

## Chief Justice Richard J. Hughes and His Contributions to the Judiciary of New Jersey\*

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Since the adoption of the New Jersey Constitution in 1947 with its dramatically improved judicial article, the New Jersey Supreme Court has gained a reputation as a progressive, activist, liberal court. Justice William Brennan of the United States Supreme Court said: "The New Jersey Supreme Court has ranked as one of the country's outstanding appellate courts since its creation in 1947."<sup>1</sup> Many of the court's decisions have been cited and followed by other jurisdictions. This has been partly the result of the extraordinary leadership of the five Chief Justices who have led that court. Those Justices, Vanderbilt,<sup>2</sup> Weintraub,<sup>3</sup> Hughes,<sup>4</sup> Wilentz,<sup>5</sup> and Poritz,<sup>6</sup> have all burnished

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<sup>1</sup> William J. Brennan, Jr., *Introduction, Chief Justice Hughes and Justice Mountain*, 10 SETON HALL L. REV. xxiv, xxiv (1979). See also BARBARA G. SALMORE & STEPHEN A. SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT: SUBURBAN POLITICS COMES OF AGE 191* (1st ed.1993).

<sup>2</sup> Chief Justice Arthur T. Vanderbilt was the first Chief Justice under the new constitution. He had previously served as Dean of New York University School of Law, President of the American Bar Association, and Republican leader of Essex County. He was seriously considered for Chief Justice of the United States at the time when Earl Warren was selected.

<sup>3</sup> Chief Justice Joseph Weintraub was a brilliant legal scholar distinguishing himself at Cornell Law School where he served as editor of the *Cornell Law Quarterly* and graduated first in the class. He had an impressive legal career before his appointment to the Court.

<sup>4</sup> This Article will focus on the achievements of Chief Justice Richard J. Hughes.

<sup>5</sup> Chief Justice Robert Wilentz was the son of David Wilentz, who had served as attorney general of the state, tried the Lindberg kidnapping case, and was the long-time Democratic leader of Middlesex County. The Chief graduated from Columbia Law School and had served in the New Jersey Legislature before his appointment. He led the court through the eighties and part of the nineties.

that reputation.<sup>7</sup> This Article will focus on the achievements of Chief Justice Richard J. Hughes as he led the court for six years from 1973 to 1979. It will particularly focus on two issues where his decisions continue to have relevance today. They are the school funding cases<sup>8</sup> and the right to die case, *In re Quinlan*.<sup>9</sup>

Hughes was the first and only person in New Jersey history to serve as both Governor and Chief Justice. He had served as Governor from 1962 to 1970. However, prior to his election as Governor he had served ten years as a judge. He had originally been appointed by Governor Alfred E. Driscoll as a judge of the Court of Common Pleas just before the 1947 Constitution came into effect. That appointment became an appointment to the County Court when the Constitution became effective. Later Governor Driscoll appointed him to the Superior Court. He served in many different capacities including Assignment Judge of Union County and as an Appellate Division judge. These designations demonstrated his excellence as a judge. The Chief Justice, who designates Assignment Judges and Appellate Division Judges, takes great care in making those appointments. He was also considered for the Supreme Court before leaving the bench for private practice in order to support his large family. Four years after leaving the bench for private practice he was elected Governor of the State of New Jersey.<sup>10</sup>

Hughes as Governor had been a progressive, activist Democratic leader of the State. He would carry over those characteristics into his role as Chief Justice.<sup>11</sup>

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<sup>6</sup> Chief Justice Deborah T. Poritz had served as Counsel to the Governor and Attorney General before appointment to the court. She was the first woman Chief Justice in New Jersey.

<sup>7</sup> Pierre Garvin was appointed as Chief Justice but died shortly after his appointment.

<sup>8</sup> *Robinson v. Cahill (Robinson I)*, 62 N.J. 473, 303 A.2d 273 (1973); *Robinson v. Cahill (Robinson II)*, 63 N.J. 196, 306 A.2d 65 (1973), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1976); *Robinson v. Cahill (Robinson III)*, 67 N.J. 35, 335 A.2d 6 (1975), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913 (1975); *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133, 351 A.2d 713 (1975), *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976), *Robinson v. Cahill (Robinson VI)*, 70 N.J. 155, 358 A.2d 457 (1976), *Robinson v. Cahill (Robinson VII)*, 70 N.J. 464, 360 A.2d 400 (1976).

<sup>9</sup> 70 N.J. 10, 355 A.2d 647 (1976).

<sup>10</sup> THE GOVERNORS OF NEW JERSEY, 1664–1974: BIOGRAPHICAL ESSAYS 223–28 (Paul A. Stellhorn & Michael J. Birkner eds., 1982).

<sup>11</sup> Alvin S. Felzenberg, *The Impact of Gubernatorial Style on Policy Outcomes: An in Depth Study of Three New Jersey Governors* 182 (1978) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

His appointment as Chief Justice by Governor William T. Cahill, his gubernatorial successor and a Republican, was a shock to the state.<sup>12</sup> But, in spite of the fact that Cahill was a Republican and Hughes a Democrat, they were good friends.<sup>13</sup> They had met when Hughes was a judge and Cahill was a trial lawyer trying a major case before him. Hughes described him as “a great trial lawyer.”<sup>14</sup> They were both Irish Catholics. They continued their relationship while Hughes was Governor and Cahill was a Congressman.

In August of 1973, Chief Justice Joseph Weintraub stepped down as Chief Justice of the New Jersey Supreme Court after sixteen years. Governor Cahill appointed his Chief Counsel, Pierre Garvin, to succeed Weintraub. Garvin died tragically in October of 1973. At that point, Cahill was a lame duck. A Democrat, Brendan Byrne, was poised to succeed him. Cahill knew that the Democrats would never let him appoint a Republican. Nevertheless, he still wanted to make the appointment. He realized that he could appoint the popular former Democratic Governor and he did so. Governor Byrne, the incoming Democratic governor who had been appointed to the Board of Public Utilities by Hughes, acquiesced.<sup>15</sup>

In many ways Hughes was an ideal candidate to serve as Chief Justice. He had many years of judicial and other legal experience to help him in his role as a member of that judicial body.<sup>16</sup> However, the role of Chief Justice also includes a large administrative component. The Chief Justice oversees a large and complex court system. Unlike some other court systems, the Chief Justice in New Jersey ac-

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<sup>12</sup> Ben Van Vliet, *County Officials, Lawyers Endorse Hughes*, DAILY REG. (Red Bank & Middletown, New Jersey), Nov. 9, 1973, at 2.

<sup>13</sup> Hughes had a great ability, despite his strong commitment to the Democratic party, to relate to members of the Republican party. He was able to depersonalize political differences.

<sup>14</sup> Interview by George Amick & John Kolesar with Richard J. Hughes, Governor of New Jersey (1982) (transcript on file with author).

<sup>15</sup> Interview with Richard Leone, former member of Governor Hughes' staff and later Treasurer of the State of New Jersey under Governor Brendan Byrne, in New York, N.Y. (Dec. 6, 2004).

<sup>16</sup> Judge Milmed, in discussing Hughes' influence on the development of administrative law in New Jersey, said: “Blessed by unique opportunity and ability to lead both the executive and judicial branches of our state government, he has built into that process lasting benefits of fair play and understanding for all the people of New Jersey of this and future generations.” Leon S. Milmed, *Chief Justice Richard J. Hughes—Architect of a Responsive Administrative Process*, 10 SETON HALL L. REV. 78, 85 (1979).

tively manages the system.<sup>17</sup> For example, the Chief determines who will serve as assignment judges, who will serve as appellate division judges, and generally the division in which each of the Superior Court judges will serve. The Chief Justice is also responsible for running the support staff for the entire judiciary. Therefore, his experience in administering the state as Governor served as a great asset. Justice Morris Pashman, who served on the court with Chief Justice Hughes, said:

Chief Justice Hughes was not only a great jurist, he was also an excellent administrator. Too often laymen are apt to forget that the major duty of a Chief Justice is that of supervising the conduct of all of New Jersey's courts. There can be no doubt that the many reforms quietly accomplished by Hughes as administrator will have a lasting impact upon our judicial system.<sup>18</sup>

Hughes' tenure as Chief Justice was a complete change. For sixteen years Justice Weintraub, a brilliant legal scholar, ran the court and seemed to dominate it. Weintraub had a distinguished legal background. After graduating from Cornell University *Phi Beta Kappa*, he attended Cornell Law School. There, he won special honors and was Editor-in-Chief of the Cornell Law Quarterly. He served as counsel to the Governor and as a member of the Waterfront Commission. But Hughes was more of a consensus-builder. While Chief Justice Weintraub could be aloof and distant, Hughes was outgoing and direct. He immediately improved the relationship between the court and the lawyers in the state. He traveled across the state meeting with judges and lawyers and worked diligently to maintain a good working relationship between the bench and the bar. He also had a great relationship with his own colleagues on the court. Justice Pashman said:

Richard Hughes is a man of great humility, strong character, wide knowledge, and utmost integrity. He has a quality that spells quiet decency, warm friendliness, and simple dignity. These virtues impelled him both to accord each of us on the Court an opportunity for full self-expression and to encourage our judiciary to tolerate dissent. He realized that such a climate was necessary in order that human rights and civil liberties be safeguarded.<sup>19</sup>

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<sup>17</sup> The New Jersey Constitution, Article VI, section vii provides: "The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State." N.J. CONST. art. VI, § vii.

<sup>18</sup> Morris Pashman, *A Tribute to Richard J. Hughes: Judge and Administrator*, 10 SETON HALL L. REV. 86, 89 (1979).

<sup>19</sup> *Id.* at 90.

## THE JUDICIAL PHILOSOPHY OF CHIEF JUSTICE HUGHES

In an article written shortly after Hughes left the Supreme Court, he set forth some of his judicial philosophy.<sup>20</sup> He praised the authors of the 1947 Constitution which had greatly improved the legal system in New Jersey and gave the Supreme Court of New Jersey great powers. He emphasized the importance of judicial independence and praised the system of appointment as opposed to an election system for choosing judges. "It is therefore most fortunate that in New Jersey, the constitutional method of appointment of judges, the traditional bipartisan division of court membership,<sup>21</sup> and absolute freedom from politics assure an independent judiciary, having the respect and support of the people."<sup>22</sup> He praised the prior chief justices and the court's "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."<sup>23</sup> He was happy that the court did not feel compelled in all cases to follow the doctrine of *stare decisis*, the doctrine that requires courts to follow past precedent. "[W]e have discarded the chains of *stare decisis*, so far as that ancient principle would bind us to the injustices of the past."<sup>24</sup> As one of his clerks would say, "He had an instinct for justice, and would not be deterred from reaching the right result even if it meant making new law."<sup>25</sup> He also approved of the practice of disagreeing with United States Supreme Court opinions. He believed the New Jersey Constitution could and should be used to reach results the United States Supreme Court would not grant under the United States Constitution. For example, during his tenure on the court, the court applied that doctrine for the first time in a search and seizure case recognizing the right of the New Jersey Supreme Court to expand the rights in a consent search case beyond those given by the United States Supreme Court by relying on the provision

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<sup>20</sup> Richard J. Hughes, *Reflections: "A Growing Court,"* 11 SETON HALL L. REV. 379 (1981).

<sup>21</sup> There is an unwritten but scrupulously followed tradition in New Jersey that the Supreme Court and in fact all the judiciary will be divided evenly between Democrats and Republicans. Therefore, the Supreme Court will generally have at least three members from each party with the party in control having the fourth member.

<sup>22</sup> Hughes, *supra* note 20, at 382 (footnote omitted).

<sup>23</sup> *Id.* at 384.

<sup>24</sup> *Id.* at 386.

<sup>25</sup> Letter from Gary A. Ehrlich, Assistant Attorney General, State of New Jersey; former law clerk to Chief Justice Hughes, to author (Feb. 17, 2005) (on file with author).

of the New Jersey Constitution protecting against unreasonable searches and seizures. The United States Supreme Court had held in *Schneekloth v. Bustamonte*<sup>26</sup> that the test for determining consent to a search would be based on the “totality of the circumstances” approach. That decision had been criticized as not being adequately protective of the search and seizure rights of the citizens.<sup>27</sup> The New Jersey Supreme Court decided that although it could not disagree with the United States Supreme Court’s interpretation of the Fourth Amendment, it could grant greater rights under the search and seizure provision of the New Jersey Constitution.<sup>28</sup> The New Jersey Supreme Court then adopted a waiver approach as its rule in *State v. Johnson*.<sup>29</sup> In this case, the New Jersey Supreme Court was striking out in a different direction. Previously, the New Jersey Supreme Court had been conservative in the area of search and seizure. But the *Johnson* case set a trend that continued into the future, with the New Jersey Supreme Court setting its own path in determining the meaning of the search and seizure law in New Jersey.<sup>30</sup>

Chief Justice Hughes also praised decisions of the New Jersey Supreme Court adopting a “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.”<sup>31</sup> However, he also recognized that the court was not a “super-legislature” and that, when appropriate, the court should defer to the legislature.<sup>32</sup> Justice Sidney Schreiber, a colleague of Chief Justice Hughes, described him as follows: “The opinions of Chief Justice Hughes . . . reflect what might best be termed a result-oriented approach to judicial decision-making. The Chief Justice serves as a ringing conscience for

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<sup>26</sup> 412 U.S. 218 (1973).

<sup>27</sup> John B. Wefing & John G. Miles, Jr., *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 251–52 (1974).

<sup>28</sup> N.J. CONST. art. I, ¶ 7.

<sup>29</sup> 68 N.J. 349, 346 A.2d 66 (1975).

<sup>30</sup> The New Jersey Supreme Court has decided a large number of cases in which it differed with the more conservative views of the United States Supreme Court. *See, e.g.*, *State v. Pierce*, 139 N.J. 184, 642 A.2d 947 (1994); *State v. Tucker*, 136 N.J. 158, 642 A.2d 401 (1994); *State v. Hemptele*, 120 N.J. 182, 576 A.2d 793 (1990); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1986).

<sup>31</sup> Hughes, *supra* note 20, at 390. The case referred to by Chief Justice Hughes was *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629 (1975).

<sup>32</sup> Hughes, *supra* note 20, at 390–91.

fairness and justice, for whom policies are marshalled to support a result compelled by the facts of a particular case.”<sup>33</sup>

#### THE COURT AS SOCIAL ACTIVIST

The New Jersey Supreme Court before, during, and after the Hughes years, took on many major societal issues, playing a leadership role in the nation in dealing with the social problems. Two areas which stand out are the inadequacy of schools in poorer urban areas and providing low- and moderate-income housing. While some argued that these cases might have gone too far in taking on the role of the legislature, the court found it imperative to deal with these pressing concerns. The two cases, or more properly series of cases, were *Robinson v. Cahill*<sup>34</sup> and *Southern Burlington County NAACP v. Township of Mount Laurel*.<sup>35</sup> *Robinson* declared that the system of school funding in New Jersey, which relied primarily on property taxes, was unconstitutional.<sup>36</sup> *Mt. Laurel* determined that various municipal ordinances which restricted access for low and moderate income housing were unconstitutional.<sup>37</sup> These two series of cases have been among the most praised and criticized in the nation's history.

#### HUGHES AND SCHOOL FUNDING

Hughes' role in school funding was particularly important. While Governor, Hughes continually sought to increase spending for education. He was successful in finding money to support the county and state colleges.<sup>38</sup> However, because of the emphasis on home rule and the lack of a large state budget, he was never able to dramatically increase state spending for the public schools. By 1973, the State was supplying twenty-eight percent of the funds for the public schools

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<sup>33</sup> Sidney M. Schreiber, *Statutory Interpretation: Some Comments on Two Judicial Viewpoints*, 10 SETON HALL L. REV. 94, 101 (1979).

<sup>34</sup> *Robinson v. Cahill (Robinson I)*, 62 N.J. 473, 303 A.2d 273 (1973); *Robinson v. Cahill (Robinson II)*, 63 N.J. 196, 306 A.2d 65 (1973), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1976); *Robinson v. Cahill (Robinson III)*, 67 N.J. 35, 335 A.2d 6 (1975), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913 (1975); *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133, 351 A.2d 713 (1975); *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976); *Robinson v. Cahill (Robinson VI)*, 70 N.J. 155, 358 A.2d 457 (1976); *Robinson v. Cahill (Robinson VII)*, 70 N.J. 464, 360 A.2d 400 (1976).

<sup>35</sup> 67 N.J. 151, 336 A.2d 713 (1976).

<sup>36</sup> *Robinson I*, 62 N.J. at 520–21, 303 A.2d at 297–98.

<sup>37</sup> *Mt. Laurel*, 67 N.J. at 187–91, 336 A.2d at 732–34.

<sup>38</sup> Hughes was able to push through a number of bond issues which were used in part to increase the opportunities for higher education in the state. The whole system of county colleges was also developed while he was governor.

while the local municipalities were providing most of the remainder.<sup>39</sup> (The federal government provided about five percent.) Governor Hughes would have preferred to spend far more on those schools. He had worked to get an income tax enacted in the state and would have used the proceeds from the income tax for that purpose.<sup>40</sup> However, he was not successful in his attempt to establish an income tax.

As a result of the emphasis on local funding,<sup>41</sup> there were significant differences between what the poor urban districts spent on schools and what the wealthy suburban districts spent.<sup>42</sup> This imbalance had been created by the loss of both business and residents in the cities, which lowered the tax base. Additionally the cities had social problems which also drained their coffers. A number of the cities had also suffered from riots during the 1960s which added to the flight of the middle class and further injured the infrastructure within those cities.

Shortly before Hughes became Chief Justice, the New Jersey Supreme Court faced a constitutional challenge to the existing funding system in the state.<sup>43</sup> The plaintiffs in that case, *Robinson v. Cahill*,<sup>44</sup> were students in poor urban districts whose schools were allegedly failing to provide an adequate education. The case was argued on a number of theories. The first theory was Equal Protection under the United States Constitution.<sup>45</sup> However, as the *Robinson* case was progressing through the New Jersey court system, another case from Texas was before the United States Supreme Court.<sup>46</sup> In that case, a similar situation in Texas was challenged as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States

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<sup>39</sup> *Robinson I*, 62 N.J. at 480, 303 A.2d at 276.

<sup>40</sup> Richard Leone, *Politics of Gubernatorial Leadership, Tax and Education Reform in New Jersey* (1969) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

<sup>41</sup> "Localism has a long history in the United States, and particularly in New Jersey. . . . Citizens who prized the independence of their local governments not surprisingly had little interest in sharing power with more distant levels of political authority, be it county, region or state." LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 228-29 (2003).

<sup>42</sup> *Robinson I*, 62 N.J. at 480-82, 303 A.2d at 276-77.

<sup>43</sup> Shortly before the *Robinson* decision, the California Supreme Court in *Serrano v. Priest*, 487 P.2d 1241 (1971) had declared the system in California to be unconstitutional. See generally John Dayton, J.D., Ed.D., *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 WEST'S EDUC. L. REP. 447 (2001).

<sup>44</sup> *Robinson I*, 62 N.J. 473, 303 A.2d 273.

<sup>45</sup> *Id.* at 482-501, 303 A.2d at 277-87.

<sup>46</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Constitution. The United States Supreme Court held that the Texas system was constitutional.<sup>47</sup> The New Jersey courts were therefore unable to find the system in New Jersey violative of the Equal Protection Clause of the United States Constitution.

However, the New Jersey Supreme Court had previously found that implied in Article I, § 1 of the New Jersey Constitution was the right to equal protection.<sup>48</sup> Therefore, the court could have decided that the system of educational funding was unconstitutional under the New Jersey equal protection clause.<sup>49</sup> Nevertheless, the court, in an opinion authored by Chief Justice Weintraub, did not base the decision on equal protection. Rather, it turned to a specific provision of the New Jersey Constitution which provided that the State had the obligation to provide a thorough and efficient education for all students aged five to eighteen.<sup>50</sup> The court found that the system of school funding, which relied so heavily on property taxes, was unconstitutional.<sup>51</sup> At that time only twenty-eight percent of the funding for the schools came from the State, five percent from the federal government and the remaining sixty-seven percent from local property taxes.<sup>52</sup> The court recognized that the poorer urban centers were burdened by large expenditures to pay for the costs of other services.<sup>53</sup> There were so many expenses on the cities, and the cities had lost so much of their tax base that they were simply unable to spend sufficient funds on their school systems. The court did not mandate any specific remedy. Rather, the court ordered the Legislature to come up with a constitutional solution to the constitutional problem.<sup>54</sup> Professors Dayton and Dupre recognized that the decision by the New Jersey Supreme Court opened a new avenue of attack upon school funding systems across the country.<sup>55</sup> The first case striking

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<sup>47</sup> *Id.* at 4–6, 62.

<sup>48</sup> That provision provides: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. CONST. art. I, ¶ 1.

<sup>49</sup> *Robinson I*, 62 N.J. at 490, 303 A.2d at 282.

<sup>50</sup> In 1875 the New Jersey Constitution was amended by adding, “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.” N.J. CONST. art. VIII, § 4, ¶ 1.

<sup>51</sup> *Robinson I*, 62 N.J. at 520–21, 303 A.2d at 297–98.

<sup>52</sup> *Id.* at 480, 303 A.2d at 276.

<sup>53</sup> *Id.* at 511, 303 A.2d at 293.

<sup>54</sup> *See id.* at 520–21, 303 A.2d at 298.

<sup>55</sup> John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2365 (2004).

down a state educational funding system came from California<sup>56</sup> and like other early cases, the California court relied upon equal protection. New Jersey was the first state to rely upon a specific provision of its own constitution. “The *Robinson* decision established a new model for plaintiffs throughout the country as they pressed their state courts to overturn entrenched school funding systems.”<sup>57</sup>

When Chief Justice Hughes was appointed, the Legislature had not yet devised a solution. Throughout Hughes’ term as Chief Justice, this issue would repeatedly come before the court.<sup>58</sup> The court grappled with the difficult legal issues involved in trying to force the executive and legislative branches of the government to provide the necessary funds to improve the schools in the urban areas. At first, Hughes moved slowly, trying to reconcile the needs of the schools with separation of powers. Clearly, the Legislature was the appropriate body to determine how to fund this mandated increase in support for the public schools. However, the legislators, fearing a backlash if they raised taxes, hesitated to act. In *Robinson II*,<sup>59</sup> the court allowed the Legislature time to come up with its own plan. In *Robinson III*,<sup>60</sup> it again extended the deadline. However, Chief Justice Hughes, writing for the court in 1975 in *Robinson IV*,<sup>61</sup> began to insist upon action. He again gave deference to the Legislature, writing, “the Court’s function is to appraise compliance with the Constitution, not to legislate an educational system,”<sup>62</sup> but restated that the court would step in to act if the Legislature defaulted on its obligation. He then set forth a provisional remedy for the 1976–77 school-year in the event that the Legislature failed to act, which was to reconfigure school aid to better help the poor urban and rural districts.<sup>63</sup>

In response to this decision, the Legislature passed the Public School Education Act of 1975<sup>64</sup> shortly before the court-ordered deadline. This legislation was the product of much debate. Governor Byrne supported an income tax solution to the funding problem,

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<sup>56</sup> *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

<sup>57</sup> *Dayton & Dupre*, *supra* note 55, at 2365.

<sup>58</sup> *See supra* note 34.

<sup>59</sup> *Robinson v. Cahill (Robinson II)*, 63 N.J. 196, 306 A.2d 65 (1973), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1973).

<sup>60</sup> *Robinson v. Cahill (Robinson III)*, 67 N.J. 35, 335 A.2d 6 (1975), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913 (1975).

<sup>61</sup> *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133, 351 A.2d 713 (1975). Justices Mountain and Clifford voted against the order.

<sup>62</sup> *Id.* at 145, 351 A.2d at 719.

<sup>63</sup> *Id.* at 146–52, 351 A.2d at 720–23.

<sup>64</sup> N.J. STAT. ANN. § 18A:7A-3 to -51 (West 1999 & Supp. 2005).

but faced significant anti-tax sentiment both in the Legislature and the polity at large.<sup>65</sup> So, at the time of the passage of the Education Act, there was still no means available to fully fund the proposal.

In *Robinson V*,<sup>66</sup> the court upheld the facial validity of the Act. That decision, an unsigned per curiam opinion for the court, emphasized the steps which the Legislature had taken to quantify what constituted a “thorough and efficient education.”<sup>67</sup> It had also taken steps to increase the aid to the poorer districts that were suffering from municipal overburden. Thus, the court concluded that—assuming the Act was fully funded—it was constitutional. However, the court also issued a threat that if the Legislature did not act by April 6, 1976, to enact legislation to fully fund the Act, it would take matters into its own hands.<sup>68</sup>

Chief Justice Hughes wrote a concurring opinion.<sup>69</sup> Two other members of the court dissented, believing that the new Act could not overcome the constitutional problems.<sup>70</sup> Hughes noted the concerns that both Judge Milton B. Conford<sup>71</sup> and Justice Pashman raised in their separate opinions and indicated sympathy with their difficulties.<sup>72</sup> He emphasized his concerns about the “workability” of the new system designed by the Legislature.<sup>73</sup> Chief Justice Hughes felt that the Commissioner did not have sufficient powers to ensure a state-wide “thorough and efficient system.”<sup>74</sup> He felt that the problems of municipal overburden were so great that no Commissioner of Education could ensure the success of the schools in the poorer districts.<sup>75</sup> But ultimately, in deference to support for separation of powers, the Chief Justice decided to concur in upholding the constitutionality of the Act.<sup>76</sup> However, he noted:

[I]f perchance in the reasonably near future there should be no effective step toward equalization, and it were to be established

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<sup>65</sup> Felzenberg, *supra* note 11, at 432–33.

<sup>66</sup> *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976).

<sup>67</sup> *Id.* at 455, 355 A.2d at 131–32.

<sup>68</sup> *Id.* at 468, 355 A.2d at 139.

<sup>69</sup> *Id.* at 468–76, 355 A.2d at 139–143 (Hughes, C.J., concurring).

<sup>70</sup> *Id.* at 476–512, 355 A.2d at 143–62 (Conford, J., concurring in part and dissenting in part); *id.* at 512–62, 355 A.2d at 163–89 (Pashman, J., dissenting).

<sup>71</sup> Judge Conford, Presiding Judge of the Appellate Division, was sitting temporarily assigned. *Id.* at 476, 355 A.2d at 143 (Conford, J., concurring in part and dissenting in part).

<sup>72</sup> *See Robinson V*, 69 N.J. at 469, 355 A.2d at 139–40 (Hughes, C.J., concurring).

<sup>73</sup> *Id.* at 470, 355 A.2d at 140.

<sup>74</sup> *Id.* at 469, 355 A.2d at 140.

<sup>75</sup> *See id.*

<sup>76</sup> *Id.* at 475, 355 A.2d at 143.

by proofs that such failure caused to continue to fester the invidious discordancies of tax resources destructive of the possibility of meeting the constitutional goal, I would feel constrained to then determine the unconstitutionality in application of the 1975 Act . . . .<sup>77</sup>

His concerns, joined with the concerns of Justice Pashman and Judge Conford, foreshadowed the events of the future. Years after Chief Justice Hughes left the court, another Chief Justice writing for the court declared the 1975 Act to be unconstitutional in its application.<sup>78</sup>

Despite the clear threat issued in the opinion, the Legislature still failed to fund the Act, as fear of the anti-tax backlash was strong.<sup>79</sup> Most of the legislators represented suburban districts where the people were content with the quality of their schools. In many cases, the suburbanites, relying on the doctrine of home rule, felt that the people in cities should support their schools, as they supported theirs. Even the Democrats, who usually supported the poorer communities, were divided. "A huge Democratic majority was split between urban legislators seeking property tax relief and more state aid and suburban lawmakers whose constituents did not want to divert local funds to urban schools."<sup>80</sup> Unfortunately, this approach by the suburban legislators did not take into consideration the serious problems of municipal overburden—the cities had so many other burdens that they could not continue to increase taxes in order to adequately fund their schools.

When the Legislature failed to fund the new Act, the court in *Robinson v. Cahill VI*<sup>81</sup> ordered that no state education funds could be dispersed to any school district after July 1, 1976.<sup>82</sup> Since every school district was at least partially funded by the State, this meant that the

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<sup>77</sup> *Id.*

<sup>78</sup> *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990). Chief Justice Wilentz wrote the opinion.

<sup>79</sup> Leone, *supra* note 40, at 82.

<sup>80</sup> SALMORE & SALMORE, *supra* note 1, at 196.

<sup>81</sup> *Robinson v. Cahill (Robinson VI)*, 70 N.J. 155, 358 A.2d 457 (1976). Justice Mountain wrote a dissenting opinion in which he argued that the Court should not interfere with what he sees as essentially a legislative function. "Thus the Court is indirectly commanding that a tax be imposed. But the taxing power is legislative and cannot be exercised by the judiciary." *Id.* at 165, 358 A.2d at 462 (Mountain, J., dissenting). Justice Pashman also dissented but suggested a very different result giving the Commissioner of Education the power to allocate all the money raised by all the districts in the state as the Commissioner sees fit. *Id.* at 168–70, 358 A.2d at 462–65 (Pashman, J., dissenting).

<sup>82</sup> *Id.* at 160, 358 A.2d at 459 (majority opinion).

schools could not open. This decision threw the state into chaos. “Although less draconian than shutting the schools down in September, the ruling immediately affected 100,000 students planning to attend summer school and many handicapped students in year-round programs.”<sup>83</sup> Public pressure was applied and on July 8, 1976 the Legislature passed, and Governor Byrne signed a two- to two-and-a-half percent income tax.<sup>84</sup> There was great consternation. Governor Byrne was soundly criticized.<sup>85</sup> (This occurred just at the same time that New York was developing off-track betting called OTB.) Byrne gained a nickname based on the off-track betting—OTB standing for “One Term” Byrne.<sup>86</sup>

Added to the income tax was a provision for property tax relief.<sup>87</sup> Some of the money from the tax was set aside to give rebates to all homeowners in the state and rebates for renters.<sup>88</sup> Interestingly, rather than give those rebates as a reduction in the income tax paid, they were given out to the citizens in mailed rebate checks. The income tax was taken out of paychecks. The people became accustomed to the small income tax (two- or two and a half percent at the beginning which in later years grew to six percent) compared to the federal income tax. The rebate checks came directly from Governor Byrne’s office and seemed like a godsend. Byrne was able to avoid the prophecy of his nickname and was elected to a second term.<sup>89</sup> A number of factors helped Byrne. Many people ran in the Democratic primary. Byrne won with a small percentage, but no runoff is provided for in the primary. His Republican opponent in the general election did not run a particularly good campaign. Byrne won by a margin well below his previous election.<sup>90</sup>

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<sup>83</sup> SALMORE & SALMORE, *supra* note 1, at 197.

<sup>84</sup> New Jersey Gross Income Tax Act, N.J. STAT. ANN. §§ 54A:1-1 through 10-12 (West 1999 & Supp. 2005). The tax was two percent of the first \$20,000 and two-and-a-half percent of the amount in excess of \$20,000. *Id.* § 54A:2-1.

<sup>85</sup> Felzenberg, *supra* note 11, at 451–52.

<sup>86</sup> Herb Jackson, *Torricelli in Race to Top of Hill*, RECORD (Bergen County, N.J.), Sept. 9, 2002, at AO3 (“Gov. Brendan “One-Term” Byrne was so wounded by enacting the state’s first income tax that challenger Raymond Bateman was ahead, 44 percent to 39 percent, in a September Eagleton poll. Just 33 percent said Byrne was doing an excellent or good job, but two months later, Byrne won by 14 percentage points.”).

<sup>87</sup> N.J. STAT. ANN. § 54A:9-25 (West 1999).

<sup>88</sup> N.J. STAT. ANN. § 54A:4-3 (repealed 1991).

<sup>89</sup> ENCYCLOPEDIA OF NEW JERSEY 110 (Maxine N. Lurie & Marc Mappen eds., 2004).

<sup>90</sup> In 1973 Byrne beat Charles Sandman, 1,397,613 votes to 676,235. He defeated Raymond Bateman 1,184,564 votes to 888,880 in 1977. STATE OF NEW JERSEY, MANUAL OF THE LEGISLATURE OF NEW JERSEY 460 (1997).

Chief Justice Hughes had finally achieved his long-sought result—an income tax. Bob Braun, who was for many years the education editor for the *Star-Ledger* newspaper, criticized Hughes and the Supreme Court for trying to run the schools:

I remember sitting across from the late Richard J. Hughes when he was Supreme Court chief justice. We were supposed to be talking about what Hughes did for colleges when he was governor, but he didn't want to talk about that.

He wanted to talk about how the Legislature had refused to give him the state income tax he wanted back in the 1960s. This was 1976 and the Legislature was still refusing, only this time Brendan Byrne was governor.

"They didn't want the income tax then? Well, they'll want one now."

I didn't know what he meant. A few days later, he issued a ruling closing the schools until legislators screamed from pain and passed the tax.

So it was more a public relations gimmick than a real threat. So the schools already were closed for the summer. Still, the idea that one guy—even so nice a guy as Dick Hughes—had that sort of unrestrained power gave pause.<sup>91</sup>

Braun did not believe that the courts should have that much power. But the decisions by the Hughes Court would be considered restrained when compared with the next series of school funding cases under future Chief Justice Wilentz.

In later years, the New Jersey Supreme Court dealt with a whole new set of cases dealing with school funding entitled *Abbott v. Burke I* through *XIV*.<sup>92</sup> In these cases the court went much further than the court in the *Robinson* cases. As predicted by Hughes in his concurring opinion in *Robinson V*, the court determined in *Abbott II*<sup>93</sup> that the statute deemed facially constitutional in *Robinson V* was unconstitutional as applied to the poorest districts in the state.<sup>94</sup> Those districts

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<sup>91</sup> Robert J. Braun, *Judges are in the Wrong Court When it Comes to Setting Education Policy*, STAR-LEDGER (Newark, N.J.), May 19, 1997, at 21.

<sup>92</sup> See generally Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615 (2004); Paul L. Tractenberg, *The Evolution and Implementation of Education Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998).

<sup>93</sup> *Abbott v. Burke (Abbott II)*, 119 N.J. 287, 575 A.2d 359 (1990). *Abbott I* had been a procedural case to decide whether the case should be handled in the Superior Court or through the administrative process. *Abbott v. Burke (Abbott I)*, 100 N.J. 269, 495 A.2d 376 (1985).

<sup>94</sup> The school districts that the New Jersey Supreme Court focused on were primarily city schools like Newark, Trenton, Camden, Jersey City, etc. However, other schools that were more rural actually argued that they were sufficiently bad to fit

became known as *Abbott* Districts and had to receive funding equal to or greater than the funding provided in the wealthiest districts in the state.<sup>95</sup> One of the problems this created was that the wealthiest and the poorest districts received funding which in many cases was far greater than the funding in the middle districts. This resulted in a number of school districts actually arguing that they were bad enough to be considered an *Abbott* District. Eventually, the *Abbott* Districts would receive up to eighty-five percent of their funding from the State while other districts receive the vast proportion of funding from local property taxes.<sup>96</sup> In one action, a group of rural schools argued that they, too, should be given added support because they had problems similar to those in the inner-cities.<sup>97</sup>

In later *Abbott* cases, the court went further and mandated particular programs and new school construction. For example, the court required that all schools in the *Abbott* Districts provide full-day kindergarten programs and half-day pre-kindergarten programs for three- and four-year-olds.<sup>98</sup> The mandate that the state provide new and rehabilitated schools within the poorest districts led to a massive bond issue of \$8.6 billion, \$6 billion of which was to be used for the schools in the thirty-two poorest districts in the state.<sup>99</sup> The court fur-

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within the ambit of the *Abbott* districts. See Abby Goodnough, *Rural Schools Feel Ignored by Trenton Aid to Poor*, N.Y. TIMES, June 23, 1997, at A1.

<sup>95</sup> *Abbott II*, 119 N.J. at 385, 575 A.2d at 408.

<sup>96</sup> New Jersey Department of Education, Comparative Spending Guide 2005: Summary of Vital Statistics: Operating Type ABBOTT, <http://www.state.nj.us/njded/guide/2005/abbott.pdf> (Mar. 2005). For example, in 2005, Newark, which is in Essex County, received eighty-four percent of its funding from the State of New Jersey, nine percent from local property taxes and six percent from the Federal Government. *Id.* On the other hand Glen Ridge, which is also in Essex County, received only five percent of its funding from New Jersey and ninety-one percent of its funding from local property taxes. New Jersey Department of Education, Comparative Spending Guide 2005: Summary of Vital Statistics: Operating Type K-12, <http://www.state.nj.us/njded/guide/2005/k-12.pdf> (Mar. 2005).

<sup>97</sup> See generally John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99 (2003).

<sup>98</sup> *Abbott v. Burke (Abbott V)*, 153 N.J. 480, 710 A.2d 450 (1998). The court mandated this even though the constitutional provision which justified the cases only provided that a through and efficient education had to be provided to those from ages five through eighteen. *Id.* at 489, 710 A.2d at 454.

<sup>99</sup> This was called the Educational Facilities Construction and Financing Act. N.J. STAT. ANN. §§ 18A:7G-1 through -30, -57 through -71 (West Supp. 2005). It was challenged as unconstitutional in violation of the debt limitation provision of the New Jersey Constitution. N.J. CONST. art. VIII, § 2, ¶ 3. That provision requires "no such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon." *Id.* The bond issue was not submitted to the voters. However, the New Jersey Supreme Court in *Lonegan v. State*, 174 N.J. 435, 809 A.2d 91 (2002), upheld

ther held that all of the funding for the construction or rehabilitation of the schools in the *Abbott* Districts had to come from the State. As it turned out, the \$6 billion was insufficient to fund all the schools requested in the *Abbott* Districts.<sup>100</sup>

It is clear that there will be continuing litigation as the court continues to oversee the problem of school funding in New Jersey.

The New Jersey Supreme Court was one of the first state courts to become so involved in the issue of school funding.<sup>101</sup> Those cases have been cited hundreds of times by courts across the country. Some courts have adopted the approach of the New Jersey Supreme Court while others have rejected it.<sup>102</sup> But New Jersey has taken dramatic steps to improve educational opportunities in the poorest areas in the state.

The *Robinson v. Cahill* and *Abbott v. Burke* series of cases may be the most far-reaching cases decided by the Hughes Court. However, the case that may have been the most gut-wrenching and difficult case the court faced during Hughes' tenure was the right to die case of Karen Ann Quinlan.

#### IN RE QUINLAN

Karen Ann Quinlan was a young woman from New Jersey who, for undetermined reasons, went into a coma.<sup>103</sup> She was in a coma for some time when it became clear that she was in a persistent vegetative

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the constitutionality of the bond issue in large measure because it was the result of the *Abbott* line of cases and its constitutional mandate to fulfill the requirements of the "thorough and efficient" education clause in the constitution. *Id.* at 462, 809 A.2d at 107.

<sup>100</sup> "Virtually all of the SCC's [Schools Construction Corp.] \$6 billion funding for the poorer districts—as well as another \$2.6 billion for suburban districts—has been depleted with less than one-third of the projects completed that districts say they need." John Mooney, *Corzine: School Program 'a Disgrace' Candidate Would Ask Voters to Approve More Funding for Construction*, STAR-LEDGER (Newark, N.J.), Sept. 9, 2005, at 31.

<sup>101</sup> "Some states have experienced protracted serial litigation that has extended for decades." Dayton & Dupre, *supra* note 55, at 2353–54, citing to the seven *Robinson v. Cahill* cases and the first two *Abbott v. Burke* cases.

<sup>102</sup> John Dayton says "35 states highest courts have ruled on the merits of constitutional challenges to their states' funding systems, with 18 courts upholding states' systems of public school funding, and 17 courts declaring school funding systems unconstitutional." Dayton, *supra* note 43, at 447.

<sup>103</sup> "On the night of April 15, 1975, for reasons still unclear, Karen Quinlan ceased breathing for at least two 15 minute periods. She received some ineffectual mouth-to-mouth resuscitation from friends. She was taken by ambulance to Newton Memorial Hospital." *In re Quinlan*, 70 N.J. 10, 23, 355 A.2d 647, 653–54 (1976).

state and unaware of what was happening.<sup>104</sup> She was kept alive by a respirator as well as a feeding tube. Her loving parents, who were devout Catholics, agonized over what to do. Finally they decided to have the respirator removed. The doctors at the hospital refused their request. They believed that she was not brain dead and therefore, it was not permissible to remove the respirator.<sup>105</sup> This was to become one of the most famous cases in recent history. The news media covered the case intensively. The *New York Daily News* even took a poll of public opinion finding that fifty-nine percent agreed that Karen Ann should be permitted to die, twenty-four percent disagreed and seventeen percent had no opinion.<sup>106</sup>

One author described the Quinlans in the following way:

Joseph and Julia Quinlan were ordinary Americans who had extraordinary virtues. Thrust into the limelight, they displayed a modest courage and moral sincerity, which the media translated into almost saintly terms. Although they had given up hope for their daughter's recovery, they visited her at least once a day. "I don't believe I could go to bed without saying anything to her," Julia Quinlan told readers of *Time*. "Just like saying good night, you know, to your other children." At the same time, however, they were seeking to let her die—or rather, as Joseph put it, to place her in the hands of the Lord. He was asking to be his daughter's guardian in order to lose her. That was the agonizing responsibility that modern medicine had imposed on him and on innumerable parents reading about him.<sup>107</sup>

As medical technology developed, many individuals who would have died in earlier times were being kept alive by artificial means. Even before the *Quinlan* case a right to die movement had begun. "As medical technology increasingly prolonged life, patients and their families demanded the right to forgo or withdraw life-support . . ."<sup>108</sup> However, the legislatures and the courts had not dealt with these issues. "[T]he event that reshaped the cultural landscape by giving irrevocable meanings and force to 'the right to die'—occurred only in 1975. That was when Joseph and Julia Quinlan went to court in New

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<sup>104</sup> *Id.* at 24, 355 A.2d at 655.

<sup>105</sup> *Id.* at 24–25, 355 A.2d at 655.

<sup>106</sup> PETER G. FILENE, IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT-TO-DIE IN AMERICA 25 (1998). This book details some of the early history of Karen and her family.

<sup>107</sup> *Id.* at 76; see also generally JULIA DUANE QUINLAN, MY JOY, MY SORROW: KAREN ANN'S MOTHER REMEMBERS (2005).

<sup>108</sup> FILENE, *supra* note 106, at xv.

Jersey, asking that their comatose daughter be taken off a respirator."<sup>109</sup>

The distinguished group of lawyers that gathered in Judge Robert Muir's courtroom in Morris County represented many different interested parties: the Quinlans themselves, the doctors, the hospital, the Morris County prosecutor, the Attorney General of the State, and the attorney for the guardian ad litem. But it was a strongly contested case. One of the lawyers went so far as to allude to Nazi Germany when people were exterminated if they were no longer useful.<sup>110</sup> The State maintained the position that it would be murder to remove the respirator. Paul Armstrong,<sup>111</sup> representing the Quinlans, argued for their right to remove the respirator. The trial court in New Jersey appointed a guardian. After a trial and hearing, the court determined that the respirator should not be removed.<sup>112</sup>

"Far from cooling the public controversy, Muir's decision fanned it to new intensity. Spokesmen for the American Medical Association and the American Bar Association applauded the judge for preserving physicians' autonomy."<sup>113</sup>

The case then went directly to the New Jersey Supreme Court, bypassing the Appellate Division. New Jersey court rules permit the New Jersey Supreme Court to certify a case directly to itself.<sup>114</sup> This is often done in cases of great importance where it is obvious that the New Jersey Supreme Court will have to review the case eventually. Mrs. Quinlan, who attended the hearing before the New Jersey Supreme Court, said that Chief Justice Hughes, as well as the other Justices, asked many questions but she could not get any impression as to the potential outcome.<sup>115</sup> She was amazed when the decision was unanimous in favor of her and her husband.<sup>116</sup>

Chief Justice Hughes wrote the opinion for a unanimous court. It was a grueling day when the court considered this case in conference with all the Justices finding the issues difficult and draining. Ultimately they decided that the father should be the guardian and

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<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Id.* at 27-28.

<sup>111</sup> Paul Armstrong would later become a Superior Court judge in New Jersey. Interestingly, Chief Justice Hughes was so impressed by the work of Paul Armstrong that he would later write a letter in support of his judicial nomination.

<sup>112</sup> *In re Quinlan*, 137 N.J. Super. 227, 348 A.2d 801 (Super. Ct. Ch. Div. 1975).

<sup>113</sup> FILENE, *supra* note 106, at 44.

<sup>114</sup> SYLVIA B. PRESSLER, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, R. 2:12-1 (2006).

<sup>115</sup> Interview with Julia Quinlan (April 27, 2005).

<sup>116</sup> *Id.*

have the power to decide in conjunction with the doctors and the ethics committee at the hospital whether or not to remove the respirator.<sup>117</sup> The Chief Justice has the power to assign the writing of opinions.<sup>118</sup> Chief Justice Hughes assigned himself this heart-wrenching opinion. Interestingly, Hughes, who always wrote his own opinions, wrote this opinion in North Carolina where his wife Betty Hughes was at a medical clinic. As Hughes said: “In February, I went to Durham, N.C., to visit Betty who was there for treatment for diabetes. I was due to go from there to Japan where I had a commitment. Betty said, “Tell the Japanese that they’ll have to wait. That girl is dying. Sit down this afternoon and get going.” I wrote the opinion down there.”<sup>119</sup>

The opinion details the findings of the doctors concerning the condition of Karen Ann. “Dr. Morse and other expert physicians who examined her characterized Karen as being in a ‘chronic persistent vegetative state.’ Dr. Fred Plum, one of such expert witnesses, defined this as a ‘subject who remains with the capacity to maintain the vegetative parts of neurological function but who \* \* \* no longer has any cognitive function.’”<sup>120</sup> Hughes further described her condition: “Karen is described as emaciated, having suffered a weight loss of at least 40 pounds, and undergoing a continuing deteriorative process. Her posture is described as fetal-like and grotesque; there is extreme flexion-rigidity of the arms, legs and related muscles and her joints are severely rigid and deformed.”<sup>121</sup> The doctors also agreed that she was not brain dead under the then-existing definitions.<sup>122</sup> The testimony further indicated that removal of the respirator would result in her death; however, how long she would live after the removal of the respirator was not known.<sup>123</sup>

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<sup>117</sup> *In re Quinlan*, 70 N.J. 10, 55, 355 A.2d 647, 671–72 (1976).

<sup>118</sup> SYLVIA B. PRESSLER, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, R. 2:13-1(a) (2006) (“The Chief Justice . . . shall preside over sessions and conferences of the court and shall sign all orders relating to the administration of the judicial system.”).

<sup>119</sup> Regina Murray, *Richard Hughes (II)*, TRENTONIAN (Trenton, N.J.), Nov. 23, 1986, at 52.

<sup>120</sup> *Quinlan*, 70 N.J. at 24, 355 A.2d at 654 (alteration in original).

<sup>121</sup> *Id.* at 26, 355 A.2d at 655.

<sup>122</sup> *Id.* at 24, 355 A.2d at 654.

<sup>123</sup> The doctors had predicted that even with the respirator she would probably not live long. As Hughes said, “no physician risked the opinion that she could live more than a year and indeed she may die much earlier.” *Id.* at 26, 355 A.2d at 655. He also said “removal from the respirator would cause her death soon, although the time cannot be stated with more precision.” *Id.*, 355 A.2d at 656. In fact she lived for many years after the respirator was removed.

The court looked at a number of different legal theories,<sup>124</sup> but turned to the right to privacy as the determining legal principle. This right had been found in both the United States Constitution<sup>125</sup> and the New Jersey Constitution.<sup>126</sup> While the court recognized that the right to privacy was not without limitation, it determined that it did encompass the right of a person to refuse life-sustaining treatment.<sup>127</sup> The court said that: “Presumably this [privacy] right is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions.”<sup>128</sup> The court recognized the State’s interest in preserving life, but went on to say:

We think that the State’s interest *contra* weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims. . . . It is for that reason that we believe Karen’s choice, if she were competent to make it, would be vindicated by the law. Her prognosis is extremely poor,—she will never resume cognitive life. And the bodily invasion is very great,—she requires 24 hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter and feeding tube.<sup>129</sup>

Normally, a competent person could form his or her own opinion as to accepting or rejecting the respirator, but in this case Karen was unable to make that decision. The court held that the father, as guardian, in conjunction with the doctors and the ethics board of the hospital could make that decision.<sup>130</sup> In the conclusion of the opinion, Chief Justice Hughes summed up his opinion:

We repeat for the sake of emphasis and clarity that upon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen’s ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital “Ethics Committee” or like body of the institution in which Karen is then hospital-

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<sup>124</sup> *Id.* at 35–39, 355 A.2d at 661–63 (discussing free exercise of religion and cruel and unusual punishment).

<sup>125</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”).

<sup>126</sup> N.J. CONST. art. I, § 1.

<sup>127</sup> *Quinlan*, 70 N.J. at 39–40, 355 A.2d at 663.

<sup>128</sup> *Id.* at 40, 355 A.2d at 663.

<sup>129</sup> *Id.* at 41, 355 A.2d at 664.

<sup>130</sup> *Id.*, 355 A.2d at 664.

ized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.<sup>131</sup>

Chief Justice Hughes did not directly reverse Judge Muir.<sup>132</sup> Chief Justice Hughes believed that under the state of the law at the time, the trial court's opinion was correct. It was necessary for the highest court of the State to make this ground-breaking decision.

One of the striking things about the decision is the long description given of the Roman Catholic position on the issue.<sup>133</sup> The New Jersey Supreme Court recognized that the Catholic Church would not prohibit the removal of the respirator. Hughes said: "the 'Catholic view' of religious neutrality in the circumstances of this case is considered by the Court only in the aspect of its impact upon the conscience, motivation and purpose of the intending guardian, Joseph Quinlan, and not as a precedent in terms of the civil law."<sup>134</sup> It is true that Joseph Quinlan was a Catholic and had looked into the Catholic position before he decided to request the removal of the feeding tube.<sup>135</sup> He would not have made that decision if he learned that the Catholic Church would prohibit the removal. However, such a recitation of the Catholic Church's position was not necessary to determine the propriety of the choice of Joseph Quinlan as guardian for his daughter. It appeared that Hughes wanted to assure himself of the morality of the decision he was making. As a devout Catholic, the Church's position on this matter would assure him of the morality of the decision.

The announcement of the court's decision was first page news in all the newspapers in this country and even around the world. "Opening the CBS Evening News, Walter Cronkite announced in somber tones: 'The Supreme Court of New Jersey ruled today on an issue that has tormented the consciences of the legal and medical professions.'"<sup>136</sup>

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<sup>131</sup> *Id.* at 55, 355 A.2d at 671-72.

<sup>132</sup> *Id.* at 42, 355 A.2d at 664.

<sup>133</sup> *Quinlan*, 70 N.J. at 33-34, 355 A.2d at 660.

<sup>134</sup> *Id.* at 33, 355 A.2d at 660.

<sup>135</sup> *Id.* at 30, 355 A.2d at 657.

<sup>136</sup> FILENE, *supra* note 106, at 93.

After the opinion was issued, the respirator was removed.<sup>137</sup> Despite the opinions of the doctors, Karen did not die as a result of the removal. She lived for more than nine years. In part, her survival resulted from her slow weaning from the respirator. “The doctors and staff were working to ‘wean’ Karen. Every few days they detached the respirator and stood by, ready to reinsert it the moment she seemed in danger of expiring. At first she was able to breathe on her own for an hour, then two hours, then longer.”<sup>138</sup> Eventually she was successfully weaned and lived for many years in the continuing vegetative state. The parents never returned to court to request the removal of the feeding tube. Instead, they created a hospice program in honor of their daughter.<sup>139</sup>

Today, the decision of the court is probably seen as a given, but at the time it was a momentous and controversial decision. Since then, many courts have reached similar results.<sup>140</sup> Even the United States Supreme Court has discussed the issue in the *Cruzan* case.<sup>141</sup> In that case, the Court referred to *Quinlan* as the “seminal” case in the right to die area and assumed the existence of a constitutional right to refuse medical treatment.<sup>142</sup> Many states have now adopted statutes permitting people to make living wills setting forth their desires in future situations if they are unable to make medical decisions.<sup>143</sup> (Unfortunately, the court battles over these issues have not ended because so many people do not create living wills.)

In more recent cases, the New Jersey Supreme Court has moved away from reliance on the right to privacy and toward reliance on the

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<sup>137</sup> *Id.* at 125–31.

<sup>138</sup> *Id.* at 125.

<sup>139</sup> Interview with Julia Quinlan (April 27, 2005).

<sup>140</sup> Rob McStay, *Terminal Sedation: Palliative Care for Intractable Pain*, *Post Glucksberg and Quill*, 29 AM. J.L. & MED. 45, 47 n.17 (2003).

<sup>141</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990). The majority opinion in *Cruzan* left open the question of whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution establishes a right to refuse lifesaving medical treatment. *Id.* at 279 & n.7. Chief Justice Rehnquist only assumed that such a right existed for the purpose of deciding the case. *Id.* at 279. The opinions of the four dissenting Justices, and the concurring opinion of Justice O’Connor, indicate that at least five Justices, on the date the *Cruzan* opinion was decided, believed that there was a right of a mentally competent adult to refuse lifesaving medical treatment or lifesaving nutrition. However, there was no majority opinion or ruling regarding the issue of whether there is a ‘right to die.’ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 982 (7th ed. 2004).

<sup>142</sup> *Cruzan*, 497 U.S. at 270, 300–01.

<sup>143</sup> Carole Ann Mooney, *Deciding Not to Resuscitate Hospital Patients: Medical and Legal Perspectives*, 1986 U. ILL. L. REV. 1025, 1053 n.165.

common law right to refuse medical treatment.<sup>144</sup> Despite that, the *Quinlan* case stands as the beginning point in the evolution of legal thinking on the right to die.

In more recent years, the case of Theresa Marie Schiavo<sup>145</sup> gained notoriety similar to that of the *Quinlan* case. That case dealt with a situation in which the parents and husband of a woman in a coma disagreed as to whether she should be permitted to die. The differences between the two situations were great. First and perhaps most importantly, the family in the *Quinlan* case was united in their determination to request the removal of the respirator.<sup>146</sup> Secondly, the Quinlans never requested removal of the feeding tube, which was at issue in the *Schiavo* case. In the *Schiavo* case the parents and the husband were in disagreement whether she would have wanted the feeding tube removed. The courts in Florida used a “clear and convincing” standard to determine that Mrs. Schiavo would have wanted the feeding tube removed.<sup>147</sup> The parents objected to that outcome and went to great lengths to prevent the removal. Ultimately the Florida Supreme Court affirmed the trial court’s order that the feeding tube be removed<sup>148</sup> and Mrs. Schiavo died.<sup>149</sup>

While the issues in the *Quinlan* case and the *Schiavo* case were different, it is clear that the law that has developed in New Jersey since the *Quinlan* opinion would have permitted the removal of the feeding tube if it was determined that the person who was incompetent to make the decision would have wanted the removal. The New Jersey Supreme Court authorized the removal of both nutrition and hydration in *In re Conroy*.<sup>150</sup> The court carefully restricted the situations in which this would be allowed, but made it clear that, if it could be determined in some way that this would have been the wish of the

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<sup>144</sup> *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

<sup>145</sup> *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005). It must be noted that there were dozens of decisions made in this case over the course of ten years. The case cited above was the last substantive decision handed down before Terri Schiavo passed away.

<sup>146</sup> *In re Quinlan*, 70 N.J. 10, 28, 355 A.2d 647, 656 (1976).

<sup>147</sup> *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at \*6 (Fla. Cir. Ct. Feb. 11, 2000); see also FLA. STAT. ANN. § 765.101 (West 2002).

<sup>148</sup> *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004) (holding unconstitutional “Terri’s Law,” a law passed by the Florida Legislature allowing Florida Governor Jeb Bush to intervene in the case).

<sup>149</sup> Abby Goodnough, *Schiavo Dies, Ending Bitter Case Over Feeding Tube*, N.Y. TIMES, Apr. 1, 2005, at A1.

<sup>150</sup> 98 N.J. 321, 486 A.2d 1209 (1985).

incompetent, it would be permitted.<sup>151</sup> However, that case as well as *In re Peter*<sup>152</sup> dealt with elderly nursing home patients who had a limited life expectancy even with the artificial support. In *In re Nancy Ellen Jobes*,<sup>153</sup> the New Jersey Supreme Court dealt with a woman who was only thirty-one years old. The trial court permitted the removal of the life-sustaining food nutrition system upon request of the husband who was joined in making this request by the parents of his wife.<sup>154</sup> As the New Jersey Supreme Court noted: "After a seven-day trial, the court found that Mr. Jobes had proved by clear and convincing evidence that his wife is in a persistent vegetative state with no prospect of improvement, and that, if competent, she would not want to be sustained by the j-tube under her present circumstances."<sup>155</sup> The New Jersey Supreme Court affirmed this decision. Thus, the New Jersey courts have moved beyond the decision of Chief Justice Hughes in *Quinlan* to further permit the right to die in those situations where the court believes that this is what the patient would have wanted.

Mrs. Quinlan indicated that she had never met Chief Justice Hughes before the case, although she and her husband always had a good opinion of Governor Hughes.<sup>156</sup> They respected him as a good and caring former Governor. But after the case was over, Hughes became friendly with the Quinlans and included them in many family events. Mrs. Quinlan recalled that he was a gracious and charming host. She considered it a privilege to be his friend. The Quinlans even sat with the family during the funeral of the Governor.<sup>157</sup>

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<sup>151</sup> The court used three different tests. First, the court used a subjective test when the actual wishes of the incompetent could be determined by the evidence. *Id.* at 360–61, 486 A.2d at 1229. It also adopted two objective tests. The first is a limited-objective test when there is some evidence of the incompetent's wishes and the pain the incompetent is suffering outweighs the benefits of continued life. *Id.* at 361–62, 486 A.2d at 1230. The other objective test is the pure-objective test, which applies when there is no evidence of the incompetent's wishes. *Id.* at 365–66, 486 A.2d at 1231–32. It should be noted that Justice Handler in a dissenting opinion was dissatisfied with the test because he felt that it focused too narrowly on the issue of pain and failed to take into consideration other issues of human decency and independence. *Id.* at 394–96, 486 A.2d at 1247–48 (Handler, J., concurring in part and dissenting in part).

<sup>152</sup> 108 N.J. 365, 529 A.2d 419 (1987).

<sup>153</sup> 108 N.J. 394, 529 A.2d 434 (1987).

<sup>154</sup> *In re Nancy Ellen Jobes*, 210 N.J. Super. 543, 510 A.2d 133 (Super. Ct. Ch. Div. 1986).

<sup>155</sup> 108 N.J. at 400, 529 A.2d at 437. The j-tube had been inserted through a hole cut into her abdominal cavity.

<sup>156</sup> Interview with Julia Quinlan, mother of Karen Ann Quinlan, in Sparta, N.J. (April 27, 2005).

<sup>157</sup> *Id.*

## HUGHES AS JUDICIAL CRAFTSMAN

Some justices and judges have their law clerks draft their opinions. Hughes did not. He wrote all his own opinions. A former clerk to Chief Justice Hughes stated that:

When it came to opinion writing, Chief Justice Hughes did everything himself. In his chambers, there was a shelf over his desk, and his clerks would pull all the relevant volumes for him so he could use the cases when he needed them. This was no small task for him, because his eyesight was not the best. Only when he had completed his draft opinion would he share it with us for our input and comments. Generally that was minimal, because he had hit the target head-on.<sup>158</sup>

Another of his clerks wrote: “He drafted all of his own opinions. Our job was to then edit, beef up, find and check citations and test the bench memo that was written by other clerks to make sure that the law was correct. . . . But, he was the author from the ‘get go.’”<sup>159</sup> Another clerk, while confirming that Hughes wrote all his own opinions, indicated that the Chief Justice gave him more of a role in helping to develop the State of the Judiciary speech Hughes gave to the Legislature.<sup>160</sup> He said that Hughes was particularly pleased with certain of the expressions he used in that speech.<sup>161</sup> In all Hughes wrote twenty-seven majority opinions, five concurring opinions and twelve dissenting opinions. Of course, he joined in many other opinions. He may have written other opinions as well because the Court sometimes issues per curiam opinions, which are not signed. This is particularly true in cases dealing with lawyer discipline. Justice Pashman in a tribute to Chief Justice Hughes wrote:

Richard Hughes did not merely supervise the workings of our court during this period; as Chief Justice, he felt it his duty to also personally pen many of the seminal decisions handed down during his tenure. His ability to grasp complexities in diverse fields of law is no better illustrated than by an enumeration of some of the varied areas in which he wrote: tort law, criminal procedure, rate-making, insurance law, secured transactions, education, civil service, and professional responsibility.<sup>162</sup>

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<sup>158</sup> Letter from Gary A. Ehrlich, *supra* note 25.

<sup>159</sup> Letter from John M. Donnelly, former law clerk to Chief Justice Hughes, to author (April 13, 2005) (on file with author).

<sup>160</sup> Interview with Hon. Ronald J. Hedges, United States Magistrate Judge, United States District Court for the District of New Jersey; former law clerk to Chief Justice Hughes, in Newark, N.J. (Jan. 24, 2005).

<sup>161</sup> *Id.*

<sup>162</sup> See Pashman, *supra* note 18, at 88 (footnotes omitted).

## ADMINISTRATOR OF THE COURT HUGHES

As noted, the position of Chief Justice in New Jersey is not purely judicial. It is also administrative. In his administrative role, Hughes initiated a system of judicial evaluation—the first in the country. He also appointed non-lawyers to the disciplinary committees dealing with improprieties of attorneys. He worked to reduce sentencing disparities within the counties and between the counties. He announced the first pre-trial intervention program in the country in an effort to keep young offenders and first-time offenders out of the criminal process. He even took a large group of judges on a tour of Rahway State Prison so that they would understand the consequences of their sentencing decisions.

Chief Justice Hughes gave a State of the Judiciary address to the Legislature in 1977. In that address he said: “So far as I can determine, this is the first time our branches of government have come together in the chambers of the Legislature to consider together the public interest in the administration of justice.”<sup>163</sup> It would also be the last time such an event occurred.

In that address, he urged the Legislature to put a constitutional amendment on the ballot which would permit the County Courts to be merged into the Superior Courts in order to have a fully integrated judicial system. That Amendment was eventually placed on the ballot and passed.

Another reason for Hughes’ appearance before the Legislature was his concern over judicial attrition. Under the New Jersey system, the Legislature determines the salaries of the judges. There are no automatic cost of living raises or any ability on the part of the judicial system to increase the salaries of the judges. At the time of the address by Governor Hughes, there had been no pay raise for many years. Hughes was well aware of the difficulty of living on a judicial salary since he had resigned from the judiciary many years earlier because the salary was not sufficient for him to raise his children. After discussing at length all the new initiatives and programs the judiciary had developed, Hughes said:

The subject I am about to discuss, however, is so serious and urgent that a failure to act in this session of the Legislature could foreshadow, indeed almost invite, a beginning deterioration in the New Jersey court system. I do not want to see this happen—I do not believe either you or the people want it to happen. But

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<sup>163</sup> Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, State of the Judiciary Address to the Legislature 1 (Nov. 21, 1977) (transcript on file with author).

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ominous signs of change are apparent, none of which are in the interest of the State. Several of our finest and most experienced judges have been forced to resign to adequately support their families. The greatest difficulty has been encountered by the Governor in persuading able and experienced lawyers with children in college, for instance, to accept appointment to the bench.<sup>164</sup>

As previously noted, Hughes had resigned from the state court many years earlier because of the low salaries. He did not want to see the courts lose their best judges. To this day, judges do not generally earn as much as the top lawyers in the same communities.

#### CONCLUSION

This brief review of the work of Chief Justice Richard J. Hughes demonstrates his importance in developing the reputation of the New Jersey Supreme Court as an innovative activist court. It also demonstrates his commitment to liberal principles. The New Jersey Supreme Court continues to take on difficult and controversial issues continuing the legacy of Hughes and the other outstanding Chief Justices who led the court since the new Constitution of New Jersey was written in 1947.

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<sup>164</sup> *Id.* at 33–34.