

## **PANEL IV: THE FINAL ACT—REPEAL: MARSHALING THE VOTES**

*Kathy Barrett Carter  
Sen. Raymond J. Lesniak  
Sen. Christopher Bateman  
Prof. Wilfredo Caraballo  
Sen. Robert J. Martin*

*KATHY BARRETT CARTER:*

It is a great pleasure to moderate this panel because, like many people in this room, I spent a significant part of my professional life writing about the death penalty. There are a lot of faces in this room that are very familiar to me because we talked a lot about cases and, in fact, I measure the death penalties in New Jersey by my kids. When I first came to Trenton in 1982, I was a young, thin bride then and during the time of covering the death penalty, I had two sons and I used to always say that this case was argued when one of them was in kindergarten and this was argued when they were in middle school. Well, the oldest has been out of Georgetown for two years and the youngest is about to graduate from college this June, so I feel like a couple of life cycles have gone by in this. But in the process of talking to both the defense and the prosecution, I believe I have a sense of both sides of these issues and even though I came into it, I must confess, as a liberal reporter, when you interview people like Maureen and Richard Kanka, it does affect how you look at these issues. I had the occasion over the years to interview a lot of those people.

Today, we are going to talk about the legislative process because, like reporters, legislators have to be concerned about both sides and sometimes it is not easy to consider proponents and opponents of a measure. Our distinguished panel here will talk about how they came to take the positions that they took and

ultimately support the effort to abolish the death penalty. I think we would like to start with Senator Lesniak because he truly had a conversion on the road to Damascus and I think it would be good to find out how that conversion occurred. Senator Lesniak, tell us about how you started out in favor of the death penalty and ultimately came around to oppose it.

*SENATOR LESNIAK:*

Freddie, Wilfredo [Caraballo], I have heard you warn about the perfect being the enemy of the good. In this case we achieved the perfect and the good. I came to this vote from a spiritual and moral basis, but being a political power broker that I am, I realized that if I started talking to most of my fellow legislators about spiritual and moral issues, I would get nothing but a puzzled look. So I had to look at the practicality, the issues that the [Death Penalty Study] Commission talked about and what Celeste [Fitzgerald] and Lorry [Post] had been working on for years. When Governor Corzine was running for the U.S. Senate, I was involved in his campaign and tried very hard to get him to moderate his views on the death penalty, asking: "Can we not make some exceptions? For terrorism? Anything?" I thought it was going to be a difficult issue for him in the election and thankfully he refused to budge. It was soon thereafter that I realized that you cannot take any anger, revenge, resentment into your views. And when you think about that, if you approach life without revenge, anger, resentment—any of those harmful emotions—there is no reason to have the death penalty. There is absolutely no reason for the death penalty to exist but for revenge; nobody believes it is a deterrent anymore, so that is how I came to this vote.

*KATHY BARRETT CARTER:*

Now, let us go to former Assemblyman Senator Kip Bateman, the Republican who we heard earlier was so crucial in getting the repeal legislation passed. Tell us why you decided to sign on and be an advocate for getting rid of the death penalty.

*SENATOR BATEMAN:*

I am now a senator and was elected back in November. When

I first ran for office, I was elected to the Assembly fourteen years ago as a Republican from a very Republican district. The last issue I thought I would tackle would be the abolition of the death penalty. A couple of things happened in my career that changed my whole perspective in thinking on this issue. One was from my former minister, Bob Hennings, who was my minister when I grew up in Northberry Reformed Church. Later on, after he left the ministry, he became a minister on death row. He and an individual who had lost his daughter to murder came to see me and pleaded with me to take a look at the whole issue of the death penalty. I can be honest with you, it was not on my radar screen at that time, but after two conversations with those gentlemen, I agreed to take a look at it.

Coming from a Republican background, I took baby steps and I first agreed to sponsor legislation for the Study Commission.<sup>1</sup> Al Steele and I submitted the original Bateman-Steele bill since the Republicans were the majority.<sup>2</sup> In the Assembly when the Democrats took over it became Steele-Bateman and then it became Caraballo. It was interesting when my caucus first heard that I was sponsoring this legislation. They wanted to throw me out because, as you can imagine, it was not a very popular position amongst Republicans. It still is not popular in many areas of the state, but the more I got into it and the more I spoke to individuals who have lost family members and loved ones, the more I realized there is no closure. It is very painful for individuals, so one step led to the next, and I sponsored the Study Commission. I was also involved in the moratorium,<sup>3</sup> and ultimately I was a sponsor of the abolition of the death penalty.<sup>4</sup>

I have had some success, more so when we were in the majority, but this is probably the most meaningful legislation that I have had to deal with in my fourteen years in the New Jersey Legislature. It is still not popular amongst my Republican friends

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<sup>1</sup> Assem. 1913, 210th Leg., 1st Sess. (N.J. 2002) (vetoed Jan. 12, 2004).

<sup>2</sup> *Id.*

<sup>3</sup> A moratorium bill was eventually passed and signed into law in 2006. Act of Jan. 12, 2006, ch. 321, 2006 N.J. LAWS 2165.

<sup>4</sup> Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)); *see also* Press Release, Governor Corzine, Governor Corzine Signs Legislation Eliminating Death Penalty in New Jersey (Dec. 17, 2007), available at <http://www.njstatelib.org/NJLH/1h2007/govmess/ch204 gov.pdf>.

and colleagues, but when you ask people around the country, you realize that New Jersey is once again the leader in this area and I think that what we did here in New Jersey is having an impact across the country. When you ask people if they support the death penalty, a lot of people say yes. But when you ask the next question, which is whether they support life in prison without any chance of parole, you would be surprised at the numbers of yes responses around not only New Jersey,<sup>5</sup> but also around the country.<sup>6</sup> I have a very strong faith and that had a lot to do with this, too. The more I got into this and the more I studied it, I realized that capital punishment in New Jersey was a flawed policy. First of all, we had not executed anybody in over forty years.<sup>7</sup> Also, there was case after case around the country and in New Jersey where people, after they have been found guilty, are exonerated because of the significant strides made with DNA.<sup>8</sup> So, the more I

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<sup>5</sup> See Keith B. Richburg, *N.J. Approves Abolition of Death Penalty: Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3 (citing 2007 Quinnipiac University Poll finding that fifty-two percent of New Jerseyans prefer life without parole while thirty-nine percent prefer the death penalty); N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 35-36 (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) (last visited Jan. 13, 2009) [hereinafter DEATH PENALTY REPORT] (citing 2002 Rutgers poll finding that forty-eight percent of New Jerseyans preferred life without parole while thirty-six percent preferred the death penalty and 1999 *Star-Ledger*/Eagleton-Rutgers poll finding that thirty-seven percent of New Jerseyans supported life without parole while forty-four percent supported the death penalty).

<sup>6</sup> See Gallup.com, Death Penalty, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Feb. 20, 2009) (According to a 2006 Gallup Poll, forty-eight percent of Americans favored life imprisonment with no possibility of parole over the death penalty as the punishment for murder, while forty-seven percent favored the death penalty); see also Death Penalty Information Center, Editorials: Life Without Parole (2008), <http://www.deathpenaltyinfo.org/editorials-life-without-parole> (last visited Feb. 20, 2009) (posting summaries of recent editorials across the nation advocating replacement of the death penalty with life without the possibility of parole).

<sup>7</sup> The State's last execution was that of Ralph Hudson in 1963. Hudson was sentenced to death by electrocution for the murder of his estranged wife. Jeremy W. Peters, *New Jersey Keeps Its Execution Chamber 'on Standby'*, N.Y. TIMES, Dec. 10, 2007, at B6.

<sup>8</sup> See generally The Innocence Project, Exonerations by State, <http://www.innocenceproject.org/news/StateView.php> (last visited Feb. 20, 2009); The Innocence Project, New Jersey: Exonerations by State, <http://www.innocenceproject.org/news/state.php?state=nj> (last visited Feb. 20, 2009). "The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the

had heard about the issues, the more I felt I took a great deal of abuse early and that it was the right thing to do.

It was quite a day when the senators and the assemblymen were there with the Governor when he signed the bill.<sup>9</sup> After New Jersey signed the bill into law, the Vatican lit up the Coliseum in gold lighting.<sup>10</sup> The emotions were overwhelming to think that what we did here in New Jersey could have an impact all the way in Rome. It was an unbelievable experience. I will probably never have another one like it in my legislative career. Signing the bill was the right thing to do and I am just happy that we had the result that we had. It would not have happened but for a lot of hard work from Celeste and other individuals.

I have been involved in some significant legislation, such as the auto insurance reform act,<sup>11</sup> but this was well done, because they realized early on it was going to be a difficult task. They really thought that they needed to have at least a couple of Republicans and bipartisan support. I cannot tell you the endless meetings we had and how we thought they were going nowhere. It was an up and down roller coaster trip, but the final result was something to be very proud of.

*KATHY BARRETT CARTER:*

Next, let us hear from former Assemblyman Wilfredo Caraballo, who also has been an outspoken advocate in the Legislature for the underdogs and always brought a lot of wisdom

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criminal justice system to prevent future injustice.” The Innocence Project, Home Page, <http://www.innocenceproject.org> (last visited Feb. 20, 2009). For cases specific to New Jersey, see <http://www.innocenceproject.org> (scroll over “Know the Cases” tab; follow “Search Profiles”; select “NJ” under “Jurisdiction” box; click search).

<sup>9</sup> Act of Dec. 17, 2007; see also Gov. Jon S. Corzine, Remarks on Eliminating the Death Penalty in New Jersey (Dec. 17, 2007), in RAYMOND J. LESNIAK, *THE ROAD TO ABOLITION: HOW NEW JERSEY ABOLISHED THE DEATH PENALTY* 65 (2008) (“Today . . . is a momentous day—a day of progress, for the State of New Jersey and for the millions of people across our nation and around the globe who reject the death penalty as a moral or practical response to the grievous, even heinous, crime of murder.”).

<sup>10</sup> See *Rome’s Colosseum Lit Up to Mark N.J. Abolishing Death Penalty*, THE STAR-LEDGER (Newark, N.J.), Dec. 19, 2007, [http://www.nj.com/news/index.ssf/2007/12/colosseum\\_lit\\_up\\_to\\_mark\\_un\\_nj.html](http://www.nj.com/news/index.ssf/2007/12/colosseum_lit_up_to_mark_un_nj.html) (last visited Jan. 13, 2009).

<sup>11</sup> Act of June 9, 2003, ch. 89, 2003 N.J. LAWS 412 (boosting consumer choice and competition in the New Jersey auto insurance market).

to his voice. What was the process like in the Assembly to get support for this bill? A lot of people were talking about the Republican opposition, but it was not a foregone conclusion that all Democrats would support this bill. What did it take to get it done?

*PROFESSOR CARABALLO:*

I came at this being a life long opponent of the death penalty. Having been raised in the South Bronx, I was always very sensitive to law enforcement mistakes and, having been at the end of some of those mistakes, I saw this as the ultimate mistake. I also came at it from a moral conviction. At one time, I studied for the priesthood and this was something that was so clear to me that I did not understand why the world did not see it the way I saw it. I had a moment in the Legislature when I was in the minority, at which time I was on the Judiciary Committee and the Assembly, and there was a bill, which proposed to have fourteen year olds eligible for the death penalty. Fourteen year olds!<sup>12</sup> At the time of this proposed bill, I believe the eligible age was sixteen years old.<sup>13</sup> A former assemblyman had a bill to lower the age to fourteen years old. I sat there in total disbelief and asked this former assemblyman: "Why fourteen, why not down to twelve, ten, or nine?" I swear to you by all that I love, his response was: "I would, but I do not think that I can get the votes."

I am telling you the God's honest truth, during this hearing a former congressman, who is now running for senator—I will not mention his name—testified on behalf of this bill. Yes, a Republican who was in the minority testified on behalf of this bill and made a statement which floored me again. He said that obviously the people of this state are for the death penalty since there is not a single bill in the Legislature to abolish it.<sup>14</sup> This was

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<sup>12</sup> *C.f.* Assem. 2925, 207th Leg., 1st Sess. (N.J. 1996) (permitting juveniles tried as adults and convicted to be sentenced to death if they were at least sixteen years of age at the date of the murder); Assem. 257, 208th Leg., 1st Sess. (N.J. 1998) (same).

<sup>13</sup> Since 1985, the Capital Punishment Act specified that the death penalty could be imposed only upon defendants eighteen years or older. *See* Act of Jan. 17, 1986, ch. 478, 1985 N.J. LAWS 536 (codified at N.J. STAT. ANN. § 2C:11-3g (West 2005)) (deleted by amendment, 2007).

<sup>14</sup> *See* New Jersey Legislature, Bills 1996-1997, <http://www.njleg.state.nj.us/bills/bills0001.asp> (click "Keyword(s)"; type death penalty; click "Find") (last visited

in 1996-1997. I remember looking at the Democratic staff for the committee and asked: "Was that true?" They went and asked the Office of Legislative Services person. It was true—there was not a single bill in the Legislature to abolish the death penalty.<sup>15</sup> I cannot tell you the embarrassment I felt at that moment. As a life long opponent of the death penalty, you would think that I would have checked and if there was not a bill, I would have put one in, right? I assumed that others had done that, so I was really comfortable preaching how we should abolish it. But I had never actually checked as to whether or not anybody was doing anything about it. I remember looking at him after the staff came up and I said to him: "Thank you for your testimony today. I truly appreciate it. I swear to you, that after today, that statement will no longer be possible as long as I am in the New Jersey Legislature. A bill will be filed this week." Then I filed the bill.<sup>16</sup>

At the time it was simply a bill that would abolish the death penalty. It did not have all of the nuances that have been subsequently introduced.<sup>17</sup> Again, I do not remember the contact dates, but I was visited by a group of folks later at my office in the Bloomfield area. I always say Larry Stocks' group came to me really to just find out if I was serious, because they were serious. They were very serious. I also remember more victims' families coming to me and telling me how they were talking to people. They were going to get Republicans. It was the most amazing thing. They did it. They did. The less I did, the better shot the bill had at passing. I understood that and then the final moment came, which I think was really what did the whole thing for us in New Jersey. That moment was when Ray [Lesniak] came.<sup>18</sup> Ray

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Feb. 20, 2009).

<sup>15</sup> *Id.*

<sup>16</sup> Assem. 3322, 208th Leg., 2nd Sess. (N.J. 1999).

<sup>17</sup> See Act of Dec. 17, 2007, ch.204, 2007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

<sup>18</sup> Senator Lesniak had originally been a supporter of the death penalty. See Sen. Raymond J. Lesniak, Letter to Members of the New Jersey State Senate, *in* THE ROAD TO ABOLITION, *supra* note 9, at 27, 28.

In September of 2006, I testified before the Commission that my legislative vote in 1982 to reinstate the death penalty was a mistake, that I no longer believed it was a deterrent and that I considered life in prison without parole to be far better than playing God with people's lives.

*Id.*

brought a certain credibility to this issue, which some of us would just never have, for a lot of reasons. I think when Ray got involved, people finally said: "Wow, this really has a shot." Then Ray got Bob Martin to go along with him.<sup>19</sup> Then we had two Democrats and two Republicans, or the other way around, two Republicans and two Democrats. We had people out there who were really doing the work that had to be done, because this really was not about politics. It really was not. So that was how it happened.

*KATHY BARRETT CARTER:*

Speaking of Senator Martin, tell us why you got on the bill and was it a Democrat/Republican thing? What was the motivation that got people on board with the bill and what kind of arguments were you all making in the trenches to get people to sign it?

*SENATOR MARTIN:*

I was serving in the Legislature and I was not really focusing on this legislation because of concerns with some other issues, like the Open Public Records Act.<sup>20</sup> I went to a graduation at Seton Hall University School of Law as a professor where Sister Helen Prejean<sup>21</sup> was the speaker. She received an honorary degree and spoke. I had a chance to meet with her before that at a little luncheon before the graduation. I had read her book and we got to talking about the subject.<sup>22</sup> I was warming up to the subject and

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<sup>19</sup> See *id.* ("Two Republicans, outgoing Senator Bob Martin and Assemblyman Chris Bateman, an incoming Senator-elect, are co-prime sponsors of my legislation.").

<sup>20</sup> See N.J. STAT. ANN. § 47:1A-1 (West Supp. 2008).

<sup>21</sup> See The Official Website of Sister Helen Prejean, CSJ, [www.prejean.org](http://www.prejean.org) (last visited Oct., 17, 2008). Sister Helen became involved in the effort to abolish the death penalty in 1981, when she became spiritual adviser to a Louisiana death row inmate. The experience opened her eyes to the Louisiana execution process, which she memorialized in *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993). Sister Helen has also served on the board and as chairperson of the National Coalition to Abolish the Death Penalty. See The Official Website of Sister Helen Prejean, *supra*.

<sup>22</sup> See HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993). The book was nominated for a 1993 Pulitzer Prize, was number one on the *New York Times* Best Seller List, and was developed



I made a vow to her. I said: "Well, if this ever gets some traction in New Jersey, I will be a supporter." I did not say I was going to be the leader, but I did say I would support it. As I mentioned this morning, I was given the privilege in the late nineties. I did not really think there was much chance, given the current mix of the Legislature and Governor.<sup>23</sup> But things evolved, which is one of the themes of Ray's book.<sup>24</sup> Also, I think that once Celeste's group and the other members of the coalition heard that somebody was a potential recruit, they never let go.

After 2002, when the Legislature changed hands, and then ultimately when we elected a Democratic governor, there was real thought about changing the law.<sup>25</sup> I think Fred was alluding to it and I had said, I think in *The Star-Ledger* at one point that the stars may be aligning for this,<sup>26</sup> as I thought it never had a shot before

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into an Oscar-award winning film. See The Official Website of Sister Helen Prejean, *supra* note 21.

<sup>23</sup> C.f. Act of Apr. 3, 1997, ch. 60, 1997 N.J. LAWS 243 (codified at N.J. STAT. ANN. § 2C:11-3b(3) (West 2005 & Supp. 2008)) (requiring defendants convicted of capital murder to be sentenced to life imprisonment without parole if not sentenced to death if the victim was less than fourteen years old and the homicide was committed during the commission of a sexual offense); Act of Sept. 17, 1999, ch. 209, 1999 N.J. LAWS 1301 (current version at N.J. STAT. ANN. § 2C:11-3b(4)(g) (West Supp. 2008)) (adding violation of a domestic violence restraining order to the list of statutory aggravating factors); Act of Dec. 23, 1999, ch. 294, 1999 N.J. LAWS 1584 (current version at N.J. STAT. ANN. § 2C:11-3j (West Supp. 2008)) (allowing family members of murder victim to display photograph of victim at sentencing); Act of Dec. 23, 1999, ch. 302, 1999 N.J. LAWS 1620 (codified at N.J. STAT. ANN. § 2C:49-7) (deleted by amendment, 2007) (permitting family members of murder victims to attend execution of loved one's murder); N.J. Exec. Order No. 72 (Aug. 1997) (creating the Study Commission on the Implementation of the Death Penalty in an effort to streamline the process of review and expedite executions).

<sup>24</sup> THE ROAD TO ABOLITION, *supra* note 9.

<sup>25</sup> C.f. Assem. 1913, 210th Leg., 1st Sess. (N.J. 2002) (vetoed Jan. 12, 2004) (establishing a study commission to review the death penalty and suspending executions in the interim; the bill passed the Assembly 70-8 and the Senate 34-0); Assem. 359, 210th Leg., 1st Sess. (N.J. 2002) (proposing repeal of the death penalty).

<sup>26</sup> C.f. Dana E. Sullivan, *All Stars Lined Up for Appeal*, N.J. LAW., Apr. 21, 2008, at 8. In her article, Sullivan described the factors that combined to allow for the death penalty's repeal as follows:

A well-organized grassroots movement, courts that insist on fairness and super due process, aggressive and determined public defenders with a decent budget, law enforcement officials and legislators who "convert" from their previous position, a sizeable portion of victims' families to argue against executions, demonstrably uneven prosecution, juries reluctant to impose the ultimate punishment, and a general public

that. But when I saw the commitment of Ray and the leaders of both houses, Speaker Roberts and Senator Codey and Governor Corzine, it looked like we might really have an opportunity, especially in light of some of the events that have been talked about today.<sup>27</sup>

It was never easy to be in the vanguard as a Republican. Kip is from a safe Republican district; I am from a safe Republican district. My colleagues in the Legislature publicly denounced all the efforts to go forward with the death penalty repeal. The Assembly's minority leader, Alex DeCroce, and Joe Pennacchio, who also was in our office, were not real supportive of this position.<sup>28</sup> It did not bother me so much that—I had been in trouble before; I was kicked out of the caucus in both the Assembly and the Senate, so I was not that much worried that I would not win universal support even and especially among my colleagues in the Senate Republican caucus.

But one thing stands out: As much as we made arguments to repeal the death penalty on these practical grounds—that it was not working, could not work, could not be fixed—while most of our colleagues acknowledged with great frustration that it was not producing results, they were absolutely determined to cure it in some fashion.<sup>29</sup> So we both recognized the problem, we just came at it from two completely opposite directions. Despite my moral

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perception that the death penalty is pointless at best. Then, all or most of those factors must come together while there's a favorable majority in the legislature and a governor eager to sign the repeal.

*Id.*

<sup>27</sup> See *Panel III: Legislative Moratorium and the New Jersey Death Penalty Study Commission*, 33 SETON HALL LEGIS. J. 137 (2008); see also *supra* note 26.

<sup>28</sup> See Alex DeCroce, Op-Ed., *Pro and Con: The Death Penalty—PRO*, THE RECORD (Hackensack, N.J.), Jan. 7, 2007, at O1; Joe Pennacchio, Op-Ed., *Putting the Death Penalty to Rest—Abolishment is a Mistake*, THE RECORD (Hackensack, N.J.), Dec. 16, 2007, at O1.

<sup>29</sup> *C.f.* Assem. 1612, 212th Leg., 1st Sess. (N.J. 2006) (calling for the Attorney General, rather than county prosecutors, to make the decision as to whether the death penalty should be sought in any particular case); Assem. 4443, 212th Leg., 2nd Sess. (N.J. 2007) (proposing retaining the death penalty in circumstances where the jury has no doubt that the aggravating factors outweigh the mitigating ones); Deborah Howlett & Joe Donohue, *Sharply Split Senate Votes to End State Executions: If Assembly Approves Repeal, Corzine Could Sign It by Friday*, THE STAR-LEDGER (Newark, N.J.), Dec. 11, 2007, at 1 (discussing position of Republican Senator Gerald Cardinale that: "The solution is not to repeal the law but to limit the 'technical' appeals that convicts are allowed.").

concerns, I felt strongly that this thing could not be fixed, as the Justices suggested earlier today. But my colleagues—to the bitter end, the amendment on the floor of the Senate on the day that we passed it—they were still arguing that, well, at least we should make some exceptions.<sup>30</sup> And of course, before that we talked about how procedurally we could somehow make it faster and fairer.<sup>31</sup> So it was a struggle and that is probably why the vote was so close, all the way through the end. Although it was not so much Republican versus Democrat, there was a lot more pressure put on us.<sup>32</sup> There was an attempt in both houses to force a party position on the publication to vote against the bill. Obviously, they knew I would not do that because I had never supported a party position and I would get thrown out rather than do it, but there was pressure put on some of our colleagues and just to mention one guy, the attorney turned this bill around with twenty-one votes [in the Senate].<sup>33</sup> When we took the vote, we had the secret vote from Sonny McCullough who was a senator who only served a short period of time from Atlantic County.<sup>34</sup> He had taken Senator Gormley's place, was known to be a conservative, and he was defeated in November when he ran for the first time

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<sup>30</sup> C.f. Peter McAleer, *N.J. Senate Says End Death Penalty; Amendment to Keep Capital Punishment for Terrorists, Child Killers Fails by One Vote*, PRESS OF ATLANTIC CITY, at A1 (noting Senate Minority Leader Leonard Lance's effort to preserve the death penalty for those convicted of terrorism, the murder of a law enforcement or corrections officer, or of the sexual assault and murder of a child under the age of fourteen. The proposed amendment failed by one vote.); Michael Booth, *Death Penalty Repealer Heads for Gov.'s Desk*, N.J.L.J., Dec. 17, 2007, at 1 (noting efforts of Republicans in the Assembly to amend the bill to retain the death penalty for these crimes).

<sup>31</sup> See *supra* note 29.

<sup>32</sup> C.f. Jeremy W. Peters, *With Senate Vote, New Jersey Nears Historic Repeal of the Death Penalty*, N.Y. TIMES, Dec. 11, 2007, at B1 (noting that the Senate vote mainly broke down party lines). In the end, four Senate Republicans voted for the bill: Senator Martin, Senator James "Sonny" McCullough, Senator Diane Allen, and Senator Joseph Palaia. Three Democratic senators, Senator Nicholas Sacco, Senator Fred Madden, and Senator Nicholas Scutari, voted against the legislation; two others, Senator Ronald Rice and Senator Sharpe James, abstained. Howlett & Donohue, *supra* note 29.

<sup>33</sup> See Peters, *supra* note 32. Approval in the Senate was considered the biggest obstacle to the repeal bill's passage, as Democrats held fifty of the eighty seats in the General Assembly. Three senators abstained from the vote (Democratic Senators Rice and James and Republican Senator Walter Kavanaugh) and the legislation was passed with a bare minimum of votes, 21-16. *Id.*

<sup>34</sup> See McAleer, *supra* note 30.

for his election to the Senate. I thought he was pretty, I will not say bitter, but he was certainly disappointed, but I never thought that he would come around on this bill.<sup>35</sup> He was the one last little surprise, so it was not only the stars, but maybe there was someone up above the stars that threw us down that last vote. Otherwise, we might not have gotten the bill through.

*KATHY BARRETT CARTER:*

Senator [Lesniak], you want to jump in on that? I have a question for you, but go ahead.

*SENATOR LESNIAK:*

I would like to talk about that vote. We actually lost three votes that day that I thought we had.<sup>36</sup> To this day, I do not know why Senator Rice did not vote. Of course, Senator Kavanaugh, who recently died, was too sick to attend. I thought we had twenty-four votes going in, knowing that the senator from Atlantic City [Senator McCullough] was going to be there.

However, Senator Rice surprisingly abstained, Senator Kavanaugh was not there because he was too sick to attend, and Senator James, who sat right next to me, abstained. I do not remember who was the last vote to make it twenty-one, but when it was stuck at twenty, I turned to Senator James and asked him what he was doing. He informed me that someone put up the last vote and that I had gotten my twenty-one votes. The Senator said this in a manner as if to tell me that he would have been there if I needed him. I do not know if that was the case, but I think he would have been there for me. I think he just wanted to show solidarity with Senator Rice, but that is how close it was. I can only speculate about Senator Rice, and the fact that Senator James was just supporting him, but the vote was right on the heels of the three very violent killings in Newark.<sup>37</sup>

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<sup>35</sup> See *id.* (Explaining his vote, Senator McCullough stated: "I believe there should be amendments, but I won't get another opportunity to vote, so I had to vote my conscience.").

<sup>36</sup> See *supra* note 33.

<sup>37</sup> See Jon Hurdle & Jennifer Lee, *Newark Victims Mourned at a Campus in Delaware*, N.Y. TIMES, Aug. 29, 2007, at B4 (noting that the killings devastated "the violence-weary New Jersey city," causing politicians to engage in "urgent introspection").

SENATOR MARTIN:

I talked to Senator Rice that day and he said he had other reasons but that was his principal issue. He believed that whoever would commit a murder assassination-style like the horrible murders here in Newark,<sup>38</sup> should be subject to the death penalty.

KATHY BARRETT CARTER:

In the process of trying to get the bill passed, were September 11 and then the triple homicide of the Newark students significant roadblocks? Talk about that.

PROFESSOR CARABALLO:

Timing. Timing was everything.

SENATOR BATEMAN:

That is right. All the stars aligned. This was a perfect time. It was a lame-duck session.<sup>39</sup> There were some outgoing representatives who were going to vote for the bill because they thought it was right and they did not have to worry about the leaders or reelection.<sup>40</sup> There was a governor who basically

<sup>38</sup> See Joe Malinconico & Jonathan Schuppe, *Police Downplay Speculation About Gang Links to Killings*, THE STAR-LEDGER (Newark, N.J.), Aug. 15, 2007, at 20 (discussing the brutality of the killings).

<sup>39</sup> See Editorial, *Time to Abolish the Death Penalty*, N.J. LAW.: THE WKLY. NEWSP., Nov. 12, 2007, at 6.

After the November biannual legislative election, legislators of the 212th legislature convene to address unfinished business before a new legislature is seated in January. This two-month period is known as a lame-duck session. Historically, during this time significant yet controversial public policy issues are considered by legislators perhaps too timid to act prior to Election Day.

*Id.*; see also Peters, *supra* note 32 (“Because the Senate voted during a lame-duck legislative session, legislators who might otherwise have voted against the bill were afforded some political cover—a factor that may have tipped the balance.”).

<sup>40</sup> Three of the four Republican senators that voted for the bill—Senators Martin, McCullough, and Palaia—were not returning to the Senate. Peters, *supra* note 32; see also Fran Wood, *Lame-Duck Legislators Are in Fine Feather*, THE STAR-LEDGER (Newark, N.J.), Dec. 19, 2007, at 19 (“Every seat was up for election in 2007, and nobody wanted to jeopardize his re-election chances by voting for anything controversial or even mildly unpopular.”).

indicated that he would sign the bill.<sup>41</sup> Everything came together and there was some cushion in the Assembly, where we had forty-four votes. Everything came together, the timing was perfect. Otherwise, if we waited until the following year, everyone would have been in election mode and the timing might not have been right.

*SENATOR LESNIAK:*

Another bump in the road occurred with the arrest of the Fort Dix terrorist suspects.<sup>42</sup> This happened shortly after the Commission came out with its report,<sup>43</sup> and before the Judiciary Committee released it. That was the amendment Senator Martin was talking about, on the floor, to make an exception for terrorism.<sup>44</sup> We were slowed down a little bit because, as we always say: bad facts make bad law. Circumstances like terrorism lend itself to reactions that were visceral and in the moment are quite difficult to overcome. Celeste, Lorry and everybody else, however, were so tied up on this, even though those blips were not fatal.

*PROFESSOR CARABALLO:*

Joe Roberts in the Assembly and myself had talked about how there were a number of issues when Joe became Speaker, issues that he and I cared deeply about. Of course there was the needle exchange, an important issue for Joe and a couple of other Assemblymen. Nevertheless, I remember having a deep and long conversation with Joe early on; we became speakers regarding many of these issues. I remember Joe telling me early in his speakership: "Fred, I really think that by lame duck we may have a

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<sup>41</sup> See Dana E. Sullivan, *Death Penalty Measure Sidetracked by Politics*, N.J. LAW.: THE WKLY. NEWSP., Apr. 2, 2007, at 1.

<sup>42</sup> In May of 2007, five Islamic terrorists were indicted with conspiring to attack American soldiers at Fort Dix. They were convicted in December 2008. See Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, WASH. POST, May 9, 2007, at A1; Paul Von Zeilbauer & Jon Hurdle, *Five Are Convicted of Conspiring to Attack Fort Dix*, N.Y. TIMES, Dec. 22, 2008, <http://www.nytimes.com/2008/12/23/nyregion/23fortdix.html>.

<sup>43</sup> N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 31 (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) (last visited Feb. 13, 2009) [hereinafter DEATH PENALTY REPORT].

<sup>44</sup> See *supra* note 30.

shot at the death penalty, some things are happening in the Senate.” The Assembly had some other things going on and I will never forget the feeling that I had when he said that. This feeling of “wow,” but then every single time an incident occurred, I said, “Oh God, who am I losing this time?” because as a legislator you are concerned that every single time when you have these incidents, you are losing one vote or even two votes because somebody is scared.

*SENATOR MARTIN:*

I think the strategic decision to wait and wait until lame duck—made by Senator Codey and Assembly Speaker Roberts—became crucial to the vote because we did not have many votes to spare.<sup>45</sup> Furthermore, I do not think all those individuals may have been committed to support that vote prior to the November election.<sup>46</sup>

*KATHY BARRETT CARTER:*

Are you arguing that you should not do the vote in lame duck and that it was sort of cowardly to do it that way? At that time, Senator Codey seemed like he was saying: “Well, we are going to pass the bill because the death penalty is a hoax, because it is not being used, more so than an argument that this is a bad law.”<sup>47</sup> How important was lame duck and was it in a sense unfair not to give it more public input at a later time?

*PROFESSOR CARABALLO:*

There is a difference between a lame-duck session and lame-duck issues. There are bills where we had a commission report—that was not a lame duck. This bill resulted in a lot of hard work

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<sup>45</sup> See remarks of Senator Martin and Senator Lesniak *supra* and accompanying notes.

<sup>46</sup> See Wood, *supra* note 40; Peters, *supra* note 32; Deborah Howlett, *Legislature's Long Recess Set to End: Democrats May Move on some Big Issues During Post-Election 'Lame Duck' Session*, THE STAR-LEDGER (Newark, N.J.), Nov. 5, 2007, at 13.

<sup>47</sup> See Peters, *supra* note 32 (“[In recommending repeal, Senate President Richard] Codey, who sponsored legislation in the early 1980s that reinstated New Jersey’s death penalty, said the system plays a cruel hoax on murder victims’ families by giving them the false hope of an execution.”).

over a number of years. For some individuals, speaking frankly, the truth of the matter is that some votes reflect pure cowardice and I was one of those cowardly individuals who voted no. With this bill, however, to accuse the Legislature of either cowardice or not having enough public input, is really just being disingenuous. Is disingenuous a nice word for it?

*SENATOR MARTIN:*

We were criticized plenty for passing the bill in lame duck.<sup>48</sup> I told the press, as well as Ray, that when the opportunity presents itself and if it is important, that opportunity must be seized. That opportunity may not present itself again, and therefore, when there was a bill like this, a bill of such importance and which may never come again, the opportunity must be seized.

*KATHY BARRETT CARTER:*

Senator Bateman you talked a lot about your colleagues criticizing you, but what kind of feedback did you get from the public, from your constituents?

*SENATOR BATEMAN:*

Fortunately, the feedback from my district was actually pretty positive after explaining that [the convicts] are staying in prison and there is no chance of parole. One of my arguments is something I strongly believe in: If you commit a heinous crime and you kill someone, maybe you should sit around in a cell and think about what you did. In a lot of ways it is the end of their life. I firmly believe that a lot of people, after you explain that New Jersey has not executed anyone in forty years,<sup>49</sup> can have an intelligent conversation with you. It is not like some other issues—for example, pro-choice or pro-life, where it is black and white, either you are with them or not. That is not how it is with this issue. People who might be in favor of the death penalty would listen to your arguments and, after talking for a while,

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<sup>48</sup> *See id.* (“[O]pponents of the bill were sharply critical of Senate Democratic leaders for scheduling a vote during a lame-duck session.”).

<sup>49</sup> The last execution in New Jersey was that of Ralph Hudson in 1963. *Supra* note 7.



would come around. The feedback I received in my district, while it is true I got a few negatives, was positive for the most part.

*KATHY BARRETT CARTER:*

One of the things that has come up and has not gotten a lot of attention is the fact that it seems that more people will get life without possibility of parole under this new law.<sup>50</sup> A lot of people are a little bit uncomfortable with that, and, in fact, today we have heard people mention that the next battle might be to loosen the law in that area. Do you think that is something that should or should not be done? Let us start with Freddie Caraballo and go down the line and talk about whether it bothers you that somebody who maybe under the old law would have gotten out in twenty years is now looking at life without parole.

*PROFESSOR CARABALLO:*

Despite my liberal leanings, I have never been averse to capital punishment. I think if anything, what we have witnessed is a series of injustices where you have a jury that is not willing to give the death penalty for whatever reason, and you wind up getting a conviction that only leads to ten or twenty years when you know that somebody committed a crime for which they should really be spending their life in jail. How is justice being served? I mean to me, I think it is absolutely true that more people are going to wind up spending more time in jail. But I do not necessarily think that is bad. It is considered an injustice. I think that what happens—what happened before in too many cases—is that we had too many people who were not, to use a very unliberal term, “appropriately punished” because the ultimate sanction was not going to be imposed. And you have the

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<sup>50</sup> See DEATH PENALTY REPORT, *supra* note 43, at 89-90.

Under the Commission's recommended procedure, imposition of life without parole is mandatory upon a finding of an aggravating factor, there is no opportunity for the defendant to offer mitigating factors, and there is no discretion on the part of the sentencer.

Needless to say, the number of defendants sentenced to life without parole will be far greater than the number currently being sentenced to death. That has been the experience in other States in which life without parole has been enacted in lieu of the death penalty.

*Id.*

sentencing guidelines, so I do not have a problem with that at all. Growing up, I got to tell you, there were three brothers, whom, to the day I die, I think they are still in jail. These guys I grew up with should not be on the street.

*SENATOR BATEMAN:*

I think I pretty much agree with what you said. I think that one of the arguments we used against the individuals who really thought they would need the death penalty—especially the victims’ families—was that the criminals have to stay in jail for the rest of their lives with no chance for parole. It is to the Governor’s credit; he obviously did not rush to sign it.<sup>51</sup> What he did before he signed it was make certain that the individuals on death row could not get off of death row by some legal maneuver. That helped us because one of the arguments—at the time it seemed like a compelling one—was that there is a chance that some of these individuals could get off death row. At least that is what he wanted to see happen. It is exactly my point with that question. But the Governor did his homework there.

*SENATOR LESNIAK:*

I had to amend my bill to coincide with the Commission’s recommendations<sup>52</sup> in order to make it tougher and have more people serve life sentences without any chance of parole.<sup>53</sup> As a famous assemblyman once said: “The perfect is the enemy of the good,” and so I compromised some things in order to get the bill through. However, having said that, I do not think we should be

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<sup>51</sup> The repeal bill was passed by the Assembly on Dec. 13, 2007 and signed by the Governor on Dec. 17, 2007. New Jersey Legislature, Bills 2006-2007: S171, <http://www.njleg.state.nj.us/bills/BillView.asp> (last visited Mar. 1, 2009).

<sup>52</sup> See DEATH PENALTY REPORT, *supra* note 43, at 67-77 (recommendations).

<sup>53</sup> See Act of Dec. 17, 2007, ch. 204, 1007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)); see also Raymond J. Lesniak & Christopher Bateman, *A Compelling Case Against the Death Penalty*, THE STAR-LEDGER (Newark, N.J.), Dec. 3, 2007, at 15.

Our bill would create one of the toughest sentencing laws in the country, broadly expand the list of crimes for which life without parole would be mandatory and ensure that current death-row inmates are never eligible for parole. Inmates sentenced under this statute would spend their entire lives in a maximum-security prison.

Lesniak & Bateman, *supra*.

changing it because we made a commitment in that regard and I think we should keep it. I am looking forward to working with Senator Bateman in attacking, not as dramatic an area as life and death, but rather the oversized prison population that we have in the state, as well as in this country, because there are so many lives being wasted in that regard.<sup>54</sup> The compromises did bother me, but it was something that was absolutely necessary for us to get the bigger issue resolved.

*SENATOR MARTIN:*

I believe in redemption at some point in time. I think it is possible. I would want some very strong assurances, but I do think there has been substantial evidence that shows that persons who are in jail, especially ages fifty, sixty, seventy, they may not really be a threat. There may be other ways to, if not completely release them, at least perhaps loosen the chains, but also we did make some sort of a compromise with this and I think it would be really unfair if there was some quick change on this issue.<sup>55</sup> I talked to a couple of the constitutional law professors at this school, especially Eddie Hartnett who convinced me that what the Governor was proposing was ironclad, as best we understood it, so I think the protections are in place. If down the road others find a conversion, maybe then we will go forward, but I think that would have to be done very carefully, otherwise you would be foisting sort of a hoax on the public.

*PROFESSOR CARABALLO:*

I think that we have to distinguish between the points that you just raised, Ray, with respect to the incarcerated population. What I mean is that I worked up a number of bills as well trying to get at some of those. I mean I am against these automatic

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<sup>54</sup> WILLIAM J. SABOL ET. AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2006 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>.

<sup>55</sup> See generally *Promoting Inmate Rehabilitation and Successful Release Planning: Hearing Before the H.S. Comm. on Crime, Terrorism, and Homeland Sec.*, 110th Cong. 40-56 (2007) (oral and written testimony of Professor Jonathon Turley, Professor of Public Interest Law, George Washington University Law School, Founder of the Project for Older Prisoners).

sentences for a thousand feet. Also I really do think we have gone way overboard on imprisoning people for certain types of crimes, but I think we have got to distinguish between that and what we did in this bill with respect to the people. It is a small group that is eligible for life imprisonment without parole.<sup>56</sup> It is not as large a group as you would think, and it seems to me that if we are saving life imprisonment as our harshest sentences for the most heinous type of crimes, then it would be contradictory for us to try and speak of loosening. In addition, I have no problems with saying we should not revisit that issue with respect to the older population, while at the same time agreeing with Ray 1,000 percent on the fact that we need to look at the sentencing guidelines as general guidelines.

*KATHY BARRETT CARTER:*

Well gentlemen, I am being told that we should wrap up. Thank you for your participation. You have been great and if I have a bill I need passed, I know who to come to.

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<sup>56</sup> See Act of Dec. 17, 2007, 1007 N.J. LAWS 1427