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# A Compleat Jurist

ROBERT MacCRATE\*

Pace Law School has been most fortunate in its formative years to experience the guiding hand of Justice James D. Hopkins. With his retirement from judicial service at the end of 1981, the courts of New York lost a uniquely compleat jurist. A man of uncommon versatility and talent, he enriched the appellate division, second department with the multiple dimensions of his life in the law. His public services spanned over 40 years in all three branches of government, at the town, county and state level, giving this naturally reflective, perceptive and inquiring scholar a rich resource of personal observation and experience upon which to draw and to share with his colleagues in the work of the court.

## I. Philosophy and the Law

*"The life of the law has not been logic: it has been experience."*<sup>1</sup>

The contributions of Justice Hopkins in his pithy opinions, his insightful articles, his teaching of other judges and his instruction of the bar set him apart. Together they reflect a master of the judicial role who, with a coherent philosophy of the law, thoroughly understood its ultimate dimensions as they relate to the individual, to responsible government, to the distribution of governmental powers, to the institution of justice and its process.

Justice Hopkins regarded it as essential to an understanding and proper development of the law to step back periodically and to examine the law as "a function of our culture."<sup>2</sup> In 1964 he

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1. O. HOLMES, JR., *THE COMMON LAW* 1 (1881).

2. Hopkins, *A Century in the Law — 1873-1972*, *BROOKLYN B.A. CENTENNIAL J.* 41,

cogently encouraged practitioners to give attention to the philosophy of the law:

I know that we, as lawyers, have somewhat of a resistance to philosophy. We are more attached to decisions and precedents than to a philosophy of law. It is the current result, rather than the preceding evolution of principle, that holds our attention, because our livelihood is involved in concrete cases, not in abstractions. But, of course, we lawyers must also be interested in principle, for otherwise the entire fabric of our common law tradition loses its meaning. If we cannot explain the decision of a case based on a reason applicable to all similarly situated, we return to the caprice of the caliph who administers justice on the steps of the mosque.<sup>3</sup>

The continuing search in each decision for the "reason applicable to all similarly situated" characterized Justice Hopkins' contributions to the law in its various dimensions, as a sampling of his writings confirms. Justice Hopkins recognized the role of the law in the resolution of basic social and economic issues. He reflected and wrote upon the law's direction, and the intellectual and cultural forces which lent the impetus to that movement, in a manner that not only placed law in its full setting but introduced a "greater perspective" into the lawyer's counseling, the judge's decision making and the calling of the law itself.<sup>4</sup>

He was particularly struck by the seminal contribution of Justice Oliver Wendell Holmes to the path taken by the law — a path that Justice Hopkins retraced in his remarkable address to the Brooklyn Bar Association in 1964.<sup>5</sup> He pointed to the ferment in thought that surrounded Holmes in his developing years, affected by Darwin and Huxley and the portents of the scientific method.<sup>6</sup> He appraised Holmes as "a great man because he seized the philosophy of his time, foresaw its implications in the future, and applied those implications to the law."<sup>7</sup> For Justice Hopkins, Holmes strikingly demonstrated his fore-

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42 (1972) [hereinafter referred to as *A Century in the Law*].

3. Hopkins, "The Path of the Law" Retraced, 41 BROOKLYN BARRISTER 205, 205-06 (1964) [hereinafter referred to as "The Path of the Law" Retraced].

4. *Id.* at 212.

5. *See id.* at 205-12.

6. *Id.* at 212.

7. *Id.*

sight when he said in an 1890's address:

For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.<sup>8</sup>

He attributes to Holmes "clear vision that in the future the social sciences — sociology, economics, political science — would have an increasingly important role in the process of legal decision."<sup>9</sup>

Justice Hopkins proceeded (both in his 1964 address and eight years later for the Brooklyn Bar's centennial) to trace the path of the law through "the Brandeis brief" and the ensuing use of economists' studies of markets and competition, sociologists' explorations of the effects of racial segregation and political scientists' appraisals of the proportionality of representation, down into his own years on the bench. He found one of the guiding precepts of the modern era to be that law should conform to the realities of the world in which we live. He noted the "insistence in the investigation and the accurate recording of things as they are" rather than as imagined.<sup>10</sup> Facts must first be known before a legal rule is determined.

In this detailed attention to the factual background for each new development in the law, Justice Hopkins found "the final recognition of the basic thought that courts do make law, and the process should be consciously accompanied by a knowledge of what present conditions are and how they will be affected by the implications of the rule adopted."<sup>11</sup>

He assigned a special importance to the modern intellectual climate in its impact upon the law. He found common well-springs for a diverse array of developments in the law in the intellectual contributions of Freud in his theories of sexual repression and of Einstein with his insights into relativity. He expressed his thesis in this way:

[T]hat law is a function of our culture, that the philosophies and the scientific advancements of the times influence the movement

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8. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

9. See "*The Path of the Law*" Retraced, *supra* note 3, at 209.

10. See *A Century in the Law*, *supra* note 2, at 43.

11. *Id.*

of the law, just as they affect our customs and habits and institutions.<sup>12</sup>

Thus he came to see a common source in the theories of Freud for the law's changing attitude toward censorship, the revision of divorce law and new approaches to the penal law.<sup>13</sup> The law's growing insistence upon the weighing of competing interests, as, for example, in zoning matters and constitutional issues, and the accompanying refusal to apply inflexibly absolute principles, he regarded as a cultural manifestation of Einstein's treatment of relatives.

Speaking as an anthropologist, Justice Hopkins saw in the total environment — with the increased tempo of life and the shortening of space and time — the origins of each of the following: the changing rule for choice of law ("contacts come closer to meeting the demands" of modern society);<sup>14</sup> the destruction of the "citadel of privity" (its significance lost as product distribution spread to even wider markets at an ever faster pace);<sup>15</sup> entertaining lawsuits far from the residence of a party (distance no longer viewed as seriously prejudicial);<sup>16</sup> limitations on the right to recover for libel (ease of communication was "an unexpressed motivation");<sup>17</sup> and expansive rules of tort liability (fright as a ground for recovery, the time when a claim for medical malpractice arises, the abolition of intrafamily tort immunity for non-willful torts, liability to bystanders).<sup>18</sup>

There can be little doubt that Justice Hopkins found the legal environment of his time congenial to his own instincts and approach to judging, as reflected in his 1972 statement to the Brooklyn Bar:

The law is ceaselessly churning between certainty and change, between precedent and reversal. . . . If the landmarks of the past seem to be one by one destroyed by a rising tide today that at times is frightening because of its force and breadth, we must recall that this is the heritage of life, that creation is the

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12. *Id.* at 42.

13. *Id.* at 45-46.

14. *Id.* at 47.

15. See "*The Path of the Law*" Retraced, *supra* note 3, at 208.

16. See *A Century in the Law*, *supra* note 2, at 47.

17. *Id.*

18. *Id.* at 46.

process of making better, of selection, and of tearing down to rebuild.<sup>19</sup>

## II. Justice Hopkins' Opinions

In his opinions addressing important public issues, such as discrimination based on sex and the permissible methods for financing free public education, to which specific reference is later made,<sup>20</sup> Justice Hopkins wrote with an awareness of the cultural forces at work and of the directions in which the law was moving. He approached what he referred to as the "process in the making of the judgment" as the responsibility "to decide what must be preserved and what must be abandoned, to reconcile the liberty to change with the constant values which must not be changed."<sup>21</sup>

### A. *Equality and the Law*

The evolution of the concept of equality in the law, from that of "equivalence" in *Plessy v. Ferguson*<sup>22</sup> to that of antidiscrimination in *Brown v. Board of Education*<sup>23</sup> and on to something more, had attracted Justice Hopkins in his overview of *A Century in the Law*. He perceived in this evolution a freeing of equality from its linkage to status and noted the growing insistence upon "a rational foundation for the denial of equal treatment" and refusal to accept differences as a characteristic of status. He perceived this "levelling of the difference in rights arising out of status" not only in the closer identity between man and woman, but in the law's changing treatment of aliens, convicts, indentured servants, infants and incompetents. Noting that Sir Henry Maine at an earlier time had declared that the direction of the common law had been from status to contract, he suggested that the more recent direction of the common law might be said to move "from status to contract toward

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19. *Id.* at 47.

20. See *infra* text accompanying notes 31-34.

21. See *A Century in the Law*, *supra* note 2, at 47.

22. 163 U.S. 537, 551-52 (1896) (commonly referred to as the "Separate but Equal" Case).

23. 347 U.S. 483, 485-96 (1954).

equality.”<sup>24</sup>

In *East Williston*,<sup>25</sup> an opinion that reflected his prior exploration of the evolution of the concept of equality, Justice Hopkins upheld the right of women to have pregnancy treated no less liberally than other physical conditions to which human beings are subject. Gender being neutralized by statute as a source of differentiation, for him it naturally followed that pregnancy so far as possible should be treated on a parity with other physical incapacity. The opinion pointed out that while in a sense the equal protection clause deals with classes of people, “the Human Rights Law deals in contrast with individuals” and “prevents disparate treatment of individuals.”<sup>26</sup>

### B. *Responsible Government*

From his background in the administration of local government, Justice Hopkins brought to the bench an acute concern with how government treats the individual citizen and how the law protects the individual from arbitrary actions. This led him to insist on the right to a simple hearing before any discharge even in the face of what a majority of his court felt were open and shut grounds for dismissal. To him, every village employee should have an opportunity to state why his or her separation from public service should not be directed.<sup>27</sup> By the same token, once the state had insinuated itself into a challenged activity “the requirements of due process must be met,” as when the State Racing Association denied track facilities to a horse trainer.<sup>28</sup>

His writings reflect an abiding sense of the importance of responsible government and the courts’ role in assuring it. At the same time, Justice Hopkins, with his singular overview of

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24. See *A Century in the Law*, *supra* note 2, at 45.

25. *Board of Educ. (East Williston) v. New York State Div. of Human Rights*, 42 A.D.2d 49, 52-53, 345 N.Y.S.2d 93, 97-98 (2d Dep’t 1973), *aff’d*, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974).

26. *Id.* at 97-98.

27. *Economico v. Village of Pelham*, 67 A.D.2d 272, 280, 415 N.Y.S.2d 239, 245 (2d Dep’t 1979) (Hopkins, J., dissenting), *aff’d*, 50 N.Y.2d 120, 405 N.E.2d 694, 428 N.Y.S.2d 213 (1980).

28. *Jacobson v. New York Racing Ass’n*, 41 A.D.2d 87, 90, 341 N.Y.S.2d 333, 337 (2d Dep’t), *modified*, 33 N.Y.2d 144, 305 N.E.2d 765, 350 N.Y.S.2d 639 (1973).

the process of governing, recognized that effective government at times required independence from public second-guessing. In determining that a public officer was immune from suit at the hand of a private citizen for the result of his discretionary or quasi-judicial acts, he observed:

In weighing the balance between the effects of oppressive action and vindictive or retaliatory damage suits against the officer, we think that the public interest in prompt and fearless determinations by the officer, based on his interpretations of the law and the facts before him, must take precedence. A public officer, haunted by the spector of a lawsuit, may well be subject to the twin tendencies of procrastination and compromise to the detriment of the proper performance of his duties.<sup>29</sup>

The court of appeals affirmed, "for the reasons stated in the opinion of the Appellate Division."<sup>30</sup>

### C. *Law Making and the Law*

While rejecting the argument that the equal protection clause as interpreted most recently by the United States Supreme Court had been violated, Justice Hopkins' eloquent separate opinion in the Levittown school financing case contained a compelling indictment (which the majority in the court of appeals chose to ignore) of opportunitistic government that ignores constitutional mandates in order to "satisfy the conflicting demands of constituents."<sup>31</sup> He found in the Education Article of the State Constitution<sup>32</sup> a firm mandate that "State support of free public schools for all children was to be provided by the Legislature according to a *system*."<sup>33</sup> He found that a uniform

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29. *Rottkamp v. Young*, 21 A.D.2d 373, 376, 249 N.Y.S.2d 330, 334 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965).

30. *Rottkamp v. Young*, 15 N.Y.2d 831, 833, 205 N.E.2d 866, 866, 257 N.Y.S.2d 944, 944 (1965).

31. *Board of Educ. (Levittown) v. Nyquist*, 83 A.D.2d 217, 267-68, 443 N.Y.S.2d 843, 873-74 (2d Dep't 1981) (Hopkins, J., concurring in part and dissenting in part), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

32. N.Y. CONST. art. XI, § 1, which provides, "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

33. *Board of Educ. (Levittown) v. Nyquist*, 83 A.D.2d at 267, 443 N.Y.S.2d at 874 (Hopkins, J., concurring in part and dissenting in part) (emphasis in original).



and harmonious system of grants had in fact been conceived in the 19th century and implemented for many years, but that more recently the Legislature had enacted a host of "special laws reaching a level of complexity so as to negate the existence of a basic State-wide fiscal system for education" and that flat grants and hold harmless formulas had rendered the plan of school finance "a perversion of the constitutional mandate for a system," that the 1978 amendments converted past complexities "into a veritable jungle of labyrinthine incongruity" and "that a constitutional system no longer exists."<sup>34</sup> Drawing upon Homer, Justice Hopkins delivered the ultimate disparagement: "The statutes now resemble a patchwork mounted on patchwork, an Ossa of confusion piled on a Pelion of disorder."<sup>35</sup> For him, no "system" of support remained. The Legislature had "frustrated" the constitutional mandate.

#### D. *The Nature and Allocation of Governmental Power*

Justice Hopkins spoke in a consistent voice regarding the nature and proper allocations of governmental powers to all levels of government. He insisted that the inherent nature of such powers and their allocation must be respected by each branch at all times. He was both a student and practitioner of governing who intuitively went back to first principles to resolve issues involving the exercise of governmental power.

In the months immediately before retirement, in several significant opinions, he had occasion to address the subject. His dissenting opinion in *Paerdegat Boat and Racquet Club, Inc. v. Zarrelli*<sup>36</sup> was adopted by the court of appeals in reversing the appellate division and confirming the long-standing principle that public land is immune from a citizen's lien or attachment regardless of the use to which the land is put at a particular time.

Again, in *Marcus v. Baron*,<sup>37</sup> his essay in dissent upon the

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34. *Id.* at 267-68, 443 N.Y.S.2d at 873-74 (emphasis in original).

35. *Id.* at 269, 443 N.Y.S.2d at 875. The reference is to two mountains in Eastern Greece in Thessaly.

36. 83 A.D.2d 444, 449, 445 N.Y.S.2d 162, 167 (2d Dep't 1981), *rev'd on other grounds*, 57 N.Y.2d 966, 443 N.E.2d 477, 457 N.Y.S.2d 229 (1982).

37. 84 A.D.2d 118, 134, 445 N.Y.S.2d 587, 598 (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).

quantity and quality of powers delegated to municipal governments by the Legislature was adopted as its own by the court of appeals in reversing the appellate division and striking down a town's attempt by local law to change the conditions enacted by the Legislature for the creation of a village.<sup>38</sup>

Ten years earlier in *Meyers v. New York State Division of Housing & Community Renewal*,<sup>39</sup> he had written an authoritative essay upon the nature and permissible scope of delegation of discretionary powers by the Legislature, confirming the nonreviewability by the courts of a local legislature's exercise of discretion with respect to decontrol of rents.

### E. *The Institution and Process of Justice*

Justice Hopkins' appreciation of the importance of the institution of the process by which justice is dispensed was probably nowhere more apparent than in his oft-cited opinion in *People v. Clayton*,<sup>40</sup> where he sought to define the elements of what came to be known as a "Clayton hearing." After tracing the history of the statutory provision for dismissals of criminal actions

38. Justice Hopkins' proclivity for providing the court of appeals with the basis for decision in that court is well illustrated by the nine times in 1982 in which his majority, concurring, dissenting, or concurring in part and dissenting in part opinion was cited as the basis for affirming or reversing the appellate division's order. See *Paerdegat Boat and Racquet Club, Inc. v. Zarrelli*, 57 N.Y.2d 966, 443 N.E.2d 477, 457 N.Y.S.2d 229 (1982), *rev'g* 83 A.D.2d 444, 445 N.Y.S.2d 162 (2d Dep't 1981) (per opinion of Hopkins, J., concurring in part and dissenting in part); *Safeco Ins. Co. v. Jamaica Water Supply Co.*, 57 N.Y.2d 944, 443 N.E.2d 493, 457 N.Y.S.2d 234 (1982), *aff'g* 83 A.D.2d 427, 444 N.Y.S.2d 925 (2d Dep't 1981) (per majority opinion of Hopkins, J.); *Marcus v. Baron*, 57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982), *rev'g* 84 A.D.2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981) (per opinion of Hopkins, J., dissenting); *People v. Parker*, 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); *Board of Educ. (Levittown) v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *modifying* 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981) (in part per opinion of Hopkins, J., concurring in part and dissenting in part); *People v. Williams*, 56 N.Y.2d 916, 438 N.E.2d 1126, 453 N.Y.S.2d 430 (1982), *aff'g* 81 A.D.2d 418, 440 N.Y.S.2d 935 (2d Dep't 1981); *People v. David L.*, 56 N.Y.2d 698, 436 N.E.2d 1324, 451 N.Y.S.2d 722 (1982) (mem.), *rev'g* 81 A.D.2d 893, 439 N.Y.S.2d 152 (2d Dep't 1981) (per opinion of Hopkins, J., and Weinstein, J., dissenting); *People v. West*, 56 N.Y.2d 637, 436 N.E.2d 191, 450 N.Y.S.2d 785 (1982) (mem.), *rev'g* 84 A.D.2d 795, 449 N.Y.S.2d 439 (2d Dep't 1981) (per opinion of Hopkins, J., dissenting); *Kiley v. Coveney*, 55 N.Y.2d 866, 433 N.E.2d 137, 448 N.Y.S.2d 154 (1982) (mem.), *aff'g* 84 A.D.2d 585, 443 N.Y.S.2d 736 (2d Dep't 1981).

39. 36 A.D.2d 166, 168-69, 319 N.Y.S.2d 522, 526-27 (2d Dep't 1971).

40. 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973).

"in the interests of justice," he insisted that before a criminal case could be dismissed on this ground there must be a systematic consideration of the relevant issues.<sup>41</sup> Finding a void in the law as to the factors to be considered, he undertook to fill that void, which served that purpose until the Legislature in 1979 finally addressed the matter and provided guidelines for the exercise of the power to act "in the interests of justice."<sup>42</sup>

He was a frequent writer not only on the role of procedure in the effective discharge of justice, but on the place of the particular court on which he served in a modern judicial system. At a time when the central role of intermediate appellate courts was coming to be recognized nationwide, he was sharing his insights as to how such a court functions, its significant responsibility as the court of last resort for the great majority of cases and the difficulties encountered in discharging that responsibility under the staggering caseloads in many jurisdictions.

In his article *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*,<sup>43</sup> he called attention to the need for an authoritative answer "as to what constitutes a tolerable case load for an appellate court."<sup>44</sup> He proceeded to reflect upon important issues of whether there should be a right of appeal in all cases, the implications of the right to a speedy disposition, the necessity for appellate court control over appeals, the special aspects of appellate review in criminal cases, and the need for streamlining the record on appeal.

Later, in 1975, he expressly set forth his conclusions as of that time on the role of an intermediate appellate court.<sup>45</sup> He concluded that "a periodic reexamination of its role should be instituted, particularly with respect to the kind of cases which it should review, the need for additional judges, or the innovation of other means of reducing the case load for the courts."<sup>46</sup> His

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41. *People v. Clayton*, 41 A.D.2d at 108, 342 N.Y.S. 2d at 110.

42. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982), *cf. id.* § 170.40 (similar standards included).

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

44. *Id.* at 551. Subsequently the question was considered in P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 144-46 (1976).

45. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

46. *Id.* at 478.

willingness to participate in the American Judicature Society's appellate study in 1981 and 1982 was directly responsive to the needs which he had identified and his contributions to that study were of immense value.<sup>47</sup>

In reviewing the life in the law of Justice Hopkins one is led to conclude that the stature, significance and role, not only of his own court but of courts across the country, have been enhanced by the example and wise counsel of that compleat jurist. Not only the bench but the entire profession is the richer for the perspective James D. Hopkins has provided.

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47. R. MACCRATE, J. HOPKINS & M. ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* (1982).