whose office is *in* the neighborhood and who is available in emergency situations or for friendly advice on minor problems, or the 9 to 5 faceless political appointee in the Legal Assistance Center?

Finally, if Mr. Greenawalt had ever tried to get an Order to Show Cause prepared and signed in the morning before a 9:30 A.M. eviction attempt, or been awakened at 2 o'clock by a half-hysterical woman with the information that her husband had been arrested, or walked through a few filthy, littered and dark hallways while investigating accidents, in brief, if he had ever practiced law in one of the "target population" neighborhoods he refers to, he would know that lawyers in a "Judicare" system are much more familiar with the legal problems that arise than the hired hands at the local center could be. The lawyers in a "Judicare" system are permanent parties in their neighborhoods, not transients at a waystation in their political climb.

Early in his article, Mr. Greenawalt makes a strong point for "Judicare" when in referring to "the prison with glass walls" he says, "One of the things visible to those looking in is a non-assertion of legal rights by those unable to afford lawyers. This undermines anyone's sense of decency and dignity, and breeds a sense of hopelessness." The major point, or one of them, of "Judicare" as I see it is that it permits the indigent person the luxury, the dignity of *selecting* his lawyer. No man could be so grateful for free assistance to his needs that he would not stand a little straighter if he could choose.

Mr. Greenawalt makes reference to "the quickest, most effective way to bring about full legal services to the poor," and obviously indicates his belief that Legal Assistance Centers are the answer. This, I feel is the basic flaw in the plan; the tendency of agencies of this kind to play the "numbers game"—to pride themselves and base their reason for existence on the number of cases they can handle, in the shortest period of time.

Finally, I was amused to read that the OEO values an attorney's services, for the purpose of computing the community's 10% share of the program costs, at $8.00 an hour. I wonder what the plumbers have to say about that.

Yours truly,

DONALD A. ALTMAN

HELP!

Again, we at headquarters are down to the last copy of a *State Bar Journal* . . . . this time it is the June, 1966 issue.

Some of our members, we hope, will be willing to send their copies of the June, 1966 issue of the *Journal* to headquarters. Please address it to Mr. John E. Berry, Executive Director, New York State Bar Association, 99 Washington Avenue, Albany, New York 12210

We need *your* help!

The Court of Appeals and the 1967 Constitutional Convention*

By Stanley H. Fuld

(Albany)

With this article we welcome our new Chief Judge of the Court of Appeals to the State Bar Journal. *Judge Fuld's address to the Association at our Annual Meeting is a timely topic in view of its subject. We recommend it highly to our readers.*

Stanley H. Fuld

IT was in 1949 that I last had the privilege and honor of addressing the members of this Association at an Annual Dinner. When I spoke to you then, it was as the second most junior judge of the Court of Appeals. Now, having for more than two decades—in the language of Gilbert & Sullivan—polished up the handle of the big front door "so carefully," I find myself the Chief Judge. Shortly after my election last November, I paused with some trepidation to reflect on the awesome responsibilities I would soon be assuming. I asked Chief Judge Desmond to brief me concerning the multiple duties of the office. His reply was brief and to the point:

"Stanley," he said, "as Chief Judge you will have the ultimate responsibility not only for the Court of Appeals but for all the other courts throughout the State as well, for 3,000 judges, 11,000 employees and 60,000 lawyers. There is only one bit of advice I can give you—Pray!"

I have—and I am reassured: Almost a month has passed since I took my oath of office and the Court still stands and the wheels of justice still turn.

Just recently, I read an item in the current issue of the American Bar Association Journal somewhat critical of the changes that have been made in the law. "Once upon a time," the article runs, "a lawyer could be reasonably certain that his advice, based on precedent, was sound and dependable." Now, laments the author, court decisions—not to mention legislative actions and administrative rulings—have overruled settled principles and "shattered precedents." This is, of course, true but we may not blink the fact that the courts have a duty to bring the law into accordance with present-day standards of wisdom and justice rather than

*Address of Stanley H. Fuld, Chief Judge of the State of New York, at the State Bar Association Dinner, held at the N. Y. Hilton Hotel, January 27, 1967.

with some outworn antiquated rule of the past. Concededly, the overruling of precedent will at times be most disturbing—as it was to one rugged member of the Bar who lost a motion before the court because a case on which he relied had, unknown to him, been overruled. As he was leaving the courtroom, he was heard to remark, "It sure beats hell what you find in those books."

And it sure does. Take these statements, for instance, which I came across some time ago in a little book dealing with the interpretation of statutes. When the legislative history is in doubt, the author wrote, read the statute. And, he continued, a judge must never be fooled by clear language; no statute is so plain that a court cannot read ambiguity into it. Indeed, despite the claims made for them, even computers are occasionally fooled by seemingly clear language. A story is told of a computer that was asked to translate a phrase from English into Russian and back again into English. For its task, the computer was given this quotation from the Bible:

> "The spirit is willing, but the flesh is weak."

Lights flashed, tapes spun and the machine typed:

> "The whiskey is O.K. but the meat is spoiled."

With some reluctance—and having in mind Francis Bacon's admonition that "judges ought to be more learned than witty"—I resist the impulse to continue in this light vein.

In a few months there will be convened in Albany the first Constitutional Convention in this State since 1938. A number of problems call with an imperious voice for wise and objective attempts at resolution. As lawyers and judges, we have a special concern with the Judiciary Article of the Constitution. Two significant questions relating to that Article—the selection of judges and the proposal for a single statewide budget for the entire court system—were discussed earlier today at one of the sessions of this Annual Meeting. Another subject, of equal importance, though somewhat more recondite and esoteric, is that dealing with the jurisdiction of our Court of Appeals—and it is to that topic that I propose briefly to address myself.

In New York—and this is true in other populous jurisdictions as well as in the Federal sphere—the heavy incidence of appeals taken from lower court decisions has made it impractical to commit the entire case load to a single appellate tribunal and has led to the establishment of several tiers in a hierarchy of appellate courts. The basic scheme is to provide one or more intermediate appellate tribunals—such as the Appellate Divisions of our Supreme Court—whose function is to dispose with finality of the bulk of the appeals, with further review by a court of last resort—such as our Court of Appeals—only of a small number of selected cases which are deemed of sufficient importance for that purpose.

There is obviously no reason for affording litigants the luxury of more than one appeal in a single litigation merely for the asking. It has, indeed, been urged that the highest appellate court should, in general, leave the correction of errors in lower court decisions to the intermediate appellate courts. The role of such a court, it is said, should be confined to hearing only those cases in which an authoritative decision would have a meaningful influence on the development of the law, by resolving some disputed question of general importance transcending the immediate litigation or by settling some conflict among the intermediate tribunals. The reasoning is that the discharge of this function—including reappraisal of the continuing validity of previously enunciated doctrines and determination of the rule of law to govern novel situations—requires a high degree of painstaking care and scholarly deliberation, and the tribunal vested with such responsibility should conserve its energies to that end. The approach taken by the Court of Appeals has not been quite that extreme. Our underlying philosophy has been that, although we should devote ourselves primarily to questions of significance in the development and clarification of the general body of law, we may not shirk our responsibility to remedy plain injustice in individual controversies, even though the immediate decision may not have any impact on the State's jurisprudence.

Nevertheless, considerations of policy and of practical necessity demand that the Court be protected by appropriate jurisdictional limitations from inundation by a flood of inconsequential and nonmeritorious appeals. The point of the limitations is not only to enable the Court to operate with efficiency and dispatch but, more importantly, to permit it to devote the major portion of its time and attention to issues calling for top-level consideration.

Simple logistics demonstrate the need for such restrictions. The four Appellate Divisions dispose of over 4,000 appeals a year, and it would manifestly be an intolerable burden on the Court of Appeals to require it to entertain a further appeal, at the litigants' option, in each of these cases. Indeed, for a long period in its history, the Court of Appeals was plagued with substantial calendar delays because of the absence of requisite jurisdictional limitations. In 1915, for instance, the Court was almost two years behind in its work. It was not until 1917 that the jurisdictional limitations in effect today were in large part formulated. They were written into the State Constitution in the Judiciary Article adopted in 1925 and have continued essentially unchanged ever since.

The course of events over the past decade has raised serious question as to whether the limitations devised in 1917 remain adequate in 1967, and this is one of the problems which the Temporary State Commission on the Constitutional Convention has listed for consideration by the delegates. In the past ten years, the number of appeals annually docketed with the Court of Appeals has increased by about 60%—from 375 in 1957 to some 600 in 1966, and the number of motions submitted has doubled—from 555 in 1957 to over 1,100 in 1966. Indeed, the volume of cases has been such that for the first time in many years there is now a measure of delay in bringing an appeal on for argument in our Court. While the problem is not as yet of serious proportions, that

is only because of the strenuous efforts which have been made on the part of the judges and the court staff to keep the Court abreast of its case load.

But, even apart from any problem of delay, it is clear that the existing jurisdictional limitations are inadequate. The question is not how many cases can seven judges dispose of in a given period but, rather, how much time is available to them for deliberation on important issues. The greater the number of nonmeritorious appeals, the less time there remains for consideration of the really significant cases. Unfortunately, the existing constitutional and statutory provisions are not sufficiently geared to the basic objective of bringing before the Court of Appeals only those cases which merit further appellate review.

At present, innumerable appeals are brought to the Court as a matter of right, at the option of the litigants, not because they are of any moment or merit but merely because there has been some disagreement, no matter how trivial, either between the Appellate Division and the lower court or within the Appellate Division itself, as to the proper final disposition of the case. Most of these cases do not deserve the attention which our Court is required to give them. As long ago as 1921, in his lectures on the "Nature of the Judicial Process" (p. 164), Judge Cardozo pointed out that "a majority" of the cases coming before the Court of Appeals at that time "could not, with semblance of reason, be decided in any way but one" and, in his words, were "predestined, so to speak, to affirmance without option." The same situation still prevails today.

The remedy is not, as some have suggested, to increase the personnel of the Court and to have it sit in two divisions or with rotating panels of judges. That expedient has been tried in the past and has been found wanting, and with good reason. Quite obviously, the varying utterances of a divided or fluctuating tribunal would thwart the very function, sought to be served by a single court of last resort, of providing a harmonious, authoritative body of decisional law for the entire State.

In my view, we have not too few judges in our Court but too many cases, and the solution is simply to impose more stringent restrictions on the Court's jurisdiction which would effectively operate to weed out unsubstantial and nonmeritorious appeals. I suggest that this can be best accomplished by the adoption of a scheme, for the most part, of discretionary, rather than obligatory, jurisdiction, which would permit the Court to select for review, in its sound discretion, only those cases which it deemed worthy of plenary consideration.

This is, in essence, the scheme which governs the jurisdiction of the Supreme Court of the United States. In the great majority of cases, review by the Supreme Court must be sought by filing with it a petition for a writ of certiorari or, to employ our own terminology, an application for leave to appeal. Only those cases which the Court determines from examination of the record to be sufficiently important or meritorious are selected for oral argument and full review. While there are a small number of cases which are by statute appealable as of right to the Supreme Court, that tribunal subjects those cases as well to a similar preliminary sifting process whereby it determines whether the appeal shall be summarily disposed of or warrants being placed on the calendar for oral argument. In practice, the Supreme Court entertains a full appeal with oral argument and on printed briefs in only a small proportion of the cases sought to be brought before it.

It would seem appropriate to use the jurisdictional scheme of the Supreme Court as a pattern for our own Court of Appeals, at least as to those cases now appealable as of right merely because there has been some disagreement in the courts below. The selection of cases for full scale review could then be made by the Court itself, rather than by the parties involved, and on the basis of importance and merit, rather than on the happenstance of the procedural posture of the litigation.

I would mention that, at present, we are also obligated to hear appeals in capital cases, in civil cases involving a substantial constitutional question and in those cases where the Appellate Division certifies that an issue of law worthy of further review is involved. These appeals have neither been numerous nor, for the most part, burdensome, and there is much that can be said in favor of retaining the existing practice in these areas. Moreover, it might also be well to preserve those provisions which now permit certain classes of cases to be brought before the Court only by permission of the Appellate Division.

Concern has been expressed that under a system of discretionary jurisdiction, such as I have suggested, some meritorious appeals might be denied a hearing in the Court of Appeals. The fear seems to be that, on a motion for leave to appeal, a case will not receive as full and thorough study as it would be accorded on oral argument. I would assure the Bar, however, that all cases passed upon by the Court or its judges, whether on motion for leave or on oral argument, are subjected to careful and searching scrutiny. Indeed, we have a liberal practice under which the affirmative votes of only two of the seven judges of the Court are required for the granting of leave to appeal.

Nor has our Court ever been deaf to a plea of injustice. A number of cases come to mind; one recent example will suffice. In that case, the defendant, never previously in trouble, walked into a police station and told one of the officers that he suspected that the car which he had been driving and which was parked outside had been stolen. He explained that it had been given to him by a friend and his belief that it might have been stolen was based on the circumstance that his friend had given him the keys to the vehicle and then left town. The defendant's suspicions proved correct—but, instead of being rewarded for his conduct, he was indicted for, and convicted of, the crime of receiving stolen property. Leave to appeal was granted and the judgment of conviction was reversed.

As this and many other of our cases attest, there need be little fear that the Court will refuse any ap-

peal which merits review. It is my sincere hope that in the coming months serious thought will be given to the desirability—perhaps, the necessity—of affording the Court of Appeals a greater voice in the selection of the cases which it will hear.

Before concluding, I would say a few words about our retired brother, Chief Judge Charles Desmond, with whom I have had the good fortune to sit for more than 20 years. As I had occasion recently to observe, no one has equalled his more than a quarter century on the Court and few have matched his contributions to our jurisprudence. His has been the happy faculty of seeing a case in its proper focus, ever ready to re-examine and reappraise earlier decisions in the light of new conditions, changed circumstances, a different way of life. A man of manifold talents and interests, he has also left his mark in the areas of judicial administration and legal education. All of us on the Court will miss his sage counsel and his gracious and stimulating companionship. I speak for my associates and, I am sure, for the Bar as a whole, in wishing him health and high satisfaction in the years ahead.

It is also my pleasure to greet our new brother, Judge Charles Breitel, who has been my close personal friend for more than 30 years and who, indeed, like Judge Walsh and myself, began his public career as an assistant under Governor Dewey in the Special Rackets Investigation and the District Attorney's Office. His appointment to our bench has been warmly acclaimed, and I speak from personal knowledge when I say that his legal acumen is matched only by the wealth of his experience. We welcome him and wish him well.

I close by thanking you again for your gracious invitation to speak this evening and for your many kindnesses in the past. My participation over the years in the activities of this Association, with the camaraderie and fellowship it has brought, has always been a source of deep satisfaction. I am truly grateful for the many friendships made and cemented. I am delighted to be here and I look forward, with anticipation, to seeing you all at future meetings.

[End]

Mouthpiece

A hundred years ago, Mr. Justice Blackburn stressed that it is unprofessional for counsel to agree to conduct a cause on terms of his giving up his discretion as to how he should conduct it—"on the unworthy terms"—as the Judge put it—"that he is simply to be the mouthpiece of his client." It is essential that the public understands that the lawyer is not to be identified with the views of his client.

—Mr. Justice Blackburn, *Strauss* v. *Francis* (1866) L.R. 1 Q.B. 379, 380, as Quoted in Coutts, Prof. J. A., "The Public Profession of Law," *The Canadian Bar Journal* (Volume 6, No. 2, April, 1963), p. 101 at p. 104.

Immunity and the Privilege Against Self-Incrimination—Too Little and Too Much

Part I

By Samuel H. Hofstadter and Shirley R. Levittan
(New York City)

The authors of this article reaffirm the privilege against self-incrimination, a subject of much discussion in the last decade. The authors will examine its history and purpose in Part II, a solution which our readers should study with care.

EDWIN ARLINGTON ROBINSON observed that of all things that have the power to grow, "few may be larger than a few small words." His perception is peculiarly applicable to the privilege against self-incrimination embodied in the Fifth Amendment of the U.S. Constitution.

The words are few and small indeed. They provide that no person "shall be compelled in any criminal case to be a witness against himself." How large these few small words have grown! The privilege was held applicable in civil cases,[1] grand jury proceedings,[2] legislative inquiries,[3] and virtually every other official proceeding. It has been applied whether the witness is a party to the criminal or civil case or merely a witness, and whether testimony is directly an issue or collateral. It is sufficient to make the privilege operative that the testimony would provide the clues by which guilt could be established.[4] The witness himself has been held to be the judge in each case, not compelled to give testimony which he, in good faith, believed might pave the way to possible prosecution.[5] To claim the privilege has required no special combination of words. The clause has been liberally construed.[6]

Simple language is the hall-mark of great expression. Simplicity conveys the message of sublimity in religious utterance—as in the Ten Commandments and the Beatitudes. As religious pronouncements are broadened by exegisis, so great secular literature is expanded by annotation. Millions of pages have been written and interpretations suggested about Hamlet—and about Moby Dick, too—that their

[1] *McCarthy* v. *Arndstein*, 226 U.S. 34.
[2] *Counselman* v. *Hitchcock*, 142 U.S. 547; *U. S.* v. *Monia*, 317 U.S. 424; *Hale* v. *Henkel*, 201 U.S. 43; *Blau* v. *U. S.*, 340 U.S. 159.
[3] *Matter of Doyle*, 257 N.Y. 244; *People* v. *Sharp*, 107 N.Y. 427.
[4] *Hoffman* v. *U. S.*, 341 U.S. 479; *Blau* v. *U. S.*, 340 U.S. 159; *Gouled* v. *U. S.*, 255 U.S. 298, 303–304; *Matter of Doyle*, 257 N.Y. 244; *People ex rel. Coyle* v. *Truessdell*, 259 App. Div. 282.
[5] *U. S.* v. *Burr*, 1 Burr's Trial 244; *Counselman* v. *Hitchcock*, 142 U.S. 547; *People ex rel. Taylor* v. *Forbes*, 143 N.Y. 219.
[6] *Quinn* v. *U. S.*, 349 U.S. 155; *Emspak* v. *U. S.*, 349 U.S. 190; *Bart* v. *U. S.*, 347 U.S. 219.