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MAINE'S OVERDUE JUDICIAL REFORMS

Peter L. Murray

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MAINE'S OVERDUE JUDICIAL REFORMS

*Peter L. Murray**

I. INTRODUCTION

The recent mandate to all organs of Maine state government to make major budget cuts in a time of international economic distress has focused attention on the fiscal and operational condition of Maine's Judicial Branch. A symposium on March 30, 2009 at the University of Southern Maine presented various perspectives on the role of Maine's judiciary as the twenty-first century unfolds, and the need for adequate resources to maintain the Judicial Branch as a vital and functioning branch of our tripartite system of government. It is clear that much of the challenge faced by our Judicial Branch is that of educating Maine's politicians, citizens, and constituencies on the vital role of Maine's courts and the importance of prioritizing funds to enable the Judicial Branch to do its work.

On the other hand, sometimes a focus on lack of resources can divert attention from serious structural issues in Maine's judicial system. We are blessed with a judiciary of high integrity, competence, and industry.¹ Many aspects of Maine's judicial function are modern and well suited to the tasks at hand.² But there are also respects in which Maine's judicial establishment has retained forms and institutions that better reflect values, technology, and political realities of the nineteenth century than those of the twenty-first. There is an urgent need for reform of some of these outdated elements of our justice system—not only to make the system more efficient, but also to provide Maine's citizens with a better quality of justice. The purpose of this Article is to remind us of three reforms to Maine's judicial establishment that are indeed overdue and to encourage us to push hard to bring all aspects of Maine's court operations into the twenty-first century.

First of all, the basic tiered structure of our courts of first instance, district, superior and probate, is a relic of the nineteenth century. The movement to unify these courts that began in the 1990s should be brought to its logical conclusion with the creation of a single Maine Trial Court.

Second, the Maine county probate courts with part-time elected judges comprise an embarrassing anomaly in a system otherwise free of judicial elections

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1. In recent decades, at any rate, justices of Maine's Superior and Supreme Judicial Courts, and judges of Maine's District Courts have been selected on a largely merit basis. Competition for the opportunity for judicial service has been keen, resulting in appointments of highly-qualified individuals. Maine's judiciary has a tradition of hard work and high integrity, which earns it the confidence and approval of the bar and the public.

2. For instance, Maine was one of the first states to adopt new rules of civil procedure based on the Federal Rules of Criminal Procedure. In general, the rules governing procedure in the trial courts and the Law Court are modern and kept up-to-date by continuous review by volunteer advisory committees and consultants. Since the 1970s, Maine has had professional administration of judicial operations through a state court administrator and administrative office of the courts.

and part-time judges. The probate judges should be phased out and the new Maine Trial Court should exercise probate jurisdiction.

Third, Maine's system of appellate justice, with only one true appellate court, has long been under stress because of overstretched resources. It is time to reorganize existing judicial resources to include an intermediate appellate court that can provide quality appellate review in the general run of cases and thus permit the Maine Supreme Judicial Court, sitting as the Law Court, to focus on guiding the work of the Judicial Branch and on hearing and deciding cases of unusual significance.

The foregoing structural reforms should bring the structure of the Maine judicial system into the first rank of modern American judicial systems. The need for reform, however, does not stop here. The operations and practices of our civil and criminal courts were originally developed at a time when Maine's citizens traveled on foot and horseback, when writing was done with quill pen on paper, and when oral discussion could take place only in the immediate vicinity of all the participants. Those days are long past. Developments in travel, information handling, and communications have rendered many of the operational practices of Maine's civil and criminal justice systems obsolete and inefficient. The structural reforms urged herein must be complemented by a rigorous overhaul of operations before we get a court system that will serve Maine's citizens efficiently and well under twenty-first century conditions.

II. JUDICIAL REFORM IN TIMES OF TRAVAIL

When one speaks of judicial reform today, the instant response is that times are too tough to consider changing anything or doing anything new. There is not enough money to do what we always have done. By definition there are no resources to make any changes. Perhaps when times get better

Rather than undertake new initiatives, the usual response to fiscal stringency by institutions such as court systems is to do things the same way they have been, but to do less. Hours are cut, services are reduced, and employees are laid off. But the structure of the system remains the same. Even if a courthouse is closed, the basic pattern of court sittings is maintained, as far as resources allow. It is a process of gradual starvation as the organization seeks to do as much of what it always has done as it can stretch the resources to allow. The current way of doing things continues as the framework for reduced operations.

But the truth is that tough times are the best times to make changes and reforms. It is the tough times that demonstrate the structural weaknesses and failings of existing institutions. There is greater reason to enact reforms that increase efficiency and save resources in times when funds are tight than in times when funds are relatively plentiful.

So also is the psychology of reform. When everything is going well and there is a sense of material well-being it is hard to argue that things should be fundamentally changed. It is easy to address systemic problems and inefficiencies by simply adding resources. Times of budgetary stringency compel us to take a very hard look at our expectations of all institutions and to strive to see how our real priorities can be addressed with greater efficiency. Reforms that promise more

performance of what really counts for the same or less resources become interesting and attractive.

Perhaps the silver lining in the difficult times that now face Maine's judicial establishment is the impetus to reform our court systems to enable them to meet our current and future needs and priorities in the most efficient manner possible. Reforms and changes that merely add resources to meet perceived increased needs will not have much chance of consideration when there are not public funds enough to go around. However, measures designed to provide more and better justice with the same or less financial resources are another matter. To the extent that the Judicial Branch and its supporters propose reforms that reduce redundancy and bring court operations more in line with modern day needs and conditions, we can expect that our colleagues in the Legislature will be interested and responsive.

The elephant in the room with any proposal to increase efficiency in court operations by consolidation of court operations, modernizing court practices, or reassigning workloads, is the fact that most of the cost savings and efficiency gains come from the elimination of jobs and the consequent reduction of expenditures for salaries, wages, and fringe benefits. In 2008, Maine's court system in its various facilities around the state employed some 440 clerical and staff personnel, amounting to an average of seven staff for each sitting judge.³ In the 2010 fiscal year, the total paid to judges in Maine will be \$9,889,829, compared with compensation paid to judicial staff of \$26,723,689.⁴ Efficiency gains from completion of the unification of the Maine Trial Court will largely come from consolidation of clerical functions and the elimination of a number of redundant clerical positions. Folding probate jurisdiction into that of the general courts will phase out not only the part-time elected probate judges, but could also lead to reductions in staffing in probate offices around the state.⁵ Consolidation of places of court sittings will lead to the elimination of jobs of court maintenance and security personnel.

It is submitted herein that a reorganized court system in Maine can provide civil and criminal justice even more efficiently than it is presently provided with a much smaller staff by accepting the realities of modern transportation and taking advantage of the potential of present day communications and data processing capabilities. However, those who currently work in the courts have in many cases devoted their careers to the provision of justice in the form that it has been provided historically. They are honest, dedicated, and competent. It is hard to consider structural reform of our judicial establishment without considering what

3. ME. JUD. BRANCH, STATE OF ME. JUD. BRANCH ANN. REP. (2008), available at http://www.courts.state.me.us/maine_courts/annual_reports/annualreport/ar-08/index.html (last visited Mar. 28, 2010).

4. Financial data provided by Ellen M. Hjelm, Budget Officer, Maine Judicial Branch. This does not include the probate courts, which are supported by county budgets. In the probate courts as well, the cost for staff salaries exceeds those paid to the probate judges. For example, in Oxford County's 2009 budget the probate judge was paid \$25,341, whereas the registrar, deputy, and part-time clerk typist together received \$73,321. OXFORD COUNTY PROBATE BUDGET (2009), available at <http://www.oxfordcounty.org/Budget09/probate.pdf> (last visited Mar. 28, 2010).

5. Probate courts currently employ a significant number of professional and administrative staff in counties throughout the state, even excluding the elected probate judges and registers of probate. See *supra* note 4.

such reform could mean to these public employees.

For this reason, a component of any program of judicial reform must be a phase-in process that eases the adverse effects of the change on the staff of the courts. The gains in efficiency that reform can bring cannot be reaped all at once. An orderly process of implementing reforms over several years will allow maximum opportunity to those affected to restructure their own financial lives to accommodate the change, whether by retirement, reassignment within the court system, or obtaining public or private employment elsewhere.

This does not mean that the reform program should be cut back or curtailed in the interest of saving jobs. Half-measures will not meet the present challenge. We should adopt a firm blueprint for a reformed Maine Judicial Branch, but carefully stage the implementation of the blueprint over time in such a manner as to minimize disruption of the lives of people who depend on judicial employment for their livelihoods. Such a phase-in should not endeavor to preserve the status quo for anyone indefinitely or for any considerable period of time. Reassignment, retraining, reorganization of work tasks and workplaces all need to go forward—but in a manner to protect actual employment long enough to cushion the burden of change on employees.

By the same token, the psychology of public institutions and their leadership has long tended to be “the bigger, the better.” Growth in staff and budget has been seen as a strong desideratum and a hallmark of success for public as well as private enterprises. In most modern contexts, success is not associated with shrinking. Reform programs that reduce the size of public bureaucracies are not popular with those who have made government service their careers.⁶ It can be hard to convince a government employee that she needs fewer personnel, less real estate, and fewer resources to do her job, rather than more.

Efficiency-oriented reform in times of shortage must overcome these understandable impediments to change. Much can be accomplished by focusing on an image of Maine’s judiciary as a “lean, but not mean” branch of government that renders high-quality civil and criminal justice very efficiently by readiness to set aside historic structures and adopt new ways to doing things. As reform cuts back on its overall size and weight, Maine’s justice establishment can take pride in its

6. See generally Steven Kelman, *Downsizing, Competition, and Organizational Change in Government: Is Necessity the Mother of Invention?*, 25 J. POL’Y ANALYSIS & MGMT. 875 (2006). Kelman’s research has shown that organizational change is most effective where an organization’s leadership is perceived as not responsible for the crisis or restructuring. *Id.* at 889. This extends to situations where downsizing is initiated even because of external impacts. *Id.* Thus, although the prevalence of budgetary constraints which have frozen or reduced budgets in thirty-nine states through the 2010 fiscal year are undeniable, it could be argued that reductions in size will be most effective in terms of increasing efficiency and achieving successful change where employees perceive the change as not inimical to the “social contract” that ensures employee security. *Id.* at 883. For more information on state budget shortfalls and their impact on staff, see NATIONAL CENTER FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2009* at viii (2009). In a 2008 survey, of the eighteen states that responded to the query, “What personnel actions are being taken (or considered) if your state is facing economic cutbacks?” fifteen contemplated instituting a hiring freeze. *Id.* at 6-7. The impact of these freezes will inevitably be felt primarily in support staff and operations. Therefore, efficiencies are necessary rather than desirable—but Kelman’s research implies that restructuring and reallocation of judicial functions that are implemented to minimize and slow the impact on staff, as proposed in this Article, would be preferable to any wholesale reductions or layoffs.

compactness, its relentless efficiency, and its focus on quality.

III. UNIFICATION OF THE TRIAL COURT

The structure of Maine's trial courts dates back to the nineteenth century, when cases of consequence were tried by single justices of the Supreme Judicial Court and minor judicial matters were handled by municipal court judges and trial justices.⁷ The creation of the state-wide Maine District Court in 1960 represented a significant reform at the time, but continued the division of first instance courts into two levels, one of which was perceived as "superior" to the other in terms of importance of matter and prestige of judge. Over the last half-century, the size and importance of legal matters confided to the District Court, as well as the perceived competence and experience of the persons appointed to the District Court bench, has markedly grown. Appeals from the District Court no longer go to the Superior Court, but are heard directly by the Law Court.⁸ Historical limitations on District Court jurisdiction in terms of the size of claims entertained and the kind of relief available have been greatly expanded.⁹ Nonetheless, the dual system of trial courts has been maintained, and Judicial Branch initiative to consolidate the two courts into a single court of first instance has been conspicuously absent.

As Maine has continued to modernize its judiciary and the facilities that it uses, the illogicality of maintaining two separate (and not equal)¹⁰ first instance courts has become more and more apparent. In many locations separate and duplicate District and Superior Court facilities are maintained within a few hundred yards of each other with completely separate clerical and support staffs.¹¹ Hearings are scheduled separately in the two different courts. It has become apparent even to laypersons that two separate trial court systems, each with its own judges,

7. WILLIAM WILLIS, HISTORY OF THE COURTS AND LAWYERS OF MAINE: FROM ITS FIRST COLONIZATION TO THE EARLY PART OF THE PRESENT CENTURY 88-89 (Lawbook Exchange 2006) (1863).

8. Prior to 1999, most appeals from District Court judgments were heard in the Superior Court, from which there was an additional right of appeal to the Law Court. In 1999, the Legislature made District Court judgments appealable directly to the Law Court. P.L. 1999, ch. 731, § ZZZ-7. This was one result of the work of the Task Force.

9. Currently, the District Court has jurisdiction over civil actions without monetary limit in which no equitable relief is demanded (and which are not otherwise within the exclusive jurisdiction of the Superior Court) as well as in a variety of specialized matters that do involve equitable relief. ME. REV. STAT. ANN. tit. 4, §152 (1989 & Supp. 2009).

10. See John C. Sheldon, *The False Idolatry of Rules-Based Law*, 56 ME. L. REV. 299, 300 (2004).

11. These include courts in South Paris and Lewiston. There are few exceptions, such as the pilot project of the Cumberland County Unified Criminal Docket. *Establishment of the Cumberland County Unified Criminal Docket*, Me. Admin. Order No. JB-08-2 (Jan. 2009). Although current plans call for a renovation of the Piscataquis County Superior Courthouse to house both the Superior and District Courts on a single floor, this plan does not unify the administrative functions of those courts. Diana Bowley, *Official Urges Court Renovations*, BANGOR DAILY NEWS, Dec. 18, 2009, available at <http://www.bangordailynews.com/detail/133022.html> (last visited Mar. 28, 2010). The new Bangor courthouse, which combines the Penobscot County Superior Court and Bangor District Court in a single facility, similarly does not feature a combined docket. Judy Harrison, *New Courthouse Provides Judiciary 21st Century Stage*, BANGOR DAILY NEWS, Nov. 11, 2009, available at <http://www.bangordailynews.com/detail/130439.html> (last visited Mar. 28, 2010). However, according to the clerk at the courthouse, the criminal docket will likely be combined in the near future.

courthouses, and support staff, may be a luxury that the state of Maine cannot afford.

It was the Maine Legislature that initiated consideration of consolidation of Maine's trial courts in 1997. By resolve, the Legislature directed the Chief Justice of the Supreme Judicial Court to convene "a task force to develop recommendations to implement the unification of the Superior and District Courts."¹² Over the next eighteen months, the Court Unification Task Force (Task Force), under the chairmanship of retired Chief Justice Vincent McKusick, heard from many constituencies and interested parties, including the judges and justices of the various courts and their staff.¹³

It soon became evident that there was serious opposition to unification of the trial court on the part of many Superior Court justices, as well as clerks and staff members, who feared personnel cuts in a consolidated court. Ultimately, the Task Force contented itself with half a loaf.¹⁴ Following the example of Massachusetts, where an effort at court unification in the 1970s had fallen short,¹⁵ the Task Force recommended that District Court judges and Superior Court justices receive the same pay and that there be free cross-assignments of judges between the courts, but stopped short of recommending a real unification of the two courts into a single court.¹⁶ Superior Court justices retained their titles and prestige, and each court system retained its full administrative and support staff. These recommendations were enacted into law and put in practice with general approbation.¹⁷

While there is no doubt that the Task Force process resulted in useful reforms, the post-Task Force profile of Maine's trial courts is a far cry from the unified single trial court that was envisioned by the Legislature and by proponents of judicial reform in general. The reasons why court unification appeared to be a good idea to the Maine Legislature in the 1990s continue to apply, and with greater force, in the present hard times. A system of two statewide generalized trial courts, with separate jurisdictions, judges, and support staff, is surely a historical anomaly that Maine can no longer afford.

The unnecessary cost and inefficiency inherent in the two-layer system is patent. Assigning judges to regular judicial duties based on the courts in which they are appointed, rather than the needs of the litigants, inevitably results in over- and under-utilization of judicial person-power.¹⁸ However, the biggest sources of excess costs of two systems are likely to be found in the courthouses and clerks'

12. L.D. 1372 (119th Legis. 1997).

13. STATE OF ME. CT. UNIFICATION TASK FORCE, TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS 3 (1999) [hereinafter CUTAF REPORT].

14. *Id.* at 11.

15. The Massachusetts court unification movement resulted in the creation of a statewide Trial Court, but retained the previously existing trial courts as departments within the unified court. Carl Baar, *Trial Court Unification in Practice*, 76 JUDICATURE 179, 183 (1993).

16. The Task Force recommended a number of other administrative and jurisdictional measures designed to improve court operations. One of them was to shunt appeals from District Court judgments directly to the Law Court, thus reducing the appellate burden of the Superior Court and increasing the caseload of the Law Court. CUTAF REPORT, *supra* note 13, at 17-22.

17. P.L. 1999, ch. 731, §§ ZZZ-1 to ZZZ-42.

18. This inefficiency has been mitigated, but is no way eliminated, by introducing free cross-assignment based on the recommendations of CUTAF.

offices in terms of duplicative personnel, record-keeping, courtrooms, and support staff.¹⁹ Although cross assignment does help, it is anomalous that Superior Court litigants in some counties only have access to a judge a few months each year, while District Court litigants in the same counties can go before a judge every week.

The notion that District Court judges are inferior in competence or experience to Superior Court appointees is belied by the remarkable and consistent quality of appointees to both benches over the last decades. The argument that it will not be possible to attract candidates of the highest quality to the Superior Court unless its bench remains a more exclusive group is similarly obsolete.²⁰

It has been argued that the skill of conducting jury trials is a special skill that not all judges can acquire and must be fostered within a special group of specially trained and experienced jurists. This is simple poppycock. With jury trials a relatively rare occurrence nowadays, it may well be wise to assign the actual conduct of jury trials to judges who have some special competence or experience in this form of judicial activity. However, that is a mere matter of trial assignment, not court organization.

Although most of the American states started like Maine with a tiered system of first instance courts, there are several states with unified trial courts, and the number is growing.²¹ In the District of Columbia, the Superior Court handles all first instance civil and criminal matters, from small claims to serious criminal offenses.²² The same is true of California, where the Superior Court is the only statewide court of first instance jurisdiction.²³ In Kansas, there is a unified District Court, which exercises all civil and criminal jurisdictions except for minor local traffic offenses.²⁴ According to the National Center for State Courts, ten states, plus the District of Columbia and Puerto Rico, have state court systems that are at least partially unified.²⁵

One question that always comes up in connection with court unification is how the unified court will be designated. In most states that have unified their trial courts, the new court has borne the name of the “higher” of its combining predecessors. So, for instance, in both the District of Columbia and in California, the unified trial court is the “Superior Court.” On the other hand, the term

19. The paperwork necessary to accomplish jurisdictional transfer would be eliminated under unification. This is an example of one of the many administrative efficiencies that would be found in unification.

20. For example, the two most recent appointees to the District Court, Beth Dobson and Daniel Driscoll, both boast long and impressive resumes.

21. The National Center of State Courts maintains a website for court unification. NCSCOnline.org, Court Unification Resource Guide, <http://www.ncsconline.org/wc/courttopics/ResourceGuide.asp?topic=CtUnif&mode=pf> (last visited Jan. 8, 2010).

22. 24 AM. JUR. 2D *District of Columbia* § 22 (2009).

23. ADMIN. OFF. OF THE CTS., CAL. JUD. BRANCH FACT SHEET 6 (2009), available at http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial_Branch.pdf (last visited Apr. 25, 2010).

24. Kan. Jud. Branch, KAN. DIST. CTS., <http://www.kscourts.org/kansas-courts/district-courts/default.asp> (last visited Jan. 7, 2010).

25. The states are California, Connecticut, Illinois, Iowa, Kansas, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin. NCSCOnline.org, Court Unification FAQs, <http://www.ncsconline.org/wc/courttopics/FAQs.asp?topic=CtUnif> (last visited Jan. 7, 2010).

“superior” is linguistically a term of comparison, implying that there is another similar lower or “inferior” body. In some states, such as Kansas, a neutral geographic term, “District Court” describes the largely unified trial court. In Massachusetts an effort was made to refer to the partly unified court of first instance as the “Trial Court,” but the new term never really caught on, probably because complete unification never took place, and the judges remained judges of their pre-existing courts. Ultimately, the name of the court is less important than its actual existence.²⁶

It is high time to finish the job that the Task Force started. With a single court of general jurisdiction for all civil and criminal matters, Maine can indeed make efficient use of whatever resources are available to provide the best service to litigants and the highest quality of justice for the public. Questions of jurisdiction and removal would be obsolete. Costly duplicate facilities can be phased out. Records systems can be unified and rationalized. And judicial resources can be deployed to meet the need without the hindrance of obsolete court structures and designations. Other than the minimal costs of implementation (because of the phased approach), the financial impact of this reform would be inevitably positive. In short, unification’s promise is one of better judicial service at lower cost—not bad in these difficult times.

IV. PROBATE COURT REFORM

Another nineteenth century anomaly in Maine’s judicial picture is the organization and staffing of our county probate courts.²⁷ There is no statewide court of probate jurisdiction. Each county has a probate court, which is supported by the county budget and staffed by county personnel. The result of this is that probate justice is not administered on a statewide basis and is not supported by statewide tax revenues. It is a creature of county government and is supported by the real estate tax.²⁸

However, the most serious shortcomings in Maine’s probate courts from a policy standpoint are the selection of probate judges and their part-time status. Maine has long prided itself as belonging to the minority of American states that select their judges by gubernatorial appointment with state senate confirmation. Since the District Court was organized in 1960, all judges in Maine’s courts of general jurisdiction have been full-time. The probate courts remain as an embarrassing exception to this picture of modern judicial structure. Probate judges are elected in popular elections to four-year terms.²⁹ They campaign for election

26. The term “Maine Trial Court” is used herein to refer to the unified court of first instance recommended by this Article.

27. See WILLIS, *supra* note 7, at 51-55.

28. This means that the quality of probate justice for Maine’s citizens depends on the fiscal condition and generosity of the respective counties and the priorities of county government. See, e.g., Dennis Hoey, *York County Lays Off Two Dozen*, PORTLAND PRESS HERALD, Sept. 15, 2009 (cutbacks in probate justice support in York County as a result of a county budget crunch).

29. The method of selection of probate judges is specified in the Maine Constitution:

Judges and registers of probate, election and tenure; vacancies. Judges and registers of probate shall be elected by the people of their respective counties, by a plurality of the votes given in, at the biennial election on the Tuesday following the first Monday of

and receive campaign contributions from lawyers who appear before them. They perform their judicial duties part-time and appear before each other as lawyers for litigants in contested matters.³⁰

There is no point in taking space to document the many shortcomings of an elected judiciary. Much of what is wrong about judging in America can be directly traced to the practice of political election of judges in a majority of the American states. The corrupting influence of campaign contributions on judicial integrity has been documented in both fiction and United States Supreme Court decisions.³¹ Although no record of campaign finance abuse has been documented in Maine probate court elections, the fact is that candidates for probate judgeships routinely do solicit contributions from lawyers who routinely appear before them. The appearance of improper influence is hard to wipe away.³²

The fact that Maine probate judges also practice law and can appear in litigated matters before probate judges in counties other than their own also raises problems. A probate judge who is judging a case presented by a colleague is surely conscious that the colleague might soon be judging one of his cases—as it is said, “one hand washes the other.” A lawyer opposing a probate judge acting as lawyer in a contested matter must be aware that his adversary may be his judge in another matter. These subtle but powerful influences have no place in a system of justice.³³

Maine has been fortunate that we have not yet experienced a serious scandal arising from these attributes of the probate courts; however, the potential for

November, and shall hold their offices for 4 years, commencing on the first day of January next after their election. Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the November election, next after their occurrence; and in the meantime, the Governor may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid.

ME. CONST. art. VI, § 6 (added by ME. CONST. amend. IX, effective February 28, 1856).

30. Probate judges routinely take part in proceedings before other probate judges. Even if a probate judge who thus appears does not intend to take advantage of his or her position, it is hard to assure opposing parties or the general public that the conflict of interest will not affect the outcome of some proceedings. See *In re Estate of McCormick*, 2001 ME 24, 765 A.2d 552; *infra* note 34.

31. See, e.g., JOHN GRISHAM, *THE APPEAL* (2008); *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

32. For instance, Robert Nadeau, a probate judge in York County, has chosen to refuse to hear cases if the lawyer representing the party has run against him for election or supported an opponent. This could negatively impact those lawyers and their clients, regardless of whether the intent is to reduce the appearance of impropriety. See William H. Simon, *The Prudent Jurist*, LEGAL AFFAIRS, July-Aug. 2004, available at <http://www.legalaffairs.org/printerfriendly.msp?id=591> (last visited Mar. 28, 2010).

33. In 1993, the Maine Futures Commission, a group established by the 114th Legislature in an effort to plan for the judicial needs of the twenty-first century, recommended that the part-time probate judges be replaced by four full-time judges who would become integrated with the Judicial Branch. This was in part because of the “appearance of impropriety” discussed herein. As part of that recommendation, the Maine Futures Commission also suggested a phased implementation as the serving probate judges retired. COMM’N TO STUDY THE FUTURE OF ME’S CTS., REPORT: NEW DIMENSIONS FOR JUSTICE 72 (1993). However, in *In re Estate of McCormick*, the Law Court ruled that the practice of probate judges appearing as counsel in contested matters before their part time judicial colleagues did not amount to an unconstitutional denial of due process of law. 2001 ME 24, ¶ 15, 765 A.2d at 558.

scandal is always there.³⁴ And there is no question that in an age that sees a large number of contested proceedings taking place in probate courts, there is uneasiness on the part of many lawyers and litigants about the impartiality of the judges, especially when there is another probate judge on the other side of the case.

Over the past half-century, there have been proposals to abolish or phase out the probate courts as the anomalies that they are and to transfer probate jurisdiction to a full-time probate court or to one of the courts of general jurisdiction.³⁵ To date all have failed, ostensibly because of the political power of the probate judges. It is hard to see how any sixteen part-time judges can exercise so much power in Maine's body politic that they can continue to frustrate such an obviously overdue reform.

In fact, if Maine completes the unification of its courts of first instance, there is no reason why that unified court could not exercise probate jurisdiction as well. This is how it is done in many of the other jurisdictions that have unified their trial courts.³⁶ The trial court could hold probate sessions, and judges could be assigned to handle probate business as a defined part of their duties. However, the court would be a unified statewide court and the judges would be full-time appointees. It could also be expected that there would be savings in both facilities and personnel from the consolidation, since the duplication of administrative services, including support staff, clerks, and registrars, could be eliminated.

V. REFORM IN APPELLATE JUSTICE

Over the last half-century, the volume of appeals presented to the Law Court each year has grown more than tenfold.³⁷ At the same time, the responsibilities of the justices who hear these appeals have greatly expanded.³⁸ Finally, the appellate

34. See COMM'N TO STUDY FAM. MATTERS IN CT., FINAL REPORT TO THE 112TH LEGISLATURE 10-11 (1986) (noting the "serious potential conflict of interest existing when part-time probate judges are also part-time practicing attorneys").

35. See, e.g., *id.*; NEW DIMENSIONS, *supra* note 33 (recommending the appointment of four full-time probate judges); ME. PROB. L. REVISION COMM'N, REPORT TO THE LEGISLATURE AND RECOMMENDATIONS CONCERNING PROBATE COURT STRUCTURE (1980) (recommending transfer of probate jurisdiction to the Superior Court); COMM. FOR THE STUDY ON CT. STRUCTURE IN RELATION TO PROB. AND FAM. L. MATTERS, REPORT TO THE JUDICIAL COUNCIL (1985) (recommending the elimination of part time probate judgeships); INSTIT. OF JUD. ADMIN., REPORT: A DISTRICT COURT FOR MAINE (1961). See also L.D. 1614 (123rd Legis. 2007) (allowing the transfer of registry of deeds and probate functions to the Secretary of State and courts); L.D. 992 (121st Legis. 2006) (allowing for the elimination of probate judgeships and the transfer of the functions to Superior and District Courts, giving the clerk of Superior Court supervisory authority over register of probate); L.D. 1012 (120th Legis. 2005) (requiring that probate judges and registers of probate be appointed by county commissioners).

36. For instance, in California and the District of Columbia, the unified Superior Court exercises the jurisdiction that the Probate Courts have in Maine. See *supra* notes 22 & 23.

37. In the period 1950-1965, the Law Court disposed of an average of sixty-four cases per year. By the end of the 1990s, the Law Court's caseload, after peaking at more than 1000 cases, appeared to stabilize at around 800 cases per year. Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 47-48 (2000).

38. The work of the Maine Supreme Judicial Court includes oversight of the entire Judicial Branch, including the education of lawyers and admission to the bar, discipline of lawyers, issues of judicial competence and conduct, and a variety of related administrative matters. Although the court is assisted

jurisdiction of the Superior Court over the probate and district courts has been gradually eliminated, so that any party who wants a single “second look” at the facts or law in his case must go to the Law Court to get it.

These circumstances have stretched the resources of the Law Court, particularly the time and energy of its justices, to a dangerous point. In 1999, a comparative study of the Law Court and its caseload documented the excessive work burden on Maine’s only appellate court and the consequent risk of dilution of justice.³⁹ This burden has not decreased since.⁴⁰

Although the Law Court has adopted various practices aimed at increasing its efficiency and the efficiency of its opinion-writing justices, the effect of many of these measures is to limit or reduce the depth and extent of judicial consideration of matters raised in appeal. For instance, appeals in both workers’ compensation and post-conviction matters have become, in essence, discretionary. The former are screened by a special law clerk at the court and are considered by the justices only if a panel of the court deems them worthy of review.⁴¹ The same is true of appeals in-post conviction matters, which are discretionary as a matter of law.⁴²

The growth in the Law Court’s caseload as well as other duties of the justices has been accompanied by a rise in the “affirmance ratio”—that is, the proportion of cases in which the result below is simply affirmed by the Law Court without modification. Compared with about 70 percent in the 1960s and early 1970s, the affirmance ratio as of 1999 was 90 percent overall and 95 percent in criminal cases.⁴³ For an overburdened court, the pressure to affirm with little explanation as opposed to reverse or modify with much explanation is easy to understand.

The caseload of the Law Court includes both more or less routine cases in which the task of the appellate court is to correct errors of procedure or law in the decision below, as well as cases that raise legal or constitutional issues of an importance that transcends the interests of the parties to the case. It seems likely

by an administrative office headed by the Maine Court Administrator, many matters are of necessity handled by justices themselves.

39. Murray, *supra* note 37, at 66. This was not the first time that the caseload of the Law Court and its effect on the quality of justice had come under study. Between 1979 and 1981, the Institute of Judicial Administration performed a study of the operations and workload of the Law Court that recommended various measures to improve operational efficiency, but concluded that an intermediate appellate court was not necessary at that time. However, the study noted that an intermediate appellate court should be considered if filings increased in the future. INSTITUTE OF JUDICIAL ADMINISTRATION, FINAL REPORT: THE FUTURE OF THE APPELLATE PROCESS IN MAINE, 16 (1981) [hereinafter 1981 IJA APPELLATE REPORT].

40. Overall, Law Court appeals caseloads were approximately 800 cases per year at the time of the 2000 study. In the last three years for which reports are available, namely 2006, 2007, and 2008, the Law Court reported appellate filings of 760, 774, and 755 cases respectively. ME. JUD. BRANCH, 2006 ANN. REP.; ME. JUD. BRANCH, 2007 ANN. REP.; ME. JUD. BRANCH, 2008 ANN. REP.

41. ME. REV. STAT. ANN. tit. 39-A § 322 (2001). The Author has been advised by members of the Supreme Judicial Court that the cases are prepared for panel consideration by a special workers compensation case law clerk, who recommends to the panel whether cases should be accepted for review.

42. ME. REV. STAT. ANN. tit. 15 § 2131(1). *See also* ME. R. APP. P. 19(a), (c).

43. Murray, *supra* note 37, at 49. The affirmance ratio in 2009 was approximately 85 percent, including administrative appeals and excluding cases dismissed for mootness or other procedural failures.

that the latter receive a thorough and thoughtful review from the Law Court even under the current circumstances. However, it is also important that the justice system have the appellate capacity to give litigants some confidence that errors and mistakes in the adjudication of their routine cases will be carefully considered and corrected.

When the *Maine Law Review* article, “Maine’s Overburdened Law Court: Has the Time Come for a Maine Appeals Court?” was published in 2000, the reaction from some members of Maine’s judicial establishment was that the concerns expressed in the article were real and that it would be nice to have a Maine Appeals Court as recommended by the author, but that the cost was simply unaffordable.⁴⁴ However, if we are thinking of structural reforms of the fundamental character recommended in this Article, it should certainly be possible to realign current elements of the judicial system to provide for an appropriately-sized intermediate appeals court without any increase in the judicial budget. Detailed below is one way in which that could be accomplished—and there are certainly many other potential configurations that would be equally cost-neutral.

The Maine Appeals Court can be initially constituted with three full-time appointees, supplemented by active retired judges and justices from the Maine Trial Court or the Maine Supreme Judicial Court. Each of the full-time judges would have a law clerk. There would be a small central staff of clerk and administrative personnel. The court would use existing courthouses for its sittings.

Since the three judges of the Appeals Court would be materially lightening the burden of the Law Court, a logical step would be to reduce the size of the Supreme Judicial Court by one or two justices, the savings from which could more than fund a corresponding number of Appeals Court judges and their staffs. The Appeals Court would also be taking over a significant part of the remaining appellate-type jurisdiction of the Superior Court, consisting of judicial review of administrative agency action under Maine Rules of Civil Procedure 80B and 80C.⁴⁵ This circumstance as well as gains in efficiency from completion of the unification of the Maine Trial Court could justify the transfer of a judgeship and related support costs from the budget of the Trial Court to that of the Appeals Court. Thus, the biggest items of additional costs would be covered by rearranging existing judicial resources to correspond with the restructuring of the reformed judicial institutions.

It is fair to say that in those states which have added intermediate appellate courts in recent years, there has been a general recognition that the quality of justice has improved, both at the supreme court level, where more time has been freed up for the most significant cases and for administration of the Judicial Branch, and in the form of more careful consideration of many routine appeals that previously got insufficient attention in the single-level appeal process.⁴⁶ It is

44. The Article suggested that a Maine Appeals Court would cost about \$1.7 million annually, which would be less than 5 percent of the budget of the Maine Judicial Branch at that time. Murray, *supra* note 37, at 76.

45. ME. R. CIV. P. 80B & 80C.

46. For example, seven years out from the establishment of the Nebraska Court of Appeals, “the number of cases disposed of by the Nebraska Supreme Court dropped from 1022 per year in 1990 to 305 per year in 1997.” Murray, *supra* note 37, at 72-73. Moreover, “the Nebraska Court of Appeals’ contribution to the total caseload grew . . . to 1111 cases per year. . . [and] [t]he Nebraska Supreme

submitted that the experience would be similar in Maine. The justices of the Supreme Judicial Court would have more time and energy to devote to the most significant appeals, to their many other functions as single justices, and to general leadership and administration of the Judicial Branch. Lawyers and litigants who believe that they received short shrift at trial would have a real expectation that their claims of error would receive thorough attention and consideration by three appellate judges with enough time to do a careful job.

As of the writing of this article, Maine is one of twelve states (including the District of Columbia) that have only a single appellate court to hear all appeals.⁴⁷ It is fair to say that all of these states are grappling with the same problem. In recent decades, many states with populations and legal establishments similar to Maine's have created intermediate appellate courts.⁴⁸ As a part of a reform package that includes the completion of trial court unification and integration of the probate courts, the creation of a Maine Appeals Court and the reallocation of resources to support it are both feasible and practical.

VI. COURT OPERATIONS IN THE TWENTY-FIRST CENTURY

As has been suggested more than once above, the basic structure of Maine's trial and appellate courts was established in the nineteenth century and has continued with little alteration to the present day. The same goes for many aspects of court operations, including the locations of courthouses, the times and manner of holding court sessions, the way in which records are kept, and the manner in which the court system interfaces with the public. Now, as funds get tight and even tighter, the Judicial Branch cries out that it cannot continue to operate the way it has in the past with the funds that are being made available to it. Unless more funds are made available, some of these operations will have to be curtailed. There may be less clerk time, reduced court hours, even a few less court locations, resulting in curtailment of service to the public and longer delays. However, the basic pattern and mode of operations remains the same as it has for more than a hundred years.

These hard times are the best times to take a real look at much of what has up to now seemed to be sacrosanct, and see whether the current way of doing things is really the best way to do them in the twenty-first century. Our current court system was designed when people traveled around Maine by horse and buggy and by train, when people exchanged written communication in letters carried to their destinations, and when oral communication had to be face-to-face.⁴⁹ Today, most Maine residents have access to a car, and can communicate in writing by fax, e-

Court's yearly number of published opinions dropped from 345 in 1990 to 227 in 1995, a decrease of 34%." Murray, *supra* note 37, at 72-73. Similarly, the Mississippi Court of Appeals relieved that state's overburdened supreme court of 25 percent of its backlog within two years. *Id.* at 73. In Utah, during the decade after the addition of its intermediate appeals court, the affirmance rate was reduced to 55.7 percent from 69.8 percent. *Id.* at 74.

47. The others are Delaware, the District of Columbia, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

48. For example, Nebraska (1991), Mississippi (1995), and Kansas (1977).

49. Except for the development of the train, land transportation and communication in the nineteenth century were essentially the same as they had been for at least 500 years.

mail, text message, and even Twitter. Further, oral communication can be shared instantly between parties anywhere in or outside the state by wired and wireless telephony. What kind of a system for applying and enforcing the law and resolving disputes should we design for this environment?

It is not the purpose of this Article to describe the court system of the twenty-first century in any detail.⁵⁰ However, it is clear that the revolutions in transportation and communication of the last century have affected the most efficient and effective way to perform the business of the courts. At one time, it was considered important that there be a staffed courthouse in every town of certain population so that citizens could have access to justice. Nowadays, it might be more important that the judicial system have a sophisticated web-based interface that can perform a number of judicial functions that formerly were done on paper and in person. A century ago, it was important to store court records in fireproof safes to protect the paper they were written on. Now, backed-up computer systems might be a better alternative for all data storage. Indeed, the law libraries of bound volumes reaching back to England are giving way to electronic databases and laptop computers.⁵¹

The key is for the court system in Maine and all the states to think creatively and find ways to render justice efficiently and effectively under the conditions that now exist and will continue to evolve.

VII. CONCLUSION: THE WILL AND ENERGY TO GET THE JOB DONE

It is not enough to make the case for fundamental structural and operational reform of Maine's justice system in law review articles, or even for judges and lawyers in discussions among themselves to agree that such reforms would be desirable, or even important. In a democratic society, there is no "philosopher prince" who can make reform happen if he is convinced that it is in order. If we really believe that Maine's judiciary can and should be modernized and reformed in the senses suggested above, it will be a hard and likely long job.

First of all, it is unrealistic to expect that any agenda of thoroughgoing reform, or the planning and policy work to get it done, will come from the Judicial Branch. While many judges may be more or less convinced that their institutions need some degree of reform, the effect of the reforms on the concrete expectations of many members of the Judicial Branch will be change. It is a human characteristic to be wary of change. Conditions have to become very bad before a change will be

50. Obvious areas in which reforms can be made include a dramatic consolidation of the number of locations where court services are provided. For instance, one can question whether it makes sense to provide jury trials at every county courthouse in the state. The cost of maintaining the apparatus to provide jury trials in every county in the state may not be justifiable when the number of jury trials conducted in many of these counties is only a handful a year. Consolidating jury trials at only four or five locations within the state could provide significant operational efficiencies and save costs.

Another area of urgent need for reform is electronic record keeping and document filing. Although there has been some recent progress in this regard, the court system appears to be lagging behind business and other organs of government in adoption of efficiencies of the digital age.

51. The Penobscot Judicial Center houses the Penobscot County Law Library. Most of the books have been removed to the Husson University Law Library, and the courthouse library consists of a small room with the Maine statutes and reports, a few treatises, and four computer terminals.

perceived as an improvement. This circumstance, plus the Judicial Branch's traditional reluctance to become embroiled in political discussion, means that the Judicial Branch should not be expected to provide leadership in the movement to reform judicial institutions and structures.

In the past, the Maine Legislature has come forward with proposals for judicial reform that have borne fruit. For instance, the Task Force was the product of a resolve of the 119th Legislature.⁵² On the other hand, the Legislature has limited facilities and staff to conduct the research and planning that would be necessary to effectuate the reforms that are urged herein. While legislative leadership should be kept abreast of developments as the reform measures are crafted, the heavy lifting of reform package development will probably have to be done by others. By the same token, although the governor and his office can provide vital leadership in getting the reform movement underway and obtaining legislative and budgetary support of the results, it is probably not realistic to ask the governor's staff to undertake the hard work of hammering out the direction and details of the reform measures.

Ultimately, it appears that the most likely mechanism to achieve and effectuate significant reforms to the Maine judicial system will be some kind of task force sanctioned by the Legislature, guided by the Supreme Judicial Court, but staffed largely by members of the bar and legal academics who would do the bulk of the work. Even if funds were available to hire a consultant there would be a great deal of work for a steering committee or other group charged with making the reform proposal a working reality. Of course, the task force would include members of the judiciary as well as lawyers, legal academics, representatives of the Legislative and Executive Branches (including the Office of the Attorney General), and representatives of the public. The talent available from the Maine bench, bar, academy, and governmental establishments is fully up to the challenges posed by this Article.

In the final analysis, it is a question of will to get the job done. There can be little doubt about the desirability of improving the quality and efficiency of civil and criminal justice in the state of Maine. Although our judges and judicial staff struggle mightily with the resources that they have available, it is evident that they are working in an outmoded framework and using obsolete technology to deliver justice in the twenty-first century. The question is whether those most immediately aware of and affected by the need for reform are ready to come forward and see to it that the job is done. How many symposia, how many bar journal and newspaper articles, and how many frustrating experiences for lawyers or litigants will it take to energize enough of the bar, bench, and political establishment to undertake a reform agenda?

In 1999, Chief Justice Saufley wrote an article about the need for reform of appellate justice in which she referred to the story of the frog in a pan of water in which the temperature was gradually increased until the frog died.⁵³ It has taken a long time for the judicial system to become as seriously out of date as it currently is. Judicial obsolescence in the face of change in the environment around it is a

52. See *supra* note 12.

53. Justice Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 51 ME. L. REV. 18, 18 (1999).

gradual process. It is easy to do little or nothing as things gradually become worse. Like the frog, sometimes our fundamental organs of government need a shock to impel them to jump out of the water. Will the travails imposed on the justice system by the current hard times help us generate the will to address reforms that have been needed for a long time?