

**THE 2008 CHIEF JUSTICE JOSEPH WEINTRAUB
LECTURE:**

**FRUSTRATIONS OF AN INTERMEDIATE APPELLATE JUDGE
(AND THE BENEFITS OF BEING ONE IN NEW JERSEY)**

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My favorite law school course, bar none, was a seminar in appellate litigation in which we studied how to argue a case before the United States Supreme Court and work to obtain five votes to achieve a favorable result. I graduated from law school prepared to argue cases in the Supreme Court, but found myself arguing cases before the Appellate Division of New Jersey—a court that was interested not in making distinctions of constitutional dimension, but in scope of review. Our law schools have courses in appellate advocacy which, for the most part, teach students how to approach the United States Supreme Court, or a state court of last resort, but most non-institutional litigators rarely appear in those courts.¹ Stated differently, few lawyers are trained in how to argue a case before an intermediate appellate court²—a court before which they may appear with some frequency.³

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1. For an interesting article on the need for specialization in the United States Supreme Court and the comparative success of its “elite bar” of experienced practitioners, see Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175 (2007).

2. See W. Warren H. Binford et al., *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 APP. PRAC. & PROCESS 37, 39 (2007).

3. A good appellate advocate in any court should read the substantive and procedural decisions of the judges before whom they will appear to find helpful decisions and those which they must distinguish.

Today, I will discuss “the frustrations of an intermediate appellate judge,” the judge “caught in the middle” between the record made by the trial court and the law as established by the New Jersey Supreme Court. However, I will also discuss the benefits of being an intermediate appellate judge in New Jersey and the distinctions between our court and other state intermediate appellate courts.

I.

Thirty-nine states and the Commonwealth of Puerto Rico now have intermediate appellate courts.⁴ New Jersey’s Appellate Division is the largest state intermediate appellate court in the country.⁵ As of the beginning of the 2008 term, we had thirty-five judges regularly assigned to the appellate division⁶ and six judges on recall for various functions. There are seven states with more intermediate appellate judges,⁷ but they sit geographically by region and are called departments, circuits, or districts.⁸ We have no law of South Jersey or North Jersey, West Jersey or East Jersey—we have the law of New Jersey with conflicts resolved by the New Jersey Supreme Court.⁹ In some states, conflicts may exist among the geographical regions, and the courts of last resort may allow them to exist. The same is true among the federal courts of appeal. The reduced number of petitions for certiorari granted by the United States Supreme Court suggests that it is not necessarily a bad thing or inappropriate with respect to certain issues.¹⁰

At present, twenty-six states and the Commonwealth of Puerto Rico, like New Jersey, have a single intermediate appellate court.¹¹ The remaining thirteen states have more than one, ranging from two in Arizona; three in Missouri and Washington; four in New York and Wisconsin; five in Florida, Illinois, Indiana, and Louisiana; six in

4. COUNCIL OF CHIEF JUDGES OF COURTS OF APPEAL, DIRECTORY OF JUDGES OF STATE COURTS OF APPEAL xxv (2006) [hereinafter DIRECTORY]; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: PUERTO RICO, <https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> (last visited Aug. 22, 2008) [hereinafter THE WORLD FACTBOOK: PUERTO RICO].

5. DIRECTORY, *supra* note 4, at xix.

6. New Jersey Judiciary: Superior Court, Appellate Division, <http://www.judiciary.state.nj.us/appdiv/index.htm> (last visited Aug. 22, 2008).

7. The seven states include: California, Florida, Illinois, Louisiana, New York, Ohio, and Texas. DIRECTORY, *supra* note 4, at xix (outlining nationwide state appellate court organization).

8. *Id.*

9. N.J. CT. R. 2:12-4 (providing grounds for appellate certification).

10. See Swanson, *supra* note 1, at 183 (discussing factors that Justices use in granting certiorari).

11. See DIRECTORY, *supra* note 4, at xix; THE WORLD FACTBOOK: PUERTO RICO, *supra* note 4.

California and Tennessee; twelve in Ohio; to fourteen in Texas.¹² There are now eighty-nine separate intermediate courts of appeal in the fifty states.¹³ Each has a chief judge.¹⁴ Chief judges are elected directly by the voters or by the members of the court.¹⁵ Some serve as a result of seniority or rotation on some basis established by law or internal practice.¹⁶ In some states, the governor or chief justice appoints the chief judge.¹⁷

From what I understand, rotation precludes continuity and internal selection promotes internal politicking and cliques, particularly because the chief judge is paid more or has a lesser caseload because of his or her administrative responsibilities.¹⁸ In any event, at last count, there were 948 state intermediate appellate judges sitting on the 89 state courts of appeal, with an average of 12 judges per court.¹⁹

The jurisdiction of state courts of appeal differs by state.²⁰ Alabama and Tennessee have different courts of appeal for civil and criminal matters.²¹ Oklahoma's Court of Appeals hears only civil matters.²² Some have limited jurisdiction and can hear only criminal cases with sentences under or over twenty years,²³ or criminal cases other than murder.²⁴ Some have no jurisdiction to handle specific matters such as challenges to statutes as being unconstitutional, board of utility cases, election cases, grand jury matters, or abortion

12. DIRECTORY, *supra* note 4, at xix.

13. See *id.*; THE WORLD FACTBOOK: PUERTO RICO, *supra* note 4. Washington's Court of Appeals has three divisions but only one chief judge. DIRECTORY, *supra* note 4, at vii, xix. Hence, there are only eighty-nine, not ninety-one, separate state courts of appeal. See *id.*

14. DIRECTORY, *supra* note 4, at xix. The number of chief judges does not directly correspond to the number of appellate courts. See *id.* Indiana, Ohio, Washington, and Wisconsin each has only one chief judge for all its courts of appeal. *Id.* Alabama and Pennsylvania each have two separate chief judges for a single appeals court, and Tennessee has two chief judges for its six districts. *Id.* Thus, there are only seventy-eight chief judges of state intermediate appellate courts. *Id.*

15. See generally *id.* (describing how judges are selected in each state).

16. *Id.*

17. *Id.*

18. See Binford et al., *supra* note 2, at 100-04, for a comparison of chief judges' and associate judges' salaries.

19. See DIRECTORY, *supra* note 4, at xix.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 60, 121.

24. See *id.* at 150.

cases.²⁵ Jurisdiction is diverse, but most intermediate appellate courts hear both civil and criminal matters.²⁶

II.

In examining the Appellate Division in New Jersey, as compared to the courts of appeal in the other thirty-eight states having intermediate appellate courts,²⁷ I note the many benefits of our system which result in better decision making.

A. *Elections and Running for Office*

Of course, the greatest advantage of being a judge in New Jersey at any level is not having to run for office, either initially or for retention.²⁸ In almost all states there is some type of election, including those involving gubernatorial appointees, with or without a Judicial Selection Commission, who must stand for retention election.²⁹ Imagine the ethical and moral issues that flow from having to campaign, raise funds, and decide cases while seeking support from the parties or attorneys in cases before you. This is not the occasion to discuss the cases and protocols being decided and developed around the country, particularly because we do not have the problem.³⁰ But, irrespective of how difficult the New Jersey appointment and confirmation process has become, and despite the fact that elections reduce the chance of vacancies in systems having the equivalent of senatorial courtesy, ours must be among the best. My colleagues on the Council of Chief Judges of State Courts of Appeal have regaled us with stories about appellate judges elected on a platform to limit *Miranda v. Arizona*³¹ or narrowly apply *Roe v. Wade*³² in their jurisdictions. I have been told that a judge in Nebraska was recently retained by a narrow vote because he was the subject of negative advertising while a Nebraska Supreme Court justice was chastised and not retained after voting to reverse a

25. See *id.* at 264.

26. *Id.* at xix.

27. A recent article examines the practices among thirteen statewide intermediate courts of appeal. See Binford et al., *supra* note 2, at 42. The article was the result of a study conducted for the benefit of the Court of Appeals of Oregon and was supported by the Council of Chief Judges of Courts of Appeal. *Id.* at 38. I urge the faculty of Rutgers School of Law-Newark and the other law schools in New Jersey to discuss the issues reviewed by the article and debate the issues herein for the benefit of the legal system of which the law schools perform such an important role.

28. See DIRECTORY, *supra* note 4, at 181.

29. See, e.g., *id.* at 21. The description of the process in the DIRECTORY is not always consistent with respect to districts within the same state. *Id.* at 9-15.

30. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765 (2002).

31. 384 U.S. 436 (1966).

32. 410 U.S. 113 (1973).

popular murder conviction. And in Missouri, a political action group campaigned to unseat all appointees of “liberal” Governor Mel Carnahan while seeking to retain those who were initially appointed by former “conservative” Governor John Ashcroft.³³

B. The Chief Justice’s Assignment Authority

Not only are New Jersey judges reviewed by the local and state bar, appointed by the governor, and confirmed by the senate, in my judgment, the most important aspect to a good appellate court in New Jersey is the chief justice’s unique assignment authority.³⁴ The chief justice has authority to assign judges of the superior court wherever he or she thinks appropriate, a notion admired but shocking to my colleagues across the country, because they are elected or appointed directly to the court of appeals, and if appointed run for retention.³⁵ While most retention elections are unopposed, in years of landslide victories during partisan political elections involving other offices, a Democrat or Republican judge may not be reelected or retained.³⁶ And, as previously mentioned, a judge may be opposed because he or she reversed a conviction when *Miranda* required it.³⁷ In Pennsylvania, judges were not retained because the Pennsylvania Supreme Court held that the judicial pay raise of several years ago could not be rolled back under the state constitution even though it was tied to an illegal pay raise to legislators in the form of unvouchered expenses.³⁸

A byproduct of the chief justice’s assignment powers, and rotation of panels on a yearly basis, is collegiality—an essential component to quality appellate justice. Mutual respect and a good working relationship are essential to achieving good and expeditious appellate justices. In many states, personality differences may not be overcome even though the judges on a four- or five-judge court must work together. In other states, an appellate judge may find himself or herself sitting with a judge who campaigned for election based on a platform of overruling a court decision or an opinion a colleague wrote. While we have few problems of “collegiality” in New Jersey

33. Margaret Ebrahim, *The Bible Bench*, MOTHER JONES, May/June 2006, at 54.

34. See N.J. CONST. art. VI, § 7, ¶ 2.

35. See generally DIRECTORY, *supra* note 4, at 181, 188; Binford et al., *supra* note 2, at 46-53. Judges are elected directly to courts of appeal in nineteen states, and are appointed and subject of retention elections in fifteen others. See generally DIRECTORY, *supra* note 4 (describing how each state selects judges). In New York, judges of the trial court may be assigned by the governor to the appellate division and must run for reelection as justices of the New York Supreme Court (the trial court). *Id.* at 194-211.

36. Texas’s elections are “partisan.” See DIRECTORY, *supra* note 4, at 273-309.

37. See discussion *supra* Part II.A.

38. *Stilip v. Commonwealth*, 905 A.2d 918, 969-70 (Pa. 2006).

because of the nature of the assignment system itself, any problems that do exist can easily be remedied by reassignment of parts.

C. *Court's Rulemaking Authority*

In most states, as with the federal government, judicial rules of procedure are adopted by the legislature, and most legislatures, as I understand it, are no longer composed of a majority or substantial number of attorneys.³⁹ The New Jersey Supreme Court's unique constitutional rulemaking power over administration, practice, and procedure makes it possible to have experts in the field promulgate the rules that affect the flow and decision of cases.⁴⁰ Moreover, under our practice, the New Jersey Supreme Court has created committees to advise it with respect to rulemaking, so people affected by the rules are the ones who make the recommendations.⁴¹ The Court adopts rules after review or upon recommendation of committees on which judges and practitioners with expertise in the area participate.⁴²

D. *General Administration*

New Jersey is also unique because, consistent with the New Jersey Supreme Court's rulemaking authority, the administration and operation of the judicial branch is within the control of the judiciary.⁴³ By constitutional authority, the chief justice is the executive head of the judiciary, independent of the New Jersey Supreme Court, and he or she appoints the Administrative Director, a constitutional officer, who implements his or her decisions, assisted by the Administrative Office of the Courts (AOC).⁴⁴ The impact of a central administration cannot be overestimated. Clearly, the benefits of professionals negotiating with the executive and legislature branches as to budgetary and personnel issues, salaries, and pending legislation takes those issues out of the hands of judges and, in many states, multiple courts on an individual basis, thereby permitting judges to devote their time to deciding cases. While a court that sits geographically can benefit by the judges' friendships or political affiliations with a legislator from the same area, or by a good relationship within the area if the court is locally funded, political squabbling on a local basis or a single unpopular opinion affecting

39. Tracy W. Carey, *Where Have All the Lawyers Gone?: The Problem of the Vanishing Lawyer-Legislator*, 67 ALA. LAW. 110, 110 (2006).

40. See N.J. CONST. art. VI, § 2, ¶ 3.

41. *Winberry v. Salisbury*, 74 A.2d 406, 413 (N.J. 1950).

42. *Id.*

43. N.J. CONST. art. VI, § 7, ¶ 1.

44. *Id.*

local affairs can be detrimental. We have benefited by the central administration in many ways, particularly from the absence of the need to do independent budgeting and purchasing to central payroll and lease management.⁴⁵

E. Limitations on Central Administration

There is a downside to central administration, however, and that relates to the inability of an appellate court to set its own priorities.⁴⁶ Four years ago, I attended a conference of the Council of Chief Judges of Courts of Appeal where we discussed technology and its benefits to counsel and the courts, including scanning techniques that make the record and briefs available online, with security features implemented to prevent access beyond the court to certain information. We discussed the benefits of electronic filing, distribution of opinions, and the need for improved technology. Subsequently, at a follow-up session a year and a half ago, a colleague from Arizona showed us the case he was working on laid out on four quadrants of his laptop screen. The quadrants displayed a portion each for the opinion he was typing, the briefs, the transcripts, and his Westlaw or Lexis research. After the conference, he made improving technology a priority, and was able to implement it in his court in Arizona. However, in a system like New Jersey's, which processes over 7,000,000 cases a year, the central administration cannot concentrate on the concerns of a court that processes only 7,000 appeals.⁴⁷ Our technology priorities, like other priorities, for budget purposes, must be decided by the AOC based on discussion with groups and committees that considerably outweigh the appellate division.⁴⁸

45. See Binford et al., *supra* note 2, at 94-98.

46. See N.J. CONST. art. VI, § 7, ¶ 1.

47. In the 2005-2006 term, there were 1,056,399 complaints filed in the trial court divisions of the superior court and 6,421,301 complaints filed in the Municipal Courts. NEW JERSEY JUDICIARY COURT MANAGEMENT: JUNE 2006, at 51, 59 (2006), <http://www.judiciary.state.nj.us/quant/cman0606.pdf>. In the 2006-2007 term, there were 1,071,071 complaints filed in the trial court divisions of the superior court and 6,511,813 in the municipal courts. NEW JERSEY JUDICIARY COURT MANAGEMENT: JUNE 2007, at 51, 59 (2007), <http://www.judiciary.state.nj.us/quant/cman0706.pdf>.

48. However, electronic filing is routine in other courts of appeal as well as the federal system. It would also expedite the distribution and decision making of motions and plenary appeals. Unfortunately, in the 2005 court term, it took us an average of twenty-eight days between the filing of a motion and its decision, even in a matter involving a contested motion for extension of time in which to file a brief. See Binford et al., *supra* note 2, at 65-67, 89-93. On the other hand, we have created an electronic database to distribute our opinions. *Id.* at 65-66.

III.

This brings me now to the decision-making process. As all courts do, we have some problems. Our court faces some serious problems in the processing of cases. Comparative statistics among the thirteen single courts of appeals in states of comparative size to ours reflect that we process appeals more slowly than others, and that our time from notice of appeal to perfection of the record and filing of briefs, and from filing of an appeal to disposition is not as good as we would like.⁴⁹ But we are the only large single-court state with a large indigent population, and the public defender cannot always process requests for appeal in a timely fashion.⁵⁰ Last term, there were over 400 motions, which included applications for leave to file an appeal as within time, under *State v. Molina*,⁵¹ because either trial counsel did not transmit the defendant's request to appeal in a timely fashion to the Appellate Section of the Public Defender's Office or that Office could not process them in a timely fashion. Yet, we open appeals upon the filing of notices of appeal in criminal cases before defendants file and perfect their *Molina* motions. The Public Defender simply cannot keep up with her caseload, and we require responding briefs in both civil and criminal appeals from all governmental entities,⁵² which now, for budgetary reasons, do not have staffs to file them or to file them in a timely fashion. Hence, we face an unusual delay in briefing and an extraordinary number of extensions.⁵³ Despite these problems and others, the benefits and advantages of our system far outweigh the disadvantages and detriments, and despite all the statistics and comparative studies, it is the quality of decision making that really counts. I will now turn to that subject.

A. Court Preparation

Another unique aspect of our court is that every judge writes a pre-conference memo (a "pink") on every case on which he or she sits (unless called into the case after one or two other judges decided it was necessary or appropriate to do so when a third judge was not

49. See Binford et al., *supra* note 2, at 68-82. Essentially because of our indigent population and the time it takes to process motions addressed to creating the record, New Jersey courts take longer than the American Bar Association (ABA) standard of sixty days in settling the record. *Id.* at 63. However, we are only nineteen days over the ABA standards, taking forty-six days on average, from argument or submission to decision. *Id.* at 82-83.

50. *Id.* at 72-73.

51. 902 A.2d 200 (N.J. 2006).

52. See N.J. CT. R. 2:6-4(d).

53. Binford et al., *supra* note 2, at 68-73.

initially assigned to the case).⁵⁴ Each judge reads the briefs and enough of the record necessary to write the comprehensive memo, and we come to conference with an understanding of what the other judges think and what must be developed at argument and in the opinion.

B. *Decision Making*

Sometimes assisted by the memos prepared by our Central Research staff in Trenton or the “elbow clerks,” the New Jersey Appellate Division judges read the briefs and record and write their own opinions. As reported in Professor Arthur Hellman’s report on the 2005 National Conference on Appellate Justice,⁵⁵ in many states, central staff screen cases and recommend to a panel that there should be a summary affirmance by one-word orders or rule citations without review of the briefs by the court or the presentation of draft opinions.⁵⁶ In other circumstances, the central staff of professional lawyers write draft opinions and circulate them to the assigned judges who decide the cases, usually on those draft opinions, although frequently with modification.⁵⁷

We have a staff of twenty-six full-time professionals in Trenton who draft memos for the court in selected cases,⁵⁸ each judge has a clerk, and the senior judges have two, each of whom serve for a year in the first year out of law school. Memos are produced in thirty to forty percent of the cases, and we use so much of the memo as the judge assigned to write the case decides to be appropriate after the judge reviews the record and briefs. But again, the *judge* reviews the record and briefs, and writes the opinion in the case.

According to the *Seeking Best Practices* study prepared for the Oregon Court of Appeals, in Nebraska thirty-two percent of the cases result in opinions, and in Oregon only fifteen percent of the cases result in opinions, and one-third of the dispositions are by affirmances without opinion (AWOPs) resulting in two AWOPs for every formal opinion.⁵⁹ Approximately fifty percent of our dispositions are by plenary opinion; although we also dispose of cases on the merits by sentencing orders, by sua sponte orders, on motions

54. See N.J. CT. R. 2:13-2(b).

55. Arthur P. Hellman, *The View from the Trenches: A Report on the Breakout Sessions At the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 184-96 (2006).

56. *Id.* at 184-86; see also Binford et al., *supra* note 2, at 98-110 (discussing the role of legal staff).

57. See Hellman, *supra* note 55, at 186-87.

58. We also have a Chief Counsel and five staff attorneys in the Clerk’s Office who advise and supervise the case managers who are responsible for case processing.

59. Binford et al., *supra* note 2, at 55.

for summary disposition, and on other motions decided by judges as well as by administrative dispositions upon withdrawal, settlement, and non-perfection.⁶⁰

C. Oral Argument

As a result of a recent survey of the Council of Chief Judges of Courts of Appeal, I learned that New Jersey is unique in permitting oral argument in any case when requested by a party within fourteen days after the service of the respondent's brief and occasionally when a late request is made by motion.⁶¹ Some other states do the same, or do so in certain types of cases only, but in many states only a certain category of cases may be argued as of right, or the court has discretion to decide what is to be argued or to pass upon a request for argument.⁶² In my view, oral argument is a wonderful opportunity for the parties to present a case and for an appellant to show his or her zeal for the matter and to emphasize and explain why a reversal is required—that is, to be assured that the message is not lost in a lengthy brief or on a calendar of twelve or sixteen cases each week containing multiple briefs.

Each judge of the appellate division is generally assigned four opinions to write for each week he or she sits and five for each summer sitting, totaling twenty-seven to twenty-eight weeks a year. This does not include the one or two Sentence Oral Argument calendars per judge in which the appeals are generally disposed by order. Each judge now writes an average of 108 opinions a year, independent of the cases disposed of by motion, sua sponte, or other order. Because of the number of opinions assigned to each judge on each calendar, the calendar usually contains four times the number of judges sitting each week.⁶³

Oral argument can also be helpful because, in some cases, the briefs ramble on, with irrelevant procedural history or unnecessary and irrelevant boilerplate language. On occasion, the appellant or respondent forgets to review the adversary's brief before deciding to request argument. The adversary may have an opportunity to answer a question, or to say something at arguments which permits counsel to fill in the gap with a reference to the record or to something which is dispositive in favor of the other party.

60. Of the 6,975 appeals decided last term, 3,721 were disposed by opinion, 769 by Sentencing Oral Argument orders, 41 by sua sponte orders, and 358 by motion order.

61. See N.J. Ct. R. 2:11-1(b).

62. Despite the survey by the Council of Chief Judges of Courts of Appeal, among the thirteen states in the *Seeking Best Practices* study, New Jersey is in the middle with forty percent of the cases argued. Binford et al, *supra* note 2, at 80.

63. The average number of opinions reported in *Seeking Best Practices* includes recall judges who sit on plenary appeals only occasionally. *Id.* at 102-03.

IV.

The Appellate Division in New Jersey faces the same problems and debates the same issues faced by all appellate courts across the country. These problems were recently the focus of the 2005 National Conference on Appellate Justice and are the subjects of ongoing discussion by intermediate appellate judges.⁶⁴ I encourage discussion of these issues by law schools, bar associations, and judges.⁶⁵ According to the *Seeking Best Practices* study:

Courts are expanding their use of summary disposition methods, increasing the categories of cases being expedited, reformulating panels, adopting new technologies, reducing oral argument, issuing a majority of unpublished opinions, and in some cases, questioning court culture. We believe that these innovations will give rise to a nascent set of best practices that, once identified, can be adopted by courts to improve their performance even in the face of limited resources.⁶⁶

If we put aside the unpopular term “best practices,” a term used nationally, these subjects are worthy of serious discussion to improve the quality of appellate justice.

A. *Speed Versus Perception*

The greatest internal debate among judges of courts of appeal is finding the proper balance between the interests of swift decision making and thorough review of cases. We have an ongoing dialogue on the subject in New Jersey, although it appears to be limited to judges. We have encouraged serious attention to the subject by the bar and academia, as encouraged at the 2005 National Conference on Appellate Justice.⁶⁷ Some assert that “justice delayed is justice denied” and the matter must be resolved quickly so people can move on with their lives. Others assert that it is important that courts consider, and show they consider, what has been presented.

Related to this debate is the question of whether the opinions should be full explorations of everything raised in order to show the matter was thoroughly reviewed and the issues raised truly studied and considered (and the client received the value of what his or her attorney charged). On the other hand, many appellate judges and some lawyers believe that the parties should know the facts, record, and the issues, and that it is better to resolve a case (and therefore a whole volume of cases) quickly—by rule affirmance, summary

64. See, e.g., Hellman, *supra* note 55, at 202-03.

65. See Binford et al., *supra* note 2, at 114.

66. *Id.* at 41.

67. See Hellman, *supra* note 55, at 202-04.

dispositions, or the like, which will also permit judges to concentrate on "polishing" opinions that will be published and become precedent.⁶⁸ Some courts that publish a greater percentage of formal opinions than we do believe rule affirmances and summary dispositions are helpful because they preclude their use as precedent or for citation.⁶⁹ Courts that publish a higher percentage of opinions may write formal opinions in a smaller percentage of cases.

B. *The Role of Staff*

Among the debatable issues related to "speed versus perception" is the question of the role of staff.⁷⁰ It can generally be said that the faster courts decide cases, the greater the delegation to staff. Certainly, judges remain responsible for the decision making, but the courts that decide cases more quickly tend to rely more heavily on the staff recommendations for summary disposition or drafting opinions.⁷¹ As Professor Thomas E. Baker wrote, in order to cope with volume:

[w]e increased the supply of appeals by creating state courts of appeals and by adding judges to the federal courts of appeals. We also added appellate inputs to both federal and state court systems in the persons of law clerks and staff attorneys. We conserved scarce resources by reducing judicial inputs in some cases by various procedural reforms like screening appeals to non-argument calendars and relying on unpublished opinions or doing away with opinions. This amounted to a paradigm shift in appellate procedure that Thomas Kuhn could write home about: The new norm was to afford just enough procedure "sufficient unto the case."

Today, most of us seem to be content in believing that the courts of appeals survived the "crisis of volume," whether it was real or imagined. The courts have maintained an appellate equilibrium: They manage to decide about as many appeals as are filed each year. This is important and significant. Cases are not queuing up on the docket, although disposition times have lengthened appreciably. Furthermore, we now take for granted what were once characterized as "emergency" procedures. We have lowered our expectations for appellate procedure. We have

68. See N.J. Ct. R. 2:11-3(e); see also N.J. Ct. R. 2:8-3(b).

69. See N.J. Ct. R. 1:36-3.

70. See Hellman, *supra* note 55, at 184-96; see also *supra* text accompanying notes 55-58.

71. See generally Binford et al., *supra* note 2.

defined down our appellate values. We all have internalized the postmodern norms of the minimalist procedural paradigm.⁷²

C. *Publication and Use of Precedent*

Decisions related to publication and the filing of separate opinions are discretionary.⁷³ New Jersey Court Rule 1:36-2(d) gives criteria for the decision to publish.⁷⁴ Judges usually publish a decision when it “determines a new and important question of law,” such as statutory construction or a constitutional principle; determines “a substantial question” under the constitution; or involves a “substantial” new question including a caveat or exception to an existing principle.⁷⁵ Opinions may also be published to restate a principle not discussed for some time or to detail a “historical review.”⁷⁶

There appears to be a relationship between a court’s publication policy and the time it takes to decide appeals. We publish only eight to ten percent of our opinions, which constitute precedent. Furthermore, only three-judge opinions may be published. In the days before electronic research, when lawyers relied on bound volumes, the Committee on Opinions decided what appellate division opinions to publish. That changed about fifteen years ago when the appellate division was permitted to decide the issue of publication for itself. This includes publication of a trial court opinion which is the subject of a timely appeal, for all published trial court opinions must be the subject of published appellate decisions. Before electronic research, in which each opinion is merely a “blip,” bookshelf space was at a premium and the cost for each individual bound volume was expensive. Accordingly, the Committee on Opinions was directed to be conservative in its publication policy. Since then, my view of publication has become far more liberal as compared to when I was one of the three members of the Committee on Opinions from 1980 to 1982 and as the alternate member from 1974 to 1977.

We do not publish every decision because there would be simply too many cases which would serve as precedent, and it would be too time consuming to “polish” each opinion for such purposes. Our percentage of published opinions is relatively low, but our number of

72. Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 113-14 (2006); see also Hellman, *supra* note 55, at 184-85 (discussing the role of staff attorneys and screening).

73. N.J. CT. R. 1:36-2(d).

74. *Id.*

75. *Id.*

76. *Id.*

opinions filed exceeds other intermediate appellate courts.⁷⁷ Moreover, some believe that if each case were to be published and become precedent, there would be far more summary opinions and researching an issue would become too cumbersome. Others believe that publishing everything is a good idea because it would permit users of the system to evaluate the impact of all decisions and would expedite decision making. New Jersey Court Rule 1:36-3 allows attorneys or parties to cite unpublished opinions for their persuasive impact upon a representation that there is no other opinion known on the subject, but the court cannot cite it in its opinion.⁷⁸ The rule, in my view, achieves a proper balance, and one which I understand other states have looked to with favor. More importantly, the panel deciding the case has the authority to publish. In many other intermediate appellate courts, because of their smaller sizes or the fact they establish the law for the geographic region (and conflicting decisions don't give rise to automatic review by the court of final resort), the entire court must approve a decision for publication, the opinion must be circulated to all members of the court for comment before publication, or the opinion can be marked as filed with precedential value.

D. Decision Making, Including the Filing of Separate Opinions

When there is a dissent, there is a difference of opinion as to when the case should be published. I decline to publish if the matter should be resolved expeditiously by the New Jersey Supreme Court or if the matter is essentially one related to application of an established principle. I elect to publish if there is a recurring problem and the resolution should be known and applied prior to the New Jersey Supreme Court's resolution of the matter.

The decision to file a separate opinion is critical to the role of an intermediate appellate judge. It must be made by the individual judge on a case-by-case basis. I firmly believe that no judge on our court declines to file a separate opinion when he or she fundamentally disagrees with the principle of law announced or the result in the case. But even in an intermediate appellate court, there are opinions or decisions which, in my view, should be unanimous, and we must remember that a dissent gives rise to a right of appeal, which in certain times will affect the court of last resort's ability to take and review other cases.⁷⁹ I have seen no evidence that the New

77. Binford et al., *supra* note 2, at 83-86.

78. N.J. CT. R. 1:36-3.

79. See N.J. CONST. art. VI, § 5, ¶ 1(b); see also N.J. CT. R. 2:2-1(a)(2) (permitting an appeal to the New Jersey Supreme Court in any case in which there is a dissent in the appellate division).

Jersey Supreme Court declines to take cases because of the volume on its docket. I am one of four or five judges on one of eight parts or panels of the court, whereas the New Jersey Supreme Court sits as an entity to decide appeals and petitions for certification and should be better able than I to decide what it should review. While I cannot turn away an appeal as of right and should know the recurring issues and issues of public importance, I do not know the impact of other cases pending before the New Jersey Supreme Court and firmly believe that the New Jersey Supreme Court should generally reach its own decisions as to cases for review.⁸⁰

The decision to dissent or file a separate opinion is the hardest I make in my adjudicatory capacity. I am now completing twenty-three years on the court, and I have filed only eight published dissents,⁸¹ twenty or so unpublished dissents,⁸² and a fair number of dissents consistent with a published dissent until the New Jersey Supreme Court resolves an issue (usually in a manner which permits a summary reversal and remand of other pending cases with a similar dissent).⁸³ My conservative approach to dissenting, in my view, has

80. Because the New Jersey Supreme Court must review disciplinary matters, *see* N.J. Ct. R. 1:20-1, and capital convictions, N.J. CONST. art. VI, § 5, ¶ 1(c); N.J. Ct. R. 2:2-1(a)(3), independent of rulemaking and administrative issues, the Court knows its docket and resources best.

81. *See* *Rowe v. Hoffmann-La Roche, Inc.*, 917 A.2d 767, 776-80 (N.J. 2007) (Stern, J., temporarily assigned, dissenting); *McKnight v. Office of the Pub. Defender*, 936 A.2d 1036, 1054-57 (N.J. Super. Ct. App. Div. 2007) (Stern, J., dissenting); *State v. Press*, 651 A.2d 1068, 1072-77 (N.J. Super. Ct. App. Div. 1995) (Stern, J., dissenting), *appeal dismissed*, 676 A.2d 1089 (N.J. 1996); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 644 A.2d 626, 632-34 (N.J. Super. Ct. App. Div. 1994) (Stern, J., dissenting), *aff'd*, 662 A.2d 509 (N.J. 1995); *State v. Sepulveda*, 602 A.2d 273, 277-79 (N.J. Super. Ct. App. Div.) (Stern, J., concurring and dissenting), *modified*, 617 A.2d 1215 (N.J. 1992); *State v. J.Q.*, 599 A.2d 172, 189-94 (N.J. Super. Ct. App. Div. 1991) (Stern, J., dissenting), *aff'd*, 617 A.2d 1196 (N.J. 1993); *Salem Group v. Oliver*, 590 A.2d 1194, 1202-05 (N.J. Super. Ct. App. Div. 1991) (Stern, J., dissenting), *aff'd*, 607 A.2d 138 (N.J. 1992); *C.A.M. v. R.A.W.*, 568 A.2d 556, 563-65 (N.J. Super. Ct. App. Div.) (Stern, J., dissenting), *dismissed*, 604 A.2d 109 (N.J. 1990).

82. *See, e.g., State v. Segars*, 799 A.2d 541, 552 (N.J. 2002) (agreeing with Judge Stern's dissent and reversing the Appellate Court's decision); *Torres v. Travelers Indem. Co.*, 793 A.2d 592, 593-94 (N.J. 2002) (agreeing with Judge Stern's dissent and reversing the Appellate Court's decision); *Marino v. Marino*, No. A-2246-06T2, 2008 WL 425578 (N.J. Super. Ct. App. Div. Feb. 19, 2008).

83. *See, e.g., State v. Dillihay*, 601 A.2d 1149 (N.J. 1992) (overruling *State v. Graham*, 584 A.2d 878 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 598 A.2d 874 (N.J. 1991)) (concluding that, despite the anti-merger provision of title 2C, section 1-8(e) of the New Jersey Statutes Annotated, a school zone violation merged with a greater offense so long as the mandatory minimum was imposed); *State v. Vasquez*, 609 A.2d 29 (N.J. 1992) (overruling *State v. Wearing*, 591 A.2d 1350 (N.J. Super. Ct. App. Div. 1991)) (dealing with the impact of a violation of probation in a school zone case in which the prosecutor originally waived the mandatory minimum for purposes of a negotiated sentence); *State v. Gonzalez*, 588 A.2d 816 (N.J. 1991).

led to positive results in two ways. First, it has forced me to work toward a consensus or resolution satisfactory to the panel without the need for a dissent, but frequently, that approach takes more time than writing the dissent. Second, it has resulted in more separate opinions which express my concerns with the majority opinion not only for the benefit of the parties, but also for the benefit of the New Jersey Supreme Court. Several of my unpublished and thirty-three published concurring opinions essentially say: "I am going along and here is why—but I am troubled, and New Jersey Supreme Court, in the exercise of your discretion, take an extra careful look at the petition for certification."⁸⁴ I evolved to this view in my first few years on the court because I learned that, if two people I respect tell me I am wrong, then I am usually willing to agree with them, but I want my reservations to be voiced. In that manner, the justices know my concerns when they review the petition, and the parties know there is a concern for which a petition may be warranted.

V.

Justice James D. Hopkins of the New York Appellate Division has noted that while intermediate appellate courts were initially created to divert the volume and workload of the courts of last resort, they have become the courts burdened by the largest workload and have developed a role in resolving individual disputes and identifying the critical issues which must be resolved by the courts of last resort:

The role of the intermediate appellate court has consequently been cast in terms primarily designed to relieve the burden of the then-existing appellate court. The assistance to the highest court assumes two forms: 1) it reduces the sheer number of appeals and 2) it releases the highest court to address itself solely to the determination of questions of law, with a particular view toward the development of the law as a whole.⁸⁵

Stated differently, the roles of intermediate appellate courts and courts of last resort are quite different and should not be confused. However, I think that it is fair to say that in a three-tier system with an intermediate appellate court, Judge John Parker of the Fourth Circuit correctly noted the role of an intermediate appellate court as the court of initial and most often last resort: "The function of the reviewing court is: (1) to see that justice is done according to law in the cases that are brought before it, (2) to see that justice is

84. See, e.g., *State v. Apprendi*, 698 A.2d 1265, 1271 (N.J. Super. Ct. App. Div. 1997) (Stern, J., concurring), *aff'd*, 731 A.2d 485 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000).

85. James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 462 (1975).

administered uniformly throughout the state, and (3) to give authoritative expression to the developing body of the law.”⁸⁶

At a seminar on appellate justice in San Diego in 1975, at the Indiana University School of Law in 2001, and in Washington in 2005, all the issues we debate—from the need for speed in deciding cases to the benefits of full exploration and development as compared with quick and expeditious dispositions, the utilization of staff in the screening and decision-making process, the pros and cons of more publication of decisions and precedent, the ability to cite unpublished opinions, and the need for and right to oral argument—have all been debated and reconsidered. In addition, the role of an opinion and what constitutes a good intermediate and supreme court opinion has been debated.⁸⁷ There seems to be little consensus on these subjects⁸⁸ with two or three exceptions: (1) there is no consensus, (2) the role of intermediate appellate courts and their practices and procedures must be constantly reviewed, evaluated, and updated,⁸⁹ and (3) the intermediate appellate courts are “caught in the middle.”⁹⁰ While most literature regarding appellate courts focuses on the federal and state supreme courts, all federal and state constitutional issues and state common law issues pass through the state intermediate courts of appeal, and more attention must be given to them. Intermediate appellate courts exist so that courts of last resort need not be burdened with the volume of cases and continued application of established law while states maintain the right to appeal. They also exist to advance the evolution of law based on their experience with the volume of cases. In any event, the growing literature devoted to the subject of intermediate appellate courts warrants both careful study and consideration.

86. John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 1 (1950).

87. See Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961).

88. Hellman, *supra* note 55, at 178-202 (examining strategies implemented by several courts to deal with these problems).

89. See Hopkins, *supra* note 85, at 478 (advocating a continual reassessment of intermediate appellate court practices to conform to the changing responsibilities of those courts); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 360-62 (2002) (discussing the functions of intermediate appellate courts and the expansion of areas of law covered by these courts, particularly in the field of the interpretation of federal law); Gary E. Strankman, *Appellate Reform: The Appellate Process Task Force Model*, 35 IND. L. REV. 375, 375-80 (2002) (examining the findings of the Appellate Task Force created by California’s Chief Justice Ronald M. George in 1997 and charged with evaluating the factors that affect the efficiency of the California Appellate Court and recommending changes to increase efficiency).

90. Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 IND. L. REV. 329, 332 (2002).

As already noted, in New Jersey each judge sits on plenary calendars twenty-seven weeks during the regular term and is assigned between eight and eleven cases on which to sit each week.⁹¹ The presiding or senior judge sitting that week assigns the cases. Generally, each calendar contains four times the number of cases as the judges sitting, so each judge is assigned four opinions to write for each calendar on which he or she sits.⁹² In addition, there are summer calendars of twenty cases per judge, and each judge has at least one Sentence Oral Argument calendar throughout the year. As a result, the court deals with many issues and many subjects.

There is no doubt that an intermediate appellate court can affect change. New York Appellate Division Justice James D. Hopkins also wrote on how that can be done:

Beyond the technique of a direct statement to another authority, the intermediate court itself can effect change. In the hierarchal view of precedent, the act may take the form of either quiet usurpation of, or a bold challenge to, existing case law. Quiet usurpation occurs when the intermediate court consciously undermines doctrine by the process of distinction without expressly impugning the doctrine. This is, of course, the traditional common law technique which usually foretells the eventual overruling or modification of doctrine. But the process is customarily initiated by the highest court, with the intermediate court then following its lead.

....

... The highest court may indeed resent the destruction of the doctrine either by the slow erosion of distinction or by the straightforward method of overruling. What may be a worthy and desirable purpose is lost by the quick and contrary response of the highest court to the trespass of the intermediate court upon the province of the highest court to mold the law.

More properly, it seems to me, the intermediate court's function should be carried out by suggestion, by indicating the reasons for change, but not by infringing upon the prerogative of the highest court to make changes in the law. If *stare decisis* is to continue to hold any place in the judicial system as a control on the uniform and non-discriminatory determination of similar disputes, there cannot be two sources for the definition of the law to be applied. Any process other than the establishment of final power in one court—at the highest tier—results only in a distrust of the system and in utter confusion among the bar and the trial courts. If the merit of the change is exposed by the statement of the intermediate court, we should

91. See *supra* Part III.C.

92. See *id.*

expect that the highest court will give suitable consideration to the recommendation.⁹³

A. *Departures from Precedent*

Related to the question of dissenting and concurring opinions is the question of going along with cases that depart from prior precedent of the court. Early in my appellate career, in *Cheung v. Cunningham*⁹⁴ and *Hellwig v. J.F. Rast & Co.*,⁹⁵ I set out to explain when I would join a case departing from precedent in the absence of a new or amended statute or supreme court decision affecting that precedent. My view is clear. I essentially decline to change common law precedent unless a new or amended expression of public policy or opinion affects it. But, I do have a constitutional obligation to interpret a statute or constitutional provision as I understand it independent of the view of others. However, any conflicting or new view would warrant the New Jersey Supreme Court's consideration of a new and conflicting opinion. We have few cases with the impact of *Planned Parenthood of Southern Pennsylvania v. Casey*,⁹⁶ *Roper v. Simmons*,⁹⁷ or *Parents v. Seattle School District*,⁹⁸ but the fact is that precedent is important to me and we have little opportunity on our level to consider the "evolving notions of fairness and decency." Adhering to clear precedent is of enormous importance to attorneys in giving advice to clients and in resolving matters before resorting to litigation, and for trial judges in a high volume state court system in settling matters and deciding cases. Moreover, conflicting decisions of our court present practical problems regarding how to proceed until the New Jersey Supreme Court resolves the conflict. For those reasons, I rarely depart from established precedent and only for compelling reasons.

However, there is nothing inappropriate about suggesting that the New Jersey Supreme Court reconsider a precedent so long as the intermediate appellate court respects it and does not overstep its bounds or authority.⁹⁹

93. Hopkins, *supra* note 85, at 466-68.

94. 520 A.2d 832, 835-36 (N.J. Super. Ct. App. Div. 1987) (Stern, J., concurring), *rev'd*, 546 A.2d 501 (N.J. 1988).

95. 521 A.2d 896, 899-900 (N.J. Super. Ct. App. Div. 1987) (Stern, J., concurring), *aff'd*, 538 A.2d 1243 (N.J. 1988).

96. 510 U.S. 1309 (1994) (determining what restrictions can be placed on a minor seeking an abortion).

97. 543 U.S. 551 (2005) (deciding the constitutionality of the death penalty with respect to a juvenile under eighteen).

98. 127 S. Ct. 2738 (2007) (resolving whether race could be used as a factor in school assignments for purposes of creating racially diverse districts).

99. *See, e.g.*, Hellman, *supra* note 55, at 170.

VI.

Having written over 2,500 opinions,¹⁰⁰ I am briefly going to touch on the greatest frustrations of an intermediate appellate judge, caught in the middle between a record made or not made in the trial courts, a limited or narrow scope of review, and the law as established by the New Jersey Supreme Court.

The New Jersey Supreme Court seems to be addressing the troublesome problem of unduly suggestive identifications in criminal cases.¹⁰¹ I recently added my contribution by suggesting a required jury charge calling the jury's attention to the adverse impact on credibility by a law enforcement officer's suggestion to the witness that the perpetrator may be present as compared to advising that he or she "may or may not" be included in the array.¹⁰²

One of my frustrations is that indigent parties in purely private civil disputes, in essence, have no right to appeal (unless represented by a legal services agency or pro bono) because they cannot afford to purchase the transcript.¹⁰³ We have begun listening to tapes of decisions where the matter is disposed of on a pretrial motion by oral opinion, and with the approval of the Judicial Council, we have administratively requested by order that motion judges place their oral opinions in writing so that transcripts are not needed with respect to pretrial dispositions. But review of transcripts of evidentiary proceedings resulting in credibility findings and review of the sufficiency of evidence cannot be avoided.¹⁰⁴ In the 1970s, a grant application was drafted for creation of a staff in the AOC to prepare transcripts for indigents in private civil matters.¹⁰⁵ The idea was

100. Between 1975 and 1998, each judge wrote an average of 130-153 opinions a term. See Hon. Justice B. Handler, *Appellate Division: Reforms and Progress for 1978-79 Term*, N.J.L.J., Nov. 29, 1979, at 2; Hon. Justice B. Handler, *The Appellate Division: A Progress Report*, N.J.L.J., Feb. 22, 1979, at 1. However, as cases became more difficult and some appeals needed more time for appropriate review, the court was enlarged and innovations such as the Sentence Oral Argument calendars and the summary disposition program, resulting in decisions by order, were developed to reduce the number of opinions generated by each judge. Two-judge panels were used in the late 1970s to help cope with volume and productivity.

101. See, e.g., *State v. Adams*, 943 A.2d 851 (N.J. 2008); *State v. Delgado*, 902 A.2d 888 (N.J. 2006); *State v. Herrera*, 902 A.2d 177 (N.J. 2006).

102. *State v. King*, 915 A.2d 587, 596-99 (N.J. Super. Ct. App. Div.), *cert. denied*, 921 A.2d 448 (N.J. 2007).

103. See, e.g., N.J. CT. R. 2:5-3(d); *In re Guardianship of G.S.*, 644 A.2d 1088, 1091 (N.J. 1994); *In re Dotson*, 367 A.2d 1160, 1162 (N.J. 1976); *Robinson v. St. Peter's Med. Ctr.*, 564 A.2d 140, 143-44 (N.J. Super. Ct. Law Div. 1989).

104. See N.J. CT. R. 2:5-3(c).

105. See Robert J. Martin & Walter Kowalski, *A Matter of Simple Justice: Enactment of New Jersey's Municipal Public Defender Act*, 51 RUTGERS L. REV. 637, 644-53 (1999) (detailing history of right to counsel in New Jersey).

never implemented because funding and grant money were available only for innovations with respect to the criminal caseload, and because of the current economic climate, such an effort cannot be funded today. However, with better technology the costs of transcripts should be reduced over time.

My greatest frustration of all is in the area of sentencing and appellate review of criminal sentences.¹⁰⁶ Relating to this subject, I want to discuss the need to reconsider three outstanding New Jersey Supreme Court opinions, which in my view, need to be reexamined, together with the amendments to the New Jersey Code of Criminal Justice over the last twenty-five years, to achieve basic fairness and uniformity of sentencing and eliminate sentence disparity. I will also take this opportunity to discuss a remedy. The frustration is caused by the fact that, as intermediate appellate judges, we frequently affirm sentences that we would not impose. In fact, we often affirm decisions we would not make, as most of our cases turn on the scope of review concerning abuse of discretion and sufficiency of evidence by which we are bound.¹⁰⁷

As adopted, the Code of Criminal Justice created degrees of crime based on the injury to the victim and culpability of the defendant.¹⁰⁸ As everyone knows, each degree had a minimum and maximum sentence within a range, with a presumptive sentence in the middle.¹⁰⁹ The sentence could be raised or lowered from the presumptive sentence in the middle of the range (now an advisory mid-range sentence).¹¹⁰ If the aggravating factors substantially outweighed the mitigating factors, the sentence could be raised within the range, and a parole ineligibility term of between one-third and one-half of the sentence could even be imposed.¹¹¹ If the mitigating factors outweighed the aggravating factors, the sentence below the presumptive could be imposed.¹¹² A first- or second-degree crime could even be downgraded for sentencing purposes when it is in "the interest of justice" to do so.¹¹³ In certain instances, usually

106. As the Chief Justice's designee on the Sentencing Commission, I have addressed the subjects included herein with the Commission.

107. See, e.g., *State v. Locurto*, 724 A.2d 234, 240-41 (N.J. 1999); *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 323 A.2d 495 (N.J. 1974).

108. See John J. Farmer, Jr., *The Evolution of Death Eligibility in New Jersey*, 26 SETON HALL L. REV. 1548, 1557-63 (1996) (discussing the public policy underlying the Code of Criminal Justice).

109. N.J. STAT. ANN. §§ 2C:43-6, :44-1(f)(1) (West 2008).

110. See *State v. Natale*, 878 A.2d 724, 728 (N.J. 2005).

111. § 2C:43-6(b), (f), (i); see also § 2C:44-1(a) (listing the aggravating factors a court should consider).

112. *Id.* § 2C:44-1(b),(f).

113. *Id.*; see also *State v. Megargel*, 673 A.2d 259, 267-69 (N.J. 1996).

involving prior convictions, an extended term could be imposed with a sentence of up to life imprisonment for a first-degree crime, and the range is doubled for other offenses,¹¹⁴ with a parole ineligibility flowing therefrom.¹¹⁵ Over the last twenty-five years since the Code of Criminal Justice took effect, more and more mandatory sentences, mandatory ineligibility terms, and mandatory extended terms with ineligibility terms were adopted, as well as the No Early Release Act for first- and second-degree crimes.¹¹⁶

The presumption of imprisonment for first- and second-degree offenders and the presumption against imprisonment for first-time offenders convicted of third- and fourth-degree crimes and non-indictable offenses¹¹⁷ were the subject of *State v. Hartye*¹¹⁸ and *State v. O'Connor*.¹¹⁹ Those opinions construed the word "imprisonment" in title 2C, section 44-1 (d) and (e) of the New Jersey Statutes Annotated to mean a state custodial sentence,¹²⁰ notwithstanding that title 2C, section 45-1(e) uses that word to authorize a condition of probation for up to 364 days for a crime and 90 days for a non-indictable offense.¹²¹ The end result is that no first-time offender convicted of a disorderly persons offense has a presumption against imprisonment. First-time offenders convicted of fourth-degree crimes could be sentenced to custodial terms of up to a year, and all third- and fourth-degree offenders could be sentenced to as much as 364 days as a condition of probation without any presumption against imprisonment.¹²²

114. §§ 2C:43-6(b), :43-7(a), (b), :43-7(d).

115. *Id.* § 2C:43-6(b).

116. In New Jersey, as in other jurisdictions, distrust for judicial discretion in sentencing developed. Under title 2A of the New Jersey Statutes Annotated, replaced by the Code of Criminal Justice in 1979, *see id.* § 2C:98-1 to -2, judges could, with few exceptions, impose minimum-maximum sentences ranging from no custodial time to the statutory maximum, which resulted in disparities. In those days, the state had no right of appeal with respect to sentences deemed excessively lenient. However, under the Code of Criminal Justice, the state can appeal from sentences imposed in first- and second-degree crimes when downgraded for sentence purposes or when resulting in probationary or noncustodial sentences. *Id.* § 2C:44-1(f)(2).

117. *See id.* § 2C:44-1(d)-(e).

118. 522 A.2d 418 (N.J. 1987).

119. 527 A.2d 423 (N.J. 1987).

120. *Hartye*, 522 A.2d at 422; *O'Connor*, 527 A.2d at 426.

121. § 2C:45-1(e).

122. As an alternative holding, the presumption of imprisonment could have been satisfied by the custodial aspect of probation, with serious consideration given to the deviation from the presumptive term. That approach would have preserved a presumption against imprisonment for first offenders on minor offenses. *See State v. Partusch*, 519 A.2d 946 (N.J. Super. Ct. App. Div. 1987). Moreover, the state can appeal from the imposition of a probationary sentence for a first- or second-degree crime, even with "imprisonment" as a condition. § 2C:44-1(f)(2).

In *State v. Roth*, the New Jersey Supreme Court set forth a limited scope of review of sentences.¹²³ According to *Roth*:

In fashioning an appropriate standard to communicate the desired intensity of review, we must give content to a phrase such as “clear abuse of discretion.” We believe that content may be found in other analogous areas of appellate review.

First, we will always require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence.

Second, we will always require that the factfinder apply correct legal principles in exercising its discretion. . . .

Third, we will exercise that reserve of judicial power to modify sentences when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience. We anticipate that we will not be required to invoke this judicial power frequently.¹²⁴

Thus, a court can modify a sentence only if the sentencing guidelines are not followed, there lacks “substantial evidence in the record to support the findings of fact upon which the sentencing court based the application of those guidelines,” or “in applying those guidelines to the relevant facts the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors.”¹²⁵

Roth is a well-written and well-reasoned opinion, and I would have proudly joined it if I were on the New Jersey Supreme Court. The problem, however, is that different judges look at the same factors differently. The same facts—such as substance abuse, being an abuse victim, or coming from a broken home with no family support, particularly when it led to a criminal record, or the quantity of substances possessed or the amount of the theft as compared to the maximum of the given range¹²⁶—can be viewed by some judges as aggravating and other judges as mitigating. Hence, in one courtroom, an offender with the same record can be sentenced to a very different sentence than a person convicted of the same offense.¹²⁷ Many

123. 471 A.2d 370, 386 (N.J. 1985).

124. *Id.*

125. *Id.* at 387.

126. See §§ 2C:20-2, :35-5.

127. For example, a defendant with a minor record and prior probation, but no prior treatment, can be viewed as having a record and being a repeat offender who will not respond to probation, classified as likely to commit another offense, and in need of deterrence. *Id.* § 2C:44-1a(3), (6), (9). But, his record can also be viewed as minor and he could be considered worthy of rehabilitation if treatment is available. Moreover, for

sentences may be deemed lenient, but nonappealable, by the state¹²⁸ and are not appealed, while the scope of review requires affirmance of a much harsher sentence imposed on a defendant with a similar record who is convicted of the same offense. A defendant convicted of his third burglary offense, or of two burglaries and a drug possession offense, could be sentenced to an extended term of ten years with five to be served before parole eligibility and see his sentence affirmed under the *Roth* scope of review. Yet, a similarly situated offender could receive three years and be paroled in nine months, or receive probation with a custodial aspect of up to 364 days, and serve no more than eighty-four days.¹²⁹ We will never see the nonappealed sentence when we review the others.

Of course, approximately ninety-five percent of the indictable cases are resolved by plea bargaining, and the prosecutor's dismissal of offenses or recommendation of maximum sentence controls the sentence.¹³⁰ But independent of the fact that different prosecutors have different plea negotiation policies (and different priorities and resources that naturally impact on plea negotiations and the sentences which flow therefrom), a negotiated plea is usually deemed reasonable and is almost always dispositive.¹³¹ I believe the time has come for adoption in New Jersey of a modified guideline or grid sentencing system, such as the one embodied in the new draft Model Penal Code or by adding more specific guidelines to the present Code. It would be a guide to plea bargaining as well as sentencing after trial. It would also reduce undue disparity and promote uniformity by establishing sentences based on factors relating to the offense and the offender's history, so that all similarly situated defendants in all courtrooms would be subject to the same grid factors within the range, some discretion, and a scope of review to broaden based on the extent of a deviation from the grid sentence after either a trial or plea. And as a pragmatist, I would recognize, as Chief Justice Weintraub and his court did in *State v. Poteet*,¹³² that while a defendant cannot be penalized for going to trial, a sentencing judge can consider that an acknowledgment of guilt is the first step towards rehabilitation.¹³³

a person who has never been sentenced to prison, a short jail sentence as a condition of probation may be perceived as providing a deterrent value.

128. *Id.* § 2C:44-1(f)(2).

129. *See State v. Heisler*, 471 A.2d 805 (N.J. Super. Ct. App. Div. 1984).

130. *See* N.J. CT. R. 3:9-3(c).

131. *State v. Sainz*, 526 A.2d 1015 (N.J. 1987). However, a defendant can appeal from a sentence imposed within the maximum of a negotiated plea. *State v. Warren*, 558 A.2d 1312, 1318-19 (N.J. 1989); *State v. Spinks*, 334 A.2d 23, 25 (N.J. 1975).

132. 295 A.2d 857 (N.J. 1972).

133. *See also* § 2C:44-1(c)(1).

VII.

With a growing court and growing problems, particularly with cases involving economically strapped institutional attorneys, there is a greater need for internal self-evaluation and reexamination of our practices and procedures; yet to avoid a greater shortfall, we have less “judge time” in which to do it and no money to hire the experts and consultants. Perhaps that is, in fact, the biggest frustration of all—the knowledge that the economic times and, to the extent we are economically dependent on the other branches of government, the political realities preclude the implementation of the reforms that are necessary and which we remain in government to achieve. As good as our system may be, we need the ability to evaluate how we can perform better, especially during the economic times we face. In sum, we must continue to evaluate our work and improve our practices and procedures.¹³⁴

There is so much ongoing national debate about the role of the intermediate appellate courts, the need for speed or perception of thorough review of the record and detailed exposition, the role of staff, and the benefits of real transparency, but the work of the court is so voluminous and time-consuming that we never take time to do the necessary evaluation and soul-searching. Perhaps that is the greatest frustration of all.

Thank you for the privilege of discussing these subjects with you.

134. See Binford et al., *supra* note 2, at 39.
