CATCHER IN THE RYE JURISPRUDENCE

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I keep picturing all these little kids playing some game in this big field of rye and all . . . . And I'm standing on the edge of some crazy cliff. What I have to do, I have to catch everybody if they start to go over the cliff—I mean if they're running and they don't look where they're going. I have to come out from somewhere and catch *them. That's all I'd do all day. I'd just be the catcher in the rye and all.*[1]

J. D. Salinger

In this State, we do not set people adrift because they are the victims of misfortune. We take care of each other.[2]

Justice Morris Pashman

According to the great liberal political theorists, we created the state to protect ourselves from each other. When we did that, however, the state itself became a potential source of oppression. We therefore created the rule of law to mediate between our fear of each other and our fear of the state. The problem of jurisprudence is to explain when the exercise of state power is legitimate and when it is oppressive.

In his many opinions, Justice Pashman explained how he justified his exercise of judicial power. I want to discuss his conception of the proper judicial role in government. I am particularly interested in his espousal of judicial activism, which is by far the most controversial aspect of his jurisprudence. It is currently fashionable to criticize activism like that of Justice Pashman; I believe his judicial philosophy was right and good, and this Article will explain why I agree with it. I will first explain and defend the jurisprudential view commonly known as "judicial activism," and then discuss Justice Pashman's contribution to it.

I. Judicial Fear of Lawmaking

Judges make law. Yet many of them are afraid to admit it. They are afraid because they want their exercise of judicial power to appear uncontroversial. Lawmakers engage in politics, and politics is a nasty,

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1. J. D. Salinger, The Catcher in the Rye 224 (1951).

2. New Jersey Ass'n for Retarded Citizens v. Human Services Dep't, 89 N.J. 234, 252, 445 A.2d 704, 713 (1982).

controversial business. Judges therefore invent arguments to convince themselves and others that they do not exercise lawmaking power. They have had several hundred years of experience doing this, and they do it quite well.

One of the more tenacious and subtle arguments of this sort is the case for judicial passivism. It is a powerful argument which has convinced intelligent and sophisticated people that judges can do their jobs well without making law. Yet the argument is terribly wrong and misleading; when examined closely, it becomes incoherent. I believe it is comprehensible only as an effort to reconcile people to the status quo. It does this by making them believe that when judges decide cases, they do not take sides in the social and political struggles of daily life. The trick is that people can be made to believe this even though judges have used the massive coercive power of the state to enforce the existing distribution of wealth, power, and prestige.

II. Activism and Passivism

Judges are accused of illegitimate "activism" when they decide cases which involve highly controversial and politicized issues. These accusations invariably come from individuals who disagree with the outcomes of those cases. Rather than criticize the outcomes directly, they claim that the court overstepped its institutional bounds by deciding issues which should be left to the political process. These issues involve the allocation of various forms of power.

I would define judicial activism as the willingness to change legal rules in a way that alters the existing distribution of social, economic, or political power. In public law, judges determine both the distribution of powers between governmental entities and the legal relation between governmental powers and individual liberties. Activism in public law is the willingness to interfere in political life in a way that contravenes the apparent will of the legislature or executive. In private law, where judges determine the legal relations among individuals, activism is the willingness to change the current legal rules in ways that disturb existing patterns of economic and social advantage.[3] Activism has no inherent political direction to the right or to the left.[4]

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3. Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 Research in Law and Sociology 3, 5-6 (1980).

4. *Id.* at 6. The Court in the *Lochner* era was every bit as activist on the right as the Warren Court was on the left. The *Lochner* era was the period in the beginning of this century in which "the Supreme Court was quite willing . . . to scrutinize and invalidate economic regulations pursuant to the due process clause." L. Tribe, American Constitutional Law § 8-2 (1978). By left wing activism, I mean the desire to change the legal rules in ways that will redistribute wealth, power, and prestige in a more egalitarian fashion. Right wing activism is the willingness to alter legal entitlements to reinforce existing hierarchies. While these are crude generalizations, they will suffice for my purposes in this Article.

By contrast, passivist judges seek to enforce the existing legal rules governing relations among individuals or to defer to the will of one of the other branches of government. The passivist position assumes that there is almost always an established rule, precedent, statute, regulation, principle, or doctrine which cleanly and definitively answers the legal question before the judge. The judge can therefore decide the case without having to make new law. Like activism, passivism has no inherent political direction. The existing legal rules may further either a left or a right wing political program.

The problem of the judicial role makes the argument for passivism seem quite attractive. Unelected judges fear being seen as tyrants if they contravene the will of democratically elected officials or if they change the legal rules in a way that appears to usurp the lawmaking function of those officials. This fear motivates them to deny the activist elements of their decisions. The more a decision conflicts with the status quo, the more the judge is likely to claim to be enforcing the democratically expressed will of the people. For example, when Chief Justice Marshall invented the doctrine of judicial review—surely one of the Supreme Court's most activist decisions ever—he claimed that he was merely enforcing the will of the people as expressed in the Constitution.[5]

Despite its attraction, passivism gives only the illusion of solving the problem of the judicial role. This is because a *consistent* passivist position would not only be impossible but, as I shall explain below, would constitute a radical departure from conventionally accepted principles of both public and private law.

III. The Constitutive Role of Judicial Activism

A. *Private Law*

Consider a situation in which the plaintiff claims that the defendant invaded her legal rights, and the defendant claims that she was legally entitled to act as she did. The judge must decide whether the defendant behaved within the bounds of her legal right, or whether the law imposes upon her a duty to the plaintiff either to refrain from the action or to provide redress for damages. For a variety of reasons, passivism cannot solve the problem of the judicial role in situations like this.

Despite the undemocratic origin of their power, judges have no choice but to exercise power when they decide cases. Legal decisions are choices between alternative rules, and as Holmes remarked, "[w]hatever decisions are made must be against the wishes and opinion of one party . . . ."[6] If the judge rules that the defendant had a

5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
6. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 7 (1894).

legal liberty to do the act, the plaintiff will be unhappy. If the judge rules that the plaintiff had a right which restricts the freedom of action of others, the defendant will be unhappy.[7] Thus the question is not whether the judge should exercise power or not exercise power, but in whose interest the power should be exercised.

The intelligent passivist will concede this point and simply argue that judges should enforce the existing rules; they should, as the saying goes, "apply" the law rather than "make" it. Yet the existing legal rules, whether derived from common law or statutory interpretation, were made by other judges in the past. As Jeremy Bentham wrote, "whatever *now* is established, *once* was innovation."[8] Deferring to the will of previous judges is no more democratic than changing the rules which they promulgated. There may be other good reasons to follow precedent—e.g., because of an interest in stability or because the precedent is wise or fair—but the fact that judicial power is undemocratic cannot be one of them.

When judges decide cases, whether or not they enforce existing rules, they place the coercive force of the state at the disposal of one of the parties against the other. Although there may be good reasons for applying existing rules, there is nothing passive about enforcing them. The notion that judges do not exercise lawmaking power in these situations is simply false. Judges take sides in controversies, and by articulating a rule or principle to justify their position, they contribute to the law of the land, whether the decision upholds or challenges the status quo.

The passivist position not only hides the reality of judicial lawmaking, but contradicts one of the underlying principles of the common law as it has been practiced for hundreds of years. As every law student knows, two opposite and contradictory principles operate in the common law system.[9] The first is that judges should follow prece-

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7. "For every legal entitlement there is an equal and opposite legal exposure." Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 760 (1980). *See also* Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

8. J. BENTHAM, A FRAGMENT ON GOVERNMENT xiv (1776), *reprinted in* COLLECTED WORKS OF JEREMY BENTHAM 400 (J.H. Burns & H.L.A. Hart eds. 1977).

9. Both conservative and progressive legal theorists have recognized the constitutive role of judicial activism in the common law. William Blackstone, the great conservative, wrote in the 1760s:

> For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion . . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason . . . [or] if it be found that the former decision is manifestly absurd or unjust . . . .

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (17th ed. Christian 1803) (1st ed. 1765). Moreover, Blackstone acknowledged with approval that the common law had evolved over time to allow the legal system to adapt to the development of the new commercial society. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 244-46, 330-32 (1979).

dent; it is the legislature's job to change the law. This is obviously consistent with the passivist position. The second principle of the common law, however, is that law protects rights; if any of the existing legal rules are unfair or bad policy, they should be overturned. According to this view, judges need not wait for legislative action to modernize judge-made law. This is the activist position, and it is as much a part of the common law tradition as passivism.

The institution of the common law is constituted by the theory that precedent should be followed only if it adequately protects legitimate rights. An absolute passivist position would mean that the decisions of prior judges must be enforced forever, until changed by the legislature, no matter how stupid or cruel they are. No jurist or judge in the history of American law has *ever* taken this position.

No one has been able to invent a non-contradictory theory which could tell us precisely when judges should follow precedent and when they should overturn it in the interest of fairness or progress. In the end, judges are vulnerable to charges of tyranny whatever they do. If they overturn precedent, they can be accused of overstepping their institutional bounds by usurping legislative power. Yet the legitimacy of our legal system would be severely undermined if individual judges did not have the courage to overturn archaic precedents which have become oppressive. If judges do not overturn precedents which have come to be seen as oppressive, they can be accused of a different sort of tyranny. Moreover, such actions are so crucial to the legitimacy of the legal system that they have been institutionalized as a central component of common-law adjudication. Activist judges recognize that the second charge is as serious as the first.

I have argued that both judicial activism and passivism in private law can leave judges vulnerable to the accusation that they have abused their power. But the problem is even worse than this. Consistent passivism would not only contradict fundamental tenets of the private law system, but would be virtually impossible to carry out in practice.

The argument for passivism severely underestimates the extent to which the legal rules in force contain gaps, conflicts, and ambiguities. In these cases, the judge has no choice but to promulgate some rule or standard to justify the result. In other words, the judge has to make law. Even when the law appears to be fairly clear, the judge must still decide whether the facts in the case before her are sufficiently similar to those in the prior case to conclude that they fit within the established rule. Since the facts of every case are different, this question is highly problematic. Felix Cohen has explained:

Jeremy Bentham, the great progressive and critic of the common law, argued in 1782 that judges must continually choose between the utility of enforcing precedents and the utility of enforcing rules based on good policies. J. BENTHAM, OF LAWS IN GENERAL 191 (Hart ed. 1970) (written in 1782, first published as THE LIMITS OF JURISPRUDENCE DEFINED in 1945).

> To the cold eyes of logic the difference between the names of the parties in the two decisions bulks as large as the difference between care and negligence. The question before the judge is, "Granted that there are differences between the cited precedent and the case at bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?" Obviously this is an ethical question.[10]

While perhaps conceding this point, the passivist may argue that this problem is far less serious if the legal relations of the parties are governed by statute. In that case the judge may be guided by legislative intent. Again, this position severely underestimates the extent to which statutes must be given substantive content by judges in particular cases. After all, it is commonplace for both sides in lawsuits to claim that the clear language of the statute supports their respective positions. Moreover, judges face not only the problem of gaps, conflicts, and ambiguities in the statutory language, but the claim that enforcement of the strict language of the statute would defeat the policies underlying the statute. When this happens, it is inevitable that the parties will point to contradictory policies. And the judge must determine the extent to which one policy will be enforced to the detriment of the other.

While it would take more space than is available here to demonstrate this claim, I believe that judges usually rely on plain language arguments, not because statutes are clear, but because they want to appear to defer to the will of the democratically elected legislature. This makes the judge's exercise of power appear less controversial, even though the meaning of the statute and the legislative intent were hotly contested in the courtroom.

B. *Public Law*

The problem of contradictory arguments about the proper judicial role is present in public law as well as private law. The foundation of our constitutional democracy includes two potentially contradictory principles. The first is the principle of majority rule which implies that judges should enforce the legal rules promulgated by statute and executive act and that judicial power is justified because the judge acts as the agent of the people. This is the passivist principle. However, as John Stuart Mill pointed out:

> The "people" who exercise the power are not always the same people with those over whom it is exercised . . . . The will of the people, moreover, practically means the will of . . . the majority; the people, consequently, *may* desire to oppress a part of their number, and precautions are as much needed against this as any other abuse of power.[11]

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10. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 217 (1931).

11. J.S. MILL, ON LIBERTY 62 (Penguin ed. 1981) (1st ed. 1859). *See also* Kennedy, *supra* note 9, at 264.

We have therefore created a second principle to limit the power of the majority to use the representative branches of government to oppress powerless minorities, and ever since *Marbury v. Madison* our political system has made the courts the institutional expression of this principle. We want judges to refuse to enforce legislative or executive action which violates the constitutional rights of individuals. Such refusals may be highly controversial and unpopular. Yet this exercise of anti-democratic power in appropriate instances is necessary to protect the weak and defenseless from oppression by the government. This is the activist principle, and it is as much a part of our political system as the passivist principle. As with the private law system, no one has yet invented a non-contradictory theory which can definitively explain when judges should defer to the expressed will of the other branches and when courts should refuse to enforce that will. Thus, whenever judges hold that executive or legislative action is unconstitutional, or when they act in areas generally thought to be the province of the legislature, they are vulnerable to the accusation that they have abused their judicial power. Yet if they allow the politically powerful to oppress the powerless, they have abdicated their constitutional responsibility and are subject to equally serious accusations of misuse of their judicial power.

IV. Justice Pashman's Contribution to the Debate

Justice Pashman was a judicial activist, as I have used that term. This does not mean that he always advocated changes in private law rules or defied the other branches of government; it only means that, relative to other judges, he was unusually willing to do these things when he felt justified by changing values, policies, or social conditions. Justice Pashman has long acknowledged that "the judiciary makes law and changes judge-made law . . . ."[12] Because this is so, Justice Pashman argued that defenders of judicial restraint are not neutral law appliers, but "advocates of the *status quo*."[13] Since judges have the power to decide whether to enforce existing legal arrangements, they should assess prior judicial decisions to see whether the arguments which support them are still convincing. If those arguments are not convincing, the precedent should not be followed. "A court should have creative power in areas of public interest or concern," Justice Pashman has written. "Attuning the law to the times is one of the principle functions of justice and the courts."[14] He therefore

12. New Jersey Sports and Exposition Auth. v. McCrane, 119 N.J. Super. 457, 566, 292 A.2d 580, 640 (Law Div. 1971) (quoting Chief Justice Weintraub in *Judicial Legislation*, 81 N.J.L.J. 545 (1958)).

13. Robinson v. Cahill, 69 N.J. 133, 167, 351 A.2d 713, 731 (1975) (Pashman, J., concurring in part and dissenting in part).

14. *New Jersey Sports Authority*, 119 N.J. Super. at 565, 292 A.2d at 640. Since Justice Pashman is not afraid to admit that judges make law, he is often disarmingly honest in his

has played a crucial role in modernizing New Jersey law. I will give some recent examples.

A. *Private Law Activism*

In his common-law opinions, Justice Pashman showed an unusual willingness to advocate changes in legal rules governing relations among individuals. Writing for the Court, Justice Pashman recently reversed the common-law rule that commercial landowners had no duty to repair sidewalks abutting their premises.[15] He has also reversed the common-law rule that property owners have an absolute right to exclude others from their property for any reason, and has created a competing right of reasonable access to private property that has been opened for public use.[16] Finally, Justice Pashman wrote an opinion in which the Court expanded the category of strict liability by striking the state of the art defense in certain products liability cases.[17]

Justice Pashman was no less activist in statutory interpretation. He was unusually willing to give broad interpretations to statutes which alter the distribution of economic and social benefits. He has argued that the worker's compensation statute should be liberally construed to include a de facto spouse when a technical defect may have invalidated a seemingly legitimate marriage.[18] He has given a broad interpretation to the statutory rights of mentally retarded persons in state facilities.[19] He has maintained that a property tax rebate should be extended to elderly residents of life care communities.[20] Finally, he has argued that certain administrative regulations were facially invalid because they did not conform to a statutory requirement that beneficiaries be entitled to a monthly income compatible with decency and health.[21]

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judicial opinions. He not only acknowledges when he makes new arguments, *see, e.g.*, Right to Choose v. Byrne, 91 N.J. 287, 327, 450 A.2d 925, 946 (1982)(Pashman, J., concurring in part and dissenting in part)("it would be disingenuous to deny that this argument is essentially new"), but candidly admits it when he changes his mind. In a recent case, Justice Pashman acknowledged that by joining the majority, he was reversing a position he had taken four years earlier in a published opinion. The vast majority of judges in this situation would have distinguished the earlier case to make it appear that the two votes were not inconsistent. Instead of doing this, Justice Pashman wrote: "Personal consistency may be a virtue in judicial decision making, but judges are charged to do justice. The sensitive issues of family law require an open mind to new patterns of social life and changing values." Kikkert v. Kikkert, 88 N.J. 4, 10, 438 A.2d 317, 320 (1981) (per curiam) (Pashman, J., concurring).

15. Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 432 A.2d 881 (1981).

16. Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370 (1982).

17. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

18. Newburgh v. Arrigo, 88 N.J. 529, 547, 443 A.2d 1031, 1039-40 (1982) (Pashman, J., concurring).

19. New Jersey Ass'n for Retarded Citizens v. Human Services Dep't, 89 N.J. 234, 445 A.2d 704 (1982).

20. MacMillan v. Taxation Div. Director, 89 N.J. 216, 218-19, 445 A.2d 397, 398-99 (1982) (per curiam) (Pashman, J., dissenting).

21. Texter v. Human Services Dep't, 88 N.J. 376, 392, 443 A.2d 178, 185-86 (1982) (Pashman, J., dissenting).

B. *Public Law Activism*

On several memorable occasions, Justice Pashman advocated the use of substantial judicial power in areas generally regarded to be the province of the executive and legislature. When the Supreme Court of New Jersey struck down the property tax funding system for public education because it created inadequate facilities in poor districts, Justice Pashman chastised the majority for not doing enough to remedy the situation.[22] He believed that the Court had the inherent power to redistribute existing state aid to education to reduce the disparities among various school districts.[23] Moreover, he argued that the Court had the power to do whatever else was necessary to "completely remedy the profound constitutional wrongs . . . ."[24]

Justice Pashman criticized the Court in a similar fashion when it struck down local zoning practices which excluded the poor.[25] Arguing for "[f]orceful judicial intervention"[26] to implement the Court's decision, Justice Pashman suggested a wide variety of remedies. These included placing affirmative obligations on some municipalities to provide low income housing through public construction, ownership, or management.[27]

Recently, Justice Pashman argued that the New Jersey Constitution placed affirmative obligations on the state to fund abortions for poor women who could not otherwise afford them.[28] This is a new paradigm of constitutional law which, if extended, would place affirmative constitutional obligations on the state to fund basic necessities for the poor, such as food, clothing, shelter, and medical care.

As is clearly shown in these opinions, Justice Pashman is far from believing that judicial activism in public law is an anomaly which needs to be extirpated. Rather, he believes it is one of the ways our legal system protects the disadvantaged from the powerful. Justice Pashman recognizes that the representative branches of government sometimes fail to protect the powerless, and he argues that the courts must not wait for legislative or executive action in those situations even if their timely action would be preferable.[29] These judicial interventions are undoubtedly politically controversial. Nonetheless, Jus-

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22. Robinson v. Cahill, 69 N.J. at 165-74, 351 A.2d at 724-35.

23. *Id.* at 165, 351 A.2d at 725.

24. *Id.* at 174, 351 A.2d at 734.

25. Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 481, 555-631, 371 A.2d 1192, 1229-63 (1977) (Pashman, J., concurring and dissenting); Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151, 193-221, 336 A.2d 713, 735-50 (1975) (Pashman, J., concurring).

26. *Mount Laurel*, 67 N.J. at 203, 336 A.2d at 740.

27. *Id.* at 211, 336 A.2d at 743. The Supreme Court of New Jersey has recently implemented some of the remedies advocated by Justice Pashman. *See* Southern Burlington County NAACP v. Mount Laurel Township, No. A-35/36/172 (N.J. Jan. 20, 1983).

28. *Right to Choose*, 91 N.J. at 324-25, 450 A.2d at 944-45.

29. *Oakwood at Madison*, 72 N.J. at 571-73, 371 A.2d at 1232-33.

tice Pashman claims, judges "should not fear unpopularity."[30] Judges wield enormous power, whether they enforce or overturn actions by the other branches; what they do *should* be controversial.[31] When courts protect minorities or other vulnerable persons from oppression by the politically powerful, their actions are bound to be unpopular at times. Yet that is what courts are supposed to do. This does not mean that every judicial intervention in public law is justified. It does mean, as Judge J. Skelly Wright has written, that "[w]hen the courts interpret constitutional provisions in ways which we believe wrong, we ought not to shift the focus from the merits of their position to a narrowing of their institutional function."[32]

V. Conclusion

Justice Pashman's activism can be explained by his desire to support public policies which "affirm our common humanity"[33] by requiring the community as a whole to share the burdens of "the most vulnerable persons in our society."[34] These include the elderly, the sick, the handicapped, the poor, and those who are disadvantaged because of race, sex, or class. According to Justice Pashman, we no longer live in an age when "the strong do what they can and the weak suffer what they must."[35] Rather, he says, we live in an "age which properly regards as essentials for all the people services which heretofore were enjoyed only by the wealthy and the affluent."[36] This vision of the good society is a prescription for substantive change of the rules in force. "We must not allow the appearance of equal freedom to obscure the reality of its denial."[37]

According to Justice Pashman, the question is not whether judges should make law, but whose interests they should protect. He sought to increase the number and variety of situations in which the legal system would require the community to come to the aid of the weak and disadvantaged in times of crisis. He also believed that the good society would be more egalitarian than the one in which we live. He therefore used his power to redistribute certain social and economic advantages from the privileged to the powerless. Was this an abuse of his judicial power? The answer depends not on abstract homilies about the judicial role, but with whom we place our sympathies.

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30. Robinson v. Cahill, 69 N.J. at 174, 351 A.2d at 734.

31. *See In re* Hinds, 90 N.J. 604, 640, 449 A.2d 483, 502 (1982) (Pashman, J., concurring).

32. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769, 786 (1971). For a discussion of the inherent indeterminacy of institutional roles and the need to inform those roles by substantive theories of rights and politics, see Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 567-73, 588-93, 608-16 (1983).

33. *New Jersey Ass'n for Retarded Citizens*, 89 N.J. at 252, 445 A.2d at 713.

34. *Texter*, 88 N.J. at 392, 443 A.2d at 186.

35. *Right to Choose*, 91 N.J. at 326, 450 A.2d at 945 (quoting Thucydides, The Peloponnesian War 331 (1951) (first published c. 450 B.C.)).

36. *New Jersey Sports Authority*, 119 N.J. Super. at 486, 292 A.2d at 597 (quoting Conrad v. Pittsburgh, 421 Pa. 492, 507-08, 218 A.2d 906, 913-14 (1966)).

37. *Right to Choose*, 91 N.J. at 326, 450 A.2d at 945.