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Restoring Luster to the Palladium of Freedom

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Foreword:
Restoring Luster to the Palladium of Freedom

Wm. T. (Bill) Robinson III

"[I]f we do not maintain justice, justice will not maintain us."
Francis Bacon

INTRODUCTION

In late September 2011, lawyers, judges, leaders in business and policymakers from across the country converged on Lexington, Kentucky to speak reverently about our system of justice. In keynotes and on panels, between plenaries and over lunches, the assembled guests at the University of Kentucky College of Law described in impassioned tones how the pillar of our judiciary as a coequal branch of government upholds our constitutional democracy. At the same time, attendees expressed concern and exasperation about a more recent phenomenon that saps the vitality of our nation's state courts.

This symposium, hosted by the Kentucky Law Journal (KLJ) and cosponsored by the American Bar Association (ABA), the National Center for State Courts (NCSC) and LexisNexis, was convened years into what every attendee would term a crisis. Even as participants gathered on the first morning to celebrate a proud anniversary—the 100th volume of KLJ—state courts around the country were opening their doors to budgetary badlands.

The crisis of state court underfunding brought them to Kentucky. The Symposium on State Court Funding, an aspirational title that posits a better funding future, was organized to bring together those with a stake in the future of our courts to find solutions to a problem of ways and means. As this Foreword and contributors to this edition of KLJ demonstrate, state courts are operating on threadbare budgets and the consequences

1 Wm. T. (Bill) Robinson III (University of Kentucky College of Law, 1971, and student member of the KLJ Staff), President of the American Bar Association; Member–in–Charge of the Northern Kentucky offices of Frost Brown Todd LLC. It has been my privilege to lead the American Bar Association and to represent the 400,000 members who make the ABA the voice of the legal profession. I owe special thanks to the outstanding lawyer volunteers on the ABA Task Force on Preservation of the Justice System and to the dedicated staff of the ABA who work tirelessly to educate the public about the fundamental value of our courts.

for our nation and the general public are severe. At the same time that state and local bar associations are mobilizing to advocate for additional state support for their courts, it is incumbent upon the legal community as a whole to urge lawmakers to adopt changes in policy that will improve the administration of courts and reduce the weight of caseloads across the entire justice system.

This volume of KLJ is a milestone in two ways. First, it represents and pays respect to the dedication of generations of students who have produced continuously since 1912 a journal that reflects the rigor and relevance of the UK College of Law itself. Every KLJ contributor, editor, staff person and faculty advisor has placed a brick in the historical edifice of this journal that will surely and deservedly see another hundred years of scholarly accomplishment.

This centennial volume of KLJ also represents a turning point for the legal profession and ultimately our courts. Lawyers are necessarily divided by the fault line between prosecution and defense, between plaintiff and defendant, and also along boundaries of practice and expertise. Bringing lawyers, as well as judges and court staff, together around one topic can be difficult.

There is no debate, however, about the deleterious impact of court underfunding on our system of justice. There is no worthy dissent from the maxim that justice delayed is justice denied. And since lawyers, judges, business leaders and policymakers first huddled in Kentucky, there has been no clearer call to action among this broad group than to the defense and support of our judiciaries from the withering, access-impairing, fully-realized danger of inadequate state court budgets.

1. Diminishing Access To Justice: A New York Case Study

The characteristically sedate back-and-forth between legislators and court officers on resources and court administration would normally be maintained within the sphere of legal interest, rarely rising to the attention of the popular media. It is a measure then of how widespread and how impactful the crisis of state court underfunding has become that local, national, and foreign media are taking note.³

NBC Nightly News, the most-watched nightly newscast in the United States,⁴ devoted a segment on July 20, 2011 to the worsening financial state

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³ Perceptive reporting and commentary are noted by subsequent contributors. See infra notes 4–10.

of California courts. Anchor Brian Williams introduced the story, saying, “So as painful as it may be on any given day to get a divorce, or pay a fine, or even a traffic ticket, it’s getting more difficult now to the point where one judge says the legal system is collapsing.” Correspondent Miguel Almaguer interviewed one of 200 staff (representing forty percent of all staff) slated to be laid off from the San Francisco Superior Court following a loss of fourteen million dollars from the court’s annual budget. Presiding Judge Katherine Feinstein bluntly told Almaguer that the court was “essentially ... going to be gutted.” Feinstein added, “Rather than being an entity of government that solves problems, which we historically have been, we are in fact creating more.” Also weighing in on the California court budget, The Economist asked and answered, “How does a court go over the cliff? In unphotogenic slow motion, which makes the dire consequences hard to see.”

Following the economic collapse of 2008, the ABA created the Task Force on Preservation of the Justice System in 2010 in response to mounting national concern that state appropriations for courts were drying up. Co-chaired by David Boies and Theodore Olson, the task force held hearings from Atlanta, Georgia to Concord, New Hampshire. Judges, court administrators, lawyers and individual court petitioners shared painful accounts of worsening delays and barriers to entry. The degenerating state of California courts with its negative consequences was just one report the task force received. In states across the nation from California to New York, courts are struggling to operate when even basic supplies like paper are considered an extravagance.

Thanks to the dedicated work of NCSC under the leadership of Mary McQueen, a wealth of quantitative information is available about trends in state spending for state judiciaries. Forty-two states reduced their court

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5 NBC Nightly News (NBC television broadcast July 20, 2011).
6 Id.
8 NBC Nightly News, supra note 5.
9 Id.
budgets just in 2011. Consequently, courts in thirty-nine states suspended filing clerk vacancies, thirty-four states laid off staff, twenty-seven states increased fines and fees, twenty-three states reduced hours of operation, and nine states rely less on jury trials.

When states cut funding for their judiciary, they force the courts to make hard choices about what services and personnel to retain. As in the private sector in this economy, courts are too often compelled to slash their workforce. While the devastating budget cuts, including an FY 2013 budget proposal to eliminate $544 million from the judicial branch, and layoffs in California are among the largest, they are not unprecedented. New York is a microcosm for the hard choices being made nationwide about how and where to allocate precious tax dollars. The pressures on the New York state court system are also emblematic of troubles elsewhere in the country.

In 2011, New York eliminated $170 million from the state's judicial budget. While that figure represents about six percent of the state's annual judicial appropriation, it is only one-tenth of one percent of the entire state operating budget. The $170 million cut resulted in almost immediate unemployment for 500 staff members. One would expect that as a result of putting five hundred people out of work and hamstringing New York's court system, the state would see a significant savings. But for every dollar New York spends, the cuts to the New York judiciary budget actually save the state only a fraction of a penny.

The New York State Bar Association (NYSBA) created a panel to study the impact of repeated, deep financial cuts on the administration of justice and the reaction of the public. The panel found that "... courts are less efficient ...," and that "... the need to provide justice to all, particularly to the disadvantaged—though greater than ever in this economic downturn—

is not being met,” and that “…the courts’ ability to protect and serve the public has been negatively impacted.”

At the time of the study’s release, access to the courts, the basic notion that those with grievances should be able to stand before the bench, had already been severely curtailed in New York. The courtroom doors were closed more often, notably during lunch when courthouses are cleared out and again around 4:30 p.m. when the court day had to end. Abbreviated working hours, resulting in the commotion of clearing a courthouse and readmitting the public through security, translate into significant delay. The NYSBA panel not surprisingly found that “the increased time to handle matters has a negative impact upon the public’s perception of the courts.” A contributing factor may be that civil litigants, in uncontested divorces, for example, are made to wait months for judgments to be signed.

Delay is costly and pervasive in New York courts. Litigants incur additional cost when trials take longer to complete and are spread across shorter days. In addition to time spent away from their place of employment, litigants must pay higher attorneys fees (a cost the NYSBA report attributes primarily to increased delays) and expert witness fees. Even some emergency cases are left for the next working day. According to the NYSBA report, “family court and domestic violence disputes that occur outside of a court’s ‘budgeted hours’ may have to wait until the next business day.”

The fundamental purpose of a court is to resolve disputes, whether between two business partners in a civil trial or between an individual and the state in a criminal proceeding. Yet the role of the courts is sullied when the lack of funding means that juries are shortchanged. According to the NYSBA report, “[t]he most pressing concern for litigants and attorneys is that jurors are cutting short deliberations and rendering ‘unjust’ verdicts.”

II. The Independent Judiciary: A Constitutional Prerogative?

At a fundamental level, the very notion of an independent judiciary is substantially undermined by persistent anemic budgets. The basic definition of judicial independence demands that courts be open and accessible, yet the other two branches too often treat the judiciary like an executive, line-item agency that provides appreciated but non-critical services.
That treatment is not how the judiciary was envisioned by the individuals who wisely established our state courts and our national system of jurisprudence. Every state constitution establishes and enumerates the responsibilities of its judiciary as a coequal branch of government. Our fifty state constitutions do not say, "Judicial power is vested in the court system... unless financial times get tough." State judiciaries are just as important and just as constitutionally required (and arguably more so) during an economic downturn as any other branch of government.

Legislatures that do not provide adequate funding for their judiciaries shrug off the constitutional responsibility entrusted them to adopt a budget that guarantees an individual's fundamental right to access justice. Consider words found in the Kentucky Constitution: "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."26

There is really no argument more clear or cogent as to why our state courts are entitled to adequate funding. To fulfill their constitutional responsibilities, courts need to be sheltered from budget squalls. To properly fulfill their own mandated responsibility, legislators need to preserve the right to legal action when needed as enumerated and mandated in state constitutions.

III. THE RAMIFICATIONS OF IGNORING JUDICIAL PAY

Judicial pay—woefully neglected in too many states—is intimately connected with judicial independence and the quality of justice. Writing under the nom de plume Publius in Federalist No. 79, Alexander Hamilton argues in favor of language proposed and later adopted in the Constitution that permits judicial pay to be raised but not diminished during tenure: "A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."27 This notion is common, even if challenged today, but was revolutionary for its time.28 Judges dispensing justice and maintaining the rule of law should be protected from financial reprisal. Hamilton's writings also prove prescient in Federalist No. 79, where he warns that:

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their

26 Ky. Const. § 14.
independence than is discoverable in the constitutions of any of the States in regard to their own judges.\(^9\)

The same valid reason that Federal judicial pay is believed to be connected to judicial independence also applies at the state level. There is a dangerous sentiment among some in the public, and even some in public office, that courts should be punished for unpopular decisions.\(^30\) Thus, cuts in judicial funding that reduce the ability of the courts to conduct the business of hearing cases become stealth opportunities to intimidate or otherwise undermine the independence of the judiciary.\(^31\)

Even when the intention is not to inhibit the work of the court, the end result can be the same. If judges cannot afford to sit on the bench or are compelled to take unpaid furlough days, the judiciary is put in distress. As Hamilton warned in Federalist No. 79, "[w]hat might be extravagant to-day, might in half a century become penurious and inadequate."\(^32\) That is certainly true in New York, where trial judges are receiving their first raise in twelve years,\(^33\) despite the real purchasing power of their salaries dwindling due to inflation.\(^34\)

**IV. Without Courts, Who Are the Guarantors of Democracy?**

When our rights are infringed, there is really only one place to go: the courthouse. Courts are designed to be the arbiters of the tension between the state and members of the public over the appropriate scope and attempted exercise of governmental authority.

Consistently throughout our country’s history, courts have been instrumental in protecting the rights of the oppressed minority. From the beginning of our country that was a concern. Alexis de Tocqueville worried that the “tyranny of the majority” would crush the freedom of those who stood opposed to the majority’s will.\(^35\) "I am not so much alarmed[.]" he

\(^{29}\) *The Federalist* No. 79, supra note 27, at 399.


\(^{32}\) *The Federalist* No. 79, supra note 27, at 398.


\(^{35}\) *Alexis de Tocqueville, Democracy In America* 258–59 (Francis Bowen & Phillips 2011-2012)
wrote, "at the excessive liberty which reigns in that country as at the inadequate securities which one finds there against tyranny." 36

Governments, for alleged benign reasons or in the name of "security," will overreach for control. 37 Overburdened courts are the only institution that can stand toe-to-toe with the other two branches of government and tell them, "No." Justice Black's words stand for all time:

Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion. 39

V. EMBRACING TWENTY-FIRST CENTURY JUSTICE

Judicial budget cuts do not take into account the workload and needs of our modern justice system. According to a Court Statistics Project report, the vast majority—approximately ninety-five percent—of all legal cases are filed in state courts.39 In 2009, the most recent year for which data is available, states reported 106 million incoming trial court cases.40 That figure surpasses every record from the preceding thirty-five years.41 Remarkably, the number of incoming cases per general jurisdiction judge often reached into the thousands. South Carolina, with one judge for every 100,000 residents, topped the list with a caseload of 5,011 incoming non-traffic cases per judge.42 Not surprisingly, the downturn in the economy in 2008 prompted an influx of civil cases, 1.3 million more cases in fact.43 State

36 Id. at 260.
43 LAFOUNTAIN ET AL. (2010), supra note 41, at 24.
appellate courts are also under intense pressure, handling nearly 300,000 cases that same year.\textsuperscript{44}

Individual jurisdictions continue to make extraordinary, good faith efforts to adapt to the rapidly changing fiscal environment. Courts from Massachusetts to Utah are expanding the use of technologies to further improve efficiency in their systems. The Boston Bar Association, for example, credits the web-based case management system, MassCourts, with increasing the timely disposition of cases by more than fifteen percent.\textsuperscript{45}

For some court systems facing cutbacks, a re-engineering of the judicial process has allowed them to maintain access to justice. Minnesota is centralizing functions that were previously carried out at the local level;\textsuperscript{46} while in Oregon, rules are being simplified in civil cases to speed dockets, no doubt partially in response to additional \textit{pro se} applications.\textsuperscript{47}

The effective use of technology is a very real opportunity to realize significant cost savings at the state and local court level. The ability to pay traffic citations and other fines by phone or online makes the process less time consuming for the payer and removes a case, even a short one, from the courtroom. The ease involved in paying online or by phone could encourage the fined party to pay more low-cost citations. Additional savings should be considered, such as potentially removing the need for a police officer to travel and wait in court to testify against the accused.

\section*{VI. Funding Courts Through Vanguard Measures}

The newest idea for funding state courts is inspired by old debt. Fines and fees on offenders and court petitioners draw some money for court systems. Many states have significantly raised court fees, and concern is growing that additional fees could present an unfair access to justice barrier for the indigent.\textsuperscript{48} Individuals who have been found liable for an offense neglect to pay court-assessed fines, though their debt may be so low that it is impractical or even cost-negative to extract payment. In totaling the sum owed to state judiciaries, however, that figure becomes very significant. State courts are collectively due approximately fifteen billion dollars.\textsuperscript{49}

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\item \textsuperscript{44} Id. at 2.
\item \textsuperscript{45} \textit{Joan A. Lukey et al., Report of the Boston Bar Association Task Force on FY 2010 Judiciary Budget} 3 (Feb. 5, 2009).
\item \textsuperscript{49} David K. Byers, \textit{What’s the Idea: Intercept Federal Tax Refunds}, in James Podgers,
Under consideration in the 112th Congress, the Crime Victim Restitution and Court Fee Intercept Act would authorize the U.S. Department of Treasury to expand its existing tax-offset program to include interception of a taxpayer's federal tax refunds to pay overdue court-ordered financial obligations. States would choose to share information about overdue restitution and court debts with the Financial Services Bureau of the Department of the Treasury, much in the same way that information about late child support is regularly shared. The proposed offset expansion for past-due court debt would apply only to criminal and traffic cases, and would not cover parking tickets, civil judgments or private litigation. Critically, offsets for child support payments or other existing categories of debt would not be affected because they would have priority over court debt offsets.

Recovering court fines through tax refund offsets from non-indigent debtors is a common-sense method to alleviate some of the mounting financial pressure on states, but it is no panacea. System-wide changes need to be made to control the ever-increasing growth in corrections, which will overwhelm the need to support courts unless it is addressed.

VII. Reforming the Courts State-by-State

At the same time that courts are trying to cope with record caseloads and shrinking budgets, governments have expanded with alacrity the definition of what is “criminal.” In 1998 the ABA published a landmark report that addressed the growing federalization of criminal law, a trend of expanding crimes traditionally under state purview, into federal jurisdiction. Ultimately, the task force studying over-criminalization concluded that the wild expansion of federal criminal law represents an unwise allocation of scarce resources needed to meet the genuine issues of crime. It is disturbing, then, that the federal criminal population has ballooned eightfold in the last thirty years.

But federalizing state criminal law has not lessened the burden for states, which also have soaring prison populations. In fact, the U.S. has the

50 H.R. 1416, 112th Cong. (1st Sess. 2011); S. 755, 112th Cong. (1st Sess. 2011). This legislation is supported by a broad coalition of justice and civic organizations including the ABA, the National Conference of State Legislatures, the National Association of Counties, the National Association for Court Management, the National Center for Victims of Crime, and the American Probation and Parole Association.  
highest incarceration rate in the world.\footnote{Christopher Mascharka, \textit{Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences} 28 FLA. ST. U. L. REV. 935, 937 (2001).} One in every thirty-one adults is under supervision of a government agency—whether in prison, on parole or on probation.\footnote{Pew Center on the States, \textit{One in 31: The Long Reach of American Corrections} 5 (2009).} The U.S. imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.\footnote{\textit{See Roy Walmsley, World Prison Population List} (International Centre for Prison Studies, 8th ed. 2009).} In 2009, well more than two million people were either in jail or prison in the U.S.; a number in stark contrast to the fewer than 500,000 Americans incarcerated just thirty years prior.\footnote{ Arrest Rates, \textit{supra} note 52.} Roughly one-quarter of all persons imprisoned in the entire world are imprisoned in the land of the free.\footnote{Adam Liptak, \textit{U.S. Prison Population Dwarfs that of Other Nations}, N.Y. TIMES, Apr. 23, 2008, \url{http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all}.} At any one time, half a million individuals sit in jail just awaiting trial, not yet having been convicted of a crime.\footnote{Laura Sullivan, \textit{Bail Burden Keeps U.S. Jails Stuffed with Inmates}, NAT'L PUB. RADIO (Jan. 21, 2010), \url{http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates}.} States spend $51.1 billion annually on corrections.\footnote{Nat'l Ass'n of State Budget Officers, \textit{State Expenditure Report: Examining Fiscal 2009–2011 State Spending} 52 (2011), available at \url{http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf}.} While some may argue about whether we incarcerate criminals too long and too harshly, there can be no disagreement about the stupefying cost to do so. At a time when states are straining to provide basic services, it is incumbent on lawyers and judges to find additional ways to save money through criminal justice reform in the states.

The ABA has identified many reforms that keep communities safe while lessening costs to already overburdened state criminal justice systems. In five areas in particular—pretrial release of accused low-risk offenders; the decriminalization of minor offenses; reentry support programs; expanded reliance on parole and probation; and community corrections—states can make common-sense changes to their processes of jurisprudence and rehabilitation that will provide significant savings opportunities. Examples in states across the nation demonstrate that these reforms merit serious consideration. In the Southern District of Iowa, a case study of the effectiveness of releasing individuals before trial found that, when courts released fifteen percent more individuals pre-trial, the overall percentage of individuals whose release was not revoked because of re-arrest and new
alleged criminal activity increased from 95.6 percent to 97.3 percent. As a result, the District saved $1.7 million in fiscal year 2008–2009.

Florida has seen substantial benefits to public safety and to its bottom line by decriminalizing minor offenses. Between 2004 and 2005, 95,254 juveniles were referred to the juvenile justice system in that state. Of the offenses that were referred, 26,990 were for school-related offenses. After implementing an alternative civil citation system that avoided criminal records and jail time for juveniles, Miami–Dade County reduced juvenile arrests by forty–six percent, and reduced the first–time offender rate of re–offense within the first year by eighty percent. Importantly, the average cost associated with civil citations is $386 per juvenile compared to the $5,000 it costs to process a juvenile through the criminal justice system.

Brooklyn’s Community and Law Enforcement Resources Together prisoner re–entry program (ComALERT) is a model for other jurisdictions. In 2010, it cost Brooklyn more than $6,000 to process a single re–arrest. With significantly fewer arrests, Brooklyn saved almost $450,000 on re–arrest costs alone. And this figure does not reflect the money saved on re–incarceration, which costs more than $53,000 per inmate, per year. Since 2004, the program boasts more than $2 million in re–arrest savings, more than $5 million in re–incarceration savings, and it has increased tax revenue by more than $600,000.

In Kentucky, the Pretrial Services Agency has saved the state millions of dollars in incarceration costs through early, managed release and subsequent

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61 Id.


63 Id.

64 Id.

65 Id.

66 Id.


69 Id.

70 Id.

71 Id.
dismissal of charges. Between 2006 and 2007, Kentucky’s Social Work Pilot Project saved almost $1.4 million in reduced incarceration costs. Recidivism rates improved. When this program is implemented statewide, savings are projected to be $3.1 to $4 million per year.

Each of these reforms is a proven way to save precious tax dollars at a time when our courts are in desperate need of additional resources. All opportunities to save the states needed money must be on the table. It is hard to identify a greater expense related to our courts than our criminal justice system. Of course, savings in one area of the justice system do not necessarily translate into increased funding for underfunded courts. Some states allow a portion of money saved by judiciaries to carry over into the next fiscal year—a sound policy. But even in states where the carry-over rule does not exist, saving money in court operations must continue to be a priority. Ultimately, most state funds come from the same coffer. If the objective is for courts to have a larger share of the total state operating budget, the legal community must demonstrate that financial allocations to the courts are used wisely, efficiently and judiciously. Criminal justice reforms will save states money and reduce the overwhelming, statutory-driven burden on courts.

CONCLUSION

In 1970, Chief Justice Warren Burger addressed the ABA Annual Meeting. Burger’s words encapsulate the true danger of maintaining what has become the status quo:

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people, and three things could destroy that confidence and do incalculable damage to society: That people come to believe that inefficiency and delay will drain even a just judgment of its value; That people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; That people come to believe the law—in the larger sense—cannot fulfill its primary function to protect them and their families in their homes, at their work and on the public streets.

Withered court budgets are causing each of the deficiencies Burger cautioned against forty–two years ago.

73 Id.
74 Id.
This anniversary edition of KLJ and the attention it devotes to the crisis of state court underfunding is part of a wider effort to educate lawyers and law students about this ongoing threat to justice. Law students today are the legal practitioners and leaders of tomorrow. As they emerge into a hostile budgetary environment for our courts, the ABA endeavors to ensure that they are well advised and properly prepared to adapt and respond. Their response to their opportunity to stand up and speak out for our courts as new Officers of the Court should be to join fellow lawyers, judges, leaders in business and policymakers in defense and support of a justice system that can continue to protect and serve us all. It will be both their privilege and their responsibility to do so because an independent judiciary supported with adequate, sustainable funding is the key to constitutional democracy. Constitutional democracy is the key to freedom. The stakes could not be higher for the future of our great country.