The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script

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In the years after the Constitution of 1947 was adopted,[1] the New Jersey Supreme Court[2] earned a national reputation as an activist, progressive and generally liberal[3] state supreme court.[4] Some of the

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[1] The Constitution of 1947 was actually adopted in 1947 to become effective on January 1, 1948. N.J. CONST. art. X, ¶ 5. The Judicial Article became effective on September 15, 1948. *Id.* art. XI, § IV, ¶ 14.

[2] The Judicial Article of the Constitution became effective on September 15, 1948. *Id.* art. XI, § IV, ¶ 14.

[3] Shortly after the adoption of the Constitution, the New Jersey Supreme Court demonstrated its independence by essentially seizing control over the rules of practice and procedure. Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950). However, in its early years the new supreme court took some decidedly conservative positions. This was particularly evident in two areas of criminal procedure—the exclusionary rule and the *Miranda* doctrine *See* Miranda v. Arizona, 384 U.S. 436 (1966). The court refused to adopt an exclusionary rule and, when it was imposed upon the states by the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), the court construed the rule as narrowly as possible. John B. Wefing, *Search and Seizure—New Jersey Supreme Court v. United States Supreme Court*, 7 SETON HALL L. REV. 771 (1976). In later years the court would totally change its approach in that area and give a broad reading to the exclusionary rule. State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987). The court in its early years also narrowly construed the *Miranda* doctrine to limit its use as much as possible. That eventually changed as well. State v. Reed, 133 N.J. 237, 627 A.2d 630 (1993). But even in its early days the New Jersey court was liberal in other areas of criminal procedure. For example, the Weintraub Court (1957-1973) used its rule making power to "[give] the defendant broad discovery rights, perhaps the broadest in the country." Wefing, *supra*, at 781-82 (internal citations omitted). The Weintraub Court "was also one of the first courts to permit the defendant to see his pre-sentence report prior to sentencing, and even before the United States Supreme Court had done so, extended the right to counsel to indigents in disorderly persons offenses." *Id.*

[4] *See, e.g.*, G. ALAN TARR & MARY CORDELIA PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988); John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L. J. 701, 701 n.1. *But see* Karen L.

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signature issues the court addressed include school funding,[5] affordable housing,[6] tort reform,[7] and the right to die.[8] In addition, the court has assumed a generally expansive role in interpreting the state's constitution to grant greater individual rights than afforded under the federal constitution.[9] This activist trend has continued under both Chief Justice Robert Wilentz, who served from 1979 to 1996, and the current Chief Justice, Deborah Poritz.

Chief Justice Poritz was sworn in as Chief Justice of the New Jersey Supreme Court on July 10, 1996.[10] Thus, she has served sufficiently long to begin both an assessment of the Poritz court as compared to the Wilentz court, and to permit an evaluation of the general direction of the New Jersey Supreme Court at the beginning of the new century.

Chief Justice Wilentz was sworn in on Aug 2, 1979, and served for nearly seventeen years. During most of his tenure, the same seven justices (Clifford, Pollock, O'Hern, Handler, Garibaldi, and Stein) served together. Over the past eight years, beginning with the appointment of Justice Coleman, the entire court has changed with

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Folster, *The New Jersey Supreme Court in the 1990's: Independence is Only Skin Deep*, 62 ALB. L. REV. 1501 (1999); *see also* Dennis J. Braithwaite, *An Analysis of the "Divergent Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L. J. 1 (2001).

[5] *See, e.g.*, Abbot v. Burke (*Abott II*), 119 N.J. 287, 575 A.2d 359 (1990).

[6] In *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mount Laurel I*), 67 N.J. 151, 336 A.2d 713 (1975) and *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mount Laurel II*), 92 N.J. 158, 456 A.2d 390 (1983), the New Jersey Supreme Court significantly restricted the right of municipalities to engage in exclusionary zoning, ordering that municipalities take affirmative action to provide for their fair share of needed low and moderate income housing. *See generally* Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001). In *Toll Brothers, Inc. v. Township of West Windsor*, 173 N.J. 502, 540-41, 803 A.2d 53, 76 (2002), the Poritz Court reaffirmed its support for the *Mount Laurel* doctrine.

[7] *See infra* text accompanying notes 204-263.

[8] *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

[9] *See infra* text accompanying notes 95-109.

[10] Chief Justice Poritz was renominated by Governor James McGreevey on April 28, 2003, and confirmed on June 16, 2003. Although a Democrat was Governor, he reappointed the sitting Chief Justice who is a Republican. *See* Michael Booth, *Avoiding Constitutional Confrontation, Governor Renominates Poritz as Chief Decision Allays Fears of Loss of Judiciary's Independence*, 172 N.J. L.J. 341, 1 (2003); Jonathan Schuppe & Kathy Barrett Carter, *Harvey and Poritz Confirmed for AG and Chief Justice Posts*, STAR-LEDGER (Newark, N.J.), June 17, 2003, at 46. This reappointment represents the continuing support for an independent judiciary, a hallmark of New Jersey since the new Constitution was adopted in 1947.

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eight new members having been appointed.[11] I conclude that, despite the significant change in membership, the Poritz Court has essentially continued the progressive, independent, and generally liberal approach of the Wilentz Court. While the word *liberal* can have many different meanings,[12] for purposes of this article, it reflects society's current perception of the emphasis on individual rights, expansive views of defendant's rights, opposition to the death penalty, support for a woman's right to choose, opposition to all forms of discrimination, broad protection of freedom of speech, and concern for the less powerful members of society, as represented by students in poor school districts, consumers, employees, and plaintiffs.[13]

Six of the eight most recent appointments to the New Jersey Supreme Court were by the Republican Governor, Christine Todd Whitman; notably, half of those appointments were Democrats. These appointments were consistent with the unwritten, but faithfully followed, rule that the court is always to be kept politically balanced, with at least three members of each party.[14] Accordingly, Governor Whitman appointed three Republicans: Chief Justice Poritz and Justices Verniero and LaVecchia;[15] and three Democrats: Justices

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[11] The appointments to the new court spanned a number of years and the most recent appointments, those of Justices Zazzali, Albin and Wallace, occurred in 2000, 2002, and 2003, respectively.

[12] For example, James Simon says: "The term 'liberal' is used to describe a justice who gives the political branches a wide latitude to effect social and economic reform while insisting that those political branches do not interfere with individual rights." James F. Simon, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 14-15 n. * (1995).

[13] Professor Beatty describes liberal in the following way:

> [A] justice will be considered to endorse a "liberal" position if he supports: (1) the claims of criminal defendants or prisoners; (2) the urban electorate in reapportionment cases; (3) the government in regulation of business and professional activities; (4) the private party in regulation of non-business entities; (5) the claimant in employment and workmen's compensation cases; (6) the labor union and employees in labor-management cases; (7) the tenant in landlord-tenant cases; (8) the economically disadvantaged in government tort, employment, and eminent domain cases; (9) the claims of the insured as opposed to the claims of the insurance company, and (10) the personally injured or the fatally injured's estate.

Jerry K. Beatty, *Decision-Making on the Iowa Supreme Court—1965-1969*, 19 DRAKE L. REV. 342, 350 (1970).

[14] New Jersey may be the only state in the country with this unwritten rule. This rule also extends to the New Jersey Superior Court, where the state also maintains a politically balanced judiciary.

[15] Justice LaVecchia is registered as an independent but was active in various Republican administrations and is widely viewed as a Republican.

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Coleman, Long, and Zazzali. More recently, Governor McGreevey, a Democrat, appointed Justices Barry Albin and John Wallace, both of whom are Democrats.[16]

Many decisions handed down thus far by the Poritz court demonstrate that it will continue in the activist, independent and progressive tradition of the New Jersey Supreme Court as well as adhering to the more liberal posture of the Wilentz Court.[17] These decisions cover a wide spectrum ranging from death penalty to consumer rights, to school funding, to search and seizure. Before analyzing these areas, it should be noted that the court does not always adopt the most liberal position possible, but in some instances takes a more moderate stance on the issue at hand. Furthermore, the court, in a number of cases, has confronted situations in which two liberal jurisprudential positions conflict, forcing the court to choose between them. For example the court has in some cases chosen anti-discrimination over associational rights,[18] free press over fair trial,[19] support for hate crime legislation over rights to a trial by jury,[20] and rights of residential privacy over freedom of speech.[21]

DEATH PENALTY

The Wilentz court adopted a moderate to liberal position on the death penalty. While upholding the basic constitutionality of capital punishment under both the federal and state constitutions,[22] the court carefully assessed each individual case and struck down the sentences in many instances, finding numerous difficulties with many of the lower court opinions.[23] Although the death penalty was

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[16] The Governor was able to appoint two Democrats because, prior to those appointments, there were only three Democrats on the Court. Therefore, his appointment of Justice Albin simply shifted the majority to the Democratic Party. Justice Wallace replaced Justice Coleman, both of whom were Democrats.

[17] In 1998, in an article in the Rutgers Law Journal, I predicted that "although the court will be somewhat less liberal in the coming years reflecting the conservative tenor of the times, it will still be an independent, activist court following the traditions it has developed in the past fifty years." Wefing, *supra* note 3, at 730. Today, I am even more convinced that it will continue its independence and activism, but I no longer believe that it will be less liberal that the Wilentz court.

[18] *See infra* text accompanying notes 199-205.

[19] *See infra* text accompanying notes 186-190.

[20] *See infra* text accompanying notes 206-11.

[21] *See infra* text accompanying notes 233-34.

[22] State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

[23] Due to trial errors, the court has "vacated thirty-six of fifty-one death penalties imposed since 1982." State v. Papasavvas, 170 N.J. 462, 515-16, 790 A.2d 798, 829 (2002) (Coleman, J., dissenting).

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reenacted by the New Jersey legislature in 1982,[24] no execution has yet occurred. *State v. Marshall*,[25] decided in 1992, was the first death penalty case which the New Jersey Supreme Court found to be appropriately and constitutionally handled at the trial level, with the punishment being proportional to the offense. That case is still wending its way through the federal court system, together with other cases[26] in which the court ultimately upheld the death penalty.

The court might have taken an even more liberal approach, had the legislature and people of New Jersey permitted it to do so. In a liberal death penalty decision, *State v. Gerald*,[27] the court declared one portion of the New Jersey death penalty statute violative of the New Jersey Constitution's provision on cruel and unusual punishment.[28] But that position was subsequently overturned by a constitutional amendment in 1992.[29] Another example is *State v. Muhammad*,[30] which essentially overruled an earlier, more liberal, decision of the New Jersey Supreme Court,[31] prohibiting victim impact statements.[32]

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[24] After the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), essentially striking down the death penalty statutes as then written in virtually all the states, many states quickly re-adopted death penalty statutes. Some of the new statutes were then approved by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). However, New Jersey did not adopt a new statute at that time. Governor Byrne, who was Governor for eight years during this period, regularly vetoed death penalty legislation, and the legislature could never muster sufficient votes to override the veto. Eventually, when Governor Kean took office in 1982, he signed a death penalty bill. N.J. STAT. ANN. § 2C:11-3.

[25] 130 N.J. 277, 613 A.2d 1059 (1992) (*Marshall II*).

[26] *See, e.g.*, State v. Morton, 165 N.J. 235, 757 A.2d 184 (2000) (*Morton II*); and State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995) (*DiFrisco III*).

[27] 113 N.J. 40, 549 A.2d 792 (1988).

[28] The court recognized in *Gerald* that under *Tison v. Arizona*, 481 U.S. 137 (1987), the United States Supreme Court would not have declared that portion of the New Jersey statute unconstitutional. *Gerald*, 113 N.J. at 75, 549 A.2d at 810-11. Thus, the court used its own cruel and unusual punishment provision, Article I, Paragraph 12, of the New Jersey Constitution, which is identical to the federal provision, to declare the statute unconstitutional. *Gerald* dealt with the constitutionality of a provision of the New Jersey's murder statute that permitted a defendant to be sentenced to death if the defendant had intended only to seriously injure the victim but had in fact killed the victim. *Gerald*, 113 N.J. at 71, 549 A.2d at 808. The New Jersey Supreme Court held that the provision was disproportionate to the crime and that a person had to intend to kill in order to receive the death penalty. *Id.* at 85, 549 A.2d at 815-16.

[29] The legislature placed an amendment on the ballot in 1992 that overruled that decision and the amendment passed by a substantial majority and took effect on December 3, 1992. N.J. CONST. art. I, ¶ 12.

[30] 145 N.J. 23, 678 A.2d 164 (1996).

[31] State v. Coyle, 119 N.J. 194, 574 A.2d 951 (1990). The United States Supreme Court had originally prohibited the use of victim impact statements in *Booth v. Maryland*, 482 U.S. 496 (1987). But in *Payne v. Tennessee*, 501 U.S. 808 (1991), the

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The court felt compelled to reverse, in large part due to the Victims' Rights Amendment to the New Jersey Constitution.[33] In a poignant concurring opinion in *Muhammad*, Justice Wilentz clearly indicated that, although he disagreed with the result of the case, he felt bound by the voice of the people as expressed by the Victim's Rights Amendment. He said:

> I write only to express my misgivings on the resolution, both nationally and within this state, of the admissibility of victim impact evidence in the sentencing phase of capital trials. . . . .I find the conclusion inescapable that New Jersey voters, by

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Court eliminated the bar to such statements. This direct reversal four years after *Booth* was the result of a change in the membership of the Court. *Booth* was a five-four opinion with Justices Powell, Brennan, Marshall, Blackmun and Stevens in the majority and Justices White, Rehnquist, O'Connor and Scalia dissenting. By the time of *Payne*, Justices Powell and Brennan had retired and been replaced by Justices Kennedy and Souter. These two new Justices joined with the four dissenters in *Booth* to create a six Justice majority, which then overturned the prior decision. When it was suggested that precedent should control, Justice Rehnquist, writing for the majority, said:

> Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.

Payne, 501 U.S. at 827-28 (internal citations omitted).

[32] Victim impact statements are statements made by a member of the family of the victim during the sentencing stage of a death penalty case in an attempt to personalize the victim and demonstrate the effect of the death on the family and the community. The court did, however, restrict the scope of the victim impact statement, agreeing with the United States Supreme Court that some impact statements could be "so unduly prejudicial" as to render "the trial fundamentally unfair." *Muhammad*, 145 N.J. at 56, 678 A.2d at 181 (quoting *Payne*, 501 U.S. at 825). Justices Handler and Stein both dissented separately.

[33] The Victim Rights Amendment provides:

> A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

N.J. CONST. art. I, ¶ 22.

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> approving the [victim's rights] amendment to our constitution, intended to allow the Legislature to adopt the victim impact statute.[34]

The Poritz court has continued to carefully assess each death penalty case and, while continuing to follow the Wilentz court in upholding the basic constitutionality of the death penalty, has reversed a number of death penalties because of procedural errors.[35] Recently, in two closely divided (four-three) opinions, the court struck down two death penalty verdicts. In the first of these cases, *State v. Koskovich*,[36] the majority found three errors in the jury instructions and held the "combined effect of those three errors warrants reversal of defendant's death sentence."[37] That opinion, written by Justice Verniero, was joined by Justices Stein, Long, and Zazzali. Justice Coleman wrote a dissenting opinion joined by Chief Justice Poritz and Justice LaVecchia.

Justice Zazzali, joined by Justice Long, took a more liberal position in his concurring opinion. He suggested a broad utilization of the cruel and unusual punishment clause of the New Jersey constitution in order to declare the death penalty unconstitutional as applied in various situations.[38] The defendant in *Koskovich* was eighteen years old when he committed the crime.[39] Further, he was an emotionally immature young man, burdened by an unfortunate

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[34] *Muhammad*, 145 N.J. at 59, 678 A.2d at 182. Justice Handler dissented. *Id.* at 69, 678 A.2d at 187 (Handler, J., dissenting).

[35] *See, e.g.*, State v. Josephs, 174 N.J. 44, 803 A.2d 1074 (2002).

[36] 168 N.J. 448, 776 A.2d 144 (2001).

[37] *Id.* at 496, 776 A.2d at 173. The court explained the three errors in instructions as follows:

> first, that the trial court erred in instructing the jury concerning its use of the victim-impact testimony; second, that the court erred in failing to explicitly inform the jury that the court would likely sentence defendant on the non-capital convictions to consecutive sentences and that as a result, defendant would likely spend the rest of his natural life in prison if the jury did not impose the death sentence; and third, that the trial court erred in instructing the jury on how to weigh the aggravating and mitigating factors, which comprise the core of the jury's function in the penalty phase.

Id. at 495-96, 77 A.2d at 172-73. The United States Supreme Court recently reaffirmed and strengthened its earlier holdings in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Shafer v. South Carolina*, 532 U.S. 36 (2001), finding that there is a constitutional right to a parole ineligibility instruction, at least in cases where the defendant's future dangerousness was brought into the case. Kelly v. South Carolina, 534 U.S. 246 (2002). The decision was a five-four opinion.

[38] *Id.* at 560, 776 A.2d at 215 (noting that "it is sometimes best to simply invoke intuition, fundamental fairness, and classic principles of discernment to make a holistic judgment about whether the death penalty ought to be imposed").

[39] *Id.* at 465, 776 A.2d at 153.

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upbringing.[40] Under such circumstances, Justice Zazzali felt that, even though the death penalty might not be considered "grossly disproportionate to the offense" committed, it may still be unconstitutional because it does not conform to contemporary standards of decency.[41] This concurring opinion, by Justice Zazzali, as well as other opinions written by Justice Long,[42] demonstrates a willingness, by at least those two justices, to expand the protections under the New Jersey cruel and unusual punishment clause.[43] The majority of justices, however, seem prepared to uphold death penalties in those cases where it believes the death penalty was reached in the fairest manner possible.

Even after a death sentence is upheld, New Jersey provides another opportunity for defendants to gain review of the penalty – proportionality review. The second recent case striking down a death penalty verdict was *State v. Papasavvas*.[44] Justices Zazzali, Long and Stein were again in the majority, but this time were joined by Chief Justice Poritz, rather than Justice Verniero who joined with Justices Coleman and LaVecchia in dissent. *Papasavvas* was the first case in

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[40] *Id.* at 474-475, 776 A.2d at 159.

[41] *Id.* at 553, 776 A.2d at 210-11.

[42] *See, e.g.*, State v. Timmendequas, 168 N.J. 20, 76-81, 773 A.2d 18, 50-53 (2001) (Long, J., dissenting); State v. Morton, 165 N.J. 235, 288-289, 757 A.2d 184, 213 (2000) (*Morton II*) (Long, J., dissenting); State v. Feaster, 165 N.J. 388, 444, 747 A. 2d 266, 296-297 (2000) (*Feaster II*) (Long, J., dissenting). Justice Long replaced Justice Alan Handler who had previously been the Justice most opposed to the death penalty. Justice Long now appears to be the Justice most opposed to this penalty. In *State v. Josephs*, 174 N.J. 44, 803 A.2d 1074 (2002), Justice Long wrote: "In my view, and for the reasons I have previously expressed in detail, the constitutionality of the New Jersey death penalty requires reassessment." *Id.* at 162, 803 A.2d at 1145. She believed the "evolving standards of decency" have shifted since the Court declared the death penalty constitutional in *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987). *Josephs*, 174 N.J. at 162-64, 803 A.2d at 1145-46. Justice Long believes that revisiting the constitutionality of the death penalty would not present any stare decisis problems. *Id.* at 162, 803 A.2d at 1145. As Justice Long said: "I remain mystified by the Court's resistance to revisiting a fifteen-year-old opinion that, by its very terms, was rooted in conclusions about the public's appetite for the death penalty that appear to have changed. The suggestion that the Court's past perfunctory rejection of equally perfunctory challenges to *Ramseur* over the years gives currency to that opinion is neither jurisprudentially sustainable nor an appropriate response to a case involving the ultimate sanction of death." *Id.* at 164-65, 802 A.2d at 1146.

[43] See the concurring opinion of Justices Zazzali and Long in *State v. Nelson*, 173 N.J. 417, 803 A.2d 1 (2002), for an argument that this specific defendant's mental illness should bar execution under the State Constitution's cruel and unusual punishment clause. *Id.* at 498, 803 A.2d at 50 (Zazzali and Long, J.J., concurring). The majority had specifically refused to reach that question. *Id.* at 478, 803 A.2d at 37.

[44] 170 N.J. 462, 790 A.2d 798 (2002).

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which the court used the proportionality review mechanism within the death penalty statute to overturn a death sentence. The New Jersey statute provides:

> Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to comparison of similar cases in which a sentence of death has been imposed under subsection c.[45]

After upholding the conviction and death penalty of Peter Papasavvas for the murder of Mildred Place, the court embarked upon this proportionality review process.[46] The court recognized, "we remain keenly aware that Papasavvas committed a terrible crime that standing alone, might legitimately be viewed as deathworthy."[47] The court went on to state, however, that the role of the proportionality review is "to place the sentence imposed for one terrible murder on a continuum of sentences imposed for other terrible murders to ensure that the defendant 'has not been singled out unfairly for capital punishment'."[48]

The court then conducted an extensive comparison of the case with other cases. While this article is not the place to review the many details of the court's analysis,[49] the court ultimately concluded that,

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[45] N.J. STAT. ANN. § 2C:11-3(e).

[46] The process for individual proportionality review is essentially set forth in *In re* Proportionality Review Project (*Proportionality Review I*), 161 N.J. 71, 735 A.2d 528 (1999) and *In re* Proportionality Review Project II (*Proportionality Review II*), 165 N.J. 206, 757 A.2d 168 (2000).

[47] *Papasavvas*, 170 N.J. at 466, 790 A.2d at 800.

[48] *Id.* (quoting State v. Timmendequas, 168 N.J. 20, 76, 773 A.2d 18, 50-51 (2001) (Long, J., dissenting)).

[49] For example, in one section dealing with the defendant's character, the Court concluded that, taking all relevant factors into consideration, his "overall culpability" was "moderate." More specifically, the Court stated:

> Of the fifteen considerations that underlie this analysis, eleven clearly support Papasavvas. The crime was not premeditated; Papasavvas is brain-damaged and suffered horrific child abuse; there is no evidence that Papasavvas had reason to know of Mrs. Place's vulnerability or even that she would be at home; Papasavvas was not aware of the non-decedent victims who would be affected by his actions; he was only twenty-three years old at the time of the crime; he did not plan it; he did not injure a non-decedent victim; his prior record is a non-violent one; he ultimately gave himself up; he expressed remorse for his crime and there is nothing to suggest that he is beyond redemption. Accordingly, we find Papasavvas's overall culpability to be moderate based on the three-part model of criminal culpability.

Id. at 484, 790 A.2d at 811.

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despite the seriousness of Papasavvas's crime, it was not comparable to other crimes for which the death penalty had been imposed, and the offense was less horrendous than many others which did not result in the death penalty.

A major distinction between the approach of the majority and dissent concerned the appropriate manner of resolving disputed issues of fact. The prosecution and the defendant in *Papasavvas* had differing interpretations of how the events at the crime scene unfolded.[50] Chief among these differences was whether or not the defendant (Papasavvas) ambushed the victim (Mrs. Place) or whether the victim had surprised the defendant. Because it was unclear which occurred, the majority believed that the defendant's position should be accepted. The dissent, on the other hand, felt that the court should instead credit the state's position. Justice Coleman, writing for the dissent, said, "[o]nce the jury imposes the death penalty, the burden shifts to the defendant to prove that his sentence is disproportionate."[51] Justice Coleman concluded that Papasavvas was more culpable than many defendants who did not receive the death penalty, thus disagreeing with the majority's view that the same defendants were more culpable than Papasavvas.[52] The opinions of this closely divided court illustrate the great difficulty the court encounters in conducting a proportionality review.

Two other cases, both decided on the same day,[53] further evidence the liberal leanings of Justices Long and Zazzali with regard to punishment issues. These cases did not address the death penalty, but dealt with consecutive sentencing in the context of drivers who were convicted of two counts of vehicular homicide based on a single accident resulting in the death of two individuals. The issue presented in both cases was whether to impose a concurrent or consecutive sentence under the sentencing guidelines, which had been developed by the New Jersey Supreme Court in *State v. Yarbough*.[54] In opinions written by Justice Coleman, the majority of

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[50] Police had come to Papasavvas's home to serve an arrest warrant. *Id.* at 467, 790 A.2d at 801. He fled in his underwear. *Id.* Four blocks away he broke into the basement of Mrs. Place's home. *Id.* The exact details of what happened in the house are disputed but Mrs. Place's body was found at the bottom of the stairs. Papasavvas's semen was found on her body. *Id.* at 467-68, 790 A.2d at 801-02.

[51] *Papasavvas,* 170 N.J. at 520, 790 A.2d at 832 (citations omitted) (Coleman, J., dissenting).

[52] *Id.* at 533-34, 790 A.2d.at 840-41.

[53] State v. Molina, 168 N.J. 436, 775 A.2d 509 (2001); State v. Carey, 168 N.J. 413, 775 A.2d 495 (2001).

[54] 100 N.J. 627, 498 A.2d 1239 (1985).

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the court held that the sentencing guidelines should be interpreted to permit the imposition of consecutive sentences when there were two victims involved.[55] The obvious result of this interpretation is a much harsher penalty.

The New Jersey Criminal Code provides, "multiple sentences shall run concurrently or consecutively as the court determines at the time of sentencing."[56] Concerned that this statute gave too much discretion to trial judges, the New Jersey Supreme Court used *Yarbough* as an opportunity to set forth guidelines to assist trial judges in making these determinations. One of the guidelines stated: "some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not . . . any of the crimes involved multiple victims."[57] The majority believed that, in these drunk-driving cases, the consecutive sentences imposed were appropriate. The court explained that it had "little difficulty in concluding that a drunk-driving accident that results in two deaths and serious bodily injuries to two others is distinctively worse that a drunk-driving accident that results in death or serious bodily injuries to a single individual."[58] Further, the court held that "in order to facilitate sentencing under *Yarbough* in vehicular homicide cases, the multiple-victims factor is entitled to great weight and should ordinarily result in the imposition of at least two consecutive terms when multiple deaths or serious bodily injuries have been inflicted upon multiple victims by the defendant."[59]

In contrast, the dissent, written by Justice Long and joined by Justice Zazzali, stated that the "greatest emphasis in deciding whether a sentence is to be served concurrently or consecutively is on the separateness of the wrongful acts."[60] Because each case involved only one drunk-driving incident, the dissent argued that concurrent sentences should have been imposed.

These two cases demonstrate that the majority of the current

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[55] *Molina*, 168 N.J. at 438, 775 A.2d at 510; *Carey*, 168 N.J. at 419, 775 A.2d at 498-99.

[56] N.J. STAT. ANN. § 2C:44-5a.

[57] *Yarbough*, 100 N.J. at 644, 498 A.2d at 1247-48. The other reasons listed by the court are "(a) the crime and their objectives were predominantly independent of each other; (b) the crimes involved separate acts of violence or threats of violence; (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior . . . [and] (e) the convictions for which the sentences are to be imposed are numerous[.]" *Id.*

[58] *Carey*, 168 N.J. at 428, 775 A.2d at 504.

[59] *Id.* at 429-30, 775 A.2d at 505.

[60] *Id.* at 434, 775 A.2d at 508.

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New Jersey Supreme Court takes drunk-driving cases very seriously, and is willing to impose relatively severe penalties. Thus, it takes a more moderate or even conservative position as compared to the more liberal view of the dissent.

SCHOOL FUNDING

One area of law, for which the New Jersey Supreme Court has been nationally noted, is school funding. Early on, in *Robinson v. Cahill*,[61] the New Jersey Supreme Court struck down the state's method of school funding, which relied heavily on local property taxes[62] for financial support.[63] This decision was based on the "thorough and efficient" education clause in the New Jersey constitution.[64] There are currently fifty state constitutions with guarantees similar to that of New Jersey, yet in only seventeen states have courts invalidated the funding systems.[65] Additionally, New Jersey was one of the first states to declare its funding system unconstitutional and take significant action to force the state to make major improvements in its educational system.[66]

A long series of *Robinson* opinions, totaling seven, developed the remedies for the constitutional violation. Ultimately the Legislature responded with a new funding system which the court held to be

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[61] 62 N.J. 473, 303 A.2d 273 (1973).

[62] At the time of the decision, local property taxes paid for 67% of the total costs of public school education within the state. *Id.* at 480, 303 A.2d at 276.

[63] New Jersey suffered from a phenomenon that existed across the country. As many people began moving out of the cities to the suburbs, the cities lost population as well as businesses and had less ratables available for taxation. Simultaneously, the problems of the cities became more and more intractable, and there was less and less money to deal with them. As a result, city school systems had far less funding than wealthy suburban school districts. The students in the inner city, many of whom had severe problems caused by poverty and other social inequities, were receiving an inferior education. The test scores of students in the inner cities declined. See Jonathon Kozol, *Death at an Early Age: The Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools* (1967) and *Savage Inequalities: Children in America's Schools* (1991), for detailed accounts and descriptions of this education crisis.

[64] "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § IV, ¶ 1.

[65] Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?* 63 ALB. L. R. 1147, 1148-49 (2000); *see also* Paula J. Lundberg, *State Courts and School Funding: A Fifty State Analysis,* 63 ALB. L.R. 1101 (2000).

[66] As Justice Wilentz said in *Abbott II*, describing the circumstances of that case, "we are the only state involved in a second round on the issue." 119 N.J. 287, 313, 575 A.2d 359, 373 (1990).

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facially constitutional if fully funded.[67] When the statute was not fully funded, the court threatened to close the schools by not permitting the disbursement of any state funds to any of the schools.[68] Eventually, New Jersey passed its first income tax to fund the increased expenditure for schools in the poorer districts, and the court permitted the disbursement of funds. Despite these significant expenditures,[69] the schools in the poorer urban districts continued to lag behind their suburban counterparts. This led to another series of cases dealing with school funding – the *Abbott v. Burke* round. In *Abbott II*,[70] *Abbott I* having essentially been a procedural case,[71] the court first decided that the statute at issue, which had been facially approved by the Court in 1976,[72] was unconstitutional as applied – at least as applied to a group of the poorest school districts.[73] Justice Wilentz said:

> We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less money available, and the worse the education. That system is neither thorough nor efficient. We hold the Act unconstitutional as applied to poorer urban school districts. Education has failed there, for both students and the State. We hold that the Act must be amended to assure funding of education in poorer urban districts at the level of property-rich districts; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.[74]

Today, as a result of *Abbott II* and other *Abbott* opinions, many of which the Supreme Court issued during the Wilentz era, urban schools in New Jersey are primarily funded by the state.[75] As noted,

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[67] Robinson v. Cahill (*Robinson V*), 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976).

[68] Robinson v. Cahill (*Robinson VI*), 70 N.J. 155, 159, 358 A.2d 457, 458 (1976) (finding that "[t]he continuation of the existing unconstitutional system of [school] financing . . . cannot be tolerated").

[69] New Jersey spends more on education per capita than any other state. David Brenner, *Both Bush and Gore Education Plans Fail*, STAR-LEDGER (Newark, N.J.), Sep. 21, 2000, at 26, *available at* 2000 WL 26961363.

[70] *Abbott II*, 119 N.J. 287, 575 A.2d 359.

[71] That case held that the entire matter should be heard by an administrative law judge rather than a superior court judge. Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) (*Abbott I*).

[72] *Robinson V*, 69 N.J. at 467, 355 A.2d at 139.

[73] *Abbott II*, 119 N.J. at 295, 575 A.2d at 363.

[74] *Id.*

[75] For the 2002-03 school year, the average *Abbott* district received more than 70% of its funding from the state. For example, Newark received 80% of its funding from

the court has required that those poorer urban schools be funded at the same rate as the wealthy suburban districts.

Shortly after Chief Justice Poritz was appointed to the court, *Abbott V*[76] was handed down and seemed to suggest some retrenchment in those positions. The court suggested that it was satisfied that the State was on track, and it would no longer need to intervene.[77] However, despite the conciliatory language[78] in that decision, the court still required substantial changes and added expenditures—including full day kindergarten for all Abbott five year-olds and half-day programs for three and four year-olds, as well as increased social services and better buildings and facilities in the Abbott districts. Chief Justice Poritz did not participate in that decision due to her involvement in the case while serving as Attorney General prior to her appointment to the court. It was suspected that, as former Attorney General and close confidant of the governor, she might be less likely to push the school funding agenda knowing the significant costs for the state.

In *Abbott VI*,[79] the Court, with Chief Justice Poritz now participating, further clarified the requirements dealing with kindergarten and preschool programs.

In *Abbott VII*,[80] the Court again faced the general funding issues. That decision further clarified the ruling of the Court in *Abbott V*. As already noted, *Abbott V* had ordered improvement in the facilities in the Abbott Districts. This had led to the passage of an immense bond

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the state while the cities of Orange and Trenton received 78% and 82% of their budgets from the state, respectively. *See* New Jersey Dep't of Educ., *Comparative Spending Guide: March 2003: Abbott Districts 1* (2003), *available at* http://www.state.nj.us/njded/guide/2003/abbott.pdf.

[76] Abbott v. Burke (*Abbott V*), 153 N.J. 480, 710 A.2d 450 (1998).

[77] That case came after *Abbott v. Burke* (*Abbott IV*), 149 N.J. 145, 693 A.2d 417 (1997), which had struck down the Comprehensive Educational Improvement and Financing Act of 1996, a statutory attempt by the state to meet the requirements of *Abbott II* and *Abbott v. Burke* (*Abbott III*), 136 N.J. 444, 643 A.2d 575 (1994), but which had failed to ensure adequate funding for the poorer urban districts.

[78] The conciliatory language in that decision may have been partially as a result of a letter written by the Legislature to the Court indicating that the Legislature could not continue to increase funding for the Abbott districts. There was some hint that a constitutional amendment limiting the court's powers in this area could be forthcoming. Despite that, as noted in the text, the Court continued to require reforms. The New Jersey Law Journal in its digest of the case stated: "Collins [Speaker of the Assembly] and the Senate President submitted a letter to the Court 'to express [their] views regarding the recent school funding recommendations . . . .'" Abbott v. Burke, *M-991/992 September Term 1999: Court to State: Absorb All Costs of Abbott Districts' Building Needs*, 160 N.J. L.J. 991, 1 (2000).

[79] Abbott v. Burke (*Abbott VI*), 163 N.J. 95, 748 A.2d 82 (2000).

[80] Abbott v. Burke (*Abbott VII*), 164 N.J. 84, 751 A.2d 1032 (2000).

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issue to pay for these improvements. The question posed in *Abbott VII* was whether the entire cost of the new facilities had to be borne by the state. The Court held that the state had to bear the entire cost.

On Feb. 21, 2002, the court issued yet another decision concerning school funding.[81] *Abbott VIII* dealt with issues growing out of the prior decisions, particularly *Abbott V* and *Abbott VI,* including preschool programs and physical facilities. Despite the court's order in 1998 to provide the preschool programs, thousands of preschool children were still not enrolled. Again, the court insisted on action by the state to begin providing preschool education for as many three and four year-olds as possible. The court did not go as far as the plaintiffs had requested, in that it did not order the appointment of a standing master, but rather chose to rely upon the State Department of Education to provide the necessary facilities. The court did, however, establish "a schedule for decision-making by the Executive Branch and by our Appellate Division to ensure that Abbott districts' preschool program and budget proposals are timely reviewed and that 'final dispositions are issued in time for the 2002-2003 school year.' "[82] It further mandated that the state supplement existing Head Start programs with additional funding to meet state preschool standards.

As this summary reveals, the New Jersey Supreme Court, which began the process of school funding reform in 1973, is strongly committed to improving schools in the state's poorer districts. However, as a result of the economic downturn in the United States in the past three years, New Jersey faced a severe budget shortfall.[83] This made it difficult for the state to continue to expand funding for education as mandated by the courts. In 2002, the state announced cuts in support of higher education[84] and indicated to all school districts that there would be no budget increases in the 2002-2003 school year.[85] In response to that budget crisis, the Court in 2002 permitted the funding to remain stable for the next school year

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[81] Abbott v. Burke (*Abbott VIII*), 170 N.J. 537, 790 A.2d 842 (2002).

[82] *Id.* at 540-41, 790 A.2d at 845 (quoting Abbott v. Burke, No. M-1131, at 3 (N.J. Oct. 22, 2001)).

[83] Joe Donohue, *Budget Gap Expands to $2.9 billion—As State Tax Revenues Continue to Plummet, McGreevey Vows Solutions to Plug Shortfall,* STAR-LEDGER (Newark, N.J.), Jan. 29, 2002, at 15.

[84] Jeff Whelan, *McGreevey Cautions State to Prepare for Lean Times,* STAR-LEDGER (Newark, N.J.), Jan. 23, 2002, at 12.

[85] Editorial, *Restraint on School Aid,* STAR-LEDGER (Newark, N.J.), Apr. 7, 2002, at 002, *available at* 2002 WL 18668073. "None of the state's 618 school districts is to receive an increase this year." *Id.*

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rather than increasing the budget as would have been required under the previous *Abbott* decisions.[86]

In 2003, with continuing state budget shortfalls, the Court again faced the continuing controversy and issued another order.[87] The State had again requested the relaxation of the remedies granted in *Abbott V.* That application was approved with certain restrictions. It provided that the "aggregate amount of Additional Abbott v. Burke State Aid shall be presumptively calculated as the total amount of Additional Abbott v. Burke State Aid approved for the Abbott districts for the Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget."[88] A maintenance budget is one, which permits added expenditures for non-discretionary costs,[89] but would not include costs for new programs or restoration of old programs with the exception of programs developing whole school reform.[90] The Department of Education would be permitted to delete money from a District for non-instructional programs[91] if it determined that those programs do not meet the effective and efficient standard. Decisions of the Department of Education deleting funds can be appealed.

Justice Long dissented from this order feeling that there should be no further delays in the implementation of *Abbott IV* and *Abbott V.* Justices Verniero and Zazzali did not participate.

The Court has given some financial relief to the state because of the severe budgetary concerns of the last two years by not mandating full compliance with the dictates of the earlier Abbott decisions.[92] But

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[86] Abbott v. Burke (*Abbott IX*), 172 N.J. 294, 798 A.2d 602 (2002). The Court did, however, permit district-by-district appeals on specific funding issues. *Id.* at 297, 798 A.2d at 604.

[87] Abbott v. Burke, No. M-976-02, 2003 N.J. LEXIS 853 (N.J. Jul. 23, 2003) (M-976 Order).

[88] *Id.* slip op. at 4-5, 2003 N.J. LEXIS 853, **3-4.

[89] "Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition." *Id.* slip op. at 5, 2003 N.J. LEXIS 853, *4.

[90] For example,

> "Whole-school reform entails 'zero-based budgeting.' Under this scheme, the school combines all of its sources of revenue or 'funding streams' and uses the aggregated amount as the basis for the entire school budget. In other words, instead of allocating certain funds to specific programs, the school uses the entirety of its funds to implement whole-school reform."

Abbott V, 153 N.J. at 498, 710 A.2d at 459.

[91] "Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students." *M-976 Order*, slip op. at 6, 2003 N.J. LEXIS 853, *5

[92] Without the relaxation of the Abbott funding mandates, the state government would have had to fulfill the $747 million in aid requested by the Abbott districts.

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if the past history of the *Robinson* and *Abbott* decisions is any guide for the future, the Court will soon insist upon progress in its attempt to improve the urban schools in the state. If and when this occurs, the Legislature may again consider the use of a constitutional amendment to remove the Court from any role in school funding. There have already been calls for a constitutional convention in New Jersey.[93] Some fear that such a convention could be used to change the "thorough and efficient education clause" to eliminate the role of the judiciary.[94]

ABORTION

The New Jersey Supreme Court has long been a protector of the right to an abortion. Naturally, after the decision of the United States Supreme Court in *Roe v. Wade*,[95] women in New Jersey unequivocally possessed the right to an abortion. Subsequently, however, many issues arose concerning the extent of that right.

In 1980, the United States Supreme Court held that the right to an abortion did not include the right to a free abortion for indigent women.[96] In *Right to Choose v. Byrne*,[97] the Wilentz court rejected this approach and held that the New Jersey government had an obligation to provide funds to any indigent woman who wanted to have an abortion if there was a threat to the life or the health of the mother. Justice Pashman wanted to go further, arguing in his dissent for the right of an indigent woman to receive state funding for a purely elective abortion.[98] The court utilized an equal protection argument: if a state chose to fund birth procedures for indigent pregnant women, it also had to fund abortion procedures for them.[99]

With the prior stay and this order, the state will need to spend only approximately $200 million on non-discretionary expenditures. John Mooney, *Justices Let State Delay Programs for Schools*, STAR-LEDGER (Newark, N.J.), Jul. 24, 2003, at 13, *available at* 2003 WL 18716889.

[93] Tom Hester, *N.J. Tax Structure Comes Under Fire—Constitutional Changes Sought*, STAR-LEDGER (Newark, N.J.), Mar. 19, 2002, at 021, *available at* 2002 WL 17058467.

[94] In discussing the issue of a constitutional convention, Professor Robert F. Williams worries that such a convention might result in limiting the scope of the *Abbott* decisions: "For instance, will the powers of the Supreme Court, whose controversial 1998 ruling ordering that education in the state's poorest districts begin at age 3, wind up on the table as well?" Fran Wood, Editorial, *The Risk in Rewriting Jersey's Constitution*, STAR-LEDGER (Newark, N.J.), Mar. 20, 2002, at 17.

[95] 410 U.S. 113 (1973).

[96] Harris v. McRae, 448 U.S. 297 (1980).

[97] 91 N.J. 287, 450 A.2d 925 (1982).

[98] *Right to Choose*, 91 N.J. at 319, 450 A.2d at 941 (Pashman, J., dissenting).

[99] In *Sojourner A. v. N.J. Dept. of Human Servs.*, 177 N.J. 318, 828 A.2d 306 (2003), the New Jersey Supreme Court considered the constitutionality of a New Jersey

The United States Supreme Court had held, contrary to this state ruling, that the government could permissibly favor birth over abortion, and that the right to an abortion did not include the right to have the government pay for the abortion.

The Poritz court reaffirmed its broad support for a woman's right to choose by striking down a recently enacted New Jersey statute[100] mandating that a woman under the age of eighteen notify at least one of her parents if she wanted an abortion.[101] The statute further provided for a judicial by-pass procedure, by which the minor could avoid the notification requirement by obtaining approval from a judge. Many other state courts, as well as the United States Supreme Court, had upheld similar statutes,[102] but the Poritz court held that the statute violated the equal protection requirement of the New Jersey Constitution. Although there is no specific provision in the New Jersey Constitution guaranteeing equal protection, such protection has been implied from the provisions of Article I, Paragraph 1.[103] The court recognized that, while many similar restrictions had been generally upheld and even more significant

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statute limiting the cash assistance for families at the level set when the family first enters the state welfare system. The family does not receive additional cash benefits if there are additional children. This was challenged as violating the right of privacy and the equal protection clauses of the New Jersey Constitution. The United States Court of Appeals for the Third Circuit had already held that the law did not violate the United States Constitution. C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996). The trial court and the appellate division in *Sojourner A.* held that the statute only indirectly and insignificantly intruded on the right of a woman to make procreative decisions. Thus, the limitation did not violate the New Jersey Constitution. The New Jersey Supreme Court unanimously affirmed. The Court distinguished *Right to Choose v. Byrne*:

> This case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice. In *Right to Choose*, we held that the State may decline to fund a woman's choice to obtain an abortion when the abortion is not medically necessary. We hold today that the State is not required to provide additional cash assistance when a woman chooses to bear a child more than ten months after her family has received welfare benefits. In so holding, we reject plaintiffs' claim that the family cap provision of WFNJ [Work First New Jersey Act] violates the equal protection and due process guarantees of our State Constitution.

Sojourner A., 177 N.J. at 337, 828 A.2d 317 (internal cross-reference omitted).

[100] N.J. STAT. ANN. § 9:17A-1.1 to -1.12 (1999).

[101] Planned Parenthood v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000).

[102] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[103] Article I, Paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

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restrictions were found constitutional by other courts,[104] none of those decisions had adequately assessed the burdens which those restrictions placed on young women desirous of having an abortion, but unwilling to discuss the decision with her parents. The court concluded:

> Article I, paragraph 1, of the New Jersey Constitution does not permit the State to impose disparate and unjustifiable burdens on different classes of young women when fundamental constitutional rights hang in the balance. The State has failed to demonstrate a substantial need for the Parental Notification for Abortion Act, or even that the asserted need is capable of realization through enforcement of the Act's provisions. Nor does the State offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their pregnancies. To the contrary, plaintiffs present compelling evidence that neither the interests of parents nor the interests of minors are advanced by the Notification Act, and further that there is no principled basis for imposing special burdens only on that class of minors seeking an abortion.[105]

That decision raised great consternation, and public cries for impeachment of the Justices ensued.[106] It also resulted in attempts to place a constitutional amendment on the ballot to overturn it.[107] To amend the constitution in New Jersey the Legislature must vote for an issue by a three-fifths majority in both houses, or by a majority in both houses in two successive years in order to place the issue on the ballot.[108] Currently, the Democrats control the Assembly, and the Senate is split equally between the Republicans and Democrats.[109] Therefore, getting the amendment on the ballot will most likely be a

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[104] Some jurisdictions provided that the minors had to get permission from, rather than simply notifying, one of the parents or pursue a by-pass procedure. These requirements have been upheld. *See* Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (*Akron II*); Hodgson v. Minnesota, 497 U.S. 417 (1990).

[105] *Farmer*, 165 N.J. at 642, 762 A.2d at 638.

[106] *See* Editorials, *Baskin in the 39th: Rooney and Vandervalk for the Assembly*, THE RECORD (Hackensack, N.J.), Oct. 23, 2001, at L-12.; Rocco Cammarere, *Legislators Furious as Court Rejects Parental Notification*, 9 N.J. LAW 1621 (2000).

[107] Various bills have been introduced since the decision in *State v. Farmer* including new bills introduced in 2002. One was introduced in the Assembly on January 8, 2002 NJ A.C.R. 25 by Assemblyman Rooney and another introduced in the Senate on Feb. 11, 2002 NJ C.C.R. 39 by Senator Cardinale.

[108] N.J. CONST. art. IX.

[109] Joe Donohue & Thomas Martello, *Democrats Gain Control of the Assembly—Senate Heads to 20-20 split*, STAR-LEDGER (Newark, N.J.), Nov. 7, 2001, at 013, *available at* 2001 WL 29565334.

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difficult task.

CRIMINAL PROCEDURE

As the United States Supreme Court has become more conservative in recent years, particularly in the area of criminal procedure, many state courts have turned to their own constitutions in order to grant greater rights to defendants. New Jersey has been a leader in this movement. As early as 1975, in a search and seizure case, *State v. Johnson*,[110] the New Jersey Supreme Court gave a defendant more protections than he would have received under the United States Constitution. *Johnson* dealt with the requirements for a voluntary consent to search. In *Schneckloth v. Bustamonte*,[111] the United States Supreme Court had held that knowledge of the right to refuse consent was just one factor in determining whether the consent was voluntary under the "totality of the circumstances" test.[112] The New Jersey Supreme Court, during the tenure of Chief Justice Hughes,[113] nonetheless, held that the waiver approach to consent should be used. Under the waiver test, the prosecution bears the burden of proving that the suspect knew he had the right to refuse consent. In light of *Schneckloth*, the New Jersey Supreme Court could not base its decision upon the Fourth Amendment of the federal constitution; instead, it rested the decision upon the New Jersey search and seizure provision, despite the fact that both provisions are virtually identical.[114]

The Wilentz court followed the trend initiated by the Hughes Court in a series of cases, diverging from the United States Supreme

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[110] 68 N.J. 349, 346 A.2d 66 (1975).

[111] 412 U.S. 218 (1973).

[112] *See generally* John B. Wefing & John G. Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211 (1974).

[113] Richard J. Hughes, a former Governor of the state from 1962-1970, was appointed Chief Justice in 1973.

[114] Article I, Paragraph 7, of the New Jersey Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Similarly, the Fourth Amendment to the Federal Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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Court's approach in *State v. Pierce*,[115] *State v. Tucker*,[116] *State v. Hempele*,[117] *State v. Novembrino*,[118] *State v. Hunt*,[119] and *State v. Alston*,[120] thus

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[115] 139 N.J. 184, 642 A.2d 947 (1994). In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court had held that, pursuant to any arrest of the driver of an automobile, the police could make a full search of the passenger portion of the automobile incident to the arrest. *Pierce* held that, at least in the case of an arrest for a traffic violation, there was no right to search the automobile.

[116] 136 N.J. 158, 642 A.2d 401 (1994). In *California v. Hodari D.*, 499 U.S. 621 (1991), the United States Supreme Court had held that police who are chasing a suspect, even if they do not have probable cause to arrest or articulable suspicion to justify detention, may seize any item thrown away by the suspect. In *Tucker*, the New Jersey Supreme Court refused to follow *Hodari D.* and held that police may not seize an item which has been discarded unless they had at least articulable suspicion to forcibly detain.

[117] 120 N.J. 182, 576 A.2d 793 (1990). In *California v. Greenwood*, 486 U.S. 35 (1998), the United States Supreme Court held that it was not necessary to obtain a warrant to search a garbage can which had been left at the curb. The vast majority of states dealing with the same issue had also permitted such searches. But in *Henpele*, the New Jersey Supreme Court, relying upon the expectation of privacy doctrine (that doctrine had also been relied upon by the United States Supreme Court), found that there was an expectation of privacy in one's garbage and mandated that the police obtain a warrant before searching a garbage can. The Court did permit the government to seize the garbage and hold it pending the outcome of a hearing to determine whether there is probable cause to issue a warrant for the search of the garbage.

[118] 105 N.J. 95, 519 A.2d 820 (1986). In *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court adopted a good faith exception to the exclusionary rule, the doctrine which requires the suppression of any evidence which has been unconstitutionally obtained. In *Leon*, the Court created an exception to that doctrine in those cases in which the police were relying upon a warrant which had been issued by a judge. The court limited the deterrence rationale of the exclusionary rule to deterrence of police. The New Jersey Supreme Court in *Novembrino* rejected the good faith exception.

Interestingly, however, in that same case the New Jersey Supreme Court did accept another change by the United States Supreme Court. In *Illinois v. Gates*, 462 U.S. 213 (1983) the United States Supreme Court had rejected a previous test for determining the existence of probable cause—the *Aguilar-Spinelli* test—and adopted a new test—the totality of the circumstances. This test made it easier to find the existence of probable cause. *Novembrino*, however, accepted the totality of the circumstances test. Therefore the Court has not always rejected the more conservative approaches of the United States Supreme Court.

[119] 91 N.J. 338, 450 A.2d 952 (1982). In *Smith v. Maryland*, 442 U.S. 735 (1979), the United States Supreme Court dealt with a pen register, a device which permits the police to learn the numbers called from a particular telephone. The Supreme Court rejected the argument that the police had to have a warrant because there was no expectation of privacy in the numbers dialed. In *Hunt*, a case dealing with obtaining toll billing records from the telephone company, the New Jersey Supreme Court held that a warrant was necessary.

[120] 88 N.J. 211, 440 A.2d 1311 (1981). In *Rakas v. Illinois*, 439 U.S. 128 (1978), and *United States v. Salvucci*, 448 U.S. 83 (1980), the United States Supreme Court had narrowed the standing doctrine so that fewer defendants had standing to raise issues concerning the validity of searches. The New Jersey Supreme Court in *Alston* rejected both those decisions and permitted broader access to defendants to gain

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establishing a strong legacy for the independent interpretation of the state's search and seizure provision to the benefit of defendants.

Chief Justice Poritz's first two opinions regarding search and seizure rights seemed less protective of defendants than the Wilentz court. These included *New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*,[121] which unanimously held that New Jersey Transit officers are subject to random drug testing, and *In re J.G.*,[122] which unanimously upheld the provision of a New Jersey statute requiring sex offenders to submit to serological tests for AIDS or HIV infection upon a victim's request. In both cases the court relied upon the "special needs doctrine" developed by the United States Supreme Court.[123]

Recently, in *Joye v. Hunterdon Central Regional Board of Education*,[124] the court returned to the issue of "special needs" in the context of random drug testing of students. This 4-3 decision demonstrated the Court's willingness to favor governmental interests over individual ones under certain limited circumstances. In *Joye*, the court considered the constitutionality of a random drug testing program that defendant Hunterdon Central Board of Education implemented to test students for signs of drug use if they participated in athletics or other extracurricular activities such as the marching band and chess club. The program also included students who had been granted a parking permit by the school. The plaintiff parents and students conceding that the program would be constitutional under federal Fourth Amendment precedent[125] instead challenged the program under Article I, Paragraph 7[126] of the New Jersey Constitution.

Justice Verniero, writing for a majority of the court consisting of Chief Justice Poritz and Justices Coleman and Zazzali, concluded that the random drug testing program at issue was not an unreasonable search and seizure under the New Jersey Constitution. In choosing how to evaluate the state provision, the court looked to the United

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standing to challenge the validity of a search. However, in that case, the New Jersey Supreme Court followed another decision of the United States Supreme Court, *Chambers v. Maroney*, 399 U.S. 42 (1970), dealing with the mobility doctrine in automobile searches.

[121] 151 N.J. 531, 701 A.2d 1243 (1997).

[122] 151 N.J. 565, 701 A 2d 1260 (1997).

[123] *See generally* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S.602 (1989); Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989) (permitting drug testing without particularized suspicion in certain special circumstances).

[124] Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 826 A.2d 624 (2003).

[125] *Joye*, 176 N.J. at 583, 826 A.2d at 633.

[126] See *supra* note 114 for the text of the provision.

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States Supreme Court's decisions in *Vernonia School District 47J v. Acton*[127] and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*[128] as guidelines on how to apply the "special needs doctrine." The special needs doctrine allows a search or seizure to be considered reasonable even if there is no particularized suspicion of wrongdoing by an individual. Thus, in certain "special" circumstances, warrants and probable cause are not required. Applying the test, the court noted that both the United States Supreme Court and it have generally held that schoolchildren have a lesser expectation of privacy than adults and that the school district has the *in loco parentis* responsibility to care for the students during the school day.[129] The "unique" circumstances of the school setting justified treating it as a "special" setting, not subject to same level of protection as adults would expect. The majority was also impressed by an extensive record of studies and surveys that, while not conclusively proving the existence of a drug problem, did not contradict the existence of such a problem either. The probable existence of a drug problem and the purported effect of random drug testing to mitigate that problem were enough to uphold the program. The Court also noted that the procedures surrounding the testing were done in a non-intrusive manner and gave greater personal privacy than the process employed in the cases approved by the United States Supreme Court. Furthermore, the testing program does not expose students to criminal liability.[130] Additionally, the

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[127] 515 U.S. 646 (1995).

[128] 536 U.S. 822 (2002).

[129] This was the result of the decisions of the New Jersey Supreme Court, *State ex rel T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983), and the United States Supreme Court, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The New Jersey Court held that, since the high school teachers and administrators were governmental officials, the Fourth Amendment was applicable to the school setting. It, however, also held that, because of the unique relationship between schools officials and students, there was a lesser expectation of privacy and therefore a search could be conducted without a warrant and with a lesser standard of suspicion – it was not necessary to show probable cause but only reasonable grounds. The United States Supreme Court concurred with both of these positions of the New Jersey Supreme Court. It differed, however, on the factual analysis of whether the search in that particular case actually met that lesser standard. The New Jersey Supreme Court held that it did not, while the United States Supreme Court held that it did.

[130] The test results are treated as a "confidential health record pursuant to regulations of the New Jersey Department of Education." *Joye*, 176 N.J. at 580-81, 826 A.2d at 631-32. Those records can only be disclosed as permitted by federal regulations. N.J. ADMIN. CODE tit. 6A § 16-1.5(c)(2) (2003). Under the current federal regulations, "no record . . . may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient." 42 C.F.R. §§ 2.1(c), 2.2(c). Thus, the test results are used for the sole purpose of

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court stated that its holding was limited to programs where an extensive record revealed the probable existence of an actual drug problem. In response to the plaintiffs' contention that this decision would signify a departure from the court's established practice of granting greater rights under the New Jersey Constitution than the Federal Constitution, the court noted that it typically granted greater rights only for "cases in which a citizen was exposed to criminal liability, with the [c]ourt concluding that local conditions required departure from federal jurisprudence."[131] Random drug testing of students for which there was no possibility of criminal liability was not one of those cases.[132]

The dissent, after describing the preference for warrants and probable case in search and seizure jurisprudence, took issue with the majority's refusal to first consider whether it would be impractical for Hunterdon Central to implement a drug testing system based on individualized suspicion before applying the balancing-of-interests step of the special needs doctrine. Justice LaVecchia, joined by Justices Long and Albin, in dissent, was concerned that ignoring the preference for individualized suspicion would teach students that searches without probable cause were all right. And even if the school district had a special need to override the preference, the dissent found the record to be wholly inadequate to prove the existence of a drug problem and so would not have found for the defendant school district. Furthermore, Justice LaVecchia was concerned that subjecting students in extracurricular activities to random drug testing would drive away the very students most in need of extracurricular activities as a way to improve their lives.

While the majority of the Court in this case seems to be taking a more conservative position, it carefully noted that it was not automatically approving searches of students but would demand a significant record similar to that developed in the instant case. Furthermore, Justice Verniero said "we do not signal a retreat from this Court's history of affording citizens enhanced protections under our state's constitution."[133]

In fact in the past few years, the Poritz court has regularly used the search and seizure provision of the New Jersey Constitution to

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determining whether a student should be disqualified from participation in extracurricular activities or be banned from receiving a parking permit.

[131] *Joye*, 176 N.J. at 608, 826 A.2d at 649.

[132] *Id.*

[133] *Id.*, 176 N.J. at 573, 826 A.2d at 627.

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grant greater rights to defendants. In *State v. Maryland*,[134] Justice Coleman, speaking for a unanimous court, modified the law dealing with field interrogation to the defendant's advantage. In field interrogation, law enforcement officers may approach and question citizens on the street without any suspicion; but, they do not have the right to detain an individual who opts not to respond to the questioning. The court held that, while there is usually no need for an officer to justify conducting a field interrogation, if the officer's motivation is improper, the approach is invalid. Justice Coleman commented:

> We do not intend to suggest that ordinarily a proper field inquiry could not be based on a hunch. But that rationale will not do here. Because the totality of the record suggests that the hunch itself was, in our view, at least in part based on racial stereotyping, it was insufficient to rebut the inference of selective law enforcement that tainted the police conduct.[135]

The New Jersey Supreme Court, under Justice Poritz, again showed its protectiveness of defendants' rights in *State v. Cooke*,[136] a unanimous decision. *Cooke* dealt with the search of a car. Under the United States Supreme Court decision, *Carroll v. United States*,[137] police may permissibly search an automobile if they have probable cause to believe there is evidence within it.[138] The Court's rationale was that the mobility of an automobile creates an exigency, which permits the police to dispense with the warrant requirement. Subsequently, the Court broadened the rule even further, permitting a search of an automobile if there is probable cause to believe there is evidence in the automobile, even in the absence of exigent circumstances.[139] Justice Verniero, however, writing for the New Jersey Supreme Court in *Cooke*, relied on the New Jersey Constitution: "We decline to reach

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[134] 167 N.J. 471, 771 A.2d 1220 (2001).

[135] *Id.* at 486, 771 A.2d at 1229.

[136] 163 N.J. 657, 751 A.2d 315 (2000).

[137] 267 U.S. 132 (1925).

[138] *See generally* John G. Miles & John B. Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105 (1972).

[139] In *Pennsylvania v. Labron*, 518 U.S. 938 (1996), the Court said:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based upon the automobile's "ready mobility," an exigency sufficient to excuse the failure to obtain a search warrant once probable cause to conduct the search is clear. More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation.

Id. at 940 (internal citations omitted); *see also* Maryland v. Dyson, 527 U.S. 465 (1999).

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a similar conclusion under the New Jersey Constitution. Instead, we conclude that the automobile exception under the New Jersey law requires both probable cause and a finding of exigent circumstances to sustain a warrantless search of a vehicle."[140]

In contrast, *State v. Stovall*,[141] a search and seizure case dealing with the stop of passengers getting off a plane based on suspicion that they were drug couriers, showed moderation rather than liberalism. The court held that the use of a drug courier profile was not automatically improper, finding it necessary to examine all the facts of the case. Because the officers had denied the suspects the right to leave, the court had to find the existence of articulable suspicion to justify the stop. While lower courts in New Jersey had held that the officers impermissibly relied on a drug courier profile, the New Jersey Supreme Court said:

> Nothing in the record indicates that Detective Benoit relied on a "drug courier profile." Even if he had, however, the characteristics contained in such a profile are permissible factors to be considered in the totality of the circumstances analysis of reasonable suspicion. A "drug courier profile" is a "compilation[] of objective factors which may be innocent alone, but in conjunction with each other or other facts, lead officers to believe that the suspect is engaging in drug trafficking."[142]

In this case, the court relied upon decisions of the United States Supreme Court and other state courts; thus, it did not need to utilize the New Jersey Constitution to grant greater rights to the defendant. The court conducted a fact sensitive analysis, which required it to examine all the information known by the officers and decide whether these facts added up to reasonable suspicion. The court ultimately decided that the information did rise to this level.[143] Justice Coleman, in a dissenting opinion joined by Justice Stein, felt that the factors cited by the majority did not constitute sufficient reasonable suspicion to justify detention.[144] With Justices Long and Verniero not participating, the court ended up in a closely divided 3-2 decision.

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[140] *Cooke*, 163 N.J. at 661, 751 A.2d at 94. The Court further said: "[A]lthough we have previously acknowledged that there is a lesser expectation of privacy in one's automobile, we do not believe that those expectations are diminished to the point that they may constitute the sole justification for a warrantless search. *Id.* at 670, 751 A.2d at 99 (internal citation omitted).

[141] 170 N.J. 346, 788 A.2d 746 (2002).

[142] *Id.* at 358-59, 788 A.2d at 753 (alteration in original) (internal citations omitted) (quoting Kimberly J. Winbush, Annotation, *Propriety of Stop and Search by Law Enforcement Officers Based Solely on Drug Courier Profile*, 37 A.L.R. 5th 1, 11 (1996)).

[143] *Id.* at 369-70, 788 A.2d at 760.

[144] *Id.* at 382, 788 A.2d at 767 (Coleman, J., dissenting).

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State v. Johnson[145] further demonstrates the New Jersey Supreme Court's sensitivity to defendants' rights in search and seizure cases. *Johnson* considered the justification necessary for a "no-knock warrant," which permits the officers executing the warrant to enter the premises without knocking.[146] In that case, the police had received reliable information that drugs were being sold from a particular apartment. The only testimony supporting the no-knock aspect of the warrant was from the officer himself, who stated that the exception was needed to ensure his safety and to ensure that the evidence was not destroyed. Such reasons are normally sufficient justifications for a executing a no-knock warrant. However, the simple allegation of these concerns is insufficient. The court recognized that the exception would swallow the rule if a no-knock warrant would issue any time police simply alleged either safety of the officer or potential destruction of the evidence. The court said "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement."[147] The court then applied a "reasonable suspicion" test, stating: "the police must have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[148]

In *State v. Carty*,[149] the court dramatically altered traditional consent search law, again in favor of defendants. According to black letter law, consent eliminates both the warrant and the probable cause requirements.

> As early as 1921, the Supreme Court [of the United States] recognized that a valid consent waives the protections afforded by the Fourth Amendment. The theory behind this rule is that once a person consents to a search of a given area she surrenders her expectation of privacy in that area. Thus a valid consent

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[145] 168 N.J. 608, 775 A.2d 1273 (2001).

[146] Referring to *Miller v. United States*, 357 U.S. 301 (1958), the Court recognized the importance of the traditional knock and announce rule. "The requirement that law enforcement officers knock and announce their presence before entering a dwelling predates our federal and State Constitutions. As a long-standing component of the common law, the 'knock-and-announce' rule reflects 'the ancient adage that a man's house is his castle.'" 168 N.J. at 615, 775 A.2d at 1277.

[147] *Johnson*, 168 N.J. at 617, 775 A.2d at 1278-79.

[148] *Id.*

[149] 170 N.J. 632, 790 A.2d 903 (2002). In *State v. Carty*, 174 N.J. 351, 806 A.2d 798 (2002) (*Carty II*), the Court modified the retroactive effect of the *Carty* decision to apply back to the date of the Appellate Division's original decision in the case.

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eliminates both the warrant and suspicion requirements for searches.[150]

Many courts agree that any consent to search, which is given knowingly and voluntarily, eliminates the need for either a warrant or any individualized suspicion. The New Jersey Supreme Court, however, departed company from this rule and determined that, "in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle."[151] The *Carty* opinion, written by Justice Coleman for a unanimous five person court,[152] relied upon the New Jersey Constitution. The court recognized that, although the defendant's consent met the "knowing" and "voluntary" requirements articulated in *State v. Johnson*,[153] problems still persisted.

Drivers who are stopped for minor traffic violations can be asked to consent to a search. Individuals may realize that failure to consent may result in a citation, whereas consent may lead to a mere warning. These circumstances, coupled with the inevitable feeling of obligation to consent created by the police-citizen encounter, create an element of coercion in the police obtaining permission for the search. The court cited its earlier opinion in *Johnson* stating " 'many persons, perhaps most, would view the request of a police officer to make a search as having the force of law'."[154] The court further cited statistics indicating that in 80% of cases a party who consents to the search is not guilty of any wrongdoing. The court then concluded that "consent searches following a lawful stop of a motor vehicle should not be deemed valid under *Johnson* unless there is reasonable and articulable suspicion to believe that an errant motorist has engaged in, or is about to engage in, criminal activity."[155] Thus, the New Jersey Supreme Court became the first court in the country to mandate reasonable and articulable suspicion before approving a consent search in that situation. The court did, however, cite a

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[150] Charles H. Whitebread & Christopher Slobogin, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS, (4th ed. 2000).

[151] *Carty*, 170 N.J. at 635, 790 A.2d at 905.

[152] Justices Verniero and LaVecchia did not participate and Justice Stein wrote a concurring opinion.

[153] 68 N.J. 349, 346 A.2d 66 (1975).

[154] *Carty*, 170 N.J. at 644, 790 A.2d at 910 (quoting *Johnson*, 68 N.J. at 354, 346 A.2d at 68).

[155] *Id.* at 647, 790 A.2d at 912. The court further found that mere nervousness was not sufficient to constitute reasonable and articulable suspicion. *Id.* at 648, 790 A.2d at 912-13.

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Hawaii Supreme Court case, *State v. Quino*, for support.[156] *Quino*, while similar in some respects, involved an airport encounter in which the police questioned passengers and requested consent to search. Those passengers were obviously not properly stopped as a result of a traffic violation. So, while the Hawaii case clearly lends some support for the position taken by the New Jersey Supreme Court, the court still stands essentially alone for the specific doctrine it developed in *Carty*. The majority opinion of *Carty* also referenced the recent World Trade Center attacks on September 11, 2001, indicating that nothing in this decision would affect "the principles enunciated in various state and federal cases that allow roadblocks, checkpoints and the like based on a concern for public safety."[157]

Justice Stein concurred in *Carty*. However, he argued that the judgment should not be based on the New Jersey Constitution. Rather, he felt that the court should order the decision as "simply a prophylactic rule of law adopted by this Court for the purpose of preventing abuses of the power of law enforcement officers to request motorists to consent to searches of their motor vehicles."[158] This approach would permit the state legislature to overrule the court if it believed the court's position to be incorrect. In light of this concurrence, perhaps the majority specifically chose to utilize the New Jersey Constitution in order to avoid this possibility.

While not directly mentioned in the opinion, the larger issue of racial profiling lurks in the background of the *Carty* case. For the past few years, racial profiling has been a hotly debated subject in New Jersey. The state police have repeatedly been accused of engaging in such profiling, resulting in significant investigations and studies. Inevitably, this context influenced the Justices in deciding the case. Clearly, *Carty* is likely to lead to a decrease in racial profiling incidents. If police are required to demonstrate justification for conducting a search, they will be discouraged from stopping cars in the hopes of finding contraband. On the other hand, the decision may also decrease police effectiveness in discovering contraband.

In *State v. Johnson*[159], the Court, in a four-three decision, faced an interesting question concerning plain view searches and showed that it does not always interpret facts in the most liberal manner. *Johnson* may demonstrate that the court, while concerned about defendants'

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[156] State v. Quino, 840 P.2d 358, 364-65 (Haw. 1992).
[157] *Carty*, 170 N.J. at 652, 790 A.2d at 915.
[158] *Id.* at 656, 790 A.2d at 917 (Stein, J., concurring).
[159] 171 N.J. 192, 793 A.2d 619 (2002).

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rights, is still split on the balance between those rights and the right of society to investigate crime. In that case, a police officer, while on patrol, had been informed by a citizen, who would not give his name, that he had observed "Drew," a black male, selling crack cocaine in small zip-lock baggies at a particular location known for drug use. The officer immediately proceeded to that location, but, when he arrived, he heard someone shout "Five-O" – a signal to flee. The officer and his partner, with flashlights and lights from the police car, viewed a porch where they saw the defendant, whom they recognized from a past narcotics investigation. The officer then observed the defendant place an object near a support post of the porch. He testified that the object was "light colored." The officer climbed the steps, aimed his flashlight at the spot, and discovered a hole a few inches deep at the base of the post. He then "retrieved" the "light-colored" object from the hole by the post. The object was ultimately found to contain crack cocaine.

Justice Coleman, for the Court, joined by the Chief Justice and Justices LaVecchia and Zazzali, discussed the testimony taken at the suppression hearing:

> [T]he motion judge asked [the officer]: "When you shined your flashlight, what did you see with the beam of the flashlight illuminating?" [The officer] answered: "I saw the package of suspected CDS right there." The motion judge further asked: "Is that what it appeared to you?" [The officer] answered: "Yes." The prosecutor also asked [the officer]: "Based on all of the circumstances that you were faced with at the time that you saw [the defendant] stuffing an unknown object into the hole, what did you believe was going on?" [The officer] answered: I believed he was attempting to conceal narcotics." In response to a question propounded by defense counsel, [the officer] stated that a zip-lock baggie is often used as a container for crack cocaine.[160]

The trial court found the officer's testimony to be credible and accepted it as true; but the trial court still found that it neither met the requirements of the plain view rule, nor was there probable cause for an arrest or a search. The Appellate Division, in a split decision, affirmed suppression of the evidence. In reviewing the case, the Supreme Court found there was ambiguity in the record made by the trial court judge. Then, in an unusual decision, the court remanded the case for further findings of fact.[161] The court later described its

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[160] *Id.* at 201, 793 A.2d at 624.

[161] State v. Johnson, 170 N.J. 385, 385, 788 A.2d 770, 770 (order remanding the case for the trial court "to conduct a conference with counsel for the State and for the defense, on the record, to specify the nature, size, and color of the bag and its

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actions as follows:

> On the remand, we directed the trial court "to conduct a conference with counsel for the State and for the defense, on the record to specify the nature, size and color of the bag and its contents seized by the police" from the hole beside the post. *The trial court stated that the evidence was not produced at the original suppression hearing.* The [trial] court observed the evidence on remand and described it as:
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> > A clear plastic-like bag, of thin texture, containing fifteen one-half inch by three-quarter inch pink plastic baggies, each of which contain [sic] a tan or a cream colored substance. The bag is soft and wrinkled making it difficult to discern the contained baggies. . . . [I]t is estimated that its dimensions approximate two inches by two and one-half to three inches. . . . At a distance of a few feet it would be reasonable to describe the bag and its contents as simply a "light colored object."[162]

The court then stated it would use that additional information when analyzing the case. The court went on to conclude that the officers had a right to be where they were when they observed the objects. While the porch is part of the curtilage, there is still a diminished expectation of privacy in a porch, as opposed to the house itself. Based on the additional information at the second hearing before the trial judge, the court found that the physical evidence at issue was a clear plastic bag. However, the court noted that the officer had failed to "testify that he saw crack-cocaine inside that bag before seizing it."[163]

The court then considered whether there was probable cause. Evaluating all the facts and circumstances, which included the description of the bag elicited at the second hearing before the trial judge, the court concluded that there was probable cause: not probable cause to seize the container, but probable cause that, once

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contents"). The court did not discuss its decision to supplement the record in this case. It appears to provide the prosecution another chance to present its evidence. In a motion to suppress evidence where the search is carried out without a warrant, the burden of proof is on the prosecution. State v. Gaudiosi, 97 N.J. Super 565, 235 A.2d 680 (App. Div. 1967). In Johnson, however, the trial judge found, and the majority of the Appellate Division affirmed, that the evidence in the record was insufficient to justify the seizure and search of the container. The Supreme Court then sought clarification of that record and the trial judge supplemented the record with information not previously in the record. This seems inconsistent with normal practice.

[162] *Johnson*, 171 N.J. at 204, 793 A.2d at 626 (emphasis added) ("sic" in original).

[163] *Id.* at 214, 793 A.2d at 632.

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the officer saw the container, it constituted incriminating evidence under the plain view rule. Therefore, the court found that all three elements of the plain view test were met: the officers had the right to be on the porch; the evidence was discovered inadvertently;[164] and, "the incriminating nature of the 'light-colored' object was immediately apparent based on probable cause after the object was visualized in the hole by [the officer]."[165]

Justice Long, joined by Justices Stein and Verniero, rejected the majority's decision that the evidence was in plain view as required by that doctrine. She explained:

> According to his own testimony, what the officer saw on the porch was essentially nothing more than what he had seen from the street—a closed container whose contents were hidden from his eyes. If he lacked probable cause to arrest [the defendant], that closed container, which did not reveal its contents, could have provided no additional evidence to justify the probable cause prong of plain view and justify the seizure.[166]

In 2002, the New Jersey Supreme Court decided a significant number of search and seizure cases. Just as *Johnson* suggested some hesitancy by the court to be as defendant-oriented as in the past, *State v. Stott*[167] seemed to mark a return to a defendant-friendly approach. In that case, the court held that patients in state-run psychiatric hospitals have a right of privacy in jointly shared rooms, and therefore, police must obtain a warrant before they search the room for illegal drugs. The police had begun an investigation following one patient's death, which was caused by a drug overdose. The police questioned a number of the hospital's other patients, one of whom indicated that the roommate of the decedent, William Stott,[168] had been involved with drugs, and in fact had illegal drugs hidden in the hem of the curtain in the room he had shared with the decedent. Suspecting that the decedent might have overdosed on a combination of drugs, including the xanax supposedly stashed in the

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[164] In light of the United States Supreme Court decision in *Horton v. California*, 496 U.S. 128, (1990), it is questionable why the court felt it had to make the finding concerning inadvertence. Since that decision I have been teaching my students that inadvertence is not part of the requirements of the plain view rule. It may be that the previous New Jersey decision in *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), could be interpreted as continuing the requirement under New Jersey law. Justice Long in her dissenting opinion raised this same issue.

[165] *Johnson*, 171 N.J. at 220, 793 A.2d at 636.

[166] *Id.* at 222, 793 A.2d at 637 (Long, J., dissenting).

[167] 171 N.J. 343, 794 A.2d 120 (2002).

[168] Stott had been involuntarily committed to the psychiatric facility, Ancora, in September 1997 after attempting suicide.

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hem of the curtain, the officers entered the room and discovered the evidence exactly where they had been told it would be. The officers admitted that they could have posted a guard at the door and proceeded to obtain a warrant. Each resident had a lockable wardrobe in the room for his or her valuables. The trial judge upheld the search by denying the suppression motions and the appellate division affirmed.[169]

The Supreme Court, in a four-three decision, then reversed. The court acknowledged that it had previously recognized that individuals have lesser expectations of privacy in places like offices and cars than in their own homes, but it agreed with the "basic premise that a hospital room is more akin to one's home than to one's car or office."[170] The defendant had already been in the room for about two weeks, thus supporting the view that the room was more like a home than an office. Analogizing to situations in which guests were entitled to an expectation of privacy in another person's home, the Court reasoned that involuntarily committed patients in a state facility, who have not been committed based on a criminal conviction, have an expectation of privacy in their rooms. The court then went on to consider whether there were any exigent circumstances justifying the search without a warrant; however, it found none.[171]

The dissent, on the other hand, reasoned that there was no expectation of privacy under the circumstances of the case. Justice LaVecchia, writing for the dissent, stated:

> In my view, the privacy expectation of an involuntarily committed psychiatric patient to his room is not equivalent to the expectation of voluntary patient in a general acute care hospital. A heightened responsibility for protection against harm is

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[169] The case also had a *Miranda* issue concerning a statement made by the defendant.

[170] *Id.* at 355, 794 A.2d at 127.

[171] The Court went on to insulate its decision from review by the United States Supreme Court by saying:

> Finally, although we have applied federal case law in evaluating the search of defendant's room, we also conclude expressly that the search was impermissible under the New Jersey Constitution for the reasons already enunciated. In reaching that conclusion, the Court does not perceive that its disposition will hamper unduly the legitimate functions of law enforcement. As is true of so much of our search-and-seizure jurisprudence, the analysis that we have employed "is fact sensitive and offers no sure outcomes in future cases." Consequently, our holding is limited to the unique facts of this case.

Id. at 363-64, 794 A.2d at 132 (internal citation omitted) (quoting State v. Ravotto, 169 N.J. 227, 250, 777 A.2d 301, 315 (2001)).

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> imposed on those running the psychiatric institution, and that circumstance limits the involuntarily-committed patient's reasonable expectation of privacy.[172]

She also felt there were exigent circumstances justifying the warrantless search and thus would have affirmed the Appellate Division's "well-reasoned opinion."[173]

These very recent cases from the New Jersey Supreme Court show the court grappling with the competing interests of individual rights to privacy versus the needs of law enforcement. The New Jersey Supreme Court is obviously closely divided on how far to go in protecting defendants' rights to privacy. While it is clearly not prepared to totally disregard the interests of law enforcement,[174] the cases dealing with search and seizure overall show the court's willingness to give defendants substantially more protection than that afforded under the federal constitution or guaranteed in most other states.[175]

The New Jersey Supreme Court has also been defendant-oriented in other areas of criminal procedure. The Poritz Court, in *State v. Cromedy*,[176] held that the jury must be specifically instructed that there are special problems with cross-racial identifications, that is, that white witnesses often have difficulty making an accurate identification of a member of a minority group. In *Cromedy*, the court

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[172] *Stott*, 171 N.J. at 372, 794 A.2d at 137-38 (LaVecchia, J., dissenting).

[173] *Id.* at 376, 794 A.2d at 140 (LaVecchia, J., dissenting).

[174] See *State v. Neshina*, 175 N.J. 501, 816 A.2d 153 (2003), in which the Court found sufficient reasonable suspicion to justify the detention and questioning of an individual which led to probable cause based on the smell of marijuana.

[175] The New Jersey Supreme Court has never hesitated to strike out on its own. In another area of criminal law, the Court clearly showed its independence from both the United States Supreme Court and other state courts. *State v. Anderson*, 127 N.J. 191, 603 A.2d 928 (1992), addressed whether materiality in a perjury case could be decided by a judge or had to be decided by the jury. At that time, virtually all the state courts as well as the United States Supreme Court permitted materiality to be decided by the Judge. However, New Jersey declared it unconstitutional as a violation of a defendant's right to a trial by jury on all the elements of the crime. Subsequently, in *United States v. Gaudin*, 515 U.S. 506 (1995), the United States Supreme Court overruled its earlier approach and agreed with New Jersey, although without citing *Anderson*. Especially important is the language used in *Anderson*:

> We recognize that the vast majority of courts, including our own, considering the issue have found that the determination of materiality in perjury cases is a question of law to be resolved by the court. Our contrary conclusion invites the question: how could so many have been wrong for so long?

Anderson, 127 N.J. at 202, 603 A.2d at 933 (internal citation omitted). But the Court did not hesitate to go against that vast weight of prior precedent.

[176] 158 N.J. 112, 727 A.2d 457 (1999).

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adopted a position that had not been previously accepted by any other court in the country. In dealing with cross-racial identification, most other states had left the question to the discretion of the trial judge, who determines whether, under all the circumstances, such an instruction should be given.[177] The New Jersey Supreme Court, however, mandated that the jury be so instructed whenever the identification "is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."[178] In so ruling, the court clearly showed its concerns about eyewitness identification in general[179] and about cross-racial identification in particular.[180]

With respect to self-incrimination, the Wilentz Court adopted a more defendant-protective approach than the United States Supreme Court. In *State v. Reed*,[181] the court rejected the United States Supreme Court's approach in *Moran v. Burbine*[182] and granted greater rights to a defendant in a self-incrimination case. Both cases dealt with a situation in which a person was arrested, taken to the police station, and questioned after having waived his *Miranda*[183] rights. Each of the defendants then made inculpatory statements. In both cases an attorney had sought to represent the defendant and had communicated that to the police prior to the defendants' statements. The United States Supreme Court held that the confession was admissible in the *Moran* case, but, in *Reed*, the New Jersey Supreme

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[177] K. Suzanne Heisinger, Casenote, *State v. Cromedy*, 6 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 155, 160 (2000).

[178] *Cromedy*, 158 N.J at 132, 727 A.2d at 467.

[179] "Both legal authorities and researchers in the field of psychology have acknowledged the shortcomings of eyewitness identification evidence." Joy L. Lindo, Note, *New Jersey Jurors are No Longer Color-Blind Regarding Eyewitness Identification*, 30 SETON HALL L. REV. 1224, 1226 (2000).

[180] A well-known case from the United States Supreme Court demonstrates the problems with eyewitness identification, particularly in a cross-racial identification. In *Arizona v. Youngblood*, 488 U.S. 51 (1998), the police had negligently handled evidence that could have shown either guilt or innocence of the defendant. The defendant argued that loss of the evidence violated due process. The Supreme Court held that "unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. The primary remaining evidence that resulted in a conviction was eyewitness identification of a ten year old boy in a cross racial identification setting. Many years later, more sophisticated DNA testing permitted the testing of the evidence and demonstrated conclusively that Youngblood was not the perpetrator of the crime. Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12.

[181] 133 N.J. 237, 627 A.2d 630 (1993).

[182] 475 U.S. 412 (1986).

[183] Miranda v. Arizona, 384 U.S. 436 (1966).

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Court found such a confession to be inadmissible. There is no self-incrimination clause in the New Jersey Constitution, but the court recognized the existence of a common law right against self-incrimination, which had been codified as early as 1855.[184] The New Jersey Supreme Court thus placed a heavy burden on the government to demonstrate that a defendant had waived that right. The court went on to say:

> Our own jurisprudence and legal traditions, in light of the distinctive origin and development of the privilege against self-incrimination in New Jersey, impel us to maximize the protection of ancillary rights, including especially the right to counsel, to vindicate fully the privilege against self-incrimination.[185]

The court concluded that the waiver by the defendant, without being informed of the availability of counsel, violated the right against self-incrimination. Therefore, the New Jersey Supreme Court utilized its powers under both the state Constitution and the state common law to grant greater rights to defendants than had been recognized by the United States Supreme Court.

In *State v. Williams*,[186] the New Jersey Supreme Court had to grapple with a conflict between two constitutional rights: the right of a defendant to a fair trial warred with the right of the press and public to access to criminal proceedings. At the time of *Williams*, the United States Supreme Court had held that all trials, at least those of adults, should presumptively be open to the public and the press. However, the question faced by the New Jersey Court was whether pre-trial hearings should be open as well. The court was concerned that excessive pre-trial publicity would be exacerbated by open pre-trial hearings, thus endangering a defendant's right to a fair and impartial trial. In the two cases, which were consolidated for trial in this matter, the defendants had requested closed hearings since both were charged with egregious murders that had already received a great deal of publicity. The supreme court recognized the importance of the conflicting constitutional rights at issue,[187] but leaned toward the right of access by the public and the press, stating:

> [W]e adopt the following balancing test as to the closure of

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[184] 1855 N.J. Laws c. 236, § 4 (codified at N.J. STAT. ANN. § 2A:84A-19); *see also* N.J. R. EVID. 24, 25.

[185] *Reed*, 133 N.J. at 253, 627 A.2d at 638 (internal citation omitted).

[186] 93 N.J. 39, 459 A.2d 641 (1983).

[187] "The Courts of this State have consistently noted the constitutional concerns for the freedoms of expression." *Id.* at 58, 459 A.2d at 650. "The securing and preservation of an impartial jury goes to the very essence of a fair trial." *Id.* at 60, 459 A.2d at 652.

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> pretrial proceedings in criminal prosecutions: All pretrial proceedings in criminal prosecutions shall be open to the public and the press. In the context of these cases, the only exception to this rule will arise in instances in which the trial court is *clearly* satisfied that if the pretrial proceeding is conducted in open court there is a realistic likelihood of prejudice to a fair trial by an impartial jury as a result of adverse publicity, and further, that such prejudice can not be overcome by resort to various methods relating to the selection of jurors that will be available to the court at the time of trial.[188]

By using the language "*clearly* satisfied," the court created what appeared to be a heavy standard of proof for closing a pre-trial hearing. Therefore, the court seemed to side with the right of the press and the public to access, over the right of a defendant to a fair trial. In his dissent, Justice Schreiber argued:

> By according priority to the First Amendment, the majority of this Court has placed the First and Sixth Amendments in a different perspective from that adopted by the United States Supreme Court. . . . Moreover, the majority insists that the defendant "clearly" show a "realistic likelihood" that the defendant will be unable to obtain an impartial jury as a result of adverse publicity.[189]

The majority, however, felt that the trial judge, through a careful use of various procedural devices including *voir dire*, change of venue, "foreign" jurors and precise instructions to the jury, could adequately protect the rights of the defendants.[190]

While *State v. Williams* seemed to emphasize the rights of the press over the rights of the press over the right to fair trial, the recent decision by the New Jersey Supreme Court in *State v. Neulander*,[191] appears to shift back to protection of the right to fair trial. In that case, the Court dealt with a well-publicized prosecution of a rabbi who was accused of killing his wife. The prosecutor sought the death penalty. The first trial resulted in a hung jury. The trial court entered an order preventing media organizations from attempting to interview jurors until the retrial was completed. The Supreme Court affirmed this order, holding that defendant's Sixth Amendment right to a fair trial trumped the media's First Amendment rights until the retrial was completed. The Court, however, clearly indicated that this was a limited intrusion upon the rights of the press:

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[188] *Id.* at 63, 459 A.2d at 653-54 (emphasis added).

[189] *Id.* at 76-77, 459 A.2d at 660-61 (Schreiber, J., dissenting).

[190] *Id.* at 63-73, 459 A.2d at 653-59.

[191] 173 N.J. 193, 801 A.2d 255 (2002).

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> The unwelcome limitation that we impose on the media in this matter does not diminish in the slightest the high value that this Court traditionally has accorded to the media's right to have access to and report on criminal proceedings, under both the federal and state constitutions. Nevertheless, our pragmatic understanding of and long experience in death penalty appellate litigation impel us to intervene in order to avoid Sixth Amendment issues that inevitably would be raised if we stayed our hand.[192]

Chief Justice Wilentz wrote one opinion, *Doe v. Poritz*,[193] a case dealing with Megan's Law, which may suggest a somewhat more conservative approach in the area of defendants' rights. Megan's Law mandated that certain convicted sex-offenders, even after they had completed their sentences, register with the police in the community in which they were living, and also required the chief of police to notify groups within the community of the registrant's presence there.[194] This law was challenged on a number of constitutional grounds. While the court imposed a number of procedural protections,[195] it essentially upheld the legislation against

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[192] *Neulander*, 173 N.J. at 222, 801 A.2d at 274 (internal citation omitted).

[193] 142 N.J. 1, 662 A.2d 367 (1995).

[194] Megan's law in New Jersey encompassed a number of statutes but the centerpiece was the registration of sex offenders and a three part system of required notifications. If the risk of re-offense is low then the person is placed in tier one; if the risk of re-offense is moderate then the person is placed in tier two; and if the risk of re-offense is high then the person is placed in tier three. If the offender is placed in tier one, the chief of police notifies only those law enforcement agencies likely to have dealings with the offender. If the offender is placed in tier two, the chief must also notify local community organizations such as schools, religious institutions and youth groups. If the offender is placed in tier three, the chief must also notify the public by appropriate methods to reach anyone likely to encounter the registrant. *See generally* Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29 (1996); *see also* Robert Lee Hornby, Note, *New Jersey Sexually Violent Predator Act: Civil Commitment Of The Sexually Abnormal*, 24 SETON HALL LEGIS. J. 473 (2000).

[195] The Court described the protections:

> The most significant change, of course, is the requirement, on application, of judicial review of the Tier classification and the manner of notification prior to actual notification. Because we have concluded that despite its constitutionality, the statute sufficiently impinges on liberty interests to trigger both procedural due process and the fairness doctrine in our state, those subject to the statute are entitled to the protection of procedures designed to assure that the risk of reoffense and the extent of notification are fairly evaluated before Tier Two or Tier Three notification is implemented. Although the provisions of the statute and the implementing Guidelines are obviously designed to assure such evaluation, and although there is no reason to believe that

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constitutional attack. The central tenet of the decision was that the registration and notification were not punishment; rather, they were a means of protecting society.

At the time of this decision, federal courts were also considering the law's validity under the federal constitution. Although a number of the federal district courts found that constitutional problems existed, particularly under the *ex post facto* clause, ultimately the United States Court of Appeals for the Third Circuit upheld the validity of Megan's law. The Third Circuit concurred with the New Jersey Supreme Court that the notification did not constitute punishment,[196] and also required certain procedural safeguards.[197] In *Smith v. Doe*,[198] the United States Supreme Court upheld the validity of Alaska's Megan's Law. The majority held it was not punitive and therefore the *ex post facto* argument failed.

While the New Jersey Supreme Court, as noted in the abortion context, has given the right of privacy a broad reading, it did not find it necessary to read that right so broadly as to encompass the rights of former sex-offenders to avoid public exposure.

THE BOY SCOUT CASE

In *Dale v. Boy Scouts of America*,[199] the New Jersey Supreme Court broadly interpreted the state's discrimination law to rule that the Boys Scouts must permit an openly gay person to serve as an adult leader. The court held that the Boy Scouts is a "place of public accommodation" under the Law Against Discrimination,[200] and, as such, the organization cannot discriminate against a person based on "affectional or sexual orientation." The court further held that its

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> the prosecutors and other law enforcement personnel charged with the decision-making power that controls both the level of notification and the specific steps that will determine the amount of notification will not discharge their duties competently and fairly, we have concluded that judicial review through a summary proceeding should be available prior to notification if sought by any person covered by the law.

Doe, 142 N.J. at 30, 662 A.2d at 382 (internal cross-reference omitted).

[196] *See generally* Artway v. Attorney General of N.J., 81 F. 3d 1235 (3d Cir. 1996); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).); *see also* David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home Of Beautiful Scenery (And A Convicted Sex Offender): Sex Offender Registration And Notification Laws In* E.B. V. Verniero, 43 VILL. L. REV. 581 (1998).

[197] *See generally* Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999); Paul P. v. Farmer, 277 F. 3d 98 (3d Cir. 2000).

[198] 538 U.S. 84 (2003); *see also* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

[199] 160 N.J. 562, 734 A.2d 1196 (1999).

[200] N.J. STAT. ANN. § 10:5-1 - 49.

decision did not violate the Boy Scouts' First Amendment rights. The case was subsequently reversed by the United States Supreme Court, in a five-four opinion,[201] which found that the Boy Scouts have a right of expressive association, guaranteed under the First Amendment, and that requiring the organization to accept someone who did not accept the principles of the association violated this right.[202] The New Jersey Supreme Court was the first court in the country to hold that the Boy Scouts could not prevent an openly homosexual man from serving as a scout leader.[203] Thus, the court balanced the right of association, which emanates from the free speech clause, with the right against discrimination. While the New Jersey Supreme Court has broadly expanded the free speech clause of the New Jersey Constitution in several cases,[204] in *Dale* the court limited free speech rights of association because they conflicted with freedom from discrimination.[205] The United States Supreme Court, on the other hand, found that free speech rights trump freedom from discrimination.

HATE CRIMES LEGISLATION

In *New Jersey v. Apprendi*,[206] the New Jersey Supreme Court again had to choose between two liberal concepts. The first concept,

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[201] Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Chief Justice Rehnquist wrote the opinion for the majority joined by Justices O'Connor, Scalia, Kennedy and Thomas. The dissenters were Justices Stevens, Souter, Ginsberg and Breyer.

[202] *Id.* at 655-61.

[203] "An interesting aspect of *Dale* is that the New Jersey Supreme Court became the first State Supreme Court to hold that the Boy Scouts is a place of public accommodation, and thus subject to a public accommodations law. No federal appellate court had reached such a holding. In fact, four other state supreme courts have reached the opposite conclusion. The United States Supreme Court did not state a holding on this particular issue [since this was a matter of state law]. However, the Court did mention how 'extremely broad' the definition of a public accommodation had been stretched by New Jersey." Jacob M. Carpenter, Casenote, Dale v. Boy Scouts of America*: Whether the Application of New Jersey's Public Accommodations Law, Forcing the Boy Scouts to Include an Avowed Homosexual, Violates the Scouts' First Amendment Freedom of Expressive Association*, 52 MERCER L. REV. 745, 757-58 (2001).

[204] *See infra* discussion in the text accompanying notes 212-34. .

[205] Justice Poritz, speaking for the New Jersey Supreme Court, which was unanimous as to result (although Justice Handler filed a concurring opinion), said: "The overarching goal of the [Law Against Discrimination] is nothing less than the eradication of the cancer of discrimination. . . . Discrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey] but menaces the institutions and foundation of a free democratic state." *Dale*, 160 N.J. at 585, 734 A.2d at 1208 (internal citations omitted) (internal quotation marks omitted).

[206] 159 N.J. 7, 731 A.2d 485 (1999).

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mandated by the Due Process clause, was the requirement that the government prove all elements of a crime to the satisfaction of a jury beyond a reasonable doubt.[207] The second concept was the notion that a court should support legislation with the primary focus of preventing hate crimes. Under the New Jersey law on hate crimes, the state was permitted to significantly increase the punishment for an assault and battery[208] if a judge found, by a preponderance of the evidence, that the motivation for the crime was racial bias.[209] The New Jersey Court upheld this approach. However, the United States Supreme Court held that due process required that a factor which could increase the sentence had to be treated as an element of the crime; therefore, it had to be proven by the prosecution beyond a reasonable doubt to a jury. In short, when confronted with a conflict between the two ideas, the New Jersey Supreme Court chose to support hate crime legislation. Yet, as in *Dale*, the decision was ultimately overruled by the United States Supreme Court, which ruled in favor of proof beyond a reasonable doubt.[210] Subsequently, the New Jersey Legislature passed legislation enhancing penalties for hate crimes, but required that the issues involved be resolved by the jury beyond a reasonable doubt.[211]

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[207] The United States Supreme Court decisions in this area are admittedly not terribly clear and may ultimately prove unworkable. The New Jersey Supreme Court relied upon decisions of the United States Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), both 5-4 opinions allowing judges to make decisions which should arguably have been decided by the jury. In light of those decisions, the New Jersey's result was quite reasonable. However, with Justice Thomas's shift in *Jones v. United States*, 526 U.S. 227 (1999), essentially joining the four previous dissenters, the Court could have predicted that the United States Supreme Court would overturn its decision. The majority opinion of the New Jersey Supreme Court virtually ignored *Jones*, despite the arguments of the dissent. This suggests that the court was more interested in affirming its support for hate crime legislation than attempting to assess the United States Supreme Court's approach to the necessity for a jury determination of the presence of the hate crime motivation.

[208] This statute had been upheld in *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257 (1994), over the objection that it violated First Amendment protections for free speech. In the clash between two liberal values—freedom of speech and eliminating racial bias— New Jersey opted for eliminating racial bias. It was, however, following the approach of the United States Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which held that a penalty-enhancement statute regulated conduct and not expression and thus did not violate the First Amendment.

[209] N.J. STAT. ANN. § 2C:44-3(e).

[210] Apprendi v. New Jersey, 530 U.S. 466 (2000). *See generally*, R. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. ___ (forthcoming 2004).

[211] N.J. STAT. ANN. § 2C:44-3 (as amended, L.2001, c. 443 § 8, eff. Jan. 11, 2002).

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FREEDOM OF SPEECH

The Wilentz Court's opinion in *New Jersey Coalition Against the War in the Middle East v. J,M.B. Realty*[212] expanded the meaning of the free speech provision of the New Jersey Constitution beyond that of the First Amendment in the United States Constitution.[213] The court held that a privately-owned regional mall[214] could not prohibit persons from handing out leaflets. It held that the mall had become the equivalent of the town square, which was a public place for purposes of free speech analysis.[215] While the court did not hold that a mall was a public place for all purposes, it did hold that malls could not prohibit the handing out of leaflets. Again, this decision was inconsistent with the vast majority of state courts which had considered the issue.[216] The New Jersey Supreme Court relied heavily on the broader language of the free speech provision in the New Jersey Constitution as compared to the language of the First Amendment.[217] The New Jersey Constitution states: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." [218]

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[212] 138 N.J. 326, 650 A.2d 757 (1994).

[213] Interestingly, an early decision of the United States Supreme Court, *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), had held that a mall was a public place. That decision was subsequently overruled by *Hudgens v. NLRB*, 424 U.S. 507 (1976). Essentially the change in membership of the Court between *Logan Valley* and *Hudgens* accounted for the difference in result. In *Logan Valley*, Justices Marshall, Warren, Douglas, Brennan, Stewart and Fortas had formed the majority. By the time of *Hudgens*, two of those justices had left the court and four new justices had been appointed, including Burger, Blackman, Powell and Rehnquist, all of whom rejected the approach in *Logan Valley* and were joined by White who had previously dissented in *Logan Valley* and Stewart who had apparently changed his mind to form a six justice majority. Brennan and Marshall dissented, and Stevens did not participate.

[214] The Court did not impose the same obligations on smaller strip-malls.

[215] See discussion in Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1 (1999); *see also* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1231 (1999).

[216] *See, e.g.*, Cahill v. Cobb Place Associates, 271 Ga. 322, 519 S.E.2d 449 (1999); State v. Wicklund, 576 N.W.2d 753 (Minn. App. 1998).

[217] "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I.

[218] N.J. CONST. art. I, ¶ 6. *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), the first case in New Jersey to utilize the New Jersey Constitutional provision on freedom of speech to give greater rights than the United States Supreme Court, said that the New Jersey Constitutional provision was adopted from the New York Constitution. New York had adopted it from Connecticut. Yet both Connecticut and New York took the opposite position from New Jersey's position in similar mall cases. *See*

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In *Green Party of N.J. v. Hartz Mountain Industries,*[219] the Poritz Court continued the trend started by the Wilentz Court and held that a mall could not require leafletters to purchase a $1 million liability insurance policy. This unanimous decision, in contrast to the 4-3 opinion in *New Jersey Coalition,* may demonstrate that the Poritz Court is even more willing than the Wilentz Court to protect freedom of speech, at least in some situations.[220]

The Poritz Court affirmed its commitment to freedom of speech in *Rocci v. Ecole Secondaire MacDonald-Cartier.*[221] Following the Wilentz Court, the Poritz Court opted to broaden free speech rights, perhaps at the expense of an individual's right to the protection of his or her good name. To understand *Rocci,* it is important to recognize that there has always been a tension between the libel laws and the right to freedom of speech. Starting with *New York Times v. Sullivan,*[222] the United States Supreme Court restricted the rights of public officials to sue for libel and slander in order to give broad leeway to free speech rights. Subsequently, the Court expanded that doctrine to public figures[223] and appeared to expand it even to private plaintiffs in matters of "public interest."[224] However, in a later case, *Gertz v. Robert Welch, Inc.,*[225] that Court retreated, leaving it to the states to determine the standard for cases involving a private plaintiff in matters dealing with the public interest.[226]

After *Gertz,* the Wilentz Court in *Sisler v. Gannett Co., Inc.,*[227] joined a minority of states[228] deciding to be more protective of free speech rights than the United States Supreme Court. Justice Handler

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Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984); Shad Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985).

[219] 164 N.J. 127, 752 A.2d 315 (2000).

[220] In another case dealing with leafletting, the Appellate Division in New Jersey permitted leafletting in a private condominium development when the condominium association had itself handed out political position papers to the residents and then sought to prohibit other groups from distributing leaflets in opposition. Guttenberg v. Galaxy Towers Condo. Ass'n, 297 N.J. Super. 309, 688 A.2d 108 (App. Div. 1996).

[221] 165 N.J. 149, 755 A.2d 583 (2000).

[222] 376 U.S. 254 (1964).

[223] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

[224] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1974).

[225] 418 U.S. 323 (1974).

[226] *See generally Developments in the Law—The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1405-06 (1982).

[227] 104 N.J. 256, 516 A.2d 1083 (1986).

[228] "Most courts, however, have declined *Gertz's* invitation to raise above the federal floor the standard for private liability." 95 HARV. L. REV. at 1405, *supra* note 226.

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said:

> However, in contradistinction from the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position would reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny.[229]

The Court then relied upon the common law[230] to hold that the plaintiff, a businessman who "enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity,"[231] had to prove actual malice in order to win his libel action.

In *Rocci*, the Poritz Court followed the expansive view of free speech taken by the Wilentz Court. *Rocci* was a case in which one teacher sued another teacher for libel based on a letter in which the defendant teacher criticized the plaintiff's behavior on a class trip. Holding this issue to be a matter of public concern, the Court said: "Thus, when alleged defamatory remarks touch on a matter of public concern, 'the interests of free speech justify, and fairness to individual reputation permits, application of a strict and high burden of proof to establish actionable defamation'."[232]

These cases demonstrate that the Court has relied upon both the common law and the State Constitution to expand rights of free speech. In contrast, when confronted with a case involving picketing in front of the residence of a doctor who performed abortions, the Court supported the right of residential privacy over the right of freedom of expression.[233] That case, while not totally prohibiting the picketing, placed such strong time, place and manner limitations on the rights of the picketers that it would be virtually impossible for the

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[229] *Sisler*, 104 N.J. at 274, 516 A.2d at 1092.

[230] The Court also discussed the fact that the New Jersey Constitution was broader in scope than United States Constitution. *Id.* at 271, 516 A.2d at 1091. However, some other states with constitutional provisions similar to the provision in New Jersey have actually held that their constitutions forbid raising the standard for plaintiffs. The New Jersey provision says in Article I, Paragraph 6: "Every person may freely speak, write and publish his sentiments on all subjects *being responsible for the abuse of that right.*" (emphasis added). Kentucky held that the emphasized language, which also appears in its constitution mandates the use of the simple negligence standard. McCall v. Courier Journal, 623 S.W.2d 882, 886-87 (Ky. 1981).

[231] *Sisler*, 104 N.J. at 279, 516 A.2d at 1095.

[232] *Rocci*, 165 N.J. at 156, 755 A.2d at 587 (quoting *Sisler*, 104 N.J. at 275, 516 A.2d at 1093).

[233] Murray v. Lawson, 138 N.J. 206, 226, 649 A.2d 1253, 1263 (1994).

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picketers to effectively present their message.[234]

VISITATION

The Poritz Court unanimously granted visitation rights to the former partner of a lesbian who had developed a relationship with twins conceived by her former partner by artificial insemination.[235] The twins were born September 29, 1994. The "parents" lived together, purchased a home together in February of 1995, and entered into a "marriage" ceremony in July, 1995. In August 1996, M.J.B, the biological mother, ended the relationship. V.C., her former partner, continued to have a relationship with the twins for some time after that. In May 1997, M.J.B. sought to end the visitation by V.C.

There was conflicting testimony regarding the psychological impact on the twins of the severance of V.C.'s relationship with them. In the absence of any specific statutory provisions addressing this issue, the Court turned to legislation dealing generally with custody and visitation.[236] This law provides that "the word 'parent' when not otherwise described by the context means a natural parent or parent by previous adoption."[237] The defendant argued that V.C. did not fit this definition. However, the Court, focusing on the words "when not otherwise described by the context," believed that the legislature had "envisioned a case where the specific relationship between a child and a person not specifically denominated by the statute would qualify as 'parental'."[238] The court concluded:

> Third parties who live in familial circumstances with a child and his or her legal parent may achieve, with the consent of the legal parent, a psychological parent status vis-a-vis a child. Fundamental to a finding of the existence of that status is that a parent-child bond has been created. That bond cannot be unilaterally terminated by the legal parent. When there is a

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[234] *Murray* restricted the picketers in the following manner: "Defendants and all those in active concert or participation with them: (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the Murray residence, located at 917 Carlton Road, Westfield, New Jersey; (2) may picket in a group of no more than ten persons outside the 100-foot zone around the Murray residence for one hour every two weeks; (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing." *Id.* at 234, 649 A.2d at 1268.

[235] V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000).

[236] N.J. STAT. ANN. § 9:2-13.

[237] *V.C.*, 163 N.J. at 216, 748 A.2d at 547 (quoting N.J. STAT. ANN. § 9:2-13(f)).

[238] *Id.* at 217, 748 A.2d at 548.

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> conflict over custody and visitation between the legal and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interest of the child.[239]

TORT REFORM

The New Jersey Supreme Court has often assumed the role of protecting the less powerful members of society. We have already noted this in the context of defendants' rights and poor school children. But in this role the Court has also protected plaintiffs, consumers and employees.

In 1960 in *Hennigsen v. Bloomfield Motors, Inc.*,[240] the New Jersey Supreme Court rendered a landmark decision reforming existing tort law[241] by rejecting the doctrine of privity and adopting a doctrine of implied warranty.[242] In doing so, the Court took a major step towards the modern concept of products liability. Tarr and Porter[243] describe that case as

> commit[ing] the court to evaluating established common law doctrines in the light of current conceptions of societal needs, an approach that was to become the hallmark of the New Jersey's court's common law jurisprudence. The continuity of the New Jersey Supreme Court's commitment to consumer protection through products liability law, apparent throughout its post-*Henningsen* rulings, is particularly clear in its rulings expanding the range of entities subject to strict liability and restricting the defenses available to them. Over time, the court has held lessors, builders, providers of services, and sellers of used goods to strict liability standards.[244]

But it was not only in the area of products liability that New Jersey led the way. In other common law areas, it often was the first court in the country to issue broad-ranging decisions. As Tarr and Porter said:

> [R]ejecting the state-of-the-art defense in *Beshada*, extending

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[239] *Id.* at 230, 748 A.2d at 555.

[240] 32 N.J. 358, 161 A.2d 69 (1960).

[241] Professor Richard Epstein described the case as "the one case that more than others inaugurated the modern age of products liability." RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 50 (1980),

[242] Prosser and Keeton described this as: "the most rapid, and altogether spectacular overturn of an established rule in the entire history of torts." WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 97 (5th ed. 1984).

[243] TARR & PORTER, *supra* note 4.

[244] *Id.* at 227 (internal footnotes omitted).

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> liability to social hosts for injuries suffered in accidents caused by their intoxicated guests in *Gwinnell*, and transforming the public trust doctrine in *Avon by the Sea*, the court not only established new law for the state but adopted positions that had not previously been endorsed by any other court.[245]

In more recent years the New Jersey court has continued to expand its common law jurisprudence to protect consumers, employees and plaintiffs. In *Strawn v. Canuso*,[246] the Wilentz Court protected purchasers of residential real estate who bought from the builder-developer. The purchasers brought a class action challenging the seller's failure to inform them of existence of a nearby closed landfill. The Court noted the existence of the doctrine of *caveat emptor*, or let the buyer beware, but recognized that the doctrine had been severely restricted in previous cases[247] and decided that it "no longer prevails in New Jersey."[248] It then held that the seller had the obligation to reveal the existence of the closed landfill. The Court did, however, limit the decision to "professional sellers."[249] Shortly after this decision the Legislature adopted the Disclosure Act.[250] That statute limited *Strawn* by creating a disclosure scheme that requires persons "who own, lease or maintain potentially dangerous off-site conditions as enunciated by the Act to provide the municipality in which the conditions exist a list of those conditions and their location, and to update the list annually."[251] Sellers of new real estate are required to give notice to prospective buyers of the availability of the lists. The Act further provides that this satisfies the seller's disclosure obligation.

Addressing this enactment in in *Norbrega v. Edison Glen Associates*, the court concluded the statute was intended to eliminate any judicially created rights in favor of the limited statutory protection.[252]

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[245] *Id.* at 231.

[246] 140 N.J. 43, 657 A.2d 420 (1995).

[247] *See, e.g.*, Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974) (seller of real estate had to notify a buyer about the existence of roach infestation unknown to the buyers).

[248] *Strawn*, 140 N.J. at 56, 657 A.2d at 426.

[249] *Id.* at 59-60, 657 A.2d at 428-29.

[250] 1995 N.J. Laws c. 256 (eff. Sept 12, 1995).

[251] 167 N.J. 520, 530, 772 A.2d 368, 374 (2001) (referring to N.J. STAT. ANN. § 46:3C-5). Those conditions are "superfund sites; hazardous discharge sites listed by the New Jersey Department of Environmental protection; certain overhead transmission lines; electrical transformer substations; underground gas transmission lines; certain sewer pump stations and sewer trunk line; sanitary landfills; public wastewater treatment facilities; and airport safety zones." *Id.* at 530 n.1, 772 A.2d at 374 n.1 (citing N.J. STAT. ANN. § 46:3C-3).

[252] *Id.* at 531-32, 772 A.2d at 374-75.

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The Court further recognized that the Act was passed "in direct response to our holding in *Strawn*" and was intended to limit that holding. "We therefore hold that the Disclosure Act prospectively precludes plaintiffs from suing sellers and developers of real estate under the Consumer Fraud Act for failure to disclose off-site conditions, provided that the sellers and developers satisfy their obligations under Section 8 and 9 of the Act."[253] The Court, however, held that the statute could not be applied retroactively. Therefore, the plaintiffs who were "barred from filing a PREDFA[254] claim at the time they first became aware of the diminution of their property values may maintain their common law and Consumer Fraud Act causes of action notwithstanding the retroactivity provision of the Disclosure Act."[255] *Norbrega* again demonstrates that the Legislature and the courts often differ on the appropriate method for protecting consumers. Although the New Jersey Legislature has generally been quite protective of consumers, it has not been willing in all cases to go as far as the supreme court. The quick adoption of the New Residential Real Estate Off-Site Conditions Disclosure Act demonstrates the Legislature assertion of ultimate control in this area. However the court's refusal to grant retroactive effect to that Act demonstrates its determination to limit the scope of legislation whenever it is in a position to do so.

Consumers were further protected by the Court in *Gennari v. Weichert Co. Realtors,*[256] a case dealing with misrepresentations made by real estate brokers to induce buyers to purchase. The question was whether the Consumer Protection Act[257] required an intent to deceive by the person making the representation. The Supreme Court first noted that the "history of the Act is one of constant expansion of consumer protection."[258] The Court then concluded that an intent to deceive was not necessary. It did note, however, that the "'misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase.'"[259]

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[253] *Id.* at 534, 772 A.2d at 376.

[254] Planned Real Estate Development Full Disclosure Act, N.J. STAT. ANN. § 45:22A-21 to -56

[255] *Nobrega,* 167 N.J. at 550, 772 A.2d at 386.

[256] 148 N.J. 582, 691 A.2d 350 (1997).

[257] N.J. STAT. ANN. § 56:8-1 to -20.

[258] *Gennari,* 148 N.J. at 604, 691 A.2d at 364. This demonstrates that the legislature of New Jersey was also committed to protection of the consumer.

[259] *Id.* at 607, 691 A.2d at 366 (quoting Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535, 672 A.2d 1190, 1206 (App. Div. 1996)).

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In *Perez v. Wyeth Laboratories, Inc.*,[260] the Poritz Court again expanded consumer rights by restricting the learned intermediary defense. This defense, which is codified in New Jersey,[261] protects pharmaceutical companies from liability for failure to warn, where they had informed physicians about drug's dangerous side effects. The Senate Judiciary Committee Statement which accompanied the statute provided "[t]he [sub]section contains a general definition of an adequate warning and a special definition for warnings that accompany prescription drugs, since, in the case of prescription drugs, the warning is owed to the physician."[262]

The *Perez* majority believed that the learned intermediary defense had made sense before pharmaceutical companies advertised directly to customers but that the advent of large-scale advertising to consumers imposed on the drug companies a duty to warn of defects in their products. Accordingly, the learned intermediary defense no longer applied in such cases. The dissent, written by Justice Pollock and joined by Justice Garibaldi, argued that the decision flew in the face of the statutory command and was beyond the power of the court. Justice Pollock pointed out that the Legislature intended to limit the judicial expansion of products liability law and specifically included the above-mentioned Comment to make clear to the courts that the learned intermediary doctrine was to be used. He also argued that the Legislature, at the time of the adoption of the statute, was well aware of the growing use of direct consumer advertising. Therefore he concluded: "When enacting the NJPLA, the Legislature chose to confine the expansion of product liability law. The majority's preference for a different policy does not justify ignoring

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[260] 161 N.J. 1, 734 A.2d 1245 (1999).

[261] N.J. STAT. ANN. § 2A:58C-4 provides:

> An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device of food or food additive has been approved or prescribed by the Federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate.

Id.

[262] N.J. ASSEMBLY INSURANCE COMMITTEE, STATEMENT TO SENATE COMMITTEE SUBSTITUTE, S. 2805, at 3 (N.J. 1987).

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the one chosen by the Legislature."[263]

The majority, committed to its role as protector of consumer rights, interpreted the legislation in accordance with that role. This case demonstrates the conflict that frequently arises in New Jersey between the court and the legislature. The Legislature has traditionally been less willing to expand certain protections and rights. In reaction, the New Jersey Supreme Court has used the State Constitution or the common law to achieve its desired result. The Court either declares the statute unconstitutional or interprets it in a manner inconsistent with the intent of the legislation. In both cases, its intent is to benefit some group that the court feels needs protection.

CONCLUSION

Prior to the adoption of the Constitution of 1947, the highest court of New Jersey was the Court of Errors and Appeals—an unwieldy sixteen person court whose members included the Chancellor of the State, members of the appellate court as well as lay members, none of whom gave their full time to the Court. Not surprisingly, that court had an undistinguished reputation. With the creation of the current streamlined supreme court with its powerful Chief Justice and the selection of Arthur T. Vanderbilt, a noted lawyer and scholar[264] as its first Chief, the new high court of the state soon developed a much more distinguished reputation. As Professors Tarr and Porter said: "by 1957, . . . New Jersey's courts enjoyed an unaccustomed national stature, and the state basked in its reputation for judicial progressivism."[265]

The New Jersey Supreme Court has retained that reputation into the twenty-first century. It is hard to find an area of the law in which the New Jersey Supreme Court has not been a leader in developing progressive positions—many of which were then adopted by other states. Of course, not everyone has been pleased by many of these developments. Many of the decisions were unpopular. Some led to

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[263] *Perez*, 161 N.J. at 42, 734 A.2d at 1269 (Pollock, J., dissenting).

[264] Chief Justice Vanderbilt prior to his selection as Chief Justice had served as Dean of New York University Law School, president of the American Bar Association, Republican leader of Essex County as well as County Counsel. He was also a prominent and well-regarded trial attorney. President Eisenhower seriously considered him for the position of Chief Justice of the United States Supreme Court. Earl Warren was eventually selected for that position. *See generally* ARTHUR T. VANDERBILT II, CHANGING LAW, A BIOGRAPHY OF ARTHUR T. VANDERBILT (1976).

[265] TARR & PORTER, *supra* note 4, at 194.

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constitutional amendments,[266] and other decisions have been reversed by the United States Supreme Court.[267]

However, in general, the Court has been able to weather the storms of adverse criticism and adhere to its own views of what is best for the state of New Jersey. This is in large measure due to the circumstances in New Jersey. It is a moderate state with a recent history of moderate to liberal Governors making appointments to the Supreme Court. There is no judicial election process and, once the Justice is reappointed after seven years, he or she gains tenure and the right to remain until the mandatory retirement age of seventy. The appointment system as opposed to an election system has traditionally created a more progressive judiciary.[268] A succession of strong Chief Justices and highly qualified associate justices has also maintained the reputation of the Court. Perhaps most importantly, since 1947 there has been great support in New Jersey for a strong independent judiciary.

It appears that the New Jersey Supreme Court will continue to enjoy a reputation as a strong, independent, and activist court.

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[266] We have already noted the amendment to the cruel and unusual punishment provision of the New Jersey Constitution prompted by a liberal decision of the Court. Additionally, in 1992, the New Jersey Constitution was amended with the addition of Article V, Section IV, Paragraph 6, which overturned the Court's decision in *Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982), which had declared a legislative veto to be unconstitutional.

[267] We have already noted the decisions regarding homosexual rights and hate crimes. *See supra* text accompanying notes 206-11. Additionally the United States Supreme Court struck down a more liberal decision of the New Jersey Supreme Court dealing with search and seizure rights in *State ex rel. T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd on other grounds sub nom., New Jersey v. T.L.O.*, 469 U.S. 325 (1985). This has led to the Court in other cases relying on its own constitution rather than the federal constitution to expand defendant's rights. *E.g.*, State v. Stott discussed in text accompanying notes 167-173.

[268] *See generally* Wefing, *supra* note 4, at 710.

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