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## *BRENNAN LECTURE*

### THE NEW ROLE OF STATE SUPREME COURTS AS ENGINES OF COURT REFORM

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*In this speech delivered for the annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, the Honorable Randall T. Shepard examines the growing role of state supreme courts in remaking the American system of justice. The vast size of the state court system, the flexibility of state rulemaking authority, and recent changes in the way state courts are financed have placed these high courts at the forefront of efforts to administer and reform their states' court systems. Chief Justice Shepard explores three major areas of court reform led by state supreme courts. First, state high courts have reformed the American jury by making it more inclusive and representative, and by improving its decisionmaking capabilities. Second, these courts have implemented new initiatives to ensure equal access to justice by providing legal assistance to low-income individuals in civil cases, creating pro bono programs, and assisting pro se litigants. Third, state supreme courts have fostered equal opportunity by addressing bias and disparate treatment within the court system, and by working to ensure that the legal profession itself is open to all people. Finally, Chief Justice Shepard describes a range of other ways in which state supreme courts have been remaking their states' court systems, from creating specialized courts to training judges in the sciences. In a profession that is fond of tradition and slow to change, many of these reforms could only proceed with leadership from state high courts.*

#### INTRODUCTION

When people inside or outside the legal profession give thought to appellate courts, they summon up roughly the same mental list of tasks those institutions perform: deciding appeals, writing opinions,

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and shaping the law and doctrines by which the legal system affects society. This list is a respectable one for state intermediate courts and federal courts of appeal, but for state supreme courts it overlooks a growing role that has largely escaped analysis: their role in remaking the American court system itself.

Practicing lawyers see the country's appellate courts through two prisms: procedural and jurisprudential. Litigators, of course, feel keenly the extent to which rules adopted by the highest federal and state courts govern the manner in which cases proceed from the very moment they become filed cases, or sometimes even before that moment. Transactional lawyers (and litigators, too) track closely the jurisprudential output of such courts, relying on the steady flow of case law to inform their advice to clients and shape the transactions that are the stuff of their regular work.

As for the academy, while it is common for state judges to lament that law faculties lack interest in state court work, the fact is that state court opinions play a leading role in the writing and teaching that occurs in the nation's law schools. Modern legal education is an exercise that begins with structured teaching of formal doctrine. This was, after all, a central objective of the profession's nineteenth-century transition from training new lawyers in law offices to training them in university classrooms.<sup>1</sup> The recent emphasis on skills education has not altered this feature of the experience aspiring lawyers undergo. The first year of legal education still looks remarkably like Blackstone's *Commentaries*;<sup>2</sup> it is an enterprise by which we lead the novitiates through common-law topics like torts and contracts. In these fields, the opinions of state courts continue to be common fodder for training first-year students to "think like lawyers." Beyond the first-year curriculum, there are a host of upper-level courses in which the substantive topics focus largely on state-crafted legal doctrine, courses like medical malpractice, choice of law, professional responsibility, and criminal law.<sup>3</sup> The high visibility of niche scholar-

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<sup>1</sup> See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979); Randall T. Shepard, *Classrooms, Clinics, and Client Counseling*, 18 OHIO N.U. L. REV. 751 (1992).

<sup>2</sup> Blackstone divided his *Commentaries* into four books: (1) The Rights of Persons; (2) The Rights of Things; (3) Private Wrongs; and (4) Public Wrongs. WILLIAM BLACKSTONE, *COMMENTARIES*.

<sup>3</sup> Indeed, scholars have noted the fundamental importance of state law in a variety of contexts, including constitutional and criminal law. See Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 218 (1992) (discussing state-crafted decisions concerning criminal law); Hans A. Linde, *E-Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 172 (1984) (asserting that most criminal law is governed by state statutes and common law); Hans A. Linde, *First Things First: Rediscovering the*

ship, in which law scholars tease out doctrinal developments in particularly complicated puzzles, distracts all of us from this central role of state court jurisprudence. Thus, even state appellate judges lose sight of the fact that their intellectual product is very much in front of the nation's law teachers in their daily work.

There are, of course, moments when state legal doctrine occupies center stage in the public mind. As Chief Judge Judith Kaye observed in the very first lecture in this series, "[t]oday's state court dockets comprise the battlefields of first resort in social revolutions of a distinctly modern vintage."<sup>4</sup> The decisions of the Massachusetts Supreme Judicial Court and the Vermont Supreme Court on gay marriage and civil unions are prime examples.<sup>5</sup> At such moments, state court decisions quickly become fodder for the national press corps, matters of presidential interest,<sup>6</sup> and the topic of constitutional referenda.<sup>7</sup>

If anything, the brightness of such klieg-light events has tended to obscure the vast changes in the work of each supreme court as the "board of directors" for managing the judicial system in its state. A series of changes over recent decades has dramatically altered the job description of these courts. I highlight here three important aspects of this alteration because they represent substantial differences between state and federal courts.

First, it is difficult to overstate the simple vastness of the state court system. When Alexis de Tocqueville visited America in the 1830s, he was especially intrigued by the fact that law and courts

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*States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392-93 (1980) (suggesting that if more constitutional law courses were constructed with reference to state-law issues, new lawyers would be more likely to pay attention to state constitutions); Randall T. Shepard, *A Bill of Rights for the Whole Nation*, 26 VAL. U. L. REV. 27 (1992) (reviewing history of relationship between federal and state constitutions and exhorting lawyers to engage in state constitutional litigation).

<sup>4</sup> Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 4 (1995) (providing examples of state court cases deciding controversial issues of public concern).

<sup>5</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding denial of civil marriage to same-sex couples impermissible under state constitution); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (finding "constitutional obligation" to extend marriage benefits to same-sex couples under state constitution).

<sup>6</sup> See, e.g., Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASH. POST, Feb. 25, 2004, at A1 (describing President's call for constitutional amendment banning same-sex marriage in response to decision by Massachusetts Supreme Judicial Court).

<sup>7</sup> Altogether, thirteen states had referenda regarding same-sex marriage in the 2004 election cycle. See David S. Broder, *Hot Issues Go Directly to State Voters*, WASH. POST, Sept. 18, 2004, at A1; Alan Cooperman & Thomas B. Edsall, *Evangelicals Say They Led Charge for the GOP*, WASH. POST, Nov. 8, 2004, at A1.

seemed to occupy or affect virtually every corner of American life. The “legal spirit,” he wrote, “infiltrates all of society” such that “in the end all the people acquire some of the habits and tastes of the magistrate.”<sup>8</sup> Modern society has an abundance of professional magistrates. There are nearly 30,000 state trial judges,<sup>9</sup> sitting in more than 3000 courthouses.<sup>10</sup> Over 100 million cases are filed each year in state courts.<sup>11</sup> Obviously, these numbers dwarf the size of the federal system, which receives about two million cases a year.<sup>12</sup> In fact, there are a fair number of states whose court systems, standing alone, exceed the size of the federal system.<sup>13</sup> The sheer size of these enterprises has compelled state high courts to become effective managers—and reformers—of their court systems.

Second, recent transformations in the way states finance court operations have altered the role of supreme courts. There was a time

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<sup>8</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 310–11 (Arthur Goldhammer trans., The Library of America 2004) (1835). Tocqueville more completely described the relationship between Americans and the law as follows:

There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question. Hence the parties in their daily polemics find themselves obliged to borrow the ideas and language of the courts. Since most public men either were or are lawyers, it is only natural for them to bring their professional habits and ways of thinking to their dealing with the public's business. Jury duty makes people of all classes familiar with legal ways. In a sense, the language of the judiciary becomes the vulgar tongue. Thus the legal spirit, born in law schools and courtrooms, gradually spreads beyond their walls. It infiltrates all of society, as it were, filtering down to the lowest ranks, with the result that in the end all the people acquire some of the habits and tastes of the magistrate.

. . . [I]t envelops the whole of society, worms its way into each of the constituent classes, works on society in secret, influences it constantly without its knowledge, and in the end shapes it to its own desires.

*Id.*

<sup>9</sup> COURT STATISTICS PROJECT, *EXAMINING THE WORK OF STATE COURTS*, 2004, at 16 (Richard Y. Schauffler et al. eds., 2005), available at [http://www.ncsconline.org/D\\_Research/csp/2004\\_Files/EW2004\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/2004_Files/EW2004_Main_Page.html) [hereinafter *EXAMINING STATE COURTS*] (charting number of state trial judges from 1994 to 2003).

<sup>10</sup> U.S. CENSUS BUREAU, *2002 CENSUS OF GOVERNMENTS: VOL. 1, NO. 1, GOVERNMENT ORGANIZATION 4* (2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf> (listing number of county governments, which roughly corresponds to number of courthouses).

<sup>11</sup> *EXAMINING STATE COURTS*, *supra* note 9, at 13–14 (charting number of state court cases from 1994 to 2003).

<sup>12</sup> ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS 11* (2005), available at <http://www.uscourts.gov/judbus2005/contents.html> [hereinafter *JUDICIAL BUSINESS*] (listing combined criminal, civil, and bankruptcy filings for twelve-month period ending September 30, 2005 at over 2.1 million, which was slightly inflated by record number of bankruptcy filings as debtors scrambled to initiate process before major reforms took effect).

<sup>13</sup> *EXAMINING STATE COURTS*, *supra* note 9, at 22, 32, 42 (totaling civil, domestic relations, and criminal cases in each of the fifty states).

when the financial and management structures of state courts typically featured appellate courts with minimal staffs and budgets financed through state revenue, and trial courts on a much larger scale financed through the revenues of county governments.<sup>14</sup> Under this arrangement, a state supreme court's daily diet was appellate adjudication, and the exertion required for court administration was minimal. During the last few decades, there has been a strong trend toward "unification," through which the legislature undertakes to finance all of a state's courts. Recent examples of this trend include the court systems of Minnesota, Iowa, Kentucky, and, most dramatically, California.<sup>15</sup> Unification has dramatically increased the amount of time state supreme courts spend on court administration, prompting the creation of substantial offices for state court administration, and various training and educational enterprises to support effective court operation.<sup>16</sup> It has also placed state high court judges, particularly chief justices, at the very center of efforts to design or redesign the operation of trial courts.

Third, the rulemaking authority possessed by many state supreme courts authorizes quicker action across a broader range of subjects than is authorized in the federal system. The Federal Rules Enabling Act compels resort to elaborate machinery and confines the areas in

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<sup>14</sup> See ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES* 34–37 (1996), available at [http://www.ncsconline.org/WC/Publications/KIS\\_FundCtFundingtheStCts.pdf](http://www.ncsconline.org/WC/Publications/KIS_FundCtFundingtheStCts.pdf) [hereinafter *FUNDING STATE COURTS*] (describing trend toward state financing through 1980s).

<sup>15</sup> See generally SUSAN M. BYRNES, *STATE FUNDING OF TRIAL COURTS: MINNESOTA'S TRANSITIONAL EXPERIENCE* (2004), available at [http://www.ncsconline.org/D\\_ICM/ResearchPapers2004/Byrnes,Susan.pdf](http://www.ncsconline.org/D_ICM/ResearchPapers2004/Byrnes,Susan.pdf) (describing and evaluating Minnesota's transition to state financing); *FUNDING STATE COURTS*, *supra* note 14, at 35 n.23 (noting that Kentucky was one of thirteen states to adopt state funding of trial courts as early as 1970s); ROBERT W. TOBIN & BRIAN LYNCH, NAT'L CTR. FOR STATE COURTS, *CASE STUDY OF EFFECTS OF STATE FINANCING OF TRIAL COURTS: CALIFORNIA 1* (1990), available at [http://www.ncsconline.org/WC/Publications/KIS\\_FundCtStfinTrCtsCalif.pdf](http://www.ncsconline.org/WC/Publications/KIS_FundCtStfinTrCtsCalif.pdf) (discussing effects of California's block-grant approach to funding state courts in contrast with system of direct financing); ROBERT W. TOBIN & BRIAN LYNCH, NAT'L CTR. FOR STATE COURTS, *CASE STUDY OF EFFECTS OF STATE FINANCING OF TRIAL COURTS: IOWA 2* (1990), available at [http://www.ncsconline.org/WC/Publications/KIS\\_FundCtStfinTrCtsIowa.pdf](http://www.ncsconline.org/WC/Publications/KIS_FundCtStfinTrCtsIowa.pdf) (noting that "[s]tate court financing [in Iowa] is generally considered to have been completed on July 1, 1986").

<sup>16</sup> The leader in providing such education and assistance to courts is the Institute of Court Management (ICM). Formed in 1970, and later merged with the National Center for State Courts, the ICM provides a range of educational programs designed to train and assist judges and court staffs in nearly every facet of court administration. Its work has helped courts around the country become more efficient and better serve the needs of the public. Most importantly, through its educational programs, the organization has shaped many of the administrative reforms currently underway in the United States. See ICM Mission, [http://www.ncsconline.org/D\\_ICM/icmaboutus.html](http://www.ncsconline.org/D_ICM/icmaboutus.html) (last visited Sept. 15, 2006).

which the U.S. Supreme Court may act.<sup>17</sup> All of the procedural rules of the Supreme Court are subject to veto by Congress, and the Court may act in some fields only when Congress gives specific approval.<sup>18</sup> While the rulemaking power of state courts varies, there are a substantial number of states in which the authority of the supreme court is plenary.<sup>19</sup> Such authority has allowed many state courts to go beyond traditional rules of procedure and employ other rules of superintendence as effective methods of system reform.<sup>20</sup>

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<sup>17</sup> See generally Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2000); 1 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §§ 1.01–.06 (3d ed. 2006); Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 328–33 (1991). To be adopted, a proposed federal rule must first be considered by one of the five advisory committees that assist the Committee on Rules of Practice and Procedure (the "Standing Committee"). MOORE, *supra*, § 1.04[3][b]. After the relevant advisory committee has reviewed the proposal and approved the rule change, a draft amendment is submitted to the Standing Committee for approval. *Id.* Once approved, the draft of the proposed amendment is submitted to the public for a six-month period of comment that includes public hearings. *Id.* At the conclusion of the comment period, the advisory committee reviews the comments and, if it still approves, prepares a report and forwards the amendment to the Standing Committee. *Id.* If the Standing Committee approves, it sends the proposed change to the Judicial Conference where it is again reviewed, and, if approved, sent to the Supreme Court. *Id.* If the Court adopts the rule, it must forward the proposal to Congress prior to May 1 of the year in which the amendment is to take effect. *Id.* § 1.04[3][a]. Congress then has seven months to enact legislation rejecting, modifying, or deferring the rule. If Congress does not do so by December 1, the rule takes immediate effect. *Id.* But see *infra* note 18.

<sup>18</sup> Congress is provided with at least a seven-month window in which to review the proposed amendment. During that time, Congress may enact legislation affecting the rule, but if it does not do so, the rule becomes effective beginning on December 1 of that year. See *supra* note 17.

One statutory exception to this rule is 28 U.S.C. § 2074(b), which provides: "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This provision is a holdover from the turmoil raised during the adoption of the Federal Rules of Evidence: Although the Court proposed adoption of the Rules in 1972, Congress delayed their implementation until 1975, when a version substantially revised by Congress became effective.

Other similar exceptions exist, most notably when a rule affects the substantive rights, rather than merely the procedural rights, of a party. 28 U.S.C. § 2072(b). This would occur if, for example, a proposed rule created or eliminated a cause of action, rather than modifying how a party seeks redress for an established wrong. Again, such a rule would not become effective without Congress's explicit approval.

Congress can also change the rules through direct legislation. A noteworthy example is the addition of Rules 412–415 to the Federal Rules of Evidence in 1994, when Congress added the provisions permitting the admission of evidence of prior offenses in molestation and sexual assault cases despite strong opposition from the Judicial Conference. See MOORE, *supra* note 17, § 1.05; Baker, *supra* note 17, at 331–33.

<sup>19</sup> See JESSICA COOK, NAT'L CTR. FOR STATE COURTS, THE RULE MAKING AUTHORITY OF COURTS OF LAST RESORT BY SPECIFIC AREAS (2003), available at [http://www.ncsconline.org/WC/Publications/KIS\\_RuleAdSCO98Table14.pdf](http://www.ncsconline.org/WC/Publications/KIS_RuleAdSCO98Table14.pdf) (tabulating authority of each state's highest court in specific areas of rulemaking).

<sup>20</sup> In Indiana, for example, we have formulated and adopted Child Support Guidelines and Parenting Time Guidelines in an effort to streamline the otherwise difficult and time-

This brings me to identifying some of the primary ways in which state supreme courts have led efforts to remake the American system of justice.

## I

### REFORMING THE AMERICAN JURY

I begin with a field in which Chief Judge Judith Kaye has been so prominent: jury reform. It is a venue in which the difference between writing doctrine and reforming systems comes into plain relief.

For those who follow doctrine closely, the most interesting cases about juries in recent decades have been the series beginning with *Batson v. Kentucky*.<sup>21</sup> In *Batson*, the U.S. Supreme Court overruled *Swain v. Alabama*<sup>22</sup> to hold that a criminal defendant could challenge the racially discriminatory use of peremptory strikes from jury panels without needing to prove a general pattern of discrimination in the jurisdiction.<sup>23</sup> There followed after *Batson* a predictable march of decisions that eventually ran all the way to holding that a peremptory

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consuming process of establishing support payments and resolving custody issues. See Indiana Child Support Rules and Guidelines, Guideline 1, IND. CODE ANN. tit. 34, app. 4 (West 2003), available at [http://www.in.gov/judiciary/rules/child\\_support/child\\_support.pdf](http://www.in.gov/judiciary/rules/child_support/child_support.pdf) (adopting "Income Shares Model" for child support payments "predicated on the concept that the child should receive the same proportion of parental income that he or she would have received if the parents lived together," and including payment schedules for calculating specific payments); Indiana Parenting Time Guidelines, Preamble, IND. CODE ANN. tit. 34, app. 4 (West 2003), available at [http://www.tippecanoe.in.gov/egov/docs/1124907434\\_694854.pdf](http://www.tippecanoe.in.gov/egov/docs/1124907434_694854.pdf) (adopting specific provisions for child custody schedules at various stages of child development, based on premise that "it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent"). With uniform guidelines throughout the state, litigants can better predict the outcome even before they go to court, which hopefully reduces the burden on the court system by fostering settlement and extra-court resolution of highly contentious issues.

Other states have adopted similar rules. Ohio, for instance, has adopted extensive rules governing the process of acquiring and enforcing civil protection orders in domestic violence cases. See OHIO R. CT. tit. IX, R. 75, available at <http://www.sconet.state.oh.us/Rules/civil/CivilProcedure.pdf>; see also General Information About Domestic Violence Protection Orders, <http://www.sconet.state.oh.us/rules/superintendence/form1001a-j.pdf> (last visited Sept. 15, 2006).

<sup>21</sup> 476 U.S. 79 (1986).

<sup>22</sup> 380 U.S. 202 (1965) (holding that defendant must show prosecutor's "systematic" discriminatory use of peremptory challenges over time).

<sup>23</sup> *Batson*, 476 U.S. at 85–86, 93–95. The mention of *Swain v. Alabama* leads to the interesting question: Where would the Warren/Brennan Court have been without Alabama as a regular foil? See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969) (holding that consent to guilty plea may not be inferred from silence); *Coleman v. Alabama*, 389 U.S. 22 (1967) (per curiam) (holding that uncontroverted testimony that African Americans were systematically excluded from grand and petit juries, alone, establishes denial of equal protection and requires reversal of conviction); *NAACP v. Alabama*, 377 U.S. 288 (1964) (holding that compelled disclosure of NAACP's membership lists would suppress legal association in violation of Due Process Clause of Fourteenth Amendment); N.Y. Times Co.

strike by a criminal defendant's publicly appointed lawyer constituted "state action" subject to the Fourteenth Amendment,<sup>24</sup> and that more recently prompted litigation exploring which of various other classes in the population (like religious groups) might make out similar challenges.<sup>25</sup>

All of this doctrinal development, as interesting a ride as it has been, has focused on a narrow aspect of the American jury: the use of discriminatory strikes during voir dire. Trial by jury, however, long needed a thorough and broad examination, and a good housecleaning. What Dean Roscoe Pound called the profession's "instinct . . . to scrutinize with suspicion all projects to reform"<sup>26</sup> was especially acute when it came to a topic as iconic as trial by jury.

Two state high courts led the way in jury reform during the early 1990s: Arizona and New York. The judicial leadership in these states launched comprehensive and public examinations of a host of practices with which judges and lawyers had become all too comfortable. Breaking out of this contentment, commissions on jury reform in these states tackled a long list of deficiencies and devised solutions that were so obviously correct that they commanded immediate adoption. Juries were too white; the reformers developed better lists for summoning the venire to assure a representative pool.<sup>27</sup> Legislatures had exempted whole classes of citizens from serving; reformers waged war against these exemptions.<sup>28</sup> We treated jurors like children by prohibiting note-taking, banning presubmission discussions, and barring questions to witnesses; the reformers abolished these roadblocks to sensible decisionmaking.<sup>29</sup> We lost substantial time and money from mistrials after juries deadlocked; reformers developed practices under which the court invited deadlocked jurors to describe their dilemma and gave counsel a chance to speak to the jury about it.<sup>30</sup>

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v. Sullivan, 376 U.S. 254 (1964) (holding that claim of libel against Alabama public official requires showing of "actual malice").

<sup>24</sup> Georgia v. McCollum, 505 U.S. 42 (1992).

<sup>25</sup> See, e.g., Highler v. State, 834 N.E.2d 182, 197 (Ind. Ct. App. 2005) (extending Batson to prohibit peremptory challenges based on potential juror's religion).

<sup>26</sup> Roscoe Pound, *The Crisis in American Law*, 10 J. AM. JUDICATURE SOC'Y 5, 10 (1926).

<sup>27</sup> B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 284 (1996).

<sup>28</sup> Elissa Kraus, *Jury Trial Innovations in New York State*, N.Y. ST. B.J., May 2005, at 22, available at [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Bar\\_Journal/Bar\\_Journal\\_Archive/2005\\_Archive/journalmay05krauss.pdf](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Bar_Journal_Archive/2005_Archive/journalmay05krauss.pdf).

<sup>29</sup> Dann & Logan, *supra* note 27, at 281–83.

<sup>30</sup> A study by the Arizona court system indicates a substantial reduction in mistrials as a result. See PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? 37 (2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuries\\_ProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuries_ProblemPub.pdf) (noting that single-count jury trials in Maricopa County, Arizona result in



The leadership of Arizona and New York prompted jury reform initiatives in more than half the states.<sup>31</sup> These reforms have been very well received by the press, and they have produced several positive by-products, including an increased response rate for citizens who are summoned to jury service.<sup>32</sup>

We lawyers being naturally conservative folk, these efforts could only proceed with leadership from the state high courts. Once the leadership set these campaigns in motion, citizen groups, the press, and the profession as a whole found common ground on which to burnish anew the crown jewel of America's legal system—trial by jury.

## II

### ASSURING EQUAL ACCESS TO JUSTICE

Even in the post-Reagan era, when most public officials feel compelled to declare a belief in smaller government, the modern bureaucratic state insinuates itself into the crevices of life in ways Tocqueville could not have imagined. One result of this expansion is a large number of people who need legal help but cannot afford a lawyer.

The notion that our society should provide a lawyer at public expense to a poor person charged with a crime is well established, deriving from state court decisions at least as far back as 1854<sup>33</sup> and from the 1963 decision by the U.S. Supreme Court in *Gideon v. Wainwright*.<sup>34</sup> Public knowledge of this guarantee is nearly universal, not because of state court decisions or because of *Gideon*, but rather because so many Americans watch police and detective shows on television, where they hear this rule recited endlessly thanks to *Miranda v. Arizona*.<sup>35</sup>

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hung juries only 2.7% of time; in multiple-count trials, only 3.7% of time); Dann & Logan, *supra* note 27, at 283 (describing Arizona's approach to breaking jury deadlocks).

<sup>31</sup> A review of those states' jury reform programs shows that significant credit is due to Arizona and New York for their forward-thinking efforts. See National Center for State Courts, CourtTopics Knowledge and Information Services, Jury Trial Innovations: State Links, <http://www.ncsconline.org/WC/Publications/StateLinks/JurInnStateLinks.htm> (last visited July 13, 2006) (listing jury reform efforts in each state).

<sup>32</sup> See Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 40 (reporting on jury trial innovations across United States, including "greater concern for juror convenience" to encourage jury service); Theodore R. Boehm, *Teamwork Leads to Jury Pool Improvements*, INDIANAPOLIS STAR, Nov. 20, 2005, at 4E (describing Indiana's creation of "vastly improved" list of potential jurors); Editorial, *Jury Selection Now More Efficient, Fair*, TIMES-MAIL (Bedford, Ind.), Jan. 8, 2006, at A7.

<sup>33</sup> *Webb v. Baird*, 6 Ind. 13, 18–19 (1854) (holding that state must compensate counsel for representing poor defendant).

<sup>34</sup> 372 U.S. 335, 344 (1963) ("[A]ny person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

<sup>35</sup> 384 U.S. 436, 467–73 (1966).

In recent decades, the new challenge has been assisting low-income people who have *civil* legal problems. If citizens have any general notion of the society's approach to this problem, they think of "legal services offices"—the network of federally financed law offices that owe their existence to President Lyndon Johnson's War on Poverty.<sup>36</sup> Legal activists likewise tend to focus on the Legal Services Corporation as the central solution to this need, spending considerable political capital on unsuccessful campaigns to increase its federal appropriation. The appropriations have stagnated over a very long time, through both Democratic and Republican administrations.<sup>37</sup>

As the federal contribution to civil legal aid has languished, the growing need for service to indigents has been addressed by interest collected on lawyer trust accounts (commonly called IOLTA), a device invented overseas and transplanted to this country by the Florida Supreme Court in 1982.<sup>38</sup> The state courts created IOLTA and successfully defended it against takings claims on two separate trips to the U.S. Supreme Court.<sup>39</sup> This two-decade effort has led us to the point that most legal aid to the poor is now financed by IOLTA, by state and local governments, and by charities.<sup>40</sup>

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<sup>36</sup> See Legal Services Corporation Act, 42 U.S.C. § 2996 (2000) (establishing Legal Services Corporation).

<sup>37</sup> See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1-2 (2005), available at [http://www.lsc.gov/press/documents/LSCJusticeGap\\_FINAL\\_1001.pdf](http://www.lsc.gov/press/documents/LSCJusticeGap_FINAL_1001.pdf) (noting that since 1981, federal funding has never reached "minimum access" level, and program is currently funded at less than half of 1981 levels when adjusted for inflation).

<sup>38</sup> See Gregory A. Hearing, Comment, *Funding Legal Services for the Poor: Florida's IOTA Program—Now Is the Time to Make It Mandatory*, 16 FLA. ST. U. L. REV. 337, 342-53 (1988) (tracing development of Florida's Interest on Trust Account program). A lawyer trust account is a bank account containing funds of clients and other third parties over which the lawyer has a fiduciary duty. See Indiana Supreme Court Disciplinary Commission, Attorney Trust Accounts, <http://www.in.gov/judiciary/discipline/trust.html> (last visited Sept. 4, 2006).

<sup>39</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

<sup>40</sup> The Project to Expand Resources for Legal Services (PERLS), run by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, has conducted research that dramatically illustrates the relative decline in funding for the Legal Services Corporation (LSC) as compared to other legal aid programs. In 1980, the LSC provided approximately 88% of all funding for such services; by 1993, the figure had fallen to 56%, and by 2005, LSC grants accounted for only 31% of the overall funding. Meredith McBurney, Project Consultant, Am. Bar Ass'n Resource Ctr. for Access to Justice Initiatives, Presentation Before the National Conference of Chief Justices (Jan. 16, 2006) (presentation on file with the *New York University Law Review*). During that same period, funding provided by state and local entities increased from a mere 1% in 1980 to 26% in 2005. *Id.* Similarly, funding by private groups has risen dramatically: In 1980, funding by those groups accounted for only 2% of all the money provided to legal aid groups; by 2005, the percentage had increased to 22%. *Id.*

This development has been crucial for access to justice, but it should not obscure other new initiatives for covering the legal needs of the poor. In the mid-1990s, for example, the Florida Supreme Court and its unified bar, the Florida State Bar Association, devised a plan to energize and organize the profession's widespread impulse for pro bono service. This plan features an organized system for reporting pro bono hours, vastly improved recruiting, and support services for pro bono lawyers. Florida implements this effort through its judicial districts, with a trial judge designated as the leader of each local effort.

Florida's groundbreaking initiative is now just one of many such initiatives by state high courts. The Indiana Supreme Court invited its voluntary state bar to create the Indiana Pro Bono Commission, jointly appointed by the court and by the association's charitable arm, the Indiana Bar Foundation, to oversee a network of local pro bono committees.<sup>41</sup> The Maryland Court of Appeals found this scheme attractive, and we assisted them in organizing a pro bono system based on judicial districts and led by lawyers.<sup>42</sup> The office of New York Chief Administrative Judge Jonathan Lippman recently issued a proposal for a statewide pro bono program based on this same model, including high levels of judicial involvement.<sup>43</sup> Even the quickest glance at the American Bar Association's online Pro Bono and Public Service Best Practices Resource Guide reveals thousands of pro bono projects and service opportunities.<sup>44</sup>

Of course, some litigants find their way to court without a lawyer because they want to handle their own legal matters. There are multiple reasons why the court system should assist such litigants.<sup>45</sup> At least one approach to doing so also helps serve the legal needs of the indigent: supplying better legal information of the sort that enables

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<sup>41</sup> IND. PROF'L CONDUCT R. 6.5 (1998), *amended and renumbered as* 6.6 (2005); David J. Remondini, *IOLTA Arrives in Indiana: Trial Judges to Play Key Role in Pro Bono Plan*, RES GESTAE, Feb. 1998, at 9.

<sup>42</sup> See DEBORAH SWEET BYRNES & SHARON E. GOLDSMITH, THE MARYLAND JUDICIAL COMMISSION ON PRO BONO: REPORT AND RECOMMENDATIONS 59 (2000), *available at* <http://www.courts.state.md.us/probono.pdf>.

<sup>43</sup> See Daniel Wise, *OCA Proposes Plan to Boost Pro Bono: Level of Service Appears to Drop*, N.Y. L.J., Jan. 16, 2004, at 1 (describing recommendations by New York Office of Court Administration to increase pro bono activity).

<sup>44</sup> See American Bar Association, Commission on the Renaissance of Idealism in the Legal Profession, Pro Bono & Public Service Best Practices Resource Guide, [http://www.abanet.org/renaissance/bestpractices/search\\_best\\_practices.html](http://www.abanet.org/renaissance/bestpractices/search_best_practices.html) (last visited Sept. 4, 2006).

<sup>45</sup> For example, providing assistance to pro se litigants improves communication between the court and the public, offers greater access to justice, and increases court efficiency. 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, 1553-54 (2005) (listing goals and benefits of pro se assistance programs).

people to handle straightforward legal tasks on their own. The pioneering work on this front was led by the Arizona Supreme Court and the state trial courts in Phoenix. Just before the Internet became the tool of choice for all sorts of information, Maricopa County created what they called "Pro Se Kiosks." They stationed these centers in courthouses and libraries to provide self-help legal information in fields like family law, complete with standardized forms for complaints and decrees.<sup>46</sup>

This work turned out to be splendid preparation for the Internet age. In state after state, citizens now access legal information on court web pages. Our court staff recently reported that just one section of the Indiana Judicial Website, the pro se help pages,<sup>47</sup> received more visitors last year than all of the pages maintained by our Governor's Office.

### III TOWARD EQUAL OPPORTUNITY

Have there been greater challenges to the vitality of the American experiment than slavery, racial inequality, and discrimination? Surely, the issue of race is the oldest open wound in our national life, and it is the obligation of decent people continually to ask what we can do about it.

The legal profession, of course, plays a significant role in fighting discrimination of all sorts through the machinery of equal opportunity agencies and through litigation. Our focus on this role played by lawyers must not lead to neglecting two needs internal to the profession: (1) assuring that citizens of all races and ethnic groups are treated fairly once they come into the court setting, and (2) creating a profession open to all. State supreme courts have sought to address these twin needs in at least two ways.

#### A. *Equal Treatment*

First, in state after state we have had the courage to examine our own operations. The New Jersey Supreme Court created the first commission on gender discrimination in 1982 and the first commission

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<sup>46</sup> See AM. BAR ASS'N, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE 64 (1996) (describing "QuickCourt" computer kiosk system devised by Arizona superior courts); Jonathan Rose, Note, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 610 (2002) (same).

<sup>47</sup> Indiana Supreme Court, Self-Service Legal Center, <http://www.in.gov/judiciary/self-service/> (last visited Sept. 4, 2006).

on racial and ethnic discrimination in 1984,<sup>48</sup> and it has sustained that effort during the ensuing decades.<sup>49</sup> Since New Jersey acted, supreme courts in more than half the states have launched formal projects to address racial and ethnic bias in the courts, and eighty percent have created bodies to examine gender bias.<sup>50</sup> These commissions typically become permanent enterprises with the ongoing mission of identifying and rectifying aspects of court operations that discriminate or mistreat the people who rely on us. The National Center for State Courts created a consortium of these state commissions, and it provides staff support to their work. The agenda for the eighteenth annual meeting of the leadership of these commissions reflects the priorities of state courts and their commissions in this field: disparate treatment in the criminal justice system, the legal problems of Native Americans, court treatment of recent immigrants, and improving court language programs.<sup>51</sup>

The breadth of initiatives addressing the challenge of language demonstrates the reach of these efforts. A group of state supreme courts under the leadership of the National Center created a separate consortium to improve court interpreter services by developing a series of valid and reliable tests for certifying interpreters and by creating a national capacity for technical assistance.<sup>52</sup> Thirty-three states have now joined this effort—which requires a substantial commitment

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<sup>48</sup> See Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1169–70, 1183–84 (1999).

<sup>49</sup> See National Center for State Courts, CourtTopics Knowledge and Information Services, Racial Fairness: Task Force, Commission, and Committee Reports, <http://www.ncsconline.org/WC/Publications/StateLinks/RacFaiStateLinks.htm> (last visited Sept. 4, 2006).

<sup>50</sup> Selby, *supra* note 48, at 1170, 1183–84 (listing years during which each state established gender and race task forces); see also DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, PUBLIC PERCEPTIONS OF THE STATE COURTS: A PRIMER (2000), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicPerceptions\\_PrimerPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicPerceptions_PrimerPub.pdf) (documenting national survey results showing lower levels of confidence in courts by African Americans than by White and Hispanic respondents).

<sup>51</sup> See HEALING OUR PAST; BRAIDING JUSTICE ACROSS CULTURES: CONFERENCE AGENDA FROM 18TH ANNUAL MEETING (National Consortium on Racial and Ethnic Fairness in the Courts), Apr. 25–28, 2006, available at [http://www.consortiumonline.net/2006Conference/Reg\\_Brochure.pdf](http://www.consortiumonline.net/2006Conference/Reg_Brochure.pdf).

<sup>52</sup> See CATHERINE GILL & WILLIAM E. HEWITT, NAT'L CTR. FOR STATE COURTS, IMPROVING COURT INTERPRETING SERVICES: WHAT THE STATES ARE DOING 1 (1996), available at [http://www.ncsconline.org/wc/publications/Res\\_CtInte\\_StateCrtJV20N1WhatStatesAreDoingPub.pdf](http://www.ncsconline.org/wc/publications/Res_CtInte_StateCrtJV20N1WhatStatesAreDoingPub.pdf) (describing “steadily expanding network” of participation in State Court Interpreter Certification Consortium). The federal government runs its own court interpretation training system called the Federal Court Interpreter Certification Examination (FCICE). FCICE was created in order to fulfill the directive of the Court Interpreters Act of 1978. See 28 U.S.C. §§ 1827–1828 (2000) (requiring definition of criteria to certify interpreters in federal court).

of money—prompted in many instances by the findings of their race and gender commissions.

### B. *Equal Opportunity*

The profession also faces the challenge of making *itself* a place of equal opportunity, and on this front all three elements of the profession have played a part. The nation's law schools, of course, have worked diligently to build J.D. classes fully representative of the American population. The University of Michigan and other schools litigated the legitimacy of using race in law school admissions in *Grutter v. Bollinger*,<sup>53</sup> as contentious a matter as American legal education has ever confronted. The American Bar Association (ABA) Section of Legal Education and Admissions to the Bar recently took a further step, proposing rules that require schools to demonstrate tangible progress in admitting minority students, even when the prevailing law of the jurisdiction prohibits the use of race as a factor in admissions.<sup>54</sup>

State supreme courts have not usually been host to this litigation, but they have themselves addressed the issue in at least two ways. First, the longest-running project to foster equal opportunity in law schools has been CLEO, the Council on Legal Education Opportunity. The Association of American Law Schools and the ABA created in CLEO a model that works like the sort of "affirmative action" that Daniel Patrick Moynihan had in mind when he popularized the term. This undertaking features aggressive recruiting, a summer institute sometimes called "Head Start for Law Students," financial assistance, and bar preparation.

The CLEO model, now formally called the Thurgood Marshall Legal Educational Opportunity Program,<sup>55</sup> has unfortunately been a regular target of federal budget cuts. Congress zeroed out CLEO in the 1990s,<sup>56</sup> and the budget proposed by President Bush for fiscal year

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<sup>53</sup> 539 U.S. 306 (2003) (holding that University of Michigan Law School may lawfully employ narrowly tailored affirmative action policy in admissions to further compelling interest in obtaining educational benefits from diverse student body).

<sup>54</sup> See David E. Bernstein, *Affirmative Blackmail*, WALL ST. J., Feb. 11, 2006, at A9 (discussing American Bar Association (ABA) legal education committee's decision to vote on "equal opportunity and diversity standards" in wake of declining African American enrollment); Nathan Koppel, *Fewer Blacks Enter Law School, Prompting Plan for Monitoring*, WALL ST. J., Feb. 14, 2006, at B6 (same).

<sup>55</sup> See 20 U.S.C. § 1136 (2000).

<sup>56</sup> See Kenneth Jost, *Law-Related Programs Facing Ax*, A.B.A. J., June 1996, at 38 (describing Congress's cuts to CLEO). CLEO was officially eliminated in 1996, but was reborn in short order under its new name. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 721, 112 Stat. 1581, 1794 (codified as amended at 20 U.S.C. § 1136 (2000)).

2007 calls for its elimination.<sup>57</sup> Alarmed by this federal roller coaster ride, three state supreme courts have started their own CLEO programs: Indiana, Georgia, and Kentucky.<sup>58</sup> The Ohio Supreme Court has likewise announced its intention to begin its own program.<sup>59</sup>

Second, state high courts and intermediate courts have been substantial participants in the efforts of the Judicial Division of the ABA and the National Association of Law Placement to promote more court clerkships for minority students.<sup>60</sup> My colleague Justice Frank Sullivan, Jr., has played the leading role in building this effort, which recognizes that clerkships can add value to a legal career and that we need to do what we can to give minority students the opportunity to attain this credential.

#### IV A FEW OTHER FIELDS

I have described activities in three areas—jury reform, equal access, and equal opportunity—in some detail so as to indicate the depth of involvement in court and legal reform that characterizes the present life of state supreme courts. A quick perusal of supreme court annual reports or speeches on the state of the judiciary by chief justices reflects the breadth of other such endeavors. To demonstrate this point, I will simply list some of those initiatives using one or two sentences for each.

The California Supreme Court has opened its state's borders to temporary practice by lawyers from other states,<sup>61</sup> and Pennsylvania's court recently authorized temporary practice by lawyers from other

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<sup>57</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2007, app. at 356 (2006), available at <http://whitehouse.gov/omb/budget/fy2007/pdf/appendix/edu.pdf>; OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MAJOR SAVINGS AND REFORMS IN THE PRESIDENT'S 2007 BUDGET 37 (2006), available at <http://www.whitehouse.gov/omb/budget/fy2007/pdf/savings.pdf>.

<sup>58</sup> IND. CODE ANN. §§ 33-24-13-1 to -7 (West 2006), available at <http://www.in.gov/legislative/ic/code/title33/ar24/>; see also Randall T. Shepard, *The Personal and Professional Meaning of Lawyer Satisfaction*, 37 VAL. U. L. REV. 161, 170 (2002) (describing how Chief Justice of Georgia declared that state's CLEO program was to be modeled after Indiana example); Kevin Corcoran, *Shepard Takes Stock of Court Reforms; State's Chief Justice Notes Progress Made in Mentoring, Public Defender Programs*, INDIANAPOLIS STAR, Jan. 14, 2000, at B1; Kay Stewart, *Series; Jury Not of Their Peers*, COURIER-J. (Louisville, Ky.), Nov. 6, 2005, at 10A.

<sup>59</sup> OHIO GOV. BAR R. XVII.

<sup>60</sup> See Frank Sullivan, Jr., *ABA Judicial Clerkship Program Inspired by Brown's Call for Opportunity*, A.B.A. JUDGE'S J., Summer 2004, at 44 (describing ABA Judicial Clerkship Program, which aims to encourage minority law students to seek judicial clerkships).

<sup>61</sup> See CAL. R. CT. 983; JUDICIAL COUNCIL OF CAL., 2005 ANNUAL REPORT: CORNERSTONES OF DEMOCRACY: CALIFORNIA COURTS ENTER A NEW ERA OF INDEPENDENCE 7,

countries,<sup>62</sup> reflecting the growing need for the legal market to facilitate commerce across state and international boundaries. The Conference of Chief Justices and the National Center for State Courts are now engaged in direct dialogue with the bars of the European Union on matters of transnational practice. In other efforts to contribute to the business climate in their states, Nevada, New York, and others have created specialized business courts or complex litigation dockets.<sup>63</sup>

The Alaska Supreme Court has embarked on creating therapeutic courts in every region to give special treatment to defendants in criminal court who suffer from addiction, mental disabilities, and family disintegration.<sup>64</sup> Alaska's effort is part of a broad movement to combine the legal process with problem-solving techniques.<sup>65</sup>

The Florida Supreme Court has launched an energetic public information and education program that includes institutes for teachers and business leaders.<sup>66</sup> The court provides training for trial court information officers. These programs are an important part of building public trust and confidence. Consider the superb way in which the Florida Supreme Court informed the public of its work on *Bush v. Gore*, an effort that stood in bright contrast to the indifferent approach taken by the U.S. Supreme Court.<sup>67</sup>

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available at <http://www.courtinfo.ca.gov/reference/documents/ar2005.pdf> (describing change in California rules).

<sup>62</sup> PA. RULES OF PROF'L CONDUCT R. 5.5(c).

<sup>63</sup> See SUPREME COURT OF NEV., ANNUAL REPORT OF THE NEVADA JUDICIARY: HISTORIC COURT, PROGRESSIVE TIMES, at iv (2004), available at [http://www.nvsupremecourt.us/documents/reports/rpt\\_annual04part1.pdf](http://www.nvsupremecourt.us/documents/reports/rpt_annual04part1.pdf) (describing establishment of specialized business courts and courts focusing on complex litigation); Daniel Wise, *Commercial Division Hails Year's Progress*, N.Y. L.J., Nov. 8, 1996, at 1.

<sup>64</sup> See Alaska Court System, Alaska Therapeutic Courts—General Information, <http://www.state.ak.us/courts/generalct.htm> (last visited Aug. 16, 2006).

<sup>65</sup> See Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 130–43 (2004) (discussing development of New York's community, drug, and domestic violence courts, and noting national interest in similar “problem-solving courts”).

<sup>66</sup> See SUPREME COURT OF FL., FLORIDA STATE COURTS: ANNUAL REPORT 2004–2005, at 20–21 (2005), available at [http://www.flcourts.org/gen\\_public/pubs/bin/annual\\_report0405.pdf](http://www.flcourts.org/gen_public/pubs/bin/annual_report0405.pdf) (describing Justice Teaching Institute and Judicial Institute for Business Leaders).

<sup>67</sup> Lesley Clark, *Unknown Court Spokesman Now on Worldwide Stage*, MIAMI HERALD, Nov. 22, 2000, at 15A (reporting on Florida Supreme Court spokesman Craig Waters's efforts to be responsive to public inquiry regarding court's deliberations on challenges to state's vote-counting procedures); Linda Greenhouse, *By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. TIMES, Dec. 13, 2000, at A1 (reporting on U.S. Supreme Court's late-night release of *Bush v. Gore* decision, “with no word to dozens of journalists from around the world who were waiting in the crowded pressroom . . . as to when, or whether, a decision might come”); Jennifer Weiner, *Networks Puzzled in Rush to Decipher Ruling*, PHILA. INQUIRER, Dec. 13, 2000, at A20 (commenting



The supreme courts of Maryland, Ohio, and California have created a consortium to provide advanced scientific and technological training for judges in fields like genetics, biomedicine, and life sciences.<sup>68</sup>

The Connecticut Supreme Court has organized participation by its judges in the Open World Program, under which they supply training to judges from Russia.<sup>69</sup> This program is part of a broad campaign to export the rule of law that has led the National Center for State Courts to place offices in more than a dozen countries, where they assist emerging democracies and their courts with everything from drafting constitutions to training trial judges.

These few examples barely suggest the broad range of ventures set in motion by state high courts and their colleagues in the trial bench, the bar, and the academy. Supreme court justices would be the first to say that the vast changes being engineered in state judicial systems require collaboration by many elements of the court and legal community, and the public at large. Still, I think it fair to say that most of these endeavors would not occur unless the state supreme court was willing, and a good many of them have occurred *only* because the highest judicial leadership has set them in motion.

#### CONCLUSION: WHY DOES THIS MATTER?

People in academic life are sometimes right when they say one can value the study of a phenomenon for its own sake, but there is a valuable lesson imbedded in this assessment of the new work undertaken by judicial institutions that were once principally appellate bodies. It is a lesson for those who have legal reform in their hearts—that reformers can fully anticipate joining forces with the men and

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on major networks' inconsistent analyses of *Bush v. Gore* decision just after it was handed down, stating "CNN's Jeff Greenfield summed it up thus: 'Doing legal analysis on the fly ought to be an Olympic sport with a degree of difficulty of 10'").

<sup>68</sup> See THE MARYLAND JUDICIARY: 2004–2005 HIGHLIGHTS 8–9, available at <http://www.courts.state.md.us/publications/annualreport/areport04-05.pdf> (describing formation of Advanced Science and Technology Adjudication and Resource Center); Press Release, The Supreme Court of Ohio, Ohio Maintains Judicial Excellence, Pursues Strength for Future, Chief Justice Says (Sept. 9, 2004), available at [http://www.sconet.state.oh.us/Communications\\_office/Press\\_Releases/2004/soj\\_090904.asp](http://www.sconet.state.oh.us/Communications_office/Press_Releases/2004/soj_090904.asp); Memorandum from Sci. and the Law Steering Comm., Judicial Council of Cal., Admin. Office of the Courts, to Members of the Judicial Council 5 (Jan. 10, 2006), available at <http://www.courtinfo.ca.gov/jc/documents/reports/0224item7.pdf>.

<sup>69</sup> WILLIAM J. SULLIVAN & JOSEPH H. PELLIGRINO, BIENNIAL REPORT AND STATISTICS 2002–2004, CONNECTICUT JUDICIAL BRANCH 15 (2005), available at <http://www.jud.state.ct.us/Publications/BiennialReport2002-04.pdf> (describing Open World Program, which "enables judges from Russia to visit Connecticut and learn about its state courts").

women who serve in these influential institutions. They are players who certainly treasure their jurisprudential role, but as the prosecutor in Indianapolis once famously and kindly said of our court, they are people who "care about the cases they never see."

Appellate court judges certainly understand Arthur T. Vanderbilt's warning that "judicial reform is no sport for the short-winded."<sup>70</sup> They also understand that the natural inertia in our profession is such that reformers need all the help they can get.

When Justice Brennan was a brand new member of the Supreme Court, he looked over the sentiments of reformers like Arthur Vanderbilt and Roscoe Pound, and exhorted the profession, including most especially the judges, to press on. "We must not retreat from the high point we have reached. We must go beyond in an increasing effort to attain what in truth may be the unattainable summit," Brennan said.<sup>71</sup> "The march of events is compelling this change and the valiants in every state fighting the battle must not lose heart."<sup>72</sup>

This spirit lives in the hearts of the men and women who lead the highest courts of the states. We have a broader sense of mission than ever before, believing that the judiciary must do what lies within us to help our fellow citizens in fostering a decent, safe, and prosperous society, by building a system of justice that befits a great nation.

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<sup>70</sup> MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, at xix (Arthur T. Vanderbilt ed., 1949).

<sup>71</sup> William J. Brennan, Jr., *Improving the Administration of Justice Today*, in *HANDBOOK FOR JUDGES* 135, 139 (Donald K. Carroll ed., 1961).

<sup>72</sup> *Id.* at 137-38.