

## DISCUSSION ON THE STATE OF STATE COURTS

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CHIEF JUDGE LIPPMAN: Professor Bonventre does have a way of raising expectations. But we are going to try to meet his expectations, because he makes us all proud to be here. I also just want to mention, before we dig right in, I'm so pleased that Judge Graffeo is here, who is such a wonderful colleague, such a terrific judge, and all of us in the court admire and respect her. I can't tell you how delightful it is to serve on the high court with Vicky Graffeo.

The Law Day theme this year set by the ABA is, "No Courts, No Justice, No Freedom."<sup>1</sup> The point behind the theme is that virtually every state court system in the United States has been under tremendous fiscal pressures during the last year. Across the country there have been widespread budget cuts resulting in furloughs, layoffs, court closings, reduced salaries, cancellation of civil jury trials, and on and on. New York has been no different. Last year we had more than 400 layoffs in our court system. We had courts closing at 4:30. We had Small Claims Court cut down to a small percentage of what it was. Arrest to arraignment times were impacted heavily by budget cuts and the lack of personnel, causing great delays in court proceedings.

We in New York feel very good about this year. The governor and

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<sup>1</sup> See *Law Day 2012*, AM. BAR ASS'N (2012), [http://www.americanbar.org/groups/public\\_education/initiatives\\_awards/law\\_day\\_2012.html](http://www.americanbar.org/groups/public_education/initiatives_awards/law_day_2012.html) (last visited May 22, 2012).

the legislature seem to be very much supporting our budget, which includes, as you know, money for salary increases for judges and a significant amount of money for civil legal services for the poor. So I'm hoping things are stabilizing here in New York, for the welfare of our state court system. The economy is getting a little better, but to be sure, there is still a sense of crisis around the country. When chief justices get together, this is the main topic of conversation. So we're going to start with that subject, state funding of the courts. Let's see the impact in each of the states here, and try to see the commonalities, and the way people have treated it differently, and approached it differently. That is, right now, the up-front issue in state courts that everyone is talking about.

So, Chief Justice Durham, what's happening in Utah, and how has the national economic crisis been reflected in Utah?

CHIEF JUSTICE DURHAM: Thank you, Jonathan. Let me go up to the 10,000-foot level. He knows he gets to ask the questions, but he also knows that I'll answer the questions.

CHIEF JUDGE LIPPMAN: I do.

CHIEF JUSTICE DURHAM: I'd like to go up to the 10,000-foot level for a moment, because when I think about reporting on and discussing the state of state courts, it seems to me that there are three categories of challenges, but they're all intertwined. The first is the funding problem. And the fact that the reductions in funding and the starvation of so many state court systems across the country are actually threatening, in my view, and in the view of many of us, the structure of the rule of law and how it's protected in this country. I heard one of my colleagues refer to it as a violation of constitutional rights "on the installment plan;" when you're closing courts at 4:30 every afternoon, when you're shutting down jury trials as New Hampshire did. These are the stories from all over the country.

The second challenge, and it's related significantly to the first, (and my specific answer to your question about my state) has to do with the way in which state courts are organized and govern themselves. Former Chief Justice John Broderick of New Hampshire, in some comments at a symposium on state funding a few months ago, said that the state courts in this country are, quote,

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“slowly failing.”<sup>2</sup> And he said that it’s not just a money problem. The courts are too slow, too inefficient and too expensive, and that we need to do something about the design on the ground in the new economy. And that relates to our governing structures, to the degree to which we have in our state court systems, the ability to manage our own affairs.<sup>3</sup>

I’m going to come back to that, but I just will mention that the third thing that is threatening the legitimacy and the management of state court systems is the method of judicial selection and retention in the state courts. With what is happening on the campaigns, we have some real questions about legitimacy. Let me go back to your question. In Utah, first of all, our state economy weathered the national downturn better than most. We’re a very fiscally conservative state, and our legislature, unlike many others around the country, insisted on jumping off the cliff up front. They used the federal bailout moneys to back fill, as much as they could the first year or two, but after that they insisted on statewide, permanent, and on-going budget cuts. And so our court had to take some very real and very significant cuts. However, in Utah we turned around a little bit faster than everybody else. We’ve stabilized, but in the meantime, our system of government in Utah, which is unique in the nation, includes the constitutional authority to manage the courts and unitary budget powers. We have control over our budget.

In Massachusetts, for example, the chief and the court have to deal with, last count, I think it was something like 212 line items in the judicial budget. That means that the legislature is running the judiciary, which seems inappropriate for the third branch of government. In our state, we have a single-line item and a great deal of autonomy. This has enabled our Judicial Council to plan and we have a brilliant state court administrator, who was Jonathan’s colleague for many years, who really helped us plan for the future. We are twenty percent leaner in terms of personnel than we were ten years ago; twelve percent leaner than we were four years ago. Nonetheless, we are able to cover our basic functions. We did the hard work of reorganizing our business plan, of redoing our clerical support systems, of getting rid of court reporters—the technology is there to make court reporters really

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<sup>2</sup> Chief Justice John T. Broderick, Jr., *Justice at Risk: Will the Profession Step Up?*, N.H. JUDICIAL BRANCH 4 (Feb. 22, 2010).

<sup>3</sup> *Id.* at 6–9.

redundant in any sensibly run system that doesn't have unionized court reporters. We have a lot of flexibility to move things around in our system. So, I have to say, we used the crisis in the funding setting to jump start reforms that we had on the docket already. Getting rid of court reporters is one example. Another example is moving entirely to an electronic record, and to electronic filing, which has saved millions of dollars in clerical personnel. And when we complete that transition, which will happen in the next year, we actually expect to have a certain amount of redundancy on the staff side in our state court system. Now that being said, nobody in state government has had a raise for four years. There are places where morale is at issue, but I'm grateful that we have a governing system in my state that's permitted us to plan for budgeting, which does not undercut the seriousness of the nationwide crisis.

If Chief Justice Margaret Marshall of Massachusetts were here, she would remind us all that state courts do over ninety-five percent of the country's judicial business. And if we are unable to do that business, the rule of law is at risk, and the promise contained in many of our state constitutions of open courts and remedies by due course of law is also at risk.

CHIEF JUDGE LIPPMAN: Thank you. I'd like to summarize what Christine was saying: really in crisis there is opportunity. Chief Justice Abrahamson, have you found that to be the case, or is it just crisis and not much opportunity? What do you think?

CHIEF JUSTICE ABRAHAMSON: Both. First, I want to say I'm glad to be back in Albany, and in no snow. It's been a long winter in the Midwest, too, for which I am grateful. The economy of the state suffers without the snow, as a great tourist state.

In Wisconsin, the court system is financially supported by both the state and the counties. In each county we have a courthouse and at least one judge. The county supports the running of the courthouse and various employees of the judicial system. The state supports other aspects of the court system, which is a statewide court system.

What you have in Wisconsin is both a shortage of money at the state level and a shortage of money at the local level, and the court system has to depend on both. It means also that within the state you have diversity, depending on how the county is doing. Some counties are financially better off than other counties, which means that the court system in that county will be able to do more. For

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example, some counties can run a drug court, or run an alcohol court, or a veteran's court, or have mediation for foreclosure, but the neighboring county won't be able to have any of these programs because they have less money available. Even though we've been short of money, and even though the state budget for the court system has been cut, and even though the local county budgets for the court system have been cut, we've taken the position that we are going forward and that we are going to do a great job for the people of our state.

So we've got judges who work overtime, and are running drug courts on no extra funds, or very limited extra funds. They're running mediation in foreclosure without funding, because they think such a program is an important access to justice issue. The judges know we haven't gotten pay raises. We've had a reduction in pay because we've had increased contributions to retirement funds, and increased contributions to health insurance. There's been a significant reduction in pay to judges and court staff. But the judges and the staff both take the view that our citizens and people are in economic crisis, and we're going to tighten our belts and do what has to be done to get through this situation. There's very little, if any, whining or complaining. We are just going ahead and doing our important work.

You have to recognize that for several years, there has been no increase in staff and we have had an increase in business, so our staff and our judges are doing more with less funds and less compensation, and we have an aging judiciary, just like you all are aging. In the next five years, a high percentage of judges will be eligible for retirement. The judges have to be replaced when they retire, and it will be hard to get competent people if we don't pay a wage that's going to allow judges to support a family, send their children to college, et cetera. Let me just finish by saying that for the first time several years ago, the legislature provided funds for counsel for indigents in civil litigation; that funding has been eliminated. Although for New York, the amount of money you get is probably not sufficient to cover all your needs, for the State of Wisconsin it looks like a gold mine. So it is a challenge, and an opportunity.

CHIEF JUDGE LIPPMAN: Before I ask Chief Justice Rogers to comment on that, I mention that the point about Wisconsin having a combination of state and local funding is also a very big issue around the country. A lot of state judiciaries want to become totally

state funded, and that's usually the goal. Though what has happened in this economic crisis is, in some ways, it gives a bigger target to the legislature to shoot at, all in one place rather than this kind of patchwork that Chief Justice Abrahamson was talking about. So there are pluses and minuses. But coming back to Chief Justice Abrahamson's main theme, what about it, what about this complaining issue? What's the best thing to do? And what have you done in Connecticut? Do you walk around saying, "gee, they're killing us, we can't do what we have to do, we can't meet our constitutional mission," or do you suck it up so-to-speak, and say, "I'm going to do more with less?" What's the answer? How have you attacked that in Connecticut?

CHIEF JUSTICE ROGERS: Very delicately. Picking up on the theme of doing more with less, the speech I gave last year for the state judiciary was we were getting very close to that constitutional line, but I didn't want to walk over it because we could still operate. I mean, you can only cry wolf so many times. And I think that this is a fabulous panel, but it's unfortunate we don't have somebody from one of the states where they really have gone over that line.

CHIEF JUDGE LIPPMAN: Yes. Crossed that line.

CHIEF JUSTICE ROGERS: Right, and we need to understand that there are places like California, they're way behind and I think are still in crisis. Fortunately for me, and for the Connecticut judiciary, we're still on the good side of the line, but I would say barely. And we're really hoping that the economy starts to turn around.

So what I tried to do was to say, we are very willing to take our full share, but we're not willing to go beyond having our full share of the problem here. Because, and I think it's basically what they're saying throughout the United States, we're about only three percent of the state budget, so, you know, when they started to talk about numbers: ten, twenty, thirty percent cuts, which was fundamentally unfair, particularly given, as we all know, when the economy goes bad, the number of cases increase. So for instance, we were up thirty-seven percent in civil cases. We had a real problem there. So we work closely with the governor and the legislature, and tell them that we'll do our full share, but beyond that, it's not fair, and we don't want your constituents to have to take the brunt of this, because they're the ones that have been coming into court on a regular basis. We did get lucky in one regard. We sort of saw the

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writing on the wall, so we did two things.

We had the legislation changed to be more along with what Chief Justice Durham was talking about. It used to be that the governor could make cuts of the approved budget up to five percent, and he could specify where those cuts would be. And we said, “we are not going to be able to operate if you start doing that, because you don’t know our business, and we know our business.” We did get legislation passed before the really severe cuts started, so we could at least pick where it was that we were going to make those cuts, and it made sense. The other thing was we knew technology was the future. So we switched over to e-filing on the civil side, and we’re going to be doing it on family this year, and criminal next year. We’re down 200 people. And those are primarily clerks and the people who are running, you know, the courtrooms. We would not be operating the way that we’re operating without changing to e-filing.

CHIEF JUDGE LIPPMAN: And I think, what you have heard in all of this is a fine line for state judiciaries and chief justices as to how you handle something that comes at you, straight in the heart, and, in particular, this lack of financial support. You want to call attention to the problem, and you want everyone to know that the judiciary is hurting. Yet it is not necessarily in your court system’s interest or in the interest of the administration of justice to be whining that this is terrible. It is not necessarily the way to win friends and influence people with when it comes to working with our partners in government. So it is a kind of balance, and that is part of what defines our job. Christine, do you agree with me?

CHIEF JUSTICE DURHAM: Well, I absolutely agree with that. And one of the things that, I’m glad you brought up, and Shirley brought up, is the structural differences between state funding and mixed state and local funding. Because that’s a very significant issue having to do with budget and planning capacities.

Although one of the advantages of state court funding, and I think there are many, is that it gives you a chance to interact as a branch of government with the legislative and the executive branches, and to educate them over time about the way that you do business. And if I could just brag a little bit, because I am stepping down as a chief justice in two weeks, and something happened in this current legislative session that has never happened, so far as I know in the history of the state. Because we’re anticipating an internal increase

in resources, as we won't need some of the clerical personnel that we now have when we go completely electronic, we asked—we made one request this year; it was for about \$300,000 to fund a self-help center that we've been running internally as a pilot. The rest of our request was, "just leave us alone, we'll be fine." The Chair of our Appropriations Committee came back and did two things. The day he spoke on the floor of the House, with respect to the budget, he said, "before I talk about the budget, I'm going to say something, and if you don't hear anything else, I want you to listen to what I say." And he went on to say the state courts in Utah are doing what everyone in state government should have been doing for the last four years. And then he talked about the planning that we've done. And then he came to our state court administrator and said, "you know, if we end up with a little bit of extra money, is there something you'd like?" And then he put law clerks in our budget that we didn't ask for. Now they don't finish until midnight tonight, and I hear they're running out of money, so we might not get them, but it would be something if we did.

CHIEF JUDGE LIPPMAN: But, you know, you raise a good issue, Christine. Before we get into the impact of fiscal problems on access to justice—which is such a fundamental issue—let's stay on the relationship between the branches of government. What is so obvious to us in the judiciary is that we are an independent branch of government. It is such a signal issue for us to be independent, but how do you advocate for independence when you're a part of a system—a tripod-like system of government—that by its nature is interdependent? How do you approach our partners in government? Does it violate our independence to go with our hands out and say, "yeah, we need more money," or "we need more salaries," (which we'll get to later also)? Is that demeaning to the judiciary? As the non-political, non-policy-making branch of government branch of government, how do you deal with the other branches? To start, Chase, what do you do?

CHIEF JUSTICE ROGERS: I'd be happy to, as the most junior chief justice here, I know historically it was that you don't get involved in politics. The reality was, when I got there, that we did get involved in politics in the sense that I try to view it as education and reminding as opposed to making deals. So I am talking to legislators a lot. And I'm talking to the governor, a lot.



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CHIEF JUDGE LIPPMAN: Do you appear before legislative committees? Would you? Is that a good idea?

CHIEF JUSTICE ROGERS: Well, this is interesting. I have not, in the five years that I've been Chief Justice, and I am tomorrow, that's why I'm flying out of here in about an hour and a half and getting back and preparing for that. And I'm sure we're going to get into this issue, but I'll tell you the issue that I'm going to appear on is judicial compensation because our judges have not had a raise in five years.

CHIEF JUDGE LIPPMAN: Why is that such an important issue that you haven't appeared before the legislature before? Why now? What's so important about judicial compensation?

CHIEF JUSTICE ROGERS: There's a couple of things going on. One of the things is, I have a lot of people who I work with, that this is an important issue to them, and they feel that they've been working hard, and they have, with fewer resources. Other state employees have received raises. The time has come, so as their leader it's important that I go do this. The other reason though, we need to be able to continue to attract the best and brightest as judges. And we know, and I know, anecdotally, and from surveys that have been done, that we are losing people now because they're saying, if I can't even get a cost of living increase, and I'm making less than a first year associate at good law firm, I can't afford to do this, as much as I would like to go into the public service and do this, I can't afford to do it. So my view of it is, the time has passed, the time has come, and Connecticut now is 45th in the nation with cost of living increases for judges' salaries. So again, I don't cry wolf until I have to. I didn't do it the last few years. The time has come, and as, just as a final word on that, per usual, I looked to what Chief Judge Lippman was doing. This commission seemed to be the best way to get this done, and to have an open transparent system where the commission will recommend salary increases that will go into effect for four years unless the legislature turns it down, as the legislature stills retains the ultimate authority to turn them down. And we seem to have a lot of support with this, so we're going forward.

CHIEF JUDGE LIPPMAN: Shirley, do you go with your hand out to

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the other branches and say, “gee, I need this, I need that?” Is that a good idea? Are you demeaned if you do that?

CHIEF JUSTICE ABRAHAMSON: No, but there are other techniques, too. Although the branches are independent, they are also dependent on each other. The legislature sets the policy; we interpret that statute and apply it. And that goes for the governor’s executive orders, et cetera, and they depend on us to do our job.

CHIEF JUDGE LIPPMAN: You have some leverage, Shirley?

CHIEF JUSTICE ABRAHAMSON: No.

CHIEF JUDGE LIPPMAN: No? I just wanted to make sure that was not what you were saying.

CHIEF JUSTICE ABRAHAMSON: We’re independent but we’re dependent on each other. Each branch should know how the others operate. All three branches operate with a different set of rules and in a different environment. And the branches know very little about each other, unless the governor happens to have been a judge, or a lawyer. And that goes for the legislature, too. In Wisconsin, the percentage of lawyers in the legislature has gone down significantly.

CHIEF JUDGE LIPPMAN: I think in all states probably it has gone down.

CHIEF JUSTICE ABRAHAMSON: So you’ve got fewer and fewer people who know about the judiciary. So we do a number of things to educate the other branches about the judicial branch. We’ve asked the legislative service agencies to put the Supreme Court on the orientation program for new legislators. New legislators come to court. We have coffee and cookies, and give them a tour, and talk about what the court does. And that’s very important. We give them material on the judicial branch. We have staff people available and give the legislators the names of those staff people so that they can call when they have questions. We have statistics and resources that can help legislators. We invite legislative committees that work with judicial issues and legal issues to come and meet with the court in open session. We explain how the court interprets statutes. And we say, “We interpret statutes with the assumption

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that a *reasonable* legislature adopted them, right?” That always brings a laugh from the legislators. But I mean that’s a short hand, and you all know that. And it’s a way of getting to know legislators and their getting to know us, and getting to understand the different cultures of the branches. I go to meet with every member of the Joint Finance Committee that does the budget. I also make a public appearance before the Joint Finance Committee, and have a prepared statement that is a blueprint of the judiciary’s position on the budget. We have a legislative committee that reviews all bills that seem to affect the judicial branch. The policy is the legislature’s, but how the bill affects the court system and whether the bill is going to accomplish what the legislators want are matters we can help on. Because of the way the courts run, we understand such things, and we will submit written material as well as provide written material for any legislator. So there are many ways the branches can interact.

The other thing is that there are many receptions at the Capitol. We just finished a reception sponsored by the City of Superior, Wisconsin. It is a northwest city, and the whole northwest area sends representatives to Madison. There’s a reception, and legislators go to the reception. I always go to the reception. I like parties. I’m known as a party animal. And I have a tag on my luggage, which I got from one of these events: “I am a Superior Lover.”

CHIEF JUDGE LIPPMAN: Don’t tell us anything more, all right?

CHIEF JUSTICE ABRAHAMSON: I told the Superior people, “My luggage tag gets strange looks at airports, but I have had no offers.” These are ways of meeting people informally. There is the matter of a trust factor. If I know somebody informally, and if I have to appear before them, just like when you appear before a judge, if you’ve met them, even casually, you’re more comfortable. And I think these are all techniques for promoting understanding, but the thing everybody knows is, we don’t talk about cases. Cases are off the table. We talk about matters of general interest, and particular interests to the legislature and judiciary.

CHIEF JUDGE LIPPMAN: Christine, let’s finish off this area. Let me ask you a question I think has come through in our discussion. Is it, in the end the culture of each particular state that determines how aggressive the judiciary is or is not, whether you testify at

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hearings, whether you meet regularly and openly with members of the legislature and the executive branch, and how public you are? Is it culturally different among all of us, or is there a commonality in the way we deal with it?

CHIEF JUSTICE DURHAM: Well, I think the local culture, in terms of individual state culture, does have a huge impact. I'm visible. I speak to the Legislature annually. I kind of think of myself in my state as the "big gun," and they only bring me in on very special occasions. The rest of it is handled by our administrative office of the courts and our State Court Administrator and our legislative staff. But I think there is a common theme that I wanted to emphasize, particularly for this audience. I first went on the state bench in 1978. So, when I came on the state bench in my state—and this was so by and large throughout the country—state courts consisted largely of relatively independent, locally funded courts where you had a lot of interactions at the local level with funding sources and so on. It's really only been in the last forty or fifty years that the concept of the judicial branch, in an organizational systems sense, has emerged. We've always talked about the judicial branch of government in the adjudicative setting as providing the balance on separation of powers, but in terms of understanding courts as systems, and as large organizations that need administration and management, that is still a relatively new phenomenon, and someone like you is one of the real architects of the modern world in that respect.

CHIEF JUDGE LIPPMAN: Christine, right, when court administration and funding are localized, you can't see the judicial branch as a whole and the issues that matter.

CHIEF JUSTICE DURHAM: That's right, and that's one of the reasons why, for example, the Conference of Chief Justices and the National Center for State Courts, have sought to raise the consciousness in the American polity of state courts as institutions. And in the state courts, we have realized that it's not just about decisional independence, but also about institutional independence: this notion of self-determination and self-management. But actual styles, I think, do vary considerably among state court leaders.

CHIEF JUDGE LIPPMAN: All right, let's change gears. I used to

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testify all the time before the legislature. The one subject that, since I have been Chief Judge, I have chosen to speak on before the legislature is the future of access to justice, civil legal services, and indigent criminal defense services in our state. This is an area where the financial crisis has certainly had an effect. The Legal Services Corporation in Washington has had its funding slashed, and it used to be a main supporter of the providers. The interest rates are so low, and business is so depressed, that IOLA (Interest on Lawyer Account) fund (or IOLTA as they call it in some states) have really taken a tremendous hit in New York. We went from thirty-six million to five million dollars in our IOLA fund. What we have tried to do in New York is tell the Governor that this is one of the priorities in our state that affects all the other vital issues, whether it be housing, or schools, or all the other things that are important. And we have tried to create a template for state funding for civil legal services. We held hearings around the state. What is clear, and what the ABA has realized as well is that there is on this issue a direct connection between this financial crisis and what is happening with access to justice in the country. The ASA put those two issues together in a committee that they set up on the preservation of the justice system, because obviously you can keep the doors of the courthouse open, but if there is not meaningful access, that does not mean anything. In the different states, how is everyone reacting to what the financial crisis has done, and what are the different things being done in different states. Chase, do you want to start?

CHIEF JUSTICE ROGERS: Sure. Okay. This is where I do think there's a crisis, on two fronts. One, legal services, legal aid, the staff are basically at minimum. Again, in Connecticut, they were down to \$100,000 in operational costs last year with the number of people they had to bring in. Of course, their clients have increased dramatically as a result of the economic collapse. We do not have a legislature that would have been interested in doing what many of others have done to dedicate funds to civil, legal defense. And so what we tried to do is come up with ways that we could help legal services and legal aid societies. We have one of the lowest rates of fees for court matters. And so we've modestly increased those numbers, and in fact, we had a very good dialogue at Yale last week, Chief Judge Lippman and I. You know, is that "pay to play", is that really the direction you want to go? And for us, that was the only realistic thing we could do, and we were able to get them an

additional \$8 million last year as a result. And this year, we think we're going to be able to close the gap even further in that regard, and hopefully get them up to \$16 million, which is wildly inadequate, but at least it's some money for them and some people can be provided these services. So that's how we're trying to deal with it.

But the second part of the crisis, and the bigger problem, is the number of self-representing litigants that we're seeing in the courts, and I really think that this is a pivotal moment. At least it has hit Connecticut, and I know it's happened in some other states. Just to give you briefly some statistics so you understand what we're dealing with: Eighty-five percent of the family cases have at least one self-represented party, Twenty-eight percent of civil cases have at least one self-represented party, and ninety percent of housing matters have at least one self-represented party. So the entire system of two lawyers, advocates, and a judge being an impartial decider is gone. And we need to really start thinking about what are we going to do, because we can't wait for the Bar to figure it out, and this is something you're going to have to figure out as new lawyers. We can't wait for you while you figure out how this is going to work in the new age. We need to deal with these people, and so we've done hundreds of things. We have court service centers in almost every courthouse. And we have volunteer attorney days, where people dedicate all morning for family matters and provide some advice to people who are looking at limited representation. There are a lot of different things to look at, but most of this is a Band-Aid approach, because to me it's a real crisis that the courts are going to face.

CHIEF JUDGE LIPPMAN: Let me ask you on this side a generic question before you say what's going on in your state. We have taken the approach in New York that we are going to put money directly in the Judiciary funds. Some people would argue that civil legal service providers are advocates, and the judiciary is the neutral party in this process, and the only thing we do by doing that is to make ourselves a target. How do you come down on that issue, and what are you doing in your state? How has the financial crisis affected you, and what do you do on this broader issue? It is an interesting threshold issue that one can argue in lots of different ways.

CHIEF JUSTICE DURHAM: I mean, you've taken a risk. On the

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other hand, as Chief Justice Rogers pointed out, there are only a very short list of things you can do, and you have to take risks. I think it is a risk. I would hate to have to go there, but if it were the only way I thought we could get some significant support for civil legal services, which we don't have, we have just minimal support for those, I would be supportive.

CHIEF JUDGE LIPPMAN: We had talked a little bit about, how, gee, you're opening the hatch with one hand and blocking with the other. Or do you have to be practical and do it?

CHIEF JUSTICE DURHAM: That's the question. Sometimes you have to be practical and do it because otherwise justice simply will not be provided. One risk, too, whenever things are tied to fees, you have an issue. It's something I've always opposed, although I will admit that at the depth of the crisis, we went in and proposed some fee increases. In our state, they go directly to the general fund, and the general fund still has the obligation to allocate back to the state courts.

CHIEF JUDGE LIPPMAN: You can raise fees but not actually get the money.

CHIEF JUSTICE ABRAHAMSON: That's true.

CHIEF JUSTICE DURHAM: Yes, that's exactly right. And the reason we did that, and it was one reason not to even mention fees, is that courts are not, cannot be, and never should become revenue centers. That's not the way justice in the United States of America is organized.

CHIEF JUDGE LIPPMAN: It's not pay as you go to, you raise the money, you raise fees—

CHIEF JUSTICE DURHAM: No, and I don't believe in pay as you go in terms of funding the courts. I think that is an obligation on the part of the legislative branch of government to provide a republican form of government to the people who are citizens of that state. It's a state obligation, a governmental obligation, to provide a forum for dispute resolution, and fair and impartial justice. That being said, all of us, to some extent, do it. For example, in my state, the guardian *ad litem* program that serves our juvenile courts, they

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are quote, "in our budget now." We've done everything we can to distance ourselves. We don't advocate for them, et cetera. But if we let that go to administrative services, which is where the legislature wanted to put it, it would have disappeared in the blink of an eye.

CHIEF JUDGE LIPPMAN: Shirley, what's our responsibility in this area? What should we be proactively doing?

CHIEF JUSTICE ABRAHAMSON: We should proactively be seeking funds to assist indigents who are not represented by counsel in civil litigation. The whole system is designed for lawyers. The lawyers and judges have a hard enough time understanding the law, so why do you expect someone who's not trained in the law to do that? And although you can get justice representing yourself, and you can do a very good job of it, in all the years I've been on the court, I think we've had three cases in our court in which one or both parties were self-represented. And I have to tell you that in those cases, the self-represented party won. Whereas if you have a lawyer, you have only a fifty percent shot at winning. Which goes to show, statistics can be deceiving. When criminal legal defense for the indigent started in Wisconsin, it was through the court system; the court system ran the public defender office. And that's not good, because the judiciary shouldn't be running counsel who appear before the court.

CHIEF JUDGE LIPPMAN: Yes, it's a conflict, even more of a conflict.

CHIEF JUSTICE ABRAHAMSON: That's right.

CHIEF JUDGE LIPPMAN: But yet we talked about how, that is the only way that the money could be protected. How do you do it?

CHIEF JUSTICE ABRAHAMSON: You do it, but then you put in walls.

CHIEF JUDGE LIPPMAN: Walls, yes.

CHIEF JUSTICE ABRAHAMSON: Walls, and you separate the court and the public defenders as much as you can. You try to separate the public defenders but make sure administratively that the system is funded. So now we have a state public defender system, and it is separate from the court and is state funded.



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CHIEF JUDGE LIPPMAN: What is the rule, Shirley, that you were considering? We were talking about that today.

CHIEF JUSTICE ABRAHAMSON: We received a petition from a leader of a legal aid society, in Milwaukee, asking the court to direct—and I'm doing this globally rather than in detail—to direct the trial court judges to appoint counsel at county expense for indigents who have civil matters that are of great human importance. The cost estimate, although no one knows really, but the cost estimate was \$52 or \$53 million dollars a year, which is almost what the whole state court system budget is, so it would be doubling our budget. We did not adopt that proposal, but the court reaffirmed our prior cases stating how important it is for judges to appoint counsel for self-represented people in special cases, and when the individual and the court needed the aid of counsel. We asked the Access to Justice Commission to run a pilot program. So that's what we're doing. We're doing a whole variety of things in Wisconsin to assist self-represented people. We don't think, at the moment, the legislative appropriation is there, but we will, probably as a result of the pilot program, ask for money.

CHIEF JUSTICE DURHAM: I just wanted to mention one thing, and that's pretty much exactly where we are, although, in addition to our self-help center, the only thing I said to the legislature was to encourage them to provide some funding, and it's always provided just a little bit, to state legal aid, and asked them to increase that because of a federal lawsuit, which I'm sure did not go over well, but I asked.

But I wanted to mention something that's happened not at the instigation of the courts in Utah, but which has turned out to be very effective, and back in the private sector. Our civil legal aid, agencies—domestic, elder law, and disability rights, and so on—are part of a consortium called “And Justice For All.” And in the urban area, where 85 percent of the population of the state lives in Salt Lake City, they've actually bought the building together, and they share intake and overhead, and they share fundraising. So they go out once a year on a major fundraising tour, and lots of judges step up and support and help with that. And it has given a level of legitimacy to the whole legal aid and civil legal services movement.

CHIEF JUDGE LIPPMAN: That could turn around the country if

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you do that, yes. Let me ask about one more area in this legal services arena before we switch gears and go to some other topics, maybe in a little less depth because we want to cover some more ground. What about foreclosures? Foreclosure is a major issue in this country. We've had it in New York, we started a new program where we are trying to get the major banks to come in, sit at the table, agree that they are going to bring people to the table who have the ability on the spot to modify the mortgage and to resolve the foreclosure predicament. Anything that you want to say? This resonates.

CHIEF JUSTICE ROGERS: It does resonate, and I think it's a good example, too, of where, by talking to the legislature, you can actually come up with a better product. So of course it was their policy and under statute that we would have mediation programs in the courts, but we needed certain things from them in order to do it right, and I think we've done it very well. In fact, the Department of Justice has cited us as the model to be using, and basically the end result is, people who would have normally been foreclosed out of their homes, now, as a result of bringing in mediation experts and judges that are dedicated to that docket, 64 percent of the people have been able to stay in their homes and been able to write new deals, so that's a pretty good number. So that's, I think, a good example of where we have worked together.

CHIEF JUDGE LIPPMAN: Okay, Shirley.

CHIEF JUSTICE ABRAHAMSON: Well, I kept reading in the newspaper that there are all these foreclosures, and I thought, well, why aren't I getting complaints from the trial judges about all this extra work they have? I checked with the Director of State Courts, and he wasn't getting any complaints. And so I said, well, let's check our statistics. Word came back that we've got a lot of cases. And I said, okay, how come the judges and the staff are not overwhelmed? And the answer was the foreclosure cases were predominately defaults.

CHIEF JUDGE LIPPMAN: Yes.

CHIEF JUSTICE ABRAHAMSON: So the judge could, with the staff, look at the papers and sign them within a relatively short time. Foreclosure really did not become a burden on the courts.

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And so I then went to the county courthouse on some other matter. The county courthouse is the primary court, that's where all the action is. With all due respect to the panel, we aren't where the action is in the state courts. Not that we're not important, right?

CHIEF JUDGE LIPPMAN: I like to think.

CHIEF JUSTICE ABRAHAMSON: But, hey, the people and the cases are in the trial courts. And so I had the clerk of the circuit court pull some cases. I said, just pull some foreclosure cases. He said, what kind, I said, I don't care, just pull them. And I looked at them, and I think one of them was not a default. And so I then went to various trial court judges meetings and said, so what's happening and what are we doing? Some trial judge finally just settled on the fact that judges can order mediation. And so in one of the rural counties, the judge said, okay, I'm ordering mediation on all foreclosures, which brought the people together. One of the issues is, and banks called me and told me this—how can we get the people, the debtors to talk to us? The homeowners don't answer the phone, they won't answer the door, and they think we're going to try and get them out of the house. What the banks really want is to talk to them and see if we can re-negotiate this, because we don't want any empty houses in Wisconsin in winter. It costs us money, and there's deterioration of the property.

CHIEF JUDGE LIPPMAN: And that's where representation comes in, too.

CHIEF JUSTICE ABRAHAMSON: That's right. So slowly but surely, several counties, through various pilot programs, are using mediation. And it doesn't always work. That means sometimes the family goes out, but they go out under conditions that are more humane and caring. And sometimes they can re-negotiate through these mediations, and it's done again at the local level. Some of the money has come from the Department of Justice, which got money from settling cases, and the Department decided that this was a good place to put the money. We sure were delighted. But it's a pilot program, and it's because the trial judges and the staff of the trial courts are just terrific in running these programs.

CHIEF JUDGE LIPPMAN: In New York what's happening is that the Attorney General is starting a program from the moneys from

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these settlements against the big banks, to get money for civil legal services. Let's switch gears a little bit and talk about money again. We talked a little bit about funding in the courts. We talked about judicial salaries. Let's talk a little about judicial recusal.

Around the country, money in judicial campaigns is a big deal. There are other conflict issues in relation to judges and when they should recuse themselves. There has been a lot of discussion at the United States Supreme Court in relation to when judges should recuse, and the famous case in relation to money is *Caperton*,<sup>4</sup> a case that some of you probably know, where the United States Supreme Court said that when there was a disproportionate contribution to a particular candidate for the high court of West Virginia, that judge should have recused himself from a involving a major contributor. Have any of you had issues in your state in relation to recusal? Is it a big issue? I know you have a disqualification rule, Christine, no?

CHIEF JUSTICE DURHAM: Yes, it is no issue at all in my state, and I would suggest the reason for that is that we have no elections. We have retention elections, but they're non-partisan and unopposed.

CHIEF JUDGE LIPPMAN: Now that's not the case in Wisconsin.

CHIEF JUSTICE DURHAM: No.

CHIEF JUDGE LIPPMAN: Shirley, you really probably want to talk to this issue right now.

CHIEF JUSTICE ABRAHAMSON: We have contested elections; they are non-partisan elections for judges, held in April. And often they used to be sleepy elections, sort of like you would have in retention elections. In more recent years, substantial sums of money have been spent in judicial elections, ordinarily not by the candidate, but by outside groups. I'm talking about millions of dollars coming into the elections. The Chamber of Commerce is one national group. The national organizations may have spinoffs. Also labor and other groups have been active. And as a result of the large sums of money being spent, issues come up as to whether the judge should sit on cases that these various money groups have an

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<sup>4</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

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interest in or are parties in.

CHIEF JUDGE LIPPMAN: Right.

CHIEF JUSTICE ABRAHAMSON: And in the *Caperton* case, it was a case that involved a mining company's liability, and much of the money in a judicial election apparently came from the mining interest. The result was the judge whose election was assisted by the mining interest sat on that case. That brought a recusal issue challenge. Across the country, courts are facing the issue of what kind of rules of recusal we should have. Now, recusal is an old, old issue. It's just an old issue in a new environment.

CHIEF JUDGE LIPPMAN: Because of money, right?

CHIEF JUSTICE ABRAHAMSON: Because of money. And the question is, what kind of rules do you have on recusal, when the money comes in a campaign? But of course, there may be money in appointments, too, where particular groups might want to go to senators or the governor, and say, hey, we really like Ann Smith—I don't know anyone that's called Ann Smith here—and, you know, we've been big contributors of yours, you're coming up for election again in a few months or years, and Ann Smith is really good. We'd really like your support for Ann Smith. But you see the difference is, that's not public. But in a judicial election, it is public. And recusal is an important issue for both elected and appointed judges. The ABA is struggling with it; various states are struggling with what kinds of rules are appropriate. It's very uncomfortable if you're dealing with your own colleague and a motion comes up asserting, "oh, we've got to get rid of Durham because she did A, B, or C."

CHIEF JUDGE LIPPMAN: You know the Chief Justice of the United States says that you leave it up to the individual judge—we're not going to tell them what to do. Does that make sense? Christine?

CHIEF JUSTICE DURHAM: That philosophy comes from the notion, and this is a problem that's at the heart, in some respects, of judicial independence and judicial branch government, namely that judges, unlike other employees of large organizations, all have independent constitutional authority. They've been appointed by an

appointing authority, or they've been elected by the people. But then you still have the opportunity to regulate judicial behavior in codes of conduct that the states have implemented to govern their own behavior, and those have standards for impartiality, and freedom from bias. So those two things are in tension.

CHIEF JUDGE LIPPMAN: What if you left it up to other judges to make their decision? What would be bad if that was the case?

CHIEF JUSTICE DURHAM: I don't think it is, I think it's good. Our rule, and it's never been challenged, although it's subject to challenge, is that if there's a recusal motion, it goes to the presiding judge of the court, trial or appellate, and that's the end of it. Although you could bring an appeal at the trial level to our court, and then I guess a member of our court could appeal it to the home court. But then we can get into a mess.

CHIEF JUDGE LIPPMAN: Yes, you could. I will say we take a little different tactic in New York, as you probably all know. Particularly where we have an elected trial court, we're just not going to assign a case to a judge if someone has given above a certain amount in contributions. Administratively, we're not going to make you recuse. You're never going to have the opportunity to recuse or not, because we are just not going to give you the case.

But let's go to another area, again, we want to leave some time at the end for your questions. Let's talk a little bit about criminal justice. In New York, we take the position that this is right in our wheelhouse, and whether it's sentencing, whether it's juvenile justice, whether it's wrongful convictions, we not only comment on it. I just submitted a number of bills to the legislature, one on wrongful convictions, and one on juvenile justice. Is that a good thing, Chase; how much should we be involved in the substantive criminal issues? Should we or shouldn't we? I raised the point to the sentencing commission in New York, of judges and others, to make recommendations. Is that something we should be involved in? Is that outside of our bailiwick?

CHIEF JUSTICE ROGERS: Well, again, we try to ride a fine line on it. We like to be part of these commissions because we think that we provide essential information as to what's really happening factually. On the other hand, quite often, we abstain from voting if somebody's on a particular commission that involves legislative

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members as well, so when it comes to the real policy question, are we going to do X or Y, we abstain from that.

CHIEF JUDGE LIPPMAN: You don't want to decide whether the sentence should be five years, ten years, or fifteen years.

CHIEF JUSTICE ROGERS: Exactly. But we want to be part of the dialogue as to: is there a problem, isn't there a problem?

CHIEF JUDGE LIPPMAN: And on broader policy issues, like let's say wrongful conviction and use of DNA, would you take the same position?

CHIEF JUSTICE ROGERS: Eyewitness identification.

CHIEF JUDGE LIPPMAN: All right, eyewitness ID, yes.

CHIEF JUSTICE ROGERS: There's a former chief justice of the Connecticut Supreme Court who is the chairperson of that.

CHIEF JUDGE LIPPMAN: Yes. So you feel comfortable with certain, a little bit broader policy issues.

CHIEF JUSTICE ROGERS: A little bit broader.

CHIEF JUDGE LIPPMAN: All right. And, on this end of the table, what do you think, Shirley? How much should we be involved in criminal justice? What is our duty, what is important to us, and what's appropriate for us to say or do?

CHIEF JUSTICE ABRAHAMSON: Everywhere in life there are fine lines, and you draw them, and you hope to do it right, and if you didn't, the next time you'll have learned. But we do criminal justice reform in terms of pilot programs. We try for diversion programs, but it's all at the trial court level. We have criminal justice collaborating councils that sit in the counties that represent all the stakeholders in the criminal justice system. The judge participates in the council. And judges have to be careful that we don't cross the line, and that the judge doesn't become so involved that he or she is no longer neutral in a particular case. And if that line is crossed, the judge has to get off that case.

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CHIEF JUDGE LIPPMAN: Isn't it, Shirley, the distinction between that administrative hat that we wear as the head of the court system, in terms of general reform of the justice system in all different areas, including criminal, and our adjudicative role, which sometimes you can compromise if you don't cross the line.

CHIEF JUSTICE ABRAHAMSON: Exactly right.

CHIEF JUDGE LIPPMAN: And what about problem solving courts, because isn't that—well, we all do that. Christine, do you?

CHIEF JUSTICE DURHAM: This is the classic example where the courts were being inundated and overwhelmed with revolving door prosecutions in criminal cases, which usually involved drug use in some level. And they came to see that the courts were inundated, and the public was not being served, and it was judges around the country, trial judges, who said that there is some evidence-based reason for thinking about programs that would give these people the treatment they need, and we can use the criminal proceedings as leverage to encourage them to participate in the treatment. There was a lot of debate in the early days.

CHIEF JUDGE LIPPMAN: You could say, some people say the courts are being coercive.

CHIEF JUSTICE DURHAM: Right.

CHIEF JUSTICE ABRAHAMSON: Yes.

CHIEF JUDGE LIPPMAN: Is that our role, to be coercive?

CHIEF JUSTICE DURHAM: Exactly. Well, my own view is that we've now got about twenty years worth of data on problem-solving courts, and the data is so fantastic. I'm sure it's a fact that it works.

CHIEF JUDGE LIPPMAN: Recidivism, and that kind of thing?

CHIEF JUSTICE DURHAM: The Recidivism data is solid. That being said, in our system, all drug court participation is post-plea.

CHIEF JUDGE LIPPMAN: That differs though.



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CHIEF JUSTICE ABRAHAMSON: Right.

CHIEF JUSTICE DURHAM: We drew the line at post-plea because we thought that minimized the coercive impact. So there are really two questions it seems to me. One of which is on the ground level, the courts' problems with the tools they already have on hand to deal with what they see. But then there's the policy making level that you started with, Jonathan, sitting on sentencing commissions. We have a commission on criminal and juvenile justice in our state that looks at a panoply of issues. We do have judges on that. Shirley wrote a wonderful article a number of years ago entitled, *Shall we Dance?*,<sup>5</sup> and she talked about the delicate dance that the three branches do in the arena of public policy and civil and criminal justice. We have to be a part of that dance. We just have to be very careful that we never compromise our impartiality.

CHIEF JUDGE LIPPMAN: Shirley?

CHIEF JUSTICE ABRAHAMSON: I wouldn't sit on one of those committees, as the Chief Justice, or as a justice of the highest court. But there is no problem with a trial court judge sitting, because the trial court judge, if he or she gets a case on that matter, whatever the policy, he or she doesn't have to handle that case. We've got 239 other judges we can put in, but we can't replace a Supreme Court justice.

CHIEF JUDGE LIPPMAN: And you've got to be careful not to, again, compromise yourself.

CHIEF JUSTICE ABRAHAMSON: That's right.

CHIEF JUDGE LIPPMAN: But yet you don't want to have the judiciary not be involved in the dialogue.

CHIEF JUSTICE ABRAHAMSON: The judiciary should be involved in the dialogue, if it can be. The committee would be sure that there's representation at the hearings and input there. But you have to be careful as to who in the judiciary will do it. Sometimes the director of state courts, the administrative arm, and sometimes

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<sup>5</sup> Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991).

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a judge, the judicial arm.

CHIEF JUDGE LIPPMAN: Chase, are you testifying on criminal justice reforms for the legislature?

CHIEF JUSTICE ROGERS: Our court administrators do, but I wouldn't undertake that.

CHIEF JUDGE LIPPMAN: You wouldn't do it yourself, right. What about a trial court judge?

CHIEF JUSTICE ROGERS: Trial court judge, yes.

CHIEF JUDGE LIPPMAN: Okay. Let's take two quick areas and finish off our kind of potpourri of issues, and then see what all your questions are. Let's talk about languages of the day. Which is so central, and it has not been addressed before, and it's a very upfront issue for all of us in state courts. In fact, we have been as active as the state's courts have been on language interpretation, and you'll hear a little bit about it in a second. The chief justices have been jousting with the Justice Department about what our role is, and as proactive as we've been, the Justice Department thinks we're not doing enough. So anyone want to comment on that?

CHIEF JUSTICE DURHAM: Well, I have a comment. I've also served this past year as Past-President of the Conference of Chief Justices of the United States, and during my year of leadership, this was one of the major issues that emerged, and then it emerged again very recently. And the problem was that we have, in the state courts, come to understand the problem of language interpreters. The National Center for State Courts has put together a consortium; they've developed standards of training materials for in-court interpreters. We've done a lot to educate judges about the fact that it is not enough to have a Spanish-speaking relative of a defendant to come in and translate in the criminal proceedings against his relative. It's a very sophisticated kind of interpretation. We've gotten that. All of us are working on standards. Part of the problem is that we now have four to five years of budget cuts, which has severely impaired our ability to move forward with expanding those programs. And the Justice Department chose that moment to come in and to announce that under Title 6 of the Civil Rights Act, they view the state courts—and only the state courts by the way,

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the federal courts were exempt from the standards—as having the obligation to provide certified interpreters, not just in criminal in-court proceedings, but in civil in-court proceedings, and at least in criminal, and possibly some civil, out-of-court proceedings. Suggesting that, in fact, even if you were taking depositions or interviewing witnesses, court funded interpreters would have to be provided.

CHIEF JUDGE LIPPMAN: Even if we have nothing to do with it, we should provide it. This is the bone, one of the big bones of contention.

CHIEF JUSTICE DURHAM: Bones of contention. And the state courts and the Conference of Chiefs pushed back very hard on that issue, and I think with some degree of success, the ABA put together a task force to elaborate standards, and argued. I'm talking as a psychologist now, but in our view, the Justice Department sort of captured that process and was about to get the ABA to sign off on standards that implemented the DOJ's version of the state courts obligations, with, as near as we could tell, very little consideration for the funding problems that we were facing.

CHIEF JUDGE LIPPMAN: At the time of this fiscal crisis.

CHIEF JUSTICE DURHAM: Exactly. That was just a perfect storm. And the chiefs were able to head that off, get people to go back to the drawing board, and adopt what in the end, I think is universally acknowledged to be a very good set of standards. It was a fascinating thing to watch. I don't know of another instance in the history of state courts where the chiefs have operated on behalf of state courts and the institution at that level to such a specific end.

CHIEF JUDGE LIPPMAN: Shirley, you want to add something?

CHIEF JUSTICE ABRAHAMSON: Well, I think you have to start from basics. If the person in court doesn't understand the English language and doesn't understand what's happening, that cannot be justice. And the chief justices and the judges understand that. In the Midwest we expect New York to have dozens and dozens of languages. Languages that I didn't even know existed. This is the great immigrant state. My own parents were immigrants to this state. Now I come from a Midwest state. You don't think of it as an

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immigrant state, but it is. And we can have over a hundred languages in a year, languages I didn't know existed either. And we are committed to have fair processes. We have a whole variety of things we do; we certify interpreters, we don't have enough of them and in enough languages, and we're trying very hard. And what we can't let happen is to allow for the desire for the perfect to shut out the good.

CHIEF JUDGE LIPPMAN: Well, that's what this is all about.

CHIEF JUSTICE ABRAHAMSON: And that's what this is about. But the premise that we should all start with is, we've got to have a court system where people who cannot understand the English language are assisted. And not by the brother-in-law who might hate the guy. Who knows what he's doing to him? The brother-in-law doesn't understand either the language or the legal system.

CHIEF JUSTICE ROGERS: Just one thought. There's one technology really that's starting to help. And we're seeing things like language lines, and so somebody can go into a clerk's office and speak one of a hundred languages that have a, like a magic phone inside it, which is how I refer to it, and they pick it up, and they're talking on one end, and the clerk is talking on the other end, and there's an interpreter in between so that they can actually communicate about what's going on. That works in a community clerk's office, it doesn't work in a courtroom. We're also seeing video conferencing, where you have an interpreter who's inside the box, but in a central location somewhere else, and the defendant is able to explain to the judge what's going on, and the judge is able to explain to the defendant what's going on, and you don't have to have an actual interpreter at that point.

CHIEF JUDGE LIPPMAN: That's a perfect segue to our last issue, Chase: technology, the future of the courts. How important is technology to the judiciary? You know, you don't associate the judiciary necessarily with high tech, although if you saw the way we went to law school, as opposed to where you go today, and how to do research, I guess the world has changed. But what do you think, Chase? Is technology the future to doing more with less, in that fiscal times are not necessarily going to get that much better in the years ahead?

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CHIEF JUSTICE ROGERS: Yes, I think it has to be. So that's why I'm sort of harping on this. Having said that, you know, I'd be remiss if I didn't say that we're down 200 people, and we sorely miss those people.

CHIEF JUDGE LIPPMAN: Can the computers make up for the 200 people?

CHIEF JUSTICE ROGERS: No. What we do see is, for instance, we don't need a second person in the front office—we'd rather have them working in IT, and right back through the e-file. We don't need as many clerks. Or the idea is centralized offices where people if call the courthouse, they're actually going to get somebody—

CHIEF JUDGE LIPPMAN: In India?

CHIEF JUSTICE ROGERS: No, in Connecticut.

CHIEF JUDGE LIPPMAN: Okay.

CHIEF JUSTICE ROGERS: But that sort of centralization is another area where technology is going to help us.

CHIEF JUDGE LIPPMAN: Okay. Christine, do you want to add anything on technology before we go to questions?

CHIEF JUSTICE DURHAM: No, I just agree completely, we are an information-based business, and information is handled electronically these days, so it's inevitable.

CHIEF JUSTICE ABRAHAMSON: Absolutely, both for the judges and the staff, and for people, who can get online and see what's happening with their cases, yes.

CHIEF JUDGE LIPPMAN: And that's the world of our future. Certainly with e-filing, I know the different states are in various places. In New York, I hope, within the next five years or so, the average case that's filed in the court is all going to be without papers, it's going to be by e-filing.

CHIEF JUSTICE ABRAHAMSON: Here, the judiciary may be ahead of the lawyers. We are moving on e-filing, but you have to

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persuade the lawyers to do it.

CHIEF JUDGE LIPPMAN: Yes, some of them are very reluctant. They want to take that paper and give it to the clerk.

CHIEF JUSTICE DURHAM: That's another area where a good crisis helps. It's going to happen.

CHIEF JUSTICE ROGERS: Yes, we made it mandatory and then we went to the law firms and taught people how to do it.

CHIEF JUDGE LIPPMAN: Yes, you have to do that. It's part of our role if we're going to make this work. Okay. So we've been pontificating all day. What questions do you have for all of us, for an individual panelist?

PATRICK WOODS: One of the issues that came up peripherally here—and it was the subject of one of our speakers at last year's symposium—is the flip side of judicial recusal, judicial selection.

CHIEF JUDGE LIPPMAN: Yes, we really didn't get into that much, let's do it. Go ahead.

PATRICK WOODS: We're fortunate to have judges from a number of different systems of selection. I'd like to hear what you think about your own state's way of doing it, and if there's a better way.

CHIEF JUSTICE DURHAM: I'd just like to say Shirley is an outlier in this respect.

CHIEF JUDGE LIPPMAN: Shirley, yes, why don't we tell them about your views on this? That has been the subject of some criticism, not by any of the three of us, but we know it's a controversial issue. Go ahead, Shirley.

CHIEF JUSTICE ABRAHAMSON: Well, I have said, and written, that it was my opinion that selection through judicial elections was a good system in Wisconsin. I recognize that there is no perfect way of selecting judges. Any system you have has its advantages and its disadvantages. And for any legal culture, and state, you have to pick the system that fits your political, legal culture. So what might work in a state like Wisconsin would not work in New York, or

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Pennsylvania, or Utah. There are three problems with elections. I said this in the 1990's, and they're still with us. One, money. Two, a very low percent of people vote in judicial elections: twenty percent or less. And three, what judges can say? And those are the three problems. The worst system, in my mind, is the retention election because the judge is a sitting duck.

CHIEF JUDGE LIPPMAN: People used to think that was the panacea. As to retention, what's wrong with it, Shirley, why is it bad?

CHIEF JUSTICE ABRAHAMSON: Money's what is wrong with it, because the judge does not necessarily know until two or three weeks before the election that people have amassed huge amounts of money and will wage a two- to three-week TV and mail campaign against that judge. Meanwhile that judge has not been doing anything for election, because the judge had no reason to do anything and may even be prohibited by the Code of Judicial Conduct from doing anything.

I remember we all sat at a session where a chief justice of a state got a phone call, and learned she had an opponent in an election in not more than two or three weeks. It was Alaska.

CHIEF JUSTICE DURHAM: But I would say that in the history of retention elections, you have ninety-eight percent retention. Last election when the Iowa judges got taken down, there was a same-sex marriage decision by the Supreme Court in the State of Iowa, determined on state constitutional grounds. It was a unanimous opinion, saying that same-sex marriage was required as a matter of equal protection under their state constitution. Three of the judges were on the ballot during the next election. There was a well funded, by out-of-state money by the way, campaign against them, and they made a choice not to campaign, and there's considerable critique of that decision because the vote ended up being very close. But they all lost. In other words, they were thrown out of office as a result of a vote in a particular case.

CHIEF JUDGE LIPPMAN: Even the Chief Justice.

CHIEF JUSTICE DURHAM: Including the Chief Justice. So this, we all felt this. Those of us who were friends of the Chief Justice felt this very deeply. I want to emphasize how recent this

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phenomenon is, but suggest that it may be a growing phenomenon; in that same year there were no fewer than five challenges, including the one in Alaska, and that was a completely new phenomenon. So retention is not the panacea that some of us thought.

CHIEF JUDGE LIPPMAN: And now the world has changed on that issue.

CHIEF JUSTICE DURHAM: But I'm curious too, Chief Justice Abrahamson, whether your thinking has modulated at all since *Citizens United*?<sup>6</sup>

CHIEF JUSTICE ABRAHAMSON: Yes, of course. I saw the three problems two decades ago; I saw the problem about money. But it wasn't the massive problem that it is now. And I thought that we could bring in reforms that would take care of the money. Like revealing names, where the money comes from. Public financing looked like a good alternative. We have to do something else if money continues to be a problem. That's the problem.

CHIEF JUDGE LIPPMAN: The evil.

CHIEF JUSTICE ABRAHAMSON: That's right.

CHIEF JUSTICE ROGERS: Can I talk about something else? I have a different kind of school of thought. I'm so happy we have no elections in Connecticut.

CHIEF JUDGE LIPPMAN: There are no retention elections, no anything?

CHIEF JUSTICE ROGERS: Nothing. No elections.

CHIEF JUDGE LIPPMAN: How long are the terms?

CHIEF JUSTICE ROGERS: Eight years. Right, so how it works is if the governor nominates someone, they go through the confirmation process of the legislature. Both branches are involved, and then you're on for eight years. At least as long as I've been

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<sup>6</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).



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doing this, it's very, very rare that somebody's not re-nominated for the next eight year term, unless they've done something, and frankly, then they shouldn't be a judge. So I think the system works beautifully, and we don't have a problem.

CHIEF JUDGE LIPPMAN: Let me give you a mixed opinion on this, as someone we has been an appointed and an elected judge. I think we could all ideally say that an appointive system by its nature has got to be better if its focus is merit. The whole idea is qualifications, merit. You would think that an appointive system is going to be better. And I think many times it is, but my own view is that that is the ideal, and that an appointive system, in practice, is only as good as your appointing authority.

CHIEF JUSTICE ROGERS: Yes.

CHIEF JUDGE LIPPMAN: You can have an appointive system that is another form of politics, like the elective system, which comes under such criticism. We were kind of giving Shirley the business, by saying, "gee, how can you defend it?" I can tell you as someone who's run in an elective system where instead of going before ten people in a room who decide whether you get on some list, you really do go out into the community and get a feel of the people, what they're about, and what they think. Just doing that, you really do feel closer to the people who you work for. You see what I'm saying? I don't think it's all black and white. I think we could all say ideally appointive is, if it's done right, going to be better, but it really makes sense to look at the individuals. Like Shirley said about Wisconsin. So I think that's the key to it. It is not so easy to make those quick judgments, that the elective system is horrible.

CHIEF JUSTICE ROGERS: No.

CHIEF JUDGE LIPPMAN: Or that the appointive system would be the greatest fix since sliced bread.

CHIEF JUSTICE DURHAM: And one of the things that's interesting is that ideally you should be able to assess the value of a system of judicial selection by its results.

CHIEF JUDGE LIPPMAN: Yes, that's true.

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CHIEF JUSTICE DURHAM: There have been efforts to do some empirical research in this arena, and I have to say that generally speaking, the research suggests two things; one probably good and one not so good. The first thing the research so far suggests is that there's not much difference in the education, background, and performance of the judges selected in the respective systems. But the other thing it suggests, and this worries me a lot about the contested elections on the money issue, is that contested elections can have a negative impact on the perception of the public, and the level of trust and confidence that they have in their courts. Jonathan's right, the verdict is out, and we need more research; to date it is very mixed.

CHIEF JUDGE LIPPMAN: Well, it has happened, and certainly a topic of discussion among the chiefs is contested elections in the high court. We get lots of money coming in from all of these interest groups.

CHIEF JUSTICE ABRAHAMSON: Well, I just found out, and maybe you all knew, that the money in the Iowa elections was not from people who had views about same-sex marriage, but it was from other kinds of special interest groups. Same-sex marriage happened to be just a good hot election topic.

CHIEF JUDGE LIPPMAN: Yes.

CHIEF JUDGE DURHAM: Outside of Iowa.

CHIEF JUDGE LIPPMAN: That's on the outside. And I know when Chief Justice Marsha Ternus was here last year it was fascinating to hear her talk about the election and what kind of monies came into the state, most of it from outside. She also talked about—which is interesting to all of you as new lawyers—the lack of support from the Bar. She was depending on the Bar to come to the rescue and to realize how outrageous this was in terms of adjudicative independence, which is at the center of what we do. The Bar did, in the end, do some things, but as she felt they had not been as proactive and vigorous as she would have liked them to be.

QUESTION: I actually have a question that sort of ties into this area, but also goes back to the question of judicial pay and retention of judges. There's a lot of legislators, in the federal government and

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state governments, that look ahead to when they leave their position as a legislator to work in the private sector, and they often make decisions on legislation based on who's going to hire them afterwards. Have you had to confront that problem with the judiciary when say you had to make your appointments, or when you have upcoming elections where judges might be making decisions on the bench?

CHIEF JUDGE LIPPMAN: Do judges feel, depending on the selection system, do they feel their independence is threatened by the decisions that they make? That could happen in the appointive system or an elected system. In New York City not that many years ago, there was a lot of criticism that there was a litmus test on reappointments for the so-called lower court judges as to how they decided on certain kinds of issues. What do you think, is either elective or appointive, in the way it plays out, a threat to the independence of judges when they make decisions? Do we think about that on the bench? I'm not necessarily talking about the high court.

CHIEF JUSTICE DURHAM: Well, in the context in which the question was phrased, namely future employment, first, there's not that big of a market for judges in my line.

CHIEF JUDGE LIPPMAN: But are your decisions impacted by outside forces? Whether it be that you can run again or you can be appointed again?

CHIEF JUSTICE DURHAM: No, I don't have to raise any money.

CHIEF JUDGE LIPPMAN: Infamous private money.

CHIEF JUSTICE DURHAM: I'll tell you an arena in which I do see it though. We have judicial performance evaluations, and it's quite rigorous in our state, and I hear judges complain, especially at the trial level, about their relationships with attorneys in terms of "if I come down on an attorney more et cetera, they're going to give me bad ratings." But I've never heard it tied to judicial decisions.

CHIEF JUDGE LIPPMAN: Has it been, you have got to go before a panel of attorneys, and he's decided a case against "x" alone?

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CHIEF JUSTICE DURHAM: I haven't experienced it, I don't know if my colleagues have.

CHIEF JUDGE LIPPMAN: Shirley?

CHIEF JUSTICE ABRAHAMSON: I think when you lift your right hand and say you're going to be a judge, and you take that oath, that you're going to support the United States Constitution, and the Constitution of the State of Wisconsin, and that you will faithfully and impartially administer justice; when you take that oath, that means you are going to call the case on the basis of facts and law as you understand them, regardless of whether it's going to be held against you in an election or an appointment, or your next job. And I think you've got to find individuals who have the courage to do that. That is the responsibility of a judge. And then, when you run, you run on being that kind of judge—fair, neutral, impartial, and non-partisan. And if you can persuade the appointing entity, or the electing entity, that that's what you're doing, they may have to hold their nose on some of your decisions and not like them, but if they know you called it like you saw it, they'll select you. And that's what a judge is supposed to do. Of course, the judge has to be intelligent and do the work, et cetera. We should be saying to every judge, that's your responsibility. And you may get a little feeling in the back of your head when you decide a high-profile case, what did one of the judges call it? "The crocodile in the bathtub." But that's going to happen. You rise above that. And people will respect that judge.

CHIEF JUDGE LIPPMAN: Chase, you have a eight-year term, does anyone think about, whether they're going to be labeled tough-on-crime, soft-on-crime, pro-tort plaintiff, pro-defense? Do they think about that?

CHIEF JUSTICE ROGERS: They can't think about that, and that's something we actually got together about the other day, and I talked to each of them individually. That's where I started. You know, but the flip side of that is what I also told them, and I did have to deal with it in one case in the five years that I've been Chief Justice. We will back you 100 percent if the reason that you're not being re-nominated or this problem with re-nomination is because of any individual decision that you made. We can't help you if you're sleeping with your secretary. Those sorts of conditions, we're

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not going to help you with. But we will help you on independent decision-making.

CHIEF JUDGE LIPPMAN: You know, we do the same thing, but I think the problem sometimes is that the press does not care when you are following your principles. They want to do whatever it is. You let criminals out on the street, or whatever you're doing wrong. So it is a very difficult, complex issue. But obviously, from all of our perspectives, there is only one thing, one option, and that's to call it the way you see it.

QUESTION: I think to tie it back in, not to the electorate as much as when you are going to a legislature, and they are determining whether or not you get a raise, or whether or not you get funded, or whether or not there are courts, or if they do pass one of these laws, demanding a vaginal ultrasound, or prohibiting same-sex marriage, or it's for something else, and it's part of politics that, this particular judge hates religion. That that's what is in the paper, and more importantly, that's what the politicians are saying, every night on TV. But you have to rely on the legislature who passes these laws in order to get your funding. How do you balance that?

CHIEF JUSTICE DURHAM: You don't. Last month in Arizona, the Arizona Supreme Court issued an opinion that infuriated the legislature. Somebody promptly introduced the bill directed to, not the high court, but the intermediate Court of Appeals, which seems to me a little misdirected, to decrease the number of judges from twenty-two to six. Although I understand that it's not going to pass, it is a clear example of using court funding cuts to express legislative disapproval of decisions.

CHIEF JUDGE LIPPMAN: But it's not unusual, Christine, that that happens, but we can't spend our days and nights worrying about it.

CHIEF JUSTICE DURHAM: That's right. My state court administrator, when I comment that things are going well, as it happened just recently, he says, "well, it will only last until your next unpopular decision."

CHIEF JUDGE LIPPMAN: Look at school funding cases. All around the country, right, Chase?

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CHIEF JUSTICE ROGERS: I said I've got to go to the legislature tomorrow, and last month we decided a redistricting case, so half of the legislature is not happy with us. And we also decided four days ago that the governor improperly disbanded a local school board, and that they couldn't do that. So I'm sure I'm going to be really popular.

CHIEF JUDGE LIPPMAN: All right, one last question. Who's got the last question? Go ahead. The last question is always dangerous, go ahead.

QUESTION: The budget constraints, of course in New York, and when I think of the history of California and other states, to look at the policies with regards to parole, incarceration. There's been recent scholarship about mass incarceration. And I'm just curious in your state, whether you're looking hard at the drug laws or sentencing or parole?

CHIEF JUDGE LIPPMAN: Anybody? I can tell you in New York that we are proud of the fact that we are one of the few states in the country that have reduced crime and incarceration at the same time, which is a neat trick. The thought that is very much on the politicians' minds, of course, is prison and incarceration. I think we all support, in varying degrees, alternative programs that play into that argument. Our main focus in life is not how big the prison population is, but those alternatives certainly are part of that puzzle.

CHIEF JUSTICE ROGERS: Yes, I would say another thing, with a caveat, that one of the things that's a little bit unusual about Connecticut is we, at the judicial branch, administer the alternatives for incarceration programs, and they're very expensive. So the governor wants to close a number of them, I think we've got four prisons. We're like that's great, but you've got to fund us then, for running these programs. So it's not easy.

CHIEF JUDGE LIPPMAN: Okay. Thank you all for having us.

PATRICK WOODS: Once again, I'd like to thank our four fantastic panelists. Thank you again, very much, for coming, for supporting the school, the judiciary, and the *Albany Law Review*.