

KEYNOTE ADDRESS: THE DYNAMIC INTERACTION BETWEEN COURTS, LEGISLATURE, AND PUBLIC OPINION

Chief Justice James R. Zazzali

Thank you, Pat, for your nice introduction. I simply would like, in addition to the acknowledgements that have already been made, to note the presence of three of my past and present colleagues, Chief Justice Poritz, Justice Handler, and former Chief Judge John Gibbons of our Third Circuit.

George [Conk], you started by saying this is an early hour. Well, I guess that is the difference between teaching law and practicing law.

I would like to provide an overview for where we have been, where we are now, and why we are here. I may have to curtail some of my remarks because I hope to keep us reasonably on track.

It was back on December 17 of last year, when the Governor signed the death penalty bill with the principal sponsors being Senator Martin and Assemblyman Caraballo.¹ Senator Martin did such a terrific job. I say that because, not only is that the fact, but also because he is teaching my son.

It was on December 17 that the bill was signed. One day later in Rome, at the Colosseum, the scene of so many ancient executions, we saw the people of Rome erecting a tribute to New Jersey.² The day after that, the United Nations General Assembly

¹ S. 171, 212th Leg., 2nd Sess. (N.J. 2007), *available at* <http://www.njleg.state.nj.us/bills/BillView.asp> (last visited Jan. 15, 2009). For a complete list of the bill's sponsors, see *id.*

² See *Rome's Colosseum Lit Up to Mark N.J. Abolishing Death Penalty*, THE STAR-

passed a resolution calling for a moratorium on executions.³ So we are here to reflect on the end of a number of eras.

The death penalty has a long pedigree in New Jersey. The first criminal code was enacted in 1668.⁴ There were eleven crimes—I know some of this is all old hat to you—that were punishable by death.⁵ They were predictable crimes like bearing false witness,⁶ forcible stealing,⁷ and incorrigible stealing,⁸ whatever that is. And then the next two were rather interesting. You could be executed if you were convicted of being a witch⁹ or an undutiful child.¹⁰ Fascinating. I can think of about ten one-liners there, but a long time ago Chief Justice Poritz told me, “just keep quiet, Jimmy,” and that is what I will do. The Code was revised again in 1796 to add some more crimes.¹¹ In 1821, the Governor was given the power of reprieve¹² and, in 1947, the New Jersey Constitution established a right to bail and less inferentially recognized the death penalty.¹³

LEDGER (Newark, N.J.), Dec. 19, 2007, http://www.nj.com/news/index.ssf/2007/12/colosseum_lit_up_to_mark_un_nj.html

³ Maggie Farley, *U.N. General Assembly Adopts Death Penalty Moratorium*, L.A. TIMES, Dec. 19, 2007, at A11. Previous attempts to pass a moratorium in 1994 and 1999 had failed. United Nations Secretary-General Ban Ki-Moon characterized the adoption of the resolution, by a vote of 104 to 54, as “further evidence of a trend towards ultimately abolishing the death penalty.” *Id.*

⁴ Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 47 (1988).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 50-51, 53. In 1796, twelve crimes were punishable by death: murder, treason, petit treason, a second offense of manslaughter, sodomy, rape, arson, burglary, robbery, or forgery, permitting a capital defendant to escape, and aiding in the rescue of a capital prisoner. *Id.* at 53.

¹² *Id.* at 53.

¹³ N.J. CONST. art. I, ¶ 12.

Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of

In the Twentieth Century, the State of New Jersey conducted 186 executions.¹⁴ The last person to be executed was Ralph Hudson in 1963.¹⁵ The final tabulation, twenty-five years after the death penalty was restored in the wake of *Furman v. Georgia*,¹⁶ is 228 capital murder trials,¹⁷ sixty death sentences,¹⁸ fifty-seven reversals,¹⁹ eight on death row at the time of repeal²⁰ and, of course, as you know, no executions.²¹

Let me reflect for a moment on Justice Potter's comments in *Furman* where he famously spoke about the random nature of the death penalty.²² He wrote a sentence that has resonated down the years: "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."²³ And so states began to reconstruct their statutes to meet the *Furman* concerns.²⁴

anything of pecuniary value.

Id.

¹⁴ Joseph F. Sullivan, *Death Penalty Bill Signed by Kean; He Calls for Execution by Injection*, N.Y. TIMES, Aug. 7, 1982, at 30.

¹⁵ Jeremy W. Peters, *New Jersey Keeps Its Execution Chamber 'on Standby'*, N.Y. TIMES, Dec. 10, 2007, at B6. Hudson was sentenced to death by electrocution for the murder of his estranged wife. *Id.*

¹⁶ 408 U.S. 238 (1972). In *Furman*, in a per curiam opinion, the Court held that the death penalty as imposed and administered by the states constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Id.* at 239-40. However, only two Justices concluded that the death penalty was unconstitutional per se. *Id.* at 257-306 (Brennan, J., concurring); *id.* at 314-75 (Marshall, J., concurring). A de facto judicial stay was therefore imposed upon use of the death penalty across the nation until 1976, when the Court upheld the constitutionality of Georgia's amended death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976). See Mark S. Hurwitz, *Give Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence*, 29 JUST. SYS. J. 243, 246-47 (2008).

¹⁷ N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 7 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf (last visited Jan. 13, 2009) [hereinafter DEATH PENALTY REPORT].

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ See DEATH PENALTY INFO. CENTER, THE DEATH PENALTY IN 2007: YEAR END REPORT (2007), <http://www.deathpenaltyinfo.org/2007YearEnd.pdf> (last visited Jan. 13, 2009).

²¹ See DEATH PENALTY REPORT, *supra* note 17, at 5.

²² *Furman v. Georgia*, 408 U.S. 238, 306-10 (1972) (Stewart, J., concurring).

²³ *Id.* at 310.

²⁴ "The reaction to *Furman* was swift and vehement," with over two-thirds of the states and Congress amending their penal codes to attempt to remedy the

Our Legislature followed, but Governor Byrne, who was once known as “one-term Byrne,” but fortunately became “two-term Byrne,” in his second term vetoed the death penalty twice.²⁵ Nonetheless, after he left office, the Legislature and the Governor restored capital punishment.²⁶ Two requirements come out of *Furman*,²⁷ by way of *Gideon*²⁸ to some extent.

First, of course, is the requirement of effective assistance of counsel.²⁹ The second is the demand for consistency and coherence concerning the application of the death penalty.³⁰ The first was easy, largely because of the Office of Public Defender, particularly Stanley Van Ness who labored so heroically in the best traditions of our profession to give a vigorous and competent defense to every person charged in a capital case.³¹ We are

deficiencies of which the Court in *Furman* had complained. Hurwitz, *supra* note 16, at 243, 247. When the Court upheld the constitutionality of Georgia’s revised statute in *Gregg* and endorsed its proportionality review requirement, the states read *Gregg* as a “how to manual for constructing a constitutional capital punishment statute” and enacted proportionality review procedures closely mirroring those in *Gregg*. Leigh B. Bienen, *The Proportionality Review of Capital Cases After Gregg: Only the Appearance of Justice*, 87 J. CRIM. L. & CRIMINOLOGY, 130, 140 (1996).

²⁵ Barbara Fitzgerald, *Rethinking the Death Penalty*, N.Y. TIMES, Dec. 14, 2003, at 14NJ1.

²⁶ Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555, amended by Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427(codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

²⁷ *Furman*, 408 U.S. 238.

²⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* resolved the question of whether an indigent criminal defendant had the right under the Federal Constitution to the assistance of counsel in state court. Overruling *Betts v. Brady*, 316 U.S. 455 (1942), the Court held that the right to counsel was a fundamental right essential to a fair trial, and therefore obligatory upon the states by the Fourteenth Amendment. *Gideon*, 372 U.S. at 342-45.

²⁹ *Id.* at 341-45; *Furman*, 408 U.S. at 257, 287 & n.34.

³⁰ See *Furman*, 408 U.S. at 255 (Douglas, J., concurring) (“[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”); *id.* at 309 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 313 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

³¹ Stanley Van Ness was New Jersey’s (and the nation’s) first state Public Advocate, serving from 1974-1982. Prior to being named Public Advocate, he served

grateful to all of them and, in particular, to Stanley who died within the last year and could not be with us. And to Dale Jones and Jim Smith as well who, as George also has noted, provided brilliant leadership in the area.

Let us jump to 1987 when, by a six to one vote, with Justice Handler in sole dissent, the Court declared the 1982 Capital Punishment Act constitutional "in all respects."³²

We thereupon embarked on the implementation course with the twenty-one county prosecutors and the Attorney General and attempted to accomplish some consistency and to restore integrity in the administration of the death penalty. A major problem was proportionality review.³³ It is challenging stuff, proportionality

as the New Jersey Public Defender, playing roles in several major court decisions. His office was party to the case that led to the state's death penalty being declared unconstitutional by the New Jersey Supreme Court in 1972. *State v. Funicello*, 60 N.J. 60 (1972). Mr. Van Ness died on Sept. 21, 2007. Dennis Hevesi, *Stanley Van Ness, State Public Advocate, Dies at 73*, N.Y. TIMES, Sept. 27, 2007, at B7.

³² *State v. Ramseur*, 106 N.J. 123, 154 (1987). Ramseur was convicted of killing his ex-girlfriend, Asaline Stokes. Stokes was in front of her house talking with a mechanic when Ramseur walked up to her and fatally stabbed her multiple times in the chest and face. *Id.* at 160-62. A jury convicted Ramseur and he was sentenced to death. *Id.* at 165-66. On appeal, Ramseur argued that the Capital Punishment Act was unconstitutional under both the Federal and State Constitutions. *Id.* at 166. The New Jersey Supreme Court held that the Act was constitutional under both constitutions and "in all respects." *Id.* at 154. However, Ramseur's sentence was reversed on the basis of improper jury instructions. *Id.* Dissenting, Justice Handler objected to the majority's use of a unified analysis of the statute's constitutionality under the Federal and State constitutions, writing that the majority "only half-heartedly consult[ed] our State Constitution and decline[d] to require greater protections in this State than are afforded under federal death-penalty jurisprudence," which he lacked confidence in "as a guide in interpreting [the] Constitution." *Id.* at 347 (Handler, J., dissenting).

³³ N.J. STAT. ANN. § 2C:11-3e required the New Jersey Supreme Court to conduct a proportionality review upon a capital defendant's request to determine whether the penalty imposed upon the defendant was disproportionate to that imposed in similar cases. N.J. STAT. ANN. § 2C:11-3e (West 2005) (deleted by amendment, 2007).

As noted, proportionality review was not unique to New Jersey. *See supra* note 24; *see also* David Weisburd, *Good for What Purpose?: Social Science, Race and Proportionality Review in New Jersey*, in *SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW* 258, 261 (Patricia Ewick et. al. eds., 1999). However, the depth of such review has varied considerably. *See* Weisburd, *supra*; Bienen, *supra* note 24, at 133-35.

Furthermore, after the United States Supreme Court held in *Pully v. Harris*, 465 U.S. 37 (1984), that proportionality review was not mandated by the Federal Constitution, some states disposed of proportionality review entirely, while others restricted it. *See* Timonthy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUST. SYS. J. 257, 259 (2008); Bienen, *supra*, note 24, at 133 (commenting

review.

Indeed, the second opinion that I wrote as new Associate Justice in 2001 involved the implementation or the upholding of the death penalty under the amended clause.³⁴ It was my first encounter with that arcane subject, proportionality review. I am still recovering.

In any event, the frustration continued. The legislative and popular pro-death penalty pressures may have peaked in 1997.³⁵ Governor Whitman, by executive order, created a study commission to find ways to streamline the death penalty cases toward execution.³⁶ It recommended that proportionality review be eliminated,³⁷ but that recommendation was never enacted, nor

that the "majority of state high courts [after *Pully*] reduced proportionality review to a perfunctory exercise."). The New Jersey Supreme Court, in contrast, took a comprehensive approach in implementing proportionality review, one which stood out for its reliance on social science methodology and empirical evidence. See Weisburd, *supra*, at 261-84 (outlining the methodology employed by the court and lauding its effort at meaningful review); Bienen, *supra* note 24, at 134, 161-63, 183-212 (same).

³⁴ State v. Timmendequas, 168 N.J. 20 (2001). Timmendequas had lured a seven-year old girl to his house and sexually assaulted her. *Id.* at 29. Fearing that someone would overhear her cries, Timmendequas strangled her with a belt until she lost consciousness before completing his sexual assault. *Id.* at 29-30. Timmendequas then placed the girl's body in his truck, drove to a county park, sexually assaulted the girl again, and hid her body in the weeds. *Id.* at 30. He later participated in a neighborhood search to find the girl, never telling his neighbors or the authorities what he had done. *Id.* After the police questioned Timmendequas and a search of his apartment had been conducted through the consent of his roommate, Timmendequas confessed and provided police with the location of the girl's body. *Id.* A jury found Timmendequas guilty of purposeful or knowing murder, felony murder, kidnapping, and aggravated sexual assault, and Timmendequas was sentenced to death. *Id.* at 31. On direct appeal, the New Jersey Supreme Court affirmed Timmendequas's conviction and death sentence. *Id.* at 34. Timmendequas requested that the court conduct a proportionality review of his sentence, contending that his "death sentence [was] aberrant, arbitrary, or otherwise anomalous." *Id.* at 27, 34. The court found that Timmendequas's sentence was not disproportionate to that in similar death penalty cases and upheld his sentence. *Id.* at 56.

³⁵ See Jennifer Preston, *Whitman Forms Panel to Expedite Death Penalty Cases*, N.Y. TIMES, Aug. 7, 1997, at B4 (indicating that two-thirds of voters supported the death penalty).

³⁶ N.J. Exec. Order No. 72 (Aug. 6, 1997), available at <http://www.state.nj.us/infobank/circular/eow72.htm>.

³⁷ STUDY COMM'N ON THE IMPLEMENTATION OF THE DEATH PENALTY, FINAL REPORT: GOVERNOR'S STUDY COMMISSION ON THE IMPLEMENTATION OF THE DEATH PENALTY 29-37 (1998), available at <http://www.njstatelib.org/digit/c244/c2441998.pdf> [hereinafter

were any other provisions or recommendations of that committee enacted, save for the right of the victim's family to be witness at the execution.³⁸

Jumping ahead, public opinion shifted. Worthy of note, in 1975, seventy-six percent of the public approved of the death penalty.³⁹ In 1981, that number dropped by three percentage points to seventy-three percent.⁴⁰ In 1999, there was a significant change, to only sixty-three percent approving.⁴¹ Cliff Zukin⁴² has noted that there was great ambivalence out there. Our Court was pressed to join the international trend away from capital punishment, given the fact that only the rogue nations were enforcing it.⁴³

Nonetheless, in 1998, we noted that the United States adhered to no treaty or convention that compelled abandonment of capital punishment; that was in *Nelson I*.⁴⁴ In *Nelson II*, which

1998 STUDY COMM'N].

³⁸ 1998 STUDY COMM'N, *supra* note 37, at 38; Act of Dec. 23, 1999, ch. 302, 1999 N.J. Laws 1620 (codified at N.J. STAT. ANN. § 2C:49-7 (West 2005)) (repealed 2007).

³⁹ Fitzgerald, *supra* note 25.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Cliff Zukin is a Professor of Public Policy and Political Science at Rutgers University's Eagleton Institute of Politics and the Edward J. Bloustein School of Planning and Public Policy. Eagleton Institute of Politics, Eagleton Faculty Staff, <http://www.eagleton.rutgers.edu/Faculty-Staff/zukinbio.html> (last visited Nov. 4, 2008).

⁴³ See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 97 (2002) ("The countries that most vigorously employ the death penalty are generally ones that the United States has the least in common with politically, economically, or socially, and ones that the United States is wont to define itself against, as they are among the least democratic and the worst human rights abusers in the world."); see also Amnesty International, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Oct. 11, 2008) (Currently only sixty countries are retentionist countries—i.e. retain the death penalty for ordinary crimes. These countries are: Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Burundi, Cameroon, Chad, China, Comoros, Congo (Democratic Republic), Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Korea (North), Kuwait, Lebanon, Lesotho, Libya, Malaysia, Mongolia, Nigeria, Oman, Pakistan, Palestinian Authority, Qatar, Saint Christopher & Nevis, Saint Lucia, Saint Vincent & Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, United States of America, Vietnam, Yemen, and Zimbabwe.).

⁴⁴ *State v. Nelson* (I), 155 N.J. 487, 512 (1998) ("The United States of America

presented issues of Nelson's mental competence, I expressed some thoughts on that subject.⁴⁵

Did the maturation process, or the evolving process, bear fruit? That seemed to be the case. Then, of course, we had the tragedy of 9/11 resulting in the amendment of the death penalty statute to make murder in the course of committing a terrorist act an aggravating factor.⁴⁶

In the next year, we saw a shift. The Legislature passed a bill declaring a moratorium on the execution of death penalty convictees and established a study commission.⁴⁷ Governor

has not subscribed to any international human rights accord that has invalidated the death penalty.”).

⁴⁵ State v. Nelson (II), 173 N.J. 417 (2002). Nelson was originally born a male and suffered severe emotional problems as a child through young adulthood. *Id.* at 434-42. In his twenties, he committed several crimes, became obsessed with suicide, and was involuntarily committed to a psychiatric facility for a period. *Id.* at 435-36. After undergoing sex reassignment surgery, Nelson became an exotic dancer and eventually a prostitute. *Id.* at 436-37. In April 1995, detectives were called to Nelson's home at the request of an investigator from the Division of Youth and Family Services. *Id.* at 430. When they arrived, Nelson appeared paranoid and fearful and refused to allow the detectives to search the home; however Nelson's mother, who was also present, acceded. *Id.* at 430-31. Nelson admitted to having a gun in her closet, but refused to show it to the detectives. *Id.* at 431. When the detectives later returned to the home, Nelson asked if they had a warrant and then ran upstairs. *Id.* The detectives followed her, and Nelson shot them with an AK-47 assault rifle, fatally wounding one of them. Nelson then shot at the police stationed outside and killed another officer. *Id.* at 431-32. At trial, the defense called as an expert witness a psychiatrist who testified that Nelson suffered from long-standing depression, sexual-identity disturbance, and acute adjustment disorder. *Id.* at 439. Nelson pled guilty to two counts of capital murder and was sentenced to death. *Id.* at 432-34. On appeal, one of Nelson's contentions was that her sentence violated the New Jersey Constitution because the crime she committed was “intertwined with her mental illness.” *Id.* at 478. The court declined to address this issue, however, because it reversed Nelson's death sentence on other grounds. *Id.* However, Justice Zazzali addressed the issue in his concurrence, opining that “it [was] constitutionally inadequate for a jury to consider [a defendant's] severe mental illness as merely a mitigating factor to be weighed among other aggravating and mitigating factors.” *Id.* at 483 (Zazzali, J., concurring).

⁴⁶ September 11th, 2001 Anti-Terrorism Act, ch. 26, § 10, 2002 N.J. LAWS 116 (codified at N.J. STAT. ANN. § 2C:11-3c(4)(l) (West 2005)) (current version at N.J. STAT. ANN. § 2C:11-3b(4)(l) (West Supp. 2008)) (The Act amended the definition of “criminal homicide” to encompass death caused “in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . terrorism” and added as an aggravating factor: “The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism . . .”).

⁴⁷ Assem. 1913, 210th Leg., 1st Sess. (N.J. 2002) (vetoed Jan. 12, 2004). The

McGreevey vetoed it.⁴⁸ Many attribute the shift in legislative sentiment and in public sentiment to the difficulty in implementing the death penalty.⁴⁹ I suspect it was also due to the great work on the part of groups like The Innocence Project, who demonstrated, not in this state, but elsewhere, how the death penalty was perhaps tragically and incorrectly applied.⁵⁰

To the credit of the New Jersey Judiciary, I do not think we have ever had a serious problem in that regard. Our review process was so scrupulous, so painstaking under the various Chief Justices, particularly Chief Justice Wilentz and Chief Justice Poritz, that we did not have to have that horrible blemish—a mistake—on our collective consciousness. The lethal-injection challenge followed. New Jerseyans for Alternatives to the Death Penalty (“NJADP”),⁵¹ whom we honor today,⁵² brought the issue to the

vetoed moratorium bill was similar to that which would be signed into law in 2006. It would have created the New Jersey Death Penalty Study Commission to study the perceived shortcomings of New Jersey’s death penalty statute and to make recommendations and would have prohibited any executions from being carried out pending the Commission’s report. *Id.*

⁴⁸ Gov. James E. McGreevey, Absolute Veto of A1913, *available at* http://www.njleg.state.nj.us/2002/Bills/A2000/1913_V1.PDF. In his veto, Governor McGreevey stated that he was vetoing the bill because he believed that a state-sponsored commission would be unlikely to yield significant new information since the statute had continuously been studied in painstaking detail by the courts, scholars, attorneys, and interest groups since its enactment in 1982. He also stressed that the constitutionality of the statute had repeatedly been upheld by the supreme court, and that the New Jersey statute and the supreme court’s review methodology provided capital defendants with safeguards neither mandated by the Federal Constitution nor afforded by many other states. Finally, Governor McGreevey opined that “a temporary study commission, regardless of how erudite and diligent its members, is not likely to advance the perennial, intrinsic issues continually debated in regard to the death penalty. These questions simply do not lend themselves to being conclusively determined through an empirical study.” *Id.*

⁴⁹ See, e.g., Assem. 1913, 210th Leg., 1st Sess. (N.J. 2002) (vetoed Jan. 12, 2004) (legislative findings); Press Release, New Jerseyans for Alternatives to the Death Penalty, Most New Jerseyans Support Moratorium on the Death Penalty New Eagon Poll Reports (May 30, 2002), *available at* <http://www.deathpenaltyinfo.org/node/577>; Fitzgerald, *supra* note 25.

⁵⁰ See generally The Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 25, 2008) (“The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice.”).

⁵¹ New Jerseyans for Alternatives to the Death Penalty, <http://www.njadp.org/> (last visited Jan. 25, 2008). NJADP was founded in 1999 with the objective of “winning public and political support for the elimination of execution as a form of punishment in New Jersey.” NJADP believes that “the death penalty is by its nature

forefront.⁵³ It was professors like Deborah Denno at Fordham, who assisted in that effort,⁵⁴ and attorneys like Kevin Walsh, who was a law clerk with Justice Stein.

Systematic proportionality analysis review will be the subject of a short discussion shortly.⁵⁵ I want to publicly acknowledge for the record the enormous work that Judge David Baime, in retirement, did for the court, for the public and for all of us in the way he labored in the proportionality review vineyard for so many years.⁵⁶ And then, of course, we have the repeal.⁵⁷ I believe the

unjust in application and immoral in principle." *Id.*

⁵³ *Legislative Resolution Presented to Celeste Fitzgerald for the New Jerseyans for Alternatives to the Death Penalty*, 33 SETON HALL LEGIS. J. 133 (2009). During the Symposium, Senator Raymond Lesniak presented NJADP director Celeste Fitzgerald with a legislative resolution honoring her contributions to the repeal of the death penalty. *Id.*

⁵⁴ See *In re Readoption with Amendments of Death Penalty Regulations* N.J.A.C. 10a:23, 367 N.J. Super. 61 (App. Div. 2004), *cert. denied* 182 N.J. 149 (2004). In *In re Readoption*, NJADP challenged changes made in 2001 to New Jersey Department of Corrections ("NJDOC") regulations for carrying out the death penalty as constituting cruel and unusual punishment in violation of the federal and state constitutions. *Id.* at 65. With respect to lethal injections, NJADP challenged the elimination of a NJDOC regulation that required executioners to have access to emergency equipment sufficient to revive an inmate in the event that a last minute stay of execution was imposed *Id.* at 65, 68. The appellate division held that unless the NJDOC came forth with medical evidence that there was no possible chance of reversibility, the death penalty could not be carried out under current NJDOC regulations. *Id.* at 69. Thus, prior to legislative moratorium imposed in 2006, a de facto moratorium was already in effect, as New Jersey had no lawful execution method. See Jessica Henry, *New Jersey's Road to Abolition*, 29 JUST. SYS. J. 408, 411 (2008).

⁵⁵ See Deborah Denno, *The Lethal Injection Quandry: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007); Deborah Denno, *The Lethal Injection Debate: Law and Science*, 35 FORDHAM URB. L. J. 701 (2008).

⁵⁶ Panel II: *The Death Penalty on Appeal: Constitutionality, Equality, and Proportionality Review*, 33 SETON HALL LEGIS. J. 95 (2009).

⁵⁷ Judge Baime was appointed Special Master by the court in 1999 to evaluate the proportionality review methodology that the court had adopted in 1992 upon the recommendations of the first Special Master, David Baldus. See *State v. Loftin* (II), 157 N.J. 253, 454-55 (1999). Judge Baime's report was to address four discrete areas of concern: "the size of the universe of comparison cases; particular issues in respect of individual proportionality review; questions relating to the statistical models used in both individual and systemic proportionality review; and the status of proportionality review as a separate proceeding in death penalty appeals." *In re Proportionality Review Project* (II), 165 N.J. 206, 208-09 (1999) (citation omitted).

Judge Baime's initial report was submitted to the court on April 28, 1999. DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: PROPORTIONALITY REVIEW PROJECT 10 (Apr. 28, 1999) [hereinafter BAIME REPORT I]; *In re Proportionality II*, at

critical factor that contributed to the repeal was the Quinnipiac poll in January last year indicating that fifty-one percent of people preferred life without parole to the death penalty.⁵⁸

Recall Justice Potter Stewart's lament that being executed is as cruel and unusual as being struck by lightning.⁵⁹ Justice Albin recently—and this is, if you recall, his opinion in *Wakefield*—echoed that sentiment by saying:

We must come to grips with the fact that the fates of the few

209. Among Judge Baime's initial recommendations was that in conducting proportionality review, the court should continue to compare the defendant's sentence with similar cases in which the defendant was death eligible (rather than only those cases in which the death penalty had actually been imposed, as a 1992 legislative amendment to the Capital Punishment Act had provided), abandon the "index-of-outcomes" component of proportionality review analysis, and eventually consolidate direct death penalty appeals with proportionality review. *In re* Proportionality Review Project (I), 161 N.J. 71, 82 (1999) (quoting BAIME REPORT I, *supra*, at 6-7). In *In re Proportionality I*, the court adopted BAIME REPORT I with modifications. *Id.* at 84-97.

During the second phase of the project, Judge Baime investigated the issue of bias in the administration of the state's capital sentence laws. DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT (Dec. 1, 1999) [hereinafter BAIME REPORT II]. In *In re Proportionality II*, the court adopted BAIME REPORT II with modifications. *In re Proportionality II*, 165 N.J. at 209. As Special Master, Judge Baime also submitted monitoring reports to the court each term. See DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000-2001 TERM (2001); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2001-2002 TERM (2002); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2002-2003 TERM (2003); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2003-2004 TERM (2004); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2004-2005 TERM (2005), available at [http://www.judiciary.state.nj.us/press rel/PR101306a.pdf](http://www.judiciary.state.nj.us/press%20rel/PR101306a.pdf).

⁵⁷ Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

⁵⁸ Quinnipiac University, New Jersey Poll, Jan. 24, 2007: New Jersey Voters Aren't Banking on Property Tax Cuts, <http://www.quinnipiac.edu/x1299.xml?ReleaseID=1006> (last visited Oct. 19, 2008) (When voters were asked which penalty they preferred for defendants convicted of murder, fifty-one percent chose life without parole while forty-one percent chose the death penalty.).

⁵⁹ *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Id.

death-slated inmates, however morally culpable they are for their crimes, are the product of what may appear to be a random selection. How else to explain that so many depraved defendants who have committed heinous murders are serving ordinary prison sentences while only nine bide their time on death row.⁶⁰

I would be remiss if I did not conclude with an observation or recognition of a couple prophetic voices in the crowd. I am talking about the great dissents of both Justice Alan Handler and Justice Virginia Long. Justice Handler called firmly and consistently in his eloquent dissents for [the court] to find the death penalty unconstitutional, flawed in concept and impossible of proper implementation.⁶¹ Justice Long, like Justice Blackmun on the United States Supreme Court, in a series of splendid dissents, refused to tinker with the mechanism of death.⁶² And as you all know, she called passionately for an abandonment of the entire enterprise.⁶³

⁶⁰ *State v. Wakefield*, 190 N.J. 397, 552 (2007) (Albin, J., concurring).

⁶¹ See, e.g., *State v. Marshall* (II), 130 N.J. 109, 229 (1992) (Handler, J., dissenting); *State v. Ramseur*, 106 N.J. 123, 321-408 (1987) (Handler, J., dissenting); *State v. Martini* (II), 139 N.J. 3, 107-09 (1994) (Handler, J., dissenting).

⁶² *In re Proportionality Review Project* (II), 165 N.J. 206, 234 (2000) (Long, J., concurring in part and dissenting in part); *State v. Timmendequas*, 168 N.J. 20, 93 (2001) (Long, J., dissenting). See generally *Wakefield*, 190 N.J. at 553-55 (Long, J., dissenting); *State v. Martini*, 187 N.J. 469, 483-84 (2006) (Long, J., dissenting); *State v. Harris*, 181 N.J. 391, 534-35 (2004) (Long, J., concurring in part and dissenting in part); *State v. DiFrisco*, 174 N.J. 195, 247 (2002) (Long, J., dissenting); *State v. Marshall*, 173 N.J. 343, 361 (2002) (Long, J., dissenting); *State v. Josephs*, 174 N.J. 44, 162-65 (2002) (Long, J., dissenting); *State v. Koskovich*, 168 N.J. 448, 575-82 (2001) (Long, J., concurring and dissenting); *State v. Harris*, 165 N.J. 303, 385 (2000) (Long, J., dissenting); *State v. Morton*, 165 N.J. 235, 288-89 (2000) (Long, J., dissenting); *State v. Feaster*, 165 N.J. 388, 444 (2000) (Long, J., dissenting); *State v. Papasavvas*, 163 N.J. 565, 630-34 (2000) (Long, J., dissenting).

⁶³ E.g., *State v. Koskovich*, 168 N.J. 448, 581 (2001) (Long, J., concurring in part and dissenting in part)

It is time for this Court to reevaluate the state's death penalty statute. We can no longer ignore the fact that the so-called justifications in favor of the death penalty have withered and that a consensus is growing—not only at home, but across the country and around the world—that the death penalty is unfair, unjust and incompatible with present standards of decency.

Id.; *State v. DiFrisco*, 174 N.J. 195, 287 (2002) (Long, J., dissenting) (“I would revisit *State v. Ramseur* in light of the changes in the public's appetite for capital punishment that have developed in the fifteen years since it was decided.”)(citation omitted).

If you will indulge me with just one final personal note, I think it is those dissents, together with the leadership of Chief Justice Poritz and others, that helped to evolve my own thinking. I argued when I was an assistant prosecutor under Brendan Byrne forty years ago a case that upheld the death penalty. I believe then, and even now, that in rare cases the death penalty is a deterrent. But I then went through a maturation process. It only took four decades. I considered the reasoning in those dissents. But I also looked at those rogue nation states and concluded that our nation is in very bad company.⁶⁴ Most important, I considered the enormous challenges facing our nation and our world. If we are to make it, if we are going to survive as a people and as a planet, we must summon up those fundamental virtues of tolerance and forgiveness, and yes, that corny concept called love. If we soldier on, if we bring tolerance, forgiveness, and love to the many challenges that we confront each day, then we have a real shot at individual and collective survival. I concluded that the abolition of the death penalty is a good place to start.

Thank you.

⁶⁴ See *supra* note 43.

