Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute

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KILLING CAPITAL PUNISHMENT IN NEW JERSEY:
THE FIRST STATE IN MODERN HISTORY
TO REPEAL ITS DEATH PENALTY STATUTE

By Robert J. Martin*

[Abstract: This article examines how opponents of the death penalty were successful in lobbying and eventually achieving statutory repeal of New Jersey’s death penalty statute in December 2007. The primary goal of the article is to offer inspiration and guidance for similar efforts in the thirty-five states that still authorize capital punishment. In reviewing lessons learned from New Jersey, the article demonstrates that abolition proved both difficult and doubtful. Led by a small group of organizers and sympathetic legislators, the advocates of abolition faced multiple challenges. The article focuses special attention on their key strategic decisions: pursuit of both legislation and litigation and support of a temporary moratorium and study commission prior to launching a direct attack on capital punishment. The author has been able to provide a first-hand, insider’s perspective because he served as one of the two state senators who prime-sponsored the Death Penalty Repeal Act that resulted this notable political success story.]

“Legislatures across the nation have tried and failed to end executions.” N.Y. Times, Dec. 11, 2007


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1 Jeremy W. Peters, With Senate Vote, New Jersey Nears Historic Repeal of the Death Penalty, N.Y. TIMES, Dec. 11, 2007, at B1. “‘Today New Jersey can become a leader, an inspiration to other states,’ Senator Robert Martin, a Republican from Morris Plains who voted for the bill, said during Monday’s debate,” Id.

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I. Introduction:

On December 17, 2007 New Jersey became the first state to repeal its death
penalty statute since the United States Supreme Court again legalized capital punishment
in 1976. Although numerous states have debated similar bans, none of their repeal bills—with the notable exception, just recently, in New Mexico—have been enacted into law. Until New Jersey’s historic repeal, death penalty opponents had succeeded in accomplishing their objective only through occasional court rulings and moratoriums imposed by a few governors.

To many observers, New Jersey’s action was extraordinary in that it required elected state legislators to take a highly controversial position, one that appeared to run contrary to public opinion. “What makes the New Jersey initiative unusual, groups opposed to the death penalty said, is that a state legislature rather than a court or

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5 Jeremy W. Peters, New Jersey Moves to End Death Penalty, N.Y. TIMES, Nov. 19, 2007, at B1 (Shortly prior to the enactment, Richard C. Dieter, Executive Director of the Death Penalty Information Center, declared, “It would be a historic measure . . . I think it is part of this bigger picture where the death penalty is on the defensive.”).
8 Peters, supra note 4, at B1 (University of California, Berkeley, Law Professor Franklin E. Zimring stated: “What New Jersey [did was to] have a legislature-initiated repeal, and that’s different.”).
9 Michael Booth, N.J. Ends Capital Punishment, Commutes All Death Sentences, 190 N.J. L.J. 1113 (It is worth noting that just prior to voting, Senator Ray Lesniak, a prime sponsor of the bill, remarked, “It’s not often we vote our consciences in the Legislature.”).
10 See e.g., Press Release, Quinnipiac University Poll, New Jersey Voters Back Life Without Parole Over Death, Quinnipiac University Poll Finds; Corzine Approval Split At Midterm (Dec. 11, 2007) available at http://www.quinnipiac.edu/x1299.xml?ReleaseID=1126 (“New Jersey voters oppose 53—39 percent the proposal to eliminate the death penalty in the state . . . [and] [b]y a substantial 78—18 percent margin, New Jersey voters would keep the death penalty for the most violent cases, such as serial killers and child killers.”).
governor would be declaring an end to capital punishment."\textsuperscript{11} New Jersey also received congratulations for “joining” a world-wide human rights campaign: “On the death penalty question, the state is now in line with a growing world movement, observed a reporter from New Jersey’s largest daily newspaper.”\textsuperscript{12}

Moreover, because of its action, New Jersey was heralded as a potential nationwide trendsetter.\textsuperscript{13} Dianne Rust-Tierney, Executive Director of the National Coalition to Abolish the Death Penalty, declared: “The New Jersey Legislature did the right thing. And we think we’ll be seeing more state legislatures saying, ‘We don’t want the death penalty.’”\textsuperscript{14}

But it must be emphasized that New Jersey’s repeal of its death penalty was far from easy. After all, its Legislature, like those in three-quarters (i.e., 37) of the states, had overwhelmingly voted to reinstate capital punishment a quarter-century earlier after having been given a green-light by the United States Supreme Court.\textsuperscript{15} The state then proceeded to build “a lethal injection chamber at the New Jersey State Prison . . . just a few miles from the Capitol’s gilded dome.”\textsuperscript{16} And when the Legislature finally voted to repeal its death penalty statute in December 2007, its two houses did so by only the narrowest of margins. Those votes took place immediately after heated debates, before packed chambers, during which legislative opponents decried the brutal murders of

\textsuperscript{11} Peters, \textit{supra} note 5, at B1.
\textsuperscript{12} Jeffrey Laurenti, \textit{Jersey joins a human rights campaign}, THE STAR-LEDGER, Dec. 18, 2007, at 19 (Mr. Laurenti pointed out that the state’s action was in line with United Nation’s Declaration of Human Rights, enacted in 1948, and noted that Britain had eliminated capital punishment in 1971, Canada and Portugal in 1976, France in 1981, Argentina in 1984, and Czechoslovakia and Hungary in 1990. Currently none of the members of the European Union apply the death penalty, and the EU sees as its civilizing mission the exportation of capital punishment abolition.).
\textsuperscript{14} Peters, \textit{supra} note 4, at B1.
\textsuperscript{15} See Tom Hester and Tom Feeney, \textit{Assembly OKs measure to end N.J. executions}, STAR-LEDGER, Dec. 14, 2007, at 1; \textit{See also} discussion \textit{infra} Part IV.B.
children, police officers and other innocent victims, and asserted that some of the perpetrators simply deserve to die.  

Consequently, if New Jersey is to serve as a trendsetter for the repeal of the death penalty in sister states, it seems worthwhile to identify and explore the reasons why this historic but controversial legislation received passage. Who were the key players and what were their roles? How did political circumstances, timing, and simple luck play into the outcome? What were the strategic decisions that led to final enactment? This article attempts to address these questions, while also presenting a comprehensive overview of this long, often frustrating, but eventually successful campaign.

It needs to be admitted upfront that this author cannot be objective in his presentation, since I strongly support abolition of the death penalty throughout the United States. With respect to New Jersey, I served as a state senator at the time the campaign was being conducted; thus I not only had a front-row seat to much of the action, but was also an active participant as one of the prime sponsors of the repeal bill. I therefore can and do bring a biased insider’s perspective to many of the critical events. Yet it is intended that this will give the article a degree of insight—drawn directly from the legislative trenches—not found simply by referring to the historical record found in the media and statehouse archives.

I begin my analysis in the next section by reviewing the history of capital punishment in New Jersey from establishment of the state in 1776 to enactment of the death penalty moratorium in 2006. In Chapter III, I examine how the opponents of capital punishment became organized at the turn of the Twenty-first Century and

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17 See infra, notes 315-330 and accompanying text. In the Senate, the bills passed with just 21 votes, the bare minimum (i.e., a majority of the 40 members) needed for passage.
II. Legislative History of the Death Penalty in New Jersey from 1776 to 2006:

A. Legislative History from Creation of the State in 1776 to Restoration of the Death Penalty in 1982

A review of the Legislative History of New Jersey’s death penalty properly begins with the law that was put into place when the state was first established in 1776.\(^\text{18}\) In the same year in which America declared its independence, New Jersey adopted its first state constitution.\(^\text{19}\) That constitution provided that the common and statutory law of England, which had been the existing law in the colony, would remain in effect.\(^\text{20}\) At that time there were seventeen crimes that carried a potential death sentence.\(^\text{21}\) Besides for various

\(^{18}\) See L. Bienen, N. Weiner, D. Denno, P. Allison and D. Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27, 46-66 (1988) (Although this history begins with the creation of the state of New Jersey in 1776 (following the Declaration of Independence), the death penalty had been firmly established in the colony of New Jersey for about a century. Hence the criminal laws put into place in New Jersey in 1776 were largely merely an extension of British colonial rule.)

\(^{19}\) N.J. CONST. of 1776, *reprinted in* Laws of the State of New Jersey (Trenton, N.J. 1821) [hereinafter 1821 REV. LAWS].

\(^{20}\) 1821 REV. LAWS VII

types of killing, they included such property crimes as counterfeiting, embezzlement by a
bank officer and the destruction of ships.\textsuperscript{22}

In 1796, the New Jersey Legislature enacted the state’s first comprehensive
crimes act.\textsuperscript{23} That statute expressly provided that the crime of murder was punishable by
death.\textsuperscript{24} The act drew no distinction between first and second degree murder, or between
principals and aiders or abettors. It also set forth the first definition of felony murder,
which was defined as a killing during the commission of any unlawful act for which the
probable consequence might lead to bloodshed.\textsuperscript{25} Those found guilty of such crimes were
subject to the death penalty. Depending on the crime, the means of death was either by
hanging or burning.\textsuperscript{26}

During the first half of the Nineteenth Century, the Legislature, in piecemeal
fashion, enacted several revisions to the state’s death penalty statute. In 1821, the
Governor was given the authority to suspend executions and grant reprieves.\textsuperscript{27} In 1829,
the Legislature revised the definition of murder so as to not include acting in self-defense
or the killing of a person engaged in the commission of a felony.\textsuperscript{28} In 1835, the
Legislature also enacted a law prohibiting public executions.\textsuperscript{29}

\textsuperscript{22} Id. at 19-24
\textsuperscript{23} Act of Mar. 18, 1796, 1821 REV. LAWS 244.
\textsuperscript{24} Act of Mar. 18, 1796, 1821 REV. LAWS 245 (The crime of murder was not defined in the statute but a
penalty was stipulated: “That every person, who shall commit murder, shall, on being thereof convicted or
attainted, suffer death….“).
\textsuperscript{25} Id. at 262.
\textsuperscript{26} Id. at 264.
\textsuperscript{27} Feiertag, supra note 21, at 39.
\textsuperscript{28} Id. at 39-40.
\textsuperscript{29} Id.
Eventually, in 1839, the crime of murder itself was revised and replaced with a two-degree classification of that act.30 The death penalty was restricted “only” to first-degree murders, which were defined as “premeditated.”31 Second-degree murder was punishable by imprisonment for a term of no less than five years and no more than twenty years of hard labor.32 A further revision occurred with the passage of the Crimes Act of 1846, which defined murder as: (1) killing during the commission of sodomy, rape, arson, robbery, burglary or “any unlawful act against the peace of this state of which the probable consequence may be bloodshed;” or (2) killing of a judge or police officer; or (3) killing of “a private person assisting in the apprehension of a criminal.”33

During the latter Nineteenth Century and early Twentieth Century several additional revisions regarding the death penalty took place. One significant development was the enactment of a statue in 1906 that substituted electrocution for hanging as the means of execution.34 Another significant statutory change, which occurred in 1922, provided for the postponement of the execution of a person found to be insane, and further providing that an insane person could be released if that person could be restored to reason.35

Perhaps even more significant were the statutes, enacted in 1917 and 1919, granting a jury the discretion to impose a life sentence instead of a death sentence for a

30 Act of Mar. 7, 1839, 1839 N.J. Laws 147, 147-148; Feiertag, supra note 21, at 41. Feiertag refers to this amendment as a law passed in 1838. The session law clearly states it was passed in 1839.
31 Id.
32 Id.
33 N.J. REV. STAT. tit. 8, § 3 (1847).
34 Act of Apr. 4, ch. 79, 1906 N.J. Laws 112. The changeover to electrocution was widely supported: “[T]he revolting spectacle of a man slowly strangling to death at the end of a rope should be relegated to the Dark Ages as fast as possible…it is certain that the spectacle of death by electricity is far less barbarous to sight than death by hanging.”; Editorial, N.J.L.J., quoted in Feiertag, supra note 21, at 53; Act. Of Apr. 25, 1907, ch. 104, 1907 N.J. Laws 260 In 1907, an amendment to the statute authorizing execution authorized representatives of the daily newspapers and news services to be present at executions.
person found guilty of murder. In authorizing the jury the prerogative to decide between a sentence of life (at hard labor) as opposed to a death sentence, the Legislature may have relied on what may be considered two inconsistent rationales. First, the Legislature apparently determined that at least not all first-degree murderers were equally culpable, and that some should be spared the death penalty. Second, the Legislature also apparently determined that the prior law—with its automatic death penalty—could ironically lead to the awarding of sentences considered too lenient. This circumstance could presumably arise in cases in which jurors found that a defendant was guilty of capital murder but did not deserve to die. Under the prior law, jurors only option in that event was to “nullify” the law of homicide by acquitting the defendant of the murder charge.

In 1937, another major revision of the general criminal code occurred, one which included additional changes in the death penalty. Only four crimes thereafter were designated as capital offenses: murder, treason, assault upon the President and Vice President (a provision first enacted in 1902, shortly after the murder of President McKinley), and kidnapping (a provision first enacted in 1933, shortly after the kidnapping and murder of American hero Charles Lindbergh’s baby son in Hunterdon

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36 Act of Apr. 12, 1919, ch. 134, 1919 N.J. Laws 303. N.J. COMM’N TO STUDY CAPITAL PUNISHMENT, REPORT at 19 (1964) [hereinafter 1964 REPORT]. The 1964 Study Commission describes the New Jersey death penalty statute as “mandatory” until 1916 and describes the 1919 statute as a “technical” amendment. 37 See Rick Steinmann, Jury Nullification in Capital Punishment, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 869, 870 (Paul Finkelman, 2006); “Through jury nullification, the jury chooses to ignore the law as provided by the judge, and instead returns a verdict based on its own sense of justice. The practice is infrequent, and although courts refuse to endorse nullification, the nevertheless recognize the jury’s power.” See also Timothy P. O’Neill, Courts may never nullify jury nullification, CHICAGO DAILY LAW BULLETIN, March 8, 1996.


39 Act of Apr. 3, 1902, ch. 133, 1922 N.J. Laws 405. The new crime was a category of treason and was defined as assault with intent to kill upon the President or Vice President of the United States or upon the ruler, governor or chief executive of any state, or upon the heir to the throne of a foreign state.
Nevertheless, the actual definition of murder under the new code stayed identical to one that had been adopted in 1898, and thus remained quite similar to the one first set forth in the Crimes Act of 1846.

During the middle three decades of the Twentieth Century, still more legislative revisions to the death penalty statute took place. In 1942, the Legislature enacted a law prohibiting the family of a victim or the family of a person to be executed from attending an execution. Another reform resulted from the state’s adoption of its most recent Constitution in 1947, which now gave the governor the unilateral power to pardon a person sentenced to death or convicted of crimes other than impeachment or treason.

But despite the continuing refinement of the death penalty in New Jersey and in numerous other states, the United States Supreme Court, in its 1972 landmark decision in *Furman v. Georgia*, effectively held all of the states’ existing death penalty statutes to be unconstitutional. The Court did so based on its determination that the then-existing two-tiered death sentence systems were fundamentally flawed, in that such systems left the decision as to who should live and who should die to the unguided direction of judges and juries.

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40 Act of June 26, 1933, ch. 322, 1933 N.J. Laws 846 (New Jersey passed two kidnapping laws after the Lindberg crime. The first statute provided for the imposition of a maximum penalty of 30 years for kidnapping); Act of Sept. 5, 1933, ch. 374, 1933 N.J. Laws 1057, 1058 (The second kidnapping statute, enacted in 1933, provided the death penalty for kidnapping for ransom.)
41 Act of May 2, 1942, ch. 61, 1942 N.J. Laws 299, 300. The former provisions allowing attendance by witnesses, members of the press, and clergymen remained in effect. It is worthwhile to note that, in comparison to other states, New Jersey in the Twentieth Century had imposed a relatively low number of executions. From 1930 until the date of the last person executed in the state in January 1963, the number of executions per year rarely exceeded five and was often less than three—despite the fact that the number of homicides in the state had been steadily increasing.
42 N.J. CONST. art. 5, § 2, ¶ 1 (1947).
44 Id. at 295. One should note that, ever since the Supreme Court decision in *Furman*, the issue of constitutionality, with respect to both the United States and the New Jersey Constitutions, has played a prominent role in the course of the legislative history of New Jersey’s death penalty statutes.
It is noteworthy to observe that prior to *Furman*--during the course of the almost two centuries after the United States had first gained its independence--that the states’ capital punishment laws had proceeded unimpeded without virtually any federal (or state) judicial objection. Yet it was not until the *Furman* decision in 1972 that the United States Supreme Court first accorded certain constitutional protections with respect to the procedures relating to the death penalty acts administered by the states.

In that five-to-four decision, each of the judges voting in the majority wrote a separate opinion, therefore providing no guiding principle. Justice Brennan opined that the death penalty under all circumstances violated the Eighth Amendment because it served no deterrent or retributive purpose. Justice Marshall concurred, further contending that the death penalty conflicted with “evolving standards of decency.” The others voting in the majority, Justices Stewart, White and Douglas, chose not to take such progressive positions. Instead, they expressed more narrow views, essentially finding that the arbitrary, unpredictable imposition of the death penalty as it was currently being applied, combined with its disproportionate impact on racial minorities, violated the Eighth Amendment. They thus determined that, unless the unguided discretionary

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45 *Id.* at 467. This failure to apply constitutional protections to death penalty statutes occurred even though at least two Amendments to the United States Constitution provided potential sources for challenging the legitimacy of a death sentence. The Eighth Amendment, as part of the Bill of Rights enacted in 1791 (and later made applicable to the states by incorporation into the Fourteenth Amendment), prohibited the use of “cruel and unusual punishment” and undoubtedly raises issues concerning the choice and manner of sentencing for defendants convicted of first-degree murder. Additionally, the Fourteenth Amendment itself (enacted in 1868) expressly affirmed the no *state* shall deprive any person of life without due process of law.” Hence, at a minimum, the Fourteenth Amendment seemingly was intended to serve as a safeguard against inadequate and uneven methods of procedure and sentencing instituted by state legal systems.

46 *Id.*

47 *Id.* at 258.

48 *Id.* at 315.

systems were reformed, the states would not be permitted to reinstate death penalty acts within their jurisdictions.\textsuperscript{50}

Perhaps not surprisingly, this momentous Supreme Court ruling triggered strong opposition throughout the country, leading many state legislators to immediately begin attempts to appropriately revise and thus restore capital punishment in their jurisdictions. The quick reenactment of death penalty acts within the states consequently led to another landmark case handed down by the United States Supreme Court in 1976, \textit{Gregg v. Georgia} (and companion cases from several other states).\textsuperscript{51} In that decision, Justice Stewart, in a plurality opinion, rejected the notion that the death penalty in all circumstances violates the Eight Amendment.\textsuperscript{52} He asserted that punishment—even death—was constitutional so long as it comported with “evolving standards of decency” as reflected in “contemporary public attitudes” and “the dignity of man.”\textsuperscript{53} He also asserted that retribution was a legitimate justification for punishment and that the death penalty was not invariably excessive for the crime of murder.\textsuperscript{54} Most significantly, he determined that many of the most recently reenacted death penalty acts, which had now been revised to provide more guided discretion to judges and jurors, were no longer unconstitutional.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Gregg v. Georgia}, 428 U.S. 153 (1976);
\item \textsuperscript{54} \textit{Id. at} 173.
\item \textsuperscript{55} \textit{Id. at} 180.
\end{itemize}
Given this green light of constitutionality by the United States Supreme Court, thirty-seven states—including New Jersey—eventually reenacted a death penalty statute. New Jersey, however, took longer than most of the other states to reinstate death as a potential penalty for first-degree murder. This delay was almost single-handedly due to the opposition of Brendon Byrne, who served as governor from 1974 to 1982. Governor Byrne used his veto power twice, in 1977 and 1979, to block legislative attempts to restore the death penalty during his term in office. But shortly after Governor Byrne’s term was completed, the New Jersey Legislature again passed a death penalty bill, which was then signed into law on August 6, 1982 by the succeeding governor, Thomas Kean.

New Jersey’s new death penalty statute was made part of the revised Code of Criminal Justice that had been enacted in 1979. Closely following the American Law Institute’s Model Penal Code, the revised New Jersey Code significantly redefined murder, which was now described as actions causing death, or seriously bodily injury resulting in death, with “purposeful or knowing” intent. The definition of felony murder was also revised, thus providing certain new defenses to that charge. Also, as part of the new statute, the penalty phase of a potential death sentence was bifurcated

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from the trial phase, requiring that the jury first determine that certain aggravating factors outweigh mitigating factors before imposing a death sentence on a defendant.⁶³

B. Legislative History from Restoration of the Death Penalty in 1982 to Enactment of the Death Penalty Moratorium in 2006

In retrospect, it can now be observed that New Jersey’s decision to reenact a death penalty statute forced the State Legislature into undertaking continuous monitoring of both the procedural aspects of a capital punishment sentence as well as the scope of the death penalty’s application. From the date of reinstatement in 1982 to approval of the death penalty moratorium in January 2006, the Legislature enacted fifteen amendments to the state’s death penalty act in an on-going effort to try to make it “better” and “fairer” and, when necessary, in compliance with the New Jersey Constitution.⁶⁴

Several of the first amendments to the restored death penalty dealt with clarifications of the statute and reactions to New Jersey Supreme Court decisions. The first amendment, enacted in 1985, clarified that the aggravating factors, as required under the act, must be governed by the court’s Rules of Evidence and must outweigh the mitigating factors beyond a reasonable doubt before imposition of a death penalty.⁶⁵ Another amendment, enacted in 1992, confirmed that a jury could not be provided with evidence concerning the method or manner of execution that would be administered to a defendant who had received a death sentence.⁶⁶

The Legislature also enacted certain amendments that afforded limited protections and exemptions for defendants. In 1985, for example, it enacted an

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⁶⁶ P.L.1992, c.76.
amendment providing that, in those circumstances in which a defendant does not appeal a death sentence, the defense counsel must file an appeal on the defendant’s behalf.\textsuperscript{67} This law also established that a juvenile who had been tried as an adult would not receive a death sentence.\textsuperscript{68} The Legislature also enacted an amendment in 1992 denoting that the standards to be used in conducting the proportionality review, which had previously been mandated by the New Jersey Supreme Court, must compare the death penalty case at issue only to other similar death penalty cases in which a death penalty sentence had been imposed.\textsuperscript{69}

During this same period in which the Legislature sought to “fine tune” its death penalty statute to make it more acceptable (and constitutional), it ironically sought to expand its scope to include additional defendants that the Legislature determined worthy of the ultimate punishment (i.e., those sometimes referred to as the “worst of the worst”\textsuperscript{70}). Thus, the Legislature successfully proposed a state constitutional amendment in 1992 (ACR-20/SCR-48, which was subsequently ratified by the voters) establishing that it would not be deemed cruel and unusual punishment to impose the death penalty on a person who purposefully or knowingly causes serious bodily injury resulting in death.\textsuperscript{71} In the following year, 1993, the Legislature enacted a statute that made leaders of narcotics trafficking networks who commanded or promised to solicit murder eligible for the death penalty.\textsuperscript{72} And, shortly after the tragedy of “9/11” (i.e., the horrific events

\textsuperscript{67} P.L.1985, c.478
\textsuperscript{68} Id.
\textsuperscript{69} N.J.S.A.2C:11-3e
\textsuperscript{71} See, e.g., Legislative Manual, State of New Jersey (2005), at 934 (the referendum was approved 1,835,203 to 664,258); See, e.g., State v. Gerald, 113 N.J. 40 (1988); See, e.g., State v. Harvey, 121 N.J. 407 (1990).
\textsuperscript{72} P.L.1993, c.27.
occurring on September 11, 2001), the Legislature enacted a law that makes a person who commits a crime of “terrorism” eligible for the death penalty if a murder occurs during the commission of the act.73

In addition to expanding the scope of the death penalty, the Legislature also enacted amendments that increased the number of aggravating factors that could be considered to justify imposition of a death sentence. In 1993, it enacted a statute adding as an additional aggravating factor the fact that a defendant caused death while committing the criminal act of “causing or risking widespread injury or damage.”74 It added another aggravating factor in 1994 pertaining to the murder of a victim who is less than fourteen years old.75 And the Legislature enacted still another aggravating factor in 1999 regarding defendants who have violated a domestic violence restraining order in the course of committing murder.76

Also during the 1990’s, some legislators expressed increasing concern that no one had yet been executed under the reenacted statute—despite the supposed legislative success in expanding the death penalty’s scope and in creating additional aggravating factors. As a response, Governor Whitman in 1997 created a Governor’s Study Commission (the “Zimmer” Commission, so named for its Chair, Richard Zimmer) charged with recommending ways in which the death penalty process could be improved.

73 P.L. 2002, c. 26, s. 10. This author was a primary sponsor of the “9/11 Terrorism Act.” However, when it was originally introduced, it did not impose a potential death penalty sentence on terrorists. That inclusion derived from subsequent amendments added during the bill’s advancement through the legislative committee process.
75 P.L.1994, c.132; See Wikipedia, Megan’s Law, http://en.wikipedia.org/wiki/Megan's_Law (as of Feb. 19, 2009 at 3:04 PM EST) This occurred after the highly publicized brutal assault and death of Megan Kanka by a sexual predator who lived next door to the young girl. Besides the adoption of Megan’s Law (at both the state and federal levels), there were additional responses, such as this one to punish such criminal actions.
and expedited. After completing its study, several of the Zimmer Commission recommendations were subsequently enacted into law by the Legislature. They included: expediting transcript preparation in capital appeals, designating trial judges who would specialize in capital cases, and adopting changes in court rules involving post conviction review procedures and stays of execution.

In this same era the Legislature also became increasing aware of and interested in the rights that should be accorded to victims. As a result, it enacted a statute in 1995 to permit prosecutors to introduce victim impact evidence during the sentencing phase of a death penalty trial. In 1998, it enacted one of the Zimmer Commission’s recommendations that would authorize family members of a murder victim to attend the murderer’s execution. And, in 1999, it enacted still another statute to allow persons associated with the victim of a homicide to display photographs of the victim during the sentencing phase of the trial.

Furthermore, the New Jersey Legislature also enacted several amendments to insure that those defendants eligible for—but who did not receive—the death penalty, would alternatively receive a life sentence. For example, in 1996, it enacted a statute providing for a life sentence without the possibility of parole for defendants convicted of,
but who had not been sentenced to death, for murder of a law enforcement officer. A similar statute the following year (1997) provided for a life sentence without the possibility of parole for murderers whose victims were less than fourteen years old and were committed during the commission of a sexual offense. And, in 2000, the Legislature established that, in capital cases in which the jury or court finds the existence of one or more aggravating factors but finds that those factors do not outweigh the mitigating factors, or in capital cases in which the jury or court is unable to reach a unanimous verdict as to the weight of the factors, the defendants should be entitled to a sentence of life imprisonment without the possibility of parole.

The final statute concerning the scope and procedures of the New Jersey’s Death Penalty came in the wake of the tragedies that occurred on September 11, 2001. In 2002, the State Legislature, as part of a comprehensive Anti-Terrorism Act, included a provision providing that a person who commits the crime of terrorism is eligible for the death penalty if the murder occurs during the commission of terrorism. An amendment to this act added as an aggravating factor, to be considered during the sentencing phase following a conviction, that the murder was committed during the commission of a crime of terrorism.

After signage of this Anti-Terrorism Act by then Gov. McGreevey on ____, 2002, no further legislation was passed to expand, revise or restrict the death penalty until the

84 P.L. 1997, c. 60.
85 See P.L. 2000, c. 88.
86 See P.L. 2002, c. 26, s. 10 (For purposes of the act, terrorism was defined in N.J.S.A.2C:38-2).
87 This author should confess that he was one of the two prime sponsors of the 9/11 Anti-Terrorism Act. As originally introduced, however, it did not specify death penalty eligibility or add terrorism as an aggravating factor for capital punishment consideration. Those additions were insisted upon by the other Co-Prime Sponsor, State Senator (now Superior Court Judge) Gary Furnari, who was Co-Chair of the State Government Committee.
successful enactment of the moratorium imposed in January, 2006. In the next section of this article, I will attempt to explain how that successful effort was achieved.

III. The Organized Effort to Abolish the Death Penalty in New Jersey

A. Creation of New Jerseyans for a Death Penalty Moratorium

Toward the close of the Twentieth Century, a number of informed citizens, faith-based organizations and public interest groups began—or in a few instances continued—to pursue what then seemed to many to be an impossible goal: to obtain abolition of the death penalty in New Jersey. As a New Jersey legislator, my first awareness of such advocacy came in 1996 when Jack Callahan, a recently retired staff member to the then Republican Senate Majority, contacted me and another colleague, and respectfully requested that we consider introducing a bill in the State Senate to abolish the death penalty. Although expressing general support of such an initiative, I informed Mr. Callahan that I would not introduce such a bill until it appeared that there was at least more than minimal support for such an action. My response strongly hinged on the fact that, at this time, Republicans were in control of both houses of the New Jersey

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88 See Letter from Jack Callahan to Senator Peter Inverso and Senator Robert Martin, dated Sept. 27, 1996 (on file with author). Jack and I had worked closely together on a number of issues, and he knew I would be more open to his proposal than many of my colleagues. In his above-referenced letter, Jack mentioned that a report had been compiled on capital punishment cases from the Administrative Office of the Courts suggesting that there were significant time and costs involved with these cases. Thus it was clear, even at that early date that a practical argument could be made against continuation of the death penalty as well as a moral one.

89 My position was strongly influenced by having read Sister Helen Prejean’s well-publicized book, Dead Men Walking (1992), and the subsequent movie of the same title (1995). Shortly thereafter, I had the chance to meet with Sister Prejean prior to a Seton Hall Law School graduation (at which she received an honorary degree) and, inspired by her advocacy, vowed to her that—if the opportunity presented itself— I would work to abolish the death penalty in New Jersey.

90 See Symposium, Legislation, Litigation, Reflection and Repeal: The Legislative Abolition of the Death Penalty in New Jersey, Seton Hall Law School, April 14, 2008, Afternoon Session, Panel IV, Transcript [hereinafter, Transcript, Panel IV] at 60 (In that period there was no bill in either house of the State Legislature designed to either abolish the death penalty or place a moratorium of death penalty sentences); Id. p. 61 (Assemblyman Wilfredo Caraballo, having become aware of that fact, shortly thereafter introduced a death penalty bill in the General Assembly. That bill, reintroduced in subsequent sessions of the Legislature, was never acted upon.).
Legislature and the Governorship, and that most of these Republicans—and many Democrats—generally took a hard line on law and order issues, especially as related to murderers, as witnessed by the continuing legislative expansion of the scope of the death penalty and the increased number of aggravating factors that had been added to the sentencing phase of murder trials. Moreover, there did not seem to be any visible anti-death penalty lobbying by an organized coalition with sufficient political clout to force the Legislature to pay much attention to this concern.

But the absence of organized lobbying changed dramatically in 1999 due largely to the collaboration of two individuals, Lorry W. Post and Celeste Fitzgerald. Mr. Post was a lawyer residing in Cape May, New Jersey, whose only daughter had been a murder victim. Ms. Fitzgerald, a married mother of two, was a former real estate agent from Chatham, New Jersey, who was undergoing recuperation after (successful) surgery for removal of a brain tumor. Both of these individuals strongly opposed the death penalty, based on their individual experiences and convictions. Given his family tragedy and legal background, Mr. Post believed that the process for invoking capital punishment in
New Jersey was fatally flawed. Ms. Fitzgerald, a self-described “pro-life Catholic” who had been inspired by the teachings of Pope John Paul II, thought the death penalty was immoral. Although they had not previously met, Mr. Post wrote to Ms. Fitzgerald proposing a meeting for the purpose of creating a formal organization, eventually titled New Jerseyans for a Death Penalty Moratorium (NJDPM). Upon its creation, Ms. Fitzgerald became the overall director of NJDPM and Mr. Post became a member of its steering committee. Its primary mission would be to serve as an umbrella organization dedicated to motivating and unifying opponents of capital punishment into a collective force that could wage a relentless campaign to prevent implementation of the death penalty in New Jersey.

During the next few years NJDPM worked hard to get established. It never had a Trenton office or high-powered staff; its officers worked out of their homes and did not require its members to pay dues. Ms. Fitzgerald described the organization as a

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96 Interview with Lorry W. Post, Statehouse, Trenton, N.J. (Dec. 17, 2007).
97 Braun, supra note 94, at 16 (In this article Ms Fitzgerald explained that her previous advocacy had involved writing letters to politicians expressing opposition to the death penalty, “but did little else beyond attending a few rallies.”).
98 Fitzgerald’s Reflections, supra, note 94 (Ms. Fitzgerald indicated that, in looking for support, Mr. Post contacted various state and national organizations and “found” Ms. Fitzgerald through Pax Christi, New Jersey, a Catholic peace organization.).
99 Id. (Along with a handful of other people, the two met in a Quaker Meeting House); See also, Celeste Fitzgerald, Determination, Hard Work, More Determination, Success [hereinafter Fitzgerald, Determination], at 11, in Senator Raymond J. Lesniak, THE ROAD TO ABOLITION (2008).
100 See pamphlet, “No Executions” (New Jerseyans for a Death Penalty Moratorium, 2002) (on file with author). At times Ms. Fitzgerald was also identified as Equal Justice USA, NE Field Organizer (arising from grants she obtained for NJDPM) and Mr. Post was identified as Executive Director, NJDPM, or as a member of the NJDPM and MVFR Steering Committees. See Letter from Lorry W. Post to Senator Robert Martin, March 22, 2004 (on file with author). Both Ms. Fitzgerald and Mr. Post listed their residences in Cape May and Chatham, respectively.
102 Id.
“church basement group.” Working at first with only five people, NJDPM was intent on growing its membership. Between 1999 and 2002 NJDPM hosted fifty to one hundred programs a year not only in church basements, but also community centers, coffee shops, and other local meeting places. The programs featured persons exonerated from murder convictions and family members of murder victims who opposed the death penalty. NJDPM also used national events to spark further interest in the cause, in particular the visit of Pope John Paul II to America in 1999, during which the Pope publicly called for the abolition of the death penalty in the United States, and the declaration by Governor Ryan of Illinois in 2000 that imposed an immediate moratorium on the death penalty in that state.

By 2002, NJDPM had grown enormously, representing several thousand individual members. Many of these individuals became quite active and, besides for supporting and contributing financially to the organization, engaged in submitting letters and e-mails to policymakers and attending functions and meetings, including visits to legislators. NJDPM also enlisted an impressive Executive Committee, created in 2000,

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104 Id. (“Our organizing philosophy was very simple; we knew we needed to create the critical mass necessary to thrust the issue onto the legislative agenda.”).
105 Id.
106 Id. Ms. Fitzgerald reported that more than sixty family members were recruited who “shared with others the worst thing that had ever happened to them.”
107 Fitzgerald Determination, supra, note 99, at 11. The Pope, in a visit to St. Louis, Missouri, “appealed for an end to the death penalty in the U.S., calling the punishment “cruel and unnecessary.”; New Jersey’s largest religious denomination is the Roman Catholic Church, of which Pope John Paul II was its universal head.
108 Transcript, Panel III, supra, note 90 at 10 (Ms. Fitzgerald stated, “Governor Ryan in 2000 declared moratorium in Illinois, that was a huge moment, it really impacted what we were doing.”).
109 Fitzgerald, Determination, supra, note 99, at 12 (“Early volunteers included lawyers, judges, religious leaders, members of victim’s families and everyday citizens.”).
110 This author received many letters and e-mails from members of NJDPM. Two examples: a letter from Page Taylor, SFO, of Chatham, NJ, dated September 25, 2002, urging passage of a moratorium on the
consisting of approximately twenty-five directors (including Jack Callahan).\textsuperscript{111} In addition, it created an equally impressive Advisory Committee, consisting of representatives from a large number of diverse religious and civic groups, such as Amnesty International and the New Jersey State NAACP.\textsuperscript{112} Because of its hard work, NJDPM was eventually able to serve as the umbrella organization for nearly two hundred smaller organizations while also serving as a subsidiary for the larger New Jersey Association on Corrections.\textsuperscript{113}

Additionally, NJDPM secured ongoing legal and lobbying assistance from one of New Jersey’s largest law firms, Gibbons P.C.\textsuperscript{114} It also drew upon the services of several “Trenton insiders” who had long-standing relationships with members of the executive and legislative branches\textsuperscript{115} Consequently, it had now acquired the resources to become a viable and on-going state-wide adversary coalition

Under the direction of Ms. Fitzgerald’s hands-on leadership, NJDPM continued to host numerous informational and outreach meetings, distribute educational pamphlets,\textsuperscript{116} death penalty, and an e-mail from Dr. Harriet Sepinwall, of Pine Brook, NJ, urging the Legislature to examine the death penalty system in this state (on file with author).

\textsuperscript{111} See \textit{supra}, notes 88-94 (for the initial role that Jack Callahan played on behalf of abolition of the death penalty).

\textsuperscript{112} See letterhead of Letter from Celeste Fitzgerald to Senator Robert J. Martin, Nov. 19, 2002 (on file with author). The NJDPM Advisory Committee also included such notable persons as Nicholas Katzenbach, former US Attorney General and Sister Helen Prejean, author of \textit{Dead Men Walking}.

\textsuperscript{113} Braun, \textit{supra} note 94, at 19; Fitzgerald, Determination, \textit{supra} note 99, p. 11.

\textsuperscript{114} Transcript Panel III, \textit{supra} note 103, at 9. The key members of the firm who engaged in this effort were the firm’s head, John J. Gibbons, former Chief Judge, United States Court of Appeals, Third Circuit and the “two Davids” of the Government Affairs Section, David Pascrell and David Filipelli, who performed much of the strategic planning and lobbying efforts.

\textsuperscript{115} \textit{Id.} at 7-8. NJDPM secured the services of Trenton lawyer-lobbyists from both political parties: Michael Murphy, a former county prosecutor and Democratic candidate for Governor, and Jim Harkness, a former Counsel to the Republican Senate Majority. NJDPM also obtained the services of Peter McDonough, former press secretary to Governor Whitman, to handle its media relations.

\textsuperscript{116} Among the most impressive pamphlets distributed by NJDPM were several from Centurion Ministries, a non-profit organization, whose purpose was to obtain freedom for the imprisoned innocent. Centurion provided information on numerous individuals who had been convicted of murder but were later proved innocent, often by DNA testing. Because Centurion Ministries was headquartered in Princeton, NJ, they
and secure grants to fund its operation. It commissioned polls, including a poll by Rutgers-Eagleton in May 2002 disclosing a significant decline in the percentage of persons who supported the death penalty in New Jersey. Most importantly, NJDPM developed both an effective legislative and litigation strategy that ultimately proved successful in achieving the goal of obtaining a moratorium on the implementation of the death penalty in New Jersey.

B. Strategy from 1999 to 2004: Pursuit of a Moratorium

1. Pursuit of a Moratorium by Legislation

In its first years of operation, the leaders of NJDPM deliberately decided to seek enactment of a death penalty moratorium, rather than abolition itself, as their primary objective. The organization did so in recognition of the fact that most state legislators were “not really interested” in considering the issue of repeal at that time. Thus NJDPM chose even its name carefully. This key decision to “organize around a moratorium” offered an important advantage: it allowed those policymakers who supported the death penalty in principle to engage in the dialogue and possibly even

were able to develop a close working relationship with NJDM. (Copies of several of their pamphlets are on file with author).

117 See, e.g., News Release, New Jerseyans for a Death Penalty Moratorium, (April 4, 2004) (describing a meeting and program to be held at the First & Trinity Presbyterian Church, South Orange, NJ, entitled The Death Penalty in New Jersey: Theological and Policy Perspectives) (copy of file with author).
118 See Eagleton Institute of Politics Center for Public Interest Polling, Rutgers University, New Jerseyan’s Opinions on a Death Penalty Moratorium; See also New Release, New Jerseyans for a Death Penalty in New Jersey, May 28, 2002 (copy of file with author) (Among other findings, the poll indicated that opposition to the death penalty in New Jersey had risen by 8 percentage points since 1999. However, a majority of New Jerseyans said that they favor use of the death penalty for persons convicted of murder—60% to 31%).
119 Supra note 103, Transcript, Panel III, at 11. It should be noted that other states that had stopped the use of the death penalty, most notably Illinois and Maryland, doing so on the basis of a moratorium, rather than an outright ban on executions; See supra note 7 (discussion of moratorium in Illinois and Maryland).
120 Id.
121 Id.
oppose its implementation in New Jersey. What NJDPM emphasized was that in New Jersey it remained indisputable that there had been a low death sentencing rate, a high reversal rate of those who received a death sentence, and a history of never having executed anyone since 1963.

As part of its reality-based strategy, NJDPM also sought to demonstrate—and thereby convince policymakers—that the current death penalty statute in New Jersey was inefficient, unfair, and harmful to crime victims. So, instead of focusing on moral and religious concerns, NJDPM focused on the failure of the state to execute anyone since the death penalty had been reinstated in 1982. Hence, NJDPM stressed the high cost of appeals and the impact on victims’ family members who were often reminded of the existence of killers who, as yet, had never been put to death. NJDPM also pointed out that innocent persons had been convicted of murder and that it was possible for such persons to be assigned to “Death Row at Trenton State Prison.” Moreover, it observed that “silent factors,” such as the race of the defendant and the race of the victim, had been shown to influence the application of the death penalty. Furthermore, it identified inherent “flaws” in the system, noting in particular that a New Jersey Supreme Court

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122 Id. The leaders of NJDPM never denied that they were fundamentally opposed to the death penalty, but they wanted to work with as many policymakers as possible, including those who may have supported the death penalty in principle but believed it unworkable in practice.
123 Id.
124 Fitzgerald, Determination, supra, note 99, 12 (Ms. Fitzgerald believed that New Jerseyans would eventually oppose the death penalty because of 5 main reasons, it: (1) carries an inevitable risk of executing innocent persons; (2) arbitrarily and unfairly selects defendants for death; (3) has had three quarters of its capital convictions reversed on appeal; (4) subjects murder victims’ loved ones to a seemingly endless connection to the criminal justice system and impedes their healing. (5) costs New Jersey taxpayers millions more than the alternative of life in prison without parole).
126 Id. (NJDPM “attracted people who thought the death penalty was simply another waste of time in money in New Jersey,” Ms. Fitzgerald subsequently explained.).
128 Id. (The 2001 Study stated, “statistical evidence strongly suggest that defendants who kill white victims are more likely to advance to penalty phase trials than defendants who kill African-American victims.”).
study in 2001 had found that the death penalty had been applied inequitably due to “county variability.”

As for its specific legislative agenda, NJDPM concentrated on bringing about a legislatively enacted moratorium on executions in conjunction with a study commission that would provide cover for politicians reluctant to being perceived as “soft on crime.” The results of a study commission would presumably demonstrate that the death penalty was wasteful and unworkable in New Jersey. Such a demonstration might then enable legislators to support eventual abolition of the death penalty, even if they personally had

129 Id. The county variability was based on the fact that “the decision to seek the death penalty rests solely with the Prosecutor in the county where the crime took place…Prosecutors have personal views, and some are many times more likely than others to seek the death penalty. Whether a defendant lives or dies may depend upon the county in which the crime took place.”

130 Id. As one of the NJDPM’s earliest legislative recruits, I attempted at the time to outline the many practical and procedural problems associated with New Jersey’s existing death penalty statute. Based on my review, there were multiple issues, as set forth below in the following outline that I made at the time (and which were subsequently presented in oral testimony to the Death Penalty Study Commission on September 13, 2006); See Comm’n Rep., supra note 64, at 14.

I. Practical problems with New Jersey’s Death Penalty
   A. Problems with Deterrence as an Alleged Justification:
     B. Problems with Other Alleged Justifications
   C. Problems of Cost:

II. Procedural Problems with New Jersey’s Death Penalty
   A. Problems with the Court: Biased Venues, Hearsay Issues, Jury Instructions
   B. Problems with the Jury: Empanelling a Jury on One’s “Peers,” Permitting One Person to Cause a Deadlock
   C. Problems with the Prosecutors: Slanted Statements, Over Aggressiveness,
     Withholding of Evidence
   D. Problems with Defense Counsel: Availability of Resources, Competence and Experience
   E. Problems with Victims’ Representatives: Presence at Trial, Bias of Victims’ Impact Statements
   F. Problems with Accused (Mental Incapacity)
   G. Problems with the System
     1. Proportionality Problems with Respect to Sentence
     2. Proportionality Problems with Respect to Race
   H. Problems with County Variance
   I. Problems with a Possible Mistakes—the Role of DNA
   J. Consequence of Procedural Problems (82 Convictions, No Deaths)
   K. The Constitutional Issue: Is It Unconstitutional to Keep Someone on Death Row?

131 See “Why A Study of the Death Penalty Is Needed In New Jersey,” a one-page paper circulated to Legislators by NJDPM (copy on file with author). Enclosed with the paper was an editorial from the Trenton Times, dated Jan 2, 2003, entitled “For A Death Penalty Study.”
no moral objection to capital punishment. To bolster its position, the NJDPM developed a “simple” message to serve as the rationale for legislators willing to reconsider their position:

We couldn’t have known in 1982 what we know now about the death penalty. We couldn’t have known [the extent of the risk] of executing an innocent person, we couldn’t have known about the reversal rates, we couldn’t have known about the impact of the longer process on the victims’ family members, which was a key message point for us. So with the focus on innocence and victim’s families, we created that message, we got out that message which happened to have the benefit of being the absolute truth in 2002.

However, despite NJDPM’s strategic planning, the climate following the tragic events of September 11, 2001 made it difficult to advocate for legislation that could be considered too lenient on murderers and terrorists. Nevertheless, beginning in 2002, several important political events occurred in New Jersey that would prove most advantageous to NJDPM and other death penalty opponents. In January 2002, the Democrats took control of the General Assembly and the Governorship and achieved co-equal status in the State Senate (owing to a twenty-twenty tie among its membership). Equally significant, the NJDPM was able to enlist two sympathetic Assembly members, Democrat Albert Steele and Republican Christopher (Kip) Bateman, to introduce a bill,

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132 The primary targets for “cover:” initially were the Governor, James McGreevey, and the Senate Co-President, Richard Codey.
133 Fitzgerald, Determination, supra, note 99, 12.
134 See Wikipedia, Beltway Sniper Attacks, http://en.wikipedia.org/wiki/Beltway_sniper_attacks (last visited Feb. 19, 2009 at 5:12 PM EST). This climate, inducing enormous fear of domestic acts of terror, had actually been building since the early to mid 1990’s, largely due to such horrific tragedies as the World Trade Center bombing on February 26, 1993 and the Oklahoma City Federal Building bombing on April 19, 1995. Moreover, after 9/11, a series of killings in the Washington D.C. area, inflicted by the “Beltway sniper,” further fueled public—and legislative—outrage over the murder of unsuspecting and innocent victims.
135 See Legislative Manual, State of New Jersey (2002), at 299. After the November 2001 election, the Democrats won 44 seats in the General Assembly to 36 for the Republicans and each party won 20 seats in the State Senate; Id. at 871 (Democrat James E. McGreevey easily beat Republican Bret Schundler).
136 See Legislative Manual, State of New Jersey (2002), at 282 (The Rev. Alfred E. Steele, Assemblyman for the 35th Legislative District representing portions of Passaic and Bergen Counties, had served in the
A-1913 on February 21, 2002,\(^{137}\) to create a Death Penalty Study Commission (DPSC) and to impose a moratorium on capital punishment until after the Commission had completed a one-year study.\(^{138}\) A companion bill was introduced in the State Senate on that same day, sponsored by Democrat Shirley Turner and Republican Richard Bagger.\(^{139}\) Because sponsorship of both bills was bipartisan, they were treated with respect and raised the possibility--for the first time--that “this was an issue whose time had come, particularly in New Jersey.”\(^{140}\)

In keeping with NJDPM’s overall strategy, the bills, had they been enacted, would have authorized the DPSC to find answers to the following questions: whether the death penalty rationally served a legitimate penological intent, such as deterrence; whether it was consistent with evolving standards of decency; whether the selection of
defendants for capital trials was arbitrary, unfair or discriminatory; and whether there was arbitrary, unfair or discriminatory variability in the sentencing phase of the process. It was assumed by NJDPM’s strategists that honest answers would have inevitably led to the conclusion that the death penalty no longer could be (and perhaps never could have been) defended in New Jersey on grounds that it met a justified governmental purpose.

Although a “study commission” was deemed not nearly as threatening from a political perspective as a bill calling for outright repeal, such proposed legislation would still have to go through a series of complicated political hurdles before finally receiving Statehouse enactment. With respect to A-1913, the first obstacle was that Linda Greenstein, Chair of the Assembly Judiciary Committee, to which the bill had been referred, opposed the bill and would not grant it a public hearing. Consequently, following several months without any action being taken by the Judiciary Committee, the Speaker of the Assembly, Joseph Roberts (a supporter of the bill), transferred the bill on December 9, 2002 to the more sympathetic Assembly Law and Public Safety

141 See A-1913, supra, note 133.
142 See Robert J. Martin, Elimination of Litigation by Legislation: The Statutory Salvation of St. Virgil School, 31 Seton Hall Leg. J. 345 (2007). In a previous article, this author has set forth a detailed explanation of the “dance of legislation,” with all its complications and surprises that takes place at New Jersey’s Statehouse.
143 Interview with Assemblywoman Linda Greenstein, 14th District, Chair of the Assembly Judiciary Committee, August 12, 2008. As Committee Chair, Ms Greenstein had the authority to decide which bills would be heard by “her” committee. Ms. Greenstein told me that she opposed a repeal of the death penalty for two main reasons. (1) She represents, as part of the 14th Legislative district, the municipality in which Megan Kanka had been brutally murdered, and she did not want Megan’s killer to be released from death row (for a description of Megan Kanka’s death and Megan’s Law, which was subsequently enacted throughout the country; (2) As in the circumstances related to Megan Kanka’s murder, Ms. Greenstein believed that there were certain heinous crimes for which murder remained an appropriate penalty; See also Wikipedia, Megan’s Law, http://en.wikipedia.org/wiki/Megan’s_Law) (last visited Aug. 6, 2008 (last visited Feb. 19, 2009 at 5:13 PM EST).
Committee. On that same day the bill was subsequently reported out of that committee with a favorable recommendation.\footnote{See A-1913, \textit{available at} http://www.njleg.state.nj.us/bills/Billview.asp (last viewed Aug. 6, 2008).}

But by then an amendment had been attached to A-1193 that seriously compromised one of the bill’s primary objectives.\footnote{Id.} In order to bolster its chances of final passage, the bill’s sponsors agreed to remove the moratorium on capital punishment to “hope[fully] bring on several legislators from both parties” who had expressed support only for a study commission.\footnote{See Assembly Law and Public Safety Committee Statement to A-1913, Dec. 9, 2002, \textit{available at} http://www.nj.us/bills/Billview.asp. “The amended bill recommends that no execution be carried out until the report has been completed. As introduced, the bill required that no executions take place until action was taken by the Governor and the Legislature in response to the report.” The difference between “recommends” versus “required” (that no executions take place) was viewed by many moratorium supporters as a serious flaw.} In this more restrictive version, A-1913 was subsequently posted for a full Assembly vote on January 23, 2003, and passed that chamber by a vote of 56 in favor, 10 in opposition, and 1 abstention.\footnote{See supra Note 144.}

Yet even though the bill had passed the Assembly by an overwhelming margin and was now in a watered-down form, the Co-Presidents of the State Senate, Democrat Richard Codey and Republican John Bennett, were still not anxious to take up either it or its Senate counterpart (S-1112).\footnote{Because of the 20-20 tie between Democrats and Republicans in the State Senate, both Senate Co-Presidents (Senator Codey and Senator Bennett) had a voice in setting the calendar and, thus, a voice as to which bills would be allowed to “move forward” for a vote.} Because 2003 was an election year in which every Senate seat would be contested (at an unprecedented time when the Senate was equally split between the two political parties), both parties sought to put off many controversial
votes until after the November general election.\textsuperscript{150} Therefore, it was not until November 23, 2003 that the Senate Judiciary Committee finally held a hearing on the two bills, at which time a substituted version (making the Senate version identical to the amended Assembly bill) was favorably reported.\textsuperscript{151} Shortly thereafter, on December 11, 2003, and in the midst of the “lame-duck session,” the full Senate voted 34-0 to approve the two bills, merging them together.\textsuperscript{152} Later that same day, the merged bills received concurrence in the Assembly by a vote of 70-8.\textsuperscript{153}

Nevertheless, A-1913 never became law. Governor McGreevey chose to (absolutely, as opposed to conditionally) veto the study commission bill on January 12, 2004.\textsuperscript{154} His official reasons for doing so, as stated in his Veto Message, were because: (1) the death penalty had been studied in “painstaking detail” since its reenactment in 1982; (2) prosecutors and juries had shown restraint in imposing the death penalty (having at that time obtained only 53 cases with death verdicts); (3) the New Jersey Supreme Court had consistently upheld the statute’s validity; and (4) the statute, the

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\textsuperscript{150} See supra, note 135 and accompanying text. Due to the tie between the two political parties in the Senate, each one was working hard to try to win additional seats in the upcoming November General Election to secure unilateral control. As a result of the tie, the State Senate had Co-Presidents: Democrat Richard Codey and Republican John Bennett. These legislative leaders were fearful that a vote involving the death penalty prior to the November General Election might prove harmful to their party’s chances for success.
\textsuperscript{151} See supra Note 144. As a member of the Senate Judiciary Committee, I argued strongly against removing the moratorium provision out of the bills (and therefore leaving only the study commission). Nevertheless, I was unable to gather much support, especially from Republican colleagues. I subsequently did vote to release the bills from the Judiciary Committee, but did so quite reluctantly and only with the assurance that NJDPM believed that the compromise was essential to get the bill enacted.
\textsuperscript{152} Id.
\textsuperscript{153} Id. Because the Assembly bill had been amended in the Senate (during its Judiciary Committee hearing), it had to be returned to the Assembly so that its membership could concur on the amendments.
\textsuperscript{154} In New Jersey, a governor has the right to absolutely or conditionally veto a bill enacted by the Legislature. Unless the Legislature overrides an absolute veto via a two-thirds majority vote in each house, the veto will prevail.
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common law and court rules in New Jersey included more safeguards than commonly found in most jurisdictions.\textsuperscript{155}

Although not mentioned, possibly another reason for Governor McGreevey’s veto was his desire to protect and enhance his popularity among voters as he began making plans for a potential re-election campaign in 2005.\textsuperscript{156} Perhaps in keeping with such concerns, Governor McGreevey waited until the last day of the two-year Legislative Session to actually veto A-1913, thus affording the Legislature no opportunity to attempt to override his veto (since that Legislature’s lawmaking powers officially expired on that date).\textsuperscript{157} Although Governor McGreevey’s action proved to be a huge disappointment for the bill’s legislative sponsors as well as NJDPM, it turned out to be merely a temporary setback, as shall be explained in Section III.C., below.

2. Pursuit of a Moratorium by Litigation

In what was later referred to in jest by its lead attorney as a “crazy idea,”\textsuperscript{158} NJDPM initially filed a lawsuit in 2001 in state superior court challenging the state regulations proposed to reauthorize executions.\textsuperscript{159} At this stage in his career, the NJDPM’s lead attorney, Kevin D. Walsh, was a young and recently admitted lawyer who had begun working in 2000 as a staff attorney for Fair Share Housing, a non-profit

\textsuperscript{155} See Governor’s Absolute Veto, A-1913, available at http://www.nj.us/bills/Billview.asp.
\textsuperscript{156} Based on the author’s personal recollections, it appeared that Governor McGreevey didn’t want to appear “soft on crime” as he started to approach what he then thought would be his re-election campaign in 2005.
\textsuperscript{157} In New Jersey, if the Legislature does not override a gubernatorial veto before its session has expired, a bill “dies.” Although it can be re-introduced in the next legislative session (as was the case with A-1913), a bill must then go through the whole legislative process again.
\textsuperscript{158} See Transcript, Panel III, supra note 103, at 20.
\textsuperscript{159} See New Jersey Death Penalty Moratorium v. New Jersey Department of Corrections, 370 N.J. Super. 11, 850 A.2d 530, N.J.Super.A.D. 2004 (App. Div. 2004); See Transcript Panel III, supra note 103, at 48 (Ms. Fitzgerald, the NJDPM Executive Director, later stated “it was as strategic decision on our part to have a legal strategy to back up a political strategy.”).
agency, located near Camden, New Jersey, that sought to alleviate racial segregation through education and litigation. To advance the agency’s goals, Mr. Walsh focused largely on regulatory and administrative law as the legal grounds for court actions designed to reduce concentrations of segregated housing.

Using his considerable persuasive skills to compensate for his relative lack of experience, Mr. Walsh was able to sell the NJDPM Executive Committee on initiating a regulatory challenge as a potential way of obtaining a death penalty moratorium. He advocated challenging the regulations that the New Jersey Department of Corrections (NJDoC) had proposed to carry out a death penalty sentence by means of lethal injection. NJDPM’s Executive Committee decided to pursue this legislation, even though it was considered a “long shot;” the Committee perceived it as a potential “insurance policy” in case the legislative effort proved unsuccessful.

Thus, what came to be known as “Kevin’s lawsuit” was ultimately crafted to raise a whole series of regulatory and constitutional issues, “filed in a “lengthy, lengthy brief” that challenged the specific steps and measures that the NJDoC had promulgated.

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160 See, News Release, South Jersey Man recognized for leadership Against Poverty and Social Injustice, New Yorkers For A Death Penalty Moratorium, available at http://www.mjadp.org/forms/kevinwalsh.htm (last visited Aug. 20, 2008). Mr. Walsh had graduated from Rutgers University School of Law-Camden in 1980. This author became acquainted with Mr. Walsh because his girlfriend (now wife), Rosemary Bates, served as my Research Assistant during my year as a Visiting Professor at Rutgers-Camden Law School in 2004-05.

161 Id. Much of New Jersey housing law is regulated by COAH (Council on Affordable Housing), and part of Mr. Walsh’s work involved enforcement of COAH regulations in municipalities such as Cherry Hill to bring those municipalities in compliance with the constitutional requirements as enunciated in New Jersey’s famous state supreme court Mt. Laurel decisions.

162 Transcript, Panel III, Supra, note 103, p. 18-19 (Mr. Walsh admits that because he was relatively new, the Executive Committee made him “go get another lawyer who could look over my shoulder to make sure that I knew what I was doing.”).


164 Id. at 24. The Executive Committee may have also been influenced by the fact that Mr. Walsh was a volunteer who had agreed to work pro bono.
for carrying out an execution, both prior to and inside the legal injection chamber. The lawsuit was slow in advancing, however, because NJDPM was unable to receive critical discovery information about legal injection protocol from the NJDoC without first resorting to side litigation through utilization of the state’s recently enacted Open Public Records Act. Although eventually successful in this preliminary round of litigation, the NJDPM now experienced a substantial delay with respect to a decision on the merits of the basic case challenging the proposed NJDoC’s regulations. Therefore, by the beginning of 2004, NJDPM had still not yet secured its primary objective: attainment of a death penalty moratorium--either by legislation or by litigation.

C. Strategy from 2004 to 2006: Achievement of a Temporary Moratorium

1. Achievement of a Temporary Moratorium by Litigation

Finally, after more than two years of protracted litigation, NJDPM was able to achieve a monumental court victory on February 20, 2004. In a “dramatically worded decision” written by Judge Sylvia Pressler, a three-judge panel of the Superior Court Appellate Division (temporarily) halted executions in New Jersey, ruling that the medical

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165 Id. at 19 (“We said that the exact method of how we execute people is something we need to know about and something we need to see and what happens in the execution chamber…is the sort of thing that informs whether the punishment is cruel and unusual.”).

166 Id. at 20; See Department of Corrections Ordered to Surrender Secret Records to Death Penalty Group, New Jerseyans for a Death Penalty Moratorium, available at http://www.njadp.org/forms/secretrecords.htm (last visited Aug. 20, 2008); See also See NJDPM v. DoC, No. A-63-04 (NJ App. Div, 2005). Specifically, the NJDPM sought information about the state’s lethal injection protocol. The Department objected, claiming privilege. The NJDPM successfully filed and not only won a law suit on Feb. 10, 2003 pertaining to the lethal injection protocol but was subsequently awarded attorney’s fees. Eventually, the suit ended up in the New Jersey Supreme Court, which ultimately did not grant a stay on legal injections but granted a stay with respect to attorney’s fees. On the issue of compensation for pro bono counsel the court held that all counsel, even if they work merely after normal working hours without expectation of compensation, are entitled to attorney fees. The Open Public Records Act, allowing the public to gain access to many governmental documents, was enacted in New Jersey in January 2002. As the prime sponsor of that act, this author did not foresee how it would shortly thereafter come to the assistance of one of my other legislative goals, abolition of the death penalty.
knowledge on which they were based was fundamentally inadequate. The court also found that NJDoC’s ban on media televising of executions required justification, otherwise it might infringe on First Amendment constitutional rights. Judge Pressler referred to the regulations adopted to govern executions by the NJDoC as “arbitrary” and “unreasonable” and only “conceptually” constitutional. It was worth noting that Kevin Walsh, the victorious litigator, subsequently conceded that although “about 85% of our issues were struck down by the Appellate Court, the two or three that really [mattered]—that won the case for us--were sufficient.”

Having struck down the proposed re-adoptions of the state’s death penalty regulations, the court proceeded to order the NJDoC to hold further hearings and do more research before promulgating the necessary revisions. Eventually, the NJDoC came out with revised regulations on September 20, 1994. However, because of the large amount of commentary submitted in response (as permitted by the state’s Administrative

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167 See Jim Edwards, Court Stays Lethal Injections Pending Review of Death Penalty Regulations, 175 N.J.L.J. 621, Feb. 25, 2004; See, also, supra Note 163 (Judge Pressler held that, without the required medical investigation into whether a lethal injection is “reversible” (in circumstance where a prisoner might win a reprieve after the injection but before the drugs had run their course) was unsubstantiated. She further held that the N.J. DoC’s argument that the “reversibility” of lethal injection is irrelevant—because the death penalty is intended to be irreversible—was merely a “tautological explanation” of the rule.).

168 See Edwards, supra, note 167 (It was noted that the stay would affect the fate of at least six pending death penalty cases. It was further noted that the decision “is written in such strong language that it practically baits those critics of the judiciary who maintain that, although the death penalty remains officially the law, state judges will not allow one to take place.”).

169 Id.

170 See Transcript, Panel III, supra note 103, p. 20.

171 Id.

172 See Celeste Fitzgerald, Death Penalty Foes Assail New Jersey Department of Corrections; Charge Agency with Hiding Documents, Predict Bungled Executions, (Feb. 2004), available at http://www.njadjp.org/forms/NJADP020405, at 3; Id. at 1 (The regulations also specified that a physician and nurse would have to attend the execution. On the issue of reversibility of a lethal injection, to which the Appellate Division had specified that the NJDOC “come forward with strong medical evidence that there is no possibility of reversibility and no other suitable drugs whose effects are reversible,” the NJDOC failed to propose any changes in its existing protocols.”).
Procedure Act), the NJDoC was forced to extend the sixty-day comment period and thereafter hold a public hearing, which was scheduled on February 5, 2005.  

This requirement to hold a public hearing, the first such hearing in NJDoC’s history, proved to be of tremendous advantage for NJDPM’s legal team and the organization itself. Working in tandem, they made use of this open forum to cast further doubt not only on the legitimacy of the proposed regulations but also on the broader question as to the wisdom and practicality of extending continuation of capital punishment.  

During the public hearing, in front of a packed audience of almost three hundred supporters, NJADP (to which NJDPM had recently changed its name) put forward an extensive number of witnesses.  Their testimony, in addition to providing expertise on the rule-making process, demonstrated that, lacking basic competence in taking a life, the DOC is likely to horrendously botch any execution it performs. Additional testimony showed that the DOC has no legitimate security interest in shrouding the execution process in near total secrecy.

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173 Id. at 3. (The comment period was extended to February 15, 2005 and the public hearing was held at the Office of Administrative Law, in Mercerville, New Jersey.).
174 See Transcript, Panel III, supra note 103, p. 22.
175 Fitzgerald, Transcript, supra note 172, at 14. As explained by Celeste Fitzgerald, the organization’s Executive Director, NJDPM changed its name “because we knew we had to talk about the alternatives to the death penalty, of life without parole. We knew that there was a lot of confusion between life sentences and life without parole sentences and we had to clear up that confusion. She also noted that NJADP felt that a position in support of a moratorium (at least in New Jersey) was now “mainstream,” and the organization should seek to advocate a solution that would extend beyond a moratorium.; See also e-mail of Dec. 6, 2006 (titled “Ending executions would end the death-row circus”) from NJADP to Senator Martin (copy on file with author) (NJADP subsequently in various mailings and e-mails described itself as the “core group of 200 N.J. civic, religious, labor, business and civil/human rights organizations who support repeal of the death penalty, in favor of life in prison without parole).  
176 See Fitzgerald, supra note 172, at 2. Among the witnesses were legal and medical experts, loved ones of murder victims, relatives of people who had been executed, and former death row inmates who had subsequently been exonerated.
177 See Fitzgerald, supra note 172, at 4; See Transcript, Panel III, supra note 103, p. 22. As for the NJDOC, it failed to provide any explanation as to what lethal drugs it would use in an execution and what their effects would be. Kevin Walsh recalls that it was the first time that the NJDOC “had ever said it and the first time that it was ever said in the country [that] we don’t know which drugs to use and we’re not going to figure out which drugs to use until an execution approaches.”
The upshot of the hearing was that NJDoC was forced to go back to the drawing board before again seeking to attain reauthorization of its proposed regulations.\textsuperscript{178} Of critical significance to NJADP was that the Department never did adopt regulations regarding executions, despite its apparent obligation to do so. Thus, NJADP’s attorney, Kevin Walsh, was able state, in retrospect, several years later: “I’m proud to say that the regulations were never adopted and the moratorium that was in place in February 2004 . . . in some sense [is] still in effect.\textsuperscript{179}

Undoubtedly, NJDoC’s reluctance to adopt revised regulations after February 2005 must have been predicated to some extent on the fact that the State Legislature appeared poised to enact its own moratorium or, alternatively, to enact a statute abolishing the death penalty. In either case, such an enactment would then have obviated the necessity for any departmental regulations regarding the complex issues surrounding implementation of carrying out a death sentence. Thus the policy of “wait-and-see” by NJDoC’s ultimately proved to advantageous on its part, since it never was forced to resolve such problems after the Legislative adopted a moratorium and then a repeal of the Death Penalty shortly thereafter.

2. Achievement of a Temporary Moratorium by Legislation

At the same time that NJADP was on the verge of winning the lawsuit that secured a judicially mandated moratorium of the death penalty, it also decided to conduct another vigorous campaign to achieve its goals through legislation. Despite its obvious disappointment over Governor McGreevey’s veto in January 2004 of the Death Penalty

\textsuperscript{178} Id. Undoubtedly, any attempt to sustain new regulations would be subject to court approval, since the Appellate Division had required that certain corrections would have to make prior to their adoption.\textsuperscript{179} See Transcript, Panel III, \textit{supra} note 103, p. 23.
Study Commission bill, NJADP took solace in the fact that “more than a hundred legislators [had now been placed] on record as saying the [existing] policy is so flawed, we ought to take a look at it.”\textsuperscript{180} In recognition of this, NJADP made a very, very important strategic decision that [would] probably forever be one of our smartest decisions. . . We didn’t focus on McGreevey and his veto. [Instead] we thanked the legislators who voted yes. We thanked them. We thanked them, and we allowed them to continue to move in the right direction on this.\textsuperscript{181}

Also of significance, NJADP took cognizance that there appeared to be no political “backlash” against those legislators who had voted in favor of the study commission.\textsuperscript{182}

Consequently, new death penalty study commission bills, identical to those of the previous session, were introduced into both houses of the Legislature on January 26, 2004, at the beginning of the new Legislative session (and only two weeks after Governor McGreevey’s previous veto of A-1913).\textsuperscript{183} With the Democrats now solely in charge of each legislative chamber (as a result of the November 2003 General Election\textsuperscript{184}), their leadership chose to take immediate—albeit—preliminary action on this issue, but this time in the Senate first, rather than the General Assembly.\textsuperscript{185} Accordingly, on the same day that S709 (and its companion bill A2347) was introduced, it received a committee hearing in the Senate Judiciary Committee.\textsuperscript{186} Under the direction of Senator John Adler, the Committee’s supportive Chair, the Judiciary Committee reported S709 out favorably,

\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{184} \textit{See} Legislative Manual, State of New Jersey (2004), at 307 (indicating that the Democrats had won sole control of the State Senate, with 22 members to the Republicans 18, while increasing their control of the General Assembly, with 47 members to the Republicans 33.).
\textsuperscript{185} It was intimated that the reason the issue was to be heard first in the Senate was because in the previous session the Senate had been the more reluctant of the two houses to take up the bill. Consequently, the General Assembly now sought assurance that the Senate would, in fact, pass a similar bill before the Assembly would choose to act on the matter.
\textsuperscript{186} \textit{See supra} Note 183.
thus placing it in a position for a full Senate vote.\textsuperscript{187} But, no quick follow-up—by means of a vote of the full Senate—unfolded; in fact, there appeared to be a deliberate effort to slow down additional progress in advancing the bill, presumably due to Governor McGreevey’s unequivocal opposition to it.\textsuperscript{188}

Hence several months passed without any further action taken on S709. However, on August 18, 2004, a totally unexpected development occurred that greatly altered the chances of the bill’s passage—as well as the overall course of New Jersey politics. Governor McGreevey abruptly announced that he was resigning from office (for personal reasons), effective Nov. 15, 2004.\textsuperscript{189} His resignation resulted in the elevation of Senate President Richard Codey to Governor for the remainder of the term, which lasted until January 17, 2006.\textsuperscript{190} Given this unanticipated event, the legislative sponsors of S709 and A2347--and the NJADP-- became much more optimistic about ultimate success, mindful that Governor Codey\textsuperscript{191}—as Senate President-- had posted and voted for the similar bill that Governor McGreevey had vetoed earlier that year.

But, once again, further advancement of S709 did not come quickly. Similar to the 2002-03 Legislative Session, a decision was made by the leadership of the two

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\textsuperscript{187} \textit{Id.}

\textsuperscript{188} In discussing the matter with colleagues, it was again suggested that Governor McGreevey did not want to be perceived as soft on crime in the year before he was expected to seek reelection. But always the politician, Governor McGreevey apparently preferred to deflect opposition to his position (shared by many Democrats and others who tended to support such “liberal” causes) by keeping the bill bottled up in the Legislative process (and thus avoiding another controversial veto).


\textsuperscript{190} See Legislative Manual, State of New Jersey (2005), at 475 (According to a provision of the New Jersey Constitution (which has since been amended), the Senate President assumed the dual role of Acting Governor and Senate President upon the vacancy of office of a sitting governor.).

\textsuperscript{191} At that time Mr. Codey’s title was “Acting Governor” (as well as Senate President). A subsequent statute, enacted after he had completed his term of office, changed Mr. Codey’s title to simply that of “Governor.”
Legislative Houses to hold the bill until the next lame-duck session, which would not occur until after the November 2005 General Election.\textsuperscript{192}

So, for the remainder of 2004 and almost all of 2005, S709 continued to languish without passage in either the State Senate or General Assembly. In the interim, NJADP continued its best to try to prod legislators and legislative candidates into committing their support for the bill. As part of its effort, NJDPM released the results of a new public opinion survey it had commissioned in May 2005 indicating that “nearly half of all New Jersey residents [47\%] prefer life in prison without the possibility of parole as the penalty for murder, with only one third choosing capital punishment.”\textsuperscript{193}

As the 2005 lame-duck session finally approached (following the General Election in which the Democrats retained control of the Governorship and General Assembly),\textsuperscript{194} NJADP deliberately stepped up its lobbying efforts to have S709 enacted prior to the close of the legislative term. It commissioned another study and a subsequent press conference, in conjunction with New Jersey Policy Perspective, which revealed that—in the 23 years since the death penalty had been reinstated—the state had spent over a quarter billion dollars more in attempting to impose capital punishment than what it would have spent if it had simply imposed life without parole.\textsuperscript{195} The study noted that

\begin{itemize}
  \item \textsuperscript{192} See, supra, note 191. This strategy would allow the Democratic majority, facing a contest for the governorship and for all seats in the General Assembly, to avoid—until after the election—a charge that its members were soft on crime, for earlier delays based on this strategy.
  \item \textsuperscript{193} See New Jerseyans for Alternatives to the Death Penalty, New Poll Shows New Jerseyans Prefer Life in Prison Without Parole Over Death Penalty, April 28, 2005. The poll was conducted by the Bloustein Center for Survey Research at Rutgers University (The results demonstrated a continuing erosion of public support for capital punishment, pointing out “just six years ago New Jerseyans preferred the death penalty to life in prison without parole by 44\% to 37\% [whereas now] 47\% of New Jersey citizens prefer life in prison with no chance of parole.”).
  \item \textsuperscript{194} See Legislative Manual, State of New Jersey (2006), at 318, 508 (noting that Democrat Jon Corzine had been elected Governor and that the Democrats had won 49 seats in the General Assembly to the Republican’s 31. Note: state senators were not up for election in 2005, so the Democrats also retained control in that house.).
  \item \textsuperscript{195} See Fitzgerald, Transcript, supra, note 99, at 15.
\end{itemize}
merely having the death penalty option on the books--even if unutilized--was more costly to taxpayers than lifetime imprisonment.\(^{196}\) Among the reasons cited for the extra expense was that capital cases required “80 times longer for jury selection, 30 more court days per trial, longer and more complicated appeals.”\(^{197}\) In addition, the study disclosed that, of the 60 death penalty convictions (resulting from the nearly 200 capital cases that had been brought since the reinstatement), 50 convictions had been reversed.\(^{198}\)

This new study, in turn, helped trigger editorials in thirteen daily newspapers across the state calling for enactment of S709.\(^{199}\) Armed with this new ammunition, NJADP called on its Trenton lobbyists to pressure the Legislature to take up the bill in December 2005,\(^{200}\) as had been previously promised.\(^{201}\) The proponents now emphasized the serious consequences of the failed policy, especially the hurt it inflicted on murder victim’s families and the extent to which it drained law enforcement resources that could be spent in better ways to combat crime.\(^{202}\)


\(^{197}\) Id.

\(^{198}\) Id.


\(^{200}\) See Transcript, Panel III, supra, note 103, at 15. NJADP relied primarily on David Filipelli, David Pascrell, Michael Murphy, and James Harkness; See, supra, notes 115-116 and accompanying text for additional discussion of NJADP’s use of lobbyists; Among other actions, the lobbyists provided legislators with useful data, such as the fact that the Ocean County Prosecutor, Tom Kelaher, had publicly announced that he was in favor of ending the death penalty. See E-mail from James Harkness to various Senate members (December 7, 2005) (copy of file with author): In a statement released to the Atlantic City Press, Mr. Kelaher stated that he did “not morally oppose the death penalty but [felt] the process is harmful to the victim’s remaining family.” Kathleen Hopkins, *Prosecutor to Cody: Abolish death penalty*, ASBURY PARK PRESS, Dec. 13, 2005, (copy on file with author) (“The limited resources of our budgets should, in my judgment, be focused on the more immediate task of investigating, arresting, trying and convicting the miscreants who prey on law-abiding citizens throughout our state.”).

\(^{201}\) See David Chen, *Suspension of the Death Penalty is All but Assured in New Jersey*, NY TIMES, Jan. 6, 2006 (copy on file with author) (indicated that the Acting Governor and Senate President, Richard Cody, had promised to support and sign the bill during the lame-duck session.).

\(^{202}\) Id.
The Senate leadership responded to this lobbying by first permitting the bill’s prime sponsor, Shirley Turner, to submit a floor amendment to the bill on December 8, 2005. In doing so, the leadership agreed to reverse its previous strategy and include reinstatement of a death penalty moratorium, the key provision that had been taken out of the previous bill, A-1913, at the end of the prior legislative session. The proposed moratorium inserted into S709 was intended to last for the period that the Death Penalty Study Commission was required to perform its work (not to exceed eighteen months and for sixty days thereafter). Although it may have made it more difficult for wavering legislators to support the bill (which could now properly be classified as a “moratorium bill”), the amendment was easily passed in the Senate by a vote of 25 to 6. One week later, on December 15, 2005, the bill itself, as amended, was passed in the Senate by a vote of 30 to 6. Then the Legislature took its customary end-of-the-year holiday break,

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203 See Statement to Senate, No. 709, with Senate Floor Amendments (adopted Dec. 8, 2005) (copy on file with author). One of the most effective lobbying strategies employed by NJADP at this critical stage was to arrange for Sister Helen Prejean, author of the best-selling book and late movie “Dead men Walking,” to testify in Trenton.

204 One of the most effective lobbying strategies employed by NJADP at this critical stage was to arrange for Sister Helen Prejean, author of the best-selling book and late movie “Dead men Walking,” to testify in Trenton. It was reported that:

She didn’t know [later that night], but Prejean’s lobbying early in the day [of Dec. 8, 2005] paid off. The nun worked the Statehouse hallways, carrying copies of her latest book, “The Death of Innocents,” button-holing legislators, charming them with her Cajun-spiced “Hey, y’all, and confounding conservatives with her consistently pro-life position. See, Bob Braun, “For pro-life nun, state’s death penalty deserves execution.” Star-Ledger (Newark, NJ), Dec. 12, 2005, at 19 (copy on file with author).

For an explanation on the previous removal of the moratorium originally included in A-1913, See, supra, noted 147-149 and accompanying text.

205 Id. As part of the amendment, the Study Commission was required to perform its work and issue its report no later than November 15, 2006. See P.L. 2005, Chap. 321, 2.k.

206 See Bills 2004-2005, S709, available at [Link to website] (last viewed Aug. 6, 2008); Proceeding the vote was a spirited debate, with the opposition led by Republican Senator Gerald Cardinale of Bergen County fiercely arguing against a bipartisan slate of senators who had sponsored the bill (including myself).

207 Id. Although the bill passed with a substantial majority, this did not occur without persistent lobbying by NJADP. For example, NJADP’s Executive Director, Ms. Fitzgerald, requested that I (as a Senate proponent of the bill) speak to my fellow Republicans, Senators Palaia, Kavanaugh, and Bucco, urging them to support the “moratorium.”; See e-mail from Celeste Fitzgerald to Senator Martin (December 12, 2005) (copy on file with author).
leaving it only a couple of meeting dates before the 2004-05 Legislative Session officially ended on January 9, 2006.

After the holiday break and with time running out, S709 in its amended form was given a speedy hearing and reported out of the Assembly Judiciary Committee on January 5, 2006. On this occasion (as had occurred at the Senate Judiciary Committee), NJADP packed the hearing with witnesses who gave compelling personal testimony and onlookers who provided strong vocal support. Finally, on the last session day of the term (January 9, 2006), S709 was substituted for A2347, its Assembly counterpart, and voted on and passed in the General Assembly by a vote of 55 in favor, 21 opposed, and 2 abstentions. Thus a temporary legislative moratorium—for the next two years--was virtually assured.

When the bill was signed into law on January 12, 2006 by Acting Governor Codey (as P.L. 2005, c.321), its enactment was perceived as a huge victory for NJADP, as reflected in the many newspaper articles published shortly thereafter. The moratorium was even noticed by the European Union, whose presidency endorsed the

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208 Id. It is worth noting that the Chair of that Committee, Linda Greenstein, who had prevented a similar bill from being heard in the Committee in the 2002-03 Legislative Session, had now consented to letting the Committee take action on this bill. See, supra, note 144 and accompanying text.

209 See Transcript, Panel III, supra, note 103, at 15 (Ms. Fitzgerald stated that “hundreds of our members . . . turned out for those hearings.”).

210 See, David Chen, Suspension of the Death Penalty is All but Assured in New Jersey, NY TIMES, Jan. 6, 2006 (copy on file with author). “If the bill that advanced on Thursday [Jan. 5, 2006] becomes law, as expected, then New Jersey would be the third state to impose a moratorium and the first to do so through legislation.”

211 See Comm’n Rep., supra Note 64, at 1, available at http://www.nj.leg.state.nj.us/committees/dpssfinalpdf (because he was re-elected Senate President for the 2006-07 Legislative term, Senator Codey continued to carry over as governor until the newly elected governor, Jon Corzine, began his term on January 16, 2006).

action. Nevertheless, the future of capital punishment in New Jersey was now largely dependent upon the actions of the soon-to-be-created Death Penalty Study Commission, whose work would ultimately prove crucial in obtaining repeal of the death penalty statute.

IV. Death Penalty Study Commission (2006-2007)

A. Composition and Meetings of the Death Penalty Study Commission

In compliance with the enabling legislation, the New Jersey Death Penalty Study Commission (DPSC) was comprised of thirteen members. In drafting the legislation careful attention had been given to its composition, which consisted of specific appointments made by the Governor, the Senate President, and the Speaker of the Assembly, in addition to certain enumerated officials. The Governor made five appointments, of which at least one had to be a representative of the Murder Victims Families for Reconciliation and New Jersey Crime Victim’s Center, as well as at least two representatives from the “religious/ethical community” in New Jersey. The Senate President and the Speaker of the Assembly both made two appointments and, in each case, one of their appointments had to be a Republican and one a Democrat. The other four appointments consisted of the state Public Defender, the state Attorney General and the President of the New Jersey State Bar Association, or their respective designees, and a representative of the County Prosecutor’s Association of New Jersey.

213 See Declaration by the Presidency on behalf of the European Union on death penalty moratorium in New Jersey, Jan. 26, 2006 (copy on file with author).
215 Id.
216 Id.
217 Id.
Although unstated, it was understood that the DPSC membership was supposed to be unbiased or at least balanced in its views at the outset—in other words, not possessing a clear majority of members either favoring or opposing abolition of the death penalty.\textsuperscript{218} In hindsight, one of its members, Miles S. Winder, III (a lawyer), indicated that he thought that goal had been met:

I felt early on that there were a lot of people on the Death Penalty Study Commission who were neutral and they came to the [DPSC] without any preordained agenda of any kind. [A]nd, in fact, I recognized that there were several who were pro death penalty or, at least by what they did for a living, gave me to believe that they should have been pro death penalty.\textsuperscript{219}

Adhering to this policy, the diverse membership\textsuperscript{220} was extremely careful in its selection of a chair. One potential candidate, who for some seemed like an obvious choice, respectfully declined.\textsuperscript{221} Former Supreme Court Justice James H. Coleman, Jr., sensitive to possible political claims that he (as a member of a court that had reversed many death sentences) might be biased, withdrew his name at the outset.\textsuperscript{222} Consequently, the members selected the Reverend M. William Howard, Jr., to serve as Chairman.\textsuperscript{223} Reverend Howard, the pastor of a large Baptist Church in Newark, had previously served as the President of New York Theological Seminary.

\textsuperscript{218} This author was informed of this policy directly from the Senate President, Richard Codey. Senator Codey had asked me to recommend a possible Republican appointee to serve on the Committee and, in response; I submitted the name of a highly respected criminal defense lawyer. However, I was then told that my candidate could not appointed because he was not identified as a proponent of the death penalty, a factor that Senator Codey deemed necessary in order to ensure that the DPSC was evenly balanced between proponents and opponents.

\textsuperscript{219} See Transcript, Panel III, \textit{supra}, note 103, at 32.

\textsuperscript{220} \textit{Id.} at 113-116 (The members were Rev. M. William Howard, Jr. Chairman, pastor of Bethany Baptist Church in Newark, NJ; James P. Abbott, Chief of Police in West Orange, NJ; Hon. James H. Coleman, Jr., former Justice of the NJ Supreme Court; Edward J. DeFazio, Hudson County Prosecutor; Kathleen Garcia, a Trustee of the New Jersey Crime Victim’s Law Center; Kevin Havarti, an attorney in Cherry Hill, NJ; Eddie Hicks, a retiree of the Atlantic City Fire Department (whose daughter was murdered in 2000); Thomas F. Kelaher, Ocean County Prosecutor; Hon. Stuart Rainer, Attorney General of NJ; Hon. John F. Russo, former NJ State Senator (and primary sponsor of the state’s death penalty law); Robert Scheinberg, Rabbi of the United Synagogue of Hoboken, NJ; Yvonne Smith Segars, Public Defender of the State of NJ; and Miles S. Winder, III, an attorney in Bernardsville, NJ.).

\textsuperscript{221} See Transcript, Panel III, \textit{supra}, note 103, at 32 (Member Miles Winder, noted that “I walked into the organizational meeting and felt that certainly he [Justice Coleman] would be the best person to lead the Commission”).

\textsuperscript{222} See Comm’n Rep., \textit{supra} Note 64, at 113.

\textsuperscript{223} \textit{Id.}
He was a graduate of Princeton Theological Seminary and a member of the Board of Governors of Rutgers—the State University, and had formerly served as President of the National Council of Churches. By almost all accounts, he proved to be an extremely effective and respectful chairman.

Throughout the latter half of 2006, the DPSC held five public hearings and one working session. At the public hearings the DPSC received testimony from more than seventy witnesses, representing many varying points of view. The witnesses included bishops, ministers and rabbis, criminal justice and law professors, prosecutors and criminal defense attorneys, representatives from organizations such as the NAACP and the New Jersey Crime Victim’s Law Center, and many private citizens. At its working session, the Commission received presentations from professionals with expertise on the

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224 Id.
225 See Transcript, Panel III, supra, note 103, at 35 (comments made in hindsight by Miles Winder, one of the members of the DPSC: “Bill Howard did a wonderful, wonderful job. He has a way with people that is probably beyond any criticism at all, because he let people speak and then he [would] tell them that they’re going to be cut off shortly and then he [would] let them go on even beyond the time that he [had] given them.”); See Comm’n Rep., supra note 64, at 82 (Even the lone member who voted against the DPSC’s final report stated, “I have known the Chairman ... for many years and have nothing but respect [for him].”); The impression of this author, (based on my participation as a witness at the DPSC’s public hearing held on September 13, 2006) is that Rev. Howard presided over the meetings effectively and efficiently; although faced with difficult time constraints, he allowed witnesses to make their points and then allowed Commission members sufficient opportunity to ask pertinent questions.
226 See Comm’n Rep., supra Note 64, at 105-111; Id. at 3 (The public meetings were held on July 19, 2006, September 13, 2006, September 27, 2006, October 11, 2006, and October 25, 2006. The working session was held on August 16, 2006. It should be observed that the primary reason the Committee ostensibly got off to a slow start was that it could not function until all its members had been appointed. Thus it did not hold its organizational meeting until June 9, 2006.); Id. (It thereon decided to meet monthly during July and August and biweekly during September, October, and November, in order to hold public hearings and deliberate.).
227 Id. at 12-20. One of the most active participants at the hearings was the NJADP. This author can personally attest to the fact that its Executive Director, Ms. Fitzgerald, made sure that appropriate NJADP members were scheduled to attend and testify at the public hearings. There was especially compelling testimony was given by crime victims who believed that the death penalty was not a proper or sufficient remedy to compensate for the loss of a loved one.
228 Id. (Among the professors who testified were Jeffrey Fagan, Co-Director, Center for Crime, Community and Law, Columbia University, Mathew B. Johnson, John Jay College of Criminal Justice, and Charles Ogletree, Jr., Jesse Climenko Professor of Law, Harvard University.)
229 Id.
implementation and effects of the existing death penalty statute.\textsuperscript{230} The DPSC also reviewed a wide array of case law and published articles,\textsuperscript{231} as well as written testimony, newspaper articles and editorials, letters, e-mails, position papers, and legal briefs.\textsuperscript{232} It seems therefore reasonable to conclude that, before issuing its findings and recommendations, the DPSC had done its homework with respect to considering the relevant material related to the subject matter.

**B. Findings of the Death Penalty Study Commission**

In accordance with its legislative mandate, the DPSC was required--after having studied “all aspects of the death penalty as currently administered in the State of New Jersey”--to make findings in response to the following seven inquiries:

1. whether the death penalty rationally serves a legitimate penological intent as deterrence;
2. whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole; in considering the overall cost of the death penalty in New Jersey, the cost of all the capital trials that result in life sentences

\textsuperscript{230} Id. at 20. For example, Joseph K. Krakora, Esq., Director of Capital Litigation, New Jersey Office of the Public Defender provided a statement and testimony); Id. at 111. R. Eric Lillquist, Professor of Law at Seton Hall University, provided a power point presentation on “Death Penalty Justifications and Procedural Improvements.”

\textsuperscript{231} Id. at 100 (To illustrate, it reviewed an article by Cass Sunstein and Adrian Vermeule entitled Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs, AEI-Brookings Joint Center for Regulatory Studies, Working Paper 05-06, March 2005. It also reviewed a paper that this author submitted on behalf of my Seton Hall Law School colleague, D. Michael Risinger, entitled Convicting the Innocent: An Empirically Justified Wrongful Conviction Rate, available at SSRN: http://ssrn.com/abstract=931454; See also Letter from Senator Martin to Rev. M. William Howard, Chairman, New Jersey Death Penalty Study Commission, Oct. 30, 2006 (copy of file with author); Of special importance to the DPSC were a series of “Reports to the New Jersey Supreme Court, Systemic Proportionality Project (for the 2000-01 Term and each succeeding term through the 2004-2005 Term), prepared by former Superior Court Judge David S. Baime; Id. at 17. Judge Baime also participated as a witness at the public hearing held on Oct. 11, 2006; Id. at 98. Judge Baime was charged with determining the extent to which a decision by a county prosecutor to seek the death penalty had led to a disproportionate impact based on the race of the alleged perpetrator and victim, the county in which the alleged murder had occurred, and other related factors.

\textsuperscript{232} See Comm’n Rep., supra Note 64, at 101-105; Id. at 104 (among the letters submitted was one from Barry C. Scheck, Esq., Co-Director, Innocence Project (on Oct. 18, 2006); Id. It is interesting to observe that virtually all of the newspaper editorials were in favor of repealing the death penalty statute.: See, e.g., Editorial, It’s Time for N.J. to Eliminate the Death Penalty, COURIER-POST, September 20, 2006; See also Editorial, The Death Penalty Is a Loser, THE STAR-LEDGER, June 17, 2006.
as well as the death sentences that are reversed on appeal must be factored into the equation;
(3) whether the death penalty is consistent with evolving standards of decency;
(4) whether the selection of defendants in New Jersey for capital trials is arbitrary, unfair, or discriminatory in any way and there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process;
(5) whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison.
(6) whether the penological interest in executing some of those guilty of murder is sufficiently compelling that the risk of an irreversible mistake is acceptable; and
(7) whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penological interests, including the interest of families of victims.233

The DPSC was also given authority--under the enabling legislation--to address other issues of relevance and to propose new legislation that it deemed appropriate.234

Having completed its “research stage” by the end of October 2006, the DPSC proceeded to formulate its required findings and recommendations, which were included in its written report released on January 2, 2007 (approximately six weeks beyond its mandated time frame.)235 Eleven of the thirteen DPSC members voted in favor of the conclusions found in the report.236 Only one member, John Russo, dissented, issuing his own “Minority View.”237 One other member, the State Attorney General, abstained,

234 Id. To perform its work, the DPSC was entitled to acquire “the assistance and service of the employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for its purposes.” See P.L. 2005, Chap. 321, 2.j.
235 Transcript, Panel III, supra, note 103, at 34. One of the members of the Commission, Justice Coleman, indicated that the report could have been submitted on time [by Nov. 15, 2006], “but because of our respect for the victims and their families knowing what our seven recommendations were, we did not want that on Christmas Eve.”
236 Id. at 41.
237 See Comm’n Rep., supra note 64, at 79 (that member was former State Senator John Russo, the original prime sponsor of the 1982 death penalty statute (and whose father had been a victim of murder resulting from a robbery); See, e.g. Legislative Manual, State of New Jersey (2006), at 469 (At the time of the report, Mr. Russo, a lawyer and former county prosecutor, was a Trenton lobbyist working for the Princeton Public Affairs Group); See Comm’n Rep, supra note 64, at 79 (Mr. Russo expressed the view that the death
based on specified policy reasons. Several DPSC members later disclosed that they had been both pleased and surprised that their diverse body had came close to achieving unanimity in its decision-making.

With respect to its findings, the DPSC Report addressed each of the seven specific questions it had been required to consider, answering them one at a time in concise fashion:

1) There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.
2) The costs of the death penalty are greater than the cost of life in prison without parole, but it is not possible to measure these costs with any degree of precision.
3) There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.
4) The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.
5) Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.
6) The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.
7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

penalty should continue to be made “available in cases of extraordinarily vile and heinous crimes.” In his dissent Senator Russo discounted and rejected arguments that the death penalty was not a deterrent and too expensive to enforce. He also felt that there was no real risk that an innocent person might be executed due to the procedural safeguards available under New Jersey’s then existing statute. He also rejected the notion that the administration of the death penalty was racially motivated and indicated that even if public opinion might be moving away from the death penalty that such movement did not justify abolishing it as a form of punishment.

238 The State Attorney General decided to abstain on voting on the report “based upon the unique constitutional position the Attorney General occupies as the state’s chief law enforcement officer.” Comm’n Rep., supra Note 64, at 85.
239 See, e.g., comment of Miles Winder, Transcript, Panel III, supra, Note 104, at 41 (“It was a very diverse group of people and I continue to be surprised at the unanimity that we came to in the last result. Justice Coleman, however, did not seemed to be so surprised that eleven of the thirteen members were able to reach agreement.”).
240 See Comm’n Rep., supra Note 64, at 1.
It should be noted that, in addition to providing specific answers, the DPSC also defended its conclusions with 43 pages of written analysis and commentary.\(^{241}\)

Moreover, as authorized by the enabling legislation, the DPSC decided to include an eighth finding. It determined “that sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.”\(^{242}\) As later explained by one of the DPSC members, “[t]he people who had lost loved ones who were on the Death Penalty Study Commission were the people who were the greatest champions of the eighth question and they did the most in my mind to persuade the rest of us to vote in favor of the eighth question.”\(^{243}\) Presumably, the DPSC concluded that some of the potential savings of taxpayers’ funds gained by repeal of the death penalty should be dedicated to this purpose.

Based on its findings, the DPSC proceeded to make two explicit recommendations: (1) “that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility”; and (2) “that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide.”\(^{244}\) To facilitate these recommendations, the DPSC also submitted a legislative proposal, in draft bill form, entitled “An Act to allow for life imprisonment without eligibility for parole and to eliminate the death penalty.”\(^{245}\) Of course, implementation of that proposed bill would not be able to occur without its passage by the State Legislature.

\(^{241}\) See \textit{Id.} at 24-65

\(^{242}\) \textit{Id.}

\(^{243}\) See comment of Miles Winder, Transcript, Panel III, \textit{supra}, note 103, at 39.

\(^{244}\) See Comm’n Rep., \textit{supra} note 64, at 1.

\(^{245}\) \textit{Id.} at 68-77.
Not surprisingly, the NJADP and other proponents for repeal of the death penalty applauded the DPSC’s Report. However, certain opponents took grave exception to its recommendations. Perhaps the most outspoken critic—and one with legitimate academic standing—was Robert Blecker, a professor at New York Law School. Professor Blecker responded shortly afterwards to the DPSC Report by authoring a full-length law review article, entitled “But Did They Listen? The New Jersey Death Penalty Commission’s Exercise in Abolitionism: A Reply.” Essentially, Professor Blecker sought to refute the findings of the DPSC by reaffirming traditional reasons why society should retain the death penalty. He suggested that the DPSC merely gave lip-service to those who disagreed with its position. Yet despite Professor Blecker’s harsh critique

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246 See, e.g., Letter from Joan M. Diefenback, Esq., Director, of the New Jersey Council of Churches, to Senator Robert Martin, (Jan. 25, 2007) (copy of file with author) (stating that “[we] applaud the recommendations newly released by the New Jersey Death Penalty Study Commission.”); Letter from Pat Clark, Chair, Murder Victims Families for Reconciliation, to Senator Martin, (Feb. 9, 2007) (copy on file with author) (noting that she “strongly support[ed] the Death Penalty Study Commission’s recommendation that New Jersey replace the death penalty with life without parole.”); and Letter from Rev. Jerry Johnson, of Butler, NJ, to Senator Codey, (undated) (copy on file with author) (stating “[n]ow that the NJ Death Penalty Study Commission has recommended replacing the death penalty with life without parole, I strongly urge you to sponsor and support S-171, which would accomplish that worthy and just goal.”).

247 As previously noted, one of the strongest was former State Senator, John Russo, the lone DPSC member to vote against the report. See Comm’n Rep., supra note 64 and accompanying text.

248 Id. at 109. Professor Blecker had not only testified before the DPSC (on Oct. 11, 2006), but had submitted numerous articles that he had authored, all in support of retaining the death penalty. He is a professor at New York Law School, where he teaches criminal aw, constitutional law, and a course on the death penalty.


250 Id. It should be mentioned that this author and Prof. Blecker had previously debated the merits of the death penalty, having appeared on the New Jersey Public Television show “Due Process,” aired on March 14 and 16, 2004 (and rebroadcast on July 4, 2004). See letter from Lorry W. Post to Senator Martin, dated March 22, 2004 (condemning me “for more than holding [my] own against a guy who has been debating this topic for years and whose primary argument focuses on the most horrible of murders”) (copy on file with author). I concede that Prof. Blecker is able to present a strong case in favor of his position, although (in my view) it is not persuasive.

251 Blecker, supra note 249, at 6 (Prof. Blecker wrote, “This witness repeatedly attempted without much effect, through personal appearance and written submission and follow-up, to inform the Commission.”); Id. at 7-54. In his article he attempted to refute each one of the DPSC’s eight findings. He also made several conclusions with respect to the allegedly negative consequences, should the recommendations of the DPSC be enacted by the Legislature; Id. at 54-60. He contended that state abolition might produce federal executions, that the “moral logic” of life without parole is without substance, that abolition may
and the backing it later garnered from certain outspoken state legislators.\textsuperscript{252} the DPSC Report was well received by the media and many lawmakers.\textsuperscript{253} The Commission’s findings thereby set the stage for the final legislative battle that would end in successful repeal of New Jersey’s death penalty statute.

V. Final Legislative Battle to Win Repeal of the Death Penalty Statute (2007)

A. The Spring 2007 Campaign

Fortified by the recommendations that the Death Penalty Commission issued in January 2007, the NJADP and others seeking to abolish capital punishment redoubled their efforts to have the State Legislature take the last big step: passage of a bill to repeal the existing death penalty statute during the 2006-07 Legislative term.\textsuperscript{254} They did so with the knowledge that John Corzine, who had been sworn in as Governor at the beginning of 2006, was also opposed to the death penalty and would likely sign such a bill, assuming it had first received passage in both houses of the State Legislature.\textsuperscript{255} They also realized that an unusually high number of legislators had announced that they extend the reach of life without parole, and that the “symbolic value of death” is significant enough to justify continuance of the death penalty.

\textsuperscript{252} See Media Advisory from NJ Senate Republicans, Senator Cardinale & Professor Blecker Hold Press Conference to Refute New Jersey Death Penalty Study Commission Report (Nov. 20, 2007) (copy on file with author).

\textsuperscript{253} See Editorial, A Barbaric Relic, NY TIMES, May 27, 2007 (an example of the favorable press it referred to the Commission’s recommendation (to repeal the death penalty statute) as “courageous,” and agreed with the Commission that “capital punishment is inconsistent with evolving standards of decency.”).

\textsuperscript{254} See Comm’n Report, supra note 64 and accompanying text; See also P.L.2005, c.321 (they also knew that it was important to take swift action, since the statute that had created the DPSC provided continuance of the temporary moratorium for only sixty days beyond the date of the DPSC’s final report (although the moratorium achieved by litigation would still remain in effect for an additional, but, uncertain amount of time)).

would be retiring at the close of the 2007 legislative session.\textsuperscript{256} Their impending retirement suggested that such legislators might be more inclined to support a death penalty abolition bill, regardless of its (perceived) unpopularity, since they no longer would have to fear future political fallout. Hence, NJADP and its allies became increasingly hopeful that the political stars were aligning in their favor and would soon yield success, providing a bill could be advanced through the various legislative committees and obtain approval in both houses prior to the close of session, scheduled by law to end on January 8, 2007.\textsuperscript{257}

Fortunately, the proponents of repeal were able to enlist one of the most energetic and skillful politicians in New Jersey to spearhead their efforts, State Senator Raymond J. Lesniak, a Democrat from Elizabeth. Ironically, Sen. Lesniak, a former Chair of the Democratic State Committee and one of the longest serving members of the State Legislature,\textsuperscript{258} had originally voted for reinstatement of the death penalty in 1982.\textsuperscript{259} However, much like the Biblical St. Paul, he had since undergone an epiphany and become an ardent advocate for repeal.\textsuperscript{260} As early as February 2004, Senator Lesniak had introduced a death penalty repeal bill in the State Senate (S-1212) and had recruited this author as its co-prime sponsor in order to demonstrate that the bill had (at least token)

\begin{itemize}
\item \textsuperscript{256} More than one-third of the members of the State Senate had announced that they were retiring at the end of the term, as were approximately one-quarter of the members of the General Assembly. See Legislative Manual, State of New Jersey (2008), at 311, 318 (listing former state senators and assembly members).
\item \textsuperscript{257} The end of each two-year Legislative Session ends on the second Tuesday in January, which for the 2006-2007 Session was January 8, 2007. See N.J.CONST. Art, 4, §1, ¶ 3.
\item \textsuperscript{258} Senator Lesniak, who represented the 20\textsuperscript{th} Legislative District (a portion of Union County) had been elected to the General Assembly in 1977 and served in the State Senate since 1983. See Legislative Manual, State of New Jersey (2006), at 237-238.
\item \textsuperscript{259} See Lesniak, Road to Abolition, at 9 (Senator Lesniak stated that “[m]y vote was based solely on the politics of the issue. The death penalty was popular. Being against the death penalty was the same as being soft on crime.”).
\item \textsuperscript{260} Id. (Senator Lesniak observes that “[t]he 20 plus intervening years taught me that public service should not be about seeking approval, glory or fame. Trinkets. They’re nothing more than trinkets.” He further notes that “[m]y spiritual beliefs lead me to envision a society that could do justice without need for revenge, without a need to take a life.”).
\end{itemize}
bipartisan support. Sen. Lesniak also helped induce fellow Democrats, Gordon Johnson, Reed Gusciora, and Jerry Green, to introduce an identical bill in the General Assembly shortly thereafter, in March 2004. Yet neither of the repeal bills received any action in the 2004-05 biannual Legislative Term, in part because most of the attention regarding this subject was focused on obtaining passage of the DPSC bill.

Consequently, the Lesniak/Martin bill was subsequently re-introduced at the beginning of the 2006-07 Legislative Term, as S-171 on January 10, 2006. In the General Assembly, Assemblymen Johnson, along with four other Democratic sponsors, again introduced an identical bill. In addition, Democrats Wilfredo Caraballo and Valerie Vainieri Huttle and Republican Christopher (Kip) Bateman re-introduced a repeal bill identical to the one they had also filed in the previous term.

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261 See New Jersey State Legislature, Bills 2006-2007, A 1732 (like S-1212, was introduced on Jan. 10, 2006 and included Reed Gusciora (15th District) and Valerie Vainieri Huttle (37th District) as prime sponsors and Jerry Green (22nd District) and Joan Voss (38th District) as co-sponsors).
262 See New Jersey State Legislature, Bills 2004-2005, S-1212; See New Jersey State Legislature, Bills 2004-2005, A2601 (The bill had shortly thereafter (on March 15, 2004) been introduced in the General Assembly in that session by Democrats Gordon Johnson (37 Dist.), Reed Gusciora (15 Dist.), and Jerry Green (22 Dist.).
263 See supra Part III.C.2. (discussion of the passage of the DPSC legislation).
264 See New Jersey State Legislature, Bills 2006-2007, S-171 (It should be noted that another version of the Lesniak/Martin bill, S-163, had been introduced earlier on that same day, January 10, 2006, but had been replaced by S-171); See New Jersey State Legislature, Bills 2006-2007, S-163 (The difference between the two bills was that S-171 included a provision allowing for death row inmates to waive further appeals concerning sentencing in exchange for being re-sentenced to life without parole; whereas S-163 did not contain the waiver provision, instead requiring all inmates then on death row to be automatically re-sentenced to life without parole upon enactment of the legislation. Upon reflection, S-163 was thought possibly to be unconstitutional (based upon ex post facto considerations)).
265 See New Jersey State Legislature, Bills 2006-2007, A-1732 (This bill, like S-1212, was introduced on Jan. 10, 2006 and listed Gordon Johnson (37th District), Reed Gusciora (15th District), and Valerie Vainieri Huttle (37th District) as prime sponsors and Jerry Green (22nd District) and Joan Voss (38th District) as co-sponsors.).
266 See New Jersey State Legislature, Bills 2006-2007, A795 (In the 2004-2005 Session, the bill’s number was A3569. Mr. Caraballo represented the 29th Legislative District, Ms. Huttle the 37th District and Mr. Bateman the 16th District; See Transcript, Panel IV, at 53-55 (Mr. Caraballo should be acknowledged for having sponsored the first repeal bill of the modern era, which he introduced in the 1996-97 Session. He continued to introduce it in six consecutive sessions, but the bill had never—until 2007-- received serious attention.).
But, once again, none of these bills received any attention during 2006, since it took that whole year for the DPSC to complete its work.\textsuperscript{267} However, once the DPSC issued its report in January 2007 specifically recommending legislation to repeal the death penalty, the stage was finally set for serious political action.

Largely though the efforts of Senator Lesniak, S-171 was placed on the Senate Judiciary Committee agenda on May 10, 2007. Leading up to that meeting, the NJADP and its underlying organizations undertook a massive letter writing and e-mail campaign, flooding legislators’ offices with messages in support of the bill’s passage. For example, this author received a personal note from Bernadette Jusinski, the President of the Chatham-Madison League of Women Voters;\textsuperscript{268} a letter on official letterhead from Janice Smith, President of the Church Women United in New Jersey;\textsuperscript{269} and an e-mail concerning a press release from “Northern New Jersey Quakers”\textsuperscript{270}-- all urging a favorable vote on S-171. In addition, numerous form letters were received from persons inside and outside of my legislative district.\textsuperscript{271} Of special interest to me was a letter from Angela Mattera, a young constituent, who had taken part in “a semester of activities regarding the death penalty at Seton Hall University,” who wrote to inform me that she now opposed the death penalty.\textsuperscript{272}

\begin{footnotes}
\footnote{See supra. Part III.3.C (discussion of the work of the DPSC).}
\footnote{Letter from Bernadette Jusinski to Senator Robert Martin dated Jan. 24, 2007 (copy on file with author) (at least three other letters from women using the same stationary were sent to my Legislative District Office).}
\footnote{Letter from Janice Smith to Senator Robert Martin dated January 23, 2007 (copy on file with author).}
\footnote{E-mail from Robin Whitely dated February 26, 2007 (copy on file with author) The group was in actuality the Chatham-Summit Monthly Meeting of the Religious Society of Friends (Quakers), “whose membership is drawn from many voting districts in northern New Jersey.”}
\footnote{Dated January 25, 2007 and February (no date), 2007 (copies on file with author) (these letters were sent in groups, with each letter signed by a different individual).}
\footnote{Letter Angela Matera to Senator Robert Martin dated April 1, 2007 (copy on file with author) (Ms. Mattera went on to say that “[n]ow that the Death Penalty Study Commission has recommended replacing the death penalty with life without parole, I respectfully urge you to sponsor and support S-171/A795,}
\end{footnotes}
Nevertheless, voices strongly opposed to abolition--although fewer in numbers--appeared no less hesitant in expressing their views. To illustrate, Sharon Hazard-Johnson, whose parents were “savagely murdered during the course of a robbery,” submitted a detailed memorandum, addressed to all New Jersey Legislators and Governor Corzine, citing why the death penalty should be retained. 273 Perhaps her most compelling comments came at the conclusion:

Some survivors are against the death penalty for their own reasons. I can attest to the fact that you have not and probably will not hear from the many survivors who are [for the death penalty]. This is because it is too difficult and unpleasant for us to speak out. And, we are too exhausted just trying to live as normal a life as possible for the sake of our children and families. This should not be our fight. 274 (Italics omitted).

Others opposed to repeal weighed in by sending legislators form-letter e-mails, in some cases from as far away as Massachusetts. 275

Moreover, two Republican state senators, Gerald Cardinale and Nicholas Asselta, issued stinging press releases two days before the scheduled committee hearing, harshly criticizing the proposed repeal. 276 A portion of Senator Asselata’s remarks demonstrates the level of their hostility:

It is shameful that Trenton politicians are engaged in a coordinated campaign to abolish capital punishment in this state. It is beyond reprehensible that they are even proposing that cop killers, child rapists

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273 See memo from Sharon Hazard-Johnson dated February 16, 2007 (copy on file with author); Ms. Hazard also sent a e-mail to the district offices of fifteen state senators setting forth bullet points as to the “Problems with the Moratorium and Study” (copy on file with author).
274 Id.
275 See E-mails from Barbara Hawley to author, dated May 8, 2007, Leah Hazard to author (of Worcester, MA), dated May 9, 2007, and Diane Tarabour to author, dated May 8, 2007 (of Red Bank, NJ) (expressing their opposition to “the decision by the NJC to substitute life and parole instead of the death penalty.”).
276 See News Releases from NJ Senate Republicans, Senator Gerald Cardinale (39th District), Capital Punishment for Terrorists to be Banned in New Jersey (May 8, 2007); and Senator Nicholas Asselta (1st District), Cop Killers, Child Rapists and Murderers and Terrorists Deserve the Death Penalty (May 8, 2007) (copies on file with author).
and murderers and terrorists will not face the ultimate punishment if they commit their crimes in New Jersey.\textsuperscript{277}

As part of their attack the two senators authorized the Senate Republican Office to send a facsimile to the four Republican members of the Judiciary Committee, warning that current death row inmates could potentially be paroled should S-171 ever become law.\textsuperscript{278}

While this assertion may have been technically correct, it overlooked the fact that virtually all of (then) nine death row inmates would never be eligible for parole for well beyond a normal lifetime.\textsuperscript{279}

Suffice it to say, the Committee meeting on May 10, 2007 was ideologically and politically contentious, as proponents and opponents of repeal gave conflicting testimony and Senate committee members themselves expressed strongly held positions. Particularly noteworthy was that Senator Cardinale and I, who happened to sit next to one another as members of the committee, were hard-pressed to remain cordial as we vehemently expounded opposing viewpoints.\textsuperscript{280}

Despite the acrimony, the Judiciary Committee eventually voted to favorably release S-171, largely due to the sympathetic but firm guidance of the Committee Chair, John Adler. The vote of the eleven-member Committee was eight in favor, two opposed,

\textsuperscript{277} Id.
\textsuperscript{278} Their information was based on a memo, prepared by Office of Legislative Services. See Memorandum from Miriam Bavati, to John Hutchinson, Death Row Inmates, (Feb. 20, 2007) (What the senators failed to emphasize is that Ms. Bavati’s letter suggests that it was unlikely that the death row inmates would ever be released.); Id. at 2 (“Thus, all would serve what is in effect a sentence of life without parole even if their death sentences are someday overturned.”).
\textsuperscript{279} See Robert Schwanberg, When life without parole is worse than death, STAR-LEDGER, Feb. 4, 2007 (indicating that the earliest that any of the inmates could be released would be at the age of 78, with most of them at the age of about 100 years or even older). The assertion of potential prison release also overlooks the fact that the Governor (which he subsequently did) had the power to commute the death sentences of those on death row to life without parole.
\textsuperscript{280} As the longest serving (i.e., ranking) Republican member of the Senate Judiciary Committee, I was placed between the Chair, Senator Adler, and the next longest serving Republican, Senator Cardinale. It seems fair to say that Senator Cardinale and I were barely on speaking terms, a circumstance that had evolved over more than twenty years in the Legislature, arising from conflicting views over many key issues.

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Prior to the vote, it was agreed that S-171 should be combined with S2471, a bill that Senator Shirley Turner (the sponsor of the act establishing the DPSC) had introduced in January 2007, which closely mirrored the DPSC’s legislative recommendation. Hence the two bills were merged into a Senate Committee Substitute. It is worth recalling that, just prior to the vote, Senator Lesniak delivered an inspirational speech, clearly conveying his personal convictions and also setting forth persuasive practical reasons why passage would be beneficial to victims and to society as a whole.

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281 See New Jersey State Legislature, Bills 2006-2007, S-171; Of the four Republicans on the Committee, I was the only one to vote in favor. Two Republicans voted in opposition, and the other abstained. The eight Democrats all voted in favor, although at least two (Senators Paul Sarlo, 36th District, and Nicholas Scutari, 22nd District) indicated that they might not vote the same way when—and if—the bill was voted on by the full Senate. In hindsight, it appears obvious that it was indeed helpful that three of the sponsors, Senator Lesniak, Senator Gill (who had become the second prime sponsor of S2471 prior to its merger with S-171) and myself were members of this committee.

282 See New Jersey State Legislature, Bills 2006-2007, S2471 (S2471 was introduced on January 9, 2007.)

283 See New Jersey State Legislature, Bills 2006-2007, S-171; The Senate Committee Substitute included certain amendments to S-171. Most notably, the substitute provided “that certain defendants convicted of murder would be sentenced to life imprisonment without eligibility for parole, to be served in a maximum security prison, if the jury finds beyond a reasonable doubt that any of the [current statutory] aggravating factors exist.” Senate Judiciary Committee, Statement to Senate Committee Substitute for Senate, Nos. 171 and 2471, May 10, 2007, at 1; The substitute also provided that “a juvenile who has been tried as an adult and convicted of murder would not be sentenced to life imprisonment without eligibility for parole,” but that “a juvenile tried as an adult and convicted of murder would remain subject to sentencing to life imprisonment with out eligibility for parole if (1) the victim was a law enforcement officer and was murdered while performing official duties or murdered because of his status as a law enforcement officer, or (2) the victim was less than 14 years old and the murder as committed in the course of the commission of a sex crime.” Id. at 2-3; In addition, the substitute provided that an “inmate sentenced to death prior to the date of enactment of this bill, upon motion to the sentencing court and waiver of any further appeals related to sentencing, would be re-sentenced to a term of life imprisonment during which the defendant would not be eligible for parole.” Id. at 3; Moreover, the substitute provided that “a person convicted of murder would be required to pay restitution to the nearest surviving relative of the victim,” in an amount and for a duration as determined by the court. Id.; With the incorporation of these various amendments, the Statement to the substitute stated that the bill was now “substantially similar to the bill proposed by the New Jersey Death Penalty Study Commission” in its January 2007 report. The Statement to the substitute also included one further comment: “It is the desire of the sponsor [Senator Lesniak] that a significant portion of any projected savings to be realized through this change in the statute be allocated to benefits and services for victims of violent crime.” Id.; This recommendation was not made mandatory, however, since the amount of potential savings was considered to speculative to attach a percentage for this particular purpose.

284 See Lesniak, Road to Abolition, supra note 261, at 23 (The portion of Senator Lesniak’s speech that I found most compelling was the following: You have before you a letter signed by more than 50 family members whose views differ greatly on the death penalty, but who stand unified in telling us to end it.)
Following the Judiciary Committee vote, the sponsors and proponents assumed that S-171 would continue to progress through the Legislative process prior to the Legislature’s scheduled summer recess at the end of June 2007. But despite their optimism, no such progress took place. Once again (and for the third time), the leaders of the two houses decided to delay ultimate action on death penalty legislation until after the upcoming General Election, which would take place in November 2007 when all seats in both houses of the Legislature would be contested. Moreover, as a means of causing delay, Senate President Richard Codey chose to assign the bill to a second standing reference committee for review, the Senate Budget and Appropriations Committee, before allowing it to be brought to a full Senate vote. The justification for this second committee referral, permitted under Senate Rules but unusual in non-tax and appropriation legislation, resulted from the fact that the bill would presumably affect more than $100,000 in state revenue. It was unusual because, if anything, the bill was anticipated to produce savings, not increased expenditures. In retrospect, it appears that the Senate President and Assembly Speaker simply thought it politically prudent to wait until the forthcoming “lame-duck” legislative session, that would follow the next General

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285 In 2003, the legislative leaders had decided to postpone action on the Death Penalty Study Commission bill (ultimately vetoed by Governor McGreevey) until after the November 2003 General Election. See, supra note 150, and accompanying text; In 2005, the legislative leaders had decided to postpone action on the Death Penalty Study Commission bill (and moratorium) until after the November 2005 General Election. See supra Note 191 and accompanying text.; Now in 2007, the legislative leaders—for the third session in a row—decided to postpone further action on the death penalty by delaying consideration of the repeal bill until after the November 2007 election.

286 See supra Note 266 (The bill was referred to the Senate Budget and Appropriations Committee on May 14, 2007).

287 See Legislative Manual, State of New Jersey (2008), at 351 (Rule 12:11 of the Senate mandating that appropriations over $100,000 must be referred to the Budget and Appropriations Committee); See also Peters, supra note 5. According to information provided by the Department of Corrections, the state spent $84,474 in 2006 housing each inmate on death row, compared with $32,400 for a prisoner in the general population.
Election in November, before further consideration of the bill. Consequently, the sponsors and supporters of the repeal bill had little choice but to remain patient and prepare for the legislative battle that the Senate and Assembly leaders promised would resume in the late fall.

B. The Fall 2007 March to Victory

On November 6, 2007, the Democrats once again won enough seats to retain control of both houses of the State Legislature; in actuality, they increased their majorities slightly in each house. Shortly thereafter, Senate President Richard Cody indicated that the death penalty bill would be placed “on a fast track to be considered by both houses within weeks.” As for the General Assembly, Speaker Joseph Roberts announced that a nearly identical bill to S-171 (as amended) would receive a committee hearing on December 6th, and then he expected a floor vote on the bill the following week.

As the lame-duck session started to unfold, the first legislative action on the death penalty bill was scheduled to take place at the public hearing of the Senate Budget and Appropriations Committee on December 3, 2007. In preparation for this hearing, the Office of Legislative Services (OLS) had been instructed to produce a “Fiscal Estimate”...

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288 As it turned out, this delay proved strategically beneficial because it provided an opportunity for supportive legislators to run for reelection without having to contend directly with another controversial issue at a time when budgetary concerns appeared to have made many voters generally displeased with the performance of their state representatives.

289 See Legislative Manual, State of New Jersey (2008), at 310 (disclosing that the Democrats won 23 seats to 17 for Republicans in the State Senate, and Democrats won 48 seats to 32 for Republicans in the General Assembly).

290 See Peters, supra note 5.

291 Id. (In this article it was pointed out that, in recent rulings, the United States Supreme Court had narrowed the use of capital punishment, declaring it unconstitutional to execute juvenile killers or the mentally retarded.)
of the financial consequences of the bill, which OLS released on November 21, 2007.\textsuperscript{292} OLS’ estimate indicated that there would be substantial savings to the State should the death penalty be abolished.\textsuperscript{293} It determined that short-term incarceration savings of $32,481 per inmate would result by removal of in-mates from the Capital Services Unit to the general population.\textsuperscript{294} OLS also determined that savings of $93,018 per person would result from the fact that the judiciary would no longer have to conduct proportionality reviews, and that significant but indeterminate savings in court costs would result from avoidance of future murder trials.\textsuperscript{295}

Seizing on this newly released data to buttress its case, NJADP and its allies began once more to inundate legislators with an extensive list of reasons\textsuperscript{296} and an impressive list of supporters,\textsuperscript{297} in their unceasing effort to convince them to vote for S-
171 and its companion bill, both in committee and on the floor.  

But adversaries, led foremost by Senator Cardinale, the most vocal legislative critic of any bill that might weaken the death penalty statute, attempted to curb the building momentum.  

Senator Cardinale held a press conference in the Statehouse on November 20, 2007, with the specific purpose of refuting “the conclusions and accuracy of the New Jersey Death Penalty Study Commission report.” The Senator was accompanied by Robert Blecker, the New York Law School professor who had testified before the DPSC and then had strongly disputed the Commission’s subsequent findings. These two opponents claimed that the death penalty bill “was being rushed through the Legislature by Democrats to appease “an uninformed electorate in inner cities.” Senator Cardinale suggested that New Jersey enact alternative legislation that would authorize jurors to spare a defendant’s life only if there was “lingering doubt” concerning guilt. He also

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298 There was also a concerted effort by organizations in support of S-171 to request their individual members to send personal letters to legislators. See, e.g., Letter from National Coalition to Abolish the Death Penalty, Nov. 21, 2007 (copy on file with author) (This letter advised: “Repeal of the death penalty in New Jersey is within sight, but we need your help. Please take a few minutes to read this letter and then another few minutes to hand-write brief letters to your state Senator and two Assembly members. If you have a little more time, we would ask you to follow-up with a call (bold print omitted)).

299 See, e.g., supra note 252 and accompanying text (discussing Senator Cardinale attempts to have S-171 defeated in the Senate Judiciary Committee on May 10, 2007. In his press release issued before that Committee session, Senator Cardinale stated, “The argument that because New Jersey doesn’t use the death penalty we should abolish it is absurd…Capital punishment serves justice and new research by respected academics in Pepperdine University indicates it also serves as a spectacular deterrent. In fact the study shows that each execution carried out is correlated with about 74 fewer murders the following year.”

300 Id.

301 Id.

302 Id.

303 See Letter to Members of the New Jersey Senate from Senator Raymond J. Lesniak, Lesniak: Replacing Death Penalty Based on Deliberative Process, Nov. 21, 2007. (In his letter, Senator Lesniak challenged Senator Cardinale’s claim, emphasizing that the “lengthy legislative and study commission review of our death penalty statute clearly repudiates Senator Cardinale’s contention that a vote on my bill next month would be a ‘rush job’ leading to a stealth enactment.”).
proposed a second amendment that would limit state appeals pursued by death row inmates.\(^{304}\)

Perhaps the most compelling argument Senator Cardinale offered for retention of the death penalty was derived from a New York Times article, which reported that “roughly a dozen recent studies” had concluded that executions save lives\(^ {305}\). The Senator failed to mention, however, that the same article had reported that the “studies have been the subject of sharp criticism,” largely from legal scholars, who contended that “they are based on faulty premises, insufficient data and flawed methodologies.\(^ {306}\)

Despite such hard-hitting accusations, Senator Cardinale and other adversaries proved unable to prevent the death penalty repeal bills from being favorably released by standing reference committees in both the State Senate and the General Assembly in early December. On December 3, 2007, the Senate and Budget and Appropriations Committee released S-171, by a vote of 8 members in favor, 4 against, and 3 not voting.\(^ {307}\) The actual margin of victory, however, was much narrower than it appeared, since the Senate rules required that a majority of the 15-member committee had to vote in

\(^{304}\) See Editorial, Time’s up for death, THE STAR-LEDGER, Nov. 23, 2007 (The editorial expressed strong support for S-171, commenting it “is long overdue.”).

\(^{305}\) See Adam Liptak, Does Death Penalty Save Lives? A New Debate, NY TIMES, Nov. 18, 2007 (The studies claimed that for “each inmate put to death . . . 3 to 18 murders are prevented.”); Another New York Times article noted that the effect is apparently greatest in states, such as Texas, that execute criminals relatively quickly and frequently. See Peters, supra note 5; Senator Cardinale quickly made sure that all legislators received a copy of Adam Liptak’s article. Other legislators, in addition to Senator Lesniak, (see supra note 306) submitted opposing viewpoints to our colleagues; See, e.g., Correspondence my office sent to Senate colleagues that featured a copy of an editorial article written by a personal friend, Jim O’Brien, entitled “Death penalty punishes victims’ families, too” (copies on file with author). Mr. O’Brien had served as Director of the New Jersey Victims of Violent Crimes Compensation Board. His beautiful young daughter, Deirdre, had been killed by a serial killer in 1982 in Morris County, New Jersey. In his article he explained in heartbreaking prose how his family had lived through appeal after appeal given to the convicted murderer, after he had been sentenced to death. “The toll it took on me and my family was horrendous,” revealed Mr. O’Brien.

\(^{306}\) See Liptak, supra note 305 (The critics of the report went on to conclude that “the existing evidence for deterrence . . . is surprisingly fragile.”); Some critics also argued that the effect of executions, if any, cannot be disentangled from larger social factors like the overall crime rate, police budgets and the economy.” See Peters, supra note 5.

favor of the bill to secure its release. Accordingly, all 8 votes cast in favor of S-171 were needed in order to put the bill in position for an upcoming Senate floor vote. In retrospect, it appears that the public and behind scenes political maneuvering of Senator Lesniak—as both prime sponsor and Committee member—proved crucial in assuring that the bill was not derailed by the Committee.\textsuperscript{308}

In the General Assembly, it was Speaker Joseph Roberts who undertook deft maneuvering to ensure that S-171’s companion bill, A3716, was released from committee.\textsuperscript{309} The bill had originally been referred to the Assembly Judiciary Committee. But, as had happened to the original death penalty study commission bill in 2002, the Judiciary Chair, Linda Greenstein, remained reluctant to post A3716 in her committee.\textsuperscript{310} Hence Speaker Roberts used his prerogative to transfer the bill, which he did on December 6, 2007, to the more receptive Assembly Law and Public Safety Committee.\textsuperscript{311}

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\textsuperscript{308} & Senator Lesniak privately assured that enough Democratic committee members would at least vote the bill out of committee, even though some might choose to reserve the right not to support it when it was voted on by the full Senate. Publicly, Senator Lesniak delivered another inspirational address as the lead witness (as first prime sponsor) on the bill. \textit{See} Lesniak, Road to Abolition, \textit{supra} note 261, at 35; Senator Lesniak concluded his address with the following statement: “The United States is one of the few countries in the world that has a death penalty, keeping company with the likes of Iraq, Iran, North Korea, Libya, and Afghanistan. Let’s change the company we keep.” \textit{Id.} at 37.

\textsuperscript{309} & A3716, which had been introduced on November 20, 2006, served as a merger and substitute for A-1732 and A785, the two death penalty repeal bills that had been introduced in January 2006 at the beginning of the Legislative Session. \textit{See} New Jersey State Legislature, Bills 2006-2007, A3196; \textit{See, also, supra} notes 267 -268 for further discussion of A-1732 and A795. The substituted bill was intended to be identical to S-171 and also to establish a different listing of sponsors and co-sponsors. The two prime sponsors of A3716 Democrat Wilfredo Caraballo, 29th District, and Republican Christopher Bateman, 16\textsuperscript{th} District, thus highlighting the bill’s bipartisanship (even though Mr. Bateman was the only Republican of the bill’s 22 sponsors and co-sponsors).

\textsuperscript{310} & Interview with Assemblywoman Linda Greenstein, 14\textsuperscript{th} District, Chair of the Assembly Judiciary Committee, on August 12, 2008; \textit{See supra} notes 143 (discussion of the reasons why Ms. Greenstein was unwilling to post the prior bill in her committee (which was largely due to the fact that the family of Megan Kanka (for whom Megan’s Law was named) lived in Ms. Greenstein’s district, and they believed that Megan’s killer should not be released from death row in Trenton.).

\textsuperscript{311} & \textit{See} New Jersey State Legislature, Bills 2006-2007, A-3716.
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Thus four days later A3716 was given a public hearing by the Assembly Law and Public Safety Committee before a standing-room crowd in a fourth floor meeting room in the Statehouse Annex. Twenty-one persons testified at the hearing, including Edward DeFazio, a representative of the County Prosecutors Association, who disclosed that his association had concluded that the state’s capital punishment law simply did not work.\(^\text{312}\) “It’s become clear that the death penalty in New Jersey is a hoax, he stated. “It’s a hoax on the families and the victims.”\(^\text{313}\) After 2 ½ hours of testimony, the Committee voted 5 to 1 to release A3716 and allow it to proceed to a vote by the full Assembly.\(^\text{314}\)

Approximately an hour later, on that same day of December 10, 2007, the full Senate voted on S-171 in front of another packed audience that filled the Senate upper-floor gallery.\(^\text{315}\) Prior to the vote, Senator Leonard Lance, the Republican Minority Leader, attempted to introduce an amendment to S-171 that would have still made the death penalty available for “cop killers, terrorists, and those who rape and murder children.”\(^\text{316}\) This proposal, however, was defeated by a procedural motion to table the amendment.\(^\text{317}\) In the view of S-171’s sponsors, this “hostile amendment” would have

\(^{312}\) Id. (Mr. DeFazio was the Prosecutor of Hudson County).

\(^{313}\) Id. (It should be mentioned, however, that witnesses such as Richard Kanka, father of the 7-year old Megan Kanka who had been brutally murdered by a sexual predator (thus creating the impetus for Megan’s Law), tried unsuccessfully to convince the Committee not to release A3716, calling it “ridiculous” and “a mistake.” And Professor Robert Blecker continued his outspoken criticism by telling the Committee that the process of passing a repeal bill in New Jersey was nothing more than a “charade.”).


\(^{315}\) Id.

\(^{316}\) See Michael Rispoli, N.J. closer to repeal of death sentence, DAILY RECORD, Dec. 11, 2007; See New Jersey State Legislature, Bills 2006-2007, A-11 (As written, the amendment would have retained death penalty eligibility for murderers whose victim was a law enforcement officer, or a person under the age of fourteen who had been sexually assaulted, or those who had committed murder during the commission of the crime of terrorism.).

\(^{317}\) See New Jersey State Legislature, Bills 2006-2007, S-171. The motion to table (a vote on the proposed amendment) was approved by a vote of 20 to 14, with 4 members not voting. (According to the Senate Rules, a motion was only required to receive a majority of those voting in order to receive passage.).
essentially maintained the status quo, and was therefore deemed to be a diversionary tactic aimed at gutting the bill.

Leading off what turned into ninety minutes of impassioned debate on the merits of S-171, Senator Codey stepped down from the President’s podium to urge his colleagues to vote for the bill.318 He focused on the plight of the families of murder victims, stating that we “have to be honest with them . . . [d]on’t tell them we are going to execute somebody when the reality is that it’s not going to happen, at least not here in the state of New Jersey.”319 Shortly thereafter, Senator Lesniak, the prime sponsor of the bill, expressed similar sentiments, insisting “We shouldn’t have the death penalty unless we’re going to use it.”320 But he also buttressed his practical rationale with a spirited moral argument, asserting that “we shouldn’t use [the death penalty] if there is a chance of executing an innocent person.”321 Several other supporters (including this author322) proceeded to follow Senator Lesniak, offering additional arguments in favor of S-171.

And, of course, passionate rhetoric was also delivered by the adversaries of S-171. Not surprisingly, it was Senator Cardinale who voiced the strongest criticism of the bill. He asserted that, instead of supporting abolition, legislators should seek to “improve” the current system by requiring juries to only hand out death sentences in cases “without any lingering doubt” and by requiring the state to shorten the appeals

318 See Howlett and Donohue, supra Note 314.
319 Id.
320 See Rispoli, supra note 316.
321 Id.; See, also Lesniak, Road to Abolition, supra note 259, at 47 (Senator Lesniak’s speech on the Senate floor can be found in his book).
322 A copy of my speech on the Senate floor, given on Dec. 10, 2007, has been included as an addendum to this article in an attempt to give some sense of the intensity and passion, which many of us engaged in during the course of this monumental debate. At one point in the debate, Senator Cardinale (whose seat was directly next to mine) leaned over toward me and told me bluntly, in unprintable words, how much he detested me for supporting this “irresponsible” bill.
He ended his comments by challenging his colleagues to “reform,” not repeal the death penalty statute. “Let’s have the guts to change it,” he declared. Let’s have the guts to make it work.”

After the speeches were finished, the Senate finally voted to approve S-171, but only by the slimmest of margins. The vote was 21-16 (with 4 abstentions), which was the minimum number of favorable votes to secure passage. Although not publicly known at the time, Senator Lesniak and this author, as the prime sponsors of the bill, had been in constant communication with one another before the vote, doing individual vote counting of our own respective party members to assure that we could deliver the necessary 21 votes. Even though we could never be assured that our colleagues would perform as indicated (until the actual vote itself), we were reasonably confident that—at crunch time—we would be able to at least produce the minimum number of votes to obtain passage.

In essence, there proved to be two, often overlapping, types of supporters. As noted in the press, “[s]ome [legislators] support it on moral grounds, while others say the unused law—no one in New Jersey has been executed since 1963—is unfair for victims’ families who seek swift justice but have to endure a lengthy appeals process.

Regardless of the reasons senators found to justify their support S-171, the sponsors were

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323 See also Rispoli, supra note 316.
324 Id.
325 See New Jersey State Legislature, Bills 2006-2007, S-171 (In the New Jersey State Senate, a majority of all Senate members is required to vote in favor of a bill to enable its passage. Thus, because there are 40 state Senators, 21 of them had to cast favorable votes.).
327 See Peters, supra note 326, at 2 (Senator Lesniak thought he could count on the vote of at least one of two additional Democratic senators (Senator Sharpe James, 30th District, or Senator Ronald Rice, 29th District), but they eventually chose to abstain. Martin thought he could count on the vote of Republican Senator Walter Kavanaugh, but that senator wound up not-voting because of series illness (he died about one month later)).
thrilled that a (bare!) majority had approved S-171, thus clearing it for its final legislative hurdle, a floor vote in the General Assembly, which was then quickly scheduled for December 13, 2007.

One potentially unsettling wrinkle, however, arose in the three-day interim between the State Senate and General Assembly floor votes. The results of a recent Quinnipiac University Poll were released on December 11, 2007. The poll again suggested that New Jersey voters still opposed, by 53 to 39 percent, the proposal to eliminate the state’s death penalty. Moreover, the poll indicated by an ever greater margin, 78 to 18 percent, that New Jersey voters wanted to maintain the death penalty for the most violent types of cases, such as those involving serial killers and sexual predators of children. Those polling results confirmed what most legislators knew instinctively: in order to achieve passage of this less than popular initiative, they would have to assume the risk of triggering negative public reaction.

Such legislative courage was reflected in the General Assembly on December 13, 2007, when the lower house passed S-171 by a vote of 44-36 (only 3 votes beyond the minimum of 41 needed to obtain approval). This vote, too, was preceded by a lengthy floor debate, one which lasted over two hours. Once again, some Assembly supporters justified their votes on moral grounds. “It is simply not for us to decide who should live and who should die,” pronounced Assembly Speaker Joseph Roberts.

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329 See Quinnipiac University Poll, supra note 10 (copy on file with author).
330 Id. (It is worth noting that the public’s opinion was somewhat contradictory, since the same poll reported that, by a margin of 52-19 percent, New Jersey voters preferred life without parole rather than the death penalty for people convicted of first-degree murder.).
331 Id. (“There is no doubt . . . when it comes to the most violent crimes: Most voters want death for serial murderers and child killers,” said Clay F. Richards, assistant director of the Quinnipiac University Polling Institute.”)
333 See Tom Hester and Tom Feeney, supra 15.
sponsors, Reed Gusciora (Dem., 15th Dist.) declared, “I don’t shed a tear for the people on death row. I think we are better as a society. We prove that we are above these murderers by abolishing the death penalty.” \(^{334}\) Other supporters focused on the consequences of the death penalty statute that had been on the books since 1982, but had never been utilized. “It creates a false sense of security for those who want to see justice done,” proclaimed prime sponsor Wilfredo Caraballo (Dem., 29th Dist.), [a]nd it is hurtful for families of murder victims who only want to see justice done.” \(^{335}\)

Assembly members who opposed the bill also voiced both moral and practical arguments. “There are some crimes that are just so heinous that society demands the death penalty,” asserted Sam Thompson (Rep., 13th Dist.).\(^{336}\) Opponents also contended that the ineffectiveness of the New Jersey law was reason to revise it, not abolish it. Assemblyman Kevin O’Toole (Rep., 40th Dist.) pointed out that, out of the 228 capital punishment trials in New Jersey since 1982, 60 of them had resulted in a death sentence, with 52 overturned by the courts. “You say do away with it. I say fix it,” O’Toole concluded: “That’s our job.”\(^{337}\) Despite the opponent’s strident pleas, however, 41 Democrats and 3 Republicans held firm in support of the bill, thus enabling S-171 to win final passage. Now, all that was needed to complete the final phase of repeal was to present the enrolled bill to Governor Corzine for his signature.\(^{338}\)

The signing of S-171 occurred on the following Monday, December 17, 2007. The event took place at a public ceremony in the Governor’s outer office at the

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\(^{334}\) Id.

\(^{335}\) Id.

\(^{336}\) Id.

\(^{337}\) Id.

\(^{338}\) Assembly roll count of S-171 (copy on file with author).
Statehouse before a standing-room crowd of approximately 200 enthusiastic invitees.\textsuperscript{339} Those in attendance consisted largely of legislative sponsors, NJADP members and other proponents, and members of the press. Governor Corzine began the ceremony by announcing that “Today, New Jersey is truly evolving.”\textsuperscript{340} He went on to declare that “a nonviolent sentence of life in prison without parole best captures our state’s highest values and reflects our best effort to search for true justice rather than state-endorsed killing.”\textsuperscript{341}

Governor Corzine also disclosed--to ensure that the legislative intent of S-171 was fully carried out\textsuperscript{342}--that he had signed an order the previous evening commuting the sentences of the eight men still sitting on death row.\textsuperscript{343} The order further stipulated that those men would have to spend the remainder of their lives in prison.\textsuperscript{344}

Several of the legislators in attendance then contributed brief remarks. Senator Lesniak noted that” [i]t’s not often we vote our consciences in the Legislature. We should do it more often.”\textsuperscript{345} This author was just as forthright in observing that

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[t]his was an epic battle. I frankly thought it was mission impossible . . . [But] there are certain things—persistence, patience, good will, and perhaps faith—
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\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} See Robert Schwanberg, “When life without parole is worse than death, THE STAR-LEDGER, Feb. 4, 2007, at 118 (copy on file with author) (As part of the Senate Judiciary Committee substitute for S-171, the bill was amended to read “that certain defendants convicted of murder would be sentenced to life imprisonment without eligibility for parole, to be served in a maximum security prison, if the jury finds beyond a reasonable doubt that any of the aggravating factors exist.” In hindsight, it may be important to note that this amendment could lead to an unintended consequence in that some convicted persons could now end up with a \textit{life} sentence, whereas previously they could have been paroled after 30 years. This could occur to persons who were formerly eligible for a death sentence, but who, as determined by a jury, were deemed not to warrant such a severe sentence. Under S-171, once aggravating factors are shown to exist, the judge is no longer able to reduce the length of a life sentence to permit parole.); (Several current legislators have talked to this author about ways to amendment the new law to provide more flexibility--as soon as it may be politically feasible to do so.).
\textsuperscript{344} Id.
\textsuperscript{345} See supra note 339.
which can overcome mountains . . . It’s remarkable that this day has arrived. Hallelujah!”

Undoubtedly, the most moving speaker was a special out-of-state guest, Sister Helen Prejean, author of the book “Dead Man Walking” (which was later turned into a hit movie). She issued a ringing endorsement of New Jersey’s legislative action:

There’s no place on Earth I would rather be . . . The word will travel around the globe that there is a state in the United States of America that was the first to show that life is stronger than death, love is greater than hatred, and that compassion is stronger than the need for revenge.

As Sister Prejean predicted, word of the repeal of New Jersey’s death penalty did indeed travel around the globe. As a sign of international recognition and approval, the ancient Coliseum in Rome was lit for 24 hours on December 19, 2007 in celebration of New Jersey’s historic action. Since 1999 the lighting of the Coliseum has become a tradition whenever a government has abolished or commuted a prisoner’ death sentence. Let us hope that other sister states—as has New Mexico just recently—will soon join New Jersey in experiencing the glow of that light.

**VI. CONCLUSION**

“Today, New Jersey can become a leader, an inspiration to other states,” Senator Robert Martin (Rep., 26th Dist), just prior to passage of S-171 in the State Senate on December 10, 2007.

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346 *Id.*
348 See Rispoli, *supra* note 13, at 1, 14.
349 The event was arranged by the Community Sant’Egidio in Rome, an International lay Catholic group that advocates ending the death penalty world wide.
Enacting controversial legislation can often prove extremely difficult to accomplish, especially when it is opposed by a large majority of the public. It can be doubly hard to achieve when that legislation literally involves a matter of life and death and under circumstances where those facing death warrant little sympathy. This is undoubtedly why no state other than New Jersey (except, most recently, New Mexico) has yet to take the controversial act of repealing its existing death penalty statute. As long as heartless murderers continue to plague society, some jurisdictions may continue to maintain the attitude that such killers deserve no mercy; instead, they should receive the same treatment--death--as they bestowed upon their victims.

But, in time, leaders in a growing number of these states may eventually conclude that this is not the proper way for a civilized society to respond, even to those who commit the most heinous of crimes. They may also come to recognize that mistakes can and do occur in murder trials, mistakes which can lead to wrongful convictions. They may also realize that victim’s families should be spared the painful trials and appeals necessary--in a country committed to social justice--to carry out due process. And they may decide that revenge and retribution are not worthwhile objectives in imposing punishment and that a death sentence is not an effective means of producing deterrence. So, for those leaders in other states who ultimately determine that life in imprisonment without parole is more advantageous--and humane-- than the killing of murderers, this article has sought to aid and inspire them by highlighting the major lessons learned in New Jersey. In doing so, the article has sought to explain how a determined coalition of laypersons and legislators can take on—and win--the fight for abolition.
First of all, in New Jersey, the effort did indeed take a highly motivated and organized group of laypersons to lead the fight. That group coalesced under New Jerseyians for Alternatives to the Death Penalty (NJADP), which ultimately served as an umbrella network and voice for some 200 organizations and more than 10,000 persons. NJADP was created for only one purpose—repeal of the state’s death penalty—and took on the task well before success was realistically achievable anytime in the foreseeable future. In the interim, its members were willing to seek short-term goals, especially a moratorium on executions. They also determined to wage battle on two fronts, seeking victories in both the statehouse and in the courtroom. Moreover, they were quick to take advantage of an unexpected but fortuitous event (in this case the surprise resignation of Governor McGreevey), which enabled them to pursue their objective without the hindrance of an unsympathetic governor.

Shortly thereafter, the NJADP worked hard to enact a bill calling for creation of a Death Penalty Study Commission (DPSC). NJADP was smart enough to recognize that the investigation and findings of the DPSC, while not a solution in itself, could provide the catalyst and cover for a subsequent repeal bill. So NJADP supported the DPSC vigorously, supplying it with an abundance of witnesses and quality research in an unceasing effort to demonstrate that the existing statute was fatally flawed. And when the DPSC reached the ultimate conclusion that NJADP had envisioned—that New Jersey should repeal its death penalty statute—NJADP jumped at the chance to move a repeal bill forward at full speed.

As part of its lawmaking strategy, NJADP agreed to take advantage of a lame-duck legislative session to achieve final victory. Although criticized by detractors for not
waiting for a new legislative term, the proponents understood that it is sometimes best to force action when doable, not when others—usually opponents—suggest may be more appropriate (and which may never materialize). Even Governor Corzine gave recognition to this critical issue of timing, stating at the bill signing ceremony: “I believe that you seize the moment where you can bring these issues into fruition.”

Thus, having made the most of that opportunity, NJADP members could rightly experience a sense of elation and satisfaction, which was best summed up by the response of retired Atlantic City firefighter, Eddie Hicks. “It’s unbelievable. A lot of hard work went into this.”

One should not forget, however, that it was the State Legislature itself that ultimately transformed S-171 into law. Out of New Jersey’s 120 legislators, only a handful truly deserve credit for forcing its passage. This small band of bipartisan members in both houses worked closely and collaboratively with NJADP, which was always prepared to buttress their leadership with critical media and political support. Nevertheless, each legislator who ended up voting for S-171 should be commended, since virtually every one of their votes proved essential. Consequently, the repeal of the death penalty in New Jersey can thus be attributed to a joint effort between a dedicated coalition of advocates and a courageous—and just bare--majority of legislators.

ADDENDUM

351 See Michael Rispoli, Corzine OKs an end to N.J. death penalty, DAILY RECORD, Dec. 18, 2007, at 7.
352 See Howlett, supra note 339.
353 As a final observation it is interesting to note that no executions occurred in New Jersey after 1963, and no executions took place during the quarter century of the death penalty’s reenactment between 1982-2007. Since that reenactment in 1982, there were 228 capital murder trials, in which juries returned death sentences in 60 cases. Now that this chapter of capital punishment has closed in New Jersey, these statistics serve as a final reminder of how futile the death penalty act actually was and how little it actually accomplished.
Speech by Senator Martin (Rep., 26th Dis.) on Dec. 10, 2007 in the New Jersey State Senate Prior to Passage of the Death Penalty Repeal Act

Apparently there are some who think that Hammurabi, the ancient King of Babylon, got it right and for all time, when he introduced the concept that justice can be reduced to a simple retributive code, based on the precept: “An eye for an eye,” and by extension, “a life for a life.” Hammurabi’s Code, written (scholars inform us) about 1760 B.C., sets forth a principle of exact reciprocity, or proportionate punishment, sometimes expressed as “let the punishment fit the crime.”

Over the ages, many other governmental leaders have used the “eye for an eye” concept in devising their own system of punishment for criminal acts. References to “an eye for an eye” are even found in the Torah, the Law of Moses (see Exodus, Ch. 21), although other Biblical teachers, most notably Jesus in his famous Sermon on the Mount, (see Mathew, Ch. 6), have expressly rejected it.

Probably the greatest virtue—or curse—of this system of punishment is its utter simplicity: it is unquestionably clear-cut, harsh, unwavering, immutable, and swift. It doesn’t bother with explanations or excuses; and it certainly isn’t interested in mercy. Nor does it consider issues of mental illness or diminished capacity. Yet some of its proponents insist that it has successfully stood the test of time.

But today, many of us think that, however well intended and inspired, Hammurabi’s code—first written into law on stone tablets—should no longer serve as the bedrock of our more modern system of criminal justice. Simply put, we believe that other factors must be considered in dispersing punishment, factors such as fundamental due process for the accused (especially protection of the innocent), and, equally
important, protection of victims’ families (especially in providing ways to mitigate their frustration, anger and grief).

In keeping with this more modern view, several of the greatest moral leaders in recent history have directly challenged the logic of the “eye for an eye” concept. Mahatma Ghandi proclaimed, “An eye for an eye, and soon the whole world is blind.” Martin Luther King observed, “An eye for an eye leaves everyone blind.”

Instead of clinging to strict retribution, such persons are more inclined to embrace the concept enunciated by US Supreme Court Justice Thurgood Marshall, who, in interpreting the parameters of cruel and unusual punishment, urged us to recognize “evolving standards of decency.” In applying this concept, Marshall didn’t mean that we should be unjustifiably lenient. Rather, he thought it critical to determine what punishment is appropriate based on our own sense of fairness, rather than blindly following rules laid out centuries ago in more vindictive, primitive societies.

To this end it appears that we are definitely making progress. America has outlawed torture (although some methods of carrying out a death sentence still produce a painful death). And our highest court has recently determined that the death penalty should no longer be applied to juveniles, recognizing that their immaturity causes problems in being able to distinguish right from wrong.

And today, some well meaning persons—including members of our Legislature—propose that we can make further progress by segregating murderers into more discreet classes, and then impose the death penalty only on those deemed the “worst of the worst.” They would thus retain the death sentence for cop-killers, multi-victim terrorists and perhaps others deemed death worthy.
But there is an obvious problem that undermines this approach. Who, indeed, are the very worst, thereby “earning” the right to die? And how does one convince a mom or dad, daughter or son, spouse or partner that the loss of their loved one—murdered by someone supposedly less culpable—is not as significant or hurtful than the murder committed by another? Given such excruciating decision-making, even Solomon would be hard-pressed to decide who should live and who should die.

Another proposal suggested as a way to make the death penalty more tolerable is to restrict it only to those whom a jury finds guilty beyond a moral certainty. But this approach, too, has severe shortcomings. Its basic assumption—that we can always separate the guilty from the innocent—can never be full-proof; moreover, it doesn’t take into account that, even if guilty, persons sentenced to death remain entitled to the most exacting level of judicial scrutiny to insure that they truly “deserve” to be executed. These procedural safeguards cannot be short-changed and cannot be rushed. It is because of them, in fact, that so many victims’ families now support the alternative punishment of life without possibility of parole, so closure can at least be brought to the judicial proceedings—even though closure can never bring relief from the ever-present, painful memory of the loss of a loved one due to a horrific criminal act.

Given these realities, I am hopeful that we can move forward today in a bipartisan, conscientious way to forge a new direction for New Jersey. What I think we all agree on is that the act of murder is undeniably, horribly wrong. Therefore murder must be severely punished (for purposes of both retribution and deterrence), and those who commit intentional murder must be prevented from ever committing it again. Yet I am convinced that these objectives can be accomplished without resorting to continued
reliance on the death penalty—with all its inherent flaws by enacting S-191, the Lesniak/Martin/Turner, Caraballo/Bateman bill, which would alternatively subject those who commit murder to a sentence of life imprisonment without the possibility of parole.

This alternative punishment has multiple advantages. Most significantly, if by chance our law enforcement system makes a mistake by convicting an innocent person, we can at least partially undo that great wrong. Secondly, by imposition of a life sentence without possibility of parole, we can spare the families of victims from having to sit through, take part in, and endure seemingly never-ending legal proceedings, often extending for a decade and beyond. Finally, we can remove from prosecutors and judges the onerous burden of having to engage in the almost all-consuming, painstaking process of ensuring that each step and stage in a death penalty case is handled properly—since the worst nightmare for prosecutors and judges is the fear that somehow they have made an irreversible mistake, thereby turning one horrendous tragedy into two.

Let me conclude by noting that our decision today will be a defining statement about us as much as it will be about persons who, if insufficient affirmative votes are cast, could end up sentenced to death row. We need to abolish the death penalty because failure to do so is morally wrong. Occasionally, the taking of another person’s life may be necessary to preserve and protect our own lives; but when there is a reasonable and effective alternative to killing other persons, no matter how egregious their actions, we as humans—for the sake of humanity—should pursue that course.

So, today, my colleagues, I appeal—as President Lincoln put it—to the better angels of your nature: Do the right thing! Utilize both your heads and your hearts. Since we are literally deciding a matter of life and death, please don’t cast your vote
based merely on political advantage. Like me, I am sure that many of you were inspired by John Kennedy’s book *Profiles in Courage*. Its theme suggests that courage is the greatest trait of a great lawmaker, and that, ultimately, we will be measured by the courage of our convictions, not the cleverness of our politics.

Today, New Jersey can become a leader and an inspiration to other states. As we did when we became the first state to ratify the Bill of Rights of the US Constitution, New Jersey can show the rest of America and the world that we are willing to embrace change—when doing so results in a better, and more dignified system of crime and punishment. Each of us will have an opportunity to play a vital role on this momentous occasion which can result in NJ becoming the first state in the nation to rescind its death penalty in modern history. One hundred years from now, we may well be remembered for having had the courage to be leaders in advancing the cause for a more civilized society.