

Remarks of
Chief Justice John Broderick
to Bench and Bar
Evanston, Wyoming
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State Courts in the 21st Century: Are We Meeting the Challenges?

This past June I spoke at an Access to Justice Conference in Honolulu dressed in a suit and tie as I am today. When I rose to speak that afternoon, however, I noticed that virtually everyone else in the room was wearing a colorful Hawaiian shirt, open at the collar. I confessed to them that I must have looked like the guy in the office who didn't get the memo. Their laughter answered my question.

This is my first trip to Wyoming and my Hawaiian experience is still fresh in my mind. I wondered, as I was coming here today, whether I should dress like this—or whether I should have worn some Western clothing. But then again, maybe I've just seen too many interviews with Jerry Spence. It seems, however, that I guessed right. However I'm dressed, it's a genuine pleasure to be with you and I will do my best not to overstay my welcome.

Let me first thank your Chief Justice for his kind invitation to speak to all of you this afternoon and for his warm introduction. My father would have been pleased and my mother would have believed it. I admire your Chief and be assured, he is as well respected by his colleagues around the country, as, I'm sure, he is throughout Wyoming. You are fortunate to have his leadership.

What brings me here today and what I came to talk to you about is my growing concern, and I hope yours, that state courts all across America are more imperiled than ever before. They are increasingly underfunded, understaffed, misunderstood and undervalued, and it's not just because of the current economy. While the pace and slope of their gradual decline varies from state to state, the downward trend, with rare exception, is unmistakable.

The challenges confronting state courts at the dawn of the 21st century are different in kind and degree than at any time in their history. In my thirty-seven years as a lawyer and judge I never remember judicial branch layoffs, involuntary furloughs of judges and staff, courthouses closed a day or two a month to save money or the temporary cancellation of jury trials. I suspect your memories are like mine.

Whether we sit on the bench, advocate for others from the well of a courtroom, as I did for over two decades, or never even enter a courthouse at all, we, all of us, have a common stake in the success of the state courts. They

are, in my opinion, the glue that holds our Republic together and their promise to provide impartial, safe havens from aggregated power and the occasional unbridled excess of majority rule is the envy of the world. They are accountable to the Constitution and not to the dictates and forces of the marketplace. But their importance is not a long-term guaranty of their continued vitality. They are facing unprecedented change and challenge. They need our full attention and our vigorous advocacy.

More and more of our “customers” are self-represented. Their rising numbers are unprecedented. As you know, it is no longer just the poor who cross our thresholds without lawyers—they have now been joined by many middle-class Americans and small businesses. The clock will not reset and wishing it otherwise will not change current reality. The courts need to serve everyone’s needs—whether they come with a lawyer or not. After all, we’re the American justice system.

Last year the president of the California bar sounded an alarm. “Of the many challenges we face as a profession,” he said, “the one that should concern us most is that we now have a legal system in which the majority of Americans cannot afford legal services.” “Either we’ll need to adapt our system to meet more of society’s needs,” he continued, “or society will change the system for us.” Sadly, I agree. If the courts were a corporation that sold a product few could afford, they would not long survive. State courts are not immune from the laws of economics, however precious our product. We, judges and lawyers alike, need to adopt a competitive mindset in this new age if we are to fulfill the constitutional obligations of the state courts. It will require that we work collaboratively to reduce the cost of access while sustaining quality. Nothing is more urgent. The courts and the bar need to engage in frank discussions and, in time, invite others to join in. One thing is clear; yesterday’s assumptions will not address today’s realities or tomorrow’s challenges.

Left unaddressed or unacknowledged the challenges confronting the administration of justice in this country will increase exponentially and continue to undermine meaningful and cost effective access to the courts. All of us lose if we let that happen. Ultimately, it’s a choice. The move is ours and the clock is ticking.

If all of us were asked today to design the court system from scratch, with full knowledge of the problems and complexities outside our courthouse windows and the rising cost of access, what are the odds we would create the exact same system on the ground today with the exact same rules and paperwork? Systemic change is needed, not just small adjustments or changes at the margins. Due process can be secured and access enhanced. They are not mutually exclusive.

The erosion I see is illustrated in the slow disappearance of civil jury trials across the United States in state and federal courts alike, as the cost of justice far outstrips the capacity of many who seek it. Trial by attrition has increasingly replaced trial by jury. Wishing it otherwise will not bring civil jury trials back but real change might. In my view, without broad public involvement in state court justice through jury service, we risk losing the wisdom of ordinary citizens, the valued stamp of community approval and the essential bond of civic trust.

Jurors have historically dispensed much of the justice in our state courts and their jury service often enhances and informs their respect for the critical work all of us do—judges and lawyers alike. But most importantly, jury service reminds the public—and all of us—that their collective wisdom is essential to the fair administration of justice in our communities.

Jury trials are declining largely because the cost of ever-expanding discovery has grown excessive. This past winter the American College of Trial Lawyers issued a report saying as much. Their Discovery Task Force has identified core principles that should govern the discovery-life of a case and they will soon propose rules and protocols to make the expense of litigation proportional to what it really involves. Real change is always hard but if we don't embrace it the private justice system in America will continue its unrelenting forward march. Without meaningful change I predict that within a decade or less state courts will be largely the domain of those who cannot afford a lawyer and those charged with crimes. If we let that happen our legislatures might suggest we don't need the funding we used to get and the best candidates for judicial service may not apply.

Taking the difficult steps to ensure the historic role and relevance of state courts will not be easy or even popular. I'm sure it won't surprise you to learn that judges are often averse to change and, frankly, lawyers are not far behind. We all grow comfortable with the familiar and assume that modest evolution will naturally occur to make needed adjustments—and where action is required we often believe it is someone else's responsibility. That formula will not withstand the demands of this impatient new century that is revolutionizing expectations.

Whether we address the needs and growing challenges of a 21st century justice system candidly, openly, creatively and promptly will largely define the future of the state courts and the legacy you and I leave to those who follow. Nothing is preordained. Just because something worked yesterday does not mean it will work indefinitely. Just ask General Motors. Silence and inaction are not our friends and should not be our goals. Change is certainly coming and needed. We must meet it, embrace it, craft it and channel it to ensure that

the state courts remain vital and relevant. If we, those of us involved each day in the justice system, fail to act we can hardly complain when others don't.

It's the critical need for leadership and change that brought me to Wyoming today. Although you and I live in different parts of the country with different histories and different traditions, we share a common mission and a common dedication to accessible, affordable justice. The status quo is a losing hand. We need new cards.

The information age, the technology century in which we live demands change in all aspects of our lives and it also demands change in the courts. To assume that the state courts have been given an exemption from the dictates of this new age is to risk their very survival. Never in my lifetime did I expect to see Chrysler and General Motors in bankruptcy or the *New York Times* struggling for its survival. Even the great depression gave them a pass. If state courts are unwilling to accept this new reality they will, over time, lose "market share" and watch this bold new century pass them by. I'm not willing to let that happen without a fight. And I'll bet you're not either. But our collective voices need to be heard. Sooner as opposed to later.

Allow me to take a quick glance in the rearview mirror to better highlight the important challenges that confront us. When I began practicing law in 1972, desktop computers were non-existent, cell phones and faxes were unheard of. No one knew what a tweet was and no one had experienced the addiction of a Blackberry. Civil jury trials were plentiful. The justice system I knew then 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 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 in judicial campaigns.

The disputes resolved by the courts in the 1970s were fewer in number and often less contentious. Timeliness was more generously defined.

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 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.

The judicial system in 2009 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.

In his recent book, Hot, Flat and Crowded, noted author and *N.Y. Times* Columnist Thomas Friedman advocates for Americans to step up and lead "to allow [our] planet to grow in cleaner, more sustainable ways. . ." He describes the challenge he poses as not just an opportunity but, more importantly, a test. "It's a test," he said, "of whether we are able and willing to lead." Friedman notes that "[t]he era [all of us] are entering will be one of enormous social, political, and economic change." I agree. But in the new era Friedman exalts how can it be that in a hot, flat and crowded world, at the dawn of an age unlike any other in recorded history, state courts can afford to turn a blind eye to the changing landscape around us? The bus to this new century has left, but we can still run to catch it.

In this new century, we need to responsibly explore re-designing the courts from the front door to the judge's bench while adhering to core principles of due process. I fear that we provide much process that is not due and that we have needlessly driven up the cost of adjudicating disputes. Needed change should not be anecdotal or incremental. Bigger thoughts are needed.

Part of the change we need, I believe, should be the infusion of alternative dispute resolution in all trial courts. Not only will ADR create off-ramps for many litigants but experience has shown that parties who have a hand in crafting their own solution are much more likely to accept and follow it. We have done this in New Hampshire. Just two years ago we created the first ever Office of Mediation and Arbitration under the Judicial Branch umbrella. It is making real strides and offers its services in all our courts, including the New Hampshire Supreme Court. We need to offer litigants cost effective off ramps. ADR is doing that. We need to compete.

We need more and better technology in all our courts to at least approximate what's available in private law firms and private businesses. Most of us have a long way to go. Let me share two brief stories that help make the case.

Jack is our next generation of “customers.” He had faster and better technology in the palm of his six-year-old hand that June evening over the Pacific than currently exists in most state courts. That’s not good news but it is one of our many challenges.

The greater the disconnect and disparity between the technology commonly available in the marketplace and that found inside our courthouses, the less and less user-friendly and relevant we will become. We need world-class self-help websites and on-site and off-site self-help centers. We need full-time webmasters. I am proud to say New Hampshire finally has one. We need paperless courts. We must create simpler forms buttressed by interactive, explanatory on-line assistance. There is so very much to do.

In our efforts to reduce costs we should not be afraid to examine whether every dispute, in the first instance, needs to be automatically tracked for the adversary process and whether some of the work we all do might be handled less contentiously, at least at the outset. Marital cases—the area where we find the largest percentage of self-represented parties—come most prominently to mind. Perhaps not every motion hearing or conference needs an in-person appearance at the courthouse. Telephones, if used wisely, can help chip away at costs and delays.

If state courts are to enjoy success in this new environment, judges will need to become more proactive in managing litigation and its costs and more willing and better trained to interact with self-represented parties. If the Rules of Judicial Conduct need to be clarified or amended to provide judges with the necessary comfort to “neutrally engage” self-represented litigants, then the rules should be amended.

In order for state courts to prosper I believe we need to prudently create specialized dockets for certain types of cases. While the judicial system is largely the domain of judges who could fairly describe themselves as generalists, generalists should not be the only players in a 21st century justice system. Generalists are not best suited to resolve every problem that comes through the courthouse door—both civil and criminal. Just as there are specialists in medicine, we need some specialists on the bench to handle certain categories of cases.

In New Hampshire we are slowly expanding our mental health court dockets. We are even further ahead with juvenile and adult drug court dockets. In many cases we are saving the state and counties the cost of incarceration and the associated childcare and family impact costs that often follow. We are learning that good economics and good social policy need not be polar opposites.

We have recently created a business court docket and will be joining about eighteen other states that got there before us. My colleagues and I worked closely with our Governor and our Legislature in creating it and its first presiding justice was recently nominated. At this point, there are many invested in its future success.

Over the last year, I have met privately with numerous Chamber of Commerce boards and with the board of our Business and Industry Association. All were enthusiastically supportive of the business court. Many board members were candid in telling me that the courts do not act fast enough and that they are finding the private justice system a better fit. While we can never hope to eliminate private mediation and arbitration, nor should we, we can, in my judgment, be far more competitive. We should all want business disputes back in the state courts; businesses deserve a court system that can resolve their disputes in a timely manner and we need businesses to be invested in our success so they will advocate for our needs with those who fund us. If they are leaving us for the private marketplace, that will not likely happen.

We cannot succeed in the difficult years ahead without broadening public understanding of what the state courts do and of their growing crises. We also need to do a better job in reaching out for public support. Our task is made the more difficult because of the current state of civic knowledge. In recent respected scientific surveys, 66% of the Americans have acknowledged that they cannot name the three branches of government. Only 15% could name the Chief Justice of the United States although 65% could name at least one judge on *American Idol*. Thirty-two percent said their state 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. Both Justice O'Connor, Justice Souter as well as the ABA have joined the mission. We all need to join it, too.

Finally, I believe this new century will require lawyers and law firms to re-examine how they do business and how they bill for the work they do. The hourly rate can no longer be the only arrow in the quiver. Clients are looking for alternative fee arrangements and it would behoove lawyers to stay ahead of the marketplace because they can never control it. Cost containment and value billing are the watchwords of this new century. State courts have a huge stake in the profession's success and need to learn some valuable lessons themselves.

To me, the imperative is clear. I firmly believe that lawyers and judges alike need to work across state lines in a national effort to ensure meaningful access to justice for all our citizens. Failure is unthinkable but inaction will ensure it.

In times of self-doubt or in moments when I am tempted to yield my better judgment to the comfortable quiet of inaction, my wife often reminds me, "Remember," she says, "a hundred years, all new people." Well, this is our time, our hundred years and we need to embrace responsible change and be open to new ways to deliver justice. We need to keep what's working and modify or eliminate what's tired or failing. Above all else, we must not make the perfect the enemy of the good and by doing so fail to act. We need to take ownership. So very much depends upon the choices we make.

Almost all of us in this room today have spent our professional lives in the state courts. As I see it, we have an obligation to pass them on to the next generation of Americans in better shape than we found them. We have no time to waste and no excuse should be accepted.

Thanks for listening and for the honor to address you.