TRIBUTE TO CHIEF JUSTICE WILENTZ

The Honorable Gary S. Stein[*]

I was privileged to serve with Chief Justice Wilentz for eleven years, and I am proud to join with those who honor his work and his memory.

The magnitude of his legacy to New Jersey and to the cause of justice will not fully be measured or appreciated for many years. An essential element in the analysis of his substantive contributions is an appreciation of the unique clarity with which he addressed issues requiring resolution by our Court. Judicial opinions often are hedged and qualified because of the complexity of the issue under adjudication, the reluctance of the opinion writer to decide more than the narrow issue before the court, and the recognition that a rule may be sound in some applications but not in others.

Chief Justice Wilentz well understood those reservations and limitations, but at the same time recognized that boldness, even bluntness, in the resolution of certain issues was of greater importance in achieving public understanding and acceptance. He applied that insight both in constitutional and non-constitutional adjudication. As a result, his judicial opinions illuminate our jurisprudence and demonstrate the powerful and persuasive impact of his piercing intellect.

One of his earliest opinions, *In re Wilson*,[1] announced the rule that lawyers who misappropriate clients' funds would invariably be disbarred. The strength of the Chief Justice's convictions on that issue was unmistakable:

> What are the merits in these cases? The attorney has stolen his clients' money. No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. The public is entitled, not as a matter of satisfying unjustifiable expectations, but as a simple matter of maintaining confidence, to know that never again will that person be a lawyer. That the moral quality of other forms of misbehavior by lawyers may be no less reprehensible than misappropriation is beside the point. Those often occur in a complex factual setting where the appli-

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[1]81 N.J. 451, 409 A.2d 1153 (1979).

> cability or meaning of ethical standards is uncertain to the bench and bar, and especially to the public, which may not even recognize the wrong. There is nothing clearer to the public, however, than stealing a client's money and nothing worse. Nor is there anything that affects public confidence more—much more than the offense itself—than this Court's treatment of such offenses. Arguments for lenient discipline overlook this effect as well as the overriding importance of maintaining that confidence.[2]

> The considerations that must deeply trouble any court which decrees disbarment are the pressures on the attorney that forced him to steal, and the very real possibility of reformation, which would result in the creation of a new person of true integrity, an outstanding member of the bar. There can be no satisfactory answer to this problem. An attorney, beset by financial problems, may steal to save his family, his children, his wife or his home. After the fact, he may conduct so exemplary a life as to prove beyond doubt that he is as well equipped to serve the public as any judge sitting in any court. To disbar despite the circumstances that led to the misappropriation, and despite the possibility that such reformation may occur is so terribly harsh as to require the most compelling reasons to justify it. As far as we are concerned, the only reason that disbarment might be necessary is that any other result risks something even more important, the continued confidence of the public in the integrity of the bar and the judiciary.[3]

In *State v. Des Marets*,[4] Chief Justice Wilentz addressed the application of the Graves Act that requires three-years mandatory imprisonment for those who commit gun-related crimes. He wrote:

> We do not pass on the wisdom of this legislation's mandatory three year imprisonment term or the wisdom of its imposition on the offenses covered. That is a matter solely for the Legislature to decide. Once the Legislature has made that decision, and has made it within constitutional bounds, our sole function is to carry it out. Judges have no business imposing their views of "enlightened" sentencing on society, including

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[2]*Id.* at 456-57, 409 A.2d at 1155.

[3]*Id.* at 460, 409 A.2d at 1157 (footnotes and citation omitted).

[4]92 N.J. 62, 455 A.2d 1074 (1983).

> notions of discretionary, individualized treatment, when the Legislature has so clearly opted for mandatory prison terms for all offenders. It may be that the Legislature is more enlightened than the judges. Our clear obligation is to give full effect to the legislative intent, whether we agree or not. We have endeavored to do so here.[5]

> The legislative purpose was to stop gun-related crimes, not just half of gun-related crimes. Its method, through this law, was to announce that anyone who had a gun in his possession while committing certain crimes would—with certainty—go to jail, and—with certainty—for three years. The certainty, not the possibility, not the probability, of not one day less than a three year prison term is the whole point, the very heart, of the Graves Act. The Legislature's hope was that the unprecedented severity and certainty of punishment attached to the possession of a gun would stop criminals from carrying them. The law's all-encompassing intention is apparent: it covered every crime where experience indicated guns were most likely to be used.[6]

In the landmark opinion of *Woolley v. Hoffmann-La Roche, Inc.*,[7] Chief Justice Wilentz announced the rule that absent a clear and prominent disclaimer, New Jersey courts would enforce against an employer a promise in an employment manual that an employee would be fired only for cause, even when the employment would otherwise be terminable at will. The Chief Justice summarized the holding in these words:

> Our opinion need not make employers reluctant to prepare and distribute company policy manuals. Such manuals can be very helpful tools in labor relations, helpful both to employer and employees, and we would regret it if the consequence of this decision were that the constructive aspects of these manuals were in any way diminished. We do not believe that they will, or at least we certainly do not believe that that constructive aspect *should* be diminished as a result of this opinion.[8]

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[5] *Id.* at 65-66, 455 A.2d at 1076 (footnotes and citation omitted).

[6] *Id.* at 85, 455 A.2d at 1086.

[7] 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

[8] *Id.* at 309, 491 A.2d at 1271.

> All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.[9]

Among his best known opinions is *In re Baby M*,[10] the case of a "surrogate mother." The Court invalidated as contrary to the State's law and public policy a contract in which one woman for a fee would conceive a child, carry it to term, and then surrender it to the father and his wife. The Chief Justice pointedly rejected the argument that the surrogate mother's voluntary consent should be dispositive:

> The point is made that Mrs. Whitehead *agreed* to the surrogacy arrangement, supposedly fully understanding the consequences. Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," or buy women's labor for less money than paid to men for the same job, or purchase the agreement of children to perform oppressive labor, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions. (Occupational Safety and Health Act of 1970). There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life. Whether this principle recommends

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[9] *Id.*

[10] 109 N.J. 396, 537 A.2d 1227 (1988).

> prohibition of surrogacy, which presumably sometimes results in great satisfaction to all of the parties, is not for us to say. We note here only that, under existing law, the fact that Mrs. Whitehead "agreed" to the arrangement is not dispositive.[11]

The Chief Justice was even more forceful in his concurring and dissenting opinions, as evidenced by his blunt opinion in *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*,[12] which eventually was adopted as the Court's majority view in *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*[13] In *Perini*, the Chief Justice sharply disagreed with the Court's decisions addressing the scope of judicial review of arbitration awards:

> In New Jersey, instead of ending the dispute, the arbitration award is just the beginning; in this state, arbitration is not an alternative to litigation but rather the first step of the lawsuit. The parties in this arbitration went through sixty-four days of hearings, involving twenty-one witnesses, resulting in 10,978 pages of transcripts before the arbitrators issued the award that was supposed to end their dispute. Instead, what followed was three-and-a-half years of litigation, first at the trial level, then before the Appellate Division, and now before this Court. The arbitration produced one decision that could fit on two pages. The litigation has produced five judicial opinions, excluding this concurrence, totaling over one hundred fifty pages. The litigation has also produced finality, with this Court's decision today, some three-and-a-half years after the date when arbitration should have produced the same finality. Those three-and-a-half years were spent trying to ensure that the arbitrators' award conformed to New Jersey law despite the fact that the arbitration agreement contained no such requirement. Indeed, the arbitrators were expressly authorized to grant *any* remedy or relief that was "just and equitable."[14]

The Court's opinion today follows our clear precedents, indeed it attempts to improve them. The problem is that those precedents are

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[11] *Id.* at 440-41, 537 A.2d 1249-50 (citations omitted).

[12] 129 N.J. 479, 610 A.2d 364 (1992).

[13] 135 N.J. 349, 640 A.2d 788 (1994).

[14] *Perini*, 129 N.J. at 518-19, 610 A.2d at 384 (Wilentz, C.J., concurring).

> wrong. They should be overruled. Their effect is to convert arbitration into litigation by subjecting it to judicial review to see if the arbitrators made legal errors—just as if the arbitrators were judges and the arbitration a lawsuit. We need a new rule, one that is true to our arbitration statute. Arbitration awards should be what they were always intended to be: final, not subject to judicial review absent fraud, corruption, or similar wrongdoing on the part of the arbitrators. Parties who choose arbitration should not be put through a litigation wringer. Whether the arbitrators commit errors of law or errors of fact should be totally irrelevant. The only questions are: were the arbitrators honest, and did they stay within the bounds of the arbitration agreement?[15]

Characteristically, the Chief Justice's final published opinion — a dissent — minced no words. In *MacDougall v. Weichert*,[16] Chief Justice Wilentz wrote that the Court should unequivocally hold that a public official fired because of a vote on a public issue affecting the financial interests of an employer should be entitled to recover damages for wrongful discharge. The Chief Justice's view of the case was simple and stark:

> This is a case about an attempted corrupt fix that did not work. It is about a businessman who opposed an ordinance of extremely limited scope that uniquely affected and hurt his business. It is a case about a businessman who discovered what he undoubtedly thought was his good fortune one of the employees of a company over which he had some influence happened to be the president of the local town council. It appears that the businessman used his leverage over that company first by getting it to "suggest" that the council president kill the ordinance and then, after the ordinance was passed, by getting it to "suggest" again that he reverse his vote. There is no suggestion that the employer resisted that leverage and it is beyond dispute that it participated in the businessman's attempted fix. Because the council president did not budge, however, the businessman insisted that he be fired, and the employer fired him. In short, the council president was fired from his private job because he refused to participate in the fix.[17]

These are but a few examples of powerful words written by a forceful,

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[15] *Id.*

[16] 144 N.J. 380, 677 A.2d 162 (1996).

[17] *Id.* at 408, 677 A.2d at 176.

clear-thinking Chief Justice who understood that the intrinsic worth and validity of a judicial opinion mattered little if its underlying principles could not be grasped and accepted by the public and the media. He wrote bluntly not to shock, but to simplify and persuade. Privately, as his colleagues knew, he wrestled with his conscience over the soundness of his judicial views. But when he put pen to paper, he cast aside his doubts and wrote with a clarity and vision that could not be misunderstood. Although we miss him enormously, his words and his conviction live on.