

## Stewart G. Pollock: Portrait of a Judge as Artist and Humanist

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Stewart Pollock is my junior in age by only a year or two, but I can proudly count him as one of my distinguished former law students, as well as a close friend. The seeming anomaly of the first characterization sheds light on an important facet of this outstanding jurist. Throughout his judicial career, Justice Pollock's opinions and other published works have been readily identifiable as the work both of a deeply concerned and inquiring mind and of a person strongly committed to a high level of legal scholarship. Thus, it should be no surprise to learn that he returned to law school in 1986, enrolling in the University of Virginia's Graduate Program for Appellate Judges. After two summers of intensive course work and the preparation of a thesis that subsequently was adapted as a law review article,<sup>1</sup> Justice Pollock received a Master of Laws in the Judicial Process.

I felt that I knew Stewart before he arrived at Virginia because I had included some of his opinions (and others in which he participated) in forefront cases in my case books and other teaching materials.<sup>2</sup> We addressed one of those cases, *E.E.B. v. D.A.*,<sup>3</sup> during the graduate program for judges. In my view, the opinion not only displayed considerable in-depth knowledge about the complex legal issues, but also was crafted to sensitively address the intensely human issues involved in determining the appropriate mechanism for deciding the custody of a child caught in a lengthy dispute across state lines. His fellow judges in the class were divided on the case, but Justice Pollock explained and defended the New Jersey Supreme Court's position very well. It was the sort of colloquy that one wishes could be achieved in classes more often. Several years later, the

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<sup>1</sup> Stewart G. Pollock, *Life and Death Decisions: Who Makes Them and by What Standards*, 42 RUTGERS L. REV. 505 (1989).

<sup>2</sup> An example of this is his opinion in *Procanik by Procanik v. Cillo*, 97 N.J. 339, 342, 478 A.2d 755, 757 (1984), dealing with the question of whether actions for wrongful life or wrongful birth should be recognized and, if so, what damages should be allowed.

<sup>3</sup> 89 N.J. 871, 446 A.2d 871 (1982).

supreme court of another state took a different tack in a somewhat similar case.<sup>4</sup> That court's opinion was widely publicized (and criticized) in the press for a lack of sensitivity to the human problems that were involved. Interestingly, certiorari was denied by the Supreme Court of the United States in both cases.<sup>5</sup> I cannot fault the latter case on strictly legal grounds, but it is interesting that the more mechanistic decision was the one singled out by the press for unfavorable attention.

Stewart holds strong views about the roles that a good judge should play. In his recent Brennan Lecture at New York University Law School, he spoke of *The Art of Judging*.<sup>6</sup> In exploring the relationship between art and adjudication, Justice Pollock showed how appellate courts have displayed considerable creativity when faced with whether and how to adapt the common law to changing conditions or how to interpret constitutions and statutes. Recognizing the many differences between the disciplines, he pointed out:

Admittedly, differences abound between judging and such creative endeavors as classical music, poetry, and the arts. No one need tell me that I am not the judicial equivalent of Johann Sebastian Bach, T.S. Eliot, or Vincent Van Gogh; not even Bruce Springsteen or Garry Trudeau.

Artists begin with a creative impulse. Judges do not begin at all until someone starts a lawsuit. Even the most activist judges do not create causes of action, but must wait for someone else to start the process. Once the process begins, most judges depend on the adversary system to shape the case. The process is inherently rational and controlled. Artists enjoy greater subjectivity and latitude in creating a work of art. Each activity emphasizes different values. Judges concern themselves with rights and justice. Although artists may share those concerns, they express them in different ways. Most importantly, the judicial process ends in a decision enforceable by law. The artistic process ends with a work of art that may be inspiring, even transforming, but that does not command under penalty of sanctions.<sup>7</sup>

He nevertheless continues the analogy, explaining:

Differences between the disciplines, however, do not undermine the justification for comparing artists and judges.

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<sup>4</sup> See *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

<sup>5</sup> See *DeBoer v. Schmidt*, 509 U.S. 938, 938 (1993); *Angle v. Bowen*, 459 U.S. 1210 (1983).

<sup>6</sup> Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591 (1996).

<sup>7</sup> *Id.* at 593.

Awareness of the differences may prevent inappropriate subjective judgments from creeping into judicial decisions. To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative. The comparison may also lend legitimacy to the proposition that judges may "think feelingly." Does anyone really want judges to be devoid of imagination, good sense, courage, and compassion?<sup>8</sup>

This characterization of what a judge does in perpetuating the dynamism of the common law may not be shared by all, but in a time when law and the judicial system are at a low ebb in public opinion, it expresses what many lay persons fear is lacking in many judges.

In another lecture at the University of Tulsa, *Lawyers and Judges as Catchers in the Rye*,<sup>9</sup> Stewart began by recalling Holden Caulfield, J.D. Salinger's character in the book mentioned in the lecture title. Having just been expelled from prep school, Caulfield gives his sister a vision of what he would really like to do, which is stand at the edge of a cliff at the edge of a rye field protecting thousands of small children from falling off the cliff where they are at play.

Stewart suggests that perhaps Caulfield should be considered for the next appointment to the supreme court of whatever state in which he resides, asking and explaining:

Why do I think that Holden Caulfield would make a good Supreme Court Justice? The reason is that he has figured out, perhaps without realizing it, what state court judges do. In today's world, state courts are the catchers in the rye. For so many people, state courts are all that stands between them and the edge of the cliff.

That cliff endangers the poor, the homeless, and the jobless. It threatens public school children in impoverished school districts with an inadequate education. It imposes intolerable conditions on people living in penal and mental institutions. The cliff condemns anyone who falls over its edge to poverty, ignorance, and isolation. Ultimately, it puts us all at peril of living in a world of lawlessness and injustice.

Even the nicest people may confront the loss of a job, run the risk of drug and alcohol addiction, or endure a terminal illness. Anyone can become a participant in a custody dispute, the victim of a toxic tort, or the parent of a child with special educational needs. Injustice, like any precipice, does not distinguish between

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<sup>8</sup> *Id.* at 593-94.

<sup>9</sup> Stewart J. Pollock, *Lawyers and Judges as Catchers in the Rye*, 34 TULSA L.J. 1 (1998).

those who do and do not deserve to fall over its edge.<sup>10</sup>

After this beginning, the lecture introduces cases from differing subject areas to illustrate just how courts have served as catchers in the rye during recent years. In the discussions of these cases, Justice Pollock's emphasis on the concern of courts for protecting human dignity stands out strongly.

Before becoming a judge, Stewart was in private law practice and in various public service positions, including counsel to Governor Brendan T. Byrne of New Jersey. During the fall term of 2000, he will expand this roster of achievements to include the role of teacher by returning to the University of Virginia Law School and conducting an intensive mini-course that will focus on judicial interpretation. His views and insights about judging and the roles and duties of lawyers will be a specially valuable experience for all those enrolled.

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<sup>10</sup> *Id.* at 3.