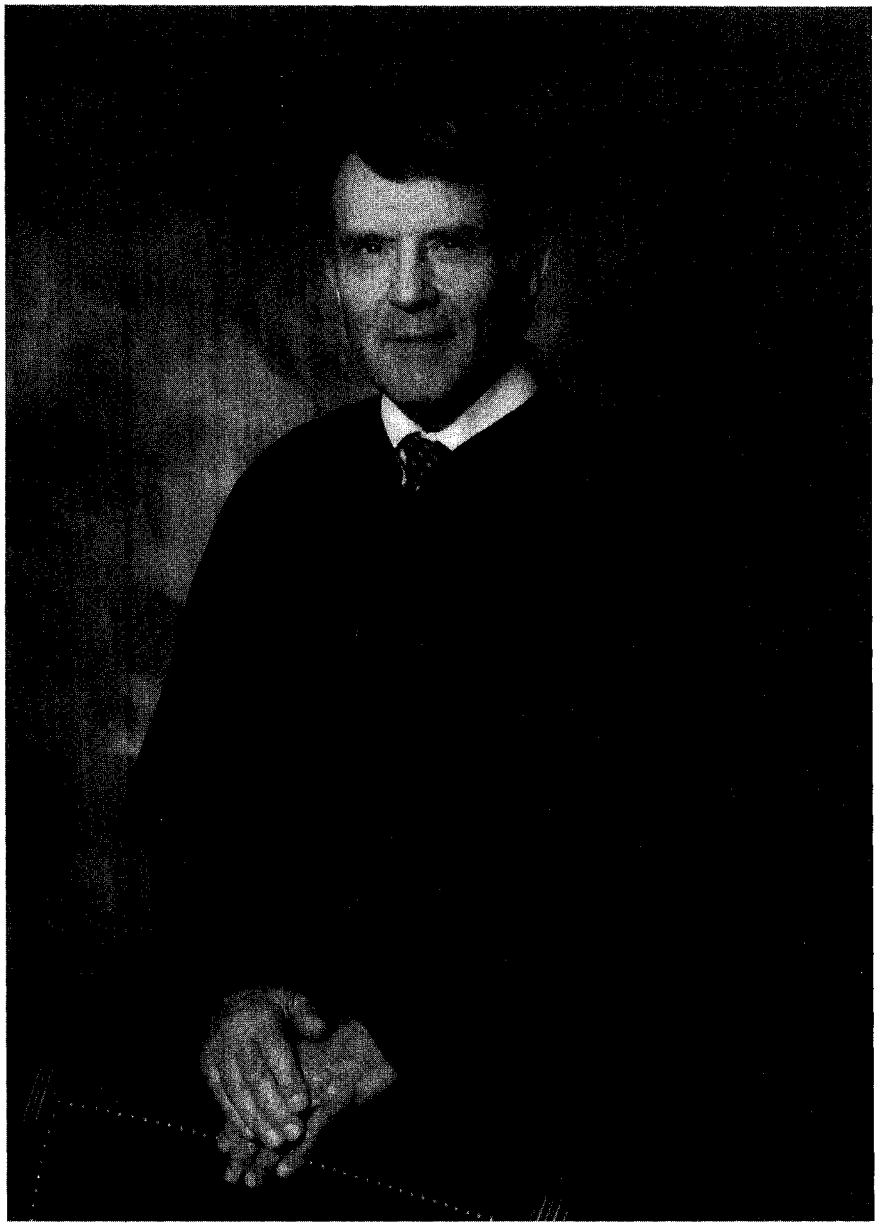

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Justice Alan B. Handler
Supreme Court of New Jersey, 1977-1999

Justice Alan B. Handler: A Towering Justice

The Hon. Daniel J. O'Hern *

Every great court needs a cleanup hitter, someone strong, someone certain, someone upon whom others can safely rely to come through at crucial moments. That was Justice Handler's role on the New Jersey Supreme Court. Of all the Justices, he had the deepest mind and the greatest reservoir of judicial experience and understanding.

At his retirement, he had served longer on the New Jersey Supreme Court than any other Justice but two, Justices Nathan Jacobs and Robert L. Clifford.

In many ways, Justice Handler's career paralleled that of Justice Jacobs. Each was a native of the Newark area. Each was a graduate of the Harvard Law School. Like that of Justice Jacobs, Justice Handler's career bridged the two great transformative eras of the New Jersey Supreme Court, established under the New Jersey Constitution of 1947. The Court's first work was to reform and modernize the common law to make it more consistent with the needs of post-World War II society and more consistent with our understanding of the importance of the individual in that new society. For example, insurance law was reformed to provide that individuals who read an insurance policy would not be deprived of their fair understanding of the policy.[1] Consumers who purchased defective products would be able to gain recourse from the manufacturers of the products.[2] Debtors who were led into unfair bargaining relationships were permitted to be relieved from the holder-in-due-course rule.[3]

Toward the end of that period of transformation, the Court turned its attention to consideration of human rights, most notably in the context of equal access to housing and educational opportunity.

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* Associate Justice, New Jersey Supreme Court.

1 *See* Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638 (1965).

2 *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

3 *See* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

In *Robinson v. Cahill*,[4] the Court held that equal funding must be provided for children in disadvantaged communities. In *Oakwood at Madison, Inc. v. Township of Madison*,[5] the Court held that New Jersey's zoning power must be exercised in the public interest to afford a fair opportunity for persons of low and moderate income to live in every community in the state.

Through these years, Justice Handler was an active member of the New Jersey legal community. Admitted to the bar in 1956, he joined the office of the New Jersey Attorney General in 1961 and participated in many of these major changes in society. In 1967, he was appointed to the superior court and elevated to the appellate division in 1973. In 1976, he left the appellate division to serve as Chief Counsel to Governor Brendan T. Byrne. In that capacity, he was deeply involved in the reform of government funding. In 1977, Governor Byrne appointed him to the New Jersey Supreme Court, during the final years of Justice Jacob's tenure.

In Justice Handler's 1989 law review article, *Individual Worth*,[6] he wrote:

> A surprising number of intense human dramas have recently played on the judicial stage. In the guise of court decisions, they have presented very poignant themes, involving the most sensitive kinds of personal concerns—procreation, birth, health, survival, and dying. What seems unusual about all of this is not the drama of these episodes but that they have been produced and directed by courts.[7]

For over twenty years, Justice Handler was at center stage as these intense human dramas were played out.

Within those years, the New Jersey Supreme Court was called on to appraise the value of human life in wrongful birth and wrongful life claims. Justice Handler cast his imprint on the Court's decisions. His dissent in *Hummel v. Reiss*[8] traced the long evolution of that doctrine and his role in shaping it. Justice Handler explained how in *Berman v. Allan*,[9] the Court had come to recognize a cause of action for wrongful birth that had not been recognized in *Gleitman v. Cosgrove*.[10] He harkened to Justice Jacob's dissent in the *Gleitman*

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[4] 62 N.J. 473, 303 A.2d 273 (1973).

[5] 72 N.J. 481, 371 A.2d 1192 (1977).

[6] *See* Alan B. Handler, *Individual Worth*, 17 HOFSTRA L. REV. 493 (1989).

[7] *Id.* at 493 (footnote omitted).

[8] 129 N.J. 118, 608 A.2d 1341 (1992).

[9] 80 N.J. 421, 404 A.2d 8 (1979).

[10] 49 N.J. 22, 227 A.2d 689 (1967); *see also Hummel*, 129 N.J. at 137-38, 608 A.2d at 1351-52 (Handler, J., dissenting).

opinion, explaining "that malpractice committed against a pregnant woman caused harm not only to the woman but also to her family."[11] Justice Handler referenced his own dissent in *Berman*, in which he elaborated on the character of the tort: "'[T]he duty [the physicians] owed Mrs. Berman enveloped a duty to the unborn child. The breach of that duty affects both.'"[12] Justice Handler also invoked the words of Justice Pollock, who wrote: "'A family is woven of the fibers of life; if one strand is damaged, the whole structure may suffer. The filaments of family life, although individually spun, create a web of interconnected [legal] interests.'"[13]

Finally, Justice Handler recalled that in *Procanik v. Cillo*,[14] the Court extended the web of protection to cover claims brought directly by handicapped children: "'When a child requires extraordinary medical care, the financial impact is felt not just by the parents, but also by the injured child.'"[15] Justice Handler explained that, although the *Procanik* Court refused to grant "impaired children the full measure of their damages, that decision nonetheless brought [the Court] full circle back to Justice Jacobs's original dissent in *Gleitman*."[16] In *Gleitman*, Justice Jacobs had written that "'while logical objection may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his [handicap] throughout life.'"[17]

Justice Handler's allusion to law as drama mirrors Justice Pollock's allusion to law as art.[18] Each of these Justices saw the relationship between law and the larger themes that govern our lives.

The theme of individual worth permeates Justice Handler's view of the judicial universe. In his memorable dissent in *State v. Marshall*,[19] Justice Handler noted the "emergence of the disquieting truth that capital punishment cannot really be made to work in a

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[11] *Hummel*, 129 N.J. at 137, 608 A.2d at 1351 (Handler, J., dissenting) (citing *Gleitman*, 49 N.J. at 50, 227 A.2d at 704 (Jacobs, J., dissenting)).

[12] *Id.* (partial alteration in original) (quoting *Berman*, 80 N.J. at 444, 404 A.2d at 20 (Handler, J., concurring in part and dissenting in part)).

[13] *Id.* at 137-38, 608 A.2d at 1351 (Handler, J., dissenting) (quoting Schroeder v. Perkel, 87 N.J. 53, 63-64, 432 A.2d 834, 839 (1981)).

[14] 97 N.J. 339, 478 A.2d 755 (1984).

[15] *Hummel*, 129 N.J. at 138, 608 A.2d at 1351 (Handler, J., dissenting) (quoting *Procanik*, 97 N.J. at 351, 478 A.2d at 762).

[16] *Id.*, 608 A.2d at 1352 (Handler, J., dissenting).

[17] *Id.* (alteration in original) (quoting *Gleitman*, 49 N.J. at 50, 227 A.2d at 704 (Jacobs, J., dissenting)).

[18] *See* Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591 (1996).

[19] 123 N.J. 1, 586 A.2d 85 (1991).

civilized society."[20] He recalled the words of the poet John Donne to remind us that we are all members of the same human family: "'[A]ny man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.'"[21] In *State v. Timmendequas*,[22] Justice Handler's final appeal to the Court's conscience, the Justice recalled La Rochefoucauld's maxim that "death, like the sun, cannot be looked at steadily."[23] Justice Handler wrote:

> The Court, in its attempt to look directly at death, loses its vision . . . . The sacrifice we make when we sentence a defendant to life imprisonment instead of death pales in comparison to what we gain by holding that a defendant who cannot receive a fair trial in this State simply cannot be put to death, no matter how certain and clear his guilt. By abandoning principle and yielding judicial integrity in order to put the defendant to death, we lose, with even greater finality, the essence of fairness that is the heart of our criminal justice system.[24]

Justice Handler's creed was that the authority of the courts depends entirely on the public's acceptance of their opinions because judges lack temporal authority to enforce their opinions through the use of force. To gain acceptance, the courts' opinions must be "intrinsically persuasive."[25] He explained that

> [a] valid judicial decision is one that holds no secrets or hidden meanings, that inspires confidence that it is right as well as correct, sound as well as accurate, complete as well as pointed, fair as well as wise, and tolerant as well as decisive. It should reflect a sense of justice that is, in a word, prudential.[26]

Such decisions would enhance the Supreme Court's legitimacy.

Consequently, the Court called upon him to explain in *Abbott v. Burke IV*[27] and *Abbott v. Burke V*,[28] among the most momentous of the Court's decisions, that the Court would insist on the fulfillment of its

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[20] *Id.* at 266, 586 A.2d at 225 (Handler, J., dissenting).

[21] *Id.* at 267, 586 A.2d at 226 (Handler, J., dissenting) (alteration in original) (quoting John Donne, *Meditation XVII* (1624), *reprinted in* THE OXFORD ANTHOLOGY OF ENGLISH LITERATURE 1057 (Frank Kermode & John Hollander eds., Oxford Univ. Press 1973)).

[22] 161 N.J. 515, 737 A.2d 55 (1999).

[23] *Id.* at 722, 737 A.2d at 172 (Handler, J., dissenting).

[24] *Id.* at 722-23, 737 A.2d at 172 (Handler, J., dissenting).

[25] *See* Alan B. Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571, 596 (1986).

[26] *Id.*

[27] 149 N.J. 145, 693 A.2d 417 (1997).

[28] 153 N.J. 480, 710 A.2d 450 (1998).

mandate that equal educational opportunity be afforded to the underprivileged children of inner-city schools. Although Justice Handler's writing style lacked the fervor of our late Chief Justice Wilentz, it contained the same measure of commitment. Justice Handler wrote in *Abbott IV*:

> The remedial proceedings to be conducted on remand are a step in the remedial process that should lead ultimately to the full realization of the constitutional educational opportunity. Although it remains our hope that needed comprehensive relief eventually will come from those branches of government more suited to the task, there can be no responsible dissent from the position that the Court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children in the poverty-stricken urban districts.[29]

Returning to the metaphor of law as art, Justice Handler may be viewed as an architect framing the structure of government. He was not a man of absolutes. He tended to view constitutional doctrine as having "play in the joints." In *Marsa v. Wernik*,[30] authored by Justice Handler, the Court held that having a council member commence a public meeting by calling for a silent meditation or delivering an invocation, the subject of which was determined by the council member, did not violate the Establishment Clause of the First Amendment. In *Knight v. City of Margate*,[31] the Justice found a "twilight zone" in the doctrine of separation of powers to enable the Court to sustain a delicate balance between the executive and legislative branches. Justice Handler wrote: "The constitutional doctrine of the separation of powers denotes not only independence but also interdependence among the branches of government. Indeed, the division of governmental powers implants a symbiotic relationship between the separate governmental parts so that the governmental organism will not only survive but will flourish."[32] In *State v. Schmid*,[33] Justice Handler found that a private property right had to yield to a broader need for free speech on a university campus. Conversely, in *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*,[34] the Justice wrote to sustain the constitutionality of New Jersey's election-funding laws despite some restraint on speech. In *Holmdel Builders Ass'n v. Township of*

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[29] *Abbott IV*, 149 N.J. at 202, 693 A.2d at 445.
[30] 86 N.J. 232, 430 A.2d 888 (1981).
[31] 86 N.J. 374, 431 A.2d 833 (1981).
[32] *Id.* at 388, 431 A.2d at 840.
[33] 84 N.J. 535, 423 A.2d 615 (1980).
[34] 82 N.J. 57, 411 A.2d 168 (1980).

Holmdel,[35] Justice Handler parsed the relationship between home rule and exclusionary zoning and a state mandate for inclusionary zoning.

He was also every bit the common-law judge. Writing opinions for the Court in a vast array of contexts, he argued for the presumption that consumers of products would heed a warning, if given,[36] the duty of a manufacturer to foresee alterations in its product,[37] and the duty of a commercial owner of property to provide a safe place of access for customers.[38] In all of these common-law cases, he displayed the skill of the late United States Supreme Court Justice Cardozo in weaving varied strands of doctrine to make the fabric of the law.

Although Justice Handler will not recall this, when he circulated his opinion in *People Express Airlines, Inc. v. Consolidated Rail Corp.*,[39] I wrote him a note expressing the view that the opinion would be as well remembered as *Palsgraf v. Long Island Railroad Co.*[40] In *People Express*, Justice Handler discarded the physical harm requirement for negligently inflicted economic losses and sustained a cause of action for foreseeable economic damages occasioned by a negligent act. Justice Handler explained that many courts had based their refusal to allow recovery for purely economic losses on the physical harm requirement, "fearing that if even one deserving plaintiff suffering purely economic loss were allowed to recover, all such plaintiffs could recover."[41] The Justice, however, believed that the Court could fashion a rule that limited liability yet permitted adjudication of meritorious claims.[42] While tracing the various exceptions to the physical harm requirement, he discovered a common theme—"[w]hen the plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by defendant's negligence, and liability can be limited fairly."[43] Thus, Justice Handler concluded that

> a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its

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[35] 121 N.J. 550, 583 A.2d 277 (1990).
[36] *See* Coffman v. Keene Corp., 133 N.J. 581, 628 A.2d 710 (1993).
[37] *See* Brown v. United States Stove Co., 98 N.J. 155, 484 A.2d 1234 (1984).
[38] *See* Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 625 A.2d 1110 (1993).
[39] 100 N.J. 246, 495 A.2d 107 (1985).
[40] 248 N.Y. 339, 162 N.E. 99 (1928).
[41] *People Express*, 100 N.J. at 254, 495 A.2d at 111.
[42] *See id.*
[43] *Id.* at 261, 495 A.2d at 114.

conduct.[44]

Finally, he was a righteous judge. In matters of attorney ethics, he demanded the highest qualities of character. In *In re Rigolosi*,[45] Justice Handler wrote to disbar an attorney despite a jury verdict that had exonerated the attorney of witness tampering. More was required, the Justice found, than that an attorney escape criminal conviction. Justice Handler wrote:

> Respondent's conduct reveals a flaw running so deep that he can never again be permitted to practice law. This is not a case of a novice who had not yet had opportunity to develop a sense of ethics. Respondent was an attorney steeped in the ways of law, government, and politics. No amount of good works can save someone who, with all the knowledge and experience that he accumulated, "poisons the well of justice."[46]

In *In re McLaughlin*,[47] Justice Handler discussed the need for both attorneys and bar applicants to adhere to the highest principles of integrity. The Justice wrote:

> Candidates for the bar are expected to understand and satisfy the personal, educational and professional requisites that inhere in good character and fitness and are indispensable in one seeking authorization to engage in the practice of law. Good character does not emerge on licensure. It is absurd to suggest that good character is not revealed until a person becomes an attorney. The fundamental character traits of honesty and truthfulness are not valued in the abstract, but are assumed to be inherent aspects of one's personality; they can, and must, be considered the measure of a candidate's eligibility to seek admission to practice law and ability to fulfill the responsibilities of the legal profession.[48]

Although he managed, in a long series of Court portraits, always to be photographed with the same frown, Justice Handler had the lightest of hearts. His humor enlivened many conferences and the hours between oral argument. He was the Justice best able to tweak the imperialism of our late Chief Justice Wilentz. Chief Justice Wilentz was the master of long single-spaced letters as a means of conveying his views on matters of Court business. These letters were weighty in substantive content, quality, and quantity. Of one such letter, Justice Handler said to the Chief Justice at a conference: "Like any piece of good literature, upon a re-reading, you can always find

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[44] *Id.* at 263, 495 A.2d at 116.
[45] 107 N.J. 192, 526 A.2d 670 (1987).
[46] *Id.* at 210, 526 A.2d at 681.
[47] 144 N.J. 133, 675 A.2d 1101 (1996).
[48] *Id.* at 148, 675 A.2d at 1109.

new riches in your memos."

At oral argument, his deep voice and slightly forbidding appearance made it impossible for lawyers to realize that he was often on their side. He would, in the course of oral argument, throw out rhetorical lifelines to lawyers who were adrift. Invariably the lawyers would reject the lifelines, suspecting some ulterior motive on Justice Handler's part rather than a genuine desire to assist the lawyer in explaining the lawyer's point.

I will miss him greatly. Justice Handler was my oldest friend on the Court. We had known each other at the bar for almost forty years. I served with him on the Court every day for eighteen years. His wit brightened every conference of the Court, and he was a source of strength for all of us, a repository of accumulated wisdom with an innate ethical sense and a passion for justice best exemplified by his dissents in capital cases.

Life will go on, the New Jersey Supreme Court will go on, but the New Jersey Supreme Court will never be the same as when Justice Handler graced our bench.