

A Tribute to Justice: Justice Daniel J. O'Hern

*The Hon. Alan B. Handler **

A tribute to Justice Daniel J. O'Hern is a tribute to justice. His tenure on the New Jersey Supreme Court was like no other. For nineteen years and more than 230 opinions, he left a distinctive imprint of sagacity and erudition leavened always with common sense. His approach was invariably marked by compassion and fairness. Justice O'Hern would view the law from a broad perspective shaped by a strong sense of judicial tradition and a special appreciation of history, but he never lost sight of the commonplace and ordinary—that an opinion must be able to explain simply and clearly the solution for a current controversy.

Justice O'Hern came to the Court in 1981. He came with a background rich with experience—he had long served the public. He was Special Counsel to Governor Brendan T. Byrne at the time of his appointment, and before that he was the Commissioner of the Department of Environmental Protection. Justice O'Hern had a strong sense of place and roots. He was born and raised in Red Bank, New Jersey, and remained throughout his life firmly grounded in the area in which he grew up. Prior to his service in state government, he was deeply involved in municipal government, having first been a councilman and then, for three successive terms, the Mayor of Red Bank, over a span of eighteen years. Justice O'Hern also had extensive experience in the private practice of law and from this he brought to the Court an abiding interest in the practice of law and a high regard for the legal profession. Justice O'Hern matriculated to Fordham College. Thereafter, he served in the United States Navy. Three years later he returned to take his legal studies at Harvard Law School. Justice O'Hern capped his legal education when, in 1957, he became a law clerk to Justice William J. Brennan. That was Justice Brennan's first full term on the United States Supreme Court, and

* Of Counsel, Wilentz, Goldman & Spitzer; Associate Justice, New Jersey Supreme Court (1977-1999).

the clerkship experience and exposure to Justice Brennan had a strong and lasting influence on Justice O'Hern.

I had the great, good fortune to be a colleague of Justice O'Hern for eighteen years. That became one of the most enriching experiences of my own life. Justice O'Hern never ceased to amaze me, a unique mix of intellectual prowess and personal modesty. There was no subject touched by the law that was not well within Justice O'Hern's grasp, despite his protestations to the contrary. He was not daunted by any case. At Supreme Court conferences, in the course of reviewing petitions for certification, he might say diffidently that a particular case was "too hard for us." He was kidding, of course. His insights were both penetrating and expansive, yet there was nothing distant or pedantic in his approach to the law. As he once described his admired friend, Justice Hayden Proctor, Justice O'Hern's every opinion displayed a genuine understanding of the needs of ordinary people who must confront the larger institutions of government, police, insurance companies, or employers.¹

Justice O'Hern revered the law, yet was completely comfortable with it. His mastery of the law cannot be explained simply by way of summary or illustration. A few examples, however, may give us a glimpse of the enormous talent and rich character of this great justice, a sense of the full range and depth of his contributions to our jurisprudence.

Subjects that were technical and exacting, no matter in what context they were presented, were not beyond the ken of Justice O'Hern. In *Owens-Illinois, Inc. v. United Insurance Co.*,² for example, Justice O'Hern took great pains to explain the complex coverages of tiered, layered, and successive general liability insurance policies for claims attributable to continuous toxic exposures occurring over long periods of time. He was cognizant of the enormity of the controversy by pointing out that the principle insurer had settled 43,000 personal injury suits and that 90,000 bodily injury suits were pending in many states.³ He described the underlying core of this complex issue in ordinary language:

What is not so easily understandable is the point at which the law will say that injury requires indemnity. . . . [T]he concept of injury, like the related concepts of duty and causation, is an instrument of policy. After all, the air we breathe and the water we drink contain trace elements of toxic substances. The law

¹ Proceedings of the Supreme Court of New Jersey, 156 N.J. XLV, LXIX (1998).

² 138 N.J. 437 (1994).

³ See *id.* at 446.

decides when an invasion of the body constitutes an injury entitling one to damages.⁴

Recognizing that "[the Court's] resolution of the issues is necessarily imperfect. . . . [because] concepts of legal causation were developed in an age of Newtonian physics, not of molecular biology,"⁵ Justice O'Hern proposed a pragmatic solution based on the assumption of instantaneous injury from the inhalation of toxins. He ruled that "the continuous-trigger theory" should be invoked "for activating the insurers' obligation to respond under the policies" so that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of [the insurance] policy."⁶

Another case, *Instructional Systems, Inc. v. Computer Curriculum Corp.*,⁷ reflected Justice O'Hern's view that law must be relevant and contemporary and must be topical and attentive to current needs. In that case, which involved a business dispute over the sale, distribution, and servicing of educational computer programs and technology, Justice O'Hern traced the origins and evolution of franchise practices from early common-law rules of freedom of contract to the economic and commercial developments surrounding current franchising.⁸ He found that even though the arrangements might not conform to the traditional or prototypical franchises exemplified by fast-food outlets, automobile dealerships, or gasoline service stations, they possessed critical features of a franchise relationship, including a community of interest entailing franchise-specific investments creating interdependence and vulnerability of the distributor sufficient to apply the protections of the New Jersey Franchise Practices Act.⁹

Clear exposition, a reflection of clear thinking, was a hallmark of a Justice O'Hern opinion. Justice O'Hern could elucidate guiding legal principles with both exactitude and clarity. He articulated with simple eloquence, in *State v. Roth*,¹⁰ the principles of uniformity, consistency, and fairness that animated the New Jersey Code of

⁴ *Id.* at 457.

⁵ *Id.* at 458.

⁶ *Id.* at 478.

⁷ 130 N.J. 324 (1992).

⁸ *See id.* at 338-41.

⁹ *See id.* at 357.

¹⁰ 95 N.J. 334 (1984); *see also* *State v. Hodge*, 95 N.J. 369 (1984) (same).

Criminal Justice and explained with clarity the standards that govern sentencing and appellate review of sentences, stating:

Pronouncement of judgment of sentence is among the most solemn and serious responsibilities of a trial court. No word formula will ever eliminate this requirement that justice be done. There is no room for trial or appellate courts to consider the public perceptions of sentences: "Judicial recognition of or action upon public opinion against a particular defendant cannot be tolerated in our criminal justice system." . . . Our new Code reflects a delicate balance between discretion and fixed sentencing.¹¹

Justice O'Hern had an abiding commitment to the principles of justice and fairness. This came through especially in the opinions of Justice O'Hern in capital punishment cases. For example, in *State v. Nelson*,¹² a capital case, he ruled that the defendant, a disturbed transsexual who shot police officers attempting to arrest her, was entitled through discovery to know, in support of her mitigating defense, that one of the surviving officers had sued the State for damages, claiming that he and other police officers had been inadequately trained in dealing with deranged persons. Viewing the nondisclosure as material evidence of mitigation, Justice O'Hern reversed the defendant's death sentence. This was reminiscent of the philosophy expressed in a dissent by his mentor, Justice Brennan, in 1953, when still a member of the New Jersey Supreme Court:

It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied.¹³

Compassion and sympathy marked Justice O'Hern's approach to all controversies. He considered, in *Williams v. Department of Human Services*,¹⁴ the plight of general assistance recipients who were threatened with the loss of shelter through the automatic termination of their emergency shelter assistance benefits upon the expiration of a five-month limitation period under an administrative regulation. He recognized that "[c]ourts . . . can act only in those rare circumstances when it is clear that the agency action is inconsistent with its legislative mandate."¹⁵ Realizing that the Court "cannot

¹¹ *Roth*, 95 N.J. at 365 (quoting *State v. Humphreys*, 89 N.J. 4, 15 (1982) (citation omitted)).

¹² 155 N.J. 487 (1998).

¹³ *State v. Tune*, 13 N.J. 203, 231 (1953) (Brennan, J., dissenting).

¹⁴ 116 N.J. 102 (1989).

¹⁵ *Id.* at 108.

administer a vast social-service agency, nor, indeed, tell it how to do its job,"¹⁶ Justice O'Hern concluded that the five-month waiting will be "deemed valid" subject to conditions that require the agency to "set in place . . . through proper administrative procedures, . . . new programs that it believes will make reasonably certain that the individuals previously housed in motels will have shelter and eventually housing elsewhere."¹⁷

That view reflected an extraordinary concern for the wellbeing of people, both as individuals and as members of a family. (I pause to observe that nothing in Justice O'Hern's life was more important to him than his own family, and I have not the slightest doubt that his love of family and religious faith were a wellspring for the empathy and understanding that he brought to all cases involving familial conflicts.) His decisions explored with great feeling and sensitivity the poignant conflicts posed by the issues implicating a child's best interests and a parent's rights. In the case of *New Jersey Division of Youth and Family Services v. A.W.*,¹⁸ he elucidated the standard for determining when parents' rights could be terminated in the best interests of their children. Observing that "[t]ermination of parental rights presents the legal system with an almost insoluble dilemma,"¹⁹ and that "[a]s judges, it is our duty within constitutional bounds to make the choice between [conflicting] policies as reflected in our legislative scheme,"²⁰ Justice O'Hern explained the operative standard of the "best interests"²¹ of the child. He ruled that termination of parental rights must be based on the determination, by clear and convincing evidence, that "[t]he child's health and development have been or will be seriously impaired by the parental relationship";²² that "[t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm";²³ that there are no viable "alternatives to termination";²⁴ and that "termination of parental rights will not do more harm than good."²⁵ Those principles became the foundation for our current laws, both statutory and decisional, that govern parental rights.

¹⁶ *Id.* at 109.

¹⁷ *Id.* at 121.

¹⁸ 103 N.J. 591 (1986).

¹⁹ *Id.* at 599.

²⁰ *Id.* at 602.

²¹ *See id.* at 602-03.

²² *Id.* at 604.

²³ *Id.* at 605.

²⁴ *New Jersey Division of Youth and Family Services*, 103 N.J. at 608.

²⁵ *Id.* at 610.

The cogency of Justice O'Hern's jurisprudence imparted to his decisions an enduring influence. That is very evident in the field of torts. In 1983, in *Butler v. Acme Markets Inc.*,²⁶ the Court considered the extent of a store owner's duty to protect its customers against the criminal acts of third persons. Justice O'Hern determined that although persons are not responsible for the criminal acts of others, if those acts are foreseeable, and if it is not unduly oppressive or unfair to take measures that could reduce or eliminate the risk of such criminal acts, then there may be a duty imposed on a defendant to exercise such reasonable care. That case has indeed become a bedrock principle of tort law.

In another landmark case, *Strawn v. Canuso*,²⁷ Justice O'Hern ruled that a real estate broker with actual or constructive knowledge of an off-site toxic dump, the existence of which would materially affect the value of the property, had a duty to disclose that to the prospective buyer. The explanation was direct and clear:

Location is the universal benchmark of the value and desirability of property. Over time the market value of the property will reflect the presence of the landfill. Professional builders and their brokers have a level of sophistication that most home buyers lack. That sophistication enables them better to assess the marketability of properties near conditions such as a landfill, a planned superhighway, or an office complex approved for construction. With that superior knowledge, such sellers have a duty to disclose to home buyers the location of off-site physical conditions that an objectively reasonable and informed buyer would deem material to the transaction, in the sense that the conditions substantially affect the value or desirability of the property.²⁸

In a recent setting involving the law of products liability, the Court was called upon to determine whether a drug manufacturer that undertook direct-to-consumer advertising of its product, a contraceptive called Norplant, was under a duty to warn its potential consumers of the deleterious harmful side effects of its product, or whether those drug manufacturers were relieved of such a duty to warn by virtue of the defense of the learned intermediary doctrine, a doctrine that would require physicians undertaking to prescribe the drug for patients to bear the full responsibility of warning those patients of the drug's harmful side effects. Justice O'Hern, in *Perez v.*

²⁶ 89 N.J. 270 (1982).

²⁷ 140 N.J. 43 (1995).

²⁸ *Id.* at 66.

Wyeth Laboratories Inc.,²⁹ took great pains to explain the origins of the learned intermediary doctrine; he fully acknowledged the sound reasons and strong policies that gave rise to that doctrine and how, in many contexts, that doctrine served suitably to protect patients.³⁰ Nevertheless, he recognized the enormous changes that had occurred in the marketing of medical products and drugs, and that advertising through modern communications had a particularly strong conditioning effect on potential consumers exposed to direct-to-consumer advertising.³¹ He also emphasized the inherent flexibility of the common law to respond to changing circumstances and needs.³² Consequently, he ruled that pharmaceutical manufacturers must include in their advertisements adequate warnings of deleterious side effects.

Justice O'Hern had a firm grasp of the responsibilities of government, the role of courts, and intergovernmental relationships. In *Williams*, he expressed his sensitivity to the principles of federalism; the Justice was mindful that citizens are governed by both the state and the national government and that both must serve the needs of society. That was also a strong theme in his *Perez* opinion. Justice O'Hern acknowledged, in that case, that the manufacture and sale of drugs was federally regulated and that the most appropriate standard for determining the reasonableness of warnings reposed in those governmental agencies that had the responsibility for their regulation. Accordingly, he qualified the rule by noting that if a manufacturer complied with federal regulations, those promulgated by the Food and Drug Administration, it could be presumed, indeed strongly presumed, that the manufacturer had given adequate warnings. The decision exemplifies Justice O'Hern's balanced judgment. Justice O'Hern was largely responsible for the current rule, still in an experimental stage, that would enable the New Jersey Supreme Court to render opinions on issues of state law upon certification to the federal courts of New Jersey through the Third Circuit Court of Appeals.³³ It is a measure designed to foster greater stability and consistency in the law when it is applied variously by federal and state courts.

²⁹ 161 N.J. 1 (1999).

³⁰ *See id.* at 17-20.

³¹ *See id.* at 11-14.

³² *See id.* at 15 (referring to the evolutionary capacity of the common law to adapt to modern conditions, as acknowledged by Judge Cardozo and recognized by the Restatement (Third) of Torts: Products Liability (1997)).

³³ Rule 2:12A, Certification of Questions of Law by the Supreme Court (N.J. Order 99-17, effective Jan. 3, 2000).

Justice O'Hern was fascinated by the ordinary human qualities of people. In a lecture given several years ago, he explored the lives and accomplishments of two great jurists who were contemporaries: Joseph Weintraub and William Brennan.³⁴ He pointed out how similar and different were both of those legal giants. In pondering their differences, he was drawn to a critique of *The Passionate Sage*, a book concerning the legacy of John Adams, in which the reviewer considers why John Adam's legacy has been overshadowed by that of Thomas Jefferson, who has "become a patron saint of American thought."³⁵ The explanation proffered was that Adams's political and philosophical views grew directly out of his personality—he was a realist when it came to assessing human nature and did not share Jefferson's sunny optimism about democracy and human reason. Adams's personality "impressed upon him the political importance of control, balance, and the modulated supervision of social change,"³⁶ while "Jefferson, with a more confident faith in the American vision, 'reversed the dichotomy.'"³⁷ Thus, Adams and Jefferson, Justice O'Hern quoted, "shared a common vision of America's future but emphasized different features of the vision. . . . The glass was always half-full at Monticello and half-empty at Quincy, even though it was the same glass."³⁸ Justice O'Hern, I believe, blends both views—an enormous respect for the role and responsibility of government in preserving social order and advancing the common good, and an enormous faith in the capacities and worth of each individual, proceeding, as would Justice Brennan, with "a sparkling vision of supremacy of the human dignity of every individual."³⁹

Justice O'Hern's sense of history, tradition, and culture was ever present and at work. He would always place matters in perspective. We were struck, for example, by how strongly Justice O'Hern reacted to the collapse of communism in Czechoslovakia and the ascension to the presidency of Vaclav Havel, the poet-playwright who led Czechoslovakia into freedom. He repeated for us Havel's belief that

³⁴ Daniel J. O'Hern, *Some Reflections on the Roots of the Differing Judicial Philosophies of William J. Brennan, Jr. and Joseph Weintraub*, 46 RUTGERS L. REV. 1049 (1994).

³⁵ *Id.* at 1067 (referring to Michiko Kakutani, *The Vinegar of the Revolutionary Salad*, N.Y. TIMES, May 14, 1993, at C28).

³⁶ Michiko Kakutani, *The Vinegar of the Revolutionary Salad*, N.Y. TIMES, May 14, 1993, at C28.

³⁷ O'Hern, *supra* note 34, at 1068 (quoting JOSEPH J. ELLIS, *PASSIONATE SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS* 135 (1993)).

³⁸ *Id.* at 1068 (quoting JOSEPH J. ELLIS, *PASSIONATE SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS* 239 (1993)).

³⁹ *Id.* at 1066 (quoting Byron R. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1116 (1991)).

democracy required individuals committed to "living within the truth" in order that law not serve as an instrument of oppression.

Justice O'Hern shared the constitutional vision of Justice Brennan and strongly supported the constitutional basis for individual rights. He believed that the Constitution itself is a part of the law that is a living process responsive to changing human needs and animated by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe. Anyone who is familiar with his judicial philosophy, Justice O'Hern also said, knows that he had not advocated reliance on state constitutional doctrine as the primary guarantor of liberties. In part, that view stems from a realization of how easy it is to change a state constitution, but also from an overwhelming sense of respect for the United States Supreme Court—a respect that originated with his early exposure to the High Court.

No one on the Court was more concerned than Justice O'Hern about the Court's supervisory responsibilities over the practice of law. He greatly respected the legal profession and honored the role of lawyers. Justice O'Hern always expected the performance of lawyers to meet high standards of competence and professionalism. He was especially fair and tempered in cases of attorney discipline. Justice O'Hern had a major hand in supporting and shaping the current standards for professionalism. He was justly honored by the Commission on Professionalism in the Law for his pioneering efforts in advancing professionalism and civility in the practice of law.

Reference to these few decisions and anecdotes hardly does justice to the Justice. They are a mere tip of a vast iceberg. They cannot fully reveal the full scope and depth of Justice O'Hern's contributions to our law. They do exemplify, however, the salient features of his judicial personality that dominated his vision of law. A broad understanding of life and people. An educated worldliness. A full awareness of society. A sharp and penetrating intellect—one not daunted or deterred by the complexity or intricacies of any problem. A comprehensive view of the courts and of government—he always understood that our courts must be independent and vigilant in serving the people of the state, yet must ever be mindful of intergovernmental relationships as well as constraints and the demands of federalism. A sense of history and tradition—he keenly appreciated the tradition of the New Jersey Supreme Court. And he brought to everything he did a modesty that shaded his excellence. Justice O'Hern said this about his good friend, Justice Proctor: "[H]is innate modesty and self-effacing manner [] makes difficult

our vision of [the] Justice's excellence. It is like attempting to see a distant star when the many lights are nearby."⁴⁰ He could have been talking about himself. But, of course, he never would.

These things touch on only Justice O'Hern's more visible and palpable contributions to the law. There are others. His colleagues would turn to him for guidance and counsel. They admired the broad reach of his perspective, his sense of the continuing timelines and relevance of history. They enjoyed his self-effacing and self-deprecating ways—he complained that no one would remember his opinions. He was quite wrong about that. The truth is that no one can forget his opinions. They are engraved in our jurisprudence, they are part of the fabric of our laws. His opinions are the laws that guide us and govern us. If the New Jersey Supreme Court has achieved any measure of greatness over the years, Justice O'Hern has a full share of the responsibility for that achievement.

⁴⁰ Proceedings of the Supreme Court of New Jersey, 156 N.J. XLV, LXIX (1997).