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Articles

The Adopted Judge of the New York State Court of Appeals: James D. Hopkins

JOSEPH W. BELLACOSA*

By the power vested in me as author of this piece, I hereby declare the Honorable James D. Hopkins an adopted Judge of the New York State Court of Appeals. This proclamation is not as brash as it might first seem nor am I so presumptuous as to suggest that it is I who has given this title to Judge Hopkins. Just glimpsing at the number and range of his opinions, adopted by the court itself over the years, will conclusively certify that it is Judge Hopkins' enduring judicial work which has elevated him to the rank of retired adopted Associate Judge of the Court of Appeals.

A different destiny deprived James D. Hopkins, and more importantly the people of the State of New York, of *de jure*¹ service on the New York State Court of Appeals. The *de facto* large-scale adoption by the court of appeals of his judicial efforts at the appellate division has, however, enriched our law. In his own self-effacing way, Judge Hopkins probably viewed that regular phenomenon — and, if he didn't, we should — as a higher accomplishment and perhaps even a joint vocation. He contributed significantly to the law of the highest court of the state while *simultaneously* fulfilling his judicial function in shaping

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1. *But see* French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), where Judge Hopkins did serve as a judge of the court of appeals designated by the court pursuant to N.Y. CONST. art. VI, § 2, and by which it bestows its highest compliment.

the law as pronounced by the state's critically important intermediate appellate court. His characteristic modesty cannot shield the role he played in elevating the reputation, preeminence and importance of New York's Appellate Division, Second Judicial Department, one of the busiest courts in the nation, on which he served *de jure* for twenty years. Who would not want to be assessed on that achievement alone? After all, the far greater number of cases Judge Hopkins helped guide to just resolution in his court were finally and for all time decided in that appellate division.² Thus, while some say regretfully, "What a loss that Judge James D. Hopkins did not get to the court of appeals," I assuredly and contentedly reply, "What a greater loss it might have been had he gotten to the court of appeals and thus not achieved that magnificent feat of judicial legerdemain by service to two courts at once!"

Over the long history of the Court of Appeals of the State of New York, many have aspired to sit on that premier common law court of this nation. Some who should have made it, did not. Most scholars of the court of appeals and of appellate courts across the land would agree that Justice³ James D. Hopkins was among those who incontrovertibly should have been elevated to the court of appeals. But he never ran for that office when it was elective and was about ready to retire when the method of selection became appointive. No one would quarrel with the assertion that were James D. Hopkins sixty years of age or less at this time in our state's history, he would be appointed in due course

2. In the vast ocean of appellate division resolutions, the opinions adopted by the court of appeals are only the tip of a beautiful iceberg. There are thousands of other cases in which Judge Hopkins' opinions were not appealed further; his unsigned memoranda, his reports and oral suasions at Conference brought common sensical yet cerebral and correct resolutions for the contending litigants before his court.

A mention, too, must be made of the special occasions when Judge Hopkins' talents were tapped for the highly sensitive, controversial and difficult judicial discipline cases as a member of the Court on the Judiciary. See *In re Fuchsberg*, 43 N.Y.2d (a), 426 N.Y.S.2d 639 (Court on the Judiciary 1978); *In re Schweitzer*, 29 N.Y.2d (a), 409 N.Y.S.2d 964 (Court on the Judiciary 1971). This, of course, was before the Commission on Judicial Conduct came into being in 1977-78, where the sole judicial involvement and review was by the court of appeals itself.

3. His precise appropriate title is "Justice," as all justices of the appellate division are necessarily elevated justices of the supreme court. I have purposefully and interchangeably referred to him as "Judge," too, the precise appropriate title of all judges of the court of appeals.

to the court of appeals. In any event, he has, even without that particular office and honor, contributed enormously to the jurisprudence of our state. Yet, I would hold to my initial premise that his contribution was such that it can justly be said that he was a member of the court of appeals. It is only now that we realize it and proclaim his arrival and adoption.

The theme woven from the selected cases and from my personal perspective on him and the courts involved⁴ is that James D. Hopkins was a *de facto* Associate Judge of the New York Court of Appeals. My objective is to show that his works were adopted by the state's highest court, wholly in many cases, in part in others, and by influence in still many more. Although other judges have enjoyed similar praise, Judge Hopkins' commendations were unique and exceptional in that adoptions of his judicial products were more numerous and more consistent than for any other lower court judge. This assertion is not based on a scientific or arithmetic count, nor on the wonders of modern electronic research wizardry. It is premised on my own visceral sense and that of many judges and other court observers, reinforced by years of attentive scrutiny of such things plus my own recent selective scanning of numerous cases for this article.

Based on personal knowledge, I can attest to the universal acclaim for the man as a jurist. Amongst members of his own court, past and present, he is regarded as being the epitome of wisdom, clarity of expression, eclecticism of interest, and correctness. His sensitive, balanced perception of public policy as it affected the justice of individual cases was superbly tuned and accurate and is reflected throughout his opinions.

One other mark of Judge Hopkins' personality is the special affectionate relationships he developed among his judicial colleagues. It is one of his greatest attributes that he did not allow his own lustre to diminish or darken the considerable qualities of the justices who served with him. Indeed, his sense of institution and collegiality was so deeply felt that he unobtrusively helped to redirect the brightest illuminations to his court *qua*

4. In addition to watching him work from my present post at the court of appeals, I also observed him closely during the years 1963 to 1970, when I served his distinguished colleague, former Presiding Justice Marcus G. Christ, as law assistant and law secretary at the Appellate Division, Second Judicial Department.

court.

It may not be possible to present Justice Hopkins' noteworthy, somewhat randomly selected opinions, as adopted by the court of appeals, in as unpretentious a manner as befits this unpretentious, yet towering jurist. Indeed, others writing in this dedicatory issue and elsewhere may allude to some of the same cases, but what I hope to achieve, perhaps somewhat differently, is the portrayal of Justice Hopkins and his judicial works functioning at the court of appeals level. The case selections in a given category or subject were made because to me they seemed to have the greatest significance, impact, worth or illustrative effect.

Municipal law/governmental law/public policy is a rather large and amorphous catch basin which drew on Justice Hopkins' greatest talents, instincts and experience. Selected cases from this first broad category will now be singled out for featured attention in this narrative.

*Marcus v. Baron*⁵ is selected first because it was decided on the last day⁶ Justice Hopkins sat on the appellate division bench and hence serves as the culmination of his work in the municipal law field and as a judge. His solo and final dissent in *Marcus*, coincidentally, became a resounding curtain call some ten months later when the court of appeals unanimously reversed the appellate division, adopting Justice Hopkins' powerful five-page dissent written against a three times as long majority opinion.

Simply put, special term declared invalid a local town law purporting to restrict incorporation of villages within the town, holding the town had no power to adopt such a law;⁷ the appellate division majority reversed and found in favor of the town;⁸ the court of appeals reversed and reinstated the special term judgment on Justice Hopkins' dissent.⁹

5. 84 A.D.2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981), *rev'd*, 57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982) (for the reasons stated in Justice Hopkins' solo dissent).

6. December 31, 1981.

7. *Marcus v. Baron*, 106 Misc. 2d 71, 431 N.Y.S.2d 627 (Sup. Ct. Rockland County 1980).

8. *Marcus v. Baron*, 84 A.D.2d at 118, 445 N.Y.S.2d at 587.

9. *Marcus v. Baron*, 57 N.Y.2d at 864-65, 442 N.E.2d at 437, 456 N.Y.S.2d at 39.

There are several delightful qualities in the adopted opinion. It opens simply with a broad issue statement: "The question before us deals with the quantity and quality of power delegated to municipalities by the State."¹⁰ It proceeds, succinctly and with a bold grasp of the subject, through the historical interplay of municipal governance and power. Although the problem is a small intermunicipal controversy, Justice Hopkins focused on the larger issue of legislative delegation and control based on statewide policy factors. Intermingled is his sense of balance and intergovernmental respect suggesting legislative, not judicial, resolution of the governmental tensions underlying the lawsuit.

The following paragraphs illustrate these qualities; note particularly the wonderful usage of "oppressive" and "internecine" in the second paragraph:

It may well be, as the appellant town argues, that the symmetry and consequences of its zoning and planning ordinances, passed to control the orderly development of its land and population, will be frustrated by the incorporation of a new village within the town's boundaries. It may well be that the problems engendered by the creation of the village should be addressed by the Legislature. These, however, are questions for the Legislature and not for the courts. We must enforce the Constitution and the statutes in their fair intendment and effect.

On the other side, the Legislature might well consider that to allow towns to adopt local laws raising a variety of conditions to the creation of villages in addition to those imposed by the Legislature, would unduly interfere with the desirable standard of uniformity of method for the creation of villages throughout the State, and would inaugurate a parochial resistance by towns to new villages through the formation of difficult or *oppressive* conditions. The Legislature, indeed, reflects the overriding concerns of the people of the State, and its judgment must ultimately resolve the conflicts between municipal segments of the State, rather than to permit a kind of *internecine* struggle between them. Here the Legislature has not found it appropriate to give to towns any power to regulate the creation of villages.¹¹

10. *Marcus v. Baron*, 84 A.D.2d at 134, 445 N.Y.S.2d at 598 (Hopkins, J., dissenting).

11. *Id.* at 138-39, 445 N.Y.S.2d at 601 (Hopkins, J., dissenting). In an entirely different subject category, but worthy of counterbalancing mention here, was Justice Hopkins' self-assurance and fearlessness in filling legislative gaps when individual rights and jus-

In *Abco Bus Co. v. Macchiarola*,¹² a case dealing with awards of public contracts, the purity of purpose, vision and articulation in Justice Hopkins' solo dissent again produced a unanimous reversal in the court of appeals. His analytical and practical ability to blend municipal government functions with public policy factors governed by limited judicial review led him to reject the majority of his own court, which fashioned a kind of equitable condition to safeguard against the potential abuses in the award of a bus contract. Judge Hopkins' view was that the test of the board's power was simply rational basis and the courts had no business substituting themselves or their remedies.

This understanding and concern for ordered municipal affairs, justified by public policy and legislatively balanced considerations, was also shown in *Leo v. Barnett*,¹³ where he rejected an award of counsel fees to the successful attorneys of an ousted town official. He said in an opinion quoted verbatim by the court of appeals:

Thus, it is clear that at common law the public officer contested his ouster at his own expense, no matter what might be the baseless character of the attack

. . . .

We conclude, therefore, that absent statutory authority expressly permitting the payment of counsel fees, a public officer or his attorneys may not recover for such counsel fees in successfully opposing his removal from office. The risk of defense and its attendant expense are the personal burden of the officer, not to be laid at the door of the municipality, unless the Legislature directs that the burden shall be assumed by the municipality.¹⁴

tice required. Compare, therefore, his seminal judicial legislation on interest of justice dismissal criteria and procedures in *People v. Clayton*, 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973), with the criteria finally legislatively adopted in 1979 with some amendments in Criminal Procedure Law sections 170.40 and 210.40, N.Y. CRIM. PROC. LAW §§ 170.40, 210.40 (McKinney 1982). A collateral theme to this article could thus be that Justice Hopkins was even an adopted son of the Legislature inasmuch as that body knew enough to use his material just as well as the court of appeals did.

12. 52 N.Y.2d 938, 419 N.E.2d 870, 437 N.Y.S.2d 967, *rev'd* 75 A.D.2d 831, 427 N.Y.S.2d 876 (2d Dep't 1980) (for the reasons stated in Justice Hopkins' dissent). The Supreme Court denied *certiorari*, 454 U.S. 822 (1981).

13. 48 A.D.2d 463, 369 N.Y.S.2d 789 (2d Dep't 1975), *aff'd*, 41 N.Y.2d 879, 362 N.E.2d 624, 393 N.Y.S.2d 994 (1977).

14. *Leo v. Barnett*, 48 A.D.2d at 465-66, 369 N.Y.S.2d at 792.

With the benefit of hindsight and a court of appeals endorsement, it is difficult to understand how anyone could not have seen the manifest correctness and wisdom of Justice Hopkins' viewpoint.¹⁵

In a related subject area, municipalities and undisclosed conflicts of interest, Justice Hopkins' opinion in *Landau v. Percacciolo*¹⁶ was not adopted by the court of appeals, which affirmed on narrower grounds; nevertheless, Justice Hopkins' view shines out for the principles of candor and honesty imposed upon municipal fiduciaries. Chief Judge Cooke and Judge Wachter concurred and voted to affirm based on Justice Hopkins' reasons, which are encapsulated in this paragraph from his opinion:

We think that the legislative policy may fairly be said to have been calculated to insure honesty and candor in municipal business dealings by deterring municipal officers from having interests adverse to municipalities and from influencing municipal action in order to advance their personal interests. The intent of the Legislature in requiring disclosure by any municipal officer, regardless of whether he had a voice in the making of a contract, was obviously to publicize the conflict of interest, so that the citizenry and the governing body of the municipality might take appropriate account of his personal interest in appraising the public benefit of a proposed transaction. Barbarita's interest at the time of the making of the contract before us is manifest, and his deliberate failure to make timely disclosure of his interest exemplifies the need of the statutory requirement. His fear that the transaction might not receive approval if his involvement were known, which led to its concealment, was precisely the mischief which the statute was intended to remedy. In this case his violation of the statute was compounded by his influencing the County Attorney to draw the contract so that his interest would be affirmatively concealed, and inducing the plaintiffs to make the misrepresenta-

15. *But see* City of Rye v. Public Service Mut. Ins. Co., 34 N.Y.2d 470, 315 N.E.2d 458, 358 N.Y.S.2d 391 (1974), *aff'g* 42 A.D.2d 749, 346 N.Y.S.2d 163 (2d Dep't 1973), in which Justice Hopkins' solo dissent on a municipal law question affecting a penalty bond was *not* adopted by the court of appeals. Charles D. Breitell, one of his great admirers and friends, then the new Chief Judge of the court of appeals, wrote one of his first opinions as Chief for a unanimous court, affirming the decision below against the view of Justice Hopkins. *Id.*

16. 50 N.Y.2d 430, 407 N.E.2d 412, 429 N.Y.S.2d 566 (1980), *aff'g* 66 A.D.2d 80, 412 N.Y.S.2d 378 (2d Dep't 1978).

tion which the contract contained.¹⁷

His technical and analytical skills in municipal tax, equalization rates, classifications of real estate tax, and municipal finance may be measured by his opinion in *860 Executive Towers, Inc. v. Board of Assessors*,¹⁸ which was unanimously adopted by the court of appeals. The courageous and discerning analysis of the man as a jurist, sitting in a lower court respectful not only of *stare decisis* but of the binding effect of higher court rulings, can be seen in this paragraph of his opinion:

We do not overlook the statement in *Guth* that the taxing authority may always show that "the equalization ratio is inappropriate to the taxing unit, to the category of property involved and to the particular property or any other valid reason which would affect its relevancy or weight." It is our view, however, after examining the record and briefs submitted to the Court of Appeals, that future retrials of the SBEA's methodology were not envisioned, and that the invitation to the taxing unit to show inappropriateness is more limited than the language might, on its face, suggest.¹⁹

While Judge Hopkins' direct views did not fare quite as well in such major tax and education finance cases as *Hellerstein v. Town of Islip*²⁰ and *Board of Education [Levittown] v. Nyquist*,²¹ his contributions were significant, notably his constraint vote in *Hellerstein* and the accuracy of his separate opinion on the main equal protection argument in *Levittown*.²²

17. *Landau v. Percacciolo*, 66 A.D.2d at 88-89, 412 N.Y.S.2d at 385.

18. 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apts., Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

19. *Id.* at 470, 385 N.Y.S.2d at 609 (quoting *Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 451, 315 N.E.2d 441, 445, 358 N.Y.S.2d 367, 373 (1974)).

20. 44 A.D.2d 689, 354 N.Y.S.2d 602 (2d Dep't 1974), *modified*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975).

21. 83 A.D.2d 217, 443 N.Y.S.2d 834 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655).

22. *Id.* at 258, 443 N.Y.S.2d at 869 (Hopkins, J., concurring in part and dissenting in part). Three other cases in which his dissenting opinions were not expressly adopted by the court of appeals, yet where his views directly influenced the analysis and result in the court of appeals, in the municipal law areas of zoning and permits, are: *Bedford v. Mt. Kisco*, 40 A.D.2d 979, 979, 338 N.Y.S.2d 447, 447 (2d Dep't 1972) (Hopkins, J., dissenting), *rev'd*, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973); *Udell v. Hass*, 27

In the administrative regulatory law field, Justice Hopkins again demonstrated a special understanding and expertise, along with a sense of where this body of law was going. His expertise in the area was no doubt honed by his earlier municipal government experience. The setting of judicial review of administrative determinations provides another glimpse of Judge Hopkins at work. In *Pappas v. New York State Division of Human Rights*,²³ he cleverly analogized to Article 78 judicial review limitations²⁴ to determine the proper standard of review. He jointly dissented with Justice Shapiro in voting to uphold a housing discrimination finding by the State Division of Human Rights; the court of appeals unanimously reversed, adopting that dissent.²⁵ Similarly, in two seminal cases on women's rights dealing with maternity leave entitlements, Justice Hopkins wrote the opinion affirmed and adopted by the court of appeals.²⁶ In upholding a finding of discrimination based on the school board policy of enforced maternity leave with a fixed commencement date, Justice Hopkins stated that:

The policy does present a manifest infirmity by singling out pregnancy among all other physical conditions to which a teacher might be subject as a category for special treatment in determining when leave from duty shall begin. In the case of other conditions such as ailments or the onset of disease, a leave of absence is not required by the petitioner to commence until medical ne-

A.D.2d 750, 750, 279 N.Y.S.2d 701, 701 (2d Dep't 1967) (Hopkins, J., dissenting), *rev'd*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); *Bernhard v. Caso*, 26 A.D.2d 695, 696, 272 N.Y.S.2d 484, 486 (2d Dep't 1966) (Hopkins, J., dissenting), *rev'd*, 19 N.Y.2d 192, 225 N.E.2d 521, 278 N.Y.S.2d 818 (1967).

23. 45 A.D.2d 973, 974-75, 359 N.Y.S.2d 590, 593-94 (2d Dep't 1974) (Hopkins, J. and Shapiro, J., dissenting), *rev'd*, 37 N.Y.2d 844, 340 N.E.2d 470, 378 N.Y.S.2d 36 (1975).

24. N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1981 & Supp. 1982). *Cf. Pell v. Board of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974) (consolidated proceedings wherein the appellate division reviewed civil service disciplinary proceedings under Article 78).

25. *Pappas v. New York State Div. of Human Rights*, 37 N.Y.2d 844, 340 N.E.2d 470, 378 N.Y.S.2d 36 (1975).

26. *Board of Educ. v. New York State Div. of Human Rights*, 42 A.D.2d 49, 345 N.Y.S.2d 93 (2d Dep't 1973), *aff'd*, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974); *Board of Educ. v. New York State Div. of Human Rights*, 42 A.D.2d 854, 346 N.Y.S.2d 843 (2d Dep't 1973), *aff'd*, 35 N.Y.2d 675, 319 N.E.2d 203, 360 N.Y.S.2d 887 (1974). The court of appeals in the latter case affirmed per the Hopkins dissent in the former case; thus Justice Hopkins got two for one for the statisticians.

cessity is demonstrated or the teacher voluntarily requests it. Hence, the female teacher is placed under a restriction dependent on sex alone by the terms of the petitioner's policy. In short, we find that the respondents' determinations that the policy was discriminatory is justified on this record.²⁷

In another unusual kudos, Justice Hopkins shared honors with the late special term Justice John W. Sweeney as the court of appeals unanimously reversed an appellate division order on both their complementary opinions in *Kane v. Parry*.²⁸ The case involved administrative law in the fair hearings sense with respect to aged patients in a decertified nursing home. An appropriate spark of judicial impatience with bureaucratic red tape is evident in the writings on this case.

Private law controversies, be they corporate, insurance, contracts, estates, or even landlord-tenant, did not escape Judge Hopkins' penetrating analysis and eclectic interest and skills. My preference for his leading contribution in this area is *Auerbach v. Bennett*,²⁹ ironically, a case where his opinion on the main issue did not prevail at the court of appeals, although on the secondary issue, standing, he did prevail.³⁰ The main issue in *Auerbach* was how much insulation should be provided by the business judgment rule in a corporate derivative action where an independent litigation committee is utilized; Judge Hopkins' preference for less insulation did not win a majority in the court of appeals, although two dissenters³¹ voted to adopt Justice Hopkins' opinion on the merits. The importance of Judge Hopkins' thoughtful contribution, however, is demonstrated by the fact that the critical substantive issue in *Auerbach* still generates considerable academic and professional debate.³²

27. *Board of Educ. v. New York State Div. of Human Rights*, 42 A.D.2d 49, 53, 345 N.Y.S.2d 93, 98 (2d Dep't 1973).

28. 55 A.D.2d 678, 390 N.Y.S.2d 191 (2d Dep't 1976), *rev'd*, 41 N.Y.2d 1051, 364 N.E.2d 846, 396 N.Y.S.2d 182 (1977).

29. 64 A.D.2d 98, 408 N.Y.S.2d 83 (2d Dep't 1978), *modified*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979).

30. *Id.* at 627.

31. The two dissenting judges were Chief Judge Cooke and Judge Wachtler.

32. Numerous law review articles have been written focusing on *Auerbach*. See, e.g., Case Comment, *The Business Judgment Rule Shields the Good Faith Decision of Disinterested Directors to Terminate a Derivative Suit Against the Corporation's Directors*,

Two quotations from Judge Hopkins' opinion illustrate the two points in the case and the cadence of his language.

Under the unusual circumstances here, we believe that Walenstein's application for intervention in order to perfect and argue this appeal should be granted and the respondents' motion to dismiss the appeal denied. Clearly, when Auerbach decided not to appeal, he could not be compelled to continue his action against his will. On the other hand, neither should his decision fatally cripple the other stockholders' suits pending for the same relief on behalf of the corporation. As a reluctant champion of the corporate cause, he should not be allowed to enlarge his lack of enthusiasm into an insurmountable barrier against others of the class readier to take up the cudgels. . . .

. . . .
 . . . In essence, the business judgment doctrine forbids the inquiry by the courts into the soundness of the decisions made by the officers and directors in the operation of the affairs of the corporation The doctrine will not be enforced when, however, the good faith or oppressive conduct of the officers and directors is in issue Indeed, the doctrine may not be used to excuse acts of the officers and directors which offend public policy
³³

Note again the use of the word "oppressive," which was emphasized in the quote selected from *Marcus v. Baron*.³⁴ This usage hints at the underlying philosophy of a jurist sympathetic toward the individual and the underdog, yet consistently blending a sense of balance and order.

Judge Hopkins' impact on the court of appeals is not only found in the broader categories of the law, but also in such specialized areas as insurance law, and estate and trust law. In *De Vanzo v. Newark Insurance Co.*,³⁵ where the court of appeals

25 VILL. L. REV. 551 (1980). The debate over this issue illustrates that the views of even adopted judges of the court of appeals do not always prevail; it makes him more truly a member of the family.

33. *Auerbach v. Bennett*, 64 A.D.2d at 105-06, 408 N.Y.S.2d at 86-87 (citations omitted).

34. 84 A.D.2d 118, 138-39, 445 N.Y.S.2d 587, 601 (2d Dep't 1981) (Hopkins, J., dissenting), *rev'd*, 57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982). See *supra* note 11 and accompanying text.

35. 37 N.Y.2d 733, 337 N.E.2d 131, 374 N.Y.S.2d 619 (1975), *aff'd* 44 A.D.2d 39, 353 N.Y.S.2d 29 (2d Dep't 1974).

affirmed per his opinion, Judge Hopkins held in favor of a policy-holder in a vacancy clause interpretation of a fire insurance policy. Even when expressing fairly elementary principles, his style and language is to be admired. "A court may not, of course, rewrite a contract to accord with its instinct for the dispensation of equity under the facts of a case; we would rapidly approach the status of paternalism if this principle were dominant."³⁶

In *Massachusetts Mutual Life Insurance Co. v. Tate*,³⁷ his one-page solo dissent in favor of the life insurance company was adopted as the basis for reversal by the court of appeals.³⁸ His directness, willingness to make hard inferences based on an obviously careful reading of the record, and his deference to the trial court's findings in a nonjury case, partly, no doubt, drawn on his own experience as a trial judge, are all displayed in his brief articulation which became the law of the state.

Although the court of appeals in *In re McManus*,³⁹ an estate and trust case, affirmed on narrower grounds than in the opinion below, the court paid a remarkable compliment to Judge Hopkins by adding in a rare advisory opinion that "if we were to reach the question, because of the special situation presented here, we state that we would affirm for the reasons stated in the opinion of Mr. Justice James D. Hopkins."⁴⁰

Two cases demonstrate Judge Hopkins' understanding of the marketplace, economics, and commercial realities. In *Mobil Oil Corp. v. Rubenfeld*,⁴¹ a landlord-tenant dispute arising in the civil court, his opinion addresses the applicability of the retaliatory defense of antitrust violation in a summary proceeding, in light of the public policy embodied in the legislative intent. The court of appeals adopted his opinion with a short additional addendum. In *Ellish v. Airport Parking Co.*,⁴² a simple bailment

36. *Id.*, at 43, 353 N.Y.S.2d at 32 (citations omitted).

37. 56 A.D.2d 173, 391 N.Y.S.2d 667 (2d Dep't), *rev'd*, 42 N.Y.2d 1046, 369 N.E.2d 767, 399 N.Y.S.2d 211 (1977).

38. *Id.* at 182-83, 391 N.Y.S.2d at 674-75 (Hopkins, J., dissenting).

39. 47 N.Y.2d 717, 390 N.E.2d 773, 417 N.Y.S.2d 55 (1979), *aff'g* 62 A.D.2d 758, 407 N.Y.S.2d 180 (2d Dep't 1978).

40. *Id.* at 719, 390 N.E.2d at 774, 417 N.Y.S.2d at 56.

41. 48 A.D.2d 428, 370 N.Y.S.2d 943 (2d Dep't 1975), *aff'd*, 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976).

42. 42 A.D.2d 174, 345 N.Y.S.2d 650 (2d Dep't 1973), *aff'd*, 34 N.Y.2d 882, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974).

question involving the theft of a car parked in a lot at JFK Airport is addressed with a modern realistic approach free of hypertechnicalities, an approach adopted by the court of appeals.

Flashes of Judge Hopkins' overall brilliance may also be found in the private law categories of negligence, matrimonial and arbitration law, and civil procedure. Because of the comprehensiveness of this combined category, and in order not to overwhelm the reader or the author, the device employed here will be to list several cases *seriatim* and add a word or two or a quote with respect to those selected.

*Zarcone v. Perry*⁴³ was affirmed for reasons stated in Judge Hopkins' opinion, with the court of appeals noting the extreme importance of the subject area, *res judicata*, and the marvelous blend of technical, analytical, and pragmatic expression in the Hopkins' opinion.

*Cubito v. Kreisberg*⁴⁴ was affirmed for reasons stated in Judge Hopkins' opinion, with the court of appeals noting the delicate interplay of much decisional law on the question of statute of limitations accrual of an action against an architect for negligent design as it affects negligently injured third parties.

*Allstate Insurance Co. v. Dailey*⁴⁵ was affirmed on the Hopkins' opinion, with the court of appeals noting his understanding of arbitration in relation to public policy and classical common law concepts. Judge Hopkins had concluded his opinion with a wonderful common sense blend of the operative principles:

We recognize that our decision is a choice between two carriers, both of whom engaged in the business of effectuating New York's public policy. But our choice must be based on reasoned principles. Here we think that National's carrier must bear the responsibility for any injury suffered by Dailey, for National put the automobile into the traffic stream, and had at its disposal the opportunity to check the means by which the automobile was

43. 55 N.Y.2d 782, 431 N.E.2d 974, 447 N.Y.S.2d 248 (1981), *aff'g* 78 A.D.2d 70, 434 N.Y.S.2d 437 (2d Dep't), *cert. denied*, 102 S. Ct. 2248 (1982).

44. 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980), *aff'g* 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dep't 1979).

45. 39 N.Y.2d 759, 349 N.E.2d 876, 384 N.Y.S.2d 776 (1976), *aff'g* 47 A.D.2d 375, 367 N.Y.S.2d 87 (2d Dep't 1975).

leased.⁴⁶

*Douglaston Civic Association v. Galvin*⁴⁷ incorporated Judge Hopkins' concurring opinion on standing, a critically important contribution to that broadening concept as it was evolving at that time.

*In re Peerless Sales Corp.*⁴⁸ was modified by the court of appeals for the reasons stated in Judge Hopkins' dissenting opinion. The court of appeals noted the directness, brevity, and simplicity of his articulation in an attorney's charging lien case, as to whether the lien was affected by arbitration and stipulation incident to a judicial proceeding.

*Kornblut v. Chevron Oil Co.*⁴⁹ was affirmed for the reasons stated in Judge Hopkins' opinion. The court noted especially the deft handling of novel negligence questions tied in with third party contract beneficiary issues in a case involving a flat tire on the thruway and a subsequent heart attack. The plaintiff had unsuccessfully attempted to impute liability for not responding in a timely manner to a request for car assistance.

In Reda v. Reda,⁵⁰ Judge Hopkins' lone dissent was adopted by the court of appeals, noting his view on the invalidity of a common law marriage by the standards of proof of either state

46. *Allstate Ins. Co. v. Dailey*, 47 A.D.2d 375, 378, 367 N.Y.S.2d 87, 91 (2d Dep't 1975). For other Hopkins' opinions in the arbitration field, not necessarily adopted expressly by the court of appeals but nevertheless having innovative and substantial impact, see *Associated Teachers of Huntington, Inc. v. Board of Educ.*, 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670 (1973), *rev'g* 40 A.D.2d 122, 338 N.Y.S.2d 45 (2d Dep't 1972) (Judge Hopkins wrote the dissenting opinion of the appellate division); *G.E. Howard & Co. v. Daley*, 27 N.Y.2d 285, 265 N.E.2d 747, 317 N.Y.S.2d 326 (1970), *rev'g* 33 A.D.2d 1045, 308 N.Y.S.2d 734 (2d Dep't) (Judge Hopkins wrote the dissenting opinion of the appellate division); *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976), *aff'g* 53 A.D.2d 373, 385 N.Y.S.2d 593 (2d Dep't) (Judge Hopkins wrote the majority opinion for the appellate division, noting especially the importance of this case on the public employees arbitration front).

47. 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974), *aff'g* 43 A.D.2d 739, 350 N.Y.S.2d 708 (2d Dep't 1973) (Judge Hopkins wrote the concurring opinion of the appellate division).

48. 48 N.Y.2d 778, 399 N.E.2d 951, 423 N.Y.S.2d 921 (1979), *modifying* 68 A.D.2d 476, 418 N.Y.S.2d 96 (2d Dep't) (Judge Hopkins wrote the dissenting opinion of the appellate division).

49. 48 N.Y.2d 853, 400 N.E.2d 368, 424 N.Y.S.2d 429 (1979), *aff'g* 62 A.D.2d 831, 407 N.Y.S.2d 498 (2d Dep't 1978).

50. 34 N.Y.2d 716, 313 N.E.2d 341, 356 N.Y.S.2d 862 (1974), *vacating* 41 A.D.2d 848, 342 N.Y.S.2d 634 (2d Dep't 1973).

involved.

Justice Hopkins was never a prosecutor or criminal defense lawyer. He had, however, as a county judge, presided over many criminal trials. Some selected opinions serve to demonstrate that the lack of a broader criminal justice experience did not lessen his influence or contribution to that branch of the law. In *People v. Williams*,⁵¹ he opted for the broadest protection on the application of New York's testimonial immunity provisions,⁵² and skillfully balanced the contending policies. The following excerpt evidences a facet of his jurisprudential philosophy:

In this, as in other instances in which the law imposes a standard to measure behavior, it is the context of the circumstances which ultimately governs; the generality of the rule yields to the weight of the facts, once they are found.

. . . .

The constitutional privilege and the benefits of CPL 50.10 and 190.40 do not depend on the attitude or intentions of the prosecutor. Neither do they depend on the effect of the witness' testimony in exposing him, without more, to conviction for the commission of a crime. Perhaps, as a result of the privilege and the plain language of the statutory protection, a heightened sense of caution on the part of the prosecutor is commended before witnesses are examined before a Grand Jury, lest the witness receive transactional immunity through his testimony from liability for the crime under investigation. Nevertheless, that is a judgment determined by the Legislature, after presumably balancing the detriments to the community with the rights of the individual in maintaining constitutional liberty.

We should not indulge in rarified refinements and overly subtle shades of difference between tests of incriminatory testimony resulting in immunity bottomed on whether the testimony elicited before the Grand Jury was "relevant" or "substantial" or "material". These linguistic aids are merely descriptive labels and not rigid models. . . .⁵³

The court of appeals affirmed for the reasons stated in the Hop-

51. 56 N.Y.2d 916, 438 N.E.2d 1146, 453 N.Y.S.2d 430 (1982), *aff'g* 81 A.D.2d 418, 440 N.Y.S.2d 935 (2d Dep't 1981).

52. N.Y. CRIM. PROC. LAW §§ 50.10, 190.40 (McKinney 1982).

53. *People v. Williams*, 81 A.D.2d at 425-26, 440 N.Y.S.2d at 940 (citations omitted).

kins' opinion.⁵⁴

Again, in *People v. West*,⁵⁵ his solo dissent was adopted by a unanimous court of appeals, reversing on a preserved charging error. What a solace it must have been to a losing counsel to see a solo dissent by Hopkins, J., at the appellate division. The expectation level for ultimate vindication must have run very high.⁵⁶

But Justice Hopkins was neither a defendant's judge nor a prosecutor's. In the previously cited cases, his opinions benefited defendants, but in two search and seizure cases, where the court of appeals adopted his dissenting views, his determinations were for the People.⁵⁷

In the custodial interrogation area he may fairly be characterized as solicitous of the rights of accused against the potential abuses of the state's power. Two examples of this may be found in holdings against the prosecution. In *People v. Parker*,⁵⁸ the court of appeals affirmed on Judge Hopkins' opinion in a *Miranda*⁵⁹ (parole officer) custodial statement case, with the result that evidence was suppressed. In *People v. Townsend*,⁶⁰ another exclusionary rule case, the rationale in Judge Hopkins' dissent was again adopted by the court of appeals.

But he was not one-sided or dogmatic even in such matters as custodial interrogation. His fine opinion in *People v. Servidio*,⁶¹ upholding a conviction, demonstrates this. More de-

54. *People v. Williams*, 56 N.Y.2d 916, 438 N.E.2d 1146, 453 N.Y.S.2d 430 (1982).

55. 56 N.Y.2d 637, 436 N.E.2d 191, 450 N.Y.S.2d 785 (1982), *rev'g* 84 A.D.2d 795, 449 N.Y.S.2d 439 (2d Dep't 1981).

56. *See, e.g., People v. Gilliam*, 37 N.Y.2d 722, 337 N.E.2d 129, 374 N.Y.S.2d 617 (1975), *rev'g* 45 A.D.2d 744, 356 N.Y.S.2d 663 (2d Dep't 1974), where Judge Hopkins' solo dissent against a no-opinion affirmance at the appellate division produced a unanimous reversal by the court of appeals.

57. *People v. David L.*, 56 N.Y.2d 698, 436 N.E.2d 1324, 451 N.Y.S.2d 722, *rev'g* 81 A.D.2d 893, 439 N.Y.S.2d 152 (2d Dep't 1981), *cert. denied*, 103 S. Ct. 146 (1982); *People v. Correa*, 47 N.Y.2d 807, 391 N.E.2d 1363, 418 N.Y.S.2d 388 (1979), *rev'g* 56 A.D.2d 934, 392 N.Y.S.2d 707 (2d Dep't 1977).

58. 57 N.Y.2d 815, 441 N.E.2d 1118, 455 N.Y.S.2d 600 (1982), *aff'g* 82 A.D.2d 661, 442 N.Y.S.2d 803 (2d Dep't 1981).

59. *Miranda v. Arizona*, 384 U.S. 436 (1966).

60. 33 N.Y.2d 37, 300 N.E.2d 722, 347 N.Y.S.2d 187 (1973), *rev'g* 36 A.D.2d 749, 320 N.Y.S.2d 891 (2d Dep't 1971).

61. 54 N.Y.2d 951, 429 N.E.2d 821, 445 N.Y.S.2d 143 (1981), *aff'g* 77 A.D.2d 191, 433 N.Y.S.2d 169 (2d Dep't 1980). Three judges of the court of appeals voted to adopt Judge Hopkins' opinion below and four others voted to affirm on a separate

finite resolution may come in the future concerning the nuances of this important issue of imputed knowledge to law enforcement officials of prior unrelated crimes and prior representations by counsel as affecting ongoing interrogations and the legal possibility of waiver of counsel.⁶² However the question is resolved, the Hopkins' opinion contributes an important analytic and practical point of view.

Finally, in this category I note that Judge Hopkins' jurisprudential sense of order and finality cried out for limiting the collateral attack routes upon a judgment of conviction by *habeas corpus*. His opinion to that effect was adopted by the unanimous court of appeals in *People ex rel. Tanner v. Vincent*.⁶³

The conclusion of this highly subjective, highly selective excursion through the judicial works of Adopted Associate Judge James D. Hopkins is at hand. No devil's advocate was permitted to intrude upon this effort for a judicial canonization, *pendente vita*. Within the confines of this article, Judge Hopkins is safe from all.

In fairness to the subject and to the reader, however, some imperfection must be disclosed to certify human fallibility. The magic of electronic research, which was used to assist in the formulation of this article, uncovered only three cases in which Judge Hopkins served as counsel in the court of appeals in his early years as an attorney.⁶⁴ He lost all three; two as counsel for respondent, and one as counsel for appellant. Now, had I changed or expanded "the search" or had I scoured the library using traditional manual, cerebral research, I no doubt would have discovered other cases, including some he won. I decided not to search further, however, confident that Judge Hopkins, who, in addition to all his other wonderful judicial and human qualities, has a sweet sense of humor, would enjoy this machine measurement of his fallibility. This is so, especially since it is a

memorandum.

62. See, e.g., *People v. Fuschino*, 87 A.D.2d 716, 448 N.Y.S.2d 904 (3d Dep't 1982) (argued and pending undecided in the court of appeals at the time of this writing).

63. 36 N.Y.2d 773, 329 N.E.2d 672, 368 N.Y.S.2d 842 (1975), *aff'g* 44 A.D.2d 170, 354 N.Y.S.2d 145 (2d Dep't 1974).

64. *Shohfi v. Shohfi*, 303 N.Y. 370, 103 N.E.2d 330 (1952); *Fata v. S.A. Healy Co.*, 289 N.Y. 401, 46 N.E.2d 349 (1943); *People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker*, 282 N.Y. 400, 26 N.E.2d 952 (1940).

machine's judgment and not that of a human being. If, by chance, the machine is right and there were only three cases and he did lose all three (and Justice Hopkins would know this), think of how wise he really was to become a judge so quickly. He knew where his talents would shine and where his contributions would be greatest, and now, fortunately, so do we.

As we welcome him into the history and annals of the judges of the court of appeals as an Adopted Associate Judge, one adornment cannot be conferred. The limited authority of this authorship will not support a commission for his portrait to be hung with the others in the beautiful court of appeals courtroom. But then he does not need that. Judge Hopkins' judicial spirit, in the fullest and in all the senses of that word, abides there permanently and that is the more important adornment.