OPINION DIGESTS

During their tenures on the bench of New Jersey's highest court, Chief Justice Hughes and Justice Mountain authored opinions which encompassed a wide range of topics and perplexing legal issues. In an effort to provide the reader with an insight into their judicial philosophies, the Seton Hall Law Review *has compiled synopses of the cases in which Chief Justice Hughes and Justice Mountain filed an opinion. These digests illustrate the lasting contributions these two men have made to the jurisprudence of this state.*

DIGESTS OF OPINIONS* BY CHIEF JUSTICE RICHARD J. HUGHES

ADMINISTRATIVE LAW—LICENSING—*In re Suspension of Heller*, 73 N.J. 292, 374 A.2d 1191 (1977).

The appellants, Fred F. Heller, a registered pharmacist, and Carfred, Inc., a closely-held corporation trading as Heller Pharmacy, challenged findings of the New Jersey State Board of Pharmacy (Board) which revoked the certificate of Mr. Heller, revoked the permit to conduct a pharmacy of Carfred, Inc., and assessed a "civil penalty" of $50,472 against both. 73 N.J. at 294, 374 A.2d at 1192 (1977). The revocations and penalty assessment were the result of the Board's findings that appellants were guilty of " 'grossly unprofessional conduct' " relating to the sale of codeine-based cough syrup. *Id.* at 296, 374 A.2d at 1193. The Board found that appellants sold the cough syrup at unconscionable prices, and in amounts much greater than was justified by the medical needs of the purchasers. Indeed, the Board found that appellants realized at least $50,472 of " 'unjust profit' " through their " 'unprofessional practices and pricing.' " *Id.* at 295, 374 A.2d at 1192.

On appeal, appellants urged that revocation of their licenses was invalid since their conduct was neither proscribed by the Pharmacy Act nor included in the list of acts constituting " 'grossly unprofessional conduct' " under N.J. STAT. ANN. § 45:14-12 (a)-(f) (West

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* *At the time these digests were prepared, there were a small number of cases, in which Chief Justice Hughes filed an opinion, that had not been approved for publication.*

1978). Furthermore, appellants argued that the imposition of the $50,472 "civil penalty" was not a valid exercise of the Board's remedial authority. *Id.* at 297, 374 A.2d at 1193. The appellate division unanimously affirmed the validity of the license revocations and, by a two to one vote, upheld the validity of the penalty assessment.

The Supreme Court of New Jersey, in an opinion authored by Chief Justice Hughes, upheld the decision of the appellate division as to the revocations but reversed as to the penalty assessment. In regard to the license revocations, the Chief Justice rejected appellants' argument that their conduct could not be considered "grossly unprofessional" since it did not fall within any of the specifically enumerated activities proscribed by N.J. STAT. ANN. § 45:14-12 (West 1978). Chief Justice Hughes noted that, "with respect to certain professions," many courts have allowed a regulatory agency to take steps to effectuate the objectives of a general statute, without limiting the agency to the statute's express provisions. *Id.* at 302, 374 A.2d at 1196. Thus, the Chief Justice found that revocation of appellants' licenses was in accord with the Board's regulatory function of " 'protect[ing] the health and welfare of members of the public.' " *Id.* at 303–04, 374 A.2d at 1197.

In regard to the monetary penalty assessment, the court held that the Board did not follow the proper statutory procedure for imposing the penalty and that it failed to give Heller adequate notice that it intended to pursue such a remedy. Viewing this as violative of constitutional procedural due process guarantees, the court reversed the decision of the appellate division concerning the penalty assessment and similarly set aside that portion of the Decision and Order of the Board. *Id.* at 310–11, 374 A.2d at 1200–01.

ADMINISTRATIVE PROCEDURE—*In re Board's Investigation of Telephone Co.*, 66 N.J. 476, 333 A.2d 4 (1975).

Counsel, who was appointed to represent the public, challenged two orders of the New Jersey Board of Public Utility Commissioners (PUC). The challenged orders authorized a telephone company, by means of a "Comprehensive Adjustment Clause" included in its tariff schedule, to recover certain expenses by increasing its rates each year. 66 N.J. at 479, 333 A.2d at 6. The PUC denied a motion for a stay of these orders and the rate counsel appealed to the appellate division. While the case was pending unheard before the appellate division, the supreme court brought the matter before it by direct certification. *Id.* After detailing the factual setting surrounding the

telephone company's asserted need for a rate increase, Chief Justice Hughes considered the rate counsel's contentions that the PUC's adoption of the orders lacked procedural regularity and that the PUC exceeded its statutory authority when it adopted the adjustment clause. *Id.* at 489, 333 A.2d at 11.

In disposing of the rate counsel's claim that no rate proceeding was " 'pending' " when the PUC issued the orders, the Chief Justice stated that such an argument suggested a "semantic rigidity" which was not realistic in light of the continuity of the PUC proceedings concerning rate increases. *Id.* at 491–92, 333 A.2d at 13.

With regard to the validity of the adjustment clause, the Chief Justice found no reason for the court to disapprove of the PUC's adoption and implementation of this clause pending a final hearing on the full rate case. *Id.* at 495–96, 333 A.2d at 15. Accordingly, Chief Justice Hughes noted that the public was protected in the interim, since the PUC provided "in unmistakable terms" that any rates found to be unjust in the final rate determination would be refunded to the customers. *Id.* at 495, 333 A.2d at 15.

APPEALS—SENTENCING—*State v. Whitaker*, 79 N.J. 503, 401 A.2d 509 (1979).

Late in the evening of December 30, 1975, the defendant and two accomplices, all being armed with knives, forcibly entered the home of Mr. and Mrs. "C." Once inside, they raped and otherwise assaulted Mrs. "C" and brutally choked Mr. "C", pulling him throughout the house by a necktie that had been tied around his throat. The victims were then imprisoned and robbed. 79 N.J. at 504–05, 401 A.2d at 509–10. At the conclusion of a jury trial, Whitaker was convicted of two counts of robbery and robbery while armed, of entering with intent to rob, and of rape. Based upon the nature of the crimes and a 1973 diagnostic evaluation which characterized the defendant as " 'highly predisposed toward asocial behavior patterns,' " the trial judge described him as a threat to the peaceful public. *Id.* at 505, 509–10, 401 A.2d at 501, 512–13. Whitaker was sentenced to a total of not less than 43 nor more than 50 years imprisonment in the state prison in Trenton. *Id.* at 507, 401 A.2d at 511. The reasons propounded by the trial judge for the particular sentence imposed were " '[s]tate recommendation; circumstances surrounding offense; custodial supervision needed; deterrence to others and himself; unable to comport with society; poor rehabilitation risk.' " *Id.* at 509, 401 A.2d at 512 (quoting from the judgment record).

On appeal, the appellate division characterized the sentence as being " 'unduly harsh and punitive,' " and imposed a sentence of not less than 26 nor more than 27 years imprisonment—the penalty for rape. *Id.* at 507, 401 A.2d at 511. The supreme court granted certification to consider the propriety of the trial judge's sentence and the grounds for the appellate division's sentence reduction. *Id.* at 508, 401 A.2d at 511.

Writing for a unanimous court, Chief Justice Hughes stated that " '[i]n fixing a sentence a judge should consider the gravity of the crime and appropriate punishment therefore, deterrence, protection of the public, rehabilitation and any other factors or circumstances relevant. . . .' " *Id.* at 508, 401 A.2d at 512 (quoting Sullivan, J., in State v. Jones, 66 N.J. 563, 568, 334 A.2d 20, 22 (1975)). Although it is within the power of an appellate court to reduce any criminal sentence which is "manifestly excessive," the Chief Justice commented that such power should only be exercised when there is a " 'clear showing of abuse of discretion.' " 79 N.J. at 512, 401 A.2d at 514. (quoting Jacobs, J., in State v. Valezquez, 54 N.J. 493, 495, 257 A.2d 97, 98 (1969)).

Bound by the principle that " 'sentencing judges [must] consider aggravating and mitigating circumstances with respect to both the offender and the offense,' " 79 N.J. at 512, 401 A.2d at 513 (quoting Pashman, J., in State v. Leggaedrini, 75 N.J. 150, 156–57, 380 A.2d 1112, 1116 (1977). Justice Hughes found no distinct abuse of discretion on the part of the trial judge. 79 N.J. at 511, 401 A.2d at 513. To the contrary, the Chief Justice concluded that "he gave most careful and conscientious weight to all of the factors described by Justice Sullivan for this Court in *Jones.*" *Id.* at 509, 401 A.2d at 512. Accordingly, the court reversed the judgment of the appellate division and reinstated the sentence imposed by the trial court. *Id.* at 517, 401 A.2d at 516.

ATTORNEY AND CLIENT—*American Trial Lawyers Association v. New Jersey Supreme Court*, 66 N.J. 258, 330 A.2d 350 (1974).

Plaintiffs, representatives of the New Jersey trial bar, challenged the constitutionality of the contingent fee rule adopted by the New Jersey supreme court in December, 1971. 66 N.J. at 260, 330 A.2d at 351. The superior court, law division, held the rule to be unconstitutional holding that it unduly interfered with freedom of contract. The appellate division reversed, holding that the rule fixing the contingent fees was constitutionally sound and, furthermore, that it was within

the court's power to regulate the relationship between the bar and the public. *Id.* at 261, 330 A.2d at 352.

The Supreme Court of New Jersey, in an opinion authored by Chief Justice Hughes, affirmed the decision of the appellate division. In discussing the nature of the court's regulatory power over members of the bar, the Chief Justice found precise and unmistakable authority for this power in article VI, § II, paragraph 3 of the New Jersey Constitution. This provision makes " 'the Supreme Court the exclusive repository of the State's power to regulate the practice of law.' " 66 N.J. at 262, 330 A.2d at 352 (citation omitted). Chief Justice Hughes also disposed of the plaintiffs' argument that an evidentiary hearing should have preceded the court's promulgation of the contingent fee rule. He stated that the constitution did not intend the "illogical" result that the court have the power to oversee the practice of law yet prohibit it from making rules to effectuate this power. *Id.* at 266, 330 A.2d at 354.

CONSTITUTIONAL LAW—*New Jersey Association of Corrections v. Lan*, 80 N.J. 199, 403 A.2d 437 (1979).

The "Institutional Construction Bond Act of 1978" (Act) authorized the state to issue bonds for the construction of prisons, homes for the mentally disabled, library facilities for the blind and handicapped, and a forensic laboratory. Plaintiff brought suit challenging the validity and wording of the Act primarily on the grounds that its grouping together various facilities, violated N.J. CONST. art. IV, § VII, para. 4. 80 N.J. at 199, 403 A.2d 439.

The trial court upheld the Act's constitutionality but the appellate division reversed, holding the Act violative of the constitution's "single object" provision. *Id.* at 204, 403 A.2d at 437. On appeal, the supreme court reversed. Chief Justice Hughes, writing for a unanimous court, stated that the "single object" provision protects the public against inclusion of measures in one act that are not properly related. This concept of relatedness involves two separate aspects: (1) all acts placed on the ballot must be clearly stated to enable voters to make appropriate choices, and (2) the act must be limited to a "single object" to prevent the inclusion of a less desirable with a more desirable provision. The court, giving a liberal construction to this relatedness concept, held that a relationship existed among the purposes of the buildings since they were to be used primarily for the benefit of those who depend on the state for care, protection, and rehabilitation. *Id.* at 216, 403 A.2d at 445–46.

Finally, the Chief Justice expressed the court's reluctance to discard a legislative enactment. When "reasonable men might differ," the concept of respect among the different branches of the government requires that the judiciary defer to the judgment of the legislature.

CONSTITUTIONAL LAW—FREEDOM OF PRESS—*In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978).

For a discussion of Chief Justice Hughes' concurring opinion, see Justice Mountain's Digests at 193.

CONSTITUTIONAL LAW—JUDICIAL APPOINTMENTS—*Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977).

For a discussion of Chief Justice Hughes' dissenting opinion, see Justice Mountain's Digests at 195.

CONSTITUTIONAL LAW—PHYSICIANS AND SURGEONS—*In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

On April 15, 1975, twenty-one-year-old Karen Ann Quinlan was admitted to Newton Memorial Hospital in a comatose state. She was subsequently transferred to the Intensive Care Unit at Saint Clare's Hospital in Denville. Karen's life was being sustained by an assisting respirator.

Karen's father, noting little improvement in his daughter's condition, requested the discontinuance of the life-supporting device. The attending physicians and the hospital refused to comply, whereupon Karen's father instituted an action. 70 N.J. at 17, 355 A.2d at 651. Mr. Quinlan's request for authorization to order the withdrawal of the respirator was denied in the chancery division. Certification was granted by the state supreme court. *Id.*

Chief Justice Hughes, who authored the court's opinion, articulated three major issues. *Id.* at 34, 355 A.2d at 660. First, the supreme court felt that the lower court correctly denied Mr. Quinlan's request for authorization to terminate the use of the life-sustaining mechanism. Secondly, the court determined that the lower tribunal's refusal to issue letters of guardianship to the plaintiff was improper since Mr. Quinlan had clearly demonstrated his capacity to act as Karen's guardian. Finally, Chief Justice Hughes ruled that declaratory relief be granted. *Id.* In arriving at the ultimate formulation of said

relief, the court reviewed the underlying constitutional considerations. The Chief Justice found the freedom of religion and cruel and unusual punishment arguments advanced by the plaintiff to be irrelevant. *Id.* at 35–38, 355 A.2d 661–62. He then turned to an evaluation of the right of privacy contention. Although the United States Constitution lacked an explicit articulation of the privacy right, Chief Justice Hughes construed an implicit guarantee recognized by the United States Supreme Court to encompass an individual's decision to refuse medical treatment. *Id.* at 39–40, 355 A.2d at 663. In its assessment of the weight of Karen's privacy right, the court asserted that the degree of bodily invasion required by the treatment would dictate the scope of the state's interest in the preservation of life. Accordingly, the court concluded that the patient's poor prognosis weakened the state's interest. Although Karen was incompetent to assert this right, Chief Justice Hughes indicated that Mr. Quinlan could advance it on his daughter's behalf. *Id.* at 51, 355 A.2d at 614.

Based on the foregoing, the Chief Justice fashioned a specific procedure by which a decision to withdraw the life-support system could be implemented in such a situation. First, the attending doctors must determine the "reasonable possibility" of recovery. *Id.* at 54, 355 A.2d at 671. If there was no hope for recovery, Mr. Quinlan, the court-appointed guardian, was directed to approach the hospital "Ethics Committee." If that body concurred in the medical opinion that there was no "reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state," the life-sustaining device could be legally removed. *Id.*

CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—*Nicoletta v. North Jersey District Water Supply Commission*, 77 N.J. 145, 390 A.2d 90 (1978).

While at police headquarters, Nicholas Nicoletta, a sergeant in the Wanaque Reservoir Police Force, engaged in a physical altercation with a fellow officer. Consequently, he was suspended indefinitely. Shortly thereafter he was notified that a hearing would be held to " 'confer on complaints' " that he failed to follow his superior's orders. 77 N.J. at 151, 390 A.2d at 92–93. At the hearing, the North Jersey District Water Supply Commission (the Commission), Sergeant Nicoletta's employer, broadened its inquiry to include other alleged misdeeds of Nicoletta. Subsequent to further investigation, the Commission adopted a resolution terminating Nicoletta's employment. *Id.* at 152, 390 A.2d at 93. Nicoletta thereafter filed suit alleg-

ing that he had been discharged without notice of the charges against him and without a full and fair hearing on those charges, thereby denying him due process as guaranteed by the fourteenth amendment. *Id.* at 149, 390 A.2d at 92.

Chief Justice Hughes, writing for a plurality of the court, determined that Nicoletta had a "liberty" interest in his employment within the meaning of the fourteenth amendment because of a regulation which disqualified from future state service any person who had been removed for cause from the public service. *Id.* at 159, 162, 390 A.2d at 97–98. (Citing N.J.A.C. 4:1-8.14). Because the notice to Nicoletta failed to inform him of the true charges against him, "the 'hearing' was totally deficient as measured by due process notice requirements." 77 N.J. at 163, 390 A.2d at 99. As a remedy, the court held that Nicoletta was entitled to a post-termination hearing in order to challenge the grounds for his dismissal and remove the possibility of future civil service disqualification. *Id.* at 168–69, 390 A.2d at 102.

For a further discussion of *Nicoletta v. North Jersey District Water Supply Commission*, see Note, *At-Will Public Employee Entitled to Procedural Due Process Hearing Prior to Termination*, 9 SETON HALL L. REV. 810 (1978).

CONSTRUCTIVE TRUSTS—*Massa v. Laing*, 77 N.J. 227, 390 A.2d 547 (1978).

Decedent, Matilda Laing, was willed her mother's family home in 1969. This will had provided that if Matilda predeceased her mother, the estate would be divided equally among the surviving children. 160 N.J. Super. 443, 445, 390 A.2d 624, 625 (App. Div. 1977). After their mother's death, plaintiffs, Matilda's brothers and sisters, were concerned about her plans for distribution of the estate, however, Matilda reassured them that she did not need a will in order to dispose of the property. Decedent repeatedly expressed her intent that the house would belong to her brothers and sisters upon her death. *Id.* at 445, 390 A.2d at 625–26. Decedent died intestate, and the house passed to her husband, the defendant. The Superior Court, Chancery Division of Essex County, imposed a constructive trust upon the property, based upon decedent's intent and expectations that the property would be taken by the plaintiffs upon her death. *Id.* at 446, 390 A.2d at 626. The trial judge felt the imposition of the trust was justified, based upon the fact that decedent's husband had somehow led his wife to believe that defendant would carry out

her express wish to distribute the property, and therefore, a will was not necessary. *Id.*

Defendant appealed from this judgment to the Superior Court, Appellate Division, and the superior court reversed, reasoning that the imposition of a constructive trust requires a finding that there was some wrongful act, such as undue influence, which resulted in the transfer of the property. *Id.* at 446–47, 390 A.2d at 626–27. The appellate division found no evidence in the trial record from which it could reasonably be inferred that decedent was induced not to make a will because of her husband's statements or actions. The court decided that the plaintiff's proof fell short of the clear and convincing standard needed for establishing a constructive trust. *Id.*

This decision was affirmed by the supreme court in a six-to-one decision. 77 N.J. 227, 390 A.2d 547. Chief Justice Hughes filed the dissenting opinion, which called for an affirmation of the trial court decision. His opinion was based upon norms and precedents set out in prior New Jersey cases and especially in State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964). This case stated that the judgment of an initial fact-finding body is entitled to considerable respect and the overturning of a previous decision should be based upon "a carefully reasoned and factually supported . . . determination . . . that the continued viability of the judgment would constitute a manifest denial of justice." 77 N.J. at 228, 390 A.2d at 547. Chief Justice Hughes expressed concern that, assuming the continued validity of these norms, there was no justification for nullifying the trial court's decision which was based upon clear and convincing evidence that the imposition of a constructive trust was warranted. *Id.*

CONTRACTS—INSTALLMENT SALES—*King v. South Jersey National Bank*, 66 N.J. 161, 330 A.2d 1 (1974).

King entered into an installment sales contract with a dealer for the purchase of an automobile. The contract gave the dealer a security interest in the automobile. The terms of the contract provided that, in the event of a default in payment, the unpaid balance would become due and the seller could peaceably retake possession of the goods "without notice or demand for performance or legal process. . . ." 66 N.J. at 166, 330 A.2d at 3. The seller then assigned the contract to the South Jersey National Bank. When King defaulted on one of his payments, the bank invoked the acceleration clause and

repossessed the car without notice, as authorized by the terms of the contract. *Id.* at 166, 330 A.2d at 4. King offered to pay the overdue installment but the bank rejected this offer and informed King that the car would be sold at a public auction.

After obtaining an order temporarily restraining the sale, King filed an amended complaint seeking damages for tortious conversion of the automobile. King further sought a declaratory judgment that N.J. STAT. ANN. § 12A:9-503 (West 1962 & Cum. Supp. 1978–1979) was both unconstitutional on its face and as applied and that the acceleration clause of the contract was unconscionable. 66 N.J. at 166–67, 330 A.2d at 4. The trial court granted summary judgment for the bank. The Supreme Court of New Jersey granted certification to consider these issues.

Chief Justice Hughes, speaking for the court, first held that the inclusion of an acceleration clause in the contract was not unconscionable. According to the Chief Justice, the court should not declare unconscionable the provisions of a contract regarding repossession that were agreed to by the parties "[i]n the absence of extraordinary circumstances demonstrating oppression or grossly unfair dealing. . . ." *Id.* at 169, 330 A.2d at 5.

On the issue of whether the self-help repossession of the automobile was unconstitutional, the appellant relied solely on the premise that N.J. STAT. ANN. § 12A:9-503 (West 1962 & Cum. Supp. 1978–1979) and the action taken under it constituted discriminatory state action in violation of the fourteenth amendment. 66 N.J. at 167–68, 330 A.2d at 4. Chief Justice Hughes, in affirming the trial court's determination that the repossession did not involve any state action, observed that the self-help right of repossession was not created by N.J. STAT. ANN. § 12A:9-503 (West 1962 & Cum. Supp. 1978–1979) but rather was deeply rooted in the common law. 66 N.J. at 170, 330 A.2d at 5. The challenged statute, according to the Chief Justice, merely codified existing law, and therefore, did not constitute state action for purposes of the fourteenth amendment. *Id.* at 172, 330 A.2d at 7. Additionally, Chief Justice Hughes rejected the argument that codification of the common law right of self-help repossession could be viewed as the state's encouragement of private wrongs. *Id.* at 175, 330 A.2d at 8. In this regard, the Chief Justice noted that "the failure of a state to legislatively . . . alter common law rights" does not fall within the nature of state action proscribed by the fourteenth amendment. *Id.*

CRIMINAL LAW—HOMICIDE—*State v. Canola*, 73 N.J. 206, 374 A.2d 20 (1977).

Defendant Canola and three confederates were in the process of robbing a jewelry store when the owner of the store, in an attempt to resist the robbery, shot and killed one of the co-felons. The owner of the store was fatally wounded during this exchange. 73 N.J. at 208, 374 A.2d at 20–21. At trial, defendant was found guilty of the murders of both the robbery victim and his co-felon. The appellate division unanimously affirmed defendant's conviction as to the robbery victim, and a majority affirmed his conviction as to the co-felon. *Id.* at 208, 374 A.2d at 21.

The issue before the Supreme Court of New Jersey was whether the language of the New Jersey felony murder statute required that a felon be held liable for the death of a co-felon caused by one resisting the commission of the felony. The pertinent language of the New Jersey felony murder statute, N.J. STAT. ANN. § 2A:113-1 (West Cum. Supp. 1979–1980) reads: "If any person, in committing or attempting to commit [certain enumerated offenses including robbery] . . . kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act . . . then such person so killing is guilty of murder."

Despite the language of the "ensues clause," the supreme court held that the felony murder rule did not create liability, in a felon, for the killing of a co-felon by someone other than those associated with the felonious act, even if the killing grew out of the commission of the felony. *Id.* at 226, 374 A.2d at 30. The court noted that this was the traditional interpretation of the felony murder doctrine and was clearly the view taken by the majority of courts in this country. In determining that the "ensues clause" of the New Jersey statute did not require the decision that felons be held liable for killings caused by others not associated with them, the court postulated several plausible interpretations of the "ensues" clause, all of which were consistent with the traditional scope of the felony murder rule. *Id.* at 220–21, 374 A.2d at 27.

Chief Justice Hughes dissented, based on his belief that the "logical and legislatively intended meaning" of the "ensues" clause was to extend liability under the felony-murder doctrine to deaths which are caused by or ensue from the furtherance of a felonious act. According to the Chief Justice, deaths which occurred in the commission of a violent felony could not be considered "outside the contemplation of

the initiator of such criminal violence," *id.* at 227, 374 A.2d at 30–31 (Hughes, C.J., dissenting), and should therefore be within the purview of the statute.

CRIMINAL LAW—SELF-INCRIMINATION—*State v. Alston*, 70 N.J. 95, 358 A.2d 161 (1976).

Steven Alston was convicted, along with Oliver Hines, of breaking and entering a dwelling in Paterson, New Jersey and stealing a revolver and cash. Alston's sole ground of appeal was the impropriety of the prosecutor's cross-examination of him as to his silence and his failure to disclose exculpatory information to the police at the time of his arrest. The appellate division affirmed defendant's conviction and he petitioned the supreme court for certification. 70 N.J. at 95–96, 358 A.2d 161–62.

Chief Justice Hughes, writing for the court, ruled that the cross-examination of Alston as to his post-arrest silence constituted harmless error beyond a reasonable doubt and affirmed defendant's conviction. In reaching its decision, the court noted that the proof of Alston's guilt was very convincing and that "the questioning was extremely limited and was never again referred to during trial . . . [and] any impression it may have left with the jury was rendered innocuous by the defendant's response." *Id.* at 98, 358 A.2d at 162.

CRIMINAL PROCEDURE—JURIES—*State v. Deatore*, 70 N.J. 100, 358 A.2d 163 (1976).

James Deatore and David Mallon were charged with armed robbery. At trial, Deatore testified that at the time of the crime he was in the company of a woman in a local motel room. 70 N.J. 103–04, 358 A.2d at 165. The prosecutor questioned Deatore, over objection, about his failure to assert this story at the time of his arrest. Deatore replied, " '[n]obody asked me.' " *Id.* at 107, 358 A.2d at 167. Another issue arose in this case. During jury selection for defendants' trial, a member of the panel being examined admitted that she was acquainted with one of the victims of the crime. After asking the juror if she could still render an impartial verdict, the trial judge failed to explore, or to allow counsel to explore, the extent of the juror's relationship with the victim. *Id.* at 104–05, 358 A.2d 165–66.

The appellate division reversed the convictions based upon the impropriety of the cross-examination of Deatore. In an opinion by

Chief Justice Hughes, the Supreme Court of New Jersey affirmed the reversal, not only because the cross-examination was improper but also because of the error in the jury selection. The court stated that in view of the right of every defendant to a fair and impartial trial, the refusal to permit further examination of the relationship of the prospective juror and the victim of the crime constituted "fundamental error." *Id.* at 105, 358 A.2d at 166.

The Chief Justice found that where a defendant remained silent at the time of his arrest, or when questioned about his arrest and subsequently testified to an exculpatory version of events, cross-examination of the defendant concerning such silence, even if used solely for impeachment, violates the New Jersey common law privilege against self-incrimination. *Id.* at 114, 358 A.2d at 171. Chief Justice Hughes also noted that silence by a criminal suspect is noncommital and "is even more so when it amounts to failure to volunteer an exculpatory story," because there are several possible explanations for a suspect's silence. 70 N.J. at 117, 358 A.2d at 172.

CRIMINAL PROCEDURE—RESTITUTION—*State v. Harris*, 70 N.J. 586, 362 A.2d 32 (1976).

Barbara Ann Harris was convicted of fraudulently obtaining money from the Bergen County Welfare Board by concealing employment earnings. The trial judge imposed a suspended custodial sentence and three years probation, on the condition that she repay $1,012 restitution to the welfare board. The court determined that since the goal of probation is rehabilitation, and the payment of restitution is rehabilitative, the probation statute, N.J. STAT. ANN. § 2A:168-2 (West 1971), authorized the imposition of restitution on an adult offender. 70 N.J. at 590, 262 A.2d at 33. On appeal, however, the appellate division vacated the restitution order. *Id.* at 591, 262 A.2d at 34.

In an unanimous opinion by Chief Justice Hughes, the Supreme Court of New Jersey affirmed the appellate division. *Id.* at 599–600, 262 A.2d at 39. Upon an analysis of the purposes served by the sentence, the court found that the cost of deterrence would be too high in light of the interest of society in Harris' struggle to sustain her children. Restitution would not serve the purpose of rehabilitation since Harris would be repaying the "welfare department which is itself partially sustaining its struggling client." *Id.* at 596, 362 A.2d at 37. Subsequently, the court exercised its "closely guarded and spar-

ingly used authority, to vacate the restitution condition as being clearly excessive." *Id.* at 597, 362 A.2d at 37.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—*State in re H.B.*, 75 N.J. 243, 381 A.2d 759 (1977).

An anonymous tip received at Newark police headquarters indicated that an individual at a certain diner was in possession of a handgun. Two uniformed officers were dispatched to investigate. Upon entering the diner, the officers observed fifteen males, only one of whom fit the description the officers had been given. They proceeded to conduct a pat down search and discovered a concealed revolver. 75 N.J. at 248, 381 A.2d at 761. A motion to suppress the revolver was denied, and H.B. was adjudicated a juvenile delinquent. The appellate division affirmed. 139 N.J. Super. 463, 354 A.2d 367 (App. Div. 1975). The case was appealed as of right to the New Jersey supreme court.

Chief Justice Hughes, speaking for the court, affirmed the appellate division decision, holding that the limited intrusion of a pat down search was reasonable where the suspect was the only party on the premises who matched the description given by the anonymous caller. The reasonableness of that frisk was dependent upon its being necessary " 'for the protection of life and limb of the police officer and exposed members of the public.' " 75 N.J. at 252, 381 A.2d at 764 (quoting State in re H.B., 139 N.J. Super. 463, 471, 354 A.2d 367, 371 (App. Div. 1975), *aff'd*, 75 N.J. 243, 381 A.2d 759 (1977)).

Justice Mountain wrote a concurring opinion in which Justices Sullivan and Schreiber joined. The justice described the sufficiency of the anonymous telephone tip to justify a frisk as a pragmatic issue which required the balancing of the dangers inherent in having persons carrying firearms at large with the problems of fourth amendment guarantees against unreasonable search and seizure. 75 N.J. at 256–57, 381 A.2d at 766 (Mountain, J., concurring). Justice Mountain further declared that police officers must be permitted to frisk for weapons on the basis of a specific, anonymous tip which is subsequently corroborated through a precise description of the suspect. Otherwise, when dangerous weapons are involved, police could ensure their safety only by disregarding anonymous reports of crimes. *Id.* at 255, 381 A.2d at 765 (Mountain, J., concurring). This latter alternative would be clearly undesirable in light of the widespread possession and use of firearms in serious crimes.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—*State v. Cohen*, 73 N.J. 331, 375 A.2d 259 (1977).

Corey Cohen was arrested on the George Washington Bridge by a Port Authority policeman. Cohen's vehicle was then impounded and removed for storage to a garage in Fort Lee, New Jersey. Cohen was indicted and was haled to court on April 26, 1974, but did not appear. A bench warrant was issued for his arrest, but upon his appearance for arraignment on May 31, 1974, the court cancelled the warrant and restored him to bail. 73 N.J. at 334, 375 A.2d at 260.

On June 11, 1974, while attempting to pick up his impounded vehicle in Fort Lee, Cohen and two of his friends were arrested when Port Authority officers searched their car, without a warrant, and discovered marijuana. *Id.* at 334–35, 375 A.2d at 261. The superior court, law division, granted plaintiff's motion to suppress the evidence seized from this warrantless search. From this finding, the State appealed to the appellate division, who affirmed the lower court on petition of the State. The Supreme Court of New Jersey granted certification. *Id.* at 333, 375 A.2d at 260.

In an opinion by Chief Justice Hughes, the supreme court held that the Port Authority police officers were authorized by N.J. STAT. ANN. § 32:2-25 (West 1963), to carry out their duties in the whole territorial area of the Port Authority, including the garage in Fort Lee, but that these officers were not justified in making the warrantless search of the vehicle at this place. *Id.* at 344–45, 375 A.2d at 266.

On the jurisdiction question, the court stressed the importance of allowing Port Authority officers to act as police officers not only at bridges, tunnels, plazas or approaches operated by the Port Authority, but also with the whole territorial area of the port district, which included the garage in Fort Lee. *Id.* at 340–43, 375 A.2d at 263–65. But the court found that the warrantless search was improper as there was "no justifiable reason or probable cause for the officers to make the initial intrusion by opening or compelling the occupant to open the van doors." *Id.* at 344, 375 A.2d at 266. As such, the court affirmed the lower court's finding that the motion to suppress was properly granted. *Id.* at 345, 375 A.2d at 266.

DAMAGES—*Baxter v. Fairmont Food Co.*, 74 N.J. 588, 379 A.2d 225 (1977).

Robert Baxter sustained severe injuries when a Fairmont Food Co. (Fairmont) truck went through a red light and struck him while

he was on his motorcycle. Baxter sued Fairmont for the permanent, disabling injuries which resulted from the accident. At a jury trial, Baxter was awarded damages in the amount of $300,000. The defendant moved for a new trial as to both liability and damages or, in the alternative, for a remittitur of damages. While upholding the verdict as to liability, the trial court reduced the damage award to $150,000. The trial judge further provided that the defendant's motion for a new trial would be denied if the plaintiff accepted the reduced award. The plaintiff accepted, but the defendant filed an appeal from this judgment. At this time, the plaintiff cross-appealed from the remittitur ordered by the trial court. 74 N.J. at 594–95, 379 A.2d at 228.

The appellate division found no merit in the defendant's contentions, and further held that the trial court improperly granted the motion for remittitur. Therefore, the remittitur was vacated and the jury verdict was reinstated, fixing damages at $300,000. *Id.* at 595, 379 A.2d at 228.

The Supreme Court of New Jersey, in an opinion authored by Chief Justice Hughes, affirmed the judgment of the appellate division. The court relied upon the rule that a trial judge should not interfere with a jury's determination of damages "unless it is so disproportionate to the injury and resulting disability shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust." *Id.* at 596, 379 A.2d at 229. Accordingly, the court found that an award of $300,000, in light of the devastating injuries incurred, was within the range of a permissible decision and should not be disturbed. *Id.* at 603–04, 379 A.2d at 233.

DAMAGES—*Leimgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 375 A.2d 652 (1977).

Willy and Hope Leimgruber were property owners who owned a wooded area located behind their home. Despite the fact that the Leimgruber property line was plainly marked, Claridge Associates, Ltd., the adjacent property owner, intruded upon the Leimgruber's property and cut off the tops of their trees to make room for a flight path required by Claridge to build a heliport. Alleging that these actions were intentional, malicious, willful, and in wanton disregard of their rights, the Leimgrubers sought equitable relief as well as compensatory and punitive damages. 73 N.J. at 453, 375 A.2d at 654.

The trial court, sitting without a jury, awarded compensatory and punitive damages, and defendant appealed. The appellate division reduced the punitive damage award. Certification was granted by the New Jersey supreme court. *Id.*

In an opinion by Chief Justice Hughes, the court reversed the appellate division and reinstated the punitive damage award. Emphasizing that the purpose of punitive damages is to punish the offender and deter future similar conduct, the court found no reason to alter the award of the trial court, which "was sound and reasonable on the basis of the record." *Id.* at 460, 375 A.2d at 658.

EDUCATION—*Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976, *aff'd on rehearing, jurisdiction retained*, 63 N.J. 196, 306 A.2d 65 (1973), *order entered*, 67 N.J. 35, 335 A.2d 6, *order entered*, 69 N.J. 133, 351 A.2d 713, *order vacated*, 69 N.J. 449, 355 A.2d 129, *injunction issued*, 70 N.J. 155, 358 A.2d 457, *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976).

In April of 1973, the Supreme Court of New Jersey held that the system of public school financing in the state was violative of the Education Clause of the New Jersey Constitution, 62 N.J. at 513, 303 A.2d at 294. The financing arrangement violated article VII, section IV, paragraph 1 of the constitution because there existed large differences, in dollars spent per pupil, among the state's various school districts. *Id.* at 515–16, 520, 303 A.2d at 295–96, 297. At that time, the court chose to postpone the imposition of a remedial order so as to give the legislature an opportunity to adopt a new statutory scheme. *See* 63 N.J. at 198, 306 A.2d at 66. By May of 1975, the legislature had yet to pass satisfactory legislation and the court threatened to redistribute the funds appropriated for public education by court order. 69 N.J. at 150–52, 351 A.2d at 721–22.

Characterizing the two-year legislative impasse as "a constitutional exigency," Chief Justice Hughes, writing for a majority of four justices, recognized the need for judicial action. 69 N.J. at 139, 351 A.2d at 716. The court reasoned that the judiciary has the purpose and authority to protect the citizenry from legislative transgressions upon its guaranteed rights. *Id.* at 147, 351 A.2d at 720. Furthermore, the court noted that legislative inaction can be as much an infringement upon those rights as an affirmative transgression would be. *Id.* Therefore, since "a thorough and efficient system of education is a fundamental right guaranteed by the Constitution," the court held that it was entitled to determine " 'an appropriate remedy' " in the face of legislative inaction. *Id.* After rejecting the more drastic remedy of enjoining the distribution of all state aid under the existing statute, the Chief Justice ordered that approximately $300 million of

funds appropriated for school aid be redistributed pursuant to a statutory formula designed to equalize educational opportunity. *Id.* at 150, 351 A.2d at 721–22. The court stated, however, that its imposed redistribution order would only remain effective until the legislature fulfilled its duty to adopt a new financing system. *Id.* at 155, 351 A.2d at 724. By providing this provisional remedy, the court recognized its potential encroachment on a legislative function, but felt that "there comes a time when no alternative remains [and] [t]hat time has now arrived." *Id.*

Justice Mountain joined with Justice Clifford in dissenting from the holding that the judiciary had the power to order the redistribution of public education funds. *Id.* at 174–84, 351 A.2d at 735–40 (Mountain & Clifford, J.J., dissenting). The dissenters viewed the court's action as a violation of the doctrine of separation of powers. *Id.* at 180, 351 A.2d at 737–38. (Mountain & Clifford, J.J., dissenting).

In January of 1976, with Chief Justice Hughes concurring and Justice Mountain concurring in part without opinion, the court conditionally upheld the constitutionality of the Public School Education Act of 1975. 69 N.J. at 449, 468, 355 A.2d at 129, 139. Justice Mountain dissented from that part of the majority opinion which conditioned its decision upon full funding of the Act for the 1976–77 school year. *Id.* at 449, 355 A.2d at 129 (Mountain, J., concurring in part without opinion).

In his concurrence, the Chief Justice weighed the benefits of the legislation against a number of troubling shortcomings and concluded that the Act showed a sufficient "commitment to the constitutional goal" to justify its constitutionality. 69 N.J. at 470–74, 355 A.2d at 139–43 (Hughes, C.J., concurring). He noted early in his opinion, however, the court's continuing obligation to oversee implementation of the Act so as to ensure compliance with the constitutional mandate of equal educational opportunity. *Id.* at 469, 355 A.2d at 139–40 (Hughes, C.J., concurring). Chief Justice Hughes warned that should the legislature fail to take steps to fund the Act immediately or fail to cure some of its more profound defects in the near future, he might feel compelled to vote against its constitutionality. *Id.* at 475, 355 A.2d at 143 (Hughes, C.J., concurring).

The legislature subsequently failed to take prompt measures to fund the Act and on May 13, 1976, the court majority voted to enjoin the expenditure, with minor exceptions, of any educational funds after July 1, 1976. 70 N.J. at 160, 358 A.2d at 459. The court gave the legislature up until that date to fund the 1975 Act or to provide

an alternative constitutional means of funding the public school system. *Id.* at 161, 358 A.2d at 459–60. Justice Mountain dissented, calling the majority's action "judicial activism" which threatened the judiciary's " 'power of legitimacy.' " *Id.* at 163, 358 A.2d at 461 (Mountain, J., dissenting). The Justice accused the majority of usurping the legislature's power by attempting to solve a problem squarely of legislative concern.

The dispute was finally resolved and the court's injunction lifted on July 9, 1976 with the passage of legislation providing full funding of the Public School Education Act. 70 N.J. at 465, 360 A.2d at 400.

HUSBAND & WIFE—CONFLICT OF INTEREST—*In re Gaulkin*, 69 N.J. 185, 351 A.2d 740 (1976).

Ellen Gaulkin, the wife of a New Jersey superior court judge, intended to seek election to the Weehawken Board of Education. Since 1948, when the judicial system established by N.J. CONST. art. VI came into existence, judges and others officially involved in the court system have been required to refrain from involvement in political activity. This separation has been thought to be indispensable to public confidence in the impartiality and integrity of the judiciary. This rule has been extended to include the political involvement of the judge's spouse. As such, Mrs. Gaulkin sought the views of the New Jersey supreme court with regard to the propriety of her candidacy. Upon receiving the court's disapproval, Mrs. Gaulkin petitioned the court, *pro bono publico,* for review of the policy which prohibited a judge's spouse from engaging in political activity. 69 N.J. at 188–89, 351 A.2d at 741–42. The supreme court, speaking through Chief Justice Hughes, eliminated the ban on political activity by judges' spouses and recognized their right to take an active role in politics. The court reasoned that it may no longer be assumed that the political views of the judge's spouse must coincide with the philosophy of the judge. The court stated that disqualification provisions in the Code of Judicial Conduct "provide an avenue for appropriate withdrawal of the judge from any matter which would or could embarrass the court." *Id.* at 198, 351 A.2d at 747. By eliminating the ban on political activity of a judge's spouse, Chief Justice Hughes conformed the court's administrative policy to that of all other jurisdictions. *Id.* at 795–96, 351 A.2d at 745–46.

INSURANCE—SETTLEMENTS—*Rova Farms Resort, Inc. v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495 (1974).

Rova Farms Resort, Inc. (Rova) operated a recreational resort which included a lake used by commercial invitees for swimming and

diving. In 1965, Lawrence McLaughlin, a commercial guest patron, dove into Rova's lake and sustained severe physical injuries. Investors Insurance Co. (Investors) had issued to Rova a policy of liability insurance which was in effect at the time of the accident. Investors was obligated to pay damages for personal injuries caused by accident to a limit of $50,000 and was further obligated to defend any suit, filed against Rova, alleging such injury. Rova was forbidden to make any settlement of such a suit except at its own cost. 65 N.J. at 479, 323 A.2d at 498.

At the trial of *McLaughlin v. Rova Farms, Inc.*, the jury awarded $225,000 to the plaintiffs, Lawrence McLaughlin and his wife. *Id.* at 481, 323 A.2d at 499. Investors had offered an insignificant amount to the McLaughlins on the first day of trial, in settlement of their claim. *Id.* At no time thereafter did Investors increase its offer, though Rova's counsel implored it to do so. *Id.* at 485, 323 A.2d at 501. A reversal of the award occurred in the appellate division. The supreme court reinstated the $225,000 verdict. *Id.* at 482, 323 A.2d at 499.

Investors paid $50,000 of the award, and Rova managed to raise the remainder. Rova sued Investors, alleging bad faith in failing to settle the case or attempt to settle in good faith. At trial, judgment was entered for Rova, and, on appeal, the appellate division affirmed. The supreme court granted certification. *Id.* at 483, 323 A.2d at 500.

Chief Justice Hughes wrote a lengthy opinion in which he held that Investors had breached its duty of good faith because the potential liability of Rova should have been reasonably obvious to an expert insurance carrier. *Id.* at 489–90, 323 A.2d at 503–04. The absence of a formal request by McLaughlin's counsel to settle within the limits of the policy was not determinative of the lack of bad faith. *Id.* at 491, 323 A.2d at 504. The court stated that an "insurer has an affirmative duty to explore settlement possibilities," even if not in the insurer's own best interest. *Id.* at 493, 323 A.2d at 505. The *Rova* decision clearly established that an insured has the right to receive the entire amount of a judgment if an insurer unreasonably fails to settle a claim. *Id.* at 506–07, 323 A.2d at 512–13. The judgment below was affirmed.

JUDICIAL ETHICS—*In re Yengo*, 72 N.J. 425, 371 A.2d 41 (1977).

John W. Yengo, a Jersey City Municipal Court judge, was accused of "persistent misbehavior in his judicial performance so bizarre as to amount to 'misconduct in office.' " 72 N.J. at 426, 371 A.2d at 42. Such misconduct ranged from his inability to perform the duties of his office " 'impartially, dispassionately and with the dignity re-

quired of a judge,' " *id.* at 428, 371 A.2d at 44, to his failure to advise defendants of their constitutional rights. Pursuant to N.J.R. 2:15-1, the Supreme Court's Advisory Committee on Judicial Conduct found that Yengo was unsuited for office and asked for his removal from the bench. On the basis of the Committee's findings, the supreme court ordered the issuance of a complaint instituting formal removal proceedings. Three superior court judges were appointed to take evidence of Yengo's misconduct and present it to the supreme court. 72 N.J. at 428–29, 371 A.2d at 44.

The Supreme Court of New Jersey, in an opinion by Chief Justice Hughes, held that pursuant to N.J. STAT. ANN. § 2A:1B-9 (West Cum. Supp. 1978–1979) just cause existed for the removal of Yengo from office. Chief Justice Hughes stated that Yengo violated the Code of Judicial Conduct and found him to be "totally unsuited, by temper and temperament, for judicial office." 72 N.J. at 451, 371 A.2d at 57. Emphasizing the importance of maintaining the integrity of the municipal courts in New Jersey, the court found Yengo's continuous abuse of judicial process to be intolerable and removed him from the bench. *Id.*

JUVENILE COURTS—RESTITUTION—*State in re D.G.W.*, 70 N.J. 488, 361 A.2d 513 (1976).

D.G.W., a juvenile, pleaded guilty to charges of breaking and entering, theft and destruction of property. The juvenile and domestic relations court placed D.G.W. on probation for one year and required that he make restitution to a victim of the offense as a condition of his probation. Acting at the judge's order, the probation department determined that D.G.W.'s damage to one of the vandalized schools amounted to $156.50. D.G.W. contested the authority of the court to impose such a condition on his probation. While his appeal was pending in the appellate division, the Supreme Court of New Jersey granted direct certification. 70 N.J. at 492–93, 361 A.2d at 515.

In an opinion by Chief Justice Hughes, the supreme court held that the trial court had the statutory authority to impose restitution or reparation as a condition of probation. *Id.* at 501, 361 A.2d at 520. The court found that restitution was a rehabilitative measure and therefore was a valid disposition in juvenile matters. *Id.* at 495–500, 361 A.2d at 516–19. However, as the probation department, and not the trial court, had determined the terms of payment, and there had not been a hearing as to the defendant's proportional liability or his

ability to pay, the court remanded the case to the juvenile and domestic relations court with directions to reestablish the amount of restitution. *Id.* at 501–09, 361 A.2d at 520–24.

MUNICIPAL LAW—BACK PAY—*White v. Township of North Bergen*, 77 N.J. 538, 391 A.2d 911 (1978).

Robert B. White, the Tax Assessor for the Township of North Bergen, was dismissed from that position prior to the expiration of his duly appointed term. 77 N.J. at 541, 391 A.2d at 912. He brought suit to challenge that action. The dismissal was eventually declared to be illegal by the trial court, and this decision was later upheld by the appellate division. *Id.* at 542, 391 A.2d at 912–13. White then claimed a right to his back salary based on N.J. STAT. ANN. § 40A: 9-172 (West 1978), which provides that when a municipal employee is dismissed from his position, and that dismissal is later declared to be illegal, the employee will be entitled to recover his back salary from the date of the dismissal. The township claimed, however, that the right to recover back salary was subject to mitigation by earnings which an employee received from other employment between the time of his dismissal and the expiration of his term of office; earnings which in the case of White were quite substantial. 77 N.J. at 540, 391 A.2d at 912.

The trial judge, in deference to prior New Jersey decisions applying the statute, reluctantly awarded $44,000, the full amount he would have earned as a municipal employee had he not been dismissed. *Id.* at 542, 391 A.2d at 912–13. A majority of the appellate division affirmed and the township appealed as of right to the Supreme Court of New Jersey. Chief Justice Hughes, writing for a unanimous court, reversed the decision of the appellate division and remanded the case to the trial court for a determination of damages or dismissal of the action, whichever course was consistent with the supreme court's construction of the statute in issue. *Id.* at 562, 391 A.2d at 923.

In reaching the determination that a municipal employee's recovery of back salary is subject to mitigation by outside earnings, Chief Justice Hughes considered several fundamental questions. On the issue of whether the court should be bound by former interpretations of the statute under the principle of *stare decisis*, he stated that "the process of justice is not bound . . . to accept the hereditary transfer of now visible defects in justice, from generation to generation. . . ." *Id.* at 551, 391 A.2d at 918. As to the proper construction

of the statute, the Chief Justice declared that "strict construction of a statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed in order to effectuate a change." *Id.* at 559, 391 A.2d at 922. Noting the lack of any such clear legislative intent, Chief Justice Hughes refused to give the statute this strict construction, reasoning "that 'the Legislature must always be presumed to favor the public interest as against any private one.' " *Id.* at 560, 391 A.2d at 922 (citation omitted). This being so, the Chief Justice asserted that the legislature could not have had the intent, when adopting N.J. STAT. ANN. § 40A:9-172 (West 1978), to award municipal employees gifts or "windfalls" out of the public funds. 77 N.J. at 560, 391 A.2d at 922.

NEGLIGENCE—*Carrino v. Novotny*, 78 N.J. 355, 396 A.2d 561 (1979).

Appellant, Madeline Carrino, suffered personal injuries in an automobile collision between a car in which she was a passenger and a commercial van illegally parked on a public street in Lodi, New Jersey. 78 N.J. at 357, 396 A.2d at 562. As a result of a jury trial, she was awarded damages of $185,000 against both the driver of the automobile, Novotny, and the owner of the commercial vehicle, a corporation entitled Mellone. *Id.* Judgment was entered in accordance with the verdict of the jury and motions by Mellone for judgment n.o.v. followed and were ultimately denied by the trial judge. *Id.* at 358, 396 A.2d at 562.

The appellate division reversed the judgment entered against Mellone on the ground that it was entered without proof of negligence. *Id.* at 358–59, 396 A.2d at 562–63. In its brief, unpublished *per curiam* opinion, the court held that the parking ordinance did not have as its purpose traffic safety and was not therefore germane to any duty owing from the defendant Mellone to the plaintiff. *Id.* at 359, 396 A.2d at 563. Thus, the parking prohibition was viewed as not being "the efficient cause of the injury." *Id.* The appellate division further stated that "the element of causation is completely lacking from the circumstances of the accident. It is clear that the collision would have been the same even if the parked vehicle were a passenger car." *Id.* With this reasoning, the court concluded that there was no basis in the record for a finding of negligence and subsequent liability against the defendant Mellone. *Id.*

Appellant Carrino appealed and the supreme court granted certification in order to "scrutinize the trial record to determine whether

or not it supports the Appellate Division's conclusion." *Id.* at 361, 396 A.2d at 564.

After reviewing Lodi's traffic ordinance concerning prohibited parking, Chief Justice Hughes perceived no basis for the conclusion of the appellate division that the parking ban was not germane to the purpose of traffic regulation and safety. *Id.* at 363–64, 396 A.2d at 565–66. Nor did the Chief Justice agree "as a matter of law, that there could have been no causal relationship between the hazard thus interdicted and the respondent's duty to avoid it and the collision which it precipitated." *Id.* at 363–64, 396 A.2d at 565. The Chief Justice reviewed other sections of the ordinance and found that the primary consideration underlying the various sections of the ordinance were traffic safety. *Id.* Additionally, the Chief Justice was unable to accept the assertion made by the appellate division that the collision would have taken place even if the parked vehicle were a passenger car. *Id.* In the view of the Chief Justice, this was clearly a jury question, and upon consideration of the evidence, the jury could reasonably have concluded that defendant Mellone was negligent. *Id.* "Thus the question of whether a reasonably prudent man could foresee the risk of harm to others . . . was directly implicated, and surely came within the legitimate range of jury decision." *Id.* at 365, 396 A.2d at 566 (citations omitted). In reversing the jury verdict, Chief Justice Hughes noted that the appellate division must have concluded that the body of evidence before that tribunal was insufficient to support a finding of negligence. *Id.* In addition, the court must necessarily have also concluded "that such verdict clearly and convincingly amounted to a miscarriage of justice under the law (R.2:10-1, R.4:49-1, *supra*), such as to shock the conscience of the court and convince it that to sustain the verdict would be manifestly unjust." *Id.* at 365–66, 396 A.2d at 566. Chief Justice Hughes concluded that the verdict against Mellone was not defective in these very substantial respects for the court to intrude upon the rightful province of the jury. *Id.* Accordingly, the decision of the appellate division was reversed and the judgment against Mellone was reinstated. *Id.* at 368, 396 A.2d at 568.

POVERTY LAW—*Pascucci v. Vagott*, 71 N.J. 40, 362 A.2d 566 (1976).

Antoinette Pascucci was a welfare recipient, classified as employable by the Department of Institutions and Agencies (Department). She was given a monthly allowance of $119, which was lower than the

sum given to those recipients classified as unemployable. 71 N.J. at 46, 362 A.2d at 569–70. Similarly, Anna Mae Gray and Lydia Ladyka were recipients classified as employable and were given monthly allowances smaller than those given unemployable welfare recipients. *Id.* at 47, 362 A.2d at 570. The Department justified the different treatment in light of limited welfare resources and the special needs of physically disabled persons, who made up the majority of those classified as unemployable. *Id.* at 46, 362 A.2d at 569.

In the appellate division, Gray and Ladyka challenged the regulation as being arbitrary, contrary to the purposes of the controlling New Jersey statutes and violative of equal protection. *Id.* at 47–49, 362 A.2d at 570–71. Additionally, in a separate action in Juvenile and Domestic Relations Court, Pascucci sought to challenge both the denial of her request for increased aid and the validity of the regulation. That court dismissed her action on the ground that it had no jurisdiction to hear a challenge to the validity of an administrative regulation and Pascucci sought review in the appellate division. *Id.* at 46–47, 362 A.2d at 570. Both of these cases were pending when the supreme court granted certification.

The Supreme Court of New Jersey, speaking through Chief Justice Hughes, invalidated the regulation. The court found a clear legislative intent to provide public assistance to persons suffering from cold, hunger and sickness, regardless of employability. *Id.* at 49–50, 362 A.2d at 571–72. Acknowledging the high inflation and unemployment rate in New Jersey, the court found no rational basis for differentiating between the needs of the employable and the unemployable and concluded that the regulation was unreasonable. *Id.*

As for the jurisdictional issue of Pascucci, the court conceded her cause of action lay potentially in two separate courts. *Id.* at 52–53, 362 A.2d at 573. The court, however, observed that sound judicial administration encourages the adjudication of all matters at one time and noted that the appellate division has original jurisdiction for the complete determination of any matter on review. Accordingly, Chief Justice Hughes concluded that a mixed action such as Pascucci's should initially be heard in the appellate division. *Id.* at 53–54, 362 A.2d at 573–74.

PRISONS—DUE PROCESS—*Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629 (1975).

On November 25, 1971, a riot broke out in the New Jersey State Prison at Rahway, which resulted in personal injuries and extensive

property damage. Upon the quelling of the riot, a number of prisoners suspected of active participation, including the plaintiffs in this case, were temporarily removed to the Youth Correction Center at Yardville, under the authority of N.J. STAT. ANN. § 30: 4-85 (West 1964). 67 N.J. at 505, 341 A.2d at 634.

The plaintiffs thereafter brought a civil rights suit in United States District Court for alleged constitutional violations, in that their summary transfer was punitive in nature and thereby a denial of procedural due process. In their complaint, the plaintiffs sought, *inter alia*, injunctive relief from newly enacted rules regarding disciplinary procedures. Because of this fact, the federal court abstained from granting relief and the case was removed to the appellate division of the New Jersey Superior Court to settle these questions of state law. The supreme court thereafter certified the appeal directly, pursuant to N.J.R. 2:12-1. 67 N.J. at 506–08, 341 A.2d at 634–35.

In a lengthy and scholarly opinion by Chief Justice Hughes, the court ruled upon the constitutionality of the new disciplinary procedure rules promulgated by the Commissioner of the Department of Institutions and Agencies, N.J.A.C. § 10:35-1.1 *et. seq.*, pursuant to N.J. STAT. ANN. § 30:1-1 to 26 (West 1964 & Cum. Supp. 1979–1980). The court held that twenty-four hour notice of disciplinary action was constitutional and fair, 67 N.J. at 525, 341 A.2d at 645; the Adjustment Committee, hearing tribunal, was "fully compatible with the broad aspects of fairness and due process," 67 N.J. 525–28, 341 A.2d at 645–46; the hearing procedures were not violative of due process, 67 N.J. at 528–32, 341 A.2d at 646–49; the disposition of the hearings comported with the guiding precedents regarding due process, 67 N.J. at 532–33, 341 A.2d at 649–50; the fifth amendment privilege against self-incrimination extends to an incarcerated suspect, 67 N.J. at 533–46, 341 A.2d at 650–57; and finally, that these rules and standards, including the March 24, 1975 revisions, were not unconstitutionally void for vagueness, 67 N.J. at 546–47, 341 A.2d at 657.

Hughes also rejected the argument that the legislative delegation of authority to the Commissioner to promulgate such rules was unconstitutional. 67 N.J. at 547–54, 341 A.2d at 657–61. Thus, the supreme court upheld the constitutionality of the rules and standards regarding prison discipline promulgated by the Commissioner of the Department of Institutions and Agencies, contained in N.J.A.C. § 10:35-1.1 *et. seq.*

PRIVILEGED COMMUNICATIONS—*In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979).

Catlett, a police chief, had been convicted on criminal charges by a jury. 79 N.J. at 234, 398 A.2d at 883. Yacovelli, a member of that jury, knew Catlett and was prejudiced against him but failed to bring these facts to the attention of the trial court during voir dire examination. *Id.* at 234–35, 398 A.2d at 883. After the conviction of Catlett, Kozlov, an attorney, was advising a client on an unrelated matter. *Id.* During this consultation, Kozlov's client sought additional advice concerning his duty to reveal knowledge of Yacovelli's prejudice towards Catlett. *Id.* Kozlov's client had accidently discovered Yacovelli's feeling toward Catlett when Yacovelli was heard to boast shortly after the conviction that he had gotten "even with the defendant [Catlett] for the arrest and prosecution of a member of his [Yacovelli's] family." In re Kozlov, 156 N.J. Super. 316, 318, 383 A.2d 1158, 1159 (App. Div. 1978). Upon having this information related to him, Kozlov realized that the information, if true, might entitle defendant Catlett to a new trial in that the jury conviction had been so contaminated. 79 N.J. at 235, 398 A.2d at 883 (1979). This information was related to Kozlov by his client on the strict condition that the client would never be identified as the source. *Id.*

Kozlov subsequently disclosed the information to Poplar, who had been the defense attorney for Catlett, with the stipulation that Kozlov's client remain anonymous. *Id.* Poplar conducted a preliminary investigation which suggested that the information may well have been true and submitted an affidavit to the court for the purpose of initiating the interrogation of juror Yacovelli. *Id.* at 236, 398 A.2d at 884. Because Poplar's affidavit relied exclusively on hearsay information and the municipal court record, the trial judge was not satisfied with the sufficiency of the affidavit. 156 N.J. Super. at 318–19, 383 A.2d at 1159 (App. Div. 1978). Rather than commencing his investigation with the interrogation of Yacovelli, the trial judge initiated a series of *in camera* hearings which sought to disgorge Kozlov of the identity of his client. 79 N.J. at 238, 398 A.2d at 884 (1979). Through the lengthy hearings which explored the nuances of the attorney-client privilege, Kozlov continued in his steadfast refusal to identify his client and was ultimately held in contempt on the rationale that the privilege did not extend as far as Kozlov asserted. *Id.* The appellate division affirmed the judgment of the trial court. Kozlov appealed and the Supreme Court granted certification.

In reversing the conviction of Kozlov, Chief Justice Hughes noted that the attorney-client privilege represents a balancing of in-

terests between the public interest in the search for truth and the privilege itself. *Id.* at 242, 398 A.2d at 886.

Thus, the privilege was viewed not to be sacrosanct but rather the privilege can fall in certain circumstances. *Id.* at 241, 398 A.2d at 890 (1979). The Chief Justice declared that in all cases, however, there must be "necessary foundations to the valid piercing of any such privilege," as well as "a showing of relevance and materiality of that evidence to the issue before the court." *Id.* at 243–44, 398 A.2d at 887. In addition, the Chief Justice stated that the trial judge must be satisfied that the information sought could not be obtained from another less intrusive source. *Id.* In this case the Chief Justice noted, testimony from Yacovelli "would have constituted that less intrusive source" and failure of the trial court to confront the juror was error sufficient to reverse the contempt conviction. *Id.*

PUBLIC OFFICIALS AND EMPLOYEES—WITNESSES—*State v. Vinegra*, 73 N.J. 484, 376 A.2d 150 (1977).

Vinegra, a former city engineer of Elizabeth, was called before a Union County grand jury to answer questions regarding official misconduct in Elizabeth. He was questioned by the grand jury without first being advised of the scope of the inquiry or that he was a possible target of investigation. Moreover, Vinegra was not informed of his privilege against self-incrimination nor was he told of his testimonial privilege under N.J. STAT. ANN. § 2A: 81-17.2a2 (West Cum. Supp. 1979–1980). 73 N.J. at 486, 376 A.2d at 151.

Subsequent to his grand jury testimony, Vinegra was indicted and charged with seven counts of misconduct in office and one count of false swearing. The trial court dismissed the first seven counts of the indictment holding that Vinegra was a target of investigation and that the failure to advise him of the scope of the investigation or of his privilege against self-incrimination violated his fifth amendment rights. *Id.* at 486, 376 A.2d at 151. On appeal, the appellate division held that dismissal of the indictment was not required since the defendant's constitutional rights were adequately safeguarded by N.J. STAT. ANN. § 2A: 81-17.2a2 (West Cum. Supp. 1979–1980). This statute provides that any public employee who testifies before a grand jury shall enjoy immunity from having his testimony or the evidence derived therefrom used against him in a subsequent criminal prosecution. Thus, the appellate division reinstated the first seven counts of the indictment. 73 N.J. at 487, 376 A.2d at 151.

The New Jersey supreme court, speaking through Justice Sullivan, affirmed the decision of the appellate division. The court, while acknowledging that it had never been confronted with the issue presented, noted that many previous decisions had quashed indictments relying on the "target doctrine" which generally provides for dismissal of indictments against target witnesses. *Id.* at 488, 376 A.2d at 152. However, the court also noted that the target doctrine has been modified somewhat, as it pertains to public employees, through enactment of a statute requiring public employees to testify about matters related to their official conduct and conferring upon them the immunity previously specified. While the court recognized that the statute deprived public employees of the benefits of the target doctrine, it nonetheless felt that this statutory limitation was neither "arbitrary" nor "unreasonable" since it is in the public interest to hold a public employee accountable for his conduct. *Id.* at 490, 376 A.2d at 153.

In his dissent, Chief Justice Hughes asserted that the statutory immunity conferred upon Vinegra was insufficient to protect his fifth amendment rights and that the appropriate remedy should have been dismissal of the indictment. *Id.* at 494, 376 A.2d at 155 (Hughes, C.J., dissenting). The Chief Justice noted that New Jersey courts have long been staunchly protective of the privilege against self-incrimination and have extended this protection beyond that prescribed by the United States Supreme Court. *Id.* at 494, 496, 376 A.2d at 155, 156 (Hughes, C.J., dissenting). Citing what he termed "a New Jersey 'fairness and rightness' doctrine," Chief Justice Hughes stated that application of this doctrine required an examination of the powers of the grand jury and prosecuting attorney in light of the rights guaranteed a public employee target witness. *Id.* at 496, 376 A.2d at 156.

As a result of this scrutiny, the Chief Justice concluded that suppression of the evidence and the fruits derived from Vinegra's testimony was not an adequate safeguard for Vinegra's constitutional rights. While Chief Justice Hughes did not go so far as to advocate transactional immunity as an end to the prosecution, he did state that protection of Vinegra's rights required dismissal of the indictment. Furthermore, in terms of target witnesses in general, the Chief Justice regarded dismissal "as 'relatively costless' . . . and a salutary remedy suggested by the New Jersey 'fairness and rightness' doctrine." *Id.* at 510, 376 A.2d at 163.

PUBLIC UTILITIES—RATE REGULATION—*In re Intrastate Industrial Sand Rates*, 66 N.J. 12, 327 A.2d 427 (1974).

The Central Railroad Company of New Jersey (CNJ) sought an increase in the intrastate railroad rates for transportation of sand. The New Jersey Board of Public Utility Commissioners (PUC) approved the increase and several of the shippers affected appealed the PUC's decision. 66 N.J. at 14–15, 327 A.2d at 428–29. The appellate division set aside the PUC's action, holding that approval of the rate increase "could not be justified as a permanent matter . . . under the 'negotiation' statute," N.J. STAT. ANN. §48:2-21.1 (West 1969), without first establishing a rate base and the fair rate of return. 66 N.J. at 18, 327 A.2d at 430.

The Supreme Court of New Jersey, in an opinion authored by Chief Justice Hughes, affirmed the judgment of the appellate division, *id.* at 29, 327 A.2d at 436, despite the PUC's argument that finding a rate base and a fair rate of return would constitute an " 'exercise in futility' " since CNJ would still be operating at a loss if the rate increase were allowed. *Id.* at 17, 327 A.2d at 430. Although the Chief Justice was not unsympathetic to CNJ's financial plight, he nonetheless argued, as had the appellate division, that the PUC exceeded its authority when it negotiated and approved a rate increase for CNJ on a permanent basis without regard to the fairness and reasonableness of either the existing or proposed transportation rates. *Id.* at 26, 327 A.2d at 435. The Chief Justice stated that the PUC's authority to negotiate rate increases with a utility is limited to providing interim relief pending these fairness determinations. *Id.*