The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency"

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THE ABOLITION OF THE DEATH PENALTY IN NEW JERSEY AND ITS IMPACT ON OUR NATION'S "EVOLVING STANDARDS OF DECENCY"

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In 2007, New Jersey became the first state in over forty years to abolish the death penalty legislatively. Twenty-five years earlier, in 1982, New Jersey had followed a state-level trend by reinstating its death penalty. However, during the twenty-five years between reinstatement and abolition, New Jersey did not conduct a single execution. Instead, the New Jersey Supreme Court reversed numerous death penalty cases and consistently narrowed the class of cases eligible for the death penalty.

This Note posits that the supreme court's narrowing of eligible cases was one of the factors that prevented executions from taking place in New Jersey. The Note further hypothesizes that this lack of executions created the policy space for legislative abolition. The Note then explores the effect that New Jersey's abolition might have on capital punishment in other states, as well as the potential influence of state-level abolition on the United States Supreme Court's evaluation of the constitutionality of the death penalty.

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* J.D. Candidate, Yale Law School, 2010; B.A., Brown University, 2005. I want to thank Stephen Bright for inspiring this Note and inspiring me; I also want to thank him for his thoughtful advice and encouragement. I want to thank my family for teaching me to always ask the hard questions; Jennifer Keighley for her excellent editorial advice; and Jeffrey Fagan, Dov Fox, and Noah Messing for their thoughtful comments and suggestions. Thanks are also due to the excellent editorial staff of the Michigan Journal of Race & Law, particularly Amy Super and Danielle Barnes.
"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

INTRODUCTION

On December 17, 2007, New Jersey Governor Jon Corzine signed legislation abolishing the death penalty in New Jersey. With that action, New Jersey became the first state in more than four decades to abolish the death penalty through the legislative process.

The story of the abolition of the death penalty in New Jersey begins not with the passage of repeal legislation in 2007, but with the period

3. West Virginia and Iowa legislatively abolished the death penalty in their states in 1965. Robert Schwaneberg, Stage is Set for Fight Over Death Penalty, STAR-LEDGER (Newark, N.J.), Dec. 2, 2007, at 25. However, until New Jersey's abolition, no state had legislatively abolished the death penalty since the Supreme Court upheld three death state penalty statutes in Gregg v. Georgia, 428 U.S. 153 (1976); see infra note 33. After Gregg, Rhode Island, Massachusetts, and New York ended their death penalty regimes, but they did so judicially. In 1979, the Rhode Island Supreme Court held that Rhode Island's death penalty statute was unconstitutional. State v. Cline, 397 A.2d 1309 (R.I. 1979). The statute provided for the death penalty only for prisoners who committed murder while already in prison; however in those cases, the death penalty was mandatory. Id. at 1311. The court held that the mandatory imposition of the death penalty was unconstitutional in light of the United States Supreme Court's jurisprudence on mandatory death sentences. Id. Five years later, the Legislature officially removed the death penalty from the murder statute, and attempts to reinstate the death penalty in Rhode Island have never succeeded. Office of the Secretary of State, Abolishing [sic] of the Death Penalty in Rhode Island (Oct. 11, 2000), http://www.sec.state.ri.us/library/riinfo/abolishing-of-the-death-penalty-in-rhode-island. In 1984, the Massachusetts Supreme Judicial Court declared the state's death penalty statute unconstitutional. Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984). The statute allowed for the imposition of the death penalty if the defendant was convicted of murder, but not if the defendant pled guilty to murder; the court found that this infringed on the right against self-incrimination and the right to a jury trial. Id. at 118. In 2004, the New York Court of Appeals, quoting an earlier New Jersey Supreme Court decision, found that the New York jury deadlock instruction in capital cases was unduly coercive and therefore unconstitutional. People v. LaValle 817 N.E.2d. 341, 361 (N.Y. 2004) (quoting State v. White, 142 A.2d 65 (N.J. 1958)). Legislative efforts to solve this constitutional infirmity have been unsuccessful. NEW JERSEY DEATH PENALTY STUDY COMMISSION, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 39 (2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf.
shortly after the death penalty's reinstatement in New Jersey in 1982. It was five years later, in 1987, before the New Jersey Supreme Court reviewed its first death penalty case after the reinstatement. But, from 1987 to 1992, the court overturned nearly every death penalty case it reviewed. Thus, by 1992, the court had communicated to prosecutors in the state that it would narrowly interpret the death penalty statute. Throughout the twenty years of post-reinstatement death penalty jurisprudence in New Jersey, the court overturned nearly eighty percent of the death penalty cases it reviewed. In doing so, the court made clear that it would not take an "expansive" reading of New Jersey's death penalty statute. Instead, the court used its powers to narrow the class of cases that were eligible for the death penalty.

As other scholars and journalists have noted, the abolition of the death penalty in New Jersey was the result of several factors: a strong and fully funded public defender's office committed to fighting every death penalty case, jurors who appeared reluctant to impose the death penalty, and prosecutors who recognized the strong possibility of

4. From 1987 to 1992, the court overturned thirty-three out of the thirty-four death sentences it reviewed. The only case upheld was that of Robert Marshall. See infra note 47. From 1992 through 2007, the court continued to overturn the majority of death penalty cases it reviewed. See infra note 6.

5. By the early 1990s, the prosecutorial charging decisions had dropped dramatically. See discussion infra note 16.

6. For a full list of death penalty cases in New Jersey after 1982, see Appendix, Table 1. The exact figure depends on how cases that were reviewed twice are counted and how one counts the three men who died while incarcerated on death row. See also Jeffrey Fagan, Testimony to the New Jersey Death Penalty Study Commission 5 (Oct. 11, 2006) (transcript on file with Michigan Journal of Race & Law) (detailing the reversal rate for cases that the court reviewed before 1997 and after 1997; when Fagan's numbers are added together, the reversal rate is seventy-nine percent).

7. Telephone Interview with John Redden, Former Prosecutor (Mar. 18, 2008) (transcript on file with Michigan Journal of Race & Law). In his twenty-year prosecutorial career, John Redden was an Assistant Prosecutor, Deputy First Assistant Prosecutor, and Chief Assistant Prosecutor in Essex and Morris counties. See discussion infra Part IV.

8. See infra Part II.

9. See, e.g., Editorial, The Difference, N.J. LAW., Jan. 14, 2008, at 6 (citing the strength of the Office of the Public Defender as one of the differences between the death penalty administration in New Jersey and Texas). There were 228 capital cases tried after the reinstatement of the death penalty in New Jersey; approximately 180 of those cases were tried by the New Jersey Public Defender's Office and juries returned verdicts of death in only 20% of those 180 cases. W. Michael Murphy et al., Panel I: The Struggle in the Courtroom, 33 SETON HALL LEGIS. J. 69, 75 (2008) (remarks of Dale E. Jones). Overall, juries returned a verdict of death in 60 of the 228 death penalty cases (approximately 26%). NEW JERSEY DEATH PENALTY STUDY COMMISSION, supra note 3, at 7.

having a death penalty verdict reversed upon appeal. In addition, as with any important legislative action, the bill had the support of key political actors. There was a strong grassroots movement against the death penalty, and Senator Raymond Lesniak, the primary co-sponsor of the bill, was a politically powerful state senator renowned for his legislative prowess.

This Note will fill a gap in the literature by closely examining the way that the New Jersey Supreme Court's decisions influenced the prospects for abolition. Those decisions consistently narrowed the class of cases that were death-eligible in New Jersey. While the New Jersey Supreme Court was not the sole reason for the legislative repeal, the court's nar-

11. See discussion infra Part IV.
14. Although the New Jersey Supreme Court did not overturn the death penalty, it did play an important role in abolition. While this paper will not discuss in detail the relative merits of legislative versus judicial repeal of the death penalty, it is worth briefly recognizing the arguments on both sides. Scholars disagree about the costs and benefits of court-imposed social policy changes, and whether court-driven social changes result in an undesirable backlash that should be avoided. Compare William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics 114 YALE L.J. 1279, 1310 (2005) (arguing that in some cases “[j]udicial review can raise the stakes of politics by taking issues away from the political system prematurely”) with Robert C. Post & Reva B. Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L. L. REV. 373, 409–424 (2007) (presenting a more positive account of backlash as a means of affirming the democratic legitimacy of the Constitution and arguing that legislative change can also create backlash). It is also unclear whether legislative or judicial repeal is more permanent. In a state without judicial elections, see infra note 46, judicial repeal might be longer-lasting. But the notion that judicial repeal is longer-lasting is less likely to hold true in those states where judicial elections can replace supreme court justices. However, as David Ruhnke, a veteran capital defense lawyer, recently pointed out, New Jersey's legislative abolition means that the state is "one election and one shocking crime away from the death penalty being brought back or being put back on the table in New Jersey." Murphy et al., supra note 9, at 84 (remarks of David A. Ruhnke). Ironically, while legislative enactments might normally be prone to quicker reversal than court rulings of unconstitutionality, New Jersey's Governor-elect, Chris Christie, will have the opportunity to reshape the New Jersey Supreme Court. Christie will be able to appoint up to four new justices in his first term. Mary Fuchs, Supreme Court's Future in Hands of Next Governor, STAR-LEDGER (Newark, N.J.), Oct. 29, 2009, at 1. However, Christie has pledged not to overturn the sixty-year old "gentleman's agreement" on the composition of the court; traditionally there are no more than four Democrats or four Republicans on the seven-
row reading of the death penalty statute was one of the primary reasons that New Jersey did not execute anyone after the death penalty was reinstated.\footnote{15}

This narrowing of cases eligible for the death penalty sent a signal to prosecutors that the New Jersey Supreme Court would uphold the death penalty in only the most extreme cases. Prosecutors reacted to the supreme court’s message; the percent of death-eligible cases brought to a penalty trial decreased from 57% in the 1980s to 18% in the 1990s,\footnote{16} even though New Jersey’s rate of death-eligible homicides remained steady.\footnote{17} The New Jersey Supreme Court’s reversals and the prosecutorial charging decisions contributed to the lack of executions under New Jersey’s reinstated death penalty statute.\footnote{18}

The absence of any executions in New Jersey over a forty-four year time span was one of the most important factors that drove the New Jersey Legislature to abolish the death penalty. This absence allowed opponents of the death penalty to argue that the death penalty’s potential benefits of retribution, deterrence, and closure were significantly outweighed by the effects of the state’s protracted death penalty process. That process re-victimized victim’s families and imposed high financial burdens on the state.\footnote{19} In addition, as with any death penalty regime, there was always the possibility that the state might execute an innocent person.\footnote{20} After weighing the costs and benefits, the New Jersey Death Penalty Study Commission, along with some prosecutors, victims’ families, and state senators who had previously sponsored death penalty enactment
bills, concluded that the state was actually better off having life without parole as its most severe penalty.\(^{21}\)

Death penalty opponents and public defenders also acknowledge that the fact that no one had been executed in New Jersey for forty-four years was an important factor leading to the abolition of the death penalty. As Celeste Fitzgerald, Director of New Jerseyans for Alternatives to the Death Penalty said, the lack of executions in New Jersey created the "policy space" for the grassroots movement and political realities that led to abolition.\(^{22}\) Joseph Krakora, Assistant New Jersey Public Defender and Director of Capital and Special Litigation further noted that the "death penalty never became routine" in New Jersey.\(^{23}\)

Instead, since every death penalty case received "incredible scrutiny from the supreme court," it was a "big deal" each time a jury imposed a death sentence and even more noteworthy when the supreme court upheld a sentence.\(^{24}\) As former New Jersey Supreme Court Justice Peter Verniero wrote, "[b]ecause death is an irreversible penalty, the state supreme [c]ourt has construed the judicial role in capital cases as requiring heightened and exact scrutiny.\(^{25}\) This close judicial scrutiny contributed to the lack of executions in New Jersey. And this Note hypothesizes that the lack of executions in New Jersey played an important role in the state's abolition of the death penalty.

New Jersey is not the only state where the infrequency of executions could play a role in abolition debates. Thus, the importance of the abolition of the death penalty in New Jersey extends beyond its borders. The lessons from New Jersey are especially relevant for the twelve other states that have death penalty statutes but rarely conduct executions.\(^{26}\) Many of the arguments made by the New Jersey Death Penalty Study Commission may be persuasive in those twelve states as well. In fact, similar arguments have already prevailed in New Mexico, a state that had executed only one person since reinstating the death penalty in 1979. On March 19, 2009, New Mexico followed New Jersey's lead and became the

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\footnotetext[21]{New Jersey Death Penalty Study Commission, supra note 3, at 2. See discussion infra Parts V & VI.}
\footnotetext[22]{Telephone Interview with Celeste Fitzgerald, Dir., New Jerseyans for Alternatives to the Death Penalty (Mar. 7, 2008) (transcript on file with Michigan Journal of Race & Law).}
\footnotetext[23]{Telephone Interview with Joseph Krakora, Assistant Pub. Defender and Director of Capital and Special Litigation (N.J.), (Mar. 11, 2008) (transcript on file with Michigan Journal of Race & Law).}
\footnotetext[24]{Id.}
\end{footnotes}
second state in nearly forty-five years to abolish the death penalty legislatively.\textsuperscript{27}

Executions are increasingly concentrated in a few states. Only nine states executed anyone in 2008; ten states have conducted an execution in 2009.\textsuperscript{28} Looking to the future, if those twelve states that still have the death penalty on the books but have rarely executed anyone were to eliminate the death penalty, they would join the fifteen states that have already abolished the death penalty. This abolition would leave only twenty-three states with the death penalty on the books, and executions would likely continue to be concentrated in a small number of even these states.

The United States Supreme Court has consistently demonstrated that its definition of cruel and unusual punishment in capital punishment cases will be influenced by state-level developments.\textsuperscript{29} Thus, a consistent state-level trend moving away from the death penalty could lead the Supreme Court to overturn the death penalty as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.

I. The Death Penalty in New Jersey Before Its Repeal

Prior to 1972, when the United States Supreme Court ruled that the death penalty was unconstitutional as it had been applied in the cases before the Court,\textsuperscript{30} 361 people had been executed in New Jersey.\textsuperscript{31}

\begin{itemize}
  \item \textsuperscript{27} Dan Boyd, Repealed: Richardson Signs Bill Abolishing Death Penalty in N.M., ALBUQUERQUE J., March 19, 2009. See discussion infra Part VII. See discussion infra note 165.
  \item \textsuperscript{28} See Death Penalty Information Center, Number of Executions by State and Region Since 1976, http://www.deathpenaltyinfo.org/article.php?did=186 (last visited Oct. 1, 2009).
  \item \textsuperscript{30} Furman v. Georgia, 408 U.S. 238 (1972). The Court issued a one paragraph per curiam opinion declaring that the “imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” Id. at 239–40 (emphasis added). All nine Justices wrote separate opinions, five concurring in the judgment and four dissenting from the per curiam opinion. Justices Brennan and Marshall would have found the death penalty unconstitutional in all instances. However, Justices Douglas, Stewart, and White found only that the death penalty had been arbitrarily applied. Three of the Justices noted the role that race placed in determining those defendants sentenced to death. See id. at 249–253 (Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 364–65 (Marshall, J., concurring). Justice Stewart noted that the death penalty had been “wantonly and ... freakishly imposed.” Id. at 310 (Stewart, J., concurring).
  \item \textsuperscript{31} Sullivan, supra note 15. These 361 executions put New Jersey among the fifteen states that had carried out the most executions since 1608, even though no one had been executed in the state since 1963. Death Penalty Information Center, supra note 26. Among those executed was Bruno Hauptmann. Hauptmann was sentenced to death for killing Charles Lindbergh's baby. The prosecutor in his trial was David Wilentz; Wilentz's son
Five months before Furman v. Georgia, the New Jersey Supreme Court had overturned the New Jersey death penalty statute based on its denial to some defendants of the right to a jury trial. After the United States Supreme Court reiterated that the death penalty was not per se unconstitutional and upheld the death penalty statutes of three states, the New Jersey Legislature considered numerous bills to reinstate the death penalty in New Jersey. The legislature passed two death penalty bills in the late 1970s, but both were vetoed by Governor Brendan Byrne. After Governor Tom Kean took office in 1982, the legislature passed another death penalty bill. Governor Kean signed the bill into law on August 6, 1982. The death penalty statute allowed for the imposition of the death penalty if, in a separate penalty proceeding, the jury unanimously found that all of the aggravating factors outweighed mitigating factors beyond a reasonable doubt. The aggravating factors included cases involving a grave risk of death to multiple victims; the murder of a public servant; an offense committed while the defendant was engaged in the commission of, or an attempt to commit . . . robbery, sexual assault, arson, burglary or kidnapping; or a murder that was “outrageously or wantonly vile, horrible or inhuman.” The mitigating factors included: that the defendant was under the influence of extreme mental or emotional disturbance; the age of the defendant at the time of the crime; if the defendant had no significant prior criminal record; or “any other factor which is relevant to the defendant’s character or record or to the circumstances of the offense.” The statute also provided that capital cases would be subject to automatic

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32. State v. Funicello, 286 A.2d 55 (N.J. 1972). Under the then-existing death penalty legislation, a defendant who did not contest the charges (by pleading non vult contendere) faced a maximum of life imprisonment, while a defendant who contested the charges was eligible for the death penalty. In Funicello, the court found that this exacted an unconstitutional penalty on those who sought a jury trial. Id. at 67.

33. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). In these five cases, all decided on July 2, 1976, the Supreme Court upheld the death penalty statutes of Georgia, Florida, and Texas, but overturned the death penalty statutes of Louisiana and North Carolina. The Supreme Court established minimum procedures for the imposition of the death penalty while making clear that states could not impose a mandatory death sentence for first-degree murder (as Louisiana and North Carolina’s statutes did).

34. Governor Byrne pocket-vetoed the first bill by refusing to act on the bill; he outright vetoed the second bill. Byrne Says Death-Penalty Veto Can Be Opposed, N.Y. Times, June 14, 1978, at NJ25.


37. § 2C:11-3(c)(3)(c)(4).

38. § 2C:11-3(c)(3)(c)(5).
review by the New Jersey Supreme Court. Capital cases bypassed the intermediate appellate courts and went directly to the New Jersey Supreme Court; this required the supreme court to closely consider every aspect of the death penalty proceeding. The statute also mandated that the New Jersey Supreme Court conduct “proportionality review,” which required the court to compare the case with the sentences imposed in similar death-eligible cases. Although the statute was amended several times, this statute was still in place when the death penalty was repealed in 2007.

II. The New Jersey Supreme Court’s Decisions Overturning Death Penalty Cases

After the death penalty’s reinstatement, supporters of capital punishment argued that the New Jersey Supreme Court would do anything to avoid upholding a death sentence. The court, however, argued that the New Jersey Constitution required it to ensure both reliability and consistency in the imposition of the death penalty. The court also made clear that it viewed the New Jersey Constitution’s protections against cruel and unusual punishment to be broader than those of the U.S. Constitution. The court’s first decision reviewing the death penalty legislation concluded that while the United States Supreme Court “may have departed from the vigorous enforcement of these constitutional principles ... we are not obliged to follow the reasoning of all these United States Supreme Court decisions in interpreting our own state constitutional protections, nor do we intend to.”

Some observers thought that the New Jersey Supreme Court would declare the New Jersey death penalty unconstitutional when it first reviewed the revised statute in 1987; but the court declined to do so and continued to uphold the constitutionality of the statute in subsequent challenges. Instead, the court demonstrated that it would vigorously

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39. § 2C:11-3(e). The New Jersey Constitution set up a scheme whereby appeals could be taken to the Supreme Court in “capital causes.” N.J. Const. art. VI, § 5.
40. § 2C:11-3(e). See Telephone Interview with Joseph Krakora, supra note 23.
41. § 2C:11-3(e).
42. Joseph E Sullivan, New Jersey’s Death Penalty: Fair or Fake?, N.Y Tims, Sept. 13, 1990, at B1 (quoting Neil Cooper, Hunterdon prosecutor: “This showed that the [s]upreme [c]ourt was going every which way to nullify the death penalty.”). On the other hand, former New Jersey Supreme Court Justice Alan Handler has argued that “it would be wrong to think the court in any actual or supplemental way had any mindset or agenda or sense that their opposition to capital punishment influenced their decisions or brought about its ultimate demise.” Zazzali et al., supra note 15, at 96 (remarks of Alan B. Handler).
44. Id.
enforce constitutional protections by limiting the applicability of the death penalty. The court overturned thirty-three of the first thirty-four death penalty convictions it reviewed in the ten years following the death penalty's reinstatement. A number of the death sentence reversals were based on faulty jury instructions and other procedural violations. The court also overturned cases in which trial judges had instructed juries that were deadlocked on the appropriate penalty to continue their deliberations; these trial judges had also emphasized to the jury the importance of reaching a unanimous verdict.

46. It is important to note that New Jersey is one of only eleven states where judges are "never subjected to election at any time in their judicial careers." See Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 776 (1995). Death penalty affirmance rates vary dramatically among state supreme courts according to the manner of judicial selection. Scholars have concluded that "nationally there is a close correlation between the method of selection of a state supreme court and that court's affirmance rate in death penalty appeals." id. at 766. It is difficult to isolate whether this is mere correlation or whether the method of judicial selection plays a causal role. It is entirely possible, however, that the method of selection influences a court's willingness to impose the death penalty.

47. The one exception in the first thirty-four cases was the case of Robert O. Marshall. See State v. Marshall, 586 A.2d 85 (N.J. 1991). The exception was consistent with the notion that the New Jersey Supreme Court would limit the application of the death penalty to the most clear-cut cases. Marshall was convicted of arranging the 1986 murder of his wife. Marshall's conviction was affirmed by the New Jersey Supreme Court in 1991. Id. at 208. There were several theories as to why the court upheld the case. The first was that this was a case with clear premeditated intent because of the defendant's debt, the life insurance policies he had taken out on his wife's life, and the alleged payments that the defendant had made to have his wife killed. Joseph F. Sullivan, New Jersey's High Court Upholds Death Sentence After Blocking 26, N.Y. Times, Jan. 25, 1991, at A1. The second theory, advanced by Professor Frank Askin of Rutgers Law School, argued that Marshall "was a case of a middle-class defendant, with resources, who had every opportunity to put forward his best defense ... . It was the best case for the court to uphold because it could not be attacked as an example of discrimination by the criminal-justice system or a jury." Id. The third theory was articulated by New Jersey Supreme Court Chief Justice Wilentz, who said of the case, "I would think the obvious conclusion would be, 'Finally, a case came before the court that it felt met its standards'. . . . And that's what it was." Jan Hoffman, His Court, His Legacy, N.Y. Times, June 30, 2006, at NJ1. However, in 2004, a federal district court overturned Marshall's sentence because the court found that Marshall had received ineffective assistance of counsel during the death penalty phase of his trial. Marshall v. Hendricks, 313 F Supp. 2d 423 (D.N.J. 2004). This decision was upheld by the Third Circuit Court of Appeals. Marshall v. Cathel, 428 F.3d 452 (3rd Cir. 2005). The Ocean County prosecutor's office declined to retry the sentencing phase of Mr. Marshall's conviction because of the "seemingly endless appeal process ... and the time that has passed since his 1986 conviction." Richard G. Jones, Legal Saga Ends for Man Who Hired Wife's Killer, N.Y. Times, May 13, 2006, at B5. Twenty years after his initial conviction, Marshall was sentenced to life in prison. Jonathan Miller, Man Who Had His Wife Killed Gets a New Sentence: Life, N.Y. Times, Aug. 19, 2006, at B2.

Other reversals were based on the jury’s weighing of aggravating and mitigating factors; the court determined that the jury must unanimously agree on aggravating factors, but need not unanimously agree on mitigating factors. The court held that “[a]lthough the Act does not expressly require the jury to be unanimous in finding the existence of an aggravating factor or factors, the lack of unanimity suggests that the factor has not been established beyond a reasonable doubt” as required by the statute. For mitigating factors, the court found the legislative history of the statute inconclusive. But, the court decided that the logic of the act, which gave the defendant the burden of production but not the burden of proof for mitigating factors, dictated that “the [l]egislature intended that jurors need not unanimously find the existence of a mitigating factor.” Instead, the court determined that after aggravating factors were determined unanimously, each juror would have to conduct his or her own weighing process to determine if aggravating factors outweighed mitigating factors. If even one juror found that aggravating factors did not outweigh mitigating factors, the jury could not impose death. The New Jersey Supreme Court had put a gloss on the statute expanding the protections for capital defendants.

A. Intent to Kill

Perhaps the most controversial death penalty reversals were those overturned under the rule established in State v. Gerald. In Gerald, the court further narrowed the class of death-eligible defendants. Although the death penalty statute allowed for the death penalty when the defendant had purposely or knowingly caused either death, or serious bodily injury resulting in death, the court unanimously held that only the former, purposely or knowingly causing death, merited the death penalty. Even though neither party raised the issue on appeal, the court found that the issue demanded consideration in order to ensure “a just resolution of

49. State v. Bey, 548 A.2d 887, 906 (N.J. 1988). The New Jersey Supreme Court cited the United States Supreme Court’s decision two months earlier in Mills v. Maryland, 486 U.S. 367 (1988), that a jury need not unanimously find a mitigating factor; instead, each juror should be “permitted to engage in the weighing process.” Bey, 548 A.2d at 906.

50. Bey, 548 A.2d at 905. The death penalty statute the court was applying stated, at that time, that “[i]f the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.” N.J. STAT. ANN. § 2C:11-3(c)(3)(a) (West Supp. 1986).

51. Bey, 548 A.2d at 905.

52. Id. at 906.


54. N.J. STAT. ANN. § 2C:11-3(a)(1)-(2) (West 1982).

55. Gerald, 549 A.2d at 807. Three justices signed separate opinions but joined with the majority in its main holding and all of the portions of the opinion discussed here.
this appeal." The court made clear that its holding was based on state constitutional grounds. This was necessary because the court recognized, and discussed at length, the fact that the Supreme Court's decision in 

Tison v. Arizona would allow the death penalty for defendants such as Gerald who had been "recklessly indifferent to human life." The court explicitly held that the state constitution's prohibition of cruel and unusual punishment provided greater protection than the Eighth Amendment of the U.S. Constitution. State v. Gerald sent a clear message that the supreme court would limit the applicability of the death penalty to the most serious crimes even if the statutory language allowed for capital punishment in a broader category of cases. The New Jersey Supreme Court also cited the U.S. Supreme Court's recognition that in capital cases, as well as in other constitutional contexts, the states "are free to provide greater protections in their criminal justice system than the Federal Constitution requires." In Gerald's trial, the jury had not specified whether it found the defendant guilty of causing serious bodily injury resulting in death as opposed to purposely or knowingly causing death. The court found that it was "possible," based on the record before the court, that the jury could have found that the defendant "had the purpose or knowledge to cause only serious bodily injury but not death." As a remedy, the court did not just reverse the sentencing phase of the trial. Instead, the court ordered an entirely new trial.

Therefore, essentially all trials post-Gerald would need to include a jury instruction explaining that there was a difference between intent to kill and intent to cause serious bodily injury. As the court later explicitly held in State v. Coyle:

56. Id. The court had previously demonstrated its willingness to consider factors not raised by either party on appeal because it determined "[i]n no proceeding is it more imperative to be assured that the outcome is fair than in [capital] cases." State v. Biegenwald, 524 A.2d 130, 156 (N.J. 1987).
57. Gerald, 549 A.2d at 807.
59. Gerald, 549 A.2d at 810. The prosecutors alleged that Gerald had stomped on the defendant's face numerous times during the course of a burglary. Id. at 823. The defendant admitted that he had punched the victim several times but denied stomping on him. Id. at 803. The court found that "[d]efendant's conduct in this case appears (or so a jury could find) to fall within the Tison category of nonintentional [sic] murders that manifest a reckless indifference to human life." Id. at 810.
60. N.J. CONST. art. 1, § 12 ("Cruel and unusual punishments shall not be inflicted.").
61. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See Gerald, 549 A.2d at 811.
62. Id. at 810 (citing California v. Ramos, 463 U.S. 992 (1983)).
63. Id. at 807.
64. Id.
[I]f the record provides a rational basis for a jury to convict a defendant of either purposely or knowingly causing death, or purposely or knowingly causing serious bodily injury that results in death, a court must instruct the jury to specify which, if any, of those findings forms the basis for a conviction.\(^6\)

The court found that to allow the death penalty in cases where the defendant only intended serious bodily injury but death did occur was "grossly disproportionate."\(^6\) Defendants who had the same intent but whose victims did not die would not be subject to the death penalty. As the court held, "the actor's conduct, mental state, and intended result in both instances are virtually identical, the victim's fortuitous survival in one case and unfortunate demise in the other cannot provide an adequate basis for subjecting one actor to a term of imprisonment and executing the other."\(^6\)

The court considered overturning only the sentencing phase of the trial, but rejected that course of action, deciding that to do so would essentially "be asking a second jury to accept—indeed, to be bound by—the findings of the first jury but then guess at precisely what the first jury meant. Such a piecemeal approach to guilt-innocence is unacceptable as a general proposition in any criminal prosecution."\(^6\)

The supreme court went on to apply the Gerald test to a number of cases from 1988 to 1992.\(^6\) Even if the defendant's intent seemed clear, the court overturned death penalty convictions that did not include an express jury finding of intent to kill. The case arising out of Gerald that raised the most public uproar was State v. Harvey.\(^7\) In that case, the victim was killed after pressure had been applied to her neck for an hour, and after being struck fifteen times with a blunt object. The defendant confessed to the crime, although he admitted only to hitting the victim once in the head with a "hammer-like object."\(^7\) Harvey's trial had taken place before State v. Gerald was decided and before the explicit ruling in State v.

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66. Gerald, 549 A.2d at 816.
67. Id.
68. Id. at 807 (emphasis in original).
69. See, e.g., State v. Erazo, 594 A.2d 232, 240 (N.J. 1991) (victim was “slashed” several times); State v. Jackson, 572 A.2d 607 (N.J. 1990) (victim was stabbed 53 times); State v. Pennington, 575 A.2d 816 (N.J. 1990) (victim was shot); State v. Clausell, 580 A.2d 221 (N.J. 1990) (victim was shot); State v. Harvey, 581 A.2d 483 (1990), cert. denied, 499 U.S. 932 (N.J. 1991) (victim was bludgeoned to death). The trials in these cases occurred before the supreme court decided Gerald; because of that, the jury instructions did not include a distinction between intent to cause serious bodily injury and intent to cause death.
71. Harvey, 581 A.2d at 485.
Coyle that jury instructions must contain specific findings of intent to kill. As a result, the trial court did not employ those jury instructions. The New Jersey Supreme Court held that “although it might seem probable that the jury had intentional murder in mind,” if there was any rational basis for the jury to find serious-bodily-injury murder, and the jury had not made a specific finding on intent, the case must be reversed and remanded for a new trial. In the new trial, the jury, as finder of fact, would be properly instructed and then make its own determination as to the intent to kill. All seven justices agreed that Harvey’s death sentence should be overturned on this ground. Just as in the other cases in the Gerald line, the court reversed the conviction and remanded for a new trial, a much more drastic step than simply reversing the death sentence and remanding for re-sentencing.

Public disapproval had been growing more vocal as the New Jersey Supreme Court overturned thirty-three of the first thirty-four death penalty cases it reviewed. To some state leaders, the outcome in State v. Harvey was particularly galling. The court’s decision in Harvey led the state’s Attorney General, Robert J. Del Tufo, to issue a public statement declaring that “[i]f the court’s underlying message is that it philosophically objects to the death penalty, then it is time to eliminate the charade and to reassess directly and expressly the continued death penalty in the state.”

Criticism of the Gerald line of cases was so intense that the court took the rare step of acknowledging the public outcry: “Although we have often visited this issue, there has been a persistent misapprehension that in the process we are second-guessing juries about the jury’s finding of intent. The public obviously does not understand what we are doing.”

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72. Id. at 486.
73. Id.
75. State v. Dixon, 593 A.2d 266 (N.J. 1991). The court went on to defend its Gerald line of cases as consistent with the legislative history of the death penalty law, which indicated that the death penalty was meant to apply only to first-degree murder. The court noted that at common law there was a distinction between first- and second-degree murder: first-degree murder applied only if the defendant had intent to kill. Prior to the reinstatement of the death penalty, the New Jersey Criminal Code had only one penalty for murder (30 years imprisonment), and therefore there was no need to distinguish between the two types of murder. When the death penalty was reinstated in 1982, the law had simply been attached to the already-existing criminal code, which did not establish different degrees of murder. Thus, the court argued that its decisions ensured that the jury would decide whether there was the requisite intent to kill before imposing the death penalty. The court argued that it was not second-guessing juries. Instead, it was maintaining the “enduring value” that properly instructed juries, rather than judges, should decide questions of guilt and innocence, and capital versus non-capital murder. Id. at 281. Indeed, Senator John F. Russo, the chief sponsor of the death penalty reinstatement law, later agreed that the Gerald line of cases was consistent with his original intent; he noted that the court was reserving the question of intent for the jury. Sullivan, supra note 74. In
Governor Jim Florio also joined the chorus of critics of *Gerald* and its progeny. He helped to secure a state constitutional amendment, passed by the legislature and ratified by New Jersey voters, which declared, "[i]t shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death." This amendment directly overturned the *Gerald* line of cases.

In *State v. Harris,* the New Jersey Supreme Court acknowledged that the state constitutional amendment had overturned the *Gerald* line of cases. The court, however, attempted to limit the impact of the constitutional amendment by mandating that trial courts instruct juries about the standard established by the United States Supreme Court "that the actor be recklessly indifferent to whether the result of the conduct would be death." While this standard would allow the imposition of the death penalty without an absolutely clear intent to kill, it could prohibit the death penalty in those cases where the defendant had intent to cause serious bodily injury but was not recklessly indifferent to human life.

B. Comparative Proportionality Review

The court also ensured that the death penalty would apply to a narrow range of cases by overseeing the most rigorous comparative proportionality review system of any state in the country. New Jersey's comparative proportionality review, which was written into the 1982 death penalty legislation, required the supreme court to compare each case in which the death penalty was imposed with similar cases to ensure that the death penalty was being applied consistently.

Until 1999, when the comparative proportionality review system was changed, comparative proportionality review and direct review were separate processes. The supreme court would conduct proportionality review only after the court had already upheld the case on direct appeal. Since the supreme court overturned thirty-three of the first thirty-four

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*Dixon*, the court vacated the capital murder conviction and the death sentence, but remanded the case to the trial court for sentencing on the lesser conviction of murder. *Dixon*, 593 A.2d at 286.

76. N.J. CONST. art. I, § 12.
77. 662 A.2d 333 (N.J. 1995).
78. Id. at 344. This standard was developed by the Supreme Court in *Tison v. Arizona*, 481 U.S. 137 (1987).
cases it reviewed after 1982, the supreme court consequently only conducted comparative proportionality review in one case.

As the court upheld more death sentences on direct appeal in the 1990s, the court began to conduct comparative proportionality review more frequently. Comparative proportionality review came to be viewed as emblematic of the lengthy death penalty appeals process, which led to calls from both Governor Florio and Governor Whitman to limit proportionality review.

Governor Florio signed into law a statute that limited the cases the court could compare during proportionality review to those where a death sentence had been imposed, rather than all death-eligible cases.

Governor Whitman appointed a death penalty commission in 1998 that criticized the length of the appeals process. The commission, chaired by former U.S. Congressman Richard Zimmer, recommended that the state abolish comparative proportionality review to decrease the length of the appeals process.

The court, however, refused to allow the legislature to limit comparative proportionality review, reasoning that the New Jersey Constitution had granted the court exclusive appellate jurisdiction over all capital cases. The court continued to include all death-eligible cases in its comparative proportionality review. The court held that proportionality review was an essential part of the court's responsibility to ensure that the "death penalty is being administered in an evenhanded and non-discriminatory manner." However, the New Jersey Supreme Court did accede to the recommendation of the Special Master for Proportionality

79. See supra note 4. See, e.g., State v. Gerald, 549 A.2d 792 (N.J. 1988) (declaring that the court need not determine the proportionality of the sentence in light of the court's reversal and remand).


81. See Jerry Gray, Adviser Urges New Jersey High Court to Change Appeals of Death Sentences, N.Y. TIMES, May 5, 1999, at B6 (noting how critics of the process, including Governor Whitman "have contended that it can extend court cases for years"); Jerry Gray, Florio Signs Bill To Strengthen Death Penalty, N.Y. TIMES, May 13, 1992, at B6 (quoting Governor Florio, who said, "[t]he proportionality review, if left open-ended, could so frustrate prosecutors that we'll never have a workable death penalty").

82. Gray, Florio Signs Bill, supra note 81.


84. State v. Loftin, 724 A.2d 129, 143 (N.J. 1999) (citing N.J. CONST. art. VI, § 5, ¶ 1(c)).

85. Id. at 146.

86. Id. at 144.
Review, Judge David Baime, to combine direct appeal and comparative proportionality review into one process.\footnote{87} Despite the vigorous debate over comparative proportionality review, the court found a death sentence to be disproportionate in only one case, State v. Papasavvas.\footnote{88} In that case, the court reviewed nineteen cases with similar circumstances and determined that only one of those nineteen defendants had been sentenced to death.\footnote{89} The court found that particular defendant to have been "far more culpable than Papasavvas."\footnote{90} Moreover, fifteen of the eighteen defendants that had not been sentenced to death had been at least as culpable as Papasavvas.\footnote{91} Therefore, the court concluded, Papasavvas had been "singled out unfairly for the death penalty."\footnote{92}

Comparative proportionality review also influenced the outcome in State v. DiFrisco.\footnote{93} Anthony DiFrisco had lost his direct appeal in 1994, 4-3, and his comparative proportionality review in 1995, 5-2. After the supreme court decided that the comparative proportionality review and direct appeals processes should be consolidated, DiFrisco's attorneys brought another appeal. In 2006, the court held that if the 1994 and 1995 votes were combined, a majority of the court had voted to overturn DiFrisco's sentence. Justice O'Hern, part of the four-judge majority rejecting DiFrisco's direct appeal, was one of the two dissenting judges who found DiFrisco's sentence disproportionate in the comparative

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  \item \footnote{87} See infra Part III.A.
  \item \footnote{88} David S. Baime, Comparative Proportionality Review: The New Jersey Experience, 41 No. 2 CRIM. L. BULL. 7 (2005). Concern about the length of the appellate review process did not subside. In fact, one trial court judge in a death penalty case demonstrated his recognition of the length of the appellate process. After the jury returned its verdict of death, trial court Judge Reginald Stanton amended the sentence to set a five-year deadline for the defendant to be executed; if he was not executed within five years his sentence would be changed to life in prison. Robert Hanley, Judge Orders Death Penalty With A Five-Year Deadline, N.Y. TIMES, May 8, 1999, at B5. In explaining his order from the bench, the Judge said, "[t]he process has become unacceptably cruel to defendants . . . who spend long years under sentence of death while the judicial system conducts seemingly interminable proceedings which remind many observers of a cruelly whimsical cat toying with a mouse." \textit{Id.} While the judge recognized that he would be overturned by the supreme court, he went on to say, "[i]t may be that we would be well advised to join most of the civilized countries of the world in abolishing the death penalty . . . But if we are to have a death penalty, then we should have the skill, the courage, and the decency to carry out the death sentences in a reasonably expeditious manner." \textit{Id.} One month later, the New Jersey Supreme Court issued a summary opinion eliminating the trial court's "condition of automatic modification of the capital sentence to a life sentence." State v. Koskovich, 735 A.2d 570, 570 (N.J. 1999).
  \item \footnote{89} 790 A.2d 798, 813 (N.J. 2002)
  \item \footnote{90} \textit{Id.}
  \item \footnote{91} \textit{Id.}
  \item \footnote{92} \textit{Id.} at 817-18.
  \item \footnote{93} \textit{Id.}
  \item \footnote{94} 900 A.2d 820 (N.J. 2006).
\end{itemize}
proportionality review. The court held that the two votes "must be combined because they are aspects of the same determination—whether a death sentence has been properly imposed." As a result, the court held that DiFrisco had received four votes to overturn his sentence.

Although the United States Supreme Court had applied procedural rules and defaults to limit the appeals of capital defendants, the New Jersey Supreme Court was less willing to do so. The court found that DiFrisco's motion for a second post-conviction review, although it had been filed five years after the deadline, should not be procedurally barred because DiFrisco's challenge was of "substantial importance" and necessary to "avoid an injustice."

III. SYSTEMIC REFORMS IN NEW JERSEY

The New Jersey Supreme Court also ordered numerous systemic reforms in an attempt to ensure consistency and fairness throughout the system. In order to accomplish these goals, the court oversaw a rigorous systemic proportionality review system and required prosecutors to submit aggravating factors to the grand jury.

A. Systemic Proportionality

In addition to comparative proportionality review, the New Jersey Supreme Court also engaged in systemic proportionality review. The Supreme Court hired two Special Masters, first David Baldus, and then
Judge David Baime, to conduct systemic statistical reviews of New Jersey's capital punishment system. The court was particularly concerned with addressing any racial disparities in the system. Although the Special Masters' reports never found that race was a statistically significant factor in capital punishment sentencing, every one of Judge Baime's reports noted that the race of the victim was a factor that helped predict rates of capital sentencing prosecutions.99

However, Judge Baime argued that differences between rates of capital prosecutions among New Jersey's counties accounted for any disparities between rates of death penalty prosecutions in cases with Black and White victims. The county disparities were first noticed in Professor Baldus' reports, particularly "higher penalty trial rates in the non-urban counties."100 The Special Masters' reports noted that when county disparities were factored into the multivariate regression models, the race of the victim was no longer a statistically significant predictive factor of death penalty prosecutions.

In response to the Baime reports, New Jersey's death penalty opponents commissioned their own study which found that if all cases were included in the model (for various reasons the Special Masters had excluded cases where policemen were killed), then the race of the victim was a statistically significant factor in predicting death penalty prosecution rates and the advancement of cases to penalty trial.101 This statistical significance remained even when controlling for county disparities.

However, although numerous defendants argued that racial disparities made New Jersey's capital punishment system fundamentally unfair, the court never accepted those arguments because of the findings of its Special Masters. The court instead focused on limiting the county disparities in the percent of death-eligible cases that went to penalty trial.

The New Jersey Supreme Court first addressed the county disparities in *State v. Koetadich.* The court held that there was not enough evidence to declare the death penalty statute unconstitutional "at this time" because there could be a "myriad of reasons" for the disparity. The court recommended that the New Jersey Attorney General work with county prosecutors to develop guidelines for capital prosecution to avoid arbitrariness and to "promote uniformity in the administration of the death penalty." The guidelines established committees of prosecutors who would review all capital charging decisions in each county. However, despite the creation of these capital review committees, the county disparities did not dissipate.

The court remained concerned about the statistical disparities in the prosecution of the death penalty among counties in New Jersey. For example, the percentage of death-eligible cases that had gone to penalty trial since the reinstatement of the death penalty ranged from 0% in Somerset County to 63% in Monmouth County. The county disparities were one of the reasons that the court insisted that the comparative proportionality review include all death-eligible cases rather than just those cases where a death sentence was imposed. Including death-eligible cases meant that the universe of cases for comparative proportionality review would include those cases where the prosecutor did not charge a death-eligible defendant with capital murder.

In order to further address county disparities, Judge Baime recommended that the court establish a statewide review procedure in which the Attorney General would review all prosecutorial charging decisions in death-eligible cases. Although Judge Baime presented this proposal to the court, the death penalty was abolished before the court decided whether to follow his recommendation. However, both the New Jersey Attorney General and New Jerseyans for Alternatives to the Death Penalty

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103. *Id.* at 953–4.
104. *Id.* at 955.
105. See Van Wyk, *supra* note 10, at 8 tbl.2 (documenting the continuing county disparities); see also Telephone Interview with Joseph Krakora, *supra* note 23 (stating that the capital review committees did not appear to have much effect).
108. Death-eligible cases were those cases where the prosecutor had served notice of an aggravating factor. *State v. Koetadich*, 548 A.2d 939, 954 n.4 (N.J. 1988). Under the death penalty statute, at least one aggravating factor had to be present before a defendant could be eligible for the death penalty. N.J. *Stat. Ann.* § 2C:11-3(b)(2)-(4) (West 2006).
(NJADP) opposed the proposal. Both believed that the change might lead to more death penalty charging decisions statewide. This fear was not unfounded; this phenomenon was observed in federal death penalty prosecutions after the United States Attorney General began reviewing all federal death penalty charging decisions.

In the court's final step towards curbing prosecutorial discretion, the court began to require prosecutors to submit aggravating factors to a grand jury. In State v. Fortin (Fortin II), the court, overruling its holding in State v. Martini (Martini I), held that the New Jersey Constitution's grand jury provisions required prosecutors to submit aggravating factors to a grand jury. The grand jury would have to return those aggravating factors in an indictment before a capital murder trial could proceed. Previously, the prosecutor had been able to wait until the penalty phase of the trial to determine aggravating factors. It is unclear if this decision had a significant impact on prosecutorial charging decisions; because the death penalty was abolished three years after Fortin II, there is not enough data to evaluate the effect of this decision.

IV. STATE ACTORS’ RESPONSE TO THE SUPREME COURT DECISIONS: A DECLINE IN PROSECUTORIAL CHARGING DECISIONS

The repercussions of the New Jersey Supreme Court's decisions were intensified by the prosecutorial responses to those decisions. In the 1980s, prosecutors brought 57% of death-eligible cases to a penalty trial. In the 1990s that rate decreased to 18%, and between 2000 and 2004, that rate decreased to 11%. This dramatic decrease occurred despite the fact that the number of death-eligible homicides remained fairly steady over that period. Initially one might hypothesize that the decrease in prosecutorial charging decisions was tied to a nationwide decline in the imposition of the death penalty. In fact, however, the nationwide imposition of the

109. Letter from New Jerseyans for Alternatives to the Death Penalty to Supreme Court of New Jersey, supra note 101, at 4 (noting the opposition of both the New Jersey Attorney General and New Jerseyans for Alternatives to the Death Penalty).
110. Id. at 19.
111. 843 A.2d 974 (N.J. 2004).
112. 619 A.2d 1208 (N.J. 1993). The Fortin II court held that the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), that aggravating factors were the equivalent of an element of the offense, had changed the calculation regarding presentation of aggravating factors to a grand jury. The court held that, because the aggravating factors were essentially elements of the charge, they had to be presented to a grand jury. Fortin II, 843 A.2d at 1027–28.
113. Van Wyk, supra note 10, at 7 tbl.1. No death sentences were imposed after 2004. Id. at 3; see discussion infra note 221; see also Appendix Table 1.
114. Van Wyk, supra note 10, at 2, 7 tbl.1.
death penalty remained steady at around 300 death penalty sentences per year from 1986 through 1999.\footnote{115} Death sentences did not decrease nationally until 2000, when the number of death sentences dropped to 235; the number of death sentences nationwide dropped to 167 in 2001.\footnote{116} Many commentators attribute this decrease to a growing concern about executing innocent victims, a movement which grew stronger when Governor George Ryan instituted a death penalty moratorium in Illinois in January 2000. The moratorium came after evidence exonerated a number of death row inmates. Governor Ryan was concerned by the fact that since the reinstatement of the death penalty in Illinois, more people had been exonerated than had been put to death.\footnote{117}

The decrease in the number of death-eligible cases in New Jersey that were brought to a penalty trial came before the exoneration issue gained traction nationwide, and before death sentencing decreased nationwide. The stark decline in New Jersey, from 57% of death-eligible cases in the 1980s to 18% in the 1990s,\footnote{118} was, at least in part, a response to the New Jersey Supreme Court’s reversal of thirty-three of the first thirty-four cases it reviewed.

Qualitative evidence from experienced prosecutors supports the quantitative evidence and the hypothesis that the state supreme court’s decisions had an effect on prosecutorial charging decisions. In fact, one prosecutor, William Zarling, noted that, in response to the New Jersey Supreme Court decisions, the Mercer County Prosecutor’s Office “altered the original philosophy that it began with and the death penalty became reserved for only the most extreme cases.”\footnote{119}


\footnote{116} Death Penalty Information Center, *supra* note 115.


\footnote{118} In other words, in the 1980s, 57% of cases where the defendant was statutorily eligible for the death penalty (because of the presence of at least one aggravating factor) proceeded to a trial where the defendant was charged with the death penalty. In the 1990s, only 18% of those cases preceded to a death penalty trial. In some cases, prosecutors could have charged the defendant with the death penalty but then accepted a plea to life in prison. Data on death penalty indictments is not available, however there is no indication that plea bargain rates increased exponentially during this time to account for the dramatic drop-off in death penalty trials. Telephone Interview with Claudia Van Wyk, Attorney (Oct. 22, 2009) (transcript on file with Michigan Journal of Race & Law).

\footnote{119} Murphy et al., *supra* note 9, at 82 (remarks of William A. Zarling).
Another prosecutor, John Redden, made similar observations. Mr. Redden, who served as an Assistant Prosecutor, Deputy First Assistant Prosecutor, and Chief Assistant Prosecutor in Essex and Morris counties during his twenty-year prosecutorial career, was intimately involved in decisions about when to seek the death penalty against defendants. Mr. Redden served on the capital review committees set up in each prosecutor's office; the committees decided when to seek the death penalty in death-eligible cases. Mr. Redden said that he and other prosecutors understood the limitations that the New Jersey Supreme Court had put on the imposition of the death penalty. Prosecutors were aware of the court's narrowing of the class of cases where the death penalty was appropriate, including cases such as Gerald. As Mr. Redden said, "The court was not taking an expansive reading of this statute, so I as prosecutor could not take an expansive view of the statute." Prosecutors sought the death penalty only in those cases that they thought the supreme court was likely to uphold under the court's "narrowed scope of what constituted a capital case." Prosecutors were forced to respond to the court's decisions; a capital case that was overturned on appeal could create a myriad of future problems for these prosecutors. Because the supreme court was reversing guilty verdicts and not just death sentences, prosecutors had to be concerned about what would happen to a case after it was reversed and remanded for a new trial. Death penalty trials and appeals could take years, and it would be very difficult for prosecutors to retry a murder case years after the initial conviction. Witnesses might have moved or died, evidence could have been misplaced, and the case in general was "cold." At this point, prosecutors would be in danger of losing their guilty verdict even on a non-capital murder charge.

Therefore, prosecutors were very conscious of cases that the supreme court might overturn and became wary of trying those cases capitally; if they did, and the cases were reversed, the defendant might be able to just "walk away." Mr. Redden recalled that there were instances in which prosecutors had to "strike a plea" after a death penalty case was remanded for a new trial because the prosecutors were worried they would not even get a non-capital murder conviction at the second trial.

120. Telephone Interview with John Redden, supra note 7.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id. Redden noted that prosecutors were also aware that charging cases capitally cost an extraordinary amount of time, money, and resources and exposed the family to "this sort of false notion that there is going to be a death penalty." Id. As discussed above, it was unlikely that New Jersey would actually execute a death row inmate. In fact, prosecutors
Based on the decisions of the supreme court and the worry that their cases would be reversed, prosecutors carefully reviewed each capital case to make sure that the case was considerably likely to prevail, both at trial and on appeal. These prosecutors had to predict which cases the New Jersey Supreme Court would accept and “couldn’t help but come away with the notion that the supreme court was taking a narrow and conservative approach as to what classifies as a death penalty case.”

The theory that prosecutors avoided bringing capital cases that they thought the supreme court would overturn was demonstrated in the case of Jonathan Zarate. Zarate was an eighteen year-old whom Redden and his colleagues in the Morris County Prosecutor’s Office began prosecuting in 2005. The office was considering charging Zarate capitally after he invited his next-door neighbor, sixteen year-old Jennifer Parks, over to his house and then punched her and beat her with a metal pole. His fifteen year-old brother, James Zarate, also stabbed Parks. After killing her, the brothers chopped her legs off below the knees and stuffed her body into canvas bags and a steamer trunk. The boys tried to dump Parks’ body in a river, but a police officer caught them in the act.

The death penalty statute’s list of aggravating factors included the commission of a murder that “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim.” However, the prosecutors were not positive that this case would meet the New Jersey Supreme Court’s definition of a

would have to “have their head in the sand not to have those thoughts go through their mind.” Id. Prosecutor William Zarling notes that “[i]f you were a prosecutor, you couldn’t help but get the message over time that the supreme court was not anxious to see anybody die. It seemed to color one’s judgment as to whether one wanted to go through the entire process if you did not believe that the process was going to end up with a death result at the end of the day anyway.” Murphy et al., supra note 9, at 82 (remarks of William A. Zarling). However, Redden noted that prosecutors were not supposed to engage in cost-benefit analysis or take a defeatist attitude and that acting on those thoughts was “highly improper.” Telephone Interview with John Redden, supra note 7. While many prosecutors might not have explicitly made decisions based on such an analysis, these thoughts might still have been in the back of some prosecutors’ minds. In fact, prosecutors sometimes did mention these thoughts at internal meetings. Id. However, there is no evidence that prosecutors ever acted upon any strict cost-benefit analysis.

127. Telephone Interview with John Redden, supra note 7.
128. Id.
129. A judge later ruled that James, the fifteen year-old, could be charged as an adult because of the “horrific nature” of the crime. Richard Cowen, Boy Charged as Adult in Slaying: Brothers Accused of Killing Randolph Girl in 2005, THE RECORD (Hackensack, N.J.), June 8, 2006, at L01.
131. Cowen, Youth Stabbed Girl, supra note 130.
murder that constituted torture or depravity of mind since the vilest aspects of the murder took place after the victim was already dead. Although the supreme court had indicated in dicta in an earlier case that it was inclined to find post-death mutilation as evidence of depravity of mind,\textsuperscript{133} the court had not explicitly found post-death mutilation to be sufficient evidence of this aggravating factor. Therefore, the prosecutors debated about whether the supreme court would uphold a potential death penalty conviction in the Zarate case. As John Redden said, if there was any doubt about whether a death penalty verdict would be upheld, most New Jersey prosecutors would not seek the death penalty. Instead, given the considerations about the case being overturned on appeal, the prosecutors would be "more than happy to say, 'let's put this on the non-capital side.'"\textsuperscript{134} In the end, a spokesman for the prosecutor's office declared that "none of the aggravating factors were met."\textsuperscript{135} Jonathan Zarate was charged with non-capital murder.\textsuperscript{136} He was convicted of murder and sentenced to life in prison plus twenty-four years.\textsuperscript{137}

David Baldus, New Jersey's former Special Master, has further corroborated this hypothesis by suggesting that some prosecutors may have understood the signals from the New Jersey Supreme Court and therefore only sought the death penalty in the most severe cases where the court might uphold the death penalty on appeal.\textsuperscript{138} Some prosecutors grew frustrated with the limits on the death penalty. As one prosecutor stated: "The only death sentence we have in New Jersey is for the victims . . . we have no death penalty for those who commit the murders."\textsuperscript{139}

The prosecutorial response to the supreme court's decisions played a role in the death penalty abolition. The marked decline in the number of cases where the prosecutor sought the death penalty further reduced the death row population and made the likelihood of an execution in New Jersey even more remote.

\textsuperscript{133} State v. Ramseur, 524 A.2d 188, 230–31 n.37 (N.J. 1987). This was dicta because the court overturned Ramseur's death penalty conviction. See discussion supra note 48 and accompanying text.

\textsuperscript{134} Telephone Interview with John Redden, supra note 7.


\textsuperscript{136} Id.


\textsuperscript{139} Sullivan, supra note 42.
In 2006, the legislature passed a bill establishing a moratorium on the death penalty and creating the New Jersey Death Penalty Study Commission. The bill recognized that “[l]ife is the most valuable possession of a human being; the State should exercise utmost care to protect its residents’ lives from homicide, accident, or arbitrary or wrongful taking by the State.” The Commission was mandated to hear public testimony and consider all aspects of the death penalty, including whether the death penalty served a rational penological interest, whether there were significant disparities in the system, whether there would be a significant cost difference if the state were to abolish the death penalty, and whether alternatives existed that would ensure public safety.

The Commission held five public hearings throughout 2006 and issued a report in 2007 recommending that the death penalty be legislatively abolished and replaced by life in prison without parole. The Commission made seven important formal findings. Although the full report provides more detail, these findings can be summarized as follows:

1. Legitimate Penological Interest: While studies around the country were inconclusive about the deterrent effect of the death penalty, it was especially difficult to determine whether the death penalty in New Jersey had any deterrent effect because no one had been executed since 1963. Any deterrence was “obviated” when the defendants spent decades on death row and the vast majority


141. An Act Creating a Study Commission on the Death Penalty, supra note 140.

142. New Jersey Death Penalty Study Commission, supra note 3, at 24. Compare Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2005) (arguing that the death penalty has a deterrent effect and saves lives) with John Donohue & Justin Wolfer, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791, 843 (2005) (“The U.S. data simply do not speak clearly about whether the death penalty has a deterrent or anti-deterrent effect. The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain.”). See also Richard Berk, New Claims About Executions and General Deterrence: Dèjà vu All Over Again?, 2 J. Empirical Legal Stud. 303 (2005) (finding that evidence of the deterrent effects of the death penalty disappears when Texas is removed from the calculations of those deterrent effects).
of death row prisoners eventually had their sentences changed to life in prison.\footnote{143}{New Jersey Death Penalty Study Commission, supra note 3, at 29.}

2. Cost: The commission found that, although it was difficult to measure precisely all the costs involved in the death penalty, the death penalty imposed more costs than life in prison without parole. One earlier outside study had found that the State had spent $253 million on the death penalty since 1982.\footnote{144}{Forsberg, supra note 19.} In addition to the financial costs, the New Jersey Commission noted the intense emotional costs of the death penalty as it was imposed in New Jersey. Many victims' families had testified before the Commission about the re-victimization that occurred while the families suffered through numerous appeals. The Commission found that these “intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty.”\footnote{145}{New Jersey Death Penalty Study Commission, supra note 3, at 34. Of course, death penalty proponents argued that a way to reduce the costs of the death penalty was to reduce the lengthy appeals process. However, the New Jersey Supreme Court had made clear that this was not an option it was willing to entertain and that death penalty cases would continue to receive exacting scrutiny. And given that there have been 139 exonerations of death row inmates nationwide, see Death Penalty Information Center, \textit{Innocence: List of Those Freed from Death Row}, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Nov. 14, 2009), the supreme court's stance was unlikely to change.}

3. Evolving Standards of Decency: The Commission found “increasing evidence that the death penalty was inconsistent with evolving standards of decency.”\footnote{146}{New Jersey Death Penalty Study Commission, supra note 3, at 1.} Included in
this evidence were polls showing that while 44% of New Jersey residents had supported the death penalty over life without parole in 1999, that number had dropped to 36% when polls were conducted in 2002 and 2005.  

4. Whether the Selection of Defendants was Arbitrary, Unfair, or Discriminatory: The commission found that the “available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.” However, the Commission noted the statistical disparities in the race of victims (defendants who killed White victims were more likely to receive the death penalty) and the county disparities. The Commission wrote that the statistics should be viewed “in light of the reality that racial discrimination is part of the history of the death penalty in the 20th century.” The Commission found that abolishing the death penalty would eliminate concerns about the effects that county disparities and race of the victim had on potential death penalty cases.

5. Proportionality: The Commission found that there may not be a “significant difference between crimes selected for the death penalty and those selected for life in prison.” The Commission found that the risk of disproportionality and the resulting increased risk of arbitrary imposition of the death penalty was unacceptable given the finality of an execution. Once again, abolition of the death penalty would solve this problem by eliminating questions about proportionality.

6. Innocence: The Commission found that “[t]he penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.” The Commission noted that although there had not been an exoneration of anyone sentenced to death in New Jersey, there had been exonerations in non-capital cases in New Jersey.

7. Alternatives: The Commission found that life in prison without parole would ensure public safety and address the interests of victims’ families. The majority of victims’

147. Id. at 35.
148. Id. at 1.
149. Id. at 44.
150. Id. at 46.
151. Id. at 51.
152. Id.
families had testified in favor of replacing the death penalty with life without parole; for example, the New Jersey Victims' Law Center had testified that the death penalty is the "greatest failing of the justice system in New Jersey" because of its re-victimization of victims' families.\footnote{153} As John Gibbons, the former Chief Judge of the Third Circuit, testified, "[t]he result in this state is that a sentence of death is in reality a sentence to incarceration in death row for decades, with the threat of execution overhanging the prisoner at all times, and the prolongation of painful uncertainty for the families of victims."\footnote{154} The Commission argued that the savings from the death penalty should be spent on services for victims' families.\footnote{155}

There is a consensus that the testimony of victims' families, the danger of executing an innocent person, and the costs of the death penalty system influenced the commission's recommendations.\footnote{156} Some of the victims' family members who testified in opposition to the death penalty were morally opposed to the death penalty. But other victims' family members, including a Death Penalty Study Commission member who supported the death penalty in theory, had come to oppose New Jersey's system. They viewed it to be a "joke" of a system that was never going to execute anyone.\footnote{157} Victims' family members who later testified before the state assembly in favor of death penalty repeal argued that "[t]o be meaningful, justice should be swift and sure. Life without parole, which begins immediately, is both of these; the death penalty is neither."\footnote{158}

\begin{footnotes}
\item[153.] Id. at 58.
\item[154.] Id. at 60.
\item[155.] Id. at 2.
\item[156.] See Telephone Interview with Celeste Fitzgerald, supra note 22; Telephone Interview with Joseph Krakora, supra note 23; Telephone Interview with Claudia Van Wyk, supra note 70.
\item[157.] NEW JERSEY DEATH PENALTY STUDY COMMISSION, supra note 3, at 94.
\item[158.] New Jersey Homicide Survivors for S-171, Testimony before the Assembly Law and Public Safety Committee, in LESNIAK supra note 13, at 51. This statement was made by victims' family members who supported the death penalty abolition bill. It is important to note that the original bill proposed by Senator Lesniak only imposed a sentence of mandatory life without parole if the defendant had murdered a law enforcement officer, a child, or engaged in certain sexual crimes during the course of a murder; for other crimes where a statutory aggravating factor existed, life without parole was a possible, but not mandatory, sentence. However, due to legislative compromises, the final bill mandated a sentence of life without parole if any statutory aggravating factor was present. An Act to Eliminate the Death Penalty and Allow for Life Imprisonment Without Eligibility for Parole. Pub. L. No. 2007, c. 204 § 1 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)). Yvonne Smith Segars, the New Jersey Public Defender, and a member of the New Jersey Death Penalty Study Commission, wrote an addendum to the commission's report noting the problems with a mandatory sentence of life without parole. NEW JERSEY DEATH PENALTY STUDY COMMISSION, supra note 3, at 89. Ms. Segars supported the commission's
\end{footnotes}
It is also clear, however, that the absence of executions in New Jersey played an important role in the decision to recommend abolition. In essence, the fact that there had been no executions in forty-four years in New Jersey created the space for victims' families to oppose the death penalty. It allowed commission members, including victims' advocates and law enforcement representatives, to recommend abolition. Five commission members were family members of murder victims. Yet, only one member of the commission disagreed with its conclusion—Senator John Russo, the original sponsor of the 1982 death penalty legislation.

VI. NEW JERSEY'S DEATH PENALTY IS ABOLISHED

After the Commission recommended abolition of the death penalty, the New Jersey Legislature, voting largely on party lines, passed legislation replacing the death penalty with life in prison without the possibility of parole. Even some Senators who co-sponsored the death penalty legislation in 1982 voted to abolish the death penalty. Senator Richard Codey, one of those Senators, explained his support for the bill succinctly:

The best thing for us as a society to do is to be honest with them [murder victims' families]. Don't tell someone that we're going to execute somebody when the reality is it's not going to happen—at least here in the state of New Jersey. Maybe in Texas. Maybe in other states. But it's not going to happen here in New Jersey, and we've got to accept that.
The bill was signed into law by Governor Jon Corzine on December 17, 2007. Corzine simultaneously commuted the sentences of the eight men on death row to life without parole.\footnote{163}

VII. MIGHT ABOLITION IN NEW JERSEY LEAD TO NATIONWIDE ABOLITION?

After the abolition of the death penalty in New Jersey it was unclear how other states would respond. After New Jersey’s abolition, op-eds and editorials appeared in numerous newspapers from states including Florida, Maryland, Oregon, North Carolina, and Illinois encouraging their state to follow New Jersey’s lead.\footnote{164} The lessons learned from New Jersey are most applicable to those states where few, if any, executions have occurred; there are twelve states that have executed fewer than three people since the reinstatement of the death penalty in that particular state.\footnote{165} It is also telling that all six of the people executed in the past ten years in those twelve states had dropped their death penalty appeals.\footnote{166}

In fact, after initial drafts of this Note were written, New Mexico followed New Jersey’s lead and became the second state in over forty years to legislatively abolish the death penalty.\footnote{167} New Mexico had only

\footnote{163}{Peters, \textit{supra} note 2.}


\footnote{165}{Death Penalty Information Center, \textit{supra} note 26. Those states (with the number of executions since death penalty reinstatement in parentheses) are New Hampshire (0), Kansas (0), Connecticut (1), Colorado (1), Idaho (1), Wyoming (1), South Dakota (1), Oregon (2), Kentucky (3), Montana (3), Pennsylvania (3), and Nebraska (3). \textit{Id.} Pennsylvania, however, is a bit of an anomaly; while most of these twelve states have few death row inmates, Pennsylvania has 226 inmates on death row. Death Penalty Information Center, \textit{State by State Database}, http://deathpenaltyinfo.org/state_by_state (last visited Nov. 18, 2009). In Pennsylvania, a death sentence is more common, but executions are still quite rare. Moreover, the three executions in Pennsylvania took place only after the defendants voluntarily dropped their appeals. Fagan, \textit{supra} note 6, at 11. Further research into the death penalty in Pennsylvania is needed in order to explain this phenomenon.}

\footnote{166}{Data compiled from Death Penalty Information Center, \textit{Searchable Execution Database}, http://deathpenaltyinfo.org/executions (last visited Sept. 27, 2009). Some scholars argue that death row inmates electing to drop their appeals might be a sign that life without parole can be a “stronger deterrent than death.” Jeffrey Fagan, Testimony to the Maryland Governor’s Commission on Capital Punishment 14 (Sept. 5, 2008) (transcript on file with \textit{Michigan Journal of Race & Law}).}

\footnote{167}{Barry Massey, \textit{State Supreme Court Won’t Rule on Astorga’s Death Penalty Appeal}, \textit{Albuquerque J.}, Sept. 17, 2009. The death penalty repeal in New Mexico does not apply retroactively; those defendants convicted of crimes that were committed before the repeal in July are still eligible for the death penalty. \textit{Id.} After the legislative repeal, the New
executed one person since the death penalty was reinstated in New Mexico in 1979.\textsuperscript{168} That person, Terry Clark, had decided to stop appealing his case.\textsuperscript{169} Unlike Governor Corzine in New Jersey, who was personally opposed to the death penalty, Governor Richardson of New Mexico believed that the death penalty was an appropriate penalty in some circumstances. He called the decision to sign the law the “most difficult decision” of his political life.\textsuperscript{170} More than three-quarters of the 12,000 public comments that Richardson received were in favor of death penalty repeal.\textsuperscript{171} In discussing his views on abolition, Governor Richardson noted the costs of the death penalty,\textsuperscript{172} although he primarily cited concerns about the execution of an innocent person. He highlighted that “130 death row inmates have been exonerated in the past 10 years in this country, including four New Mexicans.”\textsuperscript{173}

New Jersey and New Mexico are not complete outliers. In fact, there has been much legislative activity regarding death penalty repeal in recent years, especially in states that have executed three or fewer people since death penalty reinstatement.\textsuperscript{174} In 2000, the New Hampshire Legislature voted to repeal the death penalty but Governor Jeanne Shaheen

Mexico Supreme Court declined to decide on a facial constitutional challenge to the death penalty. \textit{Id.} There are at least two defendants currently facing death penalty prosecution in New Mexico. \textit{Id.} In addition, because Governor Richardson did not commute the sentences of the two inmates currently on New Mexico’s death row, those inmates are still facing potential execution. Dave Maass, \textit{Uncertain Fates}, \textsc{Santa Fe Rep.}, Sept. 23, 2009, at 13.

\textsuperscript{168} Death Penalty Information Center, supra note 28.
\textsuperscript{169} Data compiled from Death Penalty Information Center, supra note 166.
\textsuperscript{170} \textit{In New Mexico, Death Penalty Dies}, \textsc{Va. Pilot \\& Ledger-Star}, Mar. 28, 2009, at 8. While Governor Richardson was a lame duck governor (due to term-limits) at the time he signed the bill, Lieutenant Governor Diane Denish, who was running to replace him as Governor, publicly urged him to sign the bill. Boyd, supra note 27.
\textsuperscript{172} See infra note 182.
\textsuperscript{173} Bill Richardson, Op-Ed., \textit{I No Longer Believe We Can Know Enough to Justify a Death Sentence: Mistakes Prove System Too Imperfect To Be Just}, \textsc{Concord Monitor}, Mar. 20, 2009.
\textsuperscript{174} In fact, although abolition bills might be unlikely to pass in some of these states, abolition bills were introduced in eleven states in 2009: Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, Texas, and Washington. Death Penalty Information Center, 2009—\textit{Proposed or Passed Legislation}, http://www.deathpenaltyinfo.org/recent-legislative-activity#2009 (last visited Nov. 16, 2009). Those eleven states constitute approximately one-third of the states that currently have death penalty statutes on the books. Although the mere introduction of a bill obviously does not signify whether it is likely to pass, several of these states came close to legislative abolition, and New Mexico did legislatively abolish the death penalty. See discussion infra. Moratorium bills were also introduced in Alabama, Delaware, Georgia, Missouri, and Nevada. Death Penalty Information Center, 2009—\textit{Proposed or Passed Legislation}, supra.
vetoed the bill.\(^{175}\) The New Hampshire House voted for repeal again in 2009,\(^{176}\) but the bill was tabled in the New Hampshire Senate.\(^{177}\) In 2009, Connecticut passed a bill to repeal the death penalty, but Governor Jodi Rell vetoed it.\(^{178}\) Also in 2009, the Colorado House passed a bill to repeal the death penalty, but the bill lost by one vote in the Colorado Senate.\(^{179}\) All of these states had executed three of fewer people since the reinstatement of the death penalty.\(^{180}\)

Maryland, which had executed five people since the reinstatement of the death penalty, has also considered legislative abolition; instead of abolishing the death penalty, however, the state legislature recently passed a bill that would significantly limit the classes of cases that are death-eligible.\(^{181}\)

178. Christopher Keating, Rell Vetoes Bill to Abolish Capital Punishment, HARTFORD COURANT, June 6, 2009, at A3. Michael Lawlor, the co-chairman of the House Judiciary Committee made an argument in favor of the bill that bore a striking resemblance to the argument Senator Codey had made regarding New Jersey's death penalty. See supra note 162. Lawlor said, "[i]n Connecticut, we're never really going to execute someone against their will . . . . Don't we owe it to the citizens of our state and the families of the victims to tell them the truth?" Keith M. Phaneuf, House Votes to Abolish Death Penalty: But Supporters Acknowledge It's Not Likely to Happen This Year, J. INQUIRER (Manchester, Conn.), May 14, 2009.
179. Jessica Fender, Death Penalty Survives: Anguish Over Cold Cases; After Passing the House Last Week and Evading Senate Efforts to Kill It, the Bill Met Its Demise by a Single Vote, DENVER POST, May 7, 2009, at A1. The bill would have used the cost-savings from death penalty abolition to create a cold-case task force. Kirk Johnson, Death Penalty Repeal Fails in Colorado, N.Y.TIMES, May 4, 2009, at A16. Howard Morton, the head of a victim's rights groups in Colorado argued in favor of repeal. He said, "[w]e've tried 130 times in Colorado to impose the death penalty since 1970, and we executed one guy . . . . Any other program in state government with such a lousy record would have been abolished a long time ago." Paul Hammel, Death Penalty Pits Costs vs. Closure, OMAHA WORLD-HERALD, May 3, 2009.
180. See Death Penalty Information Center, supra note 26.
181. In Maryland, a death penalty commission also recommended abolition. MARYLAND COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY (2008), http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf. The commission vote, thirteen to nine, see id., was much closer than the vote on New Jersey's commission. A bill abolishing the death penalty did not pass, despite significant pressure from Governor Martin O'Malley, a long-time death penalty opponent. Julie Bykowicz & Gadi Dechter, Chaos in the Senate: Lawmakers Turn Away Repeal of Death Penalty; Debate to Resume Today, BALT. SUN, Mar. 4, 2009, at 1A. Interestingly, state senators from Baltimore County, the county that accounts for forty-five percent of the state's death penalty cases, despite having only twelve percent of the death-eligible murder cases, were largely responsible for the defeat of the abolition bill in the Maryland Senate. Bykowicz & Dechter, supra. However, the final product of the commission's efforts was the passage of the narrower death penalty bill in the country. Interview
Before signing the bill in New Mexico, New Mexico Governor Bill Richardson had discussed concerns about the costs of the death penalty. This argument may have added resonance in the current economic climate. Governor Richardson called the cost concerns "a valid reason in this era of austerity and tight budgets." As states face dramatic budget crunches, some states are reducing or considering reducing prison populations in order to save costs. Legislators in those states might be particularly amenable to arguments about the cost of the death penalty when compared to life without parole, especially if the death penalty is infrequently used in that state.

While the New Jersey Supreme Court created a somewhat unique system of capital review, statistics demonstrate that many other states also engage in exacting judicial review of death penalty cases. One study of all death penalty cases nationwide from 1973 to 1995 found that those cases were reversed 68% of the time. In addition, New Jersey is not the only

with Jeffrey Fagan, Prof. of Law and Epidemiology, Columbia Law Sch. (Nov. 12, 2009) (transcript on file with Michigan Journal of Race & Law). The bill limits the imposition of the death penalty to those cases with conclusive DNA evidence, video evidence, or a videotaped voluntary confession. Bykowicz & Dechter, supra. These requirements are extremely narrow and are likely to limit the imposition of the death penalty in Maryland. Fagan notes four reasons why Maryland did not follow New Jersey's model: 1) unlike New Jersey, Maryland had recently executed a defendant; 2) the presence of a zealous prosecutor in Baltimore County, a violent inner-city surrounded by rich suburbs, who continued to try capital cases; 3) the Maryland Supreme Court did not narrow the class of death-eligible cases as the court in New Jersey did; and 4) opponents of repeal feared that without a death penalty, there would be no way to deter those already sentenced to life in prison from murdering prison guards; this was a particularly salient concern due to the fact that Maryland had the highest rate of prison guard murders in the country. Interview with Jeffrey Fagan, supra.

183. Id.
184. Id. However, many Americans erroneously believe that it is cheaper to execute someone than to incarcerate him or her for life. For example, a study found that a majority of Californians believed execution was cheaper than incarceration. John Diaz, Op-Ed., The High Cost of Vengeance, S.F. Chron., Sept. 13, 2009, at E6. This is important because the percentage of Californians who believe that the death penalty is an effective deterrent has fallen from 74% in 1989 to 44% in 2009. Id. And while a majority of Californians support the death penalty, that support drops to 26% when life without parole (While forcing the defendant to work to pay restitution to the victim's family) is presented as an alternative. Id. A cost argument might have particular impact in California, where the state's death row houses 700 inmates, but the state has executed only 13 inmates since the reinstatement of the death penalty. Estimates are that California's death row costs $114 million per year more than it would cost if the same inmates were sentenced to life without parole. Editorial, High Cost of Death Row, N.Y. Times, Sept. 27, 2009, at A22.
state with a lengthy appeals process. The average time nationwide from sentencing to execution has been steadily increasing over the past decade from ten years in 1996 to thirteen years in 2009. In fact, the states that conduct few executions might heed Justice White’s argument in Furman that “the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.”

If other states follow New Jersey’s lead, fulfilling Justice Brandeis’ vision of states as laboratories of experimentation, this state-by-state repeal could spark nationwide repeal. Under this vision, states might look to see the results of legislative death penalty repeal in New Jersey and New Mexico. States may be particularly interested in examining the effect that the repeals have on criminal justice system costs, violent crime rates, and the way that victims’ families feel about the criminal justice system. As one preliminary piece of evidence, the number of murders in New Jersey actually decreased slightly in the year after the death penalty was abolished. If these statistics hold up over time, this would seem to undermine the argument that the death penalty is a necessary deterrent to murder.

Politicians in other states will no doubt be interested in the political repercussions of repeal for those politicians who voted for the repeal statutes in New Jersey and New Mexico. Death penalty repeal in New Jersey does not appear to have had negative political repercussions for New Jersey politicians. In fact, Chris Christie, a former U.S. Attorney who

186. Bureau of Justice Statistics, U.S. Department of Justice, Capital Punishment, 2007-Statistical Tables, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm (last visited Nov. 18, 2009). A national study has found that 26% of those who support the death penalty would lessen their support of the death penalty based on the fact that “it takes too long to go through the whole appeals process in death penalty cases and only a few of those sentenced to death are actually executed.” See Richard C. Dieter, A Crisis of Confidence: Americans’ Doubts About the Death Penalty (2007), http://www.deathpenaltyinfo.org/CoC.pdf. This factor was the second most important, after the execution of innocent people, in terms of persuading those who support the death penalty to alter their views. Id. Note that the margin of error for this survey is 3.1%. Id. at 15.
190. See supra note 142 for a further discussion of deterrence.
recently beat Governor Corzine in a bitter campaign for New Jersey Governor, did not make death penalty repeal into a campaign issue and does not seem inclined to reinstate the death penalty. Although he supports the death penalty, his campaign website did not appear to mention the death penalty at all.191

If politicians in other states pass death penalty abolition bills, the Supreme Court may view this legislative action as pertinent evidence in its evaluation of the constitutionality of the death penalty. In previous capital punishment decisions, the United States Supreme Court has examined state trends to help determine what constitutes cruel and unusual punishment.192 In recent years, the Supreme Court has overturned the death penalty for the mentally retarded in Atkins v. Virginia,193 and for minors in Roper v. Simmons,194 in part based on the number of states that had abolished the death penalty for those classes of defendants. In Atkins, the Court, in justifying its reliance on changes in state law, held that

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in Trop v. Dulles: ‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’195

191. See, e.g., Christie for Governor, Issues, http://www.christiefornj.com/index.php (last visited Nov. 19, 2009). As further evidence that Chris Christie did not make the death penalty a campaign issue, a search of the Westlaw database containing New Jersey newspapers finds no articles discussing Chris Christie's position on the death penalty. When the same search was conducted two weeks after the election, the search again returned zero articles. On the other hand, Governor Corzine sought to use the abolition to his electoral advantage. David M. Halperin & David Kocieniewski, A Rivalry as Strained as New Jersey’s Finances, N.Y. Times, Oct. 30, 2009, at A1 (“Mr. Corzine seemed almost resentful that he was not more appreciated by voters or the news media, citing unsung accomplishments like the passage of a civil unions law, paid family leave and the abolition of the death penalty.”).

192. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Enmund v. Florida, 485 U.S. 782 (1982). In fact, Justice Marshall foreshadowed this examination of state law trends in his concurring opinion in Furman. Furman, 408 U.S. at 298 (Marshall, J., concurring). In that opinion, Judge Marshall wrote, “it is significant that nine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes.” Id. Marshall also noted that “[i]n addition, six States, while retaining the punishment on the books in generally applicable form, have made virtually no use of it.” Id. at n.53.


195. Atkins, 536 U.S. at 311–12 (citation omitted).
In fact, the Justices have looked to changes in state law in areas as diverse as sodomy and evidentiary privileges to help determine the outcome of Supreme Court cases. For example, in *Lawrence v. Texas*\(^{196}\) the majority opinion noted the changes that had occurred in state laws around the country since the Court's decision upholding Georgia's sodomy ban in *Bowers v. Hardwick*.\(^{197}\) The majority noted that "[t]he [twenty-five] States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to [thirteen]."\(^{198}\) The Court considered this, among several other factors, as weighing in favor of overruling the *Bowers* precedent.

In an analogous context, the Court has demonstrated that it will look to state policy to help determine evidentiary privileges. In *Jaffee v. Redmond*,\(^{199}\) the Court held that "the fact that all [fifty] States and the District of Columbia have enacted into law some form of psychotherapist privilege" confirmed that it was appropriate for the federal courts to recognize this privilege.\(^{200}\) The Court found the changes in state evidentiary law to be relevant even though most of these changes were legislative and not judicial.\(^{201}\) The Court found that "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one."\(^{202}\) This is not to say that state-level action is the only way to get the Supreme Court to overturn precedent; however, it is clear that a change of state law in a significant number of states is one way to facilitate Supreme Court action.

Given that many states modeled their death penalty statutes on the Model Penal Code (MPC),\(^{203}\) it is also significant that the American Law Institute (ALI), which developed the MPC, recently decided to withdraw the capital punishment section of the MPC.\(^{204}\) In withdrawing the section,
the ALI cited concerns about the administration of capital punishment in the United States. The ALI’s action, after forty-seven years of keeping the capital punishment section on the books, may further spur state-level abolition. If the twelve states that have executed fewer than three defendants since 1976 were to abolish the death penalty, they would join the fifteen states that have already abolished the death penalty. This would mean that more than half of the states would have abolished the death penalty. Most importantly, the change would presumably be in one direction. The Court has made clear that in the death penalty context, “it is not so much the number of these states that is significant, but the consistency of direction of change.” In fact, at the time of *Roper v. Simmons*, only five states had abolished the death penalty for minors since the death penalty for minors was upheld in *Stanford v. Kentucky*. However, in other contexts, the Supreme Court has indicated a reluctance to overturn laws favored by at least half of the states. It is not clear that the Supreme Court would apply the same test in the death penalty context. However, if in the future, only twenty-three states retained the death penalty, the Supreme Court could declare the death penalty to be unconstitutional under either test.

**CONCLUSION**

Predicting how the Supreme Court would decide a constitutional challenge to the death penalty years from now is difficult. State-by-state repeal, however, is a potential avenue for nationwide abolition. Both proponents and opponents of the death penalty would be wise to pay heed

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supra note 203, at Annex B1. Steiker and Steiker suggest that the United States Supreme Court’s “constitutional regulation of capital punishment has not succeeded on its own terms.” *Id.* at Annex B21. Other scholars may wish to examine whether the New Jersey Supreme Court was truly “successful” at devising a system of constitutional regulation for the death penalty in New Jersey.

205. The American Law Institute, supra note 204, (citing The American Law Institute, supra note 203, at 4–5).


207. *Roper v. Simmons*, 543 U.S. 551 (2005). Four of those states had abolished the death penalty for minors through the legislative process, while the fifth had done so through the judicial process. Thus, the Court made clear that legislative enactments were not the only indicia of state trends. In dissent, Justice Scalia argued that the judicial abolition, which did not “purport” to rely on “popular sentiment,” was “irrelevant to the question of changed national consensus.” *Id.* at 612 n.4 (Scalia, J., dissenting).


209. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Supreme Court would not overturn the anti-sodomy laws of “some 25 states.”). Under this scenario, even if Pennsylvania, which has a large death row, see discussion supra note 165, did not join the other eleven states in abolishing the death penalty, there would still be twenty-six states that had abolished the death penalty.
to the potential for state-by-state legislative repeal. If this legislative repeal occurs, it will be a slow-moving process, and change will not happen overnight. Indeed, death penalty proponents can take solace in the fact that nationwide abolition of the death penalty is unlikely to come any day soon. However, the Supreme Court’s death penalty jurisprudence is evolving and has proved to be responsive to state-by-state action, so there remains a possibility of nationwide repeal.

Although death penalty opponents can draw comparisons to *Roper* and *Atkins*, the important distinction between these cases and the death penalty overall is that in *Roper* and *Atkins* the Court recognized that the execution of minors or mentally retarded people was “infrequent”\(^2\) or “uncommon”\(^2\) in those states still permitting their executions. Therefore, the Supreme Court’s recognition of state-level trends in *Roper* and *Atkins* does not perfectly translate into Supreme Court recognition of state-level death penalty abolition trends; presumably, some of the states that will retain the death penalty would still be executing a moderate number of people.\(^2\)

However, the Court might recognize the increasing isolation and concentration of the use of the death penalty.\(^2\) As Justice Breyer recently argued, half of the nation’s death penalty cases come from three percent of the counties in the United States.\(^2\) Moreover, nationwide, death penalty

\(^2\) 12. Note, however, that the number of death sentences has decreased even in death-penalty states like Texas—from an average of 34 per year from 1994 to 2004, Adam Liptak, *At 60% of Total, Texas is Bucking Execution Trend*, N.Y.TIMES, Dec. 26, 2007, at A1, to 11 in 2008. Richard Lacayo, *The Tide Shifts Against the Death Penalty*, TIME, Feb. 3, 2009. While that number would have been higher without the death penalty moratorium ordered by the consideration of *Baze v. Rees*, 128 S. Ct. 1520 (2008), it is still a sharp decline. This may also be due in part to Texas’ recent adoption of life without parole as an alternative to the death penalty. John Moritz, *The Life Penalty*, TEX. OBSERVER, Nov. 28, 2008, at 14.
\(^2\) 13. Moreover, the United States is becoming increasingly isolated internationally in its imposition of the death penalty, Justice Kennedy in his opinion in *Roper* recognized that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Roper*, 543 U.S. at 578. 94% of the world’s executions in 2006 took place in China, Iran, Saudi Arabia, and the United States. See Amnesty International Australia, *Death Penalty: 20,000 on Death Row Across the World*, Apr. 29, 2006, http://action.amnesty.org.au/news/comments/225/. Moreover, in China, the number of executions has decreased from as many as 15,000 a year a decade ago to around 1,700 people in 2008. Andrew Jacobs, *China Pledges Fewer Death Sentences*, N.Y.TIMES, July 29, 2009, at A12. In July 2009, the Chinese government declared that the death penalty should be reserved for the most serious crimes; the government vowed to further reduce executions in China. *Id*.
\(^2\) 14. *Ring v. Arizona*, 536 U.S. 584 (2002) (Breyer, J., concurring) (“more than two-thirds of American counties have never imposed the death penalty since *Gregg* (2,064 out of 3,066), and only 3% of the Nation’s counties account for 50% of the Nation’s death sentences (92 out of 3,066”). Moreover, only seven states, Texas, Virginia, Oklahoma, Florida, Georgia, South Carolina, Ohio, conducted executions in both 2008 and 2009
sentences have decreased from about 300 per year from 1986 to 1999 to 115 per year in 2006 and 110 per year in 2007. In addition, while there were ninety-eight executions a decade ago in 1999, the number of executions has now dropped to about fifty per year. Scholars have noted that there have been between 15,000 and 20,000 homicides per year nationwide over the past decade. When those fifty executions are looked at in the context of the thousands of homicides, it is clear that the death penalty is a rare form of punishment.

If the twelve states discussed above were to abolish the death penalty, the Supreme Court might recognize the consistent direction of change, the fact that more than half of the states had abolished the death penalty, and the increasing isolation of the death penalty in a few states and counties. Given that stark situation, the Supreme Court could conclude that upholding the death penalty would be inconsistent with "evolving standards of decency."

(through mid-November). Those seven states accounted for 87% of the executions nationwide in those two years. Death Penalty Information Center, supra note 28.


216. Data compiled from Death Penalty Information Center, supra note 166.


218. Steiker & Steiker, supra note 203, at Annex B44.

219. Id.

220. See Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). Justice Stevens recently concluded that the death penalty is in and of itself, cruel and unusual punishment. Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring). Though the nationwide abolition of the death penalty may seem far off, many death penalty advocates never foresaw the end of the death penalty for mentally retarded people. In fact, twenty-five years ago, no states with the death penalty prohibited the imposition of that penalty on the mentally retarded. It was only after a national outcry over the execution of Jerome Borden, a mentally retarded man in Georgia, that states around the nation began to prohibit the execution of the mentally retarded. See Atkins v. Virginia, 536 U.S. 304, 314-15 (2002).
APPENDIX

FIGURE 1: PROSECUTORIAL CHARGING DECISIONS\textsuperscript{221}
Percentage of Death-Eligible Cases Brought to Penalty Trial

Table 1: Death Row Inmates in New Jersey Since 1982\textsuperscript{222}

<table>
<thead>
<tr>
<th>Defendant</th>
<th>County Where Convicted</th>
<th>Date of Conviction</th>
<th>Status of Conviction</th>
<th>Status Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Williams, James</td>
<td>Mercer</td>
<td>2/11/1984</td>
<td>Conviction Reversed</td>
<td>12/8/1988</td>
</tr>
<tr>
<td>Hunt, James I.</td>
<td>Camden</td>
<td>2/21/1984</td>
<td>Reduced</td>
<td>6/5/1989</td>
</tr>
<tr>
<td>Lodato, Benjamin</td>
<td>Ocean</td>
<td>7/12/1984</td>
<td>Reduced</td>
<td>4/16/1987</td>
</tr>
<tr>
<td>Bey, Marko</td>
<td>Monmouth</td>
<td>9/28/1984</td>
<td>Vacated</td>
<td>8/2/1988</td>
</tr>
<tr>
<td>Moore, Marie</td>
<td>Passaic</td>
<td>11/19/1984</td>
<td>Conviction Reversed</td>
<td>10/26/1988</td>
</tr>
<tr>
<td>Pitts, Daryl</td>
<td>Camden</td>
<td>2/22/1985</td>
<td>Vacated</td>
<td>6/21/1989</td>
</tr>
</tbody>
</table>

\textsuperscript{221} Data compiled using information from Van Wyk, \textit{supra} note 10, at 7 tbl.1. Although no death sentences were imposed after 2004, there is no data available on the percentage of death-eligible cases brought to penalty trial between 2004 and the abolition. See id. at 3.

\textsuperscript{222} Table compiled from Forsberg, \textit{supra} note 19. This table was updated by the author in 2009 with information from Mark Friedman, Assistant Deputy Pub. Defender, Appellate Section (N.J.) (data on file with \textit{Michigan Journal of Race & Law}).
<table>
<thead>
<tr>
<th>Defendant</th>
<th>County Where Convicted</th>
<th>Date of Conviction</th>
<th>Status of Conviction</th>
<th>Status Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Johnson, Walter</td>
<td>Gloucester</td>
<td>8/16/1985</td>
<td>Conviction Reversed</td>
<td>7/19/1990</td>
</tr>
<tr>
<td>Harvey, Nathaniel</td>
<td>Middlesex</td>
<td>10/17/1986</td>
<td>Conviction Reversed</td>
<td>10/17/1990</td>
</tr>
<tr>
<td>Jackson, Kevin</td>
<td>Ocean</td>
<td>2/7/1987</td>
<td>Conviction Reversed</td>
<td>4/18/1990</td>
</tr>
<tr>
<td>Pumell, Braynard</td>
<td>Camden</td>
<td>2/21/1990</td>
<td>Conviction Reversed</td>
<td>1/15/1992</td>
</tr>
<tr>
<td>Martini, John</td>
<td>Bergen</td>
<td>12/12/1990</td>
<td>Affirmed</td>
<td>2/9/1993</td>
</tr>
<tr>
<td>Brown, Bobby Lee</td>
<td>Warren</td>
<td>1/14/1993</td>
<td>Conviction Reversed</td>
<td>12/21/1994</td>
</tr>
<tr>
<td>Mejia, Rigoberto</td>
<td>Monmouth</td>
<td>5/25/1993</td>
<td>Conviction Reversed</td>
<td>7/12/1995</td>
</tr>
<tr>
<td>Harris, Joseph</td>
<td>Morris</td>
<td>5/29/1993</td>
<td>Affirmed</td>
<td>7/12/1995</td>
</tr>
<tr>
<td>Harvey, Nathaniel</td>
<td>Middlesex</td>
<td>12/16/1994</td>
<td>Affirmed</td>
<td>7/30/1997</td>
</tr>
<tr>
<td>Cooper, David</td>
<td>Monmouth</td>
<td>5/17/1995</td>
<td>Affirmed</td>
<td>8/20/1997</td>
</tr>
</tbody>
</table>

*PCR* indicates a Petition for Corrected Sentence.
<table>
<thead>
<tr>
<th>Defendant</th>
<th>County Where Convicted</th>
<th>Date of Conviction</th>
<th>Status of Sentence</th>
<th>Status Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Koskovich, Thomas</td>
<td>Sussex</td>
<td>5/7/1999</td>
<td>Vacated</td>
<td>6/7/2001</td>
</tr>
</tbody>
</table>

Some names appear more than once because of changes in sentence status.
* Post Conviction Review