

## Futures and Trial Courts

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Judges are often applied futurists. That is one clear conclusion I made from work which I did for almost forty years with judiciaries of the United States, the states and territories of the United States, and all common law countries throughout the world. Whether they like it or not or even recognize it or not—and regardless of their political ideology or judicial philosophy—in our fast-moving, ever-changing society, judges often must resolve a case and controversy on issues about which no public policy has been set. The issues are so novel and the need for authoritative judgments is so urgent that the parties cannot wait for the extremely slow and costly process of formal legislation to resolve the issues. Therefore, parties turn to the courts where judges (very well trained in the law and legal reasoning, but unfamiliar with the theories, methods, and substance of futures studies) do their very best to decide the novel matters fairly for both the disputants before them and the community within which they work and live.<sup>1</sup>

Indeed, it was in part because trial judges were constantly being blindsided by novel issues that futurists, such as myself, have been asked to help them anticipate things to come so that judges can later decide such issues fairly and expeditiously. However, futurists had to make it very clear that we cannot predict the future for them.<sup>2</sup> For most of humanity's time on Earth, humans were so few and puny, and our societies and the surrounding environment were so stable and seemingly unchanging that we might have

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<sup>1</sup> See Jim Dator, *Trajectories: Judicial Governance of the Long Blur*, 33 FUTURES 181, 194 (2001); NAT'L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2007*, at 2 (Carol R. Flango et al. eds., 2007) [hereinafter NAT'L CTR.].

<sup>2</sup> Jim Dator, *Introduction to ADVANCING FUTURES: FUTURES STUDIES IN HIGHER EDUCATION 1*, 5-6 (James A. Dator ed., 2002).

thought that prediction was possible—but not now. For the past several hundred years we have lived in an industrialized society, where past experience could not be said to be the best guide for future experiences.

This does not mean, however, that anticipation is hopeless or useless. To the contrary, futurists forecast alternative futures that can be usefully contemplated.<sup>3</sup> Many futurists help judges, administrators, and clerks "preexperience" several alternative futures so that they can cope more successfully when the "real future" does arrive.<sup>4</sup>

Years of labor in the futures field have shown that while there are a vast number of alternative futures before us, there are actually four "generic" forms.<sup>5</sup> It is sufficient to reduce the many alternatives to specific versions of each of the four. The four can be labeled: continued growth, collapse, discipline, and transformation.<sup>6</sup>

### **Futures of Communities**

Most people seem biologically and sociologically programmed by eons of evolution to expect the future to be a continuation of whatever is happening now. The future is typically believed to be an extension of the present: if things are thought to be good now, it is assumed that they will continue to be pretty good forever. If things are bad now, the future looks forever grim.

#### Continued Growth

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<sup>3</sup> See NAT'L CTR., *supra* note 1, at 3.

<sup>4</sup> E.g., John F. Daffron, Jr., *Future Thinking and the Process of Preparing for Change*, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 219, 220-24 (Kathleen M. Sampson ed., 2004); James A. Dator & Sharon Rodgers, *Judicial Leadership Scenario*, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 225, 225-231 (Kathleen M. Sampson ed., 2004).

<sup>5</sup> Dator, *supra* note 2, at 10.

<sup>6</sup> *Id.* See generally 1 WENDELL BELL, FOUNDATIONS OF FUTURES STUDIES: HUMAN SCIENCE FOR A NEW ERA 239-317 (1997) (describing some methods used by futurists).

Since all advanced nations live in a world where values and human institutions are meant to serve continued economic growth, the official default future for any nation, institution, organization, or community is "continued economic growth."<sup>7</sup> Even groups opposed to ceaseless economic growth measure their own success in terms of growth.<sup>8</sup> Whenever a polity or organization is not growing it does whatever possible to get the polity or organization growing again.

We live in a world so single-mindedly devoted to growth at all costs that we often find it impossible to imagine, and thus to plan for, anything else.<sup>9</sup> However, there are always three other possibilities lying ahead of every nation, community, or organization: collapse, discipline, or transformation.<sup>10</sup>

### Collapse

For years I have struggled in vain to get groups to consider the possibility of their collapse (though many did subsequently collapse). Continuation just seemed inevitable to them. But now so many things around us seem to be going wrong that "collapse" is perhaps too popular—too ghoulishly popular. Not only are the most popular stories in our cinema and electronic games based on collapse, but so are many serious books and

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<sup>7</sup> *Id.*; see also BENJAMIN M. FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH 3-18 (2005) (discussing the preoccupation of citizens and nations across the world with economic growth).

<sup>8</sup> FRIEDMAN, *supra* note 7, at 100-02 (discussing how an individual's desire to help others is ultimately driven by their own relative perception of growth).

<sup>9</sup> *E.g.*, FRIEDMAN, *supra* note 7, at 1, 4-5; see also BJØRN LOMBORG, GLOBAL CRISES, GLOBAL SOLUTIONS 1-9 (2004) (presenting compiled works from the Copenhagen Consensus, which was an effort to prioritize resources in order to promote responsible growth); JULIAN L. SIMON, THE ULTIMATE RESOURCE 2, at 3-16 (1996) (arguing that continued growth, through labor and production, is the only remedy for waning resources).

<sup>10</sup> Dator, *supra* note 2, at 10. See generally JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 498 (2005) (arguing that, although the problems of rapid growth will be resolved in the next generation, the resolution of our problems may materialize as a result of a systematic collapse); RAY KURZWEIL, THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY 96-105 (2005) (discussing the possibilities of a transformed reality in response to demands for growth); BILL MCKIBBEN, DEEP ECONOMY: THE WEALTH OF COMMUNITIES AND THE DURABLE FUTURE 1-4 (2007) (discussing the necessity of a shift to local and community based economy to devise a more sustainable economy).

articles: Jared Diamond's famous recent book, *Collapse*, is only one of many.<sup>11</sup> It may seem preposterous for many groups or individuals to contemplate that judiciaries might collapse, but it is not too silly to wonder if the polities that support the judiciaries are as rock-solid as once supposed. If many more nations continue to weaken and implode, the world, for many of us, will effectively collapse.

### Discipline

Many people worry about the continuation of current political and economic institutions. Some fear for political and economic collapse, but others hope for it. The former prefers that economic growth continue but feels it may not be possible for much longer.<sup>12</sup> The latter argues that continued growth is comparable to the logic of a cancer cell, and that dominant processes are now eating and destroying the very cultural and environmental foundation upon which we all depend.<sup>13</sup> Thus, they say, we must devise a "sustainable" economy and polity based on personal, spiritual, or cultural growth; or perhaps, on a philosophy of "enough" and "fairness" rather than endless material growth.<sup>14</sup>

### Transformation

Finally, the fourth generic image of the future is "transformation."<sup>15</sup> Many futurists, including myself, have been tracking the way technologies—especially communication technologies—have transformed human societies and humans themselves

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<sup>11</sup> DIAMOND, *supra* note 10, at 8; *see also* DENNIS MEADOWS ET AL., LIMITS TO GROWTH: THE 30-YEAR UPDATE 164-79 (2004); MARTIN REES, OUR FINAL HOUR: A SCIENTIST'S WARNING: HOW TERROR, ERROR, AND ENVIRONMENTAL DISASTER THREATEN HUMANKIND'S FUTURE IN THIS CENTURY—ON EARTH AND BEYOND 1-8 (2003).

<sup>12</sup> *See* FRIEDMAN, *supra* note 7, at 401.

<sup>13</sup> *See* MCKIBBEN, *supra* note 10, at 184, 225-26.

<sup>14</sup> *Id.* at 11-12, 210, 217, 222; *see, e.g.*, DAVID COOK, THE NATURAL STEP: TOWARDS A SUSTAINABLE SOCIETY 13-14, 22 (2004); DANIEL QUINN, BEYOND CIVILIZATION: HUMANITY'S NEXT GREAT ADVENTURE 87, 115 (1999).

<sup>15</sup> Dator, *supra* note 2, at 10; *see* KURZWEIL, *supra* note 10, at 7.

from small, mobile, face-to-face hunting and gathering societies to sedentary, property-obsessed agricultural societies; to modern, urban, industrial societies; to the current, globalized information societies.<sup>16</sup> Focusing on new and emerging technologies, these futurists see the possible emergence of communities of “trans-humans,” “post-humans,” cyborgs, artefacts, robots—as well as old-fashioned humans—within the foreseeable future.<sup>17</sup> Ray Kurzweil's *The Singularity is Near: When Humans Transcend Biology* is just one example of such a transformational view.<sup>18</sup>

### **Futures of Courts**

Obviously courts—and all human institutions—would be very different in each of these four alternative futures.

#### Continued Growth and Technological Change

Under assumptions of continued growth, courts will continue to muddle through as they presently do—underfunded and overstressed. More and more of their work may be taken over by alternative dispute resolution techniques and practitioners, but the public courts will still serve as the core adjudicators, dealing with the thorny issues that no one else will handle; namely, issues caused by cultural diversity and conflict as well as economic and environmental uncertainty. Technology will continue to change the way the work of the courts is done, just as it has done in the past, with the courts passively adjusting to technological pressures.

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<sup>16</sup> *See id.* at 16-20.

<sup>17</sup> *See id.* at 260-62, 299-301, 309-10.

<sup>18</sup> *See id.* at 3-5 (predicting that our fast-paced, technological world will soon produce a world in which machine intelligence outstrips human brainpower and a virtual reality takes over our physical world); *see also* JOEL GARREAU, *RADICAL EVOLUTION: THE PROMISE AND PERIL OF ENHANCING OUR MINDS, OUR BODIES—AND WHAT IT MEANS TO BE HUMAN* 3-6, 11-12 (2005).

To illustrate how technology has shaped law and the practice of the law in the past, and might do so in the future, consider that once upon a time, "law" was basically in the heads of judges.<sup>19</sup> A scribe might jot down some of the major decisions of an important case, but there were no transcripts of proceedings and decisions, and no law journals or media reporters to comment on and critique them.<sup>20</sup> Moreover, given poor communications, Judge "A" in Court "A" could decide a case very differently from the way Judge "B" in Court "B," some distance away, might decide essentially the same case.<sup>21</sup>

Precedent was hard to establish, much less enforce, until the invention of the printing press.<sup>22</sup> The printing press was eventually accompanied by more formalized legal education (though as an apprentice) and the invention of constitutions, legislatures, and legislation with positive, written laws that judges were expected to know and follow.<sup>23</sup> Law was no longer in the minds and spoken words of judges but on paper with printed words of varying degrees of solemnity.<sup>24</sup>

With the gradual creation of the modern industrial state and its system of public education, higher education, and eventually professional law schools, law and judicial

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<sup>19</sup>See, e.g., M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 36 (1989) (noting that it "was not the written ruling" that controlled, "but the judge's knowledge of what [legal] custom required").

<sup>20</sup>*Id.* at 37-38 (describing the "earliest written reports of cases, called plea rolls" as "sketchy notes about a case recorded by the clerk" (emphasis omitted)).

<sup>21</sup>See *id.* at 38 (explaining the role and effect of year books).

<sup>22</sup>Compare *id.* at 36 ("Oral societies and societies that used writing desired consistency, but decision in cases *never became binding on later judges.*" (emphasis added)) with *id.* at 39 ("By the eighteenth century, the printed word had acquired sufficient reliability that 'each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard.' " (quoting WILLIAM MARKBY, *ELEMENTS OF LAW* (6th ed. 1905), *reprinted in* READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 124, 125 (Roscoe Pound & Theodore F.T. Plucknett eds., 3d ed. 1927))).

<sup>23</sup>See generally *id.* at 33-39, 84-85, 266-67 (describing the history of printed law).

<sup>24</sup>*Id.* at 39 (compiling various statements of the printed word's authority).

decision-making became even more regulated and systematic.<sup>25</sup> With the development of formal judicial administration, professional court administrators and clerks, strategic plans and policies, and continuing education of the bench and bar, the process became even more constricted.<sup>26</sup>

Then, as Ethan Katsch pointed out some years ago, the "word processor" came along,<sup>27</sup> followed by the Internet, YouTube, and Second Life. Everything has become fluid and uncertain once again, however much word-fetish legislators and administrators might try to deny and prevent it.<sup>28</sup>

But while new gadgets and fads may continue to come and go while initiating significant changes, the future for trial courts will be pretty much what it is now: underfunded, overworked, unappreciated, and, wherever possible, avoided. In the final analysis, however, the trial courts will be the authoritative dispenser of the closest approximation to public justice.

### Collapse: The Unholy Trinity, Plus One

More and more people are beginning to think that maybe the "Jared Diamonds" of the world might be right after all. I, for example, have reduced my own set of "alternative futures" to basically two—breakdown and breakthrough—with breakdown looking more and more likely with every passing day.<sup>29</sup> I currently use the phrase, "the Unholy Trinity, Plus One" to characterize that possibility. I say "Trinity" (though

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<sup>25</sup> Compare ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 205-07 (1983) (providing a history of the legal education movement), with KATSCH, *supra* note 19, at 42 (suggesting that, in time, relying on legal precedent has made our legal process more systematic).

<sup>26</sup> See KATSCH, *supra* note 19, at 42.

<sup>27</sup> *Id.* at 42-48 (providing a discussion about the impact of computers on the legal system).

<sup>28</sup> See M. ETHAN KATSCH, LAW IN A DIGITAL WORLD 8 (1995).

<sup>29</sup> Jim Dator, *Governing the Futures: Dream or Survival Societies?*, J. FUTURES STUD., May 2007, at 1, 8-11.

unholy) because while observers may focus on one of the three "persons," they often ignore the other two—or indeed see in the other two solutions to the one of their concern. Yet they are indeed three-in-one and one-in-three and must be understood together.

The three are (1) “Peak Oil” and the increasing probability that America and the world will essentially run out of cheap and abundant fuel before alternatives can be bought cheaply and abundantly online,<sup>30</sup> (2) "Global Change" and all the litany of challenges that environmentalists have been whining about for thirty-five years while the rest of us have been spiting them and making matters worse,<sup>31</sup> and (3) the possibility that the global economic system might collapse into a black hole of astronomically high and ever increasing debts.<sup>32</sup> For many years, our economy has been a series of economic bubbles and busts that were produced by creating new debt instruments when final collapse appeared at hand. These new debt instruments have so far pushed the day of reckoning into the future, that when the future finally arrives, a reckoning must be made—perhaps tomorrow, perhaps the day after, perhaps, if new debt instruments can be invented and new bubbles blown, not yet.

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<sup>30</sup> KENNETH S. DEFFEYES, *BEYOND OIL: THE VIEW FROM HUBBERT'S PEAK* 3-4 (1st ed. 2005); RICHARD HEINBERG, *PEAK EVERYTHING: WAKING UP TO THE CENTURY OF DECLINE IN EARTH'S RESOURCES* 1, 6-8 (2007). *But see* VACLAV SMIL, *ENERGY AT THE CROSSROADS: GLOBAL PERSPECTIVES AND UNCERTAINTIES* 362-67 (2003) (“[T]he one concern that can be safely set aside is the availability of energy resources: reserves of conventional fossil fuels are sufficient to meet any conceivable demand during the next two generations, and nonconventional oil and gas resources can extend the duration of hydrocarbon era into the second half of the twenty-first century.”).

<sup>31</sup> *See generally* CTR. FOR NAVAL ANALYSIS, *NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE* 6-7 (2007), [http://securityandclimate.cna.org/report/SecurityandClimate\\_Final.pdf](http://securityandclimate.cna.org/report/SecurityandClimate_Final.pdf) (declaring climate change as a national security threat due to possible major weather events); TIM FLANNERY, *THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH* 27-35 (2005) (discussing the problem of greenhouse gases); VACLAV SMIL, *GLOBAL CATASTROPHES AND TRENDS: THE NEXT 50 YEARS* 175-81 (2008) (discussing global warming and greenhouse gases).

<sup>32</sup> *See* Eric Janszen, *The Next Bubble: Priming the Markets for Tomorrow's Big Crash*, *HARPER'S MAG.*, Feb. 2008, at 39, 43-44 (discussing the current mortgage crisis and its implications); Chalmers Johnson, *Why the US Has Really Gone Broke*, *LE MONDE DIPLOMATIQUE*, Feb. 2008, **PINCITE**, available at <http://mondediplo.com/2008/02/05military> (discussing growing American debt caused by costs associated with America's military).

What is the "Plus One"? It is the fact that our disrespected, downsized, outsourced, under-resourced, and debt-gagged government—especially national government—can no longer come to the rescue with Keynesian solutions as it has in the past. With every attempt to bail out failed financial institutions and environmentally devastated communities, the government itself staggers closer to its own demise, leaving each of us to our own devices (as many Americans say they want), or to charity from families, churches, community groups, and the tender mercies of the likes of Blackwater and Halliburton.<sup>33</sup>

In such a situation, there may be little resembling the rule of law, though I expect and hope that many judges will still try to uphold the law by virtue of their own training, standing in their communities, and ethical commitment to peace and justice for all.

#### Discipline: A “u-Society”

All of these generic alternative futures can take many specific forms of which I am only very briefly sketching one for each. For a disciplined society, I focus here on what is being called in Asia and parts of Europe the “Ubiquitous Society” (or “u-Society”).<sup>34</sup> It is generally strongly favored and described as highly desirable in Asia.<sup>35</sup> It refers to rapidly emerging information and communication technologies, some of which we see already in the United States, that make it possible for individuals to be in

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<sup>33</sup> See generally NAOMI KLEIN: THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 4-15 (2007) (discussing the theory of the shock doctrine where practitioners of the doctrine capitalize on the destruction of an economy due to a myriad of circumstances to impose their own free market economies).

<sup>34</sup> Rho Jun-hyong, Slideshow, Dynamic Ubiquitous Korea—Progress and Strategy for Success 10 (May 26, 2006) (on file with author), available at [www.koren.kr/koren/kor/dat/dat\\_download.html?uid=3&PHPSESSID=f183e4dd43e2597ebc1d302932c1718a](http://www.koren.kr/koren/kor/dat/dat_download.html?uid=3&PHPSESSID=f183e4dd43e2597ebc1d302932c1718a); Hajime Sasaki, *Toward the Realization of a Japan-Initiated Ubiquitous Society*, 1 NEC J. ADVANCED TECH. 63, 65-66 (2004), available at [http://www.nec.co.jp/techrep/en/r\\_and\\_d/a04/a04-no1/a63.pdf](http://www.nec.co.jp/techrep/en/r_and_d/a04/a04-no1/a63.pdf).

<sup>35</sup> See Sasaki, *supra* note 34, at 63, 67-69.

constant communication with their environment and for that environment to be constantly attentive to their needs and behavior.<sup>36</sup>

These technologies greet us when we come home, turn on the lights and heat or air conditioning, play our favorite music, and suggest several mouth-watering things in our refrigerator that we could have the microwave prepare. Similarly, when on the road, our cars talk to us, offering helpful suggestions for places to go and things to eat, while making sure it keeps its own tires inflated, its gas tank full, and its engine properly tuned. Soon it may be impossible to have collisions—at least of the fender-bender kind—with other cars or objects.

At the same time, these technologies can make sure we do nothing illegal simply by interacting with us so that it is impossible for us to perform illegal actions. Moreover, the environment can report us if we do try to break the law. If we somehow are successful in breaking the law, then these ubiquitous environments can keep us under surveillance or arrest us with no other human involved in the process at all.

A true ubiquitous society, as described in convincing and bubbly plans I have seen, will be pet, friend, sex partner, counselor, police, lawyer, judge, jury, and jailer all in one, freeing those of us fulfilling those roles now to turn our attention to other things; that is, if the u-Society will allow us to do so.<sup>37</sup>

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<sup>36</sup> See *id.* at 63, 65-67.

<sup>37</sup> See Jun-hyong, *supra* note 34, at 2-15 (compiling statistics relating to a u-Society); Sasaki, *supra* note 34, at 63, 63-69 (providing a very positive discussion of a ubiquitous society); Ubiquitous Network Society, <http://www.itu.int/WORLD2006/forum/society.pdf> (last visited Nov. 23, 2008). See generally Mika Mannermaa, *Living in the European Ubiquitous Society*, J. FUTURE STUD., May 2007, at 105, 110-12 (discussing concepts of “some bother”); Marcel Bullinga, *Intelligent Government*, FUTURIST, Jul-Aug. 2004, at 32, 32-36 (discussing the role of technology in the future in government and people’s daily lives); Jennifer S. Winter, *Public Involvement in Technology Policy: Focus on the Pervasive Computing Environment*, COMPUTERS & SOC’Y, Sept. 2006, at 49, 49-56 (2006) (examining the role of the general public in informing technology policy); Anticipating the Citizen’s Needs in the 21st Century,

## Transformation: A Dream Society

Finally, and perhaps directly related to the technologies that permit this kind of a disciplined society, several of us are convinced that the "society" after the present "Information Society" might be called the "Dream Society"—a society where fantasy, play, performance, identity, and "schtick" are more important than "information" or "work."<sup>38</sup> Korea is sometimes said to be in the process of becoming the first "Dream Society" on the planet and a harbinger of things to come for all of us.<sup>39</sup> Of course, Americans have been very interested in dreaming for some time (though not as the result of government policy, which is the case for Korea): Disney's Mickey Mouse was the pioneer, Hollywood the dream factory, television and Internet the medium, and professional sports and athletes the mode with successful politicians—at least since President George W. Bush (if not from President Franklin D. Roosevelt onward)—making fantasies and wishes far more important than evidence and facts.

## **Conclusion**

Please remember that I am not "predicting" any of these futures; no one can do that. But, I have sketched four alternative futures each of which I believe has a roughly equal chance of becoming the present at a later time. There are many other alternatives that are feasible and perhaps preferable. For example, some years ago the Chief Justice of the Singapore Courts, Yong Pung How, gave a speech in which he said he looks

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<http://www.ica-it.org/conf39> (last visited Nov. 23, 2008) (addressing the notion of an electronic government and the role of technology in creating a ubiquitous government).

<sup>38</sup> ROLF JENSEN, *THE DREAM SOCIETY: HOW THE COMING SHIFT FROM INFORMATION TO IMAGINATION WILL TRANSFORM YOUR BUSINESS* 1-2, 47-50 (1999); see DANIEL H. PINK, *A WHOLE NEW MIND: MOVING FROM THE INFORMATION AGE TO THE CONCEPTUAL AGE* 48-51 (2005).

<sup>39</sup> Jim Dator & Yongseok Seo, *Korea as the Wave of a Future: The Emerging Dream Society of Icons and Aesthetic Experience*, *J. FUTURES STUD.*, Aug. 2004, at 31, 36-41.

forward to a time "when the courts of justice are [sic] overgrown with grass"—when resources and opportunities are fairly distributed and everyone is so familiar with avoiding, preventing, and resolving conflicts that "real men" will not go to court.<sup>40</sup> It will be considered shameful to not be able to settle disputes peacefully without limply relying on a sovereign judge. The formal courts will fade away. That is my preferred future, though we seem farther from that future now than I thought we might be when I heard Yong Pung How first suggest it.<sup>41</sup> What is your preferred future for the world, America, judiciaries, and trial courts? What are you doing to help achieve it?

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<sup>40</sup> Jim Dator, *When Courts Are Overgrown with Grass: The Role of Courts in the 21st Century*, 32 *FUTURES* 183, 196 (2000) (quoting Yong Pung How, Chief Justice, Supreme Court of Singapore, Keynote Address at the Third Asia-Pacific Courts Conference: Leading the Judiciary in the 21st Century Knowledge Economy (Oct. 6, 1998)).

<sup>41</sup> *See id.* at 186-96.