

## The End of an Era: A Tribute to Justice Gary S. Stein

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We all had an empty feeling when Justice Gary S. Stein announced his intention to retire from the New Jersey Supreme Court in September 2002 after seventeen years of service. Justice Stein was the last member of the Wilentz Court that had served together for over eleven years. His retirement marks the end of that era but reminds us of the continuity of the Court.

Justice Stein was born on June 13, 1933, in Newark. He lived much of his youth in Irvington, and liked to describe his old neighborhood to us. He earned a scholarship to attend Duke University, graduating from its college in 1954 and from its law school in 1956, second in his class. He was an associate editor of the Duke Law Review but found time to referee Duke basketball scrimmages.

After graduation from law school, he specialized in corporate and antitrust law with the New York firm of Kramer, Marx, Greenlee and Backus until 1966, when he left to establish his own practice in New Jersey. It was during this time that he was called up to active duty during the 1961 Berlin Wall crisis, and met another young reservist, Tom Kean, whose career in public life would later intersect Gary's. From 1972 to 1982, Gary was a partner in the Paramus law firm of Stein and Kurland.

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\* Associate Justice of the New Jersey Supreme Court, Retired. B.A. Fordham University, LL.B., Harvard Law School. Justice O'Hern is Counsel to Gibbons, Del Deo, Dolan, Griffinger & Vecchione. He was nominated to the Supreme Court of New Jersey by Governor Byrne and confirmed by the Senate in 1981. In 1988 he was nominated by Governor Kean and confirmed by the Senate to a second term with tenure. He retired from the Supreme Court in 2000, and was appointed by Governor Whitman as Commissioner for New Jersey to the National Conference of Commissioners on Uniform State Laws. Prior to joining the Court, Justice O'Hern had a long and distinguished career in public life, including serving as Commissioner of the New Jersey Department of Environmental Protection and Counsel to the Governor; Chair of the Judicial Salary and Pensions Committee; advisor to the New Jersey Commission on Professionalism in the Law; Chair of the Supreme Court Family Practice Committee and its Committee on Environmental Litigation. Justice O'Hern also served on the Council of Judges of the National Council on Crime and Delinquency.

Justice Stein served as chairman of the State Bar Association Committee on State Legislation from 1973 to 1976, and as Chairman of the Bergen County Ethics Committee. He was serving as director of Governor Thomas H. Kean's Office of Policy and Planning when Governor Kean announced his intention to appoint him to the Supreme Court on November 7, 1984.

Justice Stein was the only member of the Wilentz Court who had been a Wall Street lawyer. He took pride in that fact and offered us constant reminders of how they did things on Wall Street. His Wall Street mentality yielded for the Court an extraordinary blend of dogged preparation, attention to detail, and relentless determination to unravel any case that was before the Court. No case was too small for his attention; no case was too big for his intellect.

The product of his preparation may best be seen in the series of decisions involving public funding of education known as the *Abbott v. Burke* cases.<sup>1</sup> In this, as in so many areas of the law, his tireless

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<sup>1</sup> In *Abbott v. Burke (Abbott V)*, 153 N.J. 480, 710 A.2d 450 (1998), the Court set forth the history of the litigation to that date:

The first round of this generational struggle commenced in 1970 when students in poor urban school districts brought suit to enforce the New Jersey Constitution's educational guarantee. *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (Law Div. 1972). In successive decisions, this Court found that the system of public school funding then in place was unconstitutional. *See Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973); *Robinson v. Cahill*, 63 N.J. 196, 306 A.2d 65, *cert. denied*, 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973); *Robinson v. Cahill*, 67 N.J. 35, 335 A.2d 6 (1975); *Robinson v. Cahill*, 69 N.J. 133, 351 A.2d 713, *cert. denied* 423 U.S. 913, 96 S. Ct. 217, 46 L. Ed. 2d 141 (1975). The Legislature responded by enacting the Public School Education Act of 1975 (1975 Act), L. 1975, c. 212 (codified at N.J.S.A. 18A:7A-1 to -33 (repealed)), which this Court found to be facially constitutional. *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976); *Robinson v. Cahill*, 70 N.J. 155, 358 A.2d 457 (1976); *Robinson v. Cahill*, 70 N.J. 464, 360 A.2d 400 (1976).

The second round of the struggle commenced in 1981, when public school students from Camden, East Orange, Irvington, and Jersey City challenged the constitutionality of the 1975 Act as applied. The Court remanded the case for an Administrative Law Judge to develop an evidentiary record to demonstrate the existence, nature and extent of the educational deficiencies in the poor urban school districts. *Abbott v. Burke (Abbott I)*, 100 N.J. 269, 301-02, 495 A.2d 376 (1985). That hearing confirmed that the districts were not providing the constitutionally mandated thorough and efficient education and that the 1975 Act and its funding were unconstitutional as applied to those districts. *Abbott v. Burke*, No. EDU 5581-88 (OAL 1988). The Commissioner and the State Board of Education disagreed. The Court, on direct appeal, reversed the State Board's decision and

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declared the 1975 Act unconstitutional as applied to the State's twenty-eight poorest urban districts (special needs districts, SNDs, or Abbott districts). *Abbott v. Burke (Abbott II)*, 119 N.J. 287, 575 A.2d 359 (1990). As a remedial measure, the Court ordered that the 1975 Act be amended or new legislation be passed to ensure substantial equality in funding between the special needs districts and the property-rich districts. *Id.* at 385. The Court required that the level of funding "be adequate to provide for the special educational needs of these poorer urban districts" and "address their extreme disadvantages." *Ibid.* The Court also determined that special programs and services were required in the special needs districts. *Id.* at 386.

The Legislature then enacted the Quality Education Act of 1990. L. 1990, c. 52 (codified at N.J.S.A. 18A:7D-1 to -37 (repealed)). The Court, in 1994, found that statute unconstitutional as applied to the special needs districts because it failed to ensure parity of educational spending. *Abbott v. Burke (Abbott III)*, 136 N.J. 444, 451, 643 A.2d 575 (1994). The Court also found that contrary to the Court's determination in *Abbott II* and in disregard of a specific legislative directive, L. 1991, c. 259, § 21, the Commissioner did not address the supplemental programs that were needed to assist disadvantaged students. The Court reiterated its conclusion from *Abbott II* that achievement of educational success in the SNDs would not occur until such supplemental programs and services were identified and implemented. *Abbott III, supra*, 136 N.J. at 454.

In response to *Abbott III*, the Legislature, in 1996, passed the Comprehensive Educational Improvement and Financing Act (CEIFA). L. 1996, c. 138 (codified at N.J.S.A. 18A:7F-1 to -34). Plaintiffs challenged the new legislation. The Court found CEIFA to be facially constitutional in its adoption of substantive standards, referred to as "Core Curriculum Content Standards" (CCCS), that served to define a thorough and efficient education. *Abbott IV, supra*, 149 N.J. at 168. However, the Court found CEIFA to be unconstitutional as applied to the SNDs because the statute failed to guarantee sufficient funds to enable students in those districts to achieve the requisite academic standards, *id.* at 174; because CEIFA's supplemental programs, Demonstrably Effective Program Aid (DEPA), N.J.S.A. 18A:7F-18, and Early Childhood Program Aid (ECPA), N.J.S.A. 18A:7F-16, were not based on a study of the students' actual needs or the costs of meeting those needs, *id.* at 180; and because the statute failed to address the facilities problems of the SNDs, *id.* at 186.

At that point, sixteen years after the start of the *Abbott* litigation, the Court found that the continuing constitutional deprivation had persisted too long and clearly necessitated a remedy. *Id.* at 201-02. While recognizing that increased funding for regular education in the SNDs was not sufficient to remedy the educational deficiencies in those districts, we mandated, as an interim remedy, that the State provide parity funding for each SND for the 1997-1998 school year. *Id.* at 189. The Court also directed that firm administrative controls accompany this increased funding to ensure the money was spent effectively and efficiently. *Ibid.*

preparation paid off by revealing at oral argument the strength or weakness in a case.

I remember the oral argument in *Abbott IV* clearly.<sup>2</sup> That case concerned the constitutionality of the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), Governor Christine Todd Whitman's effort to remedy constitutional violations resulting from disparities in the State's system of elementary and secondary public school funding. Education advocates feared that without the leadership of Chief Justice Robert N. Wilentz, who had since retired, the Court would retreat from its previous mandates.

The case was heard on March 4, 1997. Then-Attorney General Peter Verniero argued the case on behalf of the State. Justice Stein knew as much about the intricate provisions of the new law as did the law's sponsors. What follows is a partial transcript of that oral argument concerning a funding "model" for the State's Special Needs Districts.<sup>3</sup> CEIFA's model provided \$6700 per inner-city pupil as compared with the \$11,000 per pupil provided under Governor Florio's Quality Education Act (QEA):

JUSTICE STEIN: General Verniero, that's a comforting response to know that the model can be adjusted but the reason I ask about the model, and I am glad you focused on it early, is because this new law, as we know, allows richer suburban districts to spend more money than the special-needs districts; and so in deciding whether this new law is going to assure a thorough and efficient education, the cost assumptions that the State has made are so

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The Court then remanded the case to the Superior Court, Chancery Division, to determine what judicial relief was necessary in order to address the need for supplemental programs and facilities improvements in Abbott districts. *Id.* at 224-26. Accordingly, the Court authorized the Superior Court to direct the Commissioner

to initiate a study and to prepare a report with specific findings and recommendations covering the special needs that must be addressed to assure a thorough and efficient education to the students in the SNDs. That report shall identify the additional needs of those students, specify the programs required to address those needs, determine the costs associated with each of the required programs, and set forth the Commissioner's plan for implementation of the needed programs. In addition, the Superior Court shall direct the Commissioner to consider the educational capital and facility needs of the SNDs and to determine what actions must be initiated and undertaken by the State to identify and meet those needs.

*Id.* at 489-90, 710 A.2d at 455-56.

<sup>2</sup> *Abbott v. Burke (Abbott IV)*, 149 N.J. 145, 693 A.2d 417 (1997).

<sup>3</sup> Oral argument, *id.*

critical. And I want to acknowledge the [Core Curriculum] standards. The standards are very impressive. In fact, they are somewhat intimidating to me because when I read some of those standards and found that the requirements for fourth graders were more challenging than I would care to assume, I recognize the standards are very telling; but we have a record in the case, and the record was made, as you know, in the late eighties before Administrative Law Judge Lefelt and the record reflected the abysmal conditions that existed in some of our urban schools at that time and the tremendous difference between what the urban schools were achieving and what the suburban schools were achieving, the tremendous disparity in facilities, the paucity of special science equipment and laboratories, the absence of foreign languages, the absence of adequate teachers. Now, we haven't updated the record, but we know from what we read in the newspaper that on the high school proficiency tests scores published in December the State average was 75.6%. Some of the urban districts are continuing to perform at a very low level—East Orange 30.2%, Trenton 20.6% passing, Henry Snyder School in Jersey City, a takeover district, 16.8%, Barringer High School in Newark 11.7%, East Side High School in Paterson 17.4% passing, compared to the State average. So, I looked at the model and had the concern about whether the model fairly reflected the cost to a typical urban district of preparing those children to learn to these very ambitious standards and what I saw in the model, as you just confirmed, was that the model has nothing to do, from the standpoint of its calculations, with the devastating conditions in some of our urban districts. It doesn't purport to recognize that in Trenton the need for security guards is far more than what the model says or that in Paterson and Jersey City the need for new facilities and better bathrooms and science equipment is way below what the suburban schools possess, so I wonder how we can have confidence in a model that based on a typical district but that doesn't concern itself with poor urban districts. How can we have confidence that the \$6700 figure for elementary school districts in the model is going to equip the urban school students to learn these very difficult standards.

ATTORNEY GENERAL: I think there are several responses, Justice Stein. First and perhaps foremost in a strict legal sense, we have to presume the experts who make these judgments make sound decisions . . . which is why, of course, these agency actions [are accorded deference].

JUSTICE STEIN: Well, deference would be very tempting, but on the face of it, it looks like they used as their base statistics information that has nothing to do with what's going on in Newark and Jersey City and Trenton and Camden.

With one dissenting vote, the Supreme Court essentially adopted the theory of the case set forth in the exchange between Justice Stein and his future colleague, Justice Verniero. The Court required that funding for Special Needs Districts take account of what Justice Stein dictated as “what’s going on in Newark and Jersey City and Trenton and Camden.” The Court held, in an opinion by Justice Handler, that, although CEIFA’s standards defining the substantive content of “education” to be provided to public school students were facially adequate and consistent with education clause, CEIFA’s funding standards were unconstitutional as applied to special needs districts (SNDs); it also held that CEIFA’s funding levels were insufficient to permit SNDs to provide a “Thorough and Efficient Education” to inner-city children. In addition, the Court held that CEIFA’s failure to address the problem of dilapidated, unsafe, and overcrowded facilities in SNDs violated the education clause.<sup>4</sup> In the final chapter of *Abbott* in which I participated,<sup>5</sup> Justice Stein stated in a separate concurring opinion the vision that had driven him.

The longstanding inability of urban public schools throughout the nation to provide an adequate education to minority students from low-income families represents the most enduring public policy failure of my generation. For much of the past fifty years state governments generally were unwilling to focus on the ills of urban schools. Over the past two decades, however, the issue has attracted both state and national attention. Throughout the country reforms in urban education have been implemented and found wanting. In major cities, new superintendents are hired and fired with regularity. Candidates for public office promise to repair urban education, but the promises are seldom kept and, when implemented, rarely succeed.

In New Jersey, as in other states, failures in urban education have led education advocates to turn to our courts for relief. For the twenty-five years following this Court’s first disposition in school funding litigation. See *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973). The focus has been on fiscal parity. Recently, the emphasis has shifted from funding equity to educational adequacy. See *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997) (*Abbott IV*), and *Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (1998) (*Abbott V*).<sup>6</sup>

Justice Stein was a perfectionist. He expected of others what he gave himself. He could not abide what he considered to be

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<sup>4</sup> *Abbott IV*, 149 N.J. at 198-202, 693 A.2d at 443-336 (1997).

<sup>5</sup> *Abbott v. Burke (Abbott VI)*, 163 N.J. 95, 748 A.2d 82 (2000).

<sup>6</sup> *Id.* at 121, 748 A.2d at 96.

bureaucratic inefficiencies in the implementation of court-ordered mandates for educational urban. He deplored the use by the Commissioner of Education of a “form letter” that categorically rejected the requests of school districts to meet the special needs of students, an approach that he viewed as “formalistic and inflexible” and inconsistent with the Court’s expectations. He wrote:

Only two years have elapsed since *Abbott V* was decided. As evidenced by the Court’s disposition of this Motion, significant adjustments in approach and in implementation of the *Abbott V* reforms periodically may be required in the interest of the children whose education and future prospects are at stake. In an undertaking of this complexity, missteps are virtually certain to occur. However, those missteps and the resulting course corrections will be long forgotten if, over time, the reform efforts now under way succeed. But the clock is ticking, and for each school year in which implementation is delayed or flawed, thousands of urban children will lose the full benefit promised by the *Abbott* initiatives. The time for bold, corrective and decisive action by the DOE is now.<sup>7</sup>

Justice Stein’s final chapter in *Abbott* came in 2002. In an eloquent dissent, he wrote:

This proceeding marks the fifteenth occasion in less than thirty years that the advocates of equal educational opportunity for poor urban school children have come to this Court to seek judicial relief from inadequate funding, deficient substantive educational programs and substandard facilities. A concise summary of the history of the *Robinson v. Cahill* and *Abbott v. Burke* school litigation through 1998 is set forth in *Abbott v. Burke*, 153 N.J. 480, 490-93, 710 A.2d 450 (1998) (*Abbott V*). That summary reveals that in the course of this thirty-year old litigation four state statutes providing for state funding of public education have been held by this Court to be unconstitutional as applied to the poorest urban school districts: The State School Incentive Equalization Aid Law (L. 1970 c. 234); The Public School Education Act of 1975 (L. 1975, c. 212); The Quality Education Act of 1990 (L. 1990, c. 52); The Comprehensive Educational Improvement and Financing Act (CEIFA) (L. 1996, c. 1389). Each one of those statutes, enacted by the Legislature and signed by the then Governor, was found to be flawed by this Court because of a failure to provide a level of funding “adequate to provide for the special educational needs of these poorer urban districts, and address their extreme disadvantages.” *Abbott v. Burke*, 119 N.J.

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<sup>7</sup> *Id.* at 132-33, 748 A.2d at 102-3.

287, 385, 575 A.2d 359 (1990) (*Abbott II*).<sup>8</sup> . . .

This Court has a unique role in this late stage of the approximately thirty- year history of urban school litigation in New Jersey. At every step of the long and arduous path leading to funding adequacy and essential substantive educational reforms, this Court has been required to act as the catalyst for urban school reform. Successful implementation of preschool in the Abbott districts, to a degree that will assure that the youngest children in those districts enter elementary school at grade level ready to learn, is among the most vital and indispensable components of that reform effort. Continued divisiveness among the community care providers, the districts, and the State can delay unduly the attainment of a successful preschool program for all eligible Abbott three-four-year-olds. Confronted with the disarray revealed by this record, the Court's unwillingness to ensure implementation of its judgment mandating high quality preschool in the Abbott districts by the designation of a Special Master could be misunderstood to signal a lack of resolve and a dilution of the *determination, perseverance, and consistency* that has characterized the Court's educational reform decisions over the past three decades. By declining to appoint a Special Master to assist all parties in arriving at a uniform, efficient, responsible, and cohesive dispute resolution process, the Court risks perpetuating the high degree of frustration, antagonism, delay, and deficient implementation that have plagued the State's efforts these past four years. Unwilling to take that risk, I respectfully dissent from the Court's disposition.<sup>9</sup>

"Determination, perseverance and consistency." Those three words tell you a lot about Gary Stein. Gary is a bold and decisive man, but few bold and decisive persons have the tenacity that he has. Sometimes those traits could become exasperating to the members of the Court, but we always knew with Gary that there was no hidden agenda behind that drive, just the pursuit of justice as he saw it, in order to "get it right."

This determination was evident in every aspect of his work. Not a term of Court passed that he did not labor for months to turn around the Court's thinking on a case or an issue. Often he succeeded. In an ethics-disciplinary case he unraveled the complexities of a real estate transaction and convinced the Court that what had at first glance appeared to be a plan to defraud was in fact a complex deal gone bad. Thus, a lawyer who was facing almost certain

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<sup>8</sup> *Abbott v. Burke (Abbott VII)*, 170 N.J. 537, 571, 790 A.2d 842, 862-3 (2002).

<sup>9</sup> *Id.* at 595-96, 790 A.2d at 881 (emphasis added).



disbarment because of a disciplinary board's lack of understanding of the transaction was saved from that fate. Another case, *Troth v. State*,<sup>10</sup> concerned the duty of the State to maintain a dam. A boater had been drawn to his death at the unguarded dam's spillway. Justice Stein argued that a defective dam was a dangerous condition of property under the New Jersey Tort Claims Act. To reinforce his arguments, he urged Chief Justice Wilentz to read David G. McCullough's book *The Johnstown Flood*, which recounts the tragic loss of 2,209 lives. Sometimes, however, he labored on lost causes. In *Kuzmicz v. Ivy Hill Park Apartments*<sup>11</sup> he unsuccessfully attempted to persuade the Court that a residential landlord owed a duty to warn a tenant of "off-premises" dangers that could be easily avoided by leaving the premises by another route.

There was no area of law that did not concern him. In *State v. Novembrino*,<sup>12</sup> he recounted New Jersey's long experience with the exclusionary rule as preface to our declining to follow *United States v. Leon*<sup>13</sup> and *Massachusetts v. Sheppard*<sup>14</sup> and to adopt the so-called "good faith" exception to the requirement of obtaining a valid warrant. In *Carter-Wallace, Inc. v. Admiral Insurance Co*<sup>15</sup>, he explained how excess insurance coverage for environmental damages should be allocated among successive policies.<sup>16</sup> He was the recognized expert on the Court when it came to matters of zoning and planning. *Medici v. BPR Co.*<sup>17</sup> is a landmark opinion, reshaping the law for granting "special reasons variances." I liked to tell him that if he had made a better candidate (not so obstinate), he might have been elected Mayor of Paramus, but he would not have learned as much land-use law as he did as an attorney for the Borough.

Gary Stein was a master of detail. Chief Justice Wilentz assigned to him the opinion in the *State v. Marshall* post-conviction relief case.<sup>18</sup>

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<sup>10</sup> 117 N.J. 258, 566 A.2d 515 (1989).

<sup>11</sup> 147 N.J. 510, 688 A.2d 1018 (1997).

<sup>12</sup> 105 N.J. 95, 519 A.2d 820 (1987).

<sup>13</sup> 468 U.S. 897 (1984).

<sup>14</sup> 468 U.S. 981 (1984).

<sup>15</sup> 154 N.J. 312, 712 A.2d 1116 (1998).

<sup>16</sup> *Id.* at 321-324, 712 A.2d at 1121-23.

<sup>17</sup> 107 N.J. 1, 526 A.2d 109 (1987).

<sup>18</sup> *State v. Marshall (Marshall III)*, 148 N.J. 89, 690 A.2d 1 (1997). Justice Stein described the task:

This is the first appeal taken to this Court from the denial of a post-conviction relief application seeking to set aside a murder conviction and death sentence imposed pursuant to this State's Capital Punishment Act. L. 1982, c. 111 (codified at N.J. STAT. ANN. § 2C:11-

Justice Stein took crates of transcripts and briefs to the porch of his home at Martha's Vineyard and worked all summer to reduce five hundred claims of error to a manageable judicial opinion. Only a small trace of dismay came through when he wrote:

"An appeal based on so vast a record and implicating so many distinct issues obviously imposes an enormous institutional burden on this Court, diverting time and resources from the Court's other adjudicative and administrative responsibilities. We know that defendant faces the death penalty. Nevertheless, we question both the wisdom and the necessity for so massive a presentation."<sup>19</sup>

Although I dissented from parts of his opinion, I respected the breadth of its content. My son John, who was then a Deputy Attorney General in the Appellate Section of the State Division of Criminal Justice, said that almost every point of law that you may have an occasion to research was in that opinion.

Other memorable opinions include: *Board of Education of Borough of Englewood Cliffs v. Board of Education of Borough of Tenafly*,<sup>20</sup> holding that State Board of Education has the ultimate responsibility for developing and directing implementation of plan to redress racial imbalance at Dwight Morrow High School in Englewood; *Trantino v. New Jersey State Parole Board*,<sup>21</sup> reversing the Parole Board's denial of parole because the determination that the inmate was likely to recidivate was unsupported by the preponderance of credible evidence; *In re Opinion 33 of the Committee on the Unauthorized Practice of Law*,<sup>22</sup> applying a public-interest standard and holding that neither engagement by New Jersey bond counsel of unlicensed lawyers in that firm or an out-of-state law firm to provide legal services through New

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3). The voluminous size of the petition and its constituent documents—including a forty-five volume appendix and fifteen volume supplemental appendix, together encompassing in excess of 8000 pages—combined with the 548 claims of error on which it relies, presents the Court with a gargantuan appellate record. The issues presented initially were addressed in the Public Defender's 215 page primary brief and answered by the Attorney General's primary brief of comparable dimension. The Public Defender filed a supplemental brief, at the Court's request, consisting of 250 pages and accompanied by an eleven volume index setting forth record and brief citations in support of each of the post-conviction relief claims. The State's responding supplemental brief comprises 244 pages.

*Id.* at 143, 690 A.2d at 22-23.

<sup>19</sup> *Id.* at 144, 690 A.2d at 23.

<sup>20</sup> 170 N.J. 323, 788 A.2d 729 (2002).

<sup>21</sup> 166 N.J. 113, 764 A.2d 940 (2001).

<sup>22</sup> 160 N.J. 63, 733 A.2d 478 (1998).

Jersey bond counsel, nor direct retention of out-of-state law firm by New Jersey public issuer when required by special circumstances will constitute unauthorized practice of law; *Franklin Tower One, L.L.C. v. N.M.*,<sup>23</sup> holding that state statute prohibiting landlords from refusing to rent to tenant because of “source of any lawful rent payment” bars landlords from refusing to accept federal Section 8 rental assistance voucher from an existing tenant; *Rendine v. Pantzer*,<sup>24</sup> authorizing contingency enhancements in setting attorney-fee awards under New Jersey fee-shifting statutes; *Morton Int’l, Inc. v. General Accident Insurance Co. of America*,<sup>25</sup> construing standard pollution-exclusion clause in manner consistent with objectively reasonable expectations of state regulatory authorities and holding that clause was enforceable only to extent of precluding coverage for insured’s intentional discharge of known pollutants; and *In re Township of Warren*,<sup>26</sup> invalidating a regulation of the Council on Affordable Housing that authorized municipalities seeking substantive certification of fair-share plans for low and moderate income housing to allocate fifty percent of such housing to income-eligible households that reside or work in municipality.

In addition to determination and perseverance, Justice Stein had courage. He alone dissented from Chief Justice Wilentz’s opinion in *Doe v. Poritz*,<sup>27</sup> that sustained the validity of Megan’s Law requiring notification to the community of the presence in their midst of previously convicted sex offenders despite the tidal wave of public opinion favoring Megan’s Law. In upholding the law, the Chief Justice wrote: “The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish.”<sup>28</sup> Justice Stein’s responded: “Despite the Legislature’s understandable concern about the danger presented by prior sex offenders, the judicial role, mindful of the compelling pressures that led to the statute’s enactment, is to test the statute on the basis of the Constitution’s fundamental protection against punitive retroactive legislation. I would hold that the devastating impact on prior sex offenders that

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<sup>23</sup> 157 N.J. 602, 725 A.2d 1104 (1999).

<sup>24</sup> 141 N.J. 292, 661 A.2d 1202 (1995).

<sup>25</sup> 134 N.J. 1, 629 A.2d 831 (1993).

<sup>26</sup> 132 N.J. 1, 622 A.2d 1257 (1993).

<sup>27</sup> 142 N.J. 1, 662 A.2d 367 (1995).

<sup>28</sup> *Id.* at 12, 662 A.2d at 372.

will occur from implementation of [Megan's Law] constitutes retroactively imposed punishment prohibited by the Ex Post Facto Clause of the Constitution."<sup>29</sup>

In *State v. Apprendi*, Judge Stein dissented, with Justice Handler, from our decision to uphold our hate-crimes law that allowed a judge to impose an extended sentence of imprisonment if the judge found that the crime was motivated by racial bias.<sup>30</sup> In an opinion that I wrote, the Court concluded that the question of Apprendi's intent was a sentencing factor not requiring jury determination.<sup>31</sup> In a 5-4 decision (I always remind Gary of this) the United States Supreme Court accepted his viewpoint, declaring our law unconstitutional, because the act allowed a judge, not a jury, to decide the sentence-enhancement factor.<sup>32</sup> The Court held that the Sixth Amendment right to a jury trial, read in conjunction with the Due Process Clause in the Fourteenth Amendment, requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."<sup>33</sup> One Justice of the United States Supreme Court made him right and me wrong. A prisoner writing from his place of confinement said: "To the uninitiated, this [outcome] might seem like a 'no-brainer', but the ramifications of the *Apprendi* case were the functional equivalent of logical shrapnel tearing through the nation's courts, both state and federal level."

Justice Stein's last opinion, *Lonegan v. State*,<sup>34</sup> was a partial dissent from the Court's decision to defer judgment on the constitutionality of the issuance of so-called "contract debt" by independent state authorities without voter approval. In Justice Stein's view, the answer was clear: The issuance of any debt that is backed solely by annual payments from the state budget, and not by independent revenues such as tolls, violates the Debt Limitation Clause of the State Constitution. He described as "a legal fiction" the state's argument that there is no obligation on the Legislature to appropriate the money to repay such bonds. He said: "The institutionally responsible answer is to recognize that the Constitution can be amended but it cannot be ignored." In his last opinion, he was still trying to get it

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<sup>29</sup> *Id.* at 147, 662 A.2d at 442.

<sup>30</sup> 159 N.J. 7, 731 A.2d 485 (2000).

<sup>31</sup> *Id.*

<sup>32</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>33</sup> *Id.* at 476.

<sup>34</sup> 174 N.J. 435, 809 A.2d 91 (2002). After Justice Stein retired, the Court revisited the case in *Lonegan v. State*, 176 N.J. 2, 819 A.2d 395 (2003).

right.

Although occasionally vexing, Justice Stein was not a boring or one-dimensional colleague. He enjoyed theater and the arts, read widely and was a sports fan, although I accused him of being a front-runner. (He rooted for the football Giants, the Yankees, and the Knicks.) I recently asked him if he was rooting for the Nets in their recent runs for the NBA championship. "Of course", he said. He enjoyed frequent tennis games and regularly recalled for us accounts of his tennis partners' reactions to our decisions. He was a fitness fanatic. For some time, he baked oatmeal muffins for the Court that tasted every bit like baked oats, no more, no less. The pinnacle of his fitness program was the 65-mile bicycle ride held on his 65th birthday. Justice Clifford, then in his 74<sup>th</sup> year, was the only other member of the Court able to make 65 miles, although Justice Garibaldi and I planned to enter the competition for at least part of the tour.

We cannot speak of Justice Stein without speaking of his beloved wife Et who died in July, 2003. Et was hostess to many parties for the members of the Court. She followed our work closely. She was a surrogate mother to Justice Stein's many law clerks who became part of the Stein family that he loved so much. After every Thanksgiving recess, he would recall for us his exploits as quarterback during a Thanksgiving morning touch football game. Of course, he had to be quarterback. It was his ball. Following the game, which was played in all weather, he and his late wife, Et, entertained what came to be a generation of clerks, spouses, children and family members. Finally, we recall Martha's Vineyard, a place where Justice Stein vacationed. He loved Martha's Vineyard and did some of his best work on the porch of his beach house. In later years, after Chief Justice Deborah Poritz and Justice James M. Coleman, Jr. joined the Court, we occasionally gathered at Gary's Vineyard home to prepare for the new term.

I used to say to the members of the Court that here is no such thing as an indispensable Justice. Gary Stein surely came close.

