

# Analyzing Legislative Abolition of the Death Penalty: A Preliminary Case Study of New Jersey

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*Though several state legislatures have considered bills to eliminate the death penalty in the past decade, New Jersey stands alone as the first state to legislatively abolish the death penalty in over thirty years. What factors enabled the New Jersey legislature to successfully pass legislation that abolished the death penalty? To answer this question, I conduct a qualitative case study of the state using archival research and an interview with a pro-abolition lobbyist. I conclude that the primary factors that paved the way for abolition were dedicated supporters of the legislation, unified government, amenable public opinion, and issue frames emphasizing the risk of executing an innocent person and the emotional impact of the death penalty process on victims' families. Finally, I discuss the limitations of the present study and suggest hypotheses for further research.*

## **Introduction: the Death Penalty in America**

The death penalty in the United States of America is a constant source of controversy. Efforts to abolish the death penalty in America go back over one hundred years (Davis, 1957) and have continued to the present day (Galliher, Ray, and Cook, 1992; Haines, 1996). In addition, the fifty states vary widely in their retention and use of the death penalty. As of 2008, the death penalty is legal in thirty-six states, but the distribution of actual executions is quite wide. The five states with the highest numbers of executions<sup>1</sup> account for over sixty-five percent of the total executions in the country since the Supreme Court re-affirmed the constitutionality of the death penalty in its 1976 *Gregg v. Georgia* decision; Texas alone is responsible for almost thirty-seven percent of the country's executions. On the other hand, fourteen states<sup>2</sup> have executed only five or fewer convicts since 1976, while Kansas and New Hampshire have yet to execute a single person in the past three decades.<sup>3</sup>

The death penalty is a contentious issue in many states, one that often pits various government actors against each other. For example, proponents of capital punishment in Connecticut argued that the death penalty statute reinstated in 1980 was so strict that it could never practically be used. Throughout the 1980's, state Republican legislators continually submitted bills to lessen the procedural strictures surrounding the death penalty only to see their bills blocked by Democrat-controlled committees. Proponents did succeed in passing such legislation in 1987 and again in 1991, but both bills were vetoed by the governors in office at the time (Culver, 1999). Similarly, the Kansas legislature unsuccessfully attempted to re-establish the death penalty every year from 1975 up until legislation finally cleared both chambers and the governor's desk in 1994 (Galliher and Galliher, 1997). On the other side of the issue, the New Hampshire legislature successfully voted to abolish the death penalty in 2000, but the bill was vetoed by Governor Jeanne Shaheen (Sarat, 2002). In Illinois, Governor George Ryan commuted the sentence of every condemned prisoner on death row as he was leaving office in 2003, citing the state's exoneration

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1 TX, VA, OK, MO, and FL

2 MD, WA, NE, PA, KY, MT, OR, TN, CT, ID, NM, CO, WY, and SD

3 All statistics about states' current retention and use of the death penalty obtained from the Death Penalty Information Center, <[www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)>

rate and his concerns that an innocent person might be executed accidentally (Wiener and Haney, 2004).

Given the multitude of challenges surrounding the death penalty, the abolition movement has made little progress since the 1976 *Gregg* decision. Within the last ten years, ten states have considered bills to abolish the death penalty, but only New Jersey has successfully passed such legislation, making it the first state to legislatively abolish capital punishment in over thirty years. Thus, New Jersey presents a unique case with which to study the abolition movement and its effects on the formation of death penalty legislation.

In this project, I conduct a preliminary, qualitative case study of the New Jersey legislature and affiliated actors in order to answer the question, *what factors enabled the New Jersey legislature to successfully pass legislation that abolished the death penalty?* I draw upon data derived from an interview with a lobbyist intimately involved with the abolition process, archival data from the legislature, and state news sources. In the first section of this paper, I review the details of New Jersey's abolition bill and its progress through the state legislature. In the second section, I explain my methodology and data. In the third section, I discuss how structural factors, such as the party composition of the New Jersey Legislature affected the legislative process and policy outcome. In the third section, I focus on the content of the legislators' debates and discuss how the substantive framing of the issue contributed to the successful passage of the legislation. I conclude that the primary factors that paved the way for abolition were dedicated supporters of the legislation, unified government, amenable public opinion, and issue frames that the death penalty process was hurtful to victims' families and unavoidably risked executing an innocent person. Finally, I discuss the limitations of the current work and suggest hypotheses for further research.

### **The Case of New Jersey**

Advocates of death penalty abolition in New Jersey tried to pass legislation repeatedly in the years prior to the 2007 abolition. At least one bill to abolish the death penalty was introduced in every legislative session from 1998 through 2007.<sup>4</sup> Several legislators appear to have been particularly dedicated to passing an abolition bill. Democrat Wilfredo Caraballo was a primary sponsor on eight of the ten abolition bills introduced in the General Assembly. In the Senate, Democrat Raymond Lesniak and Republican Robert Martin were primary sponsors on three of the four abolition bills introduced, while Democrat Nia Gill was a primary or co-sponsor on all four Senate bills. Eleven of the fourteen bills never reached a committee vote, while the remaining three bills were combined into the final legislation that was enacted in 2007.

Amidst the abolition bills, the legislature considered a handful of bills to establish a study commission that would be charged with reviewing the status of capital punishment in the state. The legislature passed one such bill, S709, on January 12, 2006 by a vote of 30 to 6 (4,0)<sup>5</sup> in the Senate and a vote of 55 to 21 (1,2) in the Assembly. This bill not only established the Death Penalty Study Commission, but also imposed a moratorium on all executions until the Commission issued its final report. After holding five public hearings over the course of 2006, the Commission issued its final report to the governor and the legislature on January 2, 2007. The Commission concluded that the New Jersey death penalty served no legitimate penological intent, cost the state more than a sentence of life imprisonment, was increasingly incompatible with evolving standards of decency, and held an unacceptable risk of executing an innocent person. Arguing that a sentence of life without parole in a maximum security prison could achieve the same goal of public protection as the death penalty,

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<sup>4</sup> The New Jersey legislature website only archives bill information back to the 1996-1997 legislative session; consequently, I do not have the data to address whether or not abolition bills were also introduced prior to 1996.

<sup>5</sup> I will list votes as # Yes to # No (# Not Voting, # Abstentions)

the Commission voted 12 to 1 to recommend that the legislature abolish the death penalty and replace it with life without parole.

With the Commission's recommendation in hand, the legislature proceeded to consider the final abolition bills. Assembly bill A3716 was transferred from the Judiciary committee to the Law and Public Safety Committee where it passed 5 to 1 (0,0) and was combined with S171. Senate bill S171 then passed the Judiciary committee 8 to 2 (0,0) and was reported to the Budget and Appropriations Committee because of a Senate rule that any bill involving an "actual or potential appropriation or increased expenditure of one hundred thousand dollars or more" must be reviewed by the committee (Schwaneberg, 2007a). The bill passed the third committee by a vote of 8 to 4 (3,0). The bill then passed the Senate with a vote of 21 to 16 (3,0); this vote was largely, but not completely, partisan with sixteen Democrats in favor, three opposed and five Republicans in favor, thirteen opposed. Finally, the bill was considered on the Assembly floor and passed 44 to 32 (0,0); the Assembly vote was even more partisan than the Senate vote with forty-one Democrats in favor, nine opposed and three Republicans in favor, twenty-eight opposed. Finally, the bill was signed into law by Governor Jon Corzine on December 17, 2007, thus eliminating the death penalty in New Jersey and replacing it with a sentence of life imprisonment in a maximum security facility without the possibility of parole.

### **Data and Methods**

The majority of the data for this project comes from the archives of the New Jersey state legislature. I accessed the archives via the state legislature website.<sup>6</sup> I listened to the archived proceedings of the Senate Judiciary Committee (5/10/2007) and the Assembly Law and Public Safety Committee (12/10/2007), as well as the debates on the Senate (12/10/2007) and General Assembly (12/13/2007) floors.<sup>7</sup> This archived data contains the testimony of state legislators and witnesses.

The second source of data is a personal interview with Celeste Fitzgerald, the program director of New Jerseyans for Alternatives to the Death Penalty (NJADP), a lobby group dedicated to abolition. Fitzgerald worked as a lobbyist on both the abolition campaign and the earlier moratorium campaign. In his opening remarks during the Assembly's debate on the bill, sponsor Assemblyman Caraballo acknowledged the work of NJADP and stated that "we could not be here" were it not for the group's efforts. Furthermore, Fitzgerald is widely recognized as the spearhead of the group's work (Braun, 2007). My selection of Fitzgerald as an interview candidate is purposeful, not random; as such, my interview data provides information about only one side of the debate and must be interpreted conservatively.

Finally, I conducted a search of death penalty-related news articles in two of the state's most widely-circulated newspapers, *The Star-Ledger* of Newark and *The Record* of Bergen County. Using LexisNexis, I searched for all death-penalty related articles in the two newspapers between the dates of June 19, 2006 and December 31, 2007. This time span begins one month prior to the Death Penalty Study Commission's first public hearing and ends at the close of the year in which the death penalty was abolished. My compilation of articles includes news stories, editorials, and opinion pieces.

### **Structural Factors**

Alan Rosenthal (2004) titles his study of state legislatures *Heavy Lifting* with good reason. Rosenthal notes that we charge our legislators with the responsibility of crafting good public policy, yet we also expect them to remain representative of and accountable to a diverse group of

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6 < [http://www.njleg.state.nj.us/media/ARCHIVE\\_AUDIO.ASP?SESSION=2006](http://www.njleg.state.nj.us/media/ARCHIVE_AUDIO.ASP?SESSION=2006)>

7 I skimmed the content of the Senate Budget and Appropriations Committee hearing on 12/3/2007 and found the debate to be virtually the same as the debate in the Senate Judiciary Committee due to the same witness pool. As such, I excluded the Budget and Appropriations debate from the present analysis, reserving it for a more thorough treatment in a future study.

constituents. Given that any constituency is likely to contain a multitude of opinions and preferences, the more that a legislator ties herself to a given piece of legislation, the more she risks displeasing her constituents if a majority do not approve of the bill. Legislators' concern with reelection can thus inhibit the efficiency of the lawmaking process (Mayhew, 1974). In addition, the constitutional requirements of separation of power and bicameralism that exist in the vast majority of states (New Jersey included) add the need to form bicameral coalitions of support for legislation and take into account the interests of a governor who may or may not support the legislature's actions. In the first stage of my analysis, I will discuss how the New Jersey legislature overcame the various hurdles that are inherent in the lawmaking process in order to successfully pass the abolition bill.

### Policy Goals and Entrepreneurs

Weber and Shaffer (1972) note that "all policies are made in response to someone's preferences" (684). For any bill to become law in a democracy, a majority of legislators must prefer the bill to any other alternative and express their preference through an affirmative vote (Krehbiel, 1998). However, the fact that most legislation that reaches the floor for a vote is passed indicates that the hard work of coalition building occurs well before floor debate in most cases (Sinclair, 2007). Thus, it appears that many bills (particularly controversial legislation) require "champions" who invest considerable time and resources into pushing the bills through the legislative process; Wawro (2000) calls these representatives "legislative entrepreneurs" because of their investment in a bill above and beyond the baseline level of work needed to ensure reelection.

The history of the abolition movements in America and abroad suggest that entrepreneurs both within and outside of the legislature always drove abolition efforts. Momentarily putting aside the complexities of interpreting public opinion, Hood (2001) points out that a majority of the public in each of the world's countries that abolished the death penalty did not favor the abolition; rather, governments enacted abolition despite public disapproval, and public acceptance of abolition eventually followed (Steiker, 2002). Given persistent support for the death penalty amongst the public (Mendes, 2001; Cullen, Pealer, Fisher, Applegate, and Santana, 2002; Baumer, Messner, and Rosenfeld, 2003), America seems to be no different. Tracing the early history of the abolition movement at the turn of the nineteenth century in America, Davis (1957) notes that efforts to push state legislators to consider and pass abolition legislation were almost always spearheaded by small groups of elite and/or religious reformers.

The situation does not appear to have changed substantially in today's society. In his study of the modern abolition movement, Haines (1996) extensively examines the work of the Legal Defense Fund, an organization of lawyers that was primarily responsible for orchestrating the legal challenges that led to the Supreme Court's suspension of the death penalty in *Furman v. Georgia*. The author notes, however, that the *Furman* decision sparked public outrage, so much so that the Supreme Court cited public approval of the death penalty as one of its reasons for reaffirming the constitutionality of the death penalty in *Gregg*. Since 1976, Haines recounts that the abolition movement has generally progressed *without* the support of public opinion; rather, elite lobby groups such as Amnesty International and the ACLU have been primarily responsible for efforts to abolish the death penalty.

Thus, the history of the abolition movement and legislative theory both indicate that the abolition bill in New Jersey needed strong elite support in order to successfully navigate the legislative process. My data supports this supposition. First, the leaders of NJADP were both the catalysts of legislative action and the organizers who mobilized and coordinated support for the bill. In both the Assembly Law and Public Safety Committee hearing and the Assembly debate, Assemblyman Bateman, a co-sponsor of the abolition bill, recounted how he first became motivated to investigate the effects of the death penalty in the state after he was approached by Lorry Post, one

of the founders of NJADP and the father of a murder victim, who characterized the death penalty process as hurtful to victims' families. As mentioned above, bill co-sponsor Assemblyman Caraballo acknowledged the work of NJADP as an essential component of proponents' progress through the system. NJADP program director Fitzgerald characterizes the group's work as an effort to organize opposition to the death penalty that already existed in the state. For example, NJADP organized law enforcement officials to endorse the bill (Schwaneberg, 2007d).

Second, one legislator, Senator Lesniak, can be identified as an "entrepreneurial champion" who expended considerable effort to progress the abolition bill. During the Senate Judiciary Committee hearing, both Senator Martin and Senator Gill acknowledged Senator Lesniak and testified that the progress of the bill was largely due to Lesniak's "tenacity and leadership" (in Gill's words). Indeed, Martin used the very word "champion" to describe Lesniak's work to ensure the bill's passage. Combined with Lesniak's repeated sponsorship of abolition bills over the years in the Senate, the senators' testimony provides evidence that Lesniak was an entrepreneur of this legislation.<sup>8</sup>

It is clear that passing (or defeating) this legislation was an important goal for many legislators. Senator Martin, a co-sponsor of the bill, stated to the press, in committee, and on the Assembly floor that he is morally opposed to the death penalty and believed that abolishing the death penalty was the morally correct course of action for New Jersey (Schwaneberg, 2007a). Assemblyman Caraballo, a persistent sponsor of abolition legislation for years, said, "I couldn't think of anything better that could be written on my tombstone" (Schwaneberg 2007, c1), an indication that he views abolishing the death penalty as an important, personal goal. Senator Lesniak repeatedly stressed that he had voted to reinstate the death penalty in 1982 and now holds, "I was wrong. Thank God no one has been executed. We now have an opportunity to right that wrong" (Schwaneberg 2006, 18). Senators Bateman (with Lesniak), Weinberg, and Turner all wrote opinion pieces published in state newspapers affirming their support for the abolition bill and outlining the reasons why the legislature should pass it. Arguably the most important support came from Governor Corzine who could have single-handedly blocked abolition with a veto; Corzine was a firm opponent of the death penalty who made abolition a part of this campaign platform (Young, 2007).

In sum, Fenno (1973) posited that legislators pursue the three primary goals of reelection, good policy making, and career advancement within the legislature. My data provides evidence that a few legislators expended efforts beyond floor speeches and votes to push for passage or defeat of this legislation, suggesting that they were motivated to ensure enactment of the best possible public policy for New Jersey. The work of these highly-invested legislators (particularly Senator Lesniak and Assemblyman Caraballo) was a key component of the progress of the bill through the legislature.

### The Role of Parties

An on-going debate amongst political scientists revolves around whether or not political parties affect legislative outcomes and political behavior. Smith (2007) explains that the debate is centered around the spatial theory of Krehbiel on the one hand and the conditional party government theory of Aldrich and Rohde and the cartel theory of Cox and McCubbins on the other hand. Krehbiel posits that most legislative outcomes can be explained without referring to political parties (Smith, 2007: 96), while his opponents contend that parties exert important effects on the legislative process. Aldrich and Rohde argue that the degree to which the parties in a legislature are

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<sup>8</sup> Senators Martin and Gill were co-sponsors of the bill with Lesniak, so it is entirely possible that they were simply being flattering to a colleague; in the absence of additional data to confirm Lesniak's work on the bill, I suggest that the reader accept this conclusion critically and acknowledge that further evidence is needed.

ideologically polarized determines the extent to which party leaders can influence legislators to vote beyond their own personal preferences; consequently, they argue that the majority party passes more of its bills than the individual legislators' preferences could predict alone (Smith 2007, 120). Cox and McCubbins contend that the majority party wields power through negative agenda control by blocking legislation that is unfavorable to its partisans; the degree to which the majority party can expand its own agenda is proportional to the degree of party polarization. The proposed outcome of their theory is that no bills favorable to the majority party will be defeated (Smith 2007, 129).

Despite this theoretical debate, the extant capital punishment literature has virtually ignored the impact of political parties on the passage of death penalty legislation. I found only one study that included a variable for unified government in its analysis of the likelihood of a state *enacting* death penalty legislation. Utilizing a Cox hazard model, Langer and Brace (2005) found that unified government increased the rate at which a state would enact death penalty legislation. While the current study examines the opposite policy outcome, I can think of no theoretical reason why unified government would not facilitate the passage of abolition legislation, as well. Somewhat similarly, Galliher, Ray, and Cook (1992) did note that the governor's support is necessary to enact abolition legislation, although this variable is merely a component of unified government and has little to do with party effects.

The question of whether or not political parties affect the enactment of death penalty legislation differently than other types of legislation requires far more research to answer; at present I will assume that the party effects (if any) are comparable.<sup>9</sup> Thus, theory indicates that majority party support and unified government will facilitate abolition. My data supports this theory. During the 2006-2007 legislative session, Democrats controlled both the executive and the legislature. As previously noted, Governor Corzine was strongly in favor of abolition. Additionally, both Senate President Richard Codey and Assembly Speaker Joseph Roberts supported the abolition bill and worked to facilitate its passage (Lu, 2007a; Schwaneberg, 2007c). Analyzing the final vote tallies in which overwhelming majorities of the Democrats in both chambers voted for the abolition bill, it is clear that abolition was the preference of the median Democratic legislator; because the Democrats controlled a unified government, their party preference was also the preference of the median voter in each chamber.

The current data set only contains evidence of the legislators' "public" actions, such as floor statements, votes, and statements to the press. As such, it is an inadequate data source with which to evaluate conditional party governance or cartel theory, both of which rest more heavily upon the actions of party leaders "behind the scenes" in agenda setting. Consequently, I shall restrict my present analysis to Krehbiel's (1998) spatial theory. In his theory, Krehbiel argues that four key "pivots" determine the outcome of the legislative process. In layman's terms, these pivots are 1) the median voter in the chamber who forms a majority coalition, 2) the N<sup>th</sup> legislator who forms a coalition large enough to stop a filibuster, 3) the chief executive who can veto legislation, and 4) the N<sup>th</sup> legislator who forms a coalition large enough to overturn a veto. These pivots allow you to calculate the number of legislators needed to successfully pass a bill if a) no opposition is organized, b) a filibuster is blocking progress, or c) a veto is threatened.

Krehbiel's theory provides a parsimonious explanation as to why the abolition bill in New Jersey was signed into law. First, I re-emphasize the facts that a) the median preference of the Democratic Party was to abolish the death penalty and b) the Democrats controlled a unified government. These two facts mean that three of the four pivots in Krehbiel's model (the median voter, the chief executive pivot, and the veto pivot) all favored passage of the bill. Thus, the only

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<sup>9</sup> Mooney and Lee (1999a, 1999b) demonstrate that morality policies are adopted across states at different rates than non-morality policy. However, their analyses do not take into account specific characteristics of the individual legislatures such as party composition.

remaining impediment to passage was the filibuster pivot, which is the last line of defense of the minority party. However, the rules of the New Jersey Senate do not grant senators the power to filibuster; all legislators are restricted to a total of three speeches on the floor per issue debate with imposed time limits per speech. Thus, the final pivot in Krehbiel's model is eliminated, and his theory would cleanly predict passage of the bill.

As the final vote tallies demonstrate, however, the vast majority of Republicans opposed the abolition bill. Without the ability to mount a filibuster, was the minority party powerless to stop it? Prior research suggests that this might have been the case. Discussing the lawmaking process in the modern U.S. Senate, Sinclair (2007) notes that each individual senator wields enormous power to block or manipulate legislation through the senate rules of extended debate and non-germane amending. Any dissatisfied senator can indefinitely hold up a bill by filibustering unless the Senate leadership musters a cloture vote. Alternatively, the lack of a germanity rule for amendments means that any senator can attempt to attach a "killer" amendment to a bill she dislikes; such amendments either undo the very purpose of the bill or attach completely unrelated legislation that the bill sponsors oppose, forcing the majority to surrender their preferred legislation so as not to enact the unfavorable amendment. Sinclair concludes that these two rule-based powers grant the minority party considerable power to affect legislative outcomes in the U.S. Senate despite their fewer numbers.

The legislators in the New Jersey Senate, on the other hand, lack these obstructive tools. Without a filibuster, the Republicans had no means with which to hold up debate. Alternatively, the Republicans attempted to shape the abolition bill closer to their preferences using amendments. In the Senate, Minority Leader Lance moved an amendment to the bill that would retain the death penalty for terrorists or for those convicts who a) murder police or corrections officers or b) sexually assault children under the age of fourteen. In the Assembly, Assemblywoman Karrow moved an amendment to change the bill into a referendum for the voters; retain the death penalty for convicts who murder police officers, commit serial murders, and murder and rape children; and retain the death sentences for the convicts currently on death row. In both cases, the Democratic majority leaders immediately moved to table the respective amendments. Under the rules of the chambers, motions to table require a simple majority. Senator Lance's amendment was tabled by a 20 to 14 vote<sup>10</sup>, and Assemblywoman Karrow's amendment was tabled by a 43 to 31 (6,0) vote.

Thus, in the absence of supermajoritarian procedural rules or filibuster power, the Republicans lacked the power to derail passage of the bill by the simple fact that they did not possess sufficient votes to outnumber legislators who favored abolition. This outcome is consistent with Krehbiel's theory; without partisan labels, defeat of the amendments and passage of the bills could have been reasonably predicted with knowledge of the individual legislators' preferences alone.<sup>11</sup> Party affiliation appears to have exerted no effect on the likelihood that the New Jersey legislature would pass the abolition bill.

#### Public Opinion and the Electoral Connection

Political scientists almost unanimously agree that one of a legislator's primary goals is to be reelected (Mayhew, 1974; Fenno, 1973). In order to win votes and achieve this goal, legislators must please their constituents through their actions in both the capital and their district (Fenno, 1977). Institutional structures that require relatively frequent elections establish what Mayhew termed the "electoral connection;" voters hold legislators accountable through elections, which ensure that most legislators will never stray too far from their constituents' preferences lest they lose their seat.

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<sup>10</sup> Tallies of the number of senators abstaining or not voting on the tabling measure were not recorded.

<sup>11</sup> Only one senator voted to table Senator Lance's amendment and then voted against passage of the bill, while nine members of the assembly voted either for tabling and against the bill or vice versa. Five senators and six members of the assembly cast no vote on one out of the two votes. Thus, the majority of legislators voted ideologically consistent positions between the motions to table and the final bill passage votes.

Critics might argue that the electoral connection is weak because most constituents have no strong opinion about most issues that the legislature must handle, but Rosenthal (2004) contends that constant voter attention is not necessary for strong electoral accountability. Rosenthal observes that every legislator has a friend or knows a former colleague who relaxed her attentiveness to her constituents and was subsequently voted out of office. Even these rare incumbent losses are enough to motivate legislators to be ever vigilant to constituent preferences and constantly campaign for reelection to one degree or another (Mayhew, 1974; Fenno, 2000; Rosenthal, 2004).

Furthermore, theory suggests that the electoral connection might be even stronger in regard to a vote on death penalty legislation. Mooney and Lee (1999a, 1999b, 2000) contend that morality policies like the death penalty are particularly salient amongst the general public. Rooted in personal and cultural values, it is far easier for the average voter to form an opinion about morality policies than it is for her to form an opinion about technical policies like budgets or regulations. Thus, although the average New Jersey voter may not be able to evaluate the arguments about whether or not the death penalty actually deters criminals, she will likely have an opinion as to whether or not executing murderers is ethical based upon her personal morals.

Although the rules of the New Jersey legislature are set up to ensure a strong electoral connection, several contextual factors suggest that public opinion did not prevent supporters of the bill from voting for its passage. Members of the General Assembly face reelection every two years, while senators serve four-year terms; these short terms ensure that state legislators will always be mindful of the next election, particularly in the case of the members of the Assembly. As such, I posit that the New Jersey legislators would not have been willing to support the abolition bill if they feared that voters would penalize any supporters of the bill.

Public opinion polls that are representative of the state population provide ambiguous evidence as to voters' preferences for abolition vs. the death penalty, but they do suggest that the risk of electoral retribution for a vote in favor of the bill was low. Three polls are germane to the debate: 1) a 2002 Rutgers University poll, 2) a 2005 Rutgers poll, and 3) a 2007 Quinnipiac University poll. Table 1 summarizes responses to the key questions across these three polls. Consistent with past research of other populations (Sandys and McGarrell, 1995; McGarrell and Sandys, 1996), these polls reveal several contradictions. First, a majority of citizens support the death penalty for persons convicted of murder. However, when asked if the sentence for a murder conviction should be the death penalty or life without parole, strong pluralities (or a majority in the Quinnipiac poll) favor LWOP over the death penalty by a notable margin. These results suggest that a majority of New Jersey citizens favored the abolition bill because it would give them their preferred penalty for murder. However, when directly asked about their support for the abolition bill, only 39% were in favor, while an overwhelming 78% favored retaining the death penalty for the most violent cases of murder.

[TABLE 1 ABOUT HERE]

Many legislators mentioned public opinion data during the floor debates, which indicates that they were aware of voters' preferences. With such disparate findings, though, how was a legislator to interpret these results? While the Quinnipiac poll does seem to indicate firm public opposition to total abolition of the death penalty, I argue that two factors enabled supportive legislators to vote in favor of the bill. First, questions from the Rutgers polls that asked whether or not voters would actually vote against a candidate because of her position on the death penalty indicate that the vote on this bill would not affect legislators' electoral margins at all; a vast majority of citizens indicated that the death penalty issue would not affect their votes for their legislators one way or the other.

Second, the vote on the abolition bill occurred during a "lame duck" session, which is the period of time between an election and the start of a new legislative session (Lu, 2007b). During this

particular time, a total of twenty-nine legislators were leaving office due to retirement or electoral defeat; thus, a significant portion of the legislature could vote with impunity because they were not going to return in the next session.<sup>12</sup> The current data set provides tenuous ground upon which to “test” whether or not retiring legislators voted differently than if they had been returning in the next session. I can note that three of the five Republican senators, one of the three Republican members of the Assembly, and two of the nine Democrat Assembly members who voted out-of-line with their co-partisans (i.e. Republicans in favor, Democrats opposed) were not returning to the legislature. Senator Martin, the only Republican sponsor of the Senate bill, was not returning. While it is possible that these legislators would have voted with their parties had they been returning to the legislature, I note that legislators on both sides of the aisle called the vote a “matter of conscience” that was not tied to party politics. Indeed, the Republican leadership of both chambers stated that their party was not taking an official position on the bill (Hester, 2007b; Schwaneberg, 2007c, 2007e), though Minority Leader Assemblyman DeCroce did chastise the Democrats for discussing such a controversial bill during the lame duck session (Schwaneberg, 2007c).

Without additional data about legislators’ reasons for their votes, I can make no solid conclusions as to whether or not supporters of the bill consciously considered the effects of the lame duck session and voters’ “electoral disinterest” when casting their votes. However, it is possible that these factors gave legislators reason to believe that they could cast their votes according to their own preferences or conceptions of the best public policy because they would not be penalized by voters for supporting the bill. After all, if legislators’ primary goal is to be reelected, then they will only consider constituents’ issue preferences in so much as those preferences will affect their votes for or against the legislator. Even if a vast majority of citizens opposed abolition of the death penalty, their preference is relatively meaningless if they were unwilling to enforce that preference with votes against legislators who supported the bill.

Finally, I note a methodological limitation. New Jersey legislators are elected by districts rather than being “at large.”<sup>13</sup> Consequently, no individual legislator has any reason to care about the aggregate preferences of the state citizenry as a whole; they only need attend to the preferences of the constituents in their own district in order to be reelected. Without district-level data, any effects of public opinion on legislators’ political behavior must be interpreted very cautiously. Indeed, the Quinnipiac poll did find that Republican citizens were far more likely to support the death penalty in all questions than Democrats or independents; this finding could explain the fact that a majority of Republican legislators opposed the bill if their districts were primarily composed of Republican voters.

#### Summary of Structural Factors

Not only is the work of passing legislation intrinsically difficult, abolition legislation is all the more difficult to pass due to its controversial nature. Thus, New Jersey’s successful passage of its abolition bill is particularly notable. The current data suggests that the entrepreneurial efforts of the bill’s champions, unification of the government under a Democratic party that favored abolition, and evidence that voters would not penalize their representatives for affirmative votes, all facilitated passage of the abolition bill through the legislative process. However, knowing the factors that helped the New Jersey legislature overcome the hurdles of lawmaking in regard to this bill does not help us understand the factors that convinced individual legislators to support or oppose the bill in

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<sup>12</sup> A former state legislator acknowledged the potential effects of the lame duck session. Former Senate president John Bennett stated to the press, “They may vote differently than if they’re thinking about their reelection campaign” (Lu 2007b, p. A02).

<sup>13</sup> Representatives who are elected “at large” are elected by and politically answerable to the entire citizenry of a city or a state. A governor, for example, can be thought of as “at large” because she is elected by the populace of an entire state. In contrast, most legislators are elected by and answerable to the residents of single districts.

the first place. In order to address this question, I next discuss the substance of the debate and the issue frames that appear to have convinced a majority of legislators to support the abolition bill.

### **Substantive Factors**

#### Socio-political Context: The Resurgence of Abolitionism?

Votes about crime prevention and punishment policies are always complicated hurdles for legislators. On the one hand, legislators must be very cautious when it comes to defining the power of the state to strip a citizen of his freedom or his very life. On the other hand, crime has become an increasingly salient issue in recent decades with voters demanding that elected officials ensure public safety (Warr, 1995). Several scholars recall George H.W. Bush's use of the Willie Horton incident during the 1988 presidential race to frame Michael Dukakis as being "soft on crime," an event that is thought to have been one of the so-called "nails in the coffin" of Dukakis' campaign (Sarat, 2002; Tonry, 2004). Since that time, American politicians have been afraid of being labeled "soft on crime," which means that, in general, there is a strong disincentive for politicians to support eliminating any punishment. What factors, then, could overcome this bias and lead legislators to oppose the death penalty?

Consistent with rising public support for life without parole as an alternative punishment for murder, some scholars contend that the focus of the national death penalty debate is shifting. Sarat (2002) notes that an increasing number of death row exonerations due to DNA evidence have empowered abolitionists to shift discussion of the death penalty away from the condemned criminals themselves to an emphasis on the flaws of the death penalty and what its continued use does to society. He calls this re-framing of the discussion the "new abolitionism." Sarat explains, "What I call the 'new abolitionism' opposes state killing because it damages our democracy, legitimates vengeance, intensifies racial divisions, and distracts us from the challenges that the turn of the century poses for America" (353). Under this new frame, abolitionists now focus on the argument that the death penalty cannot be administered in a way that comports with our legal system's dedication to equal treatment under the law.

Baumgartner, De Boef, and Boydston (2007) find evidence that is consistent with Sarat's new abolitionism theory. Examining death penalty-related news stories in the *New York Times* from 1960 through 2005, they find that the number of stories that focus on exonerations and procedural problems with the application of the death penalty has increased dramatically since 2000. They also find that the majority of articles that emphasize the "fairness" dimension of the death penalty debate are anti-death penalty in tone. Furthermore, they find a negative relationship between the number of anti-death penalty news articles and the number of death penalty sentences across the country. The authors conclude that the "innocence frame" is becoming increasingly important in modern politics, and it is decreasing our use of the death penalty in America.

Sarat (2002) also finds that the issues of fairness and the risk of executing an innocent person affect how legislators vote on the death penalty. Sarat interviewed a sample of New Hampshire state legislators after the legislature voted to abolish the death penalty. First, he found that several of his subjects believed that it is morally wrong to kill in the name of justice. Second, several of his subjects who voted to abolish the death penalty argued that it is not an effective crime deterrent. Third, the evidence for racial and socio-economic disparities in the imposition of the death penalty on convicts who commit similar crimes was an important reason to eliminate capital punishment for several legislators. Finally, Sarat notes that concern about the flaws in the death penalty that could lead the state to execute an innocent person was a decisive factor that moved some legislators from support of the death penalty to vote for its abolition. On the whole, Sarat concludes that the issue frames of the new abolitionism played a critical role in the passage of New Hampshire's abolition bill through the legislature, though they did not prevent a gubernatorial veto of the legislation.

Taken together, these studies suggest that the issues of fairness, the risk of an innocent execution, and the questionable deterrent effect of the death penalty can lead people to oppose the death penalty. The question that remains to be answered is whether or not these issues affected New Jersey legislators in the same way that they affected New Hampshire legislators.

#### Issue Frames and New Jersey

When asked to identify the factors that she believed to be key to the successful passage of New Jersey's abolition bill, Celeste Fitzgerald, the program director of NJADP, echoed the conclusions of Sarat (2004) and Baumgartner and his colleagues (2007). She, too, perceived that the tides of support for the death penalty across the country are receding. Fitzgerald stated that the individuals involved in the abolition process in New Jersey were attuned to developments outside the state. She particularly cited the poll data that showed increasing support for life without parole within recent years, Pope John Paul's condemnation of the death penalty in 1999 (Simpson, 1999), and Illinois Governor Ryan's 2003 moratorium on executions (Wiener and Haney, 2004).

Turning specifically to events within the state, Fitzgerald contends that abolition was the culmination of a growing realization amongst New Jerseyans that the death penalty process in their state was flawed. Not only had New Jersey executed no condemned convicts since the state re-established the death penalty in 1982, Fitzgerald pointed out that the state Supreme Court overturned fifty-two of the sixty total death sentences imposed since that time due to concern over serious procedural errors. Additionally, Fitzgerald noted a decline in the rate at which prosecutors sought the death penalty and juries imposed the sentence within the state in recent years, indicating increased reluctance to use capital punishment. She argues that the creation of the Death Penalty Study Commission and imposition of the moratorium on executions was a turning point in which a majority of the state's elected officials (including then-Governor Richard Codey, a death penalty proponent) recognized the problems with the death penalty process.

In regard to the factors that convinced legislators to vote for the abolition bill, Fitzgerald identified two issues that she perceived to be particularly persuasive for both members of the Death Penalty Study Commission and legislators. The first issue was the risk of executing an innocent person highlighted by the rising number of DNA exonerations across the country. The second issue was concern for the family members of murder victims. As Lorry Post told Assemblyman Bateman, a majority of victims' family members who testified before the Commission argued that the endless process of appeals is itself hurtful to them because they are never given closure. The implicit promise of capital punishment is that the execution of the murderer will deliver justice to the family members of the murder victim; the fact that no condemned inmate was actually executed in New Jersey's modern death row era means that the victims' family members never received their promised justice. Although some victims' family members argued forcefully that the state should retain, correct, and actually use the death penalty, the Commission was ultimately convinced that the death penalty process was unacceptably hurtful to the very people it was intended to benefit. On the whole, Fitzgerald believes that these two issue arguments were key factors that secured the legislative majority needed to pass the bill.

Statements made by the legislators themselves support Fitzgerald's evaluation of the most important arguments in the debate. Turning first to legislators' statements to the media, we see that several legislators who favored the bill cited the risk of executing an innocent person as a reason to pass the bill. In her opinion piece, Senator Turner wrote, "The fact is, there is no way to guarantee that an innocent man or women would not be wrongly executed. As a society, we cannot risk the lives of the innocent to exact punishment on those who are guilty" (Turner, 2007). Additionally, Assembly Speaker Roberts said, "The consequences are irreparable if mistakes are made" (Young, 2007). Senators Weinberg, Lesniak, and Bateman also noted the risk of wrongful executions in their own opinion pieces (Lesniak and Bateman, 2007; Weinberg, 2007).

Evidence of legislators' concern for the suffering of victims' family members is more prevalent. Recalling the Commission's hearings, Lesniak and Bateman (2007) wrote,

The commission heard from dozens of family members and victims' advocates who said the death penalty had harmed them. Some shared their deep moral conviction that more killing would dishonor the memory of their loved one. Others told heartbreaking stories of how the process forced them to relive their trauma over and over again with every appeal. (15)

Speaker Roberts expressed concern that the death penalty offered victims' family members a false hope of closure that would never come (Hester, 2007a). Perhaps most notably, Senator Sweeney stated that it was his experience hearing the testimony of family members and learning how the death penalty process hurt them that caused him to switch his vote from pro-death penalty to a vote in favor of the abolition bill (Hester, 2007b).

Proponents of the abolition bill did not solely "own" these issue frames; opponents did try to counter their arguments. For example, Senator Cardinale, arguably the most vocal opponent of the abolition bill, noted that no death row inmate in New Jersey was exonerated in the modern era, which indicates that the system was working properly to avoid innocent executions (Cardinale, 2007). In addition, opponents of the bill emphasized their own arguments, the most common of which was the contention that some types of murders are so heinous that the death penalty is the only appropriate response (DeCroce, 2007; see quotes in Schwaneberg, 2007c, 2007e). However, the selective nature of the media coverage makes it particularly ill-suited to make any general claims about which issue argument were used most extensively by legislators; for that I analyze the actual debates.

Table 2 reports the number of times that various issue arguments were mentioned by legislators in favor of and opposed to the abolition bill during the committee and floor debates in both chambers. Without full transcripts of the debates, I was unable to conduct a formal content analysis. I coded a mention as the number of times that an issue was mentioned by different legislators in different settings. If Senator A mentioned the cost of the death penalty five times during the Judiciary Committee hearing and twice on the Senate floor, I recorded two cost mentions. If Senators A, B, C, and D each mentioned the cost of the death penalty once in committee, I recorded four cost mentions. Thus, these tallies are a crude measurement, but they give a sense of the frequency with which different arguments were raised by members of each side of the debate.

[TABLE 2 ABOUT HERE]

The results of this tally indicate that proponents and opponents of the abolition bill did, indeed, tend to emphasize different issue arguments in order to make their case. Proponents of abolition emphasized the risk of executing an innocent person and the tenuous evidence of a deterrent effect by the death penalty far more than opponents of abolition. On the other hand, opponents of abolition emphasized public opinion and the heinous nature of death penalty-eligible crimes. Members of each side of the debate obviously framed the same topics with different arguments. To take the topic of public opinion as an example, proponents of abolition emphasized poll data that showed that the public favored life without parole over the death penalty, while opponents of abolition emphasized data that showed that the public opposed the abolition bill.

The tally reveals some interesting findings. Perhaps consistent with Fitzgerald's observation that one of the most potent issues in the debate was concern for the effects of the death penalty process on victims' family members, this issue was the most "contested" between proponents and opponents of the bill. That is, multiple members of both sides of the debate frequently invoked family members to make their case; proponents emphasized that the death penalty process is

intrinsically hurtful to family members while opponents argued that the process should be refined so as to give family members swifter justice. More so than any other issue, both proponents and opponents of abolition tried to frame the debate in such a way that they appeared to be championing the best interests of victims' family members.

Another surprising finding was that comparatively few legislators from either side of the debate explicitly appealed to morality to justify their position. That is, relatively few legislators stated that they supported the abolition bill because they were morally opposed to the death penalty (the opposite argument was that a just, moral society demands retribution for heinous wrongs). Perhaps the relative paucity of the morality frame was due to the influence of NJADP's lobbying efforts. Fitzgerald stated that her group intentionally tried to avoid basing their arguments on morality, believing that you cannot change people's moral beliefs. In contrast, NJADP emphasized the suffering of victims' families caused by the death penalty in the hopes that legislators would support the bill for the benefit of victims' family members.

Finally, note that proponents of the abolition bill emphasized the punitive nature of life imprisonment without parole almost as often as they mentioned the deterrence or innocent execution arguments. Proponents of the bill were clearly trying to preemptively protect themselves against a "soft on crime" attack by proclaiming that they were supporting a very tough punishment that would keep dangerous offenders off the street. Some legislators even explicitly mentioned their own "tough on crime" voting records. Some opponents, on the other hand, attempted to undermine proponents' efforts by characterizing life in the general prison population as easy and painless compared to life on death row. Fitzgerald anticipated these attacks and stated that NJADP attempted to educate the public about the harsh realities of prison life in order to dispel the myth of "country club" prisons. It appears that legislative proponents of the bill picked up on NJADP's issue frame.

#### Summary of Substantive Factors

In summary, the evidence suggests that the factors of the new abolitionism identified by Sarat (2004) facilitated passage of the abolition bill in New Jersey. Proponents of the bill frequently referenced the unavoidable risk of executing an innocent person inherent in the death penalty, the ambiguous evidence as to whether or not the death penalty deters crime, and the pain that the death penalty process causes family members of murder victims. Proponents' efforts to frame the debate so as to minimize emphasis on the murderers themselves in favor of the cultural impact on the state as a whole ultimately appeared to be a key component of the abolition bill's successful passage.

#### **Conclusion**

In conclusion, the evidence from this data suggests that several factors contributed to the successful passage of abolition legislation in New Jersey. First, the effort to push the bill through the legislative process by invested champions of the legislation was facilitated by two structural factors. The first factor was the unification of the state government under a Democratic party that favored abolition. The second factor was the "electoral free space" provided by the lame duck session and evidence that voters would not penalize their representatives for a supportive vote. Second, proponents of the legislation capitalized on the issue frames that the death penalty intrinsically risks executing an innocent person, may not deter crime, and actually causes the family members of murder victims further pain through the long appeals process.

However, I reiterate that this is a preliminary study with significant methodological limitations. First, I did not interview any legislators themselves, so this data cannot solidly address legislators' reasons for their votes from their own perspectives. Secondly, I did not interview any of the individuals who were working to defeat the abolition bill, which means that my data is biased toward the abolitionist perspective. Most importantly, the current study suffers from selection bias. I seek to identify and explain the factors that enable a state to successfully abolish the death penalty,

but by choosing the one state that did legislatively abolish capital punishment as my case study, I selected on my dependent variable. As such, I identify several factors as being critical components for successful abolition of the death penalty, but I cannot rule out the possibility that these same factors also existed in states that failed to pass abolition legislation, which would undermine the evidence of these factors' efficacy (Geddes, 2003). Consequently, I emphasize that my current findings are indicators for further research rather than firm conclusions in and of themselves.

Regardless, the current study allows me to form the following hypotheses:

1. Abolition bills will be more likely to pass under unified government than under divided government.
2. Legislators will not vote for an abolition bill if they perceive that such an action would mobilize a majority of their constituents to vote against them in the next election.
3. An abolition bill will progress further through the legislative process if proponents frame the death penalty as hurtful to murder victims' families rather than trying to argue why murderers should not be executed.
4. An abolition bill will progress further through the legislative process if proponents argue that the state cannot avoid the risk of executing an innocent person rather than trying to argue why murderers should not be executed.

The data from this study suggests that an abolition bill will not be successfully enacted into law unless these conditions are met. However, these hypotheses need to be tested with new data. In order to achieve stronger internal and external validity, future research should gather qualitative data a) directly from legislators, b) from opponents of death penalty abolition, and c) from states that failed to legislatively abolish capital punishment.

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**Table 1: Summary of New Jersey Public Opinion Polls<sup>14</sup>**

Approximate Question	2002 Rutgers	2005 Rutgers	2007 Quinnipiac
Do you favor the death penalty for convicted murderers?	Favor – 60% Oppose – 31%	Favor – 61% Oppose – 31%	N/A
What should be the sentence for murder – the death penalty or life without parole?	DP – 36% LWOP – 48%	DP – 34% LWOP – 47%	DP – 39% LWOP – 52%
If you favor the death penalty, would you switch support to life without parole if the convict had to pay restitution to victim’s family?	Yes, switch to LWOP- 43% No, still support DP- 49%	Yes, switch to LWOP- 38% No, still support DP- 58%	N/A
Have you ever voted for/against a candidate b/c of his position on the death penalty?	Yes – 12% No – (missing)	Yes – 8% No – 90%	N/A
If your state legislator voted to replace the death penalty with life without parole, would you be more or less likely to vote for him?	N/A	More likely–25% No diff – 57% Less likely-14%	N/A
Do you support eliminating the death penalty in NJ?	N/A	N/A	Support – 39% Oppose – 53%
If death penalty were abolished for most murders, would you support keeping it for the most violent cases like serial & child killers?	N/A	N/A	Support – 78% Oppose – 18%

I collapsed scale response options into favor/oppose. N/A refers to a lack of comparable questions across all 3 polls. Table 1 does not include “don’t know” and non-responses. Rutgers polls can be accessed via < <http://www.njadp.org/gdcommentary&what=polls>>, Quinnipiac poll via <<http://www.quinnipiac.edu/x1284.xml?ReleaseID=1126&What=death%20penalty&strArea=4;&strTime=9>>

**Table 2: Mentions of Issue Arguments During Committee and Floor Debates by Legislators  
(sorted by legislators’ votes to advance or pass the bill)**

<b>Issue Arguments</b>	<b>In Favor</b>	<b>Opposed</b>
Cost of DP vs. LWOP	2	0
Risk of Innocent Execution/Exoneration	11	2
Impact on Victims’ Families	15	7
Deterrence	10	4
Tough Punishment	8	3
Public Opinion	3	9
Morality	5	1
Heinous Crimes	2	7