

## OREGON COURTS TODAY AND TOMORROW\*

PAUL J. DE MUNIZ\*\*

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For more than 120 years Oregon’s courts existed as loosely connected collections of locally funded county and municipal courts. During that period of Oregon’s judicial history, the Oregon Supreme

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\* The author has written extensively on this topic, and, as such, portions of this article previously appeared in the following publications: Paul J. De Muniz, *Past is Prologue: The Future of the Oregon Supreme Court*, 46 WILLAMETTE L. REV. 415 (2010); Paul J. De Muniz, *The Invisible Branch: Funding Resilient Courts Through Public Relations, Institutional Identity, and A Place on the “Public Radar,”* 100 KY. L.J. 807 (2012); Paul J. De Muniz, *Overturing Precedent: The Case for Judicial Activism in Reengineering State Courts*, 87 N.Y.U. L. REV. 1 (2012); Paul J. De Muniz, *Maintaining Institutional Independence: Funding Sustainable State Courts During Economic Crisis*, NAT’L CTR. FOR STATE COURTS (June 2013), available at <http://www.ncsc.org/Services-and-Experts/Court-leadership/Harvard-Executive-Session/~media/Files/PDF/Services%20and%20Experts/Harvard%20Executive%20Session/Maintaining-Judicial-Independence.ashx>.

\*\* Paul J. De Muniz served as Oregon’s chief justice from 2006 through 2012. In 2011, De Muniz was inducted into the National Center for State Courts’ Warren E. Burger Society in recognition of his commitment to improving the administration of justice within the states. He is currently a distinguished jurist in residence at Willamette University College of Law. The author acknowledges the significant contributions of Sam Rayburn, J.D. Candidate, Willamette University College of Law, 2014, in the preparation of this article.

Court exerted some power over the local courts as the entity responsible for interpreting the Oregon constitution and Oregon statutes, but had little administrative authority over the local courts. That structure changed in 1981 when the legislature enacted legislation unifying the state's court system—shifting fiscal responsibility for the judiciary away from the local governments and placing it almost entirely with the state.<sup>1</sup> Today, the chief justice and the state court administrator manage a statewide court system, consisting of 27 judicial districts, 194 independently-elected judges, and nearly 1,700 employees. In addition to the functions traditionally associated with the judiciary, today the Oregon court system includes a growing array of specialized services that range from providing mediation services to solving specific community problems in non-traditional adjudicatory forums, such as drug courts, family courts, mental health courts, and veterans' courts.

This article examines the evolution of the Oregon court system, the current state of Oregon's court system, and offers some thoughts about the challenges and the opportunities for Oregon courts in the future.

#### I. EVOLUTION OF THE OREGON COURT SYSTEM

Oregon's experiences with a functioning judiciary date back as early as 1841.<sup>2</sup> Then, Oregon's "court" was not really a court at all. Instead, the men of the Oregon Country at "The Primary Meeting of the people of Oregon . . . elected Dr. I. L. Babcock . . . to act as Supreme Judge, with Probate Powers" to probate the estate of a man named Ewing Young, whom the settlers believed had died intestate.<sup>3</sup> Young, who allegedly taught Kit Carson to be a mountain man, had arrived in the Oregon Country in 1834, and became the first settler to the west of the Willamette River. When he died in 1841, Young was one of the wealthiest men in the Oregon Country, owning almost all of the Chehalem Valley (most of Yamhill County today).<sup>4</sup> Dr. Babcock was elected to fulfill an immediate need of the inhabitants of the Oregon Country administering Young's estate; however, his term

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1. OR. REV. STAT. § 1.001 (2014).

2. Mirth Tufts Kaplan, *Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government*, 62 OR. HIST. Q. 116, 116 (1961).

3. GUSTAVUS HINES, *WILD LIFE IN OREGON* 418 (Hurst & Co. 1881).

4. 1 CHARLES H. CAREY, *A GENERAL HISTORY OF OREGON PRIOR TO 1861*, at 319 (Metropolitan Press 1935).

as Supreme Judge was set to end on the adoption of a code of laws.<sup>5</sup> Establishing a form of judicial government only when confronted by a pressing circumstance bolsters the view that the original settlers of the Oregon Country wanted only the government that they needed. And, in 1841, they didn't need much.

At statehood in 1859, Oregon's Supreme Court was established with four justices, but was increased to five in 1862.<sup>6</sup> Between 1862 and 1913, the composition of the Supreme Court fluctuated between three and five justices. However, the Court struggled to meet the demands of the people with so few justices and at one point was forced to appoint temporary "commissioners . . . to assist in the performance of its duties and in the disposition of numerous causes now pending and which may hereafter be pending . . . ."<sup>7</sup> Through legislative action, the Supreme Court was increased to seven justices in 1913 and remains at that number today.

The 1913 legislative session produced Oregon's first district court, exercising its authority under Article VII (Amended) of the Oregon Constitution, "vesting the judicial power 'in one Supreme Court and in such other courts as may from time to time be created by law.'"<sup>8</sup> The district courts were, in large part, a substitute for justice courts in urban areas, having (like justice courts) limited civil and criminal jurisdiction.<sup>9</sup> By 1997, thirty of Oregon's thirty-six counties had district courts with sixty-three district judges. However, as early as the 1970's, efforts were underway to consolidate the trial courts. In 1998, unable to withstand the mounting pressure for consolidation, the Oregon Legislature abolished all district courts and transferred judicial authority and pending cases to the circuit courts. Without executive appointment or popular election, but by virtue of

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5. HINES, *supra* note 3.

6. OR. CONST. art. VII, § 1. See Stephen P. Armitage, *Supreme Court Expanded in History of the Oregon Judicial Department: After Statehood*, available at [http://www.oregon.gov/soll/pages/ojd\\_history/historyojdpart2toc.aspx](http://www.oregon.gov/soll/pages/ojd_history/historyojdpart2toc.aspx) (last visited Mar. 17, 2014).

7. 1907 Or. Laws ch. 88, short title; see Armitage, *supra* note 6. Armitage writes:

Even the two commissioners were not enough to solve the congested docket, however. The terms of the commissioner would expire in early 1909, but additional cases are being filed \*\*\* faster than three Justices, unaided, can speedily hear and determine them. So in 1909, just over 30 years after the Legislature had reduced the Supreme Court from five to three, the Legislature passed legislation again authorizing five justices on the Supreme Court.

*Id.* (internal quotation marks omitted).

8. Armitage, *supra* note 6.

9. *Id.*

consolidation, all sitting district court judges became circuit judges.<sup>10</sup>

In 1969, the legislature created the Court of Appeals to address the overflowing Supreme Court docket and the multitude of criminal procedure issues and cases spawned by the decisions of the Warren Court.<sup>11</sup> The legislature initially provided for five judges and limited jurisdiction (criminal, domestic relations, and administrative law), and it added one judge in 1973 and four more in 1977. In 1977, the legislature also removed most of the previously imposed jurisdictional limitations, routing nearly all types of cases through the Court of Appeals. The court operated with ten judges, as one of the busiest appellate courts in the country, until October 2013, when three new judges were seated.

The Oregon court system experienced its most dramatic change in 1981 when the legislature enacted legislation that “ended county funding of trial court operations (both circuit court and district court), replacing it with state funding . . . [and] centralized the administration of the Judicial Department in the hands of the [c]hief [j]ustice of the Oregon Supreme Court.”<sup>12</sup> This change addressed two major problems. First, before 1981, trial court funding depended on the county government’s finances, which resulted in uneven and unpredictable financial support across Oregon’s courts. Second, the trial courts suffered from “inadequate judicial administration, which affected all levels of control.”<sup>13</sup> With the adoption of the 1981 legislation, the office of the chief justice greatly expanded, with “significantly more authority to function as head of the Oregon Judicial Department,” and charged with “developing a personnel plan, a budgeting plan, and a property management plan for the courts of the state.”<sup>14</sup>

## II. OREGON COURTS TODAY

Today, from an organizational standpoint, Oregon’s court system is a large, complex entity. Even though its courts are unified within a well-defined administrative hierarchy, physically, the judicial branch is a collection of widely dispersed courthouses, each with a unique and independent organizational culture.

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10. *Id.*

11. OR. REV. STAT. § 2.510 (2013).

12. Armitage, *supra* note 6.

13. *Id.*

14. *Id.*

During the great recession (2007–09) the Oregon judicial system, like those in most states, suffered significant budget reductions. By January 2011, the state faced a \$3.5 billion deficit, representing one of the largest per capita budget deficits in the nation.<sup>15</sup> The Oregon Judicial Branch budget for 2009–11 was \$37.2 million less than the amount needed to continue services at 2007–09 levels.<sup>16</sup> That reduction forced the judicial department to make numerous difficult staffing decisions, including the decision to eliminate certain divisions and personnel, require staff to take a number of unpaid furlough days, reduce court operation hours, and to operate at 10–20% vacancy rate among court staff.<sup>17</sup> With the improved economy, the 2013 legislature increased judicial funding sufficient to permit the courts to return to full hours of operation, restored a number of staff positions, and approved modest cost of living and salary increases for staff and judges.

In recognition that funding the Oregon Judicial Branch would never be a first priority for the legislature, but that the branch had an obligation to the public to do everything that it could to be excellent stewards of its resources and to continue to strive to increase the public's access to the courts despite the economic downturn and resulting loss of funding, the branch began in 2009 to reengineer the structure and operations of the Oregon courts. Stated differently, the branch's objective in 2009 was to shepherd Oregon courts through bad economic times, improve the quality of judicial services, and significantly enhance the judiciary's profile as an innovative manager of the public funds.

In order to reengineer the structure and operations of Oregon's courts, the branch focused on three key target areas: (1) governance structures, (2) case administration, and (3) essential functions.<sup>18</sup> It did

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15. GOVERNOR JOHN A. KITZHABER, M.D. STATE OF THE STATE 2013 (2013), *available at* [http://www.oregon.gov/gov/media\\_room/Pages/speeches/StateoftheState2013.aspx](http://www.oregon.gov/gov/media_room/Pages/speeches/StateoftheState2013.aspx); *see* Danielle Kurtzleben, *10 States With the Largest Budget Shortfalls*, US NEWS (Jan. 14, 2011), <http://www.usnews.com/news/articles/2011/01/14/10-states-with-the-largest-budget-shortfalls>.

16. OR. JUDICIAL DEP'T, BUDGET REDUCTION PLAN (Aug. 2010).

17. *See* OR. JUDICIAL DEP'T TEMP. POLICY FOR IMPLEMENTATION OF COST REDUCTION (Aug. 2009); OR. JUDICIAL DEP'T, CHIEF JUSTICE'S RECOMMENDED BUDGET (2013–15), *available at* [http://courts.oregon.gov/OJD/docs/OSCA/2013RecommendedBudget/2013-15\\_CJ\\_Recommended\\_Budget\\_Document\\_FINAL\\_2012-12-17.pdf](http://courts.oregon.gov/OJD/docs/OSCA/2013RecommendedBudget/2013-15_CJ_Recommended_Budget_Document_FINAL_2012-12-17.pdf) (Oregon courts lost 15% of permanent staff members during the downturn).

18. *See* Thomas M. Clarke, *Reengineering: The Importance of Establishing Principles*, *in* FUTURE TRENDS IN STATE COURTS 2010, at 30, 30–31 (Carol R. Flango et al. eds., 2010), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CIS>

so guided by four principles: (1) improving litigants' convenience, (2) reducing cost and complexity for litigants, (3) improving litigants' access to justice, and (4) improving case predictability.

As noted earlier, Oregon, like most state courts, is an example of a "loosely coupled organization"—an "organization where individual elements display a relatively high level of autonomy vis-à-vis the larger system within which they exist."<sup>19</sup> As a general rule, the professionals within such organizations operate independently, as do the organizations' work units.<sup>20</sup> For state court systems like Oregon, the result is frequently a balkanized organization.<sup>21</sup> Reengineering the processes used in a decentralized entity like the Oregon court system requires, among other things, "a governance structure that treats a court system more like a single enterprise" than not.<sup>22</sup>

One of the ways the branch began moving toward such a system in Oregon was by placing greater emphasis on centralizing judicial staff functions within local courthouses. To do so, however, ran counter to 150 years of judicial culture in Oregon. Traditionally, the "judicial unit, essentially [a] judge and his or her personal support staff,"<sup>23</sup> had been considered sacrosanct—the supervisory domain of the sitting judge alone.<sup>24</sup> As a result, judicial staffs were frequently insulated from changes that affected the courthouse's central administrative work force, changes that often included increased workloads and staffing shortages.<sup>25</sup>

At the Oregon Supreme Court, the traditional concept of the judicial unit had held sway for well over one hundred years. Each justice had their own judicial assistant and staff resources. That organizational model made sense when judicial assistants typed opinions on Underwood typewriters with onionskin copies; it was no longer useful in today's technologically advanced world.

As a result of those early reengineering efforts, judicial assistants

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OPTR=1605 (setting forth three principles to guide reengineering efforts).

19. Gordon M. Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 48 (Carol R. Flango et al. eds., 2010).

20. *Id.*

21. *See id.* (attributing the judicial branch's balkanization to its loosely-coupled structure).

22. Clarke, *supra* note 18, at 30.

23. Griller, *supra* note 19, at 50.

24. *See id.* at 48 (describing commonly held belief of judicial independence as stemming from judiciary's "freedom from control by other branches of government and freedom from interference in case-related decisions").

25. *Id.* at 50.

at the Oregon Supreme Court now share duties between multiple chambers under the supervision of a single appellate court manager rather than the court's seven justices. That format, in turn, has allowed the court's judicial assistants to take on tasks directly related to court operations that were previously performed by the appellate records division. Today, the appellate court manager and three judicial assistants do the same work that seven staff members did, and, in addition, perform a great deal of the electronic case management tasks related to the supreme court's docket. The increased flexibility of that work unit, moreover, effectively added the equivalent of two and one half full-time employees to records with no new funding, enabling that department to efficiently handle the increasing case management workload of the Oregon Court of Appeals—Oregon's busiest appellate court.

Based on the Oregon Supreme Court's model, the Multnomah County Circuit Court, Oregon's largest court, was able to adopt a similar strategy: all thirty-eight judicial assistants in that county now operate under the supervision of the trial court administrator and are required to devote twenty-five percent of their time each day to courthouse operations. That strategy resulted in the equivalent of adding at least seven full-time positions to court operations, allowing that court to retain its efficiency despite severe budget reductions. The cultural shift that was initiated in the supreme court has now been implemented throughout most of the Oregon court system.

From a reengineering standpoint, however, the example just described was really only a harbinger of a much larger and bolder shift toward centralized operations that were needed in order to more closely resemble a single enterprise. Centralized docket control, jury management, and payment systems were the next logical steps—all of which the Oregon court system is currently implementing in one form or another.

Centralizing common court operations can, in turn, facilitate further renovation of court governance structures by redistributing and regionalizing state courts and judges to maximize judicial resource management, staffing, and the general delivery of trial court services. One example involves Oregon's prison litigation. Oregon has fourteen prisons scattered throughout the far reaches of the state. By leveraging its technology, the branch has centralized nearly all post-conviction litigation to a special docket that is administered out of the state court administrator's office in Salem, instead of the individual counties. Nearly all of the post-conviction litigation is

handled electronically from Salem, saving millions of dollars in indigent attorney's fees, security and transportation costs, and millions of dollars in paper and postage. Few post-conviction cases remain on a local judge's docket, retired judges preside over all the cases as part of their retirement obligation, and there is no longer a backlog.

For some, case administration means routine court administration and thus has only limited utility in animating court-reengineering efforts.<sup>26</sup> Although that analogy may be apt, as far as it goes, case administration should have a broader justice context focusing on both the processes by which controversies are brought to court, and the processes by which those controversies are resolved. Seen in that light, reengineering the framework for case administration can also be viewed as an effort to streamline and expedite many of the bedrock processes by which state courts serve the public. Doing so increases access to justice, while creating the potential for courts to realize concrete fiscal benefits as well.

In Oregon, reengineering efforts in that regard focused on the paper-intensive method by which the courts and Oregon's citizens interfaced. Oregon courts previously handled approximately fifty million pieces of paper—or 250 tons of documents—every year.<sup>27</sup> The inherent inefficiencies of that system, particularly in the face of rising judicial workloads, combined with budget-mandated staff reductions, were one of the greatest impediments to the public's expectation for court access.<sup>28</sup> To combat that dilemma the branch initiated the Oregon eCourt Program in 2006.

The statewide Oregon eCourt Program has focused on building a state-of-the-art electronic system for case management, content management, electronic filing, and e-commerce. The program's goal was to transform the business operations of Oregon's courts by creating a single virtual courthouse—the largest and most accessible in the state—available twenty-four hours a day, seven days a week. Oregon eCourt now houses: (1) a website through which parties can

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26. See, e.g., Clarke, *supra* note 18, at 31 (“Case administration principles are rarely used to motivate reengineering projects simply because they deal by definition with the more routine aspects of court administration . . .”).

27. Bud Borja, *Oregon eCourt—Improving Judicial Outcomes and Services*, in *FUTURE TRENDS IN STATE COURTS 2009*, at 87 (Carol R. Flango et al. eds., 2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1486>.

28. *Id.*



conduct significant portions of court business online without traveling to an actual courthouse, (2) an Enterprise Content Management system that acts as an electronic warehouse to store every court-related document—e-filed or not—centrally and in a digital format, (3) a Financial Management System that facilitates online payment of court filing fees, as well as fines and restitution awards, and (4) a Case Management System that allows court personnel to track the multitude of matters that arise in the course of an individual case from inception to final disposition.<sup>29</sup> The program is now operational in both appellate courts and in ten judicial districts.<sup>30</sup> By 2016, Oregon eCourt will be fully operational in every judicial district in Oregon.<sup>31</sup>

Although utilizing technology to its fullest is an important component in reengineering case administration, it is largely a means unto an end. Before courts can dramatically restructure the way they administer the matters that come before them, they must also fundamentally rethink how cases are processed and tried, particularly those that make up the civil docket.

In that regard, the branch implemented a civil trial format known as the Expedited Civil Jury Program.<sup>32</sup> At the discretion of the presiding judges in each judicial district, civil matters eligible for a jury trial may now be tried in the Expedited Civil Jury Program on a joint motion of the parties.<sup>33</sup> Such cases are exempt from mandatory arbitration,<sup>34</sup> and, after being assigned to a specific judge, receive an expedited trial before a six-person jury.<sup>35</sup> Trial dates are set within four months of acceptance into the program, and mandatory pre-trial conferences are held at least fourteen days before trial.<sup>36</sup> Parties either jointly stipulate to a plan encompassing the nature, scope, and timing of discovery or, absent such an agreement, are subject to the program's own limited and expedited discovery schedule.<sup>37</sup> Pretrial

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29. *Id.* at 89.

30. In addition, most Oregon Supreme Court arguments are streamed online, and then archived for subsequent public access.

31. CHIEF JUSTICE'S RECOMMENDED BUDGET, *supra* note 17, at 5.

32. Or. Chief Justice Order No. 10-025 (May 6, 2010).

33. Or. Unif. Trial Ct. R. 5.150(1) (2011), *available at* [http://courts.oregon.gov/OJD/docs/programs/utcr/2011\\_UTCR.pdf](http://courts.oregon.gov/OJD/docs/programs/utcr/2011_UTCR.pdf).

34. *Id.* R. 5.150(2)(a).

35. *Id.* R. 5.150(7).

36. *Id.* R. 5.150(2)(b).

37. *Id.* R. 5.150(3).

motions are prohibited without leave of court.<sup>38</sup> The program has proved to be particularly useful in smaller personal injury cases, contract cases, and any similar civil action in which no case participant stands to benefit from protracted litigation. In addition to providing a streamlined path to a jury verdict, the Expedited Civil Jury Program also allows lawyers and judges to gain valuable litigation expertise, helping to ensure that, when needed, Oregon citizens can turn to a large community of seasoned litigation professionals for help.

The branch has also pursued similar measures in more complicated civil matters as part of a program known as the Oregon Complex Litigation Court. The court was first established in 2006 as a pilot project within the state's second judicial district (Lane County).<sup>39</sup> Its primary mission was to adjudicate complex litigation unfettered by venue boundaries.<sup>40</sup> When the program began, litigants throughout Oregon could request a change of venue to the second judicial district to have their cases heard in a specialized forum if their disputes were likely to strain local court dockets.<sup>41</sup> The pilot project was successful and has been expanded statewide.<sup>42</sup> Litigants no longer need to travel to Lane County. Instead, judges travel to the litigants—a cadre of experienced judges is now available to adjudicate complex disputes throughout the state bringing efficiency, consistency, and predictability to lawyers and litigants.

Regardless of how extensively case administration processes are restructured, Oregon's, like most state court systems, still needs to pursue a final area of court reengineering—*i.e.*, redefining essential court functions and providing services accordingly. Increasingly, court management experts describe redefining essential court functions as legal “triage”: the act of prioritizing and disposing of cases by identifying and using the most issue-appropriate resources.<sup>43</sup>

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38. *Id.* R. 5.150(5).

39. *Oregon Complex Litigation Court: History and Description*, OR. JUDICIAL DEP'T, [http://courts.oregon.gov/OJD/docs/courts/circuit/OLC\\_History\\_Description.pdf](http://courts.oregon.gov/OJD/docs/courts/circuit/OLC_History_Description.pdf) (last visited Jan. 28, 2012) [hereinafter *History*].

40. *Id.* (“[The] program . . . was designed to allow Lane County Circuit Court to handle complex litigation cases from out of county that would have been burdensome to a court’s normal docket.”).

41. *Id.*

42. Or. Chief Justice Order No. 10-066 (Dec. 2, 2010).

43. See Victor E. Flango, *Which Disputes Belong in Court?*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 11 (Carol R. Flango et al. eds., 2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605>.

Suffice it to say that state court systems have long benefited from a similar kind of sorting through the use of limited jurisdiction venues such as small claims court. More often than not, however, use of those forums is predicated on self-selection—litigants must opt in to whatever process is offered. Reengineering a court's essential functions in Oregon would, among other things, shift responsibility for that sorting to the courts themselves rather than the parties.

The reengineering initiatives just described can be summarized as follows:

- Centralization: costs and local trial court workloads have been reduced in Oregon through the central processing of payables, collections, payment of traffic citations, and jury management.
- Regionalization: court processes are now managed more efficiently in Oregon by looking beyond venue borders to expedite case processing or adjudication and using specialized dockets to better utilize judicial resources statewide.
- Leveraging Technology: the branch is committed to providing the public with the ability to pay fees and fines online—including traffic citations—as well as providing online access to dockets and documents, and is using technology to promote the more efficient use of judicial resources statewide.

### III. COURTHOUSES AND COURT SECURITY

As part of the 1981 legislation unifying the Oregon court system, Oregon's counties retained ownership of the local courthouses, and the legislation required the counties to maintain suitable and sufficient facilities.<sup>44</sup> Unfortunately under that relationship, many local governments felt no need to spend their precious resources on court facilities or security. By 2006, instead of courthouses that served as symbols to the community of the majesty of the law and as public symbols that justice is available to everyone everywhere, the judicial branch was conducting operations in most counties in aging facilities

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44. See OR. REV. STAT. § 1.185 (2014).

with little or no security.

Session after legislative session in the 1990s and early 2000s, the legislature ignored the judicial branch's entreaties that most counties were not meeting their statutory responsibilities to provide suitable and sufficient court facilities. The legislative response was that the problem needed to be addressed to the counties, not to the state. Finally, in 2006, in response to a study characterizing the shoddy state of Oregon's courthouses as a "public safety" issue endangering the public and courthouse staff, the legislature agreed to fund a \$1.2 million study of all Oregon court facilities in 2007.<sup>45</sup> That study, completed in 2008, confirmed that Oregon's courthouses were in dire need of repair, upgrading, or, in some cases, complete replacement.<sup>46</sup> In turn, the 2009 legislative session authorized the expenditure of \$12 million for immediate repairs to court facilities throughout the state. The 2011 legislative session resulted in the allocation of funds from a new criminal fines bill to assist with county courthouse projects. And, finally, in 2013 the legislature enacted legislation-authorized partnerships between the counties and the state for the repair, upgrade, and replacement of county court facilities.<sup>47</sup> The first courthouse to be replaced is in Union County, where the circuit court has operated "temporarily" for twenty years in an abandoned hospital.

In 2005, the legislature enacted ORS 1.178, known as the State Court Facilities and Security Account. The funds accumulated in that account are dedicated for the exclusive use of the judicial branch to develop and implement a plan for courthouse security improvement and training, emergency preparedness, distributions to local court facility security accounts, and capital improvement to courthouses throughout the state.<sup>48</sup>

With the funds from that dedicated account, the judicial branch contracted with the National Center For State Courts in 2007 to engage in a detailed security assessment of the Oregon's court

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45. Interim Comm. on Court Facilities, Final Report, 75th Sess., at 5-6, 11 (Or. 2009), available at [http://www.oregonlegislature.gov/citizen\\_engagement/Reports/court\\_facilities\\_final\\_report.pdf](http://www.oregonlegislature.gov/citizen_engagement/Reports/court_facilities_final_report.pdf); STATE OF OREGON, OREGON COURT FACILITIES ASSESSMENT SUMMARY REPORT 7 (2008) [hereinafter STATE OF OREGON], available at [http://www.mbar.org/assets/documents/courts/2008\\_state\\_of\\_oregon\\_cfa\\_summaryreport.pdf](http://www.mbar.org/assets/documents/courts/2008_state_of_oregon_cfa_summaryreport.pdf). See also Court Facilities Task Force, Report on Or. Court Facilities (2006) [hereinafter *Court Facilities Task Force*], available at [http://www.osbar.org/\\_docs/resources/CourtFacilities06dec.pdf](http://www.osbar.org/_docs/resources/CourtFacilities06dec.pdf).

46. STATE OF OREGON, *supra* note 45, at 7.

47. 2013 Or. Laws ch. 705 (Act Relating to State Financial Administration); 2013 Or. Laws ch. 621 (Act Relating to Critical Infrastructure Development).

48. OR. REV. STAT. § 1.178 (2014).

facilities. Their report provided the judicial branch with an appropriate perspective for addressing the branch's security needs and enhancing the court security governance structure.<sup>49</sup>

In 2009, the judicial branch established the Oregon Judicial Department Security Standards for the appellate, tax, and circuit courts of the state, and authorized the implementation of a five-year security plan.<sup>50</sup> Implementation of that plan has resulted in security, emergency preparedness, and business continuity for all of Oregon's courts; two emergency response trailers that can provide temporary courtrooms, full video arraignment, telephone, and internet support with sixteen laptops and two multi-function printers in a full HVAC environment; a court security officer course that provides courtroom specific training for deputy sheriffs and police officers that provide security in the state's courtrooms; security cameras, access control, and duress alarm systems for all courts; the creation of a circuit court security assistance program that provides funding for additional security at high risk trials in smaller circuit courts; personal security training for judges and court staff, and the application of a threat assessment and management program designed to mitigate targeted violence against judges and court staff; and the creation of a judicial marshal's office to head all security and emergency preparedness for the judicial branch.

In 2012, the legislature defined the marshal's office as a law enforcement unit, allowing judicial marshals to receive police training and certification through Oregon's Department of Public Safety Standards and Training.<sup>51</sup> Most recently, the legislature included judicial marshals within the legal definition of a peace officer.<sup>52</sup> That provides judicial marshals with full police powers, including arrest authority<sup>53</sup> and liability protection for specific use of force that may be used during any dignitary protection incidents.<sup>54</sup> Although many

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49. See sources cited *supra* note 45.

50. Order Revising the Oregon Judicial Department Security Standards for the Appellate, Tax, and Circuit Courts and the Office of the State Court Administrator and Five-Year Implementation Plan, Chief Justice Order No. 10-048 (2013), <http://courts.oregon.gov/OJD/docs/OSCA/sepo/ChiefJusticeOrder10-048.pdf> (indicating changes to confidential original 2009 document).

51. OR. REV. STAT. § 181.610(12)(a) (2013) (defining judicial marshals as a law enforcement unit); *id.* § 181.640 (2013) (setting minimum training and certification standards for law enforcement units).

52. *Id.* § 133.005 (2013).

53. *Id.* § 133.235 (2013).

54. See *generally id.* § 161.095 (2013) (establishing justification as a defense to any

state judiciaries have some dedicated security service, the Oregon judicial branch is the first to have its judicial marshals designated as peace officers.

#### IV. OREGON COURTS IN THE FUTURE

##### A. *Sustainable Funding is Necessary*

One of the greatest challenges facing the Oregon court system of the future is obtaining sustainable funding—funding that will permit the court system to engage in research and development to continue to modernize and meet the public’s expectation for access to justice. The impediment to doing so, however, cannot be easily overcome. Although the Oregon Constitution (as well as the Federal Constitution) provide for decisional independence for judges, neither constitution provides for institutional independence of the judicial branch. The lack of constitutionally mandated institutional independence effectively explains why state judiciaries, like Oregon’s, are not more insulated from funding decisions made by the other two branches of government that reduce and expand judicial branch funding from session to session, as if judicial functions and programs can be turned on and off like tap water.

Although America has for the most part functioned well under the theory of divided government, at the heart of the separation of powers doctrine is a mistrust of human nature.<sup>55</sup> Montesquieu, widely credited with first articulating the divided government theory,<sup>56</sup> wrote that “[w]hen the legislature and executive powers are united in the same person, or in the same body of magistrates . . . there can be no liberty.”<sup>57</sup>

The solution, according to John Locke and James Harrington,

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prosecution); *id.* § 161.195 (2013) (defining justifiable use of force to include conduct by a “public servant in the reasonable exercise of official powers, duties or functions.”); *id.* § 161.235 (2013) (granting peace officers authority to use physical force to make an arrest). Liability protection for the use of force during dignitary protection incidents remains subject to the limitations established for peace officers, such as the use excessive of force. *See, e.g.,* State v. Wright, 799 P.2d 642 (Or. 1990).

55. Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 737–74 (1976).

56. Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 595 (1986).

57. Levi, *supra* note 55, at 373–74 (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748), *reprinted in* 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed., 1952)).

was to divide government into different branches.<sup>58</sup> However, those early models of government did not include a judicial branch.<sup>59</sup> Montesquieu, Locke, and Harrington all conceptualized tripartite divisions of power, yet none of the three philosophers posited that the judiciary should be a co-equal branch of government.<sup>60</sup>

The American judiciary, however, gained new prominence under the U.S. Constitution. The framers of the Constitution, experienced in British rule, feared the very same power as the philosophers who preceded them. As James Madison wrote: “Ambition must be made to counteract ambition.”<sup>61</sup>

The framers believed that the judiciary should be a co-equal branch of government,<sup>62</sup> but did not view the judiciary as an independent institution and thus failed to incorporate the necessary institutional protections.<sup>63</sup> The framers’ motivation to protect the judiciary was twofold.<sup>64</sup> First, the framers were concerned about judicial independence because colonial judges were under direct control of the King and had no salary protection.<sup>65</sup> Second, the framers were concerned with the power that state legislatures had over their respective judiciaries.<sup>66</sup> These fears were subsequently realized during a period of legislative encroachments, causing James Madison to lobby for the judiciary to be a co-equal branch of government.<sup>67</sup> Patrick Henry and John Marshall joined Madison, and pushed for an independent judiciary capable of protecting itself from any extra-constitutional actions stemming from other branches of government.<sup>68</sup>

As Michael Buenger noted, “[t]he Framers . . . rejected a judiciary whose . . . judgment [ ] was dangerously subject to unwarranted intrusions by the executive and legislative branches,

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58. See Kurland, *supra* note 56, at 595.

59. *Id.*

60. *Id.*

61. *Id.* at 598 (quoting THE FEDERALIST NO. 51, at 347–48 (James Madison) (Jacob Cooke ed., 1961)).

62. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980).

63. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1005–06 (2004).

64. *Id.* at 990.

65. See *id.* at 990, 992–93.

66. *Id.* at 998–99.

67. See *id.*

68. See Kaufman, *supra* note 62, at 687 n.98.

particularly with the decisional process.”<sup>69</sup> For protection, the framers included two relevant clauses in the U.S. Constitution: (1) The Good Behavior Clause,<sup>70</sup> which provided for the lifetime appointment of federal judges during good behavior; and (2) the Compensation Clause,<sup>71</sup> which prevents judicial salaries from being reduced.<sup>72</sup> Hamilton articulated the importance of the Compensation Clause when he stated, “[n]ext to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support.”<sup>73</sup>

Noticeably absent from the federal constitution and state constitutions, like Oregon’s, were any provisions protecting the budget of the judiciary as a whole. But, at the time, local municipalities entirely funded most state judiciaries.<sup>74</sup> Further, because most state appellate courts were not funded from state treasuries,<sup>75</sup> and trial courts controlled their own administrative structures,<sup>76</sup> state legislatures largely overlooked the administrative structure of its respective judicial system. Lacking an institution to safeguard, the framers of both the federal and state constitutions did not attempt to secure the institutional independence of the judiciary by incorporating structural protections, which could shelter from potential intrusions from other branches.

In the last two centuries, state judiciaries, like Oregon’s, have significantly evolved. Much of that evolution can be attributed to the massive influx of cases handled by the courts. The increased workload, coupled with an increased complexity in cases, has increased the administrative burden on the court.<sup>77</sup> As Buenger notes:

The current debate on the level of the judiciary’s independence [has to do] with the evolving and expanding role of state courts in American society. With abortion, euthanasia, environmental issues, election controversies, and even the

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69. Buenger, *supra* note 63, at 1009–10.

70. U.S. CONST. art. III, § 1.

71. *Id.*

72. Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 225 (1993).

73. *Id.*

74. Buenger, *supra* note 63, at 1012–13.

75. *Id.* at 1016.

76. *Id.* at 1014.

77. Buenger, *supra* note 63, at 1011.



legislative process itself, state judiciaries have become the fora for some of the most vexing political and social issues of our time. Unlike the past, state courts are finding themselves at the center of, and not the periphery of, many divisive political maelstroms.<sup>78</sup>

Until Oregonians truly understand the importance, in their daily lives, of an independent, relevant, and efficient court system, or the Oregon Constitution is amended to guarantee a certain level of funding to the judicial branch, obtaining sustainable funding will remain very difficult to achieve.

There are numerous indicators that suggest the current economic climate is the “new normal.”<sup>79</sup> Thus, in order to establish a new, resilient state judiciary that is able to thrive in the new normal, the judiciary must disregard the notion that normalcy will return in any predictable, typical sense. Economists have predicted that the recovery from the recent downturn will be slower and more modest than prior rebounds<sup>80</sup>—a potentially devastating result for state judiciaries, as the Pew Center on the States predicts:

Once states get past the immediate crisis of plugging record-high budget gaps, they will confront the likelihood that the recession will impose permanent changes in the size of government and in how states deliver services, who pays for them, and which ones take priority in an era of competing interests.<sup>81</sup>

In practical terms, the fear going forward is that stopgap measures taken during the recession are going to become business as usual. Further, any rebound in the economy cannot be relied on to reverse the consequences of severe budget cuts taken during the recovery. While stopgap thinking is indispensable, especially during economic downturns, it must be severed to ensure the future success of the courts.

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78. *Id.* at 1019–20.

79. See PEW CTR. ON THE STATES, STATE OF THE STATES 2010: HOW THE RECESSION MIGHT CHANGE STATES 2 (2010) [hereinafter PEW CTR. ON THE STATES], available at [http://www.pewcenteronthestates.org/uploadedFiles/State\\_of\\_the\\_States\\_2010.pdf?n=5899](http://www.pewcenteronthestates.org/uploadedFiles/State_of_the_States_2010.pdf?n=5899).

80. BRUCE GOLDBERG, OR. GOVERNOR’S RESET CABINET, BEST STEPS FORWARD: A BUDGET BALANCING PATH TO RESET STATE GOVERNMENT & OVERCOME A DECADE OF DEFICITS 8 (2010), available at [http://archivedwebsites.sos.state.or.us/Governor\\_Kulongoski\\_2011/governor.oregon.gov/Gov/docs/reset2\\_report\\_web.pdf](http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/docs/reset2_report_web.pdf).

81. PEW CTR. ON THE STATES, *supra* note 79, at 2.

The financial situation is serious and history requires a meaningful change on a grand scale, resulting in a lasting shift. That shift should come in Oregon in the way of sustainable court funding, which will allow the Oregon judicial branch to continue to leverage technology and implement reengineering strategies in accordance with long term strategies.

Sustainable funding must involve both short and long-term investment in technology. Smart phones, tablets, and other electronic devices have become commonplace with the general public to quickly access documents, email, and a variety of other needs. Oregon's courts are not exempt from the technological revolution of younger generations and to stay relevant, courts must eliminate the old "court norm"—stacks of paper, manual searches, missing files, and delayed orders. Oregon's court system must be funded sustainably so that it can quickly take advantage of technological opportunities that become available—which will not only allow the court system to stay relevant with younger generations, but also improve the public's access to justice—and allow the courts to operate fully and efficiently on less revenue.

In the short-term, Oregon's courts should also seek solutions that make the courts more user friendly for the public by offering access to frequently asked questions and web pages—which would reduce repetitive telephone inquiries or foot traffic—for readily available information. Further, the courts should implement software programs that reduce the need for manual entry of data by court clerks and other personnel. Not only does software free up time for court staff, it also reduces the likely occurrence of human error.

Vital to Oregon's long-term success is an integrated technology approach that can incorporate the major components of electronic filing and payment, electronic document and case management, person-based data, video conferencing, wireless connectivity, and a robust web-based presence. In its most expansive application, an integrated technology system will make support staff and other judicial resources available to attorneys and the public on a virtual 24-7 basis, regionally and worldwide, reducing delay and backlogs in the courthouse. Even a fraction of the system's capabilities would enable streamlined access to complete courthouse information in real-time, offer immediate self-service, and provide options that are not restricted by hours of operation and personnel availability.

In order to implement and realize such expansive changes, Oregon's legislative and executive branches should give judicial

branch funding the same priority afforded the education of our children, the health of our families, and the public safety of our communities.

### *B. Use of Technology in the Future*

The influence of technology and the use of social media have exploded over the last decade. The ways in which people get news and access information has switched from the traditional “old media,” *i.e.* newspapers and radio, to “new media,” *i.e.* the Internet, social media, video, and text publication.<sup>82</sup> This shift has produced lasting effects on our society. From the Arab Spring—where one Egyptian activist stated, “[w]e use Facebook to schedule the protests and we use Twitter to coordinate, and YouTube to tell the world”<sup>83</sup>—to the Occupy movement and disaster relief efforts in the United States,<sup>84</sup> “[t]he social web and mobile technologies have accelerated the rate at which relationships develop, information is shared[,] and influence takes hold.”<sup>85</sup>

From 2005 to 2013, the number of adults in the United States that use social media has increased from 8% to 72%.<sup>86</sup> Although Facebook and Twitter remain the most frequented social media sites, other sites, including reddit, Google Plus, Tumblr, YouTube, Myspace, LinkedIn, Instagram, Vine, and Pinterest, have also become sources of news for many Americans.<sup>87</sup> Currently, roughly 50% of the population claims to get its news from Facebook, YouTube, and Twitter.<sup>88</sup> Further, while younger generations continue to have an

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82. PATRICIA SEGUIN, THE USE OF SOCIAL MEDIA IN SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY 16 (2011), *available at* <http://www.ncsc.org/~media/Files/PDF/Educatio%20and%20Careers/CEDP%20Papers/2011/Social%20Media.ashx>.

83. Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped By Social Media*, POLICY MIC (July 3, 2012), <http://www.policymic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media>.

84. See Marc Benioff, *Welcome to the Social Media Revolution*, BBC (May 10, 2012), <http://www.bbc.co.uk/news/business-18013662>.

85. *Id.*

86. Steve Olenski, *Social Media Usage Up 800% for U.S Online Adults in Just 8 Years*, FORBES (Sept. 6, 2013), <http://www.forbes.com/sites/steveolenski/2013/09/06/social-media-us-age-up-800-for-us-online-adults-in-just-8-years/>; see Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RESEARCH INTERNET PROJECT (Aug. 5, 2013), <http://pewinternet.org/Reports/2013/social-networking-sites.aspx>.

87. Jesse Holcomb, Jeffrey Gottfried & Amy Mitchell, *News Use Across Social Media Platforms*, PEW RESEARCH JOURNALISM PROJECT (Nov. 14, 2013), <http://www.journalism.org/2013/11/14/news-use-across-social-media-platforms/>.

88. *Id.*

overwhelming presence on social media sites, “[t]hose ages 65 and older have roughly tripled their presence on social networking sites in the last four years—from 13% in the spring of 2009 to 43% now.”<sup>89</sup>

In order to stay relevant, especially with younger, technologically savvy generations, it is important for the Oregon judicial branch to understand and utilize technology and social media to its advantage. “There is an emerging recognition among courts that in order to fulfill the requirement that courts are transparent and understandable to the public in the new media age we are in, courts will have to play an active role in facilitating access to information and perform many of the same functions that traditionally have been performed by the now dwindling traditional media.”<sup>90</sup> According to the National Center for State Courts, in 2013, “25 administrative offices of the courts or high courts . . . are using at least one social media platform, such as Facebook, Twitter, YouTube, or Flickr. Of those, 23 are on Twitter, nine are on Facebook, 10 have YouTube channels, and three have Flickr photostreams.”<sup>91</sup> Mirroring the trends described above, Facebook, Twitter, and YouTube are the most frequently used social media outlets for state courts.<sup>92</sup> Of those responding, 14.3% of courts use Twitter, 11.3% use Facebook, and 6.6% use YouTube.<sup>93</sup> The range of use for the various new media outlets is vast, including: promoting events, educating the public, releasing court decisions, explaining court processes to pro se litigants, posting jobs, media relations, providing juror information, and emergency management.<sup>94</sup>

One area that could be of particular value to the Oregon court system is the use of YouTube and other new media outlets to educate the public and pro se litigants on court procedures. In 2013, an increasing number of state courts, including California and the U.S.

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89. See Brenner & Smith, *supra* note 86.

90. Christopher J. Davey & Carol Taylor, *2013 CCPIO New Media Survey*, CONFERENCE OF COURT PUB. INFO. OFFICERS 6 (2013), available at [http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report\\_CCPIO.pdf](http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report_CCPIO.pdf).

91. *Id.* at 5.

92. *Id.* at 9.

93. *Id.* The CCPIO survey was distributed to fifteen thousand people on the National Center for State Court’s email distribution list. The survey elicited 1,550 responses from forty-eight of fifty states (no responses from Hawaii or Wisconsin). There were also responses from the District of Columbia, Guam, Puerto Rico, Australia, and Canada. Of those responding, 52.1% were from trial courts, 22.1% from administrative offices of state courts, 10% from local municipal courts, and 3.5% from federal courts.

94. *Id.* at 10.

administrative office of the courts, reported successfully using YouTube channels for “public information, education, and community outreach.”<sup>95</sup> Other uses of YouTube have marked firsts in various courts’ histories: in Hawaii, Chief Justice Mark Recktenwald used the court’s YouTube channel to deliver the State of the Judiciary address, and in Michigan, the office of public information has launched an online video series called “Michigan Courts,” with the objective of telling “the everyday stories of Michigan courts—and the people they serve.”<sup>96</sup> A courthouse YouTube channel, or other video series, would allow the public twenty-four-hour access to informational videos about things like procedures and necessary forms, and decrease the seemingly never-ending lines at courthouse information desks, freeing up valuable time for court staff.

Two examples of successful integration of social media come from Ohio and Arizona. In Ohio, the state Supreme Court recently launched Court News Ohio, “a comprehensive, multimedia, multiplatform program covering news about the Ohio judiciary system.”<sup>97</sup> Court News Ohio is offered by the office of public information and currently offers access through a website, monthly print publication, television, Facebook, and Twitter.<sup>98</sup> Individuals can also access video and podcasts free through Apple iTunes.<sup>99</sup> Viewers can expect to get daily updates about cases in the supreme court and court of appeals, as well as information about judges, amendments to court rules, judicial branch administrative activities, and featured stories.<sup>100</sup>

Like Ohio, Maricopa County Superior Court in Arizona, which is the fourth largest trial court system in the United States, has created a similar mechanism to promote state court outreach and interaction with the public.<sup>101</sup> On its website, the Maricopa County Superior Court provides the public with annual reports and operational information about the court, highlighting its various programs and

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95. Davey & Taylor, *supra* note 90, at 5.

96. *Id.* at 5–6.

97. *Id.* at 6. See generally COURT NEWS OHIO, <http://www.courtnewsOhio.gov> (last visited Feb. 26, 2014).

98. ABOUT COURT NEWS OHIO, <http://courtnewsOhio.gov/about/default.asp> (last visited Feb. 26, 2014).

99. *Id.*

100. Davey & Taylor, *supra* note 90, at 6.

101. SEGUIN, *supra* note 82, at 12.

services.<sup>102</sup> Further, the court uses Facebook, Twitter, and YouTube as a way to promote interaction.<sup>103</sup> On the court's YouTube website, viewers can watch videos about how judges are selected to the bench, self-representation in court, and how to avoid juror misconduct.<sup>104</sup> Many courts across the country have made large strides embracing social media as a means of community outreach. Oregon needs to follow.

### C. *Technology in the Courtroom*

The Oregon judicial branch must also move to integrate more technologically advanced courtrooms for judges, attorneys, and juries to use. Not only is technology more readily available, but also "the population of old-school litigators" has diminished and younger generations are appearing more and more in court.<sup>105</sup> The implementation of technology into the courtroom enhances the capabilities of the court to hear testimony, receive evidence, and view documents at a quicker speed, all while maintaining the credibility of the proceedings.<sup>106</sup> As one judicial clerk in Ohio stated:

The new equipment is more than a shiny toy. The Federal Judicial Conference Committee on Automation and Technology has researched the utility of new courtroom technologies, from the perspective of both judges and jurors. The results were markedly favorable. For example, over 90% of the jurors indicated they were better able to see evidence and understand an attorney when

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102. *Id.* at 11.

103. THE JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY, <http://www.superiorcourtm.arizona.gov> (last visited Feb. 26, 2014).

104. SuperiorCourtAZ, *Merit Selection: How Judges are Appointed in Maricopa County*, YOUTUBE (Feb. 26, 2014), <http://www.youtube.com/user/SuperiorCourtAZ?feature=mhee>.

105. Hon. Herbert B. Dixon, Jr., *The Evolution of a High-Technology Courtroom*, NAT'L CTR. FOR STATE COURTS (2011), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Technology/1-4-Evolution-of-high-tech-courtroom.aspx>.

106. See NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 113-18 (2009), available at [http://apps.americanbar.org/abastore/products/books/abstracts/5450060%20chap%204\\_abs.pdf](http://apps.americanbar.org/abastore/products/books/abstracts/5450060%20chap%204_abs.pdf); Tammi Flythe, *The Courtroom 21 Project: A Light at the End of the Legal Technology Tunnel*, FINDLAW (May 5, 2013), <http://technology.findlaw.com/modern-law-practice/the-courtroom-21-project-a-light-at-the-end-of-the-legal.html>; Martin Gruen, *The World of Courtroom Technology*, THE CTR. FOR LEGAL AND COURT TECH. 1-6 (2003), available at <http://www.legaltechcenter.net/download/whitepapers/The%20World%20of%20Courtroom%20Technology.pdf>.

counsel used video evidence presentation technology. This finding is in accord with statistics showing that, after three days, people remember 15% of what they heard, but 65% of what they saw and heard—in other words, video evidence presentation can increase juror retention of information by four times.<sup>107</sup>

Technological courtroom integration should take several forms, from basic courtroom infrastructure to the more pointed evidence presentation tools. The courtroom infrastructure begins with upgraded audio/video systems, including “microphones, an audio processor, audio amplifiers, and an audio control system.”<sup>108</sup> Further, the fully integrated courtroom will include assistive listening devices for individuals with hearing disabilities, real time foreign language interpretation, and teleconferencing and videoconferencing systems.<sup>109</sup> A real advantage to a high-quality videoconferencing system is the potential application it has to a remote appearance system.<sup>110</sup> A remote appearance system, operated through the installed videoconference system, “enables individuals or groups of people in different locations to communicate through the use of audio and video equipment . . . [and] eliminates time delays and costs due to travel and scheduling.”<sup>111</sup>

Use of technology in evidence presentation can also be especially helpful. One study suggests, “[p]resentation systems helped [judges] manage trials more quickly.”<sup>112</sup> To realize these benefits, the Oregon judicial branch should consider integrating high-tech video displays, annotation monitors allowing witnesses to electronically mark exhibits on the stand, witness monitors, and evidence cameras, which allow for paper documents to be quickly converted into electronic files capable of being enlarged on a screen.<sup>113</sup> Each of these solutions is aimed at creating a paperless courtroom, which promotes witness and jury interaction.

Courts and attorneys across the country have already begun integrating technology into everyday practice. For example,

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107. Gruen, *supra* note 106.

108. *Id.* at 3.

109. *Id.*

110. *Id.* at 4.

111. *Id.* at 5; see Bret Rawson, *The Case for the Technology-laden Courtroom*, EXHIBITONE (Mar. 15, 2004), [http://www.exhibitone.com/white\\_papers/wp\\_court\\_pro.htm](http://www.exhibitone.com/white_papers/wp_court_pro.htm).

112. Gruen, *supra* note 106, at 6.

113. Dixon, *supra* note 105.

prosecutors in the San Diego County District Attorney's office have begun to utilize the popular new app TrialPad to help present cases in an interesting, interactive way.<sup>114</sup> TrialPad, which was named the #1 New Product of 2011 by TechnoLawyer, is a \$90 app sold in the iTunes store, which claims to "make [] your document management more efficient, and your presentation more dynamic."<sup>115</sup> Deputy district attorney David Grapilon of San Diego stated that TrialPad allows him to:

[P]resent a variety of evidence, a variety of media, really, at the touch of a finger. I can bring the area up, and rotate the image by using my fingers to allow the witness to better describe the area they want, I can even tilt it or pan it. We're no longer limited by space, no longer limited by static exhibits.<sup>116</sup>

The United States District Court for the District of Oregon has also begun to implement new technology changes. The District of Oregon is a Founding Affiliate of the Courtroom 21 Project, which "emphasizes experimental work focusing on how legal technology is actually used by members of the legal profession." The Founding Affiliate program "has provided invaluable assistance to the District of Oregon with regards to technology acquisition, infrastructure design, and on-site consultation."<sup>117</sup> The District of Oregon currently employs an audio visual systems manager and a courtroom technology specialist, and in 2013, the district reported that it implemented, among other things, larger monitors well suited for jury box viewing, updated video distribution systems, and increased digital content protection.<sup>118</sup> The Oregon judicial branch should move in the same direction.

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114. Janet Kwak, *District Attorney's Office Goes High-Tech in Courtroom: Prosecutors use iPad App to Build Cases*, ABC 10 NEWS (May 19, 2013), <http://www.10news.com/news/district-attorneys-office-goes-high-tech-in-courtroom-prosecutors-use-ipad-app-to-build-cases-05192013>.

115. TRIALPAD BY SAURIAN, <https://itunes.apple.com/us/app/trialpad/id381223425?mt=8> (last visited Feb. 12, 2014).

116. Kwak, *supra* note 114.

117. Flythe, *supra* note 106.

118. STEVE SIBELMAN, DISTRICT OF OREGON – RECENT COURTROOM TECHNOLOGY UPDATES (Apr. 16, 2013), *available at* [http://www.legaltechcenter.net/download/conference-documents/court\\_affiliates\\_conference\\_2013/Courtroom%2021%20Affiliates%20Update%202013%20Oregon.pdf](http://www.legaltechcenter.net/download/conference-documents/court_affiliates_conference_2013/Courtroom%2021%20Affiliates%20Update%202013%20Oregon.pdf).



#### D. Judicial Elections

The Oregon Supreme Court stands at the intersection of every important social, political, economic, and legal issue in this state. Historically, many of the hallmark laws that define Oregon—its public beaches, the bottle bill, land use planning—were challenged in court and upheld by the Oregon Supreme Court. More recently the court has decided the constitutionality of the legislature’s funding level from K-12 education, the constitutionality of Public Employee Retirement System reforms, the constitutionality of campaign finance laws, laws regulating the financial relationship between legislators, lobbyists, and constituents, the constitutionality and administration of the death penalty, and hundreds of other cases affecting human services, public safety, victim’s rights, and the enforcement of property and economic rights. The cases just described profoundly affect the social, political, and economic lives of Oregonians. That being so, it is no wonder that special interest groups now see opportunities to influence who serves on Oregon’s highest court.

So far, Oregon has been spared the financial arms race that typifies the funding of judicial election campaigns in many other states.<sup>119</sup> Unfortunately, these judicial campaigns are becoming too political, characterized by exorbitant spending, the involvement of national special interest groups, and a blizzard of misleading attack ads that mask the true interests of the sponsors.<sup>120</sup> Selecting judges

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119. See Debra Erenberg & Matt Berg, *The Dark Knight Rises: The Growing Role of Independent Expenditures in Judicial Elections After Citizens United*, 49 WILLAMETTE L. REV. 501 (2013).

120. Seth Hoy & Laurie Kinney, *Outside Spending Floods Judicial Elections at Record Levels, Report Finds*, BRENNAN CTR. FOR JUSTICE (Oct. 24, 2013), <http://www.brennancenter.org/press-release/outside-spending-floods-judicial-elections-record-levels-report-finds>. Hoy and Kinney write: “Special-interest spending in judicial elections has turned into an arms race.” *Id.* According to a report of judicial state-court races in 2011–12:

[(1)] Non-candidate groups (including political parties) pumped in 43 percent of all funds spent on state high court elections (\$24.1 million out of \$56.4 million in 2011-12), compared to 22 percent (\$12.8 million) in the last presidential election cycle. Super PACs and other outside groups funneled big spending into some state judicial elections for the first time; [(2)] Thirty-five percent of all funds spent on state high court races, or \$19.6 million, came from just 10 deep-pocketed special interest groups and political parties, compared to \$12.3 million, or 21 percent, coming from the top 10 “super spenders” in 2007-08; [(3)] A record \$33.7 million was spent on Supreme Court campaign TV ads, far exceeding the previous record of \$26.6 million in 2007-08. Negative TV ads aired in at least 10 states; [(4)] National politics invaded judicial races in 2011-12. In Iowa, TV ads referenced marriage equality; in Florida, the federal Affordable Care Act; and in Wisconsin, collective

through this kind of political process—with its inflammatory rhetoric and demagoguery—erodes public confidence in the impartiality of all judges. Polls consistently show that the public believes judicial campaign contributions pay off for donors. A 2010 Harris poll found that more than 70% of Americans believe that campaign contributions influence courtroom outcomes.<sup>121</sup>

History proves that our constitutional system of government has endured because the public and the other branches of government acquiesce to judicial authority. They have confidence and trust in the impartiality and independence of judicial decision making—namely, decision making free of outside political or economic influence. However, the special interest financing of judicial campaigns in states across the country has the potential not just to erode, but to destroy our children's and grandchildren's trust and confidence in our courts.

Oregon should not wait for the nuclear judicial arms race to strike here. Currently, the Oregon Law Commission is studying judicial selection in this state, and will eventually provide a report to the legislature that may someday provide the basis for constitutional reform.

#### *E. Family Law*

Oregon has been one of the nation's leaders in moving away from the adversarial model to a problem solving model in drug courts, mental health courts, and veterans' courts. Although there has been some innovation in Oregon's family courts, it is time to ask hard questions about the structure, operation, tradition, and culture of our family courts.

Oregon judicial leaders could begin by asking whether our traditional adversarial model actually meets the needs of divorcing and separating families. Today, the adversarial model features drawn out court processes, delays, and huge expenses, all of which intensify conflict between the parties, promote economic instability for divorcing families, and contribute to behavioral, emotional, and educational risks for children. It's time to reengineer our family courts in ways that are less adversarial, encourage continued parental

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bargaining rights.

*Id.*

121. Cliff Collins, *Judicial Selection and its Consequences*, OR. STATE BAR BULLETIN, Aug. 2012, available at <https://www.osbar.org/publications/bulletin/12augsep/judicialselection.html>.

involvement with their children, and provide for alternative forums and processes outside the court system for resolving parenting issues in a more consensual manner.<sup>122</sup>

Today, in 60% of the family law cases nationwide, at least one party is not represented by a lawyer and frequently neither party is represented. We need to ask whether the parties in these cases are well served, and whether their needs—and the needs of their children—are met in hearings controlled by procedures and rules of evidence (some of which originated in the Roman Empire) that they know nothing about. More relaxed evidentiary rules and procedures could reduce litigant stress and, with experienced, well-trained judges, create an atmosphere in which parties believe they have been fairly heard and treated with respect.

Finally, judicial leaders might also ask what is the appropriate level of judicial involvement and responsibility for review and examination of uncontested divorce agreements. Reducing the court's role in those cases and in other aspects of divorce and separation would likely enable judicial resources to be shifted away from family courts, enabling courts to better perform their core judicial functions.

## V. CONCLUSION

Despite the unprecedented economic challenges Oregon has faced during the last decade, the *New York Times*, in a 2011 editorial, identified the Oregon Court system as one of the two best run in the country.<sup>123</sup> Likely the *New York Times* made that observation for a number of reasons. First, despite funding difficulties, the Oregon court system has continued to protect public access to justice. In other words, it has prioritized keeping the courthouse doors open and assisting those people who need help seeking justice.

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122. For example, Deschutes County is piloting an Informal Domestic Relations Trial (IDRT). All parties to a dissolution of marriage case are offered the choice to “declare” at an early status or case management conference whether they want to enter the IDRT program and avail themselves of a proceeding in which most of the rules of evidence are waived and the time to hearing is accelerated. The program targets self-represented litigants; however, it also may increase the hiring of lawyers in family law cases because the informality of the proceeding and the accelerated docket have the potential to reduce the cost of litigation. See *Informal Domestic Relations Trials*, OR. JUDICIAL DEP'T, DESCHUTES CNTY. CIRCUIT COURT, <http://courts.oregon.gov/Deschutes/services/famlaw/Pages/Informal-Domestic-Relations-Trials.aspx> (last visited Mar. 17, 2014).

123. Editorial, *Threadbare American Justice*, N.Y. TIMES (Aug. 17, 2011), available at [http://www.nytimes.com/2011/08/18/opinion/threadbare-american-justice.html?\\_r=0](http://www.nytimes.com/2011/08/18/opinion/threadbare-american-justice.html?_r=0).

Second, the branch has worked hard to maintain the public's trust and confidence. The branch has changed century-old traditions to become more efficient, adopted statewide security standards for our courthouses to protect the public and court staff, and diligently emphasized impartiality and the court's limited role to interpret rather than make the law.

Third, the branch has responded to the challenge of continuing to provide quality and timely dispute resolution. It has increased its use of technology, streamlined court processes, and developed specialty courts such as the drug courts and family courts. The branch has also established the voluntary expedited civil jury trial program to resolve smaller economic disputes more quickly—and the statewide complex litigation court to ensure that large, complex cases do not overwhelm the rest of a court's business.

Fourth, the branch has worked hard to collaborate with its justice system partners and stakeholders.

Fifth, the branch has done its best to enhance judicial administration. Despite declining resources, the branch has maintained its commitment to performance measures, management, budgeting, and support for evidence-based practices.

In the end, however, the independence, competency, efficiency, and relevance of the Oregon court system of the future will depend on funding. It is too often said publicly that America's court systems need to be funded at an "adequate" level. Unfortunately, "adequate" funding is usually defined at the barest, most basic level: can a court dispense due process in disposing of the cases before it in a manner that meets the minimum constitutional or statutory muster?

The cornerstone of democracy—the rule of law—cannot survive with this meager mindset as its measuring stick. That dynamic must change. A definition of an "adequate" level of funding for the courts must recognize both the duty of the court system to provide justice without delay and, additionally, it must encompass the responsibility of *sustaining* a viable separate and equal branch of government—the judicial branch.

Finally, the judicial branch must be sensitive to the relationship between technology and the future of the court system. The younger generations that use technology every day have no patience or time for what is still considered the "court norm"—wading through reams of paper, long delays to get information, much less searching for missing paper files or delayed entry of judgments. They are used to

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accessing information, facts and data, from their smart phone instantly. Given that reality, courts must be funded so that they can move forward quickly with technological opportunities to support and improve their work processes. Failure to do so has the potential to cast Oregon's courts into irrelevancy with the upcoming generations.