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Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*

by
JUDITH S. KAYE**

I begin on a note of appreciation not only for the pleasure of your company but also for the hours I have enjoyed lately with Justice Mathew Tobriner—his opinions, his writings generally, and the many tributes to him, not the least among them this extraordinary lecture series.

It is by now amply established that Justice Tobriner, while passionate about the dignity of individuals and importance of individual rights, was profoundly concerned as well about social change and the role of the courts in this inevitable process. Time and again he reminded us of the courts' "lonely task of balancing the need for order and stability with the goal of liberty and due process, seeking to preserve a heritage of individualism in a hierarchy of pervasive institutionalism."¹

In Justice Tobriner's view, the law is doomed if it remains static—unresponsive to current needs and concerns. But legal doctrine does not develop spontaneously. It takes vigorous advocacy by those who perceive the need for change and are willing to challenge established rules. In an article twenty-five years ago, Justice Tobriner indignantly rejected the suggestion that young lawyers should not expect to bring about improvement in our society through the practice of law but rather should go into politics. In Justice Tobriner's words, "law, as an instrument of social control, must, by necessity, respond to the emerging pressures for change within our society, and, if the legal system is to remain viable in

* The Mathew O. Tobriner Lecture, Hastings College of the Law, November 3, 1997.

** Chief Judge of the State of New York and Chief Judge of the Court of Appeals of the State of New York. I am deeply grateful to my counsel, Susan K. Knipps, for her invaluable contributions to this Lecture, from its first flowerings through to its final footnotes. Special thanks are due as well to John Feinblatt for his inspired leadership of the New York State court system's Center for Court Innovation, which envisions and nurtures so many of New York State's most forward-looking reform efforts.

1. Mathew O. Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A.J. 21, 23 (1968). See also, Mathew O. Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 UCLA L. REV. 5, 12 (1972).

the face of today's rapidly shifting mores, we acutely need the advocates of change."²

As the consummate common law judge, Justice Tobriner understandably focused his article on the need for the substantive law to keep pace with changes in society. I want to echo, but also enlarge, his challenge to young lawyers. If the legal system is to remain viable in the face of today's rapidly shifting mores, we acutely need advocates of change—change not just in the substantive law but also in the operation and administration of our courts.

We all know of Justice Tobriner's egalitarianism, but I want to be sure you understand that I mean the challenge to "young lawyers" in precisely the same sense he did. Being a "young lawyer" has nothing to do with age and everything to do with attitude.

You don't need me to tell you that change has joined death and taxes as one of the few certainties in life. The changes in post-modern society are in every direction: advances in technology, declines in community institutions, shifts in values.³

As lawyers, we expect the law to grow and adapt to new social developments, and certainly many of us devote a lot of time and energy to seeing that it does. If you have any doubt about this, just come sit in a courtroom or browse through any recent law journal. Law school curricula are full of exciting new theories, doctrines, courses, and programs that push the frontiers of the law. But you don't see much about whether day-to-day court operations and administrative structures should also change, and if so, how.

Judges and court administrators are not the only ones that have noticed this dearth of attention to the mechanics of our justice system. One legal academic has written that he "would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works."⁴

2. Mathew O. Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CAL. ST. B.J. 295, 296 (1972).

3. The advances in technology over the past several decades have of course been breathtaking. For example, today's family automobile has more computing power than the lunar landing module that put Neil Armstrong on the moon. See W. Michael Cox & Richard Alm, *How Free Markets Can Unleash Technology*, CONSUMERS' RESEARCH MAGAZINE, July 1997, at 20. The social changes during this same time period are equally astonishing, for example the tripling of the divorce rate. See AMERICAN BAR ASS'N, AN AGENDA FOR JUSTICE: ABA PERSPECTIVES ON CRIMINAL AND CIVIL JUSTICE ISSUES 114 (1996).

4. Robert W. Gordon, *Lawyers, Scholars and the "Middle Ground"*, 91 MICH. L. REV. 2075, 2087 (1993).

The irony, of course, is that the average citizen's perception of our legal system is probably more profoundly shaped by how courts are run than by the content of the law. Don't get me wrong—I love my job as a judge of New York State's highest court and I think we make a valuable contribution to society. But I know that few citizens will sit down with a volume of our opinions, yet many will spend days on jury duty, seek an order of protection in family court, or live in a neighborhood where they see the effects of the criminal justice system's revolving door.

A legal system remains viable only if it responds to the present-day needs and concerns of the public. If we expect our legal system to remain vital and strong into the next century, we need advocates of change to think seriously not only about the exquisite nuances of the law but also about the hard reality of how our courts are functioning.

Without question, rapid social change has taken its toll on the administration of the courts. For starters, we have more cases—lots more cases.⁵ Any dynamic society produces its share of disputes, and a relentlessly kinetic culture like ours produces millions. So often, today's innovations become tomorrow's case captions.

Policy choices by other branches of government struggling to deal with current social problems further swell our dockets, one obvious example being the decision to fight much of the war on drugs in the courts. In New York City, my home, the Mayor's policy choice has been to prioritize prosecution of low-level, quality of life offenses, bringing record caseloads into our Criminal Court. Unlike other branches of government that control their own agendas, courts cannot choose which cases they will hear, or more pointedly, not hear. Every single case that is brought must be determined, and in the New York State court system alone, we are nearing four million filings a year.

Thus, one of the first administrative issues confronting the courts in our changing society is how to manage the rising tide of cases. Finding better ways to process cases has long been a burning issue in the field of court administration. Today it's absolutely sizzling: differentiated case management, court-annexed alternative dispute resolution, "managerial judges," "rocket dockets." Many lectures can be, and are, devoted to the hottest new techniques—with, of course, the companion lecture, the hottest new critiques of the new techniques.⁶

5. Between 1984 and 1995, the civil caseloads of the nation's state courts rose 28%; criminal caseloads rose 38%; juvenile caseloads rose 55% and domestic relations caseloads rose 70%. The population of the United States increased by approximately 10% over the same time period. See BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 7 (1996).

6. See, e.g., Raymond J. Broderick, *Court-Annexed Compulsory Arbitration Is Providing Litigants with a Speedier and Less Expensive Alternative to the Traditional Courtroom Trial*, 75 JUDICATURE 41 (1991); G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR*

Clearly, we have to find ways to reduce delays and increase efficiencies in case processing. But today, I don't want to dwell on that issue, because the challenges facing us are in some ways even more fundamental than speeding up case disposition rates. As the volume of cases has forced courts to become more bureaucratized, it is tempting to think that the only way we can measure performance is to continue counting cases in and cases out, and to assume that when we process more cases we are doing a better job.

But justice is not a widget. And one of my goals is to convince you that since it's not, we also must begin to think of the field of court administration much more creatively. We have to move away from just counting cases to making sure that every case counts.

This means that we have to take a good, hard look at what sort of cases are in the state courts today. Changing social realities have brought courts not only more cases but also more social issues that are frustrating the other branches of government: cases involving drug addiction, homelessness, juvenile crime, and family violence. Each case has its legal issues, but it may also involve social issues that challenge the effectiveness of our traditional adjudicative models.

What I am urging, therefore, is a much broader conception of court administration than just docket books and flow charts: one that looks at the outcomes our court structures actually achieve and tests new models when deficiencies are found; one that looks at the functioning of the various "systems" of which the courts are but a single part—like the criminal justice system and the child welfare system—and reaches out to promote a higher level of systemic functioning; one that looks at court operations not just from the perspective of judges and lawyers but from the perspective of the public it is trying to serve; one that invites the interest and participation of the academic community.

To some of you, my comments about the need for a fresh look at court administration may seem obvious, but this is not the way court insiders are accustomed to thinking. Sitting judges decide cases one at a time. As lawyers, we are trained to focus on process, trusting that fair procedures will produce just results. We are thus occupationally disposed to scrutinizing individual trees of controversy, not whole forests of outcomes.

We must expand our vision because the public deserves and demands courts that are both just and effective. Robes and gavels may once

Programs, 75 JUDICATURE 34 (1991); William J. Pammer, Jr. & Judith A. Cramer, *Pygmalion in Judicial Responsibility: Toward a Management Ethos Among Judges*, in HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 205 (Steven W. Hays & Cole Blease Graham, Jr., eds., 1993); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); David C. Steelman, *What Have We Learned About Court Delay, "Local Legal Culture," and Caseflow Management Since the Late 1970s?*, 19 JUST. SYS. J. 145 (1997).

have inspired awe and respect for our work, but those days are gone with a vengeance. Today the public has little tolerance for perquisites of office. The public wants performance.

I have to stress that the process of court reform always involves at least two steps: first recognizing a problem, then coming up with constructive responses. Stopping after step one is simply not enough. To see a problem is one thing—to respond constructively, to fix it, is quite another.

A story set in the time of the French Revolution illustrates my point. Three condemned men were asked if they wished to be guillotined face up or face down. The first, an aristocrat, said that his honor demanded that he meet his fate face up. He was positioned on the block and the blade released. Miraculously, it stopped just inches from his neck. His captors were so taken by his bravery that they released him on the spot. The next in line, a clergyman, for his own reasons made the same choice, and again the blade miraculously stopped. He too was released. The final prisoner—undoubtedly a recidivist court reformer—was asked his preference, and he also chose face up. But this time as the blade halted inches from his neck, he called out, “Wait a minute—I think I see the problem. We can fix this.” Particularly in court systems, where change is often viewed with skepticism if not downright hostility, that second step can be a killer.

Rather than just agonize and theorize about today’s problems, let me give you three concrete examples of responses. One is in the area of criminal justice, the second the family courts, and the third the jury system—three areas of court operations that touch large numbers of citizens. I should make clear that I describe these experiments not to convince you that we have found the answers, but just the opposite. I describe them in the hope that you will start asking questions like what works, what does not work and why, and at what price—what do we gain and lose when we try to change things?

Criminal Justice

So first let’s look at our criminal courts. The justice system’s handling of criminal matters is a much discussed topic of late. And understandably so: we know the public’s concern with crime. Most often, public discussions center on a particular case or ruling, but this is an area that could benefit from new thinking about systemic outcomes as well.

Take, for example, our handling of nonviolent, quality of life offenses, like shoplifting, illegal street vending, prostitution, and low-level drug possession. These are not the cases you see on Court TV or read about in law reviews, but they profoundly affect how secure people feel at home and on the street, and how confident employers feel about locat-

ing their business in a neighborhood. And when we scrutinize courts' performance in this area, we find that frequently we are recycling the very same people through the system. Most criminal defendants have had a prior brush with the law, and for many it has been a long and substantial association.⁷ That sort of recycling is not good for the courts, the community, or the defendants.

New York City's experience is like many other jurisdictions. Until the early 1960s, a system of local magistrate courts arraigned defendants arrested in the neighborhood and disposed of most lower-level cases on the spot. But these decentralized courts became notorious for inefficiency and corruption.⁸ With the unification of the New York State court system in 1962, large centralized criminal courts—one for each of the City's five boroughs—replaced the local tribunals.

Centralization increased efficiency, but it also had its drawbacks. The courts became less personal, more remote. Justice became something done to someone "downtown," without any particular connection to the community that had been injured by the conduct. As criminal caseloads grew, the more serious matters naturally attracted more of the courts' resources and attention. Faced with a lack of meaningful sentencing options and thousands upon thousands of cases, low-level offenses were often pleaded out with "time served" as the sanction. The process itself became the punishment.⁹

I should make clear that I do not intend this description as a criticism of those dedicated judges and court staff who work on the front lines of the criminal justice system. They struggle to get the best out of the current structure, and their dedication and hard work are the reasons the system operates as well as it does. My point is that we should start asking whether different structures could produce better results for all concerned.

7. In 1993, 40% of the defendants in the New York City Criminal Court had three or more prior misdemeanor convictions. See *Will Justice Play on the Great White Way?*, NEW YORK NEWSDAY, Oct. 8, 1993, at 77. In the first quarter of 1997, approximately 70% of the arrestees brought to the centralized New York City Criminal Courts had a prior arrest history; over 10% had seven or more prior misdemeanor convictions. Data supplied by New York City Criminal Justice Agency.

8. See Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133 (1937).

9. An analysis of a sample of cases from the New York County Criminal Court from October 1993 to September 1994 revealed that almost half (48%) of the case dispositions involved no sanctions or conditions (typically, sentences of "time served," or conditional discharge with no conditions attached). (Data on file with Center for Court Innovation.) See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (examination of functioning of New Haven, Connecticut's Court of Common Pleas).

In New York, we are trying one new model called the Midtown Community Court. Located near Times Square in Manhattan, an area renowned for pervasive quality of life offenses, the Midtown Court seeks to restore individuality and accountability to this high-volume part of the criminal justice system. It seeks to make justice visible and restorative on a local level.

The Midtown Court uses a mix of punishment and treatment to craft a more meaningful intervention than "time served."¹⁰ Defendants convicted in this court—and only those who plead guilty can remain in this court—are generally required to pay back the community by performing community service activities such as removing graffiti, cleaning subway stations, sorting materials for recycling, and stuffing envelopes for non-profit community organizations.¹¹ This sends a message to defendants that even minor offenses do harm that must be repaired. It also lets the community—law abiding and law breaking alike—see its justice system at work, enforcing the law and reinforcing values.

Viewing the purpose as not just case processing but also human problem solving, the Midtown Court uses its legal leverage to direct offenders to services that can help deter future criminal activity. Every defendant—and the single judge assigned to the court hears about 20,000 cases a year—receives a detailed pretrial assessment for such matters as drug abuse, work history, homelessness, and health problems. The information gathered is then used to devise an individualized sentence—community service plus drug treatment for example.

At the Midtown Court, everything is on-line. Court papers, rap sheets, case histories, social service evaluations, and treatment records are all instantly available to the judge, the prosecutor, and the defendant's attorney through terminals located on the bench and on counsels' table. Computers are sometimes seen as further dehumanizing bureaucratic processes, but at the Midtown Court they are a humanizing force. Indeed, the computer helps simulate the type of individualized information about a defendant that one might expect to find in a small town.¹²

10. In the first 18 months of the Midtown Court's operation, 77% of the cases disposed of at arraignment received sentences of community service, social services, or both. MICHELE SVIRIDOFF, ET AL., *DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* 61 (1997).

11. The Midtown Court assigned over 7,300 defendants to 15 community service projects in its first year and a half. These defendants collectively cleared over 1,000 tree pits, removed graffiti from over 250 walls and store fronts, and sorted, stuffed, and labeled over 1,000,000 pieces of mail for local nonprofit organizations. *See id.* at 77, 79.

12. Defendants report their perception that "they know everything about you" in the court. *Id.* at 256. On one of my own visits there, I heard a defendant deny that he had a prior drug problem, but since the judge had the goods on him on-line, his recollection on this point was quickly refreshed.

Preliminary evaluations are promising. Let me just take one example—its effect on prostitution in Midtown Manhattan. The recidivism rates of prostitutes can be truly astounding. In the court's first year of operation, the mean number of prior misdemeanor convictions among those arrested for prostitution offenses was close to thirty.¹³ In the centralized court, sentences of time served did little to disrupt "business as usual" for these defendants, much to the dismay of residents and merchants in the areas where they plied their trade.

The Community Court's broader array and use of sanctioning options, coupled with increased police enforcement efforts, appear to have significantly slowed this revolving door in the Midtown area.¹⁴ In the court's first eighteen months of operation, prostitution arrests dropped by fifty-six percent.¹⁵ The number of hard core recidivists declined dramatically.¹⁶ And most importantly, community members began seeing "a phenomenal effect" on local streets.¹⁷

I have focused here on the nuts-and-bolts of the Midtown Court, but I'm sure you can see the outlines of much broader issues behind it. By zeroing in on nonviolent quality of life offenses, the court is a working laboratory for "broken window" theories of criminal behavior: the idea being that just as one broken window left unrepaired invites more vandalism, so other forms of social disorder left unchecked invite more crime.¹⁸ Above all, the Midtown Court is a collaborative effort, led by the courts, to move theory into practice. That hardly means that all of the work in this area is done. We still need to watch this experiment to see how it plays out in the real world. And we still need to think about

13. Data supplied by Midtown Community Court.

14. In its first 18 months, the Midtown Court reduced by 98% the number of prostitution cases disposed of with no sanctions imposed. *See SVIRIDOFF, supra* note 10, at 163. It ordered four times as many community service and social service sentences as the downtown court. *See id.* at 166. After being repeatedly sentenced to community service in the Midtown Court, several prostitutes reported changing their soliciting behavior because it had become too difficult to work two jobs—one on the streets and one at the courthouse. *See id.* at 194.

15. *See id.* at 200.

16. The mean number of prior misdemeanor convictions has fallen from 28.8 to 17.3; the median number has declined from 8 to 1. Data supplied by Midtown Community Court.

17. SVIRIDOFF, *supra* note 10, at 188. The impact of the court can be seen in the histories of two defendants, sisters, who together had been arrested over 90 times in 15 months. At one point, they had been given jail sentences Downtown for a multitude of open cases. But shortly after their release, they were arrested again. When brought before the Community Court, they were placed in a structured counseling program. After completing the curriculum, they returned voluntarily to work with counseling staff. Within weeks, they called to report they had taken jobs working as exotic dancers in Queens; one has since moved on to waiting tables. Small steps, perhaps, but steps that are at least going in the right direction.

18. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31. *See also* WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990).

whether similar models could further improve our delivery of criminal justice on a larger scale.

Indeed, there are many other court-initiated collaborative experiments going on across the country: Drug Treatment Courts,¹⁹ Domestic Violence Courts,²⁰ Youth Courts with teenagers functioning as counsel, judge, and jury.²¹ All have made progress in improving outcomes and changing behavior, and all raise questions that are worth pondering. Does a court's treatment orientation lead to a dilution of individual rights? Should participation in these innovative courts be optional or mandatory in some instances? How should we measure success? Are the results we are achieving worth the expense? Are there lessons here that would be useful for our larger, centralized courts? Make no mistake, these are new frontiers for criminal justice—we must be cautiously bold (or boldly cautious) as we attempt to chart a deviation from the familiar adversarial model of criminal justice.

Family Justice

Instead of lingering on these questions, I'd like to move on to my second area of focus: the Family Court. Once a neglected stepchild of the court system, the Family Court is now a tribunal no one can afford to ignore. The jurisdiction of the Family Court covers issues that leap off today's front pages: child abuse and neglect, juvenile delinquency, domestic violence, child support and custody. Some of these cases raise issues of heart-wrenching emotion, others gut-wrenching violence. In New York, they represent over twenty percent of all state court filings.

When our Family Court was created only thirty-five years ago, it was designed to be a fresh, new, innovative court. Courts traditionally have a distinct backward orientation:²² they adjudicate facts regarding a

19. See, e.g., James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 93-98 (Winter 1997) (describing Miami and Boston Drug Courts); William D. McCall, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467 (1996).

20. See, e.g., Stephen R. Tatum, *On Starting a Domestic Violence Court*, COURT REVIEW 14 (Summer 1997) (describing the Domestic Violence Court in Johnson County, Kansas); Matthew Goldstein, *Separate Brooklyn Court Part for Domestic Violence Cases*, N.Y.L.J., June 25, 1996, at 1 (describing Domestic Violence Part in Kings County, New York).

21. See Bob Buyer, *Youth Court Pays Benefits to All Involved*, THE BUFFALO NEWS, May 15, 1997, at B5 (describing the Orleans County, New York Youth Court); Tracy Godwin, *Teens Act as Judge and Jury, Administer Justice*, COMMUNITY LINKS, Fall 1997, at 10 (describing a variety of teen court models, with focus on LaPorte County, Indiana).

22. "Judges and lawyers are seldom intuitive futurists, perhaps because they spend much of their professional lives looking backwards, to rules and precedents of sometimes ancient origin. This fact once caused futurist James Dator to observe that the law tends to exercise fore-

past event to determine what consequences should follow. Did the crime occur? Was a contract formed? Was the representation made? What punishment or damages flow from those facts?

The Family Court was designed to look backward—was this child neglected? But then it looks forward. What should we do to protect this child in the future? How can we ensure that the parent will provide adequate care? What is in the best interests of the child? The court's mission is not to punish or to compensate, but to craft an intervention that will change future behavior.

This was a difficult assignment when the court was first created. Today's social realities make it much tougher. Perhaps more than any other court, the outlines of the Family Court docket are etched by the forces of social change—and most especially, in recent years, by crack cocaine.

Before the crack epidemic, child protective matters had been a small percentage of the Family Court's caseload, and those cases typically dealt with lapses in parental supervision or educational neglect.²³ When crack hit the streets of New York City in the early 1980s, the number of neglect filings skyrocketed²⁴ and the quality of the cases changed radically. No longer did cases concern poor housekeeping or parental inattention. Drug addiction and its attendant ills—crime, sickness, total family dysfunction—became the more routine allegations.²⁵

While created with an innovative mission, the Family Court relies upon a traditional adversarial model to process its caseload. Lawyers for the parties present their evidence and arguments, the court adjudicates the issues and enters a dispositional order—most often, in child protective matters, directing that the child protective agency provide services for the family. When that order is entered, the court's involvement in the matter is essentially over.

Crack challenged the model. The flood of children entering the system strained the resources of child protective agencies. The highly

sight through a rear view mirror." Stephen P. Johnson, *Introduction: Planning for the Next Century in the California Courts*, 66 S. CAL. L. REV. 1751, 1752 (1993).

23. See Kathryn McDonald, *Changes in Children's Issues Through the Eyes of Family Court*, N.Y. ST. B.J., May/June 1992, at 40-41.

24. In the last five years of the decade, neglect filings quadrupled. See *id.* at 41. See also Lenore Gittis and Carol Sherman, *Crack/Cocaine, Children and New York City's Family Court*, N.Y. ST. B.J., May/June 1992, at 22. In 1994, three-fourths of the reports of suspected child abuse and neglect in New York City involved substance abusing parents. See THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *SUBSTANCE ABUSE AND URBAN AMERICA: ITS IMPACT ON AN AMERICAN CITY*, NEW YORK 19 (1996) [hereinafter *SUBSTANCE ABUSE AND URBAN AMERICA*].

25. For a moving description of the impact of drug addiction on a New York family and the experiences of three generations of children in foster care, see SUSAN SHEEHAN, *LIFE FOR ME AIN'T BEEN NO CRYSTAL STAIR* (1993).

addictive nature of crack demanded intensive services, yet gaps in service delivery and case supervision were rampant. As a result, more children entered foster care,²⁶ more stayed longer,²⁷ and more saw adoption as their only hope of a permanent home.²⁸ The Family Court thus also found itself engaged in human recycling—placing a child born with a positive toxicology for cocaine in foster care one year, followed by another “positive tox” sibling placed in care the next.²⁹

Of course, the problem of drug addiction is not limited to the family courts. It also drives much of the business of our criminal courts.³⁰ Across the country, many jurisdictions, including New York and California, are experimenting with Drug Treatment Courts to address the problem of criminal recidivism fueled by substance abuse. These courts, like the Family Court, have a distinct forward-orientation. They adjudicate the facts of the crime, but their main focus is the future: getting these defendants off drugs so they can stay out of the criminal justice system’s revolving door. Their main tool is rigorous judicial monitoring of defendants’ participation in court-ordered drug treatment.

The criminal Drug Treatment Courts have taught us that courts can influence addicts’ behavior through swift, consistent rewards and sanctions during the treatment process.³¹ In New York, we are now asking whether this insight can be applied to the problem of substance-abusing parents, so that their children can be released more quickly from foster

26. Between 1985 and 1991, the number of New York City children in foster care tripled, from 17,000 to 50,000. See *SUBSTANCE ABUSE AND URBAN AMERICA*, *supra* note 24, at 20.

27. In 1986, the average length of stay in foster care for New York City children was 1.81 years. Today, it is 4.5 years. See *ADMIN. FOR CHILDREN’S SERVICES, CITY OF N.Y., PROTECTING THE CHILDREN OF NEW YORK: A PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN’S SERVICES* 61, 122 (1996).

28. In 1992, 29.3% of New York City’s foster children had a case plan goal of adoption. By 1996, that figure had increased to 43.3%. During this time period, the number of children leaving the system due to adoption more than doubled. See John Courtney, et al., *Keeping Track*, *CHILD WELFARE WATCH*, Spring 1997, at 7.

29. “Now sitting at the bench, I take a quick look at the neglect allegations against the mother in this case. The case involves an ‘afterborn’ child born ‘positive tox’ to a crack addict. This means there is at least one prior neglect case against this mother and that the new baby tested positive for cocaine in his system at birth. In fact, this baby is the mother’s third in a row to be born positive tox within five years. The mother is twenty-two years old.” RICHARD ROSS, *A DAY IN PART 15: LAW & ORDER IN FAMILY COURT* 53.(1997) (describing child neglect case from typical day in Bronx Family Court).

30. In 1995, law enforcement agencies nationwide made an estimated 1.5 million arrests for drug law violations. See *FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES* 207 (1996). In New York State, drug charges accounted for 42% of all felony indictments filed in 1995. See *NEW YORK ST. UNIFIED CT. SYS., CRIMINAL JUSTICE PROGRAM* 25 (1996).

31. See, e.g., Gary Craig, *Alternative Justice*, *EMPIRE STATE REPORT* Jan. 1996, at 41, 44; Jennifer Gonnerman, *Justice for Junkies*, *VILLAGE VOICE*, June 3, 1997, at 50.

care limbo to permanency, either with biological parents or with adoptive parents.

We are developing pilot programs to test this insight. Taking a page from the criminal Drug Treatment Courts, our proposed Family Treatment program changes the current Family Court case processing model by focusing the court's attention not on formal legal issues, but on the parent's progress in drug treatment during a fixed, finite period of time. Not unlike the Midtown Community Court, participation in the Family Treatment program will be limited to parents who admit to the allegation of neglect due to drug abuse. Their service needs will be assessed and commenced from the beginning of the case, not as they are walking out the courthouse door. Nor will entry of a dispositional order end this court's involvement. Rather, the court will continue to monitor the parent's compliance, ensuring that the children either are returned home or accorded alternate permanent arrangements made on a schedule that reflects a child's sense of time, not the administrative imperatives of an overburdened child welfare system.

These changes are more than just procedural. They signal that the court is no longer a remote adjudicator but is heading a problem-solving team. The problem solving is on two levels. In any particular case, the court will be asking what do we do to get this particular parent off drugs. But on a larger scale, the court will be taking a leadership role in seeing that all the players—from Medicaid eligibility specialists to private foster care agencies to drug treatment providers to child welfare agency case-workers—work together so that the system as a whole functions as well as it can.

We are just in the planning stages for this project, so we are painfully aware of the practical and theoretical questions that surround it. How do we devise effective yet non-punitive sanctions in these civil proceedings? What are the limits of a court as a therapeutic agent? At what point do we cease being a court of law and become a social service agency? With the spotlight on treatment of parents, will the best interests of the children be put at risk? And again, how should we measure success? Plainly, there is a lot of critical thinking to be done. The issues confronting us today are simply too important to assume that traditional, established structures are ideal, or indeed even adequate to the task.

The Jury System

My third and final example of changing courts in changing times is jury reform. This example is driven not by the modern-day problems of dysfunctional communities and families but by the expectations that today's citizens have about their relationship to governmental institutions. While the motivation may be different, the challenge to courts and

lawyers is the very same: to look at our operations from the perspective of the public we are trying to serve, to stand in the shoes of the people we impact and ask whether we can do better. A top-to-bottom review suggests plenty of room for improvement—from our treatment of jurors to the rules that govern the substance of their participation in the trial process.

Each year the New York State courts summon close to half a million citizens to jury duty. Imagine, half a million opportunities to show the public firsthand that the system really does work. We all know the clichés about the value of the jury system—it is the bulwark of our personal liberties, a cherished safeguard against tyranny, democracy in action. But when you stripped away the rhetoric, you found that most citizens actually rated their jury duty experience somewhere between a tax audit and a root canal.

And why shouldn't they? Courts have tended to run their jury systems with an eye to the convenience of judges and lawyers, not the citizens being called to serve. In New York, we summoned jurors using methods that were easy to administer but eminently unfair.³² We required citizens to report for two weeks, spending most of their time sitting around in dilapidated jury rooms, or worse, cooling their heels in courthouse corridors, and paid them next to nothing for this dubious privilege. We gave jurors little information about what was going on and sought little feedback about what they thought about the process.

Was there a problem with this picture? You bet there was. First of all, it's just wrong for a branch of government to treat anyone that way, and especially anyone that it asks to perform an important task. Not surprisingly, many citizens expressed their opinion about the system by just tossing their summonses, which increased the burdens on those who did show up, and in some cases brought the system to a grinding halt.³³

In the long run, heedless treatment of jurors undermines the ultimate source of the courts' power and authority—the public's trust and confidence. For many citizens, jury duty is their only opportunity to see firsthand how their legal system operates. Very few of the millions called

32. Until recently, 61 of New York State's 62 counties summoned jurors from "Permanent Qualified Lists." Under this system, counties would develop a list of qualified jurors roughly equivalent to the number of jurors needed for their jury summoning cycle. This list would then become the permanent basis for summoning, with new names added only when a person on the list died, moved away, or became disqualified. People on the list would be summoned repeatedly; those not on the list would never be called.

33. See J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L. J. 1433, 1445 (1996) (reporting that "the public is rendering its own judgment [on the jury system] by refusing to show up for jury duty when called" and noting that felony trials in several large California counties have been delayed because of an inability to provide sufficient jurors for the courtroom when needed).

had a kind word to say about us after they completed their service, let alone a sense of trust and respect for the "Least Dangerous Branch."

In New York, we've made a fair amount of progress over the past several years.³⁴ We've changed our summoning methods, expanded our master jury list,³⁵ and abolished all of our occupational exemptions.³⁶ Now everyone must serve: doctors and lawyers, police officers and fire-fighters—oh yes, and chief judges too.³⁷ We have reduced our terms of service to one day or one trial in fifty-eight of the sixty-two counties in the State. We've spruced up jury rooms, increased compensation to \$40 a day, conducted "public awareness" training for our personnel, set up a juror hotline, experimented with an ombudsman service, and will shortly have a regular juror newsletter. And we're using cutting-edge technology, like the telephone, to minimize the time jurors waste waiting to perform their civic duty.

So far, most of our reform efforts have focused on what happens from the time citizens receive their summonses until they are seated in the jury box. Achieving those reforms was no mean feat, believe me, but the next step—examining what happens to jurors once the voir dire commences—is even more daunting. Because the next phase affects not just jury administrators and court clerks but also lawyers and judges. Here we are not talking about changing administrative procedures but challenging the legal culture—seeking to change entrenched habits of people we cannot hire or fire.

34. The basic blueprint for our efforts was a marvelous report, *THE JURY PROJECT: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* (1994). For an interim account on our achievements, see *NEW YORK ST. UNIFIED CT. SYS., JURY REFORM IN NEW YORK STATE: A PROGRESS REPORT ON A CONTINUING INITIATIVE* (1996). Other states have also undertaken comprehensive examinations of their jury systems. See, e.g., *JURORS: THE POWER OF 12: REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES* (1994); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L. J. 1433 (1996) (report of commission created by Judicial Council of California).

35. New York currently compiles its master list from five "source lists": voter registration, driver's licenses, state income tax, unemployment, and public assistance rosters. See N.Y. JUD. LAW § 506 (McKinney Supp. 1997).

36. Until January of 1996, New York had the dubious distinction of having the longest list of automatic jury exemptions in the United States. The list, which ran to over 20 callings—including prosthetists and embalmers—was repealed by Chapter 86 of the Laws of 1995. 1995 N.Y. Laws ch. 86.

37. See Janny Scott, *Line of Work, Ma'am? Chief Judge*, THE NEW YORK TIMES, Aug. 16, 1996, at B3 (describing my jury service in New York County Supreme Court). Of course, I am not the only chief judge to spend time in the jury box. See, e.g., Ann O'Neill, *The Court Files: Jury Duty Shows Judge How Other Half Lives*, LOS ANGELES TIMES, July 28, 1997, at B9 (describing jury service of California Chief Justice Ronald George in Beverly Hills Municipal Court); Shirley S. Abrahamson, *A View from the Other Side of the Bench*, 69 MARQ. L. REV. 463 (1986) (describing Wisconsin Chief Justice Shirley S. Abrahamson's jury service).

But let's look at the experience from the juror's perspective. Imagine showing up for the first day of a required course, which you are told will last for at least several days.³⁸ The class will be taught by a number of different professors and will involve a subject you know nothing about. In fact, if you do know anything about it, you will be excused. Each of the teachers will give you loads of relevant, and some irrelevant, information. Accurate recall of their lectures will be essential for the final exam. However, you will not be told what is relevant until the end of the course, just before the final. By the way, notetaking is forbidden in this class. Nor may you ask questions, no matter how confusing the presentations may be. Now you see why the class has to be mandatory—no one in their right mind would elect it.

More substantive jury reform—notetaking, question-asking, deliberating alternates, reduction or elimination of peremptory challenges, less-than-unanimous criminal verdicts—again raise a host of issues worth debating.³⁹ Do we dare loosen the bonds of the adversarial system, where lawyers and judges strictly control all information presented? Should jury trials be more focused on searching for the truth or protecting individual rights? Here again, I exercise my prerogative as a judge to pose questions without answering them. Without doubt there is a problem today. And now fully armed with the example of the court reformer facing the guillotine, I invite you to join us in the delicate task of balancing change and tradition, form and substance, in fashioning constructive solutions.

Conclusion

I have described just three areas where it may be useful to think about changing courts in changing times. While the subject areas may be disparate, the underlying approach is the same: paying attention not just to the fairness of the rules and procedures but also to the effectiveness of the outcomes. This involves examining operations, not just from the perspective of the providers but also from the consumers of court services. And mainly, it involves just being willing to ask: is there a different, better way to do this?

I view this area as one of the major challenges for courts and practicing lawyers today. I hope I have convinced you that it stands as a major challenge also for law students and professors, who by their criti-

38. A similar hypothetical was posited in a 1996 conference entitled "Jury Reform: The Jury Trial as an Educational Process," sponsored by the Superior Court of Arizona Trial Court Leadership Center. See also Robert D. Myers and Gordon M. Griller, *Educating Jurors Means Better Trials: Jury Reform in Arizona*, THE JUDGE'S JOURNAL, Fall 1997, at 13.

39. For one thoughtful perspective, see B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

cal analysis have so effectively enlarged the frontiers of the law.⁴⁰ There is much discussion in the literature today about the role of legal scholarship—its proper purpose, subjects, audience, even its vocabulary.⁴¹ Let me suggest that studying the actual day-to-day operation of our courts and helping us to imagine new and better models is an area that can be both intellectually challenging and socially important.

As Justice Tobriner recognized twenty-five years ago, a court system needs young lawyers from every quarter to be the advocates of change so it can remain viable and responsive in the face of rapidly shifting mores. What do you need to get started in this field? A commitment to the ideal of justice, a willingness to spend some time in the real world, and a vision of how we can bring the real and ideal closer together. And maybe one other trait. Arthur T. Vanderbilt, the dean of my own alma mater and a champion for changing courts in changing times, once observed that "judicial reform is no sport for the short-winded."⁴² If nothing else, I am sure my remarks today will convince you that I am aerobically qualified for this job. I urge you to start training now—because while my remarks are concluded, the last word on the topic is nowhere near.

40. See generally Ruth Bader Ginsburg, *On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829 (1997).

41. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 MICH. L. REV. 2075 (1993); Edward L. Rubin, *Commentary: The New Legal Process, the Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

42. ARTHUR T. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* at xix (1949).