

## CHARLESTON SPEECH FINAL VERSION

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We live in a changing world—changing demographics, a changing legal environment, and ever-more-rapidly changing technology. These changes present our courts with challenges, but also with opportunities. To succeed in the 21st century, we need to examine—and, in some instances, to move beyond—our assumptions: assumptions about who provides legal advice, how courts communicate with litigants and the public, and even what courts do on a daily basis. At the same time, we should remember what makes courts unique—and should recognize that now, more than ever, they can help Americans reaffirm the timeless social contract that connects and binds us all.

One of the major challenges that the legal profession faces right now is the nationwide crisis in access to justice. Some estimate that every lawyer in the country would have to work for 200 hours to give just one hour of attention to each legal problem that an American faces. **[PAUSE]** That's barely enough time to define the issue, much less resolve the problem. It's hard to comprehend the magnitude of this crisis. Eighty percent of the legal needs of the poor are going unmet. **[PAUSE]** And the problem doesn't stop there; forty to sixty percent of the legal needs of the middle class are going unmet too. But we have almost twice as many lawyers as we did in 1985, and many young lawyers are unemployed. **[PAUSE]** It's not a problem of supply. The real problem is that today's economic

realities and regulatory structures prevent legal providers from meeting the demand. **[PAUSE]**

It's a moral imperative to ensure that all people have access to justice, but it's also to the benefit of the courts. Making sure that people of modest means are represented will enhance public confidence in the courts. To paraphrase Theodore Roosevelt, no one should be above the law and no one should be below it. When more people who need legal assistance, get it, our courts will climb closer toward President Roosevelt's aspiration. As courts do so, the public's trust in them will increase.

If we as a profession do not come forward to meet the need for legal assistance, many would-be clients will go it alone. We all know that many already are. Parties increasingly appear pro se in matters that come before the state courts—in fact, about 75% of civil cases have at least one pro se party. In some areas of state law, pro ses are even more prevalent. **[PAUSE]** This trend is showing up in the federal courts too, where pro se plaintiffs now file about a quarter of all federal lawsuits.

But the problem isn't just that lawyers can't meet the demand. It's also that Americans are dissatisfied with lawyers. Many Americans would rather handle a legal problem themselves than have a lawyer represent them. **[PAUSE]**

Americans aren't that happy with courts either. According to a recent poll by the National Center for State Courts, 52% of Americans think that courts are inefficient and 44% find them intimidating. The public worries about the costs,

in both time and money, of taking a case to court. [PAUSE] African-Americans have even less faith in the system than the population as a whole. And even as people say that they'd prefer to represent themselves, most say that the courts are not doing enough to help pro se litigants navigate the court system. [PAUSE]

Given the misgivings that so many Americans have about courts, it's not surprising—but it's definitely noteworthy—that there's been a significant decline in the civil docket of state courts. The National Center for State Courts reported an 11% decline in civil filings between 2008 [two-thousand-eight] and 2013. In my own state, we've seen an even greater decline in these filings, from what had been a historic peak just as the recession hit.

Could state courts be the canary in the coal mine for federal courts? [PAUSE] Some forms of alternative dispute resolution are starting to emerge as potential competitors to the courts. To be sure, ADR can sometimes complement the courts—after all, all federal district courts offer at least one ADR method. But dramatic new forms of ADR have emerged online. These ODR methods (short for “online dispute resolution”) may be the courts' fiercest competitors yet. For example, eBay and PayPal both have online dispute resolution centers that reportedly resolve about 60 million disputes per year. Over 90% of these disputes are resolved by software only—no human referee required. There's also Modria [MO-dree-uh], an online dispute resolution platform that's active on five continents. Its developers first designed the eBay and PayPal platforms, which handle e-commerce disputes only. But Modria [MO-dree-uh] has been expanded to

handle other kinds of disputes as well, such as insurance, divorce, government, and more.

Of course, many of the disputes that ODR mechanisms resolve wouldn't have ended up in court anyway. They would have been resolved informally or by some other kind of ADR, or they would not have been resolved at all. [PAUSE] On the other hand, [SMILE] the emerging Millennial generation is a self-help generation: if they want to fix their cars, they go to a how-to video on YouTube, and WebMD is their first stop when they have a health problem. In fact, about two out of every three Americans would prefer to use some method of ADR instead of going to court. [PAUSE] So while ODR mainly supplements the courts in their resolution of civil disputes today, it could be taking disputes away from the courts tomorrow.

This may seem fanciful, but consider a Newsweek column from 1995 doubting that online shopping would ever take off. The columnist wrote: "How come my local mall does more business in an afternoon than the entire Internet handles in a month?" Today, online sales have recently surpassed 300 billion dollars annually. So it should be a little ominous for us as judges to hear Modria [MO-dree-uh] founder Colin Rule say that, and I quote, "there's no A in ODR – Online Dispute Resolution is not an alternative dispute resolution system. In many circumstances, it's going to be the default resolution of the future." He thinks people would much rather resolve their disputes, quote, "sitting in bed on [a] Saturday night at 10 p.m. with a glass of Merlot on the bedside table."

These developments may not jeopardize the courts' criminal docket. But given demographic changes, newly evolved ADR methods, and the national decline in state civil dockets, the federal civil docket may also be facing an imminent, systemic threat. **[PAUSE]**

So why does that matter? It matters because the judicial system—more than any other system that we use to resolve disputes—embodies the rule of law. Courts are still the template on which all other dispute resolution systems are based, be they public or private, and the touchstone by which these other systems are judged.

The rule of law is arguably the necessary precursor to all of the other essential parts of society—a vibrant economy, a robust political sphere, and strong artistic and cultural development. And it's essential to any system of government that's based on humanity rather than brutality. Justice Stephen Breyer has commented that today's world is not divided “on the basis of race or nationality or country or where you live,” but rather “between people who **[RIGHT HAND]** believe in a rule of law as a way of deciding significant issues and those . . . who **[LEFT HAND]** believe in force.”

In civil cases, no less than in criminal cases, the federal courts are uniquely positioned to uphold the rule of law. No ADR can match the federal judiciary's independence; its collective legal acumen; its commitment to time-tested legal procedures; and its transparent methodology. These safeguards are critical to the pursuit of justice. And of course it's important for the federal courts to retain a

robust civil docket because, by adjudicating cases that involve a diverse set of factual scenarios, federal courts can continue to develop the law. [PAUSE]

But no less important than the courts' practical effect on the rule of law, is their symbolic effect on our national civic culture. By elevating principles over passion [brief pause] and relying on evidence and reason rather than reflex and ideology, the judiciary can remind the American people how to engage in civil discourse. Given today's cantankerous national climate, courts need to strengthen their role in our society—not just in upholding the rule of law but in shaping how Americans discuss their differences and resolve their disputes.

Our courts can, and should, help us renew our commitment to the American compact that we all share. [PAUSE] This compact is based not on race or creed but on common civic ideals, ideals that are critical for a free society to flourish: the ability to talk to each other, not past one another; to listen to each other and reasonably consider different perspectives; to be as objective as possible when deciding between two opposing points of view; to disagree respectfully when we still disagree; and to live and work together harmoniously in spite of our good faith disagreements. [PAUSE]

Judges know these ideals well because we live them day in and day out, in our interactions with litigants and colleagues and in our respect for due process. Studies show that participation in the work of courts increases civic engagement among the general public as well. In at least some instances, jury service makes jurors more likely to vote than they were before they served on a

jury. But jury trials have declined since the 1930's from about 20% of cases to below 2% of federal cases and below 1% of state cases. That trend doesn't seem to be slowing down—the total number of state civil trials in the nation's 75 most populous counties declined by more than 50% between 1992 and 2005.

So as time goes by, the public is participating less in the judicial process as jurors. We might soon find that people are also participating less in the judicial process as litigants. Just as someone today might be shocked to see such a steep decline in jury trials over the last century, someone in a hundred years might be shocked to see just how steeply civil filings have fallen. We used to think that courts would always be the main way that Americans resolved their disputes. But we now know that the people won't necessarily come. **[PAUSE AND LOOK UP AT SLIDE]**

So how can courts keep their central role and ensure that they're not eclipsed by ADR and ODR? In their recent book, Reimagining Courts, Victor Flango and Thomas Clarke list three ways to redesign courts for the 21st century: first, maintain a strong customer focus;" **[PAUSE]** second, "increase access to justice;" **[PAUSE]** and third, make "delivery of services to litigants and other court stakeholders" "more efficient." By harnessing 21st century technology and ideas, we can accomplish these goals without compromising the values that make courts unique. **[PAUSE]**

Technology is already changing the way courts do business—think of the recent amendments to the Federal Rules of Civil Procedure to accommodate the

realities of e-discovery. But technology can also help courts interact with litigants, and attract new litigants that courts would otherwise lose to ADR. A 2014 National Center for State Courts study indicated that about 76% of Americans were willing to do some court business online. That number jumps to 86% for those under 40 years old. **[PAUSE]**

State courts have been the source of some key innovations that show how courts can use technology to achieve their goals. For instance, since people can use private ODR methods to resolve disputes at their computers, courts may want to let people go to court while sitting at their computers. The Los Angeles Superior Court has implemented this idea, by allowing litigants to appear by video conference in some of its courtrooms. Utah is considering adopting an online dispute resolution process for its small claims court, in an effort to reduce time and costs for litigants and to compensate for imbalances of power and resources. **[brief pause]** And in Arizona they have an interesting problem: litigants on the north side of the Grand Canyon live 95 miles away from the local county courthouse. But they have to drive about 7 hours to get there—because the courthouse lies on the south side. **[SMILE]** So the county has installed a self-help kiosk on the north side that lets litigants interact with the courthouse remotely.

There's not necessarily any reason to limit online dispute resolution to small claims courts, or to limit remote-access kiosks to places with geographical quirks. And though it may make sense that the birthplace of Hollywood would be an early adopter of videoconferencing, it certainly makes sense for that technique to

spread to less glamorous locales. [SMILE] All of these technologies could end up being part of the future of all courts—courts may decide to compete with private ODR systems by having their own ODR processes and real-time online access. Some governments have already sat down at the ODR table. For example, the EU has created an ODR platform for online retailers in Europe, and required them to include a link to the platform on their websites. [PAUSE]

But reaching out to litigants through their computers is just the start. Courts can also reach out to them through their smartphones. After all, smartphones are the main way that many young adults and lower-income people access the Internet. For courts, that means two things: mobile-friendly websites and apps. We see courts starting to adapt here as well. The Delaware state court system has made its own website easy to view and navigate on a mobile device. The Ohio Sixth District Court of Appeals has a smartphone app that works a lot like Google Alerts. It allows users to receive a notification when a new decision is issued or when the oral argument calendar is updated. And a federal judge in Oregon has worked with tech developers to create an app for people who have appeared in federal Reentry Court. The app helps them search for nearby housing, jobs, counseling, and more; allows them to take blood-alcohol tests confidentially; and lets other authorized personnel access the results of drug and alcohol testing in real-time. [PAUSE]

There are also lower-tech ways to increase consumer focus and reduce costs and delay. Some courts are improving docket management procedures.

Consider, for example, Utah’s discovery system, which assigns each civil case to one of three discovery tiers. A case’s tier determines how much discovery litigants can conduct and how long they have to conduct it. The National Center for State Courts found that Utah’s implementation of this pathway-based system led to a more efficient litigation process—decreasing the number of discovery disputes, increasing the rate of settlement, and decreasing the time to reach a final disposition. Recognizing this progress, a commission created by the Conference of Chief Justices has recommended that states adopt a pathway approach to case management that is similar to Utah’s. **[PAUSE]**

While not novel, specialized courts can help streamline the litigation process, too. My state is one of many to have created a Business Court whose judges specialize in complex business cases. That increases the efficiency of these proceedings by allowing the judges who hear them to become well-versed both in the substantive law and in the case management issues that so often arise in business disputes. So, for instance, a Business Court judge will be well positioned to quickly decide a preliminary injunction motion so that a company will have it decided before a shareholders’ meeting. This concept may be valuable in other areas of litigation as well. Above all, courts should consider moving away from a one-size-fits-all approach for cases; that approach is rapidly becoming obsolete. **[PAUSE]**

Courts in several states are already starting to address the increase in pro se litigants and the emerging self-help tendency of Millennials. Some courts are doing so with the help of legal services providers, or “LSPs.” New York and Arizona

now employ courthouse navigators, who cannot give legal advice but can use courthouse computers to get information for litigants, research the law for them, collect documentation from them, and respond to questions from a judge or court attorney about a case. **[PAUSE]** California and Washington State have courthouse facilitators who can provide pro ses with information about legal procedures and legal forms in family law cases. These facilitators sometimes also refer pro ses to legal or social services, or to ADR. Courthouse facilitators have improved public opinion of courts in Washington State—eighty-two percent of those polled said that they had more trust and confidence in the courts after visiting with a facilitator. **[PAUSE]**

The most dramatic examples of LSPs are in Washington State and Utah. The Washington Supreme Court has approved LLLTs (short for Limited License Legal Technicians) to provide legal advice specifically in the field of family law. LLLTs are the first non-lawyers in the U.S. to be authorized to provide legal advice; they do so after completing coursework and working under a supervising attorney. In Utah, the state’s Supreme Court has approved “licensed paralegal practitioners” to help clients by representing them in mediation, filling out forms, and preparing settlement agreements.

These non-traditional LSPs could help bridge the gap in access to justice by offering lower-cost and more-widely-available legal assistance. And the legal profession is paying attention. The ABA recently passed Resolution 105, which encourages each state’s highest court to assess its existing regulatory

framework regarding non-traditional LSPs. The Conference of Chief Justices has likewise resolved to help assess and modify these regulatory frameworks.

We may all need to adapt to a world in which LSPs are consulting with clients and drafting, advising on, and even signing court documents—much as patients and hospitals have adapted to a medical model in which health care is delivered not only by doctors but by individuals like nurse practitioners and physician assistants, whose licenses are more limited. Because of the rise of LSPs who handle state law matters, state courts have already begun this process. At some point, federal courts may have to consider whether, and to what extent, they need to incorporate LSPs into federal practice. **[PAUSE]**

Now, I'm not advocating any particular reform or innovation. Solutions may vary by jurisdiction and by court. But we as judges should be aware of changes in the legal landscape so that we may better serve the public. **[PAUSE]**

Finally, to make sure that people still turn to the court system to resolve their civil disputes, courts need to win the PR war. Not enough people understand what courts do, and too often the public assumes that the judiciary is just another arm of the political branches. **[PAUSE]** But courts can take advantage of new forms of social media—such as Facebook, **[brief pause]** Twitter, **[brief pause]** and even YouTube **[brief pause]**—both to educate the traditional media and to speak directly to the people. Court staff can use social media to provide accurate and up-to-date information about court news and events, court rules and protocols, and judicial decisions. **[PAUSE]** Although courts often have

this type of information on their web pages, users have to choose to go to a website. With social media, courts can come to them.

And when courts use social media, we can make thoughtful use of the symbols of an independent judiciary—a gavel, the scales of justice, Lady Justice, and so on—to help preserve our brand. **[PAUSE]** As Amazon CEO Jeff Bezos [BAY-zos] has said, “[a] brand for a company is like a reputation for a person.” We should take control of our reputation. If we’re going to compete with private ODR services for business, we need to remind the American public that courts are unique—that we’re not just one of many outlets to use when resolving disputes. **[PAUSE]**

This new century has already produced many new challenges for the legal profession and for the judiciary. It should come as no surprise that these challenges will affect both state and federal courts. Our destinies are inextricably linked, and the way that each court system acts will affect the public’s trust and confidence in the judicial system as a whole. That’s why I’m so encouraged that the Federal Judicial Center and the National Center for State Courts are working together in new ways to confront and resolve the issues that all of our courts face.

As Americans increasingly live their lives—and resolve their disputes—online, courts face an age-old choice: change, or risk becoming irrelevant. And as attorneys struggle to meet the legal demands of a large swath of our country’s citizens, those citizens may start looking elsewhere for legal assistance. But our new century also provides us with new solutions—whether those solutions

are technological innovations, or innovative thinking about the provision of legal services by legal specialists who aren't lawyers. [PAUSE]

As judges, it is our duty and our privilege to make our courts more focused on the needs of those we serve, to increase access to justice, and to help reduce the costs and delays that are so often associated with litigation. By adapting to the realities of our time, and by harnessing modern-day advances, courts can continue to be what they have been since our nation—and our American compact—were first formed long ago: peerless exemplars of civil discourse, and steadfast guardians of the rule of law. Thank you very much.