State of the Judiciary
Chief Judge Judith S. Kaye, New York Court of Appeals
Message to judges and lawmakers
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Welcome to the Judicial Conference. Welcome to the Second Annual State of the Judiciary Address. And I underscore the words Second Annual.

That has a way of happening, you know – events becoming annualized, traditionalized, institutionalized. That's especially so in the courts, where we can drape the entire exercise with the noble mantle of "precedent." Precedents are by and large good. And for judges, following precedents is by and large an honorable thing to do.

While perpetuating one tradition today, I want to make a small break with another: I am going to skip the greetings that generally open speeches of this nature. My colleagues and I are pleased as punch that all of you are here today. I want to get right to the heart of my remarks.

Some traditions are great and worth perpetuating, some not. Sometimes, it makes sense to stick to the tried and true. Sometimes it pays to take a step back, review a tradition-bound practice and ask, "Isn't there a better way to do this?"

And that's what I want to focus on today – areas of our court system where we need to take a step back, question the status quo, and see if we can't do better. This focus on change may sound a little incongruous in this magnificent 19th century chamber, a veritable shrine to the values of stability and continuity. Those values are of course extremely important – and they are certainly alive and well in the New York courts.

Overwhelmingly, the New York courts do follow past practice – sound past practice – to very good effect in carrying out the mission of delivering justice to the citizens of this State. Our highest priority is to streamline and modernize sound past practices where they are promoting effective justice. I think there can be no doubt that the New York courts serve this State well, that dedicated judges and court personnel from Accord to Yulan – and every letter of the alphabet in between – work hard to realize that distinctly American goal of equal justice under law. The written report distributed today gives you some idea of the scope and depth of our work. And for those of you who may yearn for a more detailed account of this work, we have the statutory report of our absolutely phenomenal Chief Administrative Judge Jonathan Lippman, and would be pleased to send a copy to you.

Why, then, do I want to focus today on change, on questioning the status quo, on revisiting tradition-bound practices? The answer to that question is as easy as Y2K. Change is the catchword of our society – and that inevitably affects what the State courts do and how we do it. Change is everywhere around us – in technology, of course, but also much more fundamentally in families, in community structures, in personal values. Sooner or later – and I think most definitely sooner – both the size and substance of our caseloads mirror new societal developments. That is inevitable. If we want to serve the public well – and we do – we have to take a long, hard look at whether some of the practices and approaches we have been using for decades are adequate to the task, whether they are achieving justice as we enter the next century.

Some of the biggest challenges we in the State courts face today are in the areas of criminal and family justice. I'd like to start with those subjects.

Criminal Justice

Why criminal justice first? We all know – and celebrate – that last year, major crime rates fell to their lowest levels in decades. But that hardly means that all the challenges for New York's criminal courts are behind us. Because while major crimes rates are heading toward record lows, filings in our criminal courts are soaring to all-time highs. And the substance of this caseload reflects some of the most daunting problems facing our society today.

Let me begin with some numbers. Last year, the New York State courts received over one-and-a-quarter-million new criminal cases. That's about a 50 percent jump over filings of just four years ago. The bulk of this increase was in misdemeanor filings in the New York City Criminal Court.

What societal changes are driving this trend? As community enforcement of social norms has declined, we have seen increased use of the criminal justice system to fight low-level social disorder through "quality of life" initiatives. That's a new role for the courts, and we need to think about how we can carry it out most effectively.

The sheer volume of cases challenges us, first of all, to handle our caseloads as efficiently as humanly possible. I think the New York City Criminal Court had remarkable success last year in dealing with its staggering caseload despite stagnant resources. On-line arrests were up dramatically – but the Court actually brought down arrest-to-arraignment times. There are limits, of course, to how far we can leverage our resources through hard work and good management – even the tightest ship will flounder when it gets hit by a tidal wave. But we will continue to look for the efficiencies, the synergies – as well as the resources – that will enable us to deal with these cases fairly and efficiently.

Our misdemeanor caseload presents one set of challenges. Our felony caseload presents another. Last year, nearly half of all felony filings in this State were drug- related. That's an enormous commitment of resources. That's an enormous challenge for the courts.

Again, we must try to handle this caseload efficiently. Reform of our outmoded criminal discovery laws would aid immeasurably in moving cases more expeditiously to resolution. But the challenge is more than just a matter of moving cases – it's also about doing justice. And that means taking a look at the substance of our work. Are all the legal processes making a dent in the problem?

Several years ago the court system took a step back and observed how drug abuse was the fuel driving much of the criminal justice system's revolving door. And we developed a new kind of court to address this problem – a Drug Treatment Court. Last year I reported we had eight operating Statewide. Today I can tell you we have 15 and six more in the planning stages. Almost a thousand offenders have now successfully completed these rigorous programs, and we expect that by year's end we will have close to 3,000 in treatment.

Part of the reason for the success of our Drug Courts is that they build partnerships within the community, under the court's leadership, to solve a problem – getting nonviolent offenders off drugs and out of the revolving door. Other programs are using similar strategies: the Drug

Treatment Alternative-to-Prison ("DTAP") programs run by District Attorney's offices, the Treatment Alternatives to Street Crime ("TASC") programs. Not every nonviolent offender is right for these programs. Indeed, that's one of the things that we're getting smarter about – who is a good candidate for an alternative program and who is not. But the bottom line lesson is that treatment programs that are backed by strong systems of monitoring and sanctioning for noncompliance can work. They can achieve good outcomes, better outcomes than traditional sanctions in many cases, by reducing recidivism, producing more productive citizens and saving public resources in the process.

With every new program, with every year of experience, we are getting smarter in this area. And this leads to a final point about courts, drugs and the need for change.

It has now been 25 years since the enactment of the Rockefeller Drug Laws. That's more than enough time to warrant taking a step back and ask, "Isn't there a better way to do this?"

I know it's somewhat unusual for the judicial branch to comment on matters that touch on substantive criminal justice policy. But judges have a great deal of first-hand experience with the workings of the Rockefeller Drug Laws – their fairness, their effectiveness, their impact on our justice system. As a member of a Court that has decided several cases under those laws, I count myself in that group.

And so today, I would like to offer two proposals that are rooted in the judiciary's particular perspective on these laws and accordingly very targeted. We do not presume to take on the larger policy issues. But we do seek to address aspects of the law that can work unjustly, and to supplement the law with some of the lessons we in courts have learned over the past decade on effective responses to drug-based crime.

The first proposal would grant the Appellate Division – our intermediate appellate court – interest of justice jurisdiction to reduce the minimum period of incarceration imposed for a class A-1 felony drug conviction--which is 15 years for the sale of more than two ounces, or possession of more than four ounces, of a controlled substance. Under our proposal, this power could be invoked only when the court found that the mandatory minimum term would constitute a "miscarriage of justice." The proposed statute would require the Appellate Division to consider the nature and circumstances of the offense, the history and character of the defendant and public safety concerns in determining whether an injustice has occurred. And in such cases, the court could reduce the minimum sentence, but not below five years.

This proposal would not affect large numbers of defendants. But by introducing an element of judicial discretion that could be exercised at the appellate level, the proposal would prevent egregious injustices.

A second reform proposal addresses the issue of nonviolent drug addicted defendants, many of whom may be subject to stiff mandatory sentences for fairly low level drug activity, most often second offenders charged with class B felonies. Here we suggest that a new Article be added to the Criminal Procedure Law that would authorize trial courts – with the consent of the prosecutor – to defer prosecution of a felony drug case to allow the defendant an opportunity to complete a program of drug treatment while under the authority of the court. Essentially, the new Article would codify standards for drug offender diversion programs, like DTAP and TASC – making

clear, for example, that violent offenders would not be eligible, and clarifying the court's powers should the defendant violate a condition of deferral. The proposal would thus promote uniformity and best practices among these programs. It would also hopefully encourage even more jurisdictions to start developing controlled alternative dispositions that can work, and work well, for the defendant, the community and the criminal justice system.

As the public debate on society's most appropriate and effective response to the scourge of drug abuse continues, we hope the proposals we offer today will contribute to that discussion and help to improve the current law.

Family Justice

Another area of profound societal change is in the family, and again, those changes are quickly reflected in the courts. Most of the indicators, unfortunately, suggest increased family dysfunction: child neglect filings up, contested divorces up, family offense filings up. These cases cast the courts in one of their toughest roles: arbiter of intense personal relationships gone wrong. Always our primary goal is to protect the safety and children's best interests – our pioneering specialized domestic violence courts are one example of our efforts in this area. But in addition, we have an obligation to resolve family law matters as expeditiously as possible, in a manner that minimizes both psychic and financial cost.

Last year, we saw real improvement in the processing times of two different case types: contested matrimonials and adoptions for children in foster care. Now we need to build on these achievements.

In the area of matrimonial litigation, the court system will be proposing legislation to further streamline the process and reduce the opportunities for costly gamesmanship. One bill would mandate the disclosure of key documents such as tax returns and bank statements at the outset of the litigation. Another would impose an immediate freeze of such assets as real estate, insurance policies, bank accounts. And to underscore the point that the children's best interests are always paramount, we will be seeking to expand the use of parental education programs, authorizing judges to mandate attendance in appropriate cases. These programs can help litigants put their children's needs first as they make their way through the legal process.

In the area of foster care and child welfare, our Family Courts are facing a tidal wave of their own. New York State currently has over 50,000 children in foster care. Tens of thousands of new child neglect petitions are filed each year. The New York courts have been working hard over the past year to find new approaches to reduce the amount of time that neglected children spend in foster care limbo. We have instituted function-based divisions in the New York City Family Court to reduce case-churning gridlock and allow judges to focus on systemic problems. We have launched pilot Family Treatment Courts to target the issue of substance-abusing parents. And we have initiated a model Expedited Permanency Part that is challenging almost every aspect of "business as usual" in the handling of child protective cases.

In the very near future, New York State's implementation of the federal Adoption and Safe Families Act will dramatically change the legal landscape of the Family Court. New mandates and new timeframes will unquestionably increase the workload of this already overburdened tribunal. We all have the same goal – improving the lives of New York's children. Let's continue

to work together – through legislative initiatives, pilot projects, ongoing programs of reform – to find the new approaches that move us closer to that goal.

Jury Reform

I know the theme of this address is fresh approaches, new ideas. But hard as I try, I can't avoid a favorite old idea: jury reform. We have made great progress since the issuance of The Jury Project report five years ago. Terms of service are down, frequency of summoning is down, juror fees are up, juror respect for the system is up – way up.

This past year, we began doing some follow-up on one of the more controversial reforms of the jury program, the repeal of the lawyer exemption from jury service. I asked attorney Greg Joseph to head a committee of lawyers who had performed jury service to see how the repeal of the exemption had affected the system, and to see whether lawyers could suggest further reforms.

As one of their projects, the Committee randomly surveyed attorneys registered in New York State on their jury experience. One of the survey's most interesting findings lays to rest the fears of those who predicted that summoning lawyers would be a waste of time because they would never be selected to sit on a jury. The survey shows that attorneys are in fact being selected to sit on cases, and they are being selected at just about the same rate as nonlawyers who report for service. One jury even had seven lawyers!

I am officially releasing the terrific report of Mr. Joseph's committee today. I hope you'll pick up a copy.

On the legislative front, the most recent extension of the law that ended mandatory sequestration of jurors in all but the most serious criminal cases will expire this year. I urge the Legislature to expand this law and make it permanent. An analysis of the first 18 months' experience with the temporary version found that it had spared nearly 6,000 jurors the burden of separation from their homes and families, and saved the State almost two million dollars in court employee overtime and food and lodging expenses. The court system is proposing a permanent amendment that would leave the issue of sequestration to the discretion of the trial judge in all criminal cases, except for capital matters. The experiment was a success! Let's acknowledge that and get rid of mandatory sequestration once and for all.

Legal Services for the Indigent

Thus far I've spoken mostly about changes we can make in our court system where we can measure the results – reduce the time to process cases, increase the number of orders issued, reduce recidivism, save tax dollars. I want to speak for a moment about some changes that we need where the impact is less easy to quantify, because it goes to the quality of the justice our courts provide. I want to speak for a moment about legal services for the indigent in this State.

If "equal justice under law" is to be more than simply words chiseled above a courthouse door, we must have an adequately funded, adequately functioning system of civil legal services for those who need, but cannot afford, lawyers. Last year, I appointed a task force, chaired by attorney Michael Cooper, to survey current conditions and recommend strategies for improvement. The first sentence of their report sums up the current situation: "In recent times,

only a fraction of the civil legal needs of the poor have been met, and the resources available to meet those needs have shrunk while the number of persons in need has grown."

The task force proposed a prudent strategy for addressing this problem: creation of a State Access to Justice Fund, a permanent entity that would serve as a focal point for the identification, receipt and distribution of funds to civil legal services programs. They also suggest amending the State's Abandoned Property Law to create a permanent and dedicated funding stream. Both ideas have great merit. We are at a crisis point – we must continue our efforts with the Legislature to come up with a workable plan.

Another area that cries out for change is the current schedule of assigned counsel fees under section 18-B of the County Law. The current law provides for $40 an hour for in-court work and $25 an hour for out-of-court time. These rates have not changed since 1986. In the past 13 years, plumbers, teachers – even judges – have gotten much deserved raises. If we are committed to quality justice, we simply cannot let another year pass without action on this issue.

In the past, the fiscal implications for local governments have derailed reform. To break the deadlock, the courts are proposing not a far-ranging study commission, but the creation of a highly-focused action group to convene immediately and set new rates, subject to statutory override. With a representative membership – including appointees of local governments, the Executive, the Legislature and the courts – we believe this represents a realistic vehicle for achieving greatly needed reform.

Court Restructuring

I know I've laid out an ambitious agenda – revision of the Rockefeller Drug Laws, matrimonial reform, sequestration legislation, programs to support civil legal services and raise 18B assigned counsel rates. You'd think that would keep us busy, especially when we expect to receive close to four million new cases in the State system this year. But of course, there is one fundamental change we need to achieve – one that can help us better manage that enormous caseload, one that would produce significant savings for the taxpayers of this State. That change is, of course, a constitutional amendment to restructure our Byzantine trial court system.

Let me just read the list of major trial courts in our State system: we have City Courts, Civil Courts, County Courts, Courts of Claims, Criminal Courts, District Courts, Family Courts, Supreme Courts, and Surrogate's Courts. How many of you could explain all those jurisdictional boundaries? How many of you could understand them? Once again, I urge that we replace this welter of tribunals with a simplified scheme: a Supreme Court with unlimited jurisdiction, and a District Court with limited jurisdiction over civil and criminal matters.

About a week ago, during the Annual Meeting of the State Bar Association in Manhattan, the Fund for Modern Courts sponsored a rally for court restructuring at Fordham Law School. I wish you could have seen the enthusiasm, felt the energy of the hundreds of representatives of community groups, bar groups, civic groups that attended. They know, as we know, that court restructuring will make the courts easier to understand, easier to navigate, easier to manage.

When I got up to speak at the rally, I was reminded of a homely metaphor I had heard used on one of the Sunday morning news shows – the "ox in a ditch" metaphor. As the phrase was explained, an ox is a large, powerful animal – one of the strongest on the farm. An ox can move

mountains. But an ox, once it gets stuck in a ditch, just can't get out on its own. It takes everyone pulling together to get that ox out of the ditch.

Court restructuring is a mighty idea, a powerful idea, an ox of an idea, an idea that can move mountains. I feel certain that if we all pulled together, we could get that ox out of the ditch and put it to work building a court system for the 21st century.

Conclusion

I've talked today about a number of areas where change is needed to help the State courts carry out their mission of delivering justice fairly and effectively into the next millennium. Make no mistake – these calls for reform are a sign of strength in the judiciary, not weakness. They mean that we are aware that the world is changing around us – and aware that that means we must change too.

As we approach a new century, I pronounce the state of the judiciary to be strong: strong in our commitment to the rule of law, strong in our desire to provide fair and efficient service, strong in our ability to deliver justice in a rapidly changing world.