However, it recognized that the law's passage would

2,000 prison beds." *Id.* Karen Wengert urged the Governor to do "whatever needs to be done" to create enough space. *See id.* The bill version that passed the Senate applied to all first- and second-degree violent offenders, not just those who inflicted "serious bodily injury" or committed a sexual assault as included in the final enacted version. *Compare* A. 855 (1st Reprint) with Chapter 117. To that effect, Attorney General Poritz also noted the possibility of diverting nonviolent offenders to increase jail space if the measure is enacted. *See* Graham, *supra* note 54, at A6.

⁶⁸ *See* Schwaneberg, *supra* note 23, at 19; *see also* History for Bill S. 855, *supra* note 52.

⁶⁹ *See* Hester, *supra* note 41, at 27; *see also* COMMISSION REPORT, *supra* note 3, at app. ii. Victim advocates testified in favor of both Joan's Law and the No Early Release Act. *See id.* Joan D'Allessandro told the Commission about her daughter's murder and her fear that her murderer, Joseph McGowan, could be granted parole and kill again. *See id.* "It would break my heart to see another mother go through it, another family, another community." *Id.*

⁷⁰ *See* COMMISSION REPORT, *supra* note 3, at 9-10. The bill requiring offenders to serve at least 50% of their sentence is Senate Bill No. 338. *See id.* Unlike the No Early Release Act, the 50% parole ineligibility bill has not moved beyond a second committee amendment in February 1997. *See* S. 338, 207th Leg., 1st Sess. (N.J. 1996).

⁷¹ *See* COMMISSION REPORT, *supra* note 3, at 11.

⁷² *See* COMMISSION REPORT, *supra* note 3, at 11. Exceptions to this include inmates serving true life sentences under the "three strikes and you're in" law, and murder sentences. *See id.*

⁷³ *See* COMMISSION REPORT, *supra* note 3, at 11. For example, the Commission developed recommendations that would enlarge the Parole Board's discretion. *See id.* By amending the parole laws to require 85% completion of sentences, the law effectively takes away the Board's discretion over a significant portion of the prison popu-

render New Jersey eligible for federal funding, and that the law was premised on truth-in-sentencing.⁷⁴ Thus, the Commission viewed the measure as an amendment to the sentencing laws rather than the parole laws.⁷⁵ Additionally, the Commission excused the parole board's loss of discretion as an extension of the commonly applied general sentencing feature of parole eligibility statutes.⁷⁶

The Commission also had concerns about the Act's effects on the Graves Act.⁷⁷ Enacted in 1981, the Graves Act mandates that if a defendant is convicted of possessing a firearm with intent to use it, or of its use or possession during the commission of a crime, the court must set a minimum term of one-third to one-half of the sentence imposed or three years, whichever is greater.⁷⁸ If the No Early Release Act was enacted, the court would have no ability to enhance the sentences of offenders who are subject to mandates under both the Graves Act and the No Early Release Act.⁷⁹

lation similar to how mandatory minimum sentences have taken away from judicial discretion in sentencing. *See, e.g., infra* Part V (asserting that if parole board's were granted more discretion to deny parole, the Act may not have been necessary).

⁷⁴ *See* COMMISSION REPORT, *supra* note 3, at 11.

⁷⁵ *See* COMMISSION REPORT, *supra* note 3, at 11. This analysis counters Senator Bennett's interpretation that the measure would amend parole laws, not sentencing laws. *See supra* note 60; *see also Hearing on S. 855, supra* note 28, at 24.

⁷⁶ *See* COMMISSION REPORT, *supra* note 3, at 12. Current statutes required the court to fix minimum terms between 33% and 50% of the sentence imposed. *See id.*; *see also* N.J. STAT. ANN. § 2C:43-6(c).

⁷⁷ *See* COMMISSION REPORT, *supra* note 3, at 12-13.

⁷⁸ *See* N.J. STAT. ANN. § 2C:43-6c, which states in relevant part:

A person who has been [convicted] . . . of possession of a firearm with intent to use it . . . , [or of other violent crimes] who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f, shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

Id.

⁷⁹ *See* COMMISSION REPORT, *supra* note 3, at 12. All violent offenders threatening the use of a firearm would be treated similarly under the Act. *See id.* The Commission pondered whether the Legislature should do away with the Graves Act mandate which provides enhanced sentences upon offenders who employ firearms during the commission of a crime. *See id.* at 12-13.

Additionally, the bill does not include a provision similar to the 1989 amend-

The Commission also recommended that the Legislature narrowly define *violent crime* because of its potential impact on prison populations.⁸⁰ The Senate's bill applied to crimes involving violence, but provided no instruction on how broadly that term should be interpreted.⁸¹ Consequently, the prison population will increase corresponding to the breadth of the application.⁸² The Commission recommended a definition similar to the one found in the sexual assault statute which provides for enhanced sentences if an offender commits sexual assault or criminal sexual contact.⁸³ Under that statute, a crime involves violence if the victim sustains serious bodily injury, the actor threatens such injury, or the actor is armed and uses or threatens to use a deadly weapon.⁸⁴

ment Graves Act which allows an escape valve for first-time gun offenders. See Interview with Ronald Susswein, Asst. Att'y Gen., Deputy Dir., Div. of Criminal Justice, in Newark, N.J. (Sept. 17, 1997). It must be assumed that the Legislature was aware of the Act's effects on the Graves Act when it adopted the legislation. See *id.* Under the amendment, prosecutors had the ability to move the assignment judge to reduce the mandatory minimum for first-time gun offenders, and sentencing judges had the discretion to refer first-time offenders to the assignment judge for sentence reductions. See N.J. STAT. ANN. § 2C:43-6.2. The "escape valve" provides in relevant part:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment . . . for a defendant who has not previously been convicted . . . does not serve the interests of justice, the assignment judge shall place the defendant on probation . . . or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

Id. The No Early Release Act is not selective; it encompasses all first- and second-degree violent offenders, regardless of the number of prior offenses, if any at all. See Chapter 117 §§ 2(a), (d). The Act makes no concessions for first-time gun offenders. See *id.*

⁸⁰ See COMMISSION REPORT, *supra* note 3, at 13. The Commission said "[t]he term should be drawn narrowly to reflect the most dangerous criminal conduct." *Id.*

⁸¹ See S. 855 (1st Reprint).

⁸² See COMMISSION REPORT, *supra* note 3, at 13.

⁸³ See COMMISSION REPORT, *supra* note 3, at 13; see also N.J. STAT. ANN. § 2C:14-2, Sexual assault; N.J. STAT. ANN. § 2C:14-3 (West 1995), Criminal sexual contact.

⁸⁴ See N.J. STAT. ANN. § 2C:44-3 (West 1995), which states in relevant part:

[T]he court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime under N.J.S. 2C:14-2 or N.J.S. 2C:14-3 to an extended term of imprisonment, upon application of the

A final critical observation of the Act was that it failed to provide for a period of post-release supervision.⁸⁵ Thus, there was concern that the offender will not successfully adjust upon reentry into the community, and will return to a life of crime and violence.⁸⁶ The Commission determined that the Act should provide for a period of post-release supervision that could be administratively revoked if violated by the offender, thereby returning the offender to prison.⁸⁷ Otherwise, the Parole Board would bear the strict burden of prosecuting for a new crime, which is currently the only mechanism for revoking parole.⁸⁸

In addition to its evaluation of the No Early Release Act, the Commission reported thirty-nine recommendations, both statutory and administrative, for the improvement of the parole system.⁸⁹ The Commission recognized that its recommendations

prosecutor, if the grounds specified in subsection g of this section are found.

g. The defendant has been convicted of a crime under N.J.S. 2C:14-2 [sexual assault] or N.J.S. 2C:14-3 [criminal sexual contact] involving violence or the threat of violence and the victim of the crime was 16 years of age or less.

For purposes of this subsection, a crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in subsection b. of N.J.S. 2C:11-1, or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S. 2C:11-1, or threatens to inflict serious bodily injury.

Id.

⁸⁵ See COMMISSION REPORT, *supra* note 3, at 13-14.

⁸⁶ See COMMISSION REPORT, *supra* note 3, at 13-14. The Commission said, "the 15 percent remainder of the original sentence may not be adequate for that purpose, especially when various prison credits are taken into account." *Id.*

⁸⁷ See COMMISSION REPORT, *supra* note 3, at 14. The Commission contended that "[d]uring the post-release supervision period, the offender must be subject to monitoring and must be required to abide by general and special conditions of release." *Id.* In order to succeed in administrative revocation of parole, the Parole Board or Bureau of Parole must only prove its case by a preponderance of the evidence. *See id.*

⁸⁸ See COMMISSION REPORT, *supra* note 3, at 14. A criminal prosecution entitles the offender to constitutional privileges and the state must prove its case beyond a reasonable doubt. *See id.* For instance, the Commission referred to the current "parole community supervision for life for sexual offenders" statute, which provides that if the offender violates release conditions, he is guilty of a crime of the fourth degree. *See id.*

⁸⁹ See COMMISSION REPORT, *supra* note 3, at iii - vi. The Commission recommended mandating objective risk assessments in parole determinations. *See id.* at 28. A risk assessment instrument would "promote[] consistency in the parole decision-

making process." *Id.* Included in its Appendix to the Report were two risk assessment instruments: the South Carolina Department of Probation, Parole, and Pardon Services' "Parole Risk Assessment," and the Canadian instrument, the "Level of Service Inventory - Revised" currently used in the state of Colorado. *See id.* at 29, apps. vi - end. The South Carolina instrument contains "static" factors, those which are strictly objective. *See id.* at app. vi. Each factor is attributed a weighted score, and summed to determine the category of risk and then reduced by one point if the offender is 26 to 34 years old, and by three points if the offender is 35 years of age or older. *See id.* at app. vi. The Canadian assessment includes factors about the inmate which are much more subjective in their overall prediction of recidivism. *See id.* at app. vii. Some of the factors include examinations of the inmate's unemployment history, family and marriage situation, frequency in changes of residence, friends, and attitudes toward crime and the criminal justice system. *See id.* Each factor is weighted according to the following scale:

- 3: A satisfactory situation with no need for improvement
- 2: A relatively satisfactory situation, with some room for improvement evident
- 1: A relatively unsatisfactory situation with a need for improvement
- 0: A very unsatisfactory situation with a very clear and strong need for improvement

Id. At the time the Commission Report was issued, the Parole Board, Bureau of Parole, National Institute of Corrections, and the Governor's Policy and Planning Office were developing a risk assessment tool for New Jersey. *See id.* at 28. At that point, the four planners agreed on including the following static factors: 1) the types of past offenses; 2) number of prior convictions; 3) number of "serious infractions in prison or the number of technical parole violations a parolee has incurred; and 4) the number of previous probation or parole revocations." *Id.* at 29. Ability to function independently was the only subjective factor agreed upon. *See id.* The Commission noted that before the planners decided on how to weigh the factors, a study would be conducted to determine which factors more accurately predict recidivism. *See id.*

The Commission also recommended mandating pre-parole psychological evaluations. *See id.* at 29-30. A federal district court ruling currently directs that the Board can only "request" a psychological evaluation for an inmate *prior* to the parole hearing. *See id.* at 30. Also among the recommendations was identifying inmates' individual social and psychological needs at the time of incarceration. *See id.* at 31. Public safety would be bolstered by removing "educational, emotional, and psychological deficits; medical problems; and addictions." *Id.* Assemblywoman Allen and Assemblyman DeSopo introduced the "Education and Job Training Act" at the same time they introduced the Assembly's No Early Release Act version. *See Allen, supra* note 27. The legislation would require the Department of Corrections to assign mandatory educational and vocational training to inmates as a release condition. *See id.*

One area where the Commission specifically entertained victims' rights was in recommending that the Board entertain victims' input in granting release and setting its conditions. *See* COMMISSION REPORT, *supra* note 3, at 40. The legislature should amend N.J. STAT. ANN. § 30:4-123.59(b) to take into account victims' and their families' input on release conditions and "no contact with victim" requests. *See id.* at 40-41.

Finally, the Commission recommended giving parole officers of sex offenders and drug addicts specialized case loads. *See id.* at 42-44. These parole officers

would not eliminate parolee recidivism, but that its ideas would at least reduce the risk.⁹⁰ Several of the recommendations were sufficiently persuasive for the Legislature to respond, and several measures were enacted.⁹¹ Among the adopted recommendations was an increase in the Parole Board's discretion⁹² and the authori-

should be specially trained, have frequent meetings with the inmate, "be available at all times to deal with emergencies," and "meet regularly with treatment providers" and support network members. *Id.* These parole officers should also exercise random visits, mandate counseling, and "obtain frequent drug and alcohol tests." *Id.* at 43-44.

⁹⁰ See Lisa L. Colangelo, *Parole Report Advises Tighter Rules for System; But More Jails May be Needed*, ASBURY PARK PRESS, Jan. 10, 1997, at A3.

⁹¹ See *infra* text accompanying notes 92 and 93.

⁹² See COMMISSION REPORT, *supra* note 3, at 15.

The substantive standard for determining whether to grant parole should be amended to increase the discretion of the Parole Board to deny parole when an inmate has failed to cooperate in his or her own rehabilitation or when a reasonable expectation exists that the inmate would violate conditions of parole if released.

Id.

The parole laws prior to the Parole Act of 1979 only authorized parole if the Parole Board determined that "there is a reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." In re Trantino Parole Application, 89 N.J. 347, 355, 446 A.2d 104, 108 (1982) (quoting N.J. STAT. ANN. § 30:4-123.4 (repealed)). The Parole Act of 1979 created a *presumption of parole*, by requiring that an inmate *shall be released* at the time of eligibility *unless* it is demonstrated by a preponderance of the evidence "that there is a *substantial likelihood* that the inmate will commit a crime. . ." *Id.* at 356, 446 A.2d at 108 (citing N.J. STAT. ANN. § 30:4-123.53(a)) (emphasis added).

The Commission recommended that the Legislature change this clause to include that the inmate can be denied parole if he has not participated in rehabilitation, or if there is a *reasonable likelihood* that the inmate will *violate parole conditions*, instead of *commit a crime*. See COMMISSION REPORT, *supra* note 3, at 15. Thus, the state should retain the burden of persuasion, but the substantive law could change to make it easier for the state to deny parole. See *id.* at 19-20.

In January, 1997, a bill was pending in the Senate to shift the burden of persuasion to the inmate, in direct defiance of the Commission's recommendation that the state retain the burden. See Graham, *supra* note 35, at A1. It required that the inmate prove by "clear and convincing evidence that he is unlikely to commit another crime." *Id.* That bill never passed, but an Assembly bill that adopted the Commission's recommendation to make it easier to deny parole, while retaining the burden of persuasion upon the state, became law on August 19, 1997. See N.J. STAT. ANN. § 30:4-123.53, *as amended by* 1997 N.J. Sess. Law Serv. 213 (West).

However, in crafting such a change in the substantive law, the Legislature had to be careful to abide by the holding in *Byrne*, that the Parole Act of 1979 provides an expectation of parole eligibility such that inmates are entitled to some constitutional protection in parole decisions. See N.J. Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983) (citation omitted). The prior parole laws did not provide for eligi-

zation to release certain inmates for health reasons.⁹³

Acknowledging the problems with the State parole system, the Governor lauded the Commission's recommendations for statutory changes that would increase the Parole Board's discretion to deny parole to certain criminals.⁹⁴ However, the New Jersey Association of Corrections and the Department of Corrections (DOC) predicted that the Parole Board would deny parole in only a few cases if the reforms were adopted.⁹⁵

D. *Assembly Action*

By February 1997, the bill had still not moved through the Assembly Law and Public Safety Committee.⁹⁶ At the Legislature's request, the Office of Legislative Services (OLS) prepared a fiscal analysis of the bill which outlined its projected financial impact on the corrections budget.⁹⁷ In reaching its conclusions, the OLS relied upon DOC estimates that reflected the bill's impact if applicable to inmates convicted only *after* enactment of the law.⁹⁸ How-

bility based upon a time calculation of the sentence imposed, as do the 1979 Act and court rules. See N.J. CT. R. 3:21-4(i); see also N.J. STAT. ANN. §§ 30:4-123.51a-123.51h. Under the prior parole law, eligibility was determined by complex factors and computations, governed by "statute, administrative regulations, and institutional rules and practices." *Byrne*, 93 N.J. at 204, 460 A.2d at 109.

⁹³ See COMMISSION REPORT, *supra* note 3, at 22. "The parole laws should be amended to authorize the special parole of certain inmates whose health has deteriorated to the point that they can not physically pose a threat of committing another crime if released." *Id.* A new medical release provision provides for the release of "any inmate serving any sentence of imprisonment who has been diagnosed . . . as suffering from a terminal condition, disease or syndrome and is found by the appropriate board panel to be so debilitated or incapacitated . . . as to be permanently physically incapable of committing a crime if released on parole." N.J. STAT. ANN. § 30:4-123.51c, as amended by 1997 N.J. Sess. Law Serv. 214 (West).

⁹⁴ See Thomas Zolper, *Panel Urges Tighter Grip on Parolees but Overall Proposals Are Modest*, THE RECORD (Northern N.J.), Jan. 10, 1997, at A3.

⁹⁵ See *id.* at A3.

⁹⁶ See Terri Needham, *Families of Victims Advocate Stiff Sentences*, ASBURY PARK PRESS, Mar. 4, 1997, at A3; see also McGourty, *supra* note 53, at A1. Lawmakers and the governor apparently spent the time discussing concerns over the bill's costs and broad application. See Needham, *supra*, at A3.

⁹⁷ See Fiscal Note to S. 855 (1st Reprint), Oct. 15, 1996 [hereinafter Fiscal Note].

⁹⁸ See *id.* at 1. Before the bill was amended by the Senate Law and Public Safety Committee, it only applied to offenders incarcerated *after* the date of enactment. See *supra* text accompanying note 60. When the Senate Law and Public Safety Committee amended the bill it had a much broader application and the original DOC estimates were no longer valid. See *id.*

ever, the amended version that passed the Senate would have the effect of imposing even greater costs because the mandate would occur sooner and apply to more inmates than was initially anticipated in the bill Senator Bennett originally introduced.⁹⁹

Despite the significant costs, the bill eventually passed unanimously through the Committee.¹⁰⁰ Thereafter, the Assembly

Under the original analysis, the DOC estimated that 5,800 more inmates would need to be housed, thus each additional bed space would cost \$80,000, and it would cost \$26,000 per year to house each inmate in that new bed space. *See Fiscal Note, supra* note 97, at 1. Because the impact would not be seen until two years after enactment, additional on-going operating expenses and one-time capital expenses would increase dramatically in the early years of implementation. *See id.* at 2, chart, Projected Increase in Costs. In Year 2, the DOC expected 155 additional inmates under the Senate amended version of No Early Release. *See id.* "Capital Costs Per New Bed" at \$80,000 in Year 2 were predicted to be \$12,400,000. *See id.* Annual Additional Per Capita Operating Costs at \$26,000 were predicted to be \$4,030,000. *See id.* By Year 4, "Capital Costs Per New Bed" were predicted to be \$72,240,000 for 903 additional inmates. *See id.* Annual Additional Per Capita Operating Costs were predicted to be \$23,478,000. *See id.* By Year 10, "Capital Costs Per New Bed" were predicted to be \$16,880,000 for 211 additional inmates. *See id.* Annual Additional Per Capita Operating Costs were predicted to be \$5,486,000. *See id.* By Year 17, "Capital Costs Per New Bed" were predicted to be \$5,360,000 for 67 additional inmates. *See id.* Annual Additional Per Capita Operating Costs were predicted to be \$1,742,000. *See id.* The Total "Capital Costs Per New Bed" at \$80,000 for Years 1 through 18 were predicted to sum \$464,000,000, and Total Additional Per Capita Operating Costs were predicted to sum \$150,800,000. *See id.*

⁹⁹ *See Fiscal Note, supra* note 97, at 2. As the bill was amended further, the Department of Corrections updated its estimates to reflect the numbers of new inmates affected by the Act. *See* Department of Corrections Bureau of Budget and Fiscal Planning, Senate Bill No. 855 [2R] (Administrative Substitute for S. 855) [hereinafter Administrative Substitute]; *see also infra* note 115. With the Fiscal Note in mind, the Governor said if the public wants this type of law, it should be prepared to support it financially. *See* Tom Hester, *Tougher Parole Gains for Violent Criminals*, THE STAR-LEDGER (Newark), Feb. 4, 1997, at 18.

¹⁰⁰ *See* Shannon Kokoska, *Allen's '85 Percent' Bill Passes Key Assembly Committee*, BURLINGTON COUNTY TIMES, Feb. 4, 1997, at A8. The bill passed the Committee 7-0 on February 3, 1997. *See id.*; *see also* History for Bill S. 855, *supra* note 52.

However, the Assembly Law and Public Safety Committee made one significant amendment to the bill; it deleted the Senate Law and Public Safety Committee's amendment making the law applicable to inmates currently incarcerated. *See* Chapter 117 § 4. One columnist reported that the bill was "weakened" when the Committee made the amendment, even though victims' families said it would still provide dramatic new protections. *See* Zolper, *supra* note 28, at A3. In addition, Assemblywoman Allen promised the Committee the bill faced further amendment in the Assembly Appropriations Committee. *See* Hester, *supra* note 99, at 18. The Governor and Attorney General had urged the Assembly to further amend it because the Governor needed the effected inmates to receive supervision after their release. *See id.* Allen also desired to see better drug rehabilitation and educational programs in prisons. *See* Kokoska, *supra*, at A8; *see also infra* Part IV(B).

Appropriations Committee made three significant amendments.¹⁰¹ First, it narrowed the definition of violent crime.¹⁰² Second, it added the commission of sexual assaults to the definition of violent crime.¹⁰³ Finally, the Committee added a post-release supervision period to alleviate concern about the lack of parole supervision once eighty-five percent of the offender's sentence is complete.¹⁰⁴ With these amendments, the thirteen-member Appropriations Committee unanimously approved the bill.¹⁰⁵

On June 5, 1997, the Assembly passed the bill unanimously, then immediately referred it to the Senate.¹⁰⁶ The Senate also passed the amended version without dissent.¹⁰⁷ Having achieved unanimous approval throughout the entire process, the bill's final version then went to the Governor's desk.¹⁰⁸ On June 9, 1997, the No Early Release Act became law with an immediate effective date.¹⁰⁹

¹⁰¹ See Needham, *supra* note 96, at A3.

¹⁰² See Chapter 117 § 2(d). A violent crime is one in which the offender "causes death [or] serious bodily injury, . . . or uses or threatens the immediate use of a deadly weapon." *Id.* But see *infra* text accompanying note 103 (the Act includes certain sexual offenses under the violent crime definition).

¹⁰³ See Chapter 117 § 2(d). The Act now applies to "sexual assault[s] involving physical force or the threat of physical force." *Id.*

¹⁰⁴ See Chapter 117 § 2(c). First-degree offenders would serve a five-year period of parole supervision in the community, and second-degree offenders would serve a three-year period of parole supervision in the community. See *id.* Offenders would be subject to release conditions set by the Parole Board, just as any other parolee, pursuant to N.J. STAT. ANN. §§ 30:4-123.59-123.65, including revocation and return to prison to serve the remainder of the parole term, unless it is determined that the offender is eligible for release before the expiration of the term. See *id.* § 3.

The Committee also added provisions defining "deadly weapon," and entitling a convicted offender to a hearing to establish the grounds for the Act's application. See Chapter 117 §§ 2(d)-(e).

¹⁰⁵ See Drewniak & Donahue, *supra* note 1, at 11. The bill was approved on March 3, 1997, and referred to the Assembly for a second reading. See *id.*; see also History for Bill S. 855, *supra* note 52. Again, the subsequent unanimous approval by the committees since the Senate vote demonstrates the political popularity of this emotional legislation, even with the knowledge of astronomical predicted costs increases. See *id.*

¹⁰⁶ See History for Bill S. 855, *supra* note 52. On May 8, 1997, the Assembly bill was merged with the Senate bill because it was the furthest along in the amending process; the full Assembly made one technical amendment to it. See *id.*

¹⁰⁷ See History for Bill S. 855, *supra* note 52.

¹⁰⁸ See Marsico, *supra* note 14, at 32.

¹⁰⁹ See Chapter 117 § 4.

IV. Analysis

The No Early Release Act was met without political opposition at all points throughout its presence in the Legislature.¹¹⁰ Although the Act is politically and emotionally appealing, it may have several negative effects on the criminal justice system.¹¹¹ This section discusses the potential negative effects of the Act such as

¹¹⁰ See History for Bill S. 855, *supra* note 52. Throughout the public input on the bill, the only opponent who voiced substantive opposition to the Act also offered an alternative to make its implementation more successful if it passed. See *supra* Part III(B); see also *supra* text accompanying note 54. Ray Kalainikas opposed the bill, but suggested that the Legislature apply correctional funds currently expended to house non-violent offenders to rehabilitate violent offenders so that they will become law-abiding citizens upon their eventual release under the Act. See *Hearing on S. 855 supra* note 28, at 43. A doctor who worked with sexual offenders and violent mental patients judged not guilty by reason of insanity also testified at the Public Hearing in favor of the bill. See *id.* at 35-38. Dr. Louise Mead Riscalla, former Director of Psychology at the New Jersey State Diagnostic Center, voiced strong opinions based on her experiences working with sexual offenders. See *id.* at 36. She believes the State should be permitted to lock up some offenders and "throw away the key," however for others, she feels that the entire parole system must change to allow for gradual release to society by creating a community reentry program within the prison system. See *id.* at 37. Under such a program, inmates would undergo trial placement in the community, and the State would provide the inmate with a place to live and a job. See *id.* She believes that many offenders recidivate because in jail they are provided with shelter and food. See *id.*

The Act's majority of supporters were victims and victims' rights groups. See generally *Hearing on S. 855, supra* note 28; see also Hester, *supra* note 22, at 19. There is no recorded criminologists' testimony, and politicians, police officers, and prosecutors were the only individuals who testified to recidivism rates. See generally *Hearing on S. 855, supra* note 28. Only one individual with a psychology background, Dr. Riscalla, testified on the bill, but she offered no scientific data to support her favorable opinion that the Act will deter violent crime. See *id.* at 35-38. She believes the Act will serve as a deterrent because offenders will be "more aware of the consequences of their errant behavior." See *id.* at 37.

One researcher has opined that the emphasis on harsh sentencing legislation to satisfy a void in a victim's sense of closure may be explained by the irreplaceability of human life, as opposed to property taken or destroyed by crime. See FRANKLIN E. ZIMRING, U.S. DEP'T OF JUSTICE, TWO VIEWS ON IMPRISONMENT POLICIES: LETHAL VIOLENCE AND THE OVERREACH OF AMERICAN IMPRISONMENT (1997), at 2. "Life-threatening violence creates fear because government and insurance can do little to ameliorate the harm that life-threatening assault and rape produce." *Id.* at 1. "The offender who kills his victim takes something from that victim and the victim's family that cannot be given back. By contrast, a compensation program can make the victim whole in the theft of the person's BMW with insurance or other loss-spreading devices." *Id.* at 2.

¹¹¹ See *infra* Part IV(A).

costs, overcrowding, and an increase in trial case loads.¹¹² This section also addresses the status of the companion bills introduced along with the Act.¹¹³ Finally, this section discusses a federal constitutional barrier that, were it not rectified by the Assembly, could have rendered the Act unconstitutional.¹¹⁴

A. *Burdens on the System*

First, implementation of the Act may impose excessive costs and overcrowding on the corrections system.¹¹⁵ On the other hand, the Act could save society more money by keeping violent offenders in custody for longer periods of time.¹¹⁶ By increasing their sentences, the offender will be prevented from re-offending and consequently re-entering the criminal justice system.¹¹⁷

¹¹² See *infra* Part IV(A).

¹¹³ See *infra* Part IV(B).

¹¹⁴ See *infra* Part IV(C).

¹¹⁵ See Aduabato, *supra* note 28, at RO4. New Jersey jails and prisons are currently operating at 150% of capacity. See *id.* The DOC adjusted the measure's original impact analysis after the Assembly amendments narrowed the classes of offenders to which the bill would apply. See Administrative Substitute for S. 855, *supra* note 99. Under the enacted version, the DOC determined that the state prison system will house 4,112 inmates more than would be expected under previous statutes. See Administrative Substitute for S. 855, *supra* note 99. The Act applies to all aggravated manslaughter and second degree manslaughter prison admissions, requiring DOC to provide an additional 876 beds per year for aggravated manslaughter, and 169 additional beds per year for second degree manslaughter. See *id.* at tbl.B. It would apply to approximately 50% of admissions for second degree sexual assault, based upon the statutory elements, requiring 270 additional beds per year. See *id.* Virtually all of first degree aggravated sexual assault admissions would fall under the Act, based upon the statutory elements, requiring 736 additional beds per year. See *id.* The Act would also apply to virtually all admissions for second degree assault (requiring 696 additional beds), first degree kidnapping (70 additional beds), and first degree Robbery (1,295 additional beds). See *id.* Each additional bed space costs \$95,000 in original capital improvements, as opposed to the previous estimate of \$80,000. Compare *id.* with Fiscal Note, *supra* note 98, at 1. Furthermore, 4,110 new bed spaces multiplied by \$95,000 totals \$390,640,000 in capital improvements. See Administrative Substitute for S. 855, *supra* note 99. "Operational costs [will] increase each year by the number of additional inmates serving increased length of stays at an average of \$26,000 per inmate." *Id.* By year eighteen, the cumulative additional per capita expenditures will be almost \$1,036,000,000. See *id.* at tbl.C.

¹¹⁶ See Schwaneberg, *supra* note 23, at 19. Lawmakers quoted statistics that lend support to the theory that the offenders who recidivate are those who obtain early release. See *id.* Senator Kosco stated that 54% of all violent crimes are committed by parolees. See *id.*

¹¹⁷ See generally McGourty, *supra* note 56, at A1. Assemblywoman Allen testified to

Furthermore, the prospect of increased sentences may lead to an increase in criminal court system costs.¹¹⁸ For instance, a prisoner may opt for trial over a plea bargain if faced with mandatory time in prison because he essentially has nothing to lose.¹¹⁹ In addition, because the Act provides for increased “real time” spent in state prison, federal prosecutors may decline to intervene and prosecute certain gun and drug offenses on the federal level if they fall under the Act.¹²⁰ As a result, state prosecutors and public defenders may see an increase in their caseloads.¹²¹

Additionally, the promise of federal funding, which would alleviate a portion of the financial impact the DOC predicted, may not come to fruition if the Act fails to meet all the federal requirements.¹²²

the Commission that the average violent offender costs society \$57,000 a year due to his commission of an average of twelve to fifteen crimes per year. *See id.* In contrast, it costs taxpayers \$26,000 per year to house an inmate. *See* Administrative Substitute for S. 855, *supra* note 99.

¹¹⁸ *See* Marsico, *supra* note 14, at 32. Alan Zegas, New Jersey Association of Criminal Defense Lawyers president, stated that the Act will have an enormous impact on the courts because of an increase in trials. *See id.* As a result, the length of time that passes before cases are tried will increase dramatically. *See id.* Costs include the needs for more judges, public defenders, prosecutors, and administrative court staff. *See id.*

¹¹⁹ *See* Marsico, *supra* note 14, at 32. Zegas was quoted as believing defense attorneys will be more likely to advise their clients to go to trial over accepting a plea bargain. *See id.* When the state of Illinois passed its own 85% law in 1995, legislators were warned that defendants “with nothing to lose would demand trials.” *See* Landis, *supra* note 12, at 1. One Illinois defense attorney said, “The price has doubled. You have to re-adjust your thinking in terms of plea bargaining, in terms of going to trial and the possible impact on your client.” *Id.*

¹²⁰ *See* Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*. 2 VA. J. SOC. POL'Y & L. 419, 423-24 (1995). In recent years, the federalization of many street crimes has led federal officials to intervene and prosecute because state sentences are weak in comparison with federal sentencing guidelines. *See id.* The federal system abolished parole in 1987, and established sentencing guidelines as well as mandatory minimums that far exceed the length of a state-imposed sentence for the same crime. *See id.* at 420. State officials “have largely welcomed these opportunities to hit career and violent criminals with the ‘heavier hammer’” of the federal system. *Id.* at 422.

¹²¹ *See id.* at 419-20. When the state of Virginia contemplated passing its own version of truth-in-sentencing in 1996, one U.S. Attorney for the Western District of Virginia said state and local officials habitually request the federal system to handle drug and gun cases where the offender has violated both state and federal statutes. *See id.*

¹²² *See* 42 U.S.C.A. § 13704(a)(1)(A); *see also* N.J. STAT. ANN. § 2C:15-1 (West 1995). In order to be eligible for a Violent Offender Incarceration Grant, New Jer-

Traditionally, parole is a means of managing prison populations.¹²³ For example, overcrowding is a factor in determining the number of inmates released each year.¹²⁴ Recent public outcry to eliminate parole has exacerbated an already existing overcrowding problem, forcing some states to become creative in managing the problem.¹²⁵ In 1996, New Jersey implemented an alternative

sey's law must require offenders convicted of "part 1 violent crime[s] to serve not less than 85 percent." See 42 U.S.C.A. § 13704(a)(1)(A). The No Early Release Act does not bring under its authority all part 1 violent offenses. See 42 U.S.C.A. § 13701(2), which states: "[T]he term "part 1 violent crime" means murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports" *Id.*

New Jersey law enforcement agencies report "[h]omicide ([m]urder and [m]anslaughter), [r]ape, [r]obbery, [b]urglary, [l]arceny-[t]heft, [m]otor [v]ehicle [t]heft, and [a]rson" to the Federal Bureau of Investigation. See *CRIME IN NEW JERSEY*, *supra* note 33, at 2. However, two forms of robbery will not be brought under the statute's classification: purse-snatchers or pick-pockets, and those where a firearm or other weapon is never recovered. See, e.g., N.J. STAT. ANN. § 2C:15-1; Chapter 117 § 2(e). Purse-snatching and pick-pocketing do not cause or threaten serious bodily injury. See N.J. STAT. ANN. § 2C:15-1a, which states in relevant part:

A person is guilty of robbery if, in the course of committing a theft, he:

- (1) Inflicts bodily injury or uses force upon another; or
- (2) Threatens another with or purposely puts him in fear of immediate bodily injury

Id. Robbery is a second degree crime, but if the actor "attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon," it is a crime of the first degree. *Id.* § 2C:15-1b.

In cases where a firearm or other weapon is never recovered but the victim claims the perpetrator possessed a weapon, the Act requires a hearing whereby the defendant can present and controvert evidence against him. See Chapter 117 § 2(e). If the state cannot prove the presence of a weapon during the commission of the crime, then the robbery is not a first-degree crime. See *id.*; see also § 2C:15-1b.

The New Jersey Supreme Court has held, however, that "as long as the object (simulating the deadly weapon) is 'fashioned in such a manner that the victim reasonably believes it to be capable of serious bodily harm or death,' the criteria for finding a defendant guilty of first-degree robbery is met." *State v. LaFrance*, 117 N.J. 583, 595, 569 A.2d 1308, 1314 (1990) (quoting *State v. Hutson*, 107 N.J. 222, 228, 526 A.2d 687 (1987)). If this is the case, however, the object the victim complains of has to be proven at a hearing after conviction in order for the No Early Release Act to apply. See Chapter 117 § 2(e).

¹²³ See Michele Deitch, *In the U.S. Supreme Court: Parole by Any Other Name May Smell as Sweet, But Does It Create a Liberty Interest Subject to Due Process Protection?* 1996 WL 694946, at 2.

¹²⁴ See *id.*

¹²⁵ See *id.* at 3. Oklahoma, for instance, has implemented what is called "Pre-parole Conditional Supervision" (PPCS). See *id.* Under PPCS, an eligible offender is

to traditional incarceration, the Stabilization and Reintegration Program (SRP), to deal with certain juvenile and youthful offenders through rehabilitative, residential methods.¹²⁶ Private corpora-

released under minimal supervision that looks like parole, but it's not called "parole." *See id.* Programs like this allow legislators to claim they are reducing parole rates and cutting back on inmate eligibility while managing the prison population, and it is not subject to the governor's approval, so there's no public outrage about the fallacy. *See id.* When Oklahoma's prison population reaches 95%, PPCS is called into play. *See Deitch, supra* note 120. Inmates are eligible for PPCS when they have completed 15% of their sentence. *See id.* In comparison, to be eligible for regular parole, inmates must complete 30% of their sentence. *See id.* They are subject to a variety of release conditions, nearly the same as parole conditions, and report on a monthly basis to a parole officer. *See id.* Violation of PPCS can result in a revocation hearing, return to prison, and loss of good time credits. *See id.; see also* Young v. Harper, ___ U.S. ___, 117 S. Ct. 1148 (1997) (holding that PPCS inmates are entitled to the same due process protections as a parole inmate, including a fair hearing).

The state of Connecticut also implemented its own alternatives to incarceration program in 1993. *See Longitudinal Study, Alternative to Incarceration Sentencing Evaluation, Year 3*, The Justice Education Center, Inc. (Sept. 1996), at overview. However, that program involves the non-incarceration of certain violent offenders. *See id.* Researchers found that overall, if sentenced to a community program instead of incarceration, drug and violent offenders posed less risk to the public than those who were incarcerated before release. *See id.*

New Jersey counties have also implemented the SLAP program (New Jersey Sheriff's Labor Assistance Program) in the early 1980s. *See* Daniel R. Coburn, *SLAP: An Alternative to SLAM or SCRAM*, N.J. LAWYER, Aug./Sept. 1993, at 35. Under SLAP, defendants sentenced to county jail terms can perform community service on public works projects. *See id.* The program applies to motor vehicle violators, first-time offenders, low-level nonviolent criminal offenders, and system abeyors including those who fail to pay fines, perform community service, violate probation, or fail to attend alcoholics anonymous or narcotics anonymous. *See id.* The program has received national awards, and it provides free labor for government, religious and non-profit groups' projects. *See id.* In 1993, the Morris County program cost \$4 a day to manage an offender, rather than \$80 a day to house the offender in the county jail. *See id.* at 36. By participating in SLAP, offenders don't lose their jobs, they continue to pay their taxes, and they perform a valuable public service. *See id.* SLAP resulted in a decrease in the recidivism rate among its participants in 1996. *See id.* The most important fiscal aspect, however, was that SLAP effected a 20% decrease in the Morris County jail population. *See id.* at 37.

¹²⁶ *See* N.J. STAT. ANN. §§ 52:17B-181 to -186. (West 1997). New Jersey implemented the Stabilization and Reintegration Act in July 1996. *See id.* Under the Act, certain juvenile and youthful offenders may qualify for "a special program of incarceration stressing a highly structured routine of discipline, regimentation, exercise and work therapy, together with substance abuse and self-improvement counseling, education and an intensive program of aftercare supervision." *Id.* § 52:17B-182. *See also* § 52:17B-185, which provides:

The SRP shall include the following components:

- a. Stage I: A comprehensive, residential program consisting of appropriate:

tions can contract with the State to administer the program.¹²⁷ If New Jersey is unable to obtain the necessary federal funding to accommodate additional prisoners, the SRP could become a popular form of disposition for qualifying convicts.¹²⁸ For instance, New Jersey amended the SRP's qualifications by expanding the age eligibility requirements to thirty years old.¹²⁹

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- (1) Highly structured routines of discipline;
 - (2) Physical exercise;
 - (3) Work;
 - (4) Substance abuse counseling;
 - (5) Education and vocational training;
 - (6) Psychological counseling; and
 - (7) Self-improvement and personal growth counseling stressing moral values and cognitive reasoning.
- b. Stage II: An intensive after-care program which includes work opportunities and vocational training. Offenders shall remain on parole during this period and shall be subject to re-incarceration for parole violations.

Id.

¹²⁷ See *id.* § 52:17B-184c., which provides: "The [DOC] commissioner and the [juvenile] commission may enter into a contract with a private corporation to establish and operate the programs . . . [T]he private corporation selected as the contractor for the purpose of implementing this act may be a for-profit corporation." *Id.*

¹²⁸ See *id.* § 52:17B-186, which provides:

- a. Any juvenile offender or youthful offender who is serving a term of incarceration may be assigned to the program . . . based upon passing the screening and assessment procedures for admission.
- b. If an offender fails to comply with the requirements of the SRP, [he] may be removed from the program to serve the remainder of the sentence originally imposed and shall be eligible for parole pursuant to [the Parole Act of 1979]. The offender shall not subsequently be eligible for re-admission to the program.

Id.

¹²⁹ See N.J. STAT. ANN. § 52:17B-183, as amended by 1997 N.J. Sess. Law Serv. 55 (West). The SRP originally applied to juveniles and "youthful offenders" aged 18-26 who were convicted of third or fourth degree crimes, or convicted of a second degree crime but sentenced equivalently to a third degree crime because of mitigating factors. See S. 1484, 207th Leg., 1st Sess. (N.J. 1996) (1st Reprint) (West). Senator Kosco's amendment expanded the program to include offenders up to the age of 30, but excludes persons convicted of: 1) first degree crimes; 2) sex offenses; 3) violations that impose mandatory prison terms without parole eligibility, "unless the person has less than one year of the mandatory portion of the sentence remaining; and 4) the following second degree crimes: manslaughter, assault, kidnapping, robbery, burglary, or "possession of a weapon with the purpose of using it unlawfully against the person of another." See N.J. STAT. ANN. § 52:17B-183, as amended by 1997 N.J. Sess. Law Serv. 55 (West).

In 1996, twenty-five to twenty-nine-year-olds were responsible for nearly 50,000 nonviolent offenses that would qualify for the SRP, the highest number reported for any age group. See CRIME IN NEW JERSEY, *supra* note 33, at 45. Thirty- to thirty-four

In addition, judges do not have discretion to grant an earlier parole eligibility date to defendants who are convicted of an offense specifically imposing a period of parole ineligibility.¹³⁰ Thus, New Jersey judges may opt to impose shorter sentences on first-time, non-violent offenders.¹³¹ Furthermore, the Act raises important questions concerning plea bargains and judicial acceptance of pleas.¹³²

year-olds were responsible for over 44,000 nonviolent offenses that would qualify for the SRP. *See id.* Eighteen-year-olds were by far the most violent group of offenders, and exhibited the highest non-violent crime rate as well. *See id.* at 44. As the age groups increased, the criminality rates decreased. *See id.* at 44-45.

¹³⁰ *See State v. Merritt*, 230 N.J. Super. 21, 553 A.2d 70 (Law Div. 1988). In *Merritt*, the defendant was convicted of a first-degree crime, but the sentencing judge sentenced him under the second-degree offender statute. *See Merritt*, 230 N.J. at 212. The first-degree offense required a period of parole ineligibility, and the second-degree statute did not. *See id.* at 212-14. Although the judge was permitted to use his discretion to find that mitigating factors outweighed aggravating factors so that he may reduce the degree for sentencing purposes, the degree of conviction controlled the mandatory imprisonment penalty. *See id.* at 213-15.

¹³¹ *See Crouch*, *supra* note 120, at 421.

¹³² *See Interview with Ronald Susswein*, *supra* note 79. In 1981, the New Jersey Supreme Court issued a memorandum regarding the legislative intent surrounding the Graves Act and its effect on plea bargaining. *See N.J. STAT. ANN. § 2C:43-6*, Supreme Court Memorandum, Apr. 27, 1981 —Plea Bargaining. The Court directed that judges can not accept pleas dismissing a Graves Act offense that imposes a mandatory minimum unless one of three specific factors are satisfied. *See id.* The Court said:

Accordingly, no trial judge, at the time of disposition, may approve a negotiated plea which involves dismissal of an offense carrying a mandatory custodial term . . . unless:

1. The prosecutor represents on the record that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interest of justice; or
2. A plea is being entered by the defendant to an offense (a) requiring a parole ineligibility term . . . or (b) not requiring a mandatory parole ineligibility term but where the negotiated plea acknowledges that a parole ineligibility term is to be imposed at least equal in length to that which would have been required for the offense being dismissed; or
3. The prosecutor states on the record, either in camera or in open court, that the plea bargain is essential to assure the defendant's cooperation with the prosecution.

Id. If the Court attempts to apply the Graves Act memorandum to No Early Release, prosecutors will essentially have no tools to persuade pleas because judges will not be likely to accept a plea that circumvents the Legislature's intent. *See id.* It is conceivable that because the Graves Act is effectively subsumed by No Early Release, the Court will issue a similar memorandum to protect the Legislature's intent. *See id.*

B. *Companion Bills*

In an effort to enhance the punitive aspect of prison sentences as well as to focus on the rehabilitative aspect, Assemblywoman Allen introduced two pieces of legislation along with the Assembly's No Early Release bill.¹³³ The first would eliminate so-called prison luxuries such as television and weight-lifting facilities.¹³⁴ The second bill, introduced as the Education and Job Training Act, would require the Department of Corrections to assess an inmate's skills and needs upon incarceration and afford inmates the opportunity to achieve a high school equivalency degree.¹³⁵ However, to date no movement on the two bills has occurred.

C. *Constitutional Considerations*

The only constitutional discussion of the Act concerned a potential ex post facto violation.¹³⁶ Under the Parole Act of 1979, prisoners are entitled to some form of constitutional protection concerning parole eligibility decisions.¹³⁷ Under the ex post facto prohibition,¹³⁸ any law is deemed unconstitutional if it either imposes a punishment for an act not punishable at the time it was committed, or creates punishment additional to that already imposed.¹³⁹ In *Weaver v. Graham*, the United States Supreme Court

¹³³ See Allen, *supra* note 27; see also Crouch, *supra* note 120, at 424. Increasing incarceration time is not the answer to recidivism, it is only part of the solution. See *id.* Eighty-two percent of all U.S. prisoners in 1995 had dropped out of high school. See *id.* at 423-24. The average cost to the taxpayer of housing an inmate in 1995 was \$20,000 per year. See *id.* at 424. Compare with Administrative Substitute for S. 855, *supra* note 99 (asserting that the average cost of housing an inmate in 1996 was \$26,000 per year).

¹³⁴ See A. 1539, 207th Leg., 1st Sess. (N.J. 1996).

¹³⁵ See *id.*

¹³⁶ See *Hearing on S. 855, supra* note 28, at 23-25.

¹³⁷ See *Byrne*, 93 N.J. 192, 460 A.2d 103. The New Jersey Supreme Court has held that "the Parole Act creates 'a sufficient expectancy of parole [eligibility] to entitle [prisoners] to some measure of constitutional protection with respect to parole [eligibility] decisions.'" *Id.* at 203, 460 A.2d at 108-09 (quoting *Vitek v. Jones*, 445 U.S. 480, 489 (1980)).

¹³⁸ See U.S. CONST., Art. I § 9, cl. 3 ("No Bill of Attainder or ex post facto law shall be passed"); see also U.S. CONST., Art. I. § 10, cl. 1 ("No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit, . . . pass any . . . ex post facto law").

¹³⁹ See *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

examined a state law which reduced a prisoner's good time credits, including those prisoners whose crimes had already been committed before the law's effective date.¹⁴⁰ In its analysis, the Court noted that the purpose of the ex post facto prohibition is to assure that individuals are given fair notice of legislative acts and permit them to rely on the law until it is explicitly changed.¹⁴¹ Similarly, the doctrine curtails the government from enacting arbitrary and vindictive legislation.¹⁴² In evaluating whether these purposes are frustrated, the Court set forth two elements which must be found for a law to be deemed ex post facto.¹⁴³ First, the law must be retrospective in that it applies to acts committed before its enactment; and second, the offender must be disadvantaged by the new law.¹⁴⁴

Under this inquiry, these elements appeared to exist in the earlier version of the No Early Release bill as amended by the Senate Public Law and Safety Committee.¹⁴⁵ The critical question, whether the bill would have changed the legal consequences of the crime committed prior to its effective date, was answered affirmatively.¹⁴⁶ Moreover, the Act was also construed as disadvantageous to prisoners presently incarcerated.¹⁴⁷ Notably, public

¹⁴⁰ See *id.* at 27. The Florida Legislature repealed its previous formula, allowing for the reduction of a sentence by a certain number of days per month in a given year, and enacted a replacement statute to shorten the number of days per month a sentence is reduced. See *id.* at 26. The new provision was applicable to all prisoners, current and future. See *id.* at 27. Because the petitioner's time spent in prison was increased by over two years under the new provision, the Court determined that it "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] 'the quantum of punishment.'" *Id.* at 33.

¹⁴¹ See *id.* at 28-29. The Court determined that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.*

¹⁴² See *id.* at 29.

¹⁴³ See *id.*

¹⁴⁴ See *Weaver*, 450 U.S. at 29 (citations omitted).

¹⁴⁵ See, e.g., COMMISSION REPORT, *supra* note 3, at 23-25.

¹⁴⁶ See COMMISSION REPORT, *supra* note 3, at 23-25; see also *supra* text accompanying note 60 (Senators Bennett and Cafiero stressed their desire to make the Act applicable to offenders sentenced before its enactment, offenders who rely upon the directive in N.J. STAT. ANN. § 30:4-123.51 for parole eligibility as early as after one-third completion of their sentences).

¹⁴⁷ See, e.g., N.J. STAT. ANN. § 2C:43-2f., which states:

The court shall explain the parole laws as they apply to the sentence and shall state:

statements and legislative testimony surrounding the bill's applicability to offenders currently incarcerated suggests that the Legislature's intent stems from the vengeful purpose of vindicating those lives already lost at the hands of parolees.¹⁴⁸ Although Senator Bennett was convinced that the Committee's amendment would allow the Act to survive *ex post facto* scrutiny because it pertains to parole laws rather than sentencing laws,¹⁴⁹ the Assembly wisely deleted the Senate's amendment to make the law applicable to offenders currently incarcerated.¹⁵⁰

V. Conclusion

The No Early Release Act was a victim-driven piece of legislation. Furthermore, 1996 was an election year. If it were not for these circumstances, perhaps the Legislature would have considered more of the Parole Commission's recommendations and implemented those statutory changes before considering this expansive piece of legislation. Had the Legislature taken that approach in changing the parole laws and allowing parole board's more discretion to deny parole, the No Early Release Act might not have been necessary because recidivism rates may have declined based

(1) the approximate period of time in years and months the defendant will serve in custody before parole eligibility;

(2) the jail credits or the amount of time the defendant has already served;

(3) that the defendant may be entitled to good time and work credits; and

(4) that the defendant may be eligible for participation in the Intensive Supervision Program.

Id. Current inmates would have been misled by the Senate's amendment because they would have heard the judge's explanation of the current parole laws at their sentencing hearings. *See id.* For instance, the presumptive sentence for a first-degree crime is fifteen years. *See* N.J. STAT. ANN. § 2C:44-1f(1) (West 1995). Under the previous parole requirement, current violent offenders not serving a mandatory minimum were eligible for parole after serving five years of their sentence (or less, given work and good time credits). *See* N.J. STAT. ANN. § 30:123.51. If the Act were to apply to them, they would not be eligible for parole until they have served 12.75 years. *See* S. 855 (1st Reprint) § 3.

¹⁴⁸ *See generally* *Hearing on S. 855*, *supra* note 28 (many of the hearing participants testified to seeking retribution for their anguish). One news article stated that bills like No Early Release "are, by their very language, a measure of revenge for the notorious kidnappings, rapes and murders of children in New Jersey in the last few years." Drewniak & Donahue, *supra* note 1, at 11.

¹⁴⁹ *See* *Hearing on S. 855*, *supra* note 28, at 24-25.

¹⁵⁰ *See supra* text accompanying note 100.

on those changes.

In addition, because the Act will impact prison population size, the manner in which New Jersey deals with non-violent offenders must evolve. Progress in that area is evidenced by the recent SRP expansion. If prisons begin to swell with violent offenders, and the Federal Justice Department denies New Jersey's application for matching funds to construct additional prisons, the State will have to consider expanding programs like the SRP or implementing pre-parole programs that do not require statutory permission and conditionally release offenders to the community.

Furthermore, public perception about corrections must change. Legislators must invite social scientists to test their hypotheses about harsher sentences and allow them to testify about the realistic consequences of legislation like the No Early Release Act. Legislators must also have the courage to vocalize misperceptions about corrections and rehabilitation without the fear of political repercussion. Legislators must concern themselves with resolving social ills in an objective manner instead of basing their decisions on consequences at the election polls.

Finally, simply increasing the amount of time served in prison will not solve the problem of recidivism by violent offenders, but it will at least reduce the number of offenses a repeat offender commits by removing him from society for longer periods of time. However, increasing time served in incarceration will not rehabilitate violent offenders if other policies are not enacted. To truly rehabilitate a violent offender, the state needs to do more than punish. It needs to educate. It needs to use the ten or fifteen years that a violent offender will spend behind bars constructively, so when the inmate is inevitably returned to society, he will not relapse into crime and exercise aggression towards society. Bills such as the Education and Job Training Act must become law if the No Early Release Act is to have some meaningful purpose.

However, no one can accurately determine what is an appropriate amount of punishment for each individual offender. With this Act, future victims will at least be spared the additional pain of repeatedly facing parole boards and offenders will have less opportunity to recidivate. If the Act does not reduce recidivism rates and deter violent crime, it will provide a form of restitution to victims and their families that cannot be achieved through or-

dinary means.

Yet, the reality is that not every violent offender will be deterred by the No Early Release Act, and not every violent offender would be rehabilitated by comprehensive punishment, treatment, and education. But nothing in life or law is certain.