

Thank you Speaker Hughes/President Niederhauser for the privilege of addressing this distinguished body. I am pleased to be joined by Associate Chief Justice Lee, Justice Durham and our new justices, Himonas and Pierce. They are superb additions to our court. It is one of the great privileges and pleasures of my life to work with four colleagues who are not just exemplary jurists, but also extraordinary people.

My wonderful mother was a tough and remarkable woman. She raised eight children on my father's seminary teacher salary and was fearlessly loyal to each of them, even to me, who as a lawyer-to-be was annoying even by teenage boy standards. She insisted on coming to my BYU junior varsity basketball games, despite the fact that my participation usually consisted of hoping against hope that, in a fit of irrationality, the coach might put me in. So I seldom had the opportunity to endanger the other team with my rough play. Our games were in the 20,000 seat Marriott Center, and I am guessing that, including my mom, there were usually 16 or 17 people in attendance, scattered around that vast arena.

It was a very different story when, several years later, she attended my brother Devin's games. Not only did he actually play, he was a star. She and my father sat close to the floor, just in front of the seats set aside for LDS General Authorities, who dutifully watched the games in suits, white shirts, and ties. She never missed an opportunity to point out a referee's missed call. And in my mother's eyes, the referees missed many, many calls—all fouls that she felt had been inflicted upon her dear son. She was close enough to actually be heard by the refs, and with her big voice, believe me, she was heard. Whether that did more harm than good for Devin, I'm not sure. But he is BYU's all-time leader in free throws attempted.

My father, a gentle and modest man, was often uncomfortable with the volume and harshness of my mother's criticisms of the referees, especially within ear shot of the general authorities. But he sat there helplessly, knowing there was little he could do about it. He did feel much better one game, however, when a general authority leaned over and said, "Marilyn, thank you for yelling all of the things that I want to, but can't."

Well, I'm grateful that I feel no such constraint in addressing you today. There are a number of things I very much want to share with you (I hope with a little more objectivity than my mother showed), and I appreciate this opportunity to do so. And as much as I love basketball, these things are much more important.

In the past, I have principally used these remarks to speak on the state of our judiciary. Let me assure you, our state's judiciary is sound, and I will address that briefly later in my remarks, but I'd like to begin by discussing certain values and the efforts we have made this year as a judiciary to promote them. Each year seems marked by a sense of turmoil and unrest in the world. This year, that sense seems particularly acute. Media reports provide a forceful and daily reminder of the challenges we face as a nation. As I've read these reports, I am reminded that we must stay grounded in the values that provide continuity and make us strong. In particular, the values of fairness, access to justice, individual rights, and public safety are essential to the strength and continuity of our state. They are values shared by all Utahans.

This year, the judiciary focused on four initiatives to balance and strengthen these values. Let me start with an issue you know well, the Justice Reinvestment Initiative, or JRI. This act seeks to enhance fairness in sentencing and to provide defendants with increased opportunities to receive treatment, thereby reducing the stress on our prisons while advancing access to justice and public

safety. It would not be an overstatement to describe House Bill 348, which implemented JRI, as the most significant change in Utah criminal justice policy in decades. Not only does it effect significant substantive change in our criminal law, it requires a significant cultural change, as well. It may be the latter that ends up being the most difficult challenge.

The most significant substantive changes went into effect in October. Have those first several months been without problems? No, of course not. With changes of this magnitude we expected transitional issues, and in this, we were not disappointed. Anyone who expected a flawless transition did not fully appreciate how drastically JRI changed Utah's criminal justice system. Since the Act's impact on Utah criminal justice policy requires a certain amount of phasing-in, some processes and tools await further implementation.

As noted, perhaps the most difficult change required by JRI is a cultural one. The judiciary, like other actors in the criminal justice system, must meet that challenge. Judges are now expected to use a more objective approach to sanctioning offenders than they are used to, and they now rely on tools and reports they have never seen before. To that end, we have provided extensive training to our judges in evidence-based sentencing and practices, as well as in the legal requirements of the new law. The courts are committed to realizing the full potential of JRI.

While these transitional issues will soon fade, of greater concern is an issue that is not transitional—inadequate treatment resources. The provision of treatment for defendants with substance use and mental health needs was at the heart of JRI; yet, so far, the necessary resources have not been provided. The Act was predicated on the demonstrated fact that it is more effective to treat substance abuse and mental health needs—which prevents recidivism—than to imprison. To this end, JRI reduced the supervision and incarceration aspects of the equation, but we have

not added the treatment programs and funding necessary to replace the reductions in supervision and incarceration. Without adequate treatment resources to balance the equation, the promise of this model will not be realized.

On this point I need to be clear—if treatment is unavailable, not only will the system fail to improve, it will likely worsen. Putting offenders who would previously have gone to jail or prison back into the community, without treatment, will almost certainly increase crime. Passage of the Justice Reinvestment Act was clearly the right decision, but it was conceived of as a complete package and somehow the treatment side of the equation must be addressed.

Now let me turn to the values I mentioned earlier—fairness, access to justice, individual rights, and public safety. Judges are in a unique position. Though we have a very limited policy role, we encounter the concrete consequences of numerous policy issues that relate to these values. I believe that with this perspective comes a responsibility to raise issues for discussion that may not otherwise be addressed. In this way, we in the judiciary serve as conveners. We bring various stakeholders together to examine these issues and to explore potential solutions to identified problems. We then usually present whatever consensus proposal there may be to you, the legislature, for your consideration of possible action. We believe this shared process has served Utahans well.

As conveners, over the last several months, we have concluded three collaborative studies that address issues important to the people of Utah. They concern indigent representation in criminal cases, pretrial release practices, and access to civil justice.

First, indigent representation. The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by

an impartial jury..., to be informed of the nature of the charges against him, to be confronted with the witnesses against him..., and to have the assistance of counsel for his defense.” Over the years, caselaw has defined this right to assistance of counsel to require states to provide a lawyer to those who cannot afford one in any case where there is a potential sentence of incarceration. In Utah, provision of this right has been delegated by the state to local government.

This year, a judicial council committee concluded an extensive multi-year study of how Utah is carrying out this constitutional responsibility. The committee was broadly representative, including legislators, judges, prosecutors, defense lawyers, and others involved in the criminal justice system. The committee’s report—some 192 pages—was presented to the Utah Judicial Council in October and identified three problems and three solutions.

As an initial matter, the committee found that there is a lack of oversight of how counties and municipalities comply with the constitutional mandate to provide lawyers to indigent defendants. As a result, little information is available on how this responsibility is being administered. In addition there is a dearth of operational or performance standards for these local indigent defense systems. As a solution, the committee recommends that a statewide, representative commission be created, which would set data collection standards, compile that data, and monitor the appointment and performance of defense counsel. This requires your assistance. Senator Weiler, who along with Representative McCay served on this committee, will introduce legislation this session to create the statewide indigent defense commission recommended by the committee.

Second, the way in which many counties and municipalities contract with defense lawyers often creates disincentives for those lawyers, disincentives that work against the effective delivery of legal services. The solution is to reform the contracting process by standardizing the structure of

contracts between local governments and defense counsel. And many cities and counties have already addressed the contracting issue by revamping their contracts, and have developed and disseminated model uniform contracts.

Finally, the committee identified a lack of consistency in information and procedures, primarily in courts with misdemeanor caseloads, which has resulted in a failure to obtain adequate waivers of counsel, or a failure to appoint counsel, when required. This problem needs to be addressed through training and through implementation of mandatory uniform procedures and forms. And, in fact, the Administrative Office of the Courts has already provided this training and will continue to do so, and the Judicial Council is in the final process of adopting and requiring the recommended forms and procedures.

While everyone involved in addressing this issue agreed that there are shortcomings in Utah's indigent defense system, they also agreed that the needed solutions are apparent, and well within reach. We should collectively act to implement these solutions, and in so doing promote fairness, access to justice, individual rights, and public safety.

The second discussion that we convened addressed pretrial release practices, or what is commonly referred to as the bail process. The perception of most people about the bail process is likely based upon television shows like Law and Order or The Good Wife, where a judge is often shown setting bail in the hundreds of thousands of dollars in hopes of keeping the accused behind bars pending trial. But in reality, the bail process is far more complicated and important than these TV shows portray. It has profound implications for the accused, for public safety, and for taxpayers.

There is much research about what an effective and efficient pretrial process should look like.

Five characteristics are essential. First, a smart pretrial process uses a short validated assessment to predict which detainees are likely to flee if released, and which are likely to commit new offenses if released. Outside of Salt Lake County, Utah does not use this best practice.

Second, an efficient pretrial release process quickly releases defendants who are not likely to flee or commit a new offense. Generally, Utah does not do this, either.

Third, a safe pretrial release process identifies those defendants who are truly a danger to the public and does not release them into the community before trial, offering no release on bail. In Utah, we do not have adequate tools to determine which defendants truly are a threat.

Fourth, an economical pretrial release process saves tax dollars by not using valuable jail space, as we do now, to hold thousands of defendants pending their court date who pose no risk to flee or re-offend.

And finally, a fair pretrial release process does not make defendants' wealth the deciding factor for whether they are released pending trial. In Utah, if defendants can raise enough money to meet the financial bail requirement, or 10% of that amount so that they can engage a bail bond surety, they will be released. If they don't have those funds, in jail they will stay pending trial, which means separation from their family and often a loss of their employment, with the accompanying loss of income. And as we learned from JRI, confinement in jail will forcibly expose them to a criminal culture, and research tells us they will then be more likely to commit crimes in the future. And remember that for all of these people this all occurs before they have been tried, so they are presumed innocent.

The study committee, composed of prosecutors, defense lawyers, judges, regulators, representatives of local government and the bail bond industry, as well as Representative Hutchings and Senator Hillyard, prepared 12 sound recommendations ranging from creating a statutory presumption in favor of pretrial release without financial conditions to instituting a validated pretrial risk assessment process for use in every jurisdiction.

The research in this area, and the experience of other states, has led to a national consensus about evidenced-based pre-trial release practices. Even the general public intuitively understands that these practices make sense. Independent polling shows that the vast majority of respondents support the approach recommended by the study committee. Senator Hillyard is sponsoring legislation that will move our state in this direction and better ensure fairness, protect individual rights, and promote public safety. I encourage your thoughtful consideration of the committee's recommendations.

The proposals I have outlined to this point relating to JRI, access to criminal defense counsel, and fair pretrial release practices are all consistent with the sound consensus of criminal justice professionals across the country. In fact, unlike in so many other important government functions, in these three areas Utah is not ahead of the pack, but rather in the middle of it. Many states have already adopted the best practices, the effective approaches, and the cost-saving ideas I have described, and we need to catch up.

But the last study I want to share with you puts Utah on the cutting edge of innovation and public service when it comes to access to justice. It is a study conducted by a task force appointed by our supreme court. This task force, which again had broad representation, including Senator Urquhart and Representative Brian King, was asked to study the current rules governing the

practice of law and to consider whether to permit qualified non-lawyers to provide certain law-related services currently provided only by lawyers.

The legislature, the court system, and the legal profession have, each in its own way, expressed concern about the growing chasm between the need for legal services and the ability of the average person to afford them. This is not an issue that has been ignored. The courts, with your assistance, are providing direct legal assistance to tens of thousands of self-represented parties every year through our self-help center. These are people who have chosen to participate in a legal proceeding without an attorney, sometimes because they can't afford one, but more and more because they just don't think they should *have to* hire a lawyer.

The Utah State Bar, through its pro bono and modest means programs, has worked hard to place attorneys with clients unable to afford one. As impressive as these efforts have been, they only scratch the surface of meeting the real need. In naming this task force, the supreme court wanted to consider a broader, market-based change to make legal services more accessible.

After studying the few states with similar efforts underway and examining where the need is most pronounced within our own state and court system, the task force recommended an innovative approach that has far reaching implications for improving access to justice in Utah. Last month the supreme court approved task force recommendations that would allow qualified non-lawyers to practice law, on a carefully defined basis, in three areas where legal needs are not being met: debt collection, landlord-tenant, and family law. These specially trained non-lawyers will be called licensed paralegal practitioners. For an analogy to the role they will play, you might think of the role of a physician's assistant in the medical setting.

There is still much to be done, such as finalizing minimum education, certification, and licensing requirements, but we believe this new client and market-driven approach holds great promise—not as a substitute for attorneys, but as a complimentary legal resource for providing meaningful assistance in specific areas where existing legal resources are inadequate but the need is great. The National Center for State Courts is interested in this project and has agreed to conduct an independent evaluation of our experience. I look forward to reporting to you on this initiative in a future address.

As I said at the outset, the state of our courts is sound. Our judges and staff work in an all-electronic environment. It's simply the way work is done now, and we remain one of the few state court systems able to say that. The metrics we use to track performance all show that we continue to increase our efficiency. In the last five years, the average age of cases pending in our district courts has dropped from 337 to 183 days. And we've been able to accomplish this with 81 fewer employees.

As for the court's budget, I'd like to mention just one issue. We have a continuing but acute need for two new judges: a juvenile court judge in the 4th District (Utah, Millard, Juab, and Wasatch counties) and a district court judge in the 5th District (Washington, Iron, and Beaver counties). The existing judges in these courts have for several years been carrying much higher workloads than is appropriate, and the public in these areas deserves your attention to this pressing need. And, while discussing appropriations, let me use this opportunity to sincerely thank you for the step taken last year to address the judicial compensation recommendation of your Elected Officials and Judicial Compensation Commission.

Finally, you may recall my boasting about our courts in my address two years ago, something about the public confidence in our courts being higher than John Stockton's basketball free throw percentage. And I may have modestly mentioned that my brother's percentage was itself higher than Stockton's. We have just recently completed our biannual survey of court users, and I'm pleased to be able to report that they continue to provide high marks. For example, 95% reported they were treated with courtesy and respect, and a like percentage reported being satisfied with their court experience. To give you some frame of reference, a recent national poll found that only 66% of respondents agreed with the statement: "Courts treat people with dignity and respect." I am gratified that we are doing significantly better than that.

As I have said before, I am extremely proud of our judges and staff, and for good reason. Because of the merit-based selection process that you, the legislature, have had in place for many years, we have one of the strongest benches in the country. It is an honor to be part of our state's extraordinary judiciary and to be able to work with such fine people, who, like you, value fairness, access to justice, individual rights, and public safety.

Thank you for the committed service you provide to the people of Utah, and I wish you well with your important deliberations over the next 45 days.