

# SETON HALL LAW REVIEW

A TRIBUTE TO JUSTICE DANIEL J. O'HERN

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## Justice Daniel J. O'Hern: A Law Clerk's Tribute

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When a New Jersey Supreme Court Justice retires, much is written about his<sup>1</sup> contribution to New Jersey jurisprudence in the form of his written opinions. Justice Daniel J. O'Hern leaves a legacy of approximately 400 signed majority, concurring, and dissenting opinions. Other pieces in this tribute address the substantial effect of those decisions on New Jersey law.

A Justice, however, bequeaths another legacy to the judicial system—a *living* legacy in the form of his law clerks. Typically, a law clerk enters a clerkship shortly after completing law school. The clerkship is his first exposure to the “real world” of legal practice. The lessons that his Justice imparts, by both his words and actions, shape the clerk, just as parental instruction influences a child who is beginning the journey through life. This tribute discusses that legacy of Justice O'Hern.

A Supreme Court law clerk learns a great deal of law during a clerkship. But Justice O'Hern's law clerks learned much more than legal substance and procedure. In an era in which the Court decried the incivility of society<sup>2</sup> and the nastiness that characterizes so much of legal practice,<sup>3</sup> Justice O'Hern was a role model to his clerks. The Justice talked to his clerks about the paths that they should choose, and he taught them by example both in his dealings with his clerks

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<sup>1</sup> Currently, three of the Justices on the New Jersey Supreme Court are female. For the sake of simplicity, however, this tribute uses masculine pronouns, although Justice O'Hern may consider them “a bit dated.” See *Atlantic City Convention Ctr. Auth. v. South Jersey Publ'g Co.*, 135 N.J. 53, 59, 637 A.2d 1261, 1264 (1994).

<sup>2</sup> See *Ward v. Zelikovsky*, 136 N.J. 516, 542, 643 A.2d 972, 985 (1994); cf. *In re Vey*, 135 N.J. 306, 315, 639 A.2d 718, 722 (1994) (per curiam) (O'Hern, J., dissenting) (“A bit more intolerance with chronic liars and drug dealers might not be a bad thing for our society.”).

<sup>3</sup> See, e.g., *Baxt v. Liloia*, 155 N.J. 190, 206-07, 714 A.2d 271, 279 (1998); *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 467, 713 A.2d 411, 426 (1998) (Pollock, J., concurring).

and in his written opinions. Although Justice O'Hern's instruction covered numerous areas, a few of his most elementary lessons follow.

*Respect the views of others.* Justice O'Hern consistently discussed with his clerks the cases about to be argued. Though most clerks had little or no legal experience beyond law school, and often not much more business or other "real world" knowledge, Justice O'Hern always explored and respected their views.

This same characteristic appears in Justice O'Hern's written opinions. Judicial decisions, particularly majority opinions, often read as though the results are inevitable. Those opinions imply that the "right" answer always has been certain, but merely awaiting announcement. The best judges, however, perceive that many cases easily could be decided either way.<sup>4</sup> Justice O'Hern's majority opinions frequently recognize that differing views (whether those of the losing party, commentators, or dissenting Justices) have merit and should not be dismissed summarily.<sup>5</sup> From this, Justice O'Hern's clerks learned that virtually every case has at least two colorable sides. That lesson applies every day in dealing with clients, whose position at the center of a legal matter may blind them to the perspective, valid or not, of the other side.

*When disagreeing, emphasize points of agreement.* As with any Justice, at times Justice O'Hern found it necessary to dissent. Yet, his dissenting opinions often begin by acknowledging aspects of the

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<sup>4</sup> The great Judge Learned Hand was wracked with doubt about the correctness of his opinions. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 290, 303-05 (1994). Similarly, Justice Robert Jackson of the United States Supreme Court recognized that Justices of a court of last resort "are not final because [they] are infallible, . . . [they] are infallible only because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>5</sup> See, e.g., *Martin v. Home Ins. Co.*, 141 N.J. 279, 289, 290, 661 A.2d 808, 813, 814 (1995) (acknowledging the "sound policy reasons" for a contrary result, and stating that the "issues involved in this case are close"); *Wilson v. Unsatisfied Claim & Judgment Fund Bd.*, 109 N.J. 271, 278, 536 A.2d 752, 756 (1988) (recognizing that the decision was a "close question"); *State v. Mulcahy*, 107 N.J. 467, 479 n.4, 527 A.2d 368, 374 n.4 (1987) (conceding that the case involved "hard lines to draw"); *Schultz v. Roman Catholic Archdiocese of Newark*, 95 N.J. 530, 539, 472 A.2d 531, 536 (1984) (conceding that "[t]he arguments of the dissent . . . are not without appeal"). The same recognition has appeared in Justice O'Hern's concurring and dissenting opinions. See, e.g., *State v. Hill*, 115 N.J. 169, 179, 557 A.2d 322, 327 (1989) (per curiam) (O'Hern, J., dissenting) (acknowledging that there was "no unarguable answer here"); *Woodland Private Study Group v. State, Dep't of Env'tl. Protection*, 109 N.J. 62, 76, 533 A.2d 387, 394 (1987) (O'Hern, J., dissenting) (stating that decision was a "close call"); *Kolitch v. Lindedahl*, 100 N.J. 485, 498, 497 A.2d 183, 190 (1985) (O'Hern, J., concurring) ("It would be less than candid not to admit how close is the call in this case.").

majority view with which he agrees.<sup>6</sup> Only then, having established common ground, does he proceed to outline his differences.

There are at least two lessons for clerks to draw from this as they enter legal practice. First, seeking to reduce differences between the parties to a litigation may cut down on hostility and build the basis for an eventual settlement of their differences.<sup>7</sup> Second, in a state with a relatively small bar, attorneys frequently encounter the same adversaries. Emphasizing points of agreement in one matter can build trust that may assist in making the next matter more manageable.

*Disagree without being disagreeable.* Too often, United States Supreme Court opinions are marred by ugly, often personal sniping among members of that Court.<sup>8</sup> As a winner of the moot court competition at Harvard Law School, and a successful mayor and state official, Justice O'Hern has ample rhetorical skills. Yet, a reader searching Justice O'Hern's opinions, even those in the most hotly disputed or politically charged cases, will never find an unkind word for another Justice or a lower court judge. Nor, of course, did Justice O'Hern ever treat his clerks uncivilly, even when their views of legal principles differed from his. The need to resist the basest instincts that lead to unnecessary adversarial behavior is perhaps the most important lesson that new lawyers must learn.

*Praise others.* Justice O'Hern not only treated his law clerks as colleagues, but he never hesitated to compliment them on good performance. Similarly, in his opinions, the Justice goes out of his way to praise attorneys and lower court judges whenever possible.<sup>9</sup> There is no better example of how to work well with others.

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<sup>6</sup> See, e.g., *Sherman v. Citibank (S.D.)*, N.A., 143 N.J. 35, 92, 668 A.2d 1036, 1064 (1995) (O'Hern, J., dissenting); *Rawlings v. Police Dep't of Jersey City*, N.J., 133 N.J. 182, 198, 627 A.2d 602, 610 (1993) (O'Hern, J., dissenting); *Burbridge v. Governing Body of the Township of Mine Hill*, 117 N.J. 376, 398, 568 A.2d 527, 539 (1990) (O'Hern, J., dissenting); *Romaine v. Kallinger*, 109 N.J. 282, 305, 537 A.2d 284, 295 (1988) (O'Hern, J., dissenting); *In re Township of Bridgewater*, 95 N.J. 235, 250, 471 A.2d 1, 8 (1984) (O'Hern, J., dissenting); *State v. Silver*, 92 N.J. 507, 522, 457 A.2d 463, 471 (1983) (O'Hern, J., dissenting).

<sup>7</sup> In a rare divisive case that generated five separate opinions among the seven Justices, Justice O'Hern's concurrence sought to harmonize the various opinions by "suggest[ing] that the differences between the majority and dissent[s] may be more rhetorical than real." *MacDougall v. Weichert Co., Realtors*, 144 N.J. 380, 406, 677 A.2d 162, 175 (1996) (O'Hern, J., concurring). This represents another example of Justice O'Hern's philosophy of bridging gaps and building consensus to the extent possible.

<sup>8</sup> For a recent example, see *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2227 n.2, 2228 n.3, 2231-32 (1999).

<sup>9</sup> See, e.g., *New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield, Bd. of*

*Recognize that other lawyers are not perfect.* When clerks erred, Justice O'Hern playfully twitted them, but he never "rubbed it in." Similarly, Justice O'Hern never forgot the difficulties that face lawyers in day-to-day practice.<sup>10</sup>

While properly enforcing legal ethics every bit as strictly as his colleagues on the Court,<sup>11</sup> Justice O'Hern advocated some flexibility in the discipline imposed in certain cases on particular facts.<sup>12</sup> From this realistic view of lawyers, Justice O'Hern's law clerks learned an important lesson about what to expect from other lawyers and what may be expected of them.

*Recognize that nonlawyers are people, too.* It is easy for those trained in the law to be dismissive of the ability of laypersons to understand the law. Even while residing on the Olympus of New Jersey law, Justice O'Hern never lost touch with the common person.<sup>15</sup> Justice O'Hern taught his clerks that they must not do so either.

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Adjustment, 160 N.J. 1, 19, 733 A.2d 442, 452 (1999) (O'Hern, J., dissenting) (referring to the "excellent judge of the Law Division"); *State v. Laurick*, 120 N.J. 1, 9, 575 A.2d 1340, 1344 (1990) (gratuitously identifying the author of an "ably written Law Division opinion" that was authored over twenty years earlier in an unrelated case); *In re Weiss, Healey & Rea*, 109 N.J. 246, 254, 536 A.2d 266, 269 (1988) (stating that "these are first-class lawyers").

<sup>10</sup> See *In re Howard*, 121 N.J. 173, 185, 578 A.2d 1219, 1225 (1990) (per curiam) (O'Hern, J., dissenting) (noting the difficulties of solo practice).

<sup>11</sup> Most of the Court's attorney disciplinary decisions are unanimous, per curiam opinions. For an example of a signed majority opinion by Justice O'Hern that invoked disciplinary procedures against lawyers, see *Crispin v. Volkswagenwerk, A.G.*, 96 N.J. 336, 337, 476 A.2d 250, 250 (1984). In at least one other instance, Justice O'Hern would have been more strict than the majority and would have disbarred an attorney whom the Court merely suspended. See *In re Infinito*, 94 N.J. 50, 58, 462 A.2d 160, 164 (1983) (O'Hern, J., dissenting). Above all, Justice O'Hern has been concerned that the Court have "consistent principles of decision" in attorney discipline cases. *In re Pena*, Nos. D-113-98, D-222-98, D-232-98, 2000 WL 668942, at \*12 (N.J. May 12, 2000) (O'Hern, J., dissenting); see also *In re Litwin*, 104 N.J. 362, 370, 517 A.2d 378, 382 (1986) (O'Hern, J., concurring).

<sup>12</sup> See *In re Valentin*, 147 N.J. 499, 505-06, 688 A.2d 602, 605-06 (1997) (per curiam) (O'Hern, J., dissenting); *In re Downer*, 144 N.J. 1, 14-16, 675 A.2d 604, 610-11 (1996) (O'Hern, J., dissenting); *In re Roth*, 140 N.J. 430, 449-50, 658 A.2d 1264, 1274-75 (1995) (O'Hern, J., dissenting); *In re Howard*, 121 N.J. 173, 179-80, 578 A.2d 1219, 1222 (1990) (O'Hern, J., dissenting); cf. *In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein*, 155 N.J. 357, 377, 715 A.2d 216, 226 (1998) (O'Hern, J., concurring in part and dissenting in part) (finding a public reprimand improper when the Court had not previously made clear that the conduct at issue violated the Rules of Professional Conduct).

<sup>15</sup> See, e.g., *State v. Moore*, 158 N.J. 292, 321, 729 A.2d 1021, 1036 (1999) (O'Hern, J., dissenting) ("It is one thing for the Court to discuss safe retreat [from the threat of bodily harm], at its remove from the streets; it is quite another thing to contemplate a safe retreat from the perspective of the person on the street confronted with violence and a threat of serious bodily harm.").

In a 1991 death penalty case, Justice O'Hern recognized that the public might not understand the nuances of the Court's capital punishment jurisprudence, and he expressly restated a concept so as to "get the interested readers to understand the issue."<sup>14</sup> In another recent opinion, Justice O'Hern firmly stated that the viewpoint of jurors as rustics who cannot apply legal concepts should not be the law of New Jersey.<sup>15</sup> Clerks who absorbed the lesson that nonlawyers deserve respect will not treat their clients in a patronizing way.

*Remember the true purposes of the legal system.* Justice O'Hern often reminded clerks that the justice system does not exist merely to perpetuate arid rules of law. Instead, he emphasized that the overarching purposes of the legal system must be served by the outcome in particular cases.

Justice O'Hern's opinions reflect that same perspective. The Justice endorsed the viewpoint that even the most fundamental and indisputable principles must be restated if they are not to be lost amid the cacophony of legal rules, forms, and procedures.<sup>16</sup> As a result, Justice O'Hern frequently focused on the practical, as well as the legal, effect of the Court's decisions.<sup>17</sup> His awareness of the real

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<sup>14</sup> State v. Dixon, 125 N.J. 223, 251, 593 A.2d 266, 280 (1991).

<sup>15</sup> See DeHanes v. Rothman, 158 N.J. 90, 99-100, 727 A.2d 8, 12-13 (1999); cf. State v. Short, 131 N.J. 47, 65-66, 618 A.2d 316, 325-26 (1993) (O'Hern, J., concurring in part and dissenting in part) (emphasizing the need to trust juries to follow a court's instructions). Justice O'Hern, however, has not ignored the reality that jurors may have difficulty grasping nuances of the law without adequate instructions from trial judges. See Campo v. Tama, 133 N.J. 123, 141, 627 A.2d 135, 144 (1993) (O'Hern, J., dissenting).

<sup>16</sup> See, e.g., Crespo v. Stapf, 128 N.J. 351, 375, 608 A.2d 241, 254 (1992) (O'Hern, J., dissenting) ("One of our goals should be to simplify the legal process whenever possible."); *In re* Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 116 N.J. 216, 221, 561 A.2d 542, 545 (1989) ("Our task is to have the law make sense[.]"); Buckley v. Estate of Pirolo, 101 N.J. 68, 83, 500 A.2d 703, 711 (1985) (O'Hern, J., concurring) ("One of the goals of law is to influence the conduct of those who contribute to cause harm."); Wunschel v. City of Jersey City, 96 N.J. 651, 664, 477 A.2d 329, 336 (1984) ("Law does not serve abstract goals. It serves the needs of parties to resolve disputes.").

<sup>17</sup> See, e.g., R & R Marketing, L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 180, 729 A.2d 1, 6 (1999) ("[I]t is not the form of the transaction that should govern a [liquor] wholesaler's right to restructure its organization . . . [but] the economic reality of the restructured organization that will determine a wholesaler's rights . . ."); State v. Hinds, 143 N.J. 540, 547, 674 A.2d 161, 165 (1996) (rejecting a "sophisticated argument . . . that . . . fails to take into account the reality of the situation"); Carter-Lincoln Mercury, Inc., Leasing Div. v. EMAR Group, Inc., 135 N.J. 182, 204, 638 A.2d 1288, 1299 (1994) (O'Hern, J., concurring in part and dissenting in part) ("We should consider whether violation of . . . statutory duties will resolve the issues before imposing a separate and independent duty that is realistically beyond the capacity of an insurance department, much less the capacity of an insurance broker in a small town, to fulfill."); Grunwald v. Bronkesh, 131 N.J. 483,

world effect of those decisions led Justice O'Hern to speak out for persons whom the legal system has sometimes failed.<sup>18</sup> Yet Justice O'Hern properly recognized, with characteristic clarity, that "[i]n life, it is not always so easy to see the white hats as it is in cinema."<sup>19</sup> The lesson that lawyers and the judicial system cannot ignore first principles or practical realities, but may not enshrine subjective notions of what is "good" either, is one that new lawyers will live every day that they practice law.

Justice O'Hern never flaunted his vast learning. Instead, his opinions are clear, concise, and unadorned with frills, leaving his clerks and other readers to perceive on their own his formidable brilliance. In this regard, Justice O'Hern's own simple but moving tribute to Justice Haydn Proctor<sup>20</sup> applies equally to the man who gave it: "[H]is innate modesty and self-effacing manner . . . makes difficult our vision of Justice Proctor's excellence. It is like attempting to see a distant star when the many lights are nearby."<sup>21</sup>

Justice O'Hern's fundamental humanity, his willingness to teach, and his treatment of clerks as colleagues rather than as underlings, made his clerkships an extremely fulfilling time for those of us fortunate enough to be selected for them. It was a great pleasure to

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502, 621 A.2d 459, 468 (1993) (O'Hern, J., dissenting) (criticizing the majority's legal malpractice decision that would "have two lawsuits and two sets of lawyers for the client"); *Landwehr v. Landwehr*, 111 N.J. 491, 506, 545 A.2d 738, 746 (1988) (O'Hern, J., dissenting) (stating that the majority's view was "too metaphysical for the practical realities of modern marriage"); *Continental Trailways, Inc. v. Director, Div. of Motor Vehicles*, 102 N.J. 526, 556, 509 A.2d 769, 785 (1986) (O'Hern, J., dissenting) (discussing the need to "look beyond appearance and try to focus upon the commercial event that is involved here"); *cf. Wanaque Borough Sewerage Auth. v. Township of W. Milford*, 144 N.J. 564, 575, 677 A.2d 747, 753 (1996) ("The time has long since passed when law can or should rely on [legal] fictions.").

<sup>18</sup> *See, e.g., L.T. v. New Jersey Dep't of Human Servs., Div. of Family Dev.*, 134 N.J. 304, 306, 633 A.2d 964, 965 (1993) (concerning "the rights of persons facing eviction and homelessness"); *State v. Budis*, 125 N.J. 519, 543, 593 A.2d 784, 795-96 (1991) (O'Hern, J., dissenting) (addressing the suffering of child rape victims); *Shackil v. Lederle Labs., A Div. of Am. Cynamid Co.*, 116 N.J. 155, 191, 561 A.2d 511, 529 (1989) (O'Hern, J., dissenting) (concerning a child injured by a diphtheria-pertussis-tetanus vaccine); *Self v. Board of Review*, 91 N.J. 453, 460-61, 453 A.2d 170, 174 (1982) (O'Hern, J., dissenting) (concerning workers who were denied unemployment benefits).

<sup>19</sup> *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 202 n.1, 707 A.2d 1000, 1020 n.1 (1998) (O'Hern, J., dissenting).

<sup>20</sup> Like Justice O'Hern, Justice Proctor was a son of Monmouth County who served with distinction on a Court full of impressive Justices.

<sup>21</sup> *Proceedings of the Supreme Court of New Jersey*, 156 N.J. XLV, LXIX (1997). (Editor's Note: Mr. Greenberg is not alone in having taken notice of these lines from Justice O'Hern's tribute to Justice Proctor. *See* Hon. Alan B. Handler, *A Tribute to Justice: Justice Daniel J. O'Hern*, 30 SETON HALL L. REV. 1052 at 1060-61 (2000).

come to chambers every day to work for, and with, the consummate gentleman, and the gentle man, that is Justice O'Hern. Indeed, many of us believe that clerking for Justice O'Hern is the best job we have ever had. He has remained a friend to every one of us, no matter how many years have passed since our clerkships, and he has given of himself unstintingly to those clerks who have sought his counsel on professional or personal matters.

Justice O'Hern's clerks are to be found in private law firms (large and small), in government service, in corporate legal departments, and on law faculty. In large measure, whatever professional successes we have achieved, whatever good we have done for clients or society, and whatever level of professionalism we have attained, is attributable to the influence of Justice O'Hern in that formative clerkship year. We can only try to do still better so that Justice O'Hern's *living* legacy will be every bit as impressive as the valuable inheritance he leaves in the New Jersey Reports.