EDUCATION—HANDICAPPED CHILDREN—STATE REGULATION PROVIDING FOR PAYMENT OF EDUCATIONALLY JUSTIFIED RESIDENTIAL COSTS NOT *Ultra Vires*—*D.S. v. East Brunswick Bd. of Educ.*, 188 N.J. Super. 592, 458 A.2d 129 (App. Div. 1983).

D.S., a trainable mentally retarded child, was placed in a residential educational facility in January 1977 upon the recommendation of East Brunswick school officials. The local school district paid his tuition, but refused to pay for the child's residential costs. The parents of D.S. brought an action in chancery seeking reimbursement of these expenses. 188 N.J. Super. at 596, 458 A.2d at 131. In February 1978, the judge ordered the case transferred to the State Board of Education because the plaintiffs had failed to exhaust their administrative remedies. *Id.*, 458 A.2d at 132.

N.J. ADMIN. CODE tit. 6, § 6:28-4.3(g) (1978), which requires school districts to pay for the residential costs of children placed in special facilities for educational purposes, became effective in August 1978. *Id.* at 595-96, 458 A.2d at 131-32. After a Fall 1978 hearing on D.S.'s case, a classification officer in the State Department of Education ruled that the child's placement in the residential facility was educationally justified, which made the East Brunswick Board of Education responsible for residential costs. *Id.* at 596-97, 458 A.2d at 132. The local board appealed to the Commissioner of Education, who ruled that East Brunswick was responsible for all residential costs incurred by D.S. after August 1978. East Brunswick appealed to the State Board of Education, alleging that the regulation was *ultra vires* and unenforceable. The State Board upheld the validity of the regulation, which prompted the local Board to seek judicial review. *Id.* at 597, 458 A.2d at 132.

The appellate division rejected East Brunswick's contention that N.J. ADMIN. CODE tit. 6, § 6:28-4.3(g) (1978) was *ultra vires* and affirmed the State Board's determination. *Id.* at 609, 458 A.2d at 140. Writing for the court, Judge King noted that the New Jersey Constitution mandates a "thorough and efficient system of free public education" for all students, including the handicapped. *Id.* at 605, 458 A.2d at 137. He observed that the New Jersey Legislature, in order to reach this goal, had statutorily delegated broad authority to the State Board of Education. *Id.* at 598-99, 608-09, 458 A.2d at 132-33, 139. Since part of the State Board's responsibility included securing funds for educational programs and N.J. ADMIN. CODE tit. 6, § 6:28-4.3(g) (1978) was enacted to insure state qualification for federal money,

Judge King decided that the regulation was a proper exercise of the State Board's administrative power. *Id.* at 599, 458 A.2d at 133.

Judge King also rejected East Brunswick's argument that the regulation conflicted with N.J. STAT. ANN. § 18A:46-14 (West Cum. Supp. 1983-1984), which holds local boards responsible for the tuition costs of children enrolled in special facilities. *Id.* at 602, 458 A.2d at 135. While he dismissed the State Board's argument that the term "tuition" should be broadly construed to include residential costs, he noted that the allegedly contradictory provision did not specifically exclude reimbursement of residential costs. *Id.* at 608, 458 A.2d at 139. Judge King commented that the statute had been amended subsequent to the enactment of the questioned rule and that the amendment did not disavow the regulation's validity. Since the statute was primarily concerned with allocating the cost to the school district which was placing the child in a special institution, Judge King held that the failure of the statute to assign residential costs did not prohibit the State Board of Education from assigning these expenses to local school districts. *Id.* at 608-09, 458 A.2d at 139-40.

The decision reached in this case seems fair in light of the clear federal and state policies supporting the provision of educational services to the handicapped. Judge King correctly chose substance and policy over form and technicality, and assured that minimum educational costs of handicapped children will be provided by local school districts.

Susan Joseph

LANDLORD AND TENANT—ABSENT AGREEMENT BY PARTIES COURT MAY FIX REASONABLE RENTAL VALUE IN LEASE RENEWAL OPTION CLAUSE—*P.J.'s Pantry v. Puschak*, 188 N.J. Super. 580, 458 A.2d 123 (App. Div. 1983).

In 1975, Michael Puschak purchased a commercial building in anticipation of converting it into a fast-food restaurant. Puschak sold the business to Paul Ruth. The parties also executed a lease of the store for a term of five years at a monthly rental of $350. 188 N.J. Super. at 580, 458 A.2d at 123. The lease contained provisions granting the lessee a series of four options to renew for periods of five years at a rental "reasonably to be agreed upon," inclusive of taxes. A second provision stated that the contract for sale and the lease were a "combined package." Ruth assigned his interest in the premises to P.J.'s Pantry, which in 1979 approached Puschak with the question of the

renewal option and the rental price. The parties were unable to reach an agreement. *Id.* at 582, 458 A.2d at 124.

P.J.'s Pantry filed suit demanding specific performance of the renewal option agreement, and Puschak counterclaimed for possession of the premises. *Id.* at 581, 458 A.2d at 123. The trial court refused to enforce the option agreement, and accordingly entered judgment granting possession to the defendant. *Id.* at 583, 458 A.2d at 124. The judge reasoned that there was no readily objective way he could fix a fair rent for the next five years, and that it would be a misuse of judicial power if he were to do so. *Id.*, 458 A.2d at 124-25. He concluded that "it would be an imposition by the parties for them to expect the court to make this arrangement for them."

The appellate court reversed, finding the trial court's analysis unpersuasive. *Id.*, 458 A.2d at 125. The court noted that the issue of its authority to set the rental value of a leasehold was novel in New Jersey, and acknowledged the conflicting case law on the subject in other jurisdictions. *Id.* at 584-85, 458 A.2d at 125-26. Following, however, what it perceived to be the current trend, the court held that the option clause was enforceable, and stated that absent agreement by the parties a court is permitted to determine and impose a "fair market rental" for an extended lease term following exercise of a renewal option. *Id.* at 583, 458 A.2d at 125. The court observed that since the plain purpose of the options was to assure the long-term stability of the venture, their presence in the lease was an important factor in the plaintiff's purchase of the business. *Id.* at 583-84, 458 A.2d at 125. Noting the difficulties in determining the rental value of a long-term leasehold, the court reasoned that the parties clearly intended the rent for each option term to be the fair market value and concluded that refusing to enforce the option clause would deprive the plaintiff of a significant part of the economic interest contemplated in the original transaction. *Id.* at 584, 458 A.2d at 125. The matter was remanded to the trial court for further proceedings consistent with the decision. *Id.* at 585, 458 A.2d at 126.

P.J.'s Pantry permits New Jersey courts to fix a reasonable rent in a lease option renewal when the parties are unable to reach a meaningful agreement themselves. Because New Jersey courts have not heretofore addressed this issue, the decision should provide a rule for courts to rely upon when they wish to enforce a lease whose rate terms are in dispute.

Carol Romano

CRIMINAL LAW—SENTENCING—NEW JERSEY PAROLE ACT INTERPRETED AS PROVIDING DUE PROCESS FOR MULTIPLE OFFENDERS DENIED PAROLE ELIGIBILITY REDUCTIONS—*New Jersey State Parole Board v. Byrne*, 93 N.J. 192, 460 A.2d 103 (1983).

James Byrne, a fourth offender, was serving a ten to twelve year sentence for possession of drugs with intent to distribute. 93 N.J. at 198, 460 A.2d at 106. Tony Maples, a second offender, was serving a ten to twelve year sentence for possession of drugs with intent to distribute and a concurrent four to five year term for simple possession of drugs. Under the parole law in effect at the time these sentences were imposed, first, second, third, and fourth offenders became eligible for parole after serving one-third, one-half, two-thirds, or four-fifths of their maximum sentences, respectively. *Id.* at 196-97, 460 A.2d at 105. After passage of the Parole Act of 1979, however, the parole eligibility dates for multiple offenders were to be computed as if one fewer crime had been committed. *Id.* at 196, 460 A.2d at 105. The Act further provided that this full-step reduction could be denied to an inmate if the prosecutor or sentencing judge advised the Parole Board, even without explanation, that the punitive aspects of the sentence had not yet been fulfilled. *Id.* at 197, 460 A.2d at 105. The inmate then would not be eligible for parole until serving an additional period equal to one-half the difference between the parole eligibility under the old law and the eligibility under the 1979 Act. For both Byrne and Maples, the prosecutors advised that the full-step reductions be denied, and the Parole Board complied.

Byrne and Maples appealed to the New Jersey Superior Court, Appellate Division. *Id.* at 198, 460 A.2d at 106. In Byrne's case, the court held that neither the Parole Act nor the processes afforded thereunder violated the due process clause of the fourteenth amendment since the Act created only a "possibility of parole" and not a constitutionally protected liberty interest. *Id.* at 198-99, 460 A.2d at 106. The court also found that the absence of a statement of reasons from the prosecutor or judge who advised against a full-step reduction was of no legal consequence. In Maples' case, the appellate division affirmed the Board's action based upon the *Byrne* decision. The Supreme Court of New Jersey granted petitions for certification filed by both Byrne and Maples. *Id.* at 199, 460 A.2d at 106.

The supreme court affirmed in part and reversed in part the judgment of the appellate division. *Id.* at 214, 460 A.2d at 115. The court initially held that the interest in the full-step reduction claimed by the defendants was a liberty interest protected by the due process clause of the fourteenth amendment. *Id.* at 206-08, 460 A.2d at 110-

11. Writing for the court, Justice O'Hern reasoned that while there is no constitutional right to parole, the Parole Act, by defining eligibility guidelines, created a constitutionally protected expectation of parole. *Id.* at 208, 460 A.2d at 111. Justice O'Hern then considered what minimum procedural guarantees would make the state's denial of the full-step reduction valid. *Id.* at 208-09, 460 A.2d at 112.

In determining what process was due, the court balanced the straightforward state interest in making sure the punitive aspects of a prisoner's sentence is served against the prisoner's interest that simple error or confusion of identity would negate a deserved parole reduction. *Id.* at 208-12, 460 A.2d at 112-13. Justice O'Hern concluded that three basic procedures are required to protect against erroneous determinations: notice to the prisoner of the parole disposition, a report by the objecting judge or prosecutor explaining why the punitive portion of the sentence is not complete, and an opportunity for the inmate to respond in writing to that report. *Id.* at 211, 460 A.2d at 113. Justice O'Hern further resolved that although these requirements were not explicitly mentioned in the Parole Act, the Legislature would choose to include them rather than to have the challenged provision eliminated. *Id.* at 212-13, 460 A.2d at 114. He therefore construed the Act to include these procedures, and remanded the cases for further proceedings. *Id.* at 214, 460 A.2d at 115.

The Parole Act of 1979 is a generally successful effort to eliminate arbitrary sentencing. In attempting, however, to curtail parole eligibility for multiple offenders who had not served their punitive requirements, the Legislature inadvertently left in the hands of the judge or prosecutor what was most antithetical to the Act: the strong possibility of unfettered discretion. In requiring a statement of reasons and an opportunity to respond, the court does not expressly limit the power of the judge or prosecutor, but rather induces them to exercise their authority in a reasonable manner. The unanimity of the court reflects the consistency of the opinion not only in ensuring constitutional due process, but also in furthering the efforts of the Legislature to eliminate the vagaries of sentencing.

Patrick Gleason

TORTS—PRODUCTS LIABILITY—DRUG MANUFACTURER'S LIABILITY IN DEFECTIVE PRODUCTS ACTION MEASURED BY NEGLIGENCE STANDARDS AND STATE-OF-THE-ART DEFENSE VALID—*Feldman v. Lederle Laboratories*, 189 N.J. Super. 424, 460 A.2d 203 (App. Div. 1983).

Whenever Carol Feldman developed an infection, her father, a medical doctor, treated it with Declomycin, an antibiotic produced by Lederle Laboratories (Lederle). 189 N.J. at 426, 460 A.2d at 203-04. Harold Feldman estimated that he administered the drug to Carol on as many as twenty occasions during the period between her birth in February 1960 and the latter part of 1963. When Carol's first set of teeth appeared, her mother observed that they were gray. It was subsequently established that the discoloration resulted from the Declomycin treatments. *Id.* at 426, 460 A.2d at 204.

Harold Feldman brought an action as parent and guardian *ad litem* of Carol against Lederle, basing the claim for relief upon the theories of strict liability and negligence. At trial Lederle relied upon a state-of-the-art defense and adduced proofs showing that during the period of Carol's treatments neither it nor the scientific community were aware that the use of Declomycin could bring about discoloration of teeth. The case was tried on that basis, and the jury returned a verdict in Lederle's favor. The judgment was affirmed by the appellate division, and Feldman's petition for certification to the New Jersey Supreme Court was granted. The supreme court, however, remanded the case back to the appellate division for reconsideration in light of *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), wherein the court held that in failure-to-warn strict liability cases, knowledge of the potential hazards of a product is imputed to the producer and that a state-of-the-art defense is unavailable. 189 N.J. Super. at 426-27, 460 A.2d at 204.

On remand, the appellate division distinguished *Beshada* and affirmed the trial court judgment in favor of Lederle. *Id.* at 432, 460 A.2d at 207. Judge McElroy, writing for the court, noted that New Jersey courts have followed the Restatement (Second) of Torts § 402A, comment k (1965), which explicitly recognizes that the manufacture and use of certain inherently unsafe products, including drugs, is justified because of the benefits they provide. *Id.* at 427-28, 460 A.2d at 204. Under comment k, liability of drug manufacturers for harms proximately caused by their products is measured by negligence standards and therefore the state-of-the-art is a valid defense. Strict liability is limited to instances where drugs are improperly prepared or where manufacturers fail to furnish adequate warnings of the dangers

known to accompany the use of their drugs. *Id.* at 428, 460 A.2d at 205.

The appellate court observed that the reason for the comment k exception was a concern that the specter of "almost absolute liability" would substantially reduce the incentive of manufacturers to produce and market indispensable drugs. Judge McElroy contrasted this concern against the *Beshada* court's view that a manufacturer is best situated to distribute the costs of harm caused by defective products by passing them on to the consumer. While Judge McElroy conceded that *Beshada's* impact upon ordinary products liability cases was favorable, he was unwilling to extend the holding to actions against drug manufacturers. He concluded that effecting such a change would require a delicate balancing of competing public policy considerations and that the state legislature or supreme court were the more proper authorities to consider the issue. *Id.* at 434, 460 A.2d at 209.

The decision of the appellate division does little to firmly settle the question of whether drug manufacturers should be treated as an exception to the *Beshada* rule and should be permitted to invoke the state-of-the-art defense in products liability actions. Rather, the opinion merely served to sharpen the issue and present it to other authorities for resolution. The court correctly acknowledged that an issue requiring an authoritative choice between competing policy concerns of great magnitude should not be adjudged by an intermediate appellate court. Thus, the court squarely placed on others the onus of delineating the scope of *Beshada*.

Robert S. Burney

CONVERSION—WAREHOUSES—BAILOR'S PRIMA FACIE CASE OF CONVERSION ESTABLISHED UPON PROOF OF DELIVERY, DEMAND FOR REDELIVERY AND BAILEE'S FAILURE TO RETURN BAILED GOODS—*Joseph H. Reinfeld, Inc. v. Griswold & Bateman Warehouse Co.*, 189 N.J. Super. 141, 458 A.2d 1341 (Law Div. 1983).

Griswold and Bateman Warehouse Co. (Griswold) stored 337 cases of Chivas Regal Scotch Whiskey for Joseph H. Reinfeld, Inc. (Reinfeld) in Griswold's bonded warehouse. When Reinfeld sent its truck to reclaim the whiskey, forty cases were found to be missing. Reinfeld brought suit in both conversion and negligence for the wholesale value of the missing goods, $6,417.60. Griswold admitted its

negligence but claimed that its liability was limited by contract to $1,925.00.

At trial, after introducing evidence of its delivery, demand for redelivery, and Griswold's failure to return the bailed goods, Reinfeld argued that the burden of production shifted to the defendant to explain the disappearance. The plaintiff argued that absent such an explanation, its proofs established a prima facie case raising a presumption of both conversion and negligence. The plaintiff further asserted that because N.J. STAT. ANN. § 12A:7-204(2) (West 1962) prohibits a warehouseman from limiting his liability for conversion, the contractual limitation was ineffective. Griswold argued that Reinfeld's proofs raised only a presumption of negligence and that, consequently, the contract's limitation of damages was controlling. 189 N.J. Super. at 143, 458 A.2d at 1342.

The trial court adopted the rule from *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372 (1980), and held that Reinfeld had established a prima facie case of conversion and that the burden of producing evidence to explain the whiskey's disappearance shifted to Griswold. 189 N.J. Super. at 144, 458 A.2d at 1343. To hold otherwise, the court reasoned, would permit unscrupulous warehousemen to profit by stealing goods entrusted to their care. *Id.* at 143, 458 A.2d at 1342-43. The court observed that knowledge concerning the fate of the goods was available only to Griswold and that he therefore was in the best position to explain their disappearance. *Id.* at 144, 458 A.2d at 1343. The court further held that not only had defendant failed to meet plaintiff's prima facie case, but also that evidence introduced by defendant established misdelivery as the cause of the loss. Misdelivery by a bailee, the court noted, was the legal equivalent of conversion. The court accordingly determined that the goods had been converted and that Griswold was liable for their full market value. *Id.* at 147, 458 A.2d at 1344-45.

The court's decision upholds the statutory policy embodied in N.J. STAT. ANN. § 12A:7-204(2) (West 1962). By shifting the burden of production to the bailee subsequent to the bailor's introduction of proof of delivery, demand, and the bailee's failure to return the goods, the court prevents the warehouseman from manipulating the rules of evidence to achieve a statutorily impermissible end. Thus, the consequences of silence are made to fall upon their authors, and those seeking the benefits of limited liability are required to establish their entitlement to such protections.

Stephen J. Foley, Jr.

DOMESTIC RELATIONS—DIVORCE—TERMINAL DATE OF MARRIAGE FOR EQUITABLE DISTRIBUTION PURPOSES IS DATE OF FILING OF COMPLAINT WHICH CULMINATES IN FINAL JUDGMENT OF DIVORCE—*Portner v. Portner*, 93 N.J. 215, 460 A.2d 115 (1983).

In August 1974, Morton Portner separated from his wife, Barbara, and moved from their New Jersey marital home to Philadelphia. 93 N.J. at 216, 460 A.2d at 116. On November 6, 1974 Barbara filed a complaint for separate maintenance in the Superior Court of New Jersey, and an order for support *pendente lite* was entered in February 1975. Morton filed for divorce in Pennsylvania in August 1975, but the complaint was dismissed. Morton moved to Delaware where he again filed an action for divorce. This complaint also was dismissed. *Id.* at 217, 460 A.2d at 116. In December 1979 Barbara amended her complaint to demand a judgment of divorce. Morton filed a counterclaim for divorce, and in September 1980 a divorce judgment was entered.

Between the time of his initial separation from his wife and the judgment for divorce, Morton allegedly acquired property. New Jersey's Divorce Reform Act of 1971 provides for the equitable distribution of assets acquired during a marriage. *Id.* at 218, 460 A.2d at 116. The trial court determined that for the purpose of equitable distribution, the terminal date of the marriage was the date the Portners separated in 1974, and that therefore the acquired property was not subject to equitable distribution. The appellate division reversed, holding that the marriage ended on the date Morton filed an action for divorce in Pennsylvania. Barbara appealed to the New Jersey Supreme Court. *Id.* at 217, 460 A.2d at 116.

Writing for the court, Justice Garibaldi noted that the watershed case of *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), established that for the purpose of determining the equitable distribution of assets, a marriage ends when a divorce complaint is filed. 93 N.J. at 219, 460 A.2d at 117. Justice Garibaldi observed that subsequent cases which varied from this rule involved situations where the intent of both parties to unconditionally terminate the marriage was clearly indicated, a circumstance not present in the current case. *Id.* at 220, 460 A.2d at 118. The court found that the *Painter* rule was still the most practical formulation to determine the terminal date of a marriage. *Id.* at 219, 460 A.2d at 117. Justice Garibaldi concluded, however, that in order for a divorce complaint to signify the termination of a marriage, the complaint must culminate in a final judgment for divorce. *Id.* at 225, 460 A.2d at 120.

Justice Garibaldi noted that since Morton did not seek a divorce in New Jersey until four years after his groundless out-of-state complaints were dismissed, it was reasonable to assume that Morton filed the foreign complaints not to end the marriage, but to prevent Barbara from sharing the assets he acquired after his desertion. *Id.* at 222, 460 A.2d at 118. She therefore reversed the appellate division ruling, and held that for equitable distribution purposes, the marriage ended on the date that Barbara amended her complaint to demand a judgment for divorce. *Id.* at 225, 460 A.2d at 120. Justice Garibaldi remanded the case to the trial court for proceedings consistent with the holding. *Id.* at 225, 460 A.2d at 120.

In *Portner*, the New Jersey Supreme Court reaffirmed the *Painter* rule as the standard to be applied in ascertaining the terminal date of a marriage. The decision restricts exceptions to the rule to situations in which an absolute breakdown of the marital relationship is clearly established. *Portner* also prevents a spouse from attempting to circumvent the Divorce Act by filing an unmeritorious divorce complaint solely for the purpose of depriving the other spouse of assets acquired during the marriage.

Shirley L. Berger

CRIMINAL PROCEDURE—PAROLE—JUDICIALLY IMPOSED MINIMUM PAROLE INELIGIBILITY TERMS INAPPLICABLE TO SEX OFFENDERS SENTENCED TO AVENEL TREATMENT—*State v. Chapman*, 189 N.J. Super. 379, 460 A.2d 177 (App. Div. 1983).

Donald Chapman abducted and sexually assaulted a young woman. After pleading guilty to charges of kidnapping and aggravated sexual assault, Chapman underwent evaluation at the Adult Diagnostic and Treatment Center (Avenel). His behavior was determined to be repetitive and compulsive, and it was recommended that Chapman be sentenced to the Center's treatment program. 189 N.J. Super. at 382, 460 A.2d at 179.

At the sentencing proceeding, Chapman was sentenced to Avenel for a term of twenty years for kidnapping and for a concurrent term of twenty years for aggravated sexual assault. Sentence was served pursuant to N.J. STAT. ANN. § 2C:47-3 (West 1982), which affords the sentencing judge the option of imposing upon an eligible sex offender either a treatment disposition or a prison term. Each term was made subject to a ten-year mandatory minimum parole ineligibility period. In so burdening Chapman's sentence, the trial judge concluded that

N.J. STAT. ANN. § 2C:43-6b (West 1982), which allows the sentencing judge to fix a minimum parole ineligibility term of up to one-half the set term of imprisonment, was applicable to Avenel sentences. At a second sentencing proceeding, the judge concluded that Chapman's previous offense of abduction with intent to rape warranted the application of N.J. STAT. ANN. § 2C:14-6 (West 1982), which provides that a repeated sex offender's sentence must include a fixed minimum parole ineligibility period of five years. *Id.* at 383, 460 A.2d at 180. The effect of this judgment on Chapman's earlier sentence was left unclear.

The appellate court agreed that the multiple offender provision of N.J. STAT. ANN. § 2C:14-6 (West 1982) was properly invoked in light of Chapman's previous offense. *Id.* at 384, 460 A.2d at 180. The court, however, rejected the trial judge's interpretation of N.J. STAT. ANN. § 2C:43-6b (West 1982) and held that the statute was not applicable to either a first or second offender's Avenel sentence. *Id.* at 389, 460 A.2d at 183. In reaching this determination, the appellate court noted that the legislative intent of the New Jersey Code of Criminal Justice (Code) was to follow the "release on cure" principle. *Id.* at 390, 460 A.2d at 183-84. Judge Pressler, writing for the court, acknowledged that applying N.J. STAT. ANN. § 2C:14-6 (West 1982), a Code provision, to persons undergoing Avenel treatment deviated from "release on cure," but she observed that the 1979 Parole Act, which supersedes the Code, explicitly recognized N.J. STAT. ANN. § 2C:14-6 (West 1982) as applicable to repeat offenders sentenced to Avenel. *Id.* at 392, 460 A.2d at 184-85. She reasoned that since N.J. STAT. ANN. § 2C:43-6b (West 1982), also a Code provision, was not recognized in the Parole Act as a condition of an Avenel sentence, the Legislature did not intend the provision to be a further exception to "release on cure." *Id.*, 460 A.2d at 185. Judge Pressler determined that the sentences imposed on Chapman were improper because Avenel treatment was not an appropriate sentence for kidnapping, and because an Avenel sentence for sexual assault was not subject to the minimum parole ineligibility term of N.J. STAT. ANN. § 2C:43-6b (West 1982). The sentences were vacated and the case was remanded to the trial court. *Id.* at 399, 460 A.2d at 188.

In a dissenting opinion, Judge Michels contended that N.J. STAT. ANN. § 2C:43-6b (West 1982) should apply to offenders given an Avenel sentence. *Id.* at 401, 460 A.2d at 190 (Michels, J., dissenting). He argued that the majority had effected an implied repealer of part of the general sentencing provisions of the Code. *Id.* at 402, 460 A.2d at 190 (Michels, J., dissenting).

In *Chapman*, the appellate division set guidelines relating to the sentencing of sex offenders in an attempt to both clarify provisions of the New Jersey Code of Criminal Justice and to ensure the Code's intent to "release on cure." By eliminating, however, the fixed parole ineligibility term for first offense Avenel dispositions and by limiting it to five years for second offense Avenel sentences, judges who might have otherwise been inclined to favor rehabilitation might now find a fixed parole ineligibility term in prison more in keeping with public safety interests.

Darlene Pereksta