

Municipal Courts Task Force
Submission of Steven H. Shiffrin

I am grateful for the opportunity to speak to you. I am a Professor of Law emeritus at the Cornell Law School. I taught constitutional law specializing in the First Amendment for nearly 40 years primarily at UCLA and Cornell. For most of those years I was Of Counsel to Irell and Manella, a large Los Angeles law firm. I have been engaged in criminal defense work in New York on a limited part time basis since 2013. My remarks today are primarily based on my examination of well over a thousand pages of materials including the testimony before the New York Assembly Committees studying Reform of the New York State Justice Courts, the testimony before the Special Commission on the Future of the New York State Courts (the Dunne Commission), the Report of the Commission, entitled *Justice Most Local: The Future of Town and Village Courts in New York State*, and the oral and written submissions to this Commission.

I want to discuss the issue of the qualifications to be a judge in a Justice Court particularly in criminal cases and to explore whether being “close to the people”¹ accurately describes the Justice Courts and whether it is a good thing to the extent it does.

¹ The argument that Town and Village judges are close to the people recurs throughout the testimony in support of the present system’s structure. See, e.g., Testimony of Allyn Hammell before The Special Commission on the Future of the New York State Courts 240 (Rochester, New York, Sept. 25, 2007); Testimony of Judge Thomas Disalvo, *id.* at 48; Testimony of Judge James Dwyer, *id.* at 130; Testimony of Judge Dennis Young, *id.* at 179; Testimony of Judge Michael Sciortino, *id.* at 260; Testimony of Judge Biaggio DeStaphano before The Special Commission on the Future of the New York State Courts 26 (Ithaca, New York, June 26, 2007); Testimony of Judge Marie Roller, *id.* at 82; Testimony of Judge Richard Roberg, *id.* at 180.

I share the view that most lay judges are dedicated, work hard, strive to be fair,² and for the most part perform an exceptional public service. In particular we are fortunate that many of these same lay judges are extremely well educated, quite smart, and have distinguished backgrounds.

Nonetheless, despite the commitment of these judges, there is considerable testimony to the effect that lawyer judges are needed to handle parts of the docket of the Justice courts (or at least that it would be better if such judges were lawyers). The authors of the Action Plan, Chief Judge Kaye and then Judge now Chief Judge Lippman maintained that lawyer judges would be superior.³ Kaye took the position that a lawyer judge should be a constitutional requirement in criminal cases.⁴ A number of important organizations do not have confidence in the capacity of lay judges appropriately to handle important parts of their docket. They include the New York State Bar Association,⁵ the New York Civil Liberties Union,⁶ the New York Association of Criminal Defense Attorneys,⁷ the New York State Coalition Against Domestic Violence,⁸ the New York State League of

² Contra to the *New York Times*, I do not share the view that lay judges are less professionally responsible from an ethical perspective than lawyer judges though the testimony suggests a greater problem with ex parte communications. See Testimony of Edward J. Nowak, Public Defender Monroe County before the Dunne Commission in Rochester, *supra* note 1, at 73; Testimony of Joseph Fazzary, District Attorney of Schuyler County before the Dunne Commission in Ithaca, *supra* note 1, at 106-07.

³ Testimony of then Judge Jonathan Lippman in the hearings on Reform of the New York State Justice Courts before the Assembly Standing Committee on Judiciary and the Assembly Standing Committee on Codes 48 (Dec. 14, 2006).

⁴ *People v. Charles F.*, 60 N.Y.2d 474, 477-81 [1983][dissenting].

⁵ Testimony of Lorraine Power Tharp before the Assembly Standing Committees, *supra* note 3, at 65; Testimony of Judge John Rowley before Municipal Courts Task Force (Sept. 16, 2015).

⁶ Testimony of Corey Stoughton before the Assembly Standing Committees, *supra* note 3, at 277, 280. See also Testimony of Gary Pudup before the Dunne Commission in Rochester, *supra* note 1, at 116-22.

⁷ Testimony of Greg Lubow before the Assembly Standing Committees, *supra* note 3, at 293.

⁸ Testimony of Connie Neal before the Assembly Standing Committees, *supra* note 3, at 134. *Cf.* the testimony of Cathy Mazzotta before the Dunne Commission in Rochester representing the Monroe County

Women Voters,⁹ and, with respect to landlord tenant cases, Legal Assistance of Western New York.¹⁰ In addition, the Dunne Commission concluded that a defense attorney should have the absolute right to remove a case after arraignment (before substantive motions or a trial is scheduled) from a lay judge's court to the court of an attorney judge.¹¹ My own experience as a law professor is that it takes at least two years of legal education even in very good schools for a substantial number of students to catch on to the complexities of legal culture, to be able to read case and statutes carefully, and to know how to assess arguments within that culture. Many take longer. And when they graduate, these students know very little about New York law. The requirement that they practice for at least five years before becoming a City Court judge strikes me as a vital qualification.

Domestic Violence Consortium which is comprised of some 45 agencies, *supra* note 1, at 210-17(critical of Town and Village courts handling of Domestic Violence issues and recommending a District court).

⁹ Testimony of Barbara Bartoletti, before the Dunne Commission, *supra* note 1, at 50 (Albany, New York, June 13, 2007) ("Some non-attorney judges are excellent and some attorney judges lack temperament, but on balance, modern justice standards call for judges who are educated in the law. The public cannot be confident in the fairness and accuracy of court proceedings unless judges are at least as well trained as the prosecutors, defenders, and other lawyers in their courts").

¹⁰ Testimony of Martha Roberts on behalf of Legal Assistance of Western New York before the Dunne Commission in Rochester, *supra* note 1, at 187-88, 196. *Cf.* Kevin Kelly, Executive Director of Legal Assistance of Western New York, Testimony before Municipal Courts Commission, *supra* note 5 (expressing view that lawyer judges had greater knowledge of law without taking position on the course Tompkins County should pursue).

¹¹ Justice Most Local: The Future of Town and Village Courts in New York State: A Report by the Special Commission on the Future of the New York State Courts 17 (September, 2008)(the Dunne Commission) http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf. The Dunne Commission maintained that the removal provision of CPL § 170.25 is inadequate. *Id.* at 64-66, 93-95. A similar proposal was made by the New York City Bar Task Force on Town and Village Courts. For discussion, see *id.* at 445-47.

I do not think it is an adequate answer to suggest that lay judges bring a degree of humanity and common sense to the bench that lawyers do not possess.¹² Of course, there are thousands of lawyers who have no business being judges. But the notion that lawyers who seek to be judges are warped human beings in comparison to those who did not go to law school is simply indefensible stereotyping. In fact, the empirical evidence now clearly demonstrates as the realists have argued for more than a hundred years that lawyer judges like juries often bend the law to conform to their perception of just outcomes.¹³ Nonetheless, the suggestion that the law is common sense or that common sense should generally be privileged over law is way off the mark. Most areas of law are complicated as any law student can tell you. In particular, as an inexperienced criminal lawyer, I have spent countless hours confronting the complicated and often counterintuitive character of New York criminal procedure law, evidence law, and criminal law, and those complications abound not just in felonies and misdemeanors, but in violations as well. Finally, in this connection, the testimony of the New York Civil Liberties Union and several of the other organizations suggests to me that the common sense or lack of knowledge of too many lay judges results in not just bending the law, but departing from it by denying important statutory or constitutional rights and

¹² See, e.g., Testimony of Gerald Pickering, Chair of the Monroe County Enforcement Council in Rochester before the Dunne Commission in Rochester, *supra* note 1, at 247 (“Sometimes we feel that attorney judges get so caught up in points of law that they forget common sense”); Testimony of Judge Michael Sciortino, *id.* at 266 (lay judges “often had a better grasp of common sense of their communities than their colleagues with law degrees”).

¹³ Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart v. Head: Do Judges Follow the Law or Follow Their Feelings*, 93 *Texas L. Rev.* 855 (2015). According to Professor Rachlinski, it may be that newer judges lay or lawyer are more likely to follow the law to the letter than experienced judges. They may be more concerned with getting the law wrong in the early going. In that connection, the average five year turnover among lay judges (Testimony of James Morris before the Dunne Commission, *supra* note 1, at 10) appears to be greater than lawyer judges. It may be that on the whole lay judges are somewhat less likely to apply “common sense” to legal outcomes – which may or may not be a bad thing.

liberties. That is unacceptable, and that is why numerous organizations are calling for lawyer judges.

I also do not think it is an adequate answer to say that judges in Justice Courts have access to a resource center that will answer legal questions. As an advocate representing a client, I want the person who renders judgment to read my brief. In this respect, there is a substantial difference between a law clerk who provides advice and a resource center. In addition, my sense with a resource center is that the act of judging too often shifts to the center. Needless to say, resorting to the center in that way mocks the notion that the Justice Courts are closest to the people.

But I have more serious problems with the “closest to the people” argument. First, the term “people” is always metaphorical particularly given the low turnout in local elections. The second relates to what Mark Solomon asked about. As the Dunne Commission observed, the “vast majority” of litigants in Justice Courts are not residents of the town or village in which they are tried. In a third of the cases litigants travel more than twenty miles to get to court. 46% travel more than 10 miles. In fact, 40% of the litigants are not even from the same county.¹⁴ If the judges are close to the people, they are not close to the vast majority of the litigants who appear before them. When they are close to the litigants, it is fair to be concerned that in some cases familiarity can bring favoritism or a hostile bias.

¹⁴ *Supra* note 11, at 53.

Third, as the Dunne Commission¹⁵ and other sources including Chief Judge Lippman,¹⁶ and Ithaca Town Supervisor Herb Entman,¹⁷ have recognized, a substantial portion of fees and fines levied in Justice Courts go back to the localities. The localities financially support the Justice Courts including the salaries of the Justices. This is an obvious conflict of interest. The Dunne Commission concluded that this creates perverse incentives and shows that those incentives have apparently driven judgments in a number of courts.¹⁸

More generally, I would argue that even if judicial elections are a good thing at some level of government, – I don't think so - it strikes me they are a particularly bad thing in smaller election districts. The danger is that judges will represent their sense of the people as opposed to being fair, impartial, and independent which often will require the rendering of judgments that the people won't like. I am reminded of the remark of Otto Kaus, one of California's greatest appellate judges. He strongly believed that he had a duty to be independent and that he should ignore the fact of elections, but he said "You

¹⁵ *Id.* at 76-80. The Dunne Commission's estimated that the percentage of revenue captured by the towns and villages was 50%. *Id.* at 77. It relied on a small sample size, however. *Id.* at 77 n. 144.

¹⁶ *Supra* note 3, at 34. The numbers Lippman provided suggest that the percentage going back to towns and villages was between 38 and 40%. Lippman indicated that these courts play a "vital role in relation to the fiscal health of local town and village governments." Given the incentives of the system described by the Dunne Commission (see *infra*), it by no means clear that this is a good thing. Cf. Testimony of Gerald Pickering before the Dunne Commission in Rochester, *supra* note 1, at 247 ("I hesitate to mention this. I realize that courts are not supposed to be money making institutions, but the reality is, to lose the town court and the money generated would be a hardship on any municipality").

¹⁷ See

http://www.tompkinscountyny.gov/files/tccog/Shared_Services/Municipal_Courts_Task_Force/Stakeholder_Input/Engman.pdf (last paragraph). Engman indicated that the percentage going back to his town was about a third.

¹⁸ *Supra* note 11, at 77-79. The Executive Director of the New York Conference of Mayors testified to the Assembly Committees that Villages generally do a cost/benefit analysis of Village courts. One third of the Villages at the time had decided not to have courts. Testimony of Peter Baynes before the Assembly Standing Committees, *supra* note 3, at 255, 259.

cannot forget the fact that you have a crocodile in your bathtub while shaving in the morning.”¹⁹

Given that Town and Village justices can qualify for the ballot with no educational qualifications, no character checks, and no job experience, we have been fortunate that those elected have in the main served so well. I am aware that the anecdotal evidence marshalled against the Justice Courts could be paired with anecdotal evidence against lawyer judges. And I recognize that many lay judges have overcome their lack of legal training to develop legal acumen comparable to or better than most lawyer judges. But surely that is not the norm.

It seems clear that individuals who graduate from law school, pass a bar examination, and practice law in New York for at least five years generally have far better training than the overwhelming majority of lay judges.²⁰ In addition, I find it decisive that respectable organizations lack confidence in the ability of lay judges to handle portions of their current docket in comparison to lawyer judges. Those portions at least include criminal cases (I would include any violation where the prosecutor would ask for incarceration of the defendant) and landlord-tenant cases. The creation of a limited jurisdiction district court – a court that might send some revenues back to the Towns

¹⁹ For discussion, see Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971 (1997). Uelman comments that if an outstanding judge like Otto Kaus had to “struggle like Prometheus to avoid being influenced by political threats, what about all the judges who do not measure up to Otto Kaus?” *Id.* at 974.

²⁰ Of course, these individuals need regular additional training. Judge Schlee in his submission to this Commission maintains that judges need social worker training. http://www.tompkinscountyny.gov/files/tccog/Shared_Services/Municipal_Courts_Task_Force/Stakeholder_Input/Schlee.pdf. There is much to this. Judges and attorneys need training in the dynamics of domestic violence, drug and alcohol addiction, mental health issues, the recidivism problems caused by fines and fees imposed on indigents, the collateral consequences of convictions including housing, employment, and welfare, and the extent to which jail sentences do or do not contribute to public safety including the potential impact on recidivism to name a few.

and Villages – would leave the Justice Courts with the bulk of their jurisdiction, and would assure that those threatened with incarceration or with eviction from their homes or apartments would in the main be judged by persons with stronger qualifications than the current system affords. That creation would seem to require state legislation and a majority vote of the affected electorate.²¹ Failing that, I would favor state legislation permitting removal from a lay judge court to a lawyer judge court along the lines recommended by the Dunne Commission, revised to be limited to Tompkins County²² and to include both violations where incarceration is recommended by the prosecutor and landlord tenant cases.²³

²¹ N.Y. Const. Article 6 § 16.

²² The Town and Village Codes include numerous state provisions containing specific exceptions for various towns and villages. The Dunne Commission believed that retention of lay judges was a practical necessity because in many rural areas lawyer candidates for judges would not emerge. *Supra* note 11, at 70-71. *Accord*, Chief Judge Lippman, *supra* note 3, at 15. See also Testimony of State Senator George Winner to the Dunne Commission in Ithaca, *supra* note 1, at 9-10. It is unlikely that would be an issue in Tompkins County. See also Testimony of State Senator George Winner to the Dunne Commission in Ithaca, *supra* note 1, at 9-10.

²³ http://www.nycourtreform.org/Justice_Most_Local_Part2.pdf at 253-54.