



## **2019 STATE OF THE JUDICIARY**

**Chief Justice Matthew B. Durrant**

Speaker Wilson / President Adams, legislators of the great state of Utah, each year, I look forward to sharing with you my thoughts on the state of Utah's judiciary. I'm joined today by my colleagues: Associate Chief Justice Lee, Justice Himonas, Justice Pearce, and Justice Peterson. Each is a dedicated, thoughtful, and brilliant jurist. I'm also pleased to be joined today by the members of our judicial council. Thank you for welcoming us here today, and thank you for your dedicated service.

I often start my remarks with a story. This year, I'd like to tell you about Walter Arnold. 122 years ago, Mr. Arnold was apprehended by a constable for speeding through Paddock Wood, a village about 40 miles southeast of London. He was operating an Arnold Benz Motor Carriage designed and manufactured by his own company.

I'm sure Mr. Arnold was thrilled to test the limits of his machine. But, as is often the case, the police did not share his enthusiasm. When Mr. Arnold flew past the officer at a blistering rate of four-times the speed limit, the chase was on. Ordinarily, for a vehicle traveling the speed limit at the time, the officer might easily have pursued on foot, at a stroll's pace, because the speed limit was 2 MPH. But in order to apprehend Mr. Arnold, the officer was forced to pursue on a pedal bike. After what I can only imagine was a frenzied and exhausting chase, reaching speeds upwards of 8 MPH, the officer stopped Mr. Arnold. Order and safety were restored to the village roads.

Mr. Arnold was brought to court for his crime, where, upon hearing the case and considering all of the evidence, the judge ordered a one-shilling fine. If my math is

correct, this would be roughly \$8.00 in today's money. A suitable punishment for so heinous a crime.

Mr. Arnold's experience serves as a single example of the beginning of an era of legislative and judicial efforts to address a dramatic social metamorphosis, one driven by the technological revolution. To shed some light on just how dramatic these changes were, we can look to the records of motor vehicle registrations. In 1900, only 8,000 motor vehicles were registered in the United States. Just 20 years later, that number had increased to nearly ten million.<sup>1</sup> Those two decades gave birth to an entire system of laws and conventions that each of us continues to observe today. And none of us questions the need for such rules, especially as we speed toward each other on undivided roadways at a combined 130 miles per hour or more, with nothing separating us from a head-on collision but a series of yellow dashes painted on the pavement and a common understanding of their meaning.

Mr. Arnold's case and the traffic laws to which he was subject illustrate well the familiar process of creating, enforcing, and adjudicating the law. For centuries, the law has charted this same course forward, responding along the way to the need for safety, predictability, and uniformity. You don't need me to tell you that this is the task you as the legislature embark upon today.

And while Mr. Arnold's speeding case was simple and straightforward, it demonstrates one of the major challenges for legislatures and courts in every generation: to create and apply the law in a way that fosters public trust and confidence. Over time, legislative and judicial action shapes, and is shaped by, community values, establishing a common commitment to shared conventions. Widespread adherence to the law results in a more durable social fabric. This is the basis for the rule of law.

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<sup>1</sup> United States Department of Transportation, Federal Highway Administration <https://www.fhwa.dot.gov/ohim/summary95/mv200.pdf> (last accessed Friday, December 28, 2018).

For hundreds of years, scholars and authors have wrestled with defining “the rule of law.” The term is not mentioned in the United States Constitution. Neither is it mentioned in the Utah Constitution. And it is not explicitly defined in the federal or state codes. Yet the rule of law undergirds every aspect of our state and federal governments. The courts of the United States describe the rule of law as “a principle under which all persons, institutions, and entities are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated.”<sup>2</sup> Public participation in, and respect for, our institutions of government is essential.

Yet, like many of you, I read in the national news of widespread political discontent and of warring factions who seem to be irreconcilably divided by their views. Like you, I have seen how tribalism and isolation have disrupted social cohesion. Cynicism causes many to surrender to indifference. A complaint often voiced is that government and the courts have become “too political.” Some believe that politicians do only what’s right for their party, not for the people. Others believe that judges allow politics to influence their interpretation of the law. Very few are insulated from or unaware of these trends.

Let me say clearly – fidelity to the law should never be shaped by or subjugated to a political agenda. Sadly, this is not a universally respected principle. Some seem to forget, or willfully ignore, that the rule of law is a bedrock principle upon which our country and our state have been established. And just as the rule of law has been essential to our strength as a country, when it is undermined, it weakens us immeasurably. At its extreme, undermining the rule of law jeopardizes the health of our democratic republic.

Thankfully, I think these conflicts run more deeply in print and on screens of all sizes than they do in the hearts and minds of the people. The vast majority of Americans are law-abiding citizens who honor the law of the land in their day-to-day

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<sup>2</sup> <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last accessed Friday, January 4, 2019).

lives. And they expect that same commitment from their political representatives and judges. As those who have been elected or appointed to positions of power and influence, it's imperative, now more than ever before, that we meet this expectation and adhere faithfully to the rule of law.

No one is above the law, and no one should be beneath its protections. It is the rule of law that provides accountability and security. There are many ways you can measure a country. You can look to its economic stability, its resources, its governance structure, or the security it provides its citizens. But no measure is more important than a country's respect for and adherence to the rule of law. It is the foundation upon which all else rests. And, in my view, it is the single most important source of our country's greatness.

The rule of law is our shared enterprise. You endeavor to make the law, and we judges strive to interpret the law. Our shared commitment to the rule of law, which we have publicly declared to the citizens of Utah when we were sworn in to our respective offices, must continue to resonate throughout the legislative, executive, and judicial branches.

I have always respected the careful and thoughtful process this body employs in creating our state's laws. I say this not to flatter you, but because I feel certain you are driven by a belief that our communities benefit from working together to seek common solutions to common problems.

Our judges, too, are careful and thoughtful in resolving the cases brought before them. Each day, in each courthouse and in each courtroom, judges work to interpret and apply the laws you have enacted. The issues presented are wide ranging and the details often complex. Arriving at a just result that honors the rule of law requires each judge to take the time necessary to carefully weigh the merits of the matter, the arguments presented, and to ensure that the law is fairly and consistently applied. For the rule of law to have meaning, the public must be able to trust that the right outcome is reached. In this process, each party must have a voice and be respectfully heard. This

concept is as important today as it has ever been, and it can be realized only by investing sufficient time in the case resolution process.

For many years now, the judiciary has worked to quantify the workload that is appropriate for each judge to responsibly bear. This is a critically important calculation; the efficient, timely, and just resolution of cases hangs in the balance. By striking the right balance, judges are able to responsibly and in a timely fashion provide the best possible process to the public.

The judiciary has always appreciated the support that you have provided to ensure there are enough judges available to meet the needs of the people. Currently, the citizens in the third judicial district, composed of Salt Lake, Tooele, and Summit counties, do not have enough district court judges to meet the demand. While the weighted caseload shows that 6.7 additional judges are needed in the third district, the judicial council has requested that the legislature provide four. During the session, you will have an opportunity to vote to approve these new judges. The people need our careful attention to this matter. They rightfully expect timely service from, and access to, our courts, and we can't deliver it without your assistance and support.

In that same vein, Utah is fortunate to have superb judges, and it's important that we continue to attract new judges of the same caliber. For this reason I urge you to adopt the recommendation on judicial salaries of the Elected Official and Judicial Compensation Commission. I also urge you to support our budget request for an increase in salaries for our dedicated clerical staff.

Finally, I'd like to address the challenge both our branches face in ensuring that Utah citizens have access to our justice system. Each of the past seven years, the World Justice Project has looked at how closely the nations of the world adhere to the rule of law, through a survey of 110,000 households and 3,000 experts.<sup>3</sup> The United States has typically fared well in this assessment. But one area in which our system lags

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<sup>3</sup> <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017-2018> (last accessed Friday, December 28, 2018).

dramatically is in the access to and affordability of civil justice. In the 2017-2018 Index, our country ranked 98<sup>th</sup> out of 113 countries in this important metric. National and local studies also support this conclusion. They suggest that roughly 80% of our civil justice needs go unmet each year.

I'm sure we all recognize that this gap is unacceptable. In our effort to bridge it, we in the judiciary have been working on several innovative solutions to increase access to justice. I'd like to share some details regarding two such initiatives, both brilliantly spearheaded by Justice Himonas.

Utah's 2017 court records reveal that in family law cases 69% of respondents and 56% of petitioners were self-represented. In other types of cases the numbers are even more stark – 95% of defendants in eviction cases and 98% of defendants in debt collection cases are self-represented.<sup>4</sup> Yet most people feel ill-equipped to navigate the court system without an attorney and lack confidence in their ability to represent themselves. In 2018, the National Center for State Courts conducted a survey showing that only 36% of people believed they could find the information and tools needed to effectively represent themselves. 62% didn't believe they could effectively do so no matter what resources were provided to them.<sup>5</sup> And yet, many people also report they cannot afford legal representation. These numbers are distressing.

To address this, we have created a new class of legal professional: the licensed paralegal practitioner or LPP, a position akin to the nurse practitioner profession in medicine. This is the result of several years of dedicated work by individuals both inside and outside the court system. Once licensed, LPPs will be able to provide legal advice and assistance in three areas of law affecting a large number of people: landlord-tenant disputes, debt collection actions, and family law matters. LPPs can provide this

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<sup>4</sup> Data from *Licensed Paralegal Practitioners*, Catherine Dupont - Utah Bar Journal, Volume 31, No. 3 (May/June 2018)

<sup>5</sup> Data from "The State of State Courts: a 2018 NCSC Public Opinion Survey" located at <https://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide/2018-State-of-State-Courts-Survey.aspx> (last accessed Friday, December 28, 2018).

legal assistance without undergoing the expense of three years of law school, so they will be able to offer the public a lower cost option than is now available, thereby increasing access to competent legal representation. The first LPPs will begin work later this year.

Another dramatic change we've seen in recent years is that people have grown increasingly accustomed to engaging online with institutions of all types, be it their bank, their school, their doctor, or their government. In response to this shift in public preference and expectation, we're increasing access to the courts through online dispute resolution, or ODR. In its initial implementation, ODR permits parties in small claims matters to resolve their legal dispute without ever entering a physical courthouse. Instead, they can negotiate with each other online using their phone or other device.

This negotiation is asynchronous, meaning it does not require the parties to address the matter at the same time. For instance, one party may communicate a position at the start of the day, while the other party is at work. Later, the other party can respond at a time that is more convenient for him or her. This back and forth exchange of information and ideas can continue over the course of several days, rather than in those stressful minutes just before a court hearing or in front of the judge.

A court-trained volunteer facilitator helps the parties have a conversation that explores all possible resolutions of the case. If the parties are able to reach a settlement, a computer-generated agreement is created; if they are unsuccessful, the facilitator works with the parties to prepare an informational document for the judge. This document assists the parties in focusing their claims and defenses so the judge is better situated to address the parties' positions. It includes written materials, such as contracts or receipts, that the parties intend to rely on at the trial. The parties can then choose to have the judge decide the matter based on the written materials or they can have a traditional small claims trial.

The benefits of this flexible approach are obvious. Simply put, many people never engage in the litigation process, because it requires them to take time off work, go

to what they often see as a strange and intimidating courthouse, and to interact with an adversarial party face-to-face. ODR provides them a convenient, quicker, and less stressful way to engage in the judicial process.

This program launched in September 2018 in the West Valley City Justice Court. Early participation is strong, and early feedback is positive. In the four months the system has been running, over 600 cases have been filed using ODR. We're watching carefully as this program proceeds, tracking outcome data internally. In addition, the National Center for State Courts has agreed to formally and independently evaluate the program after a year by measuring metrics such as participation rates, disposition times, and court efficiencies. I look forward to January next year when I can share additional outcome data with you.

These kinds of innovations and experiments reflect our commitment to expanding access to justice for Utah's citizens in ways that are responsive to what they want, not what is easiest or most convenient for the courts. By using our constitutional responsibility to govern the practice of law and by leveraging rapidly expanding technological advancements, we are delivering new ways of overcoming barriers to justice.

As I consider the many changes taking place in our modern lives, I wonder how different our time really is from that of Mr. Walter Arnold and the advent of motor vehicle laws. Yes, Mr. Arnold was living in a 2 MPH world, while ours runs at 70 MPH—or even the much higher speed at which bits of information travel in cyberspace. But the need to protect and nurture the public's trust and confidence in the rule of law is unchanging. While our fast-paced society and advances in technology may, at times, seem overwhelming, both lawmakers and judges must continue to carefully enact and faithfully adjudicate the law with fidelity. When generations to come look back upon the contributions of our generation, I hope they will conclude that we honored and respected the rule of law.

I deeply appreciate your service to Utah's citizens, and I wish you a productive session. Thank you.