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Remarks of the Chief Judge of the State of New York

Lawrence H. Cooke*

I. Keynote Address: International Perspectives on the Right to Privacy¹

Founded in 1969, the International Association of Jewish Lawyers and Jurists has as one of its objectives to contribute, alone or in cooperation with other International organizations, towards the establishment of an International legal order based on the Rule of Law in relations between all Nations and States; and to promote Human Rights and the principles of equality and the right of all states and peoples to live in peace. This congress and those convened in the past are the embodiment of those objectives. It is under the umbrella of this lofty consciousness that we convene from many parts of the globe.

The world is in turmoil, economically, politically and socially. Perhaps it is a repetition of history but today's unrest is real and seems quite different in some aspects from its predecessors. Yet, all of us today, in our respective countries, yearn for and strive toward the betterment of the human spirit. As members of the legal profession, we hold a sacred trust: Perpetuating and refining the law, to ensure individual justice and to benefit the commonweal. In keeping with this ponderous responsibility, we gather here to share our knowledge and opinions about the law of privacy.

Privacy has been defined as "the quality or state of being apart from the company of others . . . isolation, seclusion, or freedom from unauthorized oversight or observation."² In a

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1. This address was made before the Fifth Int'l Congress of Jewish Lawyers and Jurists, Jerusalem, Israel, on July 27, 1981.

2. WEBSTER'S THIRD NEW INT'L DICTIONARY 1804 (1971).

broad sense, the right of privacy may well encompass what the esteemed United States Supreme Court Justice Louis D. Brandeis termed "the right to be let alone".³

As observed by Rudolf B. Schlesinger, the esteemed comparative law authority at Hastings College of the Law, in the common law countries the great body of law has emerged from the courts and has then been commented upon by the academics. In the field of privacy law, however, the reverse has been true since in that special area the legal articulations have in large measure been made first in academia and then have been accepted or rejected by the courts. In several European countries, the opposite transition has taken place.

Recognition of a "right" of privacy as a distinct right deserving legal protection is of relatively recent origin. The interests thought to be implicated by the notion of privacy, for example, freedom from physical invasion, originally were protected by existing property and tort concepts⁴ and by provisions of the United States Constitution.⁵ The fourth amendment to the United States Constitution,⁶ for example, requires except in carefully limited circumstances, that a warrant be issued by a neutral magistrate upon a showing of probable cause before a search or seizure is effected.⁷ The sanctity of a person's home, his castle, thus receives constitutional recognition. But in its early application, the fourth amendment was not read to encom-

3. *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis employed that phrase earlier in advocating recognition of personal privacy rights in a well-known law review article published in 1890. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

4. See generally Warren & Brandeis, *supra* note 3; Posner, *The Uncertain Protection of Privacy by The Supreme Court*, 1979 SUP. CT. REV. 173.

5. E.g., U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law"); *Id.* amend. II, *infra* note 5; *Id.* amend. V ("... nor shall private property be taken for public use, without just compensation").

6. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

7. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Johnson v. United States*, 333 U.S. 10 (1948).

pass the concept of personal privacy beyond protection against physical invasion; there appeared to be no constitutional right to be free of scrutiny by means not implicating physical security.⁸

Contemporary constitutional adjudication, however, has wrought fundamental alterations in the values and interests deserving of protection. From the old hypothesis that only a physical invasion by police was prohibited by the constitutional proscription against unreasonable searches and seizures, there came to be recognized the real possibility that a person's sphere of privacy could be invaded by nonphysical means.⁹ Indeed, applied to nonphysical intrusions, the fourth amendment could not be read as protecting a right of privacy that encompassed the right simply to maintain secrecy about one's self from unjustified governmental invasion.¹⁰ A person can now rely, however, upon his or her reasonable expectation of privacy as a shield against official intrusion, physical or nonphysical.¹¹

There also exists constitutionally grounded guarantees of individual privacy other than protection against unreasonable searches and seizures. Absent compelling and demonstrable need, the government may not inquire into associational ties.¹² More basic to the concept of privacy as it has developed from specific constitutional guarantees is the right of personal autonomy or personhood,¹³ the right to make certain decisions without unwarranted government intrusion or oversight.¹⁴

Notwithstanding the relatively broad protection for the right of privacy, the Supreme Court of the United States has made clear that there is no all-encompassing constitutional right to privacy, that "the protection of a person's *general* right to privacy - - the right to be let alone by other people - - is, like the

8. See *Goldstein v. United States*, 316 U.S. 114 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928).

9. See *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Goldstein* and *Olmstead*, *supra* note 8).

10. See Posner, *supra* note 4, for a discussion of the distinction between a legally cognizable interest in seclusion and in secrecy.

11. See *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); Posner, *supra* note 4.

12. See *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

13. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

14. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-990 (1978).

protection of his property and of his very life, left largely to the law of the individual States."¹⁵ Thus, interests in individual privacy must and do find legal protection through both common law developments and state and federal legislation. The assertion of a constitutionally-protected privacy interest requires the existence of some governmental interference; nongovernmental intrusion can be protected only by nonconstitutional judicial and legislative responses.

A tort cause of action for an invasion of privacy, recognized in some form throughout the United States,¹⁶ protects the individual against unauthorized and unwanted intrusions into matters he or she desires to keep private. Thus, a person may have a protectable interest against appropriation of his name or likeness for pecuniary gain by another; against an invasion of his solitude; against placing him in a false light in the public eye, or against public disclosure of private facts.¹⁷ The interest protected and the degree of protection may vary from jurisdiction to jurisdiction and may be defined solely by legislation.¹⁸

Contemporary civilization poses threats to privacy beyond the possible encroachments traditionally identified. In today's technological age, it is becoming more and more difficult to safeguard personal information. With the increase in the availability of optional and necessary services has come requirements of more detailed disclosure of personal information to a wider spectrum of the providers of these services. In a simpler time, record maintenance systems had controls on dissemination inherent in them; manual filing and retrieval simply were more time consuming and less efficient. With the advent of the computer age, the vast improvements in information processing techniques have brought large stores of information to one's fingertips quickly and easily. Record storage techniques, including microforms, reduce the space necessary for maintenance, in-

15. *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (emphasis in original) (footnotes omitted).

16. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 804 (4th ed. 1971).

17. See generally *id.* at 804-14.

18. For example, New York has rejected the common law formulation of the right of privacy. See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). In New York, a limited right of privacy stems solely from statutory protections. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); *Id.* § 51 (McKinney Supp. 1979).

creasing the life of the record and facilitating easy access for reference and updating. As data gathering becomes more detached from the subject, the individual loses control over what information will be collected, by whom and for what purpose. Easy access by the public and private sectors creates a danger that extensive dossiers can and will be created and maintained without the knowledge or consent of the subject.

Given the impact of computerized fact gathering systems and the abuses to which they may be subject, there has developed the view of a right of information privacy, which recognizes the individual's right to choose the extent to which, and the time and circumstances under which his attitudes, behavior, and beliefs will be shared with others.¹⁹ As a matter of federal constitutional law, a broad right of information privacy has not been recognized on the reasoning that an individual has no reasonable expectation of privacy in material voluntarily disclosed in the first instance.²⁰ Even if a constitutional right of information privacy were recognized, it would only protect against government access and dissemination; protection against private sector access and dissemination would need another source.

The call has been for statutory controls over public and private sector input and readout practices to safeguard an individual's interest in information collection, accuracy and disclosure. Federal and state legislatures have responded favorably with respect to fact gathering activities of government agencies.²¹ Understandably, controls on fact acquisition practices of the private sector have been slower to evolve, although some do exist.²² But if the legal status of personal privacy is to be given more than mere lip service, greater efforts must be made to regulate private information activities.²³ The needs and interests of the organization that gathers the information must be balanced with

19. Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. REV. 589 (1980).

20. See *United States v. Miller*, 425 U.S. 435 (1976).

21. For a discussion of legislative efforts to regulate information practices, see Comment, *supra* note 19, at 602-07.

22. *E.g.*, The Fair Credit Reporting Act, 15 U.S.C. §§ 1681a-1681t (1976 & Supp. II 1978).

23. See generally Privacy Protection Study Commission, *Personal Privacy in an Information Society* (1977).

those of the individual about whom the information is gathered. Indeed, information systems may well be the new frontier for developments in privacy law.

Out of deference to those experts from countries around the free world who will be reporting at this conference on the judicial and parliamentary advancements of their respective nations in the field of privacy law, my remarks on specific developments in the United States are brief in nature.

The theme of this year's Congress is truly heartening for it represents a firm commitment to human dignity. A right of privacy accorded legal recognition is imperative in a free society. Unwarranted scrutiny can subject an individual to disapproving pressures or hostile reactions to his or her thoughts and actions. If the individual perceives that survival is at stake, there will be a cessation of activity and society thereby loses its richest source for progress. If new ideas are to be developed, innovative thinking and personal productivity to be encouraged, the human spirit to be exalted to new heights, then individuals must be secure in the belief that they, without fear, may close some doors and thus prevent public scrutiny of private affairs. The bottom line is that the human animal, if it is to be more than animal, must have the opportunity to be nourished by this treasured mark of human respectability, which is far more significant and valuable than finite realty or chattels.

Of course, no person, as a member of a free society, can be a modern day Robinson Crusoe and demand perfect privacy. Such membership requires that there be some interaction, some balance, for the sake of the individual and society. But a free society would not tolerate a total loss of privacy, for human development would be stifled by constant scrutiny. The harrowing specter of George Orwell's "1984"²⁴ need only be recalled to demand that there be an adjustment made.

Tremendous developments in the law of privacy have been witnessed in our time. This evolution has been reflected to a degree in the evolution of society through technological, educational and economic advancements. Yes, law is a reflection of the social order; as the late United States Supreme Court Justice Oliver Wendell Holmes observed, it "is the witness and external

24. G. ORWELL, NINETEEN EIGHTY-FOUR (1949).

deposit of our moral life. Its history is the history of the moral development of the race."²⁵ Thus, prevailing social values, as discerned by judges, legal scholars and legislators, will be reflected in legal developments. To that extent, privacy rights will continue to be respected in the law only so far as prevailing desires for liberty demand. And, possibly, that is how it should be.

Respect for privacy, however, cannot be made to depend solely upon what may be the transient mood of the masses. Nor can it be allowed to be snuffed out in a materialistic milieu. The repercussions of inadequate protection for individual privacy interests may be felt for generations. Thus, those who make the law and those who contribute to lawmaking through advocacy or ratification must act responsibly, lest cherished rights be lost forever.

Mere fear of social change expressed by the established order cannot and should not justify total or partial disregard of personal privacy interests. This is not to say, however, that legitimate governmental interests in national security or survival must be ignored in the face of claimed privacy interests. It should not be forgotten that if a state is weak or helpless, there will be no effective agency to grant or protect the privacy of its populace. But all nations today face internal stress and external dangers. It is too easy to invoke the incantations of "national security" and "national emergency". The commitment to human rights to which the free world is pledged demands that the invocation of these and similar phrases be carefully scrutinized. Still, means must be found to accommodate both interests. Otherwise, by the slow but perpetual process of erosion, individual rights will surely disappear.

Of course, the weightiest force to intrude upon privacy interests is reposed in the sovereign government with its vast resources. But privacy interests are also subject to unjustified invasion by private parties. The law of privacy must protect against each of these infringements with constant vigilance, for a trespass adversely affects the one trespassed upon, no matter what the source.

The right of privacy, the right to be let alone, has been

25. O.W. HOLMES, *The Path of Law*, in COLLECTED LEGAL PAPERS 170 (1921).

termed "the most comprehensive of rights and the right most valued by civilized men."²⁶ Indeed, it has been observed that "[t]he free state offers what a police state denies—the privacy of the home, the dignity and peace of mind of the individual."²⁷

Represented at this Congress is a wide spectrum of legal systems and schools of thought. We are here to share our views on privacy, to study free world developments and solutions to some common problems. We welcome the opportunity to exchange ideas, to learn and, it is hoped, to contribute to an improvement of human life in our time.

II. Individual Calendaring in the New York Courts²⁸

No one person holds all the answers to any problem and, fortunately, we live in a democracy bejeweled by its freedoms of thought and expression. Fair criticism of judicial operations or suggestions for improvement, therefore, are entitled to analysis and response.

The courts in this country are in a Catch-22 situation. They are beleaguered by an oppressive workload and, here in New York State, are hampered by an archaic structure of eleven different trial courts. There is a desperate need for consolidation of the major trial courts, for more judges, for voir dire legislation, and for the elimination of inconsistent and outdated statutes. Repeated requests for legislative relief remain unanswered.

Recently there has been a growth in interest for IC, or individual calendaring for our courts. It is offered as the great additive, perhaps a panacea, in the field of operating the trial courts. The enthusiasm of its advocates appears to arise, at least in part, from its use in the Federal district courts of the metropolitan area, and elsewhere.

The court system in New York State is unique in its volume and its complexity. Certainly, it is one of the largest judicial systems in the western hemisphere. In each of the last two years there have been filed in the major trial courts of this state over 2,000,000 actions, proceedings, and indictments. The New York

26. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

27. Address by William O. Douglas, AMERICAN LAW INSTITUTE (1953).

28. This address was given at the luncheon of the Fund of Modern Courts at the Citicorp Building in New York City, November 10, 1981.

courts are presided over by about 1,000 judges and a few hearing examiners. There is also a vast number of matters handled by the 2,350 town and village justices in the State. It is also interesting to note that in excess of 96% of all litigation in the nation wends its way through the judicial labyrinths of state courts.

I respectfully submit that a universal or even prevailing system of individual calendaring would not be efficacious in the New York courts. In the first place, the courts of our State do not offer the proper milieu for such a technique. Here there is a constant need to transfer our judges from court to court, from civil to criminal and from area to area, as caseloads require; this fact in and of itself inhibits the use of the individual calendar method. Traditionally, and through the years, judges in the upstate judicial districts moved from county seat to county seat. This was followed by movement across district and even departmental lines. More recently judges have been temporarily assigned in large numbers into New York City and other regions of the Empire State. Such temporarily assigned judges could not operate under the IC system. The moving judge moves away from the immovable calendar and is in no geographical or judicial position to continue to adjudicate all the steps and phases of a matter as it progresses from commencement to final resolution.

Secondly, individual calendaring in New York City would mean considerable hardship for the trial bar. The ability of most attorneys to service the demands imposed by both Federal and state courts, civil and criminal, with each applying IC methods, would be doubtful at best. On some law offices would be thrust the duty of following a sizable portion of 253 calendars in the Supreme Courts in New York City alone, besides the sizeable number in Civil, Criminal, Family, and Surrogates' Courts in the state system. Inordinate burdens would be placed on the offices of the District Attorneys and the Legal Aid Society. For example, there are 57 criminal parts of Supreme Court in New York County alone. Individual trial attorneys, either as single practitioners or associates of a firm, would find it difficult and disorderly to plan their schedules and prepare their cases when pressured for trial by so many calendar commanders, each jealous of his or her own calendar progress.

Thirdly, it would be frustrating to the judges to schedule a trial only to find that one or more of the attorneys involved had

previously been directed by another judge to trial at the same time but at another place. It would be impossible to coordinate the movement of so many calendars. There is a problem in this respect even now with cluster calendar parts, but individual calendars would magnify the vexation.

A fourth consideration which militates against individual calendaring in New York is that the burden of calendaring administration placed on each trial judge, irrespective of whether the judge has a flair for such administration, would severely limit the judge's availability for trials. In the past, it was found that the calendar call in some individual calendar criminal parts consumed as much as an hour and a half each day. Not only would there be the uncertainty as to the length of a calendar call and the consequent uncertainty as to whether a trial would commence or continue each day, but great difficulty could also be expected in scheduling the appearances of witnesses, particularly experts like physicians.

Fifth, yet still important, "judge-matching," like "judge-shopping," should be avoided. With an IC system and the assignment of a substantial number of cases to one particular trial judge, there would be a great temptation, if not design, to commission one trial lawyer to a particular trial judge who has a predetermined calendar of long standing, where there is the likelihood of a friendly or compatible relationship.

Lastly, we must remember the admonition of Coke that the science of laws must join hands with experience. Here, in New York State, a system of individual calendaring was tried in the First Judicial Department in the early 1970's, and court administration was forced to abandon it soon after inception, mainly because the backlog of older cases grew out of hand. Formerly, Queens and Kings Counties had IC Parts in Supreme Court exclusively but they each abandoned the practice as well. It was found that due principally to the volume encountered, individual calendaring could not dispose of enough cases to keep current with an ever-increasing caseload.

The court system in New York is unique in many ways. With eleven different trial courts and a number of specific constitutional limitations on temporary assignments, it is complex. While the federal district courts in the Eastern and Southern Districts are conducted mainly at one address in each, the State

courts, both in the City and State, are dispersed in many locations. The argument that Federal district courts in the Metropolitan area operate effectively under individual calendaring overlooks the lack of resemblance of those courts to the State's judicial system. An examination of the "handle" or volume should be convincing. First, as to criminal cases, for the 12 month period ending June 30, 1980, in the Southern District there was a total of 882 felony and misdemeanor cases commenced, with a total of 210 criminal trials completed. In the Eastern District, for the same period, there was a total of 615 criminal proceedings commenced and 196 criminal trials completed. For the calendar year 1980 in the City of New York, there were 19,602 indictments filed in Supreme Court with a total of 2,091 completed trials. This is aside from the 182,968 filings in the Criminal Court of New York City with its 1,053 trials. As for civil trials, for the same respective periods of one year, there were 457 in the Southern District, 209 in the Eastern District and 4,908 in the Supreme Court of New York City. In the New York City Supreme Courts, there are now 214 trial parts, while there are said to be 39 full time District Court Judges and Magistrates in the Southern District and 16 in the Eastern District. In high volume areas, IC does not work well. Since as the numbers increase, individual calendaring diminishes in value; and since the attributes of these Federal district courts are so diverse from those of the New York City courts, the Federal experience is not a reliable barometer and certainly not reason for change in New York.

In New York City, the use of the "cluster part" system predominates. A cluster system involves a central calendar part surrounded by several trial parts, the average ratio being about six and a half trial parts to each central part. The calendar part services the calendar and feeds ready cases to the trial parts. Such a system materially reduces the number of calendar parts which the Bar must attend and watch. It allows more judges to be engaged in trials. It reduces the occasion when an attorney is directed to be ready for trial in more than one court at the same time. With its pool of ready cases and with the use of expeditors, it is possible to supply trial parts with hearings or trials on short notice. It is noteworthy that in New York City the trial rate of 12% in criminal cases is twice as high as the national average.

Actually, in New York City, we have a modified or hybrid plan; in New York County there are three IC parts for long-term detainee cases where particular expertise is deemed advisable. Such a modification is also employed in Kings and Bronx Counties. Another variation appears in the Criminal Court of New York County where two judges each are assigned to a particular complex and serve as the only ones to handle all cases from beginning to end. In some New York City counties all tax certiorari and condemnation matters are now tried in IC parts. It is interesting to note that Dean Ernest Friesen of Whittier Law School, a nationally recognized authority on matters related to court congestion, at a recent national meeting of the Conference of Metropolitan Judges hailed the New York system as his preferred model.

Neither our thoughts nor our plans are cast in stone. We ask experts to come here to evaluate our operations; we try to acquire fresh ideas from other states, and we are open to innovation. We have been progressive and we are anxious to improve. It would be a serious mistake, however, to step back to individual calendaring, a method discarded after reasonable testing not too long ago, and a method not designed for or compatible with the high case volume or the court structure of New York City. The fair and speedy delivery of justice is undoubtedly the noblest of human aspirations. It must remain our constant goal, but it will not be achieved through the use of an individual calendar in New York State.

III. Equality, Fairness, and the Rotation of Judges.²⁹

Diminutive Tom Paine, of Herculean pen, became the firebrand of the American Revolution. As assistant editor of the *Pennsylvania Magazine* he had deplored the repulsive violations of human rights he found in the colonies. When thousands of colonists were wavering on the question of independence, he published his little pamphlet *Common Sense* in which he ex-

29. This address was originally given at the First Annual Rivers, Toney, Watson Dinner of Judicial Friends, at the New York University School of Law, December 11, 1981. This event honors the first three black Judges elected to office in New York City. Honored in 1981 were black Judges from Maryland for their leading roles in contributing to their communities.

horted: "Freedom hath been hunted round the globe. Asia and Africa have long expelled her . . . and England hath given her warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind!"³⁰

Then came his *Rights of Man* which set forth this philosophical gem: "Every history of the Creation, and every traditional account, whether from the lettered or unlettered world, however they may vary in their opinion or belief of certain particulars, all agree in establishing one point, *the unity of man*; by which I mean that men [and women] are all of *one degree*, and consequently that all men [and women] are born equal, and with equal natural rights, in the same manner as if posterity had been continued by *creation* instead of *generation*"³¹

Only three years ago, Garry Wills, in his award-winning volume, *Inventing America - Jefferson's Declaration of Independence*, challenged that the truth that bothers people most is that all men and women are created equal.³² We received the answer to this semantical twist way back in the civics classes of our grammar schools: That while there are striking and obvious inequalities in the externals, such as the capabilities and talents of human beings, as to natural rights and governmental guarantees there is absolute equality. In the idealism of our youth this teaching of parity of privilege was sweet syrup for youngsters to swallow; it made our chests swell with patriotism and pride.

Justice is the great commodity. Indeed, Madison saw it as the end of government; the end of civil society. It cannot be isolated in the abstract for visual perception but it is recognized readily. It is not easy of definition but one ever present character in its fabric is equality. Jefferson, in his First Inaugural Address, exalted the concept of "Equal and exact justice to all"³³ Frederick Douglass, the distinguished orator and reformer, once wrote a letter carrying this message: The lesson

30. T. PAINE, *Common Sense*, in *SELECTED WRITINGS OF THOMAS PAINE*. 8, 29-30 (R. Roberts ed. 1945).

31. T. PAINE, *THE RIGHTS OF MAN* 78 (Citadel Press Ed. 1974) (emphasis in original).

32. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

33. T. Jefferson, *First Inaugural Address*, reprinted in *1A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 309 (1897).

which the American people must learn, or neglect to do so at their own peril, is that Equal Manhood means Equal Rights. The United States Supreme Court Building in Washington is adorned with the inscription "Equal Justice under Law". Consistently, there is also discerned the attendant quality of fairness. Goodhart in his ABA Journal article on *Lincoln and the Law*³⁴ noted: "[T]o Lincoln the most important idea that the law represented was the idea of fairness."³⁵

The notions we have of justice are of little value if confined to the tomes of our libraries. The Declaration of Independence has been declared by many, and undoubtedly rightly so, as the greatest human document ever struck off by the human mind at a single time. Its first declaration starts out with these words: "We hold these truths to be self-evident, that all Men [and women] are created equal, that they are endowed by their Creator with certain unalienable Rights"³⁶ These words, clear as the peal from the Liberty Bell itself, were of little solace and yielded no "Life, Liberty and the Pursuit of Happiness"³⁷ to hundreds of thousands of human souls wasting in some of the colonies in the very year of its declaration.

The principles of justice, which we revere at least outwardly, must be the driving force of our judicial power train. There must be no institutional hypocrisy. For example, there was a Sheriff's Jury in New York County. Robert Fichenberg, a former editor of the Albany Knickerbocker News, wrote in 1975 that it amounted to a wealthy men's private club within the state's jury system. The next year the State Commission on Investigation found, inter alia, that the jury rarely functioned as an official body (one day in the last forty-six months) and that the Sheriff's Jury existed without women, those of Hispanic origin and only a token number of blacks. This was a good example of inequality and unfairness and, consequently, of injustice. We abolished the Sheriff's Jury early in 1979. Similarly when it appeared that some functions of an official nature were being conducted at places practicing discrimination, rules were adopted

34. Goodhart, *Lincoln and the Law*, 50 A.B.A.J. 433 (1964).

35. *Id.* at 441.

36. The Declaration of Independence para. 2 (U.S. 1776).

37. *Id.*

barring reimbursement for expenses from public funds for any judicial operations in such locations.

Studies have revealed shocking disparities in the penal sentences meted out to persons with similar backgrounds convicted of the same crime committed under similar circumstances. These sentence disparities appear in the sanctions imposed by the individual judges of the same area, as well as among the numerous regions in the State. Sentence disparity is also seen between those imposed upon defendants with assigned counsel as opposed to private counsel, and between those meted out to non-whites when matched with those given whites. Is this justice? Is this equality? Is this fairness? As a remedy we have advocated, and are advocating, the creation of a Felony Sentence Review Court, which would give the defendant the right to appeal a sentence. Such a procedure may be the only effective method of dealing with this perplexing and persistent problem; this fundamental defect in our criminal justice system. Such a review court or board is used successfully in no less than six nearby states.

For over a decade, it has been found necessary in New York City to assign Civil Court and Criminal Court Judges to the Supreme Court. Under the law these assignments are "temporary". Yet some judges have been assigned for long periods, one judge for 170 months; while other judges have never been assigned. Is this temporary? The yearly salary differential between a City Court and a Supreme Court judge is \$7,350.

Allegations and rumors have spread over the years concerning the reasons and selection methods for the assignments. In an effort to be equitable and fair, to have our system perform better and to improve the perception of the courts, a two-step program has been instituted: A screening by a prestigious committee and rotation of those judges recommended for assignment. The screening committee was organized in such a fashion as to preserve the independence of the judges and not as to give an "edge" to an active litigator. I am informed that the screening committee nonetheless has invited appraisals of those being screened from no less than 13 different bar associations.

There have been complaints and there have been pressures to make us abandon the plan. The plan will not be abandoned but every effort will be exerted to improve it and to make it

work fairly and well. The argument has been made that the public entitlement to quality justice outweighs the need to be fair to judges. This reasoning is unsound; it involves a non-sequitur by assuming that we can't have both quality justice for the public and equity for the judges. We can have both, and we will! The judges themselves will make this happen!

It is most important, for the sake of justice and for the perception of it, that no prosecutor nor defense attorney nor other litigator pick the judges. We want no "loaded dice" in the system. One of the ills we are combatting and will combat with systematic attention is the number of adjournments or appearances before disposition. Adjournments may have to be denied. Sanctions may have to be imposed on those who refuse to try their cases. It is important to the public and to the judges that each judge realize that he is neither obligated nor beholden to any litigator or any other person for his or her assignment.

I believe we can improve our judicial system. The purity of the process must be our constant goal. If it is, we as judges will be proud of our performance; but, more important, the justice and equality, promised at our nation's inception and constantly yearned for, will come our way.