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# The Hopkins' Opinions: Criminal Law and Procedure

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I wish to state at the outset that Pace University School of Law was indeed fortunate to have had Judge Hopkins as its dean, even for a little while. He is a man of high principles, deep concern and limitless compassion.

My major association with Judge Hopkins has been in connection with the Appellate Judges Conference of the American Bar Association, to which he gave a large portion of his life, serving on various committees and as its chairman. When I served as chairman, I always knew that I could count on him to carry out any task where his sound judgment was needed. In all these activities his only concern was the improvement of the appellate judiciary and the administration of justice.

In searching through the numerous opinions which he wrote in the area of criminal law and procedure, I recognized several cases that I know he was struggling with during the years that we spent so much time together. A review of these decisions has deepened the great respect and admiration that I already have for this great man. I have been impressed with the clear and concise language used by Judge Hopkins and his ability to say all that is necessary in relatively short opinions, a gift most of us wish all appellate judges possessed. Another thing I like about Jim Hopkins' opinions is that he cites his authorities in the body of the opinion instead of in footnotes and he uses footnotes very

* Chief Justice, Retired, Supreme Court of the State of New Hampshire; Distinguished Visiting Professor at California Western School of Law. Because I am living until June in San Diego where I am a visiting professor at California Western School of Law, there has been considerable delay in my receiving word of the well deserved dedication of this volume in honor of my good friend, Judge James D. Hopkins. With a March 1 deadline and with a commitment to spend a week in Florida at an Appellate Judges' Seminar, I am afraid there may be insufficient time for me to do an adequate job on this article. Nevertheless, because of my high regard for Judge Hopkins, I do wish to write something.

sparingly. Nothing detracts the reader of an opinion more than the excessive use of footnotes, which attract the eye away from the body of the opinion.[1]

In *People v. Swift*,[2] Judge Hopkins dealt with the question whether *Miranda* warnings had to be given in the precise manner set forth by the United States Supreme Court in *Miranda v. Arizona*.[3] Writing for a unanimous court, he held that it was sufficient if the substance of the warnings was "imparted in a manner which would be understandable by the ordinary person—at least in the absence of evidence that the person in custody did not understand them."[4] In deciding *Swift* as he did in 1969, he came to the same conclusion that the United States Supreme Court did in *California v. Prysock*[5] more than twelve years later.

On at least three other occasions, the Supreme Court seemed to reflect earlier decisions of Judge Hopkins. In a 1963 decision,[6] Judge Hopkins dealt with section 667 of the New York Code of Criminal Procedure[7] which provides for dismissal of a prosecution if an indictment is not found against the defendant at the next term unless good cause is shown. Defendant Saccenti had been arrested in May 1959 and arraigned on a larceny complaint. He was released on bail and the proceeding was held in suspense until April 1961 when he moved to dismiss the complaint for want of prosecution because no indictment had been returned. Pending a hearing, the prosecutor obtained an indictment and the motion to dismiss was denied on the ground that the indictment had made section 667 inapplicable. Writing for a majority of the court, Judge Hopkins determined that the intent of the code was to protect a defendant's right to a speedy trial and that prejudice to a defendant who had been arrested could

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1. Mindful of the irony involved, the editors are nevertheless compelled to follow the standard law review format and put citations in footnotes.

2. 32 A.D.2d 183, 300 N.Y.S.2d 639 (2d Dep't 1969), *cert. denied*, 396 U.S. 1018 (1970).

3. 384 U.S. 436 (1966).

4. People v. Swift, 32 A.D.2d at 187, 300 N.Y.S.2d at 644.

5. 453 U.S. 355 (1981).

6. People v. Saccenti, 18 A.D.2d 311, 311-12, 239 N.Y.S.2d 725, 727 (2d Dep't 1963), *rev'd*, 14 N.Y.2d 1, 196 N.E.2d 885, 247 N.Y.S.2d 479, *cert. denied*, 379 U.S. 854 (1964).

7. N.Y. Code of Criminal Procedure § 667. The current version of this statute is found at: N.Y. CRIM. PROC. LAWS § 190.80 (McKinney 1982).

occur as much before an indictment as after.[8] The delay of over two years after the arrest in obtaining an indictment without adequate excuse was thus held to deny defendant the right to a speedy trial.[9] The court of appeals reversed on the basis of the statute alone, without consideration of the right to a speedy trial.[10] Twelve years after Judge Hopkins' decision, the Supreme Court of the United States held that, for the purposes of the speedy trial requirement of the sixth amendment, the time begins to run from the time of arrest and not from a later indictment.[11]

In *People ex rel. Arnold v. Allen*,[12] Judge Hopkins' holding was consistent with the law later laid down by the Supreme Court in *Michigan v. Doran*[13] and *Pacileo v. Walker*.[14] Judge Hopkins held that in extradition proceedings, the asylum state cannot, consistent with our federal system and the requirement of comity, decide the validity of the indictment or the compliance with constitutional safeguards of the demanding state's procedures.[15]

In *People v. Duchin*,[16] Judge Hopkins wrote for the majority that in a non-capital case, a defendant does not have an absolute right to waive trial by jury. This is consistent with the later holding of the Supreme Court in *Singer v. United States*.[17] The defendant in *Duchin* filed a written waiver of a trial by jury stating that pretrial publicity prevented a fair trial by jury. The New York Constituton provides for such a waiver,[18] but the trial

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8. People v. Saccenti, 18 A.D.2d at 312-13, 239 N.Y.S.2d at 728.

9. *Id.* at 314, 239 N.Y.S.2d at 729.

10. People v. Saccenti, 14 N.Y.2d 1, 196 N.E.2d 885, 247 N.Y.S.2d 479, *cert. denied*, 379 U.S. 854 (1964).

11. Dillingham v. United States, 423 U.S. 64 (1975).

12. 30 Misc. 2d 1031, 220 N.Y.S.2d 71 (Sup. Ct. Westchester County 1961).

13. 439 U.S. 282 (1978) (holding that under 18 U.S.C. § 3182, courts of the asylum state are bound by extradition clause).

14. 449 U.S. 86 (1980) (18 U.S.C. § 3182 does not give courts of asylum state authority to inquire into prison conditions of demanding state).

15. People v. Allen, 30 Misc. 2d 1031, 220 N.Y.S.2d 71 (Sup. Ct. Westchester County 1961).

16. 16 A.D.2d 483, 229 N.Y.S.2d 46 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 351, 190 N.E.2d 17, 239 N.Y.S.2d 670 (1963).

17. 380 U.S. 24 (1965) (defendant's constitutional right is to an impartial trial by jury).

18. People v. Duchin, 16 A.D.2d at 484, 229 N.Y.S.2d at 47 (citing N.Y. CONST., art.

court denied the waiver. Defendant was convicted by a jury and appealed. Judge Hopkins also held that the court did not have an absolute right to deny the waiver and that under the circumstances of the case, the trial judge abused his discretion and ordered a new trial without a jury.[19]

The holdings of Judge Hopkins' opinions can also be found in subsequent legislation. In *People v. Clayton,*[20] a landmark decision in New York, a statute authorized the dismissal of an indictment "in the furtherance of justice" on the court's own motion.[21] In *Clayton,* the defendant moved to dismiss on the ground that he had not been brought to trial.[22] The trial judge dismissed the motion *sua sponte* "in the furtherance of justice" under the statute. Judge Hopkins, writing for the court, held that a dismissal could not be ordered on the court's own motion without notice and a hearing. The opinion, setting forth seven factors to be considered in making the determination, was codified in an amendment to the statute.[23]

Judge Hopkins showed his sense of fairness in *People v. Schwartz,*[24] where again for a unanimous court he construed a New York statute which forbids the use of any "confession or admission" at trial unless written notice has been given to the defendant.[25] At issue was a statement by the defendant that he had been at the address next door to the scene of an assault when in fact he had been at the scene. The statement was intended by the defendant to be exculpatory and it was therefore argued that the statute did not apply.[26] Judge Hopkins, however, read the statute broadly as pertaining to all incriminating statements regardless of the subjective intent of the defendant.

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I, § 2).

19. *Id.* at 485, 229 N.Y.S.2d at 50.

20. 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973).

21. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982).

22. *See* United States *ex rel.* Clayton v. Mancusi, 326 F. Supp. 1366 (E.D.N.Y. 1971), *aff'd,* 454 F.2d 454 (2d Cir.), *cert. denied sub nom.* Montayne v. Clayton, 406 U.S. 977 (1972). For a brief discussion of the facts of *Clayton, see* Cohalan, James D. Hopkins, *An Appreciation,* 3 PACE L. REV. 479 (1983).

23. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982).

24. 30 A.D.2d 385, 292 N.Y.S.2d 518 (2d Dep't 1968).

25. *Id.* at 386-87, 292 N.Y.S.2d at 520-21. N.Y. Code of Criminal Procedure § 813-f. The current version of this statute is found at N.Y. CRIM. PROC. LAW § 710.30 (McKinney 1971 & Supp. 1982).

26. *Id.* at 388, 292 N.Y.S.2d at 522.

He pointed out that statements the defendant believes will detour the police away from him may be "doubly damning when the falsity of the ruse is uncovered."[27] He noted that in that very case the prosecutor in his argument used the statement as evidence of guilt. This refusal to consider the subjective intent of the defendant as to the incriminating character of the statement is of course in line with the Supreme Court decisions of *Miranda v. Arizona*[28] and *Rhode Island v. Innis*.[29]

In the *Schwartz* case, Judge Hopkins also showed his knowledge of Supreme Court law when he held that a statement given without compliance with *Miranda* could not be used for impeachment purposes when the defendant does not open the inquiry by his own direct testimony going beyond denial of all the elements of the crime.[30] In other words, a denial cannot be obtained on cross-examination for the purpose of using a confession which is otherwise inadmissible because of a failure to comply with *Miranda*.[31]

In the case of *In re William L.*,[32] involving a fourteen-year-old boy who was awakened at 3:00 a.m. in his home and taken to the police station, Judge Hopkins again showed his sense of fairness. The boy's mother was told it was not a serious matter, that her son would be home in an hour or so, and it was not necessary that she come along. At the station, the boy was given the bare bones of the *Miranda* warnings, to which he did not respond except to say he wanted to tell what had happened. He was then questioned by four or five police officers. His statement, amounting to a confession to a stabbing death, was sought to be suppressed in the delinquency proceeding which followed. The boy's mother was never informed of the boy's right to retain

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27. *Id.*

28. 384 U.S. 436, 476-77.

29. 446 U.S. 291, 301 n.5 (1980).

30. People v. Schwartz, 30 A.D.2d at 388-89, 292 N.Y.S.2d at 522-23. *See* Agnello v. United States, 269 U.S. 20 (1925); *see also* Walder v. United States, 347 U.S. 62 (1954); Harris v. New York, 401 U.S. 222 (1971) (illegally seized evidence held admissible for the purpose of impeaching defendant's statements made during direct testimony as opposed to statements made in response to the prosecution's cross-examination as in *Schwartz* and *Agnello*).

31. People v. Schwartz, 30 A.D.2d at 390, 292 N.Y.S.2d at 523.

32. 29 A.D.2d 182, 287 N.Y.S.2d 218 (2d Dep't), *appeal dismissed*, 21 N.Y.2d 1005, 238 N.E.2d 327, 290 N.Y.S.2d 925 (1968).

counsel or to have one appointed if poverty prevented retaining one, nor was she present during the questioning.[33] Judge Hopkins held that, even apart from the mandates of *In re Gault*[34] and *Miranda*, due process requirements and "the special conditions of care which a juvenile's interrogation demands" rendered the confession invalid.[35] Judge Hopkins further stated that "a boy of 14, aroused from his sleep at 3:00 a.m., taken to a police station and questioned by four or five police officers concerning a homicide, would scarcely be in a frame of mind capable of appreciating the nature and effect of the constitutional warnings given him before the questioning begins."[36]

Similarly, in *People v. Ward*,[37] Judge Hopkins, in a one-page opinion, required a new trial for a defendant convicted of driving while intoxicated because the blood used in the test, the result of which had been admitted in evidence, had been extracted after the skin had been swabbed with alcohol. There was evidence that it was "possible" that alcohol might have entered the blood withdrawn and a statute provided for the admission of a chemical test only when conducted in accordance with standard operating procedures, which had not been followed.[38]

In *People v. Goggins*,[39] a majority of the court reversed a conviction because of the refusal of the prosecution to reveal the identity of an informer. The majority decided that the identity should have been revealed, and rejected the need for an *in camera* hearing.[40] Judge Hopkins, although agreeing that a new trial should be ordered, argued that the trial judge after an *in camera* hearing was in a better position to determine "the proper break-

33. *Id.*

34. 387 U.S. 1 (1967) (procedural safeguards for juveniles).

35. *In re* William L., 29 A.D.2d at 184, 287 N.Y.S.2d at 221.

36. *Id.*

This case stands in stark contrast to the lack of concern shown by five members of the Supreme Court of the United States for the plight of juveniles in Fare v. Michael C., 442 U.S. 707 (1979). In that case, a confession, obtained after extensive two-on-one interrogation, was held admissible even though the minor, on being given the *Miranda* warnings, asked to talk to his probation officer, but was refused the opportunity. *Michael C.* indicates that the result would be the same if the boy had asked for his mother or father.

37. 14 Misc. 2d 518, 178 N.Y.S.2d 708 (Westchester County Ct. 1958).

38. *Id.* at 519, 178 N.Y.S.2d at 708-09.

39. 42 A.D.2d 227, 228, 346 N.Y.S.2d 381, 382 (2d Dep't 1973), *aff'd*, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974).

41. *Id.* at 229-30, 346 N.Y.S.2d at 383-84.

ing point between the interest of the State and the interest of the individual—the traditional role of due process under the Constitution."[41]

This balance between the interests of the state and the individual was later seen in many cases including *People v. Vega*,[42] an interesting case in which Judge Hopkins dissented. The majority held that a person, not arrested, who was suspected of robbery and who had been identified without a beard in photographs, could not be required to shave his beard, grown since the offense, so as to be placed in a lineup for identificaton by witnesses who could not identify him with the beard.[43] The majority, mistakenly I think, confused probable cause to arrest with probable cause to search. They stated that if the authorities had probable cause to require the removal of the beard, they had probable cause to arrest him, but without a prior arrest the court had no jurisdicton to interfere with the suspect's right to determine his appearance.[44]

Judge Hopkins in dissent, although agreeing that the right to determine one's appearance is one that is guaranteed by the Constitution, nevertheless argued that the right was subject to regulation when a compelling state interest required.[45] He said that "[w]e should not tolerate an attempt to disguise one's appearance in order to escape the detection of a crime."[46] He pointed out that the fact that a criminal proceeding has not begun, by an arrest or otherwise, should not prevent a subject from being produced for identification procedures. Whether he should be required to alter his appearance by removing his beard should depend on the combination of the circumstances including the seriousness of the crime, the degree of intrusion, the transitory effect of the intrusion and the reliability of the information sought. Considering all these factors, he concluded that the order to remove the beard should stand.[47] This case, in ef-

41. *Id.* at 231, 346 N.Y.S.2d at 385 (Hopkins, J., concurring in part and dissenting in part).

42. 51 A.D.2d 33, 379 N.Y.S.2d 419 (2d Dep't 1976).

43. *Id.* at 35, 38, 379 N.Y.S.2d at 421, 424.

44. *Id.* at 38, 379 N.Y.S.2d at 424.

45. *Id.* at 39, 379 N.Y.S.2d at 424-25 (Hopkins, J., dissenting).

46. *Id.* at 39, 379 N.Y.S.2d at 425 (Hopkins, J., dissenting).

47. *Id.* at 40-41, 379 N.Y.S.2d at 425-27 (Hopkins, J., dissenting).

fect, involved the distinction between probable cause to arrest and probable cause to search;[48] Judge Hopkins showed he was aware of the distinction. *Davis v. Mississippi*,[49] a United States Supreme Court decision, cited by Judge Hopkins, recognized that there could be valid procedures to obtain physical evidence from suspects where there was not yet probable cause to arrest them.

*People v. Parker*[50] involved a parolee who was arrested for criminal possession of a weapon, assault and attempted robbery. He was arraigned the next day and counsel was assigned. The following day he reported to his parole officer by phone. During a visit to the parole officer two days later, he was asked about the circumstances after being warned that any statement could result in revocation of parole. No *Miranda* warnings were given, however, with respect to the use of the statements in the pending criminal proceedings. Defendant admitted that a gun found at the scene belonged to him.[51]

The grand jury failed to indict the defendant and the charges were dismissed. The parole officer again questioned the defendant without giving the *Miranda* warnings, although he was told any statements could be used to revoke his parole. The defendant stated that he possessed the gun because he was carrying a large amount of money for a deposit as rent for an apartment. He also submitted a written statement to the same effect. The parole officer reported this information to the district attorney and testified before the grand jury when the matter was resubmitted. An indictment was returned for criminal possession of a weapon.[52]

Judge Hopkins writing for a unanimous court held that although *Miranda* warnings need not be given by a parole officer in routine interviews within the parole system, a different rule must apply to statements extracted and then used against the parolee in a criminal proceeding outside the parole system. He wrote that not only should *Miranda* warnings have been given

48. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 556 n.6 (1978).

49. 394 U.S. 721, 727-28 (1969).

50. 82 A.D.2d 661, 442 N.Y.S.2d 803 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 815, 441 N.E.2d 1118, 455 N.Y.S.2d 600 (1982).

51. *Id.*

52. *Id.*

but also "that the use of statements made by a parolee to his parole officer as evidence in a criminal trial against the parolee disrupts and destroys the confidence and trust which must inevitably inhere in the relations created by the parole system. The parole system . . . must be built on the frank communication[s] . . . between parolee and his supervisor, and that relationship will be damaged beyond repair if the indispensable pillar of candid exchange is undermined."[53]

Writing for the court in *Barber v. Rubin*,[54] Judge Hopkins demonstrated his knowledge of due process and basic fourth amendment law when he upheld an order of the trial court allowing a doctor to extract hairs from the head of a person indicted for murder. Hair had been found in the clinched fist of the victim. Judge Hopkins found that probable cause existed and that the extraction of the hairs would require no more than minimal invasion of defendant's rights and that any danger or harm to him would be slight.

*People v. Iucci*[55] presented an unusual problem in the area of search and seizure. A wire tap had been authorized on the phone of one Moss. While listening pursuant to this tap, the police learned from a conversation between Moss and one Geritano, a telephone employee, of an illegal tap on the phone of one Basciano to be operated from 424 Clinton Street. The police then found the wire tap and learned it ran to the Clinton Street residence of Iucci. They obtained a warrant to search Iucci's residence and pursuant to it discovered the illegal tap and a rifle and other electronic equipment.[56] Iucci was indicted and sought to suppress the evidence on the basis that the police had failed for 29 days to seal the tapes of the Moss tap in violation of a statutory requirement that they be sealed immediately. Judge Hopkins, writing for the court, upheld the search. He held that the failure to seal the tapes in no way tainted the warrant or the evidence and that to hold otherwise would make the validity of the warrant depend on omissions taking place after its issuance "a shifting and uncertain foundation for the administration of

53. *Id.* at 667, 442 N.Y.S.2d at 807.
54. 72 A.D.2d 347, 424 N.Y.S.2d 453 (2d Dep't 1980).
55. 61 A.D.2d 1, 401 N.Y.S.2d 823 (2d Dep't 1978).
56. *Id.* at 1-2, 401 N.Y.S.2d at 823.

criminal justice."[57]

In his dissent in *People v. Abruzzi*,[58] Judge Hopkins showed his capacity for innovation. In that case, patients of a doctor complained about sexual misconduct during gynecological examinations. The police arranged for a policewoman, posing as a patient, to visit the defendant's office to survey the inner office while another officer viewed her from outside as she entered one of the examination rooms. To do this, the officer outside was required to use a seven-foot ladder to see through a curtained window. While doing so, the officer could see into another room in which the doctor was performing acts of sexual misconduct on a woman. The officer had no warrant[59] and Judge Hopkins assumed that one could not be obtained.[60] The majority held the evidence inadmissible on familar fourth amendment grounds.[61]

Judge Hopkins in his dissent agreed that the search could not be justified under the fourth amendment but argued that the exclusionary rule should exclude evidence only of past crimes and should not close "the eyes and mouth of a police officer who sees a crime committed in his presence, even though he is there illegally."[62] The court of appeals affirmed the majority view, with one dissenter supporting the Hopkins' view.[63]

In *Sackler v. Sackler*,[64] a divorce case, Judge Hopkins took a more liberal view toward the exclusionary rule, and in a dissent would have extended it to exclude evidence of adultery obtained by a private party by means of an illegal entry into the home of the defendant. Even though the majority opinion was upheld, Judge Hopkins received three dissenting votes for his view.

In two cases involving rights of religious freedom, Judge Hopkins recognized the limitations of such rights. In *People v.*

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57. *Id.* at 12, 401 N.Y.S.2d at 829.

58. 52 A.D.2d 499, 385 N.Y.S.2d 94 (2d Dep't 1976), *aff'd*, 42 N.Y.2d 813, 364 N.E.2d 1342, 396 N.Y.S.2d 649, *cert. denied* 434 U.S. 921 (1977).

59. *Id.* at 500-01, 385 N.Y.S.2d at 95-96.

60. *Id.* at 504, 385 N.Y.S.2d at 98 (Hopkins, J., dissenting).

61. *Id.*

62. *Id.* at 507, 385 N.Y.S.2d at 100 (Hopkins, J., dissenting).

63. People v. Abruzzi, 42 N.Y.2d 813, 364 N.E.2d 1342, 396 N.Y.S.2d 649, *cert. denied*, 434 U.S. 921 (1977).

64. 16 A.D.2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962) (Hopkins, J., dissenting), *aff'd*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

*Woodruff*,[65] he wrote for a unanimous court that a grand jury witness, who had been granted immunity, had no right to refuse to testify on the ground that her testimony would violate her religious principles. He wrote that, even though her belief was sincere, the right of the individual must be balanced against the interest of the state,[66] and that

> [defendant's] scruples must give way to the dominant right of the State to maintain peace and order. If it were otherwise, the fabric of society might be pierced and fatally rent by a religious belief sincerely held by an individual in action or in non-action damaging to the continuing existence of peace and order in the community; and the individual right, given vitality by the community, would take precedence over the right of the community to protect itself and to perpetuate the liberties granted to the individual.[67]

Beautiful, almost poetic writing and the entire opinion is only two and a half pages long with no footnotes. The decision was affirmed by the court of appeals.[68]

In *La Rocca v. Lane*,[69] Judge Hopkins, writing for the majority, upheld the power of the trial court to prohibit a priest, who was also an attorney, from wearing his clerical collar when trying a jury case. He held that the state's right to a fair trial and the importance of the appearance of fairness outweighed the right to the free exercise of the priest-attorney's religious beliefs which were subject to reasonable regulation when he was acting in the secular role of an attorney.[70] He wrote that "[t]here is 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."[71] This decision was also upheld by the court of appeals.[72]

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65. 26 A.D.2d 236, 272 N.Y.S.2d 786 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968).

66. *Id.* at 238, 272 N.Y.S.2d at 789.

67. *Id.* at 239, 272 N.Y.S.2d at 789-90.

68. People v. Woodruff, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968).

69. 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).

70. *Id.* at 248-49, 366 N.Y.S.2d at 461-62.

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

72. La Rocca v. Lane, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976).

In *Lewinson v. Crews*,[73] the question was whether a blind person was qualified to serve on a jury. The New York Judiciary Law provided that to be qualified to serve as a juror, a person must "[b]e in the possession of his natural faculties and not infirm or decrepit."[74] The person involved held several advanced degrees including a Ph.D. The majority held that a blind person does not have his "natural facilities" according to the statute. They pointed out that evidence may consist of photograph charts, mechanical objects and other types of physical evidence which require sight. Sight, they said, is also a factor in determining the credibility of a witness.[75] Judge Hopkins dissented,[76] pointing out that service as a juror was a privilege of citizenship and that the right to trial by jury requires a jury representing a broad spectrum of the community. He stated that the blind are a large segment of our population and that a statute which disqualifies the blind must do so in unmistakable terms and be based on rational grounds. He argued that the New York statute did not single out blindness as a disqualification and he would construe the "natural faculties" language to refer to "the possession of intellectual power to discharge the duty . . . ."[77] He pointed out that there are blind judges who act alone whereas jurors do not. He would leave the question to be determined as a matter of discretion with respect to the particular litigation involved.

In one of his longest opinions in this area of the law (seven pages), Judge Hopkins dealt with a difficult problem involving double jeopardy. *People v. Fernandez*,[78] involved a defendant who was indicted in 1967 for assault in the second degree and resisting arrest. Instead of being tried on these charges, he was tried and convicted of disorderly conduct arising out of the same incident as the charges in the indictment. His conviction was overturned on appeal as was his second conviction in 1970, at which time the complaint was dismissed on the ground of insuf-

73. 28 A.D.2d 111, 282 N.Y.S.2d 83 (2d Dep't 1967), *aff'd sub nom. In re* Lewinson, 21 N.Y.2d 898, 236 N.E.2d 853, 289 N.Y.S.2d 619, *appeal dismissed*, 393 U.S. 13 (1968).

74. N.Y. JUDICIARY LAW § 596 (McKinney 1975) (repealed 1977).

75. Lewinson v. Crews, 28 A.D.2d at 112-13, 282 N.Y.S.2d at 84-85.

76. *Id.* at 114, 282 N.Y.S.2d at 86.

77. *Id.* at 115, 282 N.Y.S.2d at 87.

78. 43 A.D.2d 83, 349 N.Y.S.2d 774 (2d Dep't 1973).

ficient evidence.[79] The prosecution then brought him to trial in 1972 on the indictment over defendant's objection that the New York Criminal Procedure Act (CPL) barred separate prosecutions arising out of the same transaction if they are joinable in one accusatory instrument. He was convicted and appealed.[80]

Judge Hopkins noted that in substance the same evidence was used as was presented in the trial for disorderly conduct. After reviewing the prior tests for the application of the rule against double jeopardy including collateral estoppel, all of which he said caused confusion, he wrote that CPL 40.20 assumed a "divergent approach." He noted that the Act provides that "a person may not be separately prosecuted for two offenses based upon the same act or criminal transaction"[81] unless one of the enumerated exceptions to the rule applied. Exception (b) states "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil."[82] He held that CPL 40.40 did not apply because at the time of the indictment, the offense of disorderly conduct could not have been joined and it would be unfair to apply the 1971 act to a 1967 indictment.

He also noted that the crimes involved probably could not be considered the same crime under the first part of CPL 40.20. However, he noted that the evil to be inhibited is common to all three crimes and that the spirit of CPL 40.40 in seeking to avoid harassment pervades the provisions of CPL 40.20. The conviction was reversed and the indictment dismissed on double jeopardy grounds.

It thus appears that Justice Brennan's single transaction theory of double jeopardy may have won acceptance in New York if not in Washington.[83]

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79. Under current law, this would bar a retrial. Burks v. United States, 437 U.S. 1 (1978) (fifth amendment precludes second trial once reviewing court has found evidence insufficient for jury's verdict of guilty).

80. The current version of this statute is found at N.Y. CRIM. PROC. LAW § 40.40 (McKinney 1981).

81. People v. Fernandez, 43 A.D.2d at 89, 349 N.Y.S.2d at 780.

82. *Id.* at 90 n.8, 349 N.Y.S.2d at 780 n.8.

83. *Id.* at 89, 349 N.Y.S.2d at 780 (citing Justice Brennan's concurrence in Ashe v. Swenson, 397 U.S. 436, 453-57 (1970)).

I have by no means done justice to the work of my old friend in the criminal procedure field. However, time restraints added to my own limitations stand in the way of a more deserving review of his work. I have not come close to covering all of his opinions in this field, but have selected those I thought most interesting. Reading through his opinions has made me even more aware than I was before of the greatness of this man, who has given so much of his life to the cause of justice and who so deserves the honor of having this volume of the law review dedicated to him.