REFLECTIONS: "A GROWING COURT"

*Richard J. Hughes**

Years ago a political friend of mine, being a good lawyer and hopeful of future appointment to the bench when a vacancy might occur, made the pessimistic comment that "judges never retire, and they very seldom die." The immutable laws of nature have not changed as to the latter element, but since 1948 there has been a new dimension as to retirement, at the behest of the New Jersey Constitution, at the age of seventy. Many valued friends and colleagues of mine experienced, as I did in 1979, this abrupt separation from the judicial work to which their lives were devoted. There ensues a brief pause, and then, as they and I have experienced, a surviving vigor of mind and health and professional interest brings about quite naturally a multitude of activities. These, to varying degrees, fill the vacuum which otherwise might tend to deaden the tenor of life. In my case, that quite brief pause enabled me to reflect upon the growth of New Jersey's present court system since 1948, its implementation date under our modern 1947 Constitution.

That Constitution replaced one of 1844, adopted in an agrarian State of some 400,000 people. It remained in effect for more than a century, unmindful of the interim growth of the State to house great corporate headquarters, business and industry, vast research, activity in electronic, drug, chemical manufacture—all sorts of things—accompanied by a growth of population to some five million, now about seven and a half million.

A Time For Change

So in 1947, it was high time for constitutional reform. Not to discard its indispensable values of check and balance among governmental branches which we Americans so cherish in order to contain power within reasonable bounds, and certainly not to tamper with its Bill of Rights, but to replace constitutional parts eroded and outgrown by the passage of time. Chief among the latter was our antiquated court system. The old system divided courts and concepts of law and equity, to the disadvantage of litigants, not to speak of its other failings. On top was a final appeal Court, the predecessor of our Supreme Court. That Court had a very long title and very many

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members. It was called "The Court of Errors and Appeals in the last resort in all causes"[1] and included the Chancellor, the Chief Justice, eight Associate Justices and six lay Judges who did not have to be lawyers. Only technically did it head a cumbersome and inefficient court system, in which there was no semblance whatever of effective administrative direction. A Vice-Chancellor or Advisory Master could sit on a litigation for ten years after submission without deciding the case, and there was nothing in the world that a litigant, a lawyer, or other authority could do about it.

That was all replaced in 1948 by a new system, causing national legal authorities to observe that "the people of New Jersey . . . exchange[d] America's worst court system for America's best."[2] But that decision was not achieved easily. For many years reform-minded lawyers like Arthur T. Vanderbilt, Alfred Clapp and Nathan Jacobs had fought for change. Authorities like Dean Roscoe Pound came here to urge court modernization on our Constitutional Convention. A once-in-a-century political miracle occurred when Governor Al Driscoll and the Republicans and powerful Mayor Hague and the Democrats, prodded and pushed by the reformers, agreed upon a new Constitution. Upon submission to the electorate, it was adopted by the people.[3] Its centerpiece was the Sixth, "Judicial," Article, which gave the new court system unprecedented administrative authority, vested in the Chief Justice, assisted by an Administrative Director, to control the administration of all courts in New Jersey,[4] presently numbering 750. It gave rule-making flexibility to the Supreme Court unequaled in any other jurisdiction in the English-speaking legal world. It accommodated easy transition of issues between courts of law and equity for expeditious decision. These modern court system tools are unmatched in any other American jurisdiction.

JUDICIAL INDEPENDENCE

Of course, a constitution is implemented by dedicated human beings. Fortuitously, Governor Driscoll, a Republican, was in the habit of appointing good Judges, of whatever political party. By happenstance only, he appointed me, a Democrat, in 1948 to the Mercer County Court and again in 1952 to the New Jersey Superior Court. I should mention here that the New Jersey court system is bipartisan,

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[1] N.J. CONST. of 1844, art. VI, § 1.

[2] *New Jersey Goes to the Head of the Class*, 31 J. AM. JUD. SOC'Y 131, 131 (1948).

[3] A. VANDERBILT, CHANGING LAW 154-68 (1976).

[4] N.J. CONST. of 1947, art. VI, § 7.

largely due to tradition rather than constitutional or statutory mandate. The Judges once appointed are separated from politics, unlike some other unfortunate States where judges have to be elected with the support of political parties. Or worse still, where they are subject to recall, a coercive device bound to interfere with judicial independence, tempering it to transitory public prejudice and feelings, rather than Constitution, law and duty. In *Bradley v. Fisher*[5] the United States Supreme Court held:

> [I]t is a general principle of the highest importance to the proper administration of the justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself.[6]

Lord Coke said of judges that "[t]hey are only to make an account to God and the King [the State]" for corruption in judicial office.[7] The same common law immunity surrounds grand jurors, so that they too can act independently, without fear of personal consequence.[8]

Independence of the judiciary, historically, has been treasured by Americans. They fought for it in the Revolution, having criticized the British Crown in the Declaration of their Independence, in these words—"He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[9]

More recently, a vastly popular American President, elected in 1936 by the electoral votes of 46 of 48 states, attempted in 1937 to "pack" the United States Supreme Court which had been less than friendly to his New Deal legislation (the latter itself was supported by a clear majority of our people). Yet in 1938 this same electorate administered a severe rebuke to this challenge to judicial independence, refusing to displace many congressional members of the President's own party, who had opposed his plan, and against whose reelection he had mounted a vigorous campaign. His own reelection, had he been a candidate that year, would obviously have been at risk. The same "message" by the people anent judicial independence was repeated at the New Jersey polls in 1978, when they

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[5] 80 U.S. (13 Wall.) 335 (1872).

[6] *Id.* at 347.

[7] Floyd and Barker, 12 Coke Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (Star Cham. 1608).

[8] O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A.2d 10 (Sup. Ct. 1940).

[9] United States Declaration of Independence (1776).

resounding approved a referendum merging the county courts into the statewide judicial system, thus indicating their confidence in that system.

In his interesting article, *The Essence of Judicial Independence*,[10] Judge Irving R. Kaufman, former Chief Judge of the United States Court of Appeals for the Second Circuit, traced the evolution of judicial independence in English and colonial American history. He discussed the confirmation of the separation of powers through 200 years of case law. He pointed out the "flimsy justification"[11] for the Judicial Conduct and Disability Act of 1979, and warned that "[f]ear of the personal consequences of a single 'unpopular' decision could take the upper hand, irreparably chilling fearless and impartial adjudication."[12] He concluded, and I of course agree, that this incursion on judicial impartiality is intolerable under the doctrine of separation of powers and is an "unconstitutional infringement upon judicial independence."[13]

It is therefore most fortunate that in New Jersey, the constitutional method of appointment of judges, the traditional bipartisan division of court membership, and absolute freedom from politics[14] assure an independent judiciary, having the respect and support of the people. One hopes this will always be the case.

The Chief Justices

In the context of a system of such splendid potential, Governor Driscoll's great historical appointment, a golden page in our State's history, was his selection of Arthur T. Vanderbilt to be the first Chief Justice and thus the architect of beginning development of the new system. Vanderbilt insisted that those in the judiciary be entirely non-political, industrious and disciplined so far as administration was concerned, and be partners in the development of an independent and efficient court system of maximum benefit to the people. He was an inspirational leader, and I was proud to have worked under his leadership for nine years. He died in harness, one might say, felled by a heart attack on his way to Court Chambers in 1957. He was succeeded by another truly fine lawyer, Joseph Weintraub, a worthy successor and equally dedicated to the concept of greatness in our

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[10] 80 Colum. L. Rev. 671 (1980).
[11] *Id.* at 700.
[12] *Id.*
[13] *Id.*
[14] *In re* Gaulkin, 69 N.J. 185, 351 A.2d 740 (1974).

system of justice. Chief Justice Weintraub served until 1973 and left a stamp of probity, industry and scholarship on the Court. People would come from other States, and from as far away as Japan, to examine and try to emulate our system.

Upon the Weintraub retirement, Governor Cahill, a Republican, appointed to be Chief Justice his personal Counsel to the Governor, Pierre Garven. By coincidence, when I was Governor years before, I had appointed Pete Garven to the Bergen County Court, from which he retired to be Governor's Counsel. Chief Justice Garven was a fine man but not very well, and in a few months he died from a massive stroke. Then came the question of the new Chief Justice. Governor Cahill had been defeated in his Party's primary election because of some internal political problems, and was therefore a "lame duck" when Chief Justice Garven died in October. Nevertheless, he sent out public signals that "by golly," he was going to appoint the new Chief Justice. The Senate, perceiving the probability of election of Governor Brendan Byrne, answered that "by golly," Cahill was not going to appoint or gain confirmation of the new Chief Justice.

Governor Cahill decided that the way to obtain confirmation would be to appoint a Democrat possessing a supposed residue of affection in the Democratic party. Cahill was a fine lawyer and had tried cases before me when I was a judge a quarter century before. When he offered the appointment, I accepted because of the leadership opportunities in the Court system which I have described. So, with the approval of Governor-Elect Byrne, he appointed me; a tolerant Senate gave its unanimous confirmation, and I served as Chief Justice for almost six years until I reached the constitutional retirement age of seventy. I tell you all of this not like an old actress reviewing her clippings and yellowing pictures, but to trace the continuity of growth of a great court system, particularly under the stewardship of Chief Justices Vanderbilt and Weintraub. And this growth will undoubtedly continue apace under the leadership of our new Chief Justice, Bob Wilentz. He is young, and therefore, God willing, he has many years to serve. An activist, he has shown an aura of moral leadership, a sort of mystique, which bodes well for the future of the Court as well as that of the legal profession. Formerly a fine trial lawyer, he understands Lord Bacon's reference to a Court of Justice as "an hallowed place" [15] and a place where great judges deal justly and with equal respect to the humble citizen and young beginning advocate, as well as those more powerful and experienced, a factor in acceptable judicial conduct.

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[15] F. BACON, *Of Judicature*, THE ESSAYS OF FRANCIS BACON 210, 213 (1900).

GROWTH AND CHANGE

The significant growth of the Court since 1948 has not been in the numbers of cases dealt with and Judges added to the system, though there have been many multiples in each category. Rather, it has been a persistent growth in what one might call the spirit, a willingness to cope with new problems and devise new solutions in the name of justice, as the common law unfolds and the Constitution adapts its magnificent basic philosophy to meet new societal problems, as a living organism rather than a dead letter. As an example, in the Federal sphere it was not always so that the Fourteenth Amendment was deemed to incorporate the guarantees of the Bill of Rights into the conduct of State court proceedings. There was once a time when illegal evidence seized in violation of the Fourth Amendment could be freely introduced in a State Court,[16] though it would be forbidden and excluded in a Federal Court.[17] The Fourteenth Amendment as now interpreted by the Court applies these guarantees to all the states,[18] The same Constitution, mind you, but living in its essence rather than dead in its letter.

Moreover, in New Jersey, since the beginning of the new court system, it has been our philosophy that we are not confined to limited Federal constitutional rights as interpreted by the United States Supreme Court, though we must of course comply with its rulings as the Supreme Law of the land. For instance, in *State v. Deatore*,[19] we held that while the United States Supreme Court's determinations on Federal constitutional law are binding on our Court, each State has the power to impose higher standards under State law. This is an established concept of federalism.[20] The same principle underpinned our decision in *State v. Johnson*,[21] an opinion written by Justice Mark Sullivan. The United States Supreme Court not long before had held in a case with a most fascinating title, *Schneckloth v. Bustamonte*,[22] that where the subject of a search is not in custody and the State attempts to justify the search on the basis of consent, the Fourth and Fourteenth Amendments require that it show that such consent was in fact voluntarily given, and not the result of duress or

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[16] Wolf v. Colorado, 338 U.S. 25 (1949).

[17] Weeks v. United States, 232 U.S. 383 (1914).

[18] Ker v. California, 374 U.S. 23 (1969); Mapp v. Ohio, 367 U.S. 643, *rehearing denied*, 368 U.S. 871 (1961).

[19] 70 N.J. 100, 358 A.2d 163 (1976) (case involving evidential significance of defendant's silence in face of accusation).

[20] Cooper v. California, 386 U.S. 58, *rehearing denied*, 386 U.S. 988 (1967).

[21] 68 N.J. 349, 346 A.2d 66 (1975).

[22] 412 U.S. 218 (1973).

coercion, express or implied; and that while knowledge of a right to refuse consent is one factor to take into account, it is not an indispensable element of an effective consent.[23] Our Court held, *contra*, that while "*Schneckloth* is controlling on state courts insofar as construction and application of the Fourth Amendment is concerned and is dispositive of defendant's federal constitutional argument . . ., each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution."[24] And hence that under the New Jersey Constitution, the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, *i.e.*, "where the State seeks to justify a search on the basis of consent, it has the burden of showing that it was voluntary, an essential element of which is knowledge of the right to refuse consent."[25]

Our own distinguished New Jersey member of the United States Supreme Court, Justice William J. Brennan, once mentioned in an article:

> state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[26]

I have often thought that our Court's instinctive defense of individual constitutional human rights, must be responsive even subconsciously to the golden words of Woodrow Wilson:

> This is not America because it is rich. This is not America because it has set up . . . great opportunities of material prosperity. America is a name which sounds in the ears of men everywhere as a synonym [for] . . . individual liberty. Liberty is not something that can be created by a document; neither is it something which, when created, can be laid away in a document. . . . It is an organic principle,—a principle of life, renewing and being renewed.

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[23] *Id.* at 248-49.

[24] 68 N.J. at 353, 346 A.2d at 67.

[25] *Id.* at 353-54, 346 A.2d at 68.

[26] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

> Democratic institutions are never done; they are like living tissue, always a-making.[27]

Considering this concept of "liberty" as extending broadly to the doing of right as between man and man, I suggest that the Wilson truism has found its place in the course of judicial development in New Jersey during the years of our new court system. For instance, with due regard to the law's stability, we have discarded the chains of *stare decisis*, so far as that ancient principle would bind us to the injustices of the past. An example permits me to remind you that a fiction has grown up in the press that the so-called "Hughes" Supreme Court was fragmented, always disagreeing in dissent, never having a single point of view, as was the supposed case under the Vanderbilt-Weintraub tenures. It is argued that these two men were so forceful in leadership as to have dominated the "thinking" of the Court. I suggest that was not so at all. If one were to go back historically, to explore the many serious and highly principled disagreements in law among the members of these splendid courts, an entirely different picture would be presented. One example will suffice, although many others could be mentioned. In the case of *Fox v. Snow*,[28] Chief Justice Vanderbilt was on the losing end of a six to one judgment of the Court involving the *stare decisis* principle. It had to do with a question of testamentary construction, the detail of which is not important here. Six members of the Court were very firm in their opinion that since something had always been the viewpoint of the court in precedent, it should continue. In a most vigorous dissent, Vanderbilt denounced the consequent "ossification" of the common law but was unable to convince his colleagues of what he thought was the need to grope for justice in the face of clear injustices in the judicial past.

Involving a concept certainly not new—"As the usages of society alter, the law must adapt itself to the various situations of mankind"[29]—Vanderbilt argued:

> [w]e should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason. Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid

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[27] II THE NEW DEMOCRACY—PRESIDENTIAL MESSAGES, ADDRESSES AND OTHER PAPERS (1913-1917), *A New Latin American Policy* 64, 68 (1926); III SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON, *Character of Democracy in United States* 85, 98 (1921).

[28] 6 N.J. 12, 76 A.2d 877 (1950).

[29] Barwell v. Brooks, 3 Doug. 371, 373 (1784) (Lord Mansfield).

> economic and social change. It will be on its way to the grave. In the instant case the rule applied by the court below should be rejected and effect should be given to the testator's intention. . . .[30]

This remarkable dissent has been described as "the most quoted dissent since Holmes," in the foreword to *Cases and Text, Future Interests and Estate Planning*.[31] And however unpersuasive it was to the *Fox* court majority in 1950, its philosophy has clearly guided the New Jersey Supreme Court since, as exemplified in many of its decisions. It has agreed with the Vanderbilt thesis that the process of justice is not bound, as though by some strange sort of Mendelian law, to accept the hereditary transfer of now visible defects in justice, from generation to generation; that no such inevitability is required by the principle of *stare decisis*; and that the Court, as well as the Legislature, has authority to intervene against operation of any such fallacy.

For instance, *Radio Taxi Service, Inc. v. Lincoln Mutual Insurance Co.*[32] and *Bowers v. Camden Fire Insurance Association*[33] breathed new life-giving honesty into the bare contractual relationship previously thought to exist between insured and insurer, overruling the precedent unanimously endorsed by our then highest court in *McDonald v. Royal Indemnity Insurance Co.*[34] In *In re Quinlan*[35] the Court affirmed a constitutional right of privacy, unrecognized if not denied in earlier precedent.[36] In striking down exclusionary zoning devices in *Southern Burlington County NAACP v. Mount Laurel*,[37] the Court considered that prior judicial decisions do not prevent a change in judicial view and application where that change is mandated by new conditions. In *State v. Saulnier*,[38] holding a county court to have jurisdiction over a defendant charged with a non-indictable lesser included offense, the Court thought a prior judicial decision to the contrary to have no current vitality.[39] Abandoning

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[30] 6 N.J. at 27-28, 76 A.2d at 885 (Vanderbilt, C.J., dissenting). In 1952, with the passage of N.J. STAT. ANN. § 3A:3-16 (West 1953), the Legislature adopted the substance of Chief Justice Vanderbilt's dissent, overruling *Fox v. Snow*.

[31] *Foreword* to W. LEACH & J. LOGAN, CASES AND TEXT, FUTURE INTERESTS AND ESTATE PLANNING XIX (1961).

[32] 31 N.J. 299, 157 A.2d 319 (1960).

[33] 51 N.J. 62, 237 A.2d 857 (1968).

[34] 109 N.J.L. 308, 162 A. 620 (E. & A. 1932).

[35] 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

[36] John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 580-81, 279 A.2d 670, 672 (1971).

[37] 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

[38] 63 N.J. 199, 306 A.2d 67 (1973).

[39] *Id.* at 207-08 (overruling State v. McGrath, 17 N.J. 41, 110 A.2d 11 (1954)).

the concept of interspousal immunity for torts arising out of negligent automobile operation in *Immer v. Risko*,[40] the Court reassessed the reason which had prompted adoption of the doctrine in the past, as not supporting its current viability.[41]

When the time came to recognize the injustice of sovereign immunity in denying relief to persons injured by the State's negligence, the Court abandoned that long-established principle in *Willis v. Department of Conservation & Economic Development*.[42] And when modern conditions prompted reappraisal of the aged *caveat emptor* concept the Court held, in *Reste Realty Corp. v. Cooper*,[43] that there was an implied warranty against latent defects in leased premises. In viewing current concepts of what is right and just, the Court ruled in *Schipper v. Levitt & Sons, Inc.*[44] that a builder of new homes may be held liable for design defects therein on warranty or strict liability theories.

Interests of justice required the Court to hold in *Fernandi v. Strully*[45] that a prior contrary decision be disapproved and that the statutory period of limitations on a cause of action, where a foreign object, after surgery, was not removed from plaintiff's body, begins when that victim knew or should have known of the object's presence and the existence of a cause of action therefor. In *Henningsen v. Bloomfield Motors, Inc.*[46] the Court believed that modern conditions mandate that prior established legal principles should not defeat recovery in a case in which it held that the manufacturer of a new automobile impliedly warrants its merchantability to an ultimate purchaser thereof regardless of absence of privity.

A very recent example of this unfolding reach of the law for the sake of essential justice may be noted in *Green v. Bittner*,[47] a remarkable opinion of our Supreme Court extending the scope of "pecuniary loss," resulting from the wrongful death of a child, previously constricted by judicial view of the statute.[48] At the same time, the Court exhibited its traditional respect to the legislative intent to exclude "emotional" loss, consequent to the wrongful death, as an element of damages.[49]

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[40] 56 N.J. 482, 267 A.2d 481 (1970).
[41] *See* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978).
[42] 55 N.J. 534, 264 A.2d 34 (1970).
[43] 53 N.J. 444, 251 A.2d 268 (1969).
[44] 44 N.J. 70, 207 A.2d 314 (1965).
[45] 35 N.J. 434, 173 A.2d 277 (1961).
[46] 32 N.J. 358, 161 A.2d 69 (1960).
[47] 85 N.J. 1, 424 A.2d 210 (1980).
[48] N.J. STAT. ANN. §§ 2A:31-1 to 31-6 (West 1952).
[49] 85 N.J. at 12, 424 A.2d at 215.

Many other instances to the same effect might be cited. This ability of the law to change and develop in the interest of justice extends to a review of statutory interpretations. The general principles which operate in such a case were summarized by Justice Jacobs in *Watson v. United States Rubber Co.*:[50]

> It has been suggested that the principle of *stare decisis* should stay our hand in expressly overruling *Glover*, even though a majority of the court is now firmly convinced that it embodied a mistaken interpretation of the Unemployment Compensation Law. To the extent that the principle of *stare decisis* affords a measure of stability it is of great social value. But as we pointed out in *Arrow Builders Supply Corp. v. Hudson Terrace Apts, Inc.*, . . . the principle is not an absolute one and under cogent circumstances it must give way to the overriding force which dictates that, since the purpose of our legal system is to serve justly the needs of present day society, judges must always remain free to re-examine earlier determinations and correct judicial errors whether they be their own or those of their predecessors.[51]

The rule is not otherwise in the federal jurisdiction, in which the United States Supreme Court recently reversed a 17-year standing interpretation of the Civil Rights Act, 42 U.S.C. § 1983. In *Monell v. Department of Social Services*[52] the Court partially overruled *Monroe v. Pape*.[53] In the *Monell* opinion, written by Justice Brennan, he mentioned "we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes."[54] One of his predecessors, Justice Frankfurter, in a concurring opinion in *Bernhardt v. Polygraphic Co.*,[55] had said that "[l]aw does change with times and circumstances, and not merely through legislative reforms. . . . [C]ourts do not always wait for legislation to find a judicial doctrine outmoded."[56]

Thus, in the words of Dean Pound, the "Law must be stable, and yet it cannot stand still."[57] So it has been that in New Jersey the Court has considered itself free to reconsider rulings of the judicial past, where justice plainly warrants that course.

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[50] 24 N.J. 598, 133 A.2d 328 (1957).
[51] *Id.* at 603, 133 A.2d at 330-31 (citation omitted).
[52] 365 U.S. 167 (1961).
[53] 436 U.S. 658 (1978).
[54] *Id.* at 695.
[55] 350 U.S. 198, 205 (1956) (Frankfurter, J., concurring).
[56] *Id.* at 209-11 (Frankfurter, J., concurring).
[57] R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

THE NEW JERSEY "FAIRNESS AND RIGHTNESS" RULE

As I have said, there has been no judicial hesitancy in going beyond naked constitutional right as defined by the United States Supreme Court. And, our State constitution apart, there have been recognized in our jurisdiction other and broader rights, seen as judicially enforceable, which have sometimes been described as responsive to a New Jersey "fairness and rightness" doctrine. Even where no constitutional right is involved, this "fairness and rightness" concept is sometimes invoked to prevent arbitrary abuse of power such as in a parole board's refusal to state reasons for its denial of parole to a prisoner entitled to be considered for parole. In *Monks v. New Jersey State Parole Board*[58] Justice Jacobs wrote for our Court that "fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons" for such denial.[59] He recalled an earlier reference by Supreme Court Justice William J. Brennan, Jr., then a member of our Superior Court Appellate Division, in *White v. Parole Board of New Jersey*,[60] to "considerations of simple fairness."[61] In another context, the Court extended the "fairness" rule to require a Board of Education to state reasons for its decision not to appoint a teacher for a successive term which would mean tenure in her position.[62] In *Rodriquez v. Rosenblatt*[63] "considerations of fairness" were held to require assignment of counsel to an indigent accused of a petty offense, although not otherwise required by constitution or statute. And in *State v. Kunz*[64] our Court held, though it was not prepared to find it of constitutional right, that "rudimentary fairness" required disclosure to a defendant being sentenced of the substance of the probation pre-sentence report before the judge, so that he and his counsel might be heard thereon.

JUDICIAL RESTRAINT

It must not be thought that this consistent upward trend in the pattern of its judicial response to emerging and clearly perceived needs of justice betokens other than a scrupulous circumspection by the Court in its respectful relationship to the other branches of government. It has persistently forsworn any illusion that it sits " 'as a

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[58] 58 N.J. 238, 277 A.2d 193 (1971).
[59] *Id.* at 249, 277 A.2d at 199.
[60] 17 N.J. Super. 580, 86 A.2d 422 (App. Div. 1952).
[61] *Id.* at 586, 86 A.2d at 425.
[62] Donaldson v. Board of Educ., 65 N.J. 236, 320 A.2d 857 (1974).
[63] 58 N.J. 281, 277 A.2d 216 (1971).
[64] 55 N.J. 128, 259 A.2d 895 (1969).

super-legislature to determine the wisdom, need, and propriety of laws.' "[65] For instance, out of respect to the legislative arm, which had to be reapportioned under the "one-person, one-vote" aphorism underlying *Reynolds v. Sims*,[66] the Court permitted litigation to fulfill in New Jersey this Supreme Law of the land, to extend from *Jackman v. Bodine* (1964)[67] to *Jackman v. Bodine* (1970).[68] Similarly, in dealing with a profound New Jersey constitutional defect identified in the financing of public education, the Court continuously withheld its arm. In 1973 when Chief Justice Weintraub recognized that "the judiciary cannot unravel the fiscal skein," and that "government must go on, and some period of time will be needed to establish another statutory system" (of financing), the Court exhibited utmost respect to the Legislature.[69] Extended litigation followed until the Court, unless it were to abandon its obligation to enforce the Constitution of New Jersey, had to act. It closed the public schools for so long as the constitutional violation persisted.[70] The Legislature promptly funded the Public Education Act of 1975,[71] and the Court dissolved its injunction in 1976.[72] Some protest ensued, but the furor has died down, and I think there can be little present public doubt that the Court did only its constitutional duty in this stormy case.

This policy of deference and respect to the legislative branch was invoked in the early days of our nation. Chief Justice John Marshall counseled the courts to avoid, where at all possible, any confrontation with constitutional issues. Sitting at circuit in *Ex Parte Randolph*,[73] he stated:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.[74]

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[65] King v. South Jersey Nat'l Bank, 66 N.J. 161, 179, 330 A.2d 1, 10 (1974) (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

[66] 377 U.S. 533, *rehearing denied*, 379 U.S. 870 (1964).

[67] 43 N.J. 453, 205 A.2d 713 (1964).

[68] 55 N.J. 371, 262 A.2d 389, *cert. denied*, 400 U.S. 849 (1970).

[69] Robinson v. Cahill, 62 N.J. 473, 520, 303 A.2d 273, 297-98, *cert. denied*, 414 U.S. 976 (1973).

[70] Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976).

[71] N.J. STAT. ANN. §§ 18A:7A-1 to -33.

[72] Robinson v. Cahill, 70 N.J. 464, 360 A.2d 400 (1976).

[73] 20 F. Cas. 242 (C.C.A. Va. 1833).

[74] *Id.* at 254.

The New Jersey Supreme Court has been no less than scrupulous in the judicial restraint so recommended.[75]

Constitutional Duty

Notwithstanding this abiding respect for the other branches, the Court has no choice but to act when called upon to meet its constitutional responsibility on an issue which has reached the stage of inevitability. In respect of fulfillment of the Constitution, the Court is its last guarantor. That is our American ideal and system of government, for otherwise constitutions would be but paper and the organic law, the constitutional voice of the people, thus muted, would fail. So it was that, finally, the Supreme Court of New Jersey reluctantly but necessarily had to force the funding of the Public Education Act of 1975 in *Robinson v. Cahill*,[76] as it had previously been constitutionally required to compel reapportionment of the Legislature to comply with the decision of the United States Supreme Court, the Supreme Law of the land, in *Jackman v. Bodine*.[77] The same constitutional imperative required it, with reluctance and by a bare majority of the Court, to invalidate on constitutional grounds, the appointment by the Governor and confirmation by the Senate of an otherwise worthy appointee as Associate Justice of the Court itself.[78]

It sometimes happens that a specific constitutional conflict emerges because of the passage of time and flow of changing developments in society; and that what was once regarded as being within the orbit of a legitimate State interest, justifying the statutory use of its police power, is no longer found to be so. Let me lighten the seriousness of this article, already too long, by an example. In *State v. Saunders*[79] our Supreme Court confronted an appeal by a person convicted of fornication, private sexual contact between single adults,

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[75] Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975) (statute conferring departmental control of penal institutions); A & B Auto Stores of Jones St., Inc. v. Newark, 59 N.J. 5, 279 A.2d 693 (1971) (statute making city responsible for property damage from riot); Independent Electricians & Elec. Contractors Ass'n v. New Jersey Bd. of Examiners of Elec. Contractors, 54 N.J. 466, 256 A.2d 33 (1969) (Electrical Contractors Licensing Act); Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969) (Gun Control Law); New Jersey Chapter, Am. Inst. of Planners v. New Jersey State Bd. of Professional Planners, 48 N.J. 581, 227 A.2d 313, *appeal dismissed*, 389 U.S. 8 (1967) (Professional Planners Licensing Act); Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 160 A.2d 265 (1960) (Sunday Closing Law).

[76] 70 N.J. 155, 358 A.2d 457 (1976).

[77] 55 N.J. 371, 262 A.2d 389, *cert. denied*, 400 U.S. 849 (1970).

[78] Vreeland v. Byrne, 72 N.J. 292, 370 A.2d 825 (1977).

[79] 75 N.J. 200, 381 A.2d 333 (1977).

deemed by the Legislature many years ago to constitute a crime, for social reasons then perceived. But presently, because of the more sensitive recognition of constitutional rights of privacy to which I have referred, and the questionable impact of such private sexual conduct upon the public well-being, the Court determined that the State had no compelling interest in its suppression by a statute denominating it a crime. And so the statute was found to be outside the police power of the State and thus unconstitutional, and the conviction was reversed. The able opinion of the Court was written by Justice Pashman. As sometimes happened, I took it home after its publication for Mrs. Hughes to read. A liberal thinker, she approved its rationale. I asked her what she would think if the next case involved adultery by a married man. She said—"That would call for the death penalty!"

It is improbable that the Supreme Court of New Jersey will ever have to confront, under our habitual criminal statutes, an extreme such as involved in *Rummel v. Estelle, Director, Texas Department of Corrections*,[80] so I think it not inappropriate to mention it in the context of the permissible limits of the concept of federalism to which I have referred.

In *Rummel* the United States Supreme Court dealt with a Texas case in which that State's recidivist statute embraced successive "felony" convictions of Rummel for fraudulent use of a credit card to gain $80 worth of goods, passing a forged check for $28.36 and obtaining $120.75 by false pretenses, resulting in a sentence to life imprisonment.[81] He argued "that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment" in the sense of the Eighth Amendment.[82] The majority opinion conceded that the Amendment indeed "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime," and that "[w]e all, of course, would like to think that we are 'moving down the road toward human decency.'"[83] But, after many twists and turns, the majority concluded that "the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments."[84] The dissenting opinion of Mr. Justice Powell,

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[80] 445 U.S. 263 (1980).

[81] *Id.* at 265-66.

[82] *Id.* at 267.

[83] *Id.* at 271, 283 (quoting Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting)).

[84] *Id.* at 285.

joined by Justices Brennan, Marshall and Stevens, traced the principle of disproportionality to deep roots in English constitutional law and the Magna Carta of 1215, and pointed out that these crimes of fraud entailed only $230 in total, *sans* injury, violence or the like, and posed little danger to the peace and good order of a civilized society.[85] It denied the validity of considering the "utilitarian goal" of such punishment, pointing out that "a statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."[86] The same example might apply to larceny of chickens, viewed very strongly indeed, as almost a capital offense, in certain rural areas. Justice Powell, voting for reversal, said "[w]e are construing a living Constitution. The sentence imposed upon petitioner would be viewed as grossly unjust by virtually every laymen and lawyer."[87]

I do not think it would take a seer to prophesy that the dissenting opinion in *Rummel* would be the majority view of the Supreme Court of New Jersey, in a comparable case. The concept of federalism which I have noted would leave our Court free to apply in more humane fashion the New Jersey rule stated by our Court in *State v. Smith*[88] as follows:

> As a general proposition the courts will not interfere with the [legislatively] prescribed form of penalty unless it is so clearly arbitrary and without rational relation to the offense or so disproportionate to the offense as to transgress the Federal and State constitutional prohibitions against excessive fines or cruel and unusual punishment.[89]

Conclusion

Thus, some few facets of the administration of justice in New Jersey during the growth years of its "new" court system. It has its warts, of course, mostly because of the litigation explosion and consequent significant pressures upon a court system which in 1948 faced 12,000 cases and today is confronted by almost 200,000 cases on its calendars. But one hopes that its traditional preoccupation with essential justice will enable it, somehow, to surmount these pressures and make sure that in New Jersey the place of justice will always be

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[85] *Id.* at 287-89, 295 (Powell, J., dissenting).
[86] *Id.* at 288 (Powell, J., dissenting).
[87] *Id.* at 307 (Powell, J., dissenting).
[88] 58 N.J. 202, 276 A.2d 369 (1971).
[89] *Id.* at 211, 276 A.2d at 373.

"an hallowed place," even if we are in a hurry. Justice is too important to be lost in hurry and statistical achievements. As once stated by Judge Learned Hand:

> If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.[90]

I hope and believe that the Supreme Court of New Jersey will be mindful of this commandment as the years unfold, and that justice will never be sacrificed upon the altar of expediency.

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[90] L. Hand, *Thou Shalt Not Ration Justice*, IX, THE LEGAL AID BRIEF CASE 3, 5 (1951).