

My Life as Chief Judge: The Chapter on Juries
21st Annual John E. Burton Lecture
The Rockefeller College of Public Affairs & Policy
SUNY Albany
May 18, 2006
Judith S. Kaye

Many thanks to all of you for this great day--starting with my friends President Hall and Dean Desfosses, thank you for inviting me to deliver the distinguished John E. Burton Lecture and for this opportunity to reflect on, and to share, some of my work with this wonderful audience of current and future leaders in government. And thank you for honoring me with a Distinguished Service Award, especially in this great company. I'm only sorry that Marty Silverman couldn't be here to stand alongside these extraordinary people--Professor Johnson, Senator Dunne and Christine Ward--to receive this recognition.

I was tempted for a moment to stop right here and follow the sage advice that guarantees audience appreciation: "Always be briefer than anyone dared to hope." But then again Paula Heighton told me that this is a knowledgeable audience and she encouraged me to give a serious, substantive, "meaty" (her word) talk. As a Judge of the state's highest court, the Court of Appeals, for an incredible 23 years--13 of them as Chief Judge--I can tell you that this is what we in the law call "assumption of the risk." You have no legitimate complaint.

I should say right at the outset that as Chief Judge I hold two positions, each genuinely a full-time job. And without the blessing of an off-the-charts great Chief Administrative Judge--Jonathan Lippman--who serves at my pleasure, this life would not even be possible.

As Chief Judge of the Court of Appeals, I am one of seven equals, with superb Colleagues hearing appeals on a range of issues that defies human imagination. On any one day at Court of Appeals Hall we could be hearing argument on budget-making authority, or education funding, under the State Constitution; alongside a slip-and-fall on a patch of ice in the Bronx; a construction site injury under Labor Law Section 240; a multiple murder case raising federal constitutional issues; and a teacher's claim that his right to tenure under the Education Law has been violated.

Honest, we have days like that--each issue of paramount importance to the individual litigants and to society generally, since the very idea of having a court such as ours--a second level of appeal--is that we will, through a relatively few cases of novel statewide significance, settle and declare law that has lasting, widespread application. I think of this judicial role, as a Judge of the Court of Appeals--a role I have now cherished for 23 years--as Lawyer Heaven.

But the second box of stationery that I acquired 13 years ago--Chief Judge of the State of New York--a chief executive officer role, is right up there too. When I saw Pride of the Yankees recently on TV, for the 100th time, I thought I could adopt Lou Gehrig's closing line as my own. Genuinely, I feel that I am the luckiest person on the face of the Earth.

As I stepped back and thought long and hard about what I do--particularly as head of the Third Branch of government--it occurred to me that most often I was returning to two basic, overlapping questions. First, how do we assure the delivery of justice in this modern, fast-paced, rapidly changing society? Just think of some of the new challenges we face on today's court dockets, especially state court dockets, like family dysfunction, domestic violence, and rampant drug abuse and mental illness driving low-level crime. And second, how do we maintain the trust and confidence of the public so that our work and our decrees are respected? That's another enormous challenge today, given little public awareness or understanding of our work.

In a nutshell: what are we doing, and how is it perceived? We want high marks in both.

I could think of no better context for a discussion of these two fundamental questions than the subject of the jury, which by wonderful coincidence is also something I enjoy speaking

about. While there is a good deal of talk, and literature, today about the "vanishing jury" and the "runaway jury," the jury system continues to be central to the delivery of justice in the New York State courts, where we have close to 10,000 jury trials a year. The jury, moreover, cuts across everything the Chief Judge does. I've even been summoned several times to serve as a juror, but never succeeded in actually being selected for a case. Believe me, I know the pain of people being rejected during voir dire.

The jury, of course, is the subject of innumerable Court of Appeals decisions--on issues such as discrimination in selection, juror misconduct, even how jurors are seated in a courtroom for voir dire. But I thought that today, instead of a lecture on Court of Appeals jurisprudence, I'd focus on my executive/administrative Chief Judge role. Both of the fundamental questions I've posed are especially pertinent to the subject of juries.

In so many ways the modern world impacts the jury. Just think of the effect of technology, how people communicate and how they learn today. So much is instant, experiential, visual--television, the Internet, power point, text messaging on cell phones and blackberries. Not exactly what we're accustomed to in the courts, where judges dress in garb from the Middle Ages and

revere precedents from the past. How do we ensure that the jury system continues to deliver justice in today's changed atmosphere? Then too, jury service is the courts' direct link--often our only direct link--with the millions upon millions of citizens called to serve as jurors--more than 650,000 a year in New York State alone. Surely 650,000 positive jury experiences would be a great means of fostering public confidence in the justice system. How do we best assure public trust and confidence when jurors come into our courts?

While my two questions clearly overlap, the first is more inner-directed, to improvement in court process and procedures, the second more outreach to the public. Both questions, I assure you, constantly challenge the Chief Judge, whether the issue is problem-solving courts, commercial courts, foster care, jury service or even court security in the post-9/11 world. Always we want to do the best we possibly can to deliver justice, and always we want the trust and confidence of the public.

I'd like to start my jury discussion with another question: What's so great about juries anyway? Why were juries so essential to our nation's founders?

Since even a brief summary of the history of the jury system could take hours, I'll start by saying that the jury system came to our shores with our earliest settlers. Throughout

the colonies, the jury system was seen as a fundamental right and a way for the public to restrain government power. As you might imagine, the colonists were none too pleased when the Crown dispensed with jury trials for anyone accused of violating the despised Stamp and Navigation Acts. That added to the many grievances against King George III listed in the Declaration of Independence. So it's no surprise that Article III of the United States Constitution provided for a right to trial by jury for all crimes except impeachment--and the omission of the right in civil cases ultimately led to inclusion of the Seventh Amendment in the Bill of Rights guaranteeing jury trials in certain civil cases. Every state constitution also secured those rights--our own back in 1777.

Glorious rhetoric about the right to trial by jury continues to this very day.

Oddly enough, although England was "the intellectual mother of all . . . jury systems around the world," the jury is more widely used in the United States. The jury is not only more significant here, but also in many ways reflects the progress of America. Just think: critical as the jury was to the founders of a free nation, they limited service to white male landowners.

Not until 1975 did the Supreme Court prohibit the systematic exclusion of women from jury service, and not until 1986 did the

Supreme Court prohibit the discriminatory use of peremptory challenges. In New York, our Civil Rights Law guaranteed women the right to serve way back in 1938, but until 1975 women could claim an automatic exemption. Most of them did.

Thus, the right to have, and to serve on, juries has been part of our nation's struggle from its beginnings.

New York's public policy is spelled out in the Judiciary Law, and it echoes our proud history. In the words of our statute, litigants entitled to a jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community[,]. . . all eligible citizens shall have the opportunity to serve . . . and shall have an obligation to serve when summoned for that purpose, unless excused."

Regrettably, the reality of jury duty hasn't always matched the rhetoric. By the early 1990's, in New York we were calling the same limited group every two years like clockwork, and they served on average two full weeks. One reason for this was that our statutes allowed dozens of automatic exemptions and disqualifications from jury service--ranging from judges, doctors, lawyers, police officers, firefighters and elected officials to embalmers, podiatrists, people who wore prosthetic devices and people who made them, to individuals with principal child-care responsibilities. Seemingly every group that could

lobby Albany for an automatic exemption successfully did, and that sorely depleted our jury pools. To makes things worse, the court system did little follow-up on the rooms-ful of summonses returned as undeliverable.

Given the huge demand for jurors, and the short supply, we developed what we called Permanent Qualified Lists. Once qualified for jury service, a person remained qualified forever.

Not a choice list to be on--especially given the condition of our juror facilities, which often were shabby and neglected.

So how were we measuring up? Was the prized obligation, and right, to serve on a jury in fact valued and appreciated? We certainly weren't earning points with the public.

In September 1993, shortly after I became Chief Judge, we convened a commission of lawyers, judges and public members to review jury service in New York, with a dynamo trial lawyer--now United States District Judge Colleen McMahon--as chair. In six months, they handed us a blueprint for comprehensive reform, which we have been implementing ever since. In fact, this experience was so encouraging that again and again we have convened task forces and commissions to help us address other vexing issues. Just now we are awaiting the report of the Indigent Defense Commission; we have a brand new Commission on Probation, happily with Senator Dunne as its chair; and we are

about to announce a Commission on the Future of the Courts. Over the years, carefully selected, superb commissions of lawyers, judges and others have paved the way on virtually every one of our successful reforms--business courts, fiduciary appointments, drug courts, judicial selection, matrimonial litigation, the legal profession and more.

Without doubt, the centerpiece of jury reform here in New York was the legislation adopting the Commission's top recommendation to wipe the automatic exemptions off the books. How shocking, especially for the groups that lost their exemption. Fortunately, the Legislature resisted their pressures, and about one million potential new jurors were added to the court lists. Soon after, the Legislature adopted the recommended expansion of juror source lists to include unemployment and public assistance rosters, adding yet another 500,000 potential jurors.

These reforms sent a strong message: no person, no group is more privileged so as to be excused automatically from a fundamental right, and obligation, of citizenship. We underscored that message with assiduous follow-up of all summonses returned as undeliverable. Besides gaining a more diverse jury pool, we could now spread the burdens and benefits of jury duty more widely--ending the Permanent Qualified Lists,

the customary two-week minimum service and the every-two-years-like-clockwork callbacks. The Legislature also responded to recommendations for increased juror compensation, and ending automatic sequestration in criminal cases, among many other reforms.

This was also a powerful lesson for a new Chief Judge. We treasure the independence of the Judiciary, and rightly so. It's essential to our democracy, to our system of checks and balances, that the Judiciary be wholly independent in its core decisionmaking function. But in so many other ways--most notably systemic reform--we are vitally connected to our partners in government. The jury program is one of the best examples of profound system-wide reform within the Third Branch--still, by the way, a work in progress.

Which brings me to my next subject: how best to manage the bounty or, in other words, be careful what you wish for. Not all of the more than million-five new potential jurors were as pleased as the Chief Judge. The court system faced a huge new challenge.

Always the vision was clear: to deliver justice for the litigants while affording a positive experience for jurors. This means efficient use of jurors' time in summoning, selection and service; and it means courteous, respectful treatment.

Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial. A lawyer-friend--general counsel of a major media corporation--told me that her recent jury service ranked among the great experiences of her entire life. We need to multiply that.

The easier part of the challenge, without question, has been the internal administrative part--like conducting training for our employees in dealing with jurors; assuring clean restrooms with locks on bathroom doors, paper towels and liquid (instead of bar) soap (yes, the Chief Judge checks out that sort of stuff--ladies' and men's rooms); providing decent facilities and quiet work space, even Internet access, in juror waiting rooms; devising efficient summoning procedures, like telephone call-ins both to see if you really do need to show up the next day, and to secure one automatic postponement; facilitating prompt payment of juror fees; and orienting jurors with handbooks as well as live and video presentations.

Yes, definitely the easy part, though still--and I would think forever--a work in progress.

The hard part is what we speak of as cultural change. I had always thought of culture as a good thing. Changing a culture is something else. The entrenched culture I speak of includes age-old practices of experienced lawyers and judges such

as settling cases only after (instead of before) the jury is selected; endless, unsupervised voir dire in civil cases, and (what I would like to focus on next) proceedings conducted in a foreign language--legalese--before boxes of inert, passive jurors.

Some of you may be familiar with a comparison that's been made to taking a required course. You are told on Day One that it will last for at least several days--but no one knows for sure. The class will be taught by a number of different teachers and involve subjects you know nothing about. In fact, if you do know anything about these subjects, you are disqualified. Each teacher will give you loads of relevant--and not so relevant--information. You will not be told what is significant until the end of the course, just before the final. By the way, notetaking is forbidden, you may not discuss the information with your classmates before the final, and you may not ask questions.

Not a happy picture for classes--or for juries--today. How do we change that picture? A good, solid decade of research and experience in other states have shown that change is both possible and very, very desirable.

I spoke earlier of statutory reforms that radically changed the face of our juries; that is perhaps best described as top-down reform. New rules and statutes imposed requirements,

and court administration made the appropriate adjustments. But changing how trials are conducted by experienced lawyers and judges cannot be accomplished by order of a Chief Executive Officer--particularly a CEO without power to hire, fire, or promote; particularly for wonderful people at the pinnacle of their careers, mindful of affording due process and avoiding reversible error, and thus understandably more comfortable staying with ways that are tried-and-true. The sort of change I am advocating here can be accomplished only by the judges and lawyers themselves, from the ground up.

To stimulate the process of reform, we convened a group of judges and lawyers from around the State willing to try out some of the well-researched and best-known modern aids to juror comprehension, and we very carefully documented their experience.

Perhaps the most telling finding was that, where jurors reported that the trials were "very complex," judges and lawyers reported that those same trials were not "complex." Doesn't that speak volumes? What the lawyers and judges easily comprehended was not necessarily getting through to the jurors.

At the conclusion of their study, the group issued an overwhelmingly positive report, endorsing such "innovations" as opening statements that give jurors some idea of the nature of the case before they are questioned; juror note-taking to

facilitate better recall of the evidence; permitting jurors to submit written questions to the judge, who would then determine whether they should be asked of witnesses; and providing jurors with a copy of the judge's final instructions to take into deliberations. This was followed by publication of a "Practical Guide" describing these practices, which we have distributed to all judges. Many of the participants in the initiative--pleased, even sometimes surprised, by their firsthand experience--are now sharing their findings in judicial education programs and articles, which we hope also will encourage their colleagues to follow suit.

Will this succeed in changing the picture? Only time will tell.

I turn next, and finally, to what may be the most difficult issue of all, how to assure the trust and confidence of the public--jurors and nonjurors--in the work of the courts, particularly given an abysmal lack of civic education and a flood of negative news. A major part of the answer to my question, perhaps a complete answer, is doing what I have just been describing--improving in every possible way the jury experience for those called to serve, and generally doing a first-rate job.

Still, I think we need to do more. The public should know more about us, and should think well of us.

In the words of the great French statesman and observer of American life Alexis de Tocqueville, "The jury may be regarded as a . . . public school ever open, in which every juror learns his [or her] rights." I have no doubt that de Tocqueville's observation remains true today, and that serving on a case to verdict is not only an educational experience but also a satisfying one for a juror.

Sadly, only 18 percent of those summoned to jury service will actually get selected for a trial. For the other 82 percent, we depend on courtesy, efficiency and outreach efforts--like our orientation video, the availability in every juror assembly room of copies of informational periodicals, and Juror Appreciation Week events in courthouses throughout the State. We have also just completed a booklet about juries, Democracy in Action--all of you should have copies--designed to be shared with family, neighbors and friends.

But how do we address the fact that New Yorkers for the most part are unaware of the role of the courts in their daily lives? And by the way, this is not mere personal vanity on my part. I am reminded of the question posed to Benjamin Franklin by a Philadelphia woman about what the Constitution's authors had

"given" to the American public. His response: "A republic, Madam, if you can keep it." No doubt of it--it takes work, constant attention, to keep our republic and its prized institutions.

So that is a challenge I put to this audience: help us build a better informed citizenry, about all three branches of government, but especially about the courts, which of necessity--and, I must admit, habit--remain somewhat remote and detached. One of our newest initiatives, announced in the 2006 State of the Judiciary, will be a Center for the Courts and the Community, a nonprofit public-private partnership now in formation, to focus on fortifying educational alliances with schoolchildren and adults, and on establishing programs to inform and facilitate the work of the media in reporting on the courts. I'd appreciate your ideas, in whatever form you see fit, for furthering the success of this new effort.

Conclusion

And there, in capsule, is the jury chapter in my life as Chief Judge of the State of New York. A dozen other chapters--like children in the courts, domestic violence, drugs, matrimonials, fiduciary appointments, commercial courts--have the same questions at their core: are we meeting today's needs, and how are we perceived by the public? Sometimes the answers lie in

legislation, sometimes in court rules, sometimes in task forces and commissions, sometimes in small groups seeding reform, always in vital partnerships with our great Judiciary and court staff, with the Bar and with others. When the mountain moves, even a millimeter--as it clearly has in the New York State jury system--it's absolutely exhilarating.

I end with a question for all of you: as Chief Judge of the State of New York, am I not the luckiest person on the face of the Earth?