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The inestimable contributions which Judge James D. Hopkins has made to our state's legal system are to be found not only in the many authoritative judicial opinions by which he helped to shape the decisional law of this state, but also in a host of extrajudicial writings. In those writings he has expounded his philosophy of judicial decision making and, in addition, has highlighted the threat posed to the continued viability of our appellate courts by the staggering appellate caseload, and has proposed various remedies therefore.

I. Judge Hopkins' Philosophy of Judicial Decision Making

In a series of law review articles, Judge Hopkins has presented a lucid analysis of the various factors on which a judge may draw to aid him in making the choice of a rule of law for decision making purposes.[1] Judge Hopkins described those factors, in ascending order of importance, as follows: general legal maxim, legal doctrine, precedent, statute or constitutional provision, and public policy.[2] Public policy, as he explained, could serve to shape the construction of a statute, and could also be the basis for making a choice between two competing rules of

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* Chairman, New York State Board of Law Examiners; co-author (with Henry Cohen), POWERS OF THE NEW YORK COURT OF APPEALS (1952); author, *The New York Court of Appeals: Some Aspects of the Limitations on Its Jurisdiction*, 27 REC. A.B. CITY N.Y. 370 (1972).

1. Hopkins, *Fictions and the Judicial Process: A Preliminary Theory of Decision*, 33 BROOKLYN L. REV. 1 (1966); Hopkins, *The Formation of Rules: A Preliminary Theory of Decision*, 35 BROOKLYN L. REV. 165 (1969); Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323 (1971).

2. Hopkins, *Fictions and the Judicial Process: A Preliminary Theory of Decision*, 33 BROOKLYN L. REV. 1, 5-10 (1966).

law or for fashioning a new rule of law.[3]

Where there is no precise precedent or controlling statute directly on point, the judge will tend to "search for a result consonant with his ideas of justice."[4] However, not every judge will articulate the exact grounds on which he may base his decision in such a case. Instead, he may invoke some legal fiction or merely express his conviction in general terms that the result he has reached is demanded by public policy.[5]

Judge Hopkins recognized that in filling "the gaps" or "interstitial limits" in the law as a judicial lawmaker,[6] the judge is at a disadvantage as compared to the legislature since he is not in a position to obtain samplings of public opinion from the citizenry or to take "testimony either within or outside the record" on the issue of public policy.[7] Nevertheless, as Judge Hopkins emphasized, it is the judge's function to declare the applicable public policy where the legislature has failed to do so; it is through "intuition, which has hardened into certainty," that the judge's "sense of 'general and well-settled public opinion' is gathered."[8]

Judge Hopkins was strongly of the view that it was incumbent on the judge, in his judicial lawmaking role, to give a full and candid explanation of his reasons for choosing a particular rule of law.[9] He further urged that where the choice turns on considerations of public policy, the judge should not only specifically articulate the public policy invoked by him, but should also show that such public policy has sound reasons to support it.[10] The choice of a rule of law may thus involve several competing public policy considerations, and the judge should explain the reasons which have led him to give overriding importance to one

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3. *Id.* at 6-7, 9.

4. *Id.* at 11.

5. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 333-34 (1971).

6. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103, 113-14 (1921).

7. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 332 (1971).

8. *Id.*

9. Hopkins, *Fictions and the Judicial Process: A Preliminary Theory of Decision*, 33 BROOKLYN L. REV. 1, 7-8 (1966).

10. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 333-34 (1971).

particular policy consideration rather than the other.[11]

The judicial opinions rendered by Judge Hopkins, some involving novel situations, clearly exemplify the principles which he expounded in his law review articles. His opinions thus exhibit a sensitivity to relevant policy considerations and a distaste for obscurantism or reliance on legal fiction. He invariably cut through the outer trappings to get at the realities of the situation and presented a full and fair analysis of relevant competing policy considerations and of the reasons which led him to the results he reached. A few examples of his opinions may serve as illustrations.

Carr v. Carr[12] concerned certain death benefits payable to the surviving spouse of a deceased United States Foreign Service officer who had died a resident of California. The status of surviving spouse was claimed, on the one hand, by a wife against whom he had previously obtained a judgment of divorce in Honduras, and, on the other hand, by a second "wife" whom he had married after such divorce and who was living with him as his wife at the time of his death.

The divorced wife brought an action in the New York Supreme Court against the second "wife" for a declaratory judgment that the Honduras divorce was jurisdictionally invalid and that the divorced wife was the decedent's lawful surviving spouse. The second "wife" resided in California and was served with process in that state by a form of substituted service, pursuant to order of the New York Supreme Court. The second "wife's" motion to dismiss the complaint for lack of jurisdiction was granted at special term, and the appellate division of the second department reversed in an opinion by Judge Hopkins.

The primary issue was whether there were sufficient contacts between the nonresident defendant and New York to make it reasonable for New York, as a matter of due process, to compel her to appear in this state to defend the action. As Judge Hopkins held, the determinative New York contact was provided by the plaintiff's allegations that she had left the marital abode in Honduras because of the decedent's cruel and inhuman

11. *Id.* at 333-35.

12. 60 A.D.2d 63, 400 N.Y.S.2d 105 (2d Dep't 1977), *rev'd*, 46 N.Y.2d 270, 385 N.E.2d 1234, 413 N.Y.S.2d 305 (1978).

treatment and had thereupon moved to New York where she had assumed a permanent domicile and had lived ever since. As Judge Hopkins pointed out, the marital *res* would follow the wronged wife, with the result that if the decedent were still living, the plaintiff would have been able to sue him in New York to establish her marital status even though he was domiciled and served with process in California.[13]

As Judge Hopkins recognized, however, a novel element was presented by the circumstance that "from a legalistic view, the marital *res* in New York no longer existed after . . . [the decedent's] death."[14] Nevertheless, Judge Hopkins refused to be bound by the constraints of legal fictions and looked instead to the realities of the situation. As he pointed out, there was

> little, if any, difference under the strictures of due process and reasonableness in the choice of a forum between the issue of the validity of the foreign divorce in an action against [the decedent], if he were living, for a declaration that the plaintiff was his wife, and the issue of the validity of the foreign divorce in an action against the defendant for a declaration that the plaintiff was [the decedent's] lawful surviving widow. New York in either case, under the doctrine of *International Shoe Co. v. Washington* . . . and *Shaffer v. Heitner* . . . , maintains a continuing interest in the determination of its domiciliary's rights in the controversy over survivor's benefits to entertain the action and to exercise jurisdiction over the parties.[15]

In *Ellish v. Airport Parking Co.*,[16] the plaintiff, who was about to leave on a flight from Kennedy Airport, parked her car in a fenced in parking lot operated by the defendant at the airport. When she returned from her flight, her car had disappeared. She thereupon brought an action for damages against the defendant, charging it with liability for the loss.

The parties stipulated that the plaintiff had driven into the parking lot at the airport, receiving from the automatic vending machine a ticket stamped with the date and time of entry. The

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13. *Id.* at 69, 400 N.Y.S.2d at 109.

14. *Id.*

15. *Id.* (citations omitted).

16. 42 A.D.2d 174, 345 N.Y.S.2d 650 (2d Dep't), *appeal dismissed*, 33 N.Y.2d 764, 305 N.E.2d 490, 350 N.Y.S.2d 411 (1973), *aff'd*, 34 N.Y.2d 882, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974).

ticket was labeled "License to Park" and stated that the lot was not attended and that the car should be locked. The plaintiff then drove her car into a parking space, locked it, and took the keys with her. Under the defendant's practice, on leaving the lot, the driver of a car would drive to the point of exit, present the parking ticket to the cashier and pay the amount due based on the time elapsed. None of the tickets identified any particular vehicle. If the driver did not have a ticket, the cashier would demand proof of ownership of the vehicle.

The parties further stipulated that neither of them had any knowledge concerning the disappearance of the car, and there was no proof of neglect by the defendant.

The plaintiff recovered judgement in her favor in the civil court, but that judgment was reversed by the appellate term and the complaint dismissed. On appeal by the plaintiff, the appellate division of the second department affirmed the appellate term by a three-to-two decision. Judge Hopkins wrote the majority opinion for the court.

Both the majority and the dissenters agreed that the issue was whether the transaction constituted a bailment or merely a license to occupy space. If it was a bailment, there would be a presumption of negligence on the part of the defendant bailee, under the common law rule relating to bailments, unless the bailee came forward with a satisfactory explanation to rebut the presumption. On the other hand, if the transaction was only a license to occupy space, there would be no such presumption and the plaintiff would be required to adduce affirmative evidence of negligence on the defendant's part in order to void dismissal of the complaint.

Judge Hopkins, in the majority opinion, took the position that only a license to occupy space was involved. He emphasized that the label of bailment "merely describes a result which in many instances does not flow from the conscious promises of the parties made in a bargaining process but from what the law regards as a fair approximation of their expections" and that, "in formulating a rule to determine the extent of the liability of the defendant, we must concern ourselves with the realities of the transaction in which the parties engaged."[17]

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17. *Id.* at 176, 345 N.Y.S.2d at 653.

Judge Hopkins noted that, unlike "the traditional warehouses of the professional bailee with their stress on security and safekeeping," parking lots such as that in the case at bar were "designed to meet the need of providing temporary space in crowded urban centers for a highly mobile means of transportation," and that it was "important that a fair rule, easy to apply, should govern."[18]

Summing up, Judge Hopkins stated as follows:

> We are of the opinion that liability should not be determined by ancient labels and characteristics not connected with present-day practices. It is one thing for the owner of a livery stable to have to explain the disappearance of a horse from its stall to the owner, but it is not at all the same for the operator of a parking lot at a busy airport to have to explain the disappearance from the lot of one of the thousands of cars parked there daily. Unless proof of negligence is present on the part of the operator of the lot, the risk of loss must be assumed by the owner of the automobile.[19]

In *La Rocca v. Lane*,[20] the petitioner, who was both a Roman Catholic priest and an attorney and who represented a defendant in a criminal case, appeared in his clerical garb for the trial of the case before a jury. The trial court directed him to remove his clerical collar before proceeding further in the trial, and he thereupon instituted a proceeding to restrain the court from enforcing that direction. He was granted judgment in his favor in the *nisi prius* court, and that judgment was reversed by the appellate division of the second department, by a three-to-one decision, and the petition dismissed, in an opinion by Judge Hopkins for the majority. The court of appeals thereafter affirmed by a six-to-one decision.

As Judge Hopkins noted in his opinion, the petitioner's first amendment right to the free exercise of religion had to be balanced against the secular value of preserving the right to a fair trial. Judge Hopkins carefully reviewed the considerations underlying each of those competing rights, and he reached the

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18. *Id.* at 177, 345 N.Y.S.2d at 653.

19. *Id.* at 179, 345 N.Y.S.2d at 655.

20. 47 A.D.2d 243, 366 N.Y.S.2d 456 (2d Dep't), *aff'd*, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976).

well-reasoned conclusion that the petitioner's first amendment right had to yield to the right to a fair trial.

His reasoning was as follows: that there was "hardly a stronger interest within the governmental structure than the preservation of the right to a fair trial, both by the accused and by the prosecution";[21] that when a clergyman "enters on secular pursuits he is subject to reasonable regulations in the secular realm";[22] and that the petitioner's right to the free exercise of religion must consequently "yield to the reasonable regulation of the court when he appears to try a case before a jury."[23]

In *People v. Servidio*,[24] the defendant challenged his burglary conviction on the ground that inculpatory statements which he had made pursuant to police interrogation while in custody should have been suppressed for the reason that they were made in the absence of his attorney who was representing him on pending unrelated criminal charges. Prior decisions had held that the police could not question a person in custody in the absence of counsel, once an attorney had become involved in a pending criminal action on that person's behalf, whether related or unrelated to the charges in connection with which the challenged questioning occurred.[25] However, those prior decisions left unresolved the issue whether the prohibition against such police questioning would be applied if the police did not have actual knowledge at the time that the person being questioned was represented by an attorney in the pending unrelated action.

Affirming the conviction, the appellate division of the second department, in an opinion by Judge Hopkins, rejected the defendant's contentions and held that the police questioning in the case before it was unobjectionable since there was no showing that the police had had actual, as distinguished from merely constructive, knowledge of the defendant's being represented by counsel.

Reviewing the pertinent policy considerations, Judge Hop-

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21. *Id.* at 247, 366 N.Y.S.2d at 461.

22. *Id.* at 249, 366 N.Y.S.2d at 462.

23. *Id.*

24. 77 A.D.2d 191, 433 N.Y.S.2d 169 (2d Dep't 1980), *aff'd*, 54 N.Y.2d 951, 429 N.E.2d 821, 445 N.Y.S.2d 143 (1981).

25. *See* People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

kins concluded as follows:

> '[W]hat is required must always be considered in light of what is practical under the circumstances.' The balance between the rights of the individual and the responsibilities of the State will be fairly maintained if actual knowledge, not constructive knowledge, is the ingredient of the rule forbidding the interrogation of a suspect when he is represented by counsel on unrelated charges unknown to the police. This does not mean that the police may act by subterfuge to conceal such knowledge, or to overlook the obvious. Equally, it means that the police undertaking the questioning must be possessed with the knowledge of the prior representation.[26]

The court of appeals thereafter unanimously affirmed the appellate division's decision,[27] four judges subscribing to a brief memorandum decision and the other three specifically agreeing "for the reasons stated by Justice James D. Hopkins at the appellate division."[28]

In other situations, dealing with a comparatively new doctrine such as that of strict products liability,[29] or a novel application of an established concept such as that of proximate cause,[30] Judge Hopkins has taken pains, in his opinion, to explain not only the reasons for the decision, but also its implications and ramifications.

The positions espoused by Judge Hopkins in opinions written by him, whether for the majority or in a limited concurrence or a dissent, have generally found acceptance in the court of appeals.[31] However, that has not always been so. On occasion, the

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26. 77 A.D.2d at 197, 433 N.Y.S.2d at 174 (citing People v. Pinzon, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 724, 406 N.Y.S.2d 268, 271 (1978)).

27. 54 N.Y.2d 951, 429 N.E.2d 821, 445 N.Y.S.2d 143 (1981).

28. *Id.* at 954, 429 N.E.2d at 823, 445 N.Y.S.2d at 145.

29. Jerry v. Borden Co., 45 A.D.2d 344, 358 N.Y.S.2d 426 (2d Dep't 1974).

30. Pagan v. Goldberger, 51 A.D.2d 508, 382 N.Y.S.2d 549 (2d Dep't 1976).

31. *See* La Rocca v. Lane, 47 A.D.2d 243, 366 N.Y.S.2d 456 (2d Dep't), *aff'd*, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976); People v. Servidio, 77 A.D.2d 191, 433 N.Y.S.2d 169 (2d Dep't 1980), *aff'd*, 54 N.Y.2d 951, 429 N.E.2d 821, 445 N.Y.S.2d 143 (1981); Douglaston Civic Ass'n Inc. v. Galvin, 43 A.D.2d 739, 350 N.Y.S.2d 708 (2d Dep't 1973), *aff'd*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974); State Div. of Human Rights v. Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28 (2d Dep't 1970) (Hopkins, J., dissenting), *rev'd sub nom.* 29 N.Y.2d 555, 272 N.E.2d 884, 324 N.Y.S. 297 (1971); People v. Bailey, 28 A.D.2d 126, 282 N.Y.S.2d 303 (2d Dep't 1967) (Hopkins, J., dissenting), *rev'd*, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d

views expressed by him on important questions of policy have not prevailed in the court of appeals, though sometimes winning the support of dissenters in that court. Thus, in *Sackler v. Sackler*,[32] Judge Hopkins dissented in a divorce action on the ground that the strictures of the fourth amendment required the exclusion of evidence of adultery obtained by the husband's illegal focible entry into the wife's home. The court of appeals rejected Judge Hopkins' views, by a five-to-two decision, holding that the fourth amendment had traditionally not been applied to the actions of "private litigants" in civil cases.[33]

Another example is *Lastowski v. Norge Coin-O-Matic, Inc.*,[34] which involved the question whether, in an action brought by a father on behalf of his unemancipated infant child against a third party to recover damages for injuries sustained by the child as a result of the negligence of the third party, the latter could counterclaim against the father for contribution on the basis of the father's alleged negligence in failing properly to supervise the child.

The majority of the appellate division held that the counterclaim was insufficient as a matter of law on the ground that there was no tort liability on the part of a parent for negligent failure to supervise properly an unemancipated child. Judge Hopkins dissented in a lengthy opinion in which he reviewed the pertinent policy considerations and reached the opposite conclusion. The same question was thereafter decided by the court of appeals in other litigation, contrary to Judge Hopkins' views, by a five-to-two decision.[35]

In any event, regardless of his "batting average" in the court of appeals, there can be no doubt as to the high regard in which Judge Hopkins is held in that court and elsewhere. As an example, it may be noted that in a recent decision of the court of appeals in a case involving the concept of proximate cause, Chief Judge Lawrence H. Cooke, in his opinion for the full court, cited, as authority for a certain proposition, Judge Hopkins'

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943 (1968).

32. 16 A.D.2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962), *aff'd*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

33. *Id.* 15 N.Y.2d at 43, 203 N.E.2d at 483, 255 N.Y.S.2d at 85.

34. 44 A.D.2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974).

35. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

opinion in *Pagan v. Goldberger*,[36] and specifically noted in parenthesis that it was an opinion by "Hopkins, Acting P.J.," thereby signifying that the opinion was entitled to especially great weight because of the stature of its author.

II. Judge Hopkins' Contributions to Appellate Procedural Reform

Judge Hopkins was one of the first forceful spokesmen to call attention to the critical situation created by the ever increasing appellate caseload and to propose appropriate remedies.[37] As he made clear in his writings, no appellate court, no matter how competent, could long continue to function efficiently and maintain high-quality standards in the face of such an overwhelming avalanche of appeals.[38] Some of the remedies which he proposed have become established features of the practice, but he has continued to press for more far-reaching changes.[39]

The dimensions of the problem have become even more serious in recent years, and they were delineated in a recent study, entitled "Appellate Justice in New York," sponsored by the American Judicature Society, on which Judge Hopkins collaborated with Robert MacCrate and Professor Maurice Rosenberg.[40] In that study, it was noted that the aggregate caseload of the four appellate divisions in this state had increased by over 200% during the twenty-year period from 1960 to 1980.[41] Indeed, the percentage of increase was even greater for Judge Hopkins' court, the appellate division of the second department, which disposed of a record number of 3502 appeals in 1980, as compared with 730 appeals decided by it twenty years earlier in the

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36. 51 A.D.2d 508, 382 N.Y.S.2d 549 (2d Dep't 1976).

37. Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551 (1972); Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 HOFSTRA L. REV. 649 (1975).

38. Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551, 555, 556 (1972); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 HOFSTRA L. REV. 649, 652 (1975).

39. R. MACCRATE, J. HOPKINS, M. ROSENBERG, APPELLATE JUSTICE IN NEW YORK 55-56, 67-71, 86-88, 117-19 (American Judicature Society 1982).

40. *Id.*

41. *Id.* at 56-57.

1959-1960 court year.[42] That huge volume of appeals, coupled with an additional annual workload of some 8000 motions, make it the busiest appellate tribunal in this state and one of the busiest in this country.[43]

The volume of appellate business of the court of appeals has likewise undergone an enormous increase during the past two decades—from 399 appeals decided in the 1959-1960 court year to 722 decided in 1982.[44] Adding to that court's burdens is a huge volume of motions in civil cases, which numbered 1329 in 1982, and applications for leave to appeal in criminal cases, decided by individual judges of the court, which numbered 1863 in 1982.[45]

The proposals which Judge Hopkins advanced were directed at the entire appellate court system, and not merely at the court in which he sat. He felt that it was essential to streamline the appellate process, for the benefit of the litigants and the bar as well as of the appellate courts, and to ease the burden of those courts so as to promote their efficient functioning and guard against any sacrifice of quality in their operations.[46]

One proposal, which was strongly championed by Judge Hopkins as well as by others, and which is now widely accepted, is that of the "hot court," whereby the judges of the panel assigned to hear an appeal become acquainted with the issues in each case prior to argument by reading the briefs.[47] That practice, which is now followed by the court of appeals as well as by each of the appellate divisions, reduces argument time and enhances the value of oral argument for both the judges and counsel by enabling them to focus attention on the critical issues in the case.

Another of Judge Hopkins' proposals, the gist of which has since been adopted, was to require that the appellate court be apprised of the pendency of an appeal promptly after service of

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42. *Id.*

43. *Id.* at 61-62.

44. *Id.* at 63-64; *see also,* ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, 5, app. I (1982).

45. *Id.* at 12, 13.

46. Hopkins, *Small Sparks From a Low Fire: Some Reflections on the Appellate Process,* 38 BROOKLYN L. REV. 551, 559 (1972).

47. *Id.* at 558.

the notice of appeal in order to enable the appellate court to monitor the expeditious prosecution of the appeal.[48] The notice of appeal has traditionally been filed only with the clerk of the *nisi prius* court, and, under the prior practice, the appellate court would not learn of the appeal until one of the parties activated the appeal or moved for some relief before the court.[49]

Under practice changes made by the appellate divisions of the first and second departments, the appellant is now required to file, with the notice of appeal, a pre-argument statement of the nature of the case and the issues presented by the appeal, and the clerk of the *nisi prius* court is directed to forward that statement to the appellate division together with a copy of the notice of appeal. Pre-argument conferences with counsel are scheduled shortly thereafter for discussion of the possibility of settlement and narrowing of the issues for the appeal.[50]

A somewhat similar practice has also been adopted by the court of appeals. Under that practice, the appellant is required to file a so-called jurisdictional statement with the court of appeals within ten days after the appeal is taken. That statement must set forth, among other things, the issues presented by the appeal and a showing that the court has jurisdiction to entertain the appeal and to review the issues raised. It is also required that the statement be accompanied by copies of the notice of appeal, any opinions below and other pertinent papers.[51] The filing of such statement and accompanying papers enables the court to identify and dismiss, on its own motion, at the threshold stage, appeals of which the court has no jurisdiction and which should never have been taken.[52]

In an effort to conserve judicial resources for the consideration of important cases, Judge Hopkins also proposed that there should be a preliminary screening of pending appeals in order to select for oral argument only those appeals which present issues worthy of such argument, and that appeals not so selected should be submitted for decision without oral argument.[53]

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48. *Id.* at 559-60.
49. *Id.* at 559.
50. NEW YORK COURT RULES §§ 600.17, 670.28 (McKinney 1982).
51. *Id.* § 500.2.
52. *Id.* § 500.2(f).
53. Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate*

Though no such practice has been adopted by the appellate divisions, the court of appeals has adopted a rule, which became effective on January 1, 1982, establishing a pre-argument screening procedure, whereby appeals not deemed to merit full briefing and oral argument are set aside for summary consideration and decision by the court without oral argument.[54]

Such appeals are summarily decided by the court of appeals on the basis of the appellate division record and briefs, any opinions in the courts below, and such additional written submissions on the merits as counsel may file. The pertinent rule of the court of appeals provides that appeals may be selected for such summary procedure "on the basis of (i) nonreviewable discretion or affirmed findings of fact, (ii) clear recent controlling precedent, (iii) narrow issues of law not of overriding or statewide importance, (iv) nonpreserved issues of law, or (v) other appropriate categories."[55]

According to the Annual Report of the Clerk of the Court of Appeals for 1982, of the 722 appeals decided by that court during that year, 229 consisted of selected appeals decided on such summary submissions without oral argument.[56] A somewhat similar practice is also followed by the United States Supreme Court whereby summary dispositions are made on the merits without oral argument in selected cases in the exercise of the Court's review of applications for *certiorari*.[57]

Judge Hopkins has, in addition, advocated other, more radical remedies which would limit the availability of appeal as of right in certain areas and substitute a practice requiring permission to appeal. Thus, he has been a strong champion of a proposal to eliminate all appeals as of right to the court of appeals and to provide that court, instead, with a *certiorari*-type jurisdiction, analogous to that of the United States Supreme Court, which would permit appeals to be taken only by its permission.[58]

Process, 38 BROOKLYN L. REV. 551, 558 (1972).

54. NEW YORK COURT RULES § 500.2(g) (McKinney 1982). Prior to the adoption of this rule, a similar practice was followed by the court on an experimental basis, beginning in November, 1980. *See* ANNUAL REPORT, *supra* note 44, at 7.

55. NEW YORK COURT RULES § 500.2(g)(2) (McKinney 1982).

56. *See* ANNUAL REPORT, *supra* note 44, at 8.

57. *See* STERN & GRESSMAN, SUPREME COURT PRACTICE 220-26 (4th ed. 1969).

58. Hopkins, *Small Sparks From a Low Fire: Some Reflections on the Appellate*

In a similar vein, Judge Hopkins has likewise proposed to limit the availability of appeals as of right to the appellate division from intermediate or interlocutory orders.[59] Both of these proposals, which have also been advanced by others, have recently been endorsed by the court of appeals.[60]

Judge Hopkins has also suggested limitations on the availability of appeals in criminal cases after a plea of guilty or where only the severity of the sentence is being challenged.[61] He has further proposed that the courts should be relieved of the burden of reviewing administrative agency decisions where the issue is whether the decision is supported by substantial evidence, and that such review should be handled by an administrative board of review rather than by the courts.[62]

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Judge James D. Hopkins has truly been our Man for All Seasons: a great jurist in the highest traditions of the common law, a judicial philosopher, an innovative architect of urgently needed appellate procedural reform, and a law school dean. It is indeed a privilege to join in Pace Law Review's tribute to him.

Process, 38 BROOKLYN L. REV. 551, 555 (1972); R. MACCRATE, J. HOPKINS & M. ROSENBERG, APPELLATE JUSTICE IN NEW YORK 76-77, 117.

59. Hopkins, *Small Sparks From a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551, 555 (1972).

60. *See* ANNUAL REPORT, *supra* note 44, App. 20(a), at 3-4, 7.

61. Hopkins, *Small Sparks From a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551, 561 (1972).

62. Hopkins, *Appellate Overload: Prognosis, Diagnosis, and Analeptic* (1980) (unpublished).