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Portrait of the Judge as an Artist (with apologies to James Joyce)

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Presiding at the Pace Law School commencement June, 1982, Acting Dean James D. Hopkins urged the graduates to be like Joyce's Stephen Daedalus and "go to encounter for the millionth time the reality of experience and to forge in the smithy of [their] soul[s] the uncreated conscience of [their] race."[1] To the glimpse of Judge Hopkins[2] these words provide, we owe our title.

We embark on this effort with not a little trepidation for oft we have thought there is only one soul with the flair accurately to portray Judge Hopkins in words. That person is the Judge himself and he will never do it. Would that he would write the portrait of the Judge as a man, lawyer and artist that he is.

Law is the science that lives by the written word. Words are the tools of the law and when artfully used the result is a joy for "true ease in writing comes from art."[3] The ease with which Judge Hopkins wrote was amazing and he seemed to be most at ease when he was writing. The art at first escaped us but more about that later.

We see now why the Judge's writing came so easily. It was because of the process and preparation that preceded it. We feel that the writing never started until the answer was formed. The quality of the effort that had gone into finding the right answer made the writing easy. But so immersed were we in this process

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1. J. JOYCE, PORTRAIT OF THE ARTIST AS A YOUNG MAN 252-53 (1966).

2. His official title is Justice Hopkins, as an elected Supreme Court Justice. We adopt the common parlance and everyday usage we have become accustomed to.

3. A. POPE, ESSAY ON CRITICISM line 362 (1711).

that it was not until we were asked to do this piece that we discovered it was art we were engaged in. How did the process that produced this art work?

We discovered five stages which were not a formal procedure but rather a pattern which evolved from Judge Hopkins' commitment to quality at every stage of preparation. The Judge assigned the matter to one of us by giving us copies of the briefs of counsel or a law-assistant's report. He generally made comments about the basic facts and the legal issue or issues presented. His style was somewhat like the comments that appear on the inside flaps of books — enough to pique your interest but never enough to give away the substance. It was his habit never to indicate any opinions he had formed, the better to give us room for our own thoughts. The assignment had no time limit attached. The Judge expected quality and recognized that we were individuals. Each of us found our own pace to achieve thorough familiarity with the case and return to him for the second stage, discussion. Discussion was free ranging and open. We argued, advocated, shifted from reason to reason and viewpoint to viewpoint. No judgments were made at this stage but opinions emerged and from those opinions we formulated questions. Framing the questions set the stage for the research which was the next step. It was the careful articulation of those questions which made research the simplest part of our task. Our objective was to look through the library and find an answer.

Once the research yielded some applicable law we entered the penultimate stage. Thinking, weighing, and balancing forged a final analysis. This was not a communal or shared experience. The person assigned to the matter worked through the questions, applied the law, attempted to perceive the future and the results that would accrue. Our conclusion was submitted to the Judge in a written memo.

The final stage was reached when Judge Hopkins picked up his pen. Armed with his knowledge of the law, his own conclusion and the results of our interaction, he sat to write. We marveled at his ease. His writing flowered into straightforward, effortless, essential expressions of not only the law but the human condition as well. It is impossible to portray the tempo of this process except to say that it suited all concerned.

Judge Hopkins' respect for us and our opinions was essen-

tial to our daily pattern. It produced separate thoughts and opinions and a cumulative effect which gave Judge Hopkins a broader base from which to work. Secure in his position, he wrote legal decisions which he often visited with a poetic touch. We have chosen some examples from his decisions to demonstrate his special talent for symbolism and for capturing the essence of a case in melodic passage.

The process was art at work in decision writing. Decision writing is intended to be didactic. Hence, it often becomes pedantic, heavy, somber and convoluted. Judge Hopkins' decisions are didactic without boring pedantry. His sentences are simple and direct, never heavy with the unnecessary phrase or adjective. He writes only what needs to be written.

Judge Hopkins wrote about marriage on a number of occasions. The facts of each case enabled him to approach the concept of marriage with a different angle of vision ranging from a tender definition of marriage to a straightforward acceptance of the hollowness that can exist in the name of marriage. In *Phillips v. Phillips*,[4] for example, a wife sought to dissolve a thirty-five year marriage on the grounds of cruel and inhuman conduct; the trial court denied relief and the appellate division affirmed.

In examining the facts in light of the length of the marriage, Judge Hopkins concluded:

> *A marriage, composed as it is of the delicate interrelationship of attitudes and temperaments, expressing the emotional and physical characteristics of two people changing over the years,* must be placed in the balance by an objective and careful appraisal of the Judge with the effect of the conduct of the parties upon that interrelationship and the increased burden which the law itself imposes on the parties when the marriage has lasted for nearly 35 years. We do not believe that the discretion of Special Term in the discharge of its task here was improperly exercised.[5]

In the Judge's discussion of the division of marital assets, he uses the symbol of iron fetters to show that law cannot be unresponsive to reality, and in a passage of depth and wisdom fairly captures the spectrum of marital relationships:

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4. 70 A.D.2d 30, 419 N.Y.S.2d 573 (2d Dep't 1979).
5. *Id.* at 36, 419 N.Y.S.2d at 576 (emphasis added).

> We do not think that the rigid application of principles of property or trust law should govern the distribution of an income tax refund upon the dissolution of a marriage and the division of marital assets. Each case must be decided on its own facts, and the *court should not be fettered in achieving an equitable apportionment* of assets on the dissolution of a marriage *by the iron clasp of a mechanical formula.*
>
> The *financial arrangements between husband and wife are intensely personal; what suits one household would throw another in disarray.* Sometimes the spouses join in discharging the financial responsibilities of the family; sometimes one spouse defers to the other in managing their affairs. Sometimes they agree to keep their individual earnings and property separately; sometimes they agree to merge them. Sometimes their agreement is formal; in most instances it is not. All of these circumstances must be weighed by the court when the marriage is no longer sustainable and the distribution of the family assets is the issue. The filing of a joint income tax return must therefore be viewed in the circumstances of the general financial background of the marriage; moreover, it should be construed as a response to the tax statutes designed to confer a benefit to the married couple. In itself the exercise of the option by the spouses to file a joint return should not be interpreted as the conclusive memorial of the intent to create a joint tenancy or to make a gift by one for the other. We should look beyond the simple execution of the return to the circumstances of the marriage.[6]

On another occasion, the Judge looked at a marriage with a short and turbulent history and wrote directly to the point. There was little in the case to induce him to ponder the nature of marriage:

> The brief duration of the marriage, the relative stations of the parties before the marriage and after its acrimonious ending, the unfortunate attitudes exhibited by the parties toward one another and their differing aspirations and demands persuade us that the marriage is unworkable and should be brought to legal termination. Indeed, the record evinces a marriage foredoomed to failure nearly at the start. *There is little to save in a marriage when nothing has grown out of it.*[7]

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6. Angelo v. Angelo, 74 A.D.2d 327, 333, 428 N.Y.S.2d 14, 17-18 (2d Dep't 1980) (emphasis added).

7. John W.S. v. Jeanne F.S., 48 A.D.2d 30, 32-33, 367 N.Y.S.2d 814, 817 (2d Dep't

In the course of exploring the tapestry, we noticed another artistic aspect of the Judge's style. He used reiteration so carefully crafted that his point became clearer without making his decision redundant and convoluted.

In a negligence case involving three defendants, a property owner, a tenant and a subtenant, the jury found for the injured plaintiff and the question on appeal was how much money each of the tortfeasors had to contribute. Judge Hopkins wrote,

> A relationship of a derivative or vicarious character between the tort-feasors need not be demonstrated and the shares of the payment of the judgment are determined by an analysis of the duties owed to the injured party in the situation out of which the injury was incurred and the balancing of the equities inherent in the situation.[8]

His statement explained how the court approached the problem. He stated what actions of each party constituted negligence and then he rendered his judgment. In that conclusion was the echo of the test he had already set out.

> Thus, the injury to the plaintiffs was produced by two distinct causes; the proportion of the shares of the payment of the judgment should be fixed between the perpetrators of the causes not per capita but per stirpes. Both from the nature of the duties cast on them and the sense of the extrinsic equities, the burden of the loss should be equally divided between Rohde as one prime actor and Grupenel and Queens Park as the other.[9]

In another case examining the liabilities of several defendants, the question hinged not on apportionment but rather on the status of the injured plaintiff vis-a-vis each defendant. Judge Hopkins explained the nature of the duty owed.

> But thus far in our law the content of the duty owed by the landowner varies as the status of the injured party varies from trespasser, to licensee, to business invitee. In drawing these distinctions, the courts have categorized a social invitee as a licensee, though "a verbal paradox" may thereby seem to be engendered.[10]

1975).

8. McCabe v. Century Theatres, 25 A.D.2d 154, 157, 268 N.Y.S.2d 48, 51 (2d Dep't 1966) (citations omitted).

9. *Id.* at 158, 268 N.Y.S.2d at 52.

10. Cesario v. Chiapparine, 21 A.D.2d 272, 276, 250 N.Y.S.2d 584, 588 (2d Dep't

There followed several pages of careful analysis of the parties involved and the content of duty. He reiterated:

> So long as the classification of visitors to land distinguishes between licensee and invitee in the degree of care which the landowner must exercise, the decision as to the character of the visitor and as to the liability of the landowner will logically vary, though the facts of the accident remain the same.[11]

He then concluded as to the status of the plaintiff and the differing liabilities of the defendants.

In more recent years, the Judge was asked to decide whether the Motor Vehicle Accident Indemnification Corporation Law[12] (MVAIC) necessarily had to dovetail with the no fault statute.[13] The dispute arose over whether an alighting passenger is nonetheless an occupant because of an MVAIC definition. To approach the problem, Judge Hopkins stated the factors that concerned him.

> Whether the same term must be accorded the same meaning under different statutes entails a consideration of several factors — whether the statutes are *in pari materia*, whether the statutes have common aims and whether the public policy underlying the statutes demands similar treatment of the term.[14]

He continued with an analysis of his triple-pronged consideration and in a poetic reiteration he reached a conclusion.

> In short, we see not grounds for straying from the ordinary meaning of pedestrian in favor of a judicial gloss imparted on another word written in a different statute having a different purpose.[15]

Another aspect of Judge Hopkins' writing style was his sensitivity to the reality that existed behind the surface mechanics of the situation. In a question of whose law to apply, he rejected both an out-worn rule and a mathematical contact count to de-

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1964).

11. *Id.* at 279, 250 N.Y.S.2d at 591.

12. N.Y. INS. LAW §§ 5201-5225 (McKinney Supp. 1982).

13. N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1982).

14. Colon v. Aetna Cas. & Sur. Co., 64 A.D.2d 498, 502, 410 N.Y.S.2d 634, 637 (2d Dep't 1978).

15. *Id.* at 504, 410, N.Y.S.2d at 638.

scribe a striving for justice.

> Thus, in place of the mechanical rule of *lex loci delicti* or the arithmetical rule of counting contacts, the Court of Appeals has adopted an analytical process of evaluating the facts and interests involved in the litigation. The objective of the search rests in arriving at a just and reasonable selection of the law in its relation to the total circumstances of the case. *We look not for absolutes, but for relative justice in the setting of the parties.*[16]

On another occasion a pharmacist defended his unlawful practice of writing prescriptions using fictitious names by saying the prescriptions were not falsely made since he (the pharmacist) had actually executed them. Judge Hopkins penetrated the mechanical defense by saying:

> A prescription is a physician's written order for the preparation and use of a medicine by a patient. If on his prescription form a physician inscribes the name of a person other than the person for whom the prescription is in fact written, the prescription cannot be said to be genuine. In its character as a prescription, *it does not represent the reality of which it purports to be an embodiment*. Thus, a physician's inscription of a deceased or fictitious patient's name on his prescription form constitutes more than the making of a false statement of fact. If he so executes his prescription form in order to defraud, his conduct falls within the interdiction of the statute. *He has contrived a counterfeit document*, valid on its face and having legal effect, for the purpose of defrauding another.[17]

An attorney who failed to make timely service of a notice of claim sought to avoid malpractice liability by saying that the client's claim was barred by the statute of limitations. Judge Hopkins used the "continuous treatment" rationale to impress liability and in careful symbolism drove home the point that you cannot have your cake and eat it too.

> We note, too, that a contrary rule concerning the accrual of a cause of action against an attorney for malpractice in the management of litigation might well lead to procrastination by the attor-

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16. Pahmer v. Hertz Corp., 36 A.D.2d 252, 255, 319 N.Y.S.2d 949, 953 (2d Dep't 1971) (citations omitted) (emphasis added).

17. People v. Klein, 23 A.D.2d 95, 96, 258 N.Y.S.2d 783, 784 (2d Dep't 1965) (citations omitted) (emphasis added).

> ney to postpone the inevitable event of defeat. *The author of the disaster should not be enabled to chart the strategy to avoid the liability for his own negligence.* Otherwise, negligence could be disguised by the device of delay, and an attorney rewarded by immunity from the consequence of his negligence.[18]

Note here also, the use of analogy rather than having the decision reflect someone's error.

Nor is the form all lost in art; it also manifests itself in scholarship and instruction. In *People v. John F. McNeill*,[19] Judge Hopkins reviewed a *habeas corpus* petition of a Matteawan inmate named John Butler, who claimed he was competent to stand trial. The state argued that Butler was suffering from dementia praecox, paranoid type, and was unable to understand the charges brought or make a competent defense. In a one-page opinion (with the use of footnotes, a practice he seemed later to have abandoned), Judge Hopkins presented the current law on the entire range of mental capacity in the criminal process from the test of mental capacity which the law imposed upon a person accused of crime to determine whether he is capable of standing trial, to the test for legal responsibility for the crime charged, to the test for the capacity to be punished after conviction to the test for disposition of the accused after acquital. In addition, the Judge wrote a thorough explanation of the disease of acromegaly, from which Butler suffered. To present this case in quotes does it a disservice. It must be read.

The bane of law students today and from time immemorial has been the rule against perpetuities. Judge Hopkins, writing in 1981, encapsulizes not only the philosophy of the rule, but also marks its distinction from restraints on alienation in prose as fine as a legal decision permits.

> In a general sense, the rule against perpetuities limits the power of an owner to create future interests, whereas the rule against restraint on alienation prohibits the owner from creating provisions blocking his grantee from disposing of the property. More to the point, here the terms of the option do not extend beyond the period of lives in being and a term of 21 years. Under

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18. Siegel v. Kranis, 29 A.D.2d 477, 480, 288 N.Y.S.2d 831, 835 (2d Dep't 1968) (emphasis added).

19. 30 Misc. 2d 722, 219 N.Y.S.2d 722 (Sup. Ct. Dutchess County 1961).

> either contingency of the option, it must be exercised within the lifetime of Boddy or within 30 days after his death—both contingencies thus being within the permissible period of the statute. We do not accept the defendant's construction of the option that there was no duty on him to notify the plaintiffs of Boddy's death, thereby, according to his argument, lengthening the exercise of the option possibly beyond the 21-year period provided by the statute. As we interpret the language of the option, the plaintiffs' time to exercise it began on "the receipt of notice of death," and we think it a reasonable conclusion that notification of death would be given by Boddy's heirs or successors in interest to Witt or his successors.
>
> In contrast, the rule against restraints on alienation is not now codified, but remains a doctrine controlled by decisional law. It was early stated that where an estate was conveyed in fee simple, a condition forbidding alienation by the grantee was void. The reason for the rule was said to be that the ownership of the fee could not exist in one person while the ownership of the right of alienation existed in another. That statement, of course, embodies a conceptual difficulty; but the public policy in favor of facilitating the free transfer of property is undoubtedly a more substantial ground for the rule.[20]

In presenting Judge Hopkins with a copy of the *Pocket Constitutionalist*, Professor Paul R. Baier inscribed, "To Justice James Hopkins, whose judicial flame has always reminded me of Benjamin Cardozo." We can substantiate Professor Baier's encomium. Cardozo stated the traditional dilemma of the criminal law in the following words in *People v. Defore*:[21]

> The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.[22]

Judge Hopkins in writing the now famous *People v. Clayton*[23]

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20. Witt v. Disque, 79 A.D.2d 419, 424-25, 436 N.Y.S.2d 890, 893-94 (2d Dep't 1981) (citations omitted).

21. 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926).

22. *Id.* at 24, 150 N.E. at 589.

23. 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973).

decision, which became a statutory enactment,[24] said:

> On the one side the statute allows an escape from the rigorous rules controlling the dismissal of an indictment only for reasons arising from substantial defects in supporting evidence or required procedure; on the other side, the statute erects the well-considered discretion of the court as a safeguard to prevent a dismissal of an indictment unless the public interests are as fully protected as the individual interests of the defendant for justice and mercy.[25]

We mentioned quality earlier in describing our method of finding the right answer. One summer, coming upon *Zen and the Art of Motorcycle Maintenance*,[26] the thought was to get a copy and bring it to the Judge's home when delivering court papers. Much to our dismay at not being first, but not really to our surprise, we noted a hard cover copy in his den. In that book there is much discussion of "Quality" but these words in that regard are most apropos of the Judge:

> But now we have with us some concepts that greatly alter the whole understanding of things. Quality is the Buddha. Quality is scientific reality. Quality is the goal of Art.[27]

On another occasion, at his suggestion, Thornton Wilder's *Ides of March*[28] was read. We hastened to call especially to his notice the following, attributed by Wilder to Julius Caesar:

> I am accustomed to being hated. Already in early youth I discovered that I did not require the good opinion of other men, even of the best, to confirm me in my actions. I think there is only one solitude greater than that of the military commander and of the head of the state and that is the poet's - for who can advise him in that unbroken succession of choices which is a poem? It is in this sense that responsibility is liberty; the more decisions that you are forced to make alone, the more you are aware of your freedom to choose. I hold that we cannot be said to be aware of our minds save under responsibility and that no greater danger could befall mine than that it should reflect an

24. *Clayton* is codified at N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982).
25. People v. Clayton, 41 A.D.2d at 208, 342 N.Y.S.2d at 110.
26. R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1974).
27. *Id.* at 276.
28. T. WILDER, THE IDES OF MARCH 34 (1948).

> effort to incur the approval of any man, be it a Brutus or a Cato. I must arrive at my decisions as though they were not subject to the comment of other men, as though no one were watching."[29]

We were stymied once again when he took the very words from his wallet.

His declining to be the presiding justice of the second department caused some wonderment. After all it was a prestigious judicial office and who declines prestige! He preferred to be a judge and only a judge. This is the true devotion of the artist.

29. *Id.* at 33.