

Starts on Page 146 – Line 15 of Transcript:

(NOTE: Robert Blecker and a research assistant have reviewed the recording and transcript of his June 11, 2015 Oral Testimony. For ease of comprehension and clarity, Blecker has removed lax tokens and meaningless repetition and [supplied obvious or intended meaning] in brackets or parentheses.

Thank you. I appreciate this opportunity. Since my name was already invoked about Terrence Williams, let me make things clear. I was just approached by Mr. Bookman (in the hall)-- I had not met him before -- and he asked, 'If someone kills their sexual abuser, would you count that as the worst of the worst?' And I said "no, if that's it and nothing else." I made it clear at the time and would like to reiterate (for the record): I did not study the case; I do not know anything about the case. I am now told that the first time his sexual abuser came up as his victim was ten years later; that in his first testimony he never even mentioned that his victim was a sexual abuser. So please do not invoke my name concerning this case about which I am ignorant.

What I do have a certain knowledge of, and hope will be helpful --two aspects: 1. Who are the worst of the worst? How can Pennsylvania change its system and refine it? It's not about the process so much, but about substance. The question of aggravating circumstances came up. Let me give you a sense of my background. I have spent thousands of hours inside maximum security prisons and on death rows in seven states. Well, actually, now it's eight states, because the last two days, anticipating that I'd be testifying before you and fearing that someone would say, 'well is it relevant? Has your experience been duplicated in Pennsylvania?' So with the approval of Secretary Wetzel, I've spent the last two days inside Graterford Prison to see whether the experiences that I've witnessed are relevantly similar in Pennsylvania -- that is to say the life on death row as compared to the life in general population, as compared to the life of those who are serving their time in disciplinary segregation. I was given carte blanche to interview officers with a directive saying that they should speak to me candidly. I was allowed to interview killers who are serving life and killers who are on death row with the dictate that the officers stay outside of any ear reach so that they couldn't hear what was going on. They could just visually protect me in case I needed protection. I was allowed to go anywhere inside Graterford at any time I wanted, see any part of the prison operation, talk to anybody and stay there for as long as I wanted.

So I'd like to respond to some of the issues that have come up. The first part is reflected in my written statement, the second part is not because this is the result of the last two days inside Graterford. And (until I knew that Pennsylvania was relevantly similar), I didn't want to put in my written statement that which I've learned and reflected in a book that I wrote called *The Death of Punishment: Searching for Justice Among the Worst of the Worst*.

I begin and end with the proposition that the punishment should fit the crime. I take it that that's common ground. I also begin and end with the proposition that we can tell the difference between the worst of the worst and less

serious criminals, and that we can adequately reflect on that. The statement was made earlier by one of your colleagues that the 18 aggravating circumstances represent the considered wisdom of the people of Pennsylvania. And after deep reflection I would suggest they do not. That, in fact, one of the things that this committee should be proposing is a refined death penalty statute. Now I know that there is supposedly a 'study committee' meeting from the Senate. I do not know of any witnesses they've called who favor the death penalty, as I do. Maybe they have called some, but none of my colleagues have been called that I know of. I certainly have not been called. And my guess is if that experience replicates what went on in New Jersey and Connecticut and New York, where I've testified before death penalty study commissions, it's basically predisposed (and constituted) to call for an end of the death penalty. And they will not even consider changing it, amending it, refining it morally. I would urge you to take that responsibility and do that. Although I won't go through them in any detail, I just want to spend a minute or two (with aggravating circumstances) and get to the part that is not in the written statement about what life is like for convicted killers who are serving life, both on death row and inside general population.

To answer two of the questions that came up earlier in the questioning period: What to do with a lifer who kills again, don't we need the death penalty? And also isn't life without parole worse than death? The answers to those two are actually deeply connected. The answer is no, life without parole is not worse than death, it's not even close. But to answer (the claim) that they are otherwise undeterable: Are they deterable? Yes. Lifers are deterable and the two conclusions are connected.

First, in terms of proposed aggravators. They are reflected, very briefly, in the written statement and (much more extensively in) the book itself. *The Death of Punishment* gives you a model death penalty statute based upon thousands of hours inside prisons across the country, over 30 years now. It's one of the largest, maybe the largest study ever conducted.

But some things I would ask you to rethink in your aggravating circumstances. Some of them will make it broader and some of them will make it narrower. The death penalty, really to get to the worst of the worst. Among the categories of people, for example, that aggravate -- in terms of the victims -- are law enforcement. And I understand [specifying] police, judges, prosecutors. But you've left out one that is critical. And it's unusual but it's still critical: jurors -- anybody who kills a juror (to prevent or) in retaliation for the verdict. A juror is the purest person doing good as a good citizen. Jurors should be added.

Killing a witness is an aggravating circumstance appropriately -- but it depends on (the motive), and one relies on prosecutorial discretion to weed this out. My view is, not on the basis of protection or deterrence, which I reject because I'm a retributivist. For me, the reason we have, and the only legitimate reason we have the death penalty in the end is because some people deserve to die. And we have an obligation to kill them.

So if we are really focused on the worst of the worst of the worst, I would distinguish, and I would like the statute to distinguish between killing an innocent witness and killing a snitch. If you go on a robbery, and one of your co-felons gives

you up to the police -- well we (in society) want them to do that. And they deserve witness protection. But if you kill that person, (your cofelon for giving you up to the authorites, maybe even shifting the weight from himself to you) you're not in the same moral category, as when you're a robber . . I've come across. You're in the midst of the robbery and you look up, and you notice that someone is looking at you from a window, and you go, 'let's see, (pointing) that's second story, third apartment over. And you break down the door and then go kill them - (completely innocent citizens in their apartment) in order to eliminate them as a witness. Or you eliminate your very robbery victim as a witness, that's a different moral category. And all other things equal, that deserves death. Killing one of your co-felons who understood what the rules of the game were is not. So I would distinguish that in the statute.

I would definitely eliminate the drug dealing aggravator. The fact is, once again, if you're in the game and you know what the rules of the game are -- and you kill a drug dealer, it *doesn't* in and of itself appropriately aggravate.

That connects, by the way, with the question of race. One of the reasons why there is a disproportionate number of African Americans on death row who are committing death eligible crimes does not go to prejudice. It goes to the definition of the crimes themselves. Race correlates very closely with class, class correlates very closely with drug crimes and robbery. And so if you eliminate, and that's another . . key thing.

You should eliminate felony murder entirely. But you should definitely eliminate the felony aggravator. Because you have killed in the course of and in furtherance of a felony does not in and of itself -- and should not make you death eligible. I would definitely keep rape as an aggravating circumstance. But not because it's a felony; but because it is torture. And torture unquestionably belongs as a moral aggravator.

I would also add -- because this is crucial in determining who the worst of the worst of the worst are -- the motive of the killer. Add the bias aggravator, which is absent from Pennsylvania's statute and in my view really belongs there. A person who commits a hate crime, who kills because of the victim's race, religion, national origin, sexual orientation, gender identity, all other things equal, is worse . . . (Hate and bias as a motive) *should* be an aggravating circumstance.

The child under 12: yes I agree, but that's too narrow; it should broader. It should be "killing especially vulnerable victims." It should include the elderly, which Pennsylvania does not presently include; it should include people who are mentally or physically disabled. People who prey on vulnerable victims tend to be cowards. By the way, they also, once captured, tend to be the most compliant and best behaved -- when confronted with overwhelming state power.

Which will get me to the second part of my comments: What's life like inside for those who are spared the death penalty or those who are given it? Two quick other points and then I will move to that.

This is the closest thing I'll get to talking about process unless you ask me about it in the questioning period. I think your burdens of persuasion are not adequately thought out, though they're very standard across the country.

We heard earlier the statement about proof beyond a reasonable doubt from the prosecutors. And they're right; it's the maximum burden of persuasion presently. The United States Supreme Court has held in *Kansas v. Marsh* that the Constitution does not command a burden of persuasion any higher in the penalty phase. Or any different in the penalty phase than it commands in the guilt phase. That may be true as a matter of Constitutional law; that is not true as a matter, in my view, of moral fact.

The burden of persuasion should be different in the penalty phase than it is in the guilt phase -- as death is a different punishment in kind than any other. The question is different. The question in the guilt phase is, 'Did he do it?' The question in the penalty phase is 'Does he deserve it?' And in order to answer that question properly, in my view, the jury should be instructed that they may not have even a lingering doubt. Which is a doubt that is not strictly rational, but it's real. Something in their gut just isn't sure. They're certain enough to convict, and they properly did convict of murder because they're convinced beyond a reasonable doubt. Nevertheless, they still have a real doubt . It's not rational, they can't give a reason for it, but it's real. It's sometimes called a 'residual doubt,' it's sometimes called a 'lingering doubt'. If a juror has that residual doubt or lingering doubt, though he or she properly convicts of first-degree murder, he or she improperly sentences to death.

And then finally, I would alter the burden of persuasion in the penalty phase to say that not only must you have no lingering doubt, but you also have to be *convinced to a moral certainty that he deserves it*. And that's .. [not] strictly rational. That is if a jury that has already been appropriately selected as a death qualified jury, cannot say to moral certainty that they believe that death is the appropriate punishment, then they ought not to give it. I would also add the word "clearly" to the aggravators outweighing the mitigators. Some states do that, some states don't. Again, that is giving the benefit of the doubt to the defendant.

On the other hand, I would eliminate the requirement of unanimity on the part of the jury. There are what we call 'stealth jurors,' as many of you know. Jurors who go through the process, who say that "under the right set of circumstances, I will in fact give the death penalty." And they're lying. They simply won't.

It's an enormous advantage, as it come up earlier in this hearing , that it only takes one. That's been said two or three times and of course that's right: It only takes one holdout juror, who may be a stealth juror, who will not listen to the evidence. That happened in one of the post 9/11 cases in New York, where the jury came back in a federal case came back 11-1 with Moussaoui I think, I may be wrong on the person – (the jury) came back 11-1 for death. It clearly qualified as death, under any reasonable interpretation. That was a single stealth juror holdout. I personally would have a 10-2 or 11-1 verdicts for death verdicts on the grounds that it represents the clear consensus of the jury. And that every other advantage still remains, to a great degree, with the defendant.

That just scratches the surface. Again, if you're interested in what after 30 years of probing, a model death penalty statute would look like, I included it in my written statement. It comes from the book, *The Death of Punishment*, it's Appendix B from that book.

Now I want to talk about stuff that is not in the written statement. And respond to some of what's gone on, because here I do bring a certain expertise that I hope will be helpful to you in terms of what is life like inside prison. And specifically, what is life like inside Pennsylvania's maximum security prison at Graterford. Now, I haven't toured all of the (Pennsylvania) prisons; I've only toured one.

But Graterford . . is a large prison, it is a maximum-security prison. It draws principally from Philadelphia. It is also only one of two in Pennsylvania that has death row – which I toured. It gives you the chance to contrast what life is like. 15 hours with extraordinary access to both prisoners and officers (allowed me to) sample it. It would become a reliable sample because I heard (and saw) the same things I've been hearing and seeing for 30 years inside prisons in other states.

First thing: Look at the Mission Statement of the Department of Corrections. In Pennsylvania and every other state in the United States, you will not see the word '*punishment*.' In any Mission Statement, in any department of corrections in the United States -- or the Federal Government. And then, when you talk to the members of the Department of Corrections, and I had occasion in these last two days to talk to the deputy administrator, to talk to the Major, and talk to several of the line officers down there inside the prisons themselves and I ask them, 'what is your goal? What are you trying to accomplish?' And from the top, it's basically this: "Safety."

From the top, it's "I want my officers to be able to come into the prison safely and get out of the prison safely at the end of the day. I want to keep the people safe, the people out here in Pennsylvania, safe from these guys. I want to keep the prisoners safe from each other. And I want to keep staff safe from the prisoners." Safety, safety, safety.

And then I asked them, "Do you know what these guys did? Do you know the killings they committed, do you know the crimes?" And you get two answers -- yes or no. But you get one answer about the relevance of that. Either "I don't know, I make a conscious effort not to know" or "I do know but I don't let that affect any part of the way that we treat them once they're inside." So, their mission is safety; it's not at all punishment. And they say that with one voice.

Consequently . . . let me tell you a little bit of what life is like. The question came up earlier. Some people are saying, I know it came from a supporter of the death penalty who is not here right now. "But some people are saying that life without parole is worse than death."

Let me tell you what life without parole is like for the people in Graterford. I saw it over the last two days. Death row they're in their cell for 23 hours a day and they do not have contact visits. But even that, by the way, solitary confinement, you heard the phrase 'solitary confinement.' It's solitary confinement in the sense that it's single celled. It's not solitary confinement in the sense that you don't talk to other people during the day. The cells are open bars you can communicate with the mirror, you can talk to people on either side of you and during rec you can talk to people. In fact, death row has a basketball court that I was on yesterday. Two at a time are allowed on that. Most of the people rec on death row in single cages. But

there is this basketball court.

Let me contrast that to the lifer. Life for the lifer, let's talk about a well-behaved lifer. The typical coward that preys on vulnerable victims, who rapes and murders a child and does not get the death penalty, and gets instead life in Graterford prison. What's his life like?

Well, if he's well behaved, he's going to be on A and B block, if he's less well behaved he will be on C and D block. There are slight differences and I'll go through it in just a second. But let me tell you their essential life. You know how much they're out of their cells, either working or engaged in playing in recreation. They are out of their cells essentially from 6:30 in the morning until 9pm. 6:30am until 9pm.

They are either at their jobs, I went to Industry. I went to the barber shop. I couldn't tell the difference between being in a barber shop in prison. And by the way, they're skilled barbers. They're inmate barbers but they go through a sustained procedure in order to get licensed for it.

Or they're in the day room, playing cards, playing chess, showering, telephoning, 6:30am to 9pm. Now you ask, are the doors locked? Well, the cell doors on C and D pod, not the honor pod, not A and B pod which contain hundreds of lifers. Let me assure you, we are not talking about an isolated situation. Hundreds of lifers are living there. Indiscriminately with non-lifers -- guys who commit burglary or guys who commit murder and are sentenced to life are living together under the same conditions.

In A and B block, the honor block, they open their own cell doors when they want, and furthermore, they can lock their cell doors for their own safety or to secure their valuables, because they don't want anybody coming into their cells. So they open and close their own doors at will. They are out sometimes, essentially, except for a couple of counts, they are out essentially from 6:30am to 9pm.

Then, after 9pm, you might imagine it's lights out. But no; it's not lights out. It's just they are confined to their cells at that point. They have cable television, which can stay on all night. There is no lights out policy; you can watch TV all night.

I also went to the commissary where you go once a week with a maximum -- I have it written down -- I think it's \$78 a week worth of commissary. The bags, the guys are walking out with these huge bags of goodies from the commissary. And by the way, for all these guys who are never going to see the light of day including death row -- if you never see the light of day on death row, how come the commissary list, which I have here -- . . . the commissary list includes suntan lotion with an SPF factor of 30? For people who never see the light of day, I wonder why you need suntan lotion with an SPF factor of 30.

But, even more so, the volleyball court which is sand is also labeled "the beach", where guys hang out and get suntans. I could not believe when I went out on the great yard. The great yard in Graterford is the size of about three football fields.

I watched a softball game. There is an A league and B league. The A league is the equivalent of really good, good softball. And they're into it. During those hours that they are playing softball, (they're not prisoners.) By the way there is an all-star game, there are guys keeping statistics, umpires in uniform. The statistics are

posted every month. There are playoffs at the end. So the softball game is going on. At a remote corner, hundreds of yards away, there is a basketball game, pretty good quality going on. Volleyball games, there is bocce, weightlifting, there's handball. 6:30am to 9pm.

Some of the time, they're at their jobs. You might think that those who get the best jobs would be those who committed the least serious crimes. It's just the opposite. And this is true, not just of Pennsylvania; this is true across-the-board.

The people who run industry choose to give the lifers the best jobs because they are the most reliable, they are the most dependable. And so they work their way up, pretty soon to the best jobs. So ironically, the people who commit the (most) serious crimes on the outside, have the best lifestyles on the inside in Graterford.

Now, the department of corrections is somewhat remedying that, somewhat. Because of the new secretary, Secretary Wetzel, is apparently very committed to rehabilitation and is coming to realize if you allow the best jobs in industry to go to lifers and they are never getting out, you are not really serving rehabilitation. So the new rule from the department of corrections is no more than 10% of industry may be lifers.

Thus, I went to the weaving industry yesterday. And the guy in charge of it was saying, "You know I wish I could take more lifers but I am way above my quota of 10% so I can't take lifers for a while . But I look forward to the time that I can, once again, have the lifers because they are reliable."

By the way, if you are in A and B block, you can smoke outside; it is a smoke-free facility but you can smoke outside.

Not only that -- I couldn't believe it, out in the great yard, yesterday, there's an ice cream stand. And you can buy ice cream. Remember what we are talking about -- hundreds of guys who are convicted of murder and spared the death penalty. And the flavors rotate, the flavors yesterday were, [reading from notes] 'strawberry shortcake, chocolate chip cookie dough, birthday cake -- and banana daiquiri water ice. Two scoops for a dollar.

I could go on and on and on. Another thing you might be curious about -- I went to the library to see the kinds of books that the library stocks. And again, I would astounded. But I've seen it also in Tennessee, and .. other states. Believe it or not, they have a true crime section. A true crime section, think about that. In the prison library for convicted murderers. Some of the books available, these weren't the most popular ones right now because they were on the shelves. They weren't taken out so I wrote down some of them: *A Rip in Heaven: a Memoir of Murder, I Did It: Confessions of a Killer, Death Scholarship, Run at Destruction: A True Fatal Love Triangle, Death Benefit*. And the librarian told me that the mafia books are especially popular.

So .. 'Is there any way to deter lifers from killing again?' The answer is yes there is. There's an easy way. And that is threaten them with the loss of this lifestyle which is going on.

There's very little murder going on among lifers. You should not retain the death penalty under the illusion that there is no other way to keep lifers in check. First of all, that's not retributive -- it's not, in my view, about justice. But second,

because the United States Supreme Court has made it clear, and rightfully so, that incapacitation alone cannot constitute a legitimate reason for the death penalty. It must only be deterrence or retribution.

We have the ability and the obligation to construct prisons that will keep us safe. Lifers can be deterred. I would eliminate the lifer aggravator. There are sets of circumstances in which lifers will kill again inside the prison and I understand and it doesn't make them the worst of the worst. The threats are constant. Take away their privileges and transfer. What the lifers fear, especially most of these guys who are in Graterford who are coming out of Philadelphia? They fear being transferred to a prison that's nine hours away, when their visitors want to visit them. That's the end of visits. They fear being transferred to disciplinary segregation. I forgot. They don't call it disciplinary segregation but it's close to that. There, the lifestyle is pretty grim. It's 23 hours a day. You still can have televisions; you still have radios if you can afford it from the commissary. But again, ironically, the lifestyle in disciplinary segregation, which you can get from . . . having contraband. I'm not talking about weapons, I'm just talking about drugs etc. The lifestyle to which you will be subjected will be much worse, much harsher, than the lifestyle that you get on death row.

So, we say, "Let the punishment fit the crime!" And then we do everything in the administration of the prison system, to sever the very connection of the punishment from the crime. We do it through the mission statement of the department of Corrections. We do it in the day-to-day operation of the department of corrections.

What can you do about it? There's a lot you can do about it. You can take the step that Connecticut took. It abolished the death penalty, and in my view, that was a terrible step. But even as they . . . abolished the death penalty, they enacted a provision that says: Anybody serving life without parole shall serve their entire sentence in a separate wing or a separate prison, under conditions no better than disciplinary segregation.

And I would urge you to think about that, that is, reserve the worst punishment for the worst crime. Make life without parole something special, something different, something extraordinarily unpleasant. But only reserve it for those who don't get the death penalty.

That's another thing I urge you and beg you to change. And it's ironic that Pennsylvania does not have a separate life sentence and life without parole sentence. It's one sentence. I didn't know that. All lifers serve life without parole. That's morally indiscriminate.

There's a big difference between, and there should be, between life with parole and life without parole. The same kind of sentence, the same day-to-day experience which is the essence of punishment should not be reserved for those who get a few drug deals stacked on top of each other when no one got hurt as it is for those who murder and rape, etc. They exist in different moral universes and the (day to day) experience (of punishment) should be different.

So to conclude this: Why should you keep the death penalty? . . . You hear the argument made, 'Well, there would be no difference -- it would be no different if Pennsylvania abolished the death penalty because no one's being executed.' It

would be a huge difference if Pennsylvania abolished the death penalty. If Pennsylvania abolished the death penalty, those guys on death row go into general population. They're going to be out of their cells from 6:30 a.m. to 9 p.m. playing basketball, playing, I'm told they play football in the winter. I didn't see that. Playing basketball, playing softball, etc, etc, etc, buying ice cream.

Number two, you should retain the death penalty because it serves one other function that nobody talks about. It censures – (denunciation.) It is a very important statement on the part of the Commonwealth of Pennsylvania and the juries who give the death penalty: 'You have committed such a heinous crime that you simply deserve to die. Whether or not we kill you, you deserve to die.' That has a certain sting, by the way, for guys who have been condemned to death. I have interviewed now dozens of condemned killers and I probe them, "Do you remember the moment when the jury sentenced you to die? And how did you feel? And how do you feel about that now?" And it bothers them, as it should. Most importantly, it is a statement that we make, we the citizens make -- about what they deserve. And then finally, another reason that nobody talks about.

The United States Supreme Court, three Justices, perhaps four, are just itching to abolish the death penalty on the grounds of it being cruel and unusual. They don't yet have the majority. But their jurisprudence has been 'evolving standards of decency of a maturing society.' So the content of the 8<sup>th</sup> amendment, of what constitutes cruel and unusual punishment is a function of some degree public opinion. And they measure these evolving standards of decency by jury verdicts of death. And by state legislation. There are 31 states with the death penalty right now; Pennsylvania is one of them. The latest jurisprudence out of the United States Supreme Court says, 'its not just the number of states; it's the direction of change.' Now seven states, with Nebraska, have abolished the death penalty -- seven state legislatures. If Pennsylvania were to join them, it gives added fuel to the United States' Supreme Court's jurisprudence that the uniform direction of change is a rejection of the death penalty.

Even though your Governor and your courts may be presently blocking executions, if you as a Legislature were to abolish the death penalty, you would be undermining the ability of those states whose Governors and courts are not blocking the death penalty and allowing justice to proceed. You would be significantly aiding the abolitionists on the United States Supreme Court to have the fuel that they need to say 'Look, now Pennsylvania, a leading State, has just joined them. And the uniform direction of change is to reject death.'

So for justice -- because some people deserve it, and because the actual alternative to death as it is presently experienced by those who are murdering is so far outside, so far different from what's deserved, and so clearly supported by the mission statement of the Department of Corrections. Another thing I urge for you to change -- and I gave you in the written statement what I think a model Correction statement should be. It's your power to do that as the Legislature.

Because, in reality, the worst of the worst of the worst who don't get death presently experience the lifestyle they lead -- if nothing else, that's a reason to retain the death penalty. But ultimately, the reason is justice.

Some people deserve to die and we, you, the people's Representatives, have

the obligation to recognize it. And do your best to implement the punishment that's deserved.

Thank you.

Chairman Petrarca: Thank you, Mr. Blecker. I certainly appreciate your testimony. It sounds like maybe you had a better time at SCI Graterford than you're having here with us today. But in Pennsylvania, I don't know, I don't believe we're discussing or that the discussion should be abolishing the death penalty. I think that what's going on is this Governor's asked for a moratorium to wait for a report from the Joint State Government Commission that is due this fall on a number of recommendations relative to a resolution passed by the Senate a few years ago as to where we should go with our death penalty in Pennsylvania. As has been said, many problems, many flaws with that report. Questions from members? Representative Saccone.

Rep. Saccone: Thank you, Chairman. I'm shocked, and I know that people back home will be shocked if I relayed this information to them. And I will relay this information to them. But I want to make sure I got this right. So were you saying that all these privileges, the no-lights-out policy, the opening of the doors at will, the cable television, all those things, that was for people with life sentences, not for people on death row?

Prof. Blecker: Correct.

Rep. Saccone: On death row, they are confined 23 hours and ---

Prof. Blecker: They are confined 23 hours a day. They are not in solitary. They're singled-celled, by the way, which is another privilege that prisoners [in general population] want. There's a certain irony. If the solitary is so horrifying, how come [in general population] they want single cells rather than having a celly?

I perhaps spoke too quickly. A and B pods, who are the best behaved, have control over the locks on their doors. C and D pods, who are also out from 6:30 a.m. to 9 p.m. -- by the way, death row has no lights-out policy and is allowed to have televisions all night also. But C and D pods do not control the locks on their cells. All cells are opened at the same time when the officers open them and they're all closed at the same time. A and B, which include hundreds of lifers, have control over their cells from 6:30 a.m. They can lock their cells at any time. They can unlock their cells at any time, other than count. When they have to be in their cells at count, they have to be in their cells at count, but that's very brief during the day.

Rep. Saccone: Could you document this for our Committee saying, you know, people on death row get these privileges; people that are lifers get these privileges so that I can compare them? Because I was taking notes but I want to make sure I get it accurate.

Prof. Blecker: Sure. There are probably documents that reflect that from the

Department of Corrections.

Rep. Saccone: Okay.

Prof. Blecker: I'm not...

Rep. Saccone: But I was fascinated by your testimony. If you could give that to us, I would really appreciate it.

Prof. Blecker: By the way, one last point.

Chairman Petrarca: One point.

Mr. Dymek: If I can just note, this is recorded. You know, the feed's going to be made available and we're going to be transcribing all this testimony, so it will be available.

Prof. Blecker: Oh, good. I appreciate that. One last note. In terms of solitary confinement, you hear about death row syndrome. Solitary confinement. Well, I might have mentioned briefly again unlike disciplinary segregation, these guys can talk to the people on either side of them and even a couple of cells down. Beyond that, roughly 90 days a year, you can be a janitor on death row, which means that you're cleaning up the corridor. You don't go outside the row, but you're cleaning up the corridor on the row. And I watched it happen and it's not stopped -- while you're doing that for those 90 days, you have interaction with everybody on your corridor. So you can have conversations as you go down and mop and clean. So again, this notion that it's 23 hours a day; they never speak to anybody else; it's solitary confinement and so they go mad is simply not the truth. It is not the actual experience on the row.

Rep. Saccone: Okay. I know we've taken some tours before but I would love to go see...

Prof. Blecker: [Ask the] Secretary. I mean you should do it. You're the Legislature. I was just allowed as an expert visitor. You're the Legislature. It's more vital that you see what I've seen and not just get the hour-and-a-half tour.

Rep. Saccone: Yes.

Prof. Blecker: Go down there. Go into the bowls of the prison. Go out on the Great field and sit there, as I did, for an hour or stand there for an hour and really soak it up. And get the ambience of it.

Rep. Saccone: Thank you, sir.

Chairman Petrarca: Thank you, Representative Saccone. I too would maybe, again, appreciate your comments. I'd maybe like to hear what the Department of Corrections has to say about your testimony. Representative Stephens for questions.

Rep. Stephens: Thank you, Mr. Chairman. Thank you so much for your testimony. I got to tell you, I couldn't write fast enough, so fortunately we have a transcript to go off of. Your testimony is particularly relevant. I know you're here talking about the death penalty. Next week we're going to be considering legislation about the fact that many of those folks who are enjoying all those items from the commissary owe restitution to victims that haven't been made whole yet, yet they're shelling out money at the commissary to get themselves TVs. You mentioned \$78 a week, and I missed what that was.

Prof. Blecker: I have my notes from yesterday. I can tell you exactly. I know when that came up. [Reviewing pages of notes on a yellow legal notepad . . .] That came up when I visited the Commissary, which was the last place, one of the last places I went to and I asked the person in charge of the Commissary how much they were allowed to have. Here it is. I'm sorry. Let me correct that statement: \$74.90 per week. Sorry.

Rep. Stephens: So that's the maximum they're allowed to spend?

Prof. Blecker: Correct. \$74.90 per week. Same limits of death row, I have in my notes, on the commissary.

Rep. Stephens: So...

Prof. Blecker: I have the commissary list by the way, for death row, if you want to see it.

Rep. Stephens: I have the general commissary list. I don't know if it's different.

Prof. Blecker: It's slightly different.

Rep. Stephens: It's much smaller because the one I have is pretty voluminous.

Prof. Blecker: Yes, this is it. This is the commissary list for the male capital offenders right here. It's voluminous -- pages and pages -- 14 pages of items.

Rep. Stephens: And they have the leisure items, poker chips, chess, cards. That's all right. You don't have to look.

Prof. Blecker: I haven't yet focused on it. That's just material I got yesterday. I was focused on the actual life inside, making the most of those two days inside Graterford.

Rep. Stephens: Sure. Look, I appreciate your testimony. In particular, I had a question about your discussion regarding the aggravating factors, and as it related to ---

Prof. Blecker: By the way, that is in the written statement.

Rep. Stephens: Yes, and I, now, of course, now I lost my train of thought. But --- So I know that, at least I think, under our statutes, punishment is one of the goals of sentencing.

Prof. Blecker: No, it is not.

Rep. Stephens: I'm not talking about DOC regs. I'm talking about our statutes.

Prof. Blecker: Oh, I'm sorry.

Rep. Stephens: I feel like it's either our statutes or our Court Rules, because I was a prosecutor and I feel like I remember many a time arguing it and a Judge referencing it and I just wonder, I didn't know if you had a chance to look through our statutes too or whether you were just referencing a DOC Reg.

Prof. Blecker: It's not so much a reg. It's the Mission Statement..

Rep. Stephens: OK.

Prof. Blecker: ..which is relevantly similar to every mission statement of every Department of Corrections in the United States.

Rep. Stephens: OK.

Prof. Blecker: The actual Mission Statement is as follows: This is Pennsylvania's Department of Corrections' Mission Statement on their website. "Our mission is to reduce criminal behavior by providing individualized treatment and education to offenders resulting in successful community reintegration through accountability and positive change." Now, I'm all for rehabilitation for those who are going out, which is another reason why I urge you to re-think whether all lifers should be life without parole. They should not be. Some lifers should go out. But many shouldn't. For those who shouldn't, this mission is perverse. It's irrelevant. It's even more deeply and generally perverse because, again, we say "Let the punishment fit the crime." But in the actual experience of it, Corrections does everything they can to sever t[he punishment from the crime.] Not because they want to, but because it makes sense.

The Warden's Assistant [at Oklahoma State Penitentiary] said it best in one sentence. When I asked her, "You know what these guys did?" "Yes." "And you see the lifestyles they're leading?" "Yes." How do you feel about that? And she said, "*We make it easy for them because it's easy for us when it's easy for them.*" That's it in a nutshell.

Rep. Stephens: Right.

Prof. Blecker: They want to go home at night, and I understand that.

Rep. Stephens: Right.

Prof. Blecker: [In Graterford] there were five [or six] unarmed officers inside for 600 prisoners. We sat there and we walked around; five unarmed officers inside with 600 prisoners who have access to them at any time they want.

Rep. Stephens: Right.

Prof. Blecker: They sit in what's called the bubble, this little room, and then they walk around in the day room -- 600 prisoners, of whom hundreds are lifers, five unarmed officers walking among them. What do you think keeps them alive?

Rep. Stephens: Sure. And look, I've been to Graterford many times voluntarily. I was always able to leave when I wanted, in my life as a prosecutor. But let me ask you this: In your research, have you found any type of correlation between safety for the officers and this leisurely lifestyle that these folks lead? Because that is obviously I think a concern for most of us. We certainly don't want our officers in harm's way.

Prof. Blecker: Yes, I do think there is a correlation and that should be acknowledged: If you in fact do revise your punishment system, you will make it less safe for corrections officers. It's a price you're going to have to be willing to pay for justice on the margin. And/or you're going to have to spend more money on corrections and/or you're going to have to redesign your prisons.

Rep. Stephens: So and I guess that's the point. More manpower might be able to offset that safety issue.

Prof. Blecker: If you have 12 officers instead of five in the bubble among 600 guys, how are you going to stop them?

Rep. Stephens: Sure.

Prof. Blecker: Unarmed officers, let me add. Unarmed.

Rep. Stephens: And we heard a little bit of testimony earlier about this Rand study. Are you familiar with that at all?

Prof. Blecker: No, I'm not. I don't know which one they're talking about.

Rep. Stephens: I mean and this is a little off from your testimony, but have you done any research into cost savings that might be available through better representation of defendants charged with murder?

Prof. Blecker: I'm not an expert.

Rep. Stephens: OK.

Prof. Blecker: And can't intelligently comment.

Rep. Stephens: All right.

Prof. Blecker: I can talk about race if you want to go into it but I'm not an expert [about potential cost savings.]

Rep. Stephens: Well, maybe I'll follow-up with you on that because I'm very interested in it but I know the Chairman wants to move us along, but I could follow up. Is that okay if I follow up on that?

Prof. Blecker: Sure. Absolutely.

Rep. Stephens: Thank you very much. I appreciate it.

Chairman Petrarca: Thank you, Representative Stephens. We're talking about the moratorium in Pennsylvania on the death penalty, as I said earlier..

Prof. Blecker: Yes.

Chairman Petrarca: Until this study is released or received, and we have a new Governor in Pennsylvania who has been on the job let's say for six months. These situations that you're talking about or the lifestyle that you're referring to at Graterford, that is in no way related to this new Administration or the moratorium that you know of is it?

Prof. Blecker: No, it is not. This is a long-standing thing. A word about the moratorium, because I saw on the news, criticism of the Legislature on the grounds that the Legislature was taking a position that what the Governor did was unconstitutional. And some commentators say, 'well, it's not for the Legislature to talk about unconstitutionality.'

I teach constitutional history as well as constitutional law so I feel qualified to say that that's absolutely wrong. The Legislature is very much a legitimate branch to be discussing the constitutionality of its coordinate branches as well as its own behavior. And I think it's very important and fine that what Pennsylvania has done in censuring the Governor is a nonpartisan move. That it's a majority that includes Democrats and Republicans. And it should not be partisan. The death penalty should never be a partisan issue. And so it doesn't upset me that Nebraska, a conservative Republican State, would be the one to abolish it. Because that then moves the focus away from partisan politics -- although that's an unusual alliance there -- to what it should be, which is justice and the criminal justice system.

Chairman Petrarca: Yes, and certainly members of the Legislature have opinions on both sides of that question.

Prof. Blecker: From both parties.

Chairman Petrarca: Correct. Follow-up question, Representative Saccone?

Rep. Saccone: Yes. Thank you for indulging me, Chairman. I just want to know, in the Commissary when they can spend this money, that's 300 bucks a month basically,

are the prices.. .

Prof. Blecker: \$74...yes.

Rep. Saccone: ...discounted prices and is it tax-free? I imagine they don't charge any tax in the prison on these things, right?

Prof. Blecker: No, but to be fair, if their income is a function only of their work, let's know what they're getting paid. The highest payment, the greatest payment in the barbershop for the licensed barbers is 51 cents an hour. In Industry, and this is one of the premier jobs, it was 41 cents an hour. So they're getting paid. If the income comes only from their jobs in the prison, it's relatively meager. On the other hand, I'm just reading arbitrarily the first page; soups, ramen noodles, beef-flavored, three ounces, 28 cents price, non-dairy creamer, 8 ounces, one dollar, granulated sugar, 12 ounces, one dollar. So I don't know. A granola bar is eight packs...

Rep. Saccone: OK. I get you. But they're not given \$75 a week to spend. They have to earn it? That's the maximum that they have to earn?

Prof. Blecker: Absolutely.

Rep. Saccone: OK. I just want to make sure I get it right.

Prof. Blecker: Or bring in [money] from the outside.

Rep. Saccone: Or bring in from the outside? OK. Thank you very much.

Chairman Petrarca: Representative Stephens, follow-up question, then Representative Barbin.

Rep. Stephens: Just to follow up on that point. So my understanding is, though, general population inmates, if they make themselves available for the work pool are paid just for being available for the work pool even if they might not work. Are you familiar with that program at all?

Prof. Blecker: No, I'm not.

Rep. Stephens: ...when it applies to lifers?

Prof. Blecker: I'm not.

Rep. Stephens: OK. All right.

Prof. Blecker: That would surprise me.

Rep. Stephens: Well, the only reason I know about it is, some guys from the State were addressing some concerns in our county jail and their complaint was, they're not getting their stipend while they're in the county jail because -- and so when I

looked into it, the stipend was if you make yourself available for work, even if you aren't necessarily going to work but you're *available* for work, you receive a stipend in our State prison. And I wasn't sure if that applied to lifers or not, but I can check with DOC on that.

Prof. Blecker: That surprises me. I mean, it's contrary to an inference I made. Though no one specifically said that you were right or wrong on that, but I inferred that that would not be --

Rep. Stephens: OK.

Prof. Blecker: -- the case because they were talking about guys wanting jobs who weren't getting them. And the reason they wanted jobs was to get the money to get the commissary. And the irony was that the guys who had the jobs are often the worst criminals --

Rep. Stephens: Right.

Prof. Blecker: -- who had the best jobs. So it was --

Rep. Stephens: Well, they get paid more money by actually working than being available for work but they are nonetheless paid for being available for working in the work pool.

Prof. Blecker: It never came up and I never thought to ask that.

Rep. Stephens: Thank you.

Chairman Petrarca: Representative Barbin?

Rep. Barbin: Thank you. My question goes to what other States that aren't operating like us would be ones to take a look at? Because I agree with you that if the death penalty's going to be justified on safety and censure. But if you move to a system that says 'all right, we're going to look at the life without parole separately from a life term, and where should I be looking?' Who has a system of corrections that also has this separate category for the people that somehow escape the death penalty sentence but really shouldn't be with other people?

Prof. Blecker: Only Connecticut, to the best of my knowledge, when they abolished the death penalty. By the way, just to correct something you said. I hope I didn't leave the impression, I am not in favor of the death penalty on the grounds of safety. I am in favor of the death penalty only on the grounds of justice.

Rep. Barbin: All right. So your --

Prof. Blecker: And censure. You're right about censure.

Rep. Barbin: So justice is, there's a very narrow group of people --

Prof. Blecker: Who deserve it.

Rep. Barbin: -- who should go to...all right. That would be Manson and whoever else met that particular -- And I guess the other question I would have is that when you're trying to make these decisions and you're trying to get who is the really absolute worst and who's the next absolute worst so you get this second category for life without parole as a separate group, should the aggravating or mitigating circumstances that we have, be the model that's attached in your Appendix? Or should there be something different for the life without parole than there is for, you know, the people that are entitled to the death penalty but they're going to go through a process?

Prof. Blecker: That's a very good question. My view is that life without parole if it's done right, should be such a severe sentence that it should require all the super due process that the death penalty presently requires. There should be a separate penalty phase and a guilt phase. You can't do it now where all life is life without parole. But that it should be a very special sentence. It's funny because those who are against us retributivists for whom the past counts and counts independently of future benefits – [those who] say 'abolish the death penalty and instead embrace life without parole,' don't realize that life without parole is a fundamentally retributive sentence. Because it says 'No matter how much you mature, no matter how much you acquire skills and values that enable you to become a productive member of society, no matter how much you may feel legitimate and genuine remorse about what you've done, we so commit ourselves at this moment to forever keeping you imprisoned that we will never revisit, we will never reconsider. Because the past will count perpetually.' [Life without parole] is essentially a retributive sentence. So if you're going to reject retribution, then you should be rejecting life without parole as an alternative sentence. That's why this slippery-slope argument I heard before [in this hearing] I think is genuine.

The ACLU, for example, when I've confronted them in public discussion, 'If the [United States] abolish the death penalty, will you then also now next oppose life without parole?' [They] have implicitly conceded that yes, they will. And you hear that we should follow Europe's lead. Let's not forget that Europe has abolished not only the death penalty -- and that's the Governments of Europe; the people still support it in most European countries -- they have not only abolished the death penalty, they've abolished life without parole. They've abolished life in prison as well as death.

Rep. Barbin: All right. And does any other State, including Connecticut, have a C and D category where they're separate from, right now, our life without parole allows people to be basically general population prisoners. Does any State have a category that keeps the life without parole prisoners in a more restrictive setting?

Prof. Blecker: Not to the best of my knowledge.

Rep. Barbin: All right. Thank you, and I appreciate your non-political correct

answers.

Chairman Petrarca: Thank you, Professor. I appreciate your time and testimony.

Written testimony of Prof. Robert Blecker, a post-hearing addendum:

On June 11, I appreciated the opportunity to testify before the judiciary committee and attend that day's hearings. My written submission essentially outlined reforms to Pennsylvania's capital statute, in order to make it fairer and more focused upon the worst of the worst. For those who found my oral testimony about daily life for well-behaved murderers inside Graterford, disturbing or enlightening, and might want to use it to support legislative reform, I've submitted a corrected transcript.

A few days after testifying, reflecting on my 2 days investigating daily life inside Graterford immediately preceding the hearing, the significance of a scene I'd witnessed when I returned the second day to the Great Field near the end of the recreation period -- finally struck me. Thus these additional comments as a post-script to my oral testimony:

I visited the Great Field that second time with only ten or fifteen minutes officially left in the recreation period. The vast field nearly empty. In the distant corner basketball players still played, and along the wall a handball game continued, fiercely contested. But what struck me, mostly: How hundreds of prisoners hung out around the stairway, chatting and waiting to be checked back through the entrance to get back inside, surrounding us as we walked down the stairs onto the field.

Only on reflection do I now realize that scene's significance. Although recreation period was not yet over, 90% of the hundreds of inmates had had enough. No one was forcing them in. These convicted murderers, serving life without parole, had more than enough time playing – they were apparently tired and looking forward to going in, for a nice refreshing shower or something else they preferred even to play.

Can you imagine the hopelessness --being around your buddies and playing outside or inside several hours a day? You tell me with a straight face, "Life inside Graterford is worse than death."

The standard corrections counter argument: "They don't come here FOR punishment – their being here is punishment." Other witnesses support that: "Being locked up, with all the indignities of prison life constitutes a most severe punishment." But that can't be true.

Consider pre-trial detention, where prisoners are presumed innocent. Inmates are strip searched, visits are limited – reading material censored, etc. Yet in leading case of *Wolfish*, the U.S. Supreme Court upheld these restrictions as Constitutional precisely because they were NOT punishment:

**In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due**

**process of law. Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense**, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'

This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.

One last word. How should we respond to those who insist the legislature should entirely defer to Corrections from mission to administration? Even as the U.S. Supreme Court itself deferred to Corrections, in *Wolfish*, the leading case, it disagreed: “[T]he operation of our correctional facilities is peculiarly the province of the *Legislative* and Executive Branches of our Government, not the Judicial.” (emph. added)

## **STATEMENT OF PROF. ROBERT BLECKER TO ACCOMPANY ORAL TESTIMONY RE PENNSYLVANIA AND THE DEATH PENALTY JUNE 11, 2015**

### **1. PENNSYLVANIA SHOULD LEGISLATIVELY RETAIN THE DEATH PENALTY INDEPENDENTLY OF WHETHER THE JUDICIARY (STATE OR FEDERAL) AND/OR THE GOVERNOR BLOCKS OR RETARDS EXECUTIONS.**

Pennsylvania, presently one of 31 states with a death penalty statute, actively secures death sentences, and maintains a death row. But the Governor and judiciary seem perpetually to block executions. You may ask, then, why bother with the extra effort and expense involved with prosecuting capital and maintaining a death row? Why not join those other states and European countries that have abandoned death as punishment? Why not simply abolish the death penalty, substitute Life Without Parole for the worst of the worst and thereby avoid the extra expense and delay, while eliminating the possibility of executing an innocent person?

Several classic justifications for punishment itself may challenge capital punishment. While an execution unquestionably permanently and more certainly **incapacitates** a dangerous killer than does any prison, the U.S. Supreme Court has held that incapacitation alone may not justify death as punishment. We have the ability and obligation to construct and maintain prisons to keep us safe from those who might otherwise continue to threaten us.

**Rehabilitation** obviously plays little part in the design or implementation of death as punishment. Death row operates on the assumption that the penalty may be carried out. Corrections does not, nor should they consciously attempt to impart skills and values to a condemned killer who presumably will never be released.

**Deterrence:** Although logic and human nature strongly suggest that the threat of death as punishment *should* be a superior deterrent to those would-be killers who plan their murders and calculate costs vs benefits, or those who especially value their own lives above their liberty, statistical studies fail to confirm it conclusively. I have interviewed killers who in Virginia allowed their victims to live in order to avoid facing death there, but did murder similarly situated victims in Washington D.C. because they didn't fear the prison life that awaited them if caught and convicted. For me, however, and I hope the majority of the legislature, deterrence could not provide ultimate support for death as punishment. As Immanuel Kant attacked deterrence – if we execute X to change Y's behavior, we are using X as a means to our ends and not respecting his innate human dignity.

This leaves **retribution** -- as the only sufficient justification for the death penalty, and a moral imperative at that. For the worst of the worst of the worst, death -- and death alone -- becomes the only punishment that fits the crime.

The U.S. Supreme Court has held that a state legislature must guide a capital jury's discretion by listing in advance aggravating circumstances. And it must also allow the murderer to present all relevant mitigating circumstances. Pennsylvania does this, but its death penalty statute could use some moral refinement. Based on hundreds of hours interviewing convicted and condemned killers in several states these past three decades, my crime and punishment memoir, *THE DEATH OF PUNISHMENT: Searching for Justice Among the Worst of the Worst* offers a model death penalty statute. (See Appendix B attached).

Ideally, someday the Pennsylvania legislature will substantially overhaul and refine its statute to more nearly capture only the worst of the worst of the worst along the lines the Model statute suggests. Short of that and in the meantime, this committee could suggest a few essential modifications of the current statute.

## **PROPOSED REFORMS TO PENNSYLVANIA'S DEATH PENALTY IN ORDER TO MORALLY REFINE IT.**

While reasonable minds differ on the exact definition of the most heinous crimes and criminals, and the best procedure for determining when and whether to impose a sentence of death, based on my detailed studies of the lives of convicted and condemned murderers inside and outside prison, and procedures adopted in other states, I would recommend at least these few changes in Pennsylvania's current statute:

### **I. AGGRAVATING CIRCUMSTANCES MODIFIED**

#### **The current statute:**

**(d) Aggravating circumstances** -- Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, . . . judge, (deputy) attorney general, (assistant) district attorney, member of the General Assembly, (Lieutenant) Governor, State, local, Federal law enforcement official or person . . assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties . .

#### **Proposed modification: Add jurors, delete "informants".**

While the above list seems fairly comprehensive, basing the aggravator on the assumption that officials (and those assisting them in)serving the public good deserve additional protection when they act in their official capacity, the statute glaringly omits as specially deserving death, those who kill jurors to prevent a

verdict or in retaliation.

**Current statute:**

**(15)** At the time of the killing, the victim was or had been a nongovernmental informant . . and the killing was in retaliation for the victim's activities as a nongovernmental informant.

**Comment:** Although informants or co-felons who cooperate with prosecutors and turn on their criminal colleagues deserve witness protection, they should not be singled out as victims whose killers specially deserve to die.

**(5)** The victim was a **prosecution witness** to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

**Recommendation: Distinguish between the innocent witness and the snitch.** All other things equal, a robber deserves to die who kills an innocent and unresisting victim or kills a person who happens to witness the crime and thereafter bravely testifies in order to do his civic duty. This selfish, callous killer merits greater punishment than a robber who kills his former colleague who has cut a deal with the government, and perhaps exaggerates the part others played, in order to diminish his own culpability and punishment. A morally refined death penalty statute should distinguish between killing an innocent witness and killing a "snitch."

**Current statute:**

**(13)** The defendant committed the killing or was an accomplice in the killing . . while in the perpetration of a felony under the . . Controlled Substance, Drug, Device and Cosmetic Act.

**(14)** At the time of the killing, the victim was . . involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance . . and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

**Recommendation: Eliminate these drug aggravators.** In the same spirit as above, where criminals in the drug game voluntarily enter that violent world and suffer the consequences, others who play by the same set of deadly rules deserve to be treated as common killers, but that their murders stem from drugs hardly makes them even worse.

**Current statute:**

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

**Proposed modification: Carefully define killing from greed or a pecuniary motive.** A killer's **motive** can aggravate a killing, and sometimes will overlap with other aggravating circumstances. But the current statutory aggravator above too indiscriminately equates the worst with the less culpable. **A pecuniary motive** does, all other things equal, elevate a murderer's culpability. But there's a huge moral difference between a killer who hires himself out routinely to kill anybody for a living, and an abused and otherwise helpless spouse who hires him.

The statutory aggravator should be rewritten as "killing from a pecuniary motive" and should specifically include a paid assassin and a person who hired him to collect life insurance or an inheritance, while excluding an abused victim.

**Motives can aggravate.** Thus the statute should **add bias** – e.g. the condemned killed because of the victim's race, religion, national origin, sexual orientation, or gender identity.

**Current statute:**

(6) The defendant committed a killing while in the perpetration of a felony.

**Recommendations: Abolish the felony murder aggravator.** Felony-murder, which aggravates a killing because it happened in the course of a felony is hardly justifiable. Such killings need not be, of themselves more heinous. THE DEATH OF PUNISHMENT documents several situations where an unwitting or dim-witted "accomplice" to a robbery without any active intent to kill or real involvement in the killing suddenly becomes a (death-eligible) felony murderer. Robbery may have unjustifiably put more people on death rows in the U.S. than any other single aggravator. It is long since time to eliminate felony murder, and with it the capital felony murder aggravator.

Robbers almost always rob from a pecuniary motive, but rarely kill from one. Since robbery highly correlates with class and economic circumstance which itself correlates with race, a further benefit from eliminating the felony aggravator will be to **diminish the racial disparity** between blacks and whites capitally condemned.

**Continue rape and sexual abuse** as aggravators – not because they're felonies, but because they constitute **torture**.

(8) The offense was committed by means of torture [**"or was otherwise especially heinous, atrocious or cruel."**]

**Recommendation: Define torture:** Torture includes the infliction of physical or mental pain and suffering beyond what was necessary to kill. Rape or other violent sexual abuse constitutes torture.

**Comment:** The especially heinous atrocious or cruel [HAC] aggravator – or its kindred “especially calloused or depraved” – must be included as an aggravator in any morally refined statute. But the aggravator itself poses a special danger that a jury will find every and any murder qualifying. Special instructions should emphasize to the jury that the vast majority of murders should not qualify under this aggravator – only the worst of the worst.

**Current statute:**

- (10) The defendant [was serving a sentence of] **life imprisonment** at the time of the commission of the offense.

**Recommendation: Drop the Lifer aggravator.** The common justification for making lifers who kill again death eligible – that they have “nothing to lose” and are otherwise undeterable -- simply distorts reality. In fact, generally inside prison, lifers are a most determable class with the most to lose. If they kill again inside they know they face a certain loss of privileges accumulated over years, a privileged life style and status inside, along with a term in punitive segregation, often followed by transfer to a remote prison where family and friends can no longer visit. I know of lifers inside who virtually “had” to kill again for reasons that hardly constituted the worst of the worst.

**Current statute:**

- (16) The victim was a child under 12 years of age.

**Recommendation: Add other especially vulnerable victims.** Cowardice, all other things equal, elevates culpability. A young victim’s vulnerability, more than her youth, aggravates. Perhaps the aggravator should read: “The victim was especially vulnerable because of age, or physical or mental condition.”

**Recommendation: Permit non-statutory aggravators.** No legislature can exhaustively list all mitigating circumstances in advance; so too legislative wisdom cannot fully foresee much less adequately define in advance all aggravating circumstances. A revised statute should join other states in permitting the prosecution to introduce additional non-statutory aggravating circumstances provided it has established at least one statutory aggravator.

## II. CERTAINTY, DOUBT & BURDENS OF PERSUASION

Pennsylvania's statute currently reads:

§ 9711. Sentencing procedure for murder of the first degree.

**C(iv)** The verdict **must** be a sentence of **death** if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury **unanimously finds** one or more aggravating circumstances which outweigh any mitigating circumstances. The **verdict must be a sentence of life imprisonment in all other cases.** [emph. added]

The U.S. Supreme Court has held that the Constitution's 8<sup>th</sup> Amendment prohibition of cruel and unusual punishment also prohibits a mandatory death penalty. No jury may be compelled or commanded to automatically find death, no matter how heinous the crime. A state must allow relevant mitigating circumstances – never completely specifiable in advance – to move a jury to spare a convicted murderer who has committed the worst imaginable murder.

While statutes such as Pennsylvania's have passed Constitutional muster, because they allow for relevant mitigating circumstances to offset aggravating circumstances, they are still morally flawed in my view. Pennsylvania should require a greater or different kind of certainty before *condemning* a person to die than it requires before *convicting* him of Murder 1<sup>st</sup>.

In short, although a jury may have found that aggravating circumstances outweigh mitigating circumstances:

- a. That jury may have a **residual or lingering doubt** about the convicted murderer's guilt. Although they correctly *convicted* him based on proof beyond a *reasonable* doubt that he did it, they might well be justified in sparing his life based upon a *real but unreasonable doubt* of his guilt. Sometimes called a *lingering doubt*, or *residual doubt* – a juror may not be able to give a reason for it, but intuitively or non-rationally, s/he just isn't sure. This doubt has no place in the guilt phase, but it ought to count in the penalty phase.
- b. That jury may not be **convinced to a moral certainty that the convicted first degree murderer deserves to die**. Notwithstanding that they have no reasonable or residual doubts of his guilt, unless a jury feels morally certain that he deserves to die, they should spare the convicted 1<sup>st</sup> degree murderer.

The question at the guilt phase is purely empirical – a question of fact: Did he do it? At the penalty phase, however, the jury must answer a question of a different dimension – what does he deserve? The statute should reflect and respect that

added, different dimension. It falls short, also by merely requiring aggravating circumstances to "outweigh" mitigating circumstances. It should respect the greater burden here, in my view, by requiring the aggravators to ***substantially (or clearly) outweigh*** mitigating circumstances.

Offsetting this higher threshold of proof, the statute should ***eliminate the requirement of unanimity*** and provide that ten of twelve jurors voting death should constitute a death sentence. Otherwise it's life. Ten twelfths clearly constitutes a moral consensus of the jury and protects against one or two "stealth jurors" who have dishonestly promised to keep an open mind but secretly refuse to seriously consider the death penalty.

If the U.S. Supreme Court in the future holds that the Constitution demands a unanimous jury to sentence to death, then the statute should provide, as some other states do, that a non-unanimous jury results in a new penalty phase before a new jury.

### **III. LIFE AND DEATH AS PUNISHMENT: CORRECTIONS' MISSION**

Traditionally, the Legislature defines crimes as more or less serious, and attaches corresponding punishments or punishment ranges as proportionate responses, based upon its views of the appropriate mix of punishment's justifications: Retribution, Deterrence, Incapacitation, Rehabilitation and Denunciation.

It can and should do more.

While Corrections, as part of the Executive branch of government, administers the prisons -- including death row -- and regulates a prisoner's daily life inside, its basic mission statement essentially guides Corrections.

Corrections officers from top to bottom point to their official mission statement to justify their administration of prison life. Pennsylvania's Department of Corrections web-site proclaims its mission:

Our mission is to reduce criminal behavior by providing individualized treatment and education to offenders, resulting in successful community reintegration through accountability and positive change.

Notice, **there is no stated goal of punishment.** "Accountability" comes closest but is vague at best, and mostly meaningless. How will Corrections hold a condemned killer or rapist "accountable"? No differently than it holds any other prisoner accountable. By demanding they be well-behaved inside prison.

The death penalty and only the death penalty provides a clear response: We take his life. But what of those other convicted 1<sup>st</sup> degree murderers, barely spared the death penalty but sentenced to life without parole? They have committed the worst crimes, they have faced the worst possible punishment, and have in fact been sentenced to a unique, second worst punishment. What of those condemned killers

who live out their lives on Death Row? Do their actual experiences inside prison, whether as condemned killers or convicted first degree murderers serving life without parole, match the seriousness of their crime? No – if Pennsylvania resembles Oklahoma, Florida, Tennessee, Connecticut, Illinois and other states I've visited.

As counterintuitive as this sounds, my experience has shown me that inside prisons generally, it's nobody's job to punish.

"What a man did out there is none of my business," officers from top to bottom have assured me. "I only care how he behaves once he's inside." Dividing prisons into maximum, medium, and minimum *security* clearly demonstrates an overwhelming concern with safety and future dangerousness, and little concern with just deserts. Thus, essentially guided by a mission statement that disavows punishment, Corrections severs the crime from the punishment.

The Pennsylvania legislature can and should change this. It should enact a corrections mission statement somewhat as follows:

#### **A MODEL CORRECTIONS MISSION STATEMENT**

The Department of Corrections shall maintain safe and secure facilities that restrict prisoners' liberty more or less according to the seriousness of their crimes as well as the threat of future harm they pose, and the prospects for their rehabilitation.

The Department of Corrections shall protect the public, protect staff and provide humane supervision of prisoners with opportunities and programs that meaningfully support successful community re-integration for those offenders sentenced to a term of years or life with a possibility of release.

For those prisoners sentenced to Death or Life Without Parole, however, the Department shall administer *punishment* – an unpleasant, restrictive, daily regimen designed to continually convey Society's strong censure of the crime and the criminal.

**IV HOW SHOULD WE KILL?** Whether or not the legislature refines its statute to decide with greater moral precision whom to capitally punish, it still must face the question of *how* to execute those who deserve to die. Currently every state with a death penalty employs lethal injection as its primary method; and every state faces a shortage of drugs occasioned by economic coercion of abolitionists who prevent the supply of proven chemicals while they legally challenge untested chemicals. That method has been challenged before the U.S. Supreme Court. A decision is due soon.

I have long opposed lethal injection. I witnessed an execution, watching the condemned die on a gurney, wrapped in white sheets with an IV in his veins,

surrounded by his closest kin, monitored by sophisticated medical devices and personnel. It all appeared and seemed so medical. Witnessing that execution, I shuddered. It felt too much like a hospital or hospice where I watched my father-in-law die mercifully.

How we kill those we condemn should in no way resemble how we kill those we love. We have reached the point of obliterating a clear line between treating the sick and punishing the heinous. So, I too condemn lethal injection, not because it might cause pain but because it certainly causes confusion, wantonly merging punishment and treatment, arbitrarily severing crime from punishment, pain from justice.

Oklahoma, in the forefront of this controversy, has just adopted nitrogen gas as its fallback method. Pennsylvania, too, should adopt a method other than lethal injection ideally as its primary, but at the very least as a contingent method. But nitrogen gas launches the condemned into eternity or oblivion on a carpet slipper high.

A firing squad offers us the best – most honest and foolproof method. No botched firing squad executions have been documented in modern times or are there likely to be. Furthermore, execution by firing squad cannot be confused for something else – it is a punishment, a punishment of death, plain and simple.

## **V. THE DEATH PENALTY STATUTE'S VITAL FUNCTIONS: DECENCY & DENUNCIATION**

The U.S. Supreme Court's modern jurisprudence emphasizes that "evolving standards of decency of a maturing society" will largely determine the content and limits of the 8<sup>th</sup> Amendment's prohibition of cruel and unusual punishment. Accordingly, citing widespread social rejection, a majority of the Court has struck down capital punishment for those who murdered when less than 18; for defendants suffering from mental retardation; and for heinous criminals including rapists and mutilators whose victims miraculously lived.

The Court measures this dispositive national moral consensus primarily by a yardstick of jury verdicts and especially state statutes. It takes legislation as the product of the people's representatives. The Court's current and even more controversial yardstick has become **the direction of change**. Abolitionists on the Court emphasize that several states have recently *legislatively abolished* the death penalty while no states have reinstated it.

A legislature convinced that death sometimes constitutes the only just punishment, although currently effectively blocked by an abolitionist Governor and hostile judiciary, should not -- must not abolish the death penalty unless it wishes to give the U.S. Supreme Court further grounds for declaring the penalty itself unconstitutional across the United States. Thus if the people of Pennsylvania support the death penalty, although currently blocked from implementing it, they

owe it to the people of other states not to aid and abet the U.S. Supreme Court in frustrating the will of the people.

**Censure and Denunciation.** Separate from its retributive function as deserved punishment, the death penalty, whether implemented or not serves another vital function. A jury's decision for death formally *denounces* the criminal in the strongest possible terms. Condemned killers have told me that separate from the odds that they will be executed, that moment when a unanimous jury formally wished them dead still stings years later. For those of us who feel certain, intuitively, emotionally, morally that some people deserve to die, the death penalty alone allows us a solemn occasion to express our sense of deep community with the slain – never to forgive, never to forget.

This legislature must continue to do what it can to make the punishment fit the crime.



**R. B.** **E.** **B.** **L.** **E.** **C.** **K.** **R.**  
a criminal law professor at New York Law School and leading expert, was the subject of the feature and TV documentary *Robert Blecker Wants Me Dead*. He formerly prosecuted corruption in New York's criminal justice system as a Special Assistant Attorney General and has been the sole keynote speaker supporting the death penalty at several major national and international conferences. A Harvard Law School graduate and postgraduate Harvard fellow in Law and Humanities, Blecker wrote a stage play, *Vote NOI*, which premiered at the Kennedy Center. Profiled by *The New York Times* and *The Washington Post*, and the subject of a *USA Today* cover story, Blecker frequently comments for national media. He lives in New York.

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## MAKING THE PUNISHMENT FIT THE CRIME

# THE DEATH OF PUNISHMENT

SEARCHING FOR JUSTICE  
AMONG THE  
WORST OF THE WORST

ROBERT BLECKER

THE DEATH OF PUNISHMENT

ROBERT  
BLECKER



**THE DEATH PENALTY CONTINUES** to divide America. Whichever way you come out—and this book shows why the most vicious murderers deserve to die—the hidden question beneath that controversy surfaces: What kind of *life* do these predators deserve? Robert Blecker believes the past counts. For 12 years Blecker, a criminal law professor and leading retrouvist, wandered freely inside Lorton Central Prison—armed only with cigarettes, a tape recorder, and the prisoners' trust—and probed the lives of street criminals. After another decade visiting death rows and prisons around the country, speaking with convicted killers and those who guard them, Blecker saw a perverse reality hidden from the public: In today's prisons, the worst criminals often live the best lives. Inside prison, it's nobody's job to punish. *The Death of Punishment* explores the implications of this discovery, arguing that we fail to punish the worst criminals at our own peril. Blecker offers a much-needed blueprint for a more appropriate life of punishment. He urges America not to follow Europe's path, where guards must knock and murderers get unemployment insurance and paid vacations. With a seemingly endless stream of gruesome crimes in the headlines and public opinion starkly divided about what to do to those who prey on us, Blecker combines the reality of prison and street life with the wisdom of ancient philosophers to challenge criminal justice policy and move this ageless debate to new and higher ground.

# APPENDIX A

## COUNTERING THE ABOLITIONISTS

### THEIR ARGUMENTS, OUR REPLIES

FOR CENTURIES, BOTH SIDES HAVE THRASHED IT OUT, EVEN AS they complain there's nothing more to be said about capital punishment. But this topic has hardly been exhausted. We just feel exhausted hearing the same arguments over and over. Below, find ten common attacks on death as punishment and effective counters. Instead of rehashing what has been said, let's move the conversation forward beyond these.

#### 1. HYPOCRISY

We say "Thou shalt not kill," and yet we kill. Many variations and bumper stickers: "Why kill to show killing is wrong?" We devalue life by taking it. The state adds another murder with capital punishment. So-called right-to-lifers display inconsistency if not hypocrisy when they oppose abortion yet support the death penalty. All human life is sacred.

##### *Countering the Claim*

Sometimes only by killing the worst killers can we achieve justice. Far from hypocrisy, responding in kind connects us to our deepest intuitions. Metaphors illuminate our instinct for justice: "Fight fire with fire. Give a person a taste of her own medicine." Retribution, the conscious return of pain for pain—literally "payback"—partakes of a deeper human instinct developed into systems of punishment and reward. We celebrate by repaying pleasure with pleasure. We punish by inflicting pain. The claim of hypocrisy proves too much: By imprisoning kidnappers, do we devalue liberty? And when we fine a thief, do we devalue property? Sometimes only death as punishment, a like-kind response to murder, accomplishes justice. Besides, "thou shalt not kill" mis-translates the Bible, which really commands "thou shalt not commit murder." Right-to-lifers who support the death penalty emphasize the sanctity of *innocent* human life.

For those in the pro-choice movement who support a woman's right to kill an innocent unborn child, yet oppose society's right to kill an adult vicious predator, whose life is sacred?

## 2. HUMAN DIGNITY

- a. Religious: Who are we, mere mortals, to judge? Only God has the right to take life. We can count on justice in the next world.

### *Countering the Claim*

If God does work justice in the next world, it will be the only true justice. But constitutionally in this secular society, we separate church and state. We commit ourselves to pursue justice in this world as if this is all there is.

- b. Secular: Intentionally putting to death a person who does not immediately threaten us violates human dignity.

### *Countering the Claim*

We death penalty proponents claim human dignity as our primary focus. By taking the killer's life, we acknowledge and keep alive the *victim's* dignity—her voice, her memory. Beyond that, we essentially acknowledge the killer's dignity by holding him responsible and punishing him. We take his liberty, then forfeit his life as something of great value. Those who would substitute life without parole for the death penalty fail to acknowledge the full value of the killer's—and more importantly, the victim's—life. Abolitionists who would "throw away the key" cease to care about the killer as a human being whom we continue to care about. If he is sane, adult, and fully responsible, we want him fully punished. We want him dead.

## 3. MISTAKE

To err is human: Any government program, designed by politicians, administered by bureaucrats, will inevitably execute innocent people. All other punishments can be reversed once we discover error. We cannot afford to take the risk that the government may execute innocent people. One innocent person executed condemns this unnecessary punishment as morally despicable.

### *Countering the Claim*

We constantly and unnecessarily endanger our own lives and our families as we drive cars and cross streets. Many times a day, we risk the lives of those we love for the sake of convenience. Surely then, we will occasionally risk the lives of those we detest for the sake of justice.

Killing an innocent person remains our criminal justice system's worst nightmare. Thus, true retributivists join in supporting the mission of the Innocence Project. Ironically, the prospect of death radically reduces the odds of mistake, calling forth advocates for the accused while lifers rot in prison largely unattended. Our best and brightest—pro bono attorneys from big law firms with endless assets—zealously defend those sentenced to death. Death as punishment should require extraordinary burdens of persuasion: no lingering doubt of guilt and a moral certainty that death

is deserved. We should refine our capital statutes and continue to make extraordinary efforts to reduce factual error to near zero; at the same time, we insist that not all mistakes are equally tragic. In the end, we must risk a minuscule possibility of error for the near certainty of justice.

#### 4. EXPENSE

The Death Penalty costs way too much. It drains budgets. No rational person can defend the unnecessary, astronomical expense of investigation, trial, appellate litigation, and maintaining death row. That money could be put to much better purposes, such as crime prevention and victim compensation.

##### *Countering the Claim*

The people who complain about expense increase it. Much can be trimmed. Of course, if abolitionists grind the system to a standstill by frivolous appeals, the cost per execution becomes infinite. Intuition tells us it should be cheaper to kill a prisoner than to cage him for life. But studies standardly confirm that super due-process does cost more. Those studies rarely include the hundreds of thousands of dollars in trial and appellate costs saved each time an accused aggravated murderer pleads guilty and accepts life without parole to avoid the death penalty. Nor do opponents typically include the increasing geriatric costs society faces as the lifer population ages. Punishment, however, should never be measured or meted out according to economic expediency. In the end, it may cost more to punish more severely. Who ever said justice was cheap?

#### 5. DETERRENCE

##### a. The death penalty deters no one from murder.

##### *Countering the Claim*

Of course it does. Employing this simple, silly argument, abolitionists make it more difficult on themselves. Both life and death as punishment deter imperfectly. "Capital punishment has obviously failed as a deterrent when a murder is committed," declared the Royal Commission: "We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged."<sup>21</sup>

##### b. The death penalty deters no better than life without parole. Abolitionists need only show that death does not deter more effectively than life without parole. All other things equal, the less punishment the better. Many leading, sophisticated, statistical studies show death deters no better than life in prison. The statistical case has never been made. No evidence exists for the death penalty as a superior deterrent.

##### *Countering the Claim*

Human nature, "the whole experience of mankind," suggests otherwise, countered Fitzjames Stephen, the great jurist and historian of the criminal law (Palgrave 1883). It's difficult to demonstrate that death most "effectually" deters simply because it is "in [it]self more obvious than any proof can make it.... All that a man has will he give

for his life." In prison, "however terrible, there's hope."<sup>2</sup> The "no evidence" hyperbole should not be taken seriously. I know of killers who killed in Washington, DC, but not in neighboring Virginia or Maryland solely because those states had the death penalty. Other anecdotes support this. Of course suicide bombers and other self-destructive murderers can't be deterred, nor can many passion killings. But common sense dictates that, on balance, the terror of death exerts a superior deterrent effect, also subconsciously "building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder."<sup>3</sup>

Logically, psychologically, anecdotally, and perhaps statistically, death remains the more effective deterrent than life. Besides, polls show the vast majority—supporters and opponents—don't find deterrence their primary issue.

#### 6. THE COMPANY WE KEEP

Why is the United States the only democracy with the death penalty? Are we proud of the company we keep? Iran, North Korea, China. Those who largely share our values, such as Europe, Canada, and Australia, reject the death penalty as barbaric. Why should the United States not follow Europe's lead and abolish capital punishment?

##### *Countering the Claim*

We also associate ourselves with Japan, India, and much of the Caribbean. In a democracy, the popular will of the electorate should translate directly into law. Yet every European country abolished the death penalty in the teeth of overwhelming *popular support* for it. In Poland, support still hovers around 75–80 percent. Somewhere around half the Canadian people, after all the education and shaming, still support the death penalty. A majority of the British still support the death penalty, as do the Czechs. European *elites* overwhelmingly oppose the death penalty. They've also managed to abolish life without parole, allowing mass murderers like Anders Breivik to be sentenced to 21 years for killing 77 people. Bottom line: Today, the United States stands as the only leading Western democracy still acting like a Western democracy on this issue. In any case, if the European Union fractures, some parts of Europe will rejoin us.

#### 7. APPARENT MAJORITY SUPPORT

It vanishes in the United States, polls show, when the people are given the specific option of life without parole. The public, when it really considers the alternative, does not clearly support the death penalty.

##### *Countering the Claim*

The standard poll question, "Which do you prefer for murder, the death penalty or life in prison with absolutely no possibility of parole?" doubly elevates support for life. Most citizens equate "absolutely no possibility of parole" with "absolutely no possibility of release." But a future governor may commute the LWOP sentence; a future legislature or court may follow Europe's lead and abolish life without parole as unconstitutional. The poll question also fails to make plain a real aggravated murder and/or the real nature of the alternative. Suppose instead we asked: "Which do you prefer for a serial killer who rapes and murders children: death, or a life watching television, playing sports, going to therapy and arts and crafts with free medical care inside prison?"

## 8. A LIVING HELL

- a. Death row is torture. Prisoners constantly suffer while waiting to be executed.

*Countering the Claim*

Life on the Row day to day often feels no worse and sometimes much better than life inside general population. Prisoners have an incentive to behave; a group ethos prevails. The condemned use standard psychological coping mechanisms to make life on the Row more pleasant.

- b. Life inside is worse than death. The prisoner dies one day at a time. He is sentenced effectively to life and death in prison.

*Countering the Claim*

Clever rhetoric, replacing the obviously ridiculous "death by prison." Lifers give the lie to the claim: LWOPers generally thrive in general population, often living the most privileged lives inside. Few lifers commit suicide, although they can. Give us this day our daily day. Inside or out, we all live until we die.

## 9. RACISM

- a. Disproportionate representation of blacks on the Row. Black males make up 6 percent of the population and more than 40 percent of the Row.

*Countering the Claim*

Blacks commit a disproportionate number of death-eligible killings but constitute a smaller proportion of the most despicable killers. The discriminatory effect of black overrepresentation on death row rarely results from discriminatory intent. Robbery, the most common aggravator, correlates heavily with race and class. As Justice John Paul Stevens famously observed, confine the death penalty to the most culpable only, and the disparate racial effect largely disappears. Refine and redefine the death penalty. Get rid of the felony murder aggravator.

- b. The death penalty devalues black life. The death penalty is more likely for a black defendant and much less likely where the victim is African American.

*Countering the Claim*

The race of the killer will not dictate the odds of his getting death. Studies almost uniformly confirm it: This most pernicious racial discrimination has long since disappeared. A black defendant is no more likely (and probably slightly less likely) to be sentenced to die than his similarly situated white counterpart. But studies consistently show that juries sentence killers of black victims to death less often. That hardly proves racism. Most black victim cases involve black killers, and most of those take place in counties where prosecutors rarely seek the death penalty. An inner-city black victim's family opposes death typically because they continue to see worth in all black life, including the killer's. Within a given county, it generally makes no difference if the victim is black or white. The race disparity turns into a geographical effect with

different counties' prosecutors going for death at different rates under the same state law. Whether states should impose uniform capital prosecutions across counties remains an open question. The real but hidden racism discriminates against skin tone and stereotypical African features. This pernicious bias infects the black as well as white community and skews the entire criminal justice system.

#### 10. IT'S JUST WRONG

Argue all you like, we're still sure.

##### *Countering the Claim*

At last we reach common ground. We too feel just as certain. Although intuitions drive us to opposite conclusions, we agree that feelings matter. And moral facts exist. It's always wrong to kill unnecessarily. But where they deserve to die, killing the worst among us becomes a *just* wrong.

# APPENDIX B

## A MODEL DEATH PENALTY (PERMANENT PUNITIVE SEGREGATION) STATUTE

JUSTICE ALWAYS REMAINS A WORK IN PROGRESS. STANDARDS OF decency continue to evolve and not always toward greater leniency. My proposed model statute builds on centuries of others' insights that underlie my decades investigating and testifying. This blueprint surely can and should be refined, but I'm convinced it improves on current statutes. This proposed statute *eliminates* some standard aggravators—notably felony murder and premeditation—in order to more clearly isolate and *punish* most severely *only the worst of the worst*. Should legislatures adopt some variation of this statute, moral logic dictates they reevaluate those condemned presently on death row. Governors should commute to life without parole those condemned whose murders do not meet these criteria. The rest should be executed more quickly, worst first.

### AGGRAVATED FIRST-DEGREE MURDER

Whoever intentionally or with a depraved indifference to human life kills another human being with one or more of the following aggravating circumstances commits Aggravated First-Degree Murder and is thereby eligible for a punishment of death [or Permanent Punitive Segregation—PPS]. A convicted murderer can only be condemned to die [or PPS] if a unanimous jury finds at least one of the following aggravating circumstances beyond a reasonable doubt:

#### I. AGGRAVATING CIRCUMSTANCES

A. The killing was especially heinous, atrocious, or cruel. This includes but is not limited to situations where:

1. The killer exhibited pleasure in inflicting extended pain and suffering, or
2. The victim was tortured before being killed. Torture includes the infliction of physical or mental pain and suffering beyond what is necessary to kill. Rape or other violent sexual abuse constitutes torture.

- B. The victim was especially vulnerable because of age or physical or mental condition.
- C. The murderer killed law enforcement or emergency medical personnel because of that status. This includes jurors, prosecutors, and judges as victims killed to prevent a verdict or to retaliate.
- D. The murderer was a serial killer. A serial killer has killed or attempted to kill a total of three or more people on three or more unrelated occasions.
- E. The killing constituted mass murder (i.e., the defendant killed four or more victims in a single incident).
- F. The killer was a contract killer or paid assassin.

**II. AGGRAVATING MOTIVES** may sometimes overlap with aggravating circumstances. But the jury may specifically find any of several motives that alone shall aggravate the murder and may make it death [or PPS] eligible. Each motive includes but is not limited to primary examples that follow it.

- A. **PECUNIARY:** The killer was a paid assassin or otherwise killed primarily for pecuniary gain.
- B. **GREED:** The murderer had the victim killed to collect insurance or inheritance.
- C. **BIAS:** The murderer killed because of the victim's race, religion, national origin, sexual orientation, gender identity, or expression.
- D. **EXTRAORDINARY SELFISHNESS:** The defendant killed an unresisting robbery victim or person who happened to witness the defendant's crime.
- E. **CALLOUSNESS:** The killer knowingly endangered several persons. (This particularly applies to terrorists and mass murderers.)
- F. **SADISM:** The killer relished inflicting pain.

#### THE PENALTY PHASE

**PURPOSE:** To present all relevant mitigating and any other aggravating factors revealing the killer's character or circumstances of the offense that may move a jury to spare or condemn. *Experience demonstrates that we can never completely list in advance the nature or weight of all morally relevant aggravators and mitigators.*

In the penalty phase, each side shall have great leeway to present evidence. Only if the judge finds the evidence irrelevant beyond a reasonable doubt shall he or she exclude it. The rules of evidence shall not apply during the penalty phase.

#### BURDEN OF PERSUASION IN THE PENALTY PHASE:

A jury may sentence the defendant to death [or PPS] only if:

- A. At least 10 of 12 jurors are convinced with no residual or lingering doubt of the convicted murderer's guilt of aggravated first-degree murder,
- B. Upon full and fair consideration, these 10 jurors agree beyond a reasonable doubt that aggravating circumstances clearly outweigh mitigating circumstances, and
- C. These jurors are convinced to a *moral certainty* that the convicted murderer deserves death [or PPS].

But if upon full and fair consideration of the character of the convicted murderer and circumstances of the murder a unanimous jury concludes with no residual or lingering

doubt that he did it, and to a moral certainty that he deserves it, they must sentence that convicted murderer to death [or PPS].

During the penalty phase, the defense may renew its challenge to facts the jury has already found beyond a reasonable doubt by its guilty verdict. The jury shall be specifically instructed that, although it already found all facts necessary to convict the defendant of first-degree murder beyond a reasonable doubt, it may yet have a lingering doubt about the defendant's guilt and the facts on which they rest. The judge shall also instruct the jury that, notwithstanding their certainty of guilt, they may have a moral doubt about the appropriate punishment.

#### MITIGATING CIRCUMSTANCES

Mitigating circumstances include but are not limited to:

- A. The defendant's childhood, especially as a source of abuse or character deformation.
- B. The defendant's motive or delusions.
- C. The defendant's mental state:
  - 1. Killing under stress, passion, or provocation insufficient to mitigate murder to manslaughter.
  - 2. Killing under the influence of substances voluntarily taken, but only if defendant shows he had no reason to believe he would act aggressively or violently while under their influence.
- D. The defendant's prior good deeds—personal sacrifices and past accomplishments, including service to the family, community, or the nation.
- E. The defendant's killing was out of character.
- F. Anything else bearing on the defendant's character or circumstances of the offense that might move a juror to spare rather than condemn.

#### VICTIM IMPACT STATEMENTS

During the penalty phase, the Defense should attempt to humanize the defendant. Anyone, including the convicted murderer's friends or family, may recount his or her good deeds or emphasize the killer's own traumatic suffering or abuse as a child. The jury can view the living defendant in court. Thus, to help the jury strike a moral balance in deciding life or death [or PPS], the People may call the victim's family and friends as witnesses to humanize the victim and communicate their own sense of loss, aided by photographs or other video images. As the US Supreme Court has held, survivors may express no opinion on the proper sentence.

Regardless of how the survivors feel, the victim's opinion of the killer's fate should count. Thus, a reliable living will or declaration of life shall be admissible in the penalty phase. As long as evidence clearly supports it as the authentic views of the victim, a signed and dated or videotaped statement such as:

I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered.

OR

I hereby declare that should I be killed under circumstances that constitute aggravated murder, I request my killer shall be put to death.

Once victim character evidence is raised, either side may present written evidence that the victim either supported or opposed the death penalty with such qualifications as the victim made apparent during her or his life. The judge shall examine such evidence from either side, out of the presence of the jury, and shall admit it only if it clearly and convincingly shows that the victim would have supported or opposed the death penalty [or PPS] under the circumstances of the particular killing. The judge should inform the jury that they are not bound to effectuate the victim's living will but should give it substantial weight.

#### CONDITIONS ON DEATH ROW/PPS

Those condemned to die or to PPS shall be permanently housed in a separate prison [wing], with their daily conditions no better than prisoners already subject to punitive or administrative segregation for the worst prison infractions. Specifically, within constitutional bounds, those condemned to death or PPS shall have only the minimum constitutionally mandated exercise, recreation, amusements, phone calls, or physical contact. They shall not be permitted any communal form of play.

Their sole food shall be nutraloaf, nutritionally complete and tasteless. Photographs of their victims shall be posted in their cells, out of reach, in visibly conspicuous places.

#### EXECUTION PROTOCOL

Death shall be by firing squad or other constitutional method that makes it clearly punishment and not medicine. A member of the victim's family may choose the method of execution among the constitutionally permissible options.

Before (or after) the condemned makes a final statement, the victim's family may display a brief audiovisual memorial of the victim's life and may also include crime scene photos and scenes from the victim's funeral, burial, and gravesite.

Executions shall be public.

#### IF THE U.S. SUPREME COURT EVER HOLDS IT CONSTITUTIONAL OR PUBLIC OPINION STRONGLY SUPPORTS IT:

A. The minimum age subject to death or PPS shall be 16, with a strong, nearly irrebuttable presumption against death or PPS at 16, diminishing until 21.

B. Attempted first-degree aggravated murder may qualify for death or PPS, especially when coupled with sexual assault.