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NEW YORK STATE COURTS: THEIR STRUCTURE,  
ADMINISTRATION AND  
REFORM POSSIBILITIES

QUINTIN JOHNSTONE\*

The New York State court system is a big and complex organization with a large staff, substantial funding and massive caseloads. Despite its very considerable resources, it is believed by many to be inadequately funded given the quality of services it should be providing; and it quite obviously is structurally archaic. To improve the court system's effectiveness as the centerpiece justice agency in the state, many structural and administrative reforms in the system through the years have been proposed. Many of these reforms have been adopted but as demands on the system change, new reform proposals are made and some of the old ones revived with added support. Pressure for change is a continuing feature of court operations in New York as it is in most states and at the federal level as well.

This article focuses on how the New York State court system is structured and administered and on some of the possibilities for structurally and administratively reforming the system. Without sufficient knowledge of how the system is organized and operated, reforms cannot be adequately understood or evaluated. Sequentially, coverage of the article is as follows: Part I, current structure and administration of the state court system in New York, noting some of the recent reforms that have been adopted; Part II, external controls and pressures that influence court reform possibilities; Part III, important recent reform proposals for New York State courts, not as yet adopted; Part IV, some other reform possibilities that have promise but little or no present support in New York; and Part V, concluding observations, stressing more serious problems facing the New York court system and prospects for their resolution.

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\* Professor of Law, New York Law School; Justus S. Hotchkiss Professor of Law Emeritus, Yale Law School.

## I. CURRENT STRUCTURE AND ADMINISTRATION

A. *Court Structure*

The New York State court structure in very general terms resembles that of most other large-population states and the federal system: a series of trial courts, one or more intermediate appellate courts, and a top appellate court, in New York, the Court of Appeals. In detail, however, the New York court structure is complex, somewhat unique, and in the opinion of many, antiquated. The complexity of the court structure is most obvious at the trial court level. There are eleven different types of trial courts in the New York State court system, some of general jurisdiction, some with jurisdiction of only a specialized field of law, and some with broad but inferior jurisdiction. Some trial courts may also hear appeals from lower courts; and to some extent, the jurisdictions of different types of trial courts overlap. In jurisdictional importance there are two types of trial courts in the New York system: courts of superior jurisdiction and those of inferior jurisdiction. The courts of superior jurisdiction, those that may hear what are considered more serious matters, are the supreme court, county court, family court, surrogate's court and court of claims. Courts of inferior jurisdiction, those that may generally hear only what are considered less serious matters, are the New York City Civil Court, New York City Criminal Court, other city courts, district courts (there are district courts only in Nassau County and part of Suffolk County), town courts and village courts. The supreme court, as a trial court, has unlimited original jurisdiction<sup>1</sup> but hears mostly more serious civil and criminal matters.<sup>2</sup> It is a statewide court with a branch in each county. There also is a surrogate's court and a family court in each county within the state, the surrogate's court considering mostly estate matters<sup>3</sup> and family court mostly matters pertaining to children.<sup>4</sup>

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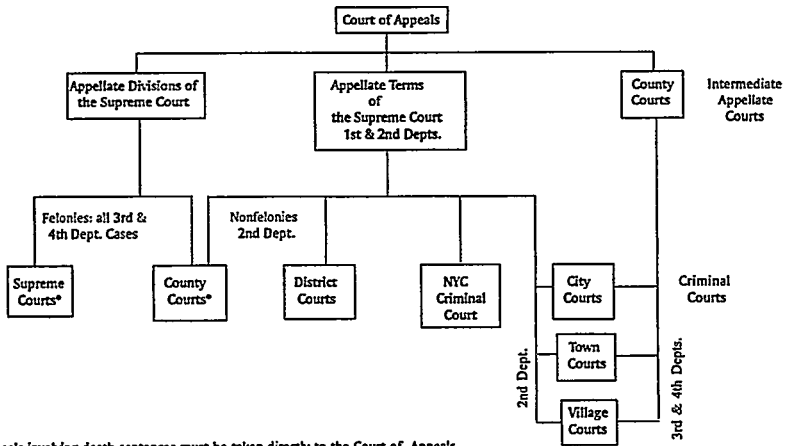
1. See N.Y. CONST. art. VI, § 7.

2. *E.g.*, large civil claims, mortgage foreclosures, divorce, and felonies.

3. See N.Y. CONST. art. VI, § 12(d)-(e).

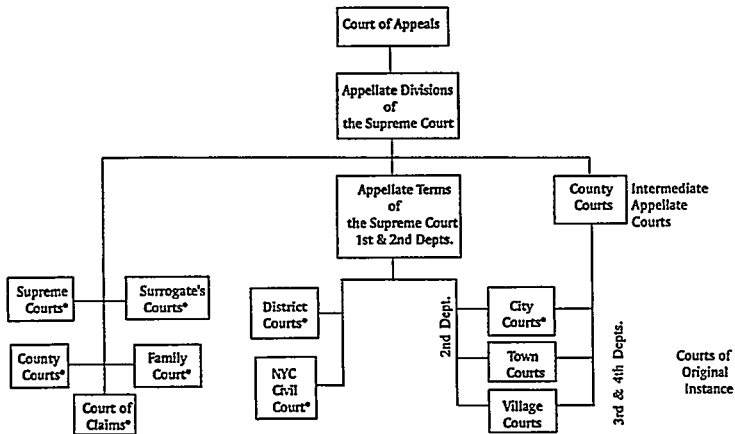
4. *E.g.*, adoption, foster care, support, custody, and delinquency—but not divorce, separation or annulment, matters within the jurisdiction of the supreme court. On the jurisdiction of family courts, see N.Y. CONST. art. VI, § 13(b)-(c).

NEW YORK STATE JUDICIAL SYSTEM  
Criminal Appeals Structure



\*Appeals involving death sentences must be taken directly to the Court of Appeals.

NEW YORK STATE JUDICIAL SYSTEM  
Civil Appeals Structure



\*Appeals from judgments of courts of record of original instance that finally determine actions where the only question involved is the validity of a statutory provision under the New York State or United States Constitution may be taken directly to the Court of Appeals.

Each county outside New York City has a county court with jurisdiction over both felonies and misdemeanors<sup>5</sup> and over civil claims generally up to \$25,000.<sup>6</sup> The court of claims hears principally tort and other claims against the State of New York<sup>7</sup> and sits in Albany. All the courts of inferior jurisdiction generally may hear only minor criminal matters or civil cases involving lesser amounts of money, the jurisdictional limits of town and village courts, successors to earlier justice of the peace courts, generally being considerably lower than those of other inferior jurisdiction courts.<sup>8</sup> However inapt the term, since amendment of the Judiciary Article of the New York Constitution in 1961, the New York State court system has commonly been referred to by court administrators and others as the "unified court system."<sup>9</sup>

A significant structural feature of some trial courts, and one that has become more common in New York as well as other states, is creation of specialized courts which are parts or divisions of existing courts, a development that greatly complicates the New York court structure.<sup>10</sup> The

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5. See N.Y. CRIM. PROC. LAW § 10.20 (McKinney 1992).

6. See N.Y. CONST. art. VI, § 11(a); N.Y. JUD. LAW §§ 190, 190-a, 190b, 191 (McKinney 1983 & Supp. 1998).

7. See N.Y. CONST. art. VI, § 9; N.Y. JUD. LAW, CT. OF CLAIMS ACT art. 2 (McKinney 1989).

8. For information on the jurisdiction of lower courts, see the following: New York City Civil Court, N.Y. CONST. art. VI, § 15(b); N.Y. CITY CIV. CT. ACT, N.Y. JUD. LAW art. 2 (McKinney 1989); New York City Criminal Court, N.Y. CONST. art. 6, § 15(c); N.Y. CITY CRIM. CT. ACT, N.Y. JUD. LAW art. 3 (McKinney 1989); city courts outside New York City, N.Y. CONST. art. VI, § 17(a), (b), UNIFORM CITY CT. ACT, N.Y. JUD. LAW arts. 2, 20 (McKinney 1989); district courts, N.Y. CONST. art. VI, § 16(d); UNIFORM DIST. CT., N.Y. JUD. LAW arts. 2, 20 & § 2402 (McKinney 1989); and town and village courts, N.Y. CONST. art. VI, § 17(a), (b); UNIFORM JUST. CT. ACT, N.Y. JUD. LAW arts. 2, 20 (McKinney 1989); N.Y. CRIM. PROC. LAW § 10.30 (McKinney 1992), jurisdiction of local criminal courts.

9. N.Y. CONST. art. VI, § 1 uses the term "unified court system" as including all state and local courts in the state.

Given the views of many as to what a unified court system should be, it is inaccurate to refer to the New York system as unified. As one commentator has observed, following the 1961 constitutional amendment, the New York courts "were far from 'unified'; but, at least, they could now fairly be described as part of a system." MARC BLOUSTEIN, *A SHORT HISTORY OF THE NEW YORK COURT SYSTEM* 10 (1987).

10. Among the New York specialized courts, subunits of other courts, are these: the Commercial Division of the Supreme Court; New York City Housing Court, a part of the New York City Civil Court; domestic violence courts, parts of the New York City Criminal Court; and community courts, parts of the New York City Criminal Court. In addition, the family court in New York City has four function-based divisions: protec-

specialized courts seek to provide faster and more expert determinations by concentrating the efforts of judges and support staff on a relatively narrow range of cases. To achieve still further efficiency and effectiveness, some of these courts even have specialized parts.<sup>11</sup> A few of the specialty courts, among them drug treatment courts, have relatively low case volumes.<sup>12</sup> Others, such as the housing court in New York City, have very high case volumes.<sup>13</sup> Some of the specialty courts commenced

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tive/permanency planning, juvenile delinquency/persons in need of supervision (PINS), domestic violence/custody, and support/ paternity. If a family has a case that may fall in more than one division, the case will be assigned to a division hearing the most critical matter. Several family courts outside New York City have recently established similar subunits. On family court divisions, see JUDITH S. KAYE & JONATHAN LIPPMAN, FAMILY JUSTICE PROGRAM PHASE 2, at 13-30 & 35-37 (1997); JUDITH S. KAYE, THE STATE OF THE JUDICIARY 9-10 (1999). On domestic violence courts, see *id.* at 18-21.

Small claims courts also are subunits of other courts. In New York City, small claims courts are parts of the New York City Civil Court, in Nassau and Suffolk Counties they are parts of the district court, they are parts of city courts in some places, and parts of town and village courts in others. On small claims courts, see Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, N.Y. ST. B.J., Dec. 1998, at 6.

Drug treatment courts, too, are subunits of several different courts, among them the Brooklyn Supreme Court, the family court in New York and Suffolk Counties, and some city courts. On drug treatment courts, see JUDITH S. KAYE & JONATHAN LIPPMAN, CRIMINAL JUSTICE PROGRAM 24-27 (1996). As of early 1999 there were 15 drug treatment courts in New York, with six more to open later in the year. See *id.* at 17. The goal is to have 30 such courts in operation by the end of next fiscal year. See *id.* at 3 (2000).

For brief descriptions of most New York specialty courts, see also STATE OF NEW YORK, UNIFIED COURT SYSTEM, BUDGET for April 1, 2000 to March 31, 2001 [hereinafter PROPOSED BUDGET 2000-2001], Executive Summary. This budget proposal was approved by the Court of Appeals, certified by the Chief Judge, and submitted to the state legislature and the Governor. It includes considerable background information on state courts and other agencies and organizations within the judicial system.

11. The New York City Housing Court has resolution parts, trial ready parts, a rent deposit part, enforcement part, and a cooperative-condominium part. See JUDITH S. KAYE & JONATHAN LIPPMAN, HOUSING COURT PROGRAM BREAKING NEW GROUND 8-13 (1997). Most housing court cases are proceedings by landlords against tenants, seeking evictions or damages for tenant rental or other lease term violations.

12. In 1998, drug treatment courts statewide had about 1,500 persons as active participants in their programs. See STATE OF NEW YORK, UNIFIED COURT SYSTEM, PROPOSED BUDGET for April 1, 1999 to March 31, 2000 [hereinafter PROPOSED BUDGET 1999-2000] at xv.

13. In 1998, there were 326,212 cases filed in the New York City Housing Court, a division of the New York City Civil Court. See PROPOSED BUDGET 2000-2001, *supra* note 10, at 168.

operations only very recently. For example, the first domestic violence court opened in 1996; the first commercial division of the supreme court opened in 1995;<sup>14</sup> and the first community court, the Midtown Community Court, opened in 1993.<sup>15</sup>

The New York appellate court structure consists of the Court of Appeals as the highest appellate court<sup>16</sup> and appellate divisions of the supreme court as the highest intermediate appellate courts.<sup>17</sup> There are four appellate division courts, one for each of four geographical areas into which the state is divided, referred to as departments. By far the largest department in population is the Second Department, which covers New York City—other than New York (Manhattan) and Bronx Counties—and much of the surrounding metropolitan area.<sup>18</sup> Some other courts also have appellate jurisdiction: appellate terms of the supreme court<sup>19</sup> and county courts.<sup>20</sup> Appellate terms of the supreme court may be created by any appellate division department<sup>21</sup> but only the First and Second Departments have such terms.

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14. It is asserted by some that courts specializing in business litigation create an elitist two-tier system of justice: one tier for the business community and one for average citizens. For this and other arguments against business litigation courts, as well as arguments for them, see Ember R. Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315 (1998). For a favorable report on the New York commercial division court, see Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as Well as Anyone?*, 13 TOURO L. REV. 191 (1996). Commercial division courts have recently been added in Monroe, Erie, Nassau and Westchester Counties. See PROPOSED BUDGET 2000-2001, *supra* note 10, at v.

15. For a detailed study of the Midtown Community Court, see NATIONAL INSTITUTE OF JUSTICE, *DISPENSING JUSTICE LOCALLY, THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* (1997).

16. On the jurisdiction of the Court of Appeals, see N.Y. CONST. art. VI, § 3.

17. On the jurisdiction of appellate division courts, see N.Y. CONST. art. VI, § 4(k) and N.Y. C.P.L.R. art. 57.

18. The Second Department includes the Counties of Kings, Queens, Richmond, Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland, and Westchester (part of New York City, all of Long Island, and five New York counties northwest of New York City). See N.Y. CONST. art. VI, § 4(a), 6(a).

19. See N.Y. CONST. art. VI, § 8(d), (e); N.Y. RULES OF CT., SUP. CT., App. Term, 1st Dept., Rule 640.1 (McKinney 1999); N.Y. RULES OF CT., SUP. CT., App. Term, 2d Dept., Rule 730.1 (McKinney 1999).

20. See N.Y. CONST. art. VI, § 11(c); N.Y. JUD. LAW, UNIFORM CITY CT. ACT § 1701 (McKinney 1989); N.Y. JUD. LAW, UNIFORM DISTRICT CT. ACT § 1701 (McKinney 1989); N.Y. JUD. LAW, UNIFORM JUSTICE CT. ACT § 1701 (McKinney 1989).

21. See N.Y. CONST. art. VI, § 8(a), (b).

Generally, only final judgments and orders are appealable. Most appeals heard by the Court of Appeals are from appellate division judgments or orders. Appeals heard by appellate division courts are typically those from judgments or orders of appellate terms of the supreme court, county courts or trial courts of superior jurisdiction. Supreme court appellate terms and county courts hear most all appeals from courts of inferior jurisdiction. As of right appeals to the Court of Appeals are very limited, most appeals to that court require permission of the Court of Appeals or an appellate division court,<sup>22</sup> and only a small percentage of motions for leave to appeal is granted.<sup>23</sup>

### B. *Funding*

The State of New York now provides almost complete financial support for all nonfederal courts in the state, except town and village courts, these latter largely funded by court fees, fines, and local government appropriations.<sup>24</sup> Another exception to state funding of the courts is that

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22. As of right appeals to the Court of Appeals are authorized in certain cases, including those in which two or more appellate division justices dissent on a question of law in favor of the appellant; in certain cases turning on a question of constitutional law; and in certain cases in which the appellant has stipulated that upon affirmance, judgment absolute shall be entered against him. On appeals to the Court of Appeals as of right, see N.Y. CONST. art. VI, § 3(b)(1)-(3); N.Y. C.P.L.R. § 5601 (McKinney 1995); N.Y. CRIM. PROC. LAW § 450.70(d), 450.80 (McKinney 1994). On appeals to the Court of Appeals by permission, see N.Y. CONST., art. VI, § 3(b)(4)-(7), N.Y. C.P.L.R. § 5602, N.Y. CRIM. PROC. LAW § 460.20 (McKinney 1994). The Court of Appeals also may decide a question of New York law certified to by the U.S. Supreme Court, a U.S. court of appeals or a court of last resort of any state if the question of New York law is determinative of a case before the certifying court and there is no controlling New York Court of Appeals precedent on the question. See N.Y. CONST., art. VI, § 3(9); N.Y. RULES OF CT., Court of Appeals, Rule 500.17 (McKinney 1999). For statistical analyses of cases considered and decided by the Court of Appeals in a recent year based on types of appellate right (e.g., court permission), see 1998 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS, 3-5 apps.

Judicial permission in some cases also may be required to appeal to an intermediate appellate court, see N.Y. C.P.L.R. §§ 5701(c), 5703(a) (McKinney 1995); N.Y. CRIM. PROC. LAW § 460.15 (McKinney 1994).

23. In 1998 the New York Court of Appeals granted 91 of the 1,196 motions for leave to appeal in civil cases and 57 of the 2,982 applications for leave to appeal in criminal cases. See 1998 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS 5, 6.

24. For a generally negative view of town and village court financing, see DORIS M. PROVINE, JUDGING CREDENTIALS, NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 132-37 (1986). However, funding seems less of a problem in some of



providing and maintaining court facilities, including courthouses, is largely the responsibility of local government, although increasingly the state has been assuming some of the costs of these facilities both to relieve localities of the financial burden and to provide more courthouses that are adequate in size and maintenance.<sup>25</sup>

The total New York state budget for the courts is now over 1.1 billion dollars a year.<sup>26</sup> This is up from 811 million dollars in fiscal year 1988-89<sup>27</sup> and 889 million dollars in fiscal year 1991-92.<sup>28</sup> Nearly all of

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the larger, more affluent town courts, e.g., in some Westchester County towns where part-time town judges are paid in the range of \$32,000-\$35,000 per year for relatively short periods of time on the bench. *See THE FUND FOR MODERN COURTS, WESTCHESTER COUNTY COURT MONITORS REPORT ON THE TOWN AND VILLAGE COURTS 7-13 (1998).*

In fiscal 1999-2000, the State of New York did make \$500,000 available to town and village courts pursuant to a 1999 statute establishing a Justice Court Assistance Program. 1999 N.Y. CONS. LAWS SERVICE, 1999 Session Laws, ch. 280. Funds made available under this program are for such purposes as automation, personnel training, acquiring law books and improving court facilities. Grants to any one court are capped at \$20,000 per year. On the 1999 act, see also PROPOSED BUDGET 2000-2001, *supra* note 10, at xii.

25. On increased state funding of court facilities, see *infra* notes 136-137 and accompanying text.

26. The exact figure for fiscal year 1999-2000 is \$1,145,040,848. *See* 1999 N.Y. ACTS, ch. 51 (legislature and judiciary budget). The federal judicial budget is about three times as much as that of the State of New York (\$3.3 billion in 1997). *See* STATISTICAL ABSTRACT OF THE U.S. TABLE 542 (1998).

For fiscal year 2000-2001, the Judiciary is requesting a budget increase of 3.4%, or \$38,138,564 over what was appropriated for the judiciary in the previous fiscal year. *See* PROPOSED BUDGET 2000-2001, *supra* note 10, at ii and 6. Among requested increases is funding for 25 additional judicial positions. *See id.* at 6.

27. *See* 1989 ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 3 [hereinafter ANNUAL REPORT, with appropriate year stated].

28. *See* 1992 ANNUAL REPORT at 4. Chief Judge Sol Wachtler's court budget request for fiscal 1991-92, that resulted in litigation against Governor Cuomo, was for \$966 million dollars. The Chief Judge's controversy with the Governor resulted when the Governor's proposed budget for the judiciary, reflecting a stringent period in the state's finances, was for less than what the judiciary had received the previous year and much less than what the judicial system had requested. Judge Wachtler's suit challenged the Governor's budget on inherent powers grounds. Governor Cuomo responded with a suit against the Chief Judge to enjoin the earlier proceeding. Each action was later withdrawn when the Governor agreed to increase the judiciary's recommended budget allocation to what it had been the previous year, with only very minor changes. On the controversy between the Chief Judge and the Governor, see *id.* at 8; Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994); a shorter version of this article appears in 78 JUDICATURE 12 (1994); Peter M. Shane, *Interbranch Accountability in*

the state's court expenditures come from the state's general fund, 96% in fiscal 1999-2000,<sup>29</sup> the remaining 4% in that year from special funds,<sup>30</sup> including some special purpose grants from the federal government.<sup>31</sup> Trial courts (courts of original jurisdiction) received 84% of 1999-2000 funds budgeted for the judiciary,<sup>32</sup> appellate courts (including the Court

*State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 21, 45-56; Note, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153 (1994); and ABA, SPECIAL COMMITTEE ON FUNDING THE JUSTICE SYSTEM 40-41 (1992) [hereinafter SPECIAL COMMITTEE], excerpted in 32 JUDGES J., no. 1, at 7 (1993). The judge's controversy with the governor is symptomatic of the justice system's vulnerability, courts included, to legislative budget cuts, especially in stringent financial periods. A decade or so ago many states reduced their justice system budgets despite rising court caseloads. A Special ABA Committee made a detailed study of the problem, considered it a very serious threat to the entire justice system, and recommended that bar leaders and judges intensify their legislative lobbying efforts to obtain needed justice system funding, building coalitions with other groups in doing so. See SPECIAL COMMITTEE at 28-31.

In adequacy of funding, the federal courts fare better than state courts, New York included; but a recent long-range planning study of the federal courts complained about the level of federal court funding:

Any comparison to the state courts discloses that the federal courts have been well funded. During the past decade, Congress has provided the judicial branch with a rate of resources growth about equal to that of the Department of Justice, but well above that of executive branch agencies and, in recent years, that of the Congress itself. Congressional penury has not placed the federal courts in their current circumstances. Rather, the current situation results from the increased workload of the federal courts and their honest adherence to empirical workload formulae as the basis for budget justification. Where workload has increased, the federal judiciary has argued that resources ought to increase as well. Where workload remains flat or decreases markedly, budget requests are correspondingly limited or reduced.

JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 93-94 (1995).

29. The general fund court operations' budget for 1999-2000 amounted to \$1,097,233,799. See PROPOSED BUDGET 2000-2001, *supra* note 10, at 7.

30. The special funds budgeted for 1999-2000 amounted to \$48,069,569. See *id.* at 8.

31. Much of this federal grant money has been for drug treatment courts. See PROPOSED BUDGET 2000-2001, *supra* note 10, at 174.

32. For 1999-2000 the budgeted allocation to courts of original jurisdiction was \$961,258,925. See 1999 N.Y. ACTS, ch. 51 (legislature and judiciary budget).

of Appeals) received about 5%,<sup>33</sup> and the balance went to administration and a miscellany of court programs, among them attorney licensing, aid to localities, employee fringe benefits and the Lawyers' Fund for Client Protection.<sup>34</sup>

Most of the important decisions as to state funding of the courts are made annually in the course of preparing and adopting the state budget. Each year the court system submits to the governor a very detailed budget covering estimated financial needs of the courts for the ensuing year. Pursuant to a constitutional requirement, prior to submission this budget is approved by the Court of Appeals and certified to by the Chief Judge.<sup>35</sup> The proposed budget is prepared under the direction of the court system's budget director who assembles needed budget request data from the various units and districts within the system. When the governor receives the courts' budget, hearings are held and the governor then submits to the legislature a proposed budget for all state government expenditures, including those for the court system. The governor may not revise the budget as proposed by the court system but may recommend changes.<sup>36</sup> On receipt of the governor's budget and budget proposals, the legislature may hold hearings before adopting its final version of the budget. In the process of budget preparation and adoption, informal discussions on budgeting issues of concern often take place between representatives of the courts and legislators or between representatives of the courts and the governor or persons on the governor's staff. Budgeting is an arduous and often acrimonious process.

### C. *Staffing and Staff Administration*

A high volume state court system, such as that of New York, requires a large bureaucracy, with many judges and even more non-judge

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33. For 1999-2000, the budgeted allocation for the Court of Appeals was \$10,415,089 (including the Law Reporting Bureau) and \$48,537,011 for other appellate courts, a total of \$58,952,100. *See id.*

The above text figure of five percent for appellate courts does not include the cost of appellate court auxiliary operations, a number of programs such as attorney discipline, law guardians and the State Board of Law Examiners, for which the appellate courts have some responsibility and for which a total of \$77,817,845 of court funds was budgeted in 1999-2000. *See id.*

34. *See id.*

35. *See* N.Y. CONST. art. VII, § 1.

36. *See id.*

employees to operate the system. The New York court system, exclusive of town and village courts, now has over 15,000 employees, about 1,200 of them judges,<sup>37</sup> approximately half as many employees as the entire federal judicial system.<sup>38</sup> In addition, there are approximately 2,300 judges who preside at the state's town and village courts.<sup>39</sup> The Court of Appeals has seven judges and there are 425 statutorily authorized supreme court justices<sup>40</sup> (the latter commonly referred to as justices rather than as judges), fifty-six of them assigned to the appellate division.<sup>41</sup> In addition, the number of supreme court justices is augmented by judges from other courts, especially the Civil and Criminal Courts of New York City, who are indefinitely assigned as acting supreme court justices,<sup>42</sup> these assignments being made to circumvent a statutory cap on the number of authorized supreme court justices.<sup>43</sup> There are more than 100 acting supreme court justices.<sup>44</sup> Other than the supreme court and town and village courts, courts in New York State's system with the most judges are the city courts outside New York City,<sup>45</sup> Family Courts,<sup>46</sup> the Civil

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37. See 1998 ANNUAL REPORT, *supra* note 27, at 1. For the authorized number of judges assigned to each New York court, see *id.* at 3.

38. The federal judicial system has 30,641 employees (as of 1997). See STATISTICAL ABSTRACT OF THE U.S. table 559 (1998). There are 834 federal authorized judges in general jurisdiction courts, not including vacancies (as of 1997): 646 for district courts, 179 for courts of appeal, and 9 for the Supreme Court, plus 86 active court of appeals senior judges and 276 active senior district court judges. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1998 ANNUAL REPORT OF THE DIRECTOR 46. In addition (as of 1998) there are 326 authorized federal bankruptcy judges, see *id.* at 47; 512 authorized magistrate judge positions, see *id.* at 48; and a small number of judges assigned to the U.S. Court of International Trade or the U.S. Court of Federal Claims.

39. See 1998 ANNUAL REPORT, *supra* note 27, at 3.

40. See *id.* The number of supreme court justices includes 56 certified retired justices. See *id.* Retired supreme court justices, if properly approved, may receive court assignments or may be appointed judicial hearing officers, including as referees. See N.Y. RULES OF CT., RULES OF THE CHIEF CT. ADMINISTRATOR pt. 122 (McKinney 1999).

41. In 1998, of the 56 justices assigned to the appellate division, 24 were permanently authorized for that assignment and the others temporarily assigned, including 12 certificated retired supreme court justices. See 1998 ANNUAL REPORT, *supra* note 27, at 3.

42. These temporary assignments are made pursuant to part 121 of the N.Y. RULES OF CT., RULES OF THE CHIEF CT. ADMINISTRATOR.

43. The statutory cap limits the number of authorized Supreme Court justices for each judicial district. See N.Y. JUD. LAW § 140-a (McKinney 1983 & Supp. 1998).

44. See Joan B. Carey, *Consolidation of the State's Courts: Judge Kaye's Proposal*, 4 N.Y.L. Sch. CITY L. 25, 29 (1998).

45. In 1998, 158 judges. See 1998 ANNUAL REPORT, *supra* note 27, at 3.

Court of New York City,<sup>47</sup> and the Criminal Court of New York City.<sup>48</sup> The town and village courts are unique in that the judges need not be admitted to the bar<sup>49</sup> and eighty percent of them are not lawyers.<sup>50</sup>

As is to be expected in any large government operation that provides a varied set of services at scattered locations over a big state, the New York court system requires its staff to perform a wide range of duties. Of these duties, the adjudicative work of judges in deciding matters before them is the most obvious. In addition, judges have extensive administrative duties, both in assuring movement of cases through the system and overseeing other operations essential to a functioning court system. To aid them in carrying out their duties, all judges in the New York court system, other than many town and village court judges, have personal clerical and secretarial assistants, immensely helpful in taking over much of the detail work of busy chambers.<sup>51</sup> Among the many other kinds of court staff positions are those concentrating on information processing and distribution, personnel recruitment, staff education and training, li-

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46. In 1998, 124 judges. *See id.*

47. In 1998, 120 judges. *See id.*

48. In 1998, 107 judges. *See id.*

49. Judges of other New York state courts must be admitted to practice law in New York and must have, before assuming office, been admitted to practice law in New York for five to ten years, depending on the court, prior to becoming judges. *See* N.Y. CONST. art. VI, § 20(a).

50. *See* N.Y. ST. COMM'N ON JUD. CONDUCT, 1998 ANNUAL REPORT 8. For a generally negative analysis of the courts, with nonlawyer judges, with special attention to Arizona, see Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role on Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 NEW MEX. L. REV. 119 (1999).

51. Most every judge of a superior court in the New York court system has a full-time clerk. Many judges in the lower-level courts in the system have only a half-time clerk each. *See* STATE OF N.Y., UNIFIED COURT SYSTEM, BUDGET for April 1, 1997 to March 31, 1998, at xxiii. By court rule, each supreme court judge is entitled to a secretary and a law clerk, and the law clerk must be a member of the New York bar or a law school graduate who expects to soon take the New York bar examination. If the clerk fails the bar examination more than once, his or her clerk's position automatically terminates. For the court rule on supreme court clerks and secretaries see part 5 of the N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE. Many town and village justices have no clerical assistance. Provine, in a 1980s study, reports that half of the New York town and village courts she surveyed had no clerical help. *See* PROVINE, *supra* note 24, at 126. On the work of law clerks and how some of them view their jobs, see EMPIRE STATE COURT NOTES 2 (Sept. 1988) and 3 (Oct. 1988).

brary operations (the court system now has fifty-six law libraries),<sup>52</sup> budgeting, purchasing of supplies, or security.<sup>53</sup> Less routine is the work of a small research staff in the court system's Center for Court Innovation that provides planning and guidance for new court projects.<sup>54</sup> The Center has been particularly active in the planning and development efforts for new specialized courts, including community courts, drug treatment courts and domestic violence courts. The court system also has its own legal counsel staff, lawyers who are responsible for drafting legislative measures proposed by the chief judge. The counsel staff maintains close working relations with the state legislature and liaison with bar associations and other private groups.<sup>55</sup> Although not court staff in the usual meaning of that term, jurors are personnel important to operation of American court systems and extensively relied on in many New York criminal and civil trials. The jury system also requires additional staff positions and staff time. Improving the jury system has been a major goal of the present Chief Judge<sup>56</sup> and, in cooperation with the legislature, some of her jury reform objectives have been achieved, including drastic reduction in legally permissible exemptions from jury service.<sup>57</sup>

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52. There are 39 supreme court and 13 county-level law libraries. *See* PROPOSED BUDGET 2000-2001, *supra* note 10, at 195. The Court of Appeals and appellate division courts also have law libraries.

53. Extensive security protection exists in most all New York courthouses due to the risk of violence and disorderly conduct. Security personnel also help in directing members of the public to the proper courtroom or office. For a discussion of security risks in courthouses and types of security personnel, equipment and procedures, see Don Hardenbergh, *Justice Without Fear: Are We Safe in Our Courthouses?*, 17 ST. CT. J., Winter 1993, at 22.

54. On the Center for Court Innovation, see 1998 ANNUAL REPORT, *supra* note 27, at 39-40; and PROPOSED BUDGET 2000-2001, *supra* note 10, at vii-viii.

55. On the role of the court system's Office of Counsel, see 1993 ANNUAL REPORT, *supra* note 27, at 49; and 1998 ANNUAL REPORT, *supra* note 27, at 29.

56. The Chief Judge has stated the basic objectives of jury reform to be these: "jury pools that are truly representative of the community; a system that operates effectively; and jury service that is a positive experience for the half-million citizens summoned each year." JUDITH S. KAYE, *THE STATE OF THE JUDICIARY 2* (1998).

57. On exemptions from jury service, see N.Y. JUD. LAW § 517 (McKinney Supp. 1998); N.Y. RULES OF COURT, RULES OF THE CHIEF CT. ADMINISTRATOR § 128.6, 128.6A, and pt. 128, app. A (McKinney 1999).

Other recent improvements in the jury system include increased juror compensation to \$40 a day, a more rapid civil juror selection process, new and improved orientation materials for those summoned for jury duty and improved jury assembly rooms in courthouses. On these and other improvements, see PROPOSED BUDGET 2000-2001, *supra* note

In selecting court employees and the terms of their employment, there is considerable variation in the New York State court system, variations depending largely on the type of job and type of court. Differences are particularly pronounced as to judges. How judges are selected and the duration of their terms of office is prescribed by the New York Constitution.<sup>58</sup> Most trial judges are popularly elected by voters in the local area their court serves. However, judges of the New York City Criminal Court and the Family Court in New York City are appointed by the mayor of New York City<sup>59</sup> and judges of the court of claims are appointed by the governor with the advice of the State Senate.<sup>60</sup> Also, the chief court administrator appoints New York City Housing Court judges

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10, at viii-ix; N.Y. UNIFIED COURT SYSTEM, JURY REFORM IN N.Y. STATE: A SECOND PROGRESS REPORT ON A CONTINUING INITIATIVE (March 1998); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L. REV. 851, 862-65 (1997); JUDITH S. KAYE, STATE OF THE JUDICIARY 7 (2000).

Improvements in the grand jury system are currently being implemented in New York. A 32-member Grand Jury Project Committee appointed by the Chief Judge made a detailed study of the grand jury system in New York and issued its report with recommendations in 1999. See GRAND JURY PROJECT COMMITTEE, THE GRAND JURY PROJECT (2 vols. 1999). The report claims that the committee's study is the most comprehensive review ever made of a statewide grand jury system. See *id.* vol. 1, at iv. On the Grand Jury Project and its implementation, also see PROPOSED BUDGET 2000-2001, *supra* note 10, at viii-ix; and JUDITH S. KAYE, STATE OF THE JUDICIARY 7 (2000).

58. The N.Y. CONST. art. VI provides for judicial selection and term duration for judges in different courts, as follows: supreme court, elected for 14-year terms, *see id.* at § 6(c); court of claims, appointed for 9-year terms, *see id.* at § 9; county courts, elected for 10-year terms, *see id.* at § 10; surrogate's courts, in New York City elected for 14-year terms, elsewhere elected for 10-year terms, *see id.* at § 12(b), (c); family courts, in New York City appointed for 10-year terms, elsewhere elected for 10-year terms, *see id.* at § 13(a); Civil Court of New York City, elected for 10-year terms, *see id.* at § 15(a); Criminal Court of New York City, appointed for 10-year terms, *see id.*; district courts, elected for 6-year terms, *see id.* at § 16(h); judges of town courts, elected for 4-year terms, *see id.* at § 17(d). The New York Constitution leaves to the legislature the terms and method of selection of village judges and judges of city courts outside New York City. See N.Y. CONST. art. VI, § 17(d).

An unusual feature of the New York court system is that, in a constitutional sense, housing court judges are not judges but rather court-appointed referees. See KAYE & LIPPMAN, *supra* note 11, at 5.

59. See N.Y. CONST. art. VI, § 13(a) (for N.Y. City Fam. Ct.), § 15(a) (for N.Y. City Crim. Ct.).

60. See N.Y. CONST. art. VI, § 9.

from a list of candidates submitted by an advisory council.<sup>61</sup> Even in selection of judges by popular election, or perhaps particularly so given how candidates likely to win are selected to run, political considerations are usually important. These can include such factors as a candidate's past political party activity and loyalty, past loyalty to a powerful political leader, and the extent to which the candidate matches the ethnic or racial makeup of a powerful voter bloc in the election district.

Judicial terms set by the New York Constitution for trial judges vary from as long as fourteen years to as short as four years, with most judicial terms being fourteen years or ten years.<sup>62</sup> Judges, of course, may succeed themselves by being elected or appointed for another term. They also may be removed for misconduct or mental or physical disability.<sup>63</sup>

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61. See N.Y. JUD. LAW, N.Y. CITY CIVIL COURT ACT § 110(f) (McKinney Supp. 1999). The advisory council includes, among others, members representative of the real estate industry and tenants' organizations and one member appointed by the mayor of New York City. See *id.* at § 110(g). Landlord influence is considerable in appointment and reappointment of housing court judges. See Daniel Wise, *A Dozen Housing Court Judges Appointed to Landlords' Praise*, N.Y. L.J., July 12, 1999, at 1.

62. For duration of terms for judges of different courts, see The N.Y. CONST. art. VI which provides for judicial selection and term duration for judges in different courts, as follows: supreme court, elected for 14-year terms, see *id.* at § 6(c); court of claims, appointed for 9-year terms, see *id.* at § 9; county courts, elected for 10-year terms, see *id.* at § 10; surrogate's courts, in New York City elected for 14-year terms, elsewhere elected for 10-year terms, see *id.* at § 12(b), (c); family courts, in New York City appointed for 10-year terms, elsewhere elected for 10-year terms, see *id.* at § 13(a); Civil Court of New York City, elected for 10-year terms, see *id.* at § 15(a); Criminal Court of New York City, appointed for 10-year terms, see *id.*; district courts, elected for 6-year terms, see *id.* at § 16(h); judges of town courts, elected for 4-year terms, see *id.* at § 17(d). The New York Constitution leaves to the legislature the terms and method of selection of village judges and judges of city courts outside New York City. See N.Y. CONST. art. VI, § 17(d).

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*supra* note 58.

63. The New York Constitution has detailed provisions as to the grounds and procedures for judicial removal. See N.Y. CONST. art. VI, §§ 22-24. A Commission on Judicial Conduct is established to investigate and hear complaints against judges for misconduct or lack of fitness to perform as a judge. See *id.* at § 22. The Commission may remove or otherwise sanction judges found unqualified, subject to review by the Court of Appeals, and the Court of Appeals has some power to sanction judges independent of a commission recommendation. See *id.* One or both houses of the legislature also may remove or impeach judges. See *id.* at §§ 23, 24.



As to the Court of Appeals, its judges, including the chief judge, are appointed for fourteen-year terms by the governor, with the advice and consent of the State Senate, from among candidates proposed by a State Commission on Judicial Nomination.<sup>64</sup> The governor selects appellate

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On the organization and powers of the Commission on Judicial Conduct also see N.Y. JUD. LAW art. 2-A (McKinney 1983 & Supp. 1999). The Commission considers complaints of misconduct against judges in the state system, including town and village judges. In 1997 it received 1,403 new complaints, including 52 initiated by the Commission. Of the new complaints, 88% were dismissed on initial review and investigations ordered on the others. During the year, 20 formal disciplinary orders were issued by the Commission, 13 against town or village judges, 8 of whom were nonlawyers. Commission determinations as to the 20 judges were that 6 should be removed, 8 censured, and 6 publicly admonished. Eighteen other judges resigned prior to a Commission determination and cases against them closed. The Commission has no jurisdiction over federal judges, housing court judges or administrative hearing officers but will review complaints against them submitted to the Commission and, in appropriate cases, the complaints will be referred to other agencies. On the above activity of the Commission, see N.Y. ST. COMM'N ON JUD. CONDUCT, *supra* note 50, at 1-16.

Prescribed judicial rules of conduct are set forth in N.Y. RULES OF CT., RULES OF THE CHIEF CT. ADMINISTRATOR pt. 100. An Advisory Committee on Judicial Ethics, composed of present or former New York State court judges, responds to judicial inquiries from judges on appropriate judicial conduct, and the responses are published. On this committee, see *id.* at pt. 101. For a digest summary of some opinions of the Committee, see EMPIRE STATE COURT NOTES 4 (Dec. 1989).

The Chief Judge also may take action in response to judicial misconduct allegations. For example, when allegations recently were made and widely publicized that some judges were improperly favoring some lawyers in making fiduciary appointments, Chief Judge Kaye announced that she would appoint a special inspector general to enforce existing court rules pertaining to such appointments, instruct administrative judges to examine fiduciary appointment practices in their localities, and would appoint a "blue ribbon" panel to examine the fiduciary appointment process and recommend any needed reforms. See JUDITH S. KAYE, STATE OF THE JUDICIARY 7 (2000). See also John Caher, *Kaye Directs Probe at Judicial Favoritism*, N.Y.L.J., Jan. 11, 2000, at 1.

64. The 12-member Commission on Judicial Nomination consists of four members appointed by the governor, four by the chief judge of the Court of Appeals, and one each by the speaker of the State Assembly, temporary president of the State Senate, minority leader of the State Assembly, and minority leader of the State Senate. See N.Y. CONST. art. VI, § 2(d).

On the selection of judges for the Court of Appeals, also see an article by a member of the Court, George B. Smith, *Choosing Judges for a State's Highest Court*, 48 SYRACUSE L. REV. 1493 (1998). Prior to a 1977 constitutional amendment, Court of Appeals judges were elected. Judge Smith states that the immediate reason for the change was to eliminate "negative aspects of politics" from the selection process; and, although the current selection method may not have removed politics from the process, he is of the opinion that it has worked well. See *id.* at 1498.

division justices for five-year terms from among supreme court justices,<sup>65</sup> and appellate term justices are selected by the chief court administrator with the approval of the presiding justice of the appropriate appellate division.<sup>66</sup> As to compensation, compared to most state government salaries, judges are well paid; but compared to earnings of more successful lawyers in private practice, judges' earnings are low. New York judges in all but city courts outside New York City and town and village courts have salaries currently in the range of \$119,800 to \$151,200 per year, except for the chief judge of the Court of Appeals, who is paid \$156,000 per year. These salaries are set by statute.<sup>67</sup>

Most employees of the New York court system who are not judges are covered by New York's Civil Service Law and by detailed Rules of the Chief Judge as to selection, promotion, and termination, consistent with the Civil Service Law.<sup>68</sup> Collective bargaining agreements have been negotiated by the court system with most nonjudicial employee units.<sup>69</sup> Many nonjudicial positions in the courts, when vacant, are filled by examination, and promotion of a present employee to a higher position may require a promotion examination.<sup>70</sup> In recruiting competent staff, an added objective of the court system has for some time been increased diversity of the court workforce and elimination of underrepresentation of minorities and women in that workforce where it exists. A Workforce Diversity Program has been aggressively pushed in attempts

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65. See N.Y. CONST. art. VI, § 4(c).

66. See N.Y. CONST. art. VI, § 8(a).

67. For salaries paid judges in various courts, see article 7-B of the New York Judiciary Law, as amended. Even with substantial 1999 increases, salaries of New York judges are not much above what beginning associates in the big New York City law firms are being paid. A further indication of the disparity in earnings of judges and some lawyers in private practice is disclosed by a recent report on income of the 100 law firms in the United States with the most lawyers per firm. This report shows the average profit per equity partner in these 100 firms to have been \$622,000 in 1998. See AM. LAW., July 1999, at 127. Of the 100 law firms included in the study, 32 have New York City offices and the average 1998 compensation for all partners in each of these 32 firms varies from a top of \$3,105,000 per partner to a low of \$240,000 per partner. See *id.* at 134.

68. See N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE pt. 25 (McKinney 1999). The deputy chief administrative judge for management support has broad powers to appoint many court system nonjudicial employees. See *id.* at pt. 81, § 81.1(c)(5).

69. On these agreements and their implementation, see the Historical Note following section 37 of the Judiciary Law.

70. See N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE pt. 25 § 25.13-25.15 (McKinney 1999).

to further the diversity objective.<sup>71</sup> Salaries, obviously another very important personnel consideration, are set for most nonjudicial court employees by Rules of the Chief Court Administrator; salaries vary with grade and years of service, and show modest annual increases in recent years.<sup>72</sup>

The administrative organizational structure of the New York State courts consists of a complex network of administrative officials, headed by the chief judge of the Court of Appeals, who in addition to her responsibilities for deciding cases also has substantial administrative responsibilities for the entire court system that are very demanding.<sup>73</sup> As not only nominal but de facto head of the system, a fully committed chief judge will oversee court operations and initiate and push for needed reforms in the court system, in addition to deciding cases.<sup>74</sup> The chief judge's immediate administrative subordinate is the chief administrative judge, a full-time administrator with statewide authority,<sup>75</sup> and reporting directly to him are four full-time deputy chief administrative judges: one who oversees the administration of courts in New York City; one who oversees the courts outside of New York City; one for management support, with general supervisory responsibility for a miscellany of court service units necessary to a functioning court system; and one recently added to increase availability of the courts to the poor.<sup>76</sup> The deputy chief

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71. On the Workforce Diversity program of the courts, see 1996 ANNUAL REPORT, *supra* note 27, at 11-12; JUDITH S. KAYE, THE STATE OF THE JUDICIARY 32-35 (1993); EMPIRE STATE COURT NOTES, WORKFORCE DIVERSITY PROGRAM LAUNCHED, Feb. 1990, at 1.

72. On recent nonjudicial salary schedules for different grades and years of service for certain nonjudicial court employees, see N.Y. RULES OF CT., RULES OF THE CHIEF CT. ADMINISTRATOR pt. 107 (McKinney 1999).

73. On the administrative functions of the chief judge, see N.Y. JUD. LAW § 211.

74. The top state court judges in other states also often assumes extensive administrative and court reform obligations in addition to their case adjudication duties. E.g., on the work of a recent New Jersey Chief Justice, see Ronald J. Fleury et al., *How Wilentz Changed the Courts*, 7 SETON HALL CONST. L.J. 411 (1997).

75. On the responsibilities of the chief administrative judge, see N.Y. JUD. LAW §§ 212, 216.

76. The chief administrative judge and the deputy chief administrative judge positions traditionally have been filled by judges but nonjudges could be selected to fill them. See N.Y. JUD. LAW, § 210(3) (McKinney 1983); N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE pt. 80, § 80.2(a) (McKinney 1999). Also, the N.Y. CONST. art. VI, § 28, refers merely to a "chief administrator of the courts," indicating that a nonlawyer could hold this position. Many of the other more important court administrative positions in the New York court system are held by nonlawyers.

administrative judge for management support is responsible for those service units pertaining to court facilities management, administrative services,<sup>77</sup> human resources,<sup>78</sup> information technology, and financial management and auditing services. The counsel to the court system also reports to the chief administrative judge.

The chief administrative judge is appointed by the chief judge, with the advice and consent of the Administrative Board of the Courts, the latter consisting of the chief judge and the presiding judge of each appellate division department.<sup>79</sup> Pursuant to a constitutional directive,<sup>80</sup> the chief judge, by court rule, has delegated extensive powers to the chief administrative judge and the deputy chief administrative judges.<sup>81</sup> However, judges of the appellate division and appellate terms of the supreme court are largely responsible for the administration of their courts, the chief administrative judge's powers and duties in relation to these courts

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Nationally, court administration is becoming a separate profession. Indications of this are that graduate judicial administration programs are now being offered at the University of Southern California, American University and the University of Denver; continuing education programs are offered by the Institute of Court Management; and there are associations of court managers, the National Association of Court Management and the Conference of State Court Administrators. On court administration as a separate profession, see Harry O. Lawson & Dennis E. Howard, *Development of the Profession of Court Management: A History with Commentary*, 15 JUST. SYS. J. 580 (1991). The new profession is influenced by organization and administration theories developed by business schools and schools of public administration. *See id.*

For a nationwide statistical survey of state and local court managers as of 1989, see David J. Saari et. al., *The Modern Court Managers: Who They Are and What They Do in the United States*, in STEVEN W. HAYS & COLE B. GRAHAM, JR., HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 237 (1993).

77. An Office of Administrative Services provides a wide range of services, including central purchasing, central accounting, attorney registration administration, centralized printing, and maintenance of official records. *See* PROPOSED BUDGET 1999-2000, *supra* note 10, at 341-42.

78. A Division of Human Resources, under the general direction of the Chief Administrative Judge for Management Support, includes the following offices: Education and Training, Employee Relations, Workforce Diversity, Personnel, Payroll, Employee Benefits, and Career Services. *See id.* at 339. On other divisions and offices under the general direction of the Deputy Chief Administrative Judge for Management Support, *see id.* 338-40.

79. *See* N.Y. CONST. art. VI, § 28(a). The chief administrative judge holds office at the pleasure of the chief judge. *See id.*

80. *See id.* at § 28(b).

81. *See* N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE pts. 1, 80 & 81 (McKinney 1999).

being sharply limited.<sup>82</sup> Although substantial administrative oversight of New York trial courts is centralized in the chief judge and top administrative judges, considerable responsibility for managing the administrative details of court operations remains at the trial court level. To assist in this process, the New York City Criminal Court, New York City Civil Court, Family Court, and each of the twelve judicial districts has an administrative judge.<sup>83</sup> Some efforts have been made recently to decentralize more aspects of personnel management, budget preparation, and day-to-day fiscal management.<sup>84</sup>

An important added feature of New York State courts' organizational structure is the frequent use of committees as administrative and decision-making aids.<sup>85</sup> Most are court appointed, usually by the chief judge. Some make binding decisions; most merely recommend action. Some are permanent; some are temporary and terminate following their final report. Some of these bodies consist solely of court personnel; some include court personnel and outsiders; and some include only outsiders. The outsiders in many instances are lawyers in private practice who are particularly knowledgeable about the subjects under consideration. An advantage to use of these bodies is the expertise they bring to the review and analysis of troublesome issues; and frequently, as well, the reputation and credibility of their members make committee conclusions and recommendations more broadly acceptable and more readily imple-

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82. *See id.* at § 80.3. The appellate division judges also have responsibility for supervising the administration and operation of a number of programs, including admission to the bar, lawyer discipline, and regulation of the practice of law. *See id.* at § 80.3(c). On these auxiliary operations, also see PROPOSED BUDGET, *supra* note 10, at 263-339.

83. *See* NEW YORK RULES OF CT., RULES OF THE CHIEF JUDGE § 80.2(a)(1) (McKinney 1999), for authorization of these administrative judges. There also are separate administrative judges for Nassau County and Suffolk County. *See id.* at § 80.2(a)(2). The presiding judge of the court of claims is the administrative judge for that court. *See id.* at § 80.3(c).

84. *See* JUDITH S. KAYE, THE STATE OF THE JUDICIARY 32 (1993). Concerns over undue administrative unification or centralization of the courts have been expressed, including that these moves may ignore local needs, values and interests and may stifle local initiative. On these and other concerns as to unification and centralization of court administration, see Harry O. Lawson, *State Court System Unification*, 31 AM. U. L. REV. 273, 286-87 (1982).

85. These bodies may officially be referred to as committees or as task forces, commissions, councils, conferences, or panels.

mented.<sup>86</sup> In addition, committees made up of judges and other court personnel can help build staff morale by creating a sense of inclusion in policy making rather than a feeling of being dictated to by others. Among recent court staffed or appointed committee-type bodies established to study and make recommendations on difficult issues facing the courts are the Grand Jury Project Committee, Commercial Courts Task Force, Committee on Case Management, Committee on Alternative Criminal Sanctions, Franklin H. Williams Judicial Commission on Minorities, Alternative Dispute Resolution Task Force, and Individual Assignment Review Committee.<sup>87</sup> In addition, there are advisory committees to the chief administrative judge, staffed by the court counsel, that work with the court counsel in preparing legislation of concern to the court system for submission to the legislature. Most advisory committee members are lawyers in private practice specializing in a relevant field of law.<sup>88</sup> The legislature has also created permanent committees, solely or largely composed of judges, to assist in judicial administration: the Administrative Board of the Courts,<sup>89</sup> the Judicial Conference,<sup>90</sup> and judicial

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86. Somewhat analogous efforts to improve the court system by drawing on the knowledge and influence of a wide range of persons in the justice community is the Los Angeles Superior Court Improvement Initiative. Los Angeles, of course, is a high population, high court caseload area similar to a number of counties in the State of New York. Through collaborative exchange of information and ideas by many persons concerned with the courts, the Initiative has sought to identify ways of improving the local courts and then focusing on actions necessary to implement the improvements. Task force meetings, stakeholder conferences, polling, surveys and interviews are among the procedures used. On the Initiative, see Bryan Borys et al., *Enlisting the Justice Community in Court Improvement*, 82 JUDICATURE 176 (1999).

87. Among the many other recent court staffed or appointed committees concerned with serious court-related problems are the Family Violence Task Force, Permanent Judicial Commission on Justice for Children, Judicial Advisory Councils, The Jury Project Panel, Judicial Commission on Women in the Courts, Pro-Bono Monitoring Committee, and Committee on the Profession and the Courts, and Commission on Drugs and the Courts.

88. There are separate advisory committees on civil practice, criminal law and procedure, family court, local courts and surrogate's court. If the chief administrative judge approves committee legislative proposals, they are then submitted to the legislature for consideration. The advisory committees also review other legislative proposals of special concern to the court system and their recommendations on this legislation, if approved by the chief court administrator, will be taken up with the legislature and the governor's counsel by court counsel. On the advisory committees and their proposals and recommendations in 1998, see 1998 ANNUAL REPORT, *supra* note 27, at 46-52.

89. This Board consists of the chief judge and the presiding judges of the appellate division courts, and advises the chief judge on selection of the chief court administrator.

associations.<sup>91</sup>

Another administrative format utilized by the New York State courts is the separate administrative center that helps carry out an important court function. One such center is the City, Town and Village Courts Resource Center that answers questions from city, town or village judges or their clerks on the law or on administrative issues. Responses to inquiries about the law are particularly helpful as many judges at this court level are not lawyers. Since its inception in 1990, the Center has answered over 50,000 inquiries.<sup>92</sup> Community Dispute Resolution Centers are another example of this type of administrative format. There are a number of these centers, located throughout the state, that informally resolve conflicts, many of which might otherwise go to the courts.<sup>93</sup> Quite different are Children's Centers, a recent innovation. These centers care for children when their adult caregivers are attending court sessions, thereby eliminating the problem of children in courtrooms. Fourteen courts now have Children's Centers and they care for almost 40,000 children each year. The Children's Centers are operated by not-for-profit agencies under contract with the court system.<sup>94</sup>

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It also has some responsibility for establishing court administrative standards and policies and rules of practice and procedure in the courts. *See* N.Y. JUD. LAW §§ 210, 213 (McKinney 1983). The Board is also a constitutional body. *See* N.Y. CONST. art. VI § 28(a).

90. The Judicial Conference, chaired by the chief judge, consists of representatives from the various courts in the state, plus one member of the bar of the state and designated members of the state legislature. It recommends changes in the law and advises on court staff education and other matters. *See* N.Y. JUD. LAW §§ 214, 214(a) (McKinney 1983 & Supp. 1998).

91. There is a judicial association for each court composed of the judges of that court. Each association meets at least annually and designates one of its members to consult with the chief judge and chief court administrator on court administrative policies. *See* N.Y. JUD. LAW § 217 (McKinney Supp. 1998).

92. On the City, Town and Village Courts Resource Center, see PROPOSED BUDGET 2000-2001, *supra* note 10, at 206.

93. On Community Dispute Resolution Centers, *see infra* note 128 and accompanying text.

94. On Children's Centers, *see* JUDITH S. KAYE & JONATHAN LIPPMAN, FAMILY JUSTICE PROGRAM 39 (1997); N.Y. STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 7 (1996).

#### D. Caseloads and Case Management

The volume of cases before New York State courts is tremendous and has been increasing, especially at the trial court level. New case filings in the trial courts of the New York State court system, excluding town and village court filings, are almost four million annually, far more than all the federal trial courts in the nation combined.<sup>95</sup> The highest volume New York trial courts, each with over 300,000 new filings in a recent reporting year, are New York City Criminal Court, family courts (statewide), civil term of the supreme court (statewide), New York City Housing Court, and city and district courts outside New York City.<sup>96</sup> Case dispositions in any one year are roughly equivalent to new filings.<sup>97</sup> The breakdown of dispositions by court type in 1997 was 44% in criminal courts, 34% in civil courts, 19% in family courts, and 3% in surrogate's courts.<sup>98</sup> Total case filings in the New York trial courts have been moving up but increases in recent years have been most substantial in criminal court filings.<sup>99</sup> In addition to the above-mentioned trial court

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95. Excluding town and village court cases, in 1998 there were 3,543,795 new cases filed and calendared in the New York state court system; other than parking and traffic cases there were 2,993,517 such cases. *See* 1998 ANNUAL REPORT, *supra* note 27, at 9. The total federal district court filings for the same year were 314,478. *See* 1998 ANNUAL REPORT OF THE DIRECTOR, *supra* note 38, at 16. Of these federal filings, 256,787 were civil cases, 57,691 were criminal cases. *See id.* In addition, in 1998, there were 1,436,964 bankruptcy court filings, *see id.*; 1,105 U.S. court of federal claims filings, *see id.* at 287; and 3,575 U.S. court of international trade filings, *see id.* at 286. Federal trial court case filings are increasing. From 1994 to 1998, U.S. district court civil case filings were up 8.6%; U.S. district court criminal case filings were up 26.8%; bankruptcy court filings were up 71.5%. *See id.* at 16. The U.S. Courts of Appeals had 53,805 cases filed in 1998, up 11.3% since 1994. *See id.*

96. In 1998 the new filings for the following high volume New York courts were these: New York City Criminal Court, 703,689 cases, including both arrest and summons cases; family courts (statewide), 654,602 cases; Civil Term of the Supreme Court (statewide), 385,797 cases (Criminal Term of Supreme and County Courts, 63,329 cases); and city and district courts outside New York City, 240,917 cases. *See* 1998 ANNUAL REPORT, *supra* note 27, at 9.

97. *E.g.*, in 1998 there were 3,560,812 cases disposed of by the New York State court system, compared to the 3,543,795 new cases filed. *See id.* This does not include town and village court cases.

98. *See id.*

99. *E.g.*, comparative filing figures for 1988 and 1998 are these, not including town and village courts: criminal courts, 730,625 in 1988, 1,069,772 in 1998; civil courts, 1,001,734 in 1990, 1,101,871 in 1998; family court, 486,946 in 1988, 654,602 in 1998; and surrogate's court, 120,750 in 1988, 167,272 in 1998. Traffic and parking ticket cases



case filings and dispositions, approximately two million minor criminal and civil cases are filed and disposed of each year in New York town and village courts.<sup>100</sup> Many of these are parking and traffic offense matters.

Although case filings in New York are high, the percentage of cases that go to trial is small, most criminal cases being disposed of by guilty pleas or dismissals<sup>101</sup> and most civil cases by settlements, dismissals, or default judgments.<sup>102</sup> However, all cases disposed of without trial require input of court staff time, often very considerable time. Required may be such judicial actions as preliminary hearings, responses to motions of parties, conferences with attorneys, and issuance of summary judgments or default judgments. Adequate records also must be kept of cases filed. Obviously, too, the amount of court personnel time, judicial and nonjudicial, can vary tremendously among individual cases and types of cases whether or not tried or disposed of without trial. For instance, a complex tort case or well-publicized murder case, whether tried or not, normally will take far more court personnel time and effort than the typical tenant eviction or traffic offense case. Clearly, annual case filing and disposition statistics are only partial indicators of caseload burdens on courts.

Compared to the volume of case dispositions by New York trial

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are not included. On the above case filing data, see 1989 ANNUAL REPORT, *supra* note 27, at 12, for 1988; 1998 ANNUAL REPORT, *supra* note 27, at 9, for 1998.

100. See JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 6 (1995).

101. E.g., in 1998 there were 66,835 felony cases disposed of statewide in New York by Supreme and County Courts but trials commenced in only 4,282 cases. See PROPOSED BUDGET 2000-2001, *supra* note 10, at 32. Of the felony cases disposed of that year, 85% were disposed of by guilty pleas, 7% by dismissals, 5% by jury verdicts, and 1% by other means. See 1998 ANNUAL REPORT, *supra* note 27, at 14 & 15. Among courts of limited jurisdiction, the Criminal Court of New York City disposed of 676,014 cases in 1998, 50% by guilty pleas, 36% by dismissals, 0.2% by jury verdicts, and the remainder by other means. See *id.* at 17.

For a discussion of high caseloads in criminal cases and alternative models for dealing with the high caseload problem, see Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761 (1996). Professor Israel concludes: "What is needed are some hard policy choices as to what exactly we want from our criminal justice enforcement process and some hard data as to what it would take to achieve these goals." *Id.* at 779.

102. E.g., in 1998, there were 205,889 civil matters disposed of by the New York supreme court. See 1998 ANNUAL REPORT, *supra* note 27, at 11. Of these, 14% were settled before trial note of issue was filed, 52% disposed by other pre-note means (e.g., dismissal, default or consolidation), 22% by settlement after note of issue filed, only 4% disposed of by verdict or decision, and 7% disposed of post note of issue by other means. See *id.*

courts, the volume of cases disposed of by New York appellate courts is very small. In New York, as in other American court systems, relatively few trial court matters are appealed, so the vast proportion of litigated cases are resolved at the trial court level. That said, the caseload of New York appellate courts is high relative to that of appellate courts in most states.<sup>103</sup> In a recent year, 1997, appellate division courts disposed of over 18,000 appeals, appellate term over 2,300, and the Court of Appeals 260.<sup>104</sup> Over the past decade or so, annual dispositions of appealed cases by the Court of Appeals and appellate term courts have remained relatively constant, but those of appellate division courts have increased considerably.<sup>105</sup>

The massive and expanding caseload burdens on New York State courts have lead to a variety of case management approaches being adopted in attempts to better resolve the problems huge caseloads have created given insufficient court personnel to provide optimal court con-

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103. *E.g.*, in 1997, New York total appellate court filings were more than any state except California, Florida and Texas. *See* B. OSTROM & N. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1997, A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (National Center for State Courts) 79 (1998).

104. In 1998, the exact number of appellate division appeals disposed of was 19,227 of which 6,680 were disposed of before argument or submission (*e.g.*, dismissed, withdrawn or settled) and 12,547 were disposed of after argument or submission (*e.g.*, dismissed, withdrawn, settled), 8,218 of them affirmed, 1,696 reversed, 1,121 modified, 1,037 dismissed, and 475 other. *See* 1998 ANNUAL REPORT, *supra* note 27, at 6. Comparable figures in 1998 for supreme court appellate term appeals are 2,064 appeals disposed of, 787 of them before argument or submission (*e.g.*, dismissed, withdrawn, settled) and 1,277 disposed of after argument or submission, 620 of them affirmed, 426 reversed, 170 modified, 51 dismissed and 10 other. *See id.* at 7. Of the 198 appeals decided by the Court of Appeals in 1998, 124 were civil cases, 74 were criminal cases. *See id.* at 5. Of the criminal cases, approximately 46% were affirmed, 22% reversed, 1% modified, and 5% dismissed; of the civil cases, 50% were affirmed, 15% reversed, 8% modified, 1% dismissed after argument, and 20% other. *See* 1998 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS, at 5.

105. *E.g.*, in 1988, the Court of Appeals disposed of 369 cases (appeals decided), appellate division courts, 13,225 cases, and appellate term courts, 2,124 cases. *See* 1989 ANNUAL REPORT, *supra* note 27, at 25-27. Compare these figures with those for 1998. *See* 1998 ANNUAL REPORT, *supra* note 104.

For an analysis of appellate division caseloads, see Spiros A. Tsimbinos, *The State of Appellate Division Caseloads*, N.Y. St. B.J., Jan. 1998, at 33. Caseload pressures on appellate division courts have recently eased somewhat, largely due to more extensive use by prosecutors of waiver of appeal as a condition to plea bargains and sentencing agreements in criminal cases. *See id.* at 34.

sideration in all cases.<sup>106</sup> These problems include how to avoid unacceptable delay in moving cases through the system, and in an overloaded system, what cases merit preference and what kind of preference. Dilatory tactics by some litigants or their lawyers frequently contribute to case delay problems. Case management, as broadly perceived, includes efforts to reduce case delay risks by imposing caseflow regulations to force or at least encourage timely movement of cases through the court system; adopting automated case information systems so that progress of cases through the court system is readily ascertainable by relevant court officials; frequent efforts by judges to encourage parties to settle; and developing court-related programs for moving some cases out of the traditional court system into other dispute resolution centers.<sup>107</sup>

A form of case management that is increasingly being resorted to by some New York courts is protracted judicial oversight of individual cases in an effort to resolve more satisfactorily, with less frequent recidivism, the underlying personal or family problems that brought the parties into court. Typical of problems dealt with by this approach are drug addiction, domestic violence and juvenile delinquency.<sup>108</sup> Usually in this approach the judge cooperates closely with others in the attempt to achieve

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106. On what case management is and what it attempts to accomplish, see ABA STANDARDS OF JUDICIAL ADMINISTRATION, VOL. 2, Relating to Trial Courts § 2.51 (1992); and Maureen M. Solomon, *Fundamental Issues in Caseflow Management*, in HAYS & GRAHAM, *supra* note 76, at 369.

107. A peripheral aspect of case management, but a matter of importance in the operation of courts, is civility of lawyers, judges, and court personnel in their relations with one another and others, both in and out of the courtroom. This was considered a sufficiently serious problem that Chief Judge Kaye and other top administrative judges recently issued guidelines, distributed in pamphlet form, as to how lawyers, judges, and court personnel should behave. See JUDITH S. KAYE ET AL., STANDARDS OF CIVILITY (1997). On civility also see a recent article by a New York Supreme Court Justice, Carolyn E. Demarest, *Civility in the Courtroom from a Judge's Perspective*, N.Y. ST. B.J., May-June 1997, at 24; and a companion article by a practicing lawyer, John S. Smith, *Civility in the Courtroom from a Litigator's Perspective*, *id.* at 28.

108. The Midtown Community Court is a leading example of a court based on the community justice center concept. Minor criminal offenses are considered by this court and sentences often involve some kind of community service. Somewhat similar community justice centers will be opened soon in Harlem and in Red Hook, Brooklyn. Among the new centers' sentencing options are community service, letters of apology and attending anger management workshop sessions. These two courts also have jurisdiction over some landlord-tenant matters. There is also a community court in the Village of Hempstead. On New York community centers, see PROPOSED BUDGET, *supra* note 10, at 170-71; JUDITH S. KAYE, STATE OF THE JUDICIARY 3 (2000); and Jonathan Lippman, *New Approach Put to the Test*, N.Y.L.J., Jan. 26, 2000, at S1.

corrective goals, others such as social workers, treatment centers, community service agencies, and the police, as well as with counsel for the parties, if represented. This form of judicial involvement is a shift away from the traditional judicial adversary model to a team-based problem-solving model, with courts monitoring compliance, rewarding progress and sanctioning infractions.<sup>109</sup> This model, however, usually results in added net financial cost to the court system, unlike more typical case management approaches, and obtaining needed financing can be difficult.<sup>110</sup>

In its case management efforts to encourage timely movement of cases through the trial court system, the New York state courts have adopted guidelines, referred to as standards and goals, in addition to the typical procedural deadlines lawyers are expected to meet during the course of litigation. The usual procedural rules set time frames for lawyers, but lawyers commonly fail to comply with prescribed deadlines without objection from their opponents.<sup>111</sup> Judges, not just lawyers, have

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109. On Judge Kaye's view as to the merits of this team-based problem solving approach, see Judith S. Kaye, *Lawyering for a New Age*, 67 *FORDHAM L. REV.* 1, 4-6 (1998), discussing drug treatment courts; and Kaye, *Changing Courts in Changing Times*, *supra* note 57, at 857-62, discussing the Midtown Community Court and family court. Although she obviously considers the problem-solving team approach highly desirable, she does raise questions about it: "What are the limits of a court as a therapeutic agent? At what point do we cease being a court of law and become a social service agency?" *Id.* at 862.

Drug treatment courts and community courts are among the team-based, problem solving courts that are being established in a number of other states, in addition to New York. On drug courts, see Special Issue, *Swift and Effective Justice: New Approaches to Drug Cases in the States*, 17 *JUST.SYS.J.* 1 (1994); Sam Torres & Elizabeth P. Deschenes, *Changing the System and Making It Work: The Process of Implementing Drug Courts in Los Angeles County*, 19 *JUST.SYS.J.* 267 (1997). On community courts in some other jurisdictions, see Gordon Bazemore, *The "Community" in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, 19 *JUST. SYS. J.* 193 (1997).

110. Funding from sources other than state government may be available to help fund problem-solving model courts. For example, drug treatment courts have received substantial financial assistance from federal government grants. See *PROPOSED BUDGET 2000-2001*, *supra* note 10, at 174-75.

111. Felony prosecutions in New York City are a type of case in which case flow delay has become particularly serious. To look into this problem a Trial Readiness Project was started and a court-appointed task force, including prosecutors and defense counsel, was asked to make proposals. The task force proposed creating pilot programs to test new approaches to reducing delays in felony cases, including earlier discovery by prosecutors, more prompt pretrial motions by defense lawyers, strict deadlines for pleas, and

a responsibility for timely caseload and, especially in courts with high case volumes, judges often have been delinquent in fulfilling their responsibility. Standards and goals are indicators of when judges are not adequately supervising caseload movement. They set time frames for case progress and case disposition, with different time frames for different kinds of cases.<sup>112</sup> A record of adherence to standards and goals is regularly reported and is a performance guide to trial judges and administrative judges. Compliance with the time frame guidelines, however, has been disappointing.<sup>113</sup> Another significant case management approach of the New York trial courts conducive to improved caseload is the individual assignment system. This system has been in effect since 1986 in most New York trial courts of superior jurisdiction and some trial courts of lesser jurisdiction.<sup>114</sup> With certain exceptions, it requires that every case be assigned to a judge soon after filing and remain with that judge until final disposition. This one-judge-per-case requirement seeks to

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fixed dates for hearings and trials. On the Trial Readiness Project, see JUDITH S. KAYE, THE STATE OF THE JUDICIARY 3-4 (1998); KAYE & LIPPMAN, CRIMINAL JUSTICE PROGRAM, *supra* note 10, at 17-18.

112. The standards and goals for civil cases have different time frames for different stages in the litigation process and for different kinds of cases. The stages are (1) from initial filing (the point at which the parties seek some form of judicial relief) to filing a note of issue (indicating readiness for trial), (2) from the time of filing the note of issue to disposition, and (3) the time of the entire proceeding from initial filing to disposition. For noncomplex civil cases (including most tort and contract cases), the time frames for completing the above stages in a proceeding are 12 months for the first, 15 months for the second and 27 months for the third. For complex cases (e.g., medical malpractice cases), the periods for the three stages are 15, 15, and 30 months. Somewhat different time periods also apply to matrimonial and tax certiorari cases. On standards and goals for civil cases, see 1998 ANNUAL REPORT, *supra* note 27, at 10. In felony cases dispositions must occur, under the standards and goals, within 6 months from filing of the indictment. *See id.* at 14.

113. Statewide in 1997, only 52% of pending civil cases met the standards and goals pre-note time requirement, 76% met the note of issue to disposition requirement, and 76% met the overall filing to disposition requirement. *See* 1997 ANNUAL REPORT, *supra* note 27, at 10. In 1997, only 81% of felony cases met the six-month disposition requirement. *See id.* at 14. The failure of so many cases to adhere to the standards and goals time frames is one reason for the new Comprehensive Civil Justice Program. On that program, see KAYE & LIPPMAN, *infra* note 135, and accompanying text.

114. For individual assignment system requirements, see the following sections of N.Y. RULES OF CT., UNIFORM RULES FOR N.Y. STATE TRIAL CTS. (McKinney 1999): § 200.11(a), criminal actions in supreme court and county court; § 202.3, civil actions and proceedings in supreme court and county court; § 205.3, family court; § 206.3, court of claims; § 210.3, civil actions and proceedings in city courts outside New York City.

avoid delays and wasteful expenditures of judicial time when different trial judges are assigned to different aspects of a particular case, thereby necessitating duplication of judicial effort to become familiar with the case.<sup>115</sup>

Effective case management requires accurate and detailed information on every case before the courts in the particular jurisdiction, information that should be kept very current and quickly and easily available to all persons with authorized access. The information also should be organized pursuant to uniform specifications so as to enable meaningful case comparisons and case volume analyses. A modern case information system of this kind requires a high degree of data automation if the system is to be sufficiently comprehensive and economically feasible.<sup>116</sup> The New York State courts have made great progress in the expensive process of developing automated information systems but more needs to be done and is planned.<sup>117</sup>

Most court chambers, other than those of many town and village courts, make extensive use of computer technology in recording, tracking and reporting on case progress; and centralized automated systems proc-

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115. A Review Committee on the Individual Assignment System in the Civil Term of the Supreme Court studied all facets of the system and in 1992 reported favorably on how the system was operating. The committee did, however, make a number of recommendations for improvements in case processing and other trial procedures, some of which have been adopted. On the Review Committee and its recommendations, see ACTING CHIEF JUDGE RICHARD D. SIMONS, *THE STATE OF THE JUDICIARY* 6-12 (1992); JUDITH S. KAYE, *STATE OF THE JUDICIARY* 27-28 (1993).

116. On the essentials of a state-of-the-art automated information system, see ABA, *STANDARDS OF JUDICIAL ADMINISTRATION*, vol. 1, §§ 1.60-1.64 (1990); vol. 2, §§ 2.81-2.84; and vol. 3, §§ 3.90-3.94 (1994).

117. For a summation of information and records management by the New York trial courts, see 1998 ANNUAL REPORT, *supra* note 27, at 31; JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 31-32 (1999). Also see a report of a court appointed committee, *THE REPORT OF THE COMMITTEE ON AUTOMATION AND TECHNOLOGY* (1995). On centralized data processing operations that process thousands of transactions daily by New York trial courts and court administrative offices, see 1996 ANNUAL REPORT, *supra* note 27, at 15.

An experimental computer-integrated courtroom is now available for use by the Commercial Division of the New York Supreme Court, particularly useful in complex litigation. This courtroom has video equipment, a computerized blackboard and personal monitors for the judge and other trial participants. On this courtroom, see JUDITH S. KAYE, *STATE OF THE JUDICIARY* 16 (1998). Pilot programs are also being considered for commencing some actions and filing some court papers by fax and e-mail. *See id.* at 32.

On present and prospective technologies useful to courts, see Technology Symposium, *What's New in Court Technology*, 32 *JUDGES' J.*, (Summer 1993).

ess a vast volume of case data each day, data used for many purposes, including statistical summaries and analyses of case activity essential to centralized case management.<sup>118</sup> A telecommunication network (Court-Net) links together many state courts and administrative agencies on matters of mutual concern and with laptop and desktop computers increasingly available to judges and support staff.<sup>119</sup> Also, the Data Case System, which recently went into operation, for a modest fee enables lawyers and other members of the public with requisite software to check from their offices progress of any civil case before the Supreme Court in any of the larger counties of the state.<sup>120</sup> Much needs to be done to make New York State court information systems of maximum utility and fully state-of-the-art, but much has already been accomplished.

A very different form of court-involved case management is court-related alternative dispute resolution (ADR). Conciliation, mediation, and arbitration are frequent means used to resolve disputes. ADR is the use of these means with the participation of neutral third parties, other than or in addition to judges, in attempts to resolve disputes. Conciliation, mediation and arbitration commonly occur without any judicial participation. However, judges may become involved in diverting cases into one of these other means of resolution. If, in doing so, the courts retain considerable supervisory control over the process and over the neutral third parties, this is known as "court-annexed" ADR. The term "court-referred" ADR is used to denote such diversions in which the court retains little or no supervisory control.<sup>121</sup> Benefits claimed for court-related ADR are that it will accelerate case dispositions, save judges' time, and reduce litigation costs for the court system and for litigants. Available data on these claims is mixed, but some ADR programs obviously are achieving one or more of these claimed benefits.<sup>122</sup>

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118. There are plans for the state to provide 750 town and village courts with cost effective access to automated databases. See PROPOSED BUDGET 1999-2000, *supra* note 12, at xxvi-xxvii.

119. On CourtNet see JUDITH S. KAYE, THE STATE OF THE JUDICIARY 31 (1999) and PROPOSED BUDGET 2000-2001, *supra* note 10, at 210.

120. On the Data Case System, *see id.* at 17 (1998).

121. On court-annexed and court-referred ADR, *see* ABA, STANDARDS OF JUDICIAL ADMINISTRATION, vol. 1, § 1.12.5 (1990).

122. For a discussion of studies evaluating the effectiveness of court-related ADR, *see* Susan L. Keilitz, *Alternative Dispute Resolution in the Courts*, in HAYS & GRAHAM, *supra* note 76, 383 at 392-94 & 397-99, and a symposium on Court-Annexed Arbitration, 14 JUSTICE SYS. J. 123 (1991). Also see Samuel Krislov & Paul Kramer, *20/20 Vision:*

Court-related ADR has had only modest adoption by the New York court system but adoptions are increasing, some of them as pilot programs.<sup>123</sup> City and district courts in thirty-one counties operate a mandatory arbitration program for smaller amount damage claims, and about 10,000 cases a year are disposed of under this program.<sup>124</sup> The Supreme Court in several counties has mandatory ADR requirements, including the New York County Commercial Division of the Supreme Court.<sup>125</sup> A mediation program also exists in family courts, that engages in mediation of about 2,400 cases a year, with an eighty percent settlement rate, concentrating on visitation, custody, and support,<sup>126</sup> and a housing court mediation program recently was instituted in New York City.<sup>127</sup> There also are Community Dispute Resolution Centers throughout the state, largely funded by the state, which through informal conciliation efforts seek to resolve conflicts, many of a minor criminal nature that otherwise would be handled by the criminal justice system.<sup>128</sup> Chief Judge Kaye has recognized that ADR is controversial and raises difficult questions but she

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*The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1940 (1993), asserting that coercive use of ADR is threatening to weaken litigants' rights by depriving them of due process and other procedural protections.

123. For a report on ADR in New York as of 1998, see STATE ADR OFFICE, ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN N.Y. STATE (1998).

124. See 1996 ANNUAL REPORT, *supra* note 27, at 29, 31. The arbitration program applies only to cases in which recovery sought for each cause of action is \$6,000 or less, or \$10,000 or less in the Civil Court of the City of New York. See N.Y. RULES OF CT., RULES OF THE CHIEF JUDGE § 28.2(b) (McKinney 1999).

125. On supreme court ADR, see *supra* note 123, at 1-11, and on the New York County commercial division's ADR program also see Haig, *supra* note 14, at 200.

126. See STATE ADR OFFICE, *supra* note 123, at 18. On family court ADR, also see KAYE & LIPPMAN, FAMILY LAW PROGRAM PHASE TWO, *supra* note 10, at 38-39.

127. See KAYE & LIPPMAN, *supra* note 11, at 11.

128. These centers are established by N.Y. JUD. LAW § 849-b (McKinney 1992). They are administered and supervised under the direction of the chief court administrator. See *id.* Requirements that a center must meet to be eligible for funding from the state are set forth in part 116 of the New York Rules of Court, Rules of the Chief Court Administrator. On the centers, also see STATE ADR OFFICE, *supra* note 123, at 17. In 1998 the centers conducted over 22,000 conciliations, mediations and arbitrations; 77% of the cases reaching the mediation stage were resolved by voluntary agreement between the parties. See *id.* Almost half the cases considered by the centers were referred to the centers by the courts. See *id.*

On the community-based justice concept, see Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121, 2160-65 (1993).



favors incorporating ADR techniques more fully into the mainstream of court operations.<sup>129</sup> A separate ADR Office was established by the court system in 1998 to coordinate and expand ADR.

In an effort to more effectively handle the workload of some very high volume courts, the Kaye administration has been featuring combination programs in which emphasis is given to case management as but one of several approaches. The objective is not only to achieve more timely consideration and disposition of cases but in many instances to resolve more satisfactorily the underlying problems that brought the parties into court. Family Court, New York City Housing Court, and New York City Criminal Court are the courts as to which the combined approach is currently being stressed.<sup>130</sup> Case volume in each of these courts exceeds 300,000 new cases annually.<sup>131</sup> Not only are the case volumes of these courts immense, but the courts' proceedings are often complicated by the high percentage of parties before them who are unrepresented by counsel and with little or no prior knowledge of court procedures. Another significant aspect of these cases is that many, if not most, of the parties are in court because of troublesome family relationships or patterns of harmful behavior to themselves or others. These are usually ongoing problems that can often be helped by appropriate and continuing judicial involvement, if needed help is available and forthcoming.

Although some aspects of the combined approach programs for Family Court, New York City Housing Court, and New York City Criminal Court were adopted prior to Judge Kaye becoming Chief Judge,<sup>132</sup> the programs have been more fully developed and featured during her administration. The principal approaches of the programs are improved case management, such as expedited case processing, and in some situations team-based efforts by the judge and others working together to help parties attain more socially acceptable behavioral patterns

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129. For Chief Judge Kaye's views on ADR, see JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 14-15 (1993), and KAYE, *supra* note 100, at 13-14 (1995).

130. For detailed descriptions of the combined approach for the three courts, see KAYE & LIPPMAN, *supra* notes 10, 11 & 94. On recent reforms in the three courts, see JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 7-25 (1999).

131. In 1998, new case filings for the three courts were: Family Court (statewide), 654,602; New York City Housing Court, 326,212; and New York City Criminal Court, 394,428 (arrest cases) and 488,651 cases (summons cases). See PROPOSED BUDGET, *supra* note 10, at xiii-xvi.

132. See, e.g., SIMONS, *supra* note 115, at 19-40.

and relationships.<sup>133</sup> Other aspects are specialty parts or other special subunits in each court to enable more efficient and expert determination,<sup>134</sup> and providing counseling and other assistance to pro se litigants so that they may represent themselves more effectively. The hope is that by pushing multi-approach programs, not only will services provided by the high volume courts involved improve, but dissatisfaction with these courts will lessen, dissatisfaction now commonly experienced by parties and lawyers who appear before them.

Very recently another combined approach program has been instituted by the court system, the Comprehensive Civil Justice Program.<sup>135</sup> This is an effort to deal with the continuing problem of case delays and backlogs in civil cases and to do so by simultaneously pushing a series of different initiatives, all of them directed at faster and increasingly efficient case disposition. The centerpiece of the program is more active monitoring by the judge of each case before his or her court at every stage in the proceedings. Differentiated case management will be imposed in which cases are screened at the outset for complexity and then assigned to a particular track—typically an expedited, standard, or complex track depending on likely discovery needs and court supervision time required. Each track will have its own court-imposed time frame for completing various stages in the litigation process. Judges will be assigned case coordinators to monitor and report on progress of cases and, by computer-generated notices, to remind the lawyers involved as to prescribed deadlines. Among other aspects of the program are expansion of court-annexed ADR to additional districts in the state, replacing individual judges' civil case rules with uniform rules within each district, expansion of the commercial division to several more counties, and proposals to the legislature for changes in the Civil Practice Law and Rules (CPLR) that will further streamline the processing of civil cases.

#### E. Courthouse Facilities

Historically in New York, providing and maintaining courthouse facilities has been a local government obligation. Due to the failure of many local governments to fulfill their obligation adequately, a 1987

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133. On team-based efforts, see *supra* notes 108-110 and accompanying text.

134. On specialized court subunits, see *supra* notes 10-15 and accompanying text.

135. On this program, see JUDITH S. KAYE & JONATHAN LIPPMAN, COMPREHENSIVE CIVIL JUSTICE PROGRAM (1999).

state statute required city and county governments to submit to the Chief Court Administrator, within two years, an assessment of the particular locality's court facilities and a capital plan for their improvement.<sup>136</sup> A total of 119 cities and counties are subject to the requirement. Upon approval of the capital plan, state funding is available to help a locality implement its plan. All 119 cities and towns have submitted plans and received at least initial approval. Total estimated cost of these plans is \$3.4 billion, over \$2 billion of which is for improved court facilities in New York City, all improvements scheduled to be completed by 2010. A total of fifty-one cities and thirty-six counties have substantially completed their capital plans, some consisting of new and expanded courthouses. Progress in implementing New York City's plans has been slow, due in part to the City's fiscal problems, but three new courthouses have recently been built in New York City: two in Queens and one in the Bronx. The New York City capital plan provides for thirty-two major projects. In addition to some financial help to localities for major new and improved courthouse facilities, the state also is gradually taking over from local government courthouse cleaning and minor repair costs, except those for town and village courts, and in a few years will be paying all of these costs.<sup>137</sup> The state also pays all capital maintenance and operations costs for appellate division and Court of Appeals courthouse facilities.

## II. EXTERNAL CONTROLS AND PRESSURES

The New York State courts are subject to many external controls and pressures that influence which reforms in court structure and administration are proposed and which are adopted. The court system has limited legal authority to reform itself, more important reforms usually requiring

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136. See N.Y. JUD. LAW § 219 (McKinney 1998). The Chief Judge has provided detailed Guidelines for New York State Court Facilities. See N.Y. RULES OF COURT, RULES OF THE CHIEF JUDGE Pt. 34 (McKinney 1999). The Guidelines pertain mostly to size and design of court facilities for various usages. The Chief Judge also has prescribed Maintenance and Operations Standards for Court Facilities, with mandatory inspection requirements. See *id.* at § 34.1.

On court facilities programs generally, progress made in program implementation and program financing, see PROPOSED BUDGET, *supra* note 10, at xi; and 1998 ANNUAL REPORT, *supra* note 27, at 29. The Court Facilities Incentive Aid Act, L. 1987, ch. 825, N.Y. JUD. LAW § 54(j) provides state financial aid to cities and counties for judicial facilities.

137. See N.Y. JUD. LAW § 39(b) (McKinney 1999), see also PROPOSED BUDGET 2000-2001, *supra* note 10, at xi.

statutory or in some instances constitutional changes. Even when the court system has the legal authority to reform its own structure or administrative operations, it may be beholden to outside groups as to what changes will be made and when. The outside groups may be governmental, commonly state legislators, or they may be private, such as those regularly before the courts as counsel or parties, and that have a vested interest in how the courts are structured and operated.

Under the constitutional concept of separation of powers, the courts are a separate branch of government that share power with the other two branches, the legislative and the executive. Some years ago Alexander Bickel wrote a well known book about the courts in which he referred to the courts as the "least dangerous branch."<sup>138</sup> One could argue, although it was not Bickel's message, that the courts are the least dangerous branch because they are the least powerful. That the courts are the least powerful branch is generally true of the New York courts, as it is of other courts in this country. New York courts are dependent on the state legislature for almost all their funding,<sup>139</sup> salaries of judges are set by the legislature,<sup>140</sup> and the legislature determines, frequently in considerable detail, many aspects of court organization and administration.<sup>141</sup> The governor, too, has some control over the courts, most particularly in budgeting<sup>142</sup> and through pressures exerted on the legislature. The New York courts are, of course, largely autonomous and independent in deciding cases before them and through their own rules of court in prescribing procedures for trial and appeal of cases and much of the detail of court administration.

Any consideration of the power of the New York courts relative to the other two branches of government, however, should also note efforts by leadership of the court system to influence actions by the legislature and the governor pertinent to the courts. Court leaders are not silent bystanders. For example, the court system regularly makes proposals to the

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138. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

139. See *supra* notes 10, 12, 29-31 and accompanying text. Town and village courts, however, are an exception as they are largely funded by court fees, fines and local government appropriations.

140. See *supra* note 67.

141. Most of these organizational and administrative controls are imposed by the New York Judiciary Law, an extensive compilation of statutes concerning the courts.

142. See *supra* notes 35, 36 and accompanying text.

legislature on legal changes affecting the courts, proposals approved in advance by the chief judge or the chief court administrator.<sup>143</sup> Many of these legislative proposals are drafts of recommended legislation prepared by the court system's Office of Counsel, and representatives of that office are in frequent contact with legislators and the governor's counsel on possible new legislation.<sup>144</sup> Stated more tersely, representatives of the court system regularly lobby the legislature and the governor on court-related matters. Other examples of efforts by representatives of the court system to influence the legislature are speeches, published reports, and press releases by recent chief judges intended in large part to generate public support for legislative action favored by the court leadership. Still another example, and one that is highly unusual and extreme, is Chief Judge Wachtler's 1991 lawsuit against Governor Cuomo and legislative leaders asserting that under the inherent powers doctrine the defendants' conduct had been unconstitutional in not funding the courts adequately and in the Governor's not incorporating the judiciary's budget request in his recommended state financing for 1991. The inherent powers of the court concept is part of the larger issue of judicial independence, about which there continues to be much discussion at both the national and local levels, but with little tangible impact.<sup>145</sup> Judge Wachtler's suit was dropped when the Governor and legislative leaders agreed to increases in the budget for the judiciary substantially up to the previous year's appropriation.<sup>146</sup> The lawsuit possibility, however remote, remains as an alternative if the court leadership again becomes highly dissatisfied with how the legislature and the governor are treating the courts.

The other two branches of government are not the only sources of external pressures on how the courts are organized and administered. Groups from the private sector often exert such pressures as well. These

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143. See, e.g., JUDITH S. KAYE & JONATHAN LIPPMAN, *THE JUDICIARY'S 1998 LEGISLATIVE AGENDA* (1998) (summarizing the 118 legislative proposals made by the judiciary in 1998).

144. In the 1997 legislative session, for example, the court system's Office of Counsel, with the assistance of advisory committees, prepared and submitted 116 new measures for legislative consideration, 18 of which were ultimately enacted into law. The Office also furnished counsel to the governor with recommendations as to 43 measures awaiting executive action. See 1998 ANNUAL REPORT, *supra* note 27, at 45-46.

145. For two excellent recent symposia on judicial independence, see *Judicial Independence and Accountability*, 61 L. & CONTEMP. PROBS., 1 (Summer 1998); and *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 311 (1999).

146. On the *Wachtler v. Cuomo* case, see *supra* note 28.

groups may seek to influence the legislature and the governor's office on judicial matters or they may seek to influence court leaders by such means as advisory sessions with top court officials, studies of court operations, reports on court needs or shortcomings, or press releases publicizing their positions. The bar associations are important private pressure groups of this sort. The larger bar associations in the state have committees concerned with various aspects of court operations<sup>147</sup> and that often report and make recommendations on court problems as the committees perceive them. Also, committee and other representatives of bar associations in the state meet periodically with court leaders to discuss court organizational and operational needs.<sup>148</sup> Some business groups whose members are often litigants also on occasion, directly or through their legal counsel, seek to influence court leadership to make changes in court structure or operations favorable to the particular group's interests.<sup>149</sup> New York non profit public interest groups through studies, reports, and discussions with court leaders are another external source of pressure on the courts as to how the courts are organized and administered.<sup>150</sup> Al-

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147. Among such committees are the Association of the Bar of the City of New York's committees on Judicial Administration, Judicial Independence, Criminal Courts, Family Court and Family Law, and Housing Court; the New York State Bar Association's committees on Judicial Administration, Judicial Selection, Courts and the Community, Procedure for Judicial Discipline, and to Improve Court Facilities; and the New York State Trial Lawyers' Association's Committee on Legislative Affairs. The Association of the Bar also has a Council on Judicial Administration that reports on important issues pertaining to the courts. For an example of such a report, see Association of the Bar of the City of New York, *Council on Judicial Administration, Report on the Chief Judge's Restructuring Plan*, 52 THE RECORD 930, 954 (1998).

148. E.g., meetings of the President and President-Elect of the New York State Bar Association with the Chief Judge, Chief Court Administrator and other court officials on a series of court-related issues, including actions in support of an independent judiciary, functioning of the jury system, use of alternative dispute resolution, and the Association's recommended amendments to the Code of Professional Responsibility. On these meetings, see Joshua M. Pruzansky, *President's Message*, 69 N.Y. ST. B.J., July-Aug. 1997, at 3.

149. E.g., the influence of the Business Council of New York State and other business groups in creation of the Commercial Division of the New York Supreme Court in 1995. On this business influence, see HAIG, *supra* note 14, at 195.

150. One such group is the Fund for Modern Courts, a nonprofit civic organization founded in 1955 to help improve the administration of justice in New York State by research, public education and advocating reforms. Citizen monitoring of court performance is a major activity of the Fund and it has 600 volunteers in 16 counties across New York State that act as monitors. For two recent reports of Fund monitors see *supra* note 24 (on five town and village courts); see also THE FUND FOR MODERN COURTS, THE

though private sector interest groups often exert pressure on the courts to achieve what the private groups want in the way of structural and administrative court reforms, the courts also make use of these groups as allies in contacts with the other two branches of government on court-related reforms.<sup>151</sup> In the arena of political influence, private interest groups can be either friends or opponents of the court system.

### III. RECENT REFORM PROPOSALS FOR NEW YORK STATE COURTS

Dissatisfaction with how New York State courts have been structured and operated has existed ever since the courts were first established and there have been many proposals for reform.<sup>152</sup> Some reform proposals have been adopted, many rejected. The push for reform has been particularly strong in the past few years, the most significant recent reform effort being that proposed by Chief Judge Kaye in 1997 and 1998.<sup>153</sup>

#### A. *The Kaye Proposal*

The Kaye proposal was supported by top administrators in the court system, the governor, many legislators, important bar groups, and some public interest organizations.<sup>154</sup> The principal objective of the proposal was to consolidate and simplify the trial court structure. It did not apply to town and village courts but the nine state-funded trial courts in the

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GOOD, THE BAD, AND THE UGLY OF THE NEW YORK CITY FAMILY COURT: A CITIZEN COURT MONITORS' ASSESSMENT OF THE COURT AND RECOMMENDATIONS FOR IMPROVEMENT (1997).

151. E.g., some of the committees function as allies of the court system on some matters. See *supra*, note 27, at 46-52; see also note 88, and the accompanying text.

152. See BLOUSTEIN, *supra* note 9.

153. On the Kaye proposal, see these generally favorable comments: Association of the Bar, *supra* note 147; Carey, *supra* note 44; CITIZEN UNION, COURT RESTRUCTURING, A POSITION PAPER (March 1998); KAYE & LIPPMAN, *supra* note 143, at 1; and Gary S. Brown, Executive Director, Committee for Modern Courts, *Statement at a Joint Hearing of the Senate and Assembly Judiciary Comms.* (Jan. 21, 1998).

In California, a state with even more severe growth pressures on its court system than New York, there has recently also been a strong push for court reform. For some of these proposals, see a symposium, *20/20 Vision: A Plan for the Future of California's Courts*, 66 S. CAL. L. REV. 1751 (1993).

154. For a list of fifty organizations that had joined a coalition in support of Judge Kaye's court restructuring proposal, see COMMITTEE FOR MODERN COURTS, ORGANIZATIONS THAT SUPPORT COURT RESTRUCTURING (1998).

state's so-called unified court system were, under the proposal, incorporated into one of two tiers: the supreme court, with unlimited jurisdiction; and the district court, with limited jurisdiction. The upper tier, the supreme court, was to have specialized divisions: family, commercial, public claims, probate, criminal, and any others ordered by the chief administrative judge. The lower tier, the district court, was to have jurisdiction over minor criminal cases (misdemeanors), housing cases (e.g., evictions), and civil cases with claims up to \$50,000. There was to be one branch of the district court in New York City, with separate civil, criminal and housing divisions. District court branches outside New York City would have no divisions.

The Kaye proposal avoided the politically delicate issue of judicial selection by adopting the status quo as to how different categories of judges obtain their positions and their tenure terms. It did, however, increase substantially the number of supreme court justices, generally more prestigious and better paid trial judges, by incorporating into the supreme court the present County Court, Family Court, Surrogate's Court, and Court of Claims. It also would have largely eliminated the need for acting supreme court justices by eliminating over time the principal reason for such acting judges, the requirement that there cannot be more than one supreme court justice for every 50,000 residents in a judicial district.<sup>155</sup>

A very politically sensitive problem that the Kaye proposal did not avoid is the high caseload burden of the appellate division court for the Second Department, the appellate court serving much of the New York City metropolitan area.<sup>156</sup> The Second Department now handles a disproportionately high number of cases compared to the other three Appellate Division courts.<sup>157</sup> The Kaye proposal would create a new Fifth Department, which would take over responsibility for cases from some of the counties within the present Second Department. The proposal, however, does not seek to resolve the contentious issue of what should be the geo-

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155. On the statutory cap on the number of supreme court justices, see *supra* note 43 and accompanying text.

156. On the counties included in the Second Department, see *supra* note 18.

157. E.g., in 1998 of 11,761 records on appeal filed in all appellate division courts, 4,456 were filed in the Second Department; of 19,227 cases disposed of by all appellate division courts, 11,180 were disposed of by the Second Department; and of 5,616 cases disposed of after argument or submission, 2,190 were disposed of by the Second Department. See 1998 ANNUAL REPORT, *supra* note 27, at 6.



graphical boundaries of the new department—what present Second Department counties would be included in a new Fifth Department.

Supporters of the Kaye proposal argued that the proposal would improve the New York court system in a number of ways.<sup>158</sup> It would create a less confusing organizational structure, easier for litigants and the public at large to understand. The consolidated structure would also enable the court system to be administered more efficiently and with many cost savings. In addition, it would largely eliminate fragmented proceedings, especially troublesome in the family law field where different aspects of the same underlying problem often are considered by different courts.<sup>159</sup> Moreover, if the proposal were adopted, there would be little or no need for acting supreme court justices, as these positions would be filled by persons with full status and tenure as justices of the Supreme Court. Under the proposal, too, the caseload burden of the Second Department would be greatly alleviated by a new Fifth Department. Such, then, would be the principal benefits that advocates of the Kaye proposal claimed would result from adoption of the proposal. New York would finally have a truly unified court system, a more rational system with better service and ultimately at lower cost.

To achieve changes in the court system as fundamental as those in the Kaye proposal would require amending the New York State Constitution. The amendment procedure deemed most feasible by the proposal's advocates was approval by majority vote of each house of the legislature in two successive sessions, to be followed by majority approval of the people in a statewide vote.<sup>160</sup> Despite the strong support the proposal elicited, it never got past the first step in the amendment process, the legislature. Merger bills were introduced in each house but due to

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158. For comments supporting the proposal, see *supra* note 153. On the need for a new Fifth Department, see Guy James Mangano, *New Fifth Department Crucial*, N.Y.L.J., Jan. 26, 2000, at S1. Justice Mangano is presiding justice of the Appellate Division, Second Department.

159. Under the current system, child custody, support and visitation matters are decided in family court but the supreme court has sole jurisdiction to grant divorces and also may consider custody and support matters. On the adverse consequences of this divided jurisdiction, see Association of the Bar, *supra* note 147, at 943-45.

On the need for a unified family court and a proposed model for such a court, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

160. See N.Y. CONST. art. XIX, § 1. Amendment by a constitutional convention is an alternative possible amendment procedure. See N.Y. CONST. art. XIX § 2.

failure to generate sufficient legislative support, and to sharp disagreements between Assembly and Senate leaders, the bills were never voted on.<sup>161</sup>

Why did the legislature reject the Kaye proposal? Apparently financial cost was a factor. At least in the near term, the proposal, if adopted, conceivably would have substantially increased the cost to the state of the judicial system, in part by added salary expense from more supreme court justices, positions paid more than the judicial positions they would replace.<sup>162</sup> The Kaye proposal also had some very influential opponents. Many supreme court justices opposed the proposal, seemingly because their status would be reduced by adding to their number many judges who formerly held less prestigious positions, such as acting supreme court justices and family court and county court judges. Also opposed were many trusts and estates lawyers, and presumably many surrogate's court judges as well, because of the prospect that under the proposed merger plan a number of surrogate's court judges and support staff might be assigned to other courts, thereby reducing available expertise needed to best handle trusts and estates matters.<sup>163</sup> Among other opponents was the 2,200-member New York State Clerks' Association, seemingly because of concern that the proposed changes might result in pay cuts for some court clerks. Failure of an attempted trade-off by some liberal legislators of support for court structure reform in return for substantial new state funding of legal services for the poor also contributed to defeat of the Kaye proposal.<sup>164</sup>

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161. Senate Bill 4226, (introduced by the Chair of the Senate Judicial Committee followed closely Judge Kaye's proposals). S. 4226; 222 Leg. (N.Y. 1999)

A major reform effort in the late 1980s also failed. This effort, strongly backed by the state's top court administrators, proposed abolishing as separate courts the court of claims, county court, family court, surrogate's court, district courts and the New York City Civil and Criminal Courts. The 1986 legislature gave first passage to a constitutional amendment that would authorize a merger proposed for the above listed courts, but the measure failed to achieve the required second approval.

162. A court system study asserts that the Kaye proposal restructuring would, through increased productivity and efficiency, result in net savings to the state and by over \$38 million dollars a year by the fifth year following implementation. *See NY UNIFIED COURT SYSTEM, TRIAL COURT RESTRUCTURING IN NYS: AN ANALYSIS OF THE BUDGETARY IMPACT, EXECUTIVE SUMMARY* (March 1998).

163. *See Association of the Bar, supra note 147, at 963, Dissent of the Committee on Trusts, Estates and Surrogate's Courts.*

164. An unsuccessful Assembly bill introduced late in the 1997-98 legislative session sought to implement a trade-off by including a very limited version of court structure

What chance does the Kaye proposal have in future legislatures? Predicting the outcome of controversial political issues in New York is always a chancy undertaking, but as of the present time, prospects for adoption of the Kaye proposal in the next few years do not appear favorable, although the court system remains committed to the proposal.<sup>165</sup> It is likely to be too difficult to soon again generate even the backing the proposal had in 1997-98, backing that proved to be insufficient.<sup>166</sup>

### B. *Selection of Judges*

In addition to court consolidation proposals made by Judge Kaye, there have been a number of other significant proposals advanced in recent years for reform of the structure or operation of New York State courts. Among the most persistently controversial of these reform proposals is judicial selection: whether judges should be appointed or popularly elected; if appointed, by whom; and the duration of judicial terms. There are many options.<sup>167</sup> The present pattern of some judges being elected and some appointed seems to fully satisfy no one. Political leaders of the dominant political party commonly favor election, especially if they determine nominees, as is often the case. Governors and mayors may favor appointment, especially if they control the appointment process. Good government organizations usually favor some form of merit selection of judges. One such New York organization, The Committee

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reform with a new \$40 million fund for legal services. See Gary Spencer, *Assembly Files Merger Bill at 11th Hour*, N.Y.L.J., June 15, 1998, at 1; Gary Spencer, *Court Reorganization Bill Dies in Legislature*, N.Y.L.J., June 23, 1998, at 1.

It has also been claimed that the basic deal breaker in major structural reform of the New York courts is inability of the state Republicans and Democrats and their leaders to reach a compromise agreement on how many authorized judges there should be in districts controlled by Republicans and how many in districts controlled by Democrats. The result is reform plan death by partisanship. See David Rohde, *A Familiar Obstacle, Partisan Rancor Threatens Effort to Overhaul New York Courts*, N.Y. TIMES, Jan. 16, 2000, at 31.

165. See JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 8 (2000).

166. Some indication that interest in structural reform of the New York courts peaked in 1997-98 is that court restructuring bills introduced in the 1998-99 session of the New York legislature created little publicity or interest and likewise failed of passage. One of the 1998-99 bills, Senate Bill 4191, included much of the earlier Kaye proposal, although it did retain the surrogate's court as a separate court not merged into the supreme court. See S. 4191; 222 Leg. (N.Y. 1999).

167. On the various methods used in the United States to select state court judges, see ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 256-62 (1996).

for Modern Courts, recommends that the New York Constitution be amended to provide for a three-step merit selection process for judges as follows:

In step one, a broadly based nonpartisan nominating commission proposes a short list of candidates for appointment to a judicial vacancy. In step two, an elected chief executive chooses from the short list of proposed names. In step three, the voters ratify or disapprove the appointment by participating in a retention election after a judge has served on the bench long enough to assess actual performance.<sup>168</sup>

Another good government organization, the Citizens Union, favors an appointment system modeled after that now followed in selecting New York Court of Appeals judges.<sup>169</sup> Under this system, a commission appointed by a wide range of executive, legislative and judicial public officials nominates a small number of candidates for each vacancy from which the appointing authority must choose. However, recognizing political reality and that some judges will continue to be elected, the Citizens Union recommends that primaries rather than political party judicial conventions should nominate judges as election candidates and also that reliable and trustworthy screening committees report to the public as to whether candidates up for election are qualified.<sup>170</sup> The Council on Judicial Administration of the Association of the Bar of the City of New York also favors a judicial selection system similar to that for Court of Appeals judges and recommends that it be put in place for all judges, not just those currently appointed.<sup>171</sup> In addition, the Council opposes any

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168. See COMMISSION FOR MODERN COURTS, CITIZENS' BILL OF RIGHTS FOR THE COURT SYSTEM 4 (1998).

169. For the Citizens Union recommendation, see *supra* note 153, at 3-4. The selection system for Court of Appeals judges is mandated by the constitution. See N.Y. CONST. art. VI, § 2(c)-(g). The governor makes appointments from those recommended by a judicial nominating commission, with the advice and consent of the State Senate. N.Y. CONST., art. VI, § 2(e). On the judicial nominating commission, also see N.Y. JUD. LAW art. 3A.

170. See CITIZENS UNION, *supra* note 153, at 4-5.

171. See Association of the Bar, *supra* note 147, at 954.

The court system leadership, just before Judith Kaye became Chief Judge, proposed nonpartisan selection of judges similar to that of the Court of Appeals. See SIMONS, *supra* note 115, at 51, which states the following:

Our State has an excellent record of producing outstanding judges. Despite this record, the process by which we select many of our judges is far from ideal. Political party leaders who dominate the partisan election process sometimes grant or withhold party endorsement

judges being appointed by the chief administrative judge or any other judge.<sup>172</sup>

The question of what is the best possible judicial selection system for any particular state or locality is a very difficult one, especially if it is recognized that left to the electorate, few voters, except perhaps for local judicial candidates in small towns or rural communities, will have any familiarity with any of the judicial candidates, even name recognition. Merit selection is an appealing option and in general terms its attractions have been well stated by the Committee for Modern Courts:

A merit plan eliminates the most blatantly political aspects of the elective process, in which judicial candidates are essentially hand-picked by political party leaders. Merit selection also eliminates the conflicts of interest and appearances of impropriety that are created when judicial candidates are forced to campaign for office and raise money from lawyers whose cases they may ultimately decide. Furthermore, the evidence is strong that merit selection results in a more diverse judiciary than the elec-

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for reasons that have no bearing on fitness for judicial office. This threatens the independence of the Judiciary, contributes to a public misperception of its function, and diminishes public faith in the quality of its judgments.

We continue to believe that the appointment of judges after nomination by a nonpartisan commission on judicial nomination, as now applies to the Court of Appeals, is a better system. It would take the selection of judges out of the partisan political arena. We recognize, however, that many members of the Legislature prefer to maintain an elective system of choosing some trial judges. Consequently, we propose that even if the elective system is retained, an element of nonpartisan selection be added to it. In an elective system, we believe that nonpartisan screening panels in each judicial district should review the qualifications of all prospective candidates. No candidate would be eligible for election unless he or she was found well qualified for judicial office. This proposal meets both the desire that the elective system be retained and the concern that only well qualified judicial candidates be elected.

172. See Association of the Bar, *supra* note 147, at 954. New York City Housing Court judges, nominally being referees, currently are appointed by the chief court administrator from candidates submitted by an advisory council. See N.Y. JUD. LAW, N.Y. CITY CIVIL COURT ACT § 110 (f) (McKinney Supp. 1999).

tive system.<sup>173</sup>

A universal feature of merit selection is the judicial nominating commission, and the usual functions of such a commission are selecting, evaluating and recommending candidates for judicial vacancies.<sup>174</sup> There are many variations among merit systems on such matters as who selects commission members; the required size and makeup of the commission; to whom the commission makes its recommendations (e.g., governor or legislature); and once selected, whether judges must later face retention election by the general electorate to remain in office. Many questions obviously remain as to the merits of merit selection. For example, are commissions that are purportedly nonpartisan really free from unacceptable political interference and bias; if a commission clearly is politically neutral and nonpartisan, do its selections reflect an elitist bias in what is a good judge; and does the merit selection process result in too few minority judges?<sup>175</sup>

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173. COMMISSION FOR MODERN COURTS, *supra* note 168, at 4.

174. On merit selection of judges, see LARRY C. BERKSON, *Selection of State Judges: Election or Appointment?*, in MANAGING THE STATE COURTS 134 (Larry C. Berkson et al. eds., 1977); ANTHONY CHAMPAGNE & JUDITH HAYDEL, *Conclusion*, in JUDICIAL REFORM IN THE STATES ch. 9 (Anthony Champagne et al. eds., 1993); and Jay A. Daugherty, *The Missouri Non-Partisan Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment*, 62 MO. L. REV. 315 (1997).

The ABA Standards favor merit selection and provide that judges should be selected by a nominating commission that recommends to the governor at least three qualified candidates for each judicial vacancy, the governor to select one of the three. The proposed commission consists of one nonvoting judge, as chairman, plus three lawyers elected by the bar and four public nonlawyer members selected by the governor. See ABA, 1 STANDARDS OF JUDICIAL ADMINISTRATION § 1.21 (1990). On merit selection limitations and judicial evaluation commission reports as means of improving the process of judicial retention, see Kevin M. Esterling, *Judicial Accountability the Right Way*, 82 JUDICATURE 206 (1999). For judicial evaluation on Connecticut, see William F. Gallagher, *Judging Judges: Connecticut's Judicial Performance Evaluation Program*, 10 CT. LAW. 4 (Nov. 1999).

However, election of judges is supported by some who are in a good position to evaluate the caliber of judges selected under the election system. For example, a former Chief Justice of the Wisconsin Supreme Court, after recounting the disadvantages of the election system, favors its retention in his state. See Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997).

175. Champagne and Haydel, from studies of judicial selection, have come to this conclusion: "[D]espite the rhetoric of the reformers, there is no ideal selection system

New York is unlikely to move any time soon to a merit system in which the evils noted by the Committee for Modern Courts are largely eliminated. This is due partly to the patronage benefits that the major political parties and many of their leaders see in the present system. But it is also due in part to the difficulty of developing the ideal selection system and one that even the various good government groups can agree on as providing the best possible judiciary.

### C. *Expansion of Reforms*

Although recent proposals for major reform in New York court structure and judicial selection have not been adopted, some important reforms recently have been made. However, in many instances these reforms have been applied in only a few counties and this has posed further reform problems: where and when to expand imposition of the reforms. Expansion concerns are particularly evident as to the programs aimed at upgrading services provided by some of the very high volume courts. As earlier noted, these programs have sought to provide better service by such means as adding specialty parts, providing counselors and other aids to litigants not represented by counsel, and by expanding the judicial role from merely adjudicating controversies to involvement in efforts fundamentally to change antisocial behavior patterns of parties before the courts.<sup>176</sup> The decision as to where and when to expand these improved service programs, or even whether to expand them at all, can turn on such considerations as available funding, whether volume in the other counties justifies expansion, and whether the programs have been sufficiently tested to show that they merit expansion.

Expanding the number of judges, especially for courts with extremely high caseloads per judge, is another reform proposal. One effort in this direction is the judiciary's current request of the legislature that twenty-three more judges be added to the New York City Criminal Court, a court in which last year each judge, on average, handled nearly 5,000 cases.<sup>177</sup> The judiciary is also asking for added funding from the legislature to improve access to justice for more poor persons by increasing assigned counsel fees paid by the state, thereby increasing the

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(although admittedly there are ways to modify selection systems to reduce some problems that have occurred)." CHAMPAGNE & HAYDEL, *supra* note 174, at 15.

176. See *supra* notes 130-135 and accompanying text.

177. See *supra* notes 136-137 and accompanying text.

number of attorneys available to represent poor persons in need of legal services, but unable to pay for them.

Another highly important reform proposal that has recently been extensively adopted and implemented is more and better courthouse facilities: buildings and equipment, including advanced technology for processing and exchange of information.<sup>178</sup> Here, too, there are problems of where and when to expand. Extensive agreement exists on expansion plans, but available funding to enable plans to be carried out on time is questionable.

#### IV. OTHER REFORM POSSIBILITIES

Much the same concerns as to how the New York State court system should best be structured and operated also exist as to other court systems in the United States. In response to these concerns, pressure for court reform is occurring everywhere in the United States and a wide range of reform proposals currently are being put forward. Many of these proposals have no serious current support in New York, however promising they may be. Reasons for this vary. They may, for example, presently be politically unacceptable, too expensive, or too extreme a departure from current norms.

This section considers some of these recent reform proposals that have promise but lack much if any present backing in New York. Some of them have been adopted in one or more other jurisdictions; some are revivals of old ideas; some are directed at courts generally, some at courts of only one jurisdiction although adaptable elsewhere. Only a limited sampling of reform proposals is included in this section. Comprehensive coverage would unduly shift the intended focus of the article. However, the limited sampling provided does illustrate what a wide range of possibilities New York may be forced seriously to consider in the future and also, from some of the examples considered, what radical changes in court structure and operations may eventually be necessary if the New York court system is to meet satisfactorily the demands made on it.

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178. See *supra* notes 136-137 and accompanying text.



### A. Trial Court Structural Unification

Court unification has been one of the major themes in state court reform efforts over the past century, with Roscoe Pound generating much of the early interest in the subject.<sup>179</sup> Court unification proponents favor a simplified and consolidated court structure.<sup>180</sup> One version, of course, is the 1997-98 Kaye proposal for New York that includes a two-tiered state trial court structure but largely excludes local town and village courts from the consolidated structure. An alternative version is the one proposed by the influential American Bar Association's Judicial Administration Division and that has been widely considered and adopted in major respects by some states.<sup>181</sup> The ABA version, as set forth in a detailed set of ABA Standards, provides for a one-tiered trial court, with, where appropriate, "specialized procedures and divisions to accommodate the various types of criminal, civil, and family matters within its jurisdiction . . . ."<sup>182</sup> Another important feature of the ABA one-tier trial

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179. On the history of court unification, see generally LARRY C. BERKSON & SUSAN J. CARBON, COURT UNIFICATION: HISTORY, POLITICS, AND INTERPRETATION ch. 1 (1978).

Roscoe Pound, one-time dean of the Harvard Law School, summarized his views on court unification in a book, ORGANIZATION OF COURTS ch. 8 (1940) and discussed his presentation to the American Bar Association in 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice." This presentation, many believe, stirred the ABA into starting what became a long-term study and action program on court structure and administration. In his 1906 paper presented to the ABA, Pound argues "that our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves." *Id.* at 273.

180. Court unification proposals also often include centralized and consolidated court administration, centralized court budgeting and state funding of all non-federal courts in each state. For various aspects of court unification, see JAMES A. GAZELL, *The Current Status of State Court Reform: A National Perspective*, in HAYS & GRAHAM, *supra* note 76, at 79; Steven W. Hays, *Contemporary Trends in Court Unification*, in BERKSON, *supra* note 174, at 122; and Lawson, *supra* note 84. Concern with more than structural unification also is apparent in ABA, 1 STANDARDS OF JUDICIAL ADMINISTRATION (1990).

181. Among state one-tier trial court systems are these: Connecticut (except for probate court), CONN. GEN. STAT. §§ 45a-98, 51-164(s) (West 1985); ILL. CONST. arts. VI & IX; MO. CONST. art. 5. See also Victor E. Flango & David B. Rottman, *Research Note: Measuring Trial Court Consolidation*, 16 JUST. SYS. J. 1, at 65 (1992) (classifying state courts by degree of trial court consolidation).

182. ABA, 1 STANDARDS OF JUDICIAL ADMINISTRATION § 1.10.

The ABA Standards of Judicial Administration appear in three volumes: vol. 1, Standards Relating to Court Organization; vol. 2, Standards Relating to Trial Courts

court proposal is that the court should have jurisdiction over all cases and proceedings brought in the state, other than appeals, administrative agency cases and cases filed in federal court.<sup>183</sup> This means no separate small claims or minor criminal or traffic infraction court systems, including local court systems maintained by local government.<sup>184</sup>

Arguments for a one-tier trial court are that it is more likely to provide equal and uniform justice throughout the state, reduce forum shopping, increase desirable flexibility in assigning judges and other court personnel when shifts in workloads occur, and reduce the sense of inferior justice and inferior judicial status that tend to result from a system of lower courts with minor civil or criminal jurisdiction.<sup>185</sup> Arguments against the one-tier trial court include the likelihood that the number of highly qualified prospects for the bench will be reduced by the possibility of lengthy judicial assignments to a division or part hearing only minor criminal, small claims or traffic matters. Also, if courts established and maintained by local government are abolished through their incorporation into the unified state system, many local perceptions of what constitutes justice, including local confidence in who is meting out justice, will be weakened. Just as there are variations among states in what is considered a fair and proper result in adjudicated matters and who can be trusted as a justice system decision maker, so there are similar variations among localities. Incorporating local courts into the state system eliminates, at least on some matters, locality choices in obtaining the kind of justice and justice system each locality prefers.

### B. *Case Backlogs and Delays*

Unacceptably high case backlogs, and the related undue delays in case dispositions, are common problems in most all American court sys-

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(1992); and vol. 3, *Standards Relating to Appellate Courts* (1994). The ABA Standards approved in the 1990s are amended versions of those earlier approved in the 1970s. For a review and an analysis of the Standards, see COLE B. GRAHAM, JR., *The American Bar Association's Standards Relating to Court Organization: A General Review*, in HAYS & GRAHAM, *supra* note 76, at 101.

183. See ABA, 1 STANDARDS OF JUDICIAL ADMINISTRATION § 1.12(a).

184. The standards do, however, suggest that judicial officers who are not judges could try minor civil and criminal matters. See *id.* at commentary to § 112(b). This possibility can reduce an unattractive feature of judicial service to many judges and prospective judges, i.e., the chance of being assigned to courts hearing only very minor matters.

185. See *id.* at commentary to § 1.11.

tems. The principal underlying cause of these problems is high case volume, more cases than existing court resources can process before too many cases take too long to finally resolve. One possible approach to case backlog and delay problems, going beyond what has been seriously considered for New York, is a greatly expanded diversion of cases to decision making bodies other than the courts. A quite radical proposal for doing this is to encourage private dispute resolution services to take over much of the public court caseload.<sup>186</sup> Private dispute resolution, this approach assumes, would be more efficient than government in providing legal services. The market should control legal service allocation, and litigants should have the opportunity to choose from a variety of dispute resolution providers and modes of dispute resolution at different prices. An expanded version of "rent-a-judge" is one model for this approach in civil matters.<sup>187</sup> Government contracting with a private court system to take over criminal court services is another.<sup>188</sup> Still another is expansion of mandatory ADR to some types of cases that take extensive court time to try. For example, one proposal is that all business litigation involving claims of over \$100,000, if a case is likely to require three or more days to try, must be scheduled for ADR.<sup>189</sup> Proponents of this requirement also suggest that to further reduce court caseloads, perhaps mandatory ADR should be extended to automobile accident liability cases, a high volume of proceedings now flooding the civil court system.<sup>190</sup>

Although mandatory case diversion schemes can substantially reduce court caseloads and caseload burdens, it should be recognized that this comes at a cost. A consequence of diversion is that the right of court access, often a cherished right in our democratic order, is lost. Diversionary substitutes also may lack the trusted procedures and respected neutral adjudicators that the government court system provides. Moreover, as to at least one kind of diversion, the shift of cases from government courts to government administrative agencies, caseloads are not reduced but merely transferred within the government. The caseload burden to the

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186. On private dispute resolution services, see BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990); and Solum, *supra* note 128, at 2139-46.

187. See Solum, *supra* note 128, 2139-40; Krislov & Kramer, *supra* note 122, at 1943-44.

188. See Solum, *supra* note 128, at 2144.

189. See Krislov & Kramer, *supra* note 122, at 1941-42.

190. See *id.* at 1941.

government remains.

One reason for high caseloads and unacceptable delay in case dispositions is too few judges to handle the caseload. This shortage of judges is primarily due to lack of sufficient funding; but it is recognized in all American jurisdictions that adequate funding will never be forthcoming to provide an optimal number of judges. A few court systems have sought to ease the judicial shortage problem, and thereby ease somewhat case backlogs and delay, by taking on volunteer lawyers to fill some part-time judicial or judicial support positions.<sup>191</sup> Prospects for this approach seem particularly promising given the growing number of retired lawyers, many of whom would be both willing and able to take on volunteer judicial-type duties.

### C. *Juries and Jury Trials*

This is another subject that recently has attracted considerable attention from court reformers, and with this subject, too, some of the proposals recommend drastic departures from existing American court practices.<sup>192</sup> One proposal that is supported by some students of the jury system is to sharply limit the right to jury trial in civil cases. A frequently referred to article supporting this proposal takes the position that the civil jury should be restricted to cases involving complex societal values or overt political content, including those cases in which the government is

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191. E.g., for experience with volunteers in Arizona, New Mexico, and Oklahoma at the appellate court level, see Thomas V. Marvell & Carlisle E. Moody, *Research Note: Volunteer Attorneys as Appellate Judges*, 16 JUST. SYS. J. 1, 49 (1992). For a parajudicial officer program in the U.S. District Court for the District of Connecticut, see J. Read Murphy, *The Parajudicial Program in the Connecticut Federal Courts*, 25 CORNELL L. F., Mar. 1999, at 9. In the Connecticut program, volunteer retired lawyers are used part-time to conduct pretrial conferences aimed at encouraging settlements; and when settlements do not result, then to reduce discovery, narrow the issues to be litigated and set dates for upcoming motions and orders. *See id.*

The New York court system in a few situations makes use of volunteer lawyers, e.g., as mediators in some ADR programs. See descriptions of particular ADR programs in STATE ADR OFFICE, *supra* note 123.

192. For a review of arguments for and against reforms of the civil jury, see Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306 (Robert E. Litan ed., 1993). Schuck is of the opinion that the alleged vices and supposed virtues of juries are exaggerated and that critics of the jury system "have not yet substantiated their most salient claims; still less have they made a compelling case for abolishing the jury." *Id.* at 330-31.

a party; no jury trial should be permitted in routine types of cases.<sup>193</sup> The principal argument advanced in support of this position is that it would greatly reduce trial court congestion, not only because jury trials take longer than trials without a jury, but also because more routine cases would be settled if jury trial were not available.<sup>194</sup> The unpredictability of how juries will decide is what results in many routine cases, including many personal injury accident cases, not being settled. Litigants in some routine cases are willing to chance an unpredictable jury verdict, whereas without that option they prefer to settle.<sup>195</sup> Where there is no clear social purpose for them, juries should be prohibited.

Other commentators have concluded that juries should not be permitted in any complex civil litigation because in those cases juries are often incompetent, unable sufficiently to comprehend the evidence or the judge's instructions to be acceptable participants in the trial process.<sup>196</sup> A response to this by some is special juries in complex civil litigation, juries in which the jurors are chosen because of superior educational backgrounds or special experience.<sup>197</sup> There is a long history of special juries in Anglo-American jurisdictions,<sup>198</sup> but in the United States the concept has been abandoned, except in Delaware, where it is still available upon

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193. See George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 198-99. For a shortened version of this article, see George L. Priest, *Justifying the Civil Jury*, in Litan, *supra* note 192, at 103.

194. Priest, 1990 U. CHI. LEGAL F., *supra* note 193, at 199-200.

195. *Id.* at 200.

196. See, e.g., Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 51-56 (1997). But cf. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in Litan, *supra* note 192, at 181, in which Lempert concludes: "[T]he weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases, [and] that we cannot assume that judges in complex cases will perform better than juries . . ." *Id.* at 235.

An earlier very negative critic of juries generally was Jerome Frank, an eminent scholar and judge, whose views on juries are often referred to by others in evaluating the jury system. For Frank's views, see JEROME FRANK, *LAW AND THE MODERN MIND* 170-85 (1936).

197. For arguments in support of special juries, see Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292 (1989); Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575; and Strier, *supra* note 196. Drazan recommends that special juries made up of scientific and medical experts be used in toxic tort cases. Strier proposes that half the members of every jury in complex cases be college graduates. See Strier, *supra* note 196, at 78-79.

198. On the history of special juries see Sutton, *supra* note 197, at 579-80.

application by any party in complex civil litigation.<sup>199</sup> There is some question as to the constitutionality of special juries under the Seventh Amendment,<sup>200</sup> and they also are vulnerable on racial and class discrimination grounds, as persons of lesser education would commonly be disqualified and these are disproportionately minorities and persons of lower income.<sup>201</sup>

Another proposed jury reform that departs markedly from current practice is the abbreviated jury trial, a novel approach aimed at modifying the jury system so as to shorten trial time and relieve court caseloads.<sup>202</sup> Under the abbreviated jury trial proposal, early in the pre-trial stage of a jury case, the judge would set a time limit for each side's courtroom presentation, the time to be relatively short compared to conventional jury trials, and each side would be required to complete its trial presentation in the prescribed time.<sup>203</sup> Pretrial and trial procedures, including discovery rules, would be revised to further facilitate acceleration of the trial process.<sup>204</sup> The abbreviated jury trial concept is another example of the kind of fundamental change that must be considered if state court systems are to satisfactorily accommodate continuing increased demands on their resources. Proposals should not be summarily rejected merely because, if adopted, they would drastically alter current institutions or practices.

#### D. *Supplemental Funding*

As the cost to state government of funding the judicial system goes up, prospects for major funding from other sources becomes more likely. Two promising supplemental funding sources are sharp increases in state

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199. The Delaware statute authorizing special juries provides: "The Court may order a special jury upon the application of any party in a complex civil case. The party applying for a special jury shall pay the expense incurred by having a special jury, which may be allowed as part of the costs of the case." DEL. CODE ANN. § 4506 (Michie, 1998 Supp.).

200. See Sutton, *supra* note 197, at 582-85.

201. See *id.* at 587-95 on fair cross-section and due process requirements as they apply to special juries.

202. On the abbreviated jury trial proposal, see Michael L. Siegel, *Pragmatism Applied: Imaging a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 593-621 (1994).

203. See *id.* at 601.

204. See *id.* at 602-14.

court charges on those using the system—fees, fines and penalties, and major increases in federal grants for state court operations.

State governments, unlike many local governments, have generally relied on filing fees and other user charges for only a small percentage of what it costs to operate their court systems. Even if fines and other penalties are included, few state courts generate sufficient income to pay for the cost of operating the state court system.<sup>205</sup> There is some possibility that this will change and more state court systems, or units within state court systems, will be financially self-sustaining or nearly so.

This is a reform with some appeal.<sup>206</sup> In a market-oriented economy, consumers arguably should pay for the services they receive; and litigants are consumers of an important service, adjudication. In some businesses, litigation costs, including lawyers' fees, are even considered anticipated costs of doing business. Should not these costs include what it costs government to provide businesses with that essential to litigation,

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205. A state by state study of court expenditures and revenues as of 1990 shows that court charges (fees, fines and penalties) by state and local courts combined were the following percentages of state and local appropriations for the courts in these States: California, 79%; Connecticut, 44%; Massachusetts, 14%; and New Jersey, 12%. Data for New York was incomplete. See David Bresnick, *Revenue Generation by the Courts*, in HAYS & GRAHAM, *supra* note 76, at 358-59. In two states, South Carolina and South Dakota, the courts collected more in revenue than it cost to operate them. See *id.*

206. For arguments generally favorable to increased reliance on court-generated revenues to fund court operations, see *id.* at 355-65. Bresnick concludes, however, that guidelines are needed to minimize risks of abuse from court-generated revenues and among his proposed guidelines are these:

Those who use the courts should pay for them where feasible. In the case of indigents, the costs should be paid by the general public through an allocation from the state legislature. . . .

If a party is found to have been at fault (e.g., committed a criminal offense, violated a contract, committed a tort), that party should pay the costs of the court activity.

If a case is resolved by negotiation, the agreement should specify who should pay the courts costs. . . .

Fees, fines, and penalties should be tailored to the particular type of case involved. The following categories merit separate and distinct consideration: felonies, misdemeanors, infractions, traffic violations, probate, personal injury, commercial litigation, administrative review, and divorce.

*Id.* at 364-65.

court services? When government operates a mass transit system, a toll road, or a water distribution system, consumers pay all or most of the cost. Why should they not pay equally for the court system when they use it? Pushing the cost-assumption concept still further, should not each defendant found guilty in a criminal proceeding be charged a fee, in addition to any possible fine, based on the estimated full cost to the government of providing court services in the case?

There is, of course, strong opposition to requiring that parties using the courts pay all or most of the government's cost of providing court services. The most compelling reason is that much enhanced user charges would deter access to the courts, and ready access is necessary if courts are to fully perform their conflict resolution function so essential to a stable society.<sup>207</sup> Another reason is that permitting sharp increases in court user charges is subject to abuse in those states where judges determine court budgets, including their own compensation, and also determine what court charges parties must pay.<sup>208</sup> The risk is too great that judges would unduly increase charges to benefit themselves, or would be perceived as so motivated.

The federal government is another potential source of substantially increased supplemental funding of state court systems. Some federal grants for state court operations now exist, relatively minor in amount, except for those directed to drug courts, drug cases generally, or some court programs concerning children.<sup>209</sup> If state court systems become sufficiently hard-pressed financially, and especially if court access or case-consideration time is being very seriously compromised, much increased federal aid might be forthcoming. Prospects for much greater federal financial aid to state courts presumably would be enhanced if current efforts to end federal court diversity jurisdiction are successful, a

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207. Note that if a court system is to be fully self-sustaining financially, user charges must be sufficiently high to make up for the many parties, such as many criminal defendants, who are unable to pay the charges.

208. See, e.g., ABA, 1 STANDARDS OF JUDICIAL ADMINISTRATION, commentary to § 1.53; Jonathan P. Nase, *The Revenue Agent Role of State Courts: Implications for Administration and Adjudication*, 76 JUDICATURE 195, 199-200 (1993).

209. On federal funding available to state courts, see Robert W. Tobin, *Funding the State Courts: Issues and Approaches*, 42-46 & app. 4 (1996), a publication of the National Center for State Courts.



move that would materially increase state court caseloads.<sup>210</sup>

## V. CONCLUSIONS

Given its large number of judges, sizable nonjudicial staff and massive case volume, the court system in New York is remarkably well run and effective. Its judges, with the assistance of a generally quite able support staff, capably consider and dispose of the tremendous flow of cases that the system must deal with. Specialized courts and subunits of courts facilitate case disposition, as do case management procedures designed to move cases efficiently through to completion. The court system also is well administered. Top leadership is particularly outstanding. It is highly competent in fulfilling its oversight duties, aware of reform needs and reform prospects, and astute in representing the court system's interests in relations with other government agencies, private groups and the general public.

Despite its performance record, the New York State court system is faced with some very serious and difficult problems. How effective the courts will be in the future depends to a considerable extent on how satisfactorily these problems are dealt with. Funding is an obvious and continuing problem and intensifies for a time each year when budget negotiations take place on the court system's share of the next year's planned state expenditures. Especially in seeking substantial increases in budget allocations over that of earlier years, the court system tends to have lower priority with the legislature and the governor than do such competing claims as education, health care, child care, highways, and in prosperous years, tax cuts. Moreover, recession years may result in strong moves to cut the state budget across the board irrespective of need. What seems likely in the foreseeable future is that the court system will receive its present proportionate share of the state's budget expenditures, with at best only minor increases.<sup>211</sup> The legislature may respond favorably to some proposed new judicial programs that are not too ex-

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210. On limiting or abolishing diversity jurisdiction of the federal courts and the implications of doing so, see RICHARD A. POSNER, *THE FEDERAL COURTS* 210-21 & 290-92 (1996).

211. The 1999-2000 state court operation increase of 5.4% compared to a 2.4% increase in general fund spending for all state agencies is as favorable a budget allocation increase as the courts are likely to receive for some time. For a review of the 1999-2000 state budget as it applies to the courts, see Gary Spencer, *Budget is Very Good to the Courts*, N.Y.L.J., Aug. 5, 1999, at 1.

pensive and its budget allocations may reflect general inflationary trends, but massive increase in the court system's budget in any one year is very unlikely.

Inevitable budget limitations pose the difficult problem of what and where to cut if costly new programs are being instituted or current programs expanded and new funding is not available to pay for them. One solution is to increase the caseloads of individual judges in at least some courts, which means a cut in the time and attention that many types of cases will receive. Another solution is cutting court caseloads by such diversionary means as mandatory ADR or reducing the number of initial case filings by substantially increasing court fees. Still another solution is sharply limiting the availability of jury trials, thereby saving court time and some financial costs to the court system. This problem of what and where to cut is one of the hardest problems faced by court administrators, who commonly must make these decisions. Individual judges also must face the problem when their caseload demands increase, as they have considerable discretion in determining what matters before them receive how much of their time and attention. The problem of what and where to cut promises to be especially acute in New York in the immediate future given the number of new programs for improving court services that the current court administration is pushing and the upward trend in case filings in the New York courts.

Another difficult problem faced by the New York court system is responding to the move for broadening the role of the courts in dealing with some kinds of social problems. How extensively, how rapidly and in what kinds of cases should the New York courts provide protracted oversight to troubled individuals and families before them in efforts to resolve or substantially alleviate the problems faced by these parties? Also, to what extent should these judicial efforts be team-based with other aid groups and what should be the role of judges in these team efforts? Community courts and drug treatment courts are examples of courts operating under this broadened role of what courts should be doing but there presently are relatively few such courts in New York. Over time, the New York court system must determine where and when to expand the number of community and drug treatment courts and, as well, on what other courts to impose this less traditional judicial role. Team-based monitoring of parties before the courts is not new. It has, for example, long been common in child custody and probation of convicted criminals. What is new is extending it to types of cases in which it has not been common and the increased emphasis on correcting antisocial

behavioral patterns by means other than incarceration. The team-based monitoring approach may require hard-to-get additional funding and it may be unpopular with many influential segments of the population that believe penal sanctions are the best corrective for criminal behavior. In addition, there are questions as to whether judges are adequately trained or psychologically suited to being team-based participants. However, the prevalence of such illegal behavior as drug-related crime, juvenile delinquency and domestic violence make it essential that new attempts be made to prevent this behavior. The New York courts will remain under pressure to do their part by further efforts to increase the number and effectiveness of community and drug treatment courts and to extend the approach of these courts to additional courts.

A long-time New York court system problem that will not soon go away is the selection and retention of judges. There is widespread dissatisfaction with the present patchwork system, a result of past political compromises. Demands for change will continue and minor alternations may be made. Patronage benefits to those with power over the selection and retention process is a major reason for the present system, and patronage advantages no doubt will remain a major bargaining consideration in any reform efforts. However, apart from the patronage issue, it is a challenge to come up with a sufficiently satisfactory judicial selection system for any state, especially one as large and diverse as New York. What system can be devised that will properly balance judicial accountability to the populace and a requisite degree of judicial independence; that will also provide a competent judiciary in terms of legal knowledge, social sensitivity, administrative ability, demeanor and willingness to work; and further, that will be sufficiently diverse in ethnic, racial and gender terms to be generally respected and trusted, especially by those who come before the courts? Given these challenging questions, no wonder the problem remains a persistent one.

Another persistent New York court system problem, but one with more promising prospects for resolution, is court structure. Needed reform is not likely to occur in the next few years, as it will take time for the forces favorable to reform to regroup and renew their efforts following failure to achieve passage of the Kaye proposal in 1998. But the existing structure is so archaic and arguments for retaining it so weak that major reform, quite possibly something very similar to the Kaye proposal, seems probable within the next decade.

Another persistent New York court system problem that has encouraging future resolution prospects is court facilities. New courthouse con-

struction plans now being implemented assure that within the next decade many New York communities will have new, larger and better designed court buildings. Even in New York City, where courts have often had to operate in overcrowded, poorly designed and poorly maintained buildings, change is underway, with some new courthouses recently completed and others soon to be built. The state is also moving very positively toward automating its court information systems, an essential to any modern administrative operation. More new, up-to-date computer information equipment is being installed in courthouses and tied into system-wide information networks.

Needed court reform would be greatly facilitated if the law schools in New York assumed a major continuing obligation to develop and impart knowledge of how the courts in the state are organized and administered and what organizational and administrative changes are needed. Much more teaching time and attention should be given to these subjects. Legal academics tend to ignore them, which has contributed to many New York lawyers lacking adequate understanding of the court system in their own state and has weakened the bar's pressures for reform. Research and writing by legal academics on state court structure and operation issues, New York as well as elsewhere, also is surprisingly sparse. This teaching and research neglect by the law schools of such important aspects of the judicial system should be corrected.

The leadership of the New York State court system can be relied on to push vigorously for appropriate reforms that will solve or substantially alleviate the more difficult and persistent problems facing the court system. Needed reforms in most instances, however, also require action by the legislature and the governor, and needed action from those sources seldom is assured. It would be helpful if the organized bar and public interest groups concerned about the courts would cooperate more fully and more aggressively with court leadership in seeking needed court reforms.

Given its many problems, the New York State court system functions admirably. However, its major problems result in serious shortcomings in the system's effectiveness that have very adverse consequences for how justice is administered in New York. The court system's major problems are financially and politically difficult ones but are solvable. Much greater effort to solve them should be taken by those with the power and authority to achieve needed changes, particularly the Governor and the legislative leadership of both major political parties.

