

Dowager Revisited

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The very first piece of work I did on the future of law and the American justice system was titled, "A dowager in a hurricane." It was, in fact, a script for a multimedia presentation--involving eight slide projectors and three motion picture projectors--for what might well have been the first state judicial foresight conference in the US, sponsored by the Hawaii State Judiciary in Honolulu in 1972.

The title came from a passage by Gresham Sykes which described the increase in the rates of crime, and changing theories about the causes and cures of crime in the US, from the 18th Century to the 1960s. Sykes then observed that

"Throughout all this, of course, the legal system has stubbornly remained in the 18th century, somewhat like a dowager in a hurricane who refuses to disturb her tea party merely because the wind seems to be rising." [Gresham Sykes, "The Future of Criminality," American Behavioral Scientist, Vol. 15, p. 409., January-February 1972]

Several hurricanes have swept through the American judicial system, leaving it in many ways a very different institution from what it was in the late 1960s. The dowager has been sent to her reward, and in her place you find a growing cadre of professional court administrators and judges who are more concerned about TQM than they are about a well-laid out tea service. And futures activities have been sweeping the American state judiciaries like a prairie fire in the dry season.

While Hawaii was the first state judiciary to take the future, and futures studies, seriously, there was a long wait before any other state judiciary caught the bug. But once Virginia began its vision quest in 1986-87, the State Justice Institute (a major source of federal funding for improving the functioning of state judiciaries) created a funding category on "the future and the courts", and the American Judicature Society made facilitating judicial foresight one of its top priorities, state judiciary after state judiciary has held some kind of a futures activity, whether it be a one-shot conference on the future, a blue-ribbon futures commission, or a lengthy, broadly participative series of activities leading to the creation of a future-oriented judicial plan and the institutionalization of futures research into the routine administration of the state court system.

I myself have worked personally over extended periods of time with the judiciaries of Virginia, Arizona, Tennessee, and the 8th Judicial Circuit of Florida, and to lesser extents with Massachusetts, Illinois, and Kansas, and indirectly with all state and territorial judiciaries, through a conference on "The Future and the Courts" which convened more than 300 participants nationwide in San Antonio in May 1990, and a workshop in Nashville in April 1993 which brought together representatives from all the state courts which had by that time conducted some kind of futures activity with the representatives from the 19 state courts which had not. [For more details about all of this, see James A. Dator and Sharon Rodgers, Alternative Futures for the State Courts of 2020. Chicago: American Judicature Society, 1991; Ira Pilchen and Sandra Ratcliff, Conducting Court Futures Activities. Chicago: American Judicature Society, 1993; Jim Dator, "The dancing judicial Zen masters: How many judges does it take to see the future?" Technological Forecasting and Social Change, Vol. 46, pp. 59-70, 1994; and Sohail Inayatullah, ed., "The Futures of State Courts," thirteen articles, and an extensive bibliography, in Futures Research Quarterly, Vol. 9, No. 4, Winter 1993 and Vol. 10, No. 1, Spring 1994].

When I first started out working with state judiciaries, I was very critical of the operation of our courts, and quite skeptical about the abilities, or even the commitment, of judges, administrators, and clerks within them, and of the lawyers who practiced before them.

I remain critical and concerned, but over the years, I have become much more respectful and appreciative of certain roles which our courts, judges, and lawyers often play within the American system of governance. Indeed, I have concluded that generally speaking (and to be sure there are far too many exceptions, but still as a general rule) judges, especially in the state courts, are the practical philosophers and (more surprisingly) the applied futurists in America today.

They have assumed these roles for the most part by default, not by the aggrandizement of their position or by usurpation of power from others. The truth of the matter is that no one else in our society has the ability or the will to make broad, socially-significant decisions from the perspectives of general morality and philosophy that our judges have. Certainly, however good and well-meaning our legislators, state or national, might be individually, no one can accuse them of being, as a group, ethically or philosophically motivated for the most part. Indeed, it is usually the case that our elected officials generally do everything they can to avoid making decisions at all, especially the hard, ethical decisions which must be made so that ordinary people can go ahead living their lives. Elected politicians know that if they make a decision they will likely alienate more people than they will please, whereas if they keep mashing a problem around with as much heat and passion, but as little light and reason, as possible, then they might well be re-elected. I must add here also that most elected judges find themselves in the same situation, unless they are from completely safe districts or unless their elections are so far into the future from the time they render a decision that they can reasonably assume that by election time most voters will have forgotten what they did.

Now let me make it clear that I am not making any comments about Texas legislators and judges here whatsoever because I am totally ignorant of the ways and means of Texas politics. And I intend to stay that way.

But it truly surprised me when I came to understand that judges are often the applied futurists of our society. Judges became futurists because they were so often asked to decide issues concerning a new technology, or a new lifestyle, about which the public, and thus the

average legislator, was utterly unaware. Indeed, if the public, and the legislator, were to get wind of some of the issues judges are faced with, they would probably react as though they had just been told some tale of far-out science fiction--something that might happen to Buck Rogers in the 22nd Century. And yet it is a consequence of the incredibly fast pace of change within our society that many "futuristic" things are causing controversy and conflict between American citizens and/or institutions now which must be resolved in our courts.

Since (or, even though) legislatures have not yet determined public policy for these "futuristic" situations, judges must nonetheless decide the case and controversy, and thus, many judges feel more comfortable with the future than do most other folks because they encounter it so frequently.

I believe this is one of the several reasons state judiciaries have embraced future-oriented activities as fully as they have (for other reasons, see my "dancing Zen Masters" article, above).

Now, please do not misunderstand me. I am not here saying that judges are flaming futurists, boldly going where no one has ever gone before. They are timid, reluctant futurists, doing the vital work that everyone else is too afraid to do. But, if they are going to do it, many judges have concluded, then they are going to try to do it right. And if futures studies can help them somehow, then bring on the clowns, they say. Whereupon I enter, stage left, with cap in hand.

And after having said my sooth, and led whoever is willing to follow through a series of future-orienting exercises, I often read the report of a futures commission I have worked with, and sit down and weep.

For example, I worked for many months with an outstanding group of judges and judicial administrators serving the Commission on the Future of Virginia's Judiciary. Their report, published in May 1989, was titled, Courts in Transition. It contained ten visions for the future of the courts in Virginia and many recommendations, the vast majority of which have been implemented by law, judicial rule, or administrative decision, as appropriate. Two recommendations resulted in unusually innovative activities. One was a set of projects

designed to make the courts more accessible and "user friendly" to its consumers [See, The Public as Partners: Incorporating Consumer Research into Strategic Planning for Courts, Judicial Council of Virginia, March 1994] .The other is Future View, a newsletter of trends and future-oriented issues published by the Office of the Executive Secretary of the Supreme Court of Virginia.

Shortly after the Virginia Commission published Courts in Transition, The Virginia Assembly on the Future of the Courts was convened on the campus of the University of Virginia. I was asked to say something about the report, which I did. The venue of my talk was the Rotunda of the University, designed by Thomas Jefferson himself--one of the most sacred spots in Virginia, or American, history.

I praised the Commission's Report as being "the most future-oriented document I have ever seen an official judicial body produce." Unfortunately, I went on to add, it only got the Virginia judiciary about twenty minutes into the future.

I still have scars to show for having made that remark.

A year or so thereafter, I was asked to talk to the inaugural meeting of the Chief Justice's Commission on the Future of the Courts of Massachusetts, which was held in an equally-sacred spot, Faneuil Hall, the (or another) "Cradle of Liberty". I told the Commission about my frustration with the Virginia Commission, and, knowing the rivalry between Massachusetts and Virginia for pride of historical place, challenged Massachusetts to go even farther into the future than did Virginia.

In 1992, the Chief Justice's Commission published its report, Reinventing Justice 2022. The report contains six "pathways" towards its vision of a preferred system of justice. Pathway One is titled, "User-Oriented Justice" and ends with these words: "In this vision of the future, the user will leave the temple of justice with dignity intact, assured that someone listened and responded with courtesy, respect, and sensitivity."

The Massachusetts report also included the State of Justice Address for January 15, 2022, by The Honorable Zoe Chan Fernandez, Chief Justice, and a timeline showing the steps made in transforming the Massachusetts judiciary from the way it was in 1990 to the way it became in 2022.

Clearly the Massachusetts document, like the Virginia one before it, is a very impressive, future-oriented piece of work. Since then many other state judiciaries have issued their reports. I call attention especially to the Report of the Commission on the Future of the California Courts, published in December 1993, Justice in the Balance 2020, and the Report to the Texas Supreme Court and the Texas Judicial Council of the Citizen's Commission on the Texas Judicial System, Into the Twenty-First Century, published in January 1993, which I would hope every person reading these words has also read.

In the course of some remarks made recently, I felt impelled to retell the Virginia and Massachusetts stories. I said that I felt that the Massachusetts report clearly positioned its judiciary well ahead of Virginia: possibly by as many as thirty minutes into the future.

It turned out that the two vice chairs of the Massachusetts Commission, and at least one Commission member, were in the audience when I said that. I was afterwards told by one of the vice chairs that, should I ever visit Massachusetts again, it should be unannounced, in disguise, and under cover of night.

Now, why do I keep on doing this kind of thing? Am I unusually stupid, self-destructive, and insulting. Well, yes, but in addition to that, I also truly believe that no judiciary or judicial commission yet has had the courage to look frankly and fearlessly at what I call the "tsunamis of change" rushing towards us from the future, and tried to learn how to "surf those tsunamis" ["Tsunami" is the proper English word, borrowed from the Japanese, to describe what is often still incorrectly called "tidal waves"].

One of the reasons no one has looked at the future as fearlessly and helpfully as I think they should has to do with our educational system. Everyone educated in the US has taken scores of courses dealing with the past--with history--and probably many courses

dealing with the present (sociology, economics, political science, and the like). Very, very few people have ever taken even ONE course dealing primarily about the future, especially a course on the future taught by someone who has been trained in, or taken the time to learn about, futures studies.

So most people simply don't know how to think about the future usefully. The past, yes. The present, yes. The future, no. Thus, when they are asked to think about the future, as their work on a judicial futures commission would seem to require, they fall back on what resources they do have for thinking about the future, which is probably endless reruns of "Star Trek" (whether Classic or Lite), or their memories of the old Buck Rogers movies, World Fair Expositions, or Disneyland rides through The Wonderful World of Tomorrow.

Or, if they try to get "serious" about it, they might ask "an expert" to provide some trend extrapolations, construct a computer model, or engage in some other "scientific" methods for "predicting" "The Future."

While such science fiction and science fact clearly have their place in useful futures studies, it is NOT possible to predict the future with anything approaching the precision necessary to warrant using any such prediction as the basis for planning the future of a state judiciary (or anything else). Thus, what I ask judicial futurists to do is first to consider some of the major forces in the present which will create the future; then to react to several alternative futures which might result from the variable interaction of those forces, and finally then to envision, design, and try to create a preferred judiciary for the future.

Now, no one in Texas can plead ignorance of, or lack of opportunity to study, the future as their excuse. There is, at the University of Houston at Clear Lake City, one of the best futures studies programs in the world (called, "Studies of the Future", and offering BS and MS degrees. I would say that it is the best in the world, except I head that one at the University of Hawaii, may God be pleased not to strike me dead for my hubris).

While there are certainly some outstanding future-oriented individuals in schools and universities throughout the US, and a number of excellent futures consulting firms, American education, higher and lower, has simply chosen to ignore the future (hoping, no doubt, that it will go away), and left us, as citizens, wholly ignorant of, and blindsided by, the future as it slams into us everyday like so much solar wind: invisible and deadly.

Nonetheless, even though all efforts at judicial foresight have inadequately considered the future from my perspective, I still believe that they often have been extremely useful for other purposes:

1. No one is an expert on the future, most certainly not even the professional or academic futurists. As Yale University futurists Wendell Bell and James Mau said many years ago, "there are no future facts, and there are no past possibilities." The future, and only the future, is the arena of possibility, of hope, of creation. Thus there is absolutely no reason to restrict judicial foresight activities to judges and court officials, or to judges, court officials and lawyers, or to judges, court officials, lawyers, and other people who have some vested interest in the current operation of the courts. While all such people should be involved in judicial foresight activities, so also should representatives of all the other people who do not have a vested interest in the way justice is defined and administered presently. That means that representatives of people who have run afoul of the law, as well as those who uphold and administer it, should participate in judicial futures activities. The net of participants should be cast as widely as possible. People from all walks of life--the very poorest as well as the most privileged; the youngest as well as experienced adults; the most severe critics of the current system as well as its greatest eulogizers--all of these should be fully and equally involved.

If you do so, you might end up with a vision of a preferred justice system fit for the future. If you restrict participation to seasoned, favored insiders, you almost certainly will not.

Thus while any activity set up, for example, to consider court or legal reform might very well be restricted to insiders, or at least

dominated by them, any activity set up honestly to consider the future should not.

2. Setting up a futures activity is often a good (and often the only) way to get even modest reforms. By setting the conceptual limit far out into the future, and considering a number of truly "far out" ideas about justice, it then usually becomes much easier to consider, and to undertake, many of the other nitty gritty reforms necessary to bring a curmudgeoned state judiciary into the 19th, or even 20th, century, if still nowhere near the 21st.

I would say this is what happened, initially, in Arizona. Their first report, The Future of the Arizona Courts, which was published in early 1989 was (in my judgment, though certainly not theirs) pretty tepid stuff, even compared to the Virginia and Massachusetts reports which were, of course, published later. But the Commission's report did make it possible for that state judiciary to make a large number of small but important reforms of the kind already achieved in many other state judiciaries which had been impossible previously.

But more importantly, once the futures ball was rolling it became impossible to stop, and, among other things, Arizona has now made some extraordinarily impressive futures innovations, most dramatically an interactive multimedia kiosk, called "QuickCourt" which enables people, by themselves, without any legal assistance whatsoever, and completely free of charge (so far), to obtain (in language they can understand, but legally accurate) information about, or in some cases, legal documents that can then be used in court proceedings, on divorce (including calculating child support payments), forcible detainer, landlord and tenant rights and responsibilities, enforcement of judgments (bankruptcy, liens, garnishments, writ of restitution, writ of execution, and debtor's exam), small claims information, information about alternative dispute resolution, a list of legal service agencies, and an overview of the Arizona court system.

Having successfully proven themselves in a heavily-used, year-long public test, QuickCourt kiosks are about to be sprinkled across Arizona like so many ATM facilities.

Vision 2004, A Technology Visions Plan for the Arizona Courts to the Year 2004, published by the Arizona Supreme Court in June 1993, promises much, much more in the immediate future.

3. But it is my hope--indeed, it is my expectation--that the next round of judicial foresight will begin to take the future even more seriously. All of the jurisdictions I am familiar with have found the work they have done so far to have been of enormous practical use--as the examples I have cited above should make clear, and as the many I have not would make even clearer.

And yet most of the people who have been most deeply involved in this so far know they have not done nearly enough, and now are in the process of doing more and better. One of the things that is happening is the creation of a network of people who are by now quite experienced judicial futurists--people both within the state judiciaries who have taken the lead in judicial foresight activities, and the various professional futures consultants who have been working with them over the years. This group of people, spread throughout the US, and in other parts of the world as well, are using the emerging Information Superhighway to stay continuously in touch with each other, sharing their plans, experiments, successes and failures in a constant race against the future. Like everything else in relation to the Information Superhighway, the longer an individual or institution delays in getting online, the harder it will be for them to catch up with those zooming on ahead.

I regret to say that throughout most of this time, the bar associations, nationally, in each state and locally, have often at best remained skeptical and aloof, and at times have been hostile and ridiculing of judicial futures work. In addition, some very good state and local judicial futures activities have been panned in the press as being a thoroughly frivolous waste of the taxpayers money--crystal ball gazing and new-age navel nit picking, it has been called.

Though many lawyers have of course been actively and positively involved in all of projects discussed above, the bar often has not.

In contrast to the state judiciaries, the bar has often been somewhat like the old dowager in the hurricane, fussing about her tea party

and worrying about her billable hours, while the wind is whipping and howling outside.

I believe this is changing.

The invitation for me to write this article is one example. So was the opportunity of discussing futures work at the annual "Editor's Exchange" for bar journal and other law-related publications, sponsored by West Publishing last February.

Perhaps of equal or greater importance was the way the states' judicial foresight activities were placed so very much in the forefront in the planning, execution, and resulting recommendations of the ABA national public forum on the justice system, "Just Solutions," held in Leesburg, Virginia May 1-3, 1994.

I take all of this to mean that--with Texas at the lead?--more and more bar associations are now beginning to study carefully the massive waves of change roaring rapidly and inevitably towards us all from the future. And that some bar associations or members might indeed have already begun waxing up their boards and are paddling out to surf the oncoming tsunamis.

Now, if we can only get the feds to pay attention, and I have had some recent feelers which indicate that this might also be commencing.

Imagine what it would mean to this country, and to the world, if our national as well as state bar and bench finally began to orient itself more usefully to the future, and stopped spending quite so much time in (understandable and fully justified) awe of the past.

We will either turn around and try to surf those tsunamis, or we will be drowned under the rapidly rising seas. We really have no responsible choice but to try because I can assure you, surf's up!