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Dedication to the Honorable Stewart F. Hancock, Jr.

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FOREWORD

DEDICATION TO THE HONORABLE STEWART F. HANCOCK, JR.

by Vincent Martin Bonventre*

> How fortunate we all are to have the responsibility for a brief moment of working with this wonderful creation called law, and of making sure that what we do is fair and just and for the benefit of society. What better and more noble calling could we have?[1]
>
> *Stewart F. Hancock, Jr.*
> Associate Judge
> New York Court of Appeals

That is the Judge Hancock I know — nobly working with the law to do what is fair and just. And how fortunate that I have his own words to use here. For this is truly a daunting task, to write about him. How do you pen a few paragraphs about a member of your own personal pantheon — your teacher, exemplar, hero and

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1. Stewart F. Hancock, Jr., *A Century of Law: Continuity in Change*, 63 N.Y. ST. B.J. 29, 32 (Jan. 1991).

friend? Not easily and, very probably, not too well.[2] So let me be as clinical as I can, with perhaps some insights gained from working by the Judge's side for nearly four years.

Oliver Wendell Holmes, Jr. rejected the view that the law is some "brooding omnipresence in the sky."[3] Judge Hancock, like his judicial hero, has approached law as part "felt necessities of the time," part "prevalent moral and political theories," and part "intuitions of public policy."[4] And if there are constants that connect Judge Hancock's judicial writings, one is Holmes' reflection that law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[5]

The other critical constant is that the law must make sense, that it must meet some basic level of fairness, and that it must serve the common good. For Judge Hancock, there have been no sacred cows, no categorical imperatives — only the ultimate judicial responsibility of insuring that the lawmaker, whatever the branch of government, has not violated the fundamental dictates of reason and justice.

So, for example, in *People v. Marerro*,[6] Judge Hancock deplored the court's inflexible application of the maxim, "ignorance of the law is no excuse," where the law itself was misleading, and the defendant's violation of its *construed* prohibition was, at the least, understandable.[7] In *People v. Green*,[8] Judge Hancock

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2. Two recent, and in my view, highly successful sketches of Judge Hancock are: Paul Pines, *Beyond the Curtilage: Judge Stewart F. Hancock, Jr.*, Upstate Legal Record, Mar. 1, 1993, at 5 col. 1; John O'Brien, *A Judge's Untiring Exploration of the Law*, Post-Standard, Syracuse, N.Y., Jan. 9, 1989, at A1, col. 1. See also the following synopsis of Judge Hancock's State Constitutional Jurisprudence: Thompson Gould Page, *Apostle of Fundamental Fairness: New York Court of Appeals Judge Stewart F. Hancock, Jr.'s State Constitutional Decision-making*, 9 TOURO L. REV. 553 (1993).

3. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1916).

4. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881).

5. *Id.*

6. 68 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987).

7. *Id.* at 387, 507 N.E.2d at 1075-76, 515 N.Y.S.2d at 219-20 (Hancock, J., dissenting).

8. 75 N.Y.2d 902, 553 N.E.2d 1331, 554 N.Y.S.2d 821 (1990).

complained that racial discrimination in jury selection, which he argued tainted the entire criminal proceeding, ought not to be treated like other, more routine trial errors that are waived upon a defendant's guilty plea, especially where the discrimination may have influenced the very decision to plead rather than face the jury.[9] And in *Ingle v. Glamore*,[10] he condemned the rigidity of the court's employment-at-will doctrine which sanctioned the arbitrary discharge of a longtime employee-minority shareholder, despite the fiduciary duties owed him by the employer-majority shareholder of the closed corporation involved.[11]

Though Judge Hancock's views were expressed in dissent in those cases, he was certainly no stranger to majority opinions in which his core legal precepts prevailed. Hence, in *Wieder v. Skala*,[12] he successfully chipped away at the court's virtually impregnable at-will rule, obtaining a unanimous decision for an attorney who was discharged for insisting that his law firm comply with ethical standards governing the profession. In the process, Judge Hancock made clear that an implied covenant of good faith and fair dealing did apply to all contracts, with no exception made for at-will employment,[13] a proposition which the court had theretofore repeatedly rejected.[14] In *People v. Dietze*,[15]

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9. *Id.* at 911-912, 553 N.E.2d at 1336, 554 N.Y.S.2d at 826-27 (Hancock, J., dissenting).

10. 73 N.Y.2d 183, 535 N.E.2d 1311, 538 N.Y.S.2d 771 (1989).

11. *Id.* at 190-91, 535 N.E.2d at 1315, 538 N.Y.S.2d at 775 (Hancock, J., dissenting).

12. 61 U.S.L.W. 2393 (N.Y. Dec. 22, 1992) (No. 256).

13. *Id.* at 2393.

14. *See, e.g., Ingle*, 73 N.Y.2d at 188, 535 N.E.2d at 1313, 538 N.Y.S.2d at 773 (Hancock, J., dissenting) ("stating that an implied obligation "would be incongruous to the legally recognized jural relationship in that kind of employment relationship."); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 335-36, 506 N.E.2d 919, 922, 514 N.Y.S.2d 209, 212 (1987) (declaring that "no obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship . . . in which the law accords the employer an unfettered right to terminate employment at any time"); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 304-05, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (finding that since plaintiff's employment was at-will, employer had an "unfettered right to terminate [his] employment at any time," therefore, to find an implied agreement on employer's part to

Judge Hancock, writing for the court's majority to overturn a conviction for using "abusive" language, refused to save the harassment statute in question by "construing" it constitutionally.[16] The customary judicial practice of rehabilitating otherwise invalid legislative enactments was inappropriate in *Dietze*, Judge Hancock explained, because it would leave on the books a statute that *literally* criminalized constitutionally protected speech, and therefore, would likely still be read and applied by many in that matter — as it had frequently been in the past.[17]

In *People v. Scott*,[18] the case which perhaps most deeply divided the court of appeals in recent history,[19] Judge Hancock garnered a majority of his colleagues to reject the federal Supreme Court's "open fields" doctrine.[20] More significantly, Judge Hancock emphatically repudiated the idea that the New York Court of Appeals owed some fealty to Supreme Court decisions constricting fundamental rights, regardless of how unjust or how inappropriate for New York.[21] In classic Hancock style and conviction, he wrote:

> [T]he rule that an owner can never have an expectation of privacy in open land is *repugnant to New York's acceptance of the "right to be let alone"* as a fundamental right deserving legal protection[.] . . . [T]he unbridled license given to agents of the state to roam at will without permission on private property in search of incriminating evidence is *repugnant to the most basic notions of fairness* in our criminal law.[22]

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deal with employee in good faith would be "incongruous" and "internally inconsistent").

15. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

16. *Id.* at 51-52, 549 N.E.2d at 1668, 550 N.Y.S.2d at 597.

17. *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

18. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

19. *See id.* at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (Kaye, J., concurring).

20. *See* Oliver v. United States, 466 U.S. 170 (1984).

21. *Scott*, 79 N.Y.2d at 490-91, 593 N.E.2d at 1337, 583 N.Y.S.2d at 930.

22. *Id.* at 490, 593 N.E.2d at 137, 583 N.Y.S.2d at 929 (citation omitted).

The foregoing few examples typify Judge Hancock's insistence that the law — and ultimately judicial decisions on fundamental questions of right and liberty — conform to essential notions of reasonableness and fairness. They ought not, however, suggest that the Judge has typically been hostile to governmental or societal interests, or has been unduly partial to criminal defendants or civil claimants. Indeed, there is nothing one sided about Judge Hancock's voting record on the New York Court of Appeals. If anything, he has been a "centrist" on that tribunal, with a record that appears well-nigh perfectly balanced between "liberal" and "conservative" positions in close cases.[23]

Though, as just discussed, there are certainly common threads in his decision-making, they have manifestly not rendered Judge Hancock's decision-making reflexively pro individual or pro government. In fact, his consistent focus on themes of fundamental fairness and basic reasonableness have seemed to insure an ideologically-free — or at least extremely well-balanced — approach to difficult issues.[24] And, to be sure, Judge Hancock's voting statistics confirm what I witnessed while clerking for him. He was always utterly open-minded. In tough cases, the opposing arguments each had a chance for his vote. How did he decide? While I can offer no definitive answer, I can at least describe the

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23. *See* Vincent Martin Bonventre, *A State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119, 143 (1992); *see also* Vincent Martin Bonventre, *Court of Appeals - State Constitutional Law Review 1990*, 12 PACE L. REV. 1, 52 (1992); Page, *supra* note 2, at 560-61 (discussing *People v. Carter*); Daniel Wise, *Wachtler Court at 5: Panel Defies Label, But Individual Trends Emerge*, N.Y. L.J, Oct. 15, 1991, at S-3.

24. Notably, Judge Hancock was a frequent dissenter to the Wachtler Court's evident change in direction during the last several years — *i.e.*, retrenchment from its prior more rights-protective posture. *See, e.g.*, People v. Kohl, 72 N.Y.2d 191, 204-07, 527 N.E.2d 1182, 1189-90, 532 N.Y.S.2d 45, 52-53 (1988) (Hancock, J., dissenting) (insanity defense); People v. Wesley, 73 N.Y.2d 351, 366, 538 N.E.2d 76, 85, 540 N.Y.S.2d 757, 766 (1988) (Hancock, J., dissenting) (standing to challenge search). Indeed, in response to a recent suggestion that former Chief Judge Sol Wachtler was able to move the Court from one direction to another, Judge Hancock responded sharply, "Well, he didn't take everybody with him. The record will tell you that." Pines, *supra* note 2, at 5.

mechanics: meticulously thorough research, thought, and crafting of a line of reasoning. His research was exhaustive. The New York and United States Reports, the treatises, and the host of related law review articles would be stacked high, in several piles on his table in chambers. He would read and outline and digest. Then he would mull it all over at his desk, on his daily jogs, during coffee and lunch, at home at night, and on the phone — day or night, weekday or weekend, with his clerk.

He would reach some tentative conclusions, then begin to write. His conclusions might solidify or even change while writing. He was never so tied to a particular holding as he was to good reasoning and a just result. He would emerge with a draft a few days later and then subject it to a clerk's review. He encouraged the most critical scrutiny. I always thought this an exercise in extraordinary modesty, humility and confidence on his part — exceeded only by his gratitude in receiving whatever comments or suggestions the clerk might offer. It was only after a few such go rounds that the Judge would circulate a proposed opinion to the other members of the court.

Let me be clear. Working for Judge Hancock was a high honor. He is a great judge, and it was very special to be part of his greatness. But it was also exhausting. He is apparently indefatigable. It was difficult to keep his hours, to be at the office as early as him, or to remain as late. It was difficult, if not impossible, to match his intensity on the cases, the research, the writing, the arguing, the questioning — he never seemed to tire of it, and his clerks never ceased to marvel at him.

The court of appeals and New York have been fortunate to have Judge Hancock's talents, mind and commitment these last eight years. It was sad for me — personally, at least as much as professionally — to leave his service a few years ago. It will be sad too for his colleagues when he leaves them in December. Farewells will be exchanged at public functions. Those who know him personally will share their sentiments in private. Some, like his colleague Judge Vito J. Titone, have shared an assessment openly: "Stew is such a decent human being; he is the

most perfect gentleman I know."[25] Those who know his wife, Ruth, his six children, and his prominent family's history, know that he is part of a distinguished Hancock tradition.

But even those who have not had the opportunity to know Judge Hancock on a personal basis, can at least know him through his professional work — those in New York State are its direct beneficiaries. And what of that work? How can his work in the law be summarized? There is undoubtedly something in the writings of Kant, Rousseau, Aristotle, Rawls, and other close companions of his, that defines it well.

Judge Hancock has often said that he sides with those philosophers who believe that "there is some moral component in law — some quality of what is right and just."[26] Perhaps that is the best way to characterize his own body of work at the court of appeals.

Thank you Touro Law Review for inviting me to participate in this dedication. And thank you Judge Hancock.

25. Judge Titone has expressed this sentiment to the author on several occasions.

26. Remarks to the author's class in Legal Profession, at Albany Law School, Union University, April 27, 1992. A videotape of Judge Hancock's presentation is on file at the Albany Law School Library.