Trends and Issues in the State Courts: Challenges and Achievements

By David B. Rottman

These are challenging times for the state judicial branches. Funding has been cut, relations with the other branches of government are frayed, and election campaigns for judicial office can be injudicious. Significant innovation is occurring nonetheless. Effective practices in one jurisdiction are being spread nationally. Reentry courts for felons released after long incarceration is one example of the reliance federal and state officials are placing on such court innovations.

Challenges and Achievements

These are neither the best of times nor the worst of times for the state courts. On one hand, court budgets have declined, staffing levels have been reduced, court facilities have been closed, and some courts struggle to remain open to the public five days a week. Tensions with the other branches of government and problematic campaigning by judicial candidates provide additional reasons for concern. "Justice in Jeopardy" was the title chosen for the recent report of the American Bar Association’s Commission on the 21st Century Judiciary.

On the other hand, state courts are becoming more innovative and responsive in addressing deeply rooted, longstanding problems. Miscarriages of justice associated with inadequate translation of court proceedings are an example. With few certified translators available and steep costs of creating tests and certification procedures, observers, relatives and even defendants could be pressed into service to translate court proceedings.

To rectify this situation, the courts of four states founded the Consortium for Court Interpreter Certification in 1995: 29 states now belong, accounting for three-quarters of U.S. citizens who do not speak English at home. The Kennedy School of Government at Harvard University recognized the consortium in 2003 for "creating a cost-effective yet rigorous system for education, training and certifying skilled court interpreters."

One state chief justice (Jean Toal of South Carolina) chose a quote from Shakespeare—"there is a tide in the affairs of men which must be taken at the flood—to express the challenge to the state courts today." This essay reviews six national trends that fed that flood and then four specific issues whose resolution will play out differently from state to state.

Six Leading Trends Shaping the State Courts

Rationalizing Justice (resumed)

From the 1960s, reformers sought to increase the ability of the judicial branch to govern itself and adapt to changing times by adopting contemporary management principles. Simplified and consolidated court structures are the most visible result. Most states now have either one or two trial court levels; this contrasts with former patchworks consisting of numerous types and levels of courts, often with overlapping jurisdiction to hear cases. Despite signs in the early 1990s that the momentum had stalled, California established a single-tier trial court in 1998, Arkansas (2000) and Oregon (1998) consolidated their general jurisdiction courts and Utah (1996) its limited jurisdiction courts (as will Arkansas in 2005). This trend will continue. A recent experimental project in Michigan found continuing benefits from trial court consolidation.

State court systems also centralized their budgeting, personnel management and resource allocation processes. Notably, court funding shifted to the state level. Today, the court systems of 31 states are entirely or primarily state-funded, with four others poised to make the switch (Florida, Illinois, Minnesota and Pennsylvania).

In the course of these changes, the proportion of non-lawyer and part-time judges has been greatly reduced. Growth in judgeships has been at the general jurisdiction level (where judges can hear all manner of disputes). General jurisdiction court judges increased from 6,000 in 1975 to 9,000 in 1985 and to over 11,000 in 2001. The bench of limited jurisdiction courts has not grown in recent decades.

Judges’ Time as a Scarce Resource

The demand for judicial intervention is declining in some legal arenas: global treaties seek to super-
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cede court jurisdiction with forums like the World Trade Organization, private judging is taking major business disputes from the state as well as federal courts, and the number of civil trials is in long-term decline in many states.

Yet the overall demand for access to state judges’ time remains strong and likely to increase. Drug courts and other problem-solving courts during the 1990s demonstrated the unique ability of judges to simultaneously hold accountable and motivate people in need of treatment for substance abuse and other problems. The U.S. Department of Justice is encouraging reentry courts in which judges become in effect “reentry managers.” Establishing reentry courts was a natural response to concern at the state and national level. However, it came with an unforeseen consequence of “truth in sentencing” laws that mandated all prisoners serve 85 percent of their original sentence and the abolition of the parole boards that traditionally determined release dates and provided supervision. Some 630,000 prisoners are released annually. Sentencing reform had “the perverse effect of returning the most risky offenders to the community with the least control and supervision.”

The impact of this change on judicial resources is substantial. Reentry court and drug court judges handle more appearances by defendants and generate more reports per defendant than traditional processes demand. The judiciary also assumes greater system-wide responsibilities for coordination and collaboration among agencies and groups.

One little discussed aspect of this use of judges’ power is the degree to which it resonates with the general public, especially minority groups. Individuals most dissatisfied with traditional courts tend to be the most supportive of the new roles judges are assuming, arguably because they fill unmet expectations people hold of the courts. Nearly 90 percent of the American public agrees, for example, with the statement, “Courts should solve problems using the knowledge of psychologists and doctors.”

Courts and Consumers

The public is replacing lawyers as the primary constituency in the minds of the state court judges and staff. A new consumer orientation is taking hold, evident in provisions by the state courts to assist litigants without lawyers through user-friendly print material, simplified processes, and computer guided, Web-based assistance. Some courts are going further, taking steps to make legal advice available in the courthouse, previously considered unfeasible.

The Internet is being mobilized as part of the recognition that litigants, jurors and other non-lawyers in the courthouse are consumers of court services. Entire statewide court systems and individual trial and appellate courts are providing a wealth of information and services online. An annual award program identifying the top 10 court Web sites, evaluated a handful of sites in 1998 when the competition was initiated, 400 in 2002 and 900 in 2003. These Web sites are becoming true points of entry to the courts. Litigants without lawyers in Orange County, California, for example, can e-file using the Superior Court’s I-CAN project.

Public involvement in judicial branch decision making is another element of the enhanced public role in the state courts. Members of the public participate directly in policymaking as members of decision making and advisory committees. Less personal participation is being affected through systematic programs that build the general public’s concerns and preferences into decision making, typically through scientific opinion surveys.

The Supreme Court of Virginia exemplifies both direct and indirect public participation through its Strategic Planning and Management System. Broad public involvement occurs through telephone surveys that “register the public’s perceptions on how well the courts are performing and indicates where citizens perceive that improvements are needed.” The survey results are combined with other information to establish future demand for court services. Emergent themes are: assigned to a focus group or “venture team” that includes a broad base of citizens, businesspersons, representatives of other government agencies, judges, clerks, magistrates, technologists and attorneys. Based on the individual and collective experience of its members, each team is asked to contribute ideas and solutions for how the courts can manage the repercussions that may flow from one of the themes.

In Virginia and other states, such policies and practices represent a new mindset within the courts in which the citizen is more an actor than just a passive recipient in the life of the courts.

Diffusion

The enhanced institutional capacity of the individual state court systems is generating collective benefits because successful innovations in one state are reaching a national audience. States are working together, as in the Consortium of Language Certification, to solve problems beyond those that their individual resources can fix.

The diffusion of new approaches has been most
strongly recorded in the rapid growth of problem-solving courts. Initiated in 1989 with the opening of the Miami-Dade County Drug Court, problem-solving courts allow a judge to strictly enforce compliance with court orders, including those specifying the delivery of services to individuals with specific kinds of social and emotional problems that promote recidivism. There are now over 1,000 drug courts nationally. Drug courts exemplify court-initiated and court-based innovations that respond to longstanding concerns over ineffective policy responses to societal problems. Diffusion of a network of problem-solving courts is being undertaken in states like Ohio, which has established a Specialized Docket Section in its Supreme Court to provide "technical support to trial courts in analyzing the need for, planning, and implementing specialized docket programs." \(^1\)

Diffusion of innovation in court practices is being facilitated by new organizations like the Center for Court Innovation, a partnership between the New York State Judicial Branch and non-profit groups, established in 1996. The center serves, in effect, as the research and development arm of the state’s courts, but is administered as a project of the non-profit Fund for the City of New York. The Best Practice Institute of the National Center for State Courts identifies and promotes the adoption in other jurisdictions of practices that enhance the effective administration of justice. Emergency management for the courts was one practice identified in 2003. \(^2\)

**Mainstreaming**

The state courts have drawn heavily on the organizational capacity built up during the period of unification to specialize effectively. \(^3\) The question now is, can the benefit of that specialization be extended to the larger court systems—to civil litigants and criminal defendants generally? The stakes are high. The margins cannot be allowed to flourish at the expense of the core.

State court leaders see the promise. The two major court leadership organizations, the Conference of Chief Justices and the Conference of State Court Administrators, recently resolved to: encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community. \(^4\)

The immediate implications of mainstreaming are most likely to be found for the broad mix of criminal defendants whose type of offense is not currently associated with a specialized court. In mid-2003, the U.S. Department of Justice organized a focus group of criminal justice officials and experts to explore the feasibility of establishing a criminal court-wide screening, assessment and referral process that would target those “generalist” offenders. More broadly, the style of interaction used by problem-solving court judges is being extended to other categories of cases, civil and criminal, where compliance with court orders has traditionally been poor. \(^5\) Social science research consistently demonstrates that the kind of courtroom interaction associated with problem-solving increases compliance. \(^6\)

**Inter-branch Tensions**

A degree of tension inevitably characterizes the relationship between the judicial and legislative branches. After all, the judiciary is “the branch that holds the representative branches to their responsibilities.” \(^7\) And contention over budget allocations is to be expected.

In recent years, however, inter-branch relations in many states have become frayed. Contributing factors include the magnitude of state budget crises and the heightening of intrastate tensions by the involvement of national groups promoting the interests of one side or the other in litigation on such matters as the environment or tort reform. Further, lawsuits filed by citizens and organizations challenging legislative provisions on such subjects draw the courts into issues that have far-reaching policy consequences. Legislators might construe such decisions as an intrusion into policy-making. Indeed, state supreme court decisions that find a piece of legislation in violation of a state’s constitution are being met with threats of retaliation by means of reducing the judiciary’s budget or the threat of recall or impeachment.

Such a reaction is contrary to what we all depend on courts for: deciding fairly, even if one side has more political clout than the other. The cases that appellate courts decide are brought and shaped by others: the judges “are forced to rule.” \(^8\) Further, the policy implications of such decisions are byproducts of a finding based on facts and the applicable law. It is only the rare case, though often ones that draw attention, in which even the ablest and most neutral judges may differ on just what is the relevant law or its application to the facts. Inescapably, sometimes the law has gap and ambiguities. But in all cases, the public must be confident that the judges are doing the best humanly possible to “call ‘em as they see ‘em.”
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Problematic Judicial Elections

Judicial campaigns as of late 2003 do not look promising for those committed to keeping judicial elections different from elections for executive and legislative branch officials. In 2003, a race for an open seat on the Pennsylvania Supreme Court pitted two lower court judges each backed by different political parties in a multi-million dollar campaign received the most attention (the year's other state supreme court race involved an incumbent in Wisconsin). The successful candidate interpreted the U.S. Supreme Court's decision in Republican Party of Minnesota v. White (which struck down the "announce clause" of Minnesota's Code of Judicial Conduct) as freeing him to tell voters his personal beliefs in favor of abortion rights, the death penalty and unions, but opposed to capping tort judgments and gun control. The defeated candidate argued that campaigning like that would "create expectations about how she would vote if elected to the Supreme Court." Whether the race is a bellwether for campaign conduct depends on the effect of the high voter turnout, which favored the winning Democratic candidate because of events involving Philadelphia's mayoral election.

Issues Facing the State Courts

Can the growth of problem solving courts be sustained? The rapid diffusion of problem-solving courts was a phenomenon. There is some evidence that the growth of the most common type of such a court is stalled, or has even reached the point of saturation. There are now nearly 1,100 drug courts (adult, juvenile, family and other varieties), 20 community courts, 70 mental health courts, and perhaps as many as 300 (if loosely defined) domestic violence courts. During 2003, 44 new drug courts were implemented, the lowest number since 1995 and one-fifth of the number recorded for 2002. The potential for further expansion is clearest for mental health courts, which were backed by a federal funding initiative. Otherwise, the greatest energy is evident in the creation of hybrid or more narrowly specialized courts to deal with specific, acute needs. "Dependency courts" are an example, established to provide judicial monitoring of participation in substance abuse treatment services for parents charged with child abuse and neglect.

Drug courts, however, may have a renewed spurt of growth. They have compelling advocates on the bench. They also are unique because an entire profession has grown up around them. The National Association of Drug Court Professionals (NADCP) has a membership of approximately 3,000; the degree of interest in the association's work is evident in the 15,000 individuals on its mailing list, making NADCP one of the largest national organizations of court-associated professionals.

Can non-regulatory approaches moderate judicial elections? In 2004, 29 states will hold supreme court elections, with at least 68 seats in contention (accounting for one out of every four seats on courts of last resort). Popular election is almost certain to remain the core element of judicial selection. No state has ever eliminated elections. Recent debates on avenues for reform have focused on methods of strengthening the credentials of those aspiring to be judges. The chief judge of New York's Commission on Public Trust and Confidence in Judicial Elections in its December 2003 preliminary report recommended that: "New York State should establish a system of state-sponsored Independent Judicial Election Qualifications Commissions to evaluate the qualifications of candidates for judicial office throughout the state."

Another response to the deterioration of judicial elections was given prominence in the U.S. Supreme Court's Republican Party of Minnesota v. White. In concurring with the majority, Justice Anthony Kennedy wrote: "The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so." A National Ad Hoc Advisory Committee on Judicial Campaign Conduct has been established to provide information and assistance to states and localities that wish to respond to Justice Kennedy's call.

Ultimately, public attentiveness may be the key to moderating the conduct of judicial election campaigns. Voters seek cues about a candidate but find few available beyond a person's surname, political party or public statements that may border on a commitment to decide cases before hearing the evidence. Can courts win the public's attention? The news for the state courts about public opinion is mixed. Contrary to many claims, survey evidence over the past quarter century does not reveal a decline in the public's confidence in the state courts or show them to enjoy less public support than the executive or legislative branches. Instead, the problem may be a lack of attentiveness to the business of the courts and a corresponding stereotypical view, national in scope and resistant to local efforts that demonstrate courts
are doing a better job. The important task is to build an active, critical, but supportive public constituency for the state courts that extends beyond the legal profession and understands the unique responsibilities our system of state government assigns to the judicial branch.

The extent of jury nullification, where the members of a jury vote to acquit a defendant despite what the law and the evidence indicates as an act of protest, has been taken as a symptom of public unease over the fairness of the courts. Research evidence reported in 2003 suggests that such concern is at least in part misplaced. Concerns over the persuasiveness of the evidence seem to drive hung juries.29

A challenge for the courts will be to develop constituencies beyond the legal profession that are constructively critical and supportive of the state courts’ unique responsibilities in our system of government.

Can court budgeting be organized in a way that balances judicial accountability and independence? There are several promising developments that provide objective measurement as part of the budget process. Methodologies for translating court caseload into workload are becoming highly sophisticated. Workload assessment derives needs based on the amount of attention various types of cases require (17 states have well-established workload measures for judges). A Minnesota effort included three indices of case complexity: substantive, procedural and idiosyncratic.30

Conclusion

The environment in which the state courts operate is more complicated than in the past. The state courts today are being driven by diverse trends, some playing out the logic of previous eras of reform. At the same time, courts are struggling to keep afloat in a harsh budgetary environment, to build durable processes of innovation, and to mainstream for general use approaches first created for very specific kinds of cases. National interest groups are becoming involved in controversies over court decisions in individual states and global trade agreements and organizations are vying for jurisdiction over cases traditionally decided according to state law.

This flood tide challenges the institutional capacity of the state courts. Success in channeling the tide will depend on the courts’ ability to build a constituency, clarify their relationship to the rest of state government, and obtain the resources commensurate with their responsibilities under our system of state government.

Notes

9 “Many courts have web sites” Criminal Justice Newsletter August 1, 2003, 1.
11 www.sconet.state.oh.us/spec_dockets/
14 Conference of Chief Justices, Resolution No. 22 (2000).
16 Tom Tyler and Yuen Hao, Trust in the Law: Encouraging Public Cooperation with the Police and Courts, (New...
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21 Drug Court Activity Update: Composite Summary Information, Drug Court Clearinghouse, American University, December 15, 2003 (reflects only the first 11 months of 2002).
22 Federal legislation recognized the promise of mental health courts, allocating funding for the creation of 100 additional courts (America’s Law Enforcement and Mental Health Project (Public Law 106-515).
23 Telephone conversation on January 8, 2004 with NADCP membership director Arlandis Rush.
25 Commission to Promote Public Confidence in Judicial Elections.
26 122 S. Ct. at 2545.
27 See www.judicialcampaignconduct.org.

About the Author

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