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Vincent L. Broderick — Jurist for the Twenty-First Century

Richard A. Givens*

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At times, a jurist can be a Renaissance thinker whose breadth of vision makes it possible to take all genuine issues into account. Such a person can achieve far-reaching objectives without causing antagonism by calling upon wide perspectives and taking all genuine needs into consideration.

A trial court judge who sees far enough ahead can affect the future of the law as profoundly as a Justice of the United States Supreme Court. Even more importantly, such a judge can affect people's lives through a contagious example.

Vincent L. Broderick, United States District Judge for the Southern District of New York from 1976 to 1995 was such a judge. Although he sought no fanfares or laurels, he deserves high recognition from the public and the Bar.

* Richard A. Givens was a law clerk for Judge Broderick from March 1992 until Judge Broderick's untimely death on March 3, 1995. Prior to that, Givens was a Regional Director for the Federal Trade Commission (1971-1977) and Chair of the New York State Bar Association's Task Force on Simplification of the Law (1985-1989). Givens first met Judge Broderick as a rookie prosecutor while Broderick was the Chief Assistant United States Attorney in the Southern District of New York in 1991. Much of the material for this article is based on talks with Judge Broderick conducted over the course of that relationship.

I. A Natural Justice Judge Who Followed Technical Rules

Judge Broderick was a stickler for technical correctness in his decisions. He believed that this was entirely consistent with finding a way to achieve justice in each case. In his view, if a result appeared unfair, that was because the truly applicable rule had not yet been found. Legal principles were not syllogistic in nature, yielding a single inevitable result in each instance. Rather, applicable rules were pulled into the center of consideration by the facts of the case in a manner similar to gravitational attraction:

Fidelity to the law must be combined with sensitivity to individual circumstances This is a preeminent reason for the universally recognized need for a separate and independent judiciary in civilized society.

In law as elsewhere, wise choices can rarely be made through mechanical, straight-line syllogistic logic. Multiple factors are almost always involved. Jurists must search for relevant sources of guidance wherever they can be found: they must consider applicable statutes and rules, the conduct of the actors in the situations before them, and the impact of that conduct upon others. They must consider the potential effect upon various fields of activity of the decisions they propose to make.¹

Always desirous of sidestepping the trap of "delusive exactness,"² Judge Broderick interpreted documents, be they contracts, statutes, constitutional provisions, or legal concepts,³ based upon the principles laid down by Chief Justice Stone: "To decide [it] we turn to the words . . . read in their historical setting as revealing the purposes of the framers, and search for admissible meanings of [the] words which, in the circumstances of their application, will effectuate those purposes."⁴

1. Vincent L. Broderick, *Local Factors in Sentencing*, 5 FEDERAL SENTENCING REPORTER 314, 316 (May/June 1993).

2. *Truax v. Corrigan*, 257 U.S. 312, 342-43 (1921) (Holmes, J., dissenting).

3. *Teachers' Insurance and Annuity Ass'n v. Coaxial Communications*, 799 F. Supp. 16 (S.D.N.Y. 1992), *later ruling* 807 F. Supp. 1155 (S.D.N.Y. 1992) (applying the concept of shared responsibility to an alleged breach of contract if each side contributed to the breakdown of negotiations to implement a preliminary agreement).

4. *United States v. Classic*, 313 U.S. 299, 317-18 (1941), *quoted in* Vincent L. Broderick, *The Delusion of Mandatory Sentencing*, TRIAL, Aug. 1994, at 62, 65.

Judge Broderick passionately believed in the importance of adhering to rules of law, rather than personal predilections. For that very reason, he sought to grant all of the rules their full majesty. Thus, he gave as much weight to Rule 1 of the Federal Rules of Civil Procedure, which commands courts to seek the "just, speedy and inexpensive determination of every action,"⁵ and to the harmless error principle of Rule 61,⁶ as he did to any more detailed provision. This vision of the law guided all of his decisions and the performance of his duties as an Article III jurist. Some may see this approach as less of a technical than a literalistic interpretation. Judge Broderick, however, believed that his approach, also that of Chief Justice Stone, was the only truly technical one because it respected the documents being interpreted.

Judge Broderick also recognized that appellate decisions are not always representative of the bulk of events occurring in courts of first impression or outside the framework of the legal system. Consequently, Judge Broderick felt no hesitation in breaking new ground based on the "steady pressure of facts and events,"⁷ whether or not supported by explicit appellate authority.⁸

A. *Dignity for All*

Judge Broderick's contributions draw upon the basic underpinnings of our legal structure as celebrated in the Declaration of Independence: respect for every human being without exception of any kind.⁹

As New York City Police Commissioner, Vincent Broderick honored the good work of the officers of the Department, while

5. FED. R. CIV. P. 1.

6. FED. R. CIV. P. 61. The court must disregard any error which does not affect the substantial rights of the parties. *Id.*

7. Harlan F. Stone, *LAW AND ITS ADMINISTRATION* 39 (1915).

8. See *United States v. Zanfrandino*, 833 F. Supp. 429 (S.D.N.Y. 1993) (holding that defense counsel should see all papers prepared by a government expert in connection with case). Judge Broderick also recognized the distortion of perception of the law when a large majority of appellate decisions are unpublished. See *Cecere v. County of Westchester*, 814 F. Supp. 378, 380 n.3 (S.D.N.Y. 1993); *Schueler v. Roman Asphalt*, 837 F. Supp. 247, 253 (S.D.N.Y. 1993).

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

making it clear that ethnic discrimination would not be tolerated in the force. He told his supervisors:

If you will tolerate . . . one attitude toward a white citizen who speaks English, and a different attitude toward another citizen who is a Negro or speaks Spanish — get out right now . . . If you do not realize the incendiary potential in a racial slur, if you will tolerate . . . the racial slur — get out right now.¹⁰

As commissioner, Broderick assumed responsibility for policing the police, and was himself a civilian reviewer of police behavior. For that very reason, he opposed Mayor John Lindsay's 1966 proposal for creation of a police review board composed entirely of civilians. Mindful of the risk of polarization among ethnic groups generated by this issue, Broderick led in the creation of the Community-Wide Panel for a Better City.¹¹ The panel was composed of more than 300 civic leaders, including both leading protagonists and opponents of Lindsay's proposal.¹² This coalition contributed to defusing the police review board controversy because of its wide representation and its focus on issues *other than* police review.¹³

Meanwhile, Broderick put flesh on the concept of collegiality by initiating regularly scheduled meetings with leaders of the many ethnically or religiously oriented organizations within

10. Lawrence VanGelder, *Vincent Broderick, Federal Judge, Is Dead at 74*, N.Y. TIMES, March 7, 1995, at D20.

11. The other participants included Bernard Jackson, then Executive Director of Lindsay's Civilian Complaint Review Board; Harold Baer, Jr., former Executive Director of that body and later a United States District Judge; State Senator (later the Secretary of State of the State of New York) Basil A. Paterson; New York Assemblyman and later Congressman Charles B. Rangel; Father Joseph Gleeson of St. Thomas the Apostle Church; Rev. David Cockcroft of the University Heights Presbyterian Church; Rabbi Ely Pilshik; Rev. Lawrence E. Beebe, Unitarian Church of All Souls; and Franklin A. Thomas, Executive Director of the Bedford Stuyvesant Restoration Corporation, and later President of the Ford Foundation.

12. *Id.*

13. Broderick testified before the Senate Subcommittee on Roads hearing on Urban Highways on May 6, 1968, on behalf of the Panel, urging long-term commitments for housing in the same vein as that provided for interstate highway construction. Judge Broderick's analysis of the history of such issues is touched upon in *Riddick v. Summit House*, 835 F. Supp. 137 (S.D.N.Y. 1993). His 1968 testimony was followed up in the subsequent discussion of a proposal for a National Development Bank, which would provide funds for the rebuilding of blighted areas, but would not require residents to remain in a state of poverty to continue to live there since it would allow them to pay rents or purchase prices based upon their current income. See H.R. 1445, 96th Cong., 1st Sess. (1979).

the Department. In each instance, the meetings were chaired by Broderick himself. He reported that participants vented anger through frequent loud shouting and expletives, yet the disagreements eventually subsided into rational discussion, and led to resolution of each dispute.

Broderick believed that past evils must be overcome by furthering an expanding society which can provide greater opportunity for all to the detriment of none.¹⁴ In his judicial decisions, he sought to assure that invidious discrimination be eliminated no matter how sophisticated the devices involved.¹⁵ He held that although an unsuccessful employer explanation for personnel action did not by itself support a complainant's claim, if the explanation made no sense, it could support an adverse inference.¹⁶ At the same time, Broderick insisted that employment discrimination suits not be permitted to become a vehicle for other employment controversies, because then they would undermine the purposes of the laws.¹⁷

B. "*Just, Speedy and Inexpensive*"¹⁸ Determination of Every Action

Judge Broderick was one of the few jurists who took Rule 1¹⁹ seriously. Through persuasion, as well as rulings, he sought innovative ways to promote its goals.

14. Judge Broderick believed that the Second World War turned out to be one of the most powerful means of furthering this objective because everyone was needed — an achievement he believed must be recaptured. See *Toliver v. Sullivan Diagnostic Treatment Center*, 818 F. Supp. 71, 73-74 (S.D.N.Y. 1993).

15. See, e.g., *Allen v. City of Yonkers*, 803 F. Supp. 679 (S.D.N.Y. 1992).

16. See, e.g., *Stewart v. IBM Corp.*, 867 F. Supp. 238, 241 (S.D.N.Y. 1994); *Chorbajian v. Goldhirsch*, 814 F. Supp. 333 (S.D.N.Y. 1992).

Judge Broderick also held that so-called pre-selection of employees for experience-rich advanced assignments could lead to illegal discrimination if such experience were a mandatory requirement for subsequent promotion, but otherwise would not be subject to lawsuits; to rule otherwise would destroy effective conduct of a viable workplace by making every job assignment subject to litigation. *Walker v. New York State Office of Mental Health*, 869 F. Supp. 227 (S.D.N.Y. 1994). See also *Walker v. New York State Office of Mental Health*, 865 F. Supp. 124, 125 (S.D.N.Y. 1994).

17. See, e.g., *Oey v. Delta Airlines*, 64 Fair Empl. Prac. Cas. (BNA) 1438 (S.D.N.Y. 1994), *aff'd*, unpublished opinion 94-7204, #670 (2d Cir. Aug. 12, 1994) (on file in Second Circuit Clerk's Office).

18. Fed. R. Civ. P. 1.

19. *Id.*

*Creating a Positive Atmosphere:*1. *The Judge Who Liked Everyone.*

One of Judge Broderick's most important tools was the fact that he *liked everybody*, even if they behaved objectionably. He drew a distinction between the person and the behavior. For example, when anyone claimed to dislike another person Judge Broderick would instantly insist that he liked that person — even if he had to take action against some of his or her conduct.

2. *Humor as Antidote to Hostility.*

Humor was one of Judge Broderick's most effective methods for overcoming tension or hostility between opposing counsel. For example, at a conference on redistricting, a dispute arose which pitted Hispanic citizens against municipal authorities. Tempers had reached the boiling point when one of the Hispanic representatives accused the City of paying attention only to "Uncle Tom" Hispanics. Judge Broderick leaned back in his chair, allowed several seconds to pass, and asked in a low tone, "How does 'Uncle Tom' translate into Spanish?" Everyone in the room burst out laughing, and soon thereafter friendly consultations were scheduled, leading to settlement of the entire dispute.

3. *Supporting Those Who Commit Ordinary Errors.*

Judge Broderick was a firm believer in the importance of the harmless error concept codified in Rule 61 of the Federal Rules of Civil Procedure, and he applied it both in judicial rulings²⁰ and in dealing with people. In one instance, a court clerk committed an error affecting a written decision, discovered the error, and suggested that Judge Broderick use the error in the clerk's office as the explanation when the order was modified. Judge Broderick's reaction is reported to have been instant and emphatic refusal to avoid responsibility for the error even though the error was not his. His response was immediate: "I will do no such thing!"

20. See, e.g., *Sealy v. Shalala*, 871 F. Supp. 612 (S.D.N.Y. 1994); *Thomas v. Yonkers Police Dep't*, 147 F.R.D. 77 (S.D.N.Y. 1993).

4. *Procedural Innovations*

To seek the "just, speedy, and inexpensive"²¹ disposition of every action, the goal of Rule 1 of the Federal Rules of Civil Procedure, Judge Broderick developed numerous innovative procedures, such as:

-Providing a one page orientation statement to all counsel, stating, in part: Judge Broderick appreciates professionalism between opposing counsel and recommends that harsh comments orally or in writing concerning opposing parties or attorneys be avoided.

-Raising the option of settlement first at all conferences, seeking solutions, even if outside the initial boundaries of the dispute, which would benefit the parties as a group, providing savings or benefits which could be divided so all could accept them.

-Treating as harmless error all technical deficiencies in service where actual notice was received, and similar errors not causing substantial prejudice,²² including minor shortfalls in meeting administratively-imposed governmental deadlines for submissions.²³

-Dismissing government lawsuits where excessive levels of bureaucracy had led to unconscionable delays.²⁴

-Transferring cases to other districts for convenience more liberally, because of the expansion of the choices available to the party who originally filed the suit provided by amendments to venue statutes.²⁵

-Allowing attorneys to file sur-reply and sur-sur-reply briefs without further permission — but at their peril, since his rules made it clear he need not wait for such belated submissions.²⁶

21. FED. R. CIV. P. 1.

22. *See, e.g.,* Thomas v. Yonkers Police Dep't, 147 F.R.D. 77 (S.D.N.Y. 1993).

23. *Compare* Sealy v. Shalala, 871 F. Supp. 612 (S.D.N.Y. 1994) (excusing short delay) *with* Wojik v. Postmaster General, 814 F. Supp. 8 (S.D.N.Y. 1993) (dismissing after excessive delay).

24. Dollar Dry Dock Bank v. Denning, 148 F.R.D. 124 (S.D.N.Y. 1993).

25. Big Baby v. Schecter, 812 F. Supp. 442, 445 (S.D.N.Y. 1993); *see also* *In re Trap Rock*, 158 B.R. 574, 575-76 (S.D.N.Y. 1993).

26. This concept was based upon former United States Supreme Court Rule 15, SUP. CT. R. 15 (allowing replies to oppositions to *certiorari* petitions, but not delaying distribution of the papers to the Justices).

-Giving full effect²⁷ to the Supreme Court's 1986 pronouncement that, if a claim is "implausible," the claimant "must come forward with more persuasive evidence . . . than otherwise would be necessary" to avoid summary judgment.²⁸

-Using authority granted by the Supreme Court²⁹ to require that parties establish the existence of a genuine issue of material fact prior to trial, even if the parties failed to move, and to require that they do so at the outset of the case if a plaintiff should be expected to have sufficient facts to fulfill the requirement without discovery.

-Declining to rule on motions where the parties have failed to deal with issues the Judge considered crucial to a just outcome, and formally reserving decision pending further submissions on subjects outlined by the court.³⁰

-Relying on Federal Rule of Civil Procedure 1³¹ to refuse to permit the retention of natural persons as defendants if a solvent institutional entity is fully responsible.³²

-Using phased discovery where initial inquiry might shed light on the need for more burdensome discovery.³³

-Encouraging bench trials with direct testimony by affidavit and cross-examination of witnesses whose testimony the judge found significant.³⁴

-Barring filing of sealed material with the court without prior permission, thus enhancing public ability to judge the

27. See, e.g., *Toliver v. SDTC*, 818 F. Supp. 71, 74 n.3 (S.D.N.Y. 1993); *DeCintio v. Lawrence Hospital*, 797 F. Supp. 323 (S.D.N.Y. 1992).

28. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

29. *Celotex v. Catrett*, 477 U.S. 317, 326 (1986), *discussed in* *Jacobson v. Cohen*, 151 F.R.D. 526, 528 (S.D.N.Y. 1993).

30. See *Star Enterprise v. Apple Valley Service Center, Inc.*, 876 F. Supp. 45 (S.D.N.Y. 1995).

31. FED. R. CIV. P. 1.

32. See *Archer v. Globe Motorists Supply Co., Inc.*, 833 F. Supp. 211, 214 (S.D.N.Y. 1993); *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 546 (S.D.N.Y. 1994).

33. *Chambers v. Capital Cities/ABC*, 159 F.R.D. 429 (S.D.N.Y. 1995); *Chambers v. Capital Cities/ABC*, 157 F.R.D. 3 (S.D.N.Y. 1994).

34. See *Strehle v. United States*, 860 F. Supp. 136 (S.D.N.Y. 1994), *aff'd* 54 F.3d 765 (2d Cir. 1995).

work of the judiciary, avoiding side litigation, and avoiding waste of scarce vault space.³⁵

-Using court-appointed experts as an antidote to reliance on partisan experts, who often earn a large part of their income by testifying or giving advice concerning litigation.³⁶

-Using an adverse inference as a substitute for formal sanctions against parties or counsel for discovery shortfalls and other improper behavior,³⁷ rather than bringing about side litigation and engender unnecessary bitterness. Judge Broderick felt strongly that monetary sanctions often operated unfairly against less affluent litigants, who could neither build up large initial fees to be shifted nor afford to pay monetary sanctions.³⁸ In some cases, Broderick would treat a private comment, or, if necessary, a published criticism as a sufficient word to the wise.³⁹

-Insisting that those bringing private RICO suits for criminal sanctions establish that a factfinder could reasonably find the criminal intent necessary to support a criminal conviction.⁴⁰

C. *Justice as the Goal of Procedure*

Judge Broderick resisted litigation techniques such as unnecessary use of *ex parte* applications⁴¹ or secrecy, not permit-

35. *Levy v. Weksel*, 143 F.R.D. 54 (S.D.N.Y. 1992); *see also* *E.R. Squibb v. Accident Ins. Co.*, 853 F. Supp. 98, 103-104 (S.D.N.Y. 1994).

36. *E.g.*, *DeAngelis v. A. Tarricone*, 151 F.R.D. 245 (S.D.N.Y. 1993). Judge Broderick insisted that all material examined by an expert which might influence the expert's testimony be revealed to opposing counsel regardless of work product or similar objections. *Murray International v. New York Telephone*, No. 912 Civ. 5975, 1993 WL 82531 (S.D.N.Y. March 17, 1993).

37. *See* *Mareno v. Jet Aviation of Am., Inc.*, 155 F.R.D. 74, 77 (S.D.N.Y. 1994); *Chemical Bank v. Affiliated FM Ins. Co.*, 154 F.R.D. 91, 94 (S.D.N.Y. 1994); *Buozo v. Citibank*, 1993 WL 525114 (S.D.N.Y. 88 Civ. 1446, Dec. 13, 1993).

38. *See* *Riddick v. Summit House, Inc.*, 835 F. Supp. 137, 146-47 (S.D.N.Y. 1993).

39. *Jones v. Wide World of Cars, Inc.*, 820 F. Supp. 132, 138-39 (S.D.N.Y. 1993).

40. *See* *Epstein v. Epstein*, 159 F.R.D. 420, 422 (S.D.N.Y. 1994); *Alpert v. Kramer*, 145 F.R.D. 318, 320 (S.D.N.Y. 1992); *see also* *Maglione v. Cedar Hill Cemetery*, 853 F. Supp. 706, 709 (S.D.N.Y. 1994); *United States v. Bryser*, 838 F. Supp. 124, 126 (S.D.N.Y. 1993).

41. *See* *Federal Home Loan Mortgage Corp., Inc.*, 813 F. Supp. 234, 235 (S.D.N.Y. 1993), *later ruling* 822 F. Supp. 137 (S.D.N.Y. 1993) (establishing strict limitations on real estate foreclosure without notice, even if authorized by contract); *Little Tor Auto Center v. Exxon*, 822 F. Supp. 141, 143 (S.D.N.Y. 1993) (dis-

ting one-sided use of surreptitious tapes of witnesses taken by one side under false pretenses.⁴² He felt such techniques would only enhance the sporting aspect of justice. He also disapproved of confidentiality agreements between employers and employees wherein severance pay was exchanged for employee's silence.⁴³

Judge Broderick believed that justice should take priority over docket statistics. While seeking to achieve a zero backlog of fully submitted motions, he declined to press parties to try cases which none of the litigants wished to pursue. Instead, Judge Broderick believed that if the parties wished to let a case lie fallow preparatory to eventual dismissal for lack of prosecution or by consent, it was a mistake to force them to litigate.

While some judges assume that the duty of a jurist is limited to resolving disputes between the parties, Judge Broderick's view was broader. He felt that the United States District Court was the nerve center of our democratic Republic. When problems reached the point of being called to the court's attention, Judge Broderick often felt something should be done about them by consent, or persuasion if possible, or by notifying other authorities, if necessary.⁴⁴

II. Juridical Foundations for the Economy for the Twenty-First Century

Judge Broderick was certain that existing law contained far more leeway than generally recognized to permit our Repub-

approving effort to obtain temporary restraining order *ex parte* without evidence of extreme emergency).

Judge Broderick specifically disapproved *ex parte* submissions by prosecutors in criminal cases without application to court with a showing of extraordinary circumstances. *Campbell v. United States*, No. 94 Civ. 634, 1994 WL 361606 (S.D.N.Y. July 5, 1994).

For an example of a situation where Judge Broderick approved limited *ex parte* practice where any errors could be promptly corrected without prejudice, see *In re Child World*, 147 B.R. 854 (S.D.N.Y. 1992), *earlier ruling* 146 B.R. 89 (S.D.N.Y. 1992).

42. *Bogan v. Northwestern Mutual Life Ins. Co.*, 144 F.R.D. 51, 53 (S.D.N.Y. 1992).

43. See *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 445 (S.D.N.Y. 1995).

44. See, e.g., *Imperial Chemical Industries, PLC v. Barr Laboratories*, 795 F. Supp. 619 (S.D.N.Y. 1992), *judgment but not opinion vacated pursuant to settlement pending appeal* in 991 F.2d 811 (Fed. Cir. 1993).

lic to meet expanding challenges. He sought to clarify such options when relevant to controversies brought before him.

A. *Responsible Stewardship*

While ruling that delegation of governmental power to exercise sovereign compulsion (e.g., breaking into a private building to save a trapped animal without seeking a warrant) was unconstitutional,⁴⁵ Judge Broderick took the occasion to emphasize that the totality of our legal rules creates a concept of responsible stewardship toward the environment.⁴⁶ He noted that Congress had established procedures for defining new technologies vital to the national interest.⁴⁷ These technologies aid in preserving natural habitats critical to biodiversity.⁴⁸

B. *Banking and Currency Power*

Judge Broderick learned the importance of the congressional banking and currency power from his father, Joseph A. Broderick, the first Secretary of the Federal Reserve Board, and Superintendent of Banks in New York State under Governor Franklin D. Roosevelt. Unlike regulatory powers, the banking and currency power permits use of the carrot rather than the stick to obtain national goals.

That power has long been used to support loans and loan guarantees for the private sector when vital to the national interest (and hence can be used to support private research and development which may create new industries, protect the environment or protect national defense), based upon long-term commitments supported by the central bank system.⁴⁹ Judge Broderick explained the constitutional validity of such options when a New Yorker challenged the permissibility of independent legislatively-created transportation agencies.⁵⁰ The potential of these insights for the twenty-first century and the role of the United States in it needs no amplification.

45. *Suss v. ASPCA*, 823 F. Supp. 181 (S.D.N.Y. 1993).

46. *Id.* at 184-85 n.3.

47. *Id.* at 185.

48. *Id.*

49. *See Fidata Trust Co. of N.Y. v. FDIC*, 826 F. Supp. 105, 106 (S.D.N.Y. 1993).

50. *Soling v. New York*, 804 F. Supp. 532, 537 (S.D.N.Y. 1992).

While seeking to reconcile the rights of state and federal agencies, and property owners and subsidized tenants,⁵¹ Judge Broderick stressed the currently obscured authority to use long-term credit for creating a considerable volume of new housing rather than giving a few people substantial subsidies under complex bureaucratic controls.⁵²

C. *Protecting the National Common Market*

Judge Broderick was keenly aware of the threat of local cartel-like arrangements to the national economy, including those implemented through abuse of occupational licensing. In a decision tracing the history of the Federal Commerce Clause,⁵³ Judge Broderick held that where a supervisor had a state license, the state could not require a contractor to obtain a separate state occupational license.⁵⁴ To so require interfered with interstate commerce, since it would be difficult to obtain advance approvals in all of the states as needed to compete in a nationwide market.⁵⁵

D. *Questioning the Limits of Executive Power to Impose Tariffs for Retaliatory Purposes*

Judge Broderick held that a drastic increase of duties on tomatoes as retribution for European rejection of hormone treated U.S. meats under the so-called "Super 301" provision of U.S. trade laws⁵⁶ could be challenged in the courts, but not by resorting to false statements to the Customs Service.⁵⁷ The decision stated that the imposition of a tax by the Executive might be contrary to the Origination Clause of the Constitution,⁵⁸ which requires revenue measures to originate in the House of Representatives.⁵⁹ Because of the constitutional vulnerability of the underlying duty if challenged honestly, additional discov-

51. *Riddick v. Summit House, Inc.*, 835 F. Supp. 137 (S.D.N.Y. 1993).

52. *Id.* at 141-42.

53. U.S. CONST. ART. I, § 8, cl. 3.

54. *Tetra Technologies, Inc. v. Harter*, 823 F. Supp. 1116, 1118 (S.D.N.Y. 1993).

55. *Id.* at 1119.

56. 19 U.S.C.A. §§ 2411, 2483 (West Supp. 1995).

57. *United States v. Gulla*, 833 F. Supp. 274 (S.D.N.Y. 1993).

58. U.S. CONST. ART. I, § 7, cl. 1.

59. *United States v. Gulla*, 833 F. Supp. 274 (S.D.N.Y. 1993).

ery was provided to the defendants even though charged with fraudulent mislabelling of tomatoes as tomato sauce.⁶⁰

III. Fairness Both to Individuals and the Institutional Sector

In controversies between natural persons and institutional entities, whether public or private, Judge Broderick was conscious of both the need for entities to be protected from being eaten to the bone by rapacious individuals, and for individuals to be heard without being caught in procedural traps. For example, Judge Broderick disregarded natural persons' unintentional failures to satisfy hyper-technical or specialized service or other paperwork requirements so long as actual knowledge was present.⁶¹ In one of his earliest landmark decisions, he insisted that an institutional entity (in this instance the United States) provide reasonable information to those acting to claim rights or fulfill obligations.⁶² In another instance, Broderick found long-arm jurisdiction available where a holding company controlling stock option trading in New York sought to escape responsibility because it was located elsewhere.⁶³

Judge Broderick held governmental and other institutional entities to a higher standard of procedural compliance because of their ability to meet that standard. For example, he dismissed a government agency's suit because it was delayed for an excessive period due to internal bureaucratic levels of approval for routine actions.⁶⁴ Broderick held that a governmental agency which misplaced its own files must pay interim benefits in certain instances.⁶⁵ Examples include when the original claim was filed nearly five years ago and when the welfare of a child is at stake.⁶⁶ Where a government agency allegedly acts arbitrarily in exercising sovereign compulsion, Judge Broderick believed that judicial review should be available.⁶⁷

60. *Id.*

61. *See* Thomas v. Yonkers Police Dep't, 147 F.R.D. 77, 79 (S.D.N.Y. 1993).

62. *See* Becker v. Blum, 464 F. Supp. 152, 155 (S.D.N.Y. 1978).

63. Bellomo v. Pennsylvania Life, 488 F. Supp. 744 (S.D.N.Y. 1980).

64. Dollar Dry Dock Bank v. Denning, 148 F.R.D. 124 (S.D.N.Y. 1993).

65. Davila v. Shalala, 848 F. Supp. 1141, 1145 (S.D.N.Y. 1994).

66. *Id.*

67. *See* Pyramid Petroleum Corp. v. United States, 856 F. Supp. 150, 152 (S.D.N.Y. 1994); United States v. Local 6A, 832 F. Supp. 674, 680 (S.D.N.Y. 1993).

Judge Broderick refused to allow consumers, often less knowledgeable, to be taken advantage of by the use of difficult-to-understand documents with inequitable provisions.⁶⁸ He also rejected attempts by sophisticated or affluent litigants to take unfair advantage of procedural complexities,⁶⁹ one sided legal doctrines,⁷⁰ or routinely asserted doubtful jurisdictional objections.⁷¹ Judge Broderick rejected attempts to justify the Southern District of New York as a forum for a case because expert witnesses in a technical area were concentrated in the district.⁷² He also refused to permit government agencies to remove cases to forums other than those where a lawsuit was originally brought merely because another venue was permissible.⁷³

In the crucial area of debt collection, Broderick held that the Federal Debt Collection Procedure Act of 1990⁷⁴ was persuasive authority in other debt collection suits under state or federal law.⁷⁵ To ensure its availability, Judge Broderick incor-

68. See *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994); *Jones v. Wide World of Cars, Inc.*, 820 F. Supp. 132, 137 (S.D.N.Y. 1993); *Estate of Sheradsky v. West One Bank, Oregon*, 817 F. Supp. 423, 425 (S.D.N.Y. 1993); *Morgan v. McNiff*, 797 F. Supp. 325, 327 (S.D.N.Y. 1992).

69. Tight deadlines imposed by administrative action were held subject to harmless error analysis under FED. R. CIV. P. 61 in, e.g., *Sealy v. Shalala*, 871 F. Supp. 612 (S.D.N.Y. 1994); *Wojik v. Postmaster General*, 814 F. Supp. 8, 9 (S.D.N.Y. 1994). On the other hand, institutional entities with well-funded legal resources were held to a tighter standard. See *Dollar Dry Dock Bank v. Denning*, 148 F.R.D. 124, 126 (S.D.N.Y. 1993) (involving delay in FDIC litigation due to excessive levels of review within the agency).

In *Cruz v. Sullivan*, 802 F. Supp. 1015, 1017 (S.D.N.Y. 1992), Judge Broderick held that a governmental date record relied upon to assert untimeliness of a citizen claim was subject to challenge as to reliability.

70. For a corrective of one such position — use of boilerplate language requiring a person retrieving a forfeited asset to pay unlimited governmental costs if a surprise third party makes a later claim, see *United States v. 163 Renwick Street*, No. 93 Civ. 2924, WL 594717 (S.D.N.Y. Sept. 29, 1994). See also *United States v. 163 Renwick Street*, 859 F. Supp. 93 (S.D.N.Y. 1994).

71. See *Barbieri v. Hartsdale Post Office*, 856 F. Supp. 817, 819 (S.D.N.Y. 1994); *United States v. Galu*, 812 F. Supp. 19, 21 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 537 (2d Cir. 1993) (holding that a person found incompetent could nevertheless assert claims not requiring a full evidentiary trial).

72. *Max Planck Gesellschaft Zur Foederung Der Wissenschaften v. General Elec. Co.*, 858 F. Supp. 380, 383 (S.D.N.Y. 1994).

73. *Ullah v. FDIC*, 852 F. Supp. 218 (S.D.N.Y. 1994).

74. 28 U.S.C. §§ 3001-3008 (1994).

75. *Schueler v. Roman Asphalt Corp.*, 827 F. Supp. 247, 254-55 (S.D.N.Y. 1993); *Schueler v. Rayjas Enterprises Inc.*, 847 F. Supp. 1147, 1148 (S.D.N.Y. 1994).

porated into one of his decisions the full text of a hitherto unavailable section-by-section analysis of the predecessor of that Act, as submitted to the Senate Judiciary by the Department of Justice.⁷⁶

Judge Broderick also emphasized actual impartiality in the selection of decision makers in disputes purporting to be resolved by a neutral party.⁷⁷ Examples include the evaluation of childrens educational programs⁷⁸ and disputes under ERISA.⁷⁹

Broderick insisted on careful examination of applications for *ex parte* receiverships whether agreed upon by contract or not, for *ex parte* temporary restraining orders,⁸⁰ and other irrevocable or emergency relief. If granted, such orders were limited to what was clearly necessary. Broderick almost always deleted large amounts of boilerplate submitted by the applicants, whether governmental or private.⁸¹

Judge Broderick also insisted that repairs to dilapidated properties take precedence over payments to creditors in disposition of rents or other funds obtained by a foreclosing receiver.⁸² In addition, Broderick's orders protected receivers from individual lawsuits and barred litigation against them in their personal capacity.⁸³

A. *Equally Important: Protecting Institutional Entities*

Judge Broderick considered institutional entities in a technological society to be both absolutely necessary and extremely dangerous unless carefully monitored by the citizenry. Recog-

76. *Schueler v. Rayjas Enterprises, Inc.*, 847 F. Supp. 1147 at 1149.

77. *See, e.g., Heldman v. Sobol*, 846 F. Supp. 285 (S.D.N.Y. 1994); *Derico v. IBM Corp.*, No. 93 Civ. 0823, 1993 WL 106799 (S.D.N.Y. April 6, 1993); *Shea v. Road Carriers Local 707 Welfare Fund*, 818 F. Supp. 631 (S.D.N.Y. 1993); *Howe v. CNA Ins. Co.*, No. 92 Civ. 7762, 1994 WL 98745 (S.D.N.Y. March 16, 1994).

78. *Heldman v. Sobol*, 846 F. Supp. at 288-89.

79. *Derico v. IBM Corp.*, No. 93 Civ. 0823, 1993 WL 106799; *Shea v. Road Carriers Local 707 Welfare Fund*, 818 F. Supp. 631; *Howe v. CNA Ins. Co.*, No. 92 Civ. 7762, 1994 WL 98745.

80. *See Little Tor Auto Center v. Exxon Corp.*, 822 F. Supp. 141 (S.D.N.Y. 1993).

81. *See Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc.*, 813 F. Supp. 234 (S.D.N.Y. 1993).

82. *See Federal Home Loan Mortgage Corp. v. S.E.A. Yonkers Assocs.*, 869 F. Supp. 187, 188 (S.D.N.Y. 1994).

83. *Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc.*, 829 F. Supp. at 87-88.

nizing the importance of protecting institutions as well as individuals, Judge Broderick granted summary judgment for defendants in numerous suits he found nonmeritorious once the facts were known.⁸⁴ He suggested criteria that institutions could consider as means to avoid potential liability.⁸⁵

Judge Broderick believed that those who were denied or were losing government contracts or grants had no standing unless it was created by statute or contract provisions.⁸⁶ He also believed that employees who acted in ways that threatened others could not use the legal system to penalize employers for their dismissal.⁸⁷

Broderick drew upon the prohibition of lawsuits between members of the armed forces concerning acts taken in the line of duty. Following that model, he insisted that law enforcement officers engaged in lawsuits against each other present the matter to their supervisors and their unions, rather than ask the courts to adjudicate their dispute.⁸⁸

Judge Broderick also questioned the assumption that the Fourteenth Amendment requires state or local public sector entities acting solely in a proprietary, rather than sovereign, capacity to be subject to any greater restrictions on contracting and personnel actions than are private entities.⁸⁹ Cases involving invidious discrimination, he pointed out, are already cov-

84. See, e.g., *Oey v. Delta Airlines*, 93 Civ 3256, 1994 WL 24656, 64 Fair Empl. Prac. Cas. (BNA) 1438 (S.D.N.Y. 1994), *aff'd unpublished opinion* 94-7204 #670 (2d Cir. August 12, 1994) (on file in 2d Cir. Clerk's office).

85. *A. and B. v. C. College and D.*, 863 F. Supp. 156 (S.D.N.Y. 1994) (involving academic disciplinary procedures for alleged student sexual misconduct); *Gottlieb v. County of Orange*, 871 F. Supp. 625, 630-31 (S.D.N.Y. 1994) (demanding that parent leave home in child sexual abuse action).

86. *Intercommunity Relations Council of Rockland County, Inc. v. United States Dep't. of Health and Human Services*, 859 F. Supp. 81, 83 (S.D.N.Y. 1994).

87. See, e.g., *Taormina v. International Union*, 798 F. Supp. 193 (S.D.N.Y. 1992) (involving dismissal of a guard at nuclear facility who failed to inspect all segments of facility after sounding of alarm); *DeCintio v. Lawrence Hospital*, 797 F. Supp. 323 (S.D.N.Y. 1992) (involving alleged sexual insults to co-worker in hospital setting).

88. *Brown v. Westchester*, 840 F. Supp. 25 (S.D.N.Y. 1993).

89. *Watkins v. McConologue*, 820 F. Supp. 70, 72 n.3 (S.D.N.Y. 1992), *aff'd*, 978 F.2d 706 (2d Cir. 1992); see also *New York State Bar Association, Task Force on Simplification of the Law, Introduction to Federalist Papers for the Twenty-First Century, Part One — Role of Local Government* (1989).

ered by statute, and also touch sovereign roles of public sector entities, as do acts contrary to the First Amendment.⁹⁰

B. *Robust Treatment as an Advantage to Its Recipient*

Judge Broderick believed that ruling against an institution, public or private, frequently *benefitted* the losing party by forcibly calling its attention to problems which could cause even greater difficulties later if left unattended. The most highly publicized example was his ruling dismissing a Federal Deposit Insurance Corporation suit as receiver of a bank because multiple levels of bureaucratic approvals required for even routine actions led to unacceptable delay.⁹¹

C. *Balancing Openness and Privacy*

Judge Broderick adamantly rejected the common practice of routinely sealing large amounts of material submitted to the court, because doing so deprived the public of ability to evaluate the work of the judiciary.⁹² At the same time, he frequently omitted the names of natural persons, and at times even entities, that might be unduly injured by written decisions when their disclosure served no legal purpose.⁹³

IV. Fair and Effective Criminal Justice

The intense nationwide concern over criminal justice makes Judge Broderick's contribution to this area of law particularly important at this point in our national history. Broderick influenced criminal law in four major ways: his work as Chair of the Criminal Law Committee of the Judicial Conference of the United States from October 1990 to October 1993, his brief but extremely eventful service as Police Commissioner

90. *Watkins v. McConologue*, 820 F. Supp. 70, 72 n.3 (S.D.N.Y. 1992).

91. *Dollar Dry Dock Bank v. Denning*, 148 F.R.D. 124, 126 (S.D.N.Y. 1993); see also Task Force on Simplification of the Law, New York State Bar Assoc., Interim Report #1, *Internal Bureaucratic Structure of Agencies* (1986).

92. See, *E.R. Squibb & Sons v. Accident & Casualty Ins. Co.*, 853 F. Supp. 98, 103-04 (S.D.N.Y. 1994); *Levy v. Weksel*, 143 F.R.D. 54, 58 (1992).

93. See, e.g., *Christiana v. Metropolitan Life Ins. Co.*, 839 F. Supp. 248, 250 n.2 (S.D.N.Y. 1993) (omitting names of nonparty employees in employment discrimination case); *A. and B. v. C. College and D.*, 863 F. Supp. 156, 157 (S.D.N.Y. 1994) (omitting *all* names when case settled, but nature and background of settlement explained to provide information to the public).

of the City of New York in 1965-66, his judicial decisions, and his writings and Bar Association work.

Judge Broderick's most basic belief concerning criminal justice was that fairness and effectiveness were interdependent rather than counter to each other.⁹⁴ Roger Bennett Adler, Esq., in a letter to the New York Law Journal of March 8, 1995, commented on Broderick's approach to criminal justice:

Notwithstanding the assumption that Judge Broderick's background as a former New York City Police Commissioner would make him an apologist for government law enforcement, the judge was "down the middle" and just as important, perceived as committed only to inspiring a fair trial for both sides Like a great baseball umpire, he called them as he saw them⁹⁵

Judge Broderick's passionate impartiality led him to eschew hypertechnical objections raised to protect criminal activities.⁹⁶ At the same time, he insisted that defendants have access to government documents not kept confidential for genuine reasons.⁹⁷

Broderick also insisted that the level of crime found today could be dealt with effectively only if underlying causes were confronted. The underlying causes, as he saw them, included absence of sufficient jobs for those wishing to work⁹⁸ and overcoming evils of past invidious discrimination. At the same time, he insisted with realism and equal fervor that protection from crime was necessary.

For some 100 years some of our citizens have been deprived of social, political and economic rights which are guaranteed them by the Constitution of the United States Our conscience as a

94. See Statement of Vincent L. Broderick, *Measures Relating to Organized Crime: Hearings before the Senate Judiciary Committee, Subcommittee on Criminal Laws and Procedures*, 91st Cong., 1st Sess. 219-29 (1969).

95. Robert Bennett Adler, Esq., N.Y.L.J. March 8, 1995 at 2.

96. *Stewart v. United States*, 817 F. Supp. 12 (S.D.N.Y. 1993) (denying drug dealers equal protection claim because crime victims in minority area have greater claims on those principles); *United States v. Stevenson*, 803 F. Supp. 825 (S.D.N.Y. 1992) (holding that car thief lacks privacy expectation concerning car's identifying number); *United States v. Mongelli*, 794 F. Supp. 529 (S.D.N.Y. 1992) (holding that monetary criteria under bribery statute concerning use of federal funds embraces value of consideration for the bribe).

97. *United States v. Zanfordino*, 833 F. Supp. 429, 433 (S.D.N.Y. 1993).

98. *Toliver v. Sullivan Diagnostic Center*, 818 F. Supp. 71 (S.D.N.Y. 1993); see *supra* notes 48-63 and accompanying text.

nation has been aroused by these inequalities and inequities . . . the striving for change . . . must take place in a climate of law and social order.

It has been, it is and it will be the primary function of the police to foster such a climate. The alternative is chaos. And it is essential . . . that nothing be done to deter the Police Department and its individual members from resolutely discharging their duty of providing such a climate of law and social order.⁹⁹

Although he did not accept the argument that one's difficulties in life, however caused, could become an excuse for crime, Judge Broderick recognized the importance of taking action to remove impediments holding anyone back or making crime an attractive option to some.

A. *Flexible Sentences*

Judge Broderick's belief in purpose interpretation¹⁰⁰ of legal concepts, and his conviction that fair and effective law enforcement were interrelated, made him a passionate crusader against rigidity in sentencing. He never tired of pointing out that mandatory minimum sentences were harmful rather than helpful to law enforcement. Such mandates lead to fewer convictions because they are nullified by judges, juries and appellate courts who may find a way to acquit a defendant if the sentence seems unduly harsh.

According to Broderick, sentencing guidelines should be just that — *guidelines*, not rules of law. He believed that courts can and should depart from the guidelines whenever unforeseen aspects of a case come to light. He expressed his conviction per-

99. Statement of Police Commissioner Vincent L. Broderick before the Committee on City Affairs, City Council, June 29, 1975 at 1. See *United States v. Stevenson*, 829 F. Supp. 99 (S.D.N.Y. 1993).

In this ringing statement as Police Commissioner, Broderick also insisted that he as a civilian commissioner was responsible for disciplining the force and that a separate civilian police review board would merely undermine that function. *Id.*

100. Purpose interpretation was described as follows by Chief Justice Stone, one of the jurists Judge Broderick particularly revered:

"To decide, we turn to the words of the [document involved, in this instance, the Constitution] read in their historical setting as revealing the purposes of its framers, and search for admissible meanings of its words, which, in the circumstances of their application, will effectuate those purposes." *United States v. Classic*, 313 U.S. 299, 317-18 (1941); see also *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939).

suasively at numerous gatherings, through testimony before the Sentencing Commission, and through a series of published decisions implementing a large variety of options (none of which were appealed).¹⁰¹

Broderick undertook a personal crusade against rigid application of mandatory minimum penalties which ignored individual circumstances.¹⁰² Judge Broderick succeeded in securing opposition to such minimums on the part of the entire federal judiciary, as he testified before the House Judiciary Committee's Subcommittee on Crime on July 28, 1994: "I am here to express the complete and unmitigated opposition of the federal judges of this country to mandatory minimums."¹⁰³

Faced by this solidity of federal judicial opposition to rigid minimums, Congress passed Title Eight of the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. § 3553(f)), permitting departures from mandatory minimums under specified circumstances.¹⁰⁴ These circumstances include a requirement of full disclosure of relevant information by the defendant in lieu of the need to obtain a "5K1" letter from the prosecution

101. See, e.g., *United States v. Caruso*, 814 F. Supp. 382 (S.D.N.Y. 1993) (allowing downward departure from sentencing guidelines where candy store operator was sole actor in local gambling activity grossing \$20,000 annually); *United States v. Gaind*, 829 F. Supp. 669 (S.D.N.Y. 1993) (allowing downward departure because of partial fulfillment of purposes of sentencing where defendant would be unable to commit further crimes of the only type he was likely to be tempted or able to commit and lost his business and livelihood); *United States v. Lieberman*, 839 F. Supp. 263 (S.D.N.Y. 1993) (finding Gaind inapplicable and denying downward departure where pharmacist prosecuted for narcotics violation, since loss of pharmacy business would not necessarily preclude recurrence of criminal activity); *United States v. Martin*, 827 F. Supp. 232 (S.D.N.Y. 1993) (basing downward departure upon voluntary participation in shock incarceration ("boot camp") program); *United States v. Neiman*, 828 F. Supp. 254 (S.D.N.Y. 1993) (granting downward departure from guidelines based upon likelihood of rehabilitation in non-narcotics context where religious leaders and family members agreed to supervise home confinement and medical treatment was to be provided); *United States v. Stevenson*, 829 F. Supp. 99 (S.D.N.Y. 1993) (granting reduction in criminal history by eliminating points for conviction involving minor amount of marijuana secured for defendant's own use).

102. For a summary of Judge Broderick's views, see Vincent L. Broderick, *The Delusion of Mandatory Sentencing*, TRIAL, Aug. 1994, at 62.

103. *Id.*

104. 18 U.S.C. § 3553(f) (1995) (limiting authority to impose a sentence below a statutory minimum).

attesting to substantial assistance in prosecuting others.¹⁰⁵ Because of Broderick's critical role, Title Eight could well be known as the "Broderick Act."¹⁰⁶

In *Shendur v. United States*,¹⁰⁷ the first substantive reported decision interpreting Title Eight, Judge Broderick quoted Alexander Hamilton's *Federalist No. 78* as follows:

[I]t is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard [against] injury . . . by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.¹⁰⁸

Judge Broderick also set forth the first comprehensive analysis of the interpretations of Title Eight.¹⁰⁹

At least as important as these efforts was Judge Broderick's development of means to make it more likely that sentencing discretion would be exercised wisely. Probation officers' reports and observations indicate that Broderick developed a unique practice of holding a detailed, private but on-the-record sentencing conference in his robing room. During these conferences, he discussed the sentence with defense counsel, the defendant in person if such informal allocution was desired, and prosecution counsel. Immediately thereafter, he consulted the probation officer involved and his staff behind closed doors. Only after full discussion did he ascend the bench, conduct formal allocution, provide necessary warnings in open court, and impose the sentence itself.¹¹⁰

In Judge Broderick's opinion, reference to harsh sentences or other rulings by state judges in re-election campaigns created the appearance, and at times the reality, of distorting the im-

105. FEDERAL SENTENCING GUIDELINES § 5K1.1 (West 1993) (allowing departures from guidelines under specific conditions).

106. Judge Broderick opposed any rigid restrictions on individualized sentencing, and would have objected to subsequent tightening of threshold requirements for exercise of discretion.

107. 874 F. Supp. 85 (S.D.N.Y. 1995).

108. *Id.* at 86-7.

109. Vincent L. Broderick, *Flexible Sentencing and the Violent Crime Control Act of 1994*, 7 FEDERAL SENTENCING REPORTER 128 (Nov./Dec. 1994) (now reprinted as an appendix to *United States v. Vargas*, 885 F. Supp. 504, 505 (S.D.N.Y. 1995)).

110. This is based on interviews with Probation Officers, in New York, N.Y. (1991-1995).

partiality of rulings in order to please the public in the short run. While he did not vacate a conviction challenged through a federal *habeas corpus* claim, he did issue a warning that continuance of such a practice might have that result.¹¹¹

Judge Broderick was deeply concerned that criminal justice was being distorted by excessive dependence on unreliable informants and undercover agents, and cooperating defendants often guilty of more serious crimes than those they testify against.¹¹² He repeatedly urged a profound re-examination of criminal justice, including current interpretations of constitutional provisions.¹¹³

Perhaps the most salient suggestion made by Judge Broderick is his call for reconsideration of current constructions of the term "compelled" in the Fifth Amendment. He believed that the text and purposes of the Amendment might be fulfilled if an adverse inference from silence were permitted, so long as safeguards were provided, including:

- * Absence of any contempt or perjury sanctions;
- * Presence of counsel;
- * A transcript of the proceedings;
- * Questioning limited to what the person did or observed (not what the person thought).¹¹⁴

Judge Broderick also suggested that there may be a federal defense of self-defense implicit in the Fifth and Fourteenth Amendment Due Process Clauses.¹¹⁵ Such a defense could protect the right of citizens to defend themselves against crime without facing prosecution.¹¹⁶ The boundaries of such a defense were not explored because the facts of the case involved did not ultimately support the applicability of the defense.¹¹⁷

111. *Brown v. Doe*, 803 F. Supp. 932, 945 (S.D.N.Y. 1992), *later ruling* 811 F. Supp. 156 (S.D.N.Y. 1993), *aff'd* 2 F.3d 1236 (2d Cir. 1993).

112. *See Solis v. Walker*, 799 F. Supp. 23 (S.D.N.Y. 1992).

113. *See* Statement of Vincent L. Broderick, *Measures Relating to Organized Crime, Hearings before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee*, 91st Cong., 1st Sess. 219-29 (1969).

114. *Id.* *See also* Theriot v. Senkowski, 802 F. Supp. 1081, 1083 n.1 (S.D.N.Y. 1992). Judge Broderick also favored alternatives to the exclusionary rule in regard to improperly obtained evidence. *See* Testimony, *supra*; *Suss v. A.S.P.C.A.*, 823 F. Supp. 181, 191 n.23 (S.D.N.Y. 1993).

115. *Jackson v. Senkowski*, 817 F. Supp. 6, 7 (S.D.N.Y. 1993).

116. *Id.*

117. *Id.*

Judge Broderick wished to avoid useless consumption of time in state courts and of counsel for prisoners, as well as to discourage vain hopes of *pro se* petitioners. He therefore consistently sought to rule on the merits of petitions for federal *habeas corpus* relief by state prisoners, *even if state remedies had not been exhausted*, if the petition would ultimately be denied on the merits in any event.¹¹⁸

V. The Role of the Bar

Judge Broderick was intensely aware of the potential of the Bar for improving the law. One of his most important contributions in his roles as a Bar leader and as Chair of the New York County Lawyers Committee on Federal Legislation was his recommendation for a provision included in the Alaska Pipeline Act, Public Law 93-153 § 408, 87 Stat. 5762 (1973), which became 15 U.S.C. § 53(b), authorizing the Federal Trade Commission to obtain permanent injunctions in proper cases.¹¹⁹ This single clause has been deemed by some to be the single most important consumer protection law.¹²⁰

Judge Broderick also sought to prevent abuses by attorneys which could reflect negatively on the Bar as a whole. He declined to authorize additional fees for multiple law firms representing plaintiffs in class actions.¹²¹ He also reduced legal fees in a class action where current stockholders would both pay for (through reduction of the company's assets) and receive a significant portion of the settlement.¹²² Similarly, he questioned the propriety and binding nature of legal ethics rules designed to

118. See, e.g., *United States ex rel. John v. People*, 868 F. Supp. 74 (S.D.N.Y. 1994).

119. 15 U.S.C. § 53(b) (1995) (temporary restraining orders, preliminary injunctions).

120. See, e.g., Cornell, *Federal Trade Commission Permanent Injunction Actions Against Unfair and Deceptive Practices: The Proper Case and the Proper Proof*, 61 ST. JOHN'S L. REV. 503, 505-06 (1987). See also, Strenio, *Why Thirteen Should Be a Lucky Number for Victims of Price Fixing*, 57 ANTITRUST L.J. 149 (1988).

121. *Bernstein v. Presidential Life*, No. 92 Civ. 6968, 1993 WL 43559 (S.D.N.Y. Feb. 10, 1993); *Aguinda v. Texaco*, No. 93 Civ. 7527, 1994 WL 716025 (S.D.N.Y. Dec. 17, 1994).

122. *In re Presidential Life Securities*, 857 F. Supp. 331, 336-37 (S.D.N.Y. 1994).

protect attorneys' financial positions rather than to protect the public.¹²³

Judge Broderick took a dim view of charges by adversaries that opposing counsel suffered from a conflict of interest.¹²⁴ He believed that such conflicts were also subject to harmless error principles.¹²⁵ He strongly disapproved the use of "retaining liens" to permit an attorney to hold a client's file as security for fees, and held that such arrangements were barred in federal cases under Fed. R. Civ. P. 1.¹²⁶

VI. "The Best Court in the Country Bar None"

United States District Judge Edward Weinfeld, often considered the best trial judge in the country during his lifetime,¹²⁷ was frequently asked if he was saddened by never having been nominated to sit on the Supreme Court of the United States. His answer was always in the negative, stating that he was sitting in "the greatest court in the country, *bar none*."¹²⁸

Judge Broderick also believed that the trial court was the most important court, for it is in the trial court that justice has the most direct and extensive effect on people's lives. Direct interaction with people, and the ability to help by listening, by bringing wisdom to bear in developing mutually beneficial solutions, was, to him, the most important part of his professional life.

Judge Broderick repeatedly made it clear that the absence of binding effect of District Court decisions upon any other judge was of no interest to him. Rather, he counted on the per-

123. See *id.*; see also *McGrane v. Reader's Digest Ass'n., Inc.*, 822 F. Supp. 1044, 1048 (S.D.N.Y. 1993).

124. *United States v. Thompson*, 803 F. Supp. 905, 907-08 (S.D.N.Y. 1992); *United States v. Bryser*, 803 F. Supp. 908, 909 (S.D.N.Y. 1992).

125. *Id.*

126. *Fontaine v. Ryan*, 849 F. Supp. 242, 246 (S.D.N.Y. 1994); *Misek-Falkoff v. IBM Corp.*, 829 F. Supp. 660, 663-64 (S.D.N.Y. 1993).

127. The widely revered Judge Weinfeld sat for almost four decades until 1988, bringing forth such evaluations as "When you're in his court, you know you're before the bar of justice." Editorial Desk, *The Devotion of Judge Weinfeld*, N.Y. TIMES, Jan. 19, 1988 at A26; see also William E. Nelson, *Judge Weinfeld and the Adjudicatory Process: A Law Finder in an Age of Judicial Lawmakers*, 50 N.Y.U. L. REV. 980 (1975).

128. Arnold H. Lubasch, *Judge Edward Weinfeld, 86, Dies; On United States Bench Nearly Four Decades*, N.Y. TIMES, Jan. 18, 1988, at A16 (emphasis added).

suasive power of his opinions to establish their place in history.¹²⁹

129. See *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994).