MITIGATING "THE FRAILTIES OF HUMAN JUDGMENT": JUSTICE ROBERT CLIFFORD AND THE SOURCES OF JUDICIAL LEGITIMACY

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> [A] judicial approach does not make the future more readily foreseeable and the assurance of our decision, whatever it be, is unfortunately circumscribed by the frailties of human judgment.[1]

I. INTRODUCTION

Robert Clifford joined the New Jersey Supreme Court during 1973, a pivotal year in the history of American appellate jurisprudence. In January of that year, the United States Supreme Court extended the federal "right of privacy" to cover a woman's decision to terminate a pregnancy in *Roe v. Wade*,[2] while in April, the New Jersey Supreme Court declared the state's system of funding its public schools unconstitutional in *Robinson v. Cahill*.[3] *Roe*, on a federal level, and *Robinson I*, on a state level, provoked an academic and social debate over the legitimacy of judicial authority that resonates to this day.[4]

Debate about the legitimacy of judge-made law in our democratic republic is, of course, nothing new. Having inherited and retained a process of judicial decisionmaking—the common law—

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1 Wachenfeld, J. (quoted by Justice Clifford in Small v. Rockfeld, 66 N.J. 231, 253 (1974)). Justice Clifford served as a law clerk to Justice Wachenfeld in 1953.

2 410 U.S. 113 (1972).

3 62 N.J. 473, 303 A.2d 273 (1973) [hereinafter *Robinson I*], *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1976).

4 *See, e.g.*, LAURENCE TRIBE, GOD SAVE THIS HONORABLE COURT (1985); ROBERT BORK, THE TEMPTING OF AMERICA (1989); Russ Bleemer, *Not Enough Progress: School-funding Law Voided*, 137 N.J. L.J. 1131 (July 18, 1994); Michael Booth, *Coleman: Courts Must Sometimes Demand Action*, 138 N.J. L.J. 800 (Oct. 24, 1994).

based on authority from the Crown,[5] each generation of Americans has had to reconcile the persistence of judicial lawmaking with a form of government based on accountability to the people. As G. Edward White has put it in his study entitled *The American Judicial Tradition*,

> One can recognize the inherently restrained nature of appellate adjudication in America simply by noting the incompatibility of a democratic theory of government and the office of the judiciary. If judges make decisions of such importance, if their decisions are exercises of power rather than of mechanical logic, and if so few checks exist on the character of their performance, how is their presence tolerated in a democracy?[6]

Justice Clifford himself put it succinctly in an early concurrence: "society has yet to achieve agreement on what it is our courts are expected to do."[7]

While different generations have asked and answered Professor White's question with differing degrees of urgency and candor, seldom has the issue of judicial legitimacy been raised with more vehemence than during the past two decades, the period spanned by the tenure of Justice Clifford on the New Jersey Supreme Court. On a federal level, the issue of judicial legitimacy in general—and the legitimacy of the *Roe* decision in particular—has dominated the academic and political discussion of the Court's work, and proved decisive in the confirmation debate over the nomination of Robert Bork to the United States Supreme Court. Arguably, however, the work of the New Jersey Supreme Court in the years since 1973 has raised the issue of judicial legitimacy more squarely than that of the United States Supreme Court, for while *Roe* can be seen as the high-water mark of the federal Supreme Court's expansion of individual rights, giving way to retrenchment, *Robinson* signalled, by contrast, an era of unprecedented activism by the New Jersey Supreme Court.[8]

In the years since Robert Clifford took the oath of office, the

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5 *See* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 173-79 (1992) (describing the sources of the validity of law).

6 G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 461 (2d ed. 1988).

7 Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 633, 371 A.2d 1192, 1268 (1977) (Clifford, J., concurring).

8 There is no settled definition of the term "activism," though it is fair to say that the term usually means "a decision with which the author disagrees." As used in this Essay, however, the term is not pejorative. Rather, for the purposes of this Essay "activism" describes a judicial decision expanding plaintiffs' civil remedies or the rights of criminal defendants.

New Jersey Supreme Court's jurisprudence has led to national renown and local controversy. The court has discovered and explored the parameters of a right to die;[9] enforced its ruling that the property tax is unconstitutional as an exclusive method of funding state schools;[10] imposed an obligation on wealthy communities to provide affordable housing for low-income populations;[11] expanded upon the federal Supreme Court's requirement that the government must advise and afford suspects in custody their constitutional rights;[12] expanded upon the federal Supreme Court's privacy precedent by forbidding unreasonable searches and seizures of curbside garbage;[13] departed from the federal Supreme Court by declining to recognize a "good faith" exception to the warrant requirement;[14] upheld the state capital punishment scheme, but imposed perhaps the most rigorous standards in the nation for its implementation;[15] defined the rights of surrogate parents;[16] departed from the United States Supreme Court by extending the right of poor women to have access to abortion;[17] extended the state constitution's protection of free speech to permit political speech on quasi-public private properties such as university campuses and shopping malls;[18] and recognized a cause of action against cigarette manufacturers for failure to warn of health risks, notwithstanding federal law.[19]

That body of law—in part a consequence of the cutting-edge issues arising in New Jersey's densely populated multicultural society, in part a consequence of the willingness of the state supreme court to address those issues—has led *The New York Times*, *The Washington Post*, *The National Law Journal*, and *The American Lawyer*, among others, to hail the New Jersey Supreme Court as the leading state court—and perhaps the leading court of any kind—in the

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9 *In re* Quinlan, 70 N.J. 10, 41, 335 A.2d 647, 664, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

10 Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975) [hereinafter *Robinson IV*].

11 Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 179, 336 A.2d 713, 728, *cert. denied*, 423 U.S. 808 (1975).

12 State v. Hartley, 103 N.J. 252, 256, 511 A.2d 80, 82 (1986).

13 State v. Hempele, 120 N.J. 182, 195, 576 A.2d 793, 799 (1990).

14 State v. Novembrino, 105 N.J. 95, 154, 519 A.2d 820, 854 (1987).

15 State v. Ramseur, 106 N.J. 123, 194, 524 A.2d 188, 223 (1987).

16 *See In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

17 Right to Choose v. Byrne, 91 N.J. 287, 310, 450 A.2d 925, 937 (1982).

18 State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980); New Jersey Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 650 A.2d 757 (1994).

19 Dewey v. R.J. Reynolds Tobacco Corp., 121 N.J. 69, 100, 577 A.2d 1239, 1255 (1990).

nation.[20] It has also, however, led some within New Jersey's legal and political communities to question the legitimacy of the court's decisions.[21]

The sheer length of Justice Clifford's tenure would make his opinions worth studying for the light it sheds on the court's course over the past twenty years. Read against the background of the historic debate over the legitimacy of judge-made law and the controversial activism of the court on which he served, however, Justice Clifford's jurisprudence is of particular interest.

This Essay attempts, on the occasion of Justice Clifford's retirement, to place his judicial philosophy in the historic context of American appellate judging. The Essay begins by setting the context of American appellate judging in 1973. It traces the decline of the so-called "oracular" natural law jurisprudence of the nineteenth century in the face of criticism from judges such as Holmes and scholars such as the Legal Realists, and discusses the debate over judicial legitimacy in the absence of "universal principles" provoked by the Warren Court's decisions, a debate that was reignited by the Court's decision in *Roe v. Wade* and remains unresolved. No single theory of jurisprudence has prevailed; in the absence of consensus, appellate courts and appellate judges in the late twentieth century must discover their own constraints.

The Essay then assesses the way in which one appellate court has defined the limits of its authority by turning to the New Jersey Supreme Court, which was poised in 1973 to assume the mantle of progressivism that the United States Supreme Court would abandon after *Roe*. The Essay discusses the legacy of the Vanderbilt and Weintraub courts, culminating in Chief Justice Weintraub's opinion in *Robinson I* that the state school funding system violated the New Jersey State Constitution. Justice Clifford's dissent from the remedy imposed in *Robinson IV* was his first major dissent. Read

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20 *See, e.g.*, Ronald K.L. Collins, *Important Precedents Emerging As States Use Their Constitutions*, NAT'L L.J., Sept. 19, 1983, at 25 ("When the history of state constitutional law . . . is next recorded, surely the contributions of the New Jersey Supreme Court will be highlighted."); David Margolick, *New Jersey Court Doesn't Keep Its Opinions to Itself*, N.Y. TIMES, July 29, 1984, § 4, at 6 (stating that the New Jersey Supreme Court "may well be the most respected and influential state appellate court"); *New Jersey's Ground-Breaking Supreme Court*, WASH. POST, Dec. 28, 1988, at A4 (observing that the New Jersey Supreme Court enjoys a "growing reputation as the nation's most innovative judiciary").

21 *See, e.g., Legislators Seek to Put Justices On Ballot*, N.Y. TIMES, Nov. 22, 1992, § 13, at 1 (quoting Senator Gerald Cardinale: "[a]s a practical matter, courts have gone from having an adjudicatory function . . . to having a policy-making function. Whatever they choose to call it, the State Supreme Court has in fact been making new laws. And they are accountable to no one.").

together with his other early dissents, it establishes a paradigm of the legal theory that would guide Justice Clifford's opinions for twenty years.

This Essay reads Justice Clifford's body of work, in general, as an attempt to adapt the traditional language and methods of appellate judging—close statutory and constitutional construction, reliance on language to structure neutral processes of decision-making, and, when all else fails (and even when it doesn't), clear exposition of reasoning—to the service of an activist philosophy. There is, throughout Justice Clifford's opinions, a tension between the traditional rhetoric and institutional constraints of appellate judging, in which he believed fervently, and the activism of the court on which he served. In general, Justice Clifford could accept "activist" results to the extent, but only to the extent, that he could arrive at those results through traditional means. Where he could not reconcile his means with the court's ends he dissented, always compellingly and often hilariously. Because of the unsettled era during which he served, because of the activism of the court on which he served, and because of the candor and eloquence with which he attempted to reconcile traditional means with activist ends, Justice Clifford's opinions illustrate the extent to which activist results can be reconciled with the traditional constraints and rhetoric of appellate judging.

II. THE CONTEXT: AMERICAN APPELLATE JUDGING, 1973

A. *The National Scene*

In 1973, American appellate judging, which had struggled for over 150 years to justify its place in American government, was once again in crisis. The Warren Court, which had ended officially with the retirement of Chief Justice Earl Warren in 1969, had broken new ground in virtually every area of federal constitutional law since the 1954 watershed decision of *Brown v. Board of Education*.[22] In every context—from the rights of criminal defendants to school desegregation, from voting rights to the law of defamation, from school prayer to contraception—the Warren Court had proved willing to intervene. The result was a revolutionary jurisprudence that outraged politicians and alarmed many scholars, even those who purported to agree with the social results prescribed by the Court.

Criticism of the Court centered on the basis for its decisions'

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[22] 349 U.S. 294 (1955).

judicial legitimacy. Nineteenth-century jurisprudence had been grounded in so-called "oracular" pronouncements based on "universal principles" of natural law.[23] As consensus about the meaning and application of those principles eroded, however, they began to seem less like "universal principles" and to sound, in cases such as *Dred Scott v. Sandford*,[24] *Plessy v. Ferguson*,[25] and *Lochner v. New York*,[26] more like subjectively held pretexts for essentially political or moral judgments. By the mid-twentieth century, this so-called "oracular" style of jurisprudence had been discredited by jurists such as Justices Holmes, Cardozo, and Brandeis, and by the so-called "Legal Realists" of the academic world. As Justice Holmes wrote, "[t]here is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them authority. . . . [T]he Common Law is not a brooding omnipresence in the sky and . . . the U.S. is not subject to some mystic overlaw that it is bound to obey."[27] But in discrediting judges as "mouthpieces of the infinite," and universal principles as a basis of judicial legitimacy, jurists and scholars left open the question of what, in the absence of universal principles, is to constrain the judiciary from simply imposing its own values on society.

The opinions of the Warren Court had answered the question for many in the most alarming way: in the absence of universal principles, nothing constrains the judiciary. Herbert Wechsler, while purporting to agree with many of the Warren Court's social conclusions, emerged as perhaps the greatest critic of the theory through which the Court arrived at those conclusions. Acknowledging that the era of "oracular" jurisprudence was gone, Wechsler insisted nonetheless that the Court derive judicial decisions somehow from "neutral principles": "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step . . . on analysis and reasons quite transcending the immediate result that is achieved."[28] The absence of such principles from Warren Court pronouncements—particularly

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[23] WHITE, supra note 6, at 148.

[24] 60 U.S. (19 How.) 393 (1856).

[25] 163 U.S. 537 (1896).

[26] 198 U.S. 45 (1905).

[27] G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 386-87 (1993) (quoting Oliver Wendell Holmes, J., letter to Harold Laski, Jan. 29, 1926).

[28] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

in *Brown v. Board of Education*—rendered those decisions, in Wechsler's view, illegitimate.

Wechsler's thesis—and its criticism of the Warren Court—provoked a heated debate about whether the Supreme Court was acting in a principled manner and, ultimately, about whether such "neutral principles" of decisionmaking really exist in any form of appellate judging. If they do not, then what is a court's opinion but the mere pretense of rationality offered in support of a conclusion arrived at by fiat, quite independently of the reasons invoked to support it? As another critic, Alexander Bickel, put it, "if that is all judges do, then their authority over us is totally intolerable and totally irreconcilable with . . . political democracy."[29]

This debate, expected to abate with the retirement of Chief Justice Warren in 1969, was rekindled dramatically by the Court's decision four years later in *Roe v. Wade*. Despite the fact that the Court decided *Roe* four years after Earl Warren's retirement, the opinion can be seen as the culmination of Warren Court jurisprudence. In *Roe*, the Court expanded the fundamental right of privacy, which the Court had discovered in the context of criminal law and had extended hesitantly to the context of marital contraception,[30] to grant a woman the choice to terminate a pregnancy or, as opponents of choice would have it, to kill an unborn child.[31] Viewing *Roe* as an exercise of raw judicial power, "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century,"[32] critics such as Robert Bork rejected outright the Warren Court's fundamental right of privacy—or, for that matter, any right that was not within the contemplation of the framers of the Constitution: "[I]f we are to have judicial review . . . so that the judge does not freely impose his or her own values, then the only way to do that is to root that law in the intentions of the founders. There is no other source of legitimacy."[33]

Even scholars who purported to endorse the federal right of privacy questioned the legitimacy of the *Roe* decision, and no competing explanation of the sources of judicial legitimacy which has emerged since the demise of "oracular jurisprudence" has carried

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29 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 80 (1962).

30 Katz v. United States, 389 U.S. 347, 350-51 (1967); Griswold v. Connecticut, 381 U.S. 479, 482 (1964).

31 Roe v. Wade, 410 U.S. 113, 154 (1972).

32 ROBERT BORK, THE TEMPTING OF AMERICA 116 (1990).

33 Hon. Robert H. Bork, Interpreting the Constitution, Address Before the Fifth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 8, 1987), *in* 119 F.R.D. 45, 68 (1988).

the day.[34] Indeed, the very proliferation of such theories, both from academia and from the bench, all fascinating as theories but none generally practiced, may be the best indication of the unsettled stature of appellate judging in the late twentieth century.[35] As perhaps a final twist, so-called Critical Legal Studies scholars question whether there can be *any* source of judicial legitimacy in the American governmental framework.[36] This much is clear: in the absence of such a consensus, each appellate court as an institution and each appellate judge as an individual must address the issue of the sources of judicial legitimacy.

Perhaps in response to the controversy it reignited with *Roe*, the Supreme Court began to retreat from its activist stance. The Court refused to extend the fundamental right recognized in *Roe* to compel access to abortion for poor women,[37] or to permit the private exercise of homosexual activity.[38] Furthermore, the Court permitted the reinstitution of capital punishment under a variety of state statutory schemes providing varying safeguards of due process, and permitted an exception to the warrant requirement in cases in which the authorities can demonstrate "good faith."[39]

The Court's retrenchment caused Justice Brennan, among others, to call upon state supreme courts to utilize their state constitutions and depart from the Supreme Court in taking up the progressive mantle.[40] The New Jersey Supreme Court, which Justice Clifford joined in 1973, was poised to do just that. The activist agenda it adopted, however, would raise the same questions of judicial legitimacy that plagued the United States Supreme Court.

B. The New Jersey Supreme Court

In the decades preceding the adoption of the New Jersey Constitution of 1947, New Jersey was notorious both at home and

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34 John H. Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 926 (1973).

35 *See generally* Alan B. Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571 (1986) (surveying several schools of current jurisprudence). *See also* RONALD M. DWORKIN, A MATTER OF PRINCIPLE (1985); KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962); Edgar Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143 (1977); H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

36 *See* MARK TUSHNET, RED, WHITE, AND BLUE (1988).

37 Harris v. McRae, 448 U.S. 297 (1980).

38 Bowers v. Hardwick, 478 U.S. 1039 (1986).

39 United States v. Leon, 468 U.S. 897 (1984); Gregg v. Georgia, 428 U.S. 153 (1976).

40 *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

abroad for the corrupt complexities of its judicial system.[41] As D.W. Brogan noted in his 1943 study *The English People*, "[t]he most indisputably English export . . . was the common law, but if you want to see the old common law in all its picturesque formality, with its fictions and fads, its delays and uncertainties, the place to look for them is not London . . . but in New Jersey. Dickens . . . would feel more at home in Trenton than in London."[42] The state's highest court, the "unwieldy, undistinguished, and unmourned" Court of Errors and Appeals, consisted of sixteen members, six of whom were not required to be lawyers, and was considered "'too large to be a court and too small to be a mob.'"[43]

By 1973, however, the New Jersey Supreme Court— consisting of seven lawyers appointed by the governor—was beginning to be recognized as one of the finest in the country. Under the strong leadership of Chief Justices Vanderbilt and Weintraub, the court had left the days of corrupt "Jersey Justice" behind and had made substantial contributions to the development of common law and constitutional doctrine. The court had abolished the doctrine of privity of contract in a products liability context,[44] abrogated the doctrines of charitable and sovereign immunity,[45] implied a covenant of habitability between landlord and tenant,[46] reformed insurance law to "effectuate the reasonable expectations" of the average consumer,[47] and held the holder-in-due-course defense inapplicable in the context of consumer loans.[48] Nor had the court hesitated to interpose itself in the political process, mandating legislative redistricting in line with the Warren Court's principle of "one man, one vote," and intervening in a labor dispute where the federal authorities had disclaimed jurisdiction.[49]

Ironically, however, in light of the future course of the court,

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41 *See generally* CARLA V. BELLO & ARTHUR T. VANDERBILT II, JERSEY JUSTICE: THREE HUNDRED YEARS OF THE NEW JERSEY JUDICIARY (1978).

42 D.W. BROGAN, THE ENGLISH PEOPLE: IMPRESSIONS AND OBSERVATIONS 108 (1943).

43 Margolick, *supra* note 20, at 6 (quotation omitted).

44 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960).

45 Colloppy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 47-48, 141 A.2d 276, 287 (1958); Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 537, 264 A.2d 34, 36 (1970).

46 Marini v. Ireland, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970).

47 Kievitt v. Loyal Protective Life Ins. Co., 34 N.J. 475, 488, 170 A.2d 22, 30 (1961).

48 Unico v. Owen, 50 N.J. 101, 122-23, 232 A.2d 405, 417 (1967).

49 Jackman v. Bodine, 43 N.J. 453, 473, 205 A.2d 713, 724 (1964); *cf.* Cooper v. Nutley Sun, Inc., 36 N.J. 189, 194, 175 A.2d 639, 642 (1961); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 11, 161 A.2d 705, 710 (1960).

the Weintraub court parted company with federal precedent in the context of criminal law. Chief Justice Weintraub, in particular, bridled at the constitutionalization of the exclusionary rule.[50] Chief Justice Weintraub asserted:

> Since the Fourth Amendment speaks, not in terms that are absolute but rather of unreasonableness, it necessarily calls for a continuing reconciliation of competing values. . . . [W]hile the sanction [of suppression] supports the high value inherent in freedom from unwarranted search, yet in another aspect it works against public morality because the suppression of the truth must tend to breed contempt for . . . the law. Such are the stakes, and it is in their light that the unreasonableness of a search must be measured.[51]

More generally, Chief Justice Weintraub resisted the Warren Court's expansion of the rights of criminal defendants, noting that "[t]hose decisions were not at all compelled by 'my copy' of the Constitution or its history."[52]

While it is difficult, therefore, to characterize the Weintraub court as liberal or conservative, the future direction of the court—both its boldness in adjudicating difficult social issues and its willingness to depart from federal jurisprudence—was signalled in one of Chief Justice Weintraub's final opinions. In *Robinson I*, Chief Justice Weintraub, writing for a unanimous court, held that the existing system of funding the public schools, which was based on the local property tax, violated the state constitution because it failed to assure the "thorough and efficient education" guaranteed in that document.

Weintraub's opinion in *Robinson I* is as interesting for what it did not decide as for what it did. Prior to addressing the effect of the state constitution's "thorough and efficient education" clause, the chief justice rejected the argument, based on the Warren Court's decision in *Brown v. Board of Education*, that the failure to provide equality of educational opportunity violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Brown* was based, the court asserted, not on the conclusion that education is a fundamental right, but on the premise

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50 Mapp v. Ohio, 367 U.S. 643, 655 (1960); *see* Hon. Daniel J. O'Hern, *Brennan and Weintraub: Two Stars to Guide Us*, 46 RUTGERS L. REV. 1049, 1059 (1994) (recounting Justice Weintraub's opinion that the exclusionary rule "worked against protection of society's interest").

51 State v. Davis, 50 N.J. 16, 22, 23, 231 A.2d 793, 796, 796-97 (1967), *cert. denied*, 389 U.S. 1054 (1968).

52 State v. Funicello, 60 N.J. 60, 70, 286 A.2d 55, 60 (1972) (Weintraub, C.J., concurring), *cert. denied sub nom.* New Jersey v. Presha, 408 U.S. 942 (1972).

that classification of students according to race is invidious. In addition, the court reasoned that the equal protection argument potentially "goes beyond the educational scene and implicates the entire concept of local government with local fiscal responsibility."[53] Thus, the court refused to decide the case on federal constitutional grounds.

The chief justice then turned to the equal protection argument under the state constitution. Chief Justice Weintraub anticipated the future course of state constitutional analysis by rejecting out of hand the parties' assumption in their briefs that state and federal equal protection guarantees were coextensive:

> Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.[54]

The court then rejected, for state constitutional purposes, federal equal protection analysis:

> We should not be understood . . . to embrace [federal equal protection] doctrine in the application of the State equal protection issue. . . . [W]e note briefly the reason why we are not prepared to accept that concept for State constitutional purposes. We have no difficulty with the thought that a discrimination which may have an invidious base is 'suspect' and will be examined closely. . . . But we have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. . . . And if a right is somehow found to be "fundamental," there remains the question as to what State interest is "compelling," and there, too, we find little, if any, light. Mechanical approaches . . . may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint of the denial against the apparent public justification, and decide whether the State action is arbitrary.[55]

The court's blunt rejection of federal constitutional precedent, even though not dispositive in *Robinson I*, stands as the first major declaration of the independence of New Jersey state constitutional doctrine from federal constitutional doctrine. Ironically,

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[53] Robinson v. Cahill, 62 N.J. 473, 489, 303 A.2d 273, 281 (1973) [hereinafter *Robinson I*], *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1976).

[54] *Id.* at 490, 303 A.2d at 282.

[55] *Id.* at 491, 491-92, 303 A.2d at 282.

in future years the court would apply Chief Justice Weintraub's observation that "the state constitution could be more demanding" to expand rights in the very area—criminal law—where Weintraub thought they should be restricted. The more immediate revolutionary impact of *Robinson I*, however, was its conclusion: that the historic method of financing public education was unconstitutional because it failed to provide a "thorough and efficient education" as guaranteed by the state constitution. Acutely aware of the public criticism certain to attend the court's intrusion into state appropriations, the court deferred deciding which remedy, if any, it should impose. Instead, the court ordered further argument on the issue of "whether the judiciary may . . . order that moneys appropriated by the Legislature . . . shall be distributed upon terms other than the legislated ones."[56]

Twice more in the next two years, the court deferred imposing a remedy, based on assurances from the executive and legislative branches that a solution was forthcoming. Finally, on May 23, 1975, the court, led now by Chief Justice Hughes, could wait no longer. "We forthwith reject the submission that we should do nothing," Hughes wrote.[57] Instead, the court rejected the statutory distribution formula of state aid to education and imposed a different formula that conformed more closely, in its judgment, with the constitutional mandate. The court anticipated the separation-of-powers controversy that would attend its opinion, stating:

> This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of Government.[58]

Like *Roe v. Wade* in the federal context, the *Robinson* decisions marked a defining historic moment for the New Jersey Supreme Court. But while *Roe* provoked an era of retrenchment on the federal bench, the *Robinson* decisions set the New Jersey Supreme Court decisively on the activist course that would define it for the next twenty years, leading it to extend privacy rights to the dying, to impose affordable housing requirements on wealthy communities, to rewrite the state death penalty statute, and, among count-

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56 *Id.* at 521, 303 A.2d at 298.

57 Robinson v. Cahill, 67 N.J. 333, 346, 339 A.2d 193, 200 (1975).

58 *Id.* at 354, 339 A.2d at 204.

less other decisions, to revisit the issue of the constitutionality of the state's educational system repeatedly.

The court's radical remedy in *Robinson IV* also marked a defining moment in the career of recently appointed Associate Justice Robert Clifford. Along with Justice Mountain, Justice Clifford dissented from the court's reallocation of funds appropriated by the Legislature. It was his first dissent from a landmark decision; read together with other early dissents, it serves as a paradigm of the jurisprudence it would inform for the next two decades.

III. *ROBINSON* AND THE EARLY DISSENTS: DEFINING A JUDICIAL PHILOSOPHY

Justice Clifford joined the court just after *Robinson I* had been decided. Between that time and *Robinson IV*, the justice had dissented in thirteen of the court's decisions, and had made it clear that the attractiveness of a result would not exempt it from careful analysis.

Justice Clifford had dissented repeatedly from the court's attempts to broaden the application of workers' compensation, arguing that where the statute contained clear language, the court had no legitimate basis to extend coverage, no matter how sympathetic the plaintiff. The justice rejected, for instance, the extension of codependency benefits to a cohabiting divorced mate, because the statute clearly limited benefits to married codependents; similarly, where the statute covered injuries incurred in the course of employment, that did not include injuries incurred in an employer-provided parking lot or while driving after work to a library to study for courses taken outside of work.[59] Justice Clifford had dissented from the court's extension of insurance benefits to a victim of cystic fibrosis, arguing that because the condition is "present at birth," it is by definition "pre-existing," and therefore outside the scope of the policy.[60] Similarly, a close reading of the visitation statute led him to dissent from the court's extension of visitation rights to grandparents when the custodial spouse remarries.[61] In the context of criminal law, Justice Clifford had dissented repeatedly from the court's dismissal of improper prosecutorial com-

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59 *See* Parkinson v. J. & S. Tool Co., 64 N.J. 159, 167, 313 A.2d 609, 613 (1973); Strzelecki v. Johns-Manville Prod. Corp., 65 N.J. 314, 319, 322 A.2d 168, 171 (1974); Levine v. Haddon Hall Hotel, 66 N.J. 415, 420, 332 A.2d 193, 195 (1975).

60 Kissil v. Beneficial Nat'l Life Ins. Co., 64 N.J. 555, 562, 319 A.2d 67, 71 (1974) (Clifford, J., dissenting).

61 Mimkon v. Ford, 66 N.J. 426, 439, 332 A.2d 199, 207 (1975) (Clifford, J., dissenting).

ments as "harmless error," reasoning that the use of improper language by the prosecutor corrupts the sanctity of the courtroom and necessarily infects the jury's deliberations.[62]

The consistent thread running through these early dissents is Justice Clifford's insistence upon language as a bulwark for judicial decisionmaking. Where language unambiguously delimited the scope of a statute, as in the workers' compensation cases or the grandparental visitation case, or where the meaning of language limiting coverage in an insurance contract could not be mistaken, as in the cystic fibrosis case, the court could not legitimately extend the scope of that language. Conversely, where language carried the clear capacity to corrupt the integrity of a criminal trial, Justice Clifford saw no way to construe it as harmless.

Justice Clifford explained the reason for this dependence on language as a ground of certainty in another of the early dissents. In *Small v. Rockfeld*, Justice Clifford dissented from the court's allowance of a wrongful death suit by an infant son (through his guardian) against his father, who had caused the death of his mother. Justice Clifford, admitting that there were competing policy considerations and no clearly defined statutory or other policy, concluded:

> [W]hile my discussion and conclusions may not bear a stamp of inspired certainty, I suppose in the final analysis I have only my own instincts and experience, my notions of human relations and their nuances, on which to rely, and admittedly they may not be very reliable. . . . I am acutely conscious of the fact that "a judicial approach does not make the future more readily foreseeable and the assurance of our decision, whatever it be, is unfortunately circumscribed by the frailties of human judgment."[63]

Justice Clifford's reliance on language stemmed not, as nineteenth century jurisprudence had, from its oracular invocation of natural law principle, but from its capacity to illumine "the frailties of human judgment." It was this sense of judicial humility, with its attendant requirement of clarity of language, that Justice Clifford brought to his dissent in *Robinson IV*.

Justice Clifford made clear from the first sentence of the *Robinson IV* dissent his view that the court was overreaching. "Today's decision," the dissent announced, "marks the Court's en-

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62 State v. DiPaglia, 64 N.J. 288, 298, 315 A.2d 385, 390 (1974) (Clifford, J., dissenting); State v. Perry, 65 N.J. 45, 60, 319 A.2d 474, 482 (1974) (Clifford, J., dissenting).

63 Small v. Rockfeld, 66 N.J. 231, 253, 330 A.2d 335, 347-48 (1974) (Clifford, J., dissenting) (quoting Lavign v. Family & Children's Soc'y, 11 N.J. 473, 483, 95 A.2d 6, 12 (1953) (Wachenfeld, J., dissenting)).

trance into the business of financing public education. . . . [T]he judiciary is conspicuously unsuited for shouldering the burdens of that business, more appropriately left to the Legislature as unmistakably provided by [the State Constitution]."[64] Beyond the court's institutional incapability of handling the issue, the opinion continued, "the most meticulous search of our Constitution fails to disclose any textual warrant for the unprecedented step taken by the majority . . . ."[65]

Justice Clifford was careful, however, to delineate the scope of his disagreement with the court. The justice accepted the fundamental premise that the current system was unconstitutional; it was, rather, "[w]hen . . . it comes to the proposed reallocation of appropriated funds . . . [that] we take a different view. The problem rests in the concept commonly referred to as the doctrine of the separation of powers."[66] Justice Clifford accepted that as the concept has evolved, the doctrine of the separation of powers no longer requires airtight separation; otherwise, modern administrative agencies could not exist. Furthermore, Justice Clifford noted, "when judges make law in the process of deciding cases, it can properly be said that they are indulging in legislation and that this is theoretically repugnant to the doctrine of the separation of powers."[67] This practice, however, "is now completely accepted and has indeed become commonplace."[68] The dissent then distinguished the commonplace judicial lawmaking it finds acceptable from the remedy at issue in *Robinson*:

> But what of the power that we are considering here? We assume it would not be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature . . . , how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. . . . If the courts are at liberty, for whatever reason, to reallocate appropriated funds in some particular case, why may not the courts do so in other cases as well? . . . There are no discernible boundaries or limits beyond which the power might not be exerted provided only that the Court were made to feel that the exigency of the moment was sufficiently serious to justify the action. It

64 Robinson v. Cahill, 67 N.J. 333, 374, 339 A.2d 193, 215 (1975) (Clifford and Mountain, JJ., dissenting).

65 *Id.* at 375, 339 A.2d at 215 (Clifford and Mountain, JJ., dissenting).

66 *Id.* at 377, 339 A.2d at 216 (Clifford and Mountain JJ., dissenting).

67 *Id.* at 379, 339 A.2d at 217 (Clifford and Mountain JJ., dissenting).

68 *Id.*

> seems to us that the exercise of such a power by the courts is indeed unchecked, and that it cannot be said to fall within any relaxation of the doctrine of the separation of powers that has thus far been countenanced.[69]

The doctrine of the separation of powers, in short, "deserves more than the ceremonial bow given it by the majority en route to its discovery of the requisite authority to act. This power it draws *not* from the Constitution but from a conviction that since it must act, it must therefore also have the power to act."[70]

The arrogance of the court in intruding in the sphere of legislative appropriations was particularly galling to Justice Clifford in light of the clear constitutional language providing for separation of powers among the three branches of government, empowering the legislature to appropriate all funds, and explicitly entrusting the legislature with the responsibility to assure the constitutional guarantee of a "thorough and efficient" public education. "Again, we face a specific and explicit constitutional prohibition standing in the way of the action sought to be undertaken."[71] To the argument that the United States Supreme Court under Chief Justice Warren had begun to fashion similar remedies, the dissent replied simply: "if the cited authorities represent what the majority characterizes as 'emerging modern concepts as to judicial responsibility to enforce constitutional rights,' we suggest those concepts should for now be permitted to remain in their 'emerging' stage rather than receive further nourishment from imprudent and untimely judicial activism."[72]

Justice Clifford's problem, then, lay not with the court's activist adjudication of the constitutional issue; it was clearly within the court's province to determine whether the constitutional mandate of a "thorough and efficient" education were being met. Instead, the justice dissented from the peculiar remedy chosen by the court of imposing its own funding formula for the schools. Such a remedy lay outside any justification for judicial action, and was expressly contrary to the constitution's delegation of powers.

Several months later, *Robinson V* made clear that this was the extent of Clifford's dissent. In *Robinson V*, the court enjoined the expenditure of school funds under the unconstitutional formula,

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69 *Id.* at 380, 339 A.2d at 217-18 (Clifford and Mountain, JJ., dissenting).

70 *Id.* at 383-84, 339 A.2d at 220 (Clifford and Mountain, JJ., dissenting) (emphasis in original).

71 *Id.* at 382, 339 A.2d at 219 (Clifford and Mountain, JJ., dissenting).

72 *Id.*, 339 A.2d at 218-19 (Clifford and Mountain, JJ., dissenting) (quoting Robinson v. Cahill, 67 N.J. 333, 352, 339 A.2d 193, 203 (1975)).

but stopped short of imposing its own formula, instead requiring the legislature to act. In these circumstances, because the remedy afforded was the traditional and unquestionably legitimate remedy of injunction, Justice Clifford rejoined the majority.[73]

Taken together, Justice Clifford's early dissents form a paradigm of the jurisprudence that would govern his opinions for twenty years. The ultimate ground of judging—a subjective determination based on the judge's experience—is not cloaked in the garb of oracular pronouncement, but is, rather, freely acknowledged. But this humble acknowledgment, far from diminishing the importance of language and traditional constructs to appellate judging, amplifies their importance. To the extent that the language of a constitution, statute, contract, or precedent is sufficiently clear to resolve an issue, or to the extent that traditional notions of construction or separation of powers are invoked to limit the effect of a decision, the reliance on the "frailties of human judgment" is reduced. To the extent, however, that none of these sources resolves an issue, the language of a judicial opinion must be sufficiently clear and eloquent to persuade others that reason has reduced the margin of human frailty.

Justice Clifford pulled these jurisprudential strands together in an early concurrence in *Oakwood at Madison, Inc. v. Township of Madison*.[74] In *Oakwood*, the court began to put meat on the bones of its decision in *Southern Burlington County NAACP v. Township of Mount Laurel*[75] that zoning designed to exclude housing for low-income people violated the New Jersey Constitution. The majority opinion occupied sixty-four pages, and involved the court in deciding the definition of a "region" and of a municipality's "fair share" affordable housing obligations. Justice Clifford, concurring, did so with a strong sense of "the frailties of human judgment." He began: "[s]ometimes judges decide cases with their fingers crossed. I confess that my vote with the majority opinion is cast with the discomforting feeling that this *judicial* effort to meet the imperative of *Mount Laurel* . . . is neither entirely satisfactory nor wholly successful."[76]

Two deficiencies in the majority opinion caused this sense of foreboding. First, Justice Clifford stated, the "infirmity" in the court's position is "the inescapable by-product of the *judicial* func-

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[73] Justice Mountain continued to dissent.

[74] 72 N.J. 481, 631, 371 A.2d 1192, 1267 (1977) (Clifford, J., concurring).

[75] 67 N.J. 151, 175, 336 A.2d 713, 725, *cert. denied*, 423 U.S. 808 (1975).

[76] *Oakwood*, 72 N.J. at 631, 371 A.2d at 1267 (Clifford, J., concurring).

tion being called upon to solve the extraordinarily complex problems underlying this litigation—problems whose solution . . . should be undertaken elsewhere."[77] The justice put the matter bluntly:

> Let me narrow the focus. What I seek to emphasize is this: society has yet to achieve agreement on the basic question of what it is our courts are expected to do; as a result of this uncertainty we may be accepting litigational burdens which . . . are beyond the institutional capacity of the tribunals and the "cranial capacity" of the judges. . . . [T]he gravitation into the judicial machinery of causes better and more effectively dealt with elsewhere surely jeopardizes the judiciary's "power of legitimacy" . . . .[78]

This threat to judicial legitimacy is exacerbated, in Justice Clifford's view, when the language justifying the court's actions is unclear:

> While I do not for a moment labor under any misapprehension that the general public seeks out our pronouncements to savor the delights of fine English prose, the fact remains that our opinions in this field have to be read—and understood . . . . Unless our determinations are susceptible of concise expression and clear interpretation, they can hardly act as a guide or aid in the predictive art. When it fails in that regard, the law has lost one of its indispensable characteristics.[79]

From these early statements setting forth the elements of illegitimacy in a judicial determination, we can infer the sources of judicial legitimacy. First, Justice Clifford unquestionably accepted the activist premise that "judges make law in the process of deciding cases."[80] In every judicial decision, however, there exists, because of "the frailties of human judgment," a margin of human frailty; it is the obligation of the court to reduce that margin. Courts can reduce that margin in two ways. First, courts can assure that judgments observe the traditional institutional constraints of appellate judging, such as the separation of powers. To the extent that a court addresses issues better suited to resolution by another

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77 *Id.*, 371 A.2d at 1268 (Clifford, J., concurring).

78 *Id.* at 633, 635, 371 A.2d at 1268, 1270 (Clifford, J., concurring) (quoting *Oakwood*, 72 N.J. at 628, 371 A.2d at 1266 (Mountain, J., concurring in part and dissenting in part)).

79 *Id.* at 636-37, 371 A.2d at 1270-71 (Clifford, J., concurring). Justice Clifford then quoted Edwin Newman: "[w]e are all safer when language is specific. It improves our chances of knowing what's going on." *Id.* (quoting EDWIN NEWMAN, A CIVIL TONGUE 69 (1976)).

80 Robinson v. Cahill, 67 N.J. 333, 376, 339 A.2d 193, 217 (1975) (Clifford, J., dissenting).

branch of government or issues otherwise not ripe for review, it has jeopardized its "power of legitimacy."[81] Second, judicial determinations must honor the language in which they are written. They must respect the plain meaning of the instruments or statutes they are construing, for to the extent that the plain meaning of language is manipulated, the certainty of any judicial determination based on language is undermined. In addition to respecting the meaning of any instruments under the court's scrutiny, judicial opinions must themselves be "susceptible of concise expression and clear interpretation" in order both to "aid in the predictive art" and, ultimately, to persuade society that the decision is correct.

IV. THE PARADIGM AT WORK: REDUCING THE MARGIN OF HUMAN FRAILTY

During his two decades on the New Jersey Supreme Court, Justice Clifford wrote 187 majority opinions, 201 dissenting opinions, and 89 concurrences. Those opinions are remarkable for the consistency with which Justice Clifford applied the judicial philosophy developed in his early opinions. No article-length treatment of such a body of work can hope to be comprehensive. It can, however, trace in general terms the progress of Justice Clifford's jurisprudence in major areas of the law, highlight those opinions that are most revealing of Justice Clifford's philosophy, and, ultimately, assess his success in reconciling activist results with traditionalist means.[82] Accordingly, the analysis that follows first identifies the application of Justice Clifford's underlying judicial philosophy by focusing on a particular context—state constitutional law—in which Justice Clifford's attempt to reconcile traditional means with activist ends was most severely tested. It then traces the application of this philosophy more generally in other contexts, and ultimately

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81 *Oakwood*, 72 N.J. at 633, 635, 371 A.2d at 1268, 1270 (Clifford, J., concurring) (quoting *Oakwood*, 72 N.J. at 628, 371 A.2d at 1266 (Mountain, J., concurring in part and dissenting in part)).

82 While mention is made of landmark decisions in which Justice Clifford participated, but did not write, no attempt is made to evaluate whether Justice Clifford's vote on those opinions is consistent with his own jurisprudence. *See, e.g.*, Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Clifford, J., joins unanimous court in implementing specific and wide-ranging zoning standards); New Jersey Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 650 A.2d 757 (1994) (Clifford joins Garibaldi, J., in dissenting from extension of free speech rights to privately owned shopping malls). The official reason for this is simply that there are too many variables and viewpoints to accommodate in any majority opinion for proper evaluation to take place. The other reason is the author's refusal to read every opinion issued by the court since 1973.

appraises Justice Clifford's success in reconciling traditional means with activist ends.

A. *State Constitutional Law*

Justice Clifford, like his brethren on the Hughes and Wilentz courts, did not share Chief Justice Weintraub's hostility toward the Warren Court's expansion of rights under the Fourth and Fifth amendments. Indeed, it was in the context of criminal constitutional law that the New Jersey Supreme Court most enthusiastically heeded Justice Brennan's call for independent state constitutional analysis. Thus, the court applied Chief Justice Weintraub's notion that "the State Constitution could require more" in rejecting a "good faith" exception to the warrant requirement,[83] in requiring repeated readings of *Miranda* warnings in successive interrogations,[84] and in upholding valid privacy interests in fornication[85] and in the contents of curbside garbage.[86]

Justice Clifford's opinions with respect to criminal state constitutional issues mirrored his approach to the school funding issue. While he did not question the status of the federal privacy cases as precedent, or the propriety of independent analysis of the state constitution in appropriate cases, his belief in the "frailties of human judgment" led him to insist that the occasions require such analysis and that the analysis itself establish a clearly defined rule of law.

In *State v. Saunders*, for instance, in holding unconstitutional on state constitutional grounds the New Jersey fornication statute, the court unified the federal cases protecting conjugal and maternal privacy with the cases protecting privacy interests in a search-and seizure context. Reading these independent lines of cases together, Justice Pashman reasoned for the majority that it is but a small leap to conclude that the state has no business outlawing the private act of fornication.

Despite his acceptance of the validity of both lines of federal cases, Justice Clifford dissented because the facts of the case before the court did not justify reaching the issue. In *Saunders*, three men picked up two women in Newark and had sex with them in the car the men were driving. At their subsequent trial for rape, the defendants argued that the women had consented to sex in the car.

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83 State v. Novembrino, 105 N.J. 95, 154, 519 A.2d 820, 854 (1987).
84 State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986).
85 State v. Saunders, 75 N.J. 200, 213, 381 A.2d 333, 339 (1977).
86 State v. Hempele, 120 N.J. 182, 195, 576 A.2d 793, 799 (1990).

The trial court, sua sponte, instructed the jury that the crime of fornication was a lesser-included offense of rape, and the jury convicted the defendants of fornication. The issue, according to Justice Clifford, was not whether the constitutional right of privacy invalidates the fornication statute, but whether fornication should have been charged as a lesser-included offense of rape. Justice Clifford wrote:

> Bluntly put, this case is a wretched vehicle for addressing the questions which counsel . . . would have us answer. It seems somehow incongruous to use the soaring phrases of Mr. Justice Brandeis . . . as support for the proposition that the State of New Jersey is powerless to prohibit . . . indiscriminate group fornicating by—or indeed, among—complete strangers exhibiting remarkable dexterity in the confined quarters of a parked automobile on a deserted lot in Newark.[87]

Justice Clifford noted his agreement with the conclusion that the court should decide the question of the fornication statute's constitutionality as a matter of state constitutional law: "[a]s an abstract proposition, certainly, I am inclined to ground any determination of the statute's invalidity on the State Constitution . . . and on the authority of *State v. Quinlan* . . . ."[88] Justice Clifford insisted, however, that the court was not addressing an "abstract proposition" but a case involving a "grubby little exercise in self-gratification" that could be decided on narrower, safer grounds. "[W]e need not," he concluded, "and I would not, get to the constitutional issue, at least not at this point." As support for this conclusion, Justice Clifford cited "the sound, oft-expressed principle that constitutional questions should not be reached and resolved unless absolutely imperative in the disposition of the litigation."[89]

As in the *Robinson IV* dissent, Justice Clifford quarrelled not with the court's underlying constitutional conclusion but with the liberties taken by the court in order to reach its desired result. In each case, the court could reach the desired result only by disregarding a traditional concept—separation of powers in *Robinson IV*,

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87 *Saunders*, 75 N.J. at 228, 381 A.2d at 346-47 (Clifford, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)).

88 *Id.*, 381 A.2d at 347 (Clifford, J., dissenting) (citing N.J. CONST. art. 1, § 1; *In re* Quinlan, 70 N.J. 10, 40, 335 A.2d 647, 663, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976)). Justice Schrieber, concurring, argued that the federal privacy cases could not be extended to prohibit fornication statutes. In Justice Schrieber's view, such a holding should have been grounded on the state constitution. Justice Clifford agreed with this analysis. *Saunders*, 75 N.J. at 220-28 (Schrieber J., concurring).

89 *Saunders*, 75 N.J. at 229, 381 A.2d at 347 (Clifford, J., dissenting).

the principle that constitutional issues are reached as a last resort in *Saunders*—designed to constrain the judiciary. For the majority in *Robinson IV*, the exigencies of the educational crisis justified the court's admitted encroachment on legislative prerogative. For the majority in *Saunders*, the importance of the privacy issue justified its conclusion that "the salutary purposes of the usual rules of standing should not operate in these circumstances . . . ."[90]

For Justice Clifford, however, the traditional doctrines constraining the judiciary did not decline in importance as the results reached by the court became more progressive; rather, because Justice Clifford premised his philosophy on an abiding sense of "the frailties of human judgment," traditional constraints on the judiciary became increasingly important as results became more "activist." Such constraints are all that exist, once the validity of judge-made law is accepted, to confine the effect of a possibly mistaken judgment. The fact that Justice Clifford was in the minority in both *Robinson IV* and *Saunders* is itself revealing, however, of the tension inherent in Justice Clifford's jurisprudence, for both cases illustrate that the pressure to overcome traditional constraints in order to reach activist results may be too much for a court to resist.

This is not to suggest that this inherent tension is unresolvable. Indeed, the opinions written by Justice Clifford for the majority in four cases decided on independent state grounds—*State v. Hartley*,[91] *State v. Gerald*,[92] *State v. Alston*,[93] and *State v. Hempele*[94]—illustrate the extent to which traditionalist means of construction can be reconciled with arguably activist ends.

1. *Hartley* and the Privilege Against Self-Incrimination

In *State v. Hartley*, the court construed the meaning of the constitutional requirement that a defendant's right to remain silent under *Miranda v. Arizona*[95] be "scrupulously honored."[96] Since that mandate had been emphasized in 1975 in *Michigan v. Mosley*, no consistent approach had emerged to evaluate whether, in a given case, the government had honored an asserted right to silence when the police resumed interrogation. The cases had tended to be extremely fact-sensitive, and had turned on the courts' assess-

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90 *Id.* at 209-10, 381 A.2d at 337.
91 103 N.J. 252, 511 A.2d 80 (1986).
92 113 N.J. 40, 549 A.2d 792 (1988).
93 88 N.J. 211, 440 A.2d 1311 (1981).
94 120 N.J. 182, 576 A.2d 793 (1990).
95 384 U.S. 436, 444 (1966).
96 423 U.S. 96, 102-03 (1975).

ment of the defendants' knowledge of their rights, not on an evaluation of the reasonableness of police conduct.[97]

In *Hartley*, the defendant had been arrested, advised of his rights, and told the police that "I don't believe I want to make a statement at this time," thus invoking his right to silence.[98] The police subsequently reinterrogated the defendant without readvising him of his rights and obtained a confession. Justice Clifford, writing for the majority, surveyed the conflicting precedent and concluded that, in order to "avoid . . . confusion and conflict in future cases," and to give "guidance to our own law-enforcement officials," the court should establish a "bright-line rule."[99] Accordingly, the court held:

> before an accused's previously-asserted right to remain silent may be deemed to have been "scrupulously honored," law enforcement authorities must, at a minimum, readminister the *Miranda* warnings. In the absence of those renewed warnings any inculpatory statement given in response to police-initiated custodial interrogation after the right to silence has been invoked is inadmissible.[100]

While the court was confident that its bright-line rule was consistent with federal case law, it also acknowledged that in light of the conflict among the opinions:

> [i]n respect of federal constitutional law, . . . ours is a predictive exercise, one conducted on the basis of our best understanding of the authorities, but nonetheless predictive. We think our reading of the federal law is right. We acknowledge that it may be wrong. Given the importance of the question involved, we see our duty to settle it as a matter of state law.[101]

Accordingly, the court's holding rested ultimately on the state common law privilege against self-incrimination, informed by the most persuasive federal and state cases. The court concluded that this bright-line rule is "sound as a matter of New Jersey common law [and] consistent with the spirit of the Supreme Court's decisions"

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97 *See* Stumes v. Solem, 752 F.2d 317, 321 (8th Cir. 1985), *cert. denied*, 471 U.S. 1067 (1985); United States v. Hackley, 636 F.2d 493, 500, 504-05 ((D.C. Cir. 1980); Brown v. Tard, 552 F. Supp. 1341, 1349 (D.N.J. 1982); United States v. Kinsey, 352 F. Supp. 1176, 1178 (E.D. Pa. 1972); Wilson v. United States, 444 A.2d 25, 31 (D.C. 1982). *See generally* Yale Kamisar, *The* Edwards *and* Bradshaw *Cases: The Court Giveth and the Court Taketh Away, in* 5 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1982-83 153 (1984).

98 State v. Hartley, 103 N.J. 252, 258, 511 A.2d 80, 83 (1986).

99 *Id.* at 268, 285, 511 A.2d at 88, 97.

100 *Id.* at 256, 511 A.2d at 82.

101 *Id.* at 284-85, 511 A.2d at 97.

in *Miranda* and *Mosley*.[102]

Justice Clifford's opinion in *Hartley* marries perfectly his belief in the application of traditional principles of judicial decisionmaking with his court's social activism. There is no question that the result reached by the court can be considered "activist." Its requirement of repeated administrations of *Miranda* warnings after a suspect has invoked his right to silence goes beyond anything required in *Mosley* or *Miranda*. Furthermore, by resting its decision ultimately on independent state common law grounds, the opinion continued the practice of the New Jersey Supreme Court of affording broader protections to criminal defendants under New Jersey law than the United States Supreme Court requires under the federal Constitution.

Justice Clifford rested on independent state constitutional grounds, however, not in the spirit of departing from federal constitutional requirements but in the interest of clarifying them for the citizens of New Jersey. Indeed, in his opinion for the court four years later in *State v. Harvey*,[103] in deciding that the courts would apply *Hartley* retroactively, Justice Clifford explicitly stated that "*Hartley* did not announce a new rule of law. It was 'not a clear break with the past, but a simple extension of the principle of cases . . . holding that the State must honor "a defendant's request—however ambiguous—to terminate interrogation."'"[104]

Justice Clifford reaffirmed his insistence that his interest lay in making existing law clear, rather than in formulating new law, by refusing, in *State v. Adams*,[105] to extend the principle of *Hartley* to contexts in which the state has previously advised a suspect of his constitutional rights but the suspect has not yet invoked them. In such situations, Justice Clifford wrote for the court, the issue is not whether the state has scrupulously honored the defendant's invocation of rights, but whether the defendant's eventual waiver of his rights was knowing, intelligent, and voluntary.[106]

In *Adams*, the defendant had explicitly refused to sign a written statement, but initiated further questioning almost immediately by offering to discuss the crime with the police. The officer

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102 *Id.* at 268, 511 A.2d at 88.

103 121 N.J. 407, 581 A.2d 483 (1990).

104 *Id.* at 421, 581 A.2d at 489 (quoting State v. Bey (II), 112 N.J. 123, 213, 548 A.2d 887, 933 (1988) (Handler, J., dissenting) (quoting State v. Kennedy, 97 N.J. 278, 288, 478 A.2d 723, 728 (1984))).

105 127 N.J. 438, 605 A.2d 1097 (1992).

106 *Id.* at 445-46, 605 A.2d at 1100 (citing State v. Hartley, 103 N.J. 252, 261, 511 A.2d 80, 84 (1986).

informed the defendant that "it's the same, what you tell me is going to be incorporated in my report, going to court," but the defendant agreed nonetheless to discuss the incident.[107] Justice Clifford refused to extend the bright-line rules of *Miranda* and *Hartley* to require that law-enforcement officers explore with a defendant his understanding of his rights:

> The responsibility of law-enforcement authorities to inform defendants of their rights ends with the proper administration of *Miranda* warnings.[108] . . . A defendant's waiver is not unintelligent merely because it is unwise. . . . A police officer has no duty to probe for a defendant's unstated misconceptions about the effect of the waiver of Fifth Amendment rights.[109]

Similarly, Justice Clifford dissented in *State v. Reed*[110] from the court's holding that New Jersey's privilege against self-incrimination required law enforcement authorities to advise a suspect that there was an attorney waiting to speak with him.[111] In *Reed*, the police not only failed to inform the suspect that an attorney was waiting to speak with him, but also transported the prisoner in a manner calculated to avoid contact with the attorney. In holding that this conduct violated the defendant's privilege against self-incrimination, the majority departed from federal precedent, relying on an extension of the rule of *Hartley*.[112] In *Hartley*, the court noted, "the Court went beyond federal precedent in establishing a strict rule" that the police must readminister *Miranda* warnings when the defendant has invoked his right to silence.[113] The court found the rationale of *Hartley*:

> compelling in the circumstances of this case, in which an attorney retained for defendant was literally knocking at the door and seeking access to the defendant while the police were trying to get him to confess. . . . [T]he need to overcome the coercion inherent in custodial interrogation, which may be significantly increased when a lawyer for the suspect is knocking at the jail-

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107 *Id.* at 452, 605 A.2d at 1103 (Handler, J., concurring).

108 *Id.* at 448, 449, 605 A.2d at 1102 (citing State v. McKnight, 52 N.J. 35, 47, 55, 243 A.2d 240, 247, 251 (1968)). In comparison, Justice Handler stated in his concurrence, "I believe that when a suspect initially partially invokes the right against self-incrimination, only two avenues are open to the police. The officer may seek defendant's clarification of the apparent invocation of the right . . . or may terminate the interview." *Id.* at 455, 605 A.2d at 1105 (Handler, J., concurring).

109 *Id.* at 449, 605 A.2d at 1102.

110 133 N.J. 237, 277, 627 A.2d 630, 651 (1993) (Clifford, J., dissenting).

111 *Id.* at 268, 627 A.2d at 647.

112 *Id.* at 259, 627 A.2d at 641.

113 *Id.*, 627 A.2d at 642 (citing State v. Hartley, 103 N.J. 252, 262, 511 A.2d 80, 84-85 (1986)).

house door, is no less imperative [than in *Hartley*].[114]

Dissenting from the majority's holding that this conduct violated the privilege against self-incrimination under the state constitution, Justice Clifford shared the majority's view of "the deplorable bumbling of the law-enforcement personnel who lied . . . and who scurried through the basement to hide defendant from the attorney who sought to confer with him."[115] Justice Clifford refused, however, to extend the rationale of *Hartley* to the right-to-counsel context: "[w]e have determined that *any indication* of a suspect's desire for counsel . . . triggers the right. But today the Court extends that treasured right even farther, concluding that the right to counsel can attach *even if a suspect expressly and voluntarily waives that right.* That goes too far."[116]

The *Reed* decision went too far, in Justice Clifford's view, in two respects. First, it misread the rationale underlying *Hartley*. The critical distinction is that Reed had never invoked—indeed, he had waived—the protections afforded by the privilege, while Hartley had invoked them. The court in *Reed* was in effect overriding the defendant's *waiver* of his privilege by allowing the presence of the attorney to invoke the privilege for him. Second, the rule established by this misreading of *Hartley* had the effect, in Justice Clifford's view, of unsettling "a coherent and easily-applied body of self-incrimination law that apprises suspects of their rights and police officers of their duties" and thus of undermining the enterprise of *Hartley*.[117] "In departing from those well-established principles," Justice Clifford concluded, "the Court in this case sacrifices certainty to return to this defendant a right that he had expressly rejected."[118]

Read in light of his subsequent opinions in *Harvey*, *Adams*, and *Reed*, Justice Clifford's adherence to traditional notions of appellate jurisprudence in *Hartley* is apparent. The arguably broader protection of individual rights afforded by his opinion in *Hartley* was a consequence of his clarification of existing law, not a cause of it. To the extent that *Hartley* expanded the application of *Miranda* and *Mosley*, it did so to elucidate the underlying principle of law, not to transform that principle. When presented with an opportunity, in *Adams*, to expand the settled prophylactic rules, Justice Clif-

114 *Id.* at 259-60, 627 A.2d at 642.
115 *Id.* at 281, 627 A.2d at 653 (Clifford, J., dissenting).
116 *Id.* at 277, 627 A.2d at 651 (Clifford, J., dissenting) (emphasis in original).
117 *Id.* at 281, 627 A.2d at 653 (Clifford, J., dissenting).
118 *Id.*

ford declined. When the court moved to transform the settled principles, as in *Reed*, Justice Clifford dissented.

Justice Clifford's unwillingness to expand the bright-line rule of *Hartley* should not be taken, however, to signal a willingness to countenance an erosion of the bright-line test. Indeed, the court's unwillingness to apply *Hartley* in the context of a capital punishment case provoked what may well be the most vehement dissent of Justice Clifford's tenure on the court. In *State v. Bey (II)*,[119] the defendant had broken off a lengthy interrogation by stating that he wanted "to lay down and to think about what happened."[120] He rested for over an hour before interrogation resumed without the readministration of *Miranda* warnings.

The court refused to apply *Hartley*, concluding that "[i]mplicit in the [trial court's] findings is the conclusion that defendant had not sought the cessation of questioning."[121] Justice Clifford could not conceal his outrage at this manipulation of the record in order to avoid *Hartley*:

> The question is: how, in the midst of a custodial interrogation, does one lie down and think for an hour about the subject of the interrogation without the interrogation stopping? . . . Only the most profound respect for my colleagues mutes my expression of exasperation with the stated "implicit" conclusion, as well as with the Court's equally extravagant declaration . . . that no reasonable police officer could have construed defendant's request as an assertion of his right to remain silent. In fact, there is no other way to construe it.[122]

"[I]t is," Justice Clifford concluded, "unthinkable that this Court would let a capital-murder appeal deteriorate into some sort of high-stakes 'Gotcha' game."[123]

In Justice Clifford's view, *Hartley* established the bright-line rule that should have applied without regard to whether the police conduct was reprehensible, as in *Reed*, or the criminal conduct was depraved, as in *Bey (II)*. *Hartley* may have been judicial activism, but it was activism accomplished in harmony with the most traditional notions of appellate judging.

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119 112 N.J. 123, 548 A.2d 887 (1988).
120 *Id.* at 187, 548 A.2d at 919 (Clifford, J., dissenting).
121 *Id.* at 139, 548 A.2d at 895.
122 *Id.* at 187-88, 548 A.2d at 920 (Clifford, J., dissenting).
123 *Id.* at 187, 548 A.2d at 918 (Clifford, J., dissenting).

2. *State v. Gerald*[124] and Capital Punishment

In *State v. Gerald*, Justice Clifford's most significant capital punishment opinion, and one of the court's most controversial, the court departed again from federal constitutional precedent and construed the New Jersey Constitution to require that a capital murder defendant have intended to kill his victim. The capital punishment statute contains no such requirement, and the constitutionality of that statute had been upheld just the prior year in *State v. Ramseur*.[125] While the imposition of a requirement of an intent to kill is undeniably activist, the reasoning informing it is, as in *Hartley*, strikingly conservative, for the court in *Gerald* was not breaking new ground in departing from federal precedent. Rather, the court was refusing to follow the United States Supreme Court's retreat from Eighth Amendment principles upon which the New Jersey Supreme Court had relied in upholding the constitutionality of the New Jersey statute.

In *State v. Ramseur*, the court upheld the federal and state constitutionality of the capital punishment statute, which renders defendants who "purposely" or "knowingly" cause death "or serious bodily injury resulting in death" eligible for the death penalty. The *Ramseur* majority had responded to the dissent's argument that this classification was overbroad by relying on *Enmund v. Florida*,[126] which held that for purposes of the Eighth Amendment, the state could not punish one who "did not kill or intend to kill" proportionately to one who actually killed and intended to kill.[127] The *Ramseur* majority stated that to the extent the New Jersey statute could be read to permit the state to impose capital punishment where a defendant intends to inflict only serious bodily injury, such intent is "insufficient to support a capital sentence . . . because of the constitutionally required culpability standards regarding a capital defendant's intent to kill."[128]

The United States Supreme Court subsequently abandoned the federal constitutional requirement of an intent to kill relied on in *Ramseur*, however, in *Tison v. Arizona*.[129] In *Tison*, the Supreme Court upheld the death sentences of brothers who assisted their father, the eventual killer, in a prison escape, but who had no prior

124 113 N.J. 40, 549 A.2d 792 (1988). A constitutional amendment in 1993 effectively reversed the holding of *Gerald*.

125 106 N.J. 123, 524 A.2d 188 (1987).

126 458 U.S. 782 (1982).

127 *Id.* at 798.

128 *Ramseur*, 106 N.J. at 194, 524 A.2d at 223.

129 481 U.S. 137, 158 (1986).

knowledge of, took no part in, and were not even present for the subsequent killing.[130] The *Tison* Court held that a death sentence for one "whose participation is major and whose mental state is one of reckless indifference to the value of human life" would not constitute cruel and unusual punishment.[131]

In *Gerald*, the defendant had participated in a home burglary involving a robbery and a severe beating, after which the victim died. Justice Clifford, writing for the majority, noted that as a result of *Tison*, Gerald could raise no Eighth Amendment claim of disproportionality based on an intent merely to inflict serious bodily harm.[132] This conclusion did not, however, end the inquiry, for "the *Tison* Court's retreat from [the] requirement [that a defendant intend to cause death] raises anew, as a matter of state constitutional law, the issue of the adequacy of the definition of capital murder . . . ."[133] Analysis under state constitutional law is particularly appropriate in capital cases, the opinion continued, based on classic principles of federalism: "capital punishment is a matter of particular state interest . . . and does not require a uniform national policy . . . ."[134]

Accordingly, in holding that the state constitutional prohibition of cruel and unusual punishment affords broader protection than the federal constitution, Justice Clifford emphasized the uniqueness of the New Jersey statutory scheme and legislative history. In particular, Justice Clifford relied on a close exposition of the New Jersey Criminal Code, noting that the code's "'ranking of crimes by degree places those crimes committed with intentional conduct as the highest degree of crime, for which the defendant is most severely punished.'"[135] As originally enacted in 1978, the code's murder provision did not include the "serious bodily injury resulting in death" language at issue in *Gerald* or, for that matter, the capital punishment component; it encompassed simply knowingly or purposefully causing death. Thus, when the legislature added "or serious bodily injury resulting in death," it was necessarily expanding the range of intentional conduct that could be consid-

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130 *Id.* at 158.

131 *Id.* at 152.

132 State v. Gerald, 113 N.J. 40, 75, 549 A.2d 792, 810 (1988).

133 *Id.*

134 *Id.* at 76, 549 A.2d at 811 (quoting State v. Ramseur, 106 N.J. 123, 167, 524 A.2d 188, 209 (1987) (citing State v. Hunt, 91 N.J. 338, 366, 450 A.2d 952, 966 (1982) (Handler, J., concurring))).

135 *Id.* at 77, 549 A.2d at 811 (quoting *Ramseur*, 106 N.J. at 207-08, 524 A.2d at 230).

ered murder.[136] When subsequent legislation made persons convicted under this expanded definition eligible for capital punishment, grafting capital punishment "onto a murder statute that did not contemplate capital punishment at the time it was drafted,"[137] the legislature undermined the gradation of punishment according to intention—the very foundation of the code. The justice stated: "[t]he failure to distinguish, for purpose of punishment, those who intend the death of their victim from those who do not does violence to the basic principle . . . that 'the more purposeful the conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.'"[138]

This undermining of the code's guiding principle results in sentences that are "grossly disproportionate" to the punishment for other crimes under the code. In particular, Justice Clifford cited the code's treatment of aggravated assault, which it defined as the purposeful or knowing infliction of "serious bodily injury" and punished with a prison term of between five and ten years. The justice asserted:

> The only difference between that crime and a serious-bodily-injury murder such as that at issue here is the fact that in the latter case the victim has died, while in the former the victim has survived. In all other material respects, e.g., the nature of the actor's conduct and his or her mental state, . . . the crimes are identical. Stated differently, the purposeful or knowing infliction of "serious bodily injury resulting in death" . . . is an aggravated assault from which death results. . . . [A] defendant convicted of [aggravated assault] faces a term of imprisonment ranging from five to ten years . . . . Where an actor commits an offense that is identical in all material respects except for the victim's unintended death, it is grossly disproportionate to subject that actor to the death penalty. Because the actor's conduct, mental state, and intended result in both instances are virtually identical, the victim's fortuitous survival in one case and unfortunate demise in the other cannot provide an adequate basis for subjecting one actor to a term of imprisonment and executing the other.[139]

Notwithstanding the subsequent criticism of *Gerald* as judicial activism at its legislative worst, the philosophical foundations of the opinion are essentially conservative. While the court did depart

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136 *Id.* at 82-83, 549 A.2d at 814 (citations omitted).

137 *Id.* at 89, 549 A.2d at 818.

138 *Id.* at 85, 549 A.2d at 815 (quoting Tison v. Arizona, 481 U.S. 137, 156 (1986)).

139 *Id.* at 86-87, 549 A.2d at 816 (citations omitted).

from the Supreme Court's Eighth Amendment interpretation, it did so not by breaking new ground but by refusing to budge from ground it considered solid. The court based its evaluation of the issues on independent state grounds, emphasizing the unique features of New Jersey's statutory scheme. This approach was rooted in traditional notions of federalism and statutory construction. Finally, the court did not exploit the occasion presented by *Gerald* to invalidate the capital punishment statute, as the dissent suggested,[140] but adopted "a narrowing construction" designed to save the statute.[141] Like *Hartley*, *Gerald* was an activist result married to traditional judicial means.

3. *State v. Hempele*[142] and the Scope of Privacy

Perhaps the sharpest departure from federal constitutional precedent in Justice Clifford's opinions came in his opinion in *State v. Hempele*, in which the court held that the state constitution protects a reasonable expectation of privacy in the contents of curbside garbage placed in opaque containers.[143] Discomfort with federal Fourth Amendment jurisprudence was nothing new to Justice Clifford. In *State v. Alston*,[144] the justice had departed from federal precedent in holding that standing, for purposes of the state constitution's prohibition of unreasonable searches and seizures, is not based on a legitimate expectation of privacy in the premises searched, but rather on "a proprietary, possessory, or participatory interest in either the place searched or the property seized."[145]

While *Alston* represented a departure from federal Fourth Amendment precedent, that departure—like the departure from Eighth Amendment jurisprudence in *Gerald*—was a reaction to perceived retrenchment by the United States Supreme Court, rather than an attempt to break new ground. In *Rakas v. Illinois*[146] and *United States v. Salvucci*,[147] the United States Supreme Court had narrowed the scope of standing under the Fourth Amendment, overruling *Jones v. United States*.[148] Under *Jones*, a defendant had

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140 *Id.* at 144, 549 A.2d at 846 (Handler, J., dissenting).
141 *Id.* at 91, 549 A.2d at 818.
142 120 N.J. 182, 576 A.2d 793 (1990).
143 *Id.* at 221, 576 A.2d at 813.
144 88 N.J. 211, 440 A.2d 1311 (1981).
145 *Id.* at 228, 440 A.2d at 1319.
146 439 U.S. 128 (1978).
147 448 U.S. 83 (1980).
148 362 U.S. 257 (1960).

standing to challenge the validity of a search if 1) she was legitimately on the premises searched, or 2) the crime charged alleged her possession of the fruits of the search.[149] In *Rakas* and *Salvucci*, the Court rejected both prongs of the test, holding that standing to contest the validity of a search exists only where the defendant has a reasonable expectation of privacy in the place searched, even where the indictment alleges and the defendant concedes possession of the object seized.[150]

In *Alston*, the New Jersey Supreme Court refused to adhere to the United States Supreme Court's narrowing of the doctrine of standing. Justice Clifford, writing for a unanimous court, first explained that "[b]ecause we find that these recent decisions of the Supreme Court provide persons with inadequate protection, . . . we respectfully part company with the Supreme Court's view of standing."[151] The justice then revealed the course that the New Jersey Supreme Court had charted instead:

> [R]ather than follow the amorphous "legitimate expectation of privacy in the area searched" standard . . . we retain the rule of standing traditionally applied in New Jersey, namely, that a criminal defendant [has standing] if he has a proprietary, possessory or participatory interest in either the place searched or the property seized. . . . More significantly . . . we retain the "automatic standing" rule of *Jones*. . . despite the rejection of that rule by the Supreme Court . . . . [W]e find the Supreme Court's grounds for abandoning the *Jones* rule of standing unpersuasive.[152]

Thus, while *Alston* reflected the New Jersey Supreme Court's activism in departing from federal constitutional law, it also reflected Justice Clifford's application of traditional notions of appellate decisionmaking in its adherence to prior New Jersey and federal precedent that, in Justice Clifford's view, established a more certain and easily applied rule of law.[153] In departing from federal precedent in *Alston*, in other words, Justice Clifford did not break new ground; he fortified the ground that already existed.

The same cannot be said, however, of Justice Clifford's opinion for the court in *State v. Hempele*, in which the court upheld a defendant's reasonable expectation of privacy in the contents of

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149 *Id.* at 263, 267.

150 Rawlings v. Kentucky, 448 U.S. 98, 105-106, 106 (1980).

151 State v. Alston, 88 N.J. 211, 226, 440 A.2d 1311, 1318-19 (1981).

152 *Id.* at 228, 440 A.2d at 1319, 1320 (citations omitted).

153 *Id.* at 226-27, 440 A.2d at 1319 (citation omitted).

curbside garbage left in opaque containers.[154] Unlike the situations in *Gerald* and *Alston*, United States Supreme Court precedent had never recognized the rule of law adopted by the court in *Hempele*. To the contrary, in *California v. Greenwood*, the United States Supreme Court had held that the federal Constitution does not prohibit unreasonable searches and seizures of garbage left in areas accessible to the public.[155] Justice Clifford took pains, therefore, to justify this radical departure from federal precedent. The grounds he sought, moreover, were classic federalism:

> For most of our country's history, the primary source of protection of individual rights has been state constitutions, not the federal Bill of Rights. . . . The genius of federalism is that the fundamental rights of citizens are protected not only by the United States Constitution but also by the laws of each of the states. The system may be untidy on occasion, but that untidiness invests it with "a vibrant diversity." . . . The [United States] Supreme Court must be especially cautious in fourth-amendment cases. When determining whether a search warrant is necessary in a specific circumstance, the Court must take note of the disparity in warrant-application procedures among the several states, and must consider whether a warrant requirement in that situation might overload the procedure in any one state. . . . A warrant requirement is not so great a burden in New Jersey as it might be in other states . . . . In holding that the fourth amendment does not protect garbage, the Court suggested that "[i]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[156]

Having justified departure from federal precedent on federalism grounds, Justice Clifford then rejected the subjective expectation of privacy test applied in *Greenwood* in favor of a simple, objective test: "[i]nstead, the New Jersey Constitution requires only that an expectation of privacy be reasonable."[157] In holding that such an expectation of privacy is reasonable, Justice Clifford relied on his own notion of "general social norms," observing that:

> Clues to people's most private traits and affairs can be found in their garbage. . . . Most people seem to have an interest in keeping such matters private; few publicize them voluntarily. Undoubtedly many would be upset to see a neighbor or stranger

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154 State v. Hempele, 120 N.J. 182, 195, 576 A.2d 793, 799 (1990).

155 California v. Greenwood, 486 U.S. 35, 40 (1988).

156 *Hempele*, 120 N.J. at 196, 197, 576 A.2d at 800-01 (citing *Greenwood*, 486 U.S. at 43) (citations omitted).

157 *Id.* at 200, 576 A.2d at 802.

> sifting through their garbage, perusing their discarded mail, reading their bank statements . . . and checking receipts to see what videotapes they rent.[158]

The tension in Justice Clifford's judicial philosophy between his belief in traditional modes of construction and his agreement with the social activism of his court was never more evident than in *Hempele*. Justice Clifford's invocation of federalist principles has a rather hollow ring in light of his later concession that "our ruling conflicts not only with . . . *Greenwood*, but also with the holdings of virtually every other court that has considered this issue."[159] The fact that twenty-seven courts across the country had reached the opposite conclusion from the *Hempele* court suggests that the result in *Hempele* created not diversity, but anomaly. Justice Clifford was candidly unable, moreover, to distinguish the contrary authorities: "'the trouble with those cases is that they are flatly and simply wrong as the matter of the way that people think about garbage.' Garbage can reveal much that is personal. We do not find it unreasonable for people to want their garbage to remain private."[160] Unlike the *Gerald* case, in other words, in which the invocation of federalism was compelling because the court could point to unique aspects of the New Jersey Criminal Code to justify departure, in *Hempele* the court could point ultimately to nothing beyond its visceral sense of "how people think about garbage."

Traditional modes of appellate adjudication could not, in *Hempele*, yield a result consistent with the dictates of Justice Clifford's conscience. As in the *Small v. Rockfeld*[161] case of so many years ago, *Hempele* left Justice Clifford with his "own instincts and experience, [his] notions of human relations and their nuances, on which to rely" to reduce the margin of human frailty.[162] Justice Clifford did break new ground, and concluded by relying on the only remaining—and his abiding—source of legitimacy: eloquence. The New Jersey Constitution, he wrote,

> confers "as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." . . . Permitting the police to pick and poke their way through garbage bags to peruse without cause the vestiges of a person's most private affairs would be repugnant to that

158 *Id.* at 201, 576 A.2d at 802, 803.

159 *Id.* at 223-24, 576 A.2d at 814 (citing 26 cases, in addition to *Greenwood*, where a court refused to recognize a legitimate privacy interest in garbage).

160 *Id.* at 225, 576 A.2d at 815 (quotation omitted).

161 66 N.J. 231, 330 A.2d 335 (1974)

162 *Id.* at 253, 330 A.2d at 814-15.

> ideal. A free and civilized society should comport itself with more decency.[163]

B. General Application

Justice Clifford's reconciliation of traditional means with activist ends is not limited to the context of state constitutional doctrine but pervades his treatment of every area of the law, from insurance to torts, from criminal law to family law. In each area, his tolerance of and advocacy for "activist" results expanding rights was invariably balanced by his insistence on the maintenance of procedural boundaries, and circumscribed by his insistence that a particular decision not do violence to the operative language of a statute or contract, or to the principle of a prior judicial decision.

1. Tort Law

In the context of tort law, Justice Clifford authored opinions expanding the rights of plaintiffs in numerous contexts. In *Dewey v. R.J. Reynolds Tobacco Co.*,[164] Justice Clifford's opinion recognized the existence of a cause of action against a cigarette manufacturer based on that manufacturer's alleged failure to warn of the health risks associated with smoking.[165] In addition, his opinions for the majority recognized an employee's cause of action against an employer for fraudulently concealing knowledge of already-contracted diseases in *Millison v. E.I. duPont de Nemours & Co.*,[166] and recognized state law liability for a drug manufacturer's alleged failure to warn of the risks of tooth discoloration in *Feldman v. Lederle Lab.*[167]

Although receptive to the expansion of plaintiffs' rights that has led to calls for tort reform,[168] Justice Clifford was equally concerned that the judiciary maintain the statutory bounds within which the common law of tort operates. The expansion of plaintiffs' rights was, for Justice Clifford, a substantive expansion, not a procedural one. Indeed, the very substantive nature of the expansion of rights required, in Justice Clifford's view, vigilance in main-

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163 *Hempele*, 120 N.J. at 225, 576 A.2d at 815 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting)).

164 121 N.J. 69, 577 A.2d 1239 (1990).

165 *Id.* at 100, 577 A.2d at 1255.

166 101 N.J. 161, 182, 501 A.2d 505, 516 (1985).

167 97 N.J. 429, 461, 479 A.2d 374, 391 (1984).

168 *See, e.g.*, P. VERNIERO ET AL., RESPONSE TO THE GOVERNOR ON THE SUBJECT OF TORT REFORM (1994) (summarizing developments in the law and recommending reforms).

taining the traditional boundaries. Justice Clifford bridled, for instance, at the court's holding in *Bligen v. Jersey City Housing Authority*[169] that Tort Claims Act immunity did not apply to the snow removal operations of public housing authorities.[170] Observing that "the Court skates on thin ice" in abrogating Tort Claims Act immunity in order to compensate a victim, Justice Clifford insisted that no respectable argument justifies "the sleigh ride that the Court takes us on today."[171] Similarly, in *Mahoney v. Carus Chemical Co.*,[172] Justice Clifford dissented from the court's abrogation of the rule prohibiting firemen from suing for injuries incurred in the line of duty as a result of negligence.[173] Justice Clifford also dissented from the court's manipulation of the statute of limitations in order to afford a remedy in *Buonviaggio v. Hillsborough*,[174] *Graves v. Church & Dwight Co., Inc.*,[175] *Lynch v. Rubacky*,[176] and *Crispin v. Volkswagenwerk, A.G.*,[177] and from the court's allowance of a juror who had found no liability to deliberate on the issue of damages in *Williams v. James*.[178] Allowing such a juror to deliberate, Justice Clifford wrote, will fuel bad lawyer jokes.[179]

Nor was this cautious approach limited entirely to procedural issues; Justice Clifford dissented from the expansion of substantive plaintiffs' rights where such expansion defied common sense or resulted in a perceived windfall out of proportion to the harm suffered. Thus, noting that "'the figure of Justice is conventionally portrayed as carrying scales, not cornucopia,'" Justice Clifford dissented from the court's conclusion in *Alfone v. Sarno*[180] that a decedent's recovery, during her lifetime, for the injuries that caused her eventual death did not bar a wrongful death action.[181]

In *Brown v. Racquet Club of Bricktown*,[182] Justice Clifford dissented from the court's allowance of a suit against a repair contrac-

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169 131 N.J. 124, 619 A.2d 575 (1993).
170 *Id.* at 137, 619 A.2d at 582.
171 *Id.* at 135, 619 A.2d at 583 (Clifford, J., dissenting).
172 102 N.J. 564, 510 A.2d 4 (1986).
173 *Id.* at 587, 510 A.2d at 16 (Clifford, J., dissenting in part).
174 122 N.J. 5, 22, 583 A.2d 739, 747 (1990) (Clifford, J., dissenting).
175 115 N.J. 256, 271, 558 A.2d 463, 471 (1993) (Clifford, J., dissenting).
176 85 N.J. 65, 78, 424 A.2d 1169, 1175 (1981) (Clifford, J., dissenting).
177 96 N.J. 336, 357, 476 A.2d 250, 261 (1984) (Clifford, J., dissenting).
178 113 N.J. 619, 634, 552 A.2d 153, 161 (1989) (Clifford, J., dissenting).
179 *Id.*
180 87 N.J. 99, 432 A.2d 857 (1980).
181 *Id.* at 124, 432 A.2d at 870 (Clifford, J., dissenting) (quoting John G. Fleming, *The Lost Years, A Problem in the Computation and Distribution of Damages*, 50 CAL. L. REV. 598, 603 (1972)).
182 95 N.J. 280, 471 A.2d 25 (1984).

tor for the collapse of a stairway, when the building's structure concealed the defect and reasonable inspection did not reveal the problem.[183] Allowance of a cause of action in those circumstances, Justice Clifford wrote, "could give res ipsa loquitur a bad name."[184]

In *Newark Beth Israel Medical Center v. Gruzen*,[185] Justice Clifford mocked the "indoor sport of picking apart a problem" in arguing that a defective condition should be considered unsafe only when directly capable of producing injury.[186] Finally, in *Board of Education v. Caffiero*,[187] the justice dissented from the court's resurrection of a dormant Civil War-era statute to hold parents vicariously liable for their children's school vandalism.[188] Quoting Disraeli's observation that "there are two things the public should never see being made: sausage and the law," Justice Clifford decried a result that could be read to "visit liability upon the parents of children who have remained immune to their parents' best efforts at the world's most difficult job, parenting . . . ."[189]

2. Insurance Law

As in the context of tort law, Justice Clifford was sympathetic to the rights of plaintiffs in insurance law, authoring an opinion for the court allowing recovery of personal injury protection benefits from a parent's insurance policy where the child had been the victim of a drive-by shooting.[190] Closely allied to his insistence on the maintenance of traditional boundaries in tort law, however, was Justice Clifford's insistence on strict construction of insurance instruments.

Thus, in *State v. Signo Trading International, Inc.*,[191] writing for a four-member majority, Justice Clifford refused to reform an insurance contract to carry out the "reasonable expectations of the parties" where the contractual language was clear.[192] In *Signo*, the court's "first excursion into the thicket of environmental-pollution coverage," the policy at issue covered damage to property owned

183 *Id.* at 303, 471 A.2d at 37 (Clifford, J., dissenting).
184 *Id.* at 302, 471 A.2d at 36 (Clifford, J., dissenting).
185 124 N.J. 357, 590 A.2d 1171 (1991).
186 *Id.* at 372, 590 A.2d at 1178 (Clifford, J., dissenting).
187 86 N.J. 308, 431 A.2d 799 (1981).
188 *Id.* at 326, 431 A.2d at 808 (Clifford, J., dissenting).
189 *Id.* (citation omitted).
190 Lindstrom v. Hanover Ins. Co., 138 N.J. 242, 251-52, 649 A.2d 1272, 1277 (1994).
191 130 N.J. 51, 612 A.2d 932 (1992).
192 *Id.* at 66, 612 A.2d at 940.

by third parties.[193] Because of the "imminent danger" of the migration of hazardous substances to third-party properties, the trial court held that cleanup of the insured's property met the reasonable expectations of the parties and ordered that it be covered by the insurance company. The New Jersey Supreme Court reversed. Justice Clifford acknowledged the validity of the "reasonable expectation of the parties" doctrine, but emphasized the limited scope of its application:

> [C]ourts should resort to the doctrine of reasonable expectations only when "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." . . . "When the terms of an insurance contract are clear, [as in this case,] it is the function of a court to enforce it as written and not to make a better contract for either of the parties."[194]

As in the area of tort law, Justice Clifford embraced the "activist" doctrine—in this case the reformation of certain insurance contracts in accordance with the courts' view of the reasonable expectations of the parties—but only where its intended sphere is clearly and narrowly drawn and never at the expense of the manipulation of clear, explicit language rendering it inapplicable. Conversely, where contractual provisions are either ambiguous or silent, the courts are justified in evaluating and enforcing the parties' reasonable expectations. In *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n Insurance Co.*,[195] for instance, where an insurance contract was silent as to which state's law would govern its construction, Justice Clifford held that the parties could reasonably expect that New Jersey's law would apply because the toxic waste at issue was to be stored in New Jersey.[196]

Justice Clifford also insisted on the maintenance of traditional procedural boundaries in the context of insurance law. He thus resisted any relaxation of the statute of limitation applicable to insurance contracts, upholding strict construction of those limits in *Ochs v. Federal Insurance Co.*[197] and *Rivera v. Prudential Property & Casualty Insurance Co.*[198]

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193 *Id.* at 58, 612 A.2d at 936.

194 *Id.* at 62-63, 612 A.2d at 938 (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247, 405 A.2d 788, 795 (1979); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717, 720 (1960)).

195 134 N.J. 96, 629 A.2d 885 (1993).

196 *Id.* at 98, 629 A.2d at 886.

197 90 N.J. 108, 115, 447 A.2d 163, 167 (1982).

198 104 N.J. 32, 40, 514 A.2d 1296, 1301 (1986).

While more than willing to construe an ambiguous instrument against the insurance industry that prepared it, Justice Clifford insisted that the court strictly enforce contractually defined bounds of coverage and not alter them in the interest of compensating a plaintiff. Thus, in *Paterson Tallow Co. v. Royal Globe Insurance Cos.*,[199] Justice Clifford refused to extend coverage under a personal liability policy for a malicious prosecution claim where the prosecutor filed the underlying criminal complaint before the policy's effective date.[200]

Furthermore, in *Allstate Insurance Co. v. Malec*,[201] Justice Clifford upheld a contractual exclusion of coverage in an automobile liability insurance policy for liability resulting from the commission of an intentional wrongful act.[202] In *Voorhees v. Preferred Mutual Insurance Co.*,[203] Justice Clifford dissented from the majority's extension of coverage under a personal liability policy because the contract's language—which extended coverage for "bodily injuries"—clearly did not embrace "emotional distress."[204]

Clear language was also the controlling factor in *Salem Group v. Oliver*,[205] in which the justice objected to the extension of coverage under a homeowner's liability policy for liability incurred in an all-terrain-vehicle accident because the insurance contract clearly delineated the limited scope of the homeowner's coverage.[206]

Finally, in *SL Industries v. Federal Insurance Co.*[207] Justice Clifford dissented from the majority's conclusion that a "false representation" that induced retirement was an "accident" within the meaning of an employer's liability policy.[208] As in the context of tort law, the court could expand plaintiffs' rights, but not, in Justice Clifford's view, at the expense of the integrity of language or procedure.

3. Criminal Law

Justice Clifford's general approach—countenancing activism in substantive areas of the law while policing traditional boundaries

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199 89 N.J. 24, 444 A.2d 579 (1982).
200 *Id.* at 36-37, 444 A.2d at 586.
201 104 N.J. 1, 514 A.2d 832 (1986).
202 *Id.* at 13, 514 A.2d at 838.
203 128 N.J. 165, 607 A.2d 1255 (1992).
204 *Id.* at 186, 607 A.2d at 1265 (Clifford, J., dissenting).
205 128 N.J. 1, 607 A.2d 138 (1992).
206 *Id.* at 7, 607 A.2d at 140 (Clifford, J., dissenting).
207 128 N.J. 188, 607 A.2d 1266 (1992).
208 *Id.* at 217, 607 A.2d at 1281 (Clifford, J., dissenting).

of language and procedure—was also manifest in his opinions regarding criminal law. In particular, Justice Clifford never made his insistence that the court give words their commonly understood meanings more clear than in the context of construing criminal statutes. Writing for the majority in *State v. Afanador*,[209] Justice Clifford upheld the constitutionality of New Jersey's "drug kingpin" statute against a vagueness challenge, noting that "a person of average intelligence comprehends the meaning of the words 'organizer, supervisor, financier or manager.' The utterance of any of those expressions would not send the average citizen scrambling for a dictionary."[210]

Conversely, where the court strained to manipulate the meaning of vague statutory language in order to uphold a statute, Justice Clifford dissented vehemently. In *State v. Lee*,[211] the court upheld, against a due process vagueness challenge, a statute defining possession of a weapon for an unlawful purpose as possession of any object for a purpose that was "not manifestly appropriate."[212] Justice Clifford, dissenting, wrote: "If the woeful lack of precision in our public discourse has not yet reached scandalous proportions, it bodes fair soon to do so. . . . I view today's decision as making a significant, if unwitting, contribution to the decline in exactness of speech . . . ."[213] This insistence on exactness in speech was not, however, mere grammatical grousing; rather, Justice Clifford insisted that by promoting inexactness, the majority's opinion "depreciates an indispensable characteristic of the law: concise expression and clarity of meaning."[214] The term "not manifestly appropriate," in Justice Clifford's view, "drips with subjective content" and "runs the risk, intolerable in a criminal statute, of wild swings of meaning."[215] Countenancing such vagueness, Justice Clifford concluded, carries implications not only for law but for the social discourse on which law is built:

> "Traditionalists revere their mother-tongue . . . not out of a perverse delight in quibbling nor out of a slavish adherence to arbitrary rules and antique forms, but rather because they realize that language is the participatory instrument of intellection.

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209 134 N.J. 162, 631 A.2d 946 (1993).

210 *Id.* at 171, 631 A.2d at 951.

211 96 N.J. 156, 475 A.2d 31 (1984).

212 *Id.* at 167, 475 A.2d at 36.

213 *Id.*, 475 A.2d at 36-37 (Clifford, J., dissenting).

214 *Id.*, 475 A.2d at 37 (Clifford, J., dissenting) (citing Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 631, 636-37, 371 A.2d 1192, 1268, 1271 (1977) (Clifford, J., dissenting)).

215 *Id.* at 169, 475 A.2d at 38 (Clifford, J., dissenting).

> From this perspective language is not simply a means of communication but also an ethical art."[216]

Similarly, in *State v. Valentin*,[217] Justice Clifford dissented from the court's refusal to apply a statute prohibiting the provision of false information to the police to a defendant who provided an alias when asked his name.[218] Justice Clifford wrote:

> If only lawyers and judges would just learn to talk the way regular folks do we would avoid a good many problems. . . . One need not be a lawyer or wordsmith or semanticist to understand that a statute proscribing the volunteering of false information to a law-enforcement officer is violated when Denny Valentin, wanted on a stolen vehicle charge, tells a state trooper that his name is Ramon Velez. I do not think the crowd down at the corner newsstand would have nearly the trouble with this simple, eminently sensible statute that this Court has.[219]

4. Procedural and Institutional Integrity

As in his early dissents and his opinions in the specific contexts discussed above, Justice Clifford's opinions in other areas balanced his approval of activist results with an emphasis on the integrity of language and process. For instance, a corollary of his insistence that words have commonly held meanings, and that those meanings matter, was Justice Clifford's safeguarding of trial procedure. Justice Clifford took pains to ensure process-neutrality in jury selection, arguing that the erroneous denial of a challenge for cause could not constitute harmless error where the defendant subsequently exhausted his peremptory challenges,[220] and that in capital cases the jury voir dire must exhaustively explore the jurors' attitudes about a defendant's prior homicide record in order to

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216 *Id.* (quoting Salemi, *Book Review*, U. BOOKMAN 45, 47 (1979) (reviewing J.N. HOOK, ENGLISH TODAY: A PRACTICAL HANDBOOK (1976)).

217 105 N.J. 14, 519 A.2d 322 (1987).

218 *Id.* at 24, 519 A.2d at 327 (Clifford, J., dissenting).

219 *Id.* at 23, 24, 519 A.2d at 327 (Clifford, J., dissenting); *see also* State v. Lashinsky, 81 N.J. 1, 30, 404 A.2d 1121, 1136 (1979) (Clifford, J., dissenting) (stating that the vagueness of the term "moving on" in statute should render the statute unconstitutional). *Cf.* State v. Cameron, 104 N.J.42, 53, 514 A.2d 1302, 1308 (1989) (adapting common law defense of intoxication to the model penal code, and holding that intoxication relates only to purposeful or knowing conduct, not to reckless conduct, because the act of becoming intoxicated is itself reckless); State v. Hawks, 114 N.J. 359, 367, 554 A.2d 1330, 1335 (1989) (applying Graves Act's mandatory sentencing provision even though the defendant's second Graves Act conviction was for his first Graves Act offense).

220 State v. Singletary, 80 N.J. 55, 71, 402 A.2d 203, 211 (1979) (Clifford, J., dissenting).

ensure impartiality.[221]

As important as the composition of the jury, moreover, was what the court allowed the jury to hear. Justice Clifford dissented consistently from the conclusion that improper prosecutorial comment during trial or summations or conduct in withholding evidence can constitute harmless error.[222] Similarly, Justice Clifford took the position that the court should not permit defendants in capital cases to infect the penalty proceeding with information—on the failure of capital punishment to deter homicide—unrelated to the character of the accused or the circumstances of his offense.[223]

Justice Clifford also carefully delineated the bounds of appellate courts' institutional competence. Thus, in *Stone v. Old Bridge*,[224] noting that "[t]here is no fun in being the Court's resident nitpicker," Justice Clifford dissented from the court's reaching the issue of the applicability to municipal employment contracts of the state's fiscal law.[225] The justice, opining that that issue was beyond the scope of the disposition in the appellate division, stated: "But this is a nit worth picking. Look at what we have here: the Court not only reaches a result not contemplated by the appeal, it achieves a result not even *allowed* by our Rules because the issue the Court decides is *not* before us."[226] For Justice Clifford, the issue "is not whether the Court's scholarly exercise gets to the 'right' place or no; it is rather whether the Court should have embarked on its journey in the first place."[227] Justice Clifford vehemently rejected a result that would "go beyond the issue before us in order to accommodate our own free-floating views of justice."[228] His reason for such restraint is grounded, moreover, in "the frailties of human judgment:"

> I can muster up whatever fortitude is required to resist the Circean allure of that approach, for it is not inconceivable to me

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221 State v. Biegenwald, 126 N.J. 1, 35, 594 A.2d 172, 189 (1991).

222 *See, e.g.*, State v. Koedatich, 112 N.J. 225, 341, 549 A.2d 939, 1000 (1988) (Clifford, J., dissenting) (referring to the prosecutor as a "loose cannon"); State v. Carter, 91 N.J. 86, 139, 449 A.2d 1280, 1309 (1982) (Clifford, J., dissenting) (stating that "suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution") (citations omitted). *Cf.* State v. Irving, 114 N.J. 427, 443, 555 A.2d 575, 583 (1989) (finding that the prosecutor could properly comment on absence of defendant's alibi witness).

223 State v. Rose, 120 N.J. 61, 65, 576 A.2d 235, 237 (1990).

224 111 N.J. 110, 543 A.2d 431 (1988).

225 *Id.* at 123, 543 A.2d at 437 (1988) (Clifford, J., dissenting).

226 *Id.* at 123-24, 543 A.2d at 438.

227 *Id.* at 124, 543 A.2d at 438 (Clifford, J., dissenting).

228 *Id.* at 125, 543 A.2d at 438 (Clifford, J., dissenting).

> that the lawyers who have lived with this case actually know a lot more about it than we do, and they may have structured the appeal to this Court the way they did for reasons that are of no proper concern to us. . . . I will assume that [plaintiff's attorneys] know what they are doing with their case, but I will not assume that they should win hands down on an issue that they did not choose to pursue.[229]

Thus, Justice Clifford adhered consistently to the view that the court should not "decide the wrong question the wrong way,"[230] substituting its judgment for that of others in contexts where its qualifications to render judgments "run the gamut from the well-concealed to the nonexistent."[231]

A similar concern for institutional integrity led Justice Clifford, in other contexts, to insist on deference to findings of fact made by lower courts. He dissented from the court's decision to ignore trial court findings of fact in *State v. Bey (II)*.[232] Additionally, urging deference to lower court findings in *State v. Gilmore*,[233] he likened the resemblance of a transcript to a live proceeding to that of a "dehydrated peach" to the ripe fruit.[234] Likewise, he upbraided the court, in *Rochinsky v. State*,[235] for interfering with lower court proceedings by suggesting that the plaintiff, on remand, add a Tort Claims Act count to its complaint,[236] noting that the court is not "a roving commission" dispensing free legal advice.[237]

Justice Clifford's concern that the court not overstep its institutional bounds, as evidenced by his insistence on the integrity of language and procedure, is reminiscent not of a view of appellate judging normally associated with activism, such as Justice Brennan's view of appellate judging as the discovery and enforcement of evolving notions of human dignity, but rather of Justice Frankfurter's view of appellate judging as obliging judges to exercise restraint. Indeed, Justice Clifford noted his views' kinship with those

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229 *Id.* at 125, 126, 543 A.2d at 438-39 (Clifford, J., dissenting). *See also* Eastern Paralyzed Veterans Assoc., Inc. v. Camden, 111 N.J. 389, 408, 545 A.2d 127, 137 (1988) (Clifford, J., dissenting).

230 *In re* Application of VV Publishing Corp., 120 N.J. 508, 520, 577 A.2d 412, 418 (1990).

231 Greenwood v. State Police Training Ctr., 127 N.J. 500, 518, 606 A.2d 336, 345 (1992) (Clifford, J., dissenting).

232 112 N.J. 123, 186, 548 A.2d 887, 919 (1988) (Clifford, J., dissenting).

233 103 N.J. 508, 511 A.2d 1150 (1986).

234 *Id.* at 547, 511 A.2d at 1170-71 (Clifford, J., dissenting) (quoting Trusky v. Ford Motor Co., 19 N.J. Super. 100, 104, 88 A.2d 235, 237 (App. Div. 1952)).

235 110 N.J. 399, 541 A.2d 1029 (1988).

236 *Id.* at 417, 541 A.2d at 1038.

237 *Id.* at 431, 541 A.2d at 1046 (Clifford, J., dissenting).

of Justice Frankfurter explicitly: "[l]ike Justice Frankfurter," he wrote, "I do not perceive procedure as 'just folderol or noxious moss. Procedure—the fair, orderly and deliberative method by which claims are to be litigated—goes to the very substance of the law.'"[238]

The comparison to Justice Frankfurter is an instructive one. Like Justice Frankfurter, Justice Clifford's "'attitude of judicial humility'"[239] led him to emphasize the jurisdictional and procedural boundaries of the court's function, "thereby marking out the areas of its competence with precision and giving clear guidance to the bar and the lower courts."[240] Like Justice Frankfurter, Justice Clifford emphasized "'the historically defined, limited nature and function of courts' . . . to keep the Court from 'entertain[ing] constitutional questions in advance of the strictest necessity.'"[241]

Justice Frankfurter, however, could not reconcile the principles of formal restraint with the substantive activism of the Warren Court. Thus, he was compelled to dissent from many of the Warren Court's groundbreaking decisions, arguing, for instance, that the principle of one person, one vote was not justiciable,[242] and that the federal court's extension of its Fourth Amendment jurisprudence to the states was inappropriate.[243] Justice Clifford saw no such fundamental incompatibility. Unlike Justice Frankfurter, Justice Clifford did not believe that the notion of judicial restraint embraced substance as well as form, because he did not share Justice Frankfurter's view that activist rulings by their very nature overwhelm traditional constraints. Indeed, for Justice Clifford, traditional constraints were so important precisely because of their role as a safeguard in circumscribing both the reach of the court and the effect of its rulings.

V. CONCLUSION

The problem of the compatibility between traditional means

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238 Stone v. Old Bridge, 111 N.J. 110, 126, 543 A.2d 431, 439 (Clifford, J., dissenting) (quoting Cook v. Cook, 342 U.S. 126, 133 (1951) (Frankfurter, J., dissenting)).

239 PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 83 (1994) (quoting Frankfurter, J.).

240 WHITE, supra note 6, at 353.

241 *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 503 (1961) (opinion of Frankfurter, J.)).

242 *See* Baker v. Carr, 369 U.S. 186, 334, 340 (1962) (Frankfurter, J., dissenting) (stating that "continuing national respect for the Court's authority depends in large measure on its wise exercise of self-restraint and discipline in constitutional adjudication").

243 Mapp v. Ohio, 367 U.S. 643, 680 (1961).

of appellate review and activist ends is the preeminent issue in American jurisprudence of the last twenty years. Implicit in the views of advocates of judicial restraint, such as Justice Frankfurter, is the notion that activist ends overwhelm traditional constraints by their very nature. In this view, the court's substantive activism necessitated its disregard of traditional notions of separation of powers in *Robinson I* and *Mt. Laurel*, and its relaxation of traditional notions of standing in *Saunders*.

Ironically, judicial activists such as Justice Pashman might actually agree with the apostles of judicial restraint on this point. Viewed, for instance, from the vantage point of the judicial philosophy of his colleague Justice Pashman, Justice Clifford's unwillingness to finesse, if not abandon, traditional notions of standing or separation of powers in cases such as *Robinson*, *Mt. Laurel*, or *Saunders* frustrated the internal logic of those decisions. For Justice Pashman, the court's willingness in *Robinson* and *Mt. Laurel* to reach the constitutional issues required it to impose commensurate remedies, regardless of the separation of powers. Similarly, in *Saunders*, the importance of unifying the criminal and conjugal rights of privacy necessitated, for Justice Pashman, a relaxation of traditional notions of standing.

Justice Clifford's body of work suggests, however, that while activist ends will always exist in tension with traditional means, the effort to reconcile them is not fruitless; to the contrary, it is in many instances the highest form of judicial art. For Justice Clifford, such notions as standing in *Saunders* or separation of powers in *Robinson* or *Mt. Laurel* exist precisely to set boundaries beyond which the court's inner logic may not carry it; those boundaries become more, not less, important as the court's logic tempts it to breach them. At the same time, however, the court is not only free, but obliged, in Justice Clifford's view, to reach the issues, such as curbside garbage in *Hempele*, or confessions in *Hartley*, or school funding in *Robinson*, that are properly before it, even where the absence of traditional bulwarks renders the judgments suspect.

For Justice Clifford, all judicial determinations are suspect, because they are founded ultimately on the judge's limited experience and fallible perceptions. To the extent, however, that a judge can point to objective factors that lie outside of his experience—traditional notions of restraint, such as separation of powers or standing, or the commonly held meaning of language—he can increase the indicia of legitimacy, and thus reduce the margin of human frailty inherent in any judgment. That was Justice Clif-

ford's unflagging goal; his consistency in attaining it is remarkable.[244]

In an era in which judgments come not as oracular pronouncements but as expositions of arguable propositions, Justice Clifford's opinions express for his time the tradition of American appellate judging identified by Professor White in *The American Judicial Tradition*:

> The source of judicial authority . . . [is not oracular pronouncement or original intent but] the process of judicial reasoning. Reasoning illustrate[s] the extent to which judges merely "follow[ ]" the law; reasoning illuminate[s] the fundamental principles of American government involved in a case. Rhetoric, in a judicial opinion, [has] thus a dual function: that of interpreting the law and that of justifying the exercise of the judicial function in a politically independent manner.[245]

Justice Clifford's insistence that activist results have some grounding in clear language and traditional appellate process, and that the court clearly and persuasively state that basis, represents the legitimate late-twentieth century expression of the tradition of American appellate judging begun by Chief Justice Marshall.

Above all, Justice Clifford's judicial philosophy is a powerful prescription for moderation. The course of moderation in law or politics will always prove the most difficult, precisely because moderation resists the tyranny of any internal logic. But such moderation has been the salvation of American law. It stands as the legacy of the great American appellate judges, and its beacon from our courts grows brighter as it fades from a public discourse of televised extremes.

Justice Clifford never abdicated his duty to render judgment, no matter how inexpedient. At the same time, he never forgot the political and institutional constraints of his office, or "the frailties of human judgment" on which his decisions ultimately rested. In his career-long insistence that "[a] free and civilized society should comport itself with . . . decency," Justice Clifford did more than

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244 Nor was the justice above changing his mind in following the dictates of his conscience. *See Tretina Printing, Inc. v. Fitzpatrick & Assocs. Inc.*, 135 N.J. 349, 366, 640 A.2d 788, 796 (1994) (Clifford, J., concurring) ("I prefer to view my defection more as a demi-pirouette—not particularly graceful or elegant, I admit, but something less than a full-fledged about face.").

245 WHITE, supra note 6, at 34.

stand within the tradition of American appellate judging; he exemplified that tradition.[246]

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[246] State v. Hempele, 120 N.J. 182, 225, 576 A.2d 793, 815 (1990).

As the last footnote of this Essay, this is an appropriate occasion to genuflect in the general direction of Justice Clifford's abhorrence of footnotes. Concurring in *In re* Opinion 662 of the Advisory Committee on Professional Ethics, 133 N.J. 22, 32, 626 A.2d 1084, 1089 (1993), Justice Clifford noted that footnotes embody "usually a monumental piece of irrelevancy or pseudo-scholarship" and observed that reading them is "'like having to run downstairs to answer the doorbell during the first night of the honeymoon.'" *Id.* (quoting John Barrymore, quoted in NORRIE EPSTEIN, THE FRIENDLY SHAKESPEARE 75 (1992)). In homage to the spirit of this observation, I have labored diligently to assure that this Essay's 246 [!] footnotes are, where possible, wholly devoid of substance, if not pointless.