

"Inventing the Future of Courts and Courts of the Future"
A Futurist's Perspective
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Jim Dator

(Appear in rabbit ears and dark glasses, beating a bass drum)

Here comes the Everyready, Diehard, Energizer, Future-hopping Rabbit.

Good God, you'd think I'd learn to quit. As you just heard, I've been banging the same drum now for over twenty years, and it's hard to say that it has made any difference whatsoever. The world has not come to an end, and no one has altered their behavior one iota as a consequence of all my drum-banging. Not even me. For reasons I can never understand, I keep being asked back to these things. Maybe folks just want to be around to see what happens when the batteries run dry.

Well, they're not dead yet!!

I can't tell you how difficult it was for me to decide what to say in this talk. This conference is one of the most important events in my modestly event-filled life. At one level, it is the culmination--literally, the maturation--of 21 years work on behalf of the future with many people in this room today. Indeed, it was 21 years ago, and in this very room, that the grandmother of all futures conference--Hawaii 2000--was held. The granddaddy of that conference--George Chaplin and many other people here today--can tell you all about it.

Because that conference did have an impact: It influenced the lives of almost everyone who attended it. It also spawned, and still is spawning, similar conferences nationally and worldwide. And it inspired the judiciary of Hawaii in 1972 to hold a citizen's conference, with the support of the American Judicature Society, which launched our judiciary on a path to the future which led inexorably to this moment, here, with all of you, today.

During the 1970s and especially the 1980s, futures research became a normal part of administrative decisionmaking for the Hawaii Judiciary. Years of workshops, seminars, planning sessions, and discussions during the 1970s eventually resulted in the publication in 1981 of the planning manual, *Comprehensive Planning in the Hawaii Judiciary*, written by Greg Sugimoto. Chapter Nine of that manual describes the rationale behind futures research for the Hawaii judiciary, and the theory and methods used by the judiciary in the exercise of foresight. Subsequently, staff members and interns in the Judiciary's Office of Planning and Statistics have produced more than forty reports on various aspects of the future (they are referenced in the bibliography prepared for this conference). Some of the reports are concerned with the immediate impact of population changes--such as "Growth Trends in Kona: Some Court Challenges Ahead". Others speculate on broader social and behavioral changes such as the impact of the UH Law School, and

the demographic pattern of law school enrollments in general, on the Hawaii judiciary ("The Future of Attorneys"); while others look somewhat further over the rim and consider, for example, when and how robots might come to demand and thus to be accorded fundamental civil rights ("The Rights of Robots"). Abbreviated versions of these reports have been made widely available to the local, national and international judicial community through the publication of a quarterly newsletter, called "Justice Horizons."

At the same time the work being done in Hawaii, along with other things, has inspired other state courts and court-related agencies to contemplate the future also. The Conference of State Court Administrators three times featured future-oriented presentations at its annual meetings. The American Bar Association, the Bar Associations of several states, The Federal Bureau of Corrections, and the American Judicature Society were among the groups launching significant future-oriented activities during the 1980s.

But without a doubt the most significant judicial impetus towards the future was the creation by Congress of the State Justice Institute as a vehicle to encourage research on matters of interest to state judiciaries, and the fact that the SJI made the research area, The Future and the Courts, one of its featured categories. I still do not know how it came about that this category was especially identified by SJI. I believe that SJI is unique among federal agencies, if indeed it is not unique among all funding agencies, private as well as public, in specifically highlighting the future as an arena of responsible awareness. I suspect it had something to do with the vision and foresight of some of the representatives of SJI who are with us at this Conference now (Judge John Daffron, Executive Director David Tevelin, and Program Director Daina Farthing-Capowich), as you will come to see.

One of the futures activities for which SJI offered support was a national conference on the future and the courts. A proposal for such a conference was made by the American Judicature Society (Larry Okinaga was on the committee which prepared the proposal), and SJI accepted it. So last May 1990, several hundred judges, lawyers, law professors, court administrators, judicial activists, and a handful of futurists, met in San Antonio, Texas, to consider the major trends, scenarios, visions, and strategies facing the courts over the next thirty years.

That conference was an enormous success. I judged it to be the most successful future-oriented conference I had attended since the 1970 Hawaii 2000 Conference itself.

Most of the people responsible for planning this 1991 Hawaii Judicial Foresight Conference attended the meeting in San Antonio. There they came to see once again the very high regard their peers on the mainland have for the pioneering futures work of the Hawaii judiciary. And it also became clear that some mainland judiciaries are catching up and perhaps overtaking the Hawaii judiciary in this respect. Most notably, the State of Virginia, under an SJI grant, engaged in a future oriented series of activities specifically based upon and substantially going beyond the Hawaii experience. Other states also are rapidly closing the futures gap--Arizona, Massachusetts, New Hampshire, California, Colorado, Utah, Idaho, Kansas, New Jersey, Florida--all are engaged in or actively considering future-oriented projects which could leave Hawaii in the dust of the past.

So immediately after returning from San Antonio in May, Chief Justice Herman Lum convened a planning group which has now resulted in this conference in order that we might now learn from the experience of others, and, in turn to continue to contribute to their own forward movement.

Sharon Rodgers, of the HRCFS, and myself were asked by the AJS and the SJI to prepare a report on the material presented to and developed by the San Antonio Conference. A short Executive Summary we prepared has already been published and made available to each of you, I believe.

We are now in the final stages of completing a book-length report. That book will open with seven scenarios which seem to us to emerge naturally from the trends, visions, and images of the future presented at that conference. The scenario which most participants in San Antonio seemed to favor is called "Judicial Leadership." It is a reasonably optimistic statement of the future based on the recognition that state judiciaries are being forced to become more and more proactive in creating preferred futures, and indeed in exercising overall public leadership, in comparison with other branches of state government and the federal government as a whole.

However, what people want for the future, and what they expect it to be, are two different things. And the image of the judicial future which most participants at the San Antonio conference felt was most likely can be called "generic justice." It results from a gloomy, or realistic, look at the many ominous demographic, economic, and behavioral trends impacting the judiciary and the fact that the courts have fewer and fewer resources with which to address them. The result will be mass-produced, assembly-line, cookie-cutter justice; justice reduced to its lowest common denominator: generic justice; get-to-the-point justice; in the best case, military justice--undemocratic and severe, but swift and reasonably fair.

But there were darker scenarios as well. Some of the participants were even more fearful of the interlocking impact of certain trends. Demographically, America is becoming an increasingly pluralistic nation, with the white majority becoming simply one more minority in more and more regions of the US, while Black, Hispanic, and Asian groups grow in number and influence. Economically, the future of the US is extremely uncertain: is this a temporary recession we are in, or a lengthy and perhaps global depression? The severity of long-neglected, and indeed exacerbated, environmental problems alarmed many people as well. And what about electronic and especially biological technology? Is it really so benign? Isn't it more likely that, especially given the other trends, technology will be used to surveil, control, and punish rather than to liberate and to empower?

In addition to the Judicial Leadership scenario, there were several other optimistic images of the future of the courts. One envisioned the creation of multi-door courthouses which you will hear more about during our conference, I hope. This was rated highly as a preferred future by many participants at the San Antonio Conference.

Another positive scenario was a Green and Feminist vision which was enchantingly evoked and will also have its counterpoint voices strongly heard during the next few days here.

But my personal favorite--which will come as a surprise to no one who has heard me talk about the future before--was the Global High Tech Scenario. So let me share some of that vision from the future with you.

Imagine yourself in the year 2020. What follows is a brief description of how state judiciaries transformed from the insular, local-oriented, low-tech public agencies of the 20th Century into the global, high tech, anticipatory virtual realities of the 21st Century.

Many people involved with state judiciaries in the 1990s wanted to preserve, expand, and improve the structure, roles, and processes of the 20th Century courts in the 21st Century. Most of the rest wanted to keep the 20th Century system as one--probably the final, or most authoritative--in a menu of alternative dispute resolution services available to future consumers of justice. And almost everyone was willing if not outright eager to use electronic technologies to assist the traditional and alternative systems in problems of judicial management and administration.

Only some foolhearty folks proposed to replace the old labor-intensive human systems, whether traditional or alternative, with Roby, the Robot Resolver. And fewer still really believed it could happen.

But it did.

The old court house and court room, and judge and baliff and clerk, and lawyer and law firm, and plaintiff and defendant, have all gone the way of the buggy whip, the horse trough, and the blacksmith a century and a half earlier.

But of course, not only the courts have changed! A visitor to the present from the past would surely be amazed at the wholly artificial world of today, and its continuous transformations tomorrow. All relations have altered--just as the old futurists said they would: work, and the production and distribution of goods and services; reproduction and the family; education at all levels; medicine and health; leisure, sports and recreation; transportation; and, yes, even government. The archaic and inadequate system of so-called representative legislatures, and the massive, faceless bureaucracies that "administered" their laws is completely gone. Electronic direct democracy has replaced the former, and artificial intelligence the latter.

But also gone is the nation-state system and its increasingly permeable and meaningless boundaries and obstacles to the flow of people, products, and ideas. Now we live in a global society, where governance issues are either planetary or local in scope and process.

Well, that is not entirely true, and it is becoming less and less so. Increasingly, our political problems are between the various forms of artificial and semi-natural intelligence on earth, on the one hand, and between earth and our former space colonies, on the other. The space settlers are struggling for true independence from earth-bound rules and ideas, and for the right to evolve according to their own preferences within their own environmental constraints and opportunities. None of them think of themselves as "humans" any more.

And neither do many of the beings on earth. "Humanism" has joined racism, sexism, and ageism as something to be avoided, indeed as something unconstitutional. With the rights of robots and other artificial beings added to the old United Nations (now, "United Beings") Declaration of Rights, the homosapiential-centric ideas and practices of earlier times are now considered at best quaint and trite, and more usually infruitingly out of place and patronizing--as though only humans, the self-proclaimed "crown of creation," have intelligence or feelings or rights! The dwindling few who persist in retaining the "purity" of humans free from "genetic tampering" are treated with the same mixture of contempt and amusement that most people in the 1990s felt for White Supremacists: while it is perfectly alright for anyone to keep her "blood line pure," if that is the way she wants it, to proclaim any "race" "supreme" over any other is utter garbage. And as for the supremacy of the human race over the AIs--well, let them find any test at which some set of AIs can't excel over any set of humans. Indeed, try to find any test at which the average human can excel over the average AI. There is none.

Of course, the artificial world of today did not just appear magically overnight. It developed over time, but much more quickly than most people thirty years ago thought it would.

The driving forces were clearly evident. The first was the technology itself and its impact on the economy. The old "electronic revolution," the stock-in-trade future of futurists from the 1960s onward, was already well underway by the 1980s. The world that went in like a set of independent, self-governing nations in the late 1970s came out (thanks to the policies of Reaganomics and the collapse of communism) as a globalized economic system by the early 1990s. No individual nation, no matter how big, could possibly control its own economic destiny. At the same time, the pressure, in all nations, to break into smaller units while at the same time integrating into the global economy became irresistible. Americans focussed on this process in the old Soviet Union and Eastern Europe, but failed to understand that that was the real meaning of Europe 1992 as well.

More importantly, they failed to see that the same forces would operate in North America, and that the merger of Canada and Mexico with the US really meant the disintegration of the US, not its enlargement, and the integration of the resulting smaller units into the global political-economy.

And the needs of the actors in the global economy had to be served. At first, in the US, state (and to some extent federal) political entities tried to provide them. For example, various state judiciaries followed Hawaii's pioneering example in 1991 and specifically modified their rules and procedures in order to attract the business of transnational parties in dispute.

In order to do that, the courts had to be as modern and efficient as the institutions they wished to serve. Among other things, this meant that the "public be damned--we'll administer justice at our pace, according to our rules, when it is convenient to us, and in a surly, autocratic manner" had to change. The power of the clerk over the obsolete paper-form system had to end.

If you wanted to attract transnational business no more could a slovenly clerk cackle in glee: "You filled out the form wrong (and I won't tell you how to do it

right). You have to do it over again. Bring it back personally a week from Tuesday. And no White-Out allowed."

No way. So, we let the nose of the camel in under the edge of the tent. We developed software which permitted lawyers to file cases from their offices. Menu driven, they did not need someone to tell you how to fill out the form, or to ridicule you when you did it wrong. And no body had to hand carry it and wait in line for a clerk to abuse you or slam the window on your fingers at 4:59 PM. The form was electronically "corrected" and instantly dispatched and registered, 24 hours a day. And once you were on line for filings, you had access to data banks of all sorts. Court procedures and court records were available to anyone from anywhere.

So more of the camel nosed under the tent.

Both hardware and software got more sophisticated--voice access and retrieval; finger-tip holographic display; voice translation; vision-activated moving and interactive holographic display; multi-user interactive life-sized holographic simulations (eventually you could copy these simulations onto your own chip, reduce the size, and plug it into your brain for repeated review and revision while you were asleep).

Local data banks on legal matters became global data banks on every matter became interactive data banks became expert systems became artificial intelligence became plugged into your brain and that of anyone else you (and they) wanted.

Reality became "virtual reality" became artificial reality became perpetually alternative realities.

"Distance" has no meaning: "Daddy, what was a 'transportation system?' Why would you 'go' somewhere when everywhere is already 'here?'"

The electronic camel slid in effortlessly. In the 1980s there was considerable caseload backlog. Computers helped eliminate it. Determining the standing of claimants in worldwide product liability cases nearly overwhelmed certain civil courts until computer modelling techniques were utilized. Determinant sentencing requirements were discovered to be tailor-made for computer analysis. Same-day hearings, made possible by computers, were first applied to certain traffic cases, and then spread quickly to other areas, and throughout the system. Since these first cases did not require a physical appearance, it became more and more rare for anyone to appear physically in any courtroom. At the same time, improved means of electronic communication seemed to bring the court to the place of the controversy instead of the parties to the court.

In certain cases at first, members of juries too were no longer physically together. Eventually, whole neighborhoods, or communities, or random samples of them, became the juries. In some controversies of worldwide import, indeed, the whole world was watching.

During the early stages of this development, judges came to be administrators of decisions reached through experts systems and, later, AI. Then humans--more nearly philosophers than judges--were used primarily to review AI decisions.

Now that scarcely seems necessary or possible, given the advances in AI on the one hand, and the virtual merger of humans with cyborgs and the imminent emergence of post-hom sapiens, on the other.

At the same time the earliest of these modifications were being achieved, the costs of litigation was rapidly dropping, leaving more resources available for those things which do demand a human's touch: social workers, family counselors, guardianships, publicly paid legal and paralegal services, ADR professionals, and, most importantly of all, equal and speedy access and treatment for the disputes of the poor as well as the rich.

From what's already been said so far, it must be clear that at a certain point in the past the biological revolution took over from, and merged with, the electronic revolution as the dominant technological force of social change. Like any technological revolution, it is hard to pinpoint the exact moment of crossover because it is all the result of a long and interrelated process. But it is probably reasonable to attribute the takeover of electronics by biology to the successful completion of the Human Genome Mapping program. This began in 1988 when the US National Science Foundation awarded several billion dollars for the project. When it was completed in 1997, the information that everyone had been waiting for to engage in serious human genetic modification was at hand.

At the same time research into basic and applied genetic engineering continued in all other areas as well, changing everything from agriculture to zoology; from the manufacturing and distribution of goods to the meaning of health and medicine.

Now, whereas the electronic camel had slid more or less quietly into the cozy corner called the world, the planet was rocked with debates over the morality of biological engineering. And so, just as American biomedical researchers had paused, discussed, and modified their rules and behavior at Asilomar in the mid 1970s, so also in recent years have they frequently had to pause, examine, and even occasionally retreat as the far more powerful and frightening technologies of life itself unfolded.

The relationship between technologies and the courts became even more complex: not only were the technologies transforming the courts, but the courts were the place where the transformative qualities of the technologies were most frequently discussed: technology was increasingly used to address the problems caused by technology.

Knowledge of genetic patterns and their manipulation or redesign were from the start used in conflicting ways. For every parent who used the knowledge to "correct a genetic defect" in their child, some other parent tried to use the information to enhance one or more physical or behavioral capabilities of their children. Parents who did neither were arrested for child neglect in certain communities and treated as defenders of traditional family values in others.

For every scientist who was called upon to find the genetic basis of cancer in order to cure it, another scientist was funded to find the genetic basis of "criminality", and cure it as well by nipping the "criminal genes" in the bud. If genetic engineering could be used as a new alternative to imprisonment, it

was. If genetic engineering could be used as a new form of art--or pornography--you may be sure it was as well.

No aspect of life was untouched. And the technological wave of the future now, in 2020, seems to be molecular engineering (first designated in the late 1980s as "nanotechnology" because it operates at the "nano" scale with a nanosecond, for example, being one billionth of a second).

In the 1990s, people were concerned (as well they should be) about environmental pollution caused by the careless use of industrial technologies in the previous centuries. This concern contributed to the rise of global consciousness in the 1990s every bit as much as the globalization of the economy through electronic technology did. It turned out, in a perverse way, though, that the American federal government was justified in not worrying about changing industrial policies and practices because of the threat of global warming, climate change, and sea level rise. None of this happened to any extent worth worrying about.

But not because the scientists who warned of the Greenhouse Effect were wrong. Rather, first electronic, then biological, and now molecular technologies have rendered industrial technologies wholly obsolete in every detail.

Of course, the US federal government was the last to know and to react to their obsolescence, but many of the state and local governments, beginning with Hawaii, worked quietly and quickly with scientists and entrepreneurs in their areas to bring about the rapid transformation to the many worlds we now enjoy.

So there you have it. Your work is done. That will be the future of the Hawaii Judiciary in 2020. Love it or live it.

What! You don't believe me! I don't want you to! I could have made an even more convincing case out of any of the other six scenarios which emerged from the San Antonio Conference. And I am certain you will unearth still more during your deliberations here.

As the material which the organizing committee prepared for this congress made absolutely clear, I hope, futures studies is not about predicting the future. This congress is not about predicting the future. The small group sessions you will attend do not expect, or want, you to predict the future. Nor will you be given predictions about the future to believe and follow. You will be given some "futuribles"--some future possibilities--and asked to speculate on their possible consequences were they to become true. But futuribles are not predictions.

No, this congress is about creativity and invention. It is about continuity and novelty. It is about tradition and anticipation.

But most of all, it is about responsibility. It is about responsibility for our children, grandchildren and great grandchildren, down to the 7th generation. It is about responsibility for our environment, our mother, earth, and the

impact of our actions on her. It is about our responsibility for our selves, our acts, our lives.

It is about our responsibility for making the future a better place than the present, however glorious we may think the present is, or however odious.

And therefore, it is not about the future at all. It is about now. Our responsibilities for today as well as for tomorrow.

I ask you to accept the responsibility to dream, to dare, to imagine, and to create. Because, in the words of the logo for Hawaii 2000, "somebody's got to care about tomorrow."

Is that really too much for this little drummer boy to ask?