

Convocation remarks by  
Chief Justice John T. Broderick, Jr.  
at Syracuse University College of Law  
Syracuse, New York  
February 22, 2010

### Justice at Risk: Will the Profession Step Up?

Let me begin by thanking Dean Arterian for inviting me to Syracuse and giving me the opportunity to speak to all of you today. During my remarks this morning I urge you to exhale and relax. You need not take notes and there will be no exam. You'll never have a better day than that in law school.

I speak to you today as someone who has spent almost thirty-eight years in the law, twenty-three as a trial lawyer and the balance as an appellate judge. But it doesn't seem that long ago that I was sitting where you are.

Being an appellate judge is a real privilege for any lawyer but my job is often misunderstood. The best working definition I've heard for an appellate judge is someone who comes onto the field of battle after the war is over to kill the wounded. It's hard to accept but often true.

All of you are at the beginning of a journey that will fundamentally change your lives and, if traveled well, will profoundly and positively affect the lives of many people you have yet to meet. Being a lawyer is a hard job but its rewards are many. You will soon become the face of the legal profession for the first half of the 21<sup>st</sup> century and much will be expected of you. You will define the changing role of lawyers in this new age and meet the endless demands of the profession. You will also help decide whether the state courts across our country are accessible, affordable and relevant to the fabric of this new century.

Because you will graduate from Syracuse trained in the law, you will command respect before you have truly earned it. Opportunities for civic and legal leadership will, in time, await you. I urge you not to turn away. I hope some of you will consider public service either as a career or as a way to give back. It is never easy, but it is always important and in many ways it adds real value to your development as a lawyer.

You are also destined for uncharted territory where your predecessors have not gone. You will be the first generation of lawyers to practice law in a "flat world" and with the rising costs of legal services, you will need to find new ways to remain accessible and affordable while maintaining the highest ethical and professional standards.

You will help shape the very face of justice in America in an era of unprecedented change where your competition is not just across town but increasingly across the globe. You will also be called upon to ensure community and collegiality for the legal profession in an era where technology, if not used wisely, will create disconnection and anonymity.

You will also be asked to make many critical decisions for the profession. You will determine the proper work/life balance in the practice of law and come to terms with the real needs of professional women and minorities in order to afford them their rightful opportunity for professional development, too long unrealized. American demographics are changing and the profession needs to open its leadership to reflect them. Change is inevitable but I urge you to hasten it wherever and whenever you can. At a minimum, I ask you to be open to it.

You will also decide whether the practice of law remains a profession or whether business principles will consume its public importance and undermine its constitutional foundation. I hope you conclude that justice is not a commodity, not an enterprise fueled by the billable hour, but a responsibility bestowed with near-sacred trust on all those privileged to serve it.

Most importantly, your generation of lawyers and judges will be called upon in many ways and in varied circumstances to decide whether state courthouses are truly open to all our people or whether they serve only the wealthy and the well to do. Current trends are disturbing. A justice system, which pulls up the gangway on the poor and middle class, is no justice system at all and will not long maintain public trust and confidence. A justice system, which is too expensive and too inefficient for too many, cannot fulfill the promises of our Constitution or the obligations of the legal profession itself.

In a sense that growing challenge is what brought me to Syracuse this morning. The stakes are high, the demands unrelenting and the need for the profession to speak up and speak out is more urgent than ever before. There is no better place to have this discussion than with the next generation of lawyers.

In my view and based upon my experience on a state supreme court these last fourteen years, state court justice is eroding and fraying all across America and, with rare exception, state courts have never been more imperiled than they are today. Their slow decline should concern all of us. State courts are the workhorse of the American justice system day in and day out. They always have been. They're closest to the people and to the problems and conflicts that beset them. More than half their work involves families. They are, in a sense, the people's courts.

There are more cases filed in state courts on the island of Manhattan in a single week than are filed in all the federal courts in America in a single year. Each year state courts average more than 102 million court filings or more than 98% of

all litigation filed in the United States. State courts nationwide have more than 30,000 judges and masters and more than 20,000 courthouses. Allowing the status quo of slow decline and benign neglect to go unnoticed, unchallenged and uncorrected will, in time, undermine one of the basic promises of our democracy—prompt and affordable access to justice for all who seek it. Allowing the courts to decline will also, in time, undermine the profession of law itself.

State courts are increasingly underfunded and undervalued. They have too few advocates and even fewer friends. Sadly, those who speak ill of the courts and of their decisions are never in short supply.

Last November the *New York Times*, in a lead editorial, declared that state courts in America were at the “tipping point,” just as Chief Justice Margaret Marshall of Massachusetts had said in a New York speech. It acknowledged that state courts were “at the center of the nation’s legal system and enforcement of the rule of law.” It also acknowledged, with regret, that state courts, an independent and co-equal branch of government, have been “spiraling into crisis as cash-starved states struggle with huge deficits.” As the *Times* pointed out, budget cuts are “impeding core court functions, forcing court closures, shortened court hours and a tangible narrowing of access to justice.” In Vermont and California state courts are closed to the public a day a month because of unpaid staff furloughs. My state will soon follow. All our judges and masters will be asked to take unpaid furlough days, too. I don’t ever remember that happening in my lifetime and the larger message of closing the courts is troubling. As it is, during the past year we suspended jury trials in eight of our ten counties for one month to avoid staff layoffs. That’s equally disturbing.

I do not suggest that state courts are special and should be spared the pain experienced by state government in these unusual economic times. Indeed, all public institutions need to share the discomfort. But state courts are different. They are not state agencies but were created by constitution or statute to safeguard fundamental rights. Unlike many agencies that have programs they can cut, we don’t. We are the program.

As the *Times* so aptly put it, “at some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself.” As someone charged under the New Hampshire Constitution with administrative oversight of the courts of my state and who is familiar with the plight faced by many of my fellow chief justices across this country, I can report that the cracks are showing and widening with each passing day.

The near silence of the profession on these issues needs to be broken and its respected and influential voice heard, locally as well as nationally. Sooner as opposed to later. If we cannot safeguard the sound operation of state courts at the

beginning of the 21<sup>st</sup> century, if we cannot be satisfied that our court system is truly open, affordable and accessible and that it can provide timely justice, what else is more important to a well-functioning democracy? If America's state courts are slowly failing, what else do we need to know before speaking up and speaking out? What else could be more important to the profession of law than protecting the Rule of Law? Yet silence in many legal quarters persists. Sadly, that silence may prove deadly.

Many of our most at-risk citizens turn to the state courts every day for protection from perceived or actual mistreatment and discrimination. They should feel confident that the courts can respond and respond in a timely way. It's part of America's social compact. State courts often are the only place the vulnerable can go for asylum against the occasional excess of a majority's aggregated power. Our justice system is rightly the envy of the world but it will take vigilance and resources to sustain it. I am concerned that state courts are presently unable to be relied upon to direct society's traffic and provide meaningful and prompt justice at a reasonable cost to all who seek it. That should concern all of us, especially you, because you will inherit the challenges that are currently buffeting the state courts. Your wisdom and commitment, your conviction and courage will likely determine outcomes. Time is not our friend.

In order to better appreciate where we are it might be helpful to examine where we came from during the span of one lawyer's career.

When I began practicing law in 1972, desktop computers were non-existent, cell phones, faxes, twitter and Facebook were unheard of and civil jury trials were plentiful. By the time I was in my early forties, I had tried more than 40 jury cases by myself. The justice system in 1972 was more affordable for more people and small businesses and self-representation was far from the norm. The demands on judges and staff were fewer, the reach and sweep of the media was much diminished, and public cynicism about government was modest, at best. Courts did not feel the need for public outreach or the necessity to promote civic education. Judges were not public figures like they are today and personal attacks against them were few. The independence of the judiciary was largely accepted; not commonly questioned or assailed. The courts were rarely caught up in the crosshairs of politics, and budgets, while always tight, were less sparse than our judicial budgets today. While there were always unpopular judicial opinions, judges were rarely publicly bludgeoned. Money in judicial elections was miniscule when compared to today and special interests rarely inserted themselves into judicial campaigns.

The disputes resolved by the courts in the 1970s were fewer in number and often less contentious. Timeliness was more generously defined. Court security was of little concern and largely unnecessary when I began the practice of law. Those days have long passed and the threat of violence is something judges think

about and deal with every day. Not only for themselves but mostly for court staff and the public inside our courthouses. Las Vegas and Atlanta are very recent reminders. They likely won't be the last.

When I became Chief Justice six years ago, I traveled to every courthouse in New Hampshire to visit with staff and talk to the judges. As you can imagine, we have some courthouses in small towns and rural areas. At one small courthouse, just off the quaint New England town square and adjacent to town offices, I asked the clerk of a one-day-a-week court what her greatest need was. She never hesitated. "Bullet proof glass," she said. It was just another reminder that times had changed.

When I began life as a trial lawyer, the state courts were the only game in town. They had no real competition and no institutional compulsion to improve service or streamline process. The private justice system in America, now in full flower, either didn't exist or was so below the radar as to go unnoticed. Disputes large and small were brought to public courtrooms and often resolved by juries.

Today, civil jury trials are slowly but surely disappearing from the judicial landscape. Merely longing for their return will not bring them back. In recognition of this reality, the American College of Trial Lawyers, which, from 1950 to 2005, required its new members to have completed twenty-five jury trials for admission, has now dropped that standard. If it hadn't, a lot of good lawyers would never be eligible for induction. That reality is not good news for state courts, let alone the profession or the public as a whole. It's like a canary in the mine.

In my view, without public involvement in the courts through the jury system, we risk losing the stamp of community approval and civic trust. Public participation in the administration of justice in open courtrooms enhances the legitimacy of the state courts and provides the valued wisdom of ordinary citizens. Jurors have also been our best friends. Their growing departure is unsettling and will have long-term consequences on the state courts—none of them good in my opinion.

The judicial system of 2010 is confronting a very different reality than in times past. Many issues previously resolved in the family, the church or the town square are, today, increasingly resolved in our courthouses. I am fearful that we are not keeping pace with the realities on the ground and that we and our funders are often tone deaf to needed change. Our only real constituency is the profession and we need your help and your renewed commitment to ensure the integrity and value of the critical services we provide.

In my view the state courts face countless challenges if they are to remain viable. Let me discuss just four of the most critical. If state courts fail to meet these and other challenges they will continue their downward spiral and be

relegated to a diminished role in our democracy. If lawyers don't commit themselves to helping us meet them, it is unlikely others will.

The first major challenge I see is accommodating the growing number of self-represented parties who cross the thresholds of our state courts each day all across America.

The ever-rising tide of self-represented litigants is a national phenomenon, a growing national crisis for state courts. Sadly, the doors of our courthouses are effectively blocked for a growing number of people, and if we remain silent and averse to change, our system of justice will not long retain its intended role—and many who can afford to leave a clogged system for the private justice system will do so. If we let current trends continue, we do so at our peril and, in my opinion, in derogation of our professional responsibilities. The collateral consequences of inaction in the face of a rising tide of self-represented parties will be both substantial and long lasting. If we fail to act to meaningfully address today's challenges, I believe that within a decade state courts will cater principally to the self-represented and to those charged with crime. If that happens the funding for state courts may slide further and good people may not step forward in the same numbers to become judges. It's no longer just the poor, by the way, who can't afford lawyers.

Most middle-income people I know would find it nearly impossible to hire a lawyer for anything other than a discrete task. It's a sensitive topic but if we are to keep legal services and the state courts within reach of the middle-class, it's a discussion that needs to take place.

Two years ago the president of the California state bar authored an article about the neglected middle class in the courts. "Of the many challenges that we face as a profession," he wrote, "the one that should concern us most is that we now have a legal system in which the majority of Americans cannot afford adequate legal service . . . Either we'll need to adapt our system to actively meet more of society's needs or society will change the system for us." I agree with him. If courts were a private sector enterprise that could not make a product or provide a service people could afford, no one would buy stock. Rather than complain about a changing and diversified "customer" base, state courts need to adapt to meet this new reality. We need a product more people can afford. State courts need to more aggressively respond to this challenge and enhance innovation. But meaningful progress is impossible with declining dollars. Change and new efficiencies are needed. Unheeded change can kill. Just ask Chrysler and General Motors.

In my state and in many others, in 70% or more of all divorce cases one or both sides is self-represented. People lose custody of their children or diminished visitation with their kids every day across this country without ever having the guidance or representation of a lawyer. People lose their homes, their apartments

and their health care with no lawyer to advocate for them. The American justice system, the greatest justice system on earth, should be able to do better than that. In California, under the leadership of Chief Justice Ron George, a pilot program has been established for a state-funded civil Gideon in certain types of life-altering disputes. Mike Greco of Boston, a former president of the American Bar Association, was and remains a staunch advocate for such a program. Progress is painfully slow. To give the issue critical mass, lawyers all across the country will need to get behind it.

Our next great challenge is simply remaining relevant in the greatest technology century in the history of mankind. Most state courts have not entered the twenty-first century when it comes to technology. Most small and successful law firms in my state have better technology than the state courts. Many business clients have better technology than their lawyers and vastly superior to the courts. The greater the disparity between the technology in the private marketplace and the technology in the courts, the less relevant, responsive and useful courts will become. It's a real and growing concern. If state courts drop further and further behind the marketplace, the marketplace will be less and less likely to use us.

It's no secret that our technology is often light years behind federal courts. A year ago I was at a bar meeting on the Dartmouth campus with the Deputy Clerk of our U.S. District Court. He was proudly explaining hyperlinks on his laptop computer, which would allow lawyers to "click" on cases cited in court orders, and have them appear immediately on their computer screens. I had the unenviable task of following him to explain what was new and different in the state courts. I remember saying that his discussion of hyperlinks had given me hypertension. The difference between where most of us are and where we need to go is regrettably expanding. It's a gap we need to close.

Without enhanced technology to approximate that used in the marketplace, state courts will likely become an increasingly unappealing place to take business disputes. If, in fact, state courts, because of technology deficiencies, cannot provide a timely match for the needs of commerce, they, at their peril, at our peril, will grow less relevant. None of us win if we let that happen.

The third great challenge state courts face, a challenge that goes to the very heart of public trust and confidence, is the widely used and often abused system of selecting state court judges: namely, judicial elections. In fact, 39 states use some form of election to choose their judges, and seven of those select them in contested partisan elections. In some races candidates are raising and spending more than one million dollars. In Illinois, in 2004, two candidates for a seat on that state's highest court raised and spent over \$9.3 million between them. That dollar total exceeded total contributions in 18 of 34 U.S. Senate races that year.

In Alabama, the cost of judicial elections has “skyrocketed in recent years.” Over the last sixteen years \$54 million has been spent there just on races for its supreme court. In 2006 the second most expensive judicial campaign in U.S. history occurred there. In the race for chief justice the candidates raised \$8.2 million. Very often the chambers of commerce and the trial lawyers are the biggest contributors. I’m not suggesting that elected judges may not be outstanding people or lawyers, but I am suggesting that partisan elections, and all elections to some extent, create a huge public perception and, in some cases, allow lawyers to be elected who shouldn’t be serving on the bench. Equally disturbing is the fact that lawyers who contribute to a judge’s campaign may later appear before the judge or the court he or she sits on. Recusals do not occur as often as you might expect.

Some years ago a national survey was done that asked elected judges if their decisions were at all influenced by where they got their money. In their anonymous responses some acknowledged that their decisions were influenced a great deal or somewhat by their contributions. That can’t be good news, however you slice it.

In its most extreme form, judicial elections can result in what happened recently in West Virginia. The election for chief justice was so polluted by money and the appearance of impropriety that a judicial decision of the West Virginia Supreme Court was overturned by the United States Supreme Court on due process grounds. If you haven’t read Caperton v. Massey, you should. The elected chief justice is no doubt a fine judge but appearances ultimately matter more.

Judges who run in popular elections, especially partisan ones, are asked to fill out special interest questionnaires asking questions ranging from political views to religious beliefs—one such questionnaire asked judges if they had been “born again.” Judicial free speech rights have been broadly interpreted by the U.S. Supreme Court in Minnesota v. White and its progeny granting judges very wide latitude in their campaigns. As a result some judicial candidates announce that they will be tough on crime or that they oppose a woman’s right to choose. Saying you’ll be impartial and listen with an open mind apparently doesn’t seem to excite the voters or help you raise money, but it is what judges are supposed to do. Some of the television and radio commercials that run in contested elections would make you wince. The American justice system can do better than billboards and bumper sticker slogans and negative campaigns. We need your voices.

There is so much money awash in judicial elections across the United States that any real change will require public financing. People will not likely give up their franchise to select judges at the ballot box, even, it seems, if they often know nothing about judicial candidates. Justice Sandra Day O’Connor has focused much of her energy in retirement trying to eliminate the worst excesses of judicial elections. She’s right to try. She deserves your help.

Anytime a judge's political future is wrapped up in someone else's justice the fundamental promise of the American justice system is at risk. The organized bar needs to speak up.

Finally, we cannot succeed in the difficult years ahead without broadening public understanding of what the state courts do and of the growing crisis they face. We need to do a better job in reaching out for public support. Our task is made more difficult given the current state of civic knowledge. In recent respected scientific surveys, 66% of Americans acknowledged that they could not name the three branches of government. Only 15% could name the Chief Justice of the United States although 65% could name the three judges on *American Idol*. Thirty-two percent said their states did not have a Constitution while 38% said they didn't know. Among teenagers, 59% could name the three stooges while only 41% could name the three branches of government. I could go on, but the challenge is stressfully clear. We cannot assume that state courts will avoid paying a price or that judicial independence itself will not be jeopardized as a result of declining civic knowledge. Justice O'Connor and now Justice Souter are leading the mission to enhance civic understanding. If citizens don't fully understand why courts need to be accountable, yet independent, the ability of state courts to fulfill their constitutional and essential obligations will likely be compromised. Once undermined, it will be difficult to recover. The profession needs to join the effort in a big way or be willing to accept the collateral damage of inaction.

Our system of justice is passed on to each succeeding generation for safekeeping. It will soon enough be passed to your generation. I urge you to honor it, improve it and, most importantly, defend it. It's only a birthright if you protect it. I have no doubt you are up to the task.

Thanks for inviting me to this great law school and thanks for listening.