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# Tribute to Justice Stewart G. Pollock, A A Tribute to Justice Stewart G. Pollock

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## A Tribute to Justice Stewart G. Pollock

*Howard M. Erichson*<sup>\*</sup>

Stewart Pollock knows how to make a play. On his favorite kind of court — the kind with a net in the middle — he can set up the winning volley with a perfectly placed approach shot. On the court on which he served for the past twenty years, the New Jersey Supreme Court, Justice Pollock proved himself an equally gifted playmaker, earning a reputation as one who could forge consensus through judicial craftsmanship and common sense.

Appellate judging is a team sport, though one would hardly know it by looking at recent United States Supreme Court cases, with all their dissents, concurrences, and fractured opinions. The New Jersey Supreme Court, in contrast, has managed to offer many unanimous decisions, even when breaking new ground or dealing with political hot-button issues.<sup>1</sup> The court has accomplished this unanimity despite New Jersey's tradition of maintaining a Democrat-Republican split among the justices.<sup>2</sup> Justice Pollock was at the center

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<sup>1</sup> See, e.g., *Dale v. Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (1999) (holding that Boy Scouts have no right to exclude a scoutmaster on grounds of homosexuality, in opinion by Chief Justice Poritz endorsed by six justices and "fully endorse[d]" by concurring Justice Handler); *State v. One 1990 Honda Accord*, 154 N.J. 373, 712 A.2d 1148 (1998) (upholding right to jury trial in forfeiture action involving property used for criminal purposes without owner's permission, in unanimous opinion by Justice Pollock); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990) (holding New Jersey's school funding system unconstitutional as applied to poorer urban school districts, in unanimous opinion by Chief Justice Wilentz); *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) (holding surrogate motherhood contract illegal and discussing parental rights in wake of surrogacy arrangement, in unanimous opinion by Chief Justice Wilentz); *Southern Burlington County NAACP v. Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (imposing broad remedial scheme for provision of low-income housing opportunities, in unanimous opinion by Chief Justice Wilentz).

<sup>2</sup> By long-standing tradition, the New Jersey Supreme Court's seven members never include more than four from the same political party. Thus, for example, Republican Governor Christine Whitman recently appointed Democrat Virginia Long to the court to maintain the current balance of four Republicans and three Democrats. Similarly, Stewart Pollock, a Republican, was appointed by Democratic

of the court on many of these decisions, not only by virtue of his political sensibilities, but also by virtue of his approach to judging. His opinions routinely are included in law school casebooks for their clarity and intelligence.<sup>3</sup> A textbook admirer of Pollock opinions, however, might miss another of their signature qualities — their collegiality.

As telling as Justice Pollock's unanimous opinions, which are many, are his concurrences and dissents, which are few. He never, as far as I can tell, wrote a concurrence or a dissent merely to wax eloquent on an interesting legal issue. Justice Pollock wrote separately only where he saw some compelling reason to do so. Generally, an unfractured opinion offers both the litigants and the public clearer guidance, and enhances the court's legitimacy and respect in the eyes of the citizenry and in coordinate branches of the government. Not only is Justice Pollock's majority-to-dissent ratio notably high,<sup>4</sup> his concurrences are exceptionally rare. Looking at his frequent unanimous opinions, his infrequent dissents, and his even less frequent concurrences, one gets an overall impression of the judge. The impression is that of a judge who can build a coalition to ensure unanimity or at least a majority, who is willing to state a dissent on those occasions when his position is irreconcilable with the majority position, but who rarely writes an opinion merely to offer another point of view.

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Governor Brendan Byrne.

<sup>3</sup> See, e.g., BARBARA BABCOCK & TONI MASSARO, CIVIL PROCEDURE 1105 (1997) (reprinting *Watkins v. Resorts Int'l Hotel & Casino*, 124 N.J. 398, 591 A.2d 592 (1991) (Pollock, J.) (addressing the claim-preclusive effect of a federal court judgment)); DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 281 (1992) (reprinting *Saint Barnabas Med. Ctr. v. County of Essex*, 111 N.J. 67, 543 A.2d 34 (1988) (Pollock, J., concurring) (addressing the duty of a county to pay for the hospitalization costs of an indigent county jail inmate)); JESSE CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 82 (4th ed. 1995) (reprinting *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981) (Pollock, J.) (addressing the duties of corporate directors)); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 733 (5th ed. 1998) (reprinting *Petrillo v. Bachenberg*, 139 N.J. 472, 655 A.2d 1354 (1995) (Pollock, J.) (addressing lawyer liability to non-clients)); ARTHUR LAFRANCE, BIOETHICS: HEALTH CARE, HUMAN RIGHTS, AND THE LAW 743 (1999) (reprinting *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984) (Pollock, J.) (addressing tort action for wrongful life)).

<sup>4</sup> See Tim O'Brien, *Pollock: Pragmatist at the Court's Center*, 151 N.J. L.J. at 230-31 (Jan. 19, 1998) (noting Justice Pollock's high majority-to-dissent ratio of 3.52:1); Kathleen Bird et al., *Reconstructing New Jersey*, 130 N.J. L.J. at 453 (Feb. 17, 1992) (noting Justice Pollock's majority-to-dissent ratio of 6:1 for the years 1979-1991, the highest ratio on the court by a significant margin); Kathleen Bird, *As Pollock Goes, So Goes the Court*, 130 N.J. L.J. at 442 (Feb. 17, 1992) ("His ratio of signed unanimous opinions to dissents is the highest on the Court.").

In a 1996 lecture entitled *The Art of Judging*, Justice Pollock noted that “judging, particularly in hard cases, is unavoidably creative.”<sup>5</sup> Creativity and flexibility are required to craft judicial opinions that not only do justice, but also command a majority of the court, as well as the respect of the community. Examples from two very different areas of law help to show the playmaking ability, flexibility, and plain old common sense that Justice Pollock brought to his judging.

In *Francis v. United Jersey Bank*,<sup>6</sup> the New Jersey Supreme Court held a corporate director liable for negligently allowing her sons to siphon funds from the corporation.<sup>7</sup> Justice Pollock’s straightforward statement of the duties of corporate directors<sup>8</sup> is widely viewed as a governing standard.<sup>9</sup> Equally impressive, however, is the way that he crafted the opinion to attract the court’s unanimous approval, as well as the common-sense justice of the outcome. As a matter of judicial craftsmanship, the opinion included both a statement of legal principles expressed in broad enough terms to give judges, lawyers, and corporate directors useful guidance,<sup>10</sup> and enough factual specificity to offer future judges and lawyers some flexibility to distinguish *Francis* from their own case when necessary.<sup>11</sup> As a matter of common-sense justice, the court’s decision had the effect of punishing the primary wrongdoers. The case involved the liability of

<sup>5</sup> Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 593 (1996).

<sup>6</sup> 87 N.J. 15, 432 A.2d 814 (1981).

<sup>7</sup> See *id.* at 45, 432 A.2d at 829.

<sup>8</sup> See *id.* at 31, 432 A.2d at 822. The justice stated:

Directors are under a continuing obligation to keep informed about the activities of the corporation. Otherwise, they may not be able to participate in the overall management of corporate affairs. Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect.

*Id.* (citations omitted).

<sup>9</sup> See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, comment to § 4.01(a)(1)-(a)(2); ROBERT CHARLES CLARK, CORPORATE LAW § 3.4.1 at 125 n.9 (1986); JAMES D. COX ET AL., CORPORATIONS § 10.5 at 189-90 (1997).

<sup>10</sup> See *Francis*, 87 N.J. at 31-35, 432 A.2d at 822-24 (stating the obligations of corporate directors as a general matter).

<sup>11</sup> In particular, Justice Pollock’s opinion suggested a possible distinction between a small, closely held corporation and a large, publicly held corporation, and emphasized that certain close corporations may “be affected with a public interest.” *Id.* at 35, 432 A.2d at 824. The opinion went on to discuss the particular character of the reinsurance industry, and the special trust placed in the directors of a reinsurance brokerage corporation, by analogy to the duties of bank directors. See *id.* at 37-39, 432 A.2d at 825-26.

the negligent director, rather than of the embezzling sons who took advantage of her,<sup>12</sup> but the director herself had died before trial. Imposing liability on her estate presumably took money from two likely beneficiaries — the embezzling sons. Although the legal standard for directors' liability may take no account of such a plot twist, I assume that the plain justice of the outcome was not lost on Justice Pollock, nor on his unanimous colleagues.

Even in the most technical aspects of the law, Justice Pollock kept his eye on the practical impact of the court's decisions. A compulsory party joinder rule known as the entire controversy doctrine, for example, was applied ever more expansively by the New Jersey Supreme Court from the late 1980s through the mid-1990s, culminating in 1995 in the application of the doctrine to legal malpractice claims.<sup>13</sup> The doctrine was problematic to begin with, but was especially troubling as applied to malpractice claims. Justice Pollock, in a 1996 opinion, acknowledged that the doctrine had attracted criticism from the bar.<sup>14</sup> A year later, in *Olds v. Donnelly*,<sup>15</sup> Justice Pollock wrote that rarest of judicial documents: an opinion that admits that the court made a mistake. "Candor compels that we acknowledge that the application of the entire controversy doctrine to legal-malpractice claims has not fulfilled our expectations," Justice Pollock wrote.<sup>16</sup> The court unanimously overruled the application of the doctrine to malpractice claims,<sup>17</sup> and requested a re-examination of the entire controversy doctrine by the Civil Practice Committee.<sup>18</sup> Through careful drafting and a wise referral to committee, Justice Pollock accomplished the right result with a minimum of fuss. It could have been — and on another court probably would have been — an acrimonious battle among the justices. Instead, Justice Pollock and his colleagues achieved the correction of an unfortunate twist of doctrine with impressive swiftness, honesty, and lack of defensiveness.

Justice Pollock never lost sight of the importance of each

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<sup>12</sup> Both of the sons had filed individual bankruptcy petitions. See *Francis v. United Jersey Bank*, 162 N.J. Super. 355, 365, 392 A.2d 1233, 1237 (Law Div. 1978).

<sup>13</sup> See *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 291, 662 A.2d 509, 513 (1995).

<sup>14</sup> See *Prevratil v. Mohr*, 145 N.J. 180, 191-92, 678 A.2d 243, 248-49 (1996).

<sup>15</sup> 150 N.J. 424, 696 A.2d 633 (1997).

<sup>16</sup> *Id.* at 440, 696 A.2d at 641.

<sup>17</sup> Justice Stein wrote separately. He agreed that legal malpractice claims should not be subject to compulsory party joinder under the entire controversy doctrine, but would have gone further to reject altogether the entire controversy doctrine's compulsory party joinder component. See *id.* at 473, 696 A.2d at 658 (Stein, J., concurring in part and dissenting in part).

<sup>18</sup> See *Olds*, 150 N.J. at 446, 449, 696 A.2d at 644, 646.

decision on human beings, including not only the particular litigants in the case, but also the other citizens whose lives are affected by the court's decisions. "In today's world, state courts are the catchers in the rye,"<sup>19</sup> Justice Pollock said in a recent lecture, alluding to the J.D. Salinger novel in which Holden Caulfield imagines himself in a field of rye catching children before they fall off a cliff. "For so many people," Justice Pollock continued, "state courts are all that stands between them and the edge of the cliff."<sup>20</sup>

In *The Art of Judging*, Justice Pollock asked, "Does anyone really want judges to be devoid of imagination, good sense, courage, and compassion?"<sup>21</sup> The citizens of New Jersey, lucky to have had a justice with the imagination, good sense, courage, and compassion of Stewart Pollock, should be able to answer with an emphatic "no."

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<sup>19</sup> Stewart G. Pollock, *Lawyers and Judges as Catchers in the Rye*, 34 TULSA L.J. 1, 3 (1998).

<sup>20</sup> *Id.*

<sup>21</sup> Pollock, *supra* note 5, at 594.