



## 2012 Forum for State Appellate Court Judges

### *Justice Isn't Free: The Court Funding Crisis and Its Remedies*

#### **STATE COURTS AND PUBLIC JUSTICE: NEW CHALLENGES, NEW CHOICES**

John T. Broderick<sup>1</sup> & Lawrence Friedman<sup>2</sup>

#### *Executive Summary*

*Dean Broderick and Professor Friedman introduce their subject by noting the attention commonly given, both in law schools and in non-legal circles, to the work of the U.S. federal courts. In contrast, the state courts, which handle the overwhelming majority of civil and criminal cases, get far less attention. Yet these workhorses of the law are faced with enormous challenges which threaten their ability to deliver justice.*

*In Section I the authors describe those challenges. The first is inadequate funding, with state courts chronically receiving less money from state legislatures than they need to do their jobs—and sometimes seeing their budgets cut more those of other branches of government. A second challenge is the decline in understanding by legislators and the general public of the work of the courts, the constant threat of “payback” for unpopular decisions, and the lack of public advocates for the legal system. A third challenge is the increasing cost of legal representation, which puts it beyond the reach of middle-class Americans, and leads to an ever-larger proportion of cases in which parties represent themselves. The fourth is the rapid advances in technology, with which the courts generally have not kept pace, but which have accustomed the public to much faster flows of information and decisions than the courts (as now configured) can provide.*

*The authors next consider, in Section II, the impact the challenges to the state courts have on our constitutional democracy, which depends in every state on the existence of three coordinate branches of government. In this scheme, the judiciary performs three vital functions: keeping any of the three branches from accruing too much power; affording a public venue for the administration of justice; and providing an opportunity for direct participation in civil society when citizens turn to the courts*

---

<sup>1</sup> Dean and President of the University of New Hampshire School of Law and former Chief Justice of the New Hampshire Supreme Court. This article is forthcoming in 100 KY. L.J. \_\_\_\_ (2012). Distribution is expected in August 2012.

<sup>2</sup> Professor of Law, New England School of Law. Thanks to Elisabeth Baker of New England Law for her exemplary research assistance.

*for dispute resolution or serve as jurors. Seen from this perspective, the challenges to the state courts are challenges to democratic government itself, and should concern every citizen.*

*In Section III, Dean Broderick and Professor Friedman provide a case analysis of the responses (starting in 2004) made by the New Hampshire courts to challenges they faced. The responses required that court leadership and management be open to significant redesign of the court system. The changes made included: the creation of a new family division, funded largely with savings realized when full-time superior court judges retired and were not replaced; implementation of mediation and arbitration services that operate without judges; the creation of an opt-in business case docket; and the inauguration of “help centers” that could be accessed by telephone, on-line, or at courthouses. When even deeper budget reductions loomed, the court system responded with voluntary unpaid furlough days, reducing court sessions and closing courts on some days, closing some court offices to the public, suspending some jury trials, reducing the use of part-time judges, and leaving some judicial and staff slots unfilled after retirements in order to redirect the funds to retirement and health care costs. Even more extensive and systemic changes to the New Hampshire courts were recommended by an Innovation Commission in 2010.*

*The authors conclude that the maintenance of democracy and the rule of law require that state courts be “open, affordable and accessible.” Making them so will require better understanding of their roles by state legislators and the general public. Members of the bar will have to play a major role in achieving that understanding.*

---

## INTRODUCTION

Students at most American law schools unfailingly study federal procedure, both civil and criminal, and engage the many challenges posed by the application of the Federal Constitution to real-world circumstances. Many citizens frequently find themselves either reassured or disquieted by widely-reported decisions of the United States Supreme Court. Some decisions significantly change rights and expectations, and some may reorder American life for all of us.

Ironically, despite all the attention often paid to federal appellate decisions and to the opinions and jury verdicts in federal trial courts, it is state and not federal courts that are at the center of the American justice system. State courts are closest to the people and to the problems and conflicts that beset them. The numbers make that clear. Consider that during 2006 and 2007, approximately 278,000 civil suits were filed in the nation’s federal district courts, while California, Florida, Maryland, New York, and Virginia *each* saw more than 950,000 new civil actions filed in 2005 alone.<sup>3</sup> To put the imbalance more starkly, more cases are filed in the state courts on the island of Manhattan in a single week than are filed in all the federal courts in America in a single year.<sup>4</sup>

But despite their “under the radar” preeminent role in dispensing justice in America, state courts are imperiled by many growing challenges. If not met, these challenges will exact real and lasting consequences. None of these changes are positive, and none can wisely be ignored.

---

<sup>3</sup> ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 22 (3d ed. 2009).

<sup>4</sup> E.g., Jonathan Lippman, N.Y. State Chief Judge, Keynote Address at Harry F. Guggenheim Symposium on Crime in America 2 (Jan. 31, 2011), available at <http://www.thecrimereport.org/conferences/past/2011-02-6th-annual-harry-f-guggenheim-conference-on-crime-in>.

## I. THE CHALLENGES

### 1. Funding

The greatest challenge facing state courts is adequate funding. With each passing year, the capacity of state courts across the country to administer timely justice for those who seek it is increasingly threatened. As a *New York Times* editorial aptly noted in 2009, state budget cutbacks are “impeding core court functions.”<sup>5</sup> State courts, the *New York Times* remarked, “are at the center of the nation’s legal system and enforcement of the rule of law, handling more than 95 percent of all civil and criminal litigation,” and they have been “spiraling into crisis as cash-starved states struggle with huge deficits.”<sup>6</sup> The editorial suggested that, “at some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself.”<sup>7</sup> State courts have always been where most citizens go to resolve their disputes, and their historic role in fulfilling the promise of our vigorous democracy cannot be seriously disputed. But make no mistake; their continued viability is seriously threatened by declining budgets.

For fiscal year 2010, thirty-two state court systems suffered budget reductions, some seeing reductions of more than twelve percent for that fiscal year alone.<sup>8</sup> In some states, like California, Arizona and Iowa, the cuts were larger. It is currently estimated that for fiscal years 2009 – 2012, the structural deficits for all state governments will approach \$600 billion.<sup>9</sup> In all this financial chaos funding for the state courts has been a very low priority. Even in good financial times, state court budgets are only a tiny fraction of overall state budgets, often not more than two or three percent.<sup>10</sup> State courts have been “making do” with too little for far too long. Further budget reductions will so impede their core functions as to render them ineffectual, to say nothing about the morale of the judges and staff who keep them running against mounting odds. The price of failure will far exceed the cost of a well-functioning state court system.

As state legislatures have been cutting budgets, it has become more commonplace for state courts to shoulder a significant and often disproportionate financial burden. For example, according to a report prepared by the Boston Bar Association, the recommended budget for the Massachusetts Judicial System for fiscal year 2012 was fourteen percent less than what the courts had been allocated three years earlier.<sup>11</sup> The Bar report noted that while the judicial branch budget in Massachusetts for fiscal year 2012 was 4.3 percent less than the budget for the preceding fiscal year, the rest of state government received only a 2.2 percent reduction.<sup>12</sup> The state courts in Massachusetts are not alone in being singled out for “special” treatment.

---

<sup>5</sup> Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 25, 2009, at A30.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Percent Change by State for Judiciary Budgets*, NAT’L CENTER FOR ST. CTS., <http://www.ncsc.org/information-and-resources/budget-resource-center.aspx> (last visited June 7, 2012) (click on “percent change by state for judiciary budget”).

<sup>9</sup> Daniel J. Hall, *The Journey Towards Court Excellence: Trends and Practices to Meet the Future*, 51 S. TEX. L. REV. 935, 938 (2010).

<sup>10</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION 2004 80 (Aug. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>.

<sup>11</sup> BOS. BAR ASS’N, JUSTICE ON THE ROAD TO RUIN: REPORT OF THE BOSTON BAR ASSOCIATION ON THE FY 2012 JUDICIARY BUDGET 3 (May 2011), available at <http://www.bostonbar.org/pub/bw/1011/052311/JusticeontheRoadtoRuinMay2011.pdf>.

<sup>12</sup> *See id.*

The vast majority of state courts are besieged from all sides and there are discernible consequences. As funding is slashed, state courts are becoming less efficient and adaptive. They are also becoming too slow, too expensive, and too inaccessible. Those who can afford to flee to the private justice system are doing so in increasing numbers; especially businesses and corporations. Those who cannot, remain stuck. In time, public trust and confidence in the state courts will erode unless the “model on the ground” is both adequately funded and meaningfully redesigned. The *status quo* is failing in place. As a result, our state courts, as currently funded and configured, are in danger of becoming a backwater reserved for the prosecution of criminal cases and for civil cases in which the parties cannot afford counsel. If current conditions are not addressed, experienced judges and staff may well retire at the first opportunity and their replacements may not be the ones we want. None of this bodes well for the American justice system or the people it serves. None of this is preordained.

## **2. Declining Civic Knowledge**

The alarming free-fall of state judicial budgets is not occurring in a vacuum. While some of the current cuts are certainly due to new economic realities, others seem the result of “payback” for unpopular decisions, especially those that curtail legislative or executive prerogatives. The funding crisis is further aggravated by a growing decline in civic knowledge in state legislatures and the public as a whole about the critical role and function of state courts in our daily lives. Too many legislators and private citizens fail to appreciate the fundamental role state courts play in protecting individual rights, providing predictability to commerce and in guaranteeing the fair functioning of our constitutional democracy. Too few accept any personal obligation to ensure the institutional vitality of the state courts and many have no real understanding of the critical role the courts play in providing a “safe place” for the resolution of disputes; free from the politics and influences at play throughout the rest of society.

Regrettably, but not surprisingly, in the face of this growing knowledge gap and indifference, state courts have too few advocates. Even lawyers are silent too often. State courts lack a natural constituency to promote the cause of a functioning justice system to legislative decision-makers, which only serves to make their predicament worse. Ironically, legislators pay almost no political price when court budgets are cut. State courts, when forced to perform with insufficient resources often endure public criticism because of their perceived “inefficiencies” and inexplicable delays. Almost no citizen faults the funders. Few connect the dots.

## **3. Self-Representation**

At the same time, as the lines at the counters in America’s state courts grow longer and more time is needed to get a trial or a hearing date, the administration of justice has become too arduous for too many.<sup>13</sup> The rising cost of legal services means more citizens and small businesses cannot afford representation. As the President of the California Bar said a few years ago, “[w]e now have a legal system in which the majority of Americans cannot afford adequate legal services.”<sup>14</sup>

---

<sup>13</sup> See, e.g., Bruce Mohl, *Exodus of Employees Slows Courts, Raises Safety Concerns*, COMMONWEALTH, Jan. 11, 2012, <http://www.commonwealthmagazine.org/News-and-Features/Inquiries/2012/Winter/002-Exodus-of-employees-slows-courts-raises-safety-concerns.aspx> (discussing reduced personnel in Massachusetts trial courts).

<sup>14</sup> Jeff Bleich, *The Neglected Middle Class*, CAL. B. J., June 2008, available at <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=92107&categoryId=91968&month=6&year=2008>.

The number of self-represented parties entering America's courthouses is rising and creates yet another serious challenge for the state courts. The self-represented understandably need more staff assistance and judge time. They are often lost in a maze of paperwork and process they do not understand. This comes at a time when court staff is being thinned by budget cuts. Uncorrected, this new paradigm will inflict long-term damage.

In New Hampshire, for example, in approximately seventy percent of all divorce cases one or both sides are self-represented.<sup>15</sup> In the New Hampshire Supreme Court, thirty-five to forty percent of all filed cases involve one or more parties "going it alone". These numbers are alarming to the fair administration of justice. The rising tide of self-represented litigants is a national phenomenon and a growing national crisis for state courts.<sup>16</sup> To be clear, it is no longer just the poor who cannot afford counsel: many middle-income people and small businesses are finding it nearly impossible to hire an attorney for anything other than a discrete task.<sup>17</sup>

People lose custody of their children, suffer changes in visitation, lose their homes, apartments and health care every day across our nation without ever being represented by a lawyer. The American justice system, the greatest in the world, should be better than that. The state courts are wilting under the challenge posed by the swelling ranks of the self-represented. In California, under the leadership of then-Chief Justice Ron George, a pilot program was established for a state-funded civil *Gideon* in certain types of life-altering disputes.<sup>18</sup> Chief Justice Jonathan Lippman of New York is an eloquent advocate of a civil *Gideon*, as well.<sup>19</sup> In Massachusetts, limited representation assignments in housing and probate court have become commonplace.<sup>20</sup> In New Hampshire and several other states, the "unbundled" delivery of legal services is now allowed,<sup>21</sup> and lawyers across the country devote countless hours to providing free legal services.<sup>22</sup> Despite all the commendable effort to deal with the new reality of a burgeoning self-represented population, more will need to be done to address this issue going forward. Change at the margins will not suffice. Systemic change is needed.

#### **4. Technology and Changing Expectations**

The expectations of the marketplace are also presenting a critical challenge for state courts. Today, instant communication is the norm. Facebook, Twitter, blogs, Skype, Blackberries, iPods and iPhones

---

<sup>15</sup> James E. Duggan, *Challenge to Justice – A Report on Self-Represented Litigants in NH Courts*, 45 N.H. B.J. 16 (2005).

<sup>16</sup> See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1547-49 (2005).

<sup>17</sup> Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J., (July 22, 2010), [http://www.abajournal.com/news/article/middleclass\\_dilemma\\_cant\\_afford\\_lawyers\\_cant\\_qualify\\_for\\_legal\\_aid](http://www.abajournal.com/news/article/middleclass_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid).

<sup>18</sup> See Bleich, *supra* note 14.

<sup>19</sup> Brennan Ctr. for Justice, *Civil Right to Counsel Proposed for New York State* (May 3, 2010), [http://www.brennancenter.org/blog/archives/civil\\_right\\_to\\_counsel\\_proposed\\_for\\_new\\_york\\_state](http://www.brennancenter.org/blog/archives/civil_right_to_counsel_proposed_for_new_york_state); William Glaberson, *Top New York Judge Seeks More Rights for the Poor*, N.Y. TIMES (May 3, 2010), [http://www.nytimes.com/2010/05/04/nyregion/04court.html?\\_r=1](http://www.nytimes.com/2010/05/04/nyregion/04court.html?_r=1).

<sup>20</sup> J. Timothy Eaton & David Holtermann, *Expanding Access to Justice: Limited Scope Representation Is Here*, 26 CBA REC. 36, 38-39 (2010).

<sup>21</sup> See ABA Standing Comm. on the Delivery of Legal Servs., *Pro Se Resources by State*, A.B.A., [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/pro\\_se\\_resources\\_by\\_state.html#nv](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html#nv) (last updated Dec. 14, 2011).

<sup>22</sup> ABA STANDING COMM. ON PRO BONO & PUB. SERV., *SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS* 4-5 (2005), available at <http://apps.americanbar.org/legalservices/probono/report.pdf>.

are the new channels for social interaction.<sup>23</sup> These and other outlets for data transmission and communication are creating a new kind of public square: a virtual space where citizens may gather to interact with one another about matters large and small and where they expect to discuss both the events of the day and the legal, political and social developments that affect their lives. By compressing time and distance, digital communication technology has spawned new expectations of diligence, efficiency and responsiveness. Weeks of waiting for a court order or decision, once perceived as reasonable, now feels an eternity to many citizens who can access other “service” providers instantly from their laptops and personal digital assistants and get a response almost immediately. The effects of rapid change in technology and consumer expectations are well illustrated by the recent Chapter 11 filing of Blockbuster and the near- extinction of video stores.<sup>24</sup> It was not that long ago that Blockbuster and DVDs represented the cutting edge of entertainment technology. Netflix and on-demand television doomed both. Even Netflix is experiencing competition.

It is no secret that state court technology often lags far behind that found in federal courts. Federal judges have the ability to produce orders and opinions with hyperlink capacity that allows readers to have immediate access to the cited authority. Lawyers practicing in the federal courts can file pleadings electronically at any time, night or day. Most state courts, on the other hand, still function on paper and operate between the hours of 8:30 am and 4:30 pm. The twenty-first century will not long tolerate yesterday’s customary practices.

State courts are fighting to remain relevant. State courts and those who lead and manage them would be wrong to assume that they are somehow immune from the effects and expectations of changing technology. State courts will need to adapt in order to provide for a more streamlined, less expensive, more understandable and more user-friendly justice system. They must ensure that they have the ability to meet the expectations of a generation of citizens that has grown accustomed, if not addicted, to new technology. Just as there are alternatives to newspapers, libraries, and old-style video, there are alternatives to the way state courts currently provide for the resolution of civil disputes. Either state courts will adapt to meet rising marketplace expectations, or the growing private justice industry will be delighted to assist. Unless the state courts are properly funded and focused upon a new model for service and access in a digital age, they will grow antiquated and increasingly unused. We all lose if we let that happen, but the choice is ours.

Each of the challenges we have described—falling budgets, declining civic knowledge, a rapidly rising self-represented population and the explosion of technology and the heightened expectations it engenders—will, if unmet, serve to undermine the ability of state courts to fulfill their core constitutional responsibilities and “direct the traffic” of everyday life in our democracy.

---

<sup>23</sup> See KEITH N. HAMPTON ET AL., PEW RESEARCH CTR., SOCIAL NETWORKING SITES AND OUR LIVES: HOW PEOPLE’S TRUST, PERSONAL RELATIONSHIPS, AND CIVIC AND POLITICAL INVOLVEMENT ARE CONNECTED TO THEIR USE OF SOCIAL NETWORKING SITES AND OTHER TECHNOLOGIES (2011), available at [http://beta.images.theglobeandmail.com/archive/01287/Pew\\_Study\\_Social\\_1287603a.pdf](http://beta.images.theglobeandmail.com/archive/01287/Pew_Study_Social_1287603a.pdf).

<sup>24</sup> Michael J. de la Merced, *Blockbuster, Hoping to Reinvent Itself, Files for Bankruptcy*, N.Y. TIMES, Sept. 23, 2010, at B3, available at <http://www.nytimes.com/2010/09/24/business/24blockbuster.html>.

## II. THE POTENTIAL IMPACT ON CONSTITUTIONAL DEMOCRACY

As we noted earlier, more than two years ago the *New York Times* saw the latest round of state court budget cuts as a potential threat to democracy itself.<sup>25</sup> The *Times* may well be right. Here, we elaborate on the ways in which a thriving state court system should be seen as an integral component of American constitutional democracy by exploring the various roles the state courts play and why their inability to meet current fiscal, access, and technological challenges may well undermine our justice system.

We turn first to constitutional texts and structures, which envision the judiciary as more than just another state agency. In the United States, the state and federal governments share a basic commitment to the separation of powers among three branches of government.<sup>26</sup> The United States Constitution and all of the state constitutions assign to a legislative branch the task of lawmaking and to an executive branch the task of enforcing the laws the legislature creates.<sup>27</sup> And each constitution creates in some form an independent judicial branch, tasked with interpreting the law.<sup>28</sup>

There is some variation in the details of the tripartite arrangement among the states; for instance, many states have plural executive branches with separately elected attorneys general.<sup>29</sup> But the core structure is the same, a legacy of the work of the framers of the post-Revolutionary state constitutions, particularly John Adams and the constitution he wrote for the Commonwealth of Massachusetts.<sup>30</sup> Indeed, the constitutional history of Massachusetts is in many ways the constitutional history of the United States, for that constitution reflects such enduring values as a preference for individual liberty and the need for government to be both representative and constrained. Though not the first of the American state constitutions to be drafted during and following the American Revolution, the Massachusetts Constitution (with Virginia's) proved to be the most influential, serving as a model for the American constitutions that followed in its attention to individual rights and the structure of government,<sup>31</sup> with divided and separated legislative, executive, and judicial powers.<sup>32</sup>

Notwithstanding the numerous state constitutional revisions over the past two centuries, every state has retained the core tripartite design.<sup>33</sup> That this structure has endured suggests that the various individuals who have, over the past centuries, framed and ratified these constitutions have seen something essentially beneficial about such a governmental design. We focus here on three aspects of the judiciary's role that seem critical to the fulfillment of this design: its checking function; its role in

---

<sup>25</sup> See *State Courts at the Tipping Point*, *supra* note 5, at A30.

<sup>26</sup> Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L. REV. AM. U. 567, 568 (1994).

<sup>27</sup> See DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 69-76 (5th ed. 2005).

<sup>28</sup> See *Comparing Federal and State Courts*, ADM. OFC. U.S. CTS., <http://www.uscourts.gov/Education/AlResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx> (last visited Jan. 9, 2012).

<sup>29</sup> See ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 303 (2009) (discussing variety of plural executive departments).

<sup>30</sup> For a discussion on the framing of the Massachusetts Constitution and the role that John Adams played in framing that document, see LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 10-11 (2011); DAVID MCCULLOUGH, JOHN ADAMS 220-25 (2001).

<sup>31</sup> See DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 138 (1988).

<sup>32</sup> In many state constitutions, the separation of powers is textually explicit. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 14 (1998).

<sup>33</sup> See WILLIAMS, *supra* note 29, at 359-400 (discussing processes of state constitutional revision and amendment).

creating a platform for the administration of public justice; and the important opportunity it offers for effective democratic participation in civil society.

One premise underlying the separation of powers is the idea that such division will serve to check the possibility of one branch accruing too much power—in other words, that the division of powers will allow the branches to check one another and thereby prevent the development of tyranny.<sup>34</sup> A vital and independent judiciary is critical to this conception of constitutional government. The judiciary may perform its checking function in several ways. A check may occur at the appellate level, when the state’s highest court declares a particular law or executive action invalid. Or, the check may occur at the trial level, when, for example, a judge acts to prevent the government from presenting illegally-seized evidence against a defendant in a criminal prosecution. The vindication of individual rights and liberties in civil cases, moreover, may be seen as a signature example of the checking function, as it is in these cases that a court may act to prevent the government, representing the political majority, from overriding the interests of individuals and political minorities.

In addition, the judiciary may serve as a platform for the administration of public justice. A court’s invalidation of an unconstitutional law is an example of public justice, but the concept has other dimensions. Public trials, both civil and criminal, allow the community to know and understand when and why laws have been transgressed. In other words, the state court, in exercising its dispute-resolution function, becomes a means by which the citizenry may know that its representatives—prosecutors and other government officials—are behaving honorably, and that private parties are being properly held to account for their violation of governing norms, such as the laws of contract, tort, and property. Public justice at once serves as a means of civic education and as a critical commentary on the vitality of a state’s professed norms of conduct. As Professors Stephen Burbank and Stephen Subrin have noted, laws only “become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decides what the community deems acceptable.”<sup>35</sup>

But the ability of state courts to perform both their checking and public justice functions is threatened to the extent that the scope of their work—primarily, the resolution of public and private legal disputes—is diminished by fiscal, technological, and access issues. Consider, for example, that a backlog of criminal matters because a court is understaffed may mean that criminal procedural rights are not timely vindicated. Cost-related barriers to litigation, in turn, may mean that legitimate individual rights claims will not be appropriately evaluated and addressed. And the quality of information the citizenry has available to it about how its laws are working, and in respect to whom, will suffer if there are progressively fewer opportunities for the educational aspects of public justice to operate. The trend toward resolution of legal issues by private dispute services will exacerbate this problem, as those services by their nature deprive the community of this education and information.

Finally, and not least, if state courts are unable to meet the fiscal, technological, and access challenges they currently face, they will not be able serve as an effective conduit of democratic values critical to the communities created by their constitutions. There are at least two opportunities for citizens to experience these democratic values through the state courts: when they act as parties or participants in a trial and when they act as jurors. In the former capacity, state courts manage a dispute-resolution process that ultimately depends upon the participants themselves to succeed, for the

---

<sup>34</sup> See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 402 (2011) (“Distrust of concentrated authority is a central feature of our system of government.”).

<sup>35</sup> *Id.* at 402.

participants are responsible for presenting the evidence, arguments, and testimony that bear on the dispute at issue. Moreover, the process is in a real sense owned by the community; the courts, therefore, are accountable to the citizenry in a way that private systems of justice are not—the state courts must take all comers, not just those whom they might prefer to serve.

In the latter capacity, state courts provide community members the opportunity to experience democratic values in a particularly profound way, by sitting as jurors in judgment of the parties or litigants.<sup>36</sup> Tocqueville notably observed that the task of the civil jury “affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself.”<sup>37</sup> Absent an adequately funded, technologically equipped and open court system, community members would be deprived of the opportunity to participate in democracy in the most immediate way possible. As Burbank and Subrin have remarked, “[a]long with voting, jury service was, and remains, one of the few ways for ordinary citizens to participate in their own government, legitimizing decisions that resolve formal disputes in the eyes of the population at large.”<sup>38</sup>

In sum, it is not just that the challenges that confront state courts threaten to undermine the integrity of the judiciary’s formal constitutional status vis-à-vis the other branches of government. Rather, these challenges threaten to undermine the ways in which the state courts serve to support democracy, by checking governmental violation of individual rights, providing a platform for public justice, and providing a venue through which citizens may experience and participate in democracy at its most basic level. The challenges to the state courts, then, should be a matter of concern to all citizens, for in the end, whether we make use of the state courts or not, the civic health of the entire state community will be affected by their decline.

### III. ADDRESSING THE CHALLENGES: THE NEW HAMPSHIRE RESPONSE

Having identified the challenges state courts are facing and the threat to constitutional democracy they pose if unmet, we now highlight the steps one state court system—New Hampshire—is taking to address those challenges. No one model will satisfy all challenges and needs, and the New Hampshire model will, no doubt, undergo additional change as needed. Meaningful and timely access to justice must undergird any change to court systems and processes to respond to the “reality on the ground” in the twenty-first century.

The kind of strategic redesign that will be needed in state courts is likely greater than many people might think. As the New Hampshire Supreme Court discovered, an effective response to our new realities required court leadership and management be open to redesign; Mary McQueen, President of the National Center for State Courts has aptly noted that “‘coping and hoping’ are simply not enough.”<sup>39</sup> In these uncertain times, “failing in place” is a possibility for every enterprise—large and small, public and private. State courts can “fail in place” too, even if the doors remain open and the lights on.

---

<sup>36</sup> See *id.* at 401 (“Since the founding of our country, trials in open court resulting in decisions by either a judge or jury have been thought to be constitutive of American democracy.”). See also Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMP. LEG. STUD. 627,630 (2004) (noting that “[t]rials educate us, about each other and about the law”).

<sup>37</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (Phillips Bradley, ed., Vintage Books 1990) (1835).

<sup>38</sup> Burbank & Subrin, *supra* note 34, at 402.

<sup>39</sup> Mary Campbell McQueen, *Preface to the 2010 Edition of C. FLANGO ET AL., NAT’L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2010: A SPECIAL FEATURE ON INTERNATIONAL COURTS*, at ix, available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605>.

Beginning in 2004, the New Hampshire Supreme Court sought to modernize and streamline court operations to make them more efficient and user-friendly. The state's population is approximately 1,300,000 people.<sup>40</sup> There were 56 full time judges, 13 marital masters, 55 part-time judges<sup>41</sup> and 614 non-judicial staff positions.<sup>42</sup> There were 58 courts<sup>43</sup> at 36 separate locations.<sup>44</sup> In 2004, divorce cases were almost exclusively processed in superior court, the State's highest trial court. The entire unified court system budget (funded exclusively by the state legislature) was \$57.5 million.<sup>45</sup> As part of its effort to adapt the court system to existing needs, the supreme court created a family division for a broad array of cases ranging from divorce, to domestic violence, adoption, juvenile delinquency, guardianship of minors, CHINS petitions and termination of parental rights.<sup>46</sup> Family division cases were drawn from all the trial courts in the state, and at this writing the family division docket now operates twenty-six locations in the state.<sup>47</sup> With the cooperation of the then-Governor, as superior court judges retired, the first seven vacancies were not filled. With legislative approval the funds saved by not filling those seven vacancies were used to secure judges and marital masters for the family division.<sup>48</sup>

The supreme court also created a self-funded, first-ever judicial branch Office of Mediation and Arbitration with a full time director.<sup>49</sup> The office operated in all courts, including the supreme court, resulting in the resolution of many cases without ever having a judge involved.<sup>50</sup> Mediation was a welcomed tool for all litigants, especially the self-represented. The court also advocated for the creation of a specialized opt-in docket for business cases, which the legislature authorized and to which the Governor then appointed the first-ever Business Court judge.<sup>51</sup> The court also initiated a host of changes to forms and process to accommodate and assist the self-represented and dramatically enhanced its website.<sup>52</sup> Some help centers were inaugurated—some by phone/computer and some at courthouses.

No sooner were these changes implemented than state budget deficits grew larger and the judiciary's appropriation declined, requiring more cuts to the already-reduced budget.<sup>53</sup> Rather than lay

---

<sup>40</sup> *State and County QuickFacts: New Hampshire*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/33000.html> (last revised Jan. 17, 2012, 4:41 PM).

<sup>41</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 297.

<sup>42</sup> *Budget Resource Center*, NAT'L CENTER FOR ST. CTS., [http://www.ncsonline.org/wc/budget/activities/new\\_hampshire.asp](http://www.ncsonline.org/wc/budget/activities/new_hampshire.asp) (last visited Mar. 4, 2012).

<sup>43</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 297.

<sup>44</sup> JUDICIAL BRANCH OF N.H. & N.H. BAR ASS'N., YOUR GUIDE TO THE NEW HAMPSHIRE COURTS 2 (2008), <http://www.courts.state.nh.us/press/2008/030608Guide.pdf> [hereinafter GUIDE TO THE NEW HAMPSHIRE COURTS].

<sup>45</sup> *Court System Announces More Layoffs, Cutbacks*, N.H. JUD. BRANCH (Aug. 1, 2003), <http://www.courts.state.nh.us/press/2003/layoffs.htm>.

<sup>46</sup> GUIDE TO THE NEW HAMPSHIRE COURTS, *supra* note 44, at 4.

<sup>47</sup> See *Family Division*, N.H. JUD. BRANCH, <http://www.courts.state.nh.us/courtlocations/index.htm#family> (last visited June 7, 2012).

<sup>48</sup> See H.B. 643 attach. 7, 2004 Session (N.H. 2005), available at <http://www.courts.state.nh.us/fdpp/fdreport/fdreport6-7appendix.pdf> (pointing to the costs of expansion as partly funded by vacant positions).

<sup>49</sup> GUIDE TO THE NEW HAMPSHIRE COURTS, *supra* note 44, at 17.

<sup>50</sup> See *id.*

<sup>51</sup> *Business Court Mediation*, N.H. JUD. BRANCH, <http://www.courts.state.nh.us/adrp/business/index.htm> (last visited June 7, 2012).

<sup>52</sup> See *NH e-Court Project*, N.H. JUD. BRANCH (Jan. 19, 2011), <http://www.courts.nh.gov/SpecialSessions/nh-e-court-project-forum-jan-19-audio.wma>.

<sup>53</sup> See SUPREME COURT OF N.H., ADMINISTRATIVE ORDER 2011-05, LAYOFFS (2011), available at <http://www.courts.state.nh.us/budget/fy-12-13-budget/Supreme-Court-AO-2011-05.pdf>.

off dedicated and experienced staff, several million dollars were saved through voluntary unpaid furlough days over the two-year budget cycle.<sup>54</sup> This move required the courts to close almost one day a month, and many counters were closed to the general public, even when the courts were open, to allow staff to process paperwork without interruption. To save more, the court reluctantly suspended many civil jury trials, reduced court session days in some courts by twenty percent, and reduced the use of many part-time judges.<sup>55</sup> As non-judicial staff retired, their positions remained vacant: at present, more than 50 of 614 staff slots are empty.<sup>56</sup> Almost fifteen percent of the full time judicial positions remain unfilled.<sup>57</sup> The supreme court asked the Governor not to fill these vacancies; the funds were needed to make retirement contributions and to address rising health care costs for judges, masters and staff.<sup>58</sup>

In March 2010, the supreme court, realizing that implemented changes were insufficient, established an Innovation Commission and asked a successful private sector businessman to chair it.<sup>59</sup> The Commission had broad membership, some of it legislative, and its mission was broad, too.<sup>60</sup> After ten months of study and analysis, the Commission issued a hundred-page report with significant suggestions for systemic change.<sup>61</sup> Most prominently, the Commission recommended a huge infusion of capital budget money for technology needs and also urged the formation of a Circuit Court combining the district, family and probate courts into a single entity.<sup>62</sup> Judges in the new combined court would serve interchangeably on all types of cases.<sup>63</sup> It also recommended consolidations and centralizations, which, in time, would eliminate fifty-one middle management positions, including clerks and deputy clerks of court.<sup>64</sup> Finally, the Commission recommended that all speeding violation cases be removed from the district courts to the Department of Safety.<sup>65</sup>

Ultimately, the Commission report promised to save thirty-seven million dollars in budget growth over the coming decade.<sup>66</sup> The report received very positive reviews from members of the media and legislative leadership.<sup>67</sup> As challenging as many of its recommendations seemed, many have already been implemented. It did not come without pain, but sustaining the “model on the ground” was no longer possible or prudent.

---

<sup>54</sup> Press Release, New Hampshire Judicial Branch News Advisory, Judicial Branch to Begin Unpaid Furloughs (Jan. 26, 2010), <http://www.courts.state.nh.us/press/2010/furloughs-1-26-10.htm>.

<sup>55</sup> Elizabeth Dinan, *More Cuts Coming for N.H. Courts*, SEACOASTONLINE (Dec. 21, 2010), <http://www.seacoastonline.com/articles/20101221-NEWS-101229950>.

<sup>56</sup> *Budget Resource Center - New Hampshire - Actions Underway*, NAT'L CENTER FOR ST. CTS., [http://www.ncsconline.org/wc/budget/activities/new\\_hampshire.asp](http://www.ncsconline.org/wc/budget/activities/new_hampshire.asp) (last visited June 7, 2012).

<sup>57</sup> *Id.*

<sup>58</sup> See Press Release, New Hampshire Judicial Branch News Advisory, Judicial Branch Innovation Commission Established (Mar. 29, 2010), <http://www.courts.state.nh.us/press/2010/jb-innovation-commission-03292010.htm>.

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> See REPORT OF THE JUDICIAL BRANCH INNOVATION COMMISSION (Jan. 2011), available at <http://www.ncsc.org/services-and-experts/~media/Files/PDF/Services%20and%20Experts/Court%20engineering/New%20Hampshire%20Final%20Report.ashx>.

<sup>62</sup> *See id.* at 14.

<sup>63</sup> *See id.* at 15.

<sup>64</sup> *Id.* at 21.

<sup>65</sup> *See id.* at 25.

<sup>66</sup> Press Release, New Hampshire Judicial Branch News Advisory, Innovation Commission Recommends New Circuit Court (Jan. 19, 2011), <http://www.courts.state.nh.us/press/2011/innovationcommissionreport.htm>.

<sup>67</sup> Cf. Joseph G. Cote, *Group Calls for Change in State Courts*, NASHUATELEGRAPH.COM (Jan. 21, 2011), <http://www.nashuatelegraph.com/news/906185-196/group-calls-for-change-in-state-courts.html>.

## CONCLUSION

Democracy and the rule of law depend upon our state courts being truly open, affordable and accessible, and having the capacity to provide timely and thoughtful justice. Many of our most at-risk citizens turn to the state courts every day for protection from perceived or actual mistreatment and discrimination. They should feel confident that the courts can respond, and that they can do so in a timely way. State courts often are the only place our most vulnerable citizens can find asylum from the claimed excess of a majority's aggregated power.

But these courts will not succeed in the difficult years ahead without broadening public understanding of what it is they do and of the fiscal, technological, and access challenges they face. The state courts cannot address those challenges without significant assistance from legislators and the general public. Lawyers will need to play a critical role in educating our fellow citizens and elected officials about the state courts, their importance and their needs. The profession needs to step up in a significant way or be willing to accept the collateral damage of inaction. We remain confident that lawyers will engage as they always have. They must.