

CALL TO ORDER & WELCOME

*Assoc. Dean R. Erik Lillquist
Prof. George W. Conk
Dean Patrick Hobbs*

ASSOCIATE DEAN LILLQUIST:

Good morning. I am Erik Lillquist. I am the Associate Dean here at Seton Hall Law School. It is my pleasure to welcome you all here this morning to this important Symposium. It is my profound pleasure to turn it over to George Conk to get us started this morning.

PROFESSOR CONK:

Thanks, Erik. Good morning and welcome to our Symposium. I want to begin by saying thank you to our hosts at Seton Hall and to Dean Patrick Hobbs.

Today's gathering was born at Fordham, at the Stein Center for Law & Ethics with which Steve Greenwald who heads up the Capital Punishment Committee at the New York City Bar Association and I are both associated. But it feels entirely right to have brought it home to New Jersey and to Seton Hall where Professor and Senator Robert Martin and Professor, Assemblyman and former Public Advocate Wilfredo Caraballo played vital roles in the legislative process that we are all here today to reflect on and celebrate.

The theme for our discussion today is "Reflection." I take this theme from *JUSTICE ACCUSED*, a brilliant book by the late Yale legal historian and ethicist Robert Cover.¹ He chronicled the struggles of anti-slavery judges who were compelled to comply

¹ ROBERT COVER, *JUSTICE ACCUSED* (1984).

with the constitutionally grounded Fugitive Slave Act.²

On the frontispiece of the book appear the words of Shalom Spiegel: "Justice cools the fierce glow of moral passion by making it pass through reflection."³ I recently, thanks to Google, found the source. It is an essay by Shalom Spiegel on the occasion of a 1957 symposium entitled *Law As a Moral Force*.⁴ It brought Chief Justice Earl Warren and former President Harry Truman to the Jewish Theological Seminary of America in New York.⁵

Justice and law, observed Professor Spiegel, are unlike morality.⁶ Morality's appeal is without limit.⁷ It springs from spontaneous intuition.⁸ But justice, the indispensable element of all law, unlike morality, is "impregnated with intellectual discipline, and presents a compound of judgment and action."⁹ Therefore, it may be said that: "Justice cools the fierce glow of moral passion by making it pass through reflection."¹⁰ Justice is born of fear of arbitrary force, said Professor Spiegel.¹¹

And that is why Martin Luther King, evoking the prophet Amos, cried out to "let justice roll down like waters and righteousness like a mighty stream."¹² Replacement of the death penalty with an alternative, life imprisonment, strikes many true notes. But they are not obvious. And that change itself must pass through the prism of reflection. The passionate moral response of a life for a life, that one forfeits his own right to life as the price of taking that of another, is more than understandable. It is compelling.

² See generally *id.*

³ SHALOM SPIEGEL, AMOS VERSUS AMAZIAH : ADDRESS AT THE JEWISH THEOLOGICAL SEMINARY OF AMERICA CONVOCATION ON LAW AS A MORAL FORCE (1957), reprinted in THE JEWISH EXPRESSION, 38, at 62 (Judah Goldin ed., 1976).

⁴ *Id.* at 38.

⁵ *Id.*

⁶ *Id.* at 61-62.

⁷ See *id.*

⁸ *Id.* at 62.

⁹ *Id.* at 62.

¹⁰ *Id.*

¹¹ *Id.* at 54.

¹² Martin Luther King, Jr., I've Been to the Mountaintop (Address at the Church of God in Christ, Memphis, T.N., Apr. 3, 1968), in MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 279 (James M. Washington, ed., 1986).

Twenty-five years after restoration of capital punishment,¹³ lawmakers in New Jersey, on reflection, have found that it did not meet the requirements of justice. Justice recognizes that custom is not identical to right; that justice is not only precedent, a foundation of all law, but also striving. Justice requires stability but retains its force by adapting to experience. As Justice Holmes said: "The life of the law has not been logic, but experience."¹⁴ Logic supported the death penalty and the popular will embraced it. Yet experience did not yield satisfaction that justice was being done.

The courts struggled with the contradictions of morality and justice, knowing that the popular will was worthy of respect but not always deference. Our judges passed every capital conviction through the prism of reflection, seeking to weed out the arbitrariness that justice abhors. Witnessing this struggle, public sentiment began to shift and legislators and the Governor acted. Perhaps the key moment of grace was New Jerseyans for Alternatives to the Death Penalty founder Lorry Post's insight that certain and severe punishment, such as lifetime imprisonment, can bring the murder victim's loved ones greater peace than the long and uncertain death watch.¹⁵ A watch ending perhaps in taking the life of one who can no longer or perhaps never did pose a threat; a taking which, in any event, cannot restore the original loss.

That insight, which NJADP determinedly preached, showed legislators, jurists, and other citizens that respect for the victims and peace for their loved ones did not compel death for the murderer. On reflection, morality may permit—but justice does not require and may not permit—the death penalty. Even this repeal measure must pass through reflection. If the death

¹³ New Jersey restored the death penalty in 1982. Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555, (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)); Joseph F. Sullivan, *Death Penalty Bill Signed by Kean; He Calls for Execution by Injection*, N.Y. TIMES, Aug. 7, 1982, at A1.

¹⁴ G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 3 (1995) (quoting J. Holmes).

¹⁵ Lorry Post, Esq. founded NJADP in 1999 as a way to honor the memory of his daughter, Lisa, who was murdered in Georgia in 1988. He is a retired legal aid attorney and also coordinates the New Jersey chapter of Murder Victims Families for Reconciliation and the New Jersey death penalty abolition effort of Amnesty International. See New Jerseyans for Alternatives to the Death Penalty, Who's Who at NJADP, <http://www.njadb.org/gdexecom&what=staff> (last visited Jan. 26, 2009).

penalty's fatal flaw was its finality, will we some day conclude that redemption may be possible even for those who have committed heinous acts? It is the lack of a final resting place—an insistence on righteousness rather than precedent and custom—that characterizes justice. It is to the continued reflection on justice's requirements that this day is dedicated.

On a personal note, twenty-five years ago, after my third homicide trial in as many months, I came to a pass. The death penalty had been restored.¹⁶ The burden of adding life and death to the task of defense was more than I could bear. I stopped working as a criminal defense trial lawyer that year. The attorneys of the Office of the Public Defender carried that weight. Dale Jones, who is here with us today, wore his heart on his sleeve during these years, as has Jim Smith, also with us today, the Public Defender's premier appellate specialist, and David Ruhnke, a private practitioner who continues to try cases that others shun. In conclusion, I want to pay my personal tribute to the little-recognized heroism of these defense attorneys, particularly those of the Office of the Public Defender, an institution of which New Jerseyans should be particularly proud. Thank you for coming here this morning.

DEAN HOBBS:

Thank you, George. I will be very brief. My job is to welcome all of you here to Seton Hall Law School, which is delighted to serve as the host for today's reflections and I guess would say celebration. Using the word "celebration" might seem somewhat odd in any discussion of the death penalty, even a repeal, but I do think that today is a celebration of the political process at its best; the work of the courts, the Legislature and, very importantly, the citizenry that George so eloquently just spoke of.

I do think today is a celebration of the efforts of many people here in this room. It is also an opportunity for me to welcome back many of you to Seton Hall Law School as well as to welcome those of you who are here for the first time. As I look out, I see alums, friends of the law school, parents of current law students, and parents of recently graduated law students, so I welcome all of

¹⁶ See *supra* note 13.

you.

As George pointed out, I do think it is particularly appropriate that Seton Hall Law School host this discussion today because of the work of two of our full-time faculty members, Senator Robert Martin, who in 2005 sponsored the legislation declaring a moratorium and creating the death penalty commission, and then-Assemblyman Wilfredo Caraballo, who was one of the primary sponsors in the Assembly to repeal the legislation. These are two individuals from the law school who certainly deserve our particular congratulations, appreciation and recognition.

Since we have everybody here and I hate doing it at the end of the day because sometimes you don't get to applaud the people who are behind the scenes and deserve some great thanks – I want to quickly say a very big thank you to three people who work here at the law school. First, to Keri Mendenko and Gina Fondetto. To the extent that this day moves forward seamlessly, it is their great work. I also want to thank Associate Dean Erik Lillquist, who also did an extraordinary amount of work in making sure that this day moves forward seamlessly.

With that, I do want to offer congratulations to three people in particular and then I will end with an introduction of the final person. First, to Senator Bob Martin, an extraordinary public servant to the State of New Jersey. He is a wonderful member of our faculty here at the law school. I think he is the best example of how Seton Hall Law School offers not just a great legal education, but service to the State of New Jersey and the broader community. We believe that it still is the case that more graduates of Seton Hall Law School serve in the Legislature than any other law school. Would you all join me in recognizing the contribution of Senator Bob Martin.

George Conk I still think of as a member of Seton Hall's faculty because he is very much in touch with the faculty here. He served on the faculty here for a number of years before moving on to Fordham. I also want to recognize the work of the Stein Center for Law & Ethics at Fordham Law School. I really view this as a joint host. It is here at Seton Hall, but really this is being hosted by Fordham Law School, as well as Seton Hall. So I welcome the folks that are here from Fordham Law School today and I congratulate you. George really is the driving force behind this conference,

along with the last person I will mention. And so would you all join me in recognizing the efforts of George Conk.

I think we have all heard the old saying that the shorter the introduction, the greater the stature of the person you are about to hear from so I will be very brief because we all are very familiar with the extraordinary life of Chief Justice James Zazzali. I do want to note that I got a call some time back from the Chief saying that this conference was in the making and because of the role of some of our faculty and the contributions of alums he thought that the appropriate place to host this, along with Fordham Law School, would be here at Seton Hall Law School. He has been a great and extraordinary friend to Seton Hall Law School over the years, has hired many of our graduates as his law clerks, is always giving us his ideas and his time to help move this law school forward and that is even more important now since his son is a first-year law student here at the law school. So we are delighted to have him here. Will you all join me in please welcoming Chief Justice James Zazzali.