

FOREWORD

STEWART F. HANCOCK, JR., 1923–2014;
IN THIS ISSUE: TRUTH V. JUSTICE
*Vincent Martin Bonventre**

“Stew Hancock is a perfect gentleman. The finest gentleman I know” is how his colleague and pal on the Court of Appeals, Judge Vito Titone, would describe him to me.

Yes, Judge Hancock was brilliant. Anyone who worked with him or heard him speak, or discussed any serious subject with him would know that.

Yes, he was an extraordinary judge. Anyone who argued before him, was subject to his rulings, or read his judicial opinions would know that.

Yes, he was a first rate scholar. Anyone who collaborated with him on a writing—judicial or academic—or who was enlightened by one of them would know that.¹

But even more than that was the personal character of the man. “A perfect gentleman.” Yes, and in the sense that Judge Titone meant and I understood. Judge Hancock was simply unsurpassed as a man who was gracious, principled, broadminded, and utterly committed to decency and fairness in the treatment of others.

He was likewise unsurpassed as a judge who brought those personal qualities to his judicial work. Indeed, if there is an essence that can be distilled from his body of judicial work, it is that commitment to decency in the law, to promoting fundamental fairness.²

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¹ An indefatigable and persistent scholar he was as well. In fact, he had just completed a law review article on state constitutional law shortly before his death, and he was coordinating with me about that article on the phone two days before his passing. Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 ALB. L. REV. (forthcoming 2014).

² Though this is written for a law review and not a family memoir, it would be

Judge Hancock certainly authored his share of landmark decisions. Indeed, his share was a disproportionate one, especially considering that his tenure on the court—cut short by New York’s unfortunate mandatory retirement age—was little more than half of a full term.³ Indeed a couple of them served as the basis for two of the most significant decisions by the Court of Appeals this past year.⁴

unforgivably remiss of me if I did not also note that Judge Hancock was an uncommonly sweet and sentimental man, and enormously fun.

Like so many others who were close to him, I was the beneficiary of—how else to say it—his endearing, lovable sweetness, kindness, and generosity of spirit. Throughout my four years working as his law clerk at the Court of Appeals, he treated me as an equal (which, needless to say, I hardly was), as his colleague, as his friend and confidant, and as family. But never, absolutely never, as someone he had hired to work *for* him. He always treated me as though we were in this together. In fact, he treated me that way, insuring that I felt vital to his work, not only during those halcyon days as his clerk on that esteemed court, but throughout the years that followed, right till the end.

Sentimental? Here was a man of great dignity, composure, logic, and reason. And yet, speaking of his family, or perhaps a lost family member or friend, or even his gratitude for my having been his law clerk and for our friendship, his eyes rarely failed to fill and redden.

Then there was the mention of “Ruthie.” I am not sure I ever spoke with the Judge that he did not speak of his beloved wife having done this or that, or having taken care of this or that—to be frank, of Ruthie being responsible for all things family and for insuring that the Judge was happy, healthy, relieved of most daily concerns, and free to devote himself to his pursuits. (In fact, the first time I met Mrs. Hancock, the very first thing she said to me was, “Now you take care of the Judge.”) He was fully aware and grateful that his Ruthie was at least his equal. And that whatever he was depended in large measure on her support, encouragement, and confidence in him. He absolutely adored her.

Oh, and fun? He loved to laugh, and he had a good, hardy, genuine one that you knew he had difficulty controlling until it had exhausted itself. The trigger might have been something self-effacing or someone’s irreverent tale about him. It might have been something as silly as a footnote he inserted into a draft opinion solely to elicit the feigned fury of Judge Richard Simons, his dear friend, who might be authoring the opposing writing. Or it might have been the first few lines of some song that had come to mind the night before, that he would then belt out as his greeting to me first thing in the morning. Yes, the Judge was a veritable hoot—and he would get a kick out of that characterization.

As must be evident, I loved working for the Judge, and I loved him.

³ Judge Hancock served on the Court of Appeals from 1986 through 1993—8 years of a full 14 year term. A small sampling of the landmark opinions penned by Judge Hancock would include *People v. Diaz*, 612 N.E.2d 298 (N.Y. 1993) (as a matter of independent New York law, restricting stop and frisks to pat downs for weapons and disallowing their extension as vehicles for warrantless searches and seizures, under the so-called “plain touch” rationale, which was approved by the Supreme Court under federal law in *Minnesota v. Dickerson*, 508 U.S. 366 (1993)); *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992) (as a matter of independent New York Law, rejecting the Supreme Court’s so-called “open fields” doctrine and, instead, requiring probable cause and a warrant to search privately owned land, even beyond the “curtilage”); *People v. Dietze*, 549 N.E.2d 1166 (N.Y. 1989) (as a matter of independent New York free speech law, invalidating, on the basis of overbreadth, a harassment statute which, among other things, criminalized the use of vulgar language directed toward another person); *O’Neill v. Oakgrove*, 523 N.E.2d 277 (N.Y. 1988) (as a matter of independent New York law, adopting a broad “reporters privilege” to protect the enterprise of newsgathering against compelled disclosures of a journalist’s sources).

⁴ See *People v. Marquan*, 2014 WL2931482 (N.Y. July 1, 2014) (relying on *People v. Dietze*

But it was Judge Hancock's overriding dedication to the promotion of fundamental fairness that is the hallmark of his opinions on the court. The primacy of decent treatment of individuals, of basic fair play. This was the dominant force guiding his interpretation of legal provisions and application of case law. If a text or precedent were feasibly amenable to reaching a fair result—even if some creative effort were required—then that was the interpretation or application that Judge Hancock would adopt and urge on his colleagues.

Whether the issue involved a wrongful firing of an employee that the “employment-at-will” doctrine typically permits;⁵ or an illegal search or seizure typically overlooked if a defendant didn't satisfy a separate requirement of demonstrating standing;⁶ or a prosecution that would be permitted under a rigid application of “mistake of law is no excuse,” despite an extremely misleading penal statute;⁷ or an injury from governmental negligence or indifference that typically receives no redress because of immunity under the “special duty” rule;⁸ or a host of other inequities that would flow from an inflexible application of legal doctrine—Judge Hancock's approach was a jurisprudence grounded in reaching a result that made sense, to him, because it was fair. Common sense and decent treatment were simply far more important to him than any interpretive methodology or allegiance to any other theory of jurisprudence. No, his judicial philosophy was fairness.

This devotion to fundamental fairness did not go unnoticed. This

to invalidate a cyberbullying ordinance on overbreadth grounds); *In re Holmes v. Winter*, 3 N.E.3d 694, 698 (N.Y. 2013) (relying on *O'Neill v. Oakgrove* to refuse to enforce a subpoena compelling a New York journalist to testify in an out-of-state proceeding regarding a confidential source).

⁵ See e.g., *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992) (upholding a cause of action for breach of an implied covenant of good faith where a junior associate in a law firm was fired for insisting on compliance with legal ethics); *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, 1314 (N.Y. 1989) (dissenting from the majority's application of the employment-at-will doctrine to reject a wrongful discharge claim, despite the bad faith discharge of the employee).

⁶ See e.g., *People v. Millan*, 508 N.E.2d 903 (N.Y. 1987) (granting an automobile passenger charged under a constructive possession statute “automatic standing” to object to an illegal search); *People v. Tejada*, 613 N.E.2d 532, 533 (N.Y. 1993) (dissenting from the majority's rejection of standing for a defendant, who was charged on the theory of constructive possession, where the police illegally entered an apartment in which he was lawfully present).

⁷ *People v. Marrero*, 507 N.E.2d 1068, 1073 (N.Y. 1987) (dissenting from the majority's rejection of the defendant's mistake of law defense, despite the highly misleading text of the criminal statute that literally permitted the defendant's conduct).

⁸ *Kircher v. Jamestown*, 543 N.E.2d 443, 448 (N.Y. 1989) (dissenting from the majority's application of the “special duty” rule to deny a cause of action where the police officers' negligent failure to respond to a 911 call, after assurances that they would, resulted in fatal injuries).

is no mere line for an obituary or remembrance of a departed judge. It was written and spoken about on many occasions by many others.⁹ In fact, he himself often acknowledged this unassuming, unpretentious, straightforward jurisprudence of his. Among other times, he did so when delivering the 2004 Hugh Jones Memorial Lecture at Albany Law School.¹⁰ Discussing notions of justice evolved over time in common law decisions and the working principle that would operate in his chambers when he served on the court, he told the audience:

For me, and perhaps for most other judges, the process of arriving at a decision in a difficult case remains a mystery. It is something that you do, but you do not quite know how. . . .

. . .

. . . I used to say to my law clerks when they were analyzing a problem, particularly one that might require the Court of Appeals to devise a new rule or change an existing one. Ask yourselves these questions: Will the rule you're proposing work? Does it make sense? How will it fit into the existing progression of the law? And, will it operate fairly?¹¹

That is precisely what Judge Hancock would ask of me and what he strove to accomplish above all else when deciding how to vote on a case and how to write an opinion. Fundamental fairness was his lodestar. It is why those opinions of his are so strong, why he was such an extraordinary judge, and why—reflecting the character of the man as it did—he was so admired and beloved.

. . .

This fourth annual issue of *Miscarriages of Justice* focuses on the vexatious question of whether the search for truth and that for justice are necessarily the same and, if in fact they sometimes conflict, which is to be preferred. This follows on the heels of last year's exploration of "when the guilty go free." The two topics are,

⁹ See e.g., E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* 285 n.20 (2005); Judith S. Kaye, *Mining Treasures: A Decade of Hugh R. Jones Memorial Lectures at Albany Law School*, 76 ALB. L. REV. 851, 858 (2013); Nana Japardize, Note, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1415 n.2 (2008); 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).

¹⁰ Stewart F. Hancock Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense—Hugh R. Jones Memorial Lecture*, 68 ALB. L. REV. 81 (2004).

¹¹ *Id.* at 84–85.

of course, intertwined. But this year our attention is paid less to the particular injustice of freeing someone who is actually guilty in the service of some higher principles or due to flaws in our system. Rather the goal here is to examine whether the search for the truth, i.e., for factual accuracy and its vindication, is even compatible with much that characterizes our justice system, or with our sense of justice in certain categories of cases, victims, or defendants.

Criminal defense attorneys Anjelica Cappellino and John Meringolo analyze the inequities in mandatory minimum sentencing for drug offenses and the consequential conflicts with sound public policy.¹² Ken Strutin of the New York State Defenders Association faults the elevation of certainty and finality in the plea bargaining process over the sanctity of truth—i.e., the uncovering and avoidance of wrongful convictions.¹³ John G. Browning of the Lewis Brisbois Bisgaard & Smith office in Dallas warns about the increased varieties and opportunities for prosecutorial misconduct with the advent of a host of technological options at prosecutors' fingertips.¹⁴

Former New York Chief Judge Sol Wachtler and Keri Bagala, the Albany Law Review Executive Editor for this issue of *Miscarriages*, condemn the use of jails and prisons as mental health treatment facilities, instead of providing the seriously mentally ill with appropriately therapeutic treatment under more humane conditions.¹⁵ Dorothy Heyl, Of Counsel to the Milbank firm, hails the New York Court of Appeals recent decision in *People v. Thomas*¹⁶ as a significant step forward in recognizing that the use of deception in custodial interrogations can contribute to a coercive environment and lead to false confessions.¹⁷ Marvin Zalman of Wayne State University and Julia Carrano of the University of Mississippi explore the forces impeding innocence reform, despite the fact that the institutional fallibilities that produce wrongful convictions are correctible.¹⁸

¹² Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771 (2014).

¹³ Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825 (2014).

¹⁴ John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881 (2014).

¹⁵ Sol Wachtler & Keri Bagala, *From the Asylum to Solitary: Transinstitutionalization*, 77 ALB. L. REV. 915 (2014).

¹⁶ *People v. Thomas*, 8 N.E.3d 308 (N.Y. 2014).

¹⁷ Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the Truth*, 77 ALB. L. REV. 931 (2014).

¹⁸ Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV.

Robert J. Norris and Allison D. Redlich, Ph.D. candidate and professor, respectively, of the School of Criminal Justice of the University of Albany, posit that the core purpose of criminal interrogations—i.e., obtaining admissions of guilt from suspects already believed to be guilty—may well compromise the search for both truth and justice in our system.¹⁹ Melissa Farley of Prostitution Research & Education in San Francisco, Kenneth Franzblau of the Coalition Against Trafficking in Women, and M. Alexis Kennedy of the University of Nevada underscore the challenges for law enforcement in dealing with online trafficking for prostitution, and yet they note that there is hope in the creative and proactive use by law enforcement of developing online technologies.²⁰

Tom R. Tyler, Professor of Law and Psychology at Yale, and Justin Sevier, Associate Research Scholar at that law school, suggest that the legitimacy of criminal courts in the eyes of the public is largely dependent on the public's view of the success of the courts in determining the truth, rather than on how just the sentences imposed seem to be.²¹ Ralph Grunewald of the University of Wisconsin explains the extent to which the search for factual truth, specifically the determination of actual guilt or innocence, is a much more paramount feature of European systems—including that of Germany on which he focuses—than it is in the American brand of adversarial justice.²² Lastly, Michael J. Yetter, the Executive Managing Editor of the Albany Law Review this past academic year, critiques the Second Circuit's recent rejection of a habeas corpus petition by a defendant who, while acquitted of intentional murder under New York law, was nevertheless convicted of depraved indifference murder, a crime whose precise contours remains murky despite the state's highest court's efforts at clarification.²³

Before closing, gratitude should be expressed to certain

955 (2014).

¹⁹ Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005 (2014).

²⁰ Melissa Farley, Kenneth Franzblau & M. Alexis Kennedy, *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039 (2014).

²¹ Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095 (2014).

²² Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139 (2014).

²³ Michael J. Yetter, *Gutierrez v. Smith, a Curious Case of Depraved Indifference Murder*, 77 ALB. L. REV. 1201 (2014).

individuals who, in addition to our contributors, insured the success of this issue. First, Keri Bagala, the Executive Editor for this issue of *Miscarriages of Justice*, is primarily responsible for putting this issue together. She oversaw every aspect of organizing the issue and of preparing it for publication. Also of the Albany Law Review is Bryan Gottlieb, this past year's Editor-in-Chief, and Joseph O'Rourke, the Editor-in-Chief for the new academic year. Their dedication to the Law Review and to finalizing this issue were indispensable. The same, of course, must be said for the student editors of the Law Review collectively. And finally, thanks to our Professional Board of Editors—headed by Professor Alissa Pollitz Worden of the School of Criminal Justice of the University of Albany, who has served as the chair this past year, and who assisted in the solicitation of articles and in planning our future issues. Thanks to all for this truly exceptional installment of *Miscarriages*.