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At the Tipping Point: State Courts and the Balance of Power

The Benjamin N. Cardozo Lecture

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Remarks as Prepared for Delivery

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Benjamin Nathan Cardozo was a realist and a pragmatist. He strove always for candor. In speaking this evening about the state of state courts, I endeavor to keep his example in mind. For if Justice Cardozo were alive today, he would pound the message home with unmistakable urgency: our state courts are in crisis. That is my message this evening. I choose my words carefully.

In my 33 years in the legal profession, I cannot recall another time in which state courts faced so many obstacles to performing their core constitutional function: to deliver justice promptly and effectively, according to the rule of law. State courts are vital to our national scheme of limited public power. They are where the overwhelming majority of the people go to obtain justice. Yet in many ways state courts are becoming our nation's most fragile public institutions. The vulnerability of today's state courts imperils the principal of judicial independence, and casts a shadow over the future of our democracy.

I speak as a state court Chief Justice; the immediate past president of the Conference of Chief Justices, which represents the nation's state and territorial courts; and as a member of the legal profession. I speak as a woman, as an immigrant, as one who has searing personal experiences of government by force.

I grew up under the apartheid regime in South Africa. It was a government of lawlessness. Yes, the legal culture was well developed. There were settled laws and a learned judiciary. There were prosecutors galore. And the courts? Their role was not to do justice, not as we understand the term. The judge's primary duty was to uphold and enforce the laws, no matter how fundamentally inhuman. South Africa followed the British parliamentary system. Under that system, Parliament's word (even its most brutal words) were law, which judges were essentially powerless to void.

Thus, when Nelson Mandela challenged his prosecution on the grounds that he was tried under a political system in which he had no voice, his defense fell on deaf judicial ears. When Stephen Biko, whom I knew, was tortured to death in his prison cell, no court intervened.

The color of my skin, the fact that I am a woman, offered me some protection from government violence. But as my anti-apartheid student activism gained the attention of the political authorities, I knew I could appeal to no judge, no court, should I hear the dreaded knock on my door in the middle of the night.

I first came to the United States as a 17-year old high school exchange student. I returned in 1968, after I graduated from university in South Africa. Each time, this nation was in turmoil. Marches for civil rights, and women's rights, and marches for the Ku Klux Klan. Riots in the streets. Fears of Soviet aggression. Vietnam. Yet to my astonishment, people were free to debate even the most controversial issues, and to criticize, scathingly criticize, their national leaders. Here I could speak my mind, and change my mind, and change it back again, without fear of punishment. Here the law of the powerful was not supreme: the Executive, and the Legislature, could be ordered to conform their actions to constitutional principles. By the courts.

Some Americans may take for granted the central role of the rule of law in this country, and the principal of equal justice. I never can, for I have known its opposite. My work as a judge shows me every day what I sensed intuitively when I first arrived here: the genius of the American system of government. A government of diffused and balanced power, limited by a fundamental charter of rights enforced by a neutral judiciary. Constitutional democracy is far from perfect. But, as most of the world now agrees, it is the best system humankind has yet devised to secure liberty and progress.

My focus this evening is on state courts within our grand scheme of government. Consider the view of former United States Supreme Court Justice Sandra Day O'Connor, herself a state court judge before joining the United States Supreme Court. "[T]he health of the entire legal system," Justice O'Connor says, "both state and federal – depends on a strong *state* judiciary."¹

The numbers tell us part of the reason that state courts are so important in our federal scheme of government. Here are some raw figures from 2007, the latest date for which comparative data are available. The total number of cases filed in federal district and appellate courts, not including bankruptcy cases: 384,330. In state courts? 47.3 million cases filed, not including traffic offenses.² By some estimates, state courts account for over 97 % of all litigation in the United States, including 99% of all criminal cases.³

State courts are important not only for *how much* but also for *what kind of* litigation they handle. Federal law unites our country under a set of common principles. But state courts routinely grapple with the most fundamental, often startling, questions posed by an evolving society. What sets of relationships are entitled to legal recognition as a family? What, legally, is death? What kinds of injuries to third parties should be reasonably foreseeable by a treating physician? What types of prison conditions are cruel and inhumane? What is the role of the

¹ Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 142 (2004) (emphasis added).

² Memorandum on file.

³ State Justice Institute, Fiscal Year 2010 Budget Request, at 17 (January 2008), quoting National Center for State Courts, 2003, Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project, available at http://www.sji.gov/PDF/fy2010_Budget_Request.pdf.

court in public education? In every facet of life and law, state courts have acted as incubators – "laboratories," in Justice Louis Brandeis's famous phrase – for developments that in some cases, over time, have changed social and legal paradigms throughout the nation.

Consider the first constitutional case presented under the world's oldest, still-governing democratic constitution, the Massachusetts Constitution of 1780. The case, actually a series of cases, arose in 1783. On one side, a black man, Quock Walker. On the other, a white man, Nathaniel Jennison. The question before the court, in essence, was whether Walker was Jennison's "proper negro slave,"⁴ his property, whom Jennison had every right to punish as he saw fit.

The Massachusetts Constitution of 1780 declared that "all men are born free and equal, and have certain natural, essential and unalienable rights." When the Walker case reached the Supreme Judicial Court, that Constitution, drafted by John Adams, was but three years old. In the criminal case against Jennison, the man who claimed to "own" Quock Walker, Chief Justice William Cushing declared that under the Massachusetts Constitution, "every subject" was guaranteed liberty – "every subject" – and that slavery was "inconsistent" with that constitutional guarantee.⁵ Massachusetts thus became the first government anywhere to abolish slavery by

⁴ From record of the Walker proceedings quoted in Peter Agnes, Jr., *The Quorck Walker Cases and the Abolition of Slavery in Massachusetts: A Reflection of Popular Sentiment or an Expression of Constitutional Law?*, Boston Bar Journal, 8, 10 (May 1992).

⁵ We do not have a decision of the Court, because none is published. But we do have Chief Justice William Cushing's notes. See Proceedings of Massachusetts Historical Society, Vol. 1873-1875, 294 (1875). "Chief Justice Gray submitted for the inspection of the members of the Massachusetts Historical Society Chief Justice Cushing's original note-book of the trials before the Supreme Judicial Court of Massachusetts at the terms held in the County of Worcester in 1783, (which had been intrusted to him for the purpose by Mr. William Cushing Paine, the namesake and great grand-nephew of Chief Justice Cushing), and read therefrom the minutes of

judicial decree.⁶ Nine decades before the American Civil War. The Massachusetts Constitution of 1780 was also the first charter of government anywhere to give practical effect to the principle of a charter of rights enforced by judges, the principle of judicial independence.

My second example, familiar to all of you, is the landmark New York case decided by Justice Cardozo in 1916, MacPherson v. Buick Motor Co.⁷ I use it to illustrate a point.

MacPherson had been injured by a defective wheel on his Buick, a wheel that Buick did not manufacture. Conventional jurisprudence held that MacPherson could not recover damages from Buick for the injuries because MacPherson, who had purchased the car from a dealer, and Buick were not in contractual privity. Justice Cardozo saw things differently. He held, in sum, that Buick had a duty to third-party consumers to ensure that its automobiles were safe:

“If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser,” he said, “and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”⁸

Impeccable legal reasoning . . . today. Initially Justice Cardozo's opinion was widely rejected.

Yet *MacPherson* surely gave rise to consumer protection law as we know it.

I dwell on these two cases as examples in which state courts have refashioned whole

the trial at the April Term 1783 of the case of *Commonwealth v. Nathaniel Jennison*, in which it was established that slavery was wholly abolished in this Commonwealth by the Declaration of Rights prefixed to the Constitution of 1780." *Id.* at 292-293.

⁶ See, e.g., A.L. Higgenbotham, Jr. and F.M. Higgenbotham, "Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. Rev. 1213, 1219 (1993).

⁷ MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Buick "was not at liberty," Cardozo said, "to put the finished product on the market without subjecting the component parts to ordinary and simple tests." *Id.* at 394.

⁸ *Id.* at 389.

areas of law far in advance of their general acceptance in the United States. The process of legal fermentation continues in state courts today, in every area from drug courts, to the definition of marriage, to the law of toxic torts.

In the laboratories of our state courts, trial judges play a vital role. Henry Lummus, a former Associate Justice of my court and himself a distinguished trial judge, observed decades ago that "[n]o judicial system can be stronger than its trial judges."⁹ Affirmed. Most state court cases will be resolved at the trial level. For the overwhelming majority of court users in the United States – litigants, attorneys, jurors, witnesses, victims of crime – the trial judge is the face of justice. Trial judges are the silent heroes of democracy. It is high time, in my view, that we acknowledged them as such.

State courts, both trial and appellate, are where most legal disputes in the United States are resolved. They allow for an orderly process of legal experimentation and transformation in the common law, statutory law, and constitutional law. They are equal partners in the federal structure of our government. But state courts, as independent, co-equal arms of government, are at the tipping point: the tipping point of dysfunction.

Many recent developments have served to undercut the vitality of state courts. I have spoken elsewhere of the crisis of credibility brought on by increasingly vituperative state-court judicial election and retention campaigns, fueled by special interest money and attacks on the judiciary itself. This evening I focus on two other developments that portend ill for our state courts: a funding crisis and a crisis in access to justice.

⁹ Henry T. Lummus, The Trial Judge n.p. (1937), reprinted by the Flaschner Judicial Institute, Boston, MA (2007).

First, funding. Some have claimed that the private sector is beginning to recover from the recent, severe economic downturn. Not so the states. According to the National Center for State Courts, 49 of 54 state and territorial court systems faced shortfalls – often huge shortfalls – in their budgets for FY 2010.¹⁰ In Massachusetts alone, the Trial Court budget was reduced by \$50 million from fiscal year 2009 to fiscal year 2010, an overall reduction of about 10%. The Governor is seeking a further reduction of some \$40 million in the court's' budget this fiscal year. Reductions such as these are echoed in other states. And so is the manner in which these cuts are made: the Judicial Branch is not given a meaningful voice at the table. Although a co-equal branch of government, in deliberations about reducing state spending, the judicial branch is often treated as merely another state agency. Governors and Legislatures must make difficult, very difficult public policy choices during hard economic times. Delivering justice, however, is not a public policy choice that can be scaled back in lean times. Delivering justice is a constitutional command.

The fiscal situation of our state courts grows bleaker by the day. One half of state court systems will not be filling judicial vacancies or calling in retired judges to sit on the bench.¹¹ One state judiciary is phasing out all court reporters.¹² Another suspended all civil and criminal jury

¹⁰ NCSC Press Release, State court budgets: reduce hours, consolidate courts, improve technology (July 7, 2009) (on file).

¹¹ National Center for State Courts, Future Trends in State Courts 2009, at 3.

¹² Court reporters soon to be replaced by recordings (AP), Daily Herald (Utah), February 15, 2009, available at http://www.heraldextra.com/news/state-and-regional/article_8c39a66d-c241-5a3d-86d0-63ffe7577899.html.

trials for a month to save on daily payments to jurors.¹³ In Massachusetts, the Judicial Branch was forced to make drastic cuts to the Trial Court's payments for guardians ad litem, who speak for the most vulnerable children and adults. And around the country: courthouse closures, reductions in court hours, judicial staff layoffs.¹⁴

Ultimately, of course, it is court users who bear the brunt of the budget axe. And the recent decimation of court budgets, with the resulting cutbacks in court access, have come at the worst possible time. In periods of economic stress, people turn in even greater numbers to state courts for relief. More petitions to modify child support payments. More collection actions. More benefits cases. In October, 2009, the Brennan Center for Justice released an in-depth study showing the high number of families that face foreclosure proceedings . . . without the aid of legal counsel.¹⁵

State courts do not solicit business; nor may we turn cases away for lack of resources. We may not pick and choose which constitutional or statutory mandates we wish to obey. People come to court seeking fair, prompt and effective justice. That is what their federal and state constitutions, whether they have read them or not, give them every right to expect. And that is what our cash-strapped courts are increasingly unable to deliver.

My concerns about the funding of state courts go beyond the current economic

¹³ Deborah Cassens Weiss, N.H. Suspends Jury Trials, Leaves Judgeships Vacant, ABA Journal, Dec. 9, 2008, available at http://www.abajournal.com/news/nh_suspends_jury_trials_leaves_judgeships_vacant/.

¹⁴ See supra note 10.

¹⁵ Melanca Clark with Maggie Barron, Foreclosures: A Crisis in Legal Representation (Brennan Center for Justice, October 6, 2009).

circumstances. Many state courts are funded, even in the best of times, by means more appropriate to an ancillary government service.¹⁶ In some states, a governor unilaterally may reduce the budget request of the judicial branch before submitting the budget to the legislature. In others, courts are funded by fixed line item budgets, which restrict the judiciary's ability to direct funds to where they are most needed. Increasingly, state courts are being required to fund themselves from revenues collected from fees and fines, despite the fact that some of this so-called retained revenue – probation fees, for instance – are notoriously hard to collect, especially now. Massachusetts is a prime example. Nearly ten percent of the Massachusetts Trial Court's Fiscal Year 2010 budget – \$53 million of \$554 million – is slated to come directly from court users, but *only* if the fees can be collected by the courts.

Budgets based on retained revenues are, at best, aspirational. They come to fruition only when judges, clerks, probation officers, and court staff add "collections agent" to their job descriptions. And no one in this country should ever have to wonder whether the fine a judge has just assessed was influenced by her wish to avoid judicial lay-offs.

The structural dependency of courts on the political budgeting process hampers the ability of even the best-managed state judiciaries to plan ahead, respond to the unexpected, or manage efficiently. The result? Too often, it is turnstile justice. We see this most clearly in state-court criminal cases. There, the sheer volume of cases, coupled with the lack of sufficient time and resources to thoroughly assess each case, exerts tremendous pressure on prosecutors, defense

¹⁶ See, e.g., Conference of Chief Justices, Resolution 22: State Judicial Branch Budgets in Times of Fiscal Crisis (January 21, 2004).

attorneys, and judges to endorse plea bargains, even where the case is triable for the defendant.¹⁷

Amy Bach, a member of your bar, has examined this pressure at length. Her term for it?

"Ordinary injustice." How much "ordinary injustice" takes place in housing court? In family court? Not because of judicial indifference, but because of systemic inadequacies that leave courts chronically short of resources to deal with the press of court business, both civil and criminal.

To be sure, the structural problems of state court funding mirror the structural problems of state funding in general. Since the turn of the last century, it has been widely evident that state and local sales, income, and property taxes— the primary components of state and municipal revenue¹⁸ – are inadequate to meet the needs of the people for even basic services. As a result, as columnist Thomas Friedman recently noted, "[e]verything from our schools to our energy and transportation systems are falling apart and in need of reinvention and reinvigoration. And what people want most from Washington today," he added, "is nation-building at home."¹⁹ Would that he had added "our courts" to his list of failures.

As a nation we have begun to realize that the consequences of the failures of our primary

¹⁷ See generally Amy Bach, Ordinary Injustice: How America Holds Court (2009).

¹⁸ See Tax Policy Center of the Urban Institute and the Brookings Institution, The State of State (and Local) Tax Policy, The Tax Policy Briefing Book, available at http://www.taxpolicycenter.org/briefing-book/state-local/revenues/state_revenue.cfm (for 2006). According to this document, state governments in 2006 averaged about 41 % of their gross revenues from sales and income taxes, with 31% of their budget coming from federal sources and the rest from miscellaneous fees and receipt; local governments on average got 28 % of their total revenue and 72 % of their tax revenue from property taxes, although such property taxes represent only about 2 % - 8% of total state revenues.

¹⁹ Thomas L. Friedman, More Poetry, Please, The New York Times, October 31, 2009.

and secondary schools, our local roads and city public transportation systems, our village police and fire departments, do not stop at state borders. They have national ramifications that call for national action.

The delivery of justice in our state courts, too, is failing. The criminal justice system is one example. "[A]s citizens we all have a stake in the fairness and legitimacy of our criminal justice system for both moral and pragmatic reasons. The character of our nation is determined in significant part by how we treat the criminally accused."²⁰ That is Professor David Cole, writing eloquently in the current issue of The New York Review of Books. I would add that the character of our nation is also determined in significant part by how we treat our civil litigants. Well-functioning courts that deliver justice equally, promptly and fairly are vital building blocks of our society, our schools, our economy, and our civic life.

Yet the critical condition of our state courts, both criminal and civil, has not sparked broad public concern, or even broad public awareness. Billions – billions– of federal dollars every year go to assist the states in meeting the basic needs for services such as a well-equipped police force and decent roads, better schools and hospitals, matters once left wholly to the states. These systems are seen as “too big” – read “too important” – “to fail.” To the extent that federal money goes to our system of justice it is overwhelmingly targeted to criminal law enforcement and homeland security – to prosecutors, sheriffs, prisons and the like. Total discretionary outlays for the Department of Transportation in FY2009 are estimated at about \$56 billion.²¹ And for the

²⁰ David Cole, Can Our Shameful Prisons Be Reformed?, The New York Review of Books, 41, 42 November 19, 2009.

²¹ Federal statistics on file.

State Justice Institute, a primary source of grants for state courts in the civil arena? A little over \$5 million.²²

Is it now the time to recognize that, in our federal scheme of government, state courts are “too big to fail.” Perhaps now is the time to think anew whether there is some role for the federal government to ensure that state courts have the material resources they need, especially where federal law requires state judiciaries to expend funds. Take state courthouses. Supreme Court Justice John Paul Stevens left no doubt that safe, accessible state courthouses are a constitutional demand. Writing for the majority in the 2004 case Tennessee v. Lane, concerning the access of disabled individuals to state courthouses, Justice Stevens noted “the well-established due process principle that, ‘within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard’ in its courts.” “[O]rdinary considerations of cost and convenience alone,” he added “cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”²³ In Massachusetts, many of our 105 courthouses were built in the nineteenth century, with steep, dark stairways and dimly lit passages worthy of an Edgar Alan Poe mystery. All branches of Massachusetts government are keenly aware of the need to repair and update these courthouses, but the revenues simply are not there to proceed with expedition. Should the option of federal funds be available where a state chooses to proceed more quickly than its available revenues allow?

Another example: accommodating those who speak little or no English. Last year, in the

²² President’s Budget Includes Full Funding for SJI, State Justice Institute News at http://www.sji.gov/article-presidents_budget.php (on file).

²³ Tennessee v. Lane, 541 U.S. 509, 532-533 (2004) (internal citations omitted).

wake of an investigation by the United States Department of Justice, the Department entered into an agreement with the State of Maine. The agreement requires the Maine judiciary to ensure, among other measures, that court interpreters are promptly available in civil and criminal matters for anyone of limited English proficiency who comes to a clerk's counter.²⁴ The cost of the agreement to the Maine judiciary? An estimated \$300,000.²⁵ Unquestionably, those with little or no fluency in English must have full access to our state courts. Is it fair, however, is it realistic, for the federal government to impose unfunded operational mandates on our cash-starved state judiciaries? Surely, the operational needs of state courts are more important to the nation's security and prosperity than a bridge to nowhere, and more deserving of carefully targeted federal support.

When I raised the matter of more federal assistance for the infrastructure of state courts privately with a senior member of the United States Senate Judiciary Committee, I was told, "Be careful what you wish for." Always good advice. However, Congress knows how to provide safe buildings and good technology and an adequate number of translators for the federal courts without weighing in on substantive justice. Can we not begin to think creatively about enhanced federal funding for state court operations that strengthens, rather than erodes, judicial independence? I raise this issue, a sensitive issue, here because this is a sophisticated audience experienced in thinking through these kinds of complicated questions.

²⁴ Department of Justice Press Release, "Justice Department Reaches Agreement with Maine Courts to Reduce Language Barriers," September 30, 2008. The agreement was reached pursuant to Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968.

²⁵ Maine courts improve interpreter services, October 1, 2008, at fosters.com (Foster's Daily Democrat), on file.

The second, related concern I share with you this evening is about broadening access to justice. A court system may deliver stellar substantive justice in the most efficient way. But unless the court has opened its doors to all within its jurisdiction on an equal basis, justice will not have been served. Where the people have no confidence that every person can find justice in our courts – every person – then our legal system effectively works only for the rich, the powerful, the strong, the well-connected. That kind of legal system engenders a justifiable cynicism about the promise of our democracy.

Today, the issue of access to justice in our state courts is complicated by rapidly evolving demographic and social changes: The explosion of litigants in our state courts who proceed without counsel because they cannot afford a lawyer. The growth in populations of non-English speakers. The plethora of dual-diagnosed litigants: defendants who have both substance abuse and mental health issues.

Problems have replaced issues as matters for judicial decision, and rarely can these problems be resolved by a single court event. Your Chief Judge, Jonathan Lippman, has it exactly right: "Whether we like it or not," he observes, "the state courts are in the eye of the storm; we have become the emergency room for society's worst ailments – substance abuse, family violence, mental illness, mortgage foreclosures, and so many more."²⁶

State judiciaries are not able to eliminate all barriers to access, of course. But they have an obligation to identify, and then to eliminate, barriers to access to justice that originate in the court system itself. Even in times of scarce resources. Ensuring that every state court system has

²⁶ Jonathan Lippman, "Institutional Independence of the Courts," quoted by Honorable Christine M. Durham, 2009 State of the Judiciary, January 26, 2009.

adequate resources to meet the evolving needs of its residents is an urgent matter of national interest.

I sometimes hear the claim that state courts are "without a constituency" to obtain needed government funds. As someone who grew up under a repressive regime in which the so-called justice system served only the most powerful, the assertion that state courts are without a "constituency" is deeply painful to me. The people of the United States understand that courts are the ultimate refuge for their rights, the arm of government in which they can demand, and receive, justice. Poll after poll tells us so, but so does our everyday experience as judges and lawyers. The constituency of the courts? They are in this room. They are riding the subway. They are in the skyscrapers. They are in homes and in shelters. They are on every Main Street in this country. The constituency is there to keep our state courts healthy. What is lacking is a concerted effort to bring the crisis in our state courts to national attention. Who better to do this than the safekeepers of the rule of law: judges and the bar. Especially the bar, the officers of our courts. "As citizens," said Attorney General Eric Holder, several months ago, "we share a common conviction that liberty depends on the equitable and impartial enforcement of the law, an ideal embodied in our founding documents. As lawyers," he continued, "we share a duty to make that conviction a reality" ²⁷

In South Africa as a young student I faced the juggernaut of apartheid. At that time, the impediments to establishing a free society founded on the principles of justice and equality seemed insurmountable. But the impediments *were* surmounted; the principles of justice and

²⁷ Attorney General Eric Holder, Remarks as Prepared for Delivery at the 2009 ABA Conviction, Chicago, August 3, 2009.

equality *did* prevail. How? I have learned that when each one of us refuses to accept what appears to be the inevitable, the consequences can be extraordinary. Each one of us has the power, if we have the will, to save our state courts from a slow and painful demise. Margaret Mead called it “the power of an individual to change the world.” I call it the power of each one of us to preserve democracy.

Thank you.