

## Justice Stewart G. Pollock: Catcher in the Rye

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I first came to know Stewart Pollock by reading his opinions and teaching them to my students. Later, I had the privilege to meet and work with him as we served together as advisors to the American Law Institute's Restatement of the Law Governing Lawyers. During all this time, I have been struck by the power of his moral intuition, the precision of his thinking, and the clarity of his expression. In writing legal opinions that have resolved the ordinary legal disputes of New Jersey citizens, Justice Pollock has managed to teach the rest of us at least as much about the need to guide future legal developments with insight, compassion, and wisdom.

About one year ago, Justice Pollock characterized judges and lawyers as "catchers in the rye."<sup>1</sup> He referred to J. D. Salinger's novel of that title and quoted the main protagonist, Holden Caulfield, who told his sister that he wanted to be someone whose job it is to "catch everybody if they start to go over the cliff."<sup>2</sup> Justice Pollock concluded that the everyday work of lawyers and state court judges likewise requires us to "catch" people before they fall off the metaphorical cliffs of life — the cliffs of poverty, homelessness, and joblessness that put "us all at peril of living in a world of lawlessness and injustice."<sup>3</sup>

Justice Pollock's service as an associate justice on the New Jersey Supreme Court over the past two decades mirrors this image. In resolving individual legal disputes in New Jersey, he has continually reminded us where the cliff is and has left us with a legacy of insight that has influenced the direction of the law far beyond New Jersey's boundaries.

Not long after he came to the bench, Justice Pollock began to articulate clear legal precedent. In rapid succession, eight of his opinions inspired the editors of American Law Reports to create new and interesting

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<sup>1</sup> See Stewart G. Pollock, *Lawyers and Judges as Catchers in the Rye*, 34 TULSA L.J. 1, 6 (1998).

<sup>2</sup> *Id.* at 2 (citation omitted).

<sup>3</sup> *Id.* at 3.

annotations.<sup>4</sup> His ability to delineate where the cliffs of life endanger us and to find a legal remedy that prevents a fall has continued throughout his career.<sup>5</sup>

Talent like this does not long escape the attention of those who write law casebooks. To instruct students of the law, law professors in disciplines from Property,<sup>6</sup> Torts,<sup>7</sup> Health Law,<sup>8</sup> Products Liability,<sup>9</sup> and

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<sup>4</sup> See Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544 (1982) (discussing *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980), 12 A.L.R. 4th 520 (1982)); John E. Theuman, Annotation, *Attorney's Failure to Attend Court, or Tardiness, as Contempt*, 13 A.L.R. 4th 122 (1982) (discussing *In re Yengo*, 84 N.J. 111, 417 A.2d 533 (1980), 13 A.L.R. 4th 102 (1982)); Jay M. Zitter, Annotation, *Wife's Liability for Necessaries Furnished Husband*, 11 A.L.R. 4th 1160 (1982) (discussing *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, 417 A.2d 1003 (1980), 11 A.L.R. 4th 1147 (1982)); Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R. 4th 948 (1984) (discussing *Lyon v. Barrett*, 89 N.J. 294, 445 A.2d 1153 (1982), 30 A.L.R. 4th 940 (1984)); Jean E. Maess, Annotation, *Order Awarding Temporary Support or Living Expenses upon Separation of Unmarried Partners Pending Contract Action Based on Services Relating to Personal Relationship*, 35 A.L.R. 4th 409 (1985) (discussing *Crowe v. De Gioia*, 90 N.J. 126, 447 A.2d 173 (1982), 35 A.L.R. 4th 394 (1985)); Jay M. Zitter, Annotation, *Postsecondary Education as Within Nondivorced Parent's Child-Support Obligation*, 42 A.L.R. 4th 819 (1985) (discussing *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982), 42 A.L.R. 4th 795 (1985)); Francis M. Dougherty, Annotation, *Propriety of Attorney Acting as both Counsel and Class Member or Representative*, 37 A.L.R. 4th 751 (1985) (discussing *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (1983), 37 A.L.R. 4th 730 (1985)); Robin Cheryl Miller, Annotation, *Recovery by Patient on Whom Surgery or Other Treatment Was Performed by One Other Than Physician Who Patient Believed Would Perform It*, 39 A.L.R. 4th 1034 (1985) (discussing *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983), 39 A.L.R. 4th 1018 (1985)).

<sup>5</sup> At last count, American Law Reports had selected a total of 12 of Justice Pollock's opinions for publication. In addition to those listed in note 4, *supra*, see also Anne M. Payne, Annotation, *Existence, Nature, and Application to Medical Professional Disciplinary Board of Privilege Against Disclosure of Identity of Informer*, 86 A.L.R. 4th 1024 (1991) (discussing *Grodjesk v. Faghani*, 104 N.J. 89, 514 A.2d 1328 (1986), 86 A.L.R. 4th 1009 (1991)); Jeffrey F. Ghent, Annotation, *Licensing and Regulation of Practice of Physical Therapy*, 8 A.L.R. 5th 825 (1992) (discussing *Medical Soc'y of N.J. v. New Jersey Dep't of Law and Pub. Safety, Div. of Consumer Affairs*, 120 N.J. 18, 575 A.2d 1348 (1990), 8 A.L.R. 5th 1035 (1992)); Charles W. Benton, Annotation, *Automobile Insurance Coverage for Drive-By Shootings and Other Incidents Involving the Intentional Discharge of Firearms from Moving Motor Vehicles*, 41 A.L.R. 5th 91 (1996) (discussing *Lindstrom v. Hanover Ins. Co.*, 138 N.J. 242, 649 A.2d 1272 (1994), 41 A.L.R. 5th 837 (1996)); J. James Fraiser III, Annotation, *Persons or Entities upon Whom Notice of Injury or Claim Against State or State Agencies May or Must Be Served*, 45 A.L.R. 5th 173 (1997) (discussing *Feinberg v. State of N.J., N.J. Dep't of Env'tl. Protection*, 137 N.J. 126, 644 A.2d 593 (1994), 45 A.L.R. 5th 837 (1997)).

<sup>6</sup> See CRIBBET ET AL., *PROPERTY CASES AND MATERIALS* 151 (7th ed. 1996) (citing *O'Keefe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980)).

<sup>7</sup> See ROBERT E. KEETON ET AL., *CASES AND MATERIALS ON TORT AND ACCIDENT LAW* 167 (3d ed. 1998) (reproducing *Snyder v. American Ass'n of Blood Banks*, 144 N.J. 269, 676 A.2d 1036 (1996)); DOBBS & HAYDEN, *TORTS AND COMPENSATION, PERSONAL ACCIDENT AND SOCIAL RESPONSIBILITY FOR INJURY* 368 (3d ed. 1997) (citing *Snyder*);

Legal Ethics<sup>10</sup> have included his opinions in their texts.

Teaching one of Justice Pollock's opinions always raises the level of inquiry in a law school class. For me, examples abound. I remember introducing students in a Law, Science, and Medicine class to the ethical mandates of research involving human subjects by analyzing a contracts case, *Pierce v. Ortho Pharmaceutical Corp.*<sup>11</sup> Dr. Pierce, the plaintiff, claimed that she was fired over a disagreement about continuing research on a new drug.<sup>12</sup> Although the decision focused primarily on the requirements for a retaliatory discharge cause of action, Justice Pollock's analysis of the relevant provisions of the Hippocratic Oath, Food and Drug Administration laws, and a report of the American Medical Association's Ad Hoc Committee on the Principles of Medical Ethics helped my students understand the basic ethical underpinnings that govern research involving human subjects.<sup>13</sup>

*Perna v. Pirozzi*<sup>14</sup> is another favorite. In *Perna*, Justice Pollock helped locate the cliff of unreasonable and harmful conduct of physicians by attacking the practice of "ghost surgery." He rightly concluded "[i]t is

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DOBBS & HAYDEN, *supra*, at 164, 166 (citing *Eaton v. Eaton*, 119 N.J. 628, 575 A.2d 858 (1990)); KEETON ET AL., *supra*, at 1168 (reproducing *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 516 A.2d 220 (1986)); JOHN W. WADE ET AL., CASES AND MATERIALS ON TORTS 1085 (9th ed. 1994) (citing *Dairy Stores, Inc.*); EPSTEIN, CASES AND MATERIALS ON TORTS 1380 (6th ed. 1995) (citing *Dairy Stores, Inc.*); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 836 (5th ed. 1999) (citing *Dairy Stores, Inc.*).

<sup>8</sup> See WADE ET AL., *supra* note 7, at 399 (citing *Carey v. Lovett*, 132 N.J. 44, 622 A.2d 1279 (1993)); DOBBS & HAYDEN, *supra* note 7, at 500 (citing *Carey*); WADE ET AL., *supra* note 7, at 426 (reproducing *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984)); SAL FISCINA ET AL., MEDICAL LIABILITY 130 (1991) (citing *Procanik*); DOBBS & HAYDEN, *supra* note 7, at 75 (citing *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983)); FISCINA ET AL., *supra*, at 201 (reproducing *Perna*).

<sup>9</sup> See EPSTEIN, *supra* note 7, at 932 (citing *Herman v. Sunshine Chem. Specialties, Inc.*, 133 N.J. 329, 627 A.2d 1081 (1993)); KEETON ET AL., *supra* note 7, at 704 (discussing *Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 562 A.2d 202 (1989)); WADE ET AL., *supra* note 7, at 735 (reproducing *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983)); EPSTEIN, *supra* note 7, at 813 (citing *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983)); DOBBS & HAYDEN, *supra* note 7, at 643 (citing *O'Brien*).

<sup>10</sup> See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 74 (5th ed. 1998) (discussing *Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633 (1997)); NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY PROBLEMS OF PRACTICE AND THE PROFESSION 426 n.70 (1996) (citing *Petrillo v. Bachenberg*, 139 N.J. 472, 655 A.2d 1354 (1995)); GILLERS, *supra*, at 733 (reproducing *Petrillo*); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS 280 (6th ed. 1995) (discussing *Petrillo*); ROBERT H. ARONSON ET AL., PROFESSIONAL RESPONSIBILITY PROBLEMS, CASES, AND MATERIALS 311 (2d ed. 1995) (citing *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (1983)).

<sup>11</sup> 84 N.J. 58, 417 A.2d 505 (1980).

<sup>12</sup> See *id.* at 62-64, 412 A.2d at 506-08.

<sup>13</sup> See *id.* at 74-76, 412 A.2d at 513-14.

<sup>14</sup> 92 N.J. 446, 457 A.2d 431 (1983).

malpractice whether the right surgeon operates on the wrong part or the wrong surgeon operates on the right part of the patient.”<sup>15</sup> Justice Pollock further characterized the resident’s actions in performing the surgery without consent as a battery, concluding that “[a]bsent an emergency, patients have the right to determine not only whether surgery is to be performed on them, but who shall perform it.”<sup>16</sup> Once again, these legal results were justified not only by existing precedent, but also by citations to the Statements on Principles and Bylaws of the American College of Surgeons and an opinion of the Judicial Council of the American Medical Association.<sup>17</sup>

Justice Pollock’s opinion in *Snyder v. American Ass’n of Blood Banks*<sup>18</sup> defined the cliff of unreasonable harm. The defendant nonprofit organization had established itself as the leader in setting industry blood-bank standards, including a regulation that did not require surrogate testing or direct questioning of donors, either of which would have detected that a blood donation was tainted with the Human Immunodeficiency Virus.<sup>19</sup> Justice Pollock’s opinion specified when a trade organization that dominates industry standards can be held accountable to the public it purports to serve.<sup>20</sup>

Lest it be thought that Justice Pollock should be known primarily for his path-breaking opinions, I hasten to add that he has not been afraid to sound a warning when a case threatens to take an established precedent too far off the mark. A good example can be found in his opinion in *Morlino v. Medical Center of Ocean County*,<sup>21</sup> in which he carefully defined the extent to which drug company instructions in the Physician’s Desk Reference can form the basis for medical malpractice liability.<sup>22</sup> In addition, Justice Pollock was not afraid to speak up in the last term of the court, when he felt that the majority was neglecting the importance of proximate causation.<sup>23</sup> In a more famous case, *In re Jobes*,<sup>24</sup> his concurring opinion explained the value of institutional ethics committees in near-death decision making.<sup>25</sup>

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<sup>15</sup> *Id.* at 465, 457 A.2d at 441.

<sup>16</sup> *Id.* at 461, 457 A.2d at 439.

<sup>17</sup> *See id.* at 463-64 & n.3, 457 A.2d at 439-40 & n.3.

<sup>18</sup> 144 N.J. 269, 676 A.2d 1036 (1996).

<sup>19</sup> *See id.* at 287-88, 676 A.2d at 1045-46.

<sup>20</sup> *See id.* at 292-307, 676 A.2d at 1048-55.

<sup>21</sup> 152 N.J. 563, 706 A.2d 721 (1998).

<sup>22</sup> *See id.* at 579-80, 706 A.2d at 729-30.

<sup>23</sup> *See Canesi v. Wilson*, 158 N.J. 490, 730 A.2d 805 (1999) (Pollock, J., dissenting).

<sup>24</sup> 108 N.J. 394, 529 A.2d 434 (1987).

<sup>25</sup> *See id.* at 450-53, 529 A.2d at 463-64 (Pollock, J., concurring). Justice Pollock later elaborated on these ideas in a law review article. *See* Stewart G. Pollock, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505 (1989).

The clarity of Justice Pollock's reasoning has influenced state and federal courts across the country. His observations about the cliffs of life and the logic of his opinions have been relied on by federal courts in the Second,<sup>26</sup> Sixth,<sup>27</sup> Eighth,<sup>28</sup> and Tenth<sup>29</sup> Circuits. State courts have followed his opinions in Illinois,<sup>30</sup> Indiana,<sup>31</sup> Kansas,<sup>32</sup> Maryland,<sup>33</sup> Michigan,<sup>34</sup> Ohio,<sup>35</sup> Pennsylvania,<sup>36</sup> Texas,<sup>37</sup> Vermont,<sup>38</sup> and Wisconsin.<sup>39</sup>

I would not feel comfortable ending this tribute without mentioning two recent opinions authored by Justice Pollock that will instruct my students in the future. In *A. v. B.*,<sup>40</sup> Justice Pollock addressed a question of first impression in the country: whether a law firm representing joint clients "may disclose confidential information of one co-client to another

<sup>26</sup> See *Stockalert, Inc. v. Nasdaq Stock Mkt., Inc.*, No. 95-C9335, 1998 U.S. Dist. LEXIS 13537, at \*46 (S.D.N.Y. Aug. 31, 1998) (citing *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 516 A.2d 220 (1986)); *Buglioli v. Enterprise Rent-A-Car*, 811 F. Supp. 105, 110 (E.D.N.Y. 1993) (citing *Eaton v. Eaton*, 119 N.J. 628, 575 A.2d 858 (1990)).

<sup>27</sup> See *Johnson v. Thomas*, 808 F. Supp. 1316, 1319 (W.D. Mich. 1992) (citing *Crowe v. De Gioia*, 90 N.J. 126, 447 A.2d 173 (1982)); *Keir v. United States*, 853 F.2d 398, 409 (6th Cir. 1988) (citing *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983)).

<sup>28</sup> See *Brumbaugh v. Ralston Purina Co.*, 656 F. Supp. 582, 584 n.1 (S.D. Iowa 1987) (citing *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980)).

<sup>29</sup> See *State Farm Mut. Auto. Ins. Co. v. Blystra*, 883 F. Supp. 583, 586 (D.N.M. 1995) (citing *Lindstrom v. Hanover Ins. Co.*, 138 N.J. 242, 649 A.2d 1272 (1994)); *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 641 (D. Colo. 1986) (citing *In re Cadillac Class Action V8-6-4*, 93 N.J. 412, 461 A.2d 736 (1983)).

<sup>30</sup> See *Advincula v. United Blood Servs.*, 678 N.E.2d 1009, 1026 (Ill. 1996) (citing *Snyder v. American Ass'n of Blood Banks*, 144 N.J. 269, 676 A.2d 1036 (1996)); *Goldberg v. Ruskin*, 499 N.E.2d 406, 407 (Ill. 1986) (citing *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984)).

<sup>31</sup> See *Curtis v. State*, 625 N.E.2d 496, 497-98 (Ind. Ct. App. 1993) (citing *In re Yengo*, 84 N.J. 111, 417 A.2d 533 (1980)).

<sup>32</sup> See *State v. Jenkins*, 950 P.2d 1338, 1347 (Kan. 1997) (citing *In re Yengo*).

<sup>33</sup> See *Belin v. Dingle, Jr.*, 732 A.2d 301, 306-07 (Md. Ct. Spec. App. 1999) (citing *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983)).

<sup>34</sup> See *North Ottawa Community Hosp. v. Kieft*, 578 N.W.2d 267, 270-71 (Mich. 1998) (citing *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, 417 A.2d 1003 (1980)).

<sup>35</sup> See *Ratliff v. Morehead*, No. 97CA2505, 1998 Ohio App. LEXIS 2271, at \*17 (Ohio Ct. App. May 19, 1998) (citing *Perna*); *Simmerer v. Dabbas*, No. CA18718, 1999 Ohio App. LEXIS 3237, at \*8 (Ohio Ct. App. July 7, 1998) (citing *Procanik*).

<sup>36</sup> See *Grabowski v. Quigley*, 684 A.2d 610, 615 (Pa. Super. Ct. 1996) (citing *Perna*); *McGonagle, Jr. v. Union Fidelity Corp.*, 556 A.2d 878, 884 (Pa. Super. Ct. 1989) (citing *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980)).

<sup>37</sup> See *Nelson v. Krusen*, 678 S.W.2d 918, 924 (Tex. 1998) (citing *Procanik*).

<sup>38</sup> See *Medical Ctr. Hosp. of Vt. v. Lorrain*, 675 A.2d 1326, 1328 (Vt. 1996) (citing *Jersey Shore Medical Center*).

<sup>39</sup> See *Stromsted v. St. Michael Hosp. of Franciscan Sisters (In re Estate of Stromsted)*, 299 N.W.2d 226, 230 n.6 (Wis. 1980) (citing *Jersey Shore Medical Center*).

<sup>40</sup> 158 N.J. 51, 726 A.2d 924 (1999).

co-client.”<sup>41</sup> In answering the question, the justice marshaled an impressive number of sources, including the Restatement (Third) of The Law Governing Lawyers, ethics opinions from New York and Florida, New Jersey’s confidentiality rules, a report of the American Bar Association Section on Real Property, Probate, and Trust Law, and standards from the American College of Trust and Estate Counsel.<sup>42</sup> Justice Pollock relied on New Jersey Rule of Professional Conduct 1.6(c)(1), which gives a lawyer discretion to “reveal confidential information to the extent the lawyer reasonably believes necessary ‘to rectify the consequences of a client’s criminal, illegal or fraudulent act in furtherance of which the lawyer’s services had been used.’”<sup>43</sup> He concluded that because the confiding client’s reasonable expectation of confidentiality was outweighed by the other client’s need for the information, the law firm could disclose that information to the effected client.<sup>44</sup> This past summer term, my legal ethics students responded to this opinion by understanding more clearly what conflicts waivers should include and by supplying a copy of the case to law firms at which they clerk.

I anticipate new understanding from my Torts students this fall when they read *Matthies v. Mastromonaco*.<sup>45</sup> In *Matthies*, Justice Pollock, speaking for a unanimous court, explained two decades of informed-consent jurisprudence.<sup>46</sup> He described when an informed-consent action sounds in battery or negligence and followed up with a comprehensive exploration of the negligence-based cause of action.<sup>47</sup> Along the way, Justice Pollock emphasized that the patient’s right to choose dictates the physician’s duty to disclose irrespective of whether the physician recommends an invasive procedure.<sup>48</sup> Best of all, this opinion carefully illustrated the interrelationship between a medical-malpractice and an informed-consent cause of action.

All of which is to say that we law professors and our students owe a great debt to Justice Stewart Pollock. He has educated us and will continue to educate future generations of students and professors about the need to clearly mark the cliffs of life and to explain the basis for our moral intuition when drawing those lines. Throughout his years on the New Jersey Supreme Court, Justice Pollock has served the citizens of New Jersey by

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<sup>41</sup> *Id.* at 52, 726 A.2d at 924.

<sup>42</sup> *See id.* at 56-67, 726 A.2d at 926-32.

<sup>43</sup> *See id.* at 57-58, 726 A.2d at 927 (citation omitted).

<sup>44</sup> *See id.* at 67, 726 A.2d at 932.

<sup>45</sup> 160 N.J. 26, 733 A.2d 456 (1999).

<sup>46</sup> *See id.* at 34-37, 733 A.2d at 460-62.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 36, 733 A.2d at 461.

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resolving their disputes and laying the foundation for the resolution of future legal controversies. His ability to address a dispute with clarity, honesty, and insight into the realities of human behavior will continue to influence judges, lawyers, students, and teachers long after he leaves the bench.