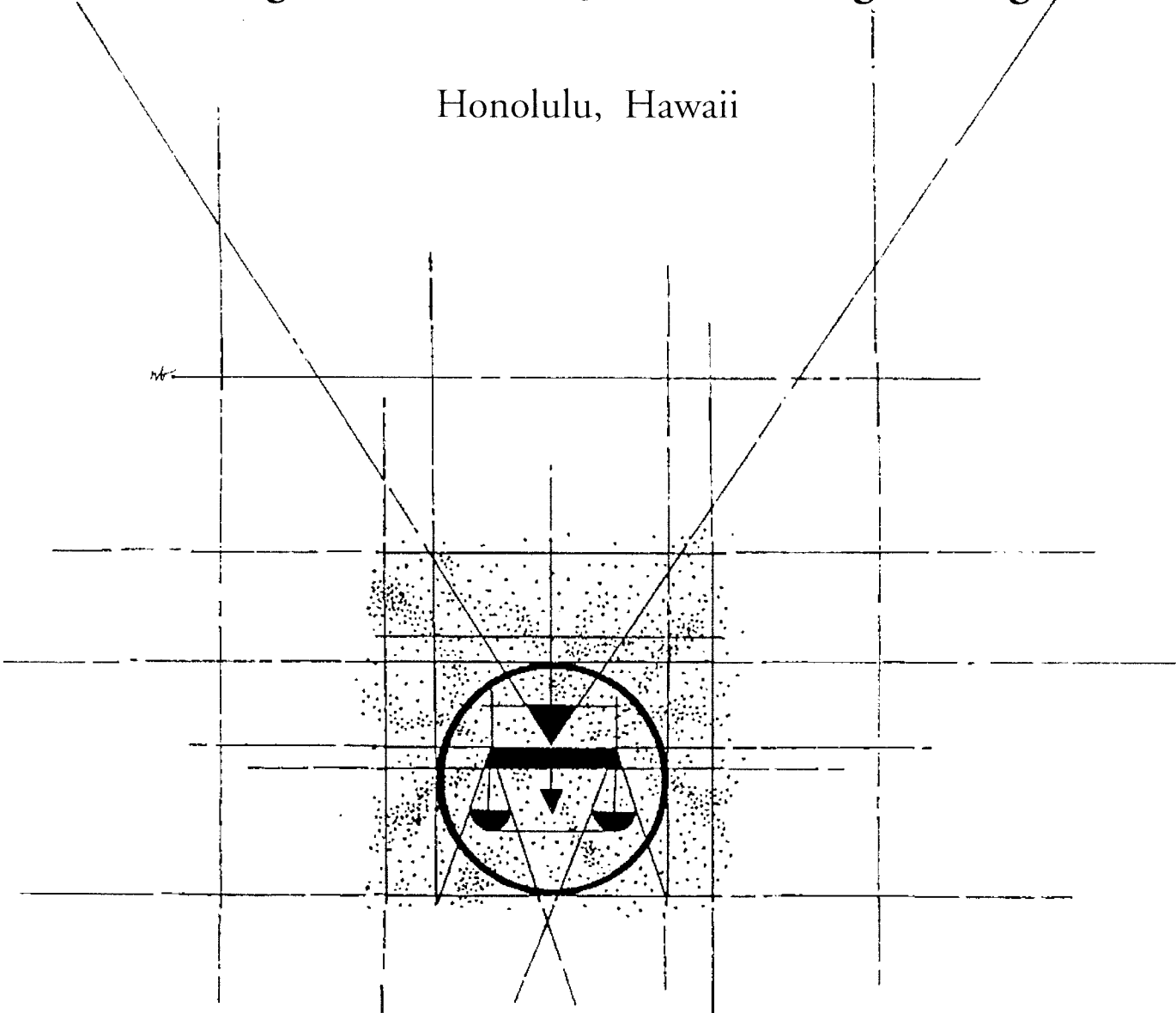


# JUDICIAL FORESIGHT IN THE HAWAII JUDICIARY

## Proceedings of the Hawaii Judicial Foresight Congress

Honolulu, Hawaii



JUDICIARY, STATE OF HAWAII



# **JUDICIAL FORESIGHT IN THE HAWAII JUDICIARY**

**Proceedings of the Hawaii Judicial Foresight Congress**

**Honolulu, Hawaii, January 6-8, 1991**

**Edited by**

**Sohail Inayatullah**

**JUDICIARY, STATE OF HAWAII**

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The views expressed herein are not  
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## MESSAGE FROM THE CHIEF JUSTICE

As we approach the threshold of a new century, we will be faced with many future challenges. To effectively meet these challenges, the role of the court must evolve along with the needs of the complex society it serves. Both the structure and function of the court needs to grow in order to accommodate the demands of our changing society.

Inspired by the national futures conference, Hawaii was the first state to convene a conference specifically designed to address issues and ideas concerning the courts. The product of the 1991 Judicial Foresight Congress has attempted to explore and anticipate the future. These recommendations will be seriously considered in our future planning efforts.

It gives me great pleasure to reaffirm our commitment to the delegates of the 1991 Judicial Foresight Congress, the Hawaii State Legislature, and the citizens of Hawaii by publishing these Proceedings. I am confident that the recommendations provided by this conference will give us wisdom and direction for the years ahead.

Ronald T. Y. Moon  
Chief Justice

## ACKNOWLEDGEMENTS

While the efforts of many individuals are necessary to complete a major publication, a few were critical and must be singled out. The Congress itself could not have been held without the dedication of Joy Labez. More than anyone else, the Hawaii Judiciary owes her an unrepayable debt.

The Proceedings itself came out because of the skillful and calm coordination of Karen Takahashi and the daily labor of Grace Maeda. Sharon Mendoza and Susan Kaya painstakingly transcribed speeches. Judge Daniel Heely and Clyde Namuo are to be thanked for finding funding for this project and Arlene Lum for her gracious editorial help.

This publication itself is a result of over two decades of futures research in the Hawaii Judiciary. For that concerted effort, Lester Cingcade is noteworthy. Without his sustained leadership, the Hawaii courts would have gazed at the future through a rearview mirror.

We are thankful to the American Judicature Society for permission to reprint Shirley S. Abrahamson's "The Consumer and the Courts" which originally appeared in Judicature (Volume 74, No. 2, 1990).

Different versions of articles in these Proceedings by Clement Bezold, Sharon Rodgers, Wendy Schultz, Frances Zemans, and Paul Alston recently appeared in Futures Research Quarterly (Winter 1993). Francis Wong's, "The Future of the Family Court," appeared in Futures Research Quarterly (Fall 1992). Sohail Inayatullah's introductory essay has also appeared in various versions in Futures Research Quarterly (Fall 1992) as "Preliminary Report of the Hawaii Judiciary Foresight Congress" and in Futures (October 1991) as "Judicial Foresight in the Hawaii Judiciary." Robert Bohrer's essay appeared in Futures (September 1992).

## PREFACE

Judicial Foresight in the Hawaii Judiciary: Proceedings of the Judicial Foresight Congress is the culmination of years of foresight activities in the Hawaii Judiciary. We believe they bring together some of the best local, national and international writing on court futures. This work is not intended to predict the future but rather to anticipate the range of possible judicial futures ahead and to encourage new visions of the courts that will lead to real immediate short and longer term transformations.

These Proceedings are divided into six sections. The first is the "Executive Summary" which presents the scenarios and the recommendations articulated by Congress delegates. The second section describes the goals and processes of the Congress as well as the resultant scenarios and recommendations. Section three consists of the speeches made at the Congress. These are divided into the following areas: "Opening Remarks," "Future of the Courts," "The Future From the Hawaii Perspective," "Science and Technology," "Culturally Appropriate Dispute Resolution Forums," "The World Economy and Hawaii," and "Comments from the Community." To a large degree they reflect the organization of the Congress. Section four lists the scenarios developed by the working group into three categories: scenarios derived from San Antonio national "The Future and the Courts" conference, possible scenarios of the courts, and preferred scenarios of the courts. Section five evaluates the Congress: its successes and its failures. The final section is the appendix which presents the entire list of recommendations, the entire list of recorders and facilitators and the list of participants.

We hope that these Proceedings encourage you to creatively envision new futures for the courts and to use these visions to make day to day to routine changes.

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## **I. EXECUTIVE SUMMARY**

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## **1991 JUDICIAL FORESIGHT CONGRESS: EXECUTIVE SUMMARY**

The 1991 Judicial Foresight Congress was funded through an appropriation of the 15th Hawaii State Legislature and co-sponsored by the American Judicature Society with a special contribution from the State Justice Institute. It drew over 275 participants from Bench, Bar, and Community. The purpose of the Congress was to "anticipate the changing judicial needs of the public and the legal system by exploring Hawaii's social, political, and economic environment and its impact upon state courts, and responding to these forecasts through the creation of new visions and structures for the Hawaii Judiciary."

The Congress grew out of the efforts of the Chief Justice to reach outside of the legal community for fresh ways of thinking and to exchange new ideas within the legal community to keep the courts effective and efficient in the years ahead.

The Congress featured both plenary and small group sessions. Plenary sessions had local, national and international speakers in the following areas: the Future of the American Courts; the Future from the Hawaii Court's Perspective; Science, Technology and Environment; Culture, Demographics and Appropriate Dispute Resolution Mechanisms; and, World Economy and Hawaii's Role in the Pacific.

Small group sessions were designed to facilitate interaction and to conclude with a concrete list of recommendations for changing laws, court rules, policies and structures. On the first day, small groups discussed possible future events and trends such as rapid advancements in genetic engineering and artificial intelligence. On the second day, groups designed their preferred Judiciary, what they wanted to see most in their ideal court system. Results from the second day included the following themes:

- The Judiciary should be consumer/public-run instead of bureaucracy or attorney-run.
- The Judiciary should wisely make use of advance computer technologies.
- The Judiciary should be sensitive to different cultural constructions of justice and should incorporate culturally appropriate dispute resolution forums.
- The Judiciary should encourage and instigate public education about the law and should processes so as to make the courts more understandable and accessible.
- The Judiciary should emphasize mediation and other less adversarial forms of dispute resolution.

In the third and final day, small group sessions developed a list of ideas and each group identified its top three recommendations. Examples of these sometimes competing recommendations are categorized below; however, the entire list should be consulted to gain a

a sense of richness of thought of participants:

- **Mission and Goals**: Achieve efficiency and swift dispute resolution; Redesign Judiciary mission to reduce emphasis on the adversarial model and focus on pretrial cooperation and harmony; Strengthen the Judiciary as the third branch of government; and, Review structures and functions of the Judiciary to meet the goals of justice.
- **Judicial Selection and Performance**: Reduce the list of nominees for judicial selection commission from six to three; Increase representation of women and minorities in the courts; and, Increase salaries and institute sabbatical leaves requiring judges to undertake work that exposes them to different cultures and viewpoints.
- **New Programs**: Establish an Office of Ethical Practices; Establish a Judicial Ombudsman; Establish a Commission to simplify court rules; and, Establish an Office of Judiciary Education.
- **Judiciary Structure**: Mandatory ADR; Cultural officers and multi-door multi-culture courthouse; Eliminate distinctions among circuits and create one level trial court; Life tenure for judges; Professional calendar administrators; Remove traffic violators from court into administrative system; and, Conduct electronic trials and improve information systems so judges have feedback throughout case.
- **Law School**: Redesign law school curriculum to include ADR training; Make curricula more global, humanistic and environmentally focused; and, Curricula should become more future focused.
- **Legal/Criminal Justice System**: Reevaluate concepts of crime and punishment and guilt versus innocence; Eliminate the parole board; and, Emphasize restitution and restoration instead of punishment.
- **Public Community Education**: Demystify the law through broad based public education including adult education, information hotlines, greater coordination with Department of Education, and public information forums involving judges; Expand teaching of mediation in schools; Community input into annual conferences; and biannual foresight Congress.

These ideas must now be refined and translated into thoughtful action. To begin this next process, the Judiciary has proposed the creation of a permanent Foresight Commission with participation from Bench, Bar and Community. This Commission would periodically advise the Chief Justice as to desirable changes in law, court rules, policies, and structures. This Commission would ensure that Hawaii's courts continually stay responsive to the changing judicial needs and ideals of the Community.



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**II. INTRODUCTION TO 1991 JUDICIAL FORESIGHT  
CONGRESS AND PROCEEDINGS**

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# INTRODUCTION TO FORESIGHT CONGRESS AND PROCEEDINGS

by

**Sohail Inayatullah**

The 1991 Judicial Foresight Congress was funded through an appropriation of the Fifteenth Hawaii State Legislature and co-sponsored by the American Judicature Society. It drew more than 275 participants from the Bench, Bar and Community. The purpose of the Congress was to anticipate the changing judicial needs of the public and the legal system by exploring Hawaii's social, political, and economic environment and its impact upon state courts, and then to respond to these forecasts through the creation of new visions and structures for the Hawaii Judiciary.

The Congress was a natural outgrowth of nearly twenty years of futures research activities conducted by the Hawaii Judiciary. The 1972 Hawaii Citizen's Congress on the Administration of Justice attempted to examine the legal problems of the coming decades. In the late 1970's a problem-solving approach to planning was developed. Dissatisfaction with this approach led to comprehensive planning and the articulation of fundamental dimensions (ways of configuring the courts) and missions. From this planning framework, a futures research project emerged in 1981. Housed in the Office of Planning, research on both long-range qualitative and short-term quantitative issues was conducted throughout the 1980's.

In 1989, perceiving the need to reach outside of the legal community for fresh ways of thinking and to exchange ideas with the legal community, the Chief Justice proposed that Hawaii convene a Foresight Congress. The Congress grew out of the personal concerns of Judiciary leadership that although the present problems of the Judiciary were significant, they could not abdicate the future to random internal and external events and trends. The courts needed to carefully and wisely prepare for the challenges and opportunities that lay ahead. In addition, Judiciary management desired to create a conference environment where individuals could feel free to develop new approaches to traditional problems.

## CONFERENCE DESIGN

While the mission of the Hawaii Judicial Congress was to anticipate future changes and respond to these changes, the conference was not predictive or empiricist in its epistemological orientation, speculation about the future was not central. The goal was not to conclude with a list of predictions of the next ten to thirty years. Rather, the more important goal was to use the future to think and reshape the present. The conference attempted to take participants to distant future places and times and return them to the present so that strategies for transformation could be developed. Moreover, the conference intended to not merely end in a series of exhortations on what the future should be like nor merely restate the present. The conference design thus attempted to move away from the empiricist/predictive mode of futures studies to

the critical/poststructural view in which the categories which give us the present are made problematic. Sessions on the history of the courts, too, were framed not to invoke nostalgia but to use the past to help understand how a particular "present" came to be and how different futures might come to pass. The papers in these Proceedings we believe reflect this view of futures studies. Even when they predict the future they do so from a critical not empiricist perspective.

Organizers designed both plenary and small group sessions so that participants would both receive expert input and would produce their own expert output. Featuring local, national and international speakers, plenary sessions had the following focus: (1) The Future of the American Courts, (2) The Future from the Hawaii Court's View, (3) Science, Technology and Environment, (4) Culture, Demographics and Appropriate Dispute Resolution Mechanisms, (5) World Economy and Hawaii's Role in Pacific. These Proceedings follow the categories of the conference. We now summarize some of the key points of the speakers.

## **PLENARY SESSIONS**

James Dator begins this section on the "The Future of the American Courts" by exploring court futures based on changes in biological, genetic, and computer technologies. He also explores the social implications of these new technologies. David Tevelin asks whether the justice system will become divided into private high-tech courts for the rich and public underfunded low-tech courts for the poor. More than the future of technology, articles in this section focus on the centrality of the public in creating the future of the courts. Justice Abrahamson argues that the courts need to become more consumer- and public-education oriented. They must continuously respond to the changing needs of the public. But can the courts become future-oriented instead of precedent-oriented given the conservative nature of the Judiciary, asks Frances Zemans. In addition, while a strong public-oriented mediation movement is creating a new future for state courts, some research shows that Americans want blame to be assigned not conflicts to be resolved, asserts Zemans.

Articles on the "The Future from the Hawaii Court's View" come from a variety of perspectives. Judge Heely argues that Courts, especially the Family Courts, should first of all be caring and compassionate. Inayatullah presents a survey of Hawaii judges in which respondents favor increased judicial leadership and an increased use of mediation. All writers questioned the desirability of the present adversarial legal system. In his essay, Paul Alston discusses future directions for reforming the legal system. Alston argues that there should be improved access to the courts, certain types of disputes should be diverted to other forums, and lawyers should better understand and help clients. Shunichi Kimura writes that the neighbor island have met their future and it is Honolulu. And unfortunately, if present trends continue they will not be able to bypass the social problems that have beset Honolulu.

Articles from the "Science, Technology and Environment" session focus on the magnitude of changes ahead. Genetic engineering and artificial procreation promise to significantly increase the court's caseload as well as the complexity of future cases, write Robert Bohrer and Judge Frances Wong. Chris Jones believes that the decline of the quality of the planet's environment and the increased popularity of the environmental movement suggest new laws that

may be conducive to specialized courts. In addition, increased belief in alternative epistemological, specifically, non-material views could transform the nature of trials and conflict resolution, writes Clem Bezold. He challenges the courts to be prepared for new paradigm. Finally, Kay Harris writes that the prisons have failed in creating a better, more cohesive society. Perhaps it is time that a new model of crime and punishment be developed; one that is tied to larger social goals and theory instead of immediate needs and issues, argues Harris.

Articles from the plenary session on "Culture, Demographics and Appropriate Dispute Resolution Mechanisms" focus on the dramatically changing ethnic mix of the United States. Wendy Schultz, for example, writes that changes in demographic patterns such as an aging population could lead to increased white collar crimes. Sharon Rodgers asks: "Should the legal system find ways to incorporate alternative dispute resolution forums from other cultures?" And: "Should there be a multi-door and multi-culture courthouse?" Brent Barner investigates the possibility of change within the law arguing that the law both resists the recognition of differences in legal proceedings and furthers the diversity of group values and behaviors. Chris Jones reviews alternative dispute resolution techniques in the Pacific.

In this plenary session, a video representing the conflict styles of Hawaiian, Filipino, Korean and Samoan groups was presented. These are summarized in Rodger's opening essay. This section concludes with commentary from representatives from these communities. Some argue that their culture (Hawaiian) is vastly different from American legal culture and both need to learn from each other (Filipino and Samoan) while others argue that their culture will easily be able to adapt to the litigious American culture (Korean).

The final section focuses on the world economy and Hawaii. Changes in the world economy have been especially dramatic recently. Johan Galtung predicts that the geo-political world of the future will no longer be bi-polar or uni-polar; instead, there will be many super powers with their own exclusive areas of hegemony. Galtung also argues that there is a strong possibility for an economic depression. The panel discussion on Hawaii's economy indicates that this could translate into increases in Pacific-based litigation and a resultant development in international law. Hawaii could play an important role in creating specialized courts and international non-judicial conflict resolution systems. Among the key concepts that Hawaii should use to create this future is aloha.

The concluding Community Response Panel features distinguished community representatives. Their short speeches commented on the previous three days: on what was lacking and what directions the Courts should pursue in their planning efforts in the future.

## **SMALL GROUP SESSIONS**

As important as plenary sessions, which were designed to provoke the audience, were small group meetings (ten to fifteen participants per group). Held each day, they were run by facilitators and recorders and were structured to produce a concrete list of recommendations as to desirable changes in the Judiciary and the legal system. Facilitators and recorders were trained in a half-day preconference in which they were familiarized with the missions of the Congress.

On the first day of small group meetings, a list of "possible future events" were presented to participants at the Congress. They were asked to focus on the potential impact of the event on the legal system holding in abeyance the likelihood of the event.

The following possible future events were put forth for discussion (each small group received five):<sup>1</sup>

1. By 2005, machine intelligence has surpassed human intelligence.
2. In 2009, commercial cold fusion is marketed, including "table-top" fusion power generators.
3. By 2004, the average level of the oceans has risen by three meters. The ozone layer has declined by one half.
4. By 2010, the entire human genetic code is deciphered, and humans gain the right to a genetically defect free baby.
5. By 2000, federal court jurisdiction is severely restricted (because of funding shortages, among other reasons) leading state courts to dramatically increase their jurisdiction.
6. By 2000, law practice become regulated by a central agency responsible for setting and standardizing fees.
7. In 1995, a global economic depression begins lasting a decade.
8. By 2015, Northern California is separated and becomes a place where different native American peoples may establish sovereign states.
9. In 2010 Pyongyang becomes the capital of the Federated States of Eastasia (which includes the present nations of Japan, the Koreas, all the Chinas and Mongolia) and Bonn becomes the capital of a United States of Europe (which extends from Finland on the north, Greece on the south, England to the west, and Russia to the east).
10. In 2007, the participants of five major transnational computer network communities declare themselves citizens of the networks. The networks then issue them passports, collect taxes from them, and offer them various social benefits, including education and medical care.

These events were chosen to force participants out of their usual belief systems and into alternative possible futures. The question was not whether such an event would or would not happen but the implications on present society and law if such an event did occur.

The second day modified the results of the national May 1990 "Future of the Courts" San Antonio Conference (funded by the State Justice Institute and organized by the American Judicature Society), largely twelve visions of court futures and analyzed them. These scenarios

were chosen as they developed a true range of alternative court futures. The scenarios offered participants some real choices of what could lie ahead, positive and negative. The San Antonio visions were as follows<sup>2</sup>:

1. **GENERIC JUSTICE**--a justice system that is overburdened with inadequate public funding and has low status;
2. **COURTS GONE AWOL** (Adjudication Without Legitimation)--courts only resolve criminal cases with private mediation for the rich (suite justice) and street justice for the poor;
3. **HIGH TECH/SUPER SURVEILLANCE**--totalitarian use of technological developments to control criminal and anti-social behavior through electronic monitoring, genetic screening (in employment), and genetic alteration of prisoners and deviants;
4. **APARTHEID JUSTICE**--white minority refuses to share power in the face of newly emerging black/brown/yellow majority, and white court system now main means of social control of emerging pluralistic society; however, Anglo-Saxon, "white law" completely alienated from nonwhite majority;
5. **ROAD WARRIOR JUSTICE**--natural disasters, severe depression, and plague create the conditions for social collapse and communities develop their own private security systems with vigilante justice prevailing;
6. **CITIZENS AS ACTIVE CONSUMERS OF JUSTICE**--high degree of citizen involvement in all areas of the legal process and local and national consumer report magazines for the courts thrive as do law-oriented consumer association movements;
7. **DECENTRALIZED BOTTOM UP JUSTICE**--neighborhood community-based justice with lay judges (advised by law-trained clerks; multiple ADR forums in accessible forums (shopping malls, near health centers) and from the adversarial "let's sue" society to the mediation "let's resolve" society;
8. **THE POSTMODERN HUMANISTIC COURTS**--judicial education incorporates broader "ways of knowing and perceiving" the world including the effective use of intuition and emphasis on the whole rather than compartmentalization, and humanistic and transpersonal methods used to alter prisoner's behavior and perception;
9. **GREEN JUSTICE**--focus on community and environmental responsibility not on individual property and economic rights and self-help focus in all aspects of life including solving your own disputes (self-reliance and self-sufficiency);
10. **HIGH-TECH/HIGH EFFICIENCY JUSTICE**--extremely efficient; elimination of clerical staff/paper flow, even with large, diverse, complex caseload and computer driven jury selection; artificial intelligence relieve lawyers and judges of routine work;

11. **THE AUTOMATED COURTS**--virtually no use of courtroom or courthouses; video and satellite hearings, jury decision-making by video or cable television (the interactive jury box), and interrogation via interactive tv of witnesses make personal appearances rare and computer judging of normal routine cases (e.g. child support, traffic violations); and
12. **GLOBAL JUSTICE**--global economy breaks down national barriers of all kinds and legal and dispute resolution traditions of different cultures gradually evolve into global law; world constitution ratified and world government formed.

Hawaii participants took these scenarios, analyzed them, created other possible scenarios, and using a checklist of design characteristics (size of court, funding sources, criteria for judgeships, types of courts) developed the contours of their ideal court system. In this design task, they were asked to imagine their ideal system, what they wanted to see. At the same time, they were asked to reinvent the courts, to ask themselves; if the Judiciary disappeared today, what would they invent to replace it? Organizers wanted a checklist available to ensure that participants would stay within various structural boundaries, that is, to design a viable future. As one can see they can be used for almost any institution or system.

1. Currently, Hawaii is a representative democracy with the Judiciary the third branch of government. What are some other forms of representation (e.g. direct electronic democracy, rule of the elders)?;
2. Currently, the courts are structured into appellate, trial, traffic violations and special courts such as the family court. What are some alternative court structures (e.g. elderly or science courts)?;
3. The present criteria for a case to enter the various structures include the amount of money involved as well as the seriousness of injury to body and property. What are some other criteria (e.g. public impact of case)?;
4. Judges are presently selected by a Judicial Commission, appointed by the Governor and approved by the Legislature, what are some other ways to select judges (e.g. election by Bar)?;
5. The present criteria for becoming a judge is a law degree, professional respect, experience, citizenship and membership in the human species. What are some other criteria? And do we need the present criteria?;
6. Courts are presently funded through the Legislature, based on indirect lobbying and formal requests based on needs. What are some other ways of gaining funds? (e.g. automatic funding based on weighted caseload)?;
7. In general the following adjectives are used to describe the courts: adversarial, bureaucratic, precedent-oriented, incremental, patriarchal, procedural, and win/lose. What would be the adjectives others would use to describe your design (e.g.



matriarchal)?;

8. The courts have been described as having the following dimensions and missions:
  - (a) Branch of Government--uphold the constitution;
  - (b) Subsystem of Legal System--coordinate and promote justice among subsystems;
  - (c) Social Institution--anticipate and respond to changing judicial needs of the public;
  - (d) Public Agency--efficiently and economically use resources;
  - (e) Dispute Resolution Forum--fairly and speedily resolve disputes brought before the courts.Would you keep the above dimensions and missions? What are some other dimensions and missions (e.g. Political Institution--to shape public policy)?;
9. The present size of the courts is: Expenditures (\$62 million or (2.84% of the State Budget), Full-time judges (64) and other Personnel (1600). What would be the size of your preferred court system?;
10. Technology is currently used for word processing, project management, electronic mail, and fax. What are some other uses for technology (e.g. judicial expert systems)?;
11. Judges and administrators are presently educated while on the job and through special programs. What are some other education strategies (e.g. an academy)?;
12. Currently, only humans, the state and corporations have standing. What are some other entities that could have standing (e.g. cultures)?;
13. Currently, cases brought before the courts are counted. What are some other possible categories?;
14. Currently, attorneys (private, prosecutors and public defenders) represent cases. Who would represent cases in your design?; and,
15. Cases are currently held in courthouses. Where are some other sites of dispute resolution?

Based on the scenarios and the design checklist, participants came up with a range of preferred designs. Some groups endorsed specific scenarios such as the decentralized model while others further developed negative scenarios such as the courts as part of a large administered bureaucratic society, courts where decisions are influenced by the wealth of the litigants, and a "Yakuza" justice model. There was a range of preferred systems articulated.

One design had as its characteristics: an informed citizen-driven, egalitarian, culturally diverse, multi-resolutional, globally connected, holistic, expert and electronically decentralized system. This system placed a great deal of emphasis on mandatory ADR and on increasing minorities and women in positions of leadership in the courts.

Another design invented was the Judiciary as a "User-Friendly System." This approach

attempted to take the best of the new computer technologies and the best of the citizen consumer-driven model with the following specific characteristics: a multi-door system alternative means of dispute resolution, video appearances and teleconferencing, public and private ADR, consumer involvement and access to the system, greater penalties for environmental damage, removal of civil cases which have public impact from the courts, electronic monitoring of law violators, and culturally appropriate dispute resolution techniques.

Instead of borrowing from the metaphors of business (consumer-driven) or technology (automation), another scenario used the medical model and called for a preventive/diagnostic system of law and justice. Here the court's main function would be to prevent conflicts from becoming legal controversies, that is, to move from a "let's sue to a let's resolve" mentality.

Another preferred judicial design titled "Kulia I Ka Pono" (Striving for Justice) featured the Courts committing to a community educational outreach program in which the public becomes conflict- and law-literate. Attorneys, as well as judges, must not only be literate in the law but knowledgeable in the cultural values and ways of thinking of the community. Judges in this scenario would be encouraged to be exposed to the real world of the community through field service or sabbaticals. Groups also developed humanistic models of courts in which the ways different groups construct their self-image, resolve conflicts are explored and encouraged. Other groups saw the end of local jurisdiction and saw the Hawaii courts becoming increasingly global in their scope.

But by and large the following themes were dominant in the preferred scenario developed by participants:

- The Judiciary should be consumer/public-driven (instead of attorney- or bureaucracy-driven);
- The Judiciary should wisely utilize advanced computer technologies;
- The Judiciary should be sensitive to different cultural constructions of justice and should incorporate culturally appropriate dispute resolution forums;
- The Judiciary should encourage and instigate public education about the law and judicial processes so as to make the courts more understandable and accessible; and,
- The Judiciary should emphasize mediation and other less adversarial forms of dispute resolution.

## **RECOMMENDATIONS:**

While the scenarios articulated general participant preferences and possibilities, the final day of the Congress focused on specific recommendations that the Judiciary, the Bar, the private sector, the University of Hawaii, particularly the law school, and non-profit and human services sectors could act on.

Recommendations followed the patterns of the preferred scenarios. They included changes in the following areas. Mission (increase emphasis on pretrial harmony), Judicial Evaluation and Selection (sabbatical for judges), New programs (Ombudsman, Office of Ethics, Office of Information and Complaint); Judiciary Structure (mandatory mediation and arbitration, cultural officers and a multi-door multi-culture courthouse, electronic trials and improved information systems so judges have feedback throughout case; Law School (redesign law school curriculum to include ADR training and make curricula more global, humanistic and environmentally focused); Legal/Criminal Justice System (reevaluate concepts of crime and punishment and guilt versus innocence, and, emphasize restitution and restoration instead of punishment); and, Public Community Education (demystify the law through broad-based public education including adult education, public information forums involving judges, and expand teaching of mediation in schools.

What follows is a categorized listing of the top three recommendations from the various groups. As there were many ties and some groups lumped a series of recommendations into one, there are more than the sixty recommendations as one might expect (twenty groups with three recommendations each).

#### **A. MISSION/GOALS**

1. Redesign the Judiciary mission so as to focus on pretrial cooperation and harmony and reduce the emphasis on the adversary model of justice.
2. Strengthen the Judiciary to in fact become the third branch of government (instead of being perceived as an agency or a department).
3. Encourage all branches of government to cooperatively and comprehensively consider implications of all changes in the Judiciary.
4. Remind management that the primary function of courts should be adjudication, not the creation of bureaucracy. Product should take precedence over procedure.
5. Focus on enhanced education for attorneys, judges, law students and the general public
6. Review the structure and functions of judicial system. Make a determination as to the public's view of the system and how best the system can change to meet the needs of the public.
7. Achieve efficiency and swift dispute resolution.
8. Promote efficiency and increased accessibility through the maximization of new technologies.

## **B. JUDICIAL SELECTION AND PERFORMANCE**

1. Conduct periodic evaluation of judicial performance. This should then be sent to the Chief Justice for review/corrective action and to Judicial Selection Commission for retention evaluation.
2. Create a short list for judicial appointments and a shorter term of commissioners. Further depoliticize judicial selection.
3. Institute pay raises for judges at a floor of no less than \$150,000 per year. Encourage sabbatical leaves requiring Judges to undertake work which exposes them to different cultures and viewpoints.
4. Increase representation of women and minorities on Bench and various Commissions.
5. Reduce list of nominees proffered by Judicial Selection Commission from six to three.

## **C. NEW PROGRAMS**

1. Establish an Office of Ethical Practices to educate and advise all Judiciary employees.
2. Create an independent commission to oversee judicial funding and spending including salary level of judges.
3. Empower commissions so as to enforce and better regulate the courts and the legal profession.
4. Establish a Judiciary Information/Education Office with the following functions: mandatory computer literacy for judges, staff and lawyers, formal outreach programs to educate the public about the judicial process.
5. Establish a Judicial Ombudsman (Information and Complaints Officer).
6. Establish a Commission to review and simplify rules of court procedure. To begin with, have Commission reassess basic concept of rules as they apply to justice; also institutionalize concept of "Aloha."

## **D. JUDICIARY STRUCTURE**

### **Alternative Dispute Resolution (ADR):**

1. Promote ADR by encouraging public and seek ADR use in filings; also court discretion for mandatory ADR.

2. Require mandatory conciliation and mediation before a case enters the trial courts.
3. Before filing a case, a judiciary agency must inform all parties of all alternatives to litigation (before discovery).
4. Develop plans to use ADR in different programs and branches of government.
5. Change court rules to promote an increase in ADR. Require institutionalization of ADR process by law.
6. Presumptive use of mediation as much as possible.
7. Require mandatory ADR and encourage experimentation with ADR, encourage private settlement before going to the courts.
8. Implement court-sponsored multi-problem solving methods available to people with appropriate screening methods.

**Judge Specific:**

1. Develop two kinds of trial judges, the first a trial judge and the second a resolution judge (some of their workload should be diverted to either administrative or specialty courts).
2. Life tenure for judges.
3. Eliminate specialization of judges.
4. Rotate appellate judges to trial level.
5. Encourage more training for judges and all government employees.
6. Develop a judge's school as an alternative to law school. Psychological screening prior to admission in judge's school should be conducted.
7. Create professional calendar administrators.
8. Improve training for jurors and judges.
9. Increase number of case decision-makers (judges and others, as appropriate) to maintain human connection between decision-maker and others, for example, more decision-makers in family court and less in traffic.

**Court Consolidation:**

1. Create single-level trial court.

2. Eliminate distinctions among circuits and create a single trial court level.
3. Streamline the courts: single-tier state court system (eliminate district courts) and have separate civil and criminal courts.
4. Take traffic violators out of court into administrative procedures.
5. Decentralize services at different stages of case process.

**Culturally Appropriate Forums:**

1. Create culturally sensitive appropriate systems with cultural officers attached to the courts. Also examine Hawaii's history to locate ADR processes that can be used.
2. Increase education for judges and others, especially cultural education.
3. Create a two-track judicial system (American jurisprudence and Minority cultures) and lobby for enabling legislation for cultural statutes.
4. Develop a multi-door multi-cultural legal system.
5. Offer culturally and constitutionally appropriate ADR mechanisms and forums.

**Technology:**

1. Use new technologies to reduce staff and create smaller, more accessible courtrooms.
2. Improve information systems by use of computers so that judges have feedback on their decision-making from start to finish.
3. Conduct electronic trials through advanced computer and telecommunications systems.

**Other:**

1. Establish structures based on types of cases, and create disincentives for exceeding rates.
2. Eliminate lawyer's time as basis for determining court-approved legal fees.
3. Create professional juries.
4. Fewer jurors in jury trial panels.

5. Create incentives and awards for creativity within system.
6. Institute system of "Judicare" insurance.
7. Increase role and importance of judicial auditor.
8. Return family problems to family services institutions and remove court and lawyers from family issues.
9. Require all parties (witnesses and judges) to take scientifically proven non-harmful lie detection tests.

**E. LAW SCHOOL**

1. Redesign law school curriculum to increase the use of ADR and discourage use of adversarial system.
2. Promote ADR education in law school.
3. Law school curriculum needs to be redesigned to become more humanistic, global and environmentally focused.
4. Train and educate Bar, law students, and business community of ADR mechanisms.
5. Expand law school curricula to include reassessment of fundamental assumptions regarding dispute resolution. Develop curricula with the State Department of Education (DOE) with regard to actual and future possible legal systems.

**F. LEGAL/CRIMINAL JUSTICE SYSTEM**

1. Seriously examine alternatives to incarceration.
2. Reevaluate concepts of crime and punishment and guilt versus innocence. Decriminalize anti-social behaviors.
3. Eliminate the parole board.
4. Emphasize restitution, restoration and protection of community and parties instead of punishment.

**G. PUBLIC/COMMUNITY EDUCATION**

1. Judiciary should maximize educational opportunities to promote better understanding of, and to demystify, the legal process.

2. Expand and fund educational role of the Judiciary. In coordination with the DOE, there should be conflict management classes with Judiciary personnel going out to the schools.
3. Increase judicial leadership with community (schools and business) partnerships.
4. Judges should be educators appearing before schools, boards and community groups. Time should be allocated for this activity.
5. Expand teaching of dispute resolution in public schools.
6. Demystify law through broad-based public education (judicial outreach, new technologies, information hot lines).
7. Improve judicial information to public. Judicial decisions should be justified and articulated to public through media. Media should be educated on court rules and processes. They should be more accountable and responsible.
8. Develop public education programs on how legal system works and why.
9. Encourage more citizen participation in annual judicial conference.
10. Hold biannual Futures Congress with increased non-legal and broader-based participation.
11. Bring public into judicial system in order to demystify it--bring children to view court activities, use live television coverage, encourage pro bono advertising for judiciary, connect judiciary to state information services.
12. Conduct broad educational campaign on the uses of ADR.

The Congress concluded with the Judiciary's intention to formulate a Foresight Commission. A Foresight Commission would further evaluate these recommendations (as well as the numerous other ideas that did not make the top three priorities of the small groups) and the preferred ideal visions and scenarios developed by participants. Unfortunately since that time, funding for the Commission was denied by the State Justice Institute. The Hawaii Legislature, as well, did not release funds for the Commission. Nonetheless, the recommendations can be evaluated and implemented and used to continue the process of anticipating and creating alternative court futures.

To conclude, the most important substantive success of the Congress was that a range of new ideas--some requiring incremental change and some requiring system transformation--that did not merely duplicate or reproduce the present entered the judicial system. The most important process success of the Congress was the dialog between participants; the sharing of diverse visions of future. In this sense, the missions of the Congress were met, new ideas were brought into the system and a community of concerned individuals committed to responding the



changing judicial needs of the public was created.

What follows are the actual speeches presented at the Congress. Some are more informal in their presentation style, some are academic. We believe the presentations to represent some of the most thoughtful essays on the futures of the courts. They do not merely restate the present rather they give us a sense of what the future might be like. But most importantly, as evidenced by the richness of participant's recommendations they open up mental territory, thus creating the possibility for transformation.

## NOTES

1. The Hawaii Center for Futures Research--through the research of Wendy Schultz and Chris Jones--provided some of these "possible future events." 2424 Maile Way. Honolulu, Hawaii 96822.
2. Clem Bezold of the Institute of Alternative Futures and Daina Farthing Capovich of the State Justice Institute developed these scenarios based on conferee responses. James Dator and Sharon Rodgers have further developed them. See James Dator and Sharon Rodgers, The Future and the Courts Conference: Executive Summary (Chicago, Illinois, American Judicature Society, 1990).

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### **III. SPEECHES**

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- A. OPENING REMARKS**
- B. THE FUTURE OF THE AMERICAN COURTS**
- C. THE FUTURE FROM THE HAWAII COURT'S PERSPECTIVE**
- D. SCIENCE, TECHNOLOGY AND THE ENVIRONMENT**
- E. CULTURE, DEMOGRAPHICS AND APPROPRIATE DISPUTE RESOLUTION FORUMS**
- F. THE WORLD ECONOMY AND HAWAII'S ROLE IN THE PACIFIC**
- G. COMMUNITY RESPONSE**



# MEETING THE NEEDS OF THE PRESENT AND THE CHALLENGES OF THE FUTURE

by

**Chief Justice Herman Lum**

Distinguished guests, friends, ladies and gentlemen: Good Afternoon, and welcome to our 1991 Hawaii Judicial Foresight Congress on "The Courts in the 21st Century." I would like to begin by sincerely thanking each of you for taking time out from your busy schedules to be a part of our Judicial Foresight Congress.

About a year ago, in my State of the Judiciary Message, I indicated that I would convene a congress "representing all segments of the community for the express purpose of identifying and examining future problems of the courts and suggesting ways that our judicial system can best prepare for them."

I proposed such a congress because of my belief that the 1990's would be tumultuous and because of "the understanding that we are not likely to survive the rapid and tumultuous change ahead of us if we simply rely upon repeating out past behavior." Indeed, I said that "if we entertained hope that our judicial system of the future will be prepared to embrace the (inevitable) changes that lie ahead, we needed to plan now." I am convinced now more than ever, that we need to address the future in an attempt to ascertain its impact upon our judicial system.

So it is altogether fitting and proper that we open the new year, indeed the new decade, with this congress on the future of the courts in the 21st century, for as we journey through the final decade of this century, we will no doubt face challenges and opportunities heretofore unknown in the entire course of human history. Yet if we are to deal effectively with these challenges and opportunities--if we are to embrace change rather than resist it--we need to prepare now for the uncertainty that lies ahead.

The most crucial problem we face today, then, is identifying exactly what it is we want to do to prepare the judicial system for the challenges and opportunities of the future. In a context of uncertainty, the choice is always clear: we can either choose to do nothing and simply react to change as it occurs, or we can choose to anticipate change and plan for it accordingly.

By focusing on the future, I do not mean to imply that we lose sight of the present. For surely, present needs and concerns must be addressed. But we must be ever vigilant so as not to allow ourselves to be constrained by the exigencies of the present--to focus only on what is rather than on what should be. For, I believe that the judiciary of tomorrow will differ substantially from the judiciary of today. And, if we accept this proposition at least in principle,

then we must (or we are obliged to) study the future as well as learn from the past, and adjust what we do today to what we have learned.

This is certainly no easy task. To be sure, it is difficult to study, yet alone understand the future, and there will be many who would advocate that we focus on solving current problems. They would dismiss any future-oriented activities as being frivolous and unnecessary. But to concentrate exclusively on the present would be tantamount to abdicating the future and perpetuating the status quo. And in view of the certainty of change in the 90's, such an approach would be totally unrealistic and unacceptable. There are other equally compelling reasons for studying the future as well.

The judicial system, like our legal system, is confined within the boundaries of history and tradition. And what lies at the very core of our legal system is the adversary system which relies principally upon the parties to frame the issues and present the case to the court for resolution in a manner consistent with established rules and procedures.

While there is no question that the adversary system has served our people well, today, more than ever before, that system is failing us. Mounting caseloads and backlogs threaten to overload our judicial system. Complex litigation consume enormous court time while taxing the abilities of attorneys, jurors and judges. And, perhaps more often than not, the litigants go away unsatisfied with the process and the results.

Yet, if we continue to advance the proposition that "justice delayed is justice denied," and if we continue to maintain hope that complex social issues can be resolved in a fair and expeditious manner by enlightened courts in an adversarial framework, then by any standard of measurement our present legal system is in trouble.

We all know that courts are not necessarily the proper forum for resolving all complex social issues. Furthermore, we all know that the complexity and scope of many technological and scientific issues brought to our courts tax the judiciary's resources and capacities and the ordinary juror's capabilities so much that our present adversarial system is challenged to respond.

The solution to these (and other) vexatious problems does not lie with more judges and more courts. Rather, now more than ever before, the courts must be responsive to changes; the courts must respond to the future.

There exists legitimate questions as to whether the judiciary can continue to effectively operate into the 21st century with a system of rules and procedures and with a structure established centuries ago. Stated another way, the question is simply whether the court system of today will be relevant to the problems of the State in the next century.

I am concerned about what happens to our judicial system if we fail to meet these challenges and opportunities in a timely and orderly fashion, or for that matter, what happens to the welfare of the people of this State if our judicial system fails to meet their needs.

While there exists as yet no clear-cut method for determining the kinds of challenges and opportunities we can expect, perhaps we should begin by attempting to identify just what issues and problems we will have to address in the near future. For we can meet the challenges of the future and the changing role of the courts if we can conceptualize and articulate today just what those problems and challenges will be.

We can begin today to shape tomorrow by letting our minds go beyond the rigid confines of our present perceptions and knowledge --to let our sixth sense about the unknown take precedence over our five senses for just a moment so that, at least for now, we transcend the problems of the present and look to the future for their resolution.

What I am saying may be incomprehensible to some of you and inherently logical to others. For, you may ask, what does the future have to do with my problems of today? Or, conversely, why should I be concerned about tomorrow when I have cases to deal with today?

That these are valid concerns there can be no doubt. But, to simply dismiss the future in favor of the exigencies of the present is to ignore the obvious. For, while surely the present is known--we are familiar with it, comfortable with it and we have learned to deal with it--it is in the future that many of the solutions to the problems of the present can be found.

As jurists, we will be confronted with a whole slew of issues that will evolve out of the technological and scientific changes that are occurring even as I speak. These issues, such as those concerned with genetic engineering and artificial intelligence, will tax our abilities to the limit. In addition, alternative dispute resolution programs will someday dominate our society in terms of resolving disputes equitably and expeditiously much like the way equity and law co-existed in the early days of the English legal system.

These and other issues lie at the very core of perhaps the greatest problem facing the courts today -- the problem of remaining relevant in a rapidly changing environment.

The Congress is but the first step in a continuing process of planning for the future.

Ladies and Gentlemen, you have all been carefully chosen to assist us in identifying future problems and opportunities and suggesting creative ways for the courts to deal with them. Your work will serve as the foundation for those who shall come after you.

Thus, we welcome your thoughts, your ideas and your concerns. But your efforts will not end here. I am also planning to seek legislation which will authorize the formation of a permanent Judicial Foresight Commission whose mission will not only be to carry on with the work of this Congress, but to explore future issues and trends and advise me specifically on what changes to implement, how and when. They, together with our administrative staff, will put together a plan for the future of the courts founded, for the most part, on your work during the next two-and-a-half days.

In closing, let me just take a moment to thank Judge Yim and Judge Heely, co-chair of

the planning committee that has spent countless hours preparing for this Congress.

I want to especially acknowledge our co-sponsor, the American Judicature Society, whose efforts at the national level, along with the State Justice Institute, served to inspire this conference.

Also, I want to thank the many special people--speakers and panelists, facilitators and recorders--who have so graciously agreed to share their time and expertise with us. Lastly, I want to express our thanks to the Legislature for the funds appropriated for this conference.

With the help of all of you, I have the utmost confidence that the work arising out of this conference, representing your best collective thinking, will be significant. We hope that the Congress will prove to be meaningful, stimulating and individually rewarding to each of you.

On behalf of the Supreme Court and the Judiciary, once again, thank you.

# CONFERENCE DESIGN AND OVERVIEW

by

**Peter Adler**

Thank you, Mr. Chief Justice, and with those good thoughts in mind, let's move forward into the program. My job is to springboard us into this extraordinary gathering of talent and energy and to help all of us be prepared to participate in it effectively and enthusiastically. As you can plainly see, this conference is a complex undertaking. It involves numerous speakers and panels, some intensive and highly interactive group discussions, and a number of media presentations that have been prepared especially for this meeting. Most importantly, you should know right up front that it has intentionally been designed to be both Participatory and Provocative. Those two words are key and I'll say them again: Participatory and Provocative. We want to stir the pot of good ideas that we know exists in this community and in this room and, by challenging your thinking, use the future as a way of re-thinking the present. This is a formidable challenge, especially to those of you who like myself tend to operate on the 5-minute plan and who are still fretting around about the undone things from yesterday and the stuff that's piled up and due tomorrow. Nonetheless, I am confident that you will find the process and the content of this conference insightful and productive. It will also move at a very fast pace so put on your seat belts and enjoy the ride.

In general, the Judicial Foresight Congress has three areas of focus around which presentations have been organized:

1. The first, which we will be dealing with today, involves the future of the judiciary and the degree to which the institutions of the law and the courts can become proactive rather than reactive.
2. The second theme is the future of science, technology, and the environment and how events in those three arenas will shape what our justice system becomes in the decades ahead. This, along with our topic on changing demographics and the globalization of culture, will be under the spotlight tomorrow.
3. Then, on Tuesday, the third and final day of the Congress, we'll be looking at various political and economic perspectives to better understand where Hawaii will fit in the larger world tapestry and how that tapestry, in turn, will determine what the courts and the practice of law may look like nationally and internationally.

Please keep in mind, however, that all of these activities are simply the conference input, grist for your individual and collective thinking and ideas to be mulled over in the days and perhaps even months and years ahead. The truly hard work of the Congress, I have to say, belongs to you. Your responsibility in agreeing to participate in this unique



meeting is to help create the Congress's output. On each day of this conference, each of you will be participating in a working group with a dozen other conferees. In these groups, you will be asked to think hard about the future of the courts and to produce ideas that will be passed onto the Judicial Foresight Commission that Chief Justice Lum spoke of in his opening remarks. I'll say more about these working groups later this afternoon but you should be aware that we truly need and value your thinking and recognize that the long term success or failure of this congress rests with the critical visions you generate.

If the design of this conference strikes you as a bit bold and unorthodox, let me be one of the first to assure you that you're correct. One of my favorite American philosophers, Mae West, once said that whenever she was confronted with a choice between two evils, she always chose the one she'd never tried before. In this conference, we are trying something different and you have full permission, not just permission, but our unqualified encouragement!, to think differently. We want you to try out ideas that are intentionally or unintentionally wild, weird, unconventional, or downright peculiar. We need and require fresh thinking. Some of this will undoubtedly make some of you uncomfortable, particularly today, the first day of the conference. If it does, please bear with it and don't abandon the effort.

Finally, I want to warn you that in preparation for this conference, Judge Weil and I have been collecting little quotes and aphorisms about the future for several months now and we intend to periodically share these little tidbits with you. In that vein, I offer you three to start the ball rolling.

The first comes from Charles Kettering who said: "My interest is in the future, because I'm going to spend the rest of my life there."

The second comes from a man named Andrew Glasgow who said that "The trouble with the future is that it usually arrives before we are ready for it."

And the last comes from Bill Vaughan who, in regards to the bleakest human future of them all, had this to say: "We hope that when the insects finally take over the world, they will remember with great gratitude how we took them along on all our picnics."

# INVENTING THE FUTURE OF THE COURTS AND THE COURTS OF THE FUTURE: A FUTURIST'S PERSPECTIVE

by

**Jim Dator**

Here comes the Everready, Diehard, Energizer, Future-hopping Rabbit (Dator appears in rabbit ears and dark glasses, beating a bass drum).

Good God, you'd think I'd learn to quit. As you well know, 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 grandfather of that conference--George Chaplin and many other people here today--can tell you all about it.

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 decision-making 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 (Lawrence 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 Hawaii Research Center for Futures Studies, and I 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 United States 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 survey, 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.

## **FUTURE SCENARIO**

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 foolhardy 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 bailiff 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, but 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 infuriatingly 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 focused on this process in the old Soviet Union and Eastern Europe, but failed to understand 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 United States really meant the disintegration of the United States, 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 United States, 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 nobody had to hand carry it and wait in line for a clerk to abuse you or slam the window on your fingers at 4:29 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 modeling 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-homosapiens, 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 thus 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 United States 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 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.

## **CONCLUSION**

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 ourselves, 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?

# **INVENTING THE FUTURE OF THE COURTS AND THE COURTS OF THE FUTURE: AN INSTITUTIONAL PERSPECTIVE**

by

**Frances Kahn Zemans**

Courts are both similar to, and different from, other institutions and, therefore, need to be looked at similarly and differently with respect to futures issues. The conference mission statement says that we are going to use the past and the future to speak to the present. That seems to me particularly appropriate to consideration of the judicial process.

Given the vast social, economic and technological changes that have taken place since the founding of this nation it seems to me that the judicial process is extraordinary in its lack of change. Of the three branches of government, the judicial branch is the one that we brought from England wholesale. Blackstone himself, were he to enter any American courtroom today, even here in Honolulu, would feel very much at home. Indeed, with the loss of civil juries in England, he may well feel more at home here than his own home country.

As we approach the questions that we are going to be addressing here, we must distinguish between changes that directly affect the courts as institutions and those that only affect the content and quantity of the caseload. For example, I am more skeptical than most about the likelihood that technology will affect the future of the courts in a significant way. Yes, I think changes in technology will change our definitions of life--they already have--and our definitions of parenthood--they already have. The state of Georgia, for example, is currently struggling with a medieval law that says that if an injury does not result in death within a year and a day after it is inflicted, the perpetrator cannot be convicted of murder. With modern technology, there are many instances in which an assault results in death well beyond a year and a day later. These changes make difficult cases for the Courts, particularly in a common law system, but they are not, I contend, conceptually different from the usual task that Courts have been called upon to fulfill since the founding of our nation.

Technology can and does, of course, affect the process. Videotapes, for example, as we saw in the case of Washington, D.C.'s mayor Marion Barry can clearly play a role in criminal convictions. Judicial conduct commissions and other investigatory bodies also have the benefit of videotaped evidence on occasion. As another example, we now have DNA testing playing an important role in criminal convictions of the most serious kind. These technological changes and others have brought differences and they will continue to do so. But are they really fundamental changes in the operation of the courts?

The rise of experts has been referred to on many occasions, "expert systems" Jim Dator said. Well, I think there has been and will continue to be a rise of "expert systems." Are they going to answer all of our questions? I am not so sure. At the "Future and the Courts" conference in San Antonio, a panel on expert witnesses included a very interesting presentation

about conflicts between experts in the context of actual litigation. Each side brings their own experts and then proceeds to argue that their own experts are the most expert in interpreting the facts of the case. Observing medical doctors argue over the validity of different approaches to medical evidence makes clear that there are many unsettled issues in the technical world. Indeed, were there perfect agreement among the scientific and technical experts there would likely be no case in court at all. The notion that those disagreements will one day disappear seems a dream that will not occur soon or in the thirty year time frame we have set for ourselves. For it is in the very nature of technological advances for there to be debate over new developments. Indeed the scientific method requires continuing challenges as the central tool in the advancement of knowledge.

Even on the level of alleged technological enhancement of court processing, serious limitations bear articulation. Has the quality or nature of the work product really improved from the word-processing revolution that we have all observed? Not in the world I live in. In fact in contrast to popular wisdom more sophisticated information systems in the courts may actually decrease public accessibility to our judicial system. As the rest of our society has become more verbal and more visual, our courts come to rely more and more on the written word. Gone are the days of the great orators who argued legal issues in open court. All of those arguments are now found in arcane legal briefs, relatively, if not totally, inaccessible to the average citizen. We need to ask the question "does that affect public interest in and public access to our judicial system?"

As has already been mentioned here today, in looking to the future we must also give due recognition to the importance of the past. One of the ideas that has persisted for a very long time in American history is the notion that the individual counts. This is certainly clear in the scenarios that have been prepared for this conference. But is the individual an appropriate unit of analysis in this age of the collective? Kenneth Feinberg who served as the court-appointed mediator in the famous (some would say infamous) agent orange cases, has written a brief piece in the February-March issue of Judicature in which he questions the relevance of courts to settling mass tort issues. Perhaps these are issues that do not belong in the courts at all; perhaps these are the kinds of issues that we will resolve the way we handled workers' compensation by simply taking them out of the purview of the courts. That is an option available from our past experience. Here and elsewhere we should not underestimate the importance of that past experience.

We need to take cognizance of the particular set of choices and events that have occurred in our national history and that have lead us to where we are today. That is a variation on the theme of saying that what we do today will have the same kind of unalterable impact on what occurs tomorrow. If the past is influential, are we now stuck? Well, let me raise some questions, I hope not too contentiously.

The scenarios prepared in preparation for this conference suggest that we should make an effort to break out of our current thinking, yet I am not sure that they go far enough. Indeed, I would suggest that they are all written with a very strong normative view that is rooted very deeply in our past and certainly in our present. I cannot help but put on my empiricist's hat and do a little reality testing. For one thing, the scenarios seem to assume a consistent

directionality of the trends they articulate; but why so? Is that how the world operates? For example, in recent years, we have seen black Americans increasingly entering the middle-class; but at the same time we are seeing a widening economic gap between black and white Americans. We see more blacks at the top of all of our institutions, and yet a decrease in the number going to college. In this a story of success or of failure? It is both. The point is that demographic changes that are emerging need not, and I think are not usually and necessarily in a consistent direction. If we are to envision alternative futures we need to do so with all the complexity that the actual future will surely entail.

Several of the scenarios, both positive and negative have a strong normative perspective that is not necessarily confirmed in practice. For example, one of the positive scenarios suggests that an increase of women and minorities in positions of authority in the courts will result in more caring, compassionate, tolerant justice. Well, where I live, I see rising racism in all quarters, and it is not something that is peculiar to the Caucasians in our society. There is another positive scenario, a consumer model of the courts. Ninety-seven percent of the voters from the Conference in San Antonio supported a service-oriented court system. While that sounds quite appealing but my own experience with the Chicago Police Board (a citizens review panel) makes me somewhat less optimistic. We had many requests for opening offices outside of the central police system for people to bring complaints against police officers. After much haggling, we finally instituted such a system. However, almost no complaints were ever brought through that more accessible system that the citizens allegedly so needed and wanted.

Another aspect of the service-oriented system suggests that courts be a venue for solving problems rather than deciding cases. Yet a recent study belies the expectations of our futures conference. Sally Merry, a professor of anthropology at Wellesley College, has recently completed a study of legal consciousness among working class Americans entitled "Getting Justice and Getting Even." She found that contrary to the preferred service-oriented model, the plaintiffs she studied want blame to be found; they do not want disputes to be resolved in any nice fashion where everybody is happy. They want the wrong that has been done to them asserted authoritatively by a judge. There is some evidence that this view is not limited to the working class Americans studied by Merry. For in most of the country ADR in general remains a supply in search of a demand. Are we who are looking to the future and the courts in accurately reading desires of the consumers of the courts? Are we again, the elite dictating to the public at-large?

Another scenario, is called "generic justice" or "discount justice." This version of justice would be cheaper than our current system but provide less individualized service. It is clear in the description that this is not a version of justice to be preferred. Well, maybe such a system of justice is okay, maybe the Wal-Marts of the country have something to tell us that is applicable to the future of our courts. American consumers are leaving the Sears Roebucks; some are still going to the Neiman Marcus', but they are also going to Wal-Mart in droves. The recent data at the end of what was supposed to be a very deadly retail season indicate that while the predictions generally held, they did not apply to Wal-Mart. Is discounted, generic Wal-Mart necessarily giving a low quality product? Never having shopped at a Wal-Mart, I do not know for sure--but I think the issue is that they provide a different kind of service. They are self-serve operations and the consumers are speaking with their dollars saying that they are willing

to invest the time and energy required in self-service to get access to products that they can afford.

All of this is a way of saying, as I started out with my discussion of the scenarios, that "positive" scenarios involving service-orientation and ADR as well as "negative" scenarios involving generic discount justice are grounded in our current norm systems. Furthermore, if we really are to open our thinking we need to raise questions about the norms themselves. Can we escape those current normative views? Should we try? Does it matter? A short riddle which will illustrate the point. A father and his son were driving down a highway when their car was broadsided by another vehicle out of control. The father died instantly; the child, severely injured, was rushed to a nearby hospital emergency room. A doctor was quickly summoned, but upon seeing the boy said "I can't operate on him, he's my son!" When telling this story I have heard the following suggestions to explain the scenario described: step-father, adopted father, foster father. The answer, however, is much more straightforward: the doctor was the boy's mother. Today, that story elicits many more correct answers than it did years ago when it first circulated. Yet there are still many whose vision of the doctor is sufficiently male dominated that they are fooled by this simple riddle. I think we can learn a lesson from the feminists, who have been particularly good at pointing out how ways of thinking indeed do influence action.

For example, it is clearly true that if every person and occupation of high status is always referred to and pictured as a "he," then we grow to think that only "hes" can be persons of high status and influence. More readily documented is the result that white males who conduct medical studies mostly on white males reach conclusions that are not necessarily valid for other segments of our society. It was recently discovered that Native American children do not respond to vaccines against meningitis in a way that medical science has assumed to be effective for many, many years. Why? Tests were never done on that population, a population that apparently reacts differently to the vaccine. Perhaps the most recent example of the feminist claim against the white male medical establishment is the amount of attention and dollars currently being devoted to AIDS research. AIDS, still largely a killer of males, receives many more dollars for medical research than does breast cancer, still largely a killer of women, a killer of many, many more humans than AIDS has killed. This is the kind of critical thinking that we need to do in other institutions as well.

There is one important commonality between our past and the suggested scenarios that is quite clear--the achievement of justice. But how do we define justice? And, how do we build functioning organizations to best achieve it? And perhaps most difficult for those of you in the room who have to run institutions, how do we operate day-to-day in what is often a crisis-management environment and yet keep this broad view in mind? In courts this is very much tied to the source of their influence; their authority and their legitimacy with the public. Such authority and legitimacy is dependant on some shared norms. But, how can courts keep pace as values change? What does it mean for those of you who must run the courts?

Most of us do not have the luxury of spending our lives waxing eloquent about the future. Decisions must be made, and they must be made on the basis of something that has been predetermined, and not what might be in some undetermined future. "Futures" speaks to

recognizing different world views, but it is difficult to act without grounding our actions in some views. Yet if we do too much grounding, we stagnate. I have come to believe that too often things are done the way they are done because they have always been done that way.

Perhaps it was recognition of this phenomenon and the circumstances under which change occurs that led sociologists of another era to suggest "The Marginal Man Theory." The theory suggested that in many fields, if not most, significant change is instigated by a person somewhat marginal to the society as a whole. The marginal person came from an "outside" ethnic group or "outside" religious group. Not being an insider, it was suggested, the marginal person, perhaps because there was less to lose in challenging the status quo, was able to retain an openness to new ideas that enabled them to lead us toward the future. Examples include Marx, Freud, Einstein and Martin Luther King, Jr.

At a recent conference on court management, Professor Ron Stupack of the University of Southern California presented a litany of what he called "foul up factors" in courts that do not work. One of the "foul up factors" he identified was "the confusion of rigidity with rigor." That is to say that "rigor," a desirable attribute, has negative results when it is confused with rigidity, an undesirable attribute. What makes rigidity undesirable in courts as elsewhere? It is that in a changing world adaptability must itself become a positive. I thought about this on my trip from Chicago yesterday, which, in typical fashion, was long delayed. When we were finally served lunch at four-thirty in the afternoon, I asked the flight attendant why under such circumstances they do not serve the lunch before they serve the drinks (it had taken at least an hour for the drinks to be served prior to lunch). Her response? "We can't, the system is set up for efficiency. It's all on a hydraulic lift and the drink cart comes up first; so we have to serve the drinks first." It seems to me that kind of efficiency, which dictates against adaptability, is the kind of efficiency about which we need to be very cautious. In the biological world we talk about the survival of the fittest. But that has not always nor even typically been the strongest. Rather it has been those species that have been able to adapt. We too need to understand how to keep our courts adaptable in a changing world with an unknown future. I suggest that attention to incentives is one of the keys.

While I am not generally much enamored with the law and economics school, I do think they are quite right that incentives count. And incentives count in the operation of our courts as well. We need to institute and really support incentives that encourage the exploration of the new and the different. We must allow those who we want to explore the new to think about the future; and we must allow them to fail, for with no failure there will be no change.

Can you run an organization that way? Does it conflict with day-to-day operations? Of course it does; but that is a tension, that I believe is a healthy one. We need a methodology that presupposes change because we will have it whether we presuppose it or not. Business often delegates planning, I think it is preferable to take a more pervasive view. We need to make change an ongoing concern, not to the exclusion of day-to-day realities but along with it. That is the easy part. It is, and will be, harder to continually reexamine and reconsider the beliefs you hold dear and the assumptions you make. We should not, indeed we cannot, reject the past, as it defines who we are and where we are; but, neither should we immortalize it.

Finally, where do we go from here? Well, in Hawaii you are quite fortunate for you have a leadership with the will to change. This "Foresight Congress" and the Commission to follow make that quite clear. It is ultimately, however, up to you to face the challenge of the discomfort of examining assumptions. Leadership is important, but leadership does not make the day-to-day decisions. Ultimately, of course, it is not just thinking, but doing. The institutionalization of "futures" sounds a bit like an oxymoron for there is a logical inconsistency inherent in institutionalizing the future. Yet, here in Hawaii you have some practical products planned; the recommendations that will come out of this Congress will go directly to the Chief Justice who has already stated to you his receptivity to your suggestions and to the establishment of the Foresight Commission that will continue to address the issues we have discussed here. Because as policymakers you must operate in the here-and-now what you do will be influenced to a significant extent by the political context in which you find yourselves. Your choices are not unlimited, but choice is there. It will not be easy and it will probably not be popular.

Although I know that ice hockey is not a major spectator sport in Hawaii, with modern telecommunications you surely have heard of Wayne Gretzky, who recently passed 700 career goals in about half the time it took any of the other players who have reached that goal. Upon being asked why he is so good, Wayne Gretzky said "I skate to where I think the puck will be." That I think is your charge here. We need to skate to where we think the puck will be. Michael Tigar, professor of law at the University of Texas and keynote speaker of the "Future and the Courts" conference in San Antonio, suggested that those of us involved with the courts need to take a bifocal view, even those of us who are not yet old enough for bifocals. We need to look at the near and we need to look at the far at the very same time. That may make us a bit schizophrenic and it will be tricky, but that indeed is the charge before us here. We need to ask what is possible and what is changeable. The starting point is to think the impossible; we will all be brought back to the real world soon enough.



# THINKING FUTURE

by

**David Tevelin**

The State Justice Institute was flattered to learn that this conference was modeled after the "Future and the Courts" Conference we co-sponsored with the American Judicature Society last May in San Antonio. Please allow me to tell you, with all humility, that you picked an excellent model.

The mission of the San Antonio Conference was to "formulate Visions of the American Judicial System over the next 30 years and beyond; establish goals for the long-term needs of the state courts; and identify an agenda for planning, research and action to achieve those goals." I can tell you without equivocation that those goals were accomplished in San Antonio, and then some.

There were many reasons why the San Antonio Conference was successful but I think there are three that stand out as the most important: First, the participants at the conference came from a broad and diverse mix of professions. We benefitted from the views of not only judges, court administrators, lawyers, and legal scholars but legislators; social scientists; experts in technology, genetics, medicine and other hard sciences; futurists; philosophers; ethicists; journalists; and members of the public.

Second, the format of the conference encouraged the members of this diverse group to exchange their views and hear each other out. The 300 invitees were divided into 30 groups of ten, with as broad a range of perspectives in each group as feasible. The groups met three times during the conference to discuss the trends, scenarios, visions, and strategies they foresaw for the state courts over the next 30 years.

The mix and the format led to the third reason for the success of the conference: The participants bought into the idea of visioning and planning for the future. In particular, the judges and lawyers whose professions demand that they look in the rear view mirror and rely on precedent, were ultimately standing in their seats looking into the distance through the sun roof. As a result, the conference produced some truly exciting visions and strategies for the state courts to aspire to over the next 30 years.

The San Antonio Conference used the trends-scenarios-visions-strategies approach you heard described earlier today by Jim Dator. I'd like to stroke your imaginations for the work you have before you over the next few days by sharing some of the most productive scenarios and visions that were developed by those attending the San Antonio Conference.

## SCENARIOS

As you now know, a scenario is basically a group of trends that presents an integrated image of the future. The San Antonio participants produced an array of diverse scenarios: Some negative, some positive, some pretty static, some very dynamic.

The negative scenarios included a "Lord of the Flies" future where the few privileged "Haves" are in protected enclaves separated from the many "Have-Nots". The "Haves" rely on a private system of justice to serve their legal needs; the "Have-Nots" have no system of justice at all. Another equally cheery scenario was termed "Robo-Cop Presiding" where an automated, depersonalized system of justice governs society.

Automation was not seen as a negative part of the future judicial system by all participants, however. One of the positive scenarios, labelled "Beam Me Up, Judge!", offered an efficient paperless courthouse where holographic witnesses and expert systems enhanced both the speed and fairness of the justice system. One of the most popular scenarios was a "Legal Shopping Mall" where the justice system used multiple dispute resolution mechanisms, including not only public courts but commercial entrepreneurs, to dispense justice.

## VISIONS

The participants' visions were as diverse and dramatic as the scenarios they conjured up. At the San Antonio Conference, as here, the participants were counseled that a "Vision" was not a crystal ball-gazing exercise but a statement of preference about the nature of the courts in 2020.

The participants were asked to vote for their preferred visions at the end of the conference and in a mail ballot shortly after the conference. Although the visions generally fell into three categories, Status Quo, Moderate change, High change, it was interesting to note that only about 11% of the San Antonio group preferred a status quo future. Almost half (49%) wanted to see a somewhat changed system and a full 40% wanted to see a markedly different future.

Exactly what differences did they want to see in 2020? Let me present you the four radically different visions:

- **Multi-Door Justice:** A public "Judicare" insurance system funds the public courts and some private options. The system is characterized by "low-tech" user-friendliness and a smorgasbord of dispute resolution options. Many currently illegal activities are decriminalized and financial penalties have replaced prisons as the preferred punitive sanction.
- **The Green Vision:** The law is more disposed to protecting community and environmental rights, rather than individual ones. Self-help is the preferred way of resolving personal disputes, and the interests of the community rather than the state govern the criminal process. Culturally-appropriate dispute resolution techniques abound.

- **Global Courts:** The concepts of local, state, and national jurisdiction have withered away in favor of a free-market, worldwide justice system. Totally private courts offer an array of dispute resolution services. Economic sanctions are used to punish those who break the few criminal laws still in place.
- **High Tech Courts in a High Tech Society:** Although artificial intelligence and expert systems are available in the holographic courts of the future, criminal courts are rarely needed because biological, chemical and electronic technologies are being used to prevent most personality disorders and criminal behavior. Using "Justice Machine" cards the way we now use money machine cards, litigants draw upon immense data bases of prior judicial decisions for justice rather than upon quirky human judges. Robots and extra-terrestrials have begun carving out legal rights.

Now, as wild as they were, I'll bet you can do even better. And who knows, even if your vision doesn't come true, it could be a TV pilot next year: Maybe Hawaii 2020. With E.T. as Chief Justice of the Ala Moana Mall. But seriously ...

As I briefly noted earlier, the mission of the San Antonio Conference was to identify an agenda for planning, research and action to help the state courts better provide effective, fair and responsive justice in a future filled with undefinable change. At SJI, we took that mission seriously. In our FY 1991 grant guideline, we put proposals following up on the futures conference on an accelerated timetable. We specifically invited grant applicants to consider several particular types of projects. Some of them have already been undertaken in Hawaii but there may be a few others you might wish to consider as well. Our list included:

- Innovative state futures conferences, commissions, and educational programs that expose judicial personnel to futures thinking;
- Development, implementation, and evaluation of institutionalized long-term planning efforts in state and local courts;
- Conferences to exchange experiences, identify problems, and share potential solutions among state court systems involved or interested in futures efforts;
- Symposia focusing on specific topics that could result in futures research, planning, training, and action;
- Development of informational materials and educational curricula to enable judges and court staff to become more familiar with and apply futures thinking and planning principles; and
- Establishment of an information clearinghouse and technical assistance center for state court futures activities.

I'd like to take just a few more minutes to reflect upon one other, more abstract product of the San Antonio Conference. This "Product", if you will, was really a confirmation of an

important observation about our legal system that much more learned thinkers that I have made over the years.

In a speech to the Chicago Bar Association in 1916--shortly before his appointment to the Supreme Court--Louis Brandeis spoke about "the living law." At the close of his remarks, he told a revealing story about a foreign legal scholar who had an international reputation as a deep student of the law. At a time late in his career, the nation of Montenegro was established and the Prince of Montenegro concluded that like other civilized countries, it must have a code of law. And so, the Prince arranged for the Scholar to come to Montenegro and prepare its legal code.

"But," said Brandeis, "instead of utilizing his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people--studying everywhere their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life which the Montenegrins lived. They respected that law; because it expressed the will of the people."

Brandeis' story has the ring of truth not only in Montenegro but in the United States and, I would suspect, the rest of the world as well. As a way of underscoring the universality of that truth, let me also share with you an article I recently read in that noted law journal, Time magazine.

It seems that Pakistan recently enacted a statute, based on an interpretation of the code of Islamic laws, that would require a driver found guilty of causing a fatal accident to pay a fine of \$8,000 to the family of the deceased and to serve up to 10 years in jail. This severe interpretation of the law so enraged the bus drivers of one province that they went out on strike.

Faced with the shutdown of the bus system, the newly elected Prime Minister of Pakistan, who, according to Time, had campaigned on a promise to institute a new legal system based on the Islamic Code, decided in this case to seek a new interpretation of the code from Islamic scholars. A government official shortly thereafter announced that "a simpler and befitting interpretation" of the law had been made and that the penalties would accordingly be reduced.

Oliver Wendell Holmes, of course, expressed the moral of these two stories more succinctly when he said that "the life of the law is experience, not logic." That principle, that has always been so important in American jurisprudence, is likely to become critical to the survival of the rule of law and the courts themselves in the future.

As the United States becomes more demographically diverse and the majority white Western European population begins to decrease while the number of Pacific Islanders, African Americans, Asian Americans, and unforeseen others increases, it may well be that those new Americans will not find the system of justice that is codified in our Constitution and our laws to be, in fact, just.

Their notions of justice may have been forged in a wholly different society with different

cultural traditions and different values. To note only the most obvious example, the confrontational adversary system that is the hallmark of American justice may not only be unfamiliar to them but inappropriate or even frightening, or actually unjust.

The Hawaii Judiciary has probably been the most responsive court system in the country to this "New Diversity." Under a grant from the State Justice Institute, your court system has been working with Jim Dator to examine and consider new, "culturally appropriate" forms of dispute resolution so that the many diverse peoples in your state can look to your courts and find justice in some forum, in some form.

I think that the results of this project are going to be among the most important results of any SJI project for the nation as a whole. If the courts as an institution are to survive in the future, they must be able to demonstrate to the public they serve that they are dispensing justice. If they can be bold enough, swift enough, and creative enough to anticipate and respond to a changing American culture and changing ideals of justice and fairness, the courts will not only survive, but flourish. If they cannot respond to those changes, one of those negative scenarios I recounted to you earlier might become reality.

# ACCEPTANCE SPEECH OF THE HERBERT HARLEY AWARD

by

**George Chaplin**

Mark Twain used to say, "Praise always embarrasses me... It never goes on long enough."

Well, Frances Zemans' extolment went on long enough, and then some. I feel like Huckleberry Finn, who, after presumably drowning in the Mississippi River, was hiding in the choir loft during the services conducted for him, listening to an overly extravagant eulogy.

That said, I am deeply honored to have been selected--as were Chief Justice Herman Lum and Herb Cornuelle before me--for this award by an organization which has an admirable record based on a steadfast and tangible commitment to improving the administration of justice.

Some time ago I gave a brief talk to a neighborhood group. I worked on the material and I thought it went fairly well--that is, until a little lady came up and said with great gusto, "Mr. Chaplin, I have to tell you, your speech was absolutely Superfluous.

I said, you're kind to say so.

She said, I hope you're going to print it in full in the newspaper.

Yes, I said, Posthumously.

Well, she said, I can hardly wait 'till it comes out.

I'll try not to be superfluous.

As a first-generation American, a son of East European immigrants who came to this country seeking religious and political freedom and economic opportunity, I was taught early on to respect the majesty of the law. My heroes include not only the great presidents and the great scholars, but the great jurists--Holmes, Brandeis, Cardozo and Stone, Jackson and Black, and Learned Hand, among others.

Our history has been written not only by the Congress, state legislatures and city councils; not only by the White House, governors and mayors, not only by the wars of the last two and a quarter centuries, but substantially by our courtrooms. William Wirt, the Virginia lawyer and author, later U.S. attorney general, said it well in 1832: "If the judiciary be struck from the system, what is there of any value that will remain? The government cannot subsist without it. It would be as rational talk of a solar system without a sun."

We look to the courts to protect our lives, our liberties, our property, our communities. We expect the courts to uphold the rights of the minority, as well as of the majority. We want the courts to act with wisdom and with unflinching integrity, in fairly meting out justice.

But in recent years, the courts, like virtually all the other institutions of American society, have suffered in public esteem. Every poll that I know of has shown low ratings for all three branches of government at all levels, as well as for the media, lawyers and the medical profession. I personally think it is dangerous for people to have a low regard for the pillars of our democratic society, especially for the courts, which we depend on to safeguard our rights through impartial and principled administration of the law.

One of America's foremost editors, the late Louis Seltzer of the Cleveland Press, in an address in 1951 to the Cleveland Bar Association, said:

A stirring sentence from the Old Testament, from the book of Leviticus, is inscribed upon the Liberty Bell. It reads, 'Proclaim Liberty throughout all the Land unto all the Inhabitants Thereof.' But liberty cannot survive unless there is justice. The courts are the bulwarks of our liberties. They are part of the foundation upon which this great nation rests. It is important, therefore, that every citizen be concerned with the administration of the law.

To develop that broad interest calls for a partnership--a combination of lawyers and judges, of a free press, and of the public, a combination designed to achieve that quality of justice which Daniel Webster once termed man's great interest on earth.

But for such a partnership to be truly effective, the courts must foster and merit the confidence and the respect of the people, who need to perceived that judges have a sense of humanity and a passion for independence and fairness. And the people themselves must prove worthy of the trust which membership in a democracy confers.

Yet a national survey shows that close to six out of ten Americans don't know what the Bill of Rights is and that almost one out of two thinks the President can suspend the Constitution during war or national emergency. That's an intolerable level of legal illiteracy, which is further evidenced, as a Rhode Island judge put it, in "ignorance about the law and the operation of our courts."

But from the courts' side there's also the need for a much better report card. All judges should be selected on merit. And their performance should be of a quality which commands the appreciation of the public. In this regard, let me take note of the good work of the Hawaii State Judicial Selection Commission, which since its establishment 11 years ago, has contributed to a visible improvement in the quality of Hawaii's bench. I am convinced that the system would be even better if the commission were permitted to submit to the appointing authority a shorter list of names than is now required. A resolution urging that was unanimously adopted at a Hawaii conference during the last American Bar Association convention here, but the legislature ignored it. In the session starting this month, I hope our lawmakers will strike a blow for

further judicial improvement.

In the years ahead, the focus of this three-day futures assembly, our courts, locally and nationally, will have to deal with avalanching change, a wide range of social, political, economic and technological developments that will tax the capacity and test the mettle and future-mindedness of the system.

In that challenging environment, the courts will be judged not only on their actions but on how well those actions are understood by the community at large.

That brings me to a final observation about the need for that partnership I earlier mentioned to come up with new approaches to public education about the law and the legal system.

The recently retired chief justices of the Massachusetts Supreme Court, Edward F. Hennessey, says judges "owe it to the public and to ourselves to advertise our efforts. We have an obligation to inform through the school system, the jury system and the news media." In highly controversial cases he would have judges explain for the public and the media, insofar as it is appropriate, the reasons for the decisions.

One of our distinguished conference speakers, Justice Shirley Abrahamson of the Wisconsin Supreme Court, a warm and wise leader, also has strong feelings on this. She says, "To promote consumer confidence in the courts, we have to demystify the legal system. The public does not know about the courts. The public does not come to the courthouse. We have to encourage individuals and groups to visit courtrooms. Classes from kindergarten to graduate school should be invited.

"Judges," she says, "have to go to the public to educate the consumer about the legal system. We have to be out in the community talking about the legal system, listening to the people's concerns and getting their suggestions for its improvements. We can also bring the courts into the people's homes through the media," which, of course, is done here in Hawaii through cameras in the courtrooms.

Justice Abrahamson gets back to the imperative that "the vitality and independence of the judicial system" in the next decades "will rest on the public's confidence in the judges." She stresses that "we the judges--and all the court personnel--must be prepared to work hard to maintain and justify the confidence." I would only add that in meeting that responsibility those in the courts deserve to be adequately staffed and properly funded.



# THE CONSUMER AND THE COURTS

by

**Shirley S. Abrahamson**

In looking ahead to the year 2020 and the future of the courts, we must consider judges and judging from the perspective of the potential consumer-user.

This country has one of the best judicial systems in the world. If I had to be in a court anywhere in the world, as litigant, lawyer or judge, I would choose to be in a court in the United States. More specifically, I would choose to be in a court in my home state of Wisconsin, just as each of you would probably prefer a court in your home state. You know the judicial system in your home state, and with all of its faults and deficiencies (and all institutions have them), overall it is a good system.

My past experience as a lawyer and law teacher and now as a judge accounts for my preference, but I wondered how a potential litigant, the consumer of the American judicial system, views the prospect of going to court. The consumer's view is, I think, the important one for the year 2020. How could I find out about the consumer's view? I did not have access to a focus group or a scientific survey. I could only conduct the Abrahamson unscientific, non-random poll, asking participants at the 1990 San Antonio to view themselves as potential litigants, as potential consumers of the judicial system.

I posed two questions in my survey of conference participants, most of whom were judges and court personnel.

First, I asked: "If you had a dispute that you could not resolve amicably and you needed a third party decision-maker, would you go to court?" The overwhelming majority responded, "No, not if I could possibly avoid it."

My second question: "If a court proceeding was your only option, how would you feel about having a randomly selected judge preside over your case?" The overwhelming majority responded that they would not be too happy. Most said they would feel better about being in court if they had some say in selecting the judge, even in being able to have one or two "peremptory strikes."

I asked my social scientist friends who were participants in the San Antonio Futures Conference to interpret the responses. One interpretation rests on human behavior: People do not like to relinquish control over decisions that affect their lives. Another interpretation (not inconsistent with the first) rests on the structure of the courts: People are apprehensive about various aspects of the judicial system--delay, costs, the quality of judges, the fairness of the laws and so forth. My point is that we must look at judges and judging from the perspective of the potential consumer, the user. To the extent that my survey of conference participants accurately

reflects the view of consumers, our constituents, it demonstrates that the judicial system must be improved to foster and justify public confidence.

If we were to ask a consumer to comment on the courts, I think the consumer would say:

This is my court, a people's court, not the lawyers' or judges' court. The court does not belong to the professionals. You all work for me. I pay your salaries. What do you mean you have to save yourselves for the important cases? If I come to your court with my problems, it is the important case. You say you believe in family values. Then drunk driving and accident and traffic cases are important. You think streets should be safe? Then the misdemeanor cases and juvenile cases are the important cases. I want the judge who sits on my cases to be well-trained, well-qualified, well-educated, and well-paid to handle my important matters impartially, independently and fairly.

I hear a lot about the free market, privatization, and choice. I'm choosing Federal Express over the United States Post Office. I may choose a private school over a public school if it offers my child a better education. The point of free choice and competition is to improve performance of both the public and private sectors. Maybe we need a private dispute resolution system to compete with the public court system. We'll rent-a-judge if we must to guarantee that a competent judge resolves the dispute promptly and fairly.

I hear a lot of complaints about delay, high costs and even unjust decisions. What are the judges doing about this situation? Democracy is springing up all over. The people are talking in China, in the Soviet Union, in Eastern Europe. Do we have enough people power in this country? Or have the public officials, including judges, stopped listening to the people?

Are we, the judges, responding to these consumer concerns? We could tell the consumer about the marvelous new technological developments that expedite cases and make the courts more efficient. That response would not quiet the concerns. I imagine the consumer would say:

I'm glad to hear about the impact of technology, but I think the most important parts of the justice system are the human beings in the courthouse. I need to know who is inside the black robe, because the individuals who take care of the justice system are the keys to justice. You can have the best computers, the best courthouse, the best libraries, but human beings determine the state of the justice system. The quality of the judges determines the quality of justice.

What are the judges' qualifications? What is their legal training, and how do I, the consumer, judge technical competence? What kind of human beings are the judges? And how do I ensure good judicial temperament?

Consumers are asking similar kinds of questions of doctors, lawyers and accountants. Inevitably they will ask them of judges.

## **JUDGING THE JUDGES**

In the future the public will be watching the courts more closely and judging the judges. Being judged is not comfortable. That we are always judging other does not make the prospect of our being judged more comfortable. No one likes to be watched, especially perhaps the watchman.

Consumers are going to ask that standards be established for judicial performance be evaluated. They are going to want to know how our sibling judges, our juries, the lawyers appearing before us, the court personnel and the media evaluate our performance. They are going to ask the courts to circulate questionnaires, conduct polls and listen to focus groups. These techniques will serve two purposes: First, to aid us as judges in self-improvement. Second, to enlighten the public about our performance.

Continuing judicial education for self-improvement will be a major theme in the year 2020. Judges will attend educational programs, as they do now, to learn about substantive and procedural law, case management and court administration. But judicial education by 2020 will widen its focus. Judges are too isolated, all too often talking with and listening only to their fellow judges and occasionally to law professors and lawyers. Judges should in the future participate in educational sessions with law enforcement officers, physical scientists, biologists, social workers, correctional officers, engineers and others.

Courses of the usual nuts and bolts variety will continue, but we shall also see courses in the humanities and in comparative law. In literature and philosophy, for instance, great writers explore the same basic human themes that the judge encounters in the courtroom: decision-making, judgment, human choice, responsibility to the group or to the individual, mercy and compassion. In law and literature seminars judges gain insights into reconciling the law with other value systems, such as economics or religion.

We can learn from the legal systems of other countries. Judges around the world have come to know about and learn from our legal system and our case law. We must be less provincial and must learn about theirs. Cases arising in Europe, Africa and Asia offer important lessons for us.

Judges will have to be prepared to move within the judicial system to meet the consumers' needs. Judges will transfer from civil to criminal cases and trial court to appellate court and then back again. Rotation of judges will be needed to supply adequate judicial power and to prevent judges from becoming case hardened or bored (or burned out, if you prefer).

Performance evaluation and standards will be used not only for self-improvement but also to enable the public to judge the judges to ensure competence. The consumer is going to want a greater voice in selection of judges, whether the selection is by political appointment, merit selection or election. For many years the American Judicature Society has urged states to adopt

merit selection. Several have. Many still elect judges, a system I favor. AJS has turned its attention to improving the elective system in states that elect judges. Concern is being voiced across the country about campaign tactics and financing of elected judges. In my home state I have advocated full public campaign financing for appellate judges with limitations on campaign spending. The public will, in the future, seek better and more information about judicial performance to participate more intelligently in the selection process.

## **JUDICIAL CONDUCT**

In the future the consumer will be more alert to judicial conduct on and off the bench and issues of judicial ethics. The two concerns more frequently voiced to judicial discipline commissions about judges are inappropriate judicial demeanor and a judge's conflict of interest. For those of you who do not think judicial demeanor and racism and sexism are problems in our courts, I suggest that your attitude may be part of the problem. The essence of judicial independence is that judges' "minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men." Open public discussion about standards for participation and disqualification is needed to enable judges and the public to understand and agree on the need for recusal.

To promote consumer confidence in the courts, we have to demystify the legal system. The public does not know about the courts. The public does not come to the courthouse. We have to encourage individuals and groups to visit courtrooms. Classes from kindergarten to graduate school should be invited.

Judges also have to go to the public to educate the consumers about the legal system. We have to be out in the community talking about the legal system, listening to the people's concerns and getting their suggestions for improvements. We can also bring the courts into the people's homes through the media. Wisconsin allows cameras in trial and appellate courts. Discussion continues about allowing cameras in federal judicial proceedings. The public may soon be able to watch judicial proceedings on a new television channel, "Court-scan." I was recently talking with a law professor and his parents and asked the parents who they thought was the best known judge in this country. The answer, without hesitation, was Judge Wapner. I said that unfortunately very few people could identify Chief Justice Rehnquist. The professor's face clouded over, and he quickly changed the subject. He later explained his awkward behavior, saying that he was concerned that his parents would ask me what channel Rehnquist was on.

We not only have to bring the public into the courthouse, but when the people come to the courthouse as litigants, witnesses and jurors we must treat them better. We must have faith in the community's participation in proceedings. Many today are concerned that jurors cannot understand or judge the issues, and commentators suggest limiting or abolishing the jury. I favor the jury. Jurors bring the sentiment of the community into the courthouse. If jurors need to be educated to handle the cases, then we must educate them, not abolish juries. The justice system cannot be left entirely in the hands of judges and lawyers. After serving on a jury, G. K. Chesterton wrote that the problem with experts is that those who study a thing and practice it every day have narrower and narrower viewpoints. He wisely observed that when we want

really important decisions to be made, we should turn to the people.

The vitality and independence of the judicial system in 2020 will rest on the public's confidence in the judges. We the judges--and all the court personnel--must be prepared to work hard to maintain and justify that confidence.

## **CONCLUSION**

This is a futures conference. We look to the year 2020 and beyond. We have been hearing about the new immigrants coming to this country with different racial, religious and cultural backgrounds and the changing composition of our population. Speakers have expressed concern about the effect of these changes on the country and the courts.

As I look to the year 2020, I also look back to the year 1920 when my father, uneducated, unskilled and poor, arrived in this country, the promised land for immigrants from around the world. My father, one of the many immigrants from Eastern Europe, came here seeking a just society, a society in which he could earn a decent living and participate in government, free from fear and discrimination. He returned to the old country in 1932, seeking a bride. He married my mother who arrived in 1933 quite pregnant with me. My mother was a wise woman, as she often reminded me. She came to the United States in time for me to be born in New York City so that, as she repeatedly told me, I could be President of the United States. This is not an announcement of my candidacy. It is a reminder to you that I, and I hope you, think it is marvelous that this country continues to be a land of immigrants. Sure there are going to be clashes of cultures, confrontations and differences in values. Our great blessing is that from these clashes, confrontations and differences can come the energy for change and progress. Because I remember 1920, I look forward to the year 2020 with hope and confidence.

# THE FUTURE OF THE FAMILY COURTS

by

**Daniel Heely**

I would like to share some personal observations on the roles we all play within the Judiciary. I will not be predicting or designing the future; rather, I will merely point out some trends to keep in mind as we think about the future.

There have been huge increases in the problems brought to our courts. We call them cases; they're really human problems that end up in our courts. Over the past decade the Courts of Appeals have had dramatic increases in their caseloads. The Family Courts have had huge increases as well as have the District and Circuit Courts. These have placed strains on the existing court structure and fortunately our Legislature has been very responsive and has provided funding, positions, new judgeships, money for new facilities.

The Court that I'm most familiar with is Family Court. For those of you who aren't familiar with the Family Court in Hawaii, it has a jurisdiction which is very wide. Many, many types of family and social problems are brought to our courts--domestic violence cases, divorces, adoptions, guardianships, all of the so-called juvenile delinquency cases, many other matters involving serious emotional problems that people experience. And to work in Family Court is really to be face-to-face often with life and death situations. And as we plan for the future, we are right now in the process of working on the preliminary plans for a new Family Court Center. This has been a dream of our Chief Justice for many years and through the support we've received through the Legislature, the State Department of Accounting and General Services, we are now meeting with the architects to design a truly innovative approach to handling the many family-related problems. It will be a Center where there will not only be the traditional courtrooms and offices for judges and staff but also facilities for the various agencies that families of Hawaii deal with (Department of Education, Department of Health, Prosecuting Attorney, Public Defender, and many other agencies) so that at least the family coming to a court hearing will not have to go all over town to many other offices that they be dealing with.

One of the more serious problems that we have been experiencing recently is the large increase in the number of domestic violence cases that come to our courts. I personally believe that there have always been many instances of domestic violence not only in Hawaii, but also nationwide. But it was never brought to light or the victim was told, "it is a family problem, solve it yourself; don't bring it out in the open." Unfortunately, it is a deadly tragedy. Almost once every month a woman has been killed by a husband or a boyfriend in Hawaii in the past couple of years. The last figures I say showed that Honolulu Police Department responds to about 1,000 calls a month. Whenever there is an arrest in those cases, they come to our court. So, our criminal caseload in Family Court has been drastically increasing. I mention these to you not to dwell on the present too much but just

to remind you that in spite of the preferred court vision that we will be debating and ultimately choosing over the next couple of days these serious social problems are still with us and we can't overlook those in our planning.

In addition, there are newly identified types of problems that will be brought to the courts. Starting July 1, 1991, the new dependent adult protective services law goes into effect. It is a law patterned substantially after the existing child abuse law on Chapter 587. But it is designed to protect any adult who because of physical or mental impairment is dependent on another person for personal, health, safety, or welfare and those types of cases will be brought to our court.

At the same time we realize that many of the most difficult issues that we see in the Family Court context involve emotional confrontations that quite often are just insoluble in an adversary setting. The courtroom structure, the confrontational atmosphere, is not always conducive to the process of helping people work through some of the emotional problems and some of the tensions. Therefore Family Court is right now in the process of establishing the statewide mediation of child custody in divorce system. For a change, we plan to initiate this first on the neighbor islands, so that they have the benefit of some of the resources that traditionally they have not had, and then ultimately make it statewide.

In the planning of the new Family Court Center, we are fortunate to be able to include some leading areas of technology based on innovations that our Chief Justice has already allowed to go forward in existing courtrooms. The courts will be video courtrooms. In the Family Court we are initiating a laser disk storage system for records so that there will be, in reality, a paperless courtroom in existence this month in the First Circuit on Oahu with a computer terminal that a judge or a clerk can view or see the records that are on a compact laser disk. And obviously there will be an increase in fax and the ultimate electronic filing of pleadings.

All of this technology we hope to be able to utilize for the benefit of the people of Hawaii. What I personally view as the preferred future for our court systems is utilizing the best of technology but at the same time consolidating our resources, ensuring that resources currently available, quite often only on Oahu, are also made available statewide so that the people of Hawaii can benefit and at the same time encouraging the judiciary to innovate and take the initiative in developing new programs and setting up procedures so that the public is not intimidated or frightened away from the court. In looking back over some of the material for this conference, I noticed that it was in 1984, in our Chief Justice's state of the judiciary address, in which he first mentioned the tremendous possibilities for the alternative dispute resolution concept. In every one of the his state of judiciary addresses since then, the ADR concept has been prominently mentioned and that I believe is the future that we need to pursue. Realizing that the traditional model of a confrontation in an arena where a battle is done sometimes to an emotional death is not the best way to solve many of the problems that come into our courts right now.

In the book Present at the Creation, former Secretary of State Dean Acheson quoted King Alphonso X, the Learned, of Spain (1252-84) as follows: "Had I been present at the

creation I would have give some useful hints for the better ordering of the universe". Acheson went on to state: "No one can decide and act who is beset by second thought, self-doubt, and that most feebling of emotions, regret".

We are confident that each of you will provide valuable ideas for the better ordering of the judiciary in the future and that you will not regret having participated in this important conference.

Thank you.



# **THE VIEW FROM THE NEIGHBOR ISLANDS: IS HONOLULU OUR FUTURE OR CAN THE NEIGHBOR ISLANDS BYPASS HONOLULU'S PROBLEMS**

by

**Shunichi Kimura**

## **IS HONOLULU OUR FUTURE?**

I can best answer whether Honolulu is the future of the neighbor islands by borrowing from my favorite swamp philosopher Pogo: The Neighbor Islands have met the future and it is Honolulu! This is an obvious conclusion as the Neighbor Islands include, in a smaller scale, the same ingredients as the urban Honolulu. (The 1990 census reports that the Statewide population is 1,108,229; with Oahu (commonly referred to as Honolulu) having a population of 836,231; Hawaii County 120,317; Maui County 100,374; and Kauai County 51,177.) Tourism is the central and growth economy of the State; the land use classification and planning is statewide; economic development and the quantity of jobs have been the central planning attitude for decades. The above philosophy of governance has fueled a population explosion: The 1990 U.S. Census Bureau reports a 14.9% increase for the State from 1980 to 1990 with Honolulu experiencing a 9.7% increase for the past decade; Hawaii County, 30.7%; Maui County, 41.7%; and Kauai County, 30.9%.

The explosion in population, hotels, jobs and the related developments have resulted in jobs, expanded income and social problems. The drug and substance abuse problems have increased in Honolulu, and the Neighbor Islands have followed the trend; family and youth problems have resulted in the substantial increase in Family Court filings in Honolulu; the Neighbor Islands have also reflected a substantial increase in Family Court filings.

The positive and negative developmental history of Honolulu is substantially mirrored in the Neighbor Islands. The median cost of housing is not "affordable"; the Neighbor Islands are also experiencing large increases in the cost of housing. The population explosion from mainland U.S. and from foreign countries have resulted in enclaves that lessen the pace of the desired integration of our touted plural society. Jobs are plentiful; so are the abundance of households that find both caretakers required to work - often on varying shifts; often with unsatisfactory caretaking services for their children.

Our planning objective of nurturing and favoring the visitor industry has resulted in our vaunted environment accommodating the tourist over the resident: We would be hard-pressed to name beautiful beach environs that do not have a hotel on them or a planned hotel. The growing discomfort--and even resentment--with this priority is reflected not only in Honolulu, but also in the Neighbor Islands. (The 1990 mayoral elections in the three Neighbor Islands resulted in allegedly slow growth candidates being elected or re-elected. I would note that all three successful candidates were women.)

The above are but samples of what is found in Honolulu and found on a lesser scale in the Neighbor Islands. Thus, the Pogo-like conclusion that "we have met the future and it is Honolulu."

### **CAN THE NEIGHBOR ISLANDS BYPASS HONOLULU'S PROBLEMS?**

The Judicial Foresight Congress planners have required that the second half of the question be addressed: "Can the Neighbor Islands Bypass Honolulu's Problems." The answer to this hopeful question is: We have not and the trend is that we probably will not be able to bypass Honolulu's problems.

The Neighbor Islands will not have a different future than Honolulu because, despite the handy reference to Honolulu and Neighbor Islands as separate entities, we are one entity. Our main and growth industry is tourism. It is an industry that purportedly needs to utilize, on a priority basis, our best environment; it is an industry that requires a large service work force. Large-scale agriculture (call it sugar and pineapple) in Honolulu will probably give way to the needs of the rapidly increasing population for housing; agriculture in the Neighbor Islands face the problem of a limited market, a fragile future for the sugar industry, the high cost of agricultural production, and the competition for land with agriculture and conservation losing the battle to a "higher and (so-called) best use" of the land and environment.

The Judiciary in Honolulu requires added facilities, added judges and personnel to meet the increase in filings in all its courts, especially the Family Court. The Neighbor Islands have similar requirements: Kauai is presently planning for the doubling of their judicial resources in twenty years; Maui plans for a doubling or even tripling of judges to meet the demands of the fastest growing county in the State; Hawaii (Third Circuit) is constructing a judicial building in Hilo that reflects an increase from five to seven judges, and is planning to build a Kona courthouse that will double the number of judges from three to six, and new facilities and accompanying judges will be needed for the rapidly growing and developing Kohala-Waikoloa area. Thus, like Honolulu, the Neighbor Island judicial resource trends are more judges, personnel and facilities in an extension of the present operational model.

The Neighbor Islands have no better remedy for the increase in substance abuse and the corresponding inability to prevent, treat and effectively deter such abuse; no better answers to the vexing concerns of our human enclaves that grow and our seeming inability to cause an early integration into our claimed plural society. The Neighbor Islands have no realistic answer to the desired objective of a tourist industry that will provide the necessary income, that will compatibly and positively share the environment, and that will strengthen the social institution we call the Family.

This Judicial Foresight Congress is not limited to the present reality, the present trends and the probable consequences of the extension of these trends. Our greater task is to emphasize the desired future so that this emphasis will improve our present judicial course and lead to the desired future.

## **ALTERNATIVE FUTURES FOR THE YEAR 2020**

The likely future is more of the present; that is, more judges, more staff, more similar buildings and application of some improved technology. I suggest another future for the next thirty years: (1) a judiciary that will implement Chief Justice Herman Lum's goal of eliminating the archaic distinction between district and circuit judges and creating one level of trial judges; (2) a judiciary that will eliminate the unnecessary distinction between Honolulu (First Circuit) and the Neighbor Islands (Second, Third and Fifth Circuits) and create a single judiciary that will utilize its limited resources in the most efficient manner; (3) programs that will assure access to the legal and judicial process; (4) a judiciary that will limit the adversary process for the "last resort" cases and instead provide multiple dispute prevention and resolution program; and a judicial and legal community that will lead in altering the philosophy of development and growth so that "the highest and best use" of our environment will mean that the alteration of our environment is consistent with the growth and development of our basic social institution--the family.

The present two-tiered jurisdictional distinction of limited and specific jurisdiction for the district courts and general jurisdiction for the circuit courts has its genesis in the by-gone era when some of the district courts had non-attorneys presiding and the district courts were not courts of record. The district courts are now courts of record, are not inferior courts, and the judicial requirements for a competent judge is the same as the circuit courts. The limited judicial resources are not utilized to its fullest as the two-tiered trial courts prevent the full use of the judges, staff and facilities. The removal of the distinction between the district and the circuit courts would allow for the efficient use of judicial resources: the judge, staff and facilities. I strongly urge that we create a more flexible and efficient single-level trial court.

The creation of a single-level trial court relates to the suggestion that the jurisdictional distinction between the circuits be eliminated so that the judiciary can utilize its limited resources most effectively to serve the community. The historical jurisdictional division of the state into the four circuits followed the political division of the state into four counties. Whatever the political justification of drawing jurisdictional lines (some overlapping counties because of the one person, one vote requirement), it does not follow that there is a judicial justification. The state has less than seventy trial level judges with the Neighbor Islands having nineteen (eight each on Maui and Hawaii, and three on Kauai). The Neighbor Islands have a disproportionate number of judge (separate jurisdictions based on counties with different populations result in more judges for the rural areas) and a disproportionate lack of facilities from judicial libraries to treatment and deterrence facilities (support facilities and programs are placed in the larger population center). A single statewide jurisdiction will allow the judiciary to best serve its clients by providing the flexibility of utilizing the limited amount of judges, by keeping our courtrooms in use to meet the mounting caseload, by allowing the necessary specialization of judges for the complex litigation that will increase with the continuing explosion in technology and knowledge. The improved technology in communication and transmission of information and documents also make the jurisdictional lines obsolete.

The desired alternative judiciary will improve the access to the courts and legal services by securing added resources for the legal aid, public defender and caring outreach legal

programs; by adopting pro bono publico rules so that the legal and judicial community can assist in meeting the growing problem of the limited access to our courts and legal services; and by providing more detailed guidelines in our ethical and disciplinary codes that will act as limits on the spiral of legal fees. The access to the courts and legal services can be improved by recognizing that non-complex legal services can be competently provided by appropriately trained and experienced paralegals--many of whom do substantial "legal" work in law offices at the present time. We cannot continue to urge activism to achieve the promise and hope of the Bill of Rights in this bicentennial year and not provide access to the courts and legal services. The activism will continue even with the decreasing access to legal services and the courts; the combination of activism and the lack of access will result in dislocations of our social institutions and the development of alternatives to the courts and legal services as the only means to adjudicate issues.

The adversary paradigm has been justly criticized by the conferees at the national conference in San Antonio last May; I believe that this Congress will also express its dissatisfaction with the adherence of the courts and the legal community to the adversary process. First, there is a recognition that the adversary process is necessary for certain disputes; second, there is a recognition that the adversary process should be limited as a last resort when prevention, reconciliation and resolution cannot be achieved by other (I object to the use of the title alternative dispute resolution for the concept of "alternative" implies the necessary existence of the adversary process as the adjudication process) appropriate dispute resolution processes. The desired legal future would have the appropriate dispute prevention and resolution as a vital part of the legal and judicial process, and limit the adversary process to those disputes which cannot be resolved by other means.

The alternative future for the years leading up to 2020 would have the legal and judicial community taking an active role in changing the required environmental impact statements of those who seek to alter our environment. The legal and judicial activists would develop an environmental governance that would require those who alter our environment to recognize that our families are the foundation of our society; and that the primary consideration of the environmental impact must be whether the effect of their alteration would be consistent with the maintenance, growth and security of our families and children. And, if the alteration would impact negatively upon our families and our children, the development must be modified to accommodate our desired future.

# HAWAII'S JUSTICE SYSTEM IN 2020: A VIEW FROM THE BAR

by

**Paul Alston**

Some time ago, the New Yorker published a cartoon depicting a lawyer warning a client that the mysteries of the law are never revealed except after a very expensive struggle. Unfortunately, that cartoon captures--in a phrase--the major problem that will shape future changes in the legal system.

Over the past century, the court system has, in truth, changed little. Time-travelling lawyers from the 19th century era could appear in the 1990's and, with only a little study, do a credible job as courtroom advocates. One commentator has said this is true even of lawyers from revolutionary war days. Perhaps, but it is certainly true of the skilled litigators from the 1920's. Even now, the old bull elephants of the Hawaii Bar, who have been lawyering for nearly 60 years, talk admiringly about the skill of the lawyers of that era and their ability to try cases; they express confidence that those lawyers would succeed admirably in the 1990's, and they are probably correct.

The members of other professions would not fare so well. In 1918, the medical profession was unable to stop an epidemic of Spanish Flu from killing more than 20 million people worldwide, more than 550,000 in the United States alone. A doctor from that era would unquestionably be incapable of making quick use of current medical equipment and technology.

There are, of course, important reasons why the judicial system has changed less than other social institutions during these tumultuous decades. Superficially, it would appear that this enduring institutional stability is caused by two primary factors. First, the judicial process has historically produced sound results at a socially acceptable cost within a socially acceptable procedural framework. Most of those who gained access to the legal system have been--probably grudgingly--satisfied with the experience. Even if they were not fully satisfied, at least they were not so dissatisfied that they spread the widespread perception that the system is intolerably bad. Indeed, the societal pressure--especially during the last three decades--has focused on initiatives to increase access to the legal system, not on efforts to restructure the system to make it simpler, better, or cheaper.

Second, procedural stability greatly facilitates lawyers' ability to advise their clients effectively; if lawyers know how issues will be presented--if they know the rules of the game--they are better able to predict not only the course to be followed but also the result of the dispute. This does not mean that accurate predictions are possible in all, or even most, cases. Especially in multi-judge courts, procedural certainty is relatively difficult; hence, most lawyers' first concern is which judge will hear their case and which lawyers are on the opposing side, for the human element often transcends other factors in determining the outcome of a case. This

effect is not linked exclusively to substantive bias or political leanings. A judge's apolitical view of evidence issues, such as the hearsay rule, or courtroom procedures, such as jury selection methods, can have decisive impact on the results of the cases over which he or she presides. Likewise, the skill and diligence of an advocate can have a decisive impact in close cases. Nevertheless, institutional and procedural stability is essential to the ability to advise clients about litigation.

There is a third crucially important factor at play, and its importance may transcend that of the other two. The stability of the judicial system flows in large measure from the fact that the present system is comfortable, both psychically and economically, for the "players." Judges and influential lawyers weaned on certain procedural rules will rarely want to learn many new tricks; they like what they know. Similarly, those who have achieved financial success through the existing system are unlikely to endorse, much less champion, radical changes. The system has been good to them, and those who have achieved success playing any game, be it football or poker, are unlikely to favor any radical change in the rules.

As a result, if lawyers and judges were left to their own devices, there would be little pressure for reform, and even less in the way of radical institutional reform. To be sure, there would be "tinkering" and "fine-tuning," but nothing that would threatened the established order.

Fortunately, it probably matters little what the lawyers want. Society will not permit the status quo to continue for several reasons:

- (1) litigation is too slow;
- (2) litigation is too costly;
- (3) the courts are inaccessible;
- (4) lawyers are inaccessible; and,
- (5) the law cannot keep pace with social and scientific changes.

These five factors are easily explained and their ramifications are obvious: First, the pace of life is accelerating, locally, nationally, and globally. People and businesses cannot continue to accept the slow, and costly, grinding of the wheels of justice. Twenty years ago, business, and legal disputes, ebbed and flowed with the postal service. To be sure, mailmen were not deterred by rain, sleet, snow or dark of night, but they are mightily slow. People had days to ponder their legal and business strategies. The clock accelerated with the rise of international delivery services, overnight deliveries spawned overnight replies. That pace was idyllic compared to the frenzied behavior caused by fax machine communications across many time zones--from Hawaii to Europe and back--which have become instantaneous, compelling faster and faster action. Problems cannot wait until tomorrow: the problem must be resolved now.

Even though lawyers have responded to this challenge, the courts have not moved with

equal vigor. Bound by civil service shackles and by institutional inertia, the courts have made only modest gains in efficiency. More will surely come in time, but the judiciary is unlikely to be given free access to the resources to effect these changes when other social problems appear more important. Competitive advantages and profit opportunities are lost while cases are processed according to the convenience of lawyers and the judges. More importantly, legal delays cause family, business and social problems to fester, harming us all. When people are forced to focus on past legal problems, they cannot be as effective or productive as society needs them to be. Businesses want prompt decisions so they can devote their time and resources to conquering new markets and making money. Individuals have similarly important personal goals: supporting their families, enjoying leisure time, and serving their community. People want action, not the excruciating exactness, and cost, of perfect justice.

Second, society's needs for effective justice will not tolerate the increasing costs of litigation. Today, especially in multi-party disputes, it is not uncommon for the aggregate legal fees and costs to match or exceed the amount in dispute. Surely if we were free to start from scratch no one would create a legal system where the direct transactional costs could approach, much less exceed, the stakes involved in the underlying dispute. Similarly, no one would create a legal system where regional and national legal problems, such as asbestos, related disease and defective breast implants, are resolved through procedures where the lawyers' take, exclusive of the institutional costs, consumes an amount approaching 100% of the victim's "compensation." Yet that is what we have today. It was not always so--legal costs have accelerated faster than inflation--and some corrective action must be taken.

Third, the needs of society will not permit us to have a legal system which is accessible only to successful businesses, the wealthy and those who suffer injuries that can generate substantial contingency fees. Indeed, such a system is hardly worthy of being called a justice system. For example, twenty years ago, there were approximately 700 active attorneys in Hawaii; today, there are sixfold that number. There is now a lawyer for every 280 people in Hawaii. An increased supply of lawyers should have led to a decrease in the "cost" of justice, yet the opposite has happened. Lawyers spawn more business for other lawyers; bad and careless lawyers create more work for their opponents than the best lawyers ever do. However, during this period, the number of lawyers working for the poor has decreased substantially, legal fees and litigation costs have grown faster than the average person's ability to pay, and fewer people can now afford legal help. At the same time, the percentage of lawyers who deny the existence of any professional duty to increase the accessibility and friendliness of the legal system has increased. The time will soon come when society expects, no demands, that lawyers "pay" for their monopoly by making the legal system work better.

Fourth, the legal profession has, to some degree, lost its compass. In the past, it seems, people chose to be lawyers because they wanted to do lawyers' work, dispensing justice, solving disputes, helping clients in many ways. However, in the 1980's and 1990's going to law school has been the path of least resistance for many bright students who had no real conception of what lawyers do and, more importantly, no commitment to any notion of justice. In the 1950's, students with no strong goals became teachers; now, they go to law school because lawyers according to television at least (1) make a lot of money, (2) spend their evenings at fancy restaurants or illicit trysts; and (3) spend their days going to partners' meetings and trying high-

profile cases, between romantic interludes at the office. It seemed better than working for a living--and it was. The reality does not--and never did--conform to the glitz and flash of Hollywood-style lawyering. Much of lawyers' work is drudgery--reading cases, studying musty documents, and working late nights preparing for trial. It is rarely exciting and never glamorous. Solving legal problems is hard work; almost always someone else is dedicated to frustrating your clients' goals. Moreover, it is clear that a lawyer with paying clients can make more money (at least in the short run) by not solving problems. Disputes which drag on--like Dickens' Jarndyce v. Jarndyce--are great for lawyers, but leave clients stripped to the economic bone. Many clients cannot distinguish between good and bad lawyering, and the latter is less work and often more profitable. Those who have not risen to these challenges and overcome these temptations have done great harm to the justice system.

Finally, the complexity of developing technological and social issues threaten to outstrip the capacity of the legal system; we are encountering new problems as to which the English common law, on which American law is largely based, provides little if any guidance, and the pace of change is so rapid that the evolutionary processes through which the common law has developed historically--decision by decision, year by year--cannot keep pace. At the same time, it makes little sense to require litigants who want informed decisions to pay for the education of both lawyers and judges and to use systems geared to another era, when time was less valuable and global competition less intense.

These pressures will compel changes. Lawyers' magazines are now talking in gloomy terms of "over supply," "increased client sophistication," and public demands for reforms. In articles that lament the passing of the "golden days" (referring, probably, to the \$1 million plus average salaries for partners in some large law firms), legal commentators are darkly predicting changes driven by market forces independent of those which have caused the current recession and independent of other passing economic phenomena.

But all this does not mean that litigation, as we know it today, will, or should, cease to exist. Undoubtedly, it will endure because the trial process--as it has evolved over the last few hundred years--is a highly effective (although slow and costly) method for discovering "The Truth" when the disputing parties' perceptions of reality have been colored by their self-interest. Pre-trial and trial practice will undoubtedly be affected by technological advances, such as video trials and electronic filings, but the process will remain essentially unchanged for those who want it.

Nor should the jury system cease to exist. As Justice Abrahamson, of the Wisconsin Supreme Court, has written, we cannot rely exclusively on experts, with their narrow points of view, to decide everything. Equally important, when "junk science" and "hired-gun experts"--both pro-plaintiff and pro-defense--threaten the integrity of the judicial process, society cannot cede control to those who stand to gain economically from increased reliance on experts. We must hold our faith in public participation in the process of dispensing justice--jurors, after all, are the only way we bring the common sense, and morality of the community into the courtroom. They have an invaluable role to play in many instances. Perhaps most importantly, twelve jurors working together seem very often to have a remarkable facility for detecting lies, for putting a fair value on unrealistic claims, and for punishing those whose conduct is abhorrent



to society through awards of punitive damages. Instead of disregarding the jury system we must revamp it to educate jurors so they may serve their role effectively.

At the same time, the social pressures I have mentioned will mean that, unlike today, in the next 25 years the trial process, whether by judge or by jury, will not constitute a core element of the legal system. Instead, trials, and jury trials in particular, will be at the high-cost end of an array of processes through which people protect their rights and obtain justice.

The societal pressures for reform must lead to four fundamental improvements: First, we must provide improved access to the legal system, through public and private mechanisms--such as legal insurance and better funding for legal services--which will enable the poor and middle class to understand and protect their rights. If we fail to make the legal system accessible to the poor and middle class, we become accomplices in the many small injustices that go uncorrected because no help is available. If we offer no remedy, we demean the justice system, we teach the victims that society does not care and we teach the perpetrators that they are effectively beyond the reach of the law. In effect, we endorse a less just, less orderly society where the Rule of Law is unattainable and people are taught that justice is unimportant.

Second, disputes must be systematically diverted to other less formal forums, which are better suited to the purpose of dispensing a fair measure of justice, within a reasonable time, at a reasonable cost. In some instances, this will mean perhaps something akin to "frontier" justice, which is imprecise but serves the important purpose of giving certainty through the prompt assistance of an impartial decision-maker, so people can get on with their lives, for better or worse. In other instances, it will involve community-based justice centers where problem-solving entrepreneurs can resolve disputes using whatever non-adversarial techniques are best suited to the task. There is a place, and a justified demand, for generic justice: the legal equivalent of fast food. When all is said and done, in daily life, for both business and as individuals, there are few principles worth defending to the point of economic ruin. For the most part, it is more important to get a fair decision promptly than it is to get a perfect decision after being put through a costly legal gauntlet. This pressure will lead to specialized forums for expert resolution of technologically complex disputes.

Third, lawyers must become better able to understand and help clients. In the next century, lawyers will be required to become intimately familiar with their clients' business and economic needs. Specialization and demonstrated competence will be required for lawyers handling complex matters, although lay advocates will be widely used for routine matters. Perhaps more importantly, instead of being trained almost exclusively for adversarial trial combat, lawyers will be trained from their professional "birth" to help clients identify and solve problems quickly and effectively, and they will be compensated for using those skills imaginatively, not by the hours they devote to litigation tactics reminiscent of World War One trench warfare. They will recognize that they and their clients can prosper by being committed unreservedly to client service.

Lastly, the judiciary will evolve using expanded powers and responsibilities to oversee dispute resolution. Court personnel--judges, clerks, and others--will be more active in seeing that the judiciary's customers--the disputing parties--are well served by the process. They will

have a commitment to service, not the bureaucrats' indifference to the public's needs. Judges will be responsible not merely for deciding the cases presented to them, but also for actively protecting and promoting the fairness, effectiveness, and efficiency of our community's dispute resolution systems. The court staff will likewise work actively to see that disputes are resolved well and that the consumers "enjoy" the experience.

Indisputably, it is in the interests of judges as well as lawyers to see that all citizens have access to legal services and can solve their legal problems fairly, promptly, and at a reasonable cost. If the judges and lawyers take the lead, these sorts of changes in the legal system can occur through evolutionary changes which are well-designed and effective.

There is a risk, however, that the lawyers will act too slowly. Just as the other industries and professions have resisted reforms that would contain spiraling costs and make them more responsive and more accessible, so, too, the legal profession may resist these sorts of changes until they are imposed from outside by uniformed politicians or by tumultuous populist political movements.

If the legal professionals do not act decisively, then surely some, if not all, of the changes needed to achieve these reforms will come in revolutionary fashion, forced upon the legal system through outside forces generated by clients, the legislature and the community at large. Lawyers' exclusive rights to practice law, and their powers of self-regulation, will be attacked. The independence of the judiciary will be compromised. The solutions imposed from outside may be poorly tailored to meet the problems; politicians are not skilled at judicial reform. Moreover, society deserves better: it deserves to have enough money and creativity devoted to these issues by lawyers and judges that the American legal system can soon achieve its promise of providing justice for all.

# HAWAII JUDICIAL FORESIGHT SURVEY RESULTS

by

**Sohail Inayatullah**

This foresight survey was designed to gain information from Hawaii's judges in three specific areas: (A) quantifiable preferences as to what judges want the courts to look like in the future; (B) open-ended qualitative short-term perspectives; and, (C) longer-term theory and design issues. Questions for the first part are based upon vision statements derived from the 1990 Future and the Courts Conference held in San Antonio, Texas. The survey was sent out to all judges in the Hawaii Judiciary. The analysis that follows is based on twenty seven responses.

## **A. PREFERENCES**

In this section, judges responded on a scale of one to nine representing strongly disagree to strongly agree to the following seven statements:

1. Judges and court administrators should increasingly take up leadership roles in the community (e.g. public education, community affairs, recommending public policy and legislation).

There was general agreement (85%) to this statement with one-fourth of these responses strongly agreeing. There were only two respondents who strongly disagreed.

2. The Courts are fine as they are; only minor incremental changes are needed such as more technology, better funding and a modest increase in the use of ADR.

Judges generally disagreed with this statement. Twelve respondents strongly disagreed (46%) and only one respondent strongly agreed.

3. Mediation should play a much greater part in resolving disputes within the courts and outside in the community. The Courts should encourage a culture of mediation through a range of public educational programs.

This statement had the strongest degree of agreement with all judges either agreeing or strongly agreeing.

4. Courts should focus on community and environmental rights (not on individual property and economic rights), on self-help (not legal professionalism), on neighborhood justice, and on culturally appropriate dispute resolution techniques.

There was general disagreement to this statement with ten judges (or nearly 40%)

disagreeing strongly and none strongly agreeing.

5. Judges, attorneys and others should as much as possible be replaced by computer driven expert systems, leaving humans for non-technical, philosophical work.

Judges disagreed with this statement with fourteen of them (52%) strongly disagreeing. However, there were eight judges (30%) who believed that artificial intelligence systems should replace judges and attorneys.

6. Biochemical, genetic, electronic, transpersonal-psychological technologies should be used to anticipate and prevent criminal acts and "personalities," to investigate alleged offenses and to cure offenders.

Half the judges disagreed with this statement and the other half agreed. Four judges strongly disagreed and one judge strongly agreed.

7. The best legal/judicial system is the adversarial one; more often than not it guarantees that opposing viewpoints will be represented fairly. Any future technological or social changes should attempt to maintain this system.

While judges strongly disagreed with incrementalism, their feelings were not as strong against the adversarial system, in fact, 60% agreed that the adversarial system was the best system. 40% of the judges disagreed.

## **SUMMARY OF PREFERENCES**

In general, the respondents felt strongest that a culture of mediation be developed. Judges taking a proactive, leadership role in the community also had a high degree of agreement. The respondents disagreed with incrementalism (muddling through problem solving approaches). Judges do not believe that the judiciary should focus on community and environmental rights and they are opposed to using artificial intelligence to replace themselves and attorneys. Judges were evenly split as to using new technologies to modify behavior and there was some agreement that the adversarial system was the best system.

### **B. SUMMARY OF SHORT TERM PERSPECTIVES**

With respect to the judges' short term forecasts of filings in the next ten years, in general, they predicted a continuation of the past ten in which the Family Court and the Court of Appeals caseload substantially grew.

As to why filings might decline, judges pointed to ADR (mediation, arbitration and neighborhood justice), decriminalization, public education, family education and the high cost of litigation.

When asked what they thought would be the most important issues for the judiciary in the 1990's, judges specified environmental issues, the quality of justice for litigants, technology,

administrative problems and welfare issues.

Possible strategies to deal with the issues of the 1990's included more and better technology, education of the public and staff, increased use of ADR, planning and technological devices to aid jurors.

## **SUMMARY OF LONG TERM ISSUES**

Judges saw the trial and appellate courts largely transformed in the next century through video technology and improved security. Computer, artificial intelligence and holograms were also mentioned. Some judges, however, saw little change in how appellate courts will be designed in the future.

When asked what new tort theories would emerge in the next thirty years, judges pointed to environmental issues, medical ethics, privacy issues, geriatric issues and biological issues. Computer malpractice, space rights, torts against humanity or torts against the general public, psychic injuries, the recognition of animal intelligence were also mentioned.

In the next thirty years, judges saw criminal law concepts such as non-traditional modes of incarceration, fetal rights, environmental pollution, new modes of criminal identification and the decriminalization of drug offenses. Mental illness and computer invasion of privacy were also mentioned.

With respect to future business/commercial litigation issues, judges pointed to computer information negligence, regulation of global multinationals and resource issues.

Family court issues in the future included the rights of natural parents vs. surrogates, issue resulting from genetically programmed children, euthanasia, elderly abuse and gay/lesbian rights. More family crimes, fetal rights, the rights of children and new definitions of the family were also mentioned.

The dominant constitutional issue in the next thirty years was the right to privacy. Other issues included euthanasia, native Hawaiian sovereignty issues, property and environmental rights. Rights, then, dominated this category.

Finally, anticipated new areas of law included laws relating to the increased power of government to allocate resources, the rights of unborn fetuses, and space laws and rights.

In general, technology, environmental, biological and rights (especially privacy) discourses dominated the judges' responses.

## **B. SHORT TERM PERSPECTIVES**

What follows are historical and forecasted percentage change in filings.

**1(a). Anticipated Percentage Change in Filings**

	<b>Actual 1980 - 1990</b>	<b>Estimated 1990 - 2000</b>	
		<b>Mean</b>	<b>Range</b>
District Court	6	12	2 - 30
Circuit Court	9	11	5 - 25
Family Court	82	58	5 - 100
Court of Appeals	65	40	2 - 100

Judges thus believe that District Court will see the largest percentage change, followed by Circuit Court. Judges also believe that the percentage change in filings for the Family and Court of Appeals will not be at the same level from 1990-2000 as it was in the previous decade. However, these are mean figures, the data on the range shows that there was a great deal of variance in judges's forecasts.

**RESPONSES TO OPEN-ENDED QUESTIONS**

The next section lists judges responses to the open-ended questions. The top three responses for each section is in bold.

**1(b). Why Filings Might Decline**

**More mediation/ADR, private arbitration, neighborhood justice (22)**

**Decriminalization of certain offenses (administrative process) (12)**

**Public education about law and the judicial system, ADR (6)**

Education to decrease family dysfunction, domestic violence, drug use and adult criminality (4)

High cost of litigation, attorneys fees (4)

Economic conditions (2)

Increase sanctions for less meritorious lawsuits (2)

Increased costs to go to court (2)

Allowing for less access to courts (2)

Fewer attorneys (2)

Disenchantment with court system (2)

Stabilization of or decline in population (2)

Private sector to bear cost of court operations (2)

Tort reform

Undue delays

Stricter rules allowing for court dismissal

Elimination of illegal drugs

War

Moratorium on building permits

No change in district court jurisdiction

Increase in consistency of court decisions

Decrease in legislation that create new rights  
Lack of growth in judicial system  
Punitive damages allotted to plaintiff recovery fund  
Comprehensive health insurance  
Limitation on jurisdiction

**2. Most Important Issues/Challenges for the Judiciary in the 1990's.**

**Environmental Issues (8)**

**Technology (7)**

**Quality of justice for litigants, delay (5)**

**Reorganization, administrative problems (5)**

**Welfare issues (elderly, housing, homeless, cost of living) (5)**

Biological, biochemical controversies (4)

Caseload increases, congestion (4)

ADR (4)

Constitutional conflicts (i.e. privacy) (3)

Domestic violence, breakdown of the family unit (3)

Drug use (3)

Hawaiian sovereignty (3)

Sentencing, alternative to incarceration (3)

Improving public image, credibility (2)

Adequate compensation for judges and support staff (2)

Facilities, office capability, processing of work (2)

Juvenile law (2)

Foreign investment (2)

Decline in government, legislature (2)

Judicial funding (2)

Role of the courts in the future, expansion of services (2)

Cultural conflicts (2)

De-politicizing the judicial process

Access

Information

Increase in crime rate

Erosion of court structure

Cost of litigation

Adult crime

International span of business, economics

Health litigation

Jury

Decriminalization of cases, administrative process

Societal breakdown

Materialism

Increased size of the Bar

Civil rights

Traffic congestion

Employer/employee relations

3. **Possible Strategies to Respond to the Issues and Challenges Facing the Judiciary in the 1990's**

**"State of the Art" technology, better technology (7)**  
**Education for staff and judges, and or public (6)**  
**Promote ADR, expand role of mediation (6)**  
Better planning, immediate action (3)  
Earphones and/or monitors for jurors (3)  
Effective public relations (2)  
Continuing education for the public (2)  
Establishment of special court/board dealing with environment (2)  
Expand personnel, hire more judges (2)  
Proactive courts--central calendars  
Less politics  
Adoption of administrative proceedings  
Jury size cut to six  
Greater judicial activism  
Enhanced uses of behavioral science in corrections  
Greater use of judicial supervisory authority to reallocate legal resources  
Reexamination of sentencing to determine feasibility of rehabilitation  
Stronger leadership in government  
Centralization of courts  
Concern in Decriminalization  
Refusal to hear certain cases to face legislative or executive activity  
Apply disincentives to litigation  
Added correctional facilities  
Resolution of environmental issues at administrative, governmental level  
Professional panel resolving claims  
Cap on attorney's fees in personal injury cases  
More supervision during the discovery stage  
Urge community powers to handle the problem of Hawaiian sovereignty  
Develop more effective procedure for class action  
Develop mandatory pro bono  
Greater funding for judicial programs  
Treat drug abuse as a medical problem  
Attorney discipline  
Specialization of judges  
Greater rights for leaseholders/renters  
Immediate institution of pilot programs  
Legislative action for change in the judiciary  
A systematic plan (10- or 20-year)  
Better communications among courts  
More media participation and cooperation  
More access to courts



Lend assistance to family unity  
Streamline court process, simplify procedures  
The judiciary takes an active role in securing needed resources  
More support agencies for the judiciary  
Alternative action against traffic violations (education, insurance incentives, etc.)

## C. LONG TERM ISSUES

### 1. Trial Courtroom in the Year 2020

**Video transcripts, with (instantaneous) playback capability (7)**  
**Improved courtroom security (i.e. bullet proof glass) (6)**  
**Computer terminals and/or optic disks for judges (at the bench) and clerks (5)**  
Better audio-visual capacity, high tech capabilities (4)  
Audio-visual relay of witness (who is not present) (3)  
Electronic filing calendars (2)  
Teleconference capabilities for judges, attorneys, etc. (2)  
Built-in equipment (blackboard, TV, screen) (2)  
Ability to conduct trial although all parties may be in different locations (2)  
Visual, computer ties to the office, to experts (2)  
Console for each juror for verdict  
Computer (inhuman) juries  
All the latest technology  
Better accommodations for the handicapped  
Adequate room for counsel  
Paperless records  
TV cameras to feed pictures to the outside  
Computer access to files and documents  
Voice-activated equipment  
Instant replay for jurors  
Video replay of trial for jurors  
Instant research capability  
Ability of artificial intelligence to recreate evidence to visual demonstrations  
Functional designs for efficiency  
Judicial input into the design of the courtroom  
Robotics  
More stations for more human players  
Will basically remain the same with better equipment  
Instantaneous written transcripts  
"Limitless" audio/visual/holographic networking and capabilities  
Ready access to artificial intelligence  
Less formalized proceedings  
T.V. access  
Highly trained professional judges  
Large screens for video replay

2. **Appellate Courtroom in the Year 2020**

**Computers for justices, staff and attorneys (4)**

**Audio/visual equipment to replace personal appearances (4)**

**Video transcripts (4)**

Not much change (3)

Video telecommunications/teleconference capability (3)

Computerized records-instant access (3)

Better security (3)

Large video screens for video relay of alleged significant trial errors (2)

Video capability (2)

"Holographic" representation of absentee parties

Some change in acoustics and comfort of courtroom

Hearings by H.D.T.V. to entire state and elsewhere (enlarged role)

Instantaneous reporting of decisions

Headphones and T.V. monitors for judges and attorneys

Smaller courtroom with large support area for computers capable of printing our first draft or opinions upon judges command

Better provisions for the handicapped

3. **New Tort Theories in the Next Thirty Years**

**Environmental issues (7)**

**Medical ethics (i.e. euthanasia, organ donors) (4)**

**Privacy issues (3)**

Geriatric issues (2)

Biological issues (i.e. genetic engineering) (2)

Computer malpractice

Extension of governmental responsibility for various injuries/damages

Torts against humanity (individual or class victims not designated)

Comparative negligence

Better education on medical injuries, etc.

Less use of expert testimony by not recognizing alleged "specialty"

Mental commitment matters

Child vs. parent rights

Negligence

Space rights

Temporary restraining order (TRO) on a universal, cross-country basis

Change in looking at liability (cause & effect)

Global economics

Psychic injuries

Damages for loss of enjoyment of life to be advanced by P.I. lawyers

Absolute liability

Tort on behalf of artificial intelligence

Animal intelligence recognized

Transmission of communicable diseases (i.e. AIDS)

Increase in no-fault concept  
Acceptance of the concept "tort against the general public"  
Little or no change

#### 4. Criminal Law Concepts in the Next Thirty Years

**Non-traditional modes of incarceration, punishment (5)**

**Fetal rights (4)**

**Pollution as a crime (e.g. right to clean air) (4)**

High tech capability in courts/use of DNA as identification (3)

Gradual decriminalization of drug offenses (3)

Mental illness/abuse (2)

Computer invasion of privacy (2)

Euthanasia (2)

Criminal transmission of disease (AIDS)

Little or no change

Tracing of assets from drug, embezzlement and theft crimes

Utility theft

Protection of victim rights

Greater law enforcement

Labeling artificial intelligence as "person"

Erosion of segregation between adult and juvenile offenders

Judicial discretion on punishment abolished

Invasion on right to clean air as criminal

Strict liability

Space rights

Prisoner's rights

Stronger Native Hawaiian Rights

Decriminalization of victimless crimes

Legalization of drug use

Client vs. attorney rights

Sentencing alternatives

Economic penalties based on percentage of wealth

New laws relating to white collar crimes

Death penalty

Racial explanations of crimes

Animal abuse as negligent homicide

#### 5. Business/Commercial Litigation Issues in the Next Thirty Years

**Computer Information negligence and abuse (4)**

**Bigger role of multi-nationals (issues concerning responsibility, regulation) (3)**

**Development/land issues due to lack of available land (3)**

Mergers and takeovers

Condo lessee's right to own

Intrusion of computers into individual rights

Global space issues  
Widespread pollution of environment  
Complex commercial litigation regarding construction

6. **Family Court Cases in the Next Thirty Years**

**Rights of natural parents vs. surrogate (7)**  
**Genetically programmed children (5)**  
**Euthanasia (3)**  
**Elderly abuse (3)**  
**Gay-lesbian rights (recognition of relationships) (3)**  
More family crimes--spouse abuse, child abuse (2)  
Fetus rights (2)  
Rights of children vs. parents (2)  
New definitions of "family" (2)  
New family crimes (2)  
Reversal of adoption (children seeking independence)  
Custody and inheritance  
More declarations of parental incompetency  
Bigger authority of TRO's  
Child witness  
Student's rights to education  
Adoption developments  
Increase in family crimes  
Juvenile drug offenses

7. **Dominant Constitutional Issues in the Next Thirty Years**

**Privacy rights (11)**  
**Euthanasia (4)**  
**Native Hawaiian Sovereignty Issues (3)**  
**Property rights (citizen and corporate) (3)**  
**Environmental rights (3)**  
Right to pursue happiness/quality of life (2)  
Press vs. privacy (2)  
Rights for disadvantaged groups (civil rights, etc.) (2)  
Censorship (2)  
Due process (2)  
Population control  
Decriminalization of laws aimed at foreign land owners  
Animal rights  
Right of children vs. parents  
Individual vs. community (environment)  
Economic rights/condemnation powers over foreign property  
Right to jury trials  
Decriminalization

Private schools--admission policies  
Use of private funds to support private institutions  
Separation of powers  
Children's rights  
Challenges to legislative power

**8. New Areas of Law Within the Next Thirty Years**

**Increasing governmental power to allocate resources (2)**

**Rights of unborn fetuses (2)**

**Space laws and rights (2)**

Spousal rights

Drug use, drug enforcement

Exploration of programs against white collar crimes

Rights of unmarried parties

Wrongful discharges

Civil rights

Increasing emphasis on affirmative governmental obligation

Decrease in anti-trust laws

Foreign ownership of land

Donor rights

Air and water rights

Traffic laws

Helicopters and hydrofoils (violations and regulations)

Regulation of ocean resources

Issue of Antarctica

# **SHAPING THE FUTURE AND THE COURTS: CHALLENGES FROM SCIENCE AND TECHNOLOGY**

by

**Clement Bezold**

In the last few years there has been an important growth in interest in the future among the court community. Several states have had or are beginning commissions on the future of their courts. Others have made serious efforts to incorporate environmental scanning into their ongoing operations. The State Justice Institute and the American Judicature Society Conference on the Future and the Courts in San Antonio, conducted during May 1990, represents a major event in the development of more effective futures thinking in the courts. That Conference used several distinct aspects of thinking about the future, particularly thinking about what is possible and plausible (trends and scenarios), preferred futures (visions) and how to get there (strategies).<sup>1</sup>

This paper presents some thought about the challenges that science and technology will pose to the courts and to judging over the next two to three decades.<sup>2</sup> Each of us should have his or her own vision for the courts. It should be informed by an awareness of the major problems and opportunities likely to emerge in the years ahead. Accordingly, this paper will review key problems and opportunities stemming from advanced in science and technology, challenge facing the courts in the years ahead, specifically in the areas of information technology and health care, and changing scientific paradigms. Finally, I'll provide some suggestions for anticipating these changes in the judicial system.

## **SELECTED TECHNOLOGICAL CHALLENGES: Information Technology**

Information technology will make society and the courts very different over the next 30 years. A recent film by Apple Computer Company called *The Knowledge Navigator* identifies how a professor will prepare for class at some point in the next two decades. His notebook-sized expert system, or "knowledge navigator" searches all relevant knowledge, to the point of summarizing how recent articles differ from the theses of his colleagues. The device, speaking as if it were a human, adroitly connects the professor by picture phone to his colleague. It displays maps that show historical data and the impact of future developments on rain forest losses in Brazil and the impact of African logging on expansion of the Sahara desert.

Long before 2020, most courts in the United States will have the equivalent capacities, but then, so will most businesses and most homes. The initial step, a useful voice interactive technology, will come in this decade. By 2000, many of our appliances will "talk" with us for instructions, and although they will not have as much intelligence as the *Knowledge Navigator*, they will have more than enough capacity to make the house warmer or cooler, make the television louder or softer, play the movie that the video recorder taped at your instructions the previous week, or let you know how your family's financial situation this week fits with your

goals for this part of the year. As with most of these advances, businesses will acquire them first. It is likely (although not certain) that the equivalent of our "plain old telephone service" (POTS) of the 1970s will include something similar to the Knowledge Navigator by 2020.

Given this type of capacity, much of the work of the courts can be made more effective and less costly. (The Knowledge Navigator played the roles of receptionist, secretary, and research assistant/clerk for the professor).

Our images of these future capacities and the vocabulary we use for them are evolving. In a 1986 report on the information revolution, for example, the expert system and its interactive features would have been called an "agent."<sup>3</sup> More recently, these combined technologies have been called a "knowbot" -- the equivalent of a physical robot for knowledge acquisition.

A host of opportunities for running courts and cases more effectively will rise from these technologies. At the same time, they will increase the potential for invasions of privacy, lead to dehumanization of certain aspects of adjudication, and confuse career planning for lawyers and judges.<sup>4</sup>

Virtual reality will also pose challenges to the courts. Computers and information systems will allow us to create artificial realities electronically, "virtual realities" wherein we experience being in a specific interpersonal or sociopolitical environment. Such experience would be essentially similar to the best, current flight simulators -- only in the years ahead, the technology will be ubiquitous and relatively inexpensive. Assessing these imaginary spaces for training purposes will be accomplished with goggles, special helmets and "data gloves" (that allow us to use our hands within the virtual reality). Somewhat later, direct connection of the appropriate portions of the brain to the machine will allow more rapid exchange of data. Nintendo already sells early versions of the "data gloves" for use with some of its games. Just as science fiction writers have allowed us to consider well in advance what technology might mean, virtual reality already has an extensive science fiction/fantasy literature surrounding it. William Gibson in Neuromancer and subsequent books (often labeled as "cyberpunk") describes life in "cyberspace" -- the electronic reality generated by a large number interacting computer networks. Will we move into the era of the "multi-door" courthouse only to later move parts of the courthouse into cyberspace or virtual reality?

The rights of robots is a seemingly bizarre topic and illustrates an optimistic response to a persistent judicial problem. The challenges that science and technology pose to the courts are seldom anticipated by the courts or their associations. When a controversy is ripe, it is dealt with, and not before. Yet early anticipation can often allow for better solutions to emerging problems that are not yet ripe.<sup>5</sup> One option is for the courts to activate their own serious program of environmentally scanning. Undertaken systematically, scanning would search both for current trends, whose effects we are now beginning to feel, and for early warning signals of more distant, emerging issues. The rights of robots is an emerging issue identified by the Hawaii Judiciary, as part of its environmental scanning effort. Some of the results can be found in the Hawaii Judiciary's newsletter, Justice Horizons: Trends, Research Findings and Emerging Issues.

In his article in Justice Horizons, futurist Sohail Inayatullah describes why the rights of robots will become an issue:

Typically, robots are viewed as machines; as inanimate objects; and therefore, devoid of rights. Since robots have restricted mobility, must be artificially programmed for "thought," lack senses as well as the emotions associated with them, and most importantly cannot experience suffering or fear, it is argued that they lack the essential attributes to be considered "alive." However, the robot of tomorrow will undoubtedly have many of these characteristics and may perhaps become an intimate companion to its human counterpart. We believe that robots will one day have rights.<sup>6</sup>

The article goes on to note that our notion of rights is descended from Newton's 16th century view of the universe as a well functioning clock, from Descartes' rationality, and from the thinkers of the Enlightenment on law. But our world view is likely to change, and the rise of the use and capacity of robots will lead to a variety of new cases:

Robots that have killed humans, robots that have been killed by humans, robots who have stolen state secrets, robots who have been stolen, robots who have taken hostages, robots who have been held hostage, robots who carry illegal drugs across borders, and robots themselves who illegitimately cross national borders.<sup>7</sup>

## **HEALTH CARE AND GENETICS**

Health care already poses a host of challenges for the courts. New cases abound--from the right to die, to surrogate parenting, to medical malpractice disputes. What else might emerge over the next 30 years? Several scenarios illustrate scientific breakthrough potentials that will be translated into technology and raise possibilities for changes in medical paradigms. These possibilities may generate flip-flops among the core criteria of the Frye Rule -- whether or not a principle or finding is accepted by the relevant community of experts.

A nearly disease-free society will be a feasible goal over the next 50 years, and much of that will be accomplished within the next 30 years. Cancer and heart disease will become preventable and/or curable. Likewise, arthritis, AIDS, and Alzheimer's. This, in turn, will put other pressures on our already aging society. Will elderly persons suffering from a disease be denied Medicare payments if they refuse to take a treatment that would lessen their disease?

The biochemical uniqueness of each individual will be factored into medical care. This difference will be recognized as great among individuals, and as unique as our fingerprints. Medicine will move to a more individualized bases. This is a change in paradigm from the mass approach now taken to care. Currently, the diagnosis and appropriate therapy for you is based



on your statistical relationship to some subset of the population. The approach will shift to far more complex and personalized care. Increases in the sophistication of our medical knowledge, our expert systems, our medical records and our measures of outcomes for all health care encounters will facilitate this increased level of diagnostic and treatment complexity.

Genetics will place a host of issues before the courts. The most fundamental ones will come when we can engineer humans before conception by adjusting the DNA in sperm and ovum. During the next 30 years, we will have the capacity to intervene before birth to eliminate certain genetic diseases. For some diseases, we will have the capacity to intervene in children and even adults through "gene surgery." Once effective genetic repair is accomplished, will the courts have to deal with theories of "minimum functions" for which everyone may be claimed to have a right? If parents allow a child to be born without repair of diseases, will they be charged with "wrongful birth"?

Changing medical paradigms will also be significant. In addition to biochemically unique medicine, it is likely that medical science and related technologies will move beyond the historic allopathic paradigm. As an outcome of Western industrial science, the allopathic paradigm splits body and mind and largely ignores the contribution of the latter. Likewise, allopathic medicine barely recognizes the role of the body's electric and electrical systems in health. The next 30 years will see a rise in bioelectric models of health as well as other challenges to conventional medicine. While there have always been frauds and quacks at the margin of medicine<sup>8</sup>, in a time of shifting paradigms it becomes more difficult to be certain as to who will be right in the long run.

For the courts, one of the difficulties of changing scientific paradigms is the often potential velocity of their shifts. As Thomas Kuhn has shown in an influential book, The Structure of Scientific Revolutions, advances are usually fought by those controlling the established paradigm. The 1990s are likely to be a time of changing paradigms in several fields in addition to health care.

Some writers, such as Alvin Toffler in The Third Wave, argue that we are undergoing a change in paradigm at the level of civilization. We will evolve from Western Industrial Civilization into something else, with a corresponding shift from Western science (empirical and reductionist in nature) to paradigms that can deal with great diversity, uncertainty, and interrelationships.<sup>9</sup> Ironically, some writers, like Walter Anderson in Reality is Not What it Used to Be, argue that in a "postmodern" period, there may not be agreement on models of reality or paradigm. Not only will the courts be changing paradigms; they may have to deal with greater diversity of opinion and more frequent competition among communities of experts.

Increased spirituality and psychic crimes. There is evidence of an increased level of interest in personal spirituality across our society. It takes many forms. Personal renewal inside and outside the major Western religions, for example. The holistic health movement and psychogenic healing are other examples. In IAF's book The Future of Work and Health, we forecast that these forces will lead to "soft technologies" for health care--the activation of those capacities which each of us has in our bodies to mentally adjust physiological processes. For example, we are becoming aware of the ability of our immune system to act positively or

negatively at will.<sup>10</sup> Techniques such as visualization can be used by cancer patients to imagine their good cells attacking bad cells. Such "soft technology" may increase the efficacy of standard chemotherapy. In the forensic arena, many police forces use a variety of consultants with presumably enhanced mental capacities to hunt for clues.

If our powers increase and a certain number of people can use powers of remote viewing to review the contents of filing cabinets without being in the room, or determine a person's location, what issue will that raise? Recognition of this capacity will probably be accompanied by a rise in psychic crimes against property and persons. The point here is that the empiricism of our scientific paradigms is likely to be challenged, raising a host of new issues for the courts. The courts should anticipate the nature of these issues, the controversies they will spawn, and the courts' range of reactions to them.

## **PRESCRIPTIONS FOR JUDICIAL FORESIGHT**

This brief review of some of the many areas where science and technology will challenge the courts suggests the value of four responses by the courts.

- Focus long in advance on the controversies that might arise, and predict how they might be resolved. Whether envisioning the rights of robots, a person's rights while traveling electronically through "virtual reality," or the rights not to use advances in genetic engineering to remove diseases or handicaps, the judicial community needs to anticipate its range of options. Justice Horizons, the newsletter of the Hawaii Judiciary, is an excellent model of how to seek out emerging issues and explore their implications for the courts.
- Be prepared for arguments about and greater demand upon the courts for broader definitions of justice. Above, I mentioned rights of robots. In addition to extending rights to that type of potentially sentient technology, what about animal rights and the legal standing of animals before common-law courts? As a judge from a farming state mentioned, as we planned for the May 1990 San Antonio Conference on the Future and the Courts, there is a growing sense that sustainable agriculture is part of the definition of appropriateness in dealing with agricultural cases. Futurist Jim Dator predicted at the San Antonio conference that investors or deal makers who use leveraged buyouts or other high-risk means to jeopardize a company's effectiveness, leading to a loss of jobs and community viability, will come to be treated as criminals.
- Be ready for Galileo. Galileo worked during a season of significant paradigm change, and he was a principal, precipitating agent. His notions of the forces governing physical reality earned him persecution. In conducting this persecution, the authorities employed the equivalent of the Frye Rule requirement. A consensus of contrary theories among established experts was part of the problem for Galileo. We are in the midst of paradigm shifts in several areas of science and technology. If you are a judge, what will you do when Galileo's successor shows up in your courtroom?

- Press to clarify your own vision for the courts. What is the best the courts could be in the first part of the 21st century? How does that related to your vision of society and the challenges listed above?

## NOTES

1. See Clement Bezold and Heather Kurent, Participants' Workbook for Small Group Discussion for the SJI/AJS Conference on the Future and the Courts. Prepared for the State Justice Institute/American Judicature Society Conference on the Future and the Courts, May 1990, San Antonio, Texas.
2. This paper focuses on the next two to three decades. Most organizations have difficulty considering beyond the next five years, yet many of the important decisions they make will have an effect for a far longer time period. The State Justice Institute deserves to be commended for setting up the San Antonio conference with a 30-year focus. Beyond the convenient associations with "2020 vision," this longer term focus challenges conference participants to move well into the next century. We have found, in work with a wide variety of audiences, that a longer term focus has to be legitimated, and then accomplished through a variety of approaches. This was attempted, and in many cases, was successful in San Antonio.
3. Clement Bezold and Richard Olson, The Information Millennium. Washington: The Information Industry Association, 1986.
4. Jim Dator, in his scenarios for the San Antonio conference, forecast that one of the major options to make such adjudication subject to expert systems, reserving only those cases where standing before a human judge and/or jury was essential. See Dator, "The Courts and Their Macroenvironments," in Bezold and Kurent, Participants' Workbook.
5. There are several understandable reasons for this, such as the courts' reliance on precedent. For a more detailed list of reasons why the courts typically have not looked ahead, see Zweig, summarized in Bezold and Kurent, Participants' Workbook.
6. Phil McNally and Sohail Inayatullah, "The Rights of Robots: Technology, Culture and Law in the 21st Century," Justice Horizons: Trends, Research Findings, and Emerging Issues (Volume 1, No. 2, 1989), 1.
7. *Ibid.*, 3.
8. In fact, it was the charge by Abraham Flexner before 1920 that there was so much quackery and fraud among America's colleges of health and medicine that he recommended (and the state legislatures concurred) granting physicians a state-sanctioned monopoly, through licensure, to be the sole practitioners of medicine.
9. Ted Becker, Quantum Politics (forthcoming), which includes an article by Laurence Tribe originally published in Harvard Law Review, on the implications of the emerging paradigm of physics for the law.
10. Clement Bezold, Rick Carlson, and Jonathan Peck, The Future of Work and Health. Dover, MA, Auburn House, 1986.

# **EARTH 2020: GAIA PRUDENCE**

by

**Christopher Jones**

## **EARTH AS A LIVING ORGANISM**

Isn't it curious that "Earth," when seen from space, is mainly ocean and clouds. Like the astronauts, we now see the planet from an entirely different perspective than ever before. One reason for this is because our journey out toward the stars enabled us to look back at ourselves and our home world.

Another reason our culture is seeing the world differently is because of a bold new reconceptualization of the Earth and Nature. This new view, the Gaia hypothesis, represents a paradigm shift for a number of scientific disciplines. More broadly, this new paradigm could alter the worldview of our entire civilization.

The Gaia hypothesis, articulated by maverick scientist James Lovelock, proposes that the Earth itself is a living organism. Comprised of soil, oceans, atmosphere, and biota, this complex entity has mediated and maintained for some 2.5 billion years the environmental conditions which sustain life. Unlike mainstream sciences which support the conception of Earth as essentially "dead" and ruled by chemical and physical processes alone, Lovelock sees Gaia as alive. Just as humans are more than a collection of life processes, Gaia is more than a litany of chemical, physical, and exchange cycles. She is an independent entity whose sum is greater than the parts.

## **CYBERNETIC REGULATION**

Lovelock takes pains to argue that Gaia does not maintain suitable conditions for life out of any sense of purpose or by intelligent decision-making. Rather, Gaia is a homeostatic system which regulates certain parameters upon which life depends. The oceans and atmosphere and life itself are essential to the Gaian process of maintaining optimal conditions such as temperature, the level of oxygen, and ocean salinity.

Since the dawn of life Earth's temperature has been almost constant (between 50 and 68 Fahrenheit), yet remarkably, the sun's total output has increased as much as 30 percent. Without life's role in the carbon cycle, the planet's oceans would either have been frozen in the earliest history of the planet or boiled away by now.

The planetary level of oxygen has also remained steady. Unlike her sister planets Venus and Mars, whose chemical makeup corresponds to "lifeless" steady-state conditions, Lovelock believes Earth's atmosphere has been fundamentally altered by life. It contains many orders of magnitude more oxygen and methane than would be expected scientifically. For 200 million

years oxygen has comprised 21 percent of the atmosphere, sufficient to support animal life.

The salinity of Earth's oceans has also remained relatively constant. In a steady-state condition, the runoff of salts from land surfaces and the mid-oceanic creation of salts would be expected to raise salinity to its current level in only 60 million years and then further accumulate. And yet the oceans appear never to have exceeded 3.5 percent salt--the current level. Saline levels over 5 percent would have disrupted cell membranes and life would not have evolved. Some of the processes involved in regulating saline levels include deposition of skeletons of dead sea creatures (mainly plankton) and isolation of salt by reef formations and tectonic activity--more evidence of Gaia's role in regulating environmental conditions.

## **GAIACIDE**

Periodically Gaia has had health problems. External events, such as impacts of asteroids and comets have caused crises for Gaia. Internal stresses, such as volcanism and ice ages, have also affected life processes. Some of these events have caused mass species extinctions, for example the demise of the dinosaurs some 65 million years ago.

Now humans pose a threat to Gaia's health. Current rates of species extinction and tropical forest destruction are likely to lead to catastrophe by the middle of the next century. We are accomplishing on a Gaian scale what at a human scale is considered genocide. We are terminating--forever--the evolutionary potential of tens of thousands of species, perhaps even hundreds of thousands by A.D. 2020.

To make matters worse, we are adding 5 billion tons of carbon dioxide and 1.5 million tons of chlorofluorocarbons into the atmosphere annually. The first will contribute to significant climatic change; the second is destroying the stratospheric ozone which protects us from shortwave ultraviolet radiation.

Humans are toxifying the planet's soil and accelerating desertification to the tune of tens of millions of acres per year. 100 million acres or more of tropical forests are being felled annually. The world's fresh and salt water resources are rapidly becoming polluted with our industrial fertilizers, pesticides, herbicides, and hazardous wastes. Oil spills and leaks are fouling the world's rivers, lakes, and oceans.

## **GEOPHYSIOLOGY**

Geophysiology, or the study of planetary health, is the articulation of what the story of Gaia implies for homo sapiens and our activities. It argues that to heal the planet, to correct our meddling, we have to pay attention to certain planetary functions. We must reduce species destruction and atmospheric pollution, preserve tropical forests, estuaries, and wetlands, and protect continental shelf ecologies. We also have to gain respect for the long-term time frame which governs Gaian cycles--or we will pay as a species for our ignorance.

It is a paradox that a planetary crisis is being precipitated by industrial civilization at the same time that our species is becoming aware of our planetary history. Our growing awareness

of our impact on the planet and our role in its future, or of Gaia and her future, is not compatible with the previous way of seeing the world and behaving in it. If the Earth is a living organism, then our industrial modes of production and behavior are not consistent with the goal of "maintaining favorable conditions" for life on Earth. Then we are, as described in Star Trek: The Movie, "biological infestations"--a Gaian experiment that failed. On the other hand, maybe we are becoming globally conscious just in the nick of time.

A paradigm shift to a Gaian perspective means a radical cultural shift--not only "thinking globally, acting locally," but also thinking locally and acting globally. In other words, seeing and acting as though everything is connected to everything else as John Muir and countless others have suggested. This new perspective would have a profound ripple effect throughout the Western worldview. A Gaian paradigm will empower those groups oppressed and peripheralized in society. The shift will be assisted by a renaissance of indigenous cultures and primal values, and rediscovered mythic and psychic connections to Nature.

## **PRIMARY PEOPLE**

A primeval Mother Goddess appears in a number of traditional cultures around the world. Many indigenous peoples--who Toynbee called "primary peoples"--understood and honored our species, close relationship with the Earth. Primary peoples, connections with the Earth were directly tied to their means of survival. As an entity far bigger than us, it is no wonder that primary cultures worshipped Gaia and her parts. Many of the basic principles for coexisting with Nature such as "walking lightly" on the Earth have been forgotten by industrial culture which continually takes from the Earth without seriously considering the consequences. By contrast, primary peoples had a rich pantheon of mythic figures and cosmologies which reflected a deep understanding of Gaia. Thus, Gaia was not just the Great Mother Goddess, but also Father Sky in some cultures. One reflection of a Gaian understanding was the ancient Hawaiian conception 'aina, which was far more than simply land, but a sacred place, which provided life and sustenance.

The voices of women are joining those of primary peoples whose cultures have been shattered by a violent patriarchal civilization which has spread across the globe. In using the word "Gaia," Lovelock set in motion a challenge to the dominant paradigm--a challenge which is linked with reemerging interest in prepatriarchal European culture and Goddess spirituality.

In the ancient Greek pantheon Gaia was the oldest goddess--the predecessor of all the other gods and goddesses. Feminist "herstorian" Barbara Walker notes, "(t)hough the Olympian gods under Zeus took over her ancient shrines, they swore their binding oaths by her name because they were subject to her law."

## **ALTERNATIVE FUTURES**

We have reached what has been called by some "the hinge of history" and by others "the end of history." We certainly are witnessing the convergence of technological, ecological, economic, and cultural transformations. Where might we be heading? What are the possible futures for humans and for Gaia?

One way futurists explore the possibilities is to look at the images of the future which are currently competing in the marketplace of ideas. While there is a diversity of popular visions of the future, there are some dominant images today which are used in long-range planning and futures research. We call these "alternative futures." To qualify as alternative futures they must be discrete and have internal consistency. They originate from visionary literature, film, art, or culture. The actual future of 2020 could be either a pure form or mixture of any of these images. Almost any of them could emerge from the others as well... Let's explore four scenarios of the future for the year 2020 and their implications for Gaia.

## **BUSINESS-AS-USUAL**

The Business-As-Usual image portrayed by futurists such as the late Herman Kahn promised a future which was "more of the same, only better." The Business-As-Usual think-tanks of the 1970's promoted an image with unparalleled technological and economic growth which would "trickle-down" to the world's poorest. Business-As-Usual, also called Continued Growth, is still the dominant mass media image of the future as well as the operational vision for most of the developed world. Obviously, this worldview rejects a Gaian paradigm.

Whether you call it Business-As-Usual or Continued Growth, there are some cracks in the vision. This worldview is about to run into an accelerated greenhouse effect, ozone depletion, Third World aspirations, and the planet's carrying capacity. An unmodified Continued Growth image is now harder to envision in a shrinking world. The words "slow growth" were practically un-American a decade ago; in many communities now "slow growth" is the way to grow. This future has become a place where our grandchildren will be paying for our deficit-spending and short-term thinking.

In the Business-As-Usual scenario of 2020, we are feeling the first real impacts of accelerated global warming. Weather variability is severely affecting agriculture and draught has a grip on the U.S. Crime is rampant and courts are sagging under the weight of more and more laws and growing case loads. Environmental issues are the fastest growing percentage of tort and administrative law cases. Increasingly, environmental suits are being filed by nations, not individuals. Corporations are increasingly being held liable for environmental claims in tort cases, and corporate bankruptcy is growing proportionately. Global law is a growth industry as the world has become increasingly interconnected; the World Court and World Bank gain authority. "Bigger is better" is bigger than ever.

## **HIGH TECHNOLOGY TRANSFORMATION**

The High Technology scenario is a transformational image of the future. That is, it represents a future that is fundamentally different from the present. In this technologically-sophisticated world, few humans work for a living. Goods are produced by automated factories and by bioengineering. Unlimited goods are universally-available. Food, housing, and health care are provided to every citizen. The High Tech future of 2020 is an all-electric photon "virtual reality." Just as most industrial jobs have disappeared, so have most government jobs. Governance bears little resemblance to the "representative" democracy of the last century. Electronic democracy has revolutionized global and local politics, and along with

economic democracy, has meant the demise of the nation-state. Bureaucracies have been replaced by artificial intelligence systems with terminals in every community center and household.

In this global High Tech society, humans are seen as the pinnacle of evolution and the mind of Gaia. We know what is best for her. This future is not "in tune" with Gaia, instead Gaia is tuned artificially to human needs. Wilderness and wildness are disappearing fast and the world is being transformed into a manicured English garden. Extinct species are recreated or reinvented to replace missing relatives. Earth is monitored and tinkered with--managed as a domesticated organism--not honored. Gaia is no longer an open-ended system, but one in which humans are firmly in control. Gaia has truly become "Spaceship Earth."

High Tech 2020 is a culturally fluid and dynamic society in which lifestyles, technologies, and social roles are in a constant state of flux. It is an abundant society with less government and more individual independence. Great amounts of law have been eliminated. Most civil disputes and minor crimes are resolved by artificial intelligence, information databases, and telecommunications technology. Drug crimes, "victimless" crimes, and all crimes against physical property have been decriminalized. Intellectual property and electronic privacy are the major areas of civil and criminal litigation. Artificial intelligences have even been nominated to the Supreme Court.

## **COLLAPSE**

A Collapse scenario captures the worst case interpretations of human interaction with Gaia. Continuation of the Business-As-Usual paradigm would ultimately provoke a severe disruption of Gaian core regulatory functions resulting in social chaos and an end to industrial civilization. The "muddle-through" approach to political and environmental crises would help precipitate the Collapse as technological fixes fail to correct the problems. Thus, even the possible High Tech future could miscalculate and fail to "tame" Nature. Or any society could easily be "bombed back to the Stone Age" by cosmic events such as a large asteroid impact. The Collapse image assumes that most, or all, Gaian systems will reach a crisis stage and that everything that can go wrong will go wrong. While a Collapse could take many forms, two plausible trends are either toward an accelerated greenhouse effect or the start of a new ice age. If the conventional scientific wisdom had to bet right now on a temperature-driven Collapse, most of the bets would be on accelerated warming. But a small minority of scientists are warning of an impending ice age. Perhaps the Gaian response to human activity will be like a planetary fever: first a high temperature and then shivering chills.

A glaciation could be so sudden that unlike a gradual warming, it could begin in less than a decade. Snow in great parts of the Northern Hemisphere simply does not melt during the summer and begins to pile up in mountains and higher elevations. The glaciation begins around the year 2000 and by 2020 the world is in a state of total fragmentation and lawlessness. The spoken word becomes law once again--the rule of the strong and the Big Man. Even in the tropics, weather variability, forest destruction, and mass migrations of homeless hordes reduce life to a matter of simple survival.



Now that we have looked at three alternative images of the future, it is time to explore one more, one which comes closer to the emerging Gaian paradigm.

## **GREEN**

In the Green scenario of 2020, the Gaian paradigm and geophysiology have become central themes in the popular worldview. The Green image of the future, sometimes called the Conserver Society, has had an enormous boost thanks to the success of the Green Party in Europe in the 1980s, in the Americas in the 1990s, and in the Soviet Union, Eastern Europe and most of the rest of the world at the turn of the century. In 2020, only nations dominated by the feudal classes have resisted the emergence of Green political power.

The Green 2020 future has also been brought about by the convergence of social movements which have respect for the Earth: Pause primarily women's liberation, environmental, peace and justice, and indigenous peoples' movements. The Green society is based on a worldview which not only stresses the values of ecological wisdom, but also Green principles of feminism, decentralization, local political and economic autonomy, participatory democracy, sustainable development, and respect for cultural diversity.

The Green society seeks ways both to mitigate and adapt to the Gaian changes wrought by the industrial "experiment" with the Earth. Native American, Hawaiian, and other indigenous systems of knowledge are incorporated into the new global consciousness. Gaia consciousness includes equal parts Earth science and Earth spirituality.

In practice, Gaia consciousness is translated into reforestation, elimination of fossil-fuel emissions, and population reduction as global priorities. Nuclear, coal, and oil-fired power plants are being retired in favor of solar, hydro, and wind power. Emphasis is on sustainable agriculture and bicycles and slower cars have replaced internal-combustion automobiles. Post-industrial technologies such as electronics, remote sensing, computers, and optical technology are favored as well as "appropriate," organic, and small-scale technologies.

Corporations have been abolished and assets transferred to global non-governmental organizations, regional development agencies, and community development banks. An integrated global governance system is beginning to equalize the information and resources disparities between North and South.

In this future, formal politics and law are still a cultural mainstay. The structure of law, however, has been radically altered in the areas of property, business, and crime. Mediation, at all levels, is emphasized more. Law is more local and more planetary. Parts of Gaia, and Gaia herself, now have legal standing and advocates to argue on their behalf. Similarly, a Council of All Beings has advisory and some decision-making power for planetary-level deliberations.

## **CONCLUSION**

Whether or not any of these images of the future BECOME reality, it is individuals that

will make it so. The power is in our hands. The future of our planet is, at this moment, intertwined with the future of our species. We must realize this as we decide what we want and decide how to get it.

The dominant paradigm has stressed that we are at war with Nature--in a contest for survival. But now, to use a baseball metaphor, we are tied with Gaia at the bottom of the ninth and she is at bat. In the Business-as-Usual future the game would go on for inning after inning until one side gives in to exhaustion. In the High Tech future, humans win in the tenth. In the Collapse, Gaia not only wins but kills the pitcher! Only in the Green future does the whole metaphor collapse and the relationship become a win-win situation.

It is said that there is now a reciprocal correspondence between the health of individuals and human society and the Earth. In order to heal ourselves we need to heal the planet and vice a versa. To deny the responsibility is to deny a choice for our children and grandchildren. The wisdom of preserving and honoring the Earth--Gaia prudence--is the buzzword for the next century.

# THE SOCIAL CONSTRUCTION OF CRIME AND THE FUTURE OF CRIME AND PUNISHMENT

by

**M. Kay Harris**

In my presentation, I would like to focus on paradigm shifts, I particularly want to talk with you about one paradigm shift that I see emerging. I believe that we are on the brink of the evolution of a new paradigm. The form of that shift is not entirely clear. What I see emerging of this paradigm shift has many shadows, so I will be talking only about outlines and images. I also remind you that changing paradigms can be a very wrenching, difficult, painful experience that will be resisted fiercely, particularly by those who have been most involved in the existing paradigm. I also recall to you the idea that there is a tendency to want to "shoot" the messenger, those fringe people who say, "There is a new paradigm. It's closer than you think. We're moving into it." That tendency makes me especially glad to be with a group of people who are so warm and gentle and generous.

The boundaries of the paradigm shift I see emerging are encompassing much more than the issues of crime and punishment, but I want to focus on the part of the paradigm change emerging that I think will involve a fundamental transformation in how we think about crime and punishment. Stated baldly, I think we are soon going to give up the ideas of crime and punishment. We will conclude that these ideas are really not very useful-- the idea of crime, the idea of punishment. In fact, we will conclude that these ideas are counter productive. These ideas and the actions that flow from them wreak consequences that are not good for living creatures and it is not necessary that we cling to them. We can do something else. We can think and act in different ways. So my mission today is to invite you to engage with me in fundamental rethinking about the social utility of crime and punishment.

There is a useful book called [A Whack on the Side of the Head](#). It argues that sometimes it takes a mule kicking us in the side of the head to open up new ways of thinking. It seems that we need that "whack" to make us look at things in a different kind of way. Something that served as such a "whack" for me came from when I was asked to review a book called [Just and Painful: A Case for the Corporal Punishment of Criminals](#) by Graeme Newman. In this stimulating and controversial book, Newman argues that we should return to corporal punishment, punishment in the body. He advocates a dual system of sanctioning, a two-track punishment system. On the one hand, he says, we have the "true criminals," people who are evil, people who are "imbued with an aura of criminality." Our punishments for such people should involve administration of punishments that involve long-term or chronic pain and suffering. Luckily, in Newman's view, we have a form of punishment at hand that comes near to satisfying this requirements. We can use imprisonment to deliver chronic pain to the truly criminal. Especially if those aspects of modern imprisonment that might tend to "water down" the experience and make it less than truly nasty are eliminated, if we take away televisions and typewriters and access to lawyers and all that sort of thing, then incarceration can be used to

punish the true criminal in a manner close to what is deserved.

On the other hand, when any of the rest of us (who are not true criminals but merely occasional offenders) commit offenses, then discrete penalties that involve acute pain infliction should be employed. For this type of penalty, Newman advocates a return to corporal punishment, primarily in the form of electric shocks. He suggests that guidelines be established to link the severity of the punishment to the seriousness of the offense, varying, for example, the voltage level, the number of sessions, and the number of doses at each session. This scheme for punishing mere offenders would have numerous virtues according to Newman, not the least of which would be that once the prescribed penalty were administered, the pain infliction would be over and done with in a short and definite time span and persons so punished could get on with their lives with a "clean slate."

The short section of that book in which Newman tries to make a case for why we ought to employ the punishment system he proposes, his justification for it; describes punishment as a basic human need and says, essentially, we simply need to do this. In his justification; Newman talks about how movie audiences tend to react when they watch Superman beat up the bully, that they love it, that everyone is satisfied when the bad guy gets "what's coming to him." And as I read that section it struck me that Newman's model, his idea of justice, is the unrevised version of the history of the "Wild West." It's a version of the bar room model. If somebody injures you or threatens you, you "call him out," you fight it out, you shoot it out. Indeed, you beat the daylight out of him. And if the other guy is unrepentant or bad enough, you tar and feather him or you string him up from the nearest tree.

As I read Newman's vision, it was very clear to me that Newman's model is not my model. It is some version of a macho model with which I in no way wish to be associated. The "whack on the side of the head" I got from reading Graeme Newman's Just and Painful served to spur me to begin to explore much more seriously how else we could look at these issues. One direction my thoughts took was to ask whether we can eliminate crime and eliminate punishment.

What do I mean by saying that perhaps we can eliminate crime and punishment? There are at least two senses in which we can talk about a crime-free future. One relates to the technique used by futurists of imagining scenarios in which we have eliminated crime. There are a number of plausible scenarios that imagine a future without crime. Consider drugs.<sup>1</sup> Drugs obviously have been a significant factor in the increase in arrests, court caseloads, jail and prison populations, and public concern about crime in recent years, and sometimes it looks as if there is no good answer for the drug problem. Yet consider the possibilities for reducing the drug problem that may spring from genetic engineering, which has received considerable attention at this meeting.

The Human Genome Project, for example, should produce benefits in curtailing dangerous drug use in the future. In addition to decoding the body's genetic structure, the project will provide new information about the chemical and electrical circuitry of the brain. With knowledge of the genetic basis of behavior, the use of therapeutic medication implanted for time-release would provide a means for keeping behavior in check. Consider too that

although hard drugs are most often associated with drug problems, many believe that alcohol use is actually the source of more problems. Testing is now underway on a new drug, RO15-5413, that may lead to a "sober-up" pill that blocks the impact of alcohol on the brain. Testing is also underway on similar impact-blocking compounds for drugs such as amphetamines, barbiturates, and crack-cocaine. Genetic advances promise a variety of other crime-reduction possibilities, such as rapid and certain identification through use of genetic "fingerprints."

Other technological advances offer countless opportunities for controlling the behavior of defendants or offenders that are much more efficient than anything now in use. With the advent of nanotechnology, we soon should be able to install nanocomputers in the brains of defendants and offenders, which could be used to track movement or even to send messages. Already many of us access our bank accounts by phone or computer and pay for groceries and other products with bank cards. Moving toward a cashless society may significantly reduce possibilities for theft. Access to buildings, bank accounts, and other information could be through hand prints, eliminating unauthorized intrusions. We already have "smart houses" with central computers that offer the opportunity to videotape intruders while the computer calls the police or security service. Indeed, it may be possible to reach 100 percent certainty of detection through development of an ability to "read" scents, auras or other traces remaining in the air long after a person has left a certain space. My point here is that it does not take much of a stretch at all to develop scenarios of a virtually crime-free future that are quite plausible. Indeed, most of the technology already exists or is close at hand.

There is a problem with suggesting that we can eliminate crime by scientific and technological means, however. The problem is that as long as we keep thinking about crime as if it were some kind of real "thing," rather than something we have constructed, there is every reason to believe that we will just keep inventing other forms of crime as ways are devised to control existing forms. The possibilities for inventing crime are almost limitless. Your legislators are about to come into session; I am sure they will be passing a lot of new laws, making a lot of new things criminal. Indeed, many technological and scientific advances create natural opportunities for new criminalization. Many types of computer crimes have been discussed at this meeting. Consider the invention of "crack cocaine;" there is considerable potential to keep developing new drugs as rapidly as antidotes are found for old ones. We can keep inventing things that we can criminalize. In short, the problem is that as long as we hold on to the idea that crime is something that we need and want, it really is not sensible to talk about eliminating it in this first sense of which I have been talking.

That brings me to a second sense in which one can talk about eliminating crime, which centers on questioning the social utility of defining anything as crime. I ask you to think back to text book definition of "a crime." A crime is an act defined and made punishable by law. In essence, a crime is whatever the legislature says it is. Judges sometimes scold the lawmakers and declare that certain things cannot be made crimes, but by and large a crime is whatever we define or choose to call a crime. From this perspective, there is an opportunity to rethink the value of making any act a crime. Why do we so relish defining things as crimes? It appears that one reason we like to establish crimes is that we need crime so that we can blame and punish people. Consider the classic distinctions between civil law and criminal law. The aim in civil law is some kind of resolution, some kind of settlement or compensation. By way of

contrast, the aim or purpose of criminal law is to blame and punish. The textbook definition of punishment is the deliberate infliction of pain and suffering. In a legal sense we are talking about deliberate infliction of pain and suffering by the State as a consequence for having committed a crime. Pretty nasty business, deliberate infliction of pain and suffering. It is a business that is very much at odds with many of our basic human values and aspirations. And yet, as a society we seem to be relishing the nasty business of punishment more and more.

If we look at recent trends in the use of criminal punishment and simply extrapolate into the future, it presents a disturbing picture. In the last decade we have more than doubled the number of people in prisons and jails on a given day. Over the last twenty years, the confined population has quadrupled. Last year we spent \$7 to \$10 billion in constructing new prisons and jails and we are going to commit ten times that amount to operating them. With the rate of growth in incarceration that we experienced last year, we would have to build four new 500 bed-prisons a week just to keep pace with the level of overcrowding that now exists in our prisons and jails. We seem to have this tremendous taste for punishment, to relish it. And as one of the African-American legislators I know says, "our taste seems to be strongly in favor of dark meat." On any given day, one out of every four young, black, adult males in the United States is under some form of correctional control. We now have four times as many black men incarcerated in the United States as does South Africa.

This last year, 1990, marked 200 years of the penitentiary in the United States, an institution whose birth usually is dated to 1790 in Philadelphia. Use of congregate confinement as a principal means of punishing convicted felony offenders was an innovation embraced most enthusiastically in this country. There are signs of growing awareness today that prisons may present more of a social problem than the problems they ostensibly are intended to address. We seem to turn to imprisonment with a sense of futility and despair; we expect prisons to accomplish little of benefit and we are disquieted by the violence and other deprivations to which those who work and live within them are subject. And it is deeply disturbing to note the extent to which imprisonment is reserved for those society seems willing to regard as "expendable people," -- racial and ethnic minorities, the poor, the jobless, the uneducated and unskilled. Yet we find ourselves relying on incarceration more and more. Perhaps it now is time to question and rethink the whole idea of caging and confining as a primary response to crime. Indeed, perhaps we should question the necessity of blaming and punishing altogether. When I recovered from the "whack on the side of the head" that reading Graeme Newman's book delivered to me, I found it hard to avoid asking myself, "Well if the Wild West Model of tough, retributive justice is not my model, what would a model of ways of thinking about and responding to crime and conflict look like that I would find satisfactory?" That led me to begin thinking about what would it look like if we based our ideas about what we now call crime and conflict on feminist values, instead of the values that now predominate.<sup>2</sup> With increasing frequency, I am encountering other people who are seeking to develop alternative models, ranging from restorative to peacemaking paradigms.<sup>3</sup> My experiences at this conference also encourage me to think that here in Hawaii, you may be in the forefront in terms of willingness to engage in fundamental rethinking of the social utility of crime and punishment. I look forward to hearing your ideas and aspirations as you undertake the work of imagining totally different ways of thinking about crime and conflicts and new ways of responding to those problems.

## NOTES

1. Phil McNally, "Expanding the Public Mind: Illegal Drugs, Problem of the Past?" Justice Horizons (Volume 22, No. 1, 1990).
2. See M.K. Harris, "Moving into the New Millennium: Toward a Feminist Vision of Justice," in H. Pepinsky and Quinney, eds., Criminology as Peacemaking. Bloomington, Indiana, Indiana University Press, 1991.
3. See Mennonite Central Committee, Justice: The Restorative Vision. New Perspectives on Crime and Justice Occasional papers, Issue No. 7, 1989.

# **FUTURE FALL-OUT FROM THE GENETIC REVOLUTION**

by

**Robert Bohrer**

We are in the early years of a technological revolution based on advances in molecular biology and genetic engineering. The precise details of the future that will be shaped by these advances may be difficult to foresee, but it is inevitable that the future will be shaped by these advances. To a large degree, our general course has been established. Scientists' ability to manipulate genes is advancing with extraordinary speed. The Human Genome Initiative, a 15 year multi-national effort to unravel all of the genetic information that defines humankind, is well underway.

The road that we are now on leads to an Aladdin's lamp of unparalleled power, the power to genetically engineer humans, whether as early embryos or, as may be most difficult, mature adults. What we will choose to do with that power, or if we will choose at all, rather than being impelled blindly by the force of our own momentum, is the question we must begin to address now.

There has been considerable debate over whether the genetic engineering revolution is truly different from the major technological advances of past ages, whether we use as reference points the industrial revolution of the mid-nineteenth century; or the transportation revolution of the steam engine, the internal combustion engine, and the airplane; or the information revolution generated by the telegraph, telephone, radio, television and computer. Each of these has had enormous impact on the physical world in which we live and on the nature of our daily lives. I would argue that the genetic engineering revolution that is underway is fundamentally different. The choices that we face are different because the power that we are developing is the power to shape not merely the future of our external world but the power to change ourselves. We must decide not only what we shall do, but who and what we shall be.

Previous technological advances, even in reproductive technology, such as in vitro fertilization and surrogate motherhood, do indeed present perplexing philosophical, moral, and ethical questions, but those are questions that can be viewed within the context of a debate about what is good for humankind. Genetic engineering and human gene therapy raise in an unprecedented way the question of what is humankind. Our dilemma also has its literary reflections; our text is *Brave New World*. If we look 30 years into the future, Huxley's nightmare of alphas, betas and greenies, of human sub-species (not necessarily sub-human) engineered for different social functions, takes on a frightening resonance.

Whether our developing power is used for good will depend on the choices that we make, or more likely, fail to make. Based on the history of past technological revolutions, we will no doubt make some mistakes and discover the consequences only after they are essentially irreversible. My hope is that the unprecedented prior scrutiny to which human gene therapy is



being and will continue to be subjected, will make this the first technological revolution that is largely an unmitigated good.

In this paper I will begin with an overview of the technology involved and then use several possible future scenarios to discuss the potential legal and ethical issues that are likely to arise. Genetic engineering has been done since the early 1970's, with ever increasing efficiency and power. Genetic engineering is simply the ability to cut and paste DNA, the chemical compound of which genes are made. To "engineer" genes requires the ability to "read" DNA and to manipulate it.

DNA turns out to be very easy to read, because it consists entirely of a four "letter" alphabet (commonly A, G, T, C) arranged exclusively into 64 possible three-letter "words." In all living things the four letters of the alphabet are four substances known as nucleotides, and in all living things each of the 64 three-letter words, known as codons, either specify one of twenty-odd amino acids, or a signal to start or stop "reading."<sup>1</sup>

Proteins, which are a very large percentage of the structurally or functionally significant substances in all living things, are chains of amino acids. A gene can thus be thought of as a stretch of DNA which contains all the nucleotides which code for a particular protein. Thus genetic engineering allows us to create genes by stringing together the DNA sequences which controls them, or to move them from organism to organism or from species to species.<sup>2</sup>

Our rapidly increasing proficiency at reading and manipulating DNA has lead to the "Human Genome Initiative" (HGI), which is an ambitious, international effort to map (locate precisely on one of the 46 human chromosomes) and sequence (determine the order of nucleotides) each gene in the human genome (aggregate of the 46 chromosomes). There are approximately 3 billion nucleotides to be sequenced and 50 thousand to 100 thousand genes to be mapped. The time-frame for the genome project is approximately 15 years, contemplating completion by the year 2005.<sup>3</sup>

Substantial portions of the work of mapping and sequencing the genome will be carried out in laboratories in Europe and Japan, however, by far the biggest share of the work will be done in the United States. In the United States the HGI is being funded by two federal agencies, the National Institutes of Health (NIH) and the Department of Energy (DOE). Although the total amount to be expended on the HGI is expected to be \$3 billion, which makes it one of the larger scientific undertakings to date, the work itself is being done at numerous university and not-for-profit research laboratories, each working under its own separate, competitively funded, grant. Each laboratory involved is assigned a different section of one of the chromosomes.

Both of the U.S. agencies involved, the NIH and DOE, recognize that the consequences of the HGI will include a number of significant social, legal, and ethical problems. As a result, each of the funding agencies has committed to allocating a portion of its HGI budget to the exploration of those issues.<sup>4</sup> By 2005, when the HGI is scheduled to be completed, our proficiency at gene manipulation can also be expected to have increased exponentially. We will then know the normal and pathological variations for all human genes, and that will allow us to begin, first for diagnosis, and ultimately for treatment, some 4000 "genetic" diseases, from heart

disease to cancer. However, the true power to be confronted will be our ability to use our knowledge of the human genome in combination with our power to manipulate human genes, to treat genetic disease at the genetic level.

Gene therapy is the attempt to control one or more genetically determined functions in selected cells of living human beings. The first efforts at human gene therapy are currently underway and involve attempts at the treatment of serious, incurable, usually fatal, human diseases. The first attempt approved by the National Institutes of Health and the FDA involved a young girl suffering from Adenosine Deaminase Deficiency (the "bubble boy" disease).<sup>5</sup> These efforts are unquestionably worthwhile and ethical. They are also known as somatic-cell gene therapy, and are distinguished from germ-line gene therapy because they involve only the manipulation of specific body cells in existing persons and do not affect the patient's germ cells, thus avoiding the creation of heritable traits. The NIH has said that they are not prepared to fund research involving germ-line gene therapy because of the substantial moral and ethical questions raised.

It is clear, whatever the NIH's position on federally funding germ-line gene therapy research, that we have begun the process of manipulating the genetic material of human beings. Our immediate ends are unquestionably laudable. The issues will become far more difficult as our ability to perform such manipulations combines with our increased knowledge of the human genome. Again, the precise time-frame is subject to some debate, however the process has already begun and the over-all direction is perfectly clear. In the next fifteen years the human genome project will give us enormous information about the genetic control of human development and function. At the same time our ability to use that knowledge to manipulate those genetic characteristics will be developing rapidly. How will we use that unprecedented power is perhaps the most important question of technology policy humankind has ever faced. I will develop three scenarios to illustrate the seriousness and the complexity of the issues which lie ahead.

The first dilemma, which is already upon us, arises because our ability to diagnose and predict the consequences of particular genetic sequences is far ahead of our ability to treat or control those genetic sequences. In other words, we now have the ability to test for latent Huntington's disease and for some genetic susceptibilities to cancer,<sup>6</sup> but we cannot prevent either. The number of such conditions that can be diagnosed and predicted will explode during the next five years, and development of therapies will continue to lag behind.

In our first scenario, we can imagine a 22 year-old male who is applying for a job with a chemical company. Ought the employer be able to require, as part of his pre-employment physical, that his blood be drawn for the purpose of determining his susceptibility to cancer, heart disease or Huntington's? Assuming that he carries defective copies of the p53 gene, thus indicating he is highly likely to develop cancer, should he be kept out of an workplace environment that, although safe for "normal" individuals, has atmospheric levels of carcinogens which present a significant risk of cancer for him? Does he have the right to protect such information or to choose his own risk level? Can he be discriminated against in health or life insurance? The very nature and existence of the United States' system of private insurance will be directly challenged by these developments.<sup>7</sup>

In the U.S., the first "genetic susceptibility" workplace discrimination case has already been decided by the United States Supreme Court in the case known as UAW v. Johnson Controls.<sup>8</sup> Johnson Controls was a lawsuit filed under the U.S. federal law prohibiting various types of workplace discrimination by employers.<sup>9</sup> In Johnson Controls the employer sought to bar persons of child-bearing age with two X chromosomes (a long-established genetic predictor of susceptibility to the condition "pregnancy"), from areas of the workplace with high ambient air levels of lead. The employer's motivation was to prevent these genetically identifiable people<sup>10</sup> from exposing unborn children, during key stages of fetal development, to the teratogenic effects of lead exposure. The issue presented was one of equality in the workplace for a genetically vulnerable individual pitted against an employer's right to exercise a paternalistic concern for the employee or her potential offspring. The Court's decision was in favor of the employee's right to work, requiring that an employer show that the particular condition upon which discrimination was based would adversely impact the employee's ability to actually perform the job. Although the decision of the U.S. high court in Johnson Controls was necessarily grounded in the particular nuances of U.S. employment law, it serves to illustrate the potential for the HGI to raise the basic problem of deciding between individual choice and genetic discrimination, even when that discrimination is benevolently motivated. Thus Johnson Controls may well have some precedential effect on the issues of genetic discrimination on the basis of health-risk versus employee rights of privacy and choice, and the concept of occupational qualification,<sup>11</sup> as the HGI identifies numerous traits less widely distributed than the potential for motherhood.

The second scenario I would ask you to consider is somewhat further in the future. While the battles over genetic privacy and genetic discrimination in employment and insurance are inevitable and near-term, battles over access to gene therapy await the refinement of that technology over a somewhat longer term of ten to fifteen years. It is virtually certain that within that time-frame we will develop the ability to treat, by preventative or ameliorative gene therapy, a variety of single-gene-defect retardations, pathologies, and susceptibilities.<sup>12</sup> The problems we will then face will require us to draw extremely fine lines between what parents may choose for their children and what parents must choose for their children.

Consider the future problem of parents who refuse to allow their Downs syndrome child to be treated to allow "normal" intellectual development. Or, instead of retardation, let us consider a treatment for a genetic abnormality that is very likely to lead to cancer by age 40 if untreated before age fifteen. To move one step further along the disease/genetic variation continuum, assume the genetic variation found is one that is associated with a 40% risk of heart disease before age 60. Finally, assume that rather than profound retardation, the problem is a susceptibility to dyslexia, or another learning disability which impairs, but does not bar, "normal" educational development. At what point does the interest of the state in the welfare of the child allow intrusion into parental control? For that matter, what if the parents disagree?

This same scenario forces us to ask what is the extent and nature of abnormality that we will consider sufficiently pathological (or, by definition, disease) to require intervention, where the resulting conditions are not imminently life-threatening? What, if any is the weight to be given to the preservation of human genetic diversity? We would not mourn the disappearance of Huntington's disease, but should we welcome a significant narrowing in the existing range

of life spans, or intellectual capacity? The traditional inquiry as to whether a particular parental choice concerning a child's medical treatment rises to the level of child abuse or neglect<sup>13</sup> is a very hazy guide to the solution of these problems. It is not the purpose of this paper to answer these questions, but to point to their appearance on the horizon and to the need to begin the development of a legal and ethical framework within which satisfactory answers may be forthcoming.

The third and final scenario is at the farthest and most speculative end of our future technological perspective, much closer to the limits of our "2020" vision. At that time, we may be likely to have developed a reasonable proficiency at controlling the development of a number of significant natural characteristics related to general health and intellectual function.<sup>14</sup> We will be able, technologically, to provide parents with the means of ensuring not only that their child will be free from pathological variation (however that is defined in response to scenario number two) but also, in some cases, that their child's development is significantly above the normal median in health and intellect.<sup>15</sup> The technology for creating the six-million-dollar baby will exist, but it will assuredly not be available in the five-and-ten cent store.<sup>16</sup> What will be the right of the poor to access to such technology? Can we afford to pay for the genetic enhancement of all? On the other hand, can we afford to create a society in which the rich not only get richer, but smarter and healthier; in which the poor not only face economic obstacles to advancement, but genetic obstacles as well?

If private health insurance as an institution survives the current crisis in health care costs and the future crisis of genetic testing, surely it will be further threatened by the subsequent crisis of genetic enhancement therapy.<sup>17</sup> Although the U.S. Constitution affords the poor no protection against the invidious discrimination of the market-place, any possible legislative responses to controlling or distributing access to this technology will create innumerable problems for the courts of the future. Legislative inaction will lead to social divisions that imperil the basis of social cohesion. If a future legislature responds to the issue with a ban on such technology, the truly wealthy will find "bootleg" genetic enhancement available at a price elsewhere. Should a future legislature attempt to provide it within a limited framework, the disputes that arise will likely overwhelm the courts and administrative agencies responsible for the program.

What then, might be done to prepare for the problems which lie just around the corner? There are no easy answers to these problems. No amount of work by high-level commissions of scientists and ethicists can resolve these issues to the satisfaction of everyone else. Perhaps that does provide us with at least somewhere to start. If we are compelled to face these questions, both collectively and individually, we would be well-advised to begin the process of education and consensus-building now. It is never easy to answer the question "what do you want to be when you grow up?" How much more difficult it is when the question is addressed not just to an individual, but to humanity as a whole. Yet answer we must, for there is no turning back. The gen(i)e is already out of the bottle. We best begin preparing to make our three wishes as best we can.

## NOTES

1. DNA consists of two complementary strands in which the nucleotides on one strand are paired with their complements (an A is always paired with a T, a G with a C). The pairing of complementary nucleotides is what allows a strand of DNA to be replicated, and the replication of DNA in the process of cell division is the basis of inheritance. Every cell of a human being or other multi-cellular organism contains exactly the same DNA. What distinguishes a skin cell from a heart muscle cell is the regulation of which genes are expressed and in what proportions.
2. The first product of genetic engineering to reach the market was Genentech's recombinant human insulin, or "human insulin" produced by bacteria into which the human insulin gene had been inserted and expressed.
3. Two good general references on the Genome project and the basic science involved are National Research Council, Mapping and Sequencing the Human Genome. Washington D.C., National Academy Press, 1988 and Bishop and Waldholz, Genome, New York, Simon & Schuster, 1990.
4. Two of the earlier grants of this type resulted in workshops, the results of which are published. See D. Karjala, "A Legal Research Agenda for the Human Genome Initiative," Jurimetrics (Winter 1992), 121-222; and A. Teich and M. Frankel, eds., The Genome, Ethics and the Law. Washington, DC, American Association for the Advancement of Science, 1992. The author of this article was an invited participant at the Arizona State University workshop summarized by Karjala.
5. See N. Angier, "With Direct Injections, Gene Therapy Takes A Step Into a New Age," New York Times (April 14, 1992), Section C, 3. The child lacks a functioning copy of the gene which produces a particular protein essential to the synthesis of complete antibodies, and thus has no working immune system. Her white blood cells are removed and the gene inserted into those cells. The altered cells are then cultured to multiply many times in number then reinserted into her blood to create a functional immune system. Preliminary assessments are that the experiment is working, although the process involved will need to be repeated several times yearly. The second human gene therapy experiment involves an attempt to treat a late-stage cancer, by genetically engineering the patient's naturally occurring cells, known as tumor infiltrating lymphocytes, to produce large amounts of a protein known as tumor necrosis factor, in an effort to destroy the cancerous tumor.
6. There are now known to be at least 100 genes which can be classified as oncogenes, or genes which can, by over or under expression, lead to cancer. We are just beginning to be able to detect and predict the consequences of the first two or three of the 100 or more oncogenes.
7. The development of increasingly accurate genetic tests for disease potential will rip apart the basic framework in which private insurance markets operate. Purchasers have always sought insurance to spread their risk of incurring individually overwhelming costs--whether of illness or early death. Insurers have always sought, within the limits of their actuarial science, to assign and limit risk by charging premiums that reflect as much as possible about the insured's actual risk level (e.g. higher premiums for smokers or persons with high blood pressure). Although the private insurance market is increasingly strained, the limits of what can be known about an individual's actual risk level prevents "perfect" underwriting and allows the insured to spread risk among a group of insureds who in fact experience different loss patterns. Some are sicker, some live longer, and the premiums of the 'healthier-than-average' are used to subsidize the loss experienced by the less healthy- than-average. With the progress of the genome project the level of actual uncertainty will be so far reduced as to collapse the ability to spread. The underwriter, if afforded access to this knowledge, will subcategorize all "p53" mutants in such a way as to reflect their virtual certainty of contracting cancer by age 45, requiring them to pay premiums that cover 100% of their expected disease costs (plus the insurer's overhead and profit), by the median age of onset of disease, approximately age 27. The cost of such premiums would mean that this group of p53 mutants are not truly

"insured" at all--they would simply be subscribing to an expensive (because of overhead and profit) self-insurance scheme.

8. UAW, et al., v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991).

9. The Civil Rights Act of 1964, 42 U.S.C. §2000 et. seq.

10. Of course persons with two X chromosomes are genetically identifiable, however, in most cases they are most easily identified phenotypically (that is, by the outward manifestation of the genes in question) as women.

11. The U.S. employment law permits discrimination against individuals where the basis of the discrimination is a "bona fide occupational qualification" (bfoq), that is, the criteria which results in the discrimination is one which measures an attribute which is truly necessary for proper job performance. Thus, in Johnson Controls, the child-bearing capacity of the employees who were discriminated against did not in fact constitute a bfoq, because it did not impair their ability to actually do the job.

12. Interview with Dr. Dennis Carson, University of California at San Diego, a leading researcher in the field of gene therapy.

13. See H. Krause, Family Law in a Nutshell. Minneapolis, MN., USA, West Publishing Co., 1986, §14.10, 202-203.

14. The genetic manipulation of mammals is already well-established. The first such patent was issued for a genetically engineered mouse species, created when a gene responsible for a variety of human cancers was inserted into fertilized mouse embryos. A number of the offspring expressed the gene as a stable heritable trait, establishing a line of such mice used for research purposes, and subject to a patent. According to a recent speech by the Commissioner of the U.S. Patent and Trademark Office, Harry Manbeck, there are now 120 such patent applications pending for non-naturally occurring, non-human animals (40 PTCJ 387 (1990)). The Patent Office has stated that it will not issue patents for genetically engineered human beings, however, the lack of those proprietary rights will not preclude patents on the processes or materials involved in human genetic engineering or diminish the market for such services. The continued progress in the human genome project and in gene therapy will combine to offer us an increasing power over our own genetic future.

15. One of the arguments that might be raised against the likelihood of this scenario is that a great many important traits may be polygenic, or involve several genes, and the completion of the genome project per se does not necessarily entail the understanding of the processes of gene interaction and regulation which determine such polygenic traits and other important genetic events. Nevertheless, I feel that looking 15 years beyond the genome project, or by the year 2020, we will have developed both the basic knowledge and the technology required to control, to an important degree, a number of significant traits, relating to general health and susceptibility to disease, as well as to human performance, both physical and intellectual. Such control is likely to be more technically feasible with respect to unborn persons, via manipulation of in vitro fertilized embryos, than with post-partum children or older persons. See note 8, supra.

16. Cf. B. Rose and M. Dixon, "I Found My Million-Dollar Baby in the Five-and-Ten-Cent Store," from the Musical "Crazy Quilt" (music by Harry Warren), Warner Brothers, 1931.

17. Under either the U.S. system of privately funded health-care, or the European system of state funded health-care, the same problem will exist as to the permissibility of the wealthiest citizens opting out of state or insurer determined limits on gene enhancement, in order to pay for such procedures privately.

# **THE FUTURE OF FAMILY COURT, REPRODUCTIVE TECHNOLOGY AND OTHER ISSUES**

by

**Frances Wong**

After reviewing the biosketches of the other panelists, I have decided that the less I say about actual technical developments the better so that I won't expose just how much I do not know. Suffice it to say that in this area of reproductive technology, much is already possible, much more will soon be possible and that the Family Court and the Judiciary will be participants in the inevitable disputes one way or another. I come here today to suggest a couple of scenarios for your discussion.

In an article I had prepared for "Justice Horizons" in the summer of 1990, I constructed a hypothetical involving a "surrogate" mother who gave birth to triplets, all genetic products of a married couple. Many legal complications arose out of the facts. I'm sure it gratified the publication's editor, to have read that one of his "feature trends" had a real life counterpart in a recent Orange County case wherein a judge awarded a baby boy to his genetic parents, the Calverts, rather than his "surrogate" mother, Anna Johnson.

Before the court, Ms. Johnson's attorney argued: "You are looking reality straight in the face and you see three parents. The question is, will you blink and turn your head? Would King Solomon solve a three-parent problem by assassinating one of the parents? You have no right to play God." In closing, this attorney gives us some insight into the "maybe" of why he lost: "And so, King Solomon, what will it be? I give you three parents and a gun. Tell us your wisdom."

In his decision, Judge Parslow likened Ms. Johnson to a foster mother and found that a "surrogate carrying a genetic child for a couple does not acquire parental rights." He further found that even if parental rights existed, "that in this case they were relinquished by the gestational carrier" (the judge was apparently referring to the surrogate agreement).

Where will this trend lead to? And, is it inevitable that the trend involve the judiciary for dispute resolution? As sympathetic as I am to Judge Parslow's ultimate decision, I find disquieting the many assumptions that he needed to make--not the least of which is that "ownership" of the child's genetic blueprint somehow has a supremacy over the gestational "work" in the child's production.

Those of us in the legal profession are sometimes accused of being short on imagination and, in the area of "foresight", imagination is key. I turn then to the area of literature and to an author who has affected the lives of millions. I think you'll recognize him immediately because of his distinctive style:

Sighed Mayzie, a lazy bird hatching an egg:  
'I'm tired and I'm bored;  
And I've kinks in my leg  
From sitting, just sitting here day after day  
It's work! How I hate it!  
I'd much rather play!  
I'd take a vacation, fly off for a rest  
If I could find someone to stay on my nest!  
If I could find someone, I'd fly away--free...'

Dr. Seuss wrote those opening lines in 1940 in Horton Hatches the Egg, a story of a faithful elephant--"surrogate" if you will--who sits on that egg through a terrible storm, a freezing winter, taunting friends, extreme loneliness, being kidnapped and sold to the circus to end up in a peep show. Horton brings that egg to term just as Mayzie serendipitously flies into the circus tent and reclaims the hatching egg. That egg hatched into an elephant-bird and the story ends on a triumphant note with Horton and the baby going home together:

And it should be, it should be, it SHOULD be like  
that!  
Because Horton was faithful! He sat and he sat!  
He meant what he said  
And he said what he meant....  
....And they sent him home  
Happy,  
One hundred percent!

What was it that allowed Horton to "win" and not Ms. Johnson? Was it that Mayzie was lazy and Ms. Calvert (the genetic mother) merely unable? Couldn't we find a certain amount of "laziness" in bypassing adoption? Was it that Horton was all ready to step down off that perch in Mayzie's favor? And, what role does the Judiciary have in deciding? Should Dr. Seuss have written in a judge at the ending?

In Geoffrey Fletcher's article "Key Concepts in the Futures Perspective," the notions of "alternative choices" and "purposeful action" were explained. Fletcher describes the concept of not one future but "a panoply of alternative futures" and that "choosing among alternatives is a necessity (and refusing to choose is itself a choice)."<sup>1</sup> "Purposeful action" can be described as exerting pressure on different points of a fulcrum which deflects the future to different directions.

I firmly believe that the judiciary must remain intentionally active in this area of "Judicial Foresight" and that this activism must be expanded in the area of reproductive technology. Without invading the provinces of the legislature and the executive, we must seek to generate community dialogue as well as to structure the discussion, helping the community to choose positive "alternative choices" by pushing on different points of the fulcrum.

Specifically, I believe that we must help the community to avoid looking to the judiciary



as the final arbiter of these disputes as well as to avoid a "quick fix". Let me give you an, what is for me--chilling, example.

In the wake of the Baby M case, the Iowa legislature contemplated various options. One option required the following:

...the intended parents must petition the court for judicial approval of the agreement, undergo an examination to ensure that they are making an informed decision, undergo counseling, agree to pay all costs and expenses incurred by the surrogate, compensate her justly and reasonably, and provide the surrogate with a term life and health insurance policy. The intended father must undergo medical testing prior to the donation of his semen, and both intended parents must agree to accept full responsibility for the child upon its birth.<sup>2</sup>

Those of us who have experienced the "fluidity" of "informed decisions", the sometimes questionable usefulness of counseling and the futility of enforcing agreements to be responsible for children, have an obligation to find that point on the fulcrum that deflects the community away from this sort of "solution" which does not adequately address the issues but may give the impression that everything now will be fine. Part of our job is to question assumptions, particularly about the role of the judiciary and the efficacy of the status quo, as well as to help the community to steer clear of inflexible black-letter law and laws and systems which have no feedback loop and/or do not respond to feedback.

I now offer two different scenarios when looking at the "future of Family Court" in two related areas--medical decision-making and child custody disputes.

In the area of medical decision-making, the case of In re A.C. was recently settled and offers what I consider to be a marvelous model for dispute resolution.

In re A.C. is every Family Court judge's nightmare. George Washington University Hospital had a dying pregnant woman on their hands. They petitioned for and received the "permission" to perform a "C" section. The woman died and the baby died within hours of birth. The trial court's decision was overturned on appeal and the case was remanded. The case was settled thereafter.

The settlement agreement (received from Lynn Paltrow, Esq., one of the counsel involved) describes a formal policy change to be made by the hospital, "emphasizing that it will rarely be appropriate to seek judicial intervention to resolve ethical issues relating to a patient's decision". Appendix B to the agreement contained proposed revisions to the hospital's informed consent practice and included the following excerpts:

Recourse to the courts is generally unnecessary for and often detrimental to the protection of patient rights. It is never justified to protect institutional interests...Judicial review is time-

consuming; it can disrupt the process of providing care for a patient since decision-making is evolutionary rather than static ... and can force patients and physicians into adversarial roles...For these reasons, a judicial proceeding is the least desirable manner to obtain authorization for treatment and should be utilized only in the absence of other surrogates.

It may be important for you to know that the American Civil Liberties Union was instrumental in this settlement agreement--certainly no stranger to the use of the courts as battleground!

The entire settlement agreement and the statements made by all the participants echo the many points made by Joseph Coates in "The Future of Law: A Diagnosis and Prescription," an article in Judging the Future, edited by James Dator and Clement Bezold containing papers from the "Conference on the Futures of the American Legal System." Although I do not subscribe to every one of Coates' sometimes extreme and often strident indictments of the system I am a part of, I do agree that our present legal system is not yet well-equipped to assist the community in stability insofar that "to meet the goal of stability there is a fundamental need for forecasting, flexibility, and feedback."<sup>3</sup> At least in the medical decision-making area, the In re A.C. agreement stresses Coates' statement that "[l]aw and common sense are not just drifting apart; they are in explosive flight from each other."<sup>4</sup>

The scenario presented by the settlement is one I would suggest. The scenario includes strong policy statements about hospitals and patients, changes in hospital procedures, a strong ethics panel, a procedure for obtaining findings of incapacity without resort to the courts as well as a strong policy statement against use of the courts.

The second scenario which I would suggest as food for thought is to take the responsibility of making child custody decisions away from the court and creating a community wide "child custody council" made up of paid, appointed and trained professionals who serve for fixed terms. Flexibility and response to feedback will be an integral part of this council although notions of permanency, developed by the courts over the past several years, should not be quickly abandoned. I suggest NO recourse into the judicial system.

Mayzie and Horton and Ms. Johnson and the Calverts were engaged, at bottom, in custody disputes. I suggest that all such disputes, no matter how the baby was "produced", would go to this Council and that we not allow such legal notions as "specific performance", "consideration" and "enforceable contracts" to denigrate human life into a consumer product.

Do you know why Dr. Seuss did not write in a judge character at the end of his story? First, because the book would have been twice as long, at least (and it would not rhyme). Second, because the judge was not necessary to reach the right result.

## NOTES

1. Geoffrey Fletcher, "Key Concepts in the Futures Perspective," World Future Society Bulletin (January-February 1979), 29.
2. "Legislating Surrogate Parenting Arrangements in Iowa, the Aftereffects of the 'Baby-M' Decision", 38 Drake Law Review 103 at 125 (88-89).
3. James Dator and Clement Bezold, eds. Judging the Future. Honolulu, Hawaii, University of Hawaii, 1981, 52.
4. Ibid., 44.

# **THE FUTURE OF CULTURAL FORMS OF DISPUTE RESOLUTION IN THE FORMAL LEGAL SYSTEM**

by

**Sharon Rodgers**

## **INTRODUCTION**

The United States is experiencing a rapid and comprehensive change in demographic makeup. Birth and in-migration rates among different ethnic groups are changing and whites no longer comprise a majority in a number of communities. Many of the fastest growing in-migrating populations come from evermore different cultural backgrounds from those historically found in the US. And, yet, the legal system underpinning so much of our society continues to be based on European Judeo-Christian values which may now and in the future no longer be appropriately representative of the citizenry. Perhaps a reassessment of the validity and efficacy of our judicial system is in order.

A project led by the Hawaii Research Center for Futures Studies (HRCFS) in 1989-91 explored some of the issues of demographic change and the potential for greater use of cultural forms of dispute resolution. The project proposed that as the cultural makeup of a society becomes more diverse the types and variety of conflicts may also change. It may then be useful to reexamine the formal and informal modes of conflict resolution currently used within that society with a view to pro-actively preparing for future changes and, at the same time, seeking new ways to reinvigorate a legal system which has lost some of its public support. Under this approach, incoming cultures can be seen not as wells of increased divisiveness but as resources to be plumbed for fresh inspiration on appropriate forms of dispute resolution.

This paper provides an overview of the work done on this project by a team of futurists, conflict resolution experts, legal consultants, anthropologists, videographers, and others at the University of Hawaii and the Hawaii Judiciary and concludes with recommendations made to the Hawaii Judiciary for further action.

## **BACKGROUND**

In 1989, the HRCFS received funding from the State Justice Institute (SJI), a federally-financed, non-profit agency supporting research relating to state judiciaries, to look at Demographic Change and Culturally-Appropriate Dispute Resolution Techniques for the Hawaii Judiciary. A research team made up of futures studies researchers, judicial personnel, alternative dispute resolution experts and others was put together to work on the question of whether cultural forms of dispute resolution--particularly those native to the increasing in-migrating populations--might not be usefully incorporated into the formal US legal system(s). Because of the existing and constantly evolving number of different ethnic

groups in Hawaii, it was felt that the mixed community in Hawaii might provide valuable insights into future issues on the US mainland.

The work was carried out in six major task areas: (1) an analysis of possible future ethnic demographic changes and their potential impacts on conflicts and conflict resolution in Hawaii and the United States; (2) a review of legal precedents relating to consideration given to culture in the United States' legal system; (3) a review and annotated bibliography of dispute resolution processes in the Asia/Pacific region; (4) an analysis of videotaped discussions regarding cultural forms of dispute resolution patterns and preferences in Hawaii; (5) an opinion poll of major judicial, legal, business, and community leaders regarding different future approaches to incorporating cultural forms of dispute resolution into the Hawaii judicial system; and (6) recommendations to the Chief Justice of the Supreme Court regarding the potential for incorporating changes.

## **ANALYSIS OF DEMOGRAPHIC CHANGES**

The principal focus of this task, completed primarily by Wendy Schultz, a futurist and political scientist, was on gathering data on current and future projections of ethnic composition and immigrant groups in Hawaii and the United States. This information helped the project team to decide which ethnic groups in Hawaii would be most pertinent to study regarding cultural approaches to conflict resolution. A secondary aspect of this section was to look at possible impacts of these demographic projections on patterns of conflict. A final section identified some trends and events which might dramatically alter patterns of immigration, demographic projections, and expectations of future conflicts, and sketched a series of possible scenarios.

Several different approaches were used. Information and projections were culled from a variety of sources including statistical abstracts and compiled to show how demographic changes might occur. The second section analyzed the impact of factors affecting cross-cultural assimilation and conflict (such as level of language acquisition and age at time of immigration) and then used information on criminal arrests vs. ethnic background combined with interviews with sociologists to give an idea of the kinds of links that might be made. The final section was based on the results of a mini-futures workshop (with the core futurist team) to develop possible immigration scenarios with attendant implications for the futures of conflicts.

The results uncovered that the fastest growing source of immigration to the US was from the Asia/Pacific region and that the current situation regarding immigration from these areas in Hawaii might very well serve as a bellwether of changes to come on the US mainland. In addition, patterns of disputes could change as there is some evidence linking cultural backgrounds and kinds of disputes. Finally, global changes could have dramatic impacts on worldwide immigration and consequently on types of conflict and forms of dispute resolution required--these must also be taken into account.

## **OVERVIEW OF LEGAL PRECEDENTS**

The purpose of this second task was to provide background material on legal precedents for incorporating cultural forms of dispute resolution into the US formal legal system. Our legal system is founded on "equal treatment under the law" and exceptions to this concept which would allow differential treatment or processes based on cultural differences are relatively uncommon. However, labor groups, religious establishments, Native American tribes, and United States territories in the Pacific have all been allowed to practice some forms of dispute resolution free from immediate intervention by the US legal system. In addition, the more recently developed "cultural defense" has suggested that there is some precedent for legal recognition of cultural difference in deciding court cases as well as in deciding the legitimacy of dispute resolution processes outside the formal legal system.

Brent Barner, a researcher in the political aspects of alternative dispute resolution, conducted the bulk of the work on this subject. He conducted a literature review and analysis of legal precedent related to these topic areas and reflected on ways in which cultural forms of conflict resolution might be incorporated.

Evidence was found of specific precedents both in the recognition of culture as a mitigating factor in resolving cases (i.e., the cultural defense) and in granting a degree of autonomy to some groups (Native Americans and Pacific Islanders, for example) in using traditional laws and dispute resolution techniques. Barner also pointed out two specific approaches that might be immediately used to advance the argument for recognizing alternative forms of dispute resolution as legitimate: consensual agreement contracts and changes in the interpretation of law. Under the former, groups might choose to form a contract agreeing to be bound by certain rules and dispute resolution processes, and under the latter, different dispute resolution techniques might be allowed if unconstitutional bias in law and process could be shown (i.e., through disproportionate incarceration rates.)

## **REVIEW OF DISPUTE RESOLUTION IN ASIAN/PACIFIC COMMUNITIES**

This third task was designed to provide additional insight into dispute resolution techniques in the Asia/Pacific region. It was intended as a background for and complement to the following task which directly interviewed users of different cultural forms of dispute resolution.

In completing the bulk of work on this section, Christopher Jones, a futurist and political scientist, expanded on the project team's question of "whether there is only one method of resolving disputes in any society, or whether it might be more fruitful to look at specific kinds of disputes and the specific techniques used to resolve them." Jones conducted an extensive literature review on forms of dispute resolution particularly in Asia and the Pacific and interviewed experts in the field for additional information.

Jones proposed a typology of characteristics of dispute resolution techniques which can help structure any research exploring similarities and differences between forms of conflict resolution. In particular, his typology can also help determine variable as well as

invariable factors to be considered in assessing different processes. In many cases, dispute resolution techniques cannot be transplanted from their native communities into more Western settings (which many of the mediation/neighborhood justice center activists of the last 30 years have found to their dismay). Issues requiring consideration include ones of formality vs. informality, rural vs. urban location, agricultural vs. industrial nature of the society, cultural worldview, questions of proximity and distance, power relations in a community, voluntary vs. coercive nature of the process, emphasis on authoritarianism vs. participation, and cross-cultural issues in non-homogeneous populations.

## **INTERVIEWS ON PRACTICES AND PREFERENCES IN HAWAII**

The fourth task in the project was to gather information on actual dispute resolution techniques and preferences in Hawaii.

After rejecting several approaches, all of which had unacceptable methodological biases, the project team decided on a series of minimally-structured interviews that would allow participants to freely describe their practices and preferences regarding conflict resolution in a conversational mode. The design of this section was greatly advanced by assistance from Neal Milner of the Program on Conflict Resolution at the University of Hawaii and Peter Adler from the Hawaii Judiciary's Center for Alternative Dispute Resolution. With advice from these and other dispute resolution experts and Jo Scheder, an anthropologist accomplished in the use of ethnographic video techniques, the team developed a procedure to: (1) select interviewees from four different ethnic groups, (2) show each group three sets of brief slide series showing silhouetted figures in situations of possible conflict or sources of conflict, (3) loosely structure a discussion on each set of slides within each group, and then (4) analyze the videotaped responses to identify areas of convergence and divergence in practices and preferences.

Based on the results of the demographic analysis and review of conflict resolution processes, small groups of interviewees from Filipino, Hawaiian, Korean, and Samoan communities were selected. Participants were not selected as part of a representative sample but were chosen to maximize discussion and to provide some insight into the range of opinion and practice in these communities. The three slide series presented three different situations which might be interpreted to represent conflicts involving violence, family relationships, and property. Interviewees were videotaped discussing what had happened in each slide series, whether a dispute was involved, how the dispute might be resolved in their home communities, whether the police might be called, etc. The over six hours of raw tape which resulted was analyzed for content and then edited into two half-hour videotapes on "Perceptions of Conflict" and "Settling Disputes." Jo Scheder led the analysis and video production, assisted by the core HRCFS team, especially Jim Dator and myself. (An additional session conducted the same interview process with twelve Hawaii state court judges but due to the timing these responses were integrated only into the "Perceptions of Conflict" tape).

The project team was surprised more by the similarities of experiences and values than by the differences between them. Family is obviously still a strong factor in

determining dispute resolution approaches for the members of the groups we interviewed, although it is increasingly difficult to maintain nuclear and extended family structures. The community also plays a role in dispute resolution for these groups, although not as strongly as in their home communities, and a choice of conflict resolution technique (especially calling the police) may rely heavily on membership in the community as well as type of conflict. New forms of dispute resolution may very well be developed through analysis of some of the core features of these cultural forms.

## **POLLING REGARDING POSSIBLE FUTURES**

The fifth task was to develop a sense of the range of judicial, legal and community opinion regarding the desirability of incorporating cultural forms of dispute resolution into the formal legal system in Hawaii. In January 1991, the HRCFS team made a presentation on the project and showed the second of the two videos described above to the participants of a Judicial Foresight Congress which included Hawaii's Supreme Court justices, State judges, members of the Bar, key Judiciary staff, legislators, academics, and members of community interest groups. Sohail Inayatullah of the Hawaii Judiciary futures section was instrumental in assuring the success of this portion of the project. Following a panel presentation and discussion of the SJI project, Congress participants were asked to indicate their preferences concerning culturally-appropriate dispute resolution techniques and the Hawaii Judiciary.

The participants in the Foresight Congress were given ballots which contained several different statements regarding the future of culturally-appropriate forms of dispute resolution. They were asked to choose the one which came the closest to their view. Below are the ballot choices, with the percentage of participants favoring each option.

Culturally-appropriate dispute resolution techniques ought to be incorporated into the judiciary and ought to replace the current adversarial system in most situations. [9%].

The Hawaii Judicial Foresight Commission or the Annual Judicial Conference, as appropriate, ought to prepare recommendations for having culturally-appropriate dispute resolution procedures be accepted by or incorporated into the formal judicial system [62%].

Although I am sympathetic to letting people use their own culturally- appropriate modes of settling disputes, the formal legal system ought not to be involved [17%].

We ought to be focusing our energies on making sure that current laws are administered fairly to all groups regardless of cultural background rather than risking even more unequal treatment [12%].

Culturally-appropriate dispute resolution techniques of this sort discussed today have no place whatsoever within the formal judiciary. There is no need for the Hawaii Judiciary to consider this matter further [0%].

As Jim Dator noted in his final report on this project to the Chief Justice of the Hawaii Judiciary, seventy-one percent of the participants favor culturally-appropriate dispute



resolution techniques playing a larger role in the formal judicial system. He also points out that eighty-eight percent are sympathetic to the use of culturally-appropriate techniques, if we include those who feel that people should be able to use their own processes, although outside the judiciary. No one voting felt that these procedures have "no place whatsoever within the formal judiciary."

## **RECOMMENDATIONS**

Based on the research outlined above and the results of the polling which took place at the Judicial Foresight Congress, the research team recommended that the Chief Justice of the Hawaii Supreme Court appoint a committee to suggest appropriate action to incorporate culturally-appropriate dispute resolution techniques into the Hawaii Judicial system "as quickly and effectively as possible." Furthermore, in order to gather additional information, the project team suggested the establishment of a pilot project using several locally-viable, culturally-appropriate dispute resolution techniques. Cases might be assigned randomly--as is currently used for testing arbitration and mediation schemes--and criteria developed for and statistics gathered on "resolution effectiveness." Although cases would be assigned without regard to ethnic background, information would be gathered on resolution effectiveness correlated to ethnic group to detect patterns of success or failure in relation to specific techniques.

## **FUTURE WORK**

The time is now ripe for continuing futures work in the US in the judicial/legal field especially in the face of current and upcoming cultural change. The national conference on the Future and the Courts in San Antonio in 1990 reinforced many of the reasons for this timeliness. Judges and other judicial personnel and legal experts, especially those associated with the family courts, are increasingly aware of the inappropriateness of the current adversarial system for resolving many disputes. Courts are also now faced with many social issues previously determined by legislative and executive bodies which can no longer cope with long-term change of the scope now occurring (especially within the narrow confines of the 2-4 year re-election time-frame). Exacerbating the problem is an increasing dissatisfaction with and even distrust of the current legal system which is growing in the public arena (measured perhaps by the increasing frequency and viciousness of "lawyer jokes.") Courts are focusing more sharply on the inclusion of a broader cross-section of the ethnic communities in judicial personnel as a way of enhancing access to justice. In addition, some courts have begun experimenting with the concept of the "multi-door" courthouse encompassing a variety of different dispute resolution options. All of these factors create a fertile ground for futures work.

This project suggests one model based on integration of a panel of interdisciplinary experts. Given a core group of futurists with some expertise in different aspects of this project, we were able to bring together a number of different areas of expertise and perspective to create a truly interdisciplinary process. One of the greatest assets that a futures studies approach can bring is its placement of a single issue within a "big picture" view of changing societies. However, within this big picture approach it is important to

establish ways of gathering information which can inform that big picture as it moves into the future(s).

In keeping with many other futures works, this project presented a variety of information and possibilities without privileging any one (which can be a difficult approach to justify in a field where strategic planners have set the precedent for expert advice and professional recommendations setting forth single answers). Instead this project has attempted to stimulate people's creativity and consideration of future possibilities and then prepare a set of building blocks that may prove useful in constructing alternative futures. But it is not for the futurists to determine which building blocks are used, or in which combination or even if they are used at all--that is for the constructors of the new future. However, by encompassing an interdisciplinary approach, and providing for the inclusion of substantive experts in a variety of topic areas, a futures studies approach can increase the number and usefulness of building blocks.

# **CULTURE IN TRANSITION: THE CHANGING ETHNIC MIX IN HAWAII AND THROUGHOUT THE U.S.<sup>1</sup>**

by

**Wendy Schultz**

## **INTRODUCTION**

As a nation built by emigres, the U.S. historically represents people's ability to work together despite cultural differences. Nonetheless, those differences do erupt into conflict. Much of the flexibility designed into U.S. political, economic, and judicial systems may be an implicit response to initially wide variations in its citizens' values. Over the last three hundred years, those values have converged into something approaching a U.S. culture.

It is this culture which must assimilate new immigrants, and to which they must adapt. Old, traditional cultures are very exclusive in the behavior patterns considered appropriate and permissible: they tolerate, or prescribe, very narrow band of behavior for each social position. The United States, on the other hand, has one of the most inclusive cultures in the world. We consider a comparatively wide band of behaviors to be acceptable. We also are much more willing to negotiate the acceptability of an unknown or innovative behavior than are many cultures.

When an exclusive and an inclusive culture interact, it can result in misunderstanding and conflict. New immigrants and their communities will find their cultural patterns and mores in conflict with current social and legal norms in the United States as they build a niche within U.S. society. When immigrants conflict with the U.S. legal code, the result may uncomfortably shoehorn an unfamiliar cultural set into an inappropriate system of justice. What results is neither anything approaching what anyone involved would call "justice" nor a resolution of any attendant disputes.

This essay considers possible future changes in the United States' cultural mix, and possibilities for conflict that might arise from those changes. The section, "Ethnic Demographics in the U.S. as a Whole," reviews projections of current trends in immigration and population growth among Asian-American communities. These statistics are then compared to current Hawaiian population and ethnicity figures. Hawaii is offered as a bellwether for possible future demographic and cultural transformations due to its unique historical experience in absorbing waves of Asian-Pacific immigrants. We also discuss two possible factors contributing to cultural assimilation and cultural conflict. The last two sections discuss future scenarios: possible changes in the future of immigration internationally, and possible changes in the nature of disputes and conflict.

## ETHNIC DEMOGRAPHICS IN THE U.S. AS A WHOLE

The population of those classified "other races" by the U.S. Census Bureau grew at a much more rapid rate (52.2%) than either "black" (11.4%) or "white" (5.7%) between 1980 and 1987. Between 1985 and 1988, the average annual rate of growth in the U.S. population of "other races" was 4.9 percent (Table I). These trends are expected not only to continue, but to accelerate.

TABLE I. U.S. ETHNIC COMPOSITION: AN OVERVIEW (1985-87)

	Mid-period population (in 1,000's)	Net Change	Average Annual (% Change)
White	204,682	4,515	0.7
Black	29,427	1,281	1.5
Other	7,505	1,106	4.9

Source: U. S. Census Bureau

According to U.S. Census Bureau estimates, growth rates for the White population will slow substantially during the 1990s, and begin to decline within 40 years. Before the decline begins, approximately 29 million people will be added to the total White population. The "Black" and "Other races" categories are projected to see significant growth by 2030-2040, with the Black population gaining as much as 14 million persons. But the real boom will be among Asians, Pacific Islanders, and American Indians, with their total combined population tripling by 2040, adding almost 16 million people to the "Other Races" category<sup>2</sup>.

During the period from 1980 to 1987, a significant portion of the population increase in the U.S. was due to immigration. In 1980, there were about 2.1 million undocumented aliens in the United States; since then, the annual net increase has ranged between 100,000 and 300,000. With regard to legal immigration, 1987 saw 2.5 net immigrants per 1,000 residents. This was down slightly from 2.7 in 1986 and 3.7 in 1980 (1980 saw the highest rate of net civilian immigration since WWII). The 1987 net civilian immigration of 599,000 amounted to 26.2% of the net change in population that year.

Prior to 1965, immigration quotas were based on the 1920 distribution of U.S. population by national origin. No limits, however, were imposed on migration from the Western hemisphere. Amendments to the Immigration and Nationality Act in 1965 abolished resident proportional national origin as a basis for quotas. This allowed countries with little historical representation in the population, primarily in Asia and the Pacific, to become major suppliers of immigrants. At this time, limits to immigration from Western hemisphere countries were implemented.

Superimposed on these bureaucratic and regulatory changes were major political upheavals in Indochina. As a result, in the two decades that followed, the proportion of immigrants from Europe declined from 41.8% of all documented alien immigrants in the year ending June 30, 1964, to 31.1% June 30, 1970, to just 11.5% by September 30, 1986. For the same years,

Asian immigrants increased from 7.5% of the total (1964), to 23.4% (1970), to 43.0% (1986).

The U.S. Census Bureau does not sufficiently disaggregate its data to allow easy tracking of immigration from Pacific Island nations. Connell (1986) offers approximate figures for populations of some island nations resident in the United States: Tonga, Tuvalu, Vanuatu, and Western Samoa (Table II). The United States is a more popular destination, apparently, than either New Zealand, Australia, or Canada for immigrants from Tonga. Immigrants from Tuvalu and Vanuatu relocate to all four countries in approximately equal amounts. New Zealand attracts twice as many immigrants from Western Samoa as does the United States, and over 40 times as many as Australia and Canada combined.

TABLE II. POPULATION IN U.S., SELECTED PACIFIC ISLAND NATIONS

Pacific Island Nation	Estimated Population	Population in U.S.
Tonga	98,000	10,000
Tuvalu	7,700	50
Vanuatu	125,600	100
Western Samoa	157,000	20,000

Source: Connell (1986)

With regard to immigrants from the Asia-Pacific region, Asians will have a much greater impact, numerically, on the U.S. population than will Pacific Islanders. This is relative, since even the aggregate category "Asian American" constitutes only a little over 1% of the total U.S. population. As far as the Census Bureau is concerned, "Asia" includes "Pakistan and the countries lying east of it in South Asia, Southeast Asia, and East Asia, but not Soviet Asia or the Pacific Islands." The forecast in Table III suggests the ranking of different cultural groups within the ethnic category "Asian" for U.S. residents through 2030.

Finally, it seems that these growing populations of Asian Americans will be found primarily west of the Mississippi. Bouvier and Agresta comment:

Asian Americans are not randomly distributed among the fifty states. According to the 1980 census, well over half live in the West and five states are home to two-thirds of all Asian Americans: California, Hawaii, New York, Illinois and Washington. Although there was some tendency to disperse during the 1970s, immigrants entering the nation since 1980 have shown similar preferences. Intended place of residence of legal immigrants leads to the same generalization: Asians tend to locate in the states and regions where other Asians reside.<sup>3</sup>

The same is also true of Pacific Islanders. Immigrant communities, though small, may be found in Hawaii, California, Oregon, and Washington.

More than the five decades projected in Table III, a major shift occurs in the rankings of groups comprising "Asian Americans." In 1980, Chinese, Filipino, Japanese, and Asian Indian

TABLE III. ASIAN AMERICAN POPULATIONS: 1980 AND PROJECTIONS THROUGH 2030

<u>1980</u> <u>Ethnicity</u>	<u>Number</u>	<u>1990</u> <u>Ethnicity</u>	<u>Number</u>	<u>2000</u> <u>Ethnicity</u>	<u>Number</u>	<u>2010</u> <u>Ethnicity</u>	<u>Number</u>	<u>2020</u> <u>Ethnicity</u>	<u>Number</u>	<u>2030</u> <u>Ethnicity</u>	<u>Number</u>
Chinese	812,178	Filipino	1,405,146	Filipino	2,070,571	Filipino	2,717,330	Filipino	3,353,990	Filipino	3,963,710
Filipino	781,894	Chinese	1,259,038	Chinese	1,683,537	Vietnamese	2,331,827	Vietnamese	3,122,591	Vietnam.	1,683,537
Japanese	716,331	Vietnamese	859,638	Vietnamese	1,574,385	Chinese	2,084,509	Chinese	2,457,046	Korean	2,946,986
Asian Indian	387,223	Korean	814,495	Korean	1,320,759	Korean	1,853,003	Korean	2,394,602	Chinese	2,779,127
Korean	357,393	Japanese	804,535	Asian Indian	1,006,305	Asian Indian	1,331,762	Asian Indian	1,634,601	Asian Indian	1,919,163
Vietnamese	245,025	Asian Indian	684,339	Japanese	856,619	Japanese	893,135	Laotian	1,035,273	Laotian	1,317,353
Other	95,873	Other	261,442	Laotian	502,599	Laotian	762,398	Japanese	929,914	Kampuch	1,073,111
Laotian	52,887	Laotian	259,674	Other	448,919	Other	645,656	Other	849,434	Other	1,055,168
Kampuch.	16,044	Kampuch.	185,301	Kampuch.	386,673	Kampuch.	603,874	Kampuch.	833,415	Japanese	945,543
TOTAL ASIAN POPULATION	3,466,421		6,533,608		9,850,364		13,223,494		16,610,866		19,934,813
TOTAL U.S. POPULATION	227,757,000		250,410,000		268,266,000		282,575,000		294,364,000		300,629,000

Sources: Leon F. Bouvier and Anthony Agresta, "Projections of the Asian American Population, 1980-2030," in James T. Fawcett and Benjamin Carino, eds. *Asian and Pacific Immigration to the United States* (forthcoming).

Gregory Spencer, *Projections of the Population of the United States by Age, Sex, and Race: 1988 to 2080*. Current Population Reports, Series P-25, No. 1018, U.S. Bureau of the Census.

residents were ranked one through four, respectively, among ethnic groups within the Asian American subpopulation. By the year 2000, the absolute number of Filipino Americans is projected to exceed that of Chinese Americans; the Japanese subgroup lags behind Asian Indians, and both of those subgroups fall behind both Vietnamese and Korean Americans. By 2030, Japanese Americans are projected to be the smallest subpopulation of Asian Americans. The top four groups in absolute terms will probably be the Filipino, Vietnamese, Korean, and Chinese Americans.

In the year 2000, Census Bureau projections suggest the U.S. population will include 9 million immigrants and their descendants who entered the country after 1986. By 2030, this will rise to 32 million post-1986 immigrants and descendants, equaling 12% of the population.<sup>4</sup> These projections, however, assume continuation of current trends in immigration and birthrates for the ethnic groups involved. These forecasts assume that no major social and technological changes will occur, nor will catastrophic political, economic, or geophysical events. For that very reason, we will use these projections as the base scenario for future changes in U.S. ethnic mix. Later sections will discuss possible events or emerging trends that could alter that base scenario.

## **CULTURAL DEMOGRAPHICS IN THE STATE OF HAWAII**

In Hawaii, the situation differs markedly from the mainland. Chinese and Filipinos are rapidly growing subgroups both here and there, but where Asian-Indian and Vietnamese populations are growing rapidly there, they are not doing so here. Japanese and Samoans are resident in relatively large numbers here compared to the mainland, where they comprise only a small fraction of the population and tend to be found in enclaves.

Much of the difference may be attributed to the fact that Hawaii's cultural mix has, over the last 150 years, been artificially engineered by economics: plantation economics. Hawaii has seen three distinct, and overtly recruited, waves of immigrants: The first wave came from China, between about 1820 and 1890; the second from Japan, between 1880 and 1920; and the third from the Philippines between 1910 and 1930 (these years are approximate). Smaller, yet still culturally significant, groups of immigrants were recruited from Scotland, Germany, and Portugal to act as lunas, or overseers of the Asian labor force, on the plantations. World Wars I and II, and the succeeding Asian national conflicts, also brought waves of immigrants and refugees to the Hawaiian islands. But the difference between regulations which produce artificial constraints on immigration, as is the case for the U.S. as a whole, and business practices which encouraged immigration as an economic necessity, are evident in Hawaii's 1980 demographic profile (Table IV).

Due to the unusual historical circumstances contributing to Hawaii's current ethnic mix, the state will never be a perfect precursor for U.S. demographic change. The percentages of Japanese and Hawaiian residents are all out of proportion relative to those in the mainland U.S. Setting those two groups aside produces a 1980 profile of Asian Americans in Hawaii, ranked by population size, as listed in Table V. This matches the 1990 and 2000 rankings of U.S. Asian American populations more closely than it does the 1980 U.S. rankings (refer to Table III).

**TABLE IV. Hawaii's Population, by Ethnicity: 1980**

ETHNICITY	NUMBER
White	331,925
Japanese	239,734
Filipino	132,075
Hawaiian	118,251
Spanish origin	71,399
Chinese	55,916
Race n.e.c.*	21,444
Black	17,687
Korean	17,453
Samoan	14,349
Other Asia/Pac.	7,140
Vietnamese	3,403
American Indian	2,833
Asian Indian	708
Eskimo	74
Aleut	69
<b>TOTAL</b>	<b>964,691</b>

Source: Hawaii Data Book, 1988. (\*not elsewhere classified)

**TABLE V. Population Ranking, Asian Americans in Hawaii  
(\* Excluding Japanese)**

Filipino
Chinese
Korean
Other
Asian
Vietnamese
Asian Indian

The state of Hawaii might therefore usefully serve as an analogy, in terms of ethnic mix, to the U.S. future of ten or fifteen years from now -- controlling for all other social and technological trends. This should not be regarded in the light of prediction, but rather as a useful bellwether for possible changes in community demographics, and therefore community dynamics, in the urban U.S. mainland.



## FACTORS AFFECTING CROSS-CULTURAL ASSIMILATION AND CONFLICT

To simplify a complex process (perhaps unduly), the degree to which immigrants subordinate their traditional patterns of life and values to those of their new society will affect the degree to which they come into conflict with that society. Without becoming inordinately post-modernist, it can be said that immigrants carry much of their traditional values, social structure, and weltanschauung in their native language. Lieberson notes how important maintaining language is in maintaining the Quebecois sense of separatism, in comparison with later immigrant groups in Canada:

French Canadians have maintained their language and other major cultural and social attributes whereas nineteenth and twentieth century immigrants are in [the] process of merging into the predominantly English-speaking Canadian society.<sup>5</sup>

The point is reinforced by the example of Australia, where Italian immigrants are more assimilated into the wider Australian community than are the German immigrants and descendants, who arrived earlier.

...twentieth century Italian immigrants in Australia [were] more prone to cultural assimilation than were German migrants to the nation in the 1800s ... Germans settled in what was a pioneer colony without an established general social order and institutions. Thus, for example, Italian children were required to attend Australian schools and learn English, whereas the German immigrants were forced to establish their own educational program.<sup>6</sup>

In establishing their own educational system, immigrants could nearly duplicate the linguistic and cultural programming traditional in Germany. This considerably slowed Australian culture's inroads into the patterns of life in German immigrant communities.

Immigrant populations in Hawaii also created schools and cultural centers to maintain cultural integrity. Most notable among these are the Japanese and Chinese schools; they are utilized today even by third generation students. Where the schools may have begun as responses to a perceived lack of social services for the immigrant groups concerned, they now serve as a value-added adjunct to the Hawaiian public and private school systems. Over one-third of both Chinese and Japanese Americans in Hawaii speak their ethnic language at home. Yet both these populations have been well integrated into Hawaii's political, economic, and educational systems for the last three decades. In these cases, the process of assimilation has been matched by an ethnic pride that invested in maintaining familiarity with traditional values and the cultural artifacts which transport them.

The three ethnic groups in the state of Hawaii that rank highest in terms of percentage of population speaking a language other than English at home are the Samoans, at 76.8%; the Koreans, at 52.9%; and the Filipinos, at 50.5% (Table VI). These are the "new waves" of immigrants. Their communities have had less time to assimilate, and have accumulated fewer resources--either economic or political--to help them do so. Given a theory that the lower the degree of assimilation to the dominant culture, the higher the probability of conflict with that

culture, then these ethnic groups ought to experience higher rates of conflict with the rules of the dominant culture.

**TABLE VI. Hawaiian Residents Speaking a Language other than English at home: 1980**

**Speaking a language other than English at home:**

ETHNICITY	NUMBER	% OF ETHNIC GROUP
Chinese	20,066	35.9
Japanese	80,230	33.5
Korean	9,231	52.9
Filipino	66,655	50.5
Spanish	11,933	16.7
All others (including Polynesian)	40,840	n.a.
<b>TOTAL:</b>	<b>228,955</b>	

**Speaking a Polynesian language at home:**

ETHNICITY	NUMBER	% OF ETHNIC GROUP
Hawaiian	9,060	7.7
Samoan	11,020	76.8
Tongan	1,180	unknown
Other Polynesian	480	n.a.
<b>TOTAL:</b>	<b>21,740</b>	<b>n.a.</b>

Source: Hawaii Data Book, 1988.

Kassebaum compares arrest and sentencing rates across ethnicities in Hawaii. This analysis supports the preceding argument; arrest data show a disproportionate number of Samoans and Filipinos charged, particularly in the juvenile category, among the immigrant populations represented in Hawaii.

The general impression then from these most recent arrest data for the state as a whole for the year 1980 is that Caucasians, Hawaiians and Samoans are over-represented in total arrests, that this over-representation is greater for adults arrested for Crime Index offenses, and that Hawaiian representation doubles when only juvenile arrests are tabulated. Filipinos also are represented in greater numbers among juvenile arrests. ...Proportionately more Hawaiians, Samoans and persons classified by the police as "mixed other" groups are ...arrested for violent offenses than are Caucasians and Asians.<sup>7</sup>

One possible explanation for the failure of Koreans to earn this dubious distinction is the similarity between the neo-Confucian and the Protestant work ethics. It is conceivable that even with poor linguistic assimilation, sufficient cultural parallels exist to lower the incidence of conflict between Korean immigrants and the dominant culture in the state of Hawaii.

Age is the second factor that may contribute to the rate of conflict between any of these ethnic subpopulations and the dominant culture. Recent studies of South Korean civil conflicts point out that rates of conflict rise when societies experience an upsurge in the proportion of youth in the population. This research focuses on the concept of a "youth bulge" in a given society's historical development. It identifies periods "of time in the history of a population when the third and fourth age cohorts (ages 15-19 and 20-24) reach a proportion of 20 percent or more of total population."<sup>8</sup> In the light of this theory, it is meaningful to note that more than the Samoans in Hawaii are under seventeen. When an outsized age cohort reaches its teens, its demands on society increase: for education, employment, and housing.

The greater the extent to which young adults are alienated from existing institutions and societal norms, the greater is the chance that they will participate in destabilizing events.<sup>9</sup>

The authors are focusing on political conflict, of course, but in less politically polarized communities the dissatisfactions could well emerge in more mundane forms of conflict.

This line of reasoning has several implications for conflict and immigrant communities. Immigrant enclaves composed of newly arrived middle-aged adults and their infants should generate less conflict than older immigrant communities with a large second generation cohort moving into early adulthood. A high percentage of teenagers who were either born in, or raised primarily within, the new culture, means a large pool of energetic individuals with time on their hands to consider the disjuncture between the expectations raised by the dominant culture and their own living conditions. The older, first generation immigrants will be too absorbed in mundane economic survival to engage much in generating conflict. In addition, the level of disparity between expectations and reality may well be lower for the first generation: instead of inflated American expectations of success (the Horatio Alger syndrome), they may contrast their expectations for life within the society they left to their present reality.

Whatever the psychological dynamics behind the hypothesis, the hypothesis itself is open to empirical verification. The statistics provided by Kassebaum's study of Hawaii are revealing.

Many ... things are correlated with ethnic status, such as income, education and other life-style variables, and the explanation of some street crime in terms of conflict between haves and have-nots, has much to support it. Consider, for example, ethnic differences on income and age. Minorities are lower on income and have a larger percentage of young members in the high crime rate years of the life cycle.<sup>10</sup>

For 1980 juvenile arrests in Hawaii, Hawaiian youth ranked first, with 37% of the juvenile arrests; "Other" youth second at 21%; Caucasian youth third at 15%; and Filipino youth fourth at 12%. In looking at ethnicity and age within the state of Hawaii, Kassebaum notes that over 19% of Hawaiians, and over 53% of part-Hawaiians, are under 17; over 38% of Samoans; over 35% of Filipinos; and over 34% of Koreans. In contrast, only 27% of Caucasians are under 17; only 18% of Japanese; and only 16% of Chinese.

This section has focused on age and language acquisition as two key factors affecting rates

of conflict between immigrant communities and the legal code of the dominant culture. It has taken as given economic disparities between immigrants and the dominant culture. Few immigrants come with sufficient financial resources to establish themselves easily within the middle or upper classes. Even for those well-educated within their own culture, insufficient language skills constrain economic success. For immigrants who lack both education and language skills, economic exploitation is almost unavoidable. The condition of exploitation is like dry pine tinder; the restlessness of youth, given relatively expansive amounts of leisure time, is the match. Conflicts result.

## **ALTERNATIVE FUTURES FOR INTERNATIONAL IMMIGRATION**

The earlier section offered a forecast of the growth of immigrant populations within the U.S. as a whole. This may be taken as a base case: a reasonable picture of the U.S. demographic profile for the next 40 years, providing other political, economic, environmental, and social issues are held constant worldwide. What if they aren't? What alternative futures might change our very conceptualization of immigration in the future, perhaps invalidating it altogether?

Cross-fertilizing some emerging trends and incasting<sup>11</sup> on the topic of international migration produces interesting variant scenarios. They cluster into four themes: economic shifts, governmental and political restructuring, environmental changes, and technological innovations. The "economic shifts" theme assumes the continuation of the economic structures of the present, but suggests that the viability of those structures will change across countries. "Governmental and political restructuring" assumes the decline of the superpowers and a radical transformation in governance internationally. This may be towards either greater centralization or greater decentralization. "Environmental changes" encompasses both emerging trends and "wild card" events transforming anything from families of microbes up to the planet's atmosphere. Finally, the "technological innovations" theme invokes some of the more startling changes in world social, political, and economic patterns that might result from humanity's continuous tinkering.

All of these scenarios in their details have implications not only for immigration patterns in the U.S. as a whole, but also specifically for Hawaii. To demonstrate the ways in which wider trends apply to specific locales, the implications for Hawaii will be briefly spelled out where appropriate.

### **"Economic Shifts" Futures:**

Economic change--either avoiding disaster or seeking success-- has long been an impetus to migration. This will remain true in any future scenario laid on the bones of the present-day global economic system. However, Japan, Germany, and Australia may well be the superpowers, and the U.S. and the U.S.S.R. fading fortresses. Americans and Soviets may be the emigres of the '20s.

Historically, Europeans moved to the United States to participate in its booming economy. "Reverse immigration" captures the notion that with growing signs of decay in the U.S. economy, many members of immigrant communities might chose to move back to their place

of birth; current and possible future developments in Europe render this plausible. "Brain gain," meaning aggressive international headhunting, may emerge out of aggressive R & D strategies in both multinational corporations and newly developing nations. In the U.S., with educational quality dropping precipitously, the top-flight foreign intellects we used to accept with a sense of noblesse oblige we may court out of desperation.

Hawaii's place in this could be a "best of all possible worlds," poised in delicate simultaneous contact with both the fading and the flowering economies on the Pacific Rim, and offering both a beautiful environment and a warm welcome for young information industries. Economic refugees from Hong Kong may well stop by in passing and bring Honolulu into the 21st century as the New Hong Kong.

### **"Government & Politics Restructured" Futures:**

The second thematic group focuses on changing scenarios of global governance. Although migration may be powered by economic necessity, it is constrained by national laws. With the U.S. and the Soviet Union losing pride of place as superpowers, the global political structure is more mutable now than it has been in half a century. Trends currently emerging point to several possible international political futures; some are much more centralized, some much less.

Without indulging in full-blown world government, other geographic agglomerations of nations could imitate the 1992 example of the European Community. This would lend increasing absurdity to the notion of passports and immigration, at least in the legal and political senses. The growing informatics web worldwide might also make it sensible to invest certain functions in international--and therefore more centralized--organizations. For example, nations and pan-national unions might hand the U.N. the responsibility of issuing "world passports;" travelers register their itineraries through different countries merely for reasons of health and physical safety. Dropping travel and residency restrictions worldwide, the category of "immigrant" would simply cease to exist --legally.

This future could see popularization of the gypsy or nomadic lifestyle; with advances in marine technology, nomadic marine communities of voluntary "boat people," or "sea gypsies" could form. In which case, Hawaii would experience a renaissance as a Pacific port of call, given our ideal location in the middle of the northern Pacific Basin. Given a healthy state economy, Hawaii would probably solicit new residents in this scenario, as a labor shortage exists even now.

On the other hand, with the fading of the political control and pressures exerted globally by superpowers, signs indicate that long-suppressed traditional conflicts could re-emerge, such as those which have erupted in Soviet Azerbaijan. Even while retaining loose regional affiliations, more and more cultural groups could reassert their rights to political sovereignty. Small nations would proliferate in an international frenzy of balkanization. Pride in politically affirmed cultural identity could cause isolationism, highly restrictive immigration policies, or closed borders. "Inappropriate" cultural subgroups might be tossed out on their collective ear, creating new refugee populations.

Furthermore, these nationalist movements do not have to be limited to the enthusiasms of traditional cultures; new cultures are spontaneously generating, or being consciously designed, day by day. An example of a "new culture" which supports dissolution of historic political boundaries is the environmental movement. For some environmentalists, national proliferation translates into "bioregionalism." Bioregions are geographic areas determined by the limits of a given ecology or biosphere. Emigration to bioregionally determined political entities could depend on applicants' knowledge of the biosphere to which they are asking admittance. In this scenario, tourism could be a sunset industry in Hawaii, and new immigrants screened for origins as environmentally similar to the Hawaiian islands as possible. The state could see a big upsurge not only in immigrants from the Philippines and Pacific island states, but also from Indonesia.

### **"Changing Environment" Futures:**

Every day, it seems, brings new stories of environmental disasters--either natural or human-related. Historically, these too motivate human migration. Volcanic eruptions, crop blights, plagues--people have often proven mobility is sometimes the only response to nature's brutality. Many of the possible environmental change scenarios depend on what might be called "wild card" events. For example, even though superpower tensions have relaxed, nuclear disasters are still a possibility, given the proliferation of both nuclear generators and terrorism. Either a plant accident, a jury-rigged bomb, or a malicious poisoning with highly toxic radioactive materials could render large metropolitan areas unlivable. Survivors would necessarily need to emigrate. Moreover, they would be rather high-cost refugees, as they would probably require a great deal of medical attention.

Along these same lines are possibilities of really massive earthquakes or meteor hits. Given that greater metropolitan Tokyo and most of California are ripe for really major quakes, earthquake scenarios could generate waves of refugees unusual in their level of education and socioeconomic bracket. A massive quake disrupting Tokyo might cause upper-class survivors to seek refuge in Hawaii. Of course, the quake scenario is likely for Honolulu, too: the state of Hawaii is also overdue for a large-scale quake; residents often overlook the fact that their lands have the same earthquake rating as does California.

Humankind's tampering with the environment could produce "pollution refugees," people escaping the irretrievable fouling of their immediate environment. This is especially likely given the inability of any nation yet to handle hazardous and toxic wastes adequately. Hawaii might find itself in a "worst of all possible worlds" future given one fairly complete oil tanker break-up near shore.

Writ large, pollution-generated scenarios become the Global Warming/Sea Level Rise future, wherein Pacific Rim nations will need to absorb Pacific Islanders fleeing the total inundation of their countries. On the other hand, the scientific community is also monitoring the possibility of a rapidly triggered Ice Age (we are, in geologic terms, due for one). In that case, we would see people from the temperate zones (most of the developed world) scampering towards the equator. Pacific Islanders might well discover they have more land, rather than less, as more water worldwide gets laid down as ice cover over the poles.

Finally, the environment also has a grab-bag of very small surprises it occasionally springs on humanity: bacteria, viruses, and cancer cells. AIDS is a notable example. "Epidemic immigrants" could be another wave of the future: individuals fleeing hotbeds of infection, or proven regions of high cancer risk. New Jersey springs to mind as a good current example of the latter. Furthermore, immigrants may find borders closed to all but the demonstrably healthy. Again, AIDS provides an example; Korea has been considering national legislation requiring AIDS bloodtests for visitors staying longer than 90 days (normal tourist visa).

### **"Technological Innovation" Futures:**

Given the American fondness for gadgets and Star Wars/Star Trek fantasies, scenarios based on technological innovation are perhaps the most fun to envision. They are usually the most radical as well: technology changes not only how we relate to other people and to nature, it can change the very definitions of "people" and "nature." The following may be loosely separated into three groups. The first has to do with advances in electronic communications and computer technologies, and the devising of what are called "virtual realities." Second are migration possibilities related to space. The third group relates to bioengineering advances.

In an "electronic nations" scenario, people are citizens of information entities, either corporate, academic, or interest group. Immigration would cease to relate at all to physical residence, and refer instead to the location of one's identity in the global databases. Related to this is the idea that physical travel itself will cease to be an activity in which humans indulge. This could occur via two very different paths. In one scenario, advances in communications technology and neurology enable people to access international communication networks directly, and to expand the range of sensory information communicated. In a second, advances in understanding the full potential of the human brain develop out-of-body travel as a common meditative technology.

Human development of interplanetary space (to limit ourselves to the next century) adds much more than just a new direction to the possibilities of human migration. It adds a whole new dimension of expense, and a truly extraordinary education and skills requirement. "Leaving for the L-5 of my dreams" will require massive advance preparation for the immigrant. Hawaii will play an important role in this scenario, both as a communications and observation center, and quite possibly as a "port of entry" to the territories of space. Hawaii might also serve as a quarantine spot for future in-migration: neighborly extra-terrestrials are a wild card too transformational to dismiss. They would, of course, give a whole new meaning to the concept of cross-cultural conflict.

Finally, possible developments in bioengineering put an intriguing spin upon the concept of immigration. Rather than immigrating geographically or even electronically, people could immigrate across the boundaries of their own organic structure. We may no longer be limited to the communities of our own race, gender, or species. Specially designed RNA viruses could rewrite genetic codes to let tall, rawboned Scandinavians join the ranks of delicate, dark-haired Japanese. Whole new genders could be designed, generating new community and political groupings out of the social restructuring that would necessarily follow. Many may choose to emigrate out of the human race entirely, as either bioengineering or personality transfer

technologies enable them to relocate as elephants, otters, owls, or dolphins. In this future, Hawaii would enjoy the comparative advantage of an already high degree of European, Pacific, and Asian heterogeneity: the state's population has already begun genetic mixing--albeit on an informal and very low tech basis. Furthermore, the state is ideally situated to provide orientation for all those wishing to emigrate to the ranks of marine mammals.

## **ALTERNATIVE FUTURES FOR COMMUNITY CONFLICTS AND DISPUTES**

Changes in the mass movement of people, and subsequent changes in the social and political structure of communities, will also change the types of conflict that arise among people. To consider an example arising from our "base case" demographic scenario, note that the relative numbers of Caucasians and Japanese are dropping in the U.S. population, while those of Filipinos are increasing. In Hawaii, at least, that has direct implications for the incidence of certain crimes. Caucasians and Japanese are far and away the greatest offenders with regard to drunk driving; Filipinos are disproportionately represented with respect to illegal gambling charges. This implies a possible future wherein the incidence of drunken driving declines and gambling is legalized.

The possible alternative futures described earlier also imply the emergence of certain kinds of civil conflict. Consider the possible changes in international government mentioned. Given more pan-national associations or even the abolition of travel restrictions worldwide, we may see more conflicts with formal law, but fewer interpersonal conflicts, as it becomes easier for people to move away from difficult personal situations. On the other hand, homebodies could increasingly come into conflict with those living the new vagabond-gypsy lifestyle. Property disputes, particularly trespassing charges and theft, could become rife as homebodies try to protect their "castles" and worldly goods, and the new nomads attempt to liberate the necessities of life. (The traditional perception of gypsies as thieves was primarily a cultural clash between concepts of private and community ownership.)

Community resentment might also run high against "partial immigrants:" day-workers from the next country over. Whole countries might suffer the equivalent of inner city urban blight; already business people in London are discussing the possibility of France as a bedroom community; if France becomes Europe's suburb, what does that do to Britain and Germany? This scenario could see increased violence against "trans-national commuters," and violence against transportation technologies in protest.

Futures involving national proliferation and super-isolationism would begin with a sorting-out phase, as people moved to form communities of "their own kind." Drops in migration would follow. Civil conflict within communities would also decline, as they would be much more homogeneous, and conflict between communities or newly constituted nations would increase. Cultural conflict will be, as it were, externalized. If, however, super-isolationism forces people to remain in closed communities, social and political dissatisfactions will be more likely to erupt in violence. As rebels cannot "move on," they will be forced to put their energies into changing the status quo at home.

In a world separated into environmentally managed bioregions, disputes over private property



could become disputes over the definition of garbage. What can only be destroyed or stored, and what can be recycled and is therefore a community resource? At what point do private belongings become a recyclable community resource? Conflicts could also arise over conventions of stewardship and etiquette with respect to the surrounding environment. Immigrants would be turned away unless they could demonstrate expertise, or at least close familiarity, with the appropriate biosphere. "They don't understand the land," would be a crime, not merely a comment.

The environmentally leveraged scenarios give rise to interesting sources of conflict. For those that are disaster scenarios, such as widespread nuclear disaster, or a rapidly triggered Ice Age, life could be nasty, brutish, and short, and the attendant conflicts simple and straightforward skirmishes over scarce resources -- water, food, shelter, clothing, women, children. But the more complex environmental change scenarios might see civil conflict arising over the right to start fires -- perhaps the institution of the death penalty in an advanced Global Warming future. In any future where "epidemic immigrants" or "infection refugees" are common, communities might institute either formal or informal health practices to be strictly followed. Immigrants would then either overtly run afoul of these, or merely be the cause of strife because they are perceived as being unclean or unhealthy.

Technological change (including meditative, spiritual, or "magical" technologies) will give rise to the most outré forms of future conflict. The first group may be roughly categorized as "boundary disputes." However, the boundaries in question are not geographic in nature. For example, in an "end of physical travel" scenario based on techniques similar to astral projection, society could see many more disputes focused on personal boundaries and invasion of privacy: astral voyeurism or spiritual "peeping Toms." Invasion of privacy could (indeed, already does) occur electronically, and electronic trespassing could be the nuisance crime wave of the future: people's hard drives, or databases, would be their castles.

Another real problem would occur from the overlap of multiple information technologies in use: electromagnetic interference and database interface interference. This would be similar to the present cordless phone frequency overlap problem, writ large. Spiritual technologies could also generate conflicts if their zones of influence overlapped. In voodoo cultures, supernatural disputes are the major candidates for community mediation. In conceivable neo-primitive cultures of the future, practitioners of supernatural technologies may need to implement "spiritual-influence-free zones," or, conversely, the equivalent of "spiritual-hard-hat zones" to minimize unintended impacts.

In space, safety rules will generate conflicts between original residents and immigrants. The space culture will have a distinctly different weltanschauung than do any of the earth-originated cultures, due not only to the greater hazards of the environment, but to the unique freedoms it offers. Understanding where the line exists between the hazards and the freedoms will separate homo stellae from homo terra; lack of understanding will generate conflicts. It is likely that any infringement of personal safety conventions will simply result in death; it is also likely that any infringement of community safety conventions will decree death. On a lighter note, welcoming communities of extraterrestrials to the surface of this planet could generate very interesting property disputes indeed. For example, aliens might have a distinctly different perspective from

humans as to what is edible, and therefore subject to foraging. Or in terms of public disturbances, sentient beings with different sensory arrays might beg to differ as to what constitutes visual, noise, or air pollution.

In a future of bioengineered and genetically altered human beings, disputes would arise between the haves, fashionably reconstructed in the race du jour, and the have nots, unable to afford reconstruction and stuck in the race into which they were born. Reverse discrimination would develop a plethora of legal meanings. It would also enable interesting forms of business and personal fraud and forgery: forging entire bodies, not merely signatures. Family conflicts would also be much more complex: families themselves would be much more complex, with wide variations and combinations in bioparents, education and profession parents, surrogate parents, clone parents/siblings, inter-species parents, and in general a greatly extended legal definition of "family." Divorce, adoption, spouse/child abuse, and similar family conflicts would take on very new forms. Finally, those who do cross over the boundaries of species and organism will experience norm, value, and behavior conflicts beside which those currently experienced by immigrants will pale.

## CONCLUSIONS

The white, Anglo-Saxon, protestant majority, ubiquitous in song, story, advertising, and media, is on the wane in the U.S. One of the world's most heterogeneous populations can look forward to a 21st century accentuated by heterogenic extremity. The injection of new perspectives and modes of thought will certainly increase the dynamism and creativity of American culture, and most likely its productivity as well.<sup>12</sup>

But with this increased dynamism will come increased conflict. We will have to become much more skilled, as a people, at traversing an ever wilder cultural landscape. This means becoming more conversant with, and adept at applying, a flexible range of techniques for mediation, dispute resolution, and negotiating trade-offs.

Luckily, the origin of conflicts may also serve as a rich source of conflict resolution technologies. Identifying traditional approaches to resolving conflicts arising in communities not only offers a base from which to develop new social technologies, it teaches us about the myriad cultures comprising the American culture. Whatever the current demographic trends say, we can make only one forecast with any certainty regarding American society and culture in 2030: it will differ from today. Let us practice endless surprise.

## NOTES

1. I am greatly indebted to Dr. Robert Gardner, of the East West Center's Population Institute, and Professor Gene Kassebaum, of the University of Hawai'i's Sociology Department, for the time they invested in introducing me to the materials and themes covered in sections two and three. Where violence has been done to the verities of the demographic art, I claim sole responsibility. I am likewise greatly indebted to Professor Wendell Bell, Sociology Department, Yale University, who spent untold time reviewing this article and making cogent suggestions which in the press of time often went unheeded: the loss and error are mine.
2. Gregory Spencer, Projections of the Population of the United States by Age, Sex, and Race: 1988 to 2080. Current Population Reports, Population Estimates and Projections, Series P-25, No. 1018. Washington DC: U.S. Department of Commerce, Bureau of the Census, 1988.
3. Leon F. Bouvier and Anthony J. Agresta. "The Fastest Growing Minority," in American Demographics (May 1985), 31-33, 46.
4. Gregory Spencer, Projections, 1988.
5. Lieberman, Stanley. "A Societal Theory of Race and Ethnic Relations," in American Sociological Review (January 1975), 902-910.
6. Ibid.
7. Gene Kassebaum, "Racial Tensions and Public Concern About Crime Control in Hawaii," (Draft article, Sociology Department, University of Hawaii at Manoa, July 1981), 10-11.
8. Gary Fuller and Forrest R. Pitts, "Youth Cohorts and political unrest in South Korea," in Political Geography Quarterly (Vol. 9, No. 1, January 1990), 9.
9. Ibid., 13.
10. Kassebaum, "Racial Tensions," 10-11.
11. Incasting is a focused brainstorming process unique to futures studies. The basic idea is to envision the future of a specific item as an extrapolation from a generalized future scenario. Participants begin with a handful of possible images of the future, details of which may not be completely fleshed out, but which are internally consistent in their general structures. Brainstorming enters the picture as they try to imagine the transformations a specific item or social institution--e.g., books or the nuclear family--would undergo in each of the possible futures. The new form taken must also follow the internal rules of the specific future scenario.  
  
Division of the ideas produced in the incasting into these categories was arbitrary. Another reporter might have sorted them along different variables than the economic, political, environmental, and technological: perhaps on geography or culture instead. The possibilities for recombination are expansive, and would create even more ideas on the future of immigration.  
  
Nine members of this research project participated in the brainstorming session which provided the bones for the alternative futures section: Peter Adler, Brent Barner, James Dator, Sohail Inayatullah, Christopher Jones, Neal Milner, Sharon Rodgers, Jo Scheder, and the author.
12. Wendy Schultz and Edith L. Mukaida. "Linking Pacific Basin Research and Education: Enhanced Community; Enhanced Creativity," in Proceedings World Futures Studies Federation Pacific Basin Conference: Linking Long-Range Visions to Short-Range Decisions in the Pacific-Basin Networking Community. Nagoya, Japan, Nagoya University of Commerce and Business Administration, forthcoming.

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# **CULTURAL PLURALISM AND THE FUTURE OF THE JUDICIARY**

by

**Brent Barner**

## **INTRODUCTION**

Change is a given in the substance, practice, and administration of law. Even the most conservative lawyer anticipates some future modifications. However, most people commonly seem to expect only incremental change that builds on and fine tunes tradition. Very few appear to welcome radical change which could divorce the practice of law from the past. Thus, law is seen as a series of transitions, a process of adaptation. Current and often contradictory trends in the law can be identified. The challenge is to place them in context, judging their relative importance as sustained trends for the future. This paper examines two aspects of the law relating to culture and difference: on the one hand, there is the desire to maintain the integrity of the law by according equal treatment and identical principles of due process to all individuals, thus refusing to recognize cultural differences in legal proceedings. On the other hand, there are jurists who would open the door to and allow the furtherance of diverse group values, norms, and behaviors in the form and content of the administration of justice. It is our purpose here to see where past and present decisions by the United States Supreme Court stand in relation to these two trends. Specifically, to what extent do Supreme Court decisions support the right and/or ability of certain groups to settle their own disputes independently of the formal judicial system? To what extent will the formal courts uphold decisions made according to rules or procedures which differ from those of the formal courts? What kinds of groups, in what kinds of controversies, have such procedures recognized by the courts, and which do not? Is there evidence of a trend towards more or towards less recognition of such practices by the US Supreme Court?

## **CULTURES AS RESOURCES FOR CONFLICT MANAGEMENT TECHNIQUES**

Recent efforts legally to recognize cultural differences have not resulted in startling changes in law but nonetheless have already given rise to significant controversy. One example is the "cultural defense" which seeks to allow the consideration of cultural differences as a basis for establishing a reasonable doubt of a defendant's guilt. But another, richer, and potentially further reaching manifestation of a trend supporting cultural diversity is the recognition of cultural differences as a fund of opportunities rather than a set of problems.

Different cultures, viewed as legitimate systems of values, and derivative systems of social institutions, often have different procedures for managing and resolving conflict.

Culture as used in this context refers to a system of shared values, norms, and practices, including a shared functional understanding of communicative language and other representative uses of symbols. The existing mainstream legal system itself can be considered to be a distinct culture, comprised of particular values integrated systematically. It may be possible that, to the extent different cultures can coexist and learn from each other, different sets of conflict-managing and conflict-resolving systems can also coexist and learn from each other as well. Moreover, given a likely increase in cultural diversity in the United States, and the growing potential for damaging divisiveness, a reasonable alternative to attempting to force compliance, acculturation, and general homogenization of cultures might be to recognize and accept cultural diversity and to use these diverse cultures as helpful reservoirs of alternative ways to lessen or control conflict.

These cultures have the potential of providing a diverse repertoire of management tools and different sets of software for organizing and managing conflict. Certainly, recognizing these different processes might increase the complexity of our institutional conflict managing systems, but given the currently increasing amount of cultural diversity, the failure institutionally to recognize it seems to be a kind of oppression reminiscent of Procrustes, the ogre encountered by Theseus in the Greek myth who, by stretching or chopping, forces each of his victim "guests" to fit his iron bed.

## **THE STRUGGLE FOR CULTURAL IDENTITY**

The assertion of a cultural identity in defiance of the central order of a nation state is an important aspect of contemporary politics. These phenomena are evident in many parts of the world, where the prevalence and vigor of such struggles is on the rise. Notable are the Kurds of the Middle East; the Lithuanians, Latvians, Estonians, Armenians, and others of the Soviet Union; the Tamils of Sri Lanka; and the Moslems of Southern Philippines whose struggles periodically make headlines around the globe. Less violent examples of the assertion of cultural identity are also readily available, such as the Welsh, the Maori of New Zealand, the Hawaiians, and others who to varying degrees have experienced cultural "renaissances." Such cultural rebirth and reinvigoration seems significant in the formation of group identity, and in the values, behavior, and identity of many individuals experiencing themselves as distinct from a dominant culture which surrounds them.

Other phenomena of equal importance in the United States and elsewhere, involve increased cultural diversity through immigration, especially from immigrants and refugees who are relatively "more different" than the communities they enter than were previous immigrants. The most notable examples in the United States include Southeast Asian immigrants, particularly those from remote rural highland areas, such as the Hmong and the other hill tribes. Such immigrants make vivid the need for concern about traditional values, because such hill tribes have not had extensive experience with outsiders, and accommodation of different ways of doing things may not mean change in their culture but complete loss of the culture.

The rhetoric of groups supporting or asserting cultural diversity often depicts the dominant culture of the United States as embodied by and protected in the laws of the United

States, and it is not uncommon for them to portray this legal system as monolithic, exclusive, and uncompromising. Although to a great degree our legal system does demand accommodation to and assimilation of the dominant values and behaviors embodied within our mainstream culture, there are significant exceptions. To some extent the "cultural defense" previously mentioned has proved somewhat successful at least in providing mitigation in sentencing.

However, the cultural defense may not benefit cultural groups as a whole before the law. Although the cultural defense involves the identification of the individual defendant with a distinct cultural group, and locates the perceptions of the defendant and the performance of the criminal action in the context of the different values which that group shares, this defense is essentially an argument of individual exception, a basis for juridical discretion. Of more significance for cultural groups seeking legitimation of their distinct values are the experiences of those groups which have already, to some extent, carved out domains of semi-autonomy within the legal system.

In an effort to establish the nature, basis, and relative success in protecting their semi-autonomy, several types of such groups, and their respective constitutional protections, were surveyed. Religious and labor groups, Native Americans, and Pacific Islanders are the focus of this paper which concludes with a brief discussion of opportunities for other groups to achieve some degree of autonomy within our legal system.

## **GROUPS AND LAW IN THE US: A Survey of Legal Precedent**

This section of the paper looks at various groups in the United States and its related territories in the Pacific to determine the extent of their autonomy for resolving conflict without government intervention. The groups selected have, or are reputed to have, a degree of semi-autonomy or jurisdiction within which they may settle disputes without scrutiny and possible contradiction by the US government's legal agencies. These sections review the degree of, and the basis for, these various groups' semi-autonomy, and then summarizes how and to what extent these groups maintain their special status with respect to the law.

### **Labor Groups and Autonomy:**

Labor law is a huge and complicated body of law. It is nonetheless possible to generalize that the autonomy available to labor groups to settle internal conflict without possible government intervention is extremely limited. In general, the actions of private groups are not subject to the same constitutional limits as government actions are and wholly private groups which are voluntary associations can therefore interfere with the fundamental constitutionally guaranteed freedoms of individuals, including those of speech, religion and assembly. Labor groups, however, have often been subject to greater government intervention due to the significant role they play in society.

Precedent supporting private organization's autonomy include cases addressing group interference with the exercise of individual rights, such as Collins v. Hardiman (1951) in which "Federal legislation enacted to protect such activities from private interference has

been held unconstitutional"<sup>1</sup>. However, government intervention into the actions of labor groups has been extensive. Labor's jurisdiction to settle their own disputes is the same as that accorded to all voluntary associations, but labor groups have seen far more government intervention into their practices than other types of voluntary associations. For instance, the mass of labor law makes it far from clear whether labor groups can determine their own membership, specify conditions for membership, and resolve conflicts which arise between members, powers which are usually available to voluntary associations. The grounds for intervention have often been based on fairness and equal treatment, but also include "the state's interest in fostering public purposes,"<sup>2</sup> for instance public safety and the public welfare.

Labor groups have limited powers to determine their own membership: the government has intervened and the judicial system supported that intervention based on a standard of fairness and equal treatment. Many Court decisions have favored the constitutional rights of individuals over those of the labor group, such as Railway Mail Ass'n v. Corsi (1945). "The question to what extent the state may compel association was first raised in Railway Mail Ass'n v. Corsi ...prohibiting labor unions from denying membership on racial grounds."<sup>3</sup> Using similar criteria of fairness and equal treatment, Railway Employees' Dept. v. Hanson (1956) favored the constitutional rights of the group, in that an employee was required to join a labor union in order to keep his job.

Labor groups have not been treated as typical private associations due to their role in public society, characterized by ubiquity, large size, and their significant influence in the economy in general, and particularly in the safety and welfare of private citizens. In sum, although mitigated by precedent recognizing their groups' rights as voluntary associations, labor groups on the whole have had their group integrity violated quite frequently as judicial decisions recognized the need for protecting the public welfare and individual rights.

### **Freedom of Religion and Religious Group Autonomy:**

In law, religious groups are considered a type of voluntary association, but a very special type. Evaluating the extent of the semi-autonomous jurisdiction provided religious groups by the Constitution is problematic. There is no consensus on the degree of autonomy or the conditions which govern the protections of religious organizations from government intervention. On the contrary, this is such a highly charged and contentious area of law that new cases are continually being considered by appellate courts.

The outcomes of these cases are unpredictable, depending largely on the precise definition of the case, which leads to a determination of what part of law is applicable. For a constitutional question of religious freedom to emerge, it must be found relevant by a presiding judge. The judge locates the jurisdiction of the state with regard to a case in defining the significance of the case. Refusing to examine the merits of religious freedom is sometimes avowed to be exercising judicial restraint. A review of Supreme Court standards leads to the reasonable assumption that "religious autonomy must be preserved unless there is a compelling state interest that would warrant an infringement."<sup>4</sup> A compelling state interest that would warrant intervention into the practices of a religious group must be clearly defined



and it must be demonstrated that grave harm is posed to public health, welfare or safety. Otherwise, as Laurence Tribe has described, "if the harm is ill defined or plainly not serious" then the religious practice must be granted an exemption.<sup>5</sup>

### **The Establishment Clause and the Free Exercise Clause of the First Amendment:**

The Court's treatment of religious groups has in practice not been static over time, and recent decisions have demonstrated some relatively new definitions of the limits of constitutional protection. Summarizing this body of law is not simple. However, there are some particularly relevant standards used to assess the position of government and the application of constitutional law involving religious groups which have been set by noteworthy decisions establishing precedent, and are largely if not entirely derived from the Establishment Clause and/or the Free Exercise Clause of the First Amendment.

The process of selecting and applying standards and deriving the government's position in a dispute inevitably involves considerable analysis and judicial discretion. Complicating the assessment of the extent of state compulsion to intervene is the tension between the two religion clauses of the First Amendment. In Walz v. Tax Commission (1970) Chief Justice Warren Burger wrote that either of the two clauses "...expanded to a logical extreme, would tend to clash with the other..."<sup>6</sup> Burger concluded that as a consequence of the necessity to avoid such a clash, "[n]o perfect or absolute separation is really possible" between church and state; Burger's solution was to take a position of "benevolent neutrality."<sup>7</sup> This standard was applied in Wisconsin v. Yoder (1972), when the Supreme Court allowed Amish to withdraw their children from school at the age of fourteen despite Wisconsin state law. Torn between the right of the Amish to free exercise of their religious convictions, and enforcing state law applicable to all citizens, the Court chose to grant the Amish an exception in an exercise of benevolent neutrality.

However, there are limits to the exceptions granted religious organizations and their members. One of the variables which governs the setting of limits is size of the population which is to be excepted. As an aspect of the Court's "balancing approach" taken in free exercise cases which recognizes that an individual's right to the free exercise of his or her religion cannot be absolute but must be balanced against the government's legitimate interest, claims to exceptions as an aspect of religious freedom have sometimes been denied. For instance, Reynolds v. United States (1878) rejected a free exercise claim by Mormons who sought to practice polygamy in violation of state law and Leary v. United States (5th Cir. 1967) denied an exemption from the drug laws to a person who alleged that marijuana use was part of his religious practice. In Leary, the Court found the exemption from criminal statutes for drug use would threaten enforceability of those laws, due to the large number of youths eager to experiment with marijuana.<sup>8</sup>

The exemption of citizens from law is calculated as a cost to government, a cost directly proportional to the number of potential claimants. Sherbert v. Verner (1963), described below, specifically noted that the number of potential claimants was very small, and exempted a Seventh Day Adventist from unemployment compensation rules. Sherbert was until recently thought applicable to the Native American Church use of peyote as a

sacrament, but the Court's 1990 decision on *Employment Division v. Smith* "marks an abrupt shift in free exercise jurisprudence, granting government broad new powers over religious practices."<sup>9</sup>

Supreme Court precedent involving the practice of religion and the actions of religious groups is not an absolutely integrated body of standards; depending on the precedent case or cases cited, interpretation and application of the First Amendment varies. One case which established one of these standards is *Everson v. Board of Education* (1974) in which the Court specified three fundamental aspects of the Establishment Clause: affirming the "wall" between church and state activity, prohibiting government aid to all religions, and prescribing government neutrality between religion and irreligion. This last fundamental aspect of the Court's interpretation of the Establishment Clause allowed New Jersey to subsidize parochial school bus transport on the grounds it was not religious aid, but benefitted the health and safety of children.

Another standard is based on *Braunfeld v. Brown* (1961). This case held that an "indirect burden" on religion is permissible in accomplishing a goal which serves a legitimate purpose. A Pennsylvania Sunday closing law was upheld despite challenges from Jews and other Saturday Sabbath observers.

A frequently cited standard at odds with the indirect burden standard is *Sherbert v. Verner* (1963), which provides a key test for balancing the state's interest against the Free Exercise Clause. In *Sherbert* the Court ruled that forcing a woman to choose between work and the precepts of her religion puts "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."<sup>10</sup> The three-part test considers: whether there is a burden placed on the free exercise of religion, and if so, whether the infringement is justified by a compelling state interest, and if a compelling state interest exists, if there is any less intrusive alternative means to meet the government's objective. For decades this test has been used to identify and weigh the needs of the state against instances of religious free exercise. As noted above, its apparent reliability as a standard for defining government's interests and restraining government intervention is becoming more problematic.

An important test regarding the Establishment Clause originated in the *Lemon v. Kurtzman* decision of 1971. Chief Justice Warren Burger wrote that public policy must meet the following standards in order not violate the Establishment Clause:

- (1) The statute must reflect a clearly secular legislative purpose;
- (2) The primary effect of the law is neither to advance nor inhibit religion; and
- (3) It must avoid excessive governmental entanglement with religion.<sup>11</sup>

Using this test, the Court decided in *Lemon* that state aid to private schools for teachers' salaries, textbooks, and instructional aids in certain secular subjects was excessive government entanglement and unconstitutionally fostered religious beliefs.

Historically the vast majority of Court judgments concerning religious groups involve property, because judges have generally avoided intervening in and have dismissed all other

types of cases as beyond their competence. Further, in nearly all court cases involving the use of church property the Court has chosen to follow the precedent of *Watson v. Jones* (1872), and "defer to the appropriate ecclesiastical authority or tribunal on all questions within that body's competence."<sup>12</sup> It is through this judgment addressing a property dispute that the Court made its most cited decision regarding the conditions and extent of autonomy allowed church organizations for settling disputes without government intervention.

*Watson v. Jones* involved a church torn by two factions, each claiming the church to be its property. This factional split was related to the position taken on slavery by a larger religious organization, the "supreme authority" of the Presbyterian church. The *Watson* decision involved, in part, establishing jurisdiction for settlement of disputes within religious organizations, and ascertaining the authoritative decision-making body within the organization. In *Watson* the Court defined three contexts of property disputes:

- (1) Where there is a will or deed committing property to a particular type of religious practice.
- (2) Where the dispute is within a congregation that is independent of other religious associations and is not subordinate to a central ecclesiastical governing body.
- (3) Where the dispute is within a congregation subordinate to a general church organization, governed by ecclesiastical tribunals under the control of a central church judicatory.

Cases of the first type would be decided by following standard civil procedure. In the second case, a majority of the congregation rules, following a democratic model of decision making. In the third case, *Watson* determined that the decision-making body of the church hierarchy has the jurisdiction to decide the dispute. By emphasizing the voluntary nature of religious association, the Court found state intervention into church conflicts inappropriate within congregations with hierarchical affiliation.<sup>13</sup> Such a church decision-making body has plenary power over church property, and it may use the courts to enforce its decrees.<sup>14</sup>

After *Watson*, the next major Court decision concerning the resolution of disputes within churches was *Kedroff v. Saint Nicholas Cathedral* (1952). The Court, citing *Watson*, found the case to be a dispute over property within a church with ecclesiastical hierarchical authority. Therefore, jurisdiction for settlement of the conflict was with the authoritative church tribunal. *Kedroff* held that the First and Fourteenth Amendments "prohibit the courts, as well as legislatures, from interfering with the ecclesiastical governance of churches."<sup>15</sup> It is maintained that *Kedroff* "constitutionalized" *Watson* with regard to the settlement of property disputes in hierarchical churches.

Nevertheless, over time the issue of "neutral principles of law" emerged—a standard at odds with *Watson*. This standard of neutrality was not at all like Burger's benevolent neutrality in *Walz v. Tax Commission*. It was a standard which emerged in state court decisions maintaining that civil procedures may be used to decide church property disputes without violating the Establishment Clause. Cases using this standard are numerous, including *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church in*

Georgia (1969), and at least eight other cases in Maryland, Virginia, Connecticut, Ohio, California, and Colorado cited in Recio.<sup>16</sup>

A noteworthy case was Jones v. Wolf (1978) in which the Georgia Court ruled for a secessionist majority faction's right to possess and control their local church property. The Supreme Court review of Jones in 1979 recognized a variety of "permissible means" for resolving church property disputes, maintaining that the Constitution did not mandate any particular method. This is distinctly at odds with the perception that Watson was "constitutionalized." Further, in Jones the Court "distinctly favored the neutral principles approach."<sup>17</sup> Four Justices dissented, criticizing the majority for intrusion into the church polity and for fashioning restrictive rules of evidence. This criticism refers to the narrowing of evidence allowed by the neutral principles approach to scrutiny of the church's constitution and restriction to language explicitly dealing with the control of property.<sup>18</sup> Using this approach moves control of decision making from authoritative ecclesiastical bodies to the language of a document which is assessed in terms similar to any other legal document. Recio argues persuasively that causing such movement of the locus of control is not in itself neutral behavior, but intrudes upon church internal conflict management.<sup>19</sup>

In addressing disputes within religious organizations, an important function of the courts is to establish the locus of control. Watson established strict criteria based on the affiliation, or lack of affiliation, of the congregation involved. The neutral standard of Jones regards Watson's analysis itself as intervention and seeks to avoid intervening in matters of religion by ignoring the church organization per se and referring only to formal legal documents. In all cases, establishing a locus of control and then recognizing and possibly enforcing the decision of that authority are the courts' responsibilities. The locus of control issue—locating the legitimate decision-making authority—is an extremely important aspect of judicial decision making in deciding disputes of all types, including disputes within voluntary associations. A thorough analysis of this issue would include examination of the tensions between individual rights, group rights, and the needs of the state, and of how primacy is assessed and asserted.<sup>20</sup>

## **"WALL" OF SEPARATION BETWEEN CHURCH AND STATE**

Freedom of religion and the rights of religious groups are explicitly protected through the Constitution's First Amendment. However, judicial decisions over time have not been absolutely consistent, so application of the diverse standards derived from precedent is problematic. The free exercise of religion guaranteed in the First Amendment has "afforded religious organizations great autonomy in conducting their internal affairs."<sup>21</sup>

Thomas Jefferson considered the intent of the Establishment Clause to be the erection of a wall of separation between Church and State. Though not appearing in the Constitution or codified as law, this view has often been considered a strong secondary source of law which has often guided judicial actions in the past. However, Chief Justice Rehnquist's resolve to eschew "interpretation" of the Constitution is well known. Rehnquist has stated that he does not find any reference in the Constitution to an impenetrable wall separating Church and State. However, any application of the Constitution to a particular case involves

interpretation through definition of the relevant aspects, so Rehnquist's resolve means, in practice, that he will interpret the Constitution without overt reference to secondary sources of law. This approach allows him to ignore Jefferson's statement regarding the intent of the Constitution's First Amendment. Rehnquist and a majority of the present Court seem inclined to diminish the jurisdiction for autonomous control available to church organizations, for instance in Employment Division v. Smith (1990), previously quoted. Nevertheless, the Free Exercise Clause and the Establishment Clause are still significant and influential protectors of religious group autonomy.

## **NATIVE AMERICAN AUTONOMY**

Native Americans, also known as American Indians, have strong claims to autonomy within certain jurisdictions of sovereignty. This autonomy is derived from references in the Constitution, court decisions, and legislated statute. "There are two clauses in the Constitution which reflect the understanding that Indians are a distinct and separate people: The Indian Commerce Clause and the clause exempting Indians from taxation for representation purposes."<sup>22</sup> Worcester v. Georgia (1832) has been said to preserve and insulate tribal sovereignty from state interference. United States v. Wheeler (1978) found tribes to be "unique aggregations possessing attributes of sovereignty over both their members and their territory." Under certain circumstances, "this power may even extend over nonmembers or extend beyond territorial limits."<sup>23</sup>

Congress has never expressly extinguished the Indian right to sovereignty. There is, however, an ongoing struggle for Native Americans to resolve conflict for their own people and on their own lands. Statutes enacted by Congress in 1982 have further diminished the exercise of Native American sovereignty. It is said that the Pueblo in New Mexico "do rely heavily on customary procedure, and may operate quite informally, relying on traditional methods of dispute resolution."<sup>24</sup> However, the practice and application of custom law free from intervention of state or federal law has continually diminished over time, and is now highly restricted.

The salient factor held in common by the approximately 499 federally recognized and 136 non-recognized tribal entities is the right to internal self-governance.<sup>25</sup> Fundamental powers retained by Native Americans include:

- (1) Power to establish a form of government;
- (2) Power to determine membership;
- (3) Power to legislate; and
- (4) Power to administer justice.<sup>26</sup>

The jurisdiction of Native American authorities to administer justice and resolve conflict is said to extend to the bounds of Indian Country, which is defined as all Indian reservations, dependent communities, and allotments with titles which have not been extinguished. Tribal criminal and civil jurisdiction is exclusive in Indian Country, except where limited by Congress. The three acts which currently curtail Native American tribal jurisdiction include Public Law 280 (1982), the General Crimes Act (1982), and the Major

## Crimes Act (1982).

Public Law 280 authorizes any state that so wishes to assume exclusive criminal jurisdiction and some civil jurisdiction over all Indian reservations. Sixteen states have adopted all or part of the jurisdiction enabled by P.L. 280. In states where P.L. 280 does not apply, Indian criminal defendants go to federal courts for most major crimes, and to tribal courts for all minor and some major crimes. Non-Indians cannot go to tribal court.<sup>27</sup> In sum, the "exclusive" jurisdiction of tribal law in criminal and civil cases within Indian Country is, in fact, very much diminished by laws that allow Federal and State intervention and structuring of jurisdiction.

In a "complicated opinion," Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation (1989) established some circumstances in which a tribe may "regulate the conduct of non-Indians." In order to do so the tribe must demonstrate serious impact which "imperils tribal political integrity, economic security, or health and welfare."<sup>28</sup>

A relatively lucid opinion was given regarding the power of Indian tribes to determine membership in their tribe. Native American tribes are clearly empowered to determine criteria for tribal membership. However, judicial recognition of Native American jurisdiction and sovereignty is constantly being tested.

As for future trends, the best benchmark may be that "a majority of the present Supreme Court appears to favor limiting the sovereignty of Indian tribes."<sup>29</sup>

## **PACIFIC ISLAND PEOPLES AND CUSTOM LAW**

It might be expected that by investigating the enactment of the Constitutions of Pacific peoples one could find some examples of effective means of incorporating state law with culturally appropriate dispute resolution technique in the form of custom law. The Federated States of Micronesia, Pohnpei, Truk, the Marshall Islands, Palau, and American Samoa all have legal codes and judicial systems modeled closely on the US system, and in each case there is some recognition of custom law in their constitutions and statutes. For instance, the constitution and statutes of the Federated States of Micronesia mentions custom law, calling for "due regard for custom law," and directing judges to "consider" custom law.<sup>30</sup> Nevertheless, in practice, custom law is clearly secondary to the mainstream legal system. Although customary law is widely practiced, its initiatives are recognized only at the discretion of prosecutors and judges, and are usually considered at most as mitigating factors in sentencing. Given these circumstances, such codified references to consideration of custom law are what Bowman calls "ameliorating."<sup>31</sup>

### **Micronesia:**

Nickontro Johnny, writing when he was serving as National Justice Ombudsman of the Federated States of Micronesia Supreme Court, describes the need for alternatives to Western law to best serve the people of Micronesia.<sup>32</sup> The Micronesian Supreme Court was created in 1981, and up to the time he wrote his article in 1987 the only two justices of the

Court were Americans. He recognizes that there have been efforts by the Court to develop a system of jurisprudence which reflects the values of Micronesians and which is understandable to Micronesians, and to this end Justice Ombudsmen were chosen to act as liaisons between the Court and the community. However, in many instances the Western law model, the basis of the Micronesian Constitution, does not reflect Micronesian cultural values. Further, even where there is not a conflict of values, the Western codified law is too inflexible "to provide precise justice for certain kinds of disputes."<sup>33</sup> To a great extent conflicts in the community are settled through traditional means by the decision-making authority of traditional leaders; this is the case for almost all land and domestic cases.<sup>34</sup> The cases that do reach the Micronesian courts include "almost no cases involving disputes between individuals."<sup>35</sup> In such cases a confrontational model of fact finding and guilt finding is inappropriate, because there is a need to gain acceptance of whatever result is reached from all parties concerned or a need for community consensus that justice has been done. To this end, there is a need for alternative dispute resolution processes, but Johnny notes that efforts to persuade the Court's two American justices of the need for alternative dispute resolution practices "have met with little success."<sup>36</sup> Apparently, from Johnny's description, Micronesians feel the best strategy is to avoid having situations come to the attention of the Court, and to settle disputes through the traditional authorities. There is not yet any significant integration of the two systems, and when the Court becomes involved in a dispute, the community may not feel well-served.

### **Melanesia:**

Bernard Narokbi writes that Western law still dominates Melanesian legal systems. However, "[t]he customs and usages of the Melanesian people were also declared to be part of the underlying law of the State, though given varying degrees of importance"<sup>37</sup> by the various constitutions. Nevertheless, custom law was expressly ignored during colonial times, and to the present day is not sufficiently recognized by the constitutional judicial system. He argues that colonial judges, by not recognizing the Melanesian institutions of social order, "unwittingly created the seeds for social disorder" through the general breakdown of the order of traditional law and social order.<sup>38</sup>

This lack of recognition is substantially continued by the current judiciary, which applies standards that are inappropriate, in an effort to promote social order in a way that is ultimately futile. For Melanesian communities, social order cannot be maintained through the application of a narrow, uniform legal code, but must consider "the ways of the people in their total environment, both physical and metaphysical, tangible and intangible, concrete and abstract."<sup>39</sup> Narokobi describes such custom as still prominent in villages, and says that "Village Courts, Local Land Courts and Local Government Councilors as well as village leaders use custom to establish local control, and more recently, extend central authority over the people and introduce social change."<sup>40</sup> However, with respect to the central legal system which still follows the Western model, custom has had a limited role. "Custom has been most effective in criminal law, especially in mitigation of sentences for crime, and to a lesser extent in the development of defenses for criminal offenses."<sup>41</sup> Here again, when custom is recognized by formal jurisprudence, it is at the discretion of the court, and acts in mitigation of, not a substantial alternative to, the system which is part of the colonial legacy.

Tony Deklin, Senior Lecturer in Law at the University of Papua New Guinea, describes the shortcomings of efforts to remodel Western legal systems to accommodate the real needs of Melanesian peoples. He states that "there have been efforts made to remodel national legal systems in the Pacific,"<sup>42</sup> but that there has been "more political rhetoric than real action in pushing for legal changes." There have been changes made, but "these changes fall into the black-letter-Law type of changes,"<sup>43</sup> which manipulate details but do not reform the basic model.

Neither Deklin nor Narokobi apparently foresee a potential for the complete abandonment of Western law in Melanesia and a complete conversion to reliance on custom law. Narokobi sees the challenge to be the infusion of "appropriate degrees of Melanesian thought and practice into these systems, while being cognizant of the positive elements introduced from the West over the past century, and sensitive to the pressures from the Far East in the coming century."<sup>44</sup>

David Akin has examined the difficulties in codifying custom or kastom law in East Kwaio, Malaita of the Solomon Islands of Melanesia, and the difficulties in combining selected aspects of the Western legal system with elements of kastom law. Problems include the differing basic motivations for undertaking the project of codification, with various groups using codification as a political tool to further particular goals. This is complicated by the heterogeneous nature of kastom law in the area, with different rules and procedures proving to be mutually exclusive, thus prohibiting a central set of kastom law acceptable to all groups. Even within groups, codifying kastom law proves elusive, because the basic nature of kastom law is its dependence on context and flexibility.

## **THE POTENTIAL FOR AN INTEGRATED SYSTEM**

The legal systems, constitutions and statutes of Pacific Islanders are essentially derived from US, British, or French law, and in the case of Vanuatu "a tragicomic amalgam" of both British and French law.<sup>45</sup> While custom law is still widely practiced, especially in villages, there is no significant integration of custom law with the jurisprudence derived from colonial models. The constitutions of now independent nations commonly make reference to the co-existence of custom law with the derived mainstream legal system of the state. In substance, there is co-existence to the extent that custom law manages to function by avoiding the attention of the formal judicial system. The references to custom law being an integral part of the formally-recognized law amount to ameliorative passages, and in practice, custom law is considered only at the discretion of judges and prosecutors who are fundamentally faithful to the western system from which their formal jurisprudence is derived.

Designing and institutionalizing a legal system which truly integrates custom law with a formal jurisprudence is a formidable task. At present in Pacific island nations, these two systems seem to co-exist best when used as mutually exclusive paths. In systems which have attempted to incorporate or in any sense integrate formal and custom law, it is evident that custom law is used at best as a mitigating factor in the defense, or more often in mitigating the consideration of sentence, much like the cultural defense in the United States. At worst,



custom law is ignored altogether, or given recognition only in the rhetoric of the decision, serving as a decoration of the judicial process.

## **UNITY, DIVERSITY AND THE FUTURES OF LAW**

The beginning of this paper stated that there is evidence of two contradictory current trends in law: resistance to the recognition of cultural difference and support of diverse values, norms, and behaviors indicative of cultural identity and cultural difference. Given the individuals comprising the current Supreme Court, and the resistance to cultural diversity apparent in the pattern of their recent decisions, finding strong evidence in support of diversity in the above summaries of decisions is problematic. Focusing on the treatment of these selected groups would seem, generally, to undermine rather than support the assertion of such a trend.

Nevertheless, this study may prove useful in demonstrating the changing environment surrounding Court decisions regarding groups and autonomy over time, and to expose the current shifting and uncertainty inherent in the Court's views on these issues. The previous sections of this paper have provided a glimpse at the overall structure defining groups in law, focusing on what has happened in the past and shapes the present. The remainder of this paper is more concerned with the future—what might be. For groups seeking greater autonomy, there are, fortunately, other directions to look that may prove more satisfactory for finding remedies.

## **DEFINITION OF CULTURAL GROUPS**

So far, this paper has side-stepped several extremely important and extremely complex issues. For instance, given group semi-autonomy, how does one identify group membership? Who decides? How does one identify a cultural group? After all, they are not all necessarily grouped on an ethnic-genetic basis.

In terms of American society and cultural change, some of the most interesting phenomena involve the emergence and increasing prevalence of relatively new conceptions of individual identity that can not be subsumed within the values of a single readily identifiable group culture. Given an increased prevalence of conflict management alternatives available to specific culture groups, will such multi-cultural individuals be denied access to alternatives available to bona fide group members and limited to mainstream alternatives? This would be a gross and absurd inequity, but not out of the question given the current lack of coherence surrounding the issue.

Of equal interest are new group cultures, with some attributes of more readily identifiable groups of the past, but with significant differences. There may be multiple group identities, overlapping and shifting, a flux of bonds initiated then withdrawn. Therefore, to some extent, when the intent is to develop alternatives for people in a changing society, an exclusive focus on legitimized groups and their members is insufficient, or not a sufficiently forward-looking perspective to satisfy social needs. We must go beyond the limited view of legitimate groups which even this paper has adopted as an organizing format. Truly opening

our formal and informal means of conflict management to real alternatives, developing ways of controlling social pathology and fostering community which embrace a diversity of values, and engendering democratic pluralism, must involve an extremely complex set of planning and implementation events.

Despite this complexity, we can speculate about the qualities of such a system. Peter Adler, one of the people most active in the development of ADR in Hawaii in the past two decades, wrote in the early 1970s about culture and identity, and how multi-cultural individuals need not be marginalized, but can demonstrate variation and flexibility of identity and behavior to reflect a variety of contexts and environments.<sup>46</sup> (This concept can also be applied to societies as a whole, including the system of conflict resolution. There would not be only one "legitimate" culture to be emulated, a culture by which the other co-existing cultures would be assimilated and judged. Neither would a single system of judicature predominate, directly or indirectly. In order to support a diverse social system truly based on democratic pluralism, there must exist a correspondingly diverse and flexible system of conflict resolution options.

The primary intent of this paper has been to establish a context within which to locate the pursuit for democratic pluralism in the law. There is evidence that law has intermittently supported the freedom to engage in behaviors which are reflections of diverse group values. These activities are by no means limited to the groups explored in the preceding sections but encompass diverse issues including, for instance, the recent controversial "right to die" cases, the support of laws forbidding discrimination on the basis of sexual preference, and the support of bilingual education in schools.

Also of relevance is the growth of alternative dispute resolution which, although not as pervasive and not always of the particular variety envisioned by some of the ADR movement's progenitors, has continued to grow—if slowly. These alternatives include arbitration, mediation, and the use of "private" courts. However, a full examination of these phenomena, and all the other aspects of this trend of increasing support for and development of diversity in law, is far beyond the scope of this paper. Having noted these limitations, the remaining portion of this paper briefly points out additional opportunities to support the trend toward legal recognition of diversity, a trend which may be an early indicator of the development of democratic pluralism in the United States.

How might movement toward such a society proceed? The most obvious answer, but perhaps the most difficult, revolves around changes in law: Congress could change federal laws or the states amend the Constitution. Although changing the law is one possibility, it is not necessary for all such change. Following are two other alternatives to move toward a system with greater cultural flexibility.

## **CONSENSUAL AGREEMENT CONTRACTS**

One possibility that has the potential for considerable growth is through the use of contracts. "Consensual agreement contracts" may be used to carve domains of semi-autonomy from the judicial system. Such an agreement might stipulate that all conflicts

of a given kind be managed by specified means. For instance, a medical group could create such an area of autonomy by having its clients enter into a contract specifying that all malpractice claims be settled through arbitration, with arbitrators drawn from a particular claims board. With such an agreement, the arbitrators' decision would apply unless there were evidence of coercion in entering into the contract, or deprivation of constitutional rights.

Consent is the essential element for such a contract to work; if it can be found that meaningful choice was not available in entering into such an agreement, the contract is vulnerable to challenge. Of course, such contracts have serious restrictions that if abused could reduce rather than enhance people's access to appropriate means of dispute resolution. However, the potential exists for making private settlements not subject to intervention by outside parties, and if used with creativity these could enhance people's ability to make their own decisions in managing conflicts, decisions which would endure regardless of the values and views of those not directly involved.

## **CHANGES IN INTERPRETATION OF LAW**

A Department of Justice report issued to the Attorney General in October 1988 states that new interpretations could expand the protections of the Equal Protection Clause of the Constitution in a way that would influence all aspects of public policy. Showing a "disproportionate burden" or "disproportionate impact" on any particular group could render a government statute, policy, program or practice unconstitutional, without need to show discriminatory intent, if Griggs v. Duke Power Co. (1971) were extended to the area of equal protection area. Areas impacted by this might include criminal statutes and penalties; it is pointed out that the death penalty might be found unconstitutional by such interpretation. This interpretation could also be used to gain acknowledgment of the autonomy of various means of alternative dispute resolution for members of groups that can demonstrate a disproportionate rate of incarceration (thus suggesting an unconstitutional bias in the law and process).

An August 1988 report from the Department of Justice's Office of Legal Policy notes that more judges are using an "equity interpretation" (based on an interpretation of Article III of the Constitution) to justify the exercise of discretion and allow them to "do justice" rather than follow just the strict application of rules. Tracing the overt emergence of this trend to Justice Douglas' Hecht opinion and noting that to a degree this trend was institutionalized by the career of Chief Justice Warren through his conviction that federal judges must "do justice,...regardless of law and precedent," the report sounds a dire warning to those concerned about loss of constitutional guidance.<sup>47</sup>

This may be the opening needed for judges who have been unwillingly acting as so many Procrustes and put in the position of mutilating disputants to fit the existing jurisprudential bed. If a strong movement developed of judges "doing justice" it is conceivable that truly enlightened judges may decide that much of formal jurisprudence is not appropriate for doing justice in a complex society, and must be supported by a more complex system of cultural values, and derivative means, methods, and systems for maintaining social

order. This would be a formidable undertaking, no doubt, requiring much courage to initiate, and a continuing process of trial and adaptation.

## **THE POWER OF STATE COURTS TO CREATE CHANGE**

It is important to recognize that any such changes need not be made at the federal level to be effective: state supreme courts are increasingly distinguishing their decisions from the federal Supreme Court's, and, on balance, may be creating greater changes in public policy. State courts may be closer to and more responsive to the values of the people they govern and more concerned with giving meaning to those values.<sup>48</sup> Although significant state supreme court recognition of pluralism might require an amendment of the state's constitution, state amendments are much more likely to occur than federal Constitutional amendments: the present constitutions of the fifty states have been amended more than 5,300 times, especially in states with citizens' initiative processes.<sup>49</sup> With or without constitutional amendments, if state supreme court justices decide there must be institutional recognition of cultural difference, and such interpretation is based on their state's constitution, such a decision would be "virtually immune from US Supreme Court review."<sup>50</sup>

Supreme Court Justice Brennan has stated that the way is clear for experimentation, and that state courts may "shield state constitutional law from federal interference and insure that its growth is not stunted by national decision makers."<sup>51</sup> Assuming this to be the case, Hawaii could be the first state to adopt truly significant recognition and institutionalization of a diverse assortment of conflict resolution systems, based on truly pluralistic values, thus initiating the first functionally democratic system of social order. While this may require constitutional amendment and significant coordination of diverse interest groups, the most important factor would be a shared conviction that everyone need not be exactly alike for the society as a whole to have justice.

## NOTES

1. Note, Harvard Law Review (1963), 1058.
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3. Ibid., 1057.
4. D.L. Tays, "Church Participation in Referenda and the First Amendment," A Journal of Church and State (Volume 32, No. 2, 1990), 403.
5. Ibid., 403.
6. Ibid., 401.
7. Ibid.
8. Note, Harvard Law Review (1986), 1309-1310.
9. R. Boston, "The Day 'Sherbert' Melted," Church and State (June 1990), 4.
10. Tays, "Church Participation," 402.
11. Ibid.
12. Note, Harvard Law Review (1963), 1055-1056.
13. R.A. Recio, "Jones v. Wolf: Church Property Disputes and Judicial Intrusion into Church Governance," Rutgers Law Review (Volume 33, 1981), 540.
14. Note, Yale Law Review, 1965, 1137.
15. Recio, "Jones v. Wolf," 541.
16. Ibid., 547.
17. Recio, "Jones v. Wolf," 550.
18. Ibid., 551.
19. Ibid., 557-558.
20. See F.M. Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights," Wisconsin Law Review (No. 1, 1989), 99-169 and R.W. Duesenberg, "Jurisdiction of Civil Courts Over Religious Issues," Ohio State Law Journal (Volume 20, 1959), 508-548.
21. Note, Harvard Law Review (1963), 1055.
22. N. Kahanu, M. Mackenzie, and J. Van Dyke, (Unpublished and Untitled Paper, 1990).
23. Ibid., 3.
24. Ibid., 10.

25. Ibid., 26.
26. Ibid., 9-10.
27. Ibid., 12-15.
28. Ibid., 25.
29. Ibid., 1.
30. A.M. Bowman, "Criminal Justice in the Federated States of Micronesia," (unpublished paper, 1990), 14-15, 24).
31. Ibid., 24.
32. Nickontro Johnny, "The Relationship Between Traditional and Institutionalized Dispute Resolution in the Federated States of Micronesia," (Occasional Paper, Program on Conflict Resolution, University of Hawaii, 1987).
33. Ibid., 10.
34. Ibid., 13.
35. Ibid., 14.
36. Ibid., 15.
37. B. Narokbi, "Law and Custom in Melanesia," Pacific Perspective (Volume 14, No. 1, 1989), 17.
38. Ibid., 18.
39. Ibid., 19.
40. Ibid., 17.
41. Ibid.
42. T. Deklin, "Prospects for Legal Research in the Pacific," Journal de la Societe des Oceanistes (Volume 84, 1987), 111.
43. Ibid., 112.
44. Narokbi, "Law and Custom," 26.
45. Ibid., 18.
46. P. Adler, "Beyond Cultural Identity: Reflections on Cultural and Multicultural Man," Topics in Cultural Learning (Honolulu, East-West Center, 1974), 37-38..
47. "Justice Without Law: A Reconsideration of the 'Broad Equitable Powers' in the Federal Courts," Report to the Attorney General, U.S. Department of Justice, Office of Legal Policy, 1988, 158.
48. E. Witt, "State Supreme Courts: Tilting the Balance Towards Change," Governing the States and Localities (August 1988), 32.

49. Ibid., 38.

50. Ibid., 35.

51. Ibid.

# **EXPLORING ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES IN THE PACIFIC REGION**

by

**Christopher Jones**

This paper was developed as part of project to examine the potential for incorporating cultural dispute resolution processes into the formal legal system. It is focused on a literature review and contains a summary discussion of the general themes and issues uncovered, including dichotomies or polarities such as formal/informal, rural/urban, agricultural/industrial, voluntary/coercive, authoritarianism/participation, and proximate/distant, and other general issues including world view, power relations, satisfaction, complexity/modernity, mixed (attorney) systems, crimes and punishments, cross-cultural, and other issues. The bulk of this paper however is composed of an extensively annotated bibliography on cultural forms of dispute resolution in the Asia-Pacific region.

## **RESEARCH DESIGN**

This paper is a product of the third section of the Future Demographic Changes and Culturally-Appropriate Dispute Resolution Procedures for the Judiciary of Hawaii project. This section's initial goal was to identify culturally-appropriate dispute resolution techniques of the selected ethnic groups chosen for the study. The scope of this paper, however, diverges somewhat from this initial intent: it is as much about process as it is technique. This change occurred as the focus of the project was clarified and the research needs modified. Thus, we moved from a narrow review of dispute resolution techniques of a few ethnic groups to a broader scope which places those groups in their Pacific Basin context. We also expanded our research techniques; in addition to interviews with experts in the field, we also included a literature search.

Another facet was added to the search based on the project team focusing the project on how different cultures would deal with disputes involving: violence, property, and relationships. This research was accordingly restructured to look at alternative ways that ethnic groups in the Pacific region dealt with violence, property disputes, and conflicts in family relationships. (A Western formulation of these three types might be criminal, civil, and family disputes.) Furthermore, the search was guided by a set of search criteria that sought for alternative dispute resolution (ADR) techniques that lower recidivism and are satisfying for the participants. In our discussions we questioned whether there is only one method of resolving disputes in any society, or whether it might be more fruitful to look at specific kinds of disputes and the specific techniques used to resolve them.

Although this paper has been expanded somewhat from the original research interest, the general approach of the process and text still focuses on culturally- appropriate ADR techniques. Broader issues, however, including philosophical questions regarding the nature of dispute



resolution have been integrated into this work. The literature search was also influenced to some extent by a feedback process of weekly and biweekly meetings of the project team, particularly with respect to the philosophical and historical questions which arose. Thus, the seemingly simple task of looking for ADR techniques in the Pacific evolved into a more complicated process which also confronted some basic questions, such as what is justice and what distinguishes formal from informal processes.

This piece is not an isolated research element, but is linked closely with the other research tasks associated with the project, and should be viewed as one component of an interactive process which included one-on-one interviews, project team meetings, meetings with experts, and library research. The foci of this research were in the areas of traditional law, customary law, and ADR in contemporary settings (which included among other things the use of ADR in traditional cultures and rural settings).

## **LITERATURE REVIEW AND INTERVIEW ANALYSIS**

One challenge in researching this area was to gain an understanding of the history and background of cross-cultural formal and informal legal studies. Another was to discover the keywords and structure of ADR discourse in the literature. The review of traditional and customary law references became an essential part of the learning process, as it was clear that much of the contemporary discourse on ethnic legal forms and traditional means of dispute resolution has its roots in these earlier legal/anthropological traditions. Similarly, the initial immersion in ADR literature revealed the scope of literature available locally which deals with ADR practices and case studies. In other words, one must first get acquainted with informal dispute resolution and various related areas and issues such as settlement strategies, bargaining, collaborating, negotiating, mediation, and training.

Focusing in on mediation itself, there are distinct literatures on the different types of mediation including: international, intercultural, environmental/urban planning, marital, community/neighborhood, commercial/consumer, and labor/employment, and specific training for these different types of mediation. Although the literature on intercultural mediation did not yield relevant information on Asia and the Pacific, it does speak to the needs of this area of dispute resolution, e.g., the need for specific training for cross-cultural mediation and ADR processes. A related literature addresses the particular cultural differences between North American culture and other cultures.

## **GENERAL THEMES AND ISSUES**

A number of the authors such as Merry, Muntarbhorn, Tadiar, cited in the bibliography discuss some of the general elements which are characteristic of mediation and other ADR techniques in non-Western societies. Merry provides a good overview of mediation in small-scale societies, for example. The general themes and issues discussed in this paper include dichotomies or polarities such as formal/informal, rural/urban, agricultural/industrial, voluntary/coercive, authoritarianism/ participation, and proximate/distant, and other general issues including world view, power relations, satisfaction, complexity/modernity, mixed (attorney) systems, crimes and punishments, cross-cultural, and other issues.

**Formal/Informal:**

It is clear that many if not most societies have both informal and more formalized forms of dispute resolution processes. Even in primitive societies, serious disputes between families or family members require a more formalized, ritualized process often involving a large number of people. In China, for centuries, there has been an option to choose between the formal and informal dispute resolution systems, and invariably, rural people preferred the informal mediation process. Generally, the distinction between formal and informal refers to the state-controlled formal court system as opposed to family or village-level ADR approaches.

Issues which relate to the option of choosing between the two systems generally have to do with the lower cost, the speed of settlement, and participatory nature of informal systems. Gibbs gives the best case study which draws out the formal/informal distinctions. Gibbs and others note that informal celebrations such as feasting and toasting (e.g., alcohol, coffee) are sometimes important social reconciliation elements absent from the formal court system.

**Rural/Urban:**

Closely related to the dichotomy of informal/formal is the social distinction between rural and urban settings. Mediation and other forms of informal dispute resolution seem more prevalent in rural than in urban areas in much of Asia and the Pacific. While in the People's Republic of China (PRC), mediation appears to be as ubiquitous in urban areas, in other countries traditional forms of dispute resolution are less likely to be brought to the city (another exception may be the Philippine katarungang pambarangay system). The rural/urban dimension is also partly related to production modes (i.e., agricultural) and overall state on national development.

**Agricultural/Industrial:**

Another key element in the overall ADR discourse is the level of development. This aspect of analysis is at the heart of the discourse on primitive and customary law. Thus, from one perspective the emergence of formal law is a natural stage of development in the evolution of customs and primitive norms to a codified modern system of dispute resolution. While one might be tempted to claim that more primitive societies have less formal means of resolving conflicts, each stage of development may have its own formal and informal processes. The Ifugao have a range more or less formal dispute resolution procedures as do modern Western societies.

However, comparing their most formal procedures with ours would reveal some striking differences. This dimension is illustrative also of the developmental social changes which lead to formal legal systems. While interpersonal conflicts have similarities in hunter-gatherer, agricultural, and industrial societies, the nature of property, land, and commerce disputes, generally-speaking, is vastly different between stages of development. The level of an issue's socio-technological complexity also begs a question regarding its proper and appropriate legal forum. All of this suggests that there are kinds of disputes that "go with" ADR and that go with litigation. Interpersonal disputes would seem at least to be amenable to mediation if the parties

agree. Perhaps Constitutional issues needing decisive clarification should not be settled by agreement between disputants.

### **Worldview:**

A variable which seems independent is the basic philosophy and worldview of a culture. Thus, generally, Western cultures are more litigious than non-Western. The literature on Japanese and Chinese attitudes towards litigation clearly stresses this difference. Japanese attitudes towards mediation and apology as show in Wagatsuma & Rosett and Kawashima in this bibliography are strikingly different from the American worldview. The importance of the role of formal apology in Polynesian dispute resolution can also be seen in marked contrast to the Western legal system.

### **Proximity and Distance:**

Probably the most critical element in mediation and ADR processes generally is the proximity issue, defined both in terms of physical and emotional proximity. Members of families, villagers, and other members of close communities are those most likely to be the subjects of successful informal dispute settlements. Whether in a traditional village or a modern family, it is people with on-going relations who need cheap, fast, and informal resolution of their conflicts. The literature on non-Western ADR suggests that the greater the physical proximity, the greater the chances are that disputes will be settled.

### **Power Relations:**

Mediation and other ADR approaches seem to work best when there is little status, wealth, or power differences between disputants. The literature suggests that some disputes which would have traditionally been settled by some form of mediation (e.g., landlord/tenant conflicts) are more likely to find their way to courts. Courts, in cases of inequalities of power, are seen as a great equalizer. Particularly with the emergence of economic rights for peasants, courts are seen as a more just forum for complaints.

### **Voluntary/Coercive:**

Another element which emerges from the literature is the extent to which ADR processes are voluntary or coercive. This is an element which appears to be a more modern concern. My reading of traditional mediation is that community pressure to resolve and settle disputes can be very strong--coercive, in other words. However, when comparing the Western formal court process to voluntary mediation settlements, it does become clear that an individuals choice to settle is a greater incentive to stick to a settlement than the incentive imposed by a judge. This is related to the issue of satisfaction. According to the literature, disputants who work out agreements themselves are more likely to be happy, or satisfied, with the outcome. In contrast to the win or lose proposition faced by disputants in formal courts, the compromise often reached by participants in mediation-type processes is far more likely to result in expressions satisfaction on both sides of the dispute.

### **Authoritarianism/Participation:**

An element related to voluntarism is the extent of mediator involvement in the course of reaching a settlement in a traditional mediation setting. In some cultures mediators are reportedly no more than facilitators, whereas in others they are assertive and powerful figures in the process. The literature reflects a strong participatory tendency in primitive cultures (i.e., hunter-gatherers) and more authoritarian in highly hierarchical agricultural societies. Although traditional mediation does not involve lawyers, the literature review found that there are some mixed ADR systems where lawyers are involved.

### **Cross-cultural Issues:**

The similarity across cultures of small-scale mediation suggests that some adaptations of the traditional process might work in various cultural and cross-cultural settings, assuming that the disputes were minor or of an interpersonal nature, that participants had some on-going relationship, and that participants had incentives to cooperate. Similarly, apology ceremonies which are fairly common in the Pacific region might also be appropriate in cross-cultural settings (given similar sorts of assumptions about participants). Furthermore, analysis of a range of cultural ADR options and sanctions suggests a wealth of dispute resolution strategies available in the cross-cultural pool of human experience.” Given the range of options expressed in the pool of human experience, it would seem that a complex multi-ethnic, and multi- developmental stage society should naturally have a range of possible ADR and litigation options. Multidoor court houses could work cross-culturally with doors leading to: formal litigation (in its varieties); mediation; arbitration; apology ceremonies; informal settlements; and even voluntary primary rites including shamanism, magic, and physical tests of endurance.

## **ANNOTATED BIBLIOGRAPHY**

Aryal, L. P. 1988. Mediation in Nepal. In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 159-166. Manila: Asia-Pacific Organization for Mediation.

Comment: Various types of ADR, which fall under the general category of mediation, are discussed in this overview of Nepalese society. The author focuses on the Nepalese Panchayat tradition and Buddhist predisposition to mediate rather than litigate. He discusses the ecclesiastical roots of mediation and the Panchayat, or assembly of elderly, who historically mediated community and family disputes. He provides a parallel summary of major laws which either have had an impact on or allowed for mediation under the law. He also discusses the changes which have occurred in mediation and the areas of Nepalese society in which mediation stills plays a large (if somewhat derivative) role. Despite the changes (such as urbanization and commercialization) underway in Nepal, the author notes the pro-mediation orientation of lawyers in Nepal and paints a bright picture for the future of mediation.

Alailima, Fay, and Vaiao Alailima. 1968. Samoa's Traditional Political System. Honolulu: University of Hawaii.

Comment: A comprehensive political anthropology of traditional Samoan society. Of relevance to our task are sections which mention traditional dispute resolution processes still in practice. For example, the fa'atoeseaga (informal apology) and ifoga (formal apology) ceremonies are still important aspects of

resolution of conflicts (47-48). Disputes within and among families (in which neither of the parties has been found guilty of an offense toward the other) are handled through a fa'aleleiga ("making things right"). In fa'aleleiga, family heads agree to abandon their antagonism and "proverbially 'shake hands'" in the presence of the chiefly council, the talatalaga. Then if the council finds a family member guilty of an offense to the family, an apology takes the form of a fa'atoesega, where "he guilty party kneels inside the family circle with tears in his eyes, and begs forgiveness while family members in turn berate him for his shortcomings." (154). The ifoga involves the guilty parties (i.e., a family) sitting humbly on the ground in front of the house of the wronged family. The chief holds a fine mat over his head. The guilty family is forgiven if the wronged family accepts the mat and asks the other family to come inside the house.

Becker, Ted, and Christa Daryl Slaton. 1987. "Cross-Cultural Mediation Training." Mediation Quarterly, Fall, pp. 55-66.

Comment: Summarizes the mediation systems in the Philippines and in Hawaii and the development of the Asia-Pacific Conference on Mediation (Manila). The paper discusses a cross-cultural experiment in mediation simulations and training with American and Filipino mediators. Discusses cross-cultural learning from and about Filipino mediators from an American perspective.

Bilmes, Jack A. 1989. Northern Thai Mediation. Honolulu: Program on Conflict Resolution, University of Hawaii. Working Paper Series, 1989: 7.

Comment: This is an analysis of a Northern Thai dispute and mediation between a rural landowner and rice sharecropper. A fascinating description of rural Thailand and Thai culture. Includes a few remarks about crime in rural Thailand and Thai cultural values as they pertain to attitudes about conflict and disputes. Bilmes raises some general issues (i.e., "exchange" vs. "division" types of negotiation) and focuses primarily on an analysis of the dispute in question.

Cohen, Jerome. 1966. "Chinese Mediation on the Eve of Modernization." California Law Review, Vol. 54, pp. 1201-1226.

Comment: This article presents an overview of the importance of mediation (as ADR) in pre-revolutionary period (Ch'ing Dynasty) and immediate post-revolutionary period of China. The author traces the historical roots of mediation in Chinese society, particularly in Confucianism, and the adaptation of Confucianist mediation to Maoism. Emphasis is on the pre-revolutionary context of mediation in the Ch'ing tradition, which stressed extrajudicial settlements and adjustments to conflicts. The author briefly discusses the roles of the courts in the early Mao period. He also presents some case studies of extrajudicial mediation (i.e., in family, clan, village, and guild disputes) prior to the revolution (late Ch'ing period).

Cloke, Kenneth. 1987. "Politics and Values in Mediation: The Chinese Experience." Mediation Quarterly, Fall, pp. 69-82.

Comment: This analysis is based on a 1984 visit of a delegation of some 30 mediation professionals to China. The author presents the extensive scope of mediation in contemporary China (e.g., a ratio of one million mediators to some five thousand lawyers). He addresses the election procedures for mediators, their availability, and their roles in general in society, factories, and neighborhoods. Cloke highlights the importance of social values in the Chinese mediation process. Similarly, he shows the crucial political dimension of the mediation process and the mediators themselves. For example, he discusses their roles as political-organizers as well as that of peacemakers. He stresses the intrinsic importance in mediation of inculcating the political values of Chinese society. Brief case studies are presented as well. Another short section covers the delegation's visit to a prison and analyzes the prison's "total" institution approach which emphasizes primarily political education and material production. The last section provides a list of lessons for U.S. mediators. Some examples include the creation of workplace mediation committees and the addition of greater numbers of mediation elements both within and around the formal U.S. justice

system.

Crockett, George W. Jr., and Morris Gleicher. 1978. "Teaching criminals a lesson: a report on justice in China." Judicature, Vol. 61, No. 6., pp. 278-288.

Comment: This article is not about ADR, but rather is a look at the contemporary formal legal system in China. It is particularly revealing, however, when compared with Cohen 1966 and Cloke 1987. If anything, it illustrates the continuum of social and political concerns in China of which both the formal and less formal processes are both a part. Furthermore, the article points out some significant differences between Chinese and U.S. conceptions of crime and punishment which apply to both the formal and informal systems. The article does pay homage to the ubiquitous mediation system before it explores in depth a trial case study.

Fried, Morton H. 1966. "Some Political Aspects of Clanship in a Modern Chinese City." In Political Anthropology, edited by Marc Swartz et al., pp. 285-300. Chicago: Aldine Publishing Company.

Comment: The author describes the nature and functions of Taiwanese clan associations. He first gives a background history of Taiwan and clan associations in general. He stresses the historical importance of clans and lineages in Taiwan and Southern China and the changes wrought by Japanese occupation (of Taiwan in 1895). He summarizes the main distinctions between the types of clan associations, membership issues, and their economic and political aspects. In the course of a discussion of the political aspects of clan associations, the author briefly notes the use of mediation in clan disputes. He notes that, although a rare use of annual clan plenary meetings, mediation is used to attempt to resolve disputes which relate to the clan. More frequently, disputes are brought before association board members who meet informally and then advise disputants of their recommendations. They have no power to impose sanctions, according to the author. Cf., Gallin 1966.

Gallin, Bernard. 1966. "Conflict Resolution in Changing Chinese Society: A Taiwanese Study." In Political Anthropology, edited by Marc Swartz et al., pp. 265-274. Chicago: Aldine Publishing Company.

Comment: Gallin looks at the demise of traditional village mediation in rural Taiwan. He begins by describing the village in west-central Taiwan where he did sixteen months of fieldwork in 1957-58. Central to the traditional practice of mediation in Taiwan was the tsu, or lineage organization. Traditionally, the tsu elder public leaders exerted considerable influence over dispute settlements. A mediator would ideally be the tsu leader or a matrilineal relative from another village. Disputes between villages would rely on a respected area leader. The author mentions two primary reasons why mediation was almost always sought: (1) because of the tendency for government officials to be very harsh on all concerned, and (2) in the interest of harmony. He notes that the manner in which the dispute was settled, in other words how well "face" was saved, was far more important than some abstract sense of "justice." He also notes that traditional mediation worked because of the static, rigid hierarchical system of social relationships. The author stresses that the mediator's success rested upon the respect that the disputants and community had for them. "If they commanded respect, they were usually able to maneuver both sides into accepting a compromise solution." The reasons for the erosion of the traditional system are multifaceted. Land reform and modification of the land tenure system had a number of distinct impacts on the rural social structure and thus on mediation. For example, the landlord-tenant relationship was transformed from a complex emotional relationship to an explicitly economic relationship. Land expropriation and a shift of attention away from the country-side to urban areas meant the tsu leaders had less wealth and time to devote to a public service like mediation. Growing individualism is also cited by the author as having a large impact of mediation. The processes of modernization and urbanization resulted in a rapidly changing social structure which weakened the traditional social structures which supported mediation.

Gibbs, James L. 1963. "The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes." Africa, January, pp. 1-11.

Comment: While this article is not about ADR in the Asia-Pacific region, it is an important piece to include here. This piece represents a kind of "missing link" between the earlier Traditional Law and Primitive Law literatures (Hoebel 1922; Llewellyn & Hoebel 1941; Hogbin 1934; Malinowski 1961; Diamond 1950, 1951; Gluckman 1965; Barton 1922; Maine 1890) and the modern ADR literature. In addition, it represents a substantial literature on ADR in Africa and the Middle East of a kind that is largely missing for the Pacific: it is a classic case study in non-Western informal conflict resolution. The third reason for inclusion is the author's psychotherapeutic approach, using Talcott Parson's analysis of the elements of therapy (i.e., support, permissiveness, denial of reciprocity, and manipulation of rewards). Gibbs' application of Parson's criteria to the Kpelle moot suggests a general set of elements to compare informal with formal processes across many cultures. One of the highlights is an explication of differences between formal (court) and informal (moot) systems (drawn from the Kpelle). In the moot system there is no vertical spatial separation between litigants and adjudicators; no robes or special seating for mediators; there is identification of faults committed by both parties; and, there is formal apology with gift-giving. The losing party is lightly "fined" beer or rum which must be presented to the mediator(s) and then consumed by all in attendance. In Kpelle moots, hearings take place soon after a breach occurs; the hearing takes place in familiar surroundings; robes, wigs, & other symbols of power are absent; and investigatory initiative rests with participants. The author stresses the participants' contributions to consensual solutions. There is no unilateral ascription of blame, but rather attribution of fault to both parties. Furthermore, the author claims that the mediator is not backed by political authority, such as the ability to impose a jail term; this however is disputable. Gibbs argues that sanctions imposed do not cause hardship for the losing party and thereby create no new grounds for a grudge. In terms of the issue of recidivism, sanctions to the losing party do have to touch the pocketbook a little. He and the Kpelle argue that if an apology does not cost something other than words, the wrongdoer is more likely to repeat the offense. He points out that unlike the formal legal system which only has the power to impose negative sanctions, the moot process "imposes" positive sanctions also. In informal dispute resolution, Gibbs argues that positive sanctions are successful in providing rewards for group conformity because new behaviors are kept in sight. Thus, praise and acts of affection for going through the process and changing one's behavior are positively reinforcing. Even feasting (sponsored by the loser) is used as a means of community sharing and reintegrating the loser into the community.

Goldstein, Susan. 1986. "Cultural Issues in Mediation: A Literature Review." Honolulu: Program on Conflict Resolution, University of Hawaii. Working Paper Series, 1986: 1

Comment: The author addresses the theoretical basics in understanding cross-cultural and intra-cultural mediation, focusing on key elements such as attitudes towards conflict, confrontation, language, non-verbal behavior, self-disclosure, the use of reason/logic, world view, and power relations. In her recommendations section is a useful table listing the "dimensions for cross-cultural comparison of mediation systems."

Kassebaum, Gene. 1989. "ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India." Honolulu: Program on Conflict Resolution, University of Hawaii. Working Paper Series, 1989: 5.

Comment: The author gives a detailed account of the use of the Lok Adalat based on observations of seven Lok Adalat camps (in Bangalore, Kolar, Mangalore, and Mysore) and data from two years of Lok Adalats held in the state of Karnataka and a sample of Bangalore cases. He notes the context of this form of ADR in India, in which tort cases are proportionally low in numbers compared with the U.S. Lok Adalat also comes out of the panchayat, or traditional village council, approach to dispute resolution. The modern Lok Adalat dates from 1974 according to the author and varies in objective, in one state is intended to resolve disputes not yet filed in courts while in another state deals only with cases pending in courts and tribunals. He points out specialization in the use of Lok Adalats: big cities use them to dispose of vehicle accident claims, while small towns and villages use them to settle long-standing criminal and other civil cases. In small towns a typical case stems from a dispute between rival village factions. Motor vehicle claims comprise a large number of the total brought before the Lok Adalats. While each case is presided over

by a Conciliator and claimants may be represented by lawyers, proceedings are much more informal than the formal Indian legal system. The author provides some interesting observations of activities during Lok Adalat cases, as well as some brief case studies of disputes which were settled and some which did not settle in lieu of a formal court hearing. He also details some of the statistics of case settlements, contributions, and limitations of the Lok Adalats.

Kawashima, Takeyoshi. 1973. "Dispute Settlement in Japan." In The Social Organization of Law, edited by Donald Black and Maureen Mileski, pp. 58-74. New York and London: Seminar Press.

Comment: Kawashima discusses the historical role of mediation as a preferred means of dispute resolution and the history of government and/or court-sponsored mediation, or chotei. Chotei was first legalized as a response to serious housing shortages toward the end of World War I. The author discussed in detail the predisposition of Japanese to settle out of court and the strong cultural disposition toward non-adversarial means of dispute resolution. He stresses the traditional Japanese emphasis on harmony and solutions to disputes based on mutual understanding. He traces the fate of mediation along with growing urbanization and industrialization, particularly the evolution of reconciliation (resolution by the two parties) and third-party conciliation. Kankai, or invitation to reconciliation, was instituted in 1883 as a regular pre-judicial procedure. Chotei was later readopted early in this century. Remarkably, though there were a large number of these mediation cases in a broad range of disputes, there was not a corresponding drop in adjudicated cases. The author also discusses the traditional role of police as mediators, particularly in family disputes. Finally, he notes the rise of awareness of legal rights in Japan and an erosion of successful mediation as a result.

Koch, Klaus-Friedrich. 1978. "Pigs and Politics in the New Guinea Highlands: Conflict Escalation Among the Jale'." In The Disputing Process—Law in Ten Societies edited by Laura Nader and Harry F. Todd Jr., pp. 41-58. New York: Columbia University Press, 1978.

Comment: War and peace among the Jale' people of the Western Highlands of Papua New Guinea. The paper discusses the cultural obstacles to mediation and negotiation over conflicts in this part of PNG. The author points out how even minor disagreements may lead to warfare between villages and districts. Conflict management is covered generally, and a conflict case study is presented to illustrate both the escalation and resolution of a particular incident. The author also details the lineage connections which make the Jale' seem so complicated from a Western perspective and explains the different uses for pigs in dispute resolution (i.e., "guilt pigs," "wergild pigs," and "parsley pigs").

Lubman, Stanley. 1967. "Mao and Mediation: Politics and Dispute Resolution in Communist China." California Law Review, Vol. 55, pp. 1284-1359.

Comment: Exhaustive analysis of post-revolutionary China's mediation system from village/neighborhood to national levels (cf., Cohen 1966). He discusses the shift from a Confucian philosophical compromise orientation to a "right vs. wrong" Maoist orientation. Extensive discussion and analysis of the political functions of mediation in modern Chinese society (cf., Cloke 1987). Illuminating case studies cover such disputes as: family (1321-1322), theft (1324), marital (1326 and 1333-1334), and landlord-tenant (1344).

MacDuff, Ian. 1988. "Mediation in New Zealand: Legislating for Community." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 167-222. Manila: Asia-Pacific Organization for Mediation.

Comment: This is a thorough discussion of mediation in New Zealand which has its tone set by a lengthy description of the Maori "voice" in dispute resolution. Similar to Shook and Kwan (1987), the author provides a detailed analysis of Maori customs and tradition with respect to dispute resolution both within the Maori culture and broader European New Zealand society. MacDuff also gives a historical framework for Maori legal rights and treaties. This article is actually two papers which could easily stand alone. The



second part is a description of models of mediation in use in New Zealand. He covers industrial mediation, Family Court mediation, Small Claims Courts, tenancy mediation, mediation and reparation under the 1985 Criminal Justice Act, and the Christchurch Community Mediation Service.

Merry, Sally Engle. 1982. "Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America." In The Politics of Informal Justice, Vol. 2, edited by R. L. Abel, pp. 17-45. New York: Academic Press, 1982.

Comment: This work is relevant to the Pacific literature in at least two ways: in providing a general introduction to the theoretical ADR literature and in providing an excellent set of case studies (one on the Ifugao in the Philippines, one from one part of the Pacific Rim [Mexico]), one from northeast Africa, and one from Afghanistan). Her focus is on small-scale societies, and she begins by citing an extensive literature which spans from the early studies of "primate" and "customary" law to more contemporary cross-cultural works. She then summarizes the use of mediation in Nuer, Ifugao, Waigali, and Zinacanteco cultures. The author also analyzes the primary characteristics of mediation in these small-scale societies, such as the social organization of mediations and the nature of mediated settlements. She then shifts to a comparison of mediation in small-scale societies with community mediation programs in the United States. Many of her observations, particularly about the challenges facing mediation in the U.S. are critical and very relevant. This is a classic article and highly recommended.

Muntarbhorn, Vitit. 1988. "Prospects and Trends of Mediation as an Alternative to Dispute Resolution in Thailand." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 393-422. Manila: Asia-Pacific Organization for Mediation.

Comment: The author begins with a theoretical discussion of the mediation process followed by a recognition of a paternalistic thread which ran through the traditional system of Thai justice. He then returns to a general theoretical discussion of mediation issues within a Thai context, such as "monopoly or plurality," "formal or informal," "urban or rural," and other dichotomies. The author extensively covers various categories of institutions and individual actors in Thailand engaged in various types of mediation. These include: village mediation committees (with examples from four different provinces); gang warfare mediation; district officer mediation; mediation by the Bureau of Civil Liberty and Public Interests Protection, Department of Public Prosecutions, Ministry of the Interior; the Committee for Assisting Farmers and the Poor (Kor Chor Kor); labor mediation; police mediation; and monks as mediators. Finally, the author presents some recommendations and observations for improving mediation and/or the climate in which mediation occurs.

Pe, Cecilio L. 1988. "The Philippine Barangay System of Compulsory Conciliation." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 237-277. Manila: Asia-Pacific Organization for Mediation, 1988.

Comment: An essentially uncritical, and excessively bureaucratic treatment of the Philippine Barangay system. The compulsory conciliation system established by President Marcos' Decree No. 1508 is described in theoretical and legalistic terms. (Cf., Silliman 1985 and Tadiar 1988, whose treatments of this village- and barrio-level ADR system are far more balanced and critical.)

Pe, Cecilio L., Gaudioso C. Sosmena, Jr., and Alfredo F. Tadiar, eds. 1988. Transcultural Mediation in the Asia-Pacific. Manila: Asia-Pacific Organization for Mediation.

Comment: This book resulted from the First Asia-Pacific Conference on Mediation held in Manila in 1985. Part I covers the role of mediation and program effectiveness from a theoretical perspective. Part II is comprised of country papers from 13 nations in the Asia-Pacific region. "Goals, structures, procedures and types of disputes covered by mediation, including techniques, legal representation and enforcement of settlements are explained." Lok Adalat (India) case study summaries 131-136; Nepal

divorce mediations (160-161); China case study, marriage "peoples' mediation" (333-335); China, family/community relations (346-347); Korea family mediation cases (358-362).

Qin, Li Mei, and He Wei. 1988. "Mediation in China." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 321-352. Manila: Asia-Pacific Organization for Mediation.

Comment: The authors present an overview of mediation, in the People's Republic of China (PRC), which is an institution which has roots a thousand years long and which has an army of some 6 million people who work as mediators. They cover the traditional roots of mediation in the PRC and the modern structure of Chinese mediation including "people's conciliation" and court conciliation. In a short section on the principles of mediation they give some illustrative case examples. They present the impressive statistical summaries of the total numbers of cases mediated between 1983 and the middle of 1986 which range between 6 and 7 million cases annually. They discuss in some detail the attention to marital disputes which comprise the largest single category of mediation cases and provide some case short studies. The issues of quality and enforcement of settlements, training, and advantages of mediation are discussed, also with illustrative case studies. Finally, they provide a candid discussion of some of the problems which have arisen in the mediation system of the PRC. Examples of problems identified include the (inappropriate) practice of "compulsory mediation," funding, and adapting to changing economic conditions.

Saposnek, Donald T. 1987. "Aikido: A Systems Model for Maneuvering in Mediation." Mediation Quarterly, Winter 1986/Spring 1987, pp. 119-136.

Comment: "Using the philosophical bases and principles of the martial art of Aikido, the author develops a model for conceptualizing and effectively maneuvering through the mediation context as a system of energy."

Shook, E. Victoria. 1985. Ho'oponopono. Honolulu: University of Hawaii Press.

Comment: The traditional Hawaiian family conflict-resolution practice of ho'oponopono is the subject of this text. The focus is on the adaptation of the ancient practice by eight individuals who use ho'oponopono for a variety of mental health as well as family conflict-resolution purposes. The author links ho'oponopono to the broader context of the history of the ancient process, the Hawaiian renaissance movement, and cultural change generally, as well as to mental health therapy. Much of the book is devoted to case studies which compare and contrast the eight individual leaders as well as their applications of ho'oponopono. Included are some excerpts from Nana I Ke Kumu (Pukui et al., 1972), the source text for much of the contemporary practitioners' variations on this ancient process.

Shook, E. Victoria and Leonard Ke'ala Kwan. 1987. "Straightening Relationships and Settling Disputes in Hawaii: Ho'oponopono and Mediation." Honolulu: Program on Conflict Resolution, University of Hawaii. Working Paper Series, 1987:10.

Comment: The authors present a comparison of the Hawaiian practice of ho'oponopono and mediation as practiced by the Honolulu Neighborhood Justice Center. While both sets of practices qualify as forms of ADR, they are very different in the view of the authors. The clearest distinction is that while mediation is secular, ho'oponopono is explicitly spiritual in orientation. The authors spend most of the paper elaborating on the Hawaii cultural context of ho'oponopono and in presenting a case study. The mediation section is short, and is derived from second-hand information. Given that shortcoming, their side-by-side comparison between the two approaches is quite revealing of the considerable differences in the goals and cultural contexts. The strength of the paper is in emphasizing the importance of cultural frameworks in analyzing ADR techniques and practices.

Silliman, Sidney G. 1985. "A Political Analysis of the Philippines Katarungang Pambarangay System of Informal Justice Through Mediation." Law & Society, Vol. 19, No. 2, pp. 279-301.

Comment: "This article analyzes the Philippine system of compulsory conciliation both in terms of its significance in the context of the political system as a whole and in terms of its operation at the village level. ... (T)he mediation structures established by national law are part of a pattern in which the Philippine state is incorporating within it the various sectors of civil society, but that the coaptation of the customary method of dispute processing is not meeting resistance from the rural Filipino. This analysis supports the more general argument that systems of informal justice operate to enhance centralized political authority, yet it reveals the dialectical nature of such arrangements for dispute processing." Cf., Sosmena, Jr. 1988; Pe 1988; Tadiar 1988.

Sosmena, Jr., Gaudioso C. "Barangay Justice: A Delegalization Mechanism." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 279-297. Manila: Asia-Pacific Organization for Mediation, 1988.

Comment: A slightly less bureaucratic treatment of the Katarungang Pambarangay (Barangay Justice) system of village conciliation in the Philippines (cf., Pe 1988), although an equally uncritical view. (Cf., Silliman 1985 and Tadiar 1988 for a more balanced analysis.)

Tadiar, Alfredo F. 1988. "Institutionalizing Traditional Dispute Resolution: The Philippine Experience." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 299-321. Manila: Asia-Pacific Organization for Mediation.

Comment: A more comprehensive and balanced look at the Katarungang Pambarangay (Barangay Justice) system of the Philippines. The author, one of the members of the drafting committee of the Presidential Decree, gives a thorough overview of the barangay system and its traditional roots within the context of the Philippines' colonial history and its contemporary socio-economic and political setting. He presents the problems of the system as well as the successes (such as the high satisfaction level among participants). The types of problems he addresses include inadequate understanding of roles, inadequate understanding of arbitration, unperceived limitations of conciliated settlements, unauthorized conciliation of serious offenses, and conflicts with cultural minority customs. Overall, Tadiar feels that the system's objectives have been basically met. Among the other benefits from the system he discusses in detail: popular satisfaction with conciliation, cost savings, speed of settlement, the voluntary aspect of settlements, and the provision of another forum for dispute resolution.

Wagatsuma, Hiroshi, and Arthur Rosett. 1986. "The Implications of Apology: Law and Culture in Japan and the United States." Law & Society, Vol. 20, No. 4, pp. 461-498.

Comment: This article is linked both to the cross-cultural body of literature and the general ADR literature. The authors start out by stressing the culturally-bound conceptions of the meaning and use of apology. This culturally-boundedness is revealed particularly well in comparing U.S. and Japan attitudes toward "apology." The authors focus on the general socio-legal aspects of apology, and distinctions between apology as an admission of an act, as admission of a wrongful act, and as disassociation from the act. Specific legal aspects discussed include: apology and defamation, apology and criminal law, apology as an admission, and liability issues. While the article's intent, at least in part, is to understand why the apology has less legal priority in the U.S., it provides, by the way, an insightful look into some of the cultural differences between Americans and Japanese.

Westermarck, George D. 1982. "'Old Talk Dies Slowly': Land Mediation in Agarabi." (Paper prepared for the AAA session on Mediation and Society, Los Angeles, 1981. Proceedings, pp. 1-23. July 1982.) La Jolla, CA: University of California, San Diego, Melanesian Studies Resource Center.

Comment: This paper describes a successful land mediation program in Kainantu District, Eastern Highlands Province of Papua New Guinea among the Agarabi people. Instituted in the early 1970s, the land mediation program has had a relatively high success rate—measured by the small percentage of

unresolved cases or cases later taken to court. The author analyzes the breakdowns by complainant/respondent relationship (e.g., related or not, living in the same hamlet or not) and type of land dispute (e.g., cash cropping, cattle grazing, housing, mining, and prohibited lands). "Old Talk [pidgin for trouble] Dies Slowly," refers to the long standing troubles between tribal groups, particularly in this case, with the Tapo and Kainoa peoples (cf., Meggitt 1977; Koch 1978). Feuding and traditional animosity have continued to be a hindrance to successful mediation in intra-tribal disputes. Mediation works best for people who live in the same area or who are related. While Old Talk may die slowly, the author suggests that the local experience of successful mediation may eventually lead to cooperation between larger groups.

Yang, Jung-Ja. 1988. "Role of the Korea Legal Aid Center in Promoting Mediation as an Alternative to the Court." In Transcultural Mediation in the Asia-Pacific, edited by Cecilio L. Pe, et al., pp. 353-363. Manila: Asia-Pacific Organization for Mediation.

Comment: A report on mediation and counseling in the Korea Legal Aid Center for Family Relations. The author discusses the special problems and legal needs of women in a strongly patriarchal society. She presents the statistical increase in mediation cases at the Center and presents two case studies of marital disputes.

## CUSTOMARY LAW

Akin, David W. 1987. "Codifying "Kastom" Law in East Kwaio, Malaita, Solomon Islands." Honolulu: Program on Conflict Resolution, University of Hawaii. Working Paper Series, 1987:6.

Comment: Fascinating case study of the efforts of the people of East Kwaio area of Malaita, Solomon Islands, to codify customary law. The paper focuses on the reasons why the highland Kwaio continue their efforts and their motivations for doing so. Fierce Kwaio independence is one of the most striking aspects of these people and their determination to establish their own kastom law. The author details the many reasons for their determination and many of the reasons why they have failed so far to successfully codify their customary rules.

Barton, R. F. 1919. "Ifugao Law." American Archeology and Ethnology, Vol. XV (1919-1922), pp. 1-186.

Comment: This is a classic 1919 ethnographic presentation of customary law of the Ifugao mountain people of the Philippines. Barton discusses the origins and general rules of the Ifugao and then plunges in to describe in detail the traditional law of these people as it pertains to the family, to property, penal codes, and procedure. [see additional Traditional Law references in References section] This is a representative sample of the Traditional Law literature on Pacific and Asian traditional, or primary, cultures (cf., Hogbin 1934 [Polynesia]; Malinowski 1962 [1926] [Melanesia]).

Holmes, Lowell. 1958. Ta'u: Stability and Change in a Samoan Village. Wellington, NZ: The Polynesian Society, Inc.

Comment: Although this Samoan anthropological study is somewhat dated, it is included here because the slower rate of change in Western Samoa makes many of these observations appropriate and applicable for much of rural Western Samoa today. Of relevance to our task are the brief descriptions of marital disputes and marital conflict resolution (pp. 16, 56).

Hutchins, Edwin. 1980. Culture and Inference: A Trobriand Case Study. Cambridge, MA and London: Harvard University Press.

Comment: This study analyzes a land tenure dispute in the Trobriand Islands of Papua New Guinea. The book is part ethnography and part cognitive theory. More a discussion of the nature of "primitive" thought than an analysis of land tenure litigation, it is still a revealing case study on the Trobriand system of land

dispute resolution.

Maddock, Kenneth. 1984. "Aboriginal customary law." In Aborigines and the Law, edited by Peter Hanks and Bryan Keon-Cohen, pp. 212-237. Sydney: George Allen and Unwin.

Comment: Interesting discussion of traditional and modern interpretations of customary law; some short case examples and statistics of marriage types and other cases of customary law applications.

Johnny, Nickontro. 1987. "The Relationship Between Traditional and Institutionalized Dispute Resolution in the Federated States of Micronesia." Honolulu: Program on Conflict Resolution, University of Hawaii. Occasional Paper, 1987: 3.

Comment: The author describes the role of the "justice ombudsman" in the Federated States of Micronesia's court system as a liaison between the Supreme Court and the community, including traditional leaders. He stresses the importance of traditional dispute resolution and argues that the adoption of the adversarial system has had minimal impact on Micronesian culture. He briefly discusses the traditional apology ritual (in the case of Pohnpei) for serious offenses and points out the importance for Micronesians of the cultural value restoration of community harmony rather than establishing guilt or conforming to an abstract standard of justice. He also gives the example of the necessity for flexibility, particularly in the case of land disputes.

Powles, Guy, and Mere Pulea, eds. 1988. Pacific Courts and Legal Systems. Suva: University of the South Pacific in association with the Faculty of Law, Monash University.

Comment: One section deals with customary law in four Pacific Island groups: Niue, New Caledonia, Tokelau, and the Cook Islands. Of particular note are commentaries on theft and customary fishing rules (see pp. 203-216).

Sack, Peter G. 1973. Land Between Two Laws: Early European Land Acquisitions in New Guinea. Canberra: Australia National University Press.

Comment: A historical treatment of the legal context of European land acquisitions in what is now Papua New Guinea. This is primarily a politico-historical analysis of European colonialism and the use of political administration and law as a means of establishing and consolidating land claims. The author illuminates the profound differences in world view between the indigenous peoples and Europeans, particularly with regard to conceptions of land. Of particular interest to ADR is the short summary in the first chapter of the development of "primitive law" and "customary law," and the evolution of legal anthropology from a branch of legal history into a branch of social anthropology.

Weisbrot, David. 1989. "Custom, Pluralism, and Realism in Vanuatu: Legal Development and the Role of Customary Law." Pacific Studies, November, pp. 65-97.

Comment: A discussion of the contemporary struggle in Vanuatu to incorporate customary law into European legal norms. The author explores the unique legal and political situation of Vanuatu, historically through the colonial French-British Condominium to independence, and the Vanuatu Constitution, particularly in terms of land tenure issues. He notes the degree of formal court sympathy toward customary solutions to disputes. Not necessarily relevant to ADR, but surprising is his revelation that the French strand of law has almost entirely vanished from the islands. He notes that all of the French legal materials were either burned or repatriated to France on the eve of Vanuatu independence. More relevant is his summary of the development of Islands Courts in 1983 which are a system of grass-roots, customary-based courts. He also reports on the neglect of the National Council of Chiefs in Parliamentary decisions involving customary matters. The linkage between customary law and customary political

movements (such as John Frum) is shown to be one of the factors complicating the integration of customary and modern means of dispute resolution. Much of these discussions relate to land tenure and land disputes.

### **CROSS-CULTURAL DISPUTE RESOLUTION**

Fieg, John Paul. 1980. Thais and North Americans. Edited by George W. Renwick. Yarmouth, ME: Intercultural Press, Inc.

Comment: A cross-cultural analysis of Thai and American attitudes and social behavior with an emphasis on helping Americans understand Thai culture. Areas covered include: similarities, differences, and comparative Thai-American social relations, attitudes toward work and workplace relations. No direct information related to our project, but some revealing commentary on Thai attitudes towards authority and "superficial harmony" in relationships.

Tyler, V. Lynn, gen. ed. 1987. Culturegrams: The Nations Around Us. Volume II. Middle East, Asia, Africa, and Pacific Areas. Provo, UT: David M. Kennedy Center for International Studies, Brigham Young University.

Comment: Snapshots of different cultures, 3-4 pages each. Topical areas include "customs and courtesies," "the people," "life style," and "the nation." The information is very general in nature and not particularly relevant to our task. However, the sections in this text could help readers understand the ethnic groups selected in our study (i.e., Samoa, Philippines, and Korea). Countries from the Asia-Pacific region which are included: Australia, China, Fiji, Hong Kong, India, Indonesia, Japan, Korea (South), Malaysia, New Zealand, Pakistan, Philippines, Samoa(s), Singapore, Sri Lanka, Tahiti, Taiwan, Thailand, and Tonga.

# **ALTERNATIVE DISPUTE RESOLUTION AND THE FUTURE SOME THOUGHTS ON CULTURE, COMMUNITY, AND THE COURTS**

by

**Peter Adler**

For the past ten years I have had the good fortune to be involved in a variety of efforts aimed at strengthening the use of alternative dispute resolution both nationally and locally. From my own perspective as an employee of the Judiciary, as a sociologist, and as a practitioner of mediation and arbitration, the trend towards expanded use of ADR looks and feels something like the proverbial paradigm shift we hear so much about when futurists get together to talk. In the United States, it represents, I think, a hunger for new and better ways of managing conflicts and an emerging receptivity by the gatekeeping institutions of government towards accepting new ways of managing the endless business of resolving fights and settling disagreements with something called "justice."

Much of what is going on in the ADR field today is tied directly to what happens inside the courthouse when people file lawsuits against each other in our civil and family courts. Courts, judges, lawyers, and litigation are very much a part of the American ethos. Decades of television shows--"The Defenders," "Perry Mason," "LA Law," "Night Court," "Law and Justice," "Shannon's Deal" and "The People's Court" to name but a few--reveal something fundamental. Americans both love and hate the adversarial system as we know it. They extol that part of that logically extends and exemplifies the notion of a system of laws that can equitably balance different individual rights. At the same time, they distrust the mysterious, expensive, and tedious complexities of this system. Hence, ADR: the search for new methods that simplify, streamline, and re-empower people to make their own decisions.

To focus only on the courts, however, is to miss a much richer tapestry of dispute resolving activities that are now going on. When I look around the ADR landscape today, as opposed to ten years ago, I see a resurgence of dispute resolution efforts that are embedded in both culture and community. I think about:

- the tribal mediation programs being developed by native Americans in Washington and Oregon;
- the community boards programs working in San Francisco's ethnic neighborhoods;
- the Mennonite Conciliation Service in Ohio and Western Pennsylvania;
- the various neighborhood justice centers we have here in Hawaii, particularly those operating on the neighbor islands; and,

- the efforts by certain Hawaiians to create "Moku" judges and mediators who can handle disputes in their own families and communities without tearing those entities apart through adversarial truth-seeking.

Frankly, I like all this diversity, but I also worry about it. I don't want to oversell it or attribute more to it than really exists. ADR, after all, is not a panacea that will cure all the ills of our justice system or our society. Nor do I think ADR by itself can suddenly transform suburbs into communities or re-make our courts and other adjudicative agencies into something inherently more culturally sensitive. Courts and other governmental entities don't organize themselves around culture in any explicit sense. They are, rather, the highest common denominator. They must serve everyone.

ADR, however, is part of the winds of change that are blowing through our system and that will continue to do so throughout the 1990's. What I think this may mean in the long run is that the modern adversarial system, which Isaac Asimov has accused of being one of the more primitive ways of solving problems, is starting to mature. It is acquiring new and diverse tools and methods that provide citizens with increased options for settling differences of opinion amicably. As someone once said, if the only tool you have is a hammer, then everything looks like a nail. And as someone else once said, you're a rich man if you have options.

The fallacy when people argue against ADR is that they presume it is one thing and that it is new. In fact, people who think they have totally new ideas tend to be people with poor memories. Mediation, arbitration, conciliation, fact-finding, and culturally specific methods of managing conflicts have been around for a long time. What's different today is the organization of those activities and the new energy we are investing in these methods. Today, at the start of the 1990's, people interested in thoughtfully fitting ADR into our society need to take stock and develop a more strategic agenda. We should start by acknowledging that the "multidoor" model already exists in embryonic form. Inside and outside the courthouse, we have--especially here in Hawaii--an incredible array of ADR options and more evolving all the time. This doesn't mean that we will abandon our trial system. Paul Ehrlich says that the first rule of intelligent tinkering is to save all the parts. And every rock-climber and wing-walker knows that you never let go of what you have until you've got purchase on something new.

So what can we expect of Hawaii's courts in the 1990's? I think, some or all of the following:

First, continued experimentation with systematic projects and programs that put new ADR methods into use in the judicial and administrative litigation systems. We will see an expanded use of court-annexed arbitration and mediation program for whole categories of cases and the specialized use of summary jury trials and special masters for particular problems. We will see second and third-generation programs in family courts, small claims courts, in our civil circuit courts, and in the agencies that run contested cases. To not test these methods means resigning ourselves to ever-increasing numbers of trials.



Second, the democratization of ADR skills. We will see the tools and methodologies of skilled ADR methods and settlement work increasingly taught in schools starting in primary schools and on through law schools and business schools. They will, in fact, become a part of America's curriculum. This is already happening and it will expand.

Third, we will see a growth a growth of independent ADR programs in the private sector. There will be a range of alternatives to the courts including simple commercial arbitration programs which take in cases by contract, to community and neighborhood forums which hear interpersonal matters, to sophisticated rent-a-judge programs which handle the most complex cases without all of the delays and ambushes that seem to occur on the normal trial track.

Fourth, we will see a continued growth of the "multi-door courthouse" metaphor and the development of new rules, laws, procedures and policies that dictate what type of dispute resolution methodology is applied to what kind of problem. The challenge, as Professor Frank Sander once said, is to "let the forum fit the fuss."

Fifth, we will see a rekindling and revitalization of ethnic and cultural methods for handling matters conflicts. Quite frankly, many people have reached the point where they would prefer to use ho'oponopono or fono or some other culturally-sensitive process for handling serious disputes in their own communities. It may very well become a point of pride and a part of the sovereignty issue which is increasingly finding its way into local conversations.

Finally, we will continue to see ferment and tension when people talk about the comparative values of formal and informal justice systems. Formal institutions have a way of swallowing innovations and leveling them. But I don't believe this happens with impunity. Changes change the changer. In my own vision, our courts will make increasing use of ADR inside the courthouse and will champion its thoughtful use outside the courthouse and in the community. These changes will be slow but cumulative. I believe that they will yield sometime beyond the year 2,000, a society in Hawaii that is more humane, diverse, and thoughtful in its approach to justice and the resolution of differences of opinion. We will still have lawyers and judges and courts but they will have more tools to exercise their work creatively. That, I think, will be the legacy all of us leave for the next generation.

# DEMOGRAPHIC AND THE FUTURE DISPUTE RESOLUTION

by

**Vita Tanielu**

Do you believe that there is a civilization out there that does not need money to survive? Yes, they utilize words, very simple words, such as Faamolemole--please.

If you do not have a place to sleep, all you have to say to the house-owner is--"faamolemole," "Please, I want a place to sleep." If you are hungry, all you have to say is--"faamolemole," "I am hungry." "No one goes hungry, as well as homeless in Samoa." Even if you kill somebody, all you have to say to the family of the deceased is--"faamolemole," or "Please, I am sorry."

How do they return the favor? Again, a very simple word - "Faafetai," or "Malo," synonym of Mahalo--Thank you.

We might say ... "Weird people, weird civilization," and might ask ... "Where in the world did they come up with these weird values?"

Well, if we really ponder over it, there is a touch of "Christianity" in it. There is a message of love, forgiveness and sharing there. It is not weird. Why? Because each one of us here in our American civilization, our American culture of today, these morals and values are within us. They are a built-in characteristics of humankind. It is a part of a divine plan.

And that was how they lived through countless generations, approximately 3,000 years ago. This tradition is still going-on strong and we are very proud of it. Moreover, each generation adds its own contribution to this age-old history. Compared to our American system which is just a little over 200 years, is it not a wonder, that we gather here today to pick our brains to find new ways?

In the turn of the 19th century, King Malietoa sought guidance and blessings from Goddess Nafanua. But instead of a blessing, Goddess Nafanua informed him that his "new" kingdom will "come from heaven." A few years later, in 1830, in the island of Savai'i, an English missionary, John Williams landed with the "message of Christianity," the same values and principles that they have been practicing for countless generations, of love, forgiveness and sharing.

The Samoans have never seen a white man before, so when missionary John Williams landed, they actually believed that the heaven--lagi, had burst--pa:Pa-Lagi, the heaven had burst and down had come this white-man; so they called him Pa-Lagi. Thus, fulfilling Goddess Nafanua's prophecy: "kingdom from heaven." Yes, these morals and values are still going strong in Samoa. Of course, the influence of the West since has not been that heavenly

for Samoans.

We always hear people saying "What a small world" when they meet again at a different location. Surely, we can talk on the telephone to someone on the other side of the world or even see them live on closed-circuit T.V. Yes, the world is getting small alright. It is simply the "coming together." This is the Era of Unity of Humankind. "This world is one country and humanity its citizen." "The Oneness of Humankind." "The Unity in Diversity." "The branches of one tree, the flowers of one garden." The time is ripe for us to "enjoy the beauty of this wonderful and colorful garden." The wealth of its beauty is in abundance in Hawaii nei. "Combining the uniqueness" of the various cultures will only "strengthen peace and unity."

I believe that in our Hawaii judicial system, there is a place for "Cultural Alternative Dispute Resolution," in respect to certain civil and criminal matters. For example: misdemeanor and violations, families and assaults, etc... Cultural alternative dispute resolution also has a place in arbitration and mediation levels, Neighborhood mediation board levels, as well as other community levels.

While I was an Outreach/Liaison Officer at our Samoan Service Provider's Association, I mediated and translated for a meeting between the Samoan parents, and the Dole Intermediate School and officers from the Kalihi Police Unit. Apparently there was a big fight the previous day amongst Kam IV and Kuhio Park Terrace Housing students. The parents were screaming for singling out only the Samoan students, but not the Filipino kids. Understanding our Samoan values and mentality, I added my two-cent contribution, and later, one Chief, Matai stood up, apologized and requested to have the Samoan troublemaker students brought into the room. The Matai then verbally disciplined them with a 10-minute harsh scolding and ordered them to make up immediately. Both the school officials and the police officers were so amazed and appreciative. A month later, I checked with the principal and she gladly said that there were no more fights. She was very pleased. Yes, cultural alternative dispute resolution works.

I also wish to commend highly Judge Shunichi Kimura's speech yesterday. Like him, I believe that the "family" is one of the most vital elements, if not the most, with which our concentration should be directed at. Last night, during my weekly Samoan Radio program on KNDI Radio, I requested some input from my listeners in order to share them with you today. Almost all of them would like to perpetuate their Samoan culture here in Hawaii nei. However, their main concern was: "parents have been arrested when they physically disciplined their children." They felt that their way would guarantee a good education as well as keeping the kids away from street gangs. They are disappointed, and some ended up sending their kids back to Samoa for obvious reasons.

In these kinds of situations, there is a need for education and understanding. Education is needed so that the parents can communicate better and understand the American viewpoint. We also need education so that we can understand the various cultures in our melting pot. Finally our government leaders need to have education so that they can develop a new vision. It is not easy, but a "1000 mile trip has to start with a single step." You the government, Judicial, Executive, particularly the Legislature as well as City Counties, have to take that first step.

One more thought. Often we hear people say about our American system, that it is a "rich man's system." The American system is for the "high and the rich," and that "it is not equal." Some say that "Justice is blind," you know what I mean ...

From that perspective, I want to close with a couple of excerpts from the "Writings of Baha'u'llah," a great world teacher. "Justice is not limited, it is a universal quality. It's operation must be carried out in all classes, from the highest to the lowest. Justice must be sacred, and the rights of all the people must be considered ... and be more concerned for the interests of others than for your own."

Also: "If administrators of the law would take into consideration the spiritual consequences of their decision, and follow the guidance of religion, they would be divine agents in the world of action, the representatives of God for those who are on earth, and they would defend, for the love of God, the interests of His servants as they would defend their own."

We have just seen the video about the various cultural viewpoints in dispute-resolution. To me, those four cultural discussions were talking about the same thing, about the "love and unity of family as well as culture."

Well, so far, this conference has been an inspirational and informative one for me. Thank you to my fellow panelists, to all the Speakers of this congress, and each and every one of you. Particularly to the sponsors, planners and our Chief Justice Herman Lum.

In conclusion, regarding our topic - Demographic & The Future Dispute Resolution, I strongly therefore, recommend that "Cultural Alternative Dispute Resolution is a blessing to our Hawaii Judicial System." "The perpetuation of such cultural characteristics is an expression of Unity in Diversity."

Faafetai and Malo, Soifua.

# DEMOGRAPHICS AND THE FUTURE OF DISPUTE RESOLUTION

by

**Ilima Piianaia**

In the short time allotted to us to discuss the very real issue of our country and our state's changing demographics and the future of dispute resolution, I will try to provoke your thinking by raising just a few questions.

As we have heard, there is general agreement that change has been slow to come to our judicial system and its processes--and that something needs to be done about it. After listening to yesterday's discussions and today's, I came away feeling that those who are actively engaged in our judicial system are frustrated. The enthusiasm of the desire for change seems to be dampened when you sit down to figure out what change is needed and how to bring it about. By tomorrow afternoon I am sure there will be a rekindling of the enthusiasm, since that is what this congress is about.

As someone detached from the judicial branch of government, I found my impression of your frustration somewhat surprising. The reason is that there is a mystique about your culture. People enter law school and come out speaking a foreign language. Some of them are anointed and sit on raised benches in black robes. Us lay folks are taught from an early age to respect and revere you. As with many priesthoods, your ways seem secret and sacred to us.

As more and more lay folks come into contact with the priesthood, there is growing discontent. As Paul Alston and others said so strongly yesterday, the rest of society will not tolerate things as they have been or are.

This raises my first question. Is the judicial system as we know it today culturally appropriate to mainstream America, then it will be even more difficult to discuss other peoples' ways of resolving disputes.

The second point I want to raise is about paradigms. Paradigm shifts are always easier to see and talk about after they've happened. For the most part, they are not cataclysmic but gradual. They are not heralded in by trumpeters and marching bands. When we want to shift paradigms, how do we do it, especially when we have not consciously done it before.

As we look at the changing demographics of our national and state populations, what existing paradigms need to be modified or discarded and, if discarded, what will fill the void? When we talk about "culturally appropriate" dispute resolution techniques, will mainstream America be willing, let alone able, to shift from existing paradigms? Much is being said about the growing pluralism of American society. While the ethnic origins of our population may be changing, will the deeper mindset of our society change? Numbers are one thing, but beliefs and values are another.

Congress has just undertaken the most comprehensive immigration reforms since 1924. These revisions essentially increase the number of foreign professionals, that is, those with job skills, who would be able to obtain visas from 54,000 a year to 140,000. The number of visas for foreign unskilled workers are reduced from 60,000 to 10,000. Additionally, the number of visas set aside for European countries has been expanded.

Is this new legislation a continuation or perhaps a strengthening of an exiting paradigm?

As we try to understand what changes in our demography will mean in the near and not-so-near future, we must ask why people come here and what they expect. We must also ask whether multiple paradigms can co-exist. If they can--and many of us in Hawaii believe they can--then we need to look at how disputes are defined by different cultural groups within our community, how they are resolved by those groups, and how can we develop an equitable and friendly system that maximizes on these practices.

I am a strong believer that changes can come about in how we settle disputes and that we can draw from the practices of different cultures and different places. A big part of what Hawaii has been and is about for the past two centuries has to do with the dynamics, including the tensions, of accommodation with respect. There are many paradigms at work here and perhaps there truly is a 21st century paradigm developing in our islands. We need to take advantage of what we have learned and what we can do. If the Judiciary does so, then it can take the lead in creating a legal system that is culturally appropriate to the United States of the 21st century.

# **KOREAN-AMERICAN PERSPECTIVES ON ALTERNATIVE DISPUTE RESOLUTION**

by

**Karl Kim**

I am a professor in the University of Hawaii urban and regional planning department. I was born in Kansas. I am a full-blooded Korean. My parents immigrated to this country in the 1950's. I was raised in a traditional Korean family. I married a Korean. And I have done my best to propagate the race by producing a full-blooded Korean daughter. While I have worked in Korea and I am faculty member of the Center for Korean Studies at UH, and while I remain intensely proud of my Korean heritage and all things Korean, I am, first and foremost an American--a product of its educational system and culture. I begin with a disclaimer--these are my views--those of one Korean-American living in Hawaii.

## **CULTURE**

Three aspects of Korean culture seem relevant to an understanding of how disputes might be resolved in the Korean-American community.

First, respect for authority. This respect derives from Confucianism, is reinforced by family and more recently by government and other institutions. In Korea, as many of you are probably aware, trial by jury does not exist. Generally, it is by tribunal or expert judges, who adjudicate. I once had occasion to mediate a dispute between Koreans. The Koreans wanted me to make a decision rather allow them to find an acceptable solution.

Second, the presence of hierarchies. Korea is a very hierarchical society. This is reinforced by social classes, economics, education, family ancestry and place of birth. This has at least two implications for understanding conflict: first, there are formal and informal rules of conduct governing relations between people throughout the society (bowing, greeting, endings used in language, etc.) and secondly, and perhaps more importantly, systems of dispute resolution may need to take into account these time-honored traditions.

Third, homogeneity. Koreans are stubbornly proud people. They are an ethnically homogenous group. They have one language, one people, one history and culture. This means that some behavioral patterns, cultural practices, beliefs and so on are very resistant to change.

## **METHODOLOGY**

As an academic, I feel compelled to make a couple comments about the video. First, there may be some self-selection bias in that those willing to come before the video camera may not be representative of the total population. Most of the people are educated or worse yet, academics. There may be need for greater representation of the working classes or

entrepreneurial (small store owners, restaurant operators, etc.).

Second, there is a problem of language which does restrict the questions and answers. An alternative technique might have been to conduct the interview in Korean and translate them into English, which would not only broaden the range of responses to those incapable of speaking English, but also would allow more subtle aspects of how conflict is perceived and resolved, to come across.

At the same time, I think that the video is an effective way for communicating a great deal of valuable information about culture and alternative dispute resolution techniques. A common theme across the four cultures which was the importance of family. It is clear to me that more inquiry into ways of incorporating the family into dispute resolution methods holds much promise.

## **CONCLUDING COMMENTS**

While I cannot speak for all Korean-Americans, I would like to suggest that while there are considerable differences between the legal systems in the United States and Korea, I believe that Koreans, as a group, are not too likely to encounter major adjustment problems in the legal system when coming to this country, except for one factor, which is language. Certainly having more Korean-speaking lawyers, judges, mediators, fact-finders and others involved with dispute resolution would be beneficial.

It is my belief that the United States is a far too litigious society and that Koreans moving to the United States may have to adjust to the constant threat of legal action--something which has not as yet become a problem in Korea. There are far too many lawyers in this country, I say that having three sisters who have attended law school.

Korea and the United States have extremely strong ties. A huge number of Koreans have been educated in the United States. Korea has become a dominant economic player in terms of electronic goods, clothing and other consumer items sold in the U.S. Each year more and more Koreans come to the United States and more and more of the culture is exchanged. Recently, my 86-year old great aunt, came to the United States for the first time. When she saw the Kentucky Fried Chicken store, she said, "oh, you have Kentucky Chicken here too?" She refused to believe that it started in America. Later, after several months, when she was homesick for Korea, we asked her what she wanted to eat, and she replied, "Kentucky Chicken."

The point is that the world is becoming an increasingly small place and that information, culture and even systems of justice are communicated over vast distances. It is my belief that the cultural differences between Korea and the United States are narrowing and that as a group, Koreans will not have major adjustment problems in the American judicial system.



# **A FILIPINO PERSPECTIVE ON DISPUTE RESOLUTION**

by

**Amy Agbayani**

I am Filipino and I was born in the Philippines and have lived in Hawaii for over 25 years. I will try and make a few points about Filipino culture and hopefully some of my friends in the audience who are from the same cultural background as I am, will not totally disagree with me. Like all ethno-cultural groups, Filipinos in Hawaii also have a great deal of diversity.

First, an important reality for Filipinos in Hawaii, both for children and adults, is that when they do have any cross-cultural contact, it is usually from a disadvantaged position. Filipinos are usually at the lower end of the power relationship in a cross-cultural contact. For example, most Filipinos have very few Filipino teachers, they interact rarely with a Filipino policeman, they interact rarely with a Filipino state official, their employers, most of whom are in the hotels, are rarely Filipinos. Court officials, the media, and others in position of power are rarely Filipino. So that a lot of cross-cultural contacts that they do have are from a very disadvantaged position.

My second point is that we must examine existing problems at the same time as we look at future possibilities and issues. The problems we have today are generally related to the "single door" justice system that is primarily Western. Some of the problems that Filipinos face (which are similar to other immigrant groups like the Koreans) deal largely with cultural communications or miscommunications. For example, in the court I think most observers would expect that a "yes" and a "no" is clearly and easily understood. But a case in Chicago where Filipino nurses were on trial illustrates how it is possible to understand and interpret the word "yes" in more than one way.

When the Filipino nurses said "yes" they may have meant: "yes" they understood the question; "yes" they understood the implications of the question or statement; not "yes" as a direct reply to the question. In their culture they often are expected to say, "yes" to an authority figure. Thus their "yes" has a number of possible interpretations that differ from an American answering the same type of question. Because these Filipino nurses were "fluent" in English, they did not need a translator yet their words in English were really not understood in the way it should have been. This example of miscommunication is subtle and scratches only the surface of the complexity of communicating among individuals from different backgrounds. The whole issue of legal access and equity for non-native English language speakers or non-English speakers needs to be addressed more adequately in Hawaii and elsewhere.

Another example of cross-cultural miscommunications in the area of non-verbal communications is eye contact. I'll use an example from a Hawaii public school. One school principal said to me, "Amy, this Filipino child was misbehaving and I called him into the office to talk to him about his behavior. Do you know that the child didn't even look at me in the eye?" In American culture, looking at someone in the eye is an example of being candid,

trustworthy, honest, sincere, and so forth. But to that Filipino immigrant child it was really showing respect to the principal by not looking at him in the eye. Just these little nonverbal ways of communicating in the courts have enormous implications. It may be possible to interpret the same non-verbal gesture or behavior as remorse, guilt, loyalty, sincerity, indifference, etc. Many of these non-verbal as well as verbal communications can easily be misinterpreted when you have a single-door kind of process and few individuals in positions of responsibility familiar with specific cultures of minority groups.

What do we do about these problems today? in the near future? and the distant future? In addition to the simple but effective solutions we have already come up such as the inclusion of bilingual and bi-cultural individuals in the courtroom, and possibly judges and lawyers that reflect the population that the clients come from, we could try to have a very extensive, intensive training program for everyone who is involved in the justice system. But it is very hard because what is culture? What is peculiarly Filipino or appropriate to a particular cultures is not that easy to say. As some of the people in the video said earlier, What is Korean? What is Filipino culture when you're dealing with large variations in income. Moreover within culture there is a large difference between those who are western-educated and those who are not western-educated. Finally cultures are not static but constantly changing.

For example, lets look at the problem today of Filipino youth gangs. These young people are of Filipino ancestry, what culture do they belong to? Some would say that they are illiterate in the Philippines traditional culture yet they are not familiar with or accepted by Hawaii's local culture. Some would say that they are actually illiterate in both cultures. In some sense they have a culture of their own, they support each other and operate within their own system. And so when we say let's have a multi-door system or use culturally appropriate techniques and so forth, it's not that easy to implement because of the varieties of culture. Perhaps in the future we might have "cultural officers" in the courts that are actual experts in particular cultures. It's not an area of expertise that is readily available. I don't know if many of you in this audience have been in the same position that many of us on this panel have experienced. We are asked to talk about our complex cultures in about five minutes. It is not easy because so much of culture is not observable and easily articulated. One must select what is relevant and important or actually appropriate to the situation really is very complex. Cultural expertise is just as important as scientific or legal expertise and we may really have to develop a cadre of people who are trained in the varieties of cultures and have them really, even in the near term future, be available or present in the courts.

Let me close with a couple of items in the Philippine culture that I think could be immediately used or potentially useful in the courts.

- (1) In the Philippines, shame is very important and it actually is a real deterrent and is an effective method of punishment. I'm not sure it would work here, but I'm sure that there are things that we could do that would shame a few people. And it might deter certain crimes if there were publicity or the threat of publicity about a court decision finding fault.
- (2) A second aspect of Philippine culture that we do use and it is probably used a lot in the

alternative dispute approach is the use of "intermediaries". A lot of conflict resolution approaches in the Philippines is really very sort of circular, it's not very confrontational, and it's done by a third party and often times the back and forth kind of interaction allows people not to lose face and to come up with a solution that's very acceptable to all parties concerned.

# GEOPOLITICAL TRANSFORMATIONS AND THE 21st CENTURY WORLD ECONOMY

by

Johan Galtung

## GEOPOLITICS I: The Geopolitical Background

It looks as if the transition from Yalta to Malta certainly was a giant step; not toward peace but to the New World Order. The question is what that means. Although there is no conclusive evidence, we may have good reasons to believe that whereas at Yalta they divided Europe, at Malta they divided the whole world, or most of it.<sup>1</sup> More particularly, four major zones, spheres of interest or regions can be described as follows:

- (1) United States will have hegemony over the Western Hemisphere and the Middle East, with an inner periphery in Canada-Mexico and Israel, and an outer periphery in the rest.
- (2) The European Community will have hegemony over most countries in Central and Eastern Europe, and the 68 countries of the ACP (African-Caribbean-Pacific) system established by the Yaounde-Lome conventions from 1964 onward,<sup>2</sup> with an inner periphery in the former (some with associate status) and an outer periphery in the latter; the most globally encompassing empire in history. Confederate EC is now moving toward a federal European Union with common finance, foreign and defense policies, making the structure irreversible by using majority rule, not consensus. There will be expansion of membership. Inner center: Germany, France and England, and basically trilingual.
- (3) Japan will have hegemony over East-Southeast Asia. This might mean an inner periphery of the two parts of Korea (South and North), the three parts of China (PR China, Hong Kong and Taiwan) and Singapore+Malaysia, and an outer periphery of the other four ASEAN countries, the five socialist and ex-socialist countries Mongolia, Burma and Vietnam/Laos/Cambodia, and then Australia/New Zealand and the other Pacific Islands, including Hawaii. In short, the old Greater East Asian Co-Prosperity Sphere;<sup>3</sup> the dai-to-a kyoeiken. The Japanese sphere has the largest population by far. So far the signs are that the sphere will be based on economic rather than military power, although it is hard to tell how long that will last given pressure from other zones.

These first three zones, spheres or regions will probably crystallize economically as the Dollar-zone, the ECU/DM-zone and the Yen-zone respectively. The next four regions will for the foreseeable future not be in the possession of what could be called world currencies (in plural), and may have to lean toward one or two of the three mentioned. Which one(s) will be a source of conflict of major geo-economic and -political significance.

- (4) The former Soviet Union will have hegemony over itself. This may imply as center Russia with White Russia, possibly also with Eastern Ukraine (orthodox) and Northern Kazakhstan (with heavy Russian population,<sup>4</sup> and a periphery consisting of the rest of a possible Commonwealth of Independent States (CIS). Like for the Western Hemisphere, however, "hegemony" is incompatible with "sovereignty" for the republics. To foresee the structure that will emerge is impossible at this stage, but many ties, at the very least economic, will remain. And it is very difficult to believe that this vast structure will not also have a center, and by implication a periphery, whether run the Gorbachev way, by the Party-Army-KGB troika in some new way, or by neo-fascists.

By "a hegemonial system", then, is meant the following:

- the right and duty of military intervention by the hegemon in case of "instability" threatening their sphere of interest;
- the duty to punish disobedient client states and individuals as individual and general prevention, including court processes;
- intervention by "gentlemen's agreement", also on behalf of other hegemons, so criticism will be soft and short lasting on an "I-don't-undercut-you-if-you-don't-undercut-me" basis;
- economic preponderance on an "I-don't-try-to-outcompete-you-in- your-region-if-you-don't-try-to-outcompete-me-in-mine" basis;
- cultural regionalism guaranteeing some cultural homogeneity;
- political regionalism; meaning regional organizations for basic decision-making controlled by the hegemon (and not by the United Nations), possibly with cross-representation of other hegemons;
- the political region defining the territory of "self-defense";<sup>5</sup>
- hegemons in deep trouble may be assisted by other hegemons;
- the final arbiter, the primus inter pares, the hegemon of the hegemons, is the United States, not the United Nations, settling conflicts among hegemons and assisting hegemons in distress.

This "Malta system" of international feudalism has already been put to a test, with the US intervening in Panama and leading the "coalition" against Iraq, and the Soviet Union intervening in the trans-Caucasian and Baltic republics; eliciting only muted critique from other hegemons. When France and the Soviet Union tried to soften/avoid the Gulf War the argument "if-you-don't-support-me-I-might-work-against-you-when-you-are-in-trouble" no doubt carried much weight. New Caledonia, the Baltic States! The EC tried to take on a softer operation in Yugoslavia. And Japan has not yet taken on any military hegemonial role using economic power, "better buying Pearl Harbor than bombing Pearl Harbor!".

The Malta system needs completion with more world regions:

- (5) China will have hegemony over itself. China has usually exercised this except for two or three periods of disgrace, the last being from the 1840s till the 1940s. China may have to accept that not only Korea and Vietnam but also Tibet are outside the region. It should be noted that this concept is entirely compatible with the old Confucian doctrine of han Chinese versus the four types of barbarians, North, East, South and West.<sup>6</sup> The innermost center remains Beijing; not Shanghai.
- (6) India will have hegemony over South Asia. This would mean an inner periphery of the other SAARC <sup>7</sup> countries on the subcontinent (Pakistan, Bangladesh, Sri Lanka, Nepal, Butan and the Maldives); and an outer periphery with a heavy population of Indian nationals, such as the littoral of the Arab Sea, Bengal Bay and India Ocean, and also the Trinidad and Fiji Islands.
- (7) A coming Islamic/Arab superpower. We are here talking about a possibility two to three generations hence, bringing one billion Muslims and the 45 countries of the Islamic conference together, possibly with a nucleus of the Arab countries (today 200 million divided into 22 states if we count Palestine), with the current process of subservience in the Gulf area possibly serving as a major impetus. It could hardly operate without a center, inner periphery and outer periphery like the others, opening a Pandora box of problems for this region. The rivalries in the Damascus-Baghdad-Cairo-Tehran-Istanbul pentagon of old empires have age-old History. But some day poly-centric formulas like the European Community may emerge. Time will show.<sup>8</sup>

It may be argued that neither the European Community, nor the Islamic Conference has the necessary coherence. But what they do not have they may get, and even through a race for coherence with Islamic countries catching up as the EC proceeds. But so far it only makes sense to talk about six regions and six hegemons/superpowers; three of them global, three regional.

Needless to say, if this is anything like an adequate vision of the geopolitical map of the 21st century, then the political and military implications are tremendous. Thus, we are actually talking about a world with six superpowers, four of them veto powers in the Security Council (EC even has two vetoes). Five of them already have nuclear weapons (EC even double) and the sixth, Japan, may be heading straight for directed energy weapons (DEW) systems, such as offensive laser beams,<sup>9</sup> beamed directly from satellites or indirectly via geo-stationary mirrors. In terms of conventional arms the five major arms exporters in the world are found within four of them, and the other three are the major arms importers.<sup>10</sup>

And this is where the "New World Order" enters. It can be seen as an effort to manage the totality of this six/seven-polar world from Washington D.C. If so the U.S. enters in two capacities: as the hegemon in Region I, so to speak, and as the primus inter pares, the hegemon's hegemon, with the others serving as regional deputies. The frequently encountered term "multilateral" does not catch this reality at all; it is more like six/seven parallel unilateralisms organized in three layers with Washington DC on top, then the hegemons, some more developed militarily than economically, and then the rest.

Idealistically speaking this should leave the U.S. free to focus on the Western hemisphere with occasional interventions in the highly uncrystallized Middle East, hoping that a local hegemon may be found/created. From gambling on Iran (e.g. the Dhoffar rebellion, in Oman), Egypt, and to some extent Israel, the current approach may be to make a hegemon out of the Middle East allies in the anti-Saddam Hussein war so that a major part of the Islamic world can also be administered through deputies.

This may be what they hope, but hardly what will happen. The New World Order is more like a nightmare, collapsing everywhere even before it is born. To see this let us try a concrete listing of the conflict formations as they are today, leaving aside tomorrow. In so doing it should be pointed out that the regions have a certain cultural homogeneity, at least where center/inner periphery are concerned: (1) and (2) are Judeo-Christian, (3) and (4) are Buddhist/Confucian, (5) Orthodox, (6) Hindu and (7) Muslim.

## **GEOPOLITICS II: A Conflict Map For a Seven Polar World**

- Unipolar conflicts, inside the spheres of interest, with the hegemon using "peacekeeping forces" in the inner and "rapid deployment forces" in the outer periphery, against revolts;
- Bipolar conflicts, between two hegemonies over jurisdiction: like US/EU over Caribbean-Pacific and possibly Latin America; US/Japan over Southeast Asia and US/Japan/EU over the Pacific; US/SU over certain weapons; US/other hegemonies in the Middle East (Egypt, Libya, Iran, Iraq, and successors to Iraq, Israel); EU/SU over Baltic republics and German and Polish east borders; EU/Japan over how to divide Soviet Union; EU/India over littorals and islands; EU/Islam over migrants; Japan/SU over the Kuriles; Japan/China over oil; SU/China over East Siberia; SU/Islam over Central Asia; China/India over border areas; China/Islam over non-han China; India/Islam over Kashmir and Muslims in India.
- Multipolar conflicts with more than two hegemonies, organized: US/EU+Japan or US+EU/Japan+SU+China+India+Islam economically, or Christianity/Islam, Occident/Orient civilizationally. Ominous.
- Coalitions of hegemonies, eg., the "North", as in the Gulf war with four hegemonies cooperating (and one abstaining) to control the outer periphery of one region, thereby reinforcing hegemony. Veto power guarantees no UN action against loyal client states.
- Coalitions of peripheries, eg., under the slogan "clients all over the world unite, you have only your hegemonies to lose". But costs are higher and resources smaller than for the Center, the "South" exists only as a set of outer peripheries, and the Third World is a myth. Moreover, the New World Order power is military rather than economic, reflecting the declining economy of the US. And veto power guarantees no UN action against hegemon states.

In short, a dangerous, familiar world with well known conflicts. To refer to it as a "new world order" is correct only in one sense: it is more peaked, with the super-hegemon, the US, on top. In the longer run this may increase the chance that all six will turn against the U.S.,

making the future position of the European Community/Union even more important.

## **GEOECONOMIC IMPLICATIONS OF THE GEOPOLITICAL ORDER.**

First some points about world economics in general before we make use of this geopolitical vision, with military and cultural aspects, and before looking at the six or seven regions.

Surprisingly little is known about the world, geo, gaia, as one economic system. Liberal economics is the economics of countries (national economics, Volkswirtschaftslehre in German, VWL) or the economics of enterprises (business administration; Betriebswirtschaftslehre in German, BWL); and their relations. Marxist-Leninist economics is the economics of class relations, within and among societies, and is more global. Liberal economics focuses on growth, Marxist economics on distribution. Both are necessary, neither of them sufficient to answer the key question: how is the world doing, seen as one country, one enterprise, one class? Four areas will be touched upon: world trade profile, world currency exchange, world arms race and world debt burden.

World trade is reported to increase 12%-13% annually; with the increase increasing,<sup>11</sup> in other words with acceleration. Is that good or bad? For the traders it sounds rather good, even very good since their profits depend on volume. The question is whether world trade (W) in the sense of inter-regional trade is at the expense of intra-regional (R) trade (eg., within South), which might be at the expense of intra-national trade (N), which in turn might be at the expense of local (L) self-reliance. There is no reason to assume that  $L+N+R+W$  is constant, if for no other reason because of the increasing numbers of producers and consumers. But the world trade profile does matter. All four should be healthy, vigorous. International trade (R+W) at the expense of autonomous L and N development, might be very cancerous,<sup>12</sup> and very vulnerable, for instance to wars.

The daily international trade volume is estimated at about \$10 billion.<sup>13</sup> But the volume of world currency exchange, was reported to be \$ 200 billion per day, or 20 times what would be warranted by the trade volume if we assume for the product flow across borders a money flow in the opposite direction. Of course, that flow does not have to change denomination; it could be kept in dollars. But recent rumors (CNN, January 1991) speak of \$ 500 billion as the volume of daily currency transactions.

In that case the proportion would be about 50:1, indicative of a very strong imbalance of finance economy over real economy. This, in turn, may be indicative of some very basic instability in the system, with finance traders hedging and speculating, launching and withdrawing all the time. Sooner or later that world bubble will probably burst.

One reason for this may be, precisely, the current multiple unipolar organization of the world. Compared to the Bretton-Woods system, and the position of the U.S. in general and the dollar in particular right after the Second world war, with Germany and Japan in ruins, there is no doubt that the current world economic landscape has a more multi-peaked topography. The potential for heavy conflicts is tremendous, as pointed out above. At the same time, and the Gulf war will increasingly bear witness to this, military articulation of conflicts imply unbearable costs to destroyers and destroyed alike, per time unit. The destructive capacity tends to zero as



it gets depleted ("running out of ordnance"), and the destruction tends to unity as it gets completed ("running out of targets"). The question is what comes first. But even with the latter first and a clear relation between destruction and capitulation, the costs are tremendous. In short, the military may be undermining itself, like any cure so much worse than the disease.

We might then speculate that conflict relations within and between the spheres of interest will increasingly be articulated with economic rather than military means; a word-pair not to be confused with constructive/destructive. A military arms race does not necessarily end with a war (confrontations may be avoided, for instance;<sup>14</sup> and a market race, complete with bankruptcies, debt and IMF conditionality, may take considerable tolls when the economy is measured in terms of human development (eg., child mortality) in all layers of society, not in terms of GNP only. If war is politics with other means, then economic relations might also be war with other means. Depending on how the race is conducted the number of victims may easily exceed even that of a cruel war, and certainly that of a non-belligerent arms race. Thus, the annual toll of children from malnutrition is 16 million, that of the Second World War was (only) 8 million.

The cost-benefits are usually negative for the arms race, except when there are profits from arms sale, from the war itself and from massive reconstruction; and positive for the market race except when the economy is no longer growing, under recession--depression conditions. But the exceptions may be the rule and may also coincide in one country, like the U.S. (and the U.K.), with massive construction following massive destruction.<sup>15</sup>

In other words, the market race in a broad sense may take over in a post Cold War war, but only partly and not necessarily leading to less violence. Moreover, the market race leads to conflicts that cannot be solved through market mechanisms alone, and that in turn may lead to war. The conflict between Kuwait and Iraq over war debts, oil prices and the use of the Rumaylah oil fields is an important example: Saddam Hussein wanted, and to some extent negotiated, adjustments the market could not offer, did not get them and went to war instead, probably partly out of anger, partly to enrich Iraq, partly to have withdrawal as a "bargaining chip."<sup>16</sup>

Another example would be the relation between Japan and the U.S. with pure market principles leading to unacceptable consequences in both countries, such as ever increasing Japanese market shares in key branches, including sensitive real estate, and increasing U.S. political interference into the socio-economic culture of Japan. Both parties currently negotiate adjustments to market principles, but mainly in vain.

This is where the world arms race, at the annual rate of far above \$ 1 trillion, becomes a triple back-up system to the market race. When conflicts, including those generated by the market system, abound, the market for arms will prosper. Most of those arms will sooner or later be used one way or the other to threaten, kill and destroy; only extremely few are destroyed or preserved for posterity in museums. The rest is rather obvious: destruction of targets is followed by reconstruction; destruction of means of destruction by rearmament. The circle feeds itself.

But the hegemons cannot go on killing and destroying endlessly within their own spheres of interest without incurring heavy resistance. Moreover, peace-keeping and rapid deployment do not come cheaply these days; and not all wars are short and decisive; meaning acceptable to the violence senders.

Other ways of keeping peripheries at bay have to be found; the most obvious being the world debt burden, which for the Third world (\$ 1.340 billion according to the World Bank at the end of 1990) and the U.S. alone exceed \$ 2 trillion. The U.S. debt, like Australia much higher than Brazil and Mexico per capita, do not appear on such lists; but on the very useful Asiaweek barometer.

Wise people used to say that small debts are a burden to the debtor, big debts to the creditor. Economically, yes; but that is a very narrow perspective on debts. The basic point is not the quantity of debt service, bound to be low given the "performance" of most indebted countries (the basic reason why they are indebted anyhow). Much more basic is the quality, how the debt is serviced. There is a world market demand for raw materials and commodities, meaning that repayment will be in products keeping the indebted countries at the lower half of the degree of processing axis. This will increase the supply and lower the prices (Fisher's law,<sup>17</sup> possibly increasing the demand and freezing world division of labor. At the same time finely tuned refusal to give new credit, or to withdraw credit (by selling bonds, for instance) is a mechanism of political control that may substitute for military intervention.<sup>18</sup>

In short, geoeconomics is geopolitics with other means, and vice versa. To be peace-productive market behavior has to be ethically conscious,<sup>19</sup> a set of conditions very far from satisfied today. More concretely, there is a limit to how much speculation and giant debts the world financial markets can take, and how much arms trade the world can take. Moral barriers against excessive speculation, seeking and granting credit (both sides of the equation) and trade with means of destruction could be imagined; some of it even backed up by international law backed up by sanctions. But the effects of such deals are likely to be far away from the wrongdoer, meaning that there is little or no moral community and sentiment (Adam Smith) to draw upon.

And the same goes for the first of the four factors, the world trade profile. The macro-levels, W and R, attract the macro-corporations in search of macro-trade with macro-profits. And the local and national levels are sapped of their energy, leading to giant population dislocations and eco-imbances.

### **GEOECONOMICS AS REGIONAL ECONOMICS: An overview.**

With the world divided into seven geopolitical regions, the next focus would be on how these regions will behave economically in the coming decade, the 1990s, starting with the center, then looking at the relation to the inner and the outer peripheries.

To do this some factors indicative of how an economy is performing are needed; a very controversial area indeed. Here three such factors will be used:

- Q/P, the ratio between the quality of the product offered and the price; both quality and price being taken in the broad sense;
- C/N, the degree of processing in a product, goods or services, from the raw, le cru, nature (N, raw material, the simplest human faculties) to the processed, le cuit, with culture (C, the form imparted to the raw materials in industrial processing, or to the human faculties through education of any kind);
- F/R, the synchrony between the (rate of growth) of the finance economy of financial assets and the (rate of growth) of the real economy of (other) goods and services. Inflation is asynchrony.

The basic point is to keep all three factors within bounds. At zero or very low levels we have an economy of nature-given products and skills, exchanged in a real, barter economy (which is where price enters). Then there is a "take-off," attending to quality (eg., long term reliability), processing, and more sophisticated economic systems with various types of financial assets. At the far end would be an economy in financial assets only, at an incredibly high level of sophistication and quality; but obviously made for King Midas rather than for human beings.

Here are some predictions for the six/seven regions:

- (1) The economic decline of the United States will continue with some minor upswings always greeted with the same official optimism, because all three indicators above are in bad shape at the same time. Relative to the competitors, there is production at ever lower levels of processing. There is also insufficient attention given to the quality/price ratio and the old adage that "the bitterness of poor quality remains longer than the sweetness of a low price." These two secular trends are partly due to the militarization of the U.S. economy (with every second engineer working for the Pentagon)<sup>20</sup> and low level of spin-offs (among other reasons because of the secrecy clauses); partly due to the "post-industrial" move toward the finance economy and away from the real economy (bad F/R ratio) leading to inflation, stock exchange crashes and speculation (often criminal, usually immoral) instead of production to get in the black every quarter; and partly due to the deskilling of the working class through destruction of trade unions, bad education, and the terrible quality of highly addictive U.S. television.

The only major exception (see Michael Porter's "clusters of excellence")<sup>21</sup> would be arms, increasingly higher in high-tech sophistication, which should not be confused with military efficiency or efficacy. These arms could, as mentioned, improve the GNP in three ways; as arms trade, as mercenary service to be paid for like any other service, and as means of destruction, paving the way (literally speaking) for profitable reconstruction when the destruction is completed.<sup>22</sup> The ideal solution would be to do all three in an area rich enough to pay the bill for the arms, for the war itself and for reconstruction. The Gulf area satisfied all three, with deficit financing from the outside, of course; Indochina none of them.<sup>23</sup>

The U.S. is by far the most indebted country in the world today, at least six times the level of no. 2, Brazil (but then the US has little more than twice the population). With the U.S.

currency value curve looking like a typhoid fever chart the credibility of the U.S. dollar will continue its downward slope, and the U.S. will probably either have to print money or abrogate loans unless some new products sufficiently high on Q/P and even C/N can be found, meaning with the same added value and market attractiveness as arms. Printing money will produce inflation and devaluation. Abrogation will legitimize retaliation.

In either case the dollar as world currency will probably not survive the 1990s. An ecu-yen combination is the likely alternative given the economic dynamism of regions II and III; possibly a dollar-ecu-yen combination. The U.S. will then squeeze the Western Hemisphere including Canada, and the Middle East instead; tolerating no deviation from US economic dominance, currently using "war against drugs" as cover. The wars against Panama and Iraq are indicative of what this means.

- (2) The general European Union upward economic trend in almost all fields of economic performance will continue, except for workers' salaries, where the 1993 inner market may imply a leveling downwards, "social dumping."<sup>24</sup> Europe, and not only EC/EU have monitored Q/P, C/N and F/R carefully. Western Europe still has an adequate educational system both at the elite and the general population levels, even if U.S.-style TV (favoring visual, not sequential mental processes; with no borderline between information and entertainment; very short sequences and idiotizing commercials) will ultimately take their toll. At the same time a "Latin Americanization" of Central/Eastern Europe has already set in, helped by local elites<sup>25</sup> and the aversion against any market skepticism. Cheap but well schooled labor will be amply available in this great area of exploitation next door. This will lead to violence, which in turn may be profitable.
- (3) Japan will continue its upward surge, but not alone. It should be noted that the periphery of Japan, inner and outer, is by far the largest in the world. The implication is of key global importance: Japan can slow down and even reverse the policy of keeping the U.S. afloat as a market, having a reserve market to fall back upon. A Unified Japan-Unified Korea-Unified China Common Market, linking Japan and its inner periphery (possibly with Singapore/Malaysia), with Japan as "inner center", is probably in the cards; depending on Korean unification.<sup>26</sup> We are then talking of a region with 1.340 million human beings and not only the 340 million in the European Community after German partial unification.<sup>27</sup>

There have been some guesses that Western Europe and/or Eastern Europe-former Soviet Union would be the Japanese alternatives to the U.S., and there is, of course, some truth to this. But the Japanese are cautious and prefer gambling on several horses. They know that the EC/EU area may also be closing, that Eastern Europe and Soviet Union are heading for considerable problems similar to other Third world type economies, and that the sphere of Buddhist-Confucian countries is more hard-working. Thus, the Greater East Asian Co-Prosperity Sphere may be realized fifty years after its official demise, with economic means, as current Japanese investment patterns seem to indicate.<sup>28</sup>

Bridging regions II and III, and a bad omen for the U.S., is Japanese-German cooperation with Mitsubishi Heavy Industries and MBB Daimler-Benz up front.<sup>29</sup> Space+Arms = Space

Arms, to balance the Star Wars of the US? For both this means access to the highest technology of the other region, a policy attempted by the U.S. in Japan, but then too high-handedly. Spin-offs for their peripheries would have to be in it lest the "inner centers" become isolated. A German-Japanese axis has to be firmly rooted.

- (4) The economic decline of the former Soviet Union will continue. The key factor is neither the problems of the stalinist system although they were considerable, nor the problems of the transition to a "market economy" although they are close to insurmountable, but the nature of the system they are getting in return for the old. The term "market economy" masks the basic difference between Center and Periphery capitalism, some of the key characteristics of the latter being a very low level of C/N (although at that level possibly a high Q/P due to the simplicity of the product, and the cheap availability of the production factors); elites negotiating within the discourse and on the terms set by the center; increasing distance between elite and people in the periphery; unemployment, and increasing misery for a high proportion of the latter. To make this system work command capitalism is needed, ie., neo-fascism. Significant reactions against the inequities of the market system will be brutally repressed, as in Latin America and China in 1989.

A likely scenario after Soviet Union has arrived at some agreement with Japan<sup>30</sup> over at least two of the South Kurile islands would be massive investment by a German-Japanese economic alliance (see iii above) dividing the Soviet Union at the Urals, declaring the Second World War finished. The historic motivation for doing so would be very clear: to undo the trauma of defeat.

Given the enormous natural resources and supply of labor at relatively high levels of education and health, the former Soviet Union should grow in spite of capital and management deficits, given the size of their science and technology establishment.<sup>31</sup> However, a positive feedback is needed, not only for speculators but for the population at large. And that feedback is today negative and may continue to be so for the people at large.<sup>32</sup>

- (5) China will continue being China, with a low level impact on the world economy except indirectly as a part of the enormous Japanese region. But, as such, China will make itself felt. The factor profile is less positive than for the former Soviet Union, being less well endowed with natural resources and labor at adequate levels of health and education. But capital can flow into the country from overseas Chinese. The Buddhist-Confucian culture and structure should make for management patterns similar to those of the Japanese. There is a tradition of being hard-working. But the most essential problem for China is to achieve more balanced growth, between classes, genders, and regions of the country.<sup>33</sup>
- (6) India will be more of a military than an economic challenge, and a periphery for Regions I, II and III; like the others using "peacekeeping forces" for the inner and "rapid deployment forces" for the outer peripheries.<sup>34</sup> India may become good at C/N with its high-level science and technology establishment, but hardly at Q/P. There may even be some carry-over from the British tradition of diffidence and disregard for the aesthetic dimension of quality; Indian products generally looking unattractive to the world market.

- (7) The Islamic/Arab region will essentially be a periphery for Regions I, II and III. Moreover, there is too much political-military work to be done to bring about higher levels of integration, some of it even deep inside non-Islamic countries (the 8 Islamic insurgencies in the world right now; Kosovo, Lebanon, intifada in Israel/Palestine, the Central Asian Soviet republics and Azerbaidzhan, Kashmir, India, China, Philippines). Parts of region VII are already in II and III.

And the same applies to the Third World, the South, as a whole, which will continue being exploited and probably more than before. A major reason for this is the way in which the South is being fragmented among the six or seven regions, as in the old colonial system. Major rebellions and all kinds of fundamentalisms will be the result, unless the fine recommendations of the South Commission<sup>35</sup> are followed, particularly increased South-South cooperation to improve Q/P, C/N and F/N, and to lower the dependence on the North for technology and currency. But will the hegemony ever permit that?

In short, the key economic actors will remain the Judeo-Christian (particularly Protestant) and the Confucian-Buddhist (particularly mahayana) regions, meaning Nos. I, II and III. This is essentially the OECD area from a governmental point of view (with the G7 as Executive Committee) and the Trilateral at a more individual and corporate level. To summarize:

- the economic position of the US continues to deteriorate;
- the economic position of the EC/EU and the dai-to-a regions are continuously improving, although this applies above all to Germany and Japan, the innermost centers (see Appendix for data);
- Japan may integrate economically with its vast inner periphery;
- Germany has already expanded territorially, and may do more, with Eastern Europe and the Baltic as economic periphery<sup>36</sup>;
- there is a Japan-Germany axis taking shape, connecting two countries with 1/5th of the gross world product, and II and III;
- what happens in the Indian and the Islamic regions point more toward political/military than economic autonomy;
- the Third World as a whole, the "South," has little coherence, divided by distance, religion/culture, race and by being the peripheries of different centers. The debt burden is essentially a political instrument used to preserve the status quo, or any order of interest to the creditors, as was seen clearly in the beginning of the Gulf crisis, using debt to buy UN votes.

The most dynamic factor in this picture is the U.S., to be explored in the next section. Not only the U.S. but also South America (from Rio Grande southwards) with only few exceptions, is affected;<sup>37</sup> and indirectly the whole world. By sinking, space is made for others. This also

applies to South America relative to other Third World regions. That others stretch out for a handshake across the quickly sinking Soviet Union and the slowly sinking U.S. should surprise nobody. But only those with long arms can do so, meaning Japan and Germany. And they might do well to remember that decline is never total, there is always something that does not decline, like military power in both cases and cultural power for the U.S. The U.S. has been more successful than any other country in producing world culture, generally plebeian and vulgar, but the most global there is; a major factor behind what remains of political clout.

## **IS THE U.S. ECONOMY MOVING INTO A DEPRESSION?**

The answer given in this section will be "yes, and it has been there for some time." Concretely, that means that we are talking about more than a (normal) downswing of the business-cycle, also of more than a prolonged trough before the upward turn. We are not talking about getting in and out of a recession, but about the "d-word", depression. Moreover, we are not talking about a world-wide depression but essentially about a Western Hemisphere depression since one basic point in the theory and practice of spheres above is the effort by the DM/ECU and Yen zones to insulate themselves from any Western Hemisphere depression where the dollar probably will remain the international currency for a long time (with the possible exception of some of the Caribbean ACP countries in Region II that will be under difficult cross-pressure, given the Caribbean Basin Initiative.

Of course, all finance economies are linked, so there will always be stock exchange shockwaves, as for communicating vessels. Often this is misinterpreted to mean that the "world economy is one". But the ability to overcome stock exchange shocks with substantial index drops depends on the local F/R ratio; with inflation being but one way F/R can go wrong. And the real economies are less tightly coupled, some being more healthy than others in the sense of adequate Q/P and C/N, and the healthy ones may be immune to the pathologies elsewhere in the world economy.

The position taken here is that a depression is not a deep recession, eg., with business stagnating more than 3 years, and, consequently, low, zero or even negative economic growth, maybe even for more than 6 years, with dramatic, quick decreases in earnings and prices (including of real estate, gold, and money), and increases in unemployment, above 12%, into 25% and more.<sup>38</sup> This is certainly more than serious for those who lose their jobs and see their earnings fall more than the prices, having little or nothing to fall back upon, but conceptually only a question of degree, and politically this can all be handled as a deep or long-lasting recession; eg., with Keynesian means (in the U.S. through military Keynesianism). The difference between recession and depression, however, is qualitative, not quantitative.

At the surface depression in a developed economy is Q/P, C/N and F/R is disarray. But deeper down the basic characteristic of a depression is serious impairment of the endogenous ability to restore and sustain economic growth. A recession downswing is supposed to be followed by an upswing, generated endogenously by the economy pulling its resources of any kind together. A recession may even be healthy if interpreted as a resting period for the economy, a signal that the economy was going too fast; maybe needed once every decade or so.<sup>39</sup> The parallel to the overworked person being forced by some disease to slow down is

obvious. But in a depression the very ability to restore economic growth through one's own efforts has been damaged, if not beyond repair at least for a longer period, as with a person with an impaired immune system.

Depressions can come to an end but only exogenously, through factors outside the economic system. Wars or other catastrophes stimulating massive demand, a charismatic leader releasing new energies in the population, even "a new beginning" would be examples. Intervention by outside forces, having experts build, repair and assemble production factors, or other countries agreeing to demand the products of the country in depression are other formulas. But acts of geoeconomic solidarity, motivated by pity for the sick, are limited by fear of effective competition after recovery, unless they are effectively integrated into some super-economy. Given the present level of decay, it does not look as if the U.S. will easily come out on top of that one, making solidarity less risky.<sup>40</sup>

The "less developed countries" can be seen as being in a lasting depression, incapable of producing growth by their own means and in need of all the measures indicated above: charismatic leaders, development expertise from the outside, solidary demand, "new beginnings" of all kinds, etc. But the most effective exogenous stimulus of development, demand for products high on Q/P and C/N, is usually withheld from developing countries.<sup>41</sup> In addition, the concept of "depression" seems to be reserved for "more developed countries" undergoing a change from stable high to stable low growth. And exogenous stimuli may easily substitute for endogenous efforts, making them very controversial.<sup>42</sup>

Seen this way, any effort to answer the question has to go beyond a listing of the well known economic indicators. We have to focus not only on the symptoms of economic decline, but also on possible underlying economic pathologies. The focus should be on the self-healing capacity, which leads us to examine the social (and cultural, and human, and ecological etc.) setting in which the economy is encased. Only when the economic pathologies are encased in a syndrome of social and political pathologies, with no clear self-healing capacity, would we be in a position to use the dreaded "d-word," depression.

But this does not define unambiguously the point of entry for an analysis of economic pathologies. Obviously, what is observed is that business stagnates, meaning that willing sellers and willing buyers do not make enough deals; not why they don't. There is a mismatch: the producer tries to sell what the buyer does not demand; the domestic or foreign consumer demands what the producer does not supply at affordable prices. The vicious circle aspect is obvious since most people are both producers and consumers; weakening each other.

One point of entry would be analysis of production factors and products. But we also need a theory of consumption factors, and the production bias of mainstream economic theory then becomes painfully evident. And, in general there is also the third in-between cluster of factors, distribution, to take into account. Thus, how can we otherwise explain the ills of the former Soviet (but not the U.S.) economy with products accumulating at the production sites, money accumulating at the consumption sites, and the connecting distributive link missing?

Having said this, here is a simplistic but systematic check list for the diagnosis of the U.S.



economy:

I. **Production Factors**, in terms of five factors:

**Nature**: Even if we are not close to the depletion limits for important raw materials as discoveries continue to be made, we may be beyond the pollution limits. Thus, how much can the U.S. soil carry of fertilizer/pesticide and other types of pollution? How much pollution-related pathologies through air, water, food and radiation can human beings take? Is AIDS related to this?

**Labor**: We are essentially talking about the educational and health labor quality needed to sustain high quantity production at high quality, meaning high Q/P. If high schools have as much as 3.000 drop-outs per day or above one million per year;<sup>43</sup> if two million of those leaving elementary school every year are not really literate; if 15.000 hours of schooling for 18-year-olds are competing with 18.000 hours of television, communicating 18.000 murders and 340.000 idiotizing commercials; if training is increasingly in pictorial forms of understanding at the expense of sequential reasoning with words tracing causal and logical chains; if there are interruptions impeding any chain of reasoning beyond the simplistic; then where is educational quality? Especially when compared to the Japanese, who probably have the highest level of education for, say, the bottom 50% of the population in the world? If in addition 37 million U.S. citizens are without health insurance, 25% of the children live below the poverty line (50% of the Black children), and the infant mortality in the cities is at Third World level, then quality of health is obviously not achieved either, for the working class.

**Capital**: Credit has to be easily available, which means that financial instruments have to be bought and sold. On the other hand, if this activity is excessive, the asynchrony relative to a sluggish real economy would become evident and lead to lack of confidence because F/R is not kept within bounds. The U.S. may be suffering both from lack of credit and from an overheated finance economy at the same time; meaning insufficient credit available to the small and too much to the big economic actors. The Savings and Loan pathology ("scandal" is a too moralizing word) is a case in point: the big use the big amounts in principle available to the small and squander them, as a result the small (the tax-payers) have to pay.

Bad loans driving out the good ones is one mechanism at work here. The old U.S. institution of "walk-away" (leaving the farm, the shop, the office, the home when debts exceed their value, taking away whatever is not a permanent fixture in a big truck, even a mobile home with ample storage space) will lead to the bankruptcy of smaller banks; big speculations even lead to the bankruptcy of the bigger ones [43].

**Technology**: Even if it is true that the U.S. has the highest elite education in the world, this does not necessarily translate into high C/N for marketable products. In principle "C" is what is taught in schools of engineering, faculties of natural sciences and schools of education. But there may be heavy filtering on the way. Thus, if 50% of the engineers and the R&D are for the military, then security clauses and irrelevance for civilian use

would impede transfer to the civilian market for a heavy portion of "C", and force the economy into arms trade to balance accounts. Processing of raw materials for military purposes, by engineering specialists, relegates products to corners of society where they can only recover investment through destruction or arms sales because of the threat of destruction. But processing of raw brains for education purposes, by education specialists, also tends to relegate the highly educated into corners of society, the campus or intellectual ghetto, with little spin-off into regular society. There are few spin-offs from the military to the civilian sector, and few spin-offs from gown to town, because intellectuals are largely absent from public space (media, election campaigns, major events) in the U.S.<sup>44</sup>

**Management:** The U.S. managerial culture is still very much based on the strong-man theory for the C.E.O., responsible for balanced books every quarter, and of course tempted to focus on finance rather than real economy for that reason. MBA training will tend to produce CEOs in money or law rather than engineering. Thus, both time pressure and deformation professionnelle will tend to increase the pressure on the finance economy for the company to be permanently in the black. And if occasionally in the red the standard reaction will be to cut expenses by firing competent personnel defined as redundant rather than through an overall cut in salaries combined with collective, long-term planning. When the crisis turns worse the standard reaction will be to sacrifice the firm through bankruptcy, rather than sacrifice incompetent leadership through voluntary withdrawal, public apologies, and, in extremis, suicide. In addition, the extreme differentials in salary between U.S. CEOs and the ordinary worker, so much more than in the competitor countries Japan and Germany, probably have a very demoralizing effect on the employees.<sup>45</sup>

## II. Products

The persistent trend over a long period is C/N deterioration in the U.S. products for export and imports, meaning more exports of products low on degree of processing, and more import of products high on degree of processing.<sup>46</sup> As a communicative act this introduces a vicious circle, giving the U.S. economy a low C/N image, with wood, scrap iron, waste paper, rice, and other foodstuffs, except for sophisticated means of destruction. High C/N images introduce a virtuous circle by making others think "these people can probably make anything sophisticated"; an image today associated with the Germans and the Japanese, but probably much less with the Swiss (cheap swatches are a far cry from Swiss watches) and the British (biscuits), let alone the United States.

## III. Consumption Factors

Consumption is here analyzed in terms of two factors, Q/P (for the product) and (WxB) (demand, want by buying power). Q/P: if we assume, ceteris paribus, that consumers go for a high Q/P, then any general national failure to achieve this will lead consumers to buy foreign products when available, except for people who are heavily nationalist (K-mart: buy U.S.), heavily masochist, or simply badly informed. Heavy and reasonably truthful advertising will counteract the latter two. Availability of foreign products may be reduced through tariff and nontariff barriers, which in turn may lead to reciprocation. Being

similar to economic sanctions, tariff barriers may be advantageous for C/N low countries, among them parts of the U.S., forcing them to produce C/N high products for their own demand rather than the easy way out, through trade across vast C/N differentials;  
selling le cru, buying le cuit.

**WxB:** If demand is conceived of as the product of want and buying power, and want is a composite of need (N, the minimum consumption requisites for survival as human beings) and greed (G, only limited by the time available for consumption), then some simple conclusions follow from  $W = N + G$ .

With less buying power for basic needs, more (by definition) misery; and the more misery the lower the quality of labor as production factor. Often forgotten by those who see unemployment as useful in creating excess demand for jobs is the low quality of the workers and the high probability of "junk workers, junk work; junk work, junk products". The buying power for greed may more than compensate in total market turnover stimulated by commercial propaganda to enhance G-want, and by easily available credit (eg plastic cards) to enhance instant buying power.

But the more buying power available for ever more greed, the more pressure on capital, and the lower the quality of capital as production factor (eg., because of junk bonds, "walk-away" strategies, etc.). In short, when BxN is too low (needs are left unsatisfied) labor as production factor suffers; when BxG is too high (greeds multiply and are "satisfied"), capital as production factor suffers, resulting in junk labor and junk capital; typical syndromes of under- and overdevelopment respectively. The U.S. is a good example of a country where the two co-exist, eroding labor from the bottom and capital from the top. Moreover, the two syndromes may coexist in the same person with TV/video bought on expensive credit terms in the slums and pathological eating habits (anorexia nervosa, bulimia) also among the affluent.

#### IV. **Distribution factors**; ie., communication and transportation.

**Communication**: In general excellent, due to the high level and easy availability of telematics (television, telephone, telefax, telex, and the possible "tele" to come for taste, smell, touch etc., including telesex). E-mail is highly interactive. For the production factors this makes interaction over any distance possible, obviating the need for production sites that are contiguous in space and continuous in time.

**Transportation**, deteriorating, as seen by the Third world level of so many streets and highways, tracks and bridges, pipes and sewers. The very slow mail system also belongs in this category, making repairs depending on spare parts problematic, increasing the demand for high quality products in the sense of reliability over time when repairs across space is unavailable.

**Sales points**, another word for the market place, and certainly abundantly available. They also serve as ever-present commercials for themselves and for consumption in general, increasing the frustration due to the unsatisfied needs and greeds.

In short, business stagnation and low or negative economic growth are multifaceted phenomena. There is no single point to start. Take interest rates, dollar exchange rates, or bonds as examples. Higher interest will attract capital from abroad, but will also cause even more bankruptcies in firms, farms, and families already overburdened with debts, and through that in banks. Lower interest rates may help all the latter provided they apply to loans, not only to deposits (with banks pocketing the difference to compensate for both past and future deficits); but will frighten away foreign capital, even to the point of the massive withdrawals the U.S. economy cannot afford to suffer.

Higher dollar rates make exports in principle more, and imports less, expensive to the buyers; but very little follows from that alone. This principle applies conversely for lower dollar rates, and again not much follows from that alone. The dealers may fail to adjust to lower prices, pocketing the difference to compensate for past and future deficits; the products exported and imported may vary too much in demand elasticity, substitutability, etc. Moreover, with cheaper dollars an exporter may try to switch from export to local production, buying cheaply available production and consumption factors (food, clothes, housing, health, education, entertainment, etc.). High dollar rates may lead to a trade deficit, lower dollar rates to investment excess. What is worse, a trade deficit or an investment excess, in the longer run?

Another possibility is to print more dollars, the U.S. being the only country that can print the currency used to denominate international debts. The result will be inflation, meaning lower, even negative interest, leading to withdrawal of credit. Either way, manipulating rates or quantities, is likely to backfire. The same applies to defaulting on the bonds declaring them non-redeemable except in new bonds with similar conditionalities, which is close to abrogating the loan. The argument might be that the credit was extended under duress. Or no argument at all, only "try come and get it," with the arms arsenal available to this particular debtor (and not to the debtors to that country) as the ultimo ratio. Like defaulting on the dollar, this will undermine the dollar as the world currency, reducing U.S. economic action space by reducing credibility even further.

But in spite of all of this, one factor remains in the U.S. favor: the U.S. as the world producer of world culture, for the people and for the peoples, not necessarily for the elites. There is money to be made.<sup>47</sup> And there is enormous sympathy to draw upon, attracting thousands, millions to the U.S., among them the highly skilled in search of a "new beginning". Whether they will be able to replace current economic elites that have gone stale is another question. They are solidly entrenched. And they keep for themselves much of the money still to be made.

## **CONCLUSION: What Can Be Done?**

Even if the U.S. fails to reconquer the ichiban position, to improve the U.S. economy is important for the citizens' sake. Manipulating the finance economy is symptom healing at best. What is needed is healing the real economy by stimulating the necessary conditions for high C/N and high Q/P while watching F/R (which is much easier if the other two are taken care of).  
Proposals:

- **reindustrialization** at a high C/N level, improving the linkage between U.S. creativity and U.S. civilian production, first with a view to producing for domestic demand, second to recreate old and create new high C/N niches on the world market;
- **selective stops for foreign imports and investment**, not to punish them, nor to protect domestic competitors, but as a part of a "let us accept that we are behind and that we have to take on the challenge to produce at least for ourselves" package;
- **massive change in corporate culture**, essentially learning from the Japanese more collective, less individualist and hierarchical patterns, putting real economy rather than finance economy people in charge, reducing intra-company wage differentials, treating workers better in general with much more participation;
- **massive change in education culture**, which is less a question of changing the schools than their major competitor: idiotizing television, eg., through viewer boycott.

But what is bad for the U.S. is not necessarily bad for the world, even if what is bad for General Motors (and Ford) is also bad for the U.S.<sup>48</sup> Other regions, hopefully not only the centers, may be given a chance. And the U.S. may reflect. And come back, some day. Hopefully not with a vengeance.

## NOTES

1. The Malta meeting took place in December 1989. No transcripts have been made available, that will still take some time. But the new empirical reality after a major political encounter may provide better evidence of the intentions than any record.
2. A relatively concrete agenda for the transition from the EC as confederation to federation was prepared for the EC summit meeting in Rome December 14-15 1990 by the Italian foreign minister De Michelis, at that time chair of the EC Council of Ministers (see the article by John Palmer in the Guardian Weekly, 2 December 1990); and followed up in Maastricht December 10-11 1991.
3. Professor John Stephan, Department of History, University of Hawaii, has done extensive research into the meaning of this concept to the Japanese military government. Included, to some, was not only Hawaii, but also the Western coast of North America from Alaska/Yukon and the Pacific states to Mexico and beyond.
4. In other words, the Solzhenitsyn plan, or something close to that. Ukraina may be subdivided along historical and confessional lines, given the possible Polish claims and the Catholic/Orthodox split; and Kazakhstan on demographic lines.
5. The UN Charter, Art. 51, does not specify the meaning of "collective": "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations--". But geographical contiguity or some pre-existing arrangement may be reasonable interpretations, both of them compatible with the "sphere of interest" idea, legitimizing what the superpower will do anyhow. The Gulf crisis is an interesting exercise in how legitimacy can be obtained, even bought.

6. The idea is attributed to Confucius, who also, as a sign of his depreciation of non-Chinese, had the idea that barbarians with leaders will always remain inferior to Chinese without.
7. The South Asian Association for Regional Cooperation can be seen as a tool by the other six to regulate Indian power, as a tool for that power, or as the former becoming the latter.
8. The objection that the khalifats were also divided (Damascus, Baghdad, Cairo, Istanbul), that there were also Persian and Mogul empires, etc., would not impress a European too much; Western Europe has been through similar divisiveness. The Arab world may have moved from about 500 polities early this century (under the weak Ottoman configuration) to the present 22 (if Palestine is counted), figures similar to the European transition from the medieval to the Westfalian system.
9. The solar power system, SPS, would be based on enormous space platforms with solar energy receivers and transmission to land-based antennas. But that directed energy can also be used as a weapon of mass destruction.
10. See my World Politics of Peace and War, forthcoming. It is important to note that the world's leading arms exporters and importers are precisely the six/seven centers outlined here.
11. The Internationale Wirtschaftszahlen from Institut der deutschen Wirtschaft in Koln gives world exports in 1970 at \$314B and in 1989 at \$3026B, corresponding to an average annual growth rate of 12.7%. GATT, quoted by the Far Eastern Economic Review (9 May 1991, p. 57) gives 13.5% growth for world imports and 13% growth for world exports.
12. This conclusion presupposes a view of the world more as a system, even an organism, and less as a set of states. No organism would survive conditions of only intra-cellular, or only inter-cellular activity. That rules out the extremes, leaving a vast band of acceptable economic systems in-between.
13. The volume was \$.86B per day in 1970 and \$8.29 per day in 1989 according to the date mentioned in note [11] above. Peter F. Drucker, in "The Changed World Economics." Foreign Affairs, Spring 1986, pp. 768-91 gives (p. 782) gives about \$12.5B per day with the foreign exchange transactions running 12 times that level. Is this too much? Too little? In-between? We do not even seem to have a theory, leaving alone an answer. What is needed is a comparison with the other types of trade, with the trends.
14. The idea underlying the Nixon-Brezhnev "traffic rules" for the cold war, because both of them could inflict "unacceptable damage" to the other and had values that were not that dissimilar, one of them being not to have a war on their own territory (one of them because the country had never experienced it in recent generations, the other because it had.) It is interesting, and chilling, to note how any such concept broke down in connection with the "Gulf crisis" 1990-1991. If both parties want a war, albeit for different reasons, they will probably get it.
15. The Gulf war offers many examples of this. Both US and UK contractors were in the market for the reconstruction of Kuwait (before anything like an estimate of the damage was available), as a reward for participation in the liberation. U.S. Commerce Secretary Mosbacher urged the Saudis to reconsider a major telephone contract to Alcatel (France) and L.M. Ericsson (Sweden) and starts discussions with ATT. The same Mosbacher "convinced the Kuwaitis to locate their postwar recovery team in Washington rather than London or Riyadh"; partly as a result, "U.S. companies are lapping up about 70 percent of the initial wave of rebuilding contracts". The world seems to be enacting the most vulgar marxism, with capitalism destroying capital to get new contracts, meaning that marxism cannot be that vulgar (IHT, March 11 1991). Also see "Dollar's Health Could Improve if Gulf Flares" (WSJ, 24 September 1990). All one has to keep in mind is that after reconstruction may come redestruction and rereconstruction.
16. Thus, the market did not compensate Iraq for the war against Iran even if many countries paid Iraq handsomely. Better than single shot payments for means of destruction is a stable earning capacity based on means of construction.

17. The Yale economist Irvin Fisher had the very reasonable idea that when many heavily indebted families sell the same goods, e.g., household silver, on the market, then the price of that commodity will decrease. The analogous element for heavily indebted Third world countries would be raw materials.

18. This mechanism is in principle available to Japan for the U.S.; whether it will be used remains to be seen. At the same time the U.S. has bases in Japan; a very explosive combination.

19. Shopping for a Better World, New York: Council on Economic Priorities, 1991, is a very important attempt along such lines. The idea is to mobilize consumers to vote with their buying power for or against products and the firms producing them, adding to economic rationality (a high Q/P ratio) other considerations: "giving to charity", "women's advancement", "advancement of minorities", "animal testing", "disclosure of information", "community outreach", "South Africa", "environment", "family benefits", "workplace issues", "military contracts", "nuclear power". In the present version customers would have to use the guide to select the products; later on they might be guided by proper labeling on the products.

20. A very common consideration heard from those engineers is the challenging and interesting nature of the job. To achieve destruction under difficult conditions cannot be easy. But this also offers interesting insights into the criteria for challenge conveyed by engineering schools. They could be improved upon.

21. Michael E. Porter, The Competitive Advantage of Nations, Free Press, 1990, defines "clusters of excellence" for the ten countries in his study. They are based on such production factors as skilled labor and infrastructure, demand conditions at home for the product, the presence of supporting industries, and heavy domestic competition. Only by becoming lean and mean domestically can the companies hope to excel internationally. The present clusters of excellence for the U.S. would include software, consumer package goods, movie-making, commercial airlines and credit card services; whereas the U.S. has lost leadership in automobiles, steel, consumer electronics, machine tools, office products, consumer durables, apparel and some telecommunications. Of the top 25 U.S. industries in terms of world export share, 15 have a heavy load on natural resources. Britain leads the field only in biscuits and auctioneering, Germany in chemicals and luxury cars (the competition between BMW and Mercedes!), Sweden for the same reason in trucks. Conspicuously missing from this list is the arms trade; imparting an air of lack of realism to the Porter study. The shadow side, not to be mentioned among gentlemen in corporate boardrooms? See "American Paradox: Smart Bombs, Dumb VCRs; Why are Makers of World's Best Weapons Falling Behind in Consumer Goods?", International Herald Tribune, 5 March 1991; giving a partial answer: "--nearly 70 percent of federal research and development money went to the military, up from 50 percent a decade ago".

22. The history of post-Gulf war economics will provide some insights into how the world economy is working. Thus, Kuwait, and Iraq, would have a unique chance to develop by taking on the reconstruction challenge themselves; but Kuwait will probably give that major impetus away, and Iraq will be denied that stimulus if key targets can only be repaired by foreigners.

23. As a consequence Indochina has not been reconstructed, neither has it come in for major redestruction since 1975; a likely follow-up to reconstruction in the Gulf area.

24. Capital, the fastest moving production factor, will under conditions of free mobility seek the cheapest labor. To keep the field equal, either expensive labor has to become less expensive (social dumping) or cheap labor less cheap (social upgrading) or both at the same time. Thus, in September 1989 one hour of a German worker in manufacturing industry cost DM 34.22 (DM 15.73 or 36% being social security contributions) as against DM 18.15 for workers in Spain (social security 37%) and DM 6.80 for workers in Portugal (social security 35%). Obviously the European Community is in for some major dumping or upgrading.

25. Der Spiegel has run an almost continuous series on this since the Wall came down November 1989. The massive demand for Western produced goods was one of the factors that brought down the socialist regimes; the supply is then made available directly from Western suppliers more than by building new production facilities. In the former DDR subsidies make it possible for the consumers to buy, thereby affecting consumer tastes for a long

period to come. In the other countries only a very limited segment of the population is able to buy, and the dealers will sell at the prices they are willing to pay. Vaclav Klaus, the Chicago School oriented Czech finance minister, seemed to think they have to learn market economics and bring prices down to get more buyers. The objection would be that these businessmen understand market economics better than a finance minister, and also know something about the layers in society. The financial upper class is a guaranteed clientele, better aim for that one since they may not be available if the prices become "cheap" (Giffin goods). In that case they shop abroad for prestige goods.

26. As unification can only be as a confederation of equals under the present circumstances it cannot be "under the leadership of President Kim Il-Sung". Either he must give up that or disappear from the scene. Then the road may be open.

27. "Partial" because four areas, two of them parts of Kaiser Germany (the areas in Poland and the enclave in Russia, Pommern, Schlesien and Ost-Preussen) and two of Nazi Germany (Sudeten in Czechoslovakia and Austria) are still outside. To know what that means in concrete terms we may have to wait for a new political generation to come into power in Germany. The present generation has made its deal: the integration or takeover of former DDR.

28. The Japan Economic Journal had a special supplement, The Rising Tide: Japan in Asia (Winter 1990) with some interesting data. Thus, in the area comprised by China, the four Tigers, the ASEAN countries and Australia/New Zealand 4.593 Japanese companies employ 981.499 workers, backed by an expatriate Japanese community of 100.000, including dependents. The investment in 1990 will be in the range of \$8-10 billion, "perhaps double U.S. investment". The total investment, \$36 billion, is only 20% of Japan's international investment, and still behind the U.S. Actually, even "Tiger" investment in ASEAN (except for Singapore) is higher than Japanese investment in the same region. Japanese trade grew from \$61.8 billion in 1982 to \$126.4 billion in 1989, with Japanese exports 40% higher than the imports, creating the usual trade deficit problem. In 1990 4.6 million Japanese traveled in the region, spending each one \$200 per day. But the cultural impact is negligible, unlike in the U.S.: in the karaoke bars "the locals who frequent them sing their own nation's popular songs, not Japanese tunes."

One persistent pattern in the Japanese strategy is to move in where others move out. Investment by Japanese manufacturing firms jumped 24.1% in 1989 from the previous year, coming second only to the U.S., and Japan is supposed to become no. 1 in Hong Kong for 1990. Investment by British manufacturers declined in 1989, for the first time in a decade (Japan Economic Journal, December 22 1990). In the same vein Japan is posed to move into Vietnam en masse the moment the U.S. embargo is lifted. Major companies have sales offices already, assembly plants are being planned (Toyota), etc. (IHT, 3 January 1991). This in direct continuation of Japan's ASEAN policy since the three former Indochinese countries will probably sooner or later become members of an expanded 10-member ASEAN, together with Myanmar (Burma). To this we could add Japanese interest in the other (partly former) socialist countries in the region: North Korea and Mongolia. Relations are quickly improving, mainly based on raw materials and cheap labor.

29. Following the Big Two are other heavy examples of Japanese-German cooperation: Itoh-Klockner, Meiji Mutual Life-Dresdner Bank, and Hoechst, Bosch and Siemens have set up cooperation with a wide range of Japanese firms, including Matsushita, Mitsubishi, Asahi and Fujitsu (IHT, November 26, 1990). And Daimler-Benz, of course, does not intend only to cooperate with Mitsubishi. The chairman of Daimler-Benz, Edzard Reuter (ibid.) mentions cars as integrated systems, defense and aerospace as fields of cooperation. The basis for cooperation seems rather solid, for more details about economic profiled see Appendix.

30. The former Soviet attitude seems to be that the islands have no military significance; and their economic importance is at most proportionate to their (insignificant) size. However, they are a part of the corpus mysticum that is Japan, and not only for the extreme right. To get them back is to restore the wholeness of that body, of the sun goddess in a sense. Thus, if the Soviet Union asks for a quid in return for that giant quo, they will probably get it. If they ask for nothing, however, they might get much more. The political issue is theological more than military or economic.



31. Of course, the best known part is the Soviet military machine, particularly the advanced bombers and the missiles, and the space capability. Even if obtained at the expense of (all?) other branches of industry, such as mass production of an adequate passenger car, this certainly shows a potential for first rate high tech capability.
32. It is very hard to see how a "market economy" can include, at an adequate level of consumption, the entire 290 million strong population, in the foreseeable future. To organize a Latin American type economy with 20%-30% integrated into a Western run world economy, a "1/3 society", should take only some years. But at that point the process may well come to a stop.
33. China's economic development after the new economic policies ("dengism") were launched in the early 1980s has been extremely lopsided. The policy of economic zones along the coast (opposite Macao, Hong Kong and Taiwan) created regional imbalances and is now back-firing since Beijing has been unable to transfer wealth to the poorer landlocked regions. "To fight back, many inland regions have set up trade barriers, hoarded raw materials in scarce supply, and diverted goods slotted for the state to the free market" (Business Week, 24 December 1990). Class-wise the basic factor is probably that dengism generated capital by giving farmers close to the cities access to the city market, then stimulated investment in millions of "township enterprises" and the formation of a merchant class. There was nothing in this policy for bureaucrats-intelligentsia, the students, or workers, or for people in cities in general, who responded through corruption or the revolt of May-June 1989. But China is now taken off the black list due to "constructive behavior" in the Security Council in the Gulf Crisis.
34. The rapid deployment force in the Maldives and the peacekeeping force in Sri Lanka are, in the view of this author, merely portents of things to come.
35. Like in the U.S., Latin American fundamentalism seems to be evangelical/Protestant, if we do not include liberation theology, and very much linked to business interests. This might set into motion entrepreneurial capitalism, and may also be extremely ruthless, with El Salvador, Guatemala and Honduras, and Brazil as examples. In all four the Protestants may be in the majority early in the third millennium (Der Spiegel, 47/1990).
36. If the area around Konigsberg/Kaliningrad becomes an independent Baltic republic partly populated by Volga Germans, then the corridor problem, from present Germany through present Poland, will certainly emerge again. But that corridor would also have obvious economic advantages. Geoeconomics easily becomes geopolitics, and vice versa. Will Europe handle the problem better now than in the 1930s?
37. Some recent data from Brazil during the decade of the brutal conditions of the International Monetary Fund may serve as examples of this. The top 10% increased their share of personal income from 47% in 1981 to 53% in 1989 (the top 1% from 13% to 17%); the bottom 50% decreased their share from 13% to 10% (the bottom 10% from 0.9% to 0.6%); istoe-senhor November 21, 1990 Of course, this is not catastrophic if at the same time there is economic growth. There is not: income per capita will decrease 6% in 1990, the worst since the -6.6% registered in 1981 (Gazeta Mercantil, 30 November 1990). Most decrease is in industry, then agriculture, then the services.
38. See the theory of depression in Ravi Batra, The Great Depression of 1990, Dallas: Venus Books, 1985; chapter 6, "Concentration of Wealth and Depressions", pp. 113-132. The approach chosen in this chapter, however, differs from Batra's who also makes a distinction between the economic surface and the social core of these cyclical phenomena. Interestingly, Business Week August 13, 1990 also went against the trend, seeing considerable problems ahead. Right they were.
39. Like the type A executive, subconsciously longing for a slight coronary that may offer him a reason acceptable to others, and to himself, to slow down a little. Moreover, there is a surprise element leading to some shake-up, reshuffling.
40. Thus, it is hard to see the U.S. fitted into a supereconomy with such rules as are currently being planned for the European Community/Union; not only a currency mechanism but a Central Bank and common currency, meaning that member countries no longer have independent fiscal policies. But being neither a super-economy nor

a sub-economy in the future for it, there is still ample space, given the size of the US economy to be one among others in a setting of multipolarity, as argued here. This is also the thesis in a major work on The Decline of the American Economy, by Robert Chodos and Ellen Garmaise, (Montreal-New York, Black Rose Books, 1988), see particularly Conclusion, pp. 197ff. However, multipolarity does not exclude hegemony as the authors seem to think. The Bush administration is trying to build a North American Free Trade Area of 360 million people and \$6 trillion product and beyond that an area for the whole Western Hemisphere.

41. If it is exogenous, how can it be reproduced when needed again? What positive externalities are lost by giving the role as stimulus, and the enormous challenges that go with it, to the exogenous sector, e.g., to an "expert"?

42. The figures given here are fairly typical of what is reported almost daily in U.S. newspapers. The public image the U.S. public has of its own system is probably a very important factor behind the deep pessimism of the public.

43. That speculation is, in turn, related to concentration of wealth where the Reagan years up to the October 1987 crash brought about wealth at the disposal of the top 1% very similar to the figures before the crash of October 1929; well above 30%. It should be noted that the depression came four years later. How bad the F/R ratio has become can be seen from some figures taken from Monthly Review of June 1990. Only 15% of the investment in the period 1983-88 was in the productive sectors agriculture, mining, industry and transportation; the other 85% being in trade, banking, insurance, and the real estate market. As a result the capital value of the productive sector was worth less than the capital value of banking, insurance and real estate in 1989. At the same time the pathological state of U.S. banking, including the hub between Salomon Brothers Inc. and the U.S. Treasury, is a major factor in creating the instability in the dollar value incompatible with the position as world currency. To sign a contract in dollars becomes too risky.

44. The famous book by Jacoby, The Last Intellectuals, makes this point very well: the disappearance of intellectuals from the public U.S. scene and the take-over by junk/pop intellectuals of the journalist/columnist variety.

45. The implicit comparison is, of course, with Japanese management culture. Both pictures may be somewhat overdrawn, but even with some correction these differences are of major significance.

46. Dr. K. Schwartzman of the Department of Sociology at the University of Arizona, using the trade composition index (TCI) developed by the present author (see "A Structural Theory of Imperialism," Essays in Peace Research, Vol. IV, ch. 13, Copenhagen, Ejlers, 1980) comparing the U.S., Brazil, Mexico, and Portugal, has shown how the U.S. is deteriorating and the others improving after the Second world war.

47. See "The Leisure Empire", TIME, December 24, 1990: American entertainment rang up some 300 billion dollars in sales last year, of which an estimated 20% came from abroad. By the year 2000, half of the revenues from American movies and records will be earned in foreign countries."

48. Thus, General Motors Corp. and Ford Motor Co. had a combined loss of 2.1 billion dollars in the red for the fourth quarter of 1990 alone (The Wall Street Journal, February 15-16, 1991). IBM third quarter 1991 was about 80% below the same quarter the year before. The flagships going down?

## APPENDIX

### GERMANY, U.S. AND JAPAN COMPARED ON ECONOMIC INDICATORS

	GERMANY	UNITED STATES	JAPAN
Life expectancy 1985-89, m-f	71.8 - 78.4	71.4 - 78.7	75.2 - 80.9
Life expectancy gain, 1970	4.4 - 4.6	4.3 - 3.6	5.9 - 6.2
Employment % 1989, p-s-t	4 - 40 - 56	2.9- 26.9 - 70.2	7.9 - 34 - 58
Unemployment % of labor force	5.5	.3	2.3
Youth (<25) unemployment, %	17.3	36.9	25.4
Hours of work/workeryear	1610.0	1996	2142.0
Lost days disputes/workeryear	5.0	170.0	5.0
Self-employment rate, %	11.2	9.0	24.2
% GDP growth per employee 1989	2.7	1.0	2.9
% CPI change 1988/89	2.8	4.8	2.3
Private consumption 1988, %GDP	54.8	66.5	57.5
Investment 1988, %GDP	19.9	17.1	30.6
Value added industry, 1988, %	41.4	28.5	39.7
Taxes and social security 1988, % GDP	37.4	29.8	31.3
Costs of social security 1988, % GDP	24.3	13.8	12.0
Workerhours costs in industry, \$	19.0	14.4	15.8
% Shareholders equity, industry	27.1	42.7	29.4
Trade Balance 1970, \$B	4.3	0.5	0.4
Trade Balance 1989, \$B	71.5	-128.9	64.2
Current account	44.4B	-99.3B	35.8B
Current account balance 1970	0.87	2.3	1.97
Current account balance 1989	55.4	-110.0	57.2
as % of GDP, for 1989	4.4	-2.0	2.0
Food, % export - %import	4.6 - 9.6	10.1 - 5.3	0.6 - 14.7
Min. Fuels, % export - % import	1.2 - 7.6	2.8 - 11.1	0. - 20.4
Tools, vehicles, % export - % import	48.7 - 30.5	42.6 - 43.5	69.8 - 14.2
Share, world export, 1989, %	11.4	12.1	9.1
Share, world import, 1989, %	8.6	15.5	6.7
Difference export - import	2.8	-3.4	2.4
Real exchange rates, 1989	120.4	67.3	128.6
Research and development, %GDP	2.9	2.8	2.9
Worker: CEO income differential (BUSINESS	1:23	1:80	1:17
Foreign net debt (ASIAWEEK)	Credit	\$664B	Credit

(Source: Internationale Wirtschaftszahlen, 1991; IDW, Koln)

Some comments may be in order. One general impression is the similarity between Germany and Japan on the one hand and how they differ from the U.S. on the other, essentially reflecting growth versus decline. Thus, the U. S. has very high proportion in the tertiary sector, very high youth unemployment (possibly not because they are young but because the phenomenon is more recent), very high number of labor disputes, a negative difference between GDP and CPI growth, the highest private consumption and the lowest investment, the lowest gross value added in industry, the lowest labor costs but then also the highest shareholder equity. On the world scene, the U.S. has negative trade and current account balances, although (still) only 2% of GDP. The U.S. is a net exporter of foodstuffs and importer of machine tools/vehicles; with the other two it is the other way round; but then the U.S. is a net importer and the other two net exporters. On September 1, 1990 the CBS "60 Minutes" reported that after the Second World War 95% of products consumed in the U.S. were made in the U.S.; that figure is now 4%.

One interesting figure outside this pattern is the highest self-employment: by far Japan (24.2%), among them the countless small shops and firms tied together in primary relations (sociologically speaking). Also, at the end there are two lines often referred to, one from the domestic and one from the international scene. The difference between the pay differentials between the ordinary worker and the CEO (with the United Airlines ratio being 1:1200) is significant given that, in 1990, CEO pay rose 7% and corporate profits declined 7%; in the U.S. (also see Wall Street Journal, June 4, 1991). But the relation to Germany and Japan being in the black and the U.S. deeply in the red, paying as much as 27% of each federal (not social security) revenue dollar in interest, is hardly simple, given that U.S. CEOs had been benefitting from high differentials long before the U.S. became a net debtor.

### **GEOPOLITICS I: A GUIDE TO THE "NEW WORLD ORDER" (Pax Americana)**

<u>Image A</u>	<u>Image B</u>	<u>Image C</u>
(NEW WORLD) ORDER	Development	Power
U.S.A.	Washington D.C.; WDC	Inner Center: U.S.A.
Canada	More Developed; MDC	Center: Hegemons
Latin America	Less Developed; LDC	Periphery: Inner, Outer
<b>CENTER</b>	<b>INNER PERIPHERY</b>	<b>OUTER PERIPHERY</b>
<u>The Hegemons</u>	<u>More favored</u>	<u>Less Favored</u>
I. U.S.A.	Canada-Mexico Israel, Gulf Corporation	Central, South America, Middle East
II. EC/EU	Eastern Europe (EC-associates?)	ACP system Yaounde-Lome
III. Japan	South Korea + North Korea China + Taiwan + Hong Kong Singapore + Malaysia Australia/New Zealand	Mongolia Indo-China, Burma ASEAN 4 Pacific Islands
IV. CIS/Moscow	Russian Republics	The rest
V. China/Beijing	Han provinces	The rest
VI. India/Delhi	SAARC systems	Littorals, islands
VII. Islamic core	Mashreq	Maghreb
World Directorate	World Middle Class	World Proletariat

# **A VALUES-BASED APPROACH TO HAWAII'S TOURISM**

by

**George Kanahale**

I welcome this opportunity to remind Jim Dator and other futurists about the Zen Master's teaching that if you don't know where you're going, you won't get lost.

Regarding Johan Galtung's critical allusion to economists, I suspect that economists went wrong early when they assumed that the nature of man is greed and competitiveness, values which have spawned a world view and a world of endless conflict and turmoil. I wonder what might have happened in the course of our history had economists espoused a different set of assumptions about the nature of man; that man is a compassionate beast driven by the need or desire for cooperativeness. What would the world be like if we were driven by that set of values' assumptions? It really comes down to our values, doesn't it?

I'd like to use this as a context for my prepared remarks about Hawaii's most important economic enterprise, its tourism industry which impacts our lives in so many ways and will continue to do so in the year 2000 and beyond.

Let us envision a different kind of hospitality industry, one whose owners and managers operate on the proposition that they are in the aloha or love business. After all, you cannot be hospitable without being kind, caring and loving. While a lot of lip service is given to aloha, the fact of the matter is that the industry does not operate on that basis. I know because I have talked with dozens of managers.

Today you have an industry balancing on a contradiction. Like one of those boxes within boxes, we have a contradiction within a contradiction in that this industry thrives in a destination area dedicated to the aloha spirit. It's a lucky coincidence and one which the industry continues to exploit in its marketing and advertising.

One day in the future people may wise up to the contradictions and stop coming or at least insist on getting what they were told they would get.

So by the year 2000 I wish owners and managers of hotels, for example, will tell us what business they are really in and start operating accordingly.

But this won't happen quickly, even if we started today. It will take years to change the mind set and values of a profit- and real estate-driver industry.

What would a truly aloha- or love-driven industry mean to the courts? A strange question which few of us have ever thought about, to be sure. Presumably better behaved guests and employees leading to less arguments and conflicts which minimize acts of violence to the

minds and bodies of others. Is our judicial system set up to operate in a non-adversarial environment predicated on aloha behavior?

By the year 2000 I'd like to see a new kind of balance sheet for service businesses (and that's nearly 85 percent of all businesses in the country). In fact, the hospitality industry will never truly become what it says it is unless it has a new balance sheet.

There is nothing really wrong with the conventional balance sheet except it doesn't tell us anything about our most important assets like loyalty, creativity, compassion, leadership and harmony. Can you imagine working for a hospitality business whose balance sheet has no place for an asset named aloha?

My larger point is that until we develop better instruments for measuring and keeping account of these kinds of human, albeit intangibles, assets, it will be difficult to motivate entrepreneurs, managers or employees to change. Financial statements, after all, are used not only to measure but to reward performance. When people know exactly how the game is scored, they will more likely play according to the rules.

Do you know who desperately needs this? The many employees who are often disvalued and unrewarded because our most important statements of success in business cannot evaluate or record their performance outcomes. Take the 60-year old housekeeper who's been making hotel guests happy for years and the travel industry management school graduate who works in sales or accounting. Who do you think gets more pay? The housekeeper will never make it as long as we use the same old statements which deny her aloha.

Even the State of Hawaii could benefit from a new balance sheet. Just think how much better our gross domestic product would look like if we could only include the value of our aloha.

It has taken hundreds of years to develop our present balance sheet, but I hope it doesn't take that long to develop a new one; though, if we leave it to the accountants, it might.

What implications would such a development have for the courts? I know it would have an enormous impact on business and it should; therefore, have an important impact on the courts. For example, how would you decide cases, say, of bankruptcy that required trust and love statements in addition to the usual financial statements?

Finally, by the year 2000 I'd like to see the hospitality industry come to a much better understanding of "sense of place" and of how to manage it as an asset. By "place" I do not mean a located space with an address. A place is a location of experiences with its own memory--or in Sheldrake's terms, "morphic resonance"--that evokes feelings, images, memories, feelings. And because each of us has an instinct or sense for places, the more responsive and open we are to a place, the more intense and meaningful a place becomes. In the Hawaiian mind, we become connected, in sync or in lokahi (harmony) with the mana of the place.

If any industry should understand this concept, it should be the hospitality industry. The

morphic resonance or beauty and mystique of places such as Hawaii is what the industry markets. It is, in fact, its product.

But the record in Hawaii is pretty clear that most people in the industry do not really understand this. We have another contradiction: people marketing what they really do not understand.

We have here another priceless asset that is largely unmanaged with terrible costs to us and those who come after us.

What would happen if, say, by the year 2000, people in this state conclude that sense of place is an integral part of landed property. How would the courts judge actions of an owner who violates the sense of place of a property?

Nothing in my wish list will happen without a new world view, a more Einsteinian, a more holistic view of reality and the universe--along with a new set of values and beliefs about human nature. Our greatest resource in Hawaii is our humanistic and spiritual strength based on our tradition of aloha that says man is by nature a compassionate beast. I'd like to see the State of Hawaii, with the courts in the vanguard, organize and implement a community-wide educational campaign to help bring about a new awareness of this world view with its commensurate value system. Rather than wait a decade, we need to start now so we can be primed for the 21st century.

# **HAWAII'S LONG-TERM ECONOMIC AND DEMOGRAPHIC FUTURE: IMPLICATIONS FOR HAWAII'S JUDICIAL SYSTEM**

by

**Gregory Pai**

What I would like to do today is to review Hawaii's long-term economic and demographic outlook and potential implications for Hawaii's judicial system. I would like to do this in essentially two ways: first, in terms of the demand for judiciary services relative to the growth in criminal activity and civil and domestic conflict; and secondly, in terms of the supply of judiciary services relative to the fiscal capacity of the state to finance the changing needs of the judicial system.

## **LONG-TERM DEMOGRAPHIC AND ECONOMIC OUTLOOK**

To begin with, the State Department of Business, Economic Development and Tourism publishes long-term economic and demographic projections for the State of Hawaii covering a 25-year period from 1985 to 2010. According to the projections, Hawaii's population will grow by 36 percent from 1.1 to 1.4 million persons, and will average 1.5 percent a year, or about twice the national growth rate, which is expected to average 0.8 percent over the same period. However, a more significant trend will be the long-term slowdown in the population growth rate. From a historical perspective, it is useful to point out that Hawaii's population grew at an average rate of 1.6 percent per annum in the 1940's. The growth rate then accelerated to 2.7 percent in the post-war "baby-boom generation" after the Second World War, leveled off to 2.3 percent per annum in the 1960's and 1970's, and then dropped to 1.6 percent per annum in the 1980's. Projections for the decade of the 1990's indicate a further decline to 1.2 percent per annum; and, by 2005, the population growth rate will be down to 1.0 percent per annum.

The immediate result will be a decline in the rate of natural population increase and an aging of the population. The median age will rise from 30 to 37 years. The population under 15 years of age will fall from 23 to 20 percent of the total population, and persons 65 years or older will grow from 9 percent to 13 percent of the population.

The population will be increasingly dispersed to the neighbor islands. During the projection period, the resident population of Honolulu will grow by 23 percent to roughly one million persons; but, the neighbor island population will grow by 81 percent to 436,000 persons.

By 2010, over 60 percent of the state's population increase will be through in-migration. That will average out to over 8,000 immigrants coming into the state every year. Roughly one-quarter of Hawaii's immigrants are estimated to come from foreign countries. That means roughly 2,000 non U.S. citizens will be entering Hawaii each year.

As a result of the slowdown in population growth, labor force growth will slow



dramatically. From a low average annual growth rate of two percent during the 1950's, labor-force growth hit an all-time high of five percent per annum in the 1970's as the baby-boom generation, then in its late teens and early twenties, entered the labor force. Since then, annual labor-force growth has fallen considerably to two percent per year in the 1980's, and is projected to decline to 1.6 percent in the 1990's and one percent by 2010.

The slowdown in the growth of the labor force will be reflected in a slow-down in the growth of the economy. Average annual growth in gross state product is expected to slow from 3.5 percent in the 1990's to 2.3 percent between 2000 and 2010. During the same period, growth in total personal income will fall from three to two percent per annum.

## **IMPLICATIONS FOR THE JUDICIAL SYSTEM**

The question, of course, emerges, how will these changes affect Hawaii's judicial system in the decades ahead. Assuming that growth in criminal activity is positively related to population growth, the increase in population would imply an increase in criminal activity, although the slowdown in population growth would, likewise, imply a slowdown in the growth of criminal activity. But, the character of criminal activity will most likely change. The greater dispersion of the population to the neighbor islands suggests higher growth in crime rates on the neighbor islands. The aging of the population may signal a shift away from youth-related crimes, such as gang and drug-related activities, and a growing pre-dominance in adult-related crimes, such as white-collar and organized criminal activity. The rising number of foreign immigrants will mean increased ethnic tensions, particularly among lower-income immigrant groups, as well as problems related to economic survival and cultural assimilation as newly-arrived immigrants struggle to integrate into American society. These changes may imply an evolution in the judicial system toward a more specialized system responsive to the spatial and demographic characteristics of its various jurisdictions. An older, more urbanized and racially heterogeneous population in Honolulu will most likely have a very different set of problems than the younger, and more rapidly growing populations on the neighbor islands.

Economic change will also have an important effect on the judicial system. In the roughly thirty years since statehood, Hawaii has enjoyed exceptional rates of economic growth compared to other states in the nation. However, because of the lower wages associated with the shift to a tourist-driven service-based economy, many of Hawaii's working people experienced a deterioration in living conditions. Fortunately, the situation began to improve in the last half of the 1980's due to increasing Japanese tourism and investment, and growing labor shortages resulting from declining population growth. As a result, average wages in Hawaii rose from 40th in the nation in 1985 to 27th in 1988, and in 1990 Hawaii ranked third in the country in terms of growth in per-capita income.

Nevertheless, much of this improvement is still being offset by Hawaii's higher than average population growth and high costs of living. For example, growth in total personal income in Hawaii exceeded that of the nation for six years out of the last ten between 1980 and 1989. However, if we account for growth in Hawaii's population and the rising cost of living in Hawaii, growth in per-capita incomes in Hawaii, adjusted for inflation, exceeded the national average in only four years out of ten.

These conditions are projected to continue into the future. While a slow-down in labor force growth will mean higher wages, higher than average population growth and increases in the costs of living will continue to result in static growth in real income. Thus, according to DBEDT projections, growth in per-capita income, adjusted for inflation, will fall from 1.5 percent per annum in the 1990's to 0.8 percent per annum in the decade after the turn of the century, while averaging 1.7 percent per annum at the national level.

The result will be continuing economic pressure with Hawaii families experiencing one of the highest rates of multi-wage earner families and percentages of women in the labor force in the nation. These economic pressures will most likely contribute to increased personal, family, and social tension that could result in higher rates of personal and substance abuse, family conflict, social alienation, and ultimately, criminal activity. These conditions imply greater demands for criminal-prevention, as well as family-mediation and dispute-resolution services.

The visitor industry itself is also often cited as a factor in criminal activity. Crimes against tourists have been shown to often exceed crimes against residents. Tourists are also a target for organized criminal activities such as gambling, prostitution, drugs and other illegal activities. In addition, Hawaii's increased international role, in terms of international trade, investment, and foreign relations will require increasing expertise in dealing with international issues.

In the area of civil litigation, the outlook remains similar. Given higher-than-average population growth, a slowing economy and static real income growth, one of the basic conditions affecting Hawaii's people will be that of growing competition for increasingly scarce resources. This will be felt in terms of growing congestion, increasing shortages of land, housing and urban living space, and ultimately, increasing conflicts over issues of personal and property rights. Added to Hawaii's traditionally high rate of inflation due to geographic isolation and increasing pressures exerted by tourism and foreign investment, the result will most likely be increasing conflict over the control over public and private resources, such as land, water, and environmental resources. This will most likely increase the propensity for civil conflict, as well as the need for mediation and conflict resolution services.

These conditions will most likely be reflected in a state judicial system characterized by increased size, complexity, sophistication and geographic dispersion. In response to changes that have already occurred in the past, fiscal appropriations for the state judiciary system, in terms of operating expenditures, increased over six times from \$11 million in FY 1976 to \$72 million in FY 1991. During that 16-year period, the operating budget increased by an average of 13 percent per year. In general, judiciary appropriations constitute roughly two percent of total state operating expenditures, and an analysis of judiciary expenditures appears to show a relatively low sensitivity of judicial appropriations to cyclical changes in the economy. Thus, in spite of the increase in demand for judiciary services that we can expect in the decades ahead, the outlook remains positive that the judiciary system will continue to remain responsive to the changing needs of the community.

## CONCLUSION

In conclusion, it is clear that the Hawaii's judiciary system will be operating in an increasingly complex and diverse demographic and economic environment in the decades to come. While history seems to indicate that fiscal resources will be available to meet the challenges of the future, it is also clear that the judicial system itself will have to remain sensitive and responsive to a complex dynamic of social and economic change. Our population will be older and more dispersed to the neighbor islands. Ethnic diversity will be increasing, and the problems of economic survival will most likely continue to exert pressure on families and households. The slowing in population and labor force growth will mean slower economic growth, continuing labor shortages, and increasing competition for public and private resources. At the same time, Hawaii's continuing reliance on tourism, foreign investment, and international trade, will demand increased international expertise. These changes will require the highest levels of sensitivity and flexibility in our judiciary system. However, given the concern, commitment and competence of those within Hawaii's judiciary system, I feel confident that these challenges will be well met in the decades to come.

# **FUTURE JUDICIAL AND LEGAL REFORM**

by

**Bert Kobayashi**

As a point of departure, I would like to look at the changes that have taken place over the last 25 years with which I am familiar to give us some idea of the significance of the changes that have been made and assume that changes from this point in these times will move at a significantly faster pace. Twenty-five years ago there was no intermediate appellate court, there was no Judicial Selection Commission, all of the district courts and judges were situated in the single small building at the corner of Bethel and Queen Street which is now used by the real property tax office, and all of the circuit courts and judges along with the Supreme Court were located in the current Supreme Court Building. In addition there was no arbitration alternative and in that year a grand total of 38 persons sat for the summer bar exam.

Time and technology will not give us the cushion to allow the new judiciary to merely evolve; thus I believe that holding this conference is definitely the right thing at the right time, and I offer the following observations and comments from the perspective of twenty years plus of private practice and almost six full years of service on the Judicial Selection Commission.

I basically endorse a lot of what has been mentioned in different commentaries up to this point and agree particularly with much of what has been said by Paul Alston as to implications for the future and problems to be addressed. As described in the scenario for generic justice the danger, which I believe constitutes the biggest threat, is to avoid the evolution of the judiciary into a second rate institution, forcing all clientele (and assuming that means all clientele who can afford such a move) to leave for private judicial forums.

I see the implications and the problems with which the new judiciary must deal as being driven more by substantial increases in numbers, technology and a potential increase in the earning abilities of the different segments of the population. I think these factors more than demographics will dictate the direction as, if history is any teacher, the ethnic and racial differences over time melt into a common pot.

While much of the comment to date has focused on the criminal calendar and the family, my comments deal more with what I anticipate the problems and implications to be with regard to the civil calendar. The problems and implications that must be faced by the courts of the future would include and these are not necessarily in any order of importance:

- (1) An increasingly more complex and highly technical civil calendar, with evolving new areas of the law that would parallel technological development.
- (2) An increasing need to develop a response that is acceptable to businessmen in terms of time and cost.

- (3) The need to serve the needs of those at the different ends of the economic scale.
- (4) The need to anticipate an increasing load of cases.
- (5) The ability to handle problems dealing with foreign nationals and to provide to both sides and particularly the U.S. businessmen equal access to equal justice. The point that I am making is that while it is often easy for foreign nationals to use the local courts to obtain justice, that same ease of access to justice is not equally afforded to citizens seeking to enforce judgments against foreign nationals without substantial assets in this country.

I agree with Chief Justice Lum that the answers that we are seeking are not more courts and more judges and that it is the proper time to question the continued validity of the adversary system, I believe that there should be some modification of this system.

However, in seeking a solution to the system the direction should be to maintain the pre-eminence of the Judiciary in the field of dispute resolution and while ADR and arbitration and mediation have a lot to offer, such programs should work as a division of the Court system and not as competing alternatives. It is important in my opinion that the Judiciary meet the challenge and increase its stature in this area.

While it is easy to point out the implications and the problems the solutions are the difficult part. I see my role being to suggest ideas which might be considered.

In my analysis it is acknowledged that there has been a very strong and increasing movement towards alternative systems of dispute resolution in civil actions, particularly in commercial areas and particular in areas which are either high tech or particularly complex. The movement has been towards mediation and arbitration, and therefore, we should look into the reasons why this movement has taken place, what do arbitration and mediation offer that is apparently lacking in the Judiciary, what can the judiciary adopt that will provide the same or greater benefits to the clientele.

I see the benefits being offered as follows:

- (1) While the Courts often use masters to assist the Judges in certain areas involving unique or complex areas, the general feeling is that arbitration will offer as the deciding authority individuals that are well versed in that particular area of the law or that particular industry and that the time required to put into preparation and presentation is substantially reduced.
- (2) There is generally greater speed in the use of arbitration particularly if the ground rules are well established in the beginning. Of course there are exceptions, but I believe that the general impression is that arbitrations proceed faster.
- (3) There is an elimination of the appeal process and decisions are generally final and binding unless there is proof that the arbitrators were not unbiased.

- (4) There is a limitation of time and money involved to the clients.
- (5) Discovery is allowed but often structured with the guideline being that if discovery will enhance the ability to produce an expedited arbitration process it will be allowed.
- (6) The elimination generally of runaway jury verdicts.
- (7) Having the mediation or settlement discussions early in the procedure and before substantial sums have been spent on discovery and before positions have been fixed.
- (8) The general elimination of the concept of punitive damages.

Of course these advantages do not address all of the problems that I have raised, particularly the problem of dealing with foreign nationals as parties to the process. But I believe that from this list, certain considerations for the future of the judiciary can be gleaned.

I suggest for consideration the following:

- (1) There has been a movement, and this is not a knock against the older system, towards a more professional judiciary with the advent of the Judicial Selection Commission. More professional in that you find more younger and established attorneys seeking, because of the new system of selection and retention, to make the judiciary a profession. The impression that exists, and which should be perpetuated, is that good performance should be rewarded with continued service. I suggest that steps be taken to further the professionalism. For example, I believe that it would be a good idea to reconsider the idea of the rotation of judges to some degree and to allow, encourage and to underwrite the development of special skills of certain judges to handle the special industry type cases that are now moving out of the system.
- (2) I think some thought should be given at certain levels to shortening the initial terms of judges as a probationary term and then lengthening the subsequent terms of those that are providing good service.
- (3) Move forward with the system to have some form of evaluation of judges so as to allow them to have the assistance of some guidelines and benchmarks in their progress or some indication of areas of skills that should be addressed.
- (4) Allow situations where the cases and the issues can allow a structuring of the discovery and the presentation.
- (5) Limit the situation or allow the parties to limit the situation wherein appeals will be allowed.
- (6) Consider addressing the types of recovery that are being allowed and the handling of issues that would keep the cost of justice down and more affordable to all facets of the community.

- (7) While the settlement Phase of the process handled by the judiciary has been extremely effective, it is generally after most if not all of the discovery has been completed and after great sums of legal fees have been incurred. If this process were moved up to the very beginning, positions would not be fixed and substantially larger sums would be available for settlement as attorneys fees and discovery costs would not yet have been incurred.

As I said it is easy for one to suggest ideas and like a good number of us have told the juries, the hard part of the work is now left to you to decide what to do.

# CORE VALUES AND THE FUTURE

by

**Eric Yamamoto**

I have the enviable task of wrap-up speaker of the Congress. And it's been a wonderful gathering of people and ideas. It seems that the emphasis of the Congress, at great benefit, has been on how things will be different in society 30 years from now and how the Hawaiian legal system might be restructured to accommodate those differences. Talk about restructuring has embraced terms like technology, efficiency, management, mediation, public education, citizen-based judging. In discussing likely differences between then and now and in talking about restructuring the legal system, the emphasis seems to have been on the forms of justice. And that has been significant.

My emphasis is an additional one. My emphasis is on how things in the future might be the same, and what that might mean for our collective focus on matters of substance, on matters of heart. Some things will likely be the same: people will inflict harm on people; families will fracture; products will defect; businesses will dispute; land and water will be fought over; newcomers will quest for recognition and economic security. Questions of power and inclusion and exclusion will persist. Even more important, people will still be seeking fairness of treatment by institutions; dignity and equality in social relations. People will still be seeking to participate meaningfully in decisions affecting daily lives; to have grievances treated seriously and sensitively; to link up and bond with others, to belong and be included. People will continue to strive for these same things. Substance within any form. Heart within the body.

We might call these and others, "core values," or perhaps transformed into a question, we might ask, "what kind of society do we desire in terms of human relations and values, and how might the judiciary encourage or contribute to movement toward that kind of society." This I suggest, should also be our emphasis for the future.

George Kanahale talked movingly about "aloha" in the context of tourism. That rang a bell for me. Is "aloha," in its myriad meanings, a concept to be embraced as a substantive value in our legal system? The Hawaii Constitution says so. Our common law tradition allows us to evolve such meanings. One discussion group adopted an apt scenario title for its futures plan, one that might be the theme of our collective future endeavors: "Kulia I Ka Pono" (Striving for Justice).

And in our collective striving for justice we might recall the prickly statement of heart of philosopher Anatoly France: "The law in all its majestic equality forbids the rich as well as the poor from sleeping on park benches, gathering under bridges, and begging in the streets." And so in our striving for justice, in addition to attending carefully to the changing forms of justice, we might continue to question the traditional and ingrained assumptions about the role



of law, lawyers, judges and legal process in the creation of the kind of society we desire.

# LAMP OIL, VISIONS AND THE SEARCH FOR A NEW WORLD

by

**John Daffron**

Thank you for inviting me to this conference. I am mindful of the words of that insightful philosopher Yogi Berra. One of Yogi's insights that is so significant was this, "If you don't know where you're going, you might end up somewhere else." Regarding the future of Hawaii's courts, do you know where you should go or how you should get there? With this wonderful Judicial Foresight Congress, you have the delightful opportunity to suggest your journey and your destination.

Perhaps some of you are underwhelmed by this prospect because, of course, it is impossible to predict the future. But you can attempt to identify the forces of change, predict how society will evolve from those forces, and suggest how courts might then best serve the public. Futurists say it this way. We attempt to discern trends and scenarios, i.e. what we want to happen, and ultimately we evolve strategies or the plans and tactics to achieve these visions.

At this conference we became aware that while no one can predict the future, we can attempt to analyze social, economic and technological trends and anticipate how these forces might shape our future. Thus we attempt to forecast possible scenarios or alternative futures. Based upon these scenarios, we can envision or design our desirable future judicial structures and goals.

Based on what we heard, some of the scenarios were inviting, some were frightening. This process and these reactions are new experiences. You may recall in Charles Dickens' A Christmas Carol, Ebenezer Scrooge, when confronted by the ghost of Christmas past, with the scenario based on his trends, asked whether "these are things that must be? or only things that may be? The answer Scrooge received and the message we have been given here is that we can create, at least the vision of the future we prefer and begin to work toward it.

The conference planners have urged you to develop the great idea, the breakthrough that will significantly improve how courts serve the public. In your analysis and visioning, do not be restricted by current constraints. I exhort you to think imaginatively, to envision boldly. Let me illustrate this challenge by a metaphor I inflicted upon the San Antonio conference.

Come with me in your mind's eye to a conference in the early 19th century, a conference on illumination, interior lighting. Imagine, if you will, a gathering of professionals, scholars and decision-makers to improve lighting. As we approach, they are discussing matters of personnel, communications and applications of advanced technology. Do you know what they are talking about? They're talking about taller masts for lookouts, more seaworthy chase boats, and sharper and more deadly harpoons. You see they are talking about catching whales for lamp oil. The more innovative participants might suggest better rendering practices or even the use

of bluefish. They suggest bluefish are oily, they exist in large quantities and they are close to the shore. Wouldn't it be great at a conference of that sort if someone over in the corner was pondering the effects of burning a carbon filament in an airless jar. Certainly it would be necessary to continue the production of whale oil, but wouldn't the development of an incandescent lamp be a quantum leap forward at that lighting conference. I would hope that the visions and strategies developed at this conference might be a new source of light, a signal light for court improvement and that from this conference your visions may light the way.

I came to this conference, consistent with my great respect for your chief justice to offer constructive criticism, and Mr. Chief Justice, I tell you bluntly, you've done it right. From a national perspective, I think this congress surpasses all the others for three reasons:

- (1) You have involved all of the judiciary. This is highly desirable because as judges, we are among the ones who best understand the problems of our justice system. We have probably given the most thought to solving them; and we are the best equipped by our experience, insights and positions of leadership to make lasting improvements to the system.

I realize that some of you at this futures congress may question the need for this exercise. As judges, lawyers, clerks and administrators, we work in a system founded on rights and duties. I remind you that Chief Justice Lum called for this congress so that you might begin to plan now to best meet the inevitable changes that lie ahead. I respectfully suggest that you have a duty to do so and I refer you to another Chief Justice, Oliver Wendall Holmes. Try to overlook the tortured sentence structure and listen to his message. Listen to the passion as Holmes reminds us of our duty. He said, "law is the business to which our lives are devoted and we should show less than devotion if we did not do what in us lies to improve it and when we perceive what seems to us the ideal of its future, if we hesitate to point it out and press toward it with all our heart."

- (2) The second reason I feel this is the best conference, and perhaps more important than involving the entire judiciary, is that you have involved all segments of the community--and properly so. It's their justice system. With the judges and other citizens you may well have in this room the majority of people who will shape the future of the Hawaii Judicial System. They need to know that it doesn't all end here. This conference is an ignition. It is not an injection. Futures planning is not a destination, it is a continuing journey.
- (3) The third reason your program surpasses the others is your proposed judicial foresight commission. That commission, when established, will institutionalize and continue environmental scanning and visioning, as it seeks to bring about your visions and ideas of the role and the structure of the courts in Hawaii.

I leave you with a challenge from the poet Tennyson. Perhaps several of you have said, "Why take the time? We have cases to try, jobs to work and responsibilities to meet. Why take our time from the current and ever-increasing press of judicial business?" Look to Tennyson.

Perhaps some of you recall his poem "Ulysses" about the aged warrior king who had fought successful battles on the ringing plains of windy Troy, who had governed well and wisely, who had traveled widely and was a part of all that he had seen and met. In the autumn of his years his friends counseled him to retire and rest upon his achievements. In rejecting their advice his reply is your challenge and justification for this wonderful conference. You remember the lines, "come my friends, tis not too late to seek a newer world."

I have given you your challenge in the words of a nineteenth century Victorian poet. I hope you will respond in the vernacular of our time and say, "let's go for it."

# **POLITICS, PLANNING AND THE FUTURE**

by

**Kem Lowry**

First, I was impressed by the degree to which participants in the conference were willing to engage in careful consideration and discussion of futures that many of us are not likely to inhabit. I have heard futures studies people complain about how no one seems to take futures seriously. For the past three days, people have taken future seriously. No doubt some of the participation is a reflection of the interest of the Chief Justice. But the Chief Justice did not attend all the working groups, and so his interest and enthusiasm for this conference does not explain the energy and effort that participants put forth in those sessions. Many people did give themselves permission to engage in speculation without being bound by our usual assumptions about how the world works, how change occurs or the private certainties with which we console ourselves. Partly that is a reflection of good conference design for which the Chief Justice and the planning committee are to be congratulated, partly it is a reflection of the tireless efforts of Jim Dator and his colleagues in the "Manoa School of Futures Research." But the readiness for this foresight conference also reflects the rapidity with which physical, social and economic change is occurring all around us and our recognition of at least some of these changes. The future is eating up all the parking places.

Second, as an exercise in foresight, some conference activities were more successful than others. It seemed to me that conference activities could be divided into four main activities: (1) those which asked us to acknowledge the future by reminding of change in the past and the likelihood of the probability of radically different futures; (2) those which educated us about trends and technologies shaping the future; (3) those which asked us to choose a preferred future; and, (4) those in which we were asked to design strategies to shape that preferred future.

Conference planners had to try to find a balance between the passive activities of acknowledgment and education over future design activities. The implicit assumption seemed to be "Well, even if they don't buy this futures stuff, we can still entertain them with the trends and technologies, the alternative futures scenarios and the prospects of radically different institutions and processes."

Foresight conferences such as this one are stimulating, even invigorating. Part of their attraction, truth be told, is that they deflect our attention from the immediate crisis management activities in which we are engaged to get us to reflect on new sets of crises and opportunities. But if such foresight conferences are to be productive other than in building readiness for more futures design we must have tighter, more focused design agendas and more time. I can't speak for the other groups, but our groups' facilitator and recorder worked hard to get us through the agenda, but any one of the agenda items could have fruitfully occupied much more of our time. And I think the results would have been more useful.

So next time let's have a more focused agenda and more working sessions. Let's spend more time planning for our preferred future.

Now some comments. Judge Weil said Sunday that Chief Justice Lum had promised to implement all the good ideas coming out of the conference. She was being facetious, but she makes a serious point. That point is that taking the future seriously means acting in the present to shape preferred futures. That, of course, is not just the Chief Justice's responsibility, but the charge to all of us.

The question is how do we link the present with our visions of a preferred future? My concern is that too much reflection on long-term trends and nascent technologies diverts us from the grubby politics of today which is narrowing the range of possible futures. The further out the future is that preoccupies us the more apolitical it is.

And too much attention to the next biennium budget and legislative requests for a few more judges and administrators may keep us from seeing the trends and technologies that are shaping the environment that will create future crises.

What do we do? One response, and not a surprising one coming from a planner, is more planning. The conventional process of identifying a set of alternative means for reaching some goal, identifying criteria for evaluating those alternatives and choosing a strategy. Only instead of a two or five year time horizon we choose a thirty year horizon.

A second approach is to try on the future. To be experimental. Experiments are sometimes developed in public policy when there is agreement about some goal to be reached or problem to be mitigated but uncertainty about how to do so. In the Judiciary two prominent examples of experiments are the Center for Alternative Dispute Resolution and the Court Annexed Arbitration Program.

Now that we have seen how willing people are to embrace the need for designing organizational futures and how energetic can be in imagining alternative futures and strategies for shaping a preferred future, we need to think about other organizational contexts in which the design of the conference might be adapted and applied. We should design ways to open such meetings to a broader cross-section of the public. Our motto might be: Let a hundred foresight conferences bloom!!!

# A CRITICAL VIEW OF JUSTICE AND THE COURTS

by

**A. Q. McElrath**

Well, I've seen changes and changes in the administration of justice. I guess the first time I became interested, was when as a voluntary organizer for the ILWU, I became aware that a penal code had been devised by the Hawaiian Legislature and carried into completion by a compliant judiciary in order to help Sugar planters keep contract laborers tied to their jobs.

The other experience I had with the judicial system, is that the only picture we have of our father, and he died when I was about five, is that which was stolen from the files of Oahu Prison by my sister at the time that he was jailed for making home brew, I think it was called "Okolehao Hau," a really strong brew if you wanted to get drunk in no time at all. Other incidents with the judicial system, occurred when my husband was arrested on the picket lines along with other rank-and-file workers who were arrested on the picket lines during the strikes which were conducted by the ILWU. And I became aware also when some of us were arrested during the peace demonstrations.

I also became aware of the administration of justice when I attended fair hearings for the poor who were denied their welfare benefits or supplemental security income under the federal system. And then several years ago when I joined the Schutter Foundation and organized two legislative forums which served as a way of educating the legislators as to what was wrong in the judiciary. And I dare say that much of what has been done subsequently in the judiciary, have been the result of what was done by the Schutter Foundation. A lot quicker resolution of cases, unclogging of the court calendars, although I understand your civil calendars are pretty bad at the moment.

And so, it is with a great deal of personal interest that I approach this particular conference and some of the things that were said in it. And I'd like to quote from C.C. Tolbert Jr., who was a former Chief Justice of Alabama, who said, "That the courts must be interested in futures planning because the judicial leadership, the political leadership, and the public in each state are truly committed to ensuring that their courts remain effective, accessible, and just." Now more than ever, there is need to erase once and for all the common picture of an American court as an institution rooted in the past, resistant to change, and resigned to inefficiency. And therefore, it is with a bit of consternation that I read the articles in the newspapers about administrative and management problems in the Judiciary.

I am also disconcerted that there is not a wider representation here at the conference. I did a very quick survey of the preliminary participants to the conference and sixty percent of those participants represent the legal profession and the judiciary. Forty percent represented community organizations, state government, community representatives, such as I, and perhaps two from trade unions and so on down the line. When you consider the changes need to be

made, then it seems to me we should have gone an extra mile in getting more representation of the community. After all, the judiciary are not the change agents. The Legislature, the public that votes, are the true change agents; they are the ones, who through lobbying in the Legislature make things happen. It is extremely interesting that one of our speakers here, I believe it's Ms. Zemans, said, "The judiciary is least subject to change because you have taken on a system which is centuries old and which gives you a great deal of comfort. Kay Harris, on the other hand, spoke about the eliminations of the words "crime" and "punishment." I would call your attention to Jean Valiean Jean and his long battle with Javier, the police *certe* representative in Les Miserables. Was the stealing of a loaf of bread to feed hungry people a crime? And was Javier's pursuit of Jean Valliean Jean in fact the evil or the good forces of a community? And need we think through for example, a la Harris, a model by which we can move our adversarial system to the kind of harmony that Puanani Burgess talked about and to which such eloquence was given by George Kanahale. Perhaps, in fact in this community, in the middle of the Pacific, we may be able to change this whole model of juris prudence so that it would reflect the kind, gentleness of our island community and all of the ethnic groups that have come to it.

As to technology, look, it's here, there's no way in which you can avoid it. You use it to the best possible use that you use that you can make of it, but I would also say that we might have to be careful especially in light of the fact that those incursions on our civil liberties which we worried about some years ago are upon us, witnessed for example, the wide use of our social security numbers without any protest on our part. In every sector of our lives, and I would say beware the wide, indiscriminate use of technology. Use it wisely, use it in a way that would truly bring justice to our people. There was also some talk about making our justice systems truly, culturally sensitive. You saw the video tape. Above all, while we respect the idiosyncrasies, the strong points of different cultures, remember that at the base of all of this, we are truly human beings. And I'd like to read to illustrate this point.

Scene 1, from Act 3 of the "Merchant of Venice":

Shylock is meeting with two of his friends, Salanio and Salarino and is talking about his treatment at the hands of Antonio, the Venetian Merchant, and he says, "I am a Jew, have not a Jew eyes, have not a Jew hands, organs, dimensions, senses, affections, passions, fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and colded by the same Winter and Summer, as a Christian is? If you prick us, do we not bleed? If you tickle us do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? If we are like you and the rest, we will resemble you in that. If a Jew wrong a Christian, what is his humility--revenge! If a Christian wrong a Jew, what should the sufferance be by Christian example? Why, revenge! The villainy you teach me, I will execute and it shall go hard, but I will better the instruction."

So beneath all of this, we are human being, brothers and sisters under the skin, and let the administration of our justice system reflect this.



It is interesting that we talk about different modes of dispensing justice, and today at lunch, Ms. Abrahamson spoke of having to go to Sophia, Bulgaria in order to help them devise a justice system. I was in Sophia in 1972, and granted it's been a number of years since 1972, the overthrow of the government there. But one day I happened into the hall of justice and there were five people in the little room, a man and a woman dressed in street clothes, another man and a woman also dressed in street clothes, and a young lady dressed in a flowery dress. They were mediating a domestic crisis. There was a divorce in the offing, and they wanted to decide where the young lady should go. And without any black robes, without any gaveling of the table, they made a decision then. A similar kind of situation occurred in the People's Republic of China when I was there in 1980. There was that version of a People's Court that we are talking about, the kind of administration of justice that makes real sense because it utilizes community people who are attuned to the more ways of families, attuned to the more ways of a particular neighborhood and true justice can in fact be dispensed along those lines.

Because I have a social worker's background, I was very interested in some of the remarks made by Judge Wong yesterday on children's' adjudication. I remember when I was at the University of Michigan, 1965--1967, and we were on the eve on what we thought was the Magna Carta of rights for children, alas in all of the years since, the 1967 decision, children have gotten short-shifted in the courts at the national, and I believe, as well as the local level. As Judge Heely told you, we are redesigning a Family Court. I can tell you that the present Family Court is a shambles, when I went there because my house was burglarized. I went into a huge room where defendants, plaintiffs, attorneys, were all herded together. And with regard to the feminization and minoritization of the legal profession, let me as on aside say that I listened to female attorneys at that time, and they sounded no different from the men attorneys in their cavalier attitudes towards the people whom they were representing. I say that as a woman, we need to think through what is happening to us in the professionalization process in the huge, bureaucratic organization for which we work. Are we indeed victims of the typical, barbarian, bureaucratic model that makes robots of us all without having to worry about artificial intelligence.

Along these lines might I read from what the First Kings, Chapter 3 beginning at verse 16:

Perhaps we can put forward this kind of wisdom as we work through our problems with young children. Then came there two women, who were harlots, unto the king and stood before him and one woman said, "Oh my lord, I and this woman dwell in one house and I was delivered of a child with her in the house. And it came to past the third day that I was delivered, that this woman was delivered also, and we were together. There was no stranger with us in the house, except we two were in the house, and this woman's child died in the night because she lay on it. And she arose at midnight and took my son from beside me while thy handmaid slept and laid it on her bosom and laid her dead child on my bosom. And when I rose in the morning to nurse my child, behold it was dead. And when I said, I had looked at it in the morning, behold it was not my son, whom I did bear and the other woman said nay, but the living

child is my son and the dead is thy son. And this said no but the dead child is thy's son and the living is my son. Thus this spoke before the King. Then said the King, the one saidth this is my son who liveth and thy son is the dead and other said nay but thy son is the dead child and my son is the living and the King said, bring me a sword. And they brought a sword before the King. And the King said, "divide the living child in two and give half to the one and half to the other." Then spoke the woman whose living child was unto the King, for her heart yearned over her son and she said, "Oh my lord, give her the living child and by no means slay it." But the other said, "Let it be neither mine nor thine, but divide it." Then the King answered and said, "Give her the living child, and by no means slay it, she is the mother of it." And all Isarel heard of the judgement which the King had judged, and they feared the King for they saw that the wisdom of God was in him to do justice. Would that we could, do justice by our children to whom we pay the supreme praise of being the future citizens of this nation.

Though the internal forces of the court allow us to make a lot of changes, but there are a lot of external forces and the judiciary must seek the help of those of us in the community in order that you might take care of these external forces. After all, social policy is not decided solely by you. Social policy is decided largely by the legislature and in partnership with the executive and with the judiciary branches. Social policy affects all of us. Let us work together so that all of us can revise that social policy which in the long run will ensure equal justice to all of us. Equal justice so that you do not remain insulated and work towards your demise so that you will become activists and participate in the full fruition of equal justice for all. As a social worker I would dearly hope that we can begin the process and help the judiciary along these lines by truly participating in the political process of this state.

# PROFOUND EFFECTS AND ANTICIPATED CHANGES

by

**Lawrence Okinaga**

I'm sure that most, if not all of you, have been to Washington, D.C., and many, if not most of you, have been to the U.S. Supreme Court Building. As you approach the building, you see a statue of a woman holding a scale. And above that statue is an emblem that says, "Equal Justice Under Law." "Equal Justice Under Law."

I think that after what you have heard over the past three days at this Congress, as well as those of us who were able to go to San Antonio, I wonder if some of us would question that whether that phrase, "Equal Justice Under Law" should not be vice versa. Should the law be "under justice"?

These are the kinds of questions certainly that we have raised in our discussions during these past three days. We have used words and concepts such as justice, fairness, humanistic caring, decentralized consumer justice, the feminization of the courts. On the other hand, I've noticed that we have not used certain words and concepts as often, such as judicial precedent, which is the need by lawyers and parties for predictability through judicial precedent, ... as well as words and concepts relating to, among others, "statutes", "laws", ... our Constitution.

This Congress, it seems to me, has imposed profound changes in our way of thinking, in our way of approaching the judicial system. Its effect is first, it seems to me, on judges, and this effect is profound. Will this new thinking promote judicial activism on the part of judges? For example, would judges be willing to refer more cases to ADR (which seems to be what is being recommended here), but on the other hand, will such referral on an accelerated basis permit judges to be able to maintain the kind of experience, the kind of sensitivity that a judge gets from handling these types of cases on a regular basis? What in effect will be the role of judges in the future? How will judges be trained under these new scenarios? Take more social science courses? More efforts understanding a multiple of cultures? How will the Judicial Selection Commission decide on the type of judges that would be good for this system? As a past member of the Judicial Selection Commission, I'm very proud of the way that the Commission has conducted itself in large part because the system itself is conducive to a better judicial system. Merit selection is working in Hawaii, and as I talk to judges and lawyers, not only here, but across the country, I'm personally convinced that this system works. But how does it adapt to these changes? What qualities must judges have in order to be effective under these new scenarios? How will the Judicial Discipline Commission handle complaints? What about a complaint that a judge regularly cuts off arguments? Because the arguments were redundant? Or did the judge not care enough, not spend enough time? What will be the standards? What kind of standards will apply to judges in the future?

In addition to this profound effect on judges, we're also talking, I believe, about

structural changes in the practice of law. The lawyers' role, especially litigators, could change considerably especially with the lessening of the advocacy system. Law firm practice and economics will be affected. Lawyers are very much a part of the system, and their concerns should be rightfully addressed as we approach these issues that confront us.

In addition, the judicial future as evidenced by the Congress' thoughts and predictions over the past three days would also impact profoundly the role of citizens in our community. After all, the legitimacy of the entire judiciary system is based on our citizenry who speak largely through the legislature and the executive branch. Greater involvement and interest on their part brings us a perspective that I believe is needed and warranted in the new scenarios and visions that we have for the future. Organizations, such as the AJS, are committed to increased citizen involvement in the process. And we have found through our experience that, that kind of involvement has led to productive improvements in the administration of justice.

The roles of judges, attorneys, and citizens are diverse, but together they can form a strong partnership to probe the future together. As part of the planning committee for this Congress, I would just like to add something to what A.Q. McElrath said. We did try to invite just as many non-lawyers as lawyers and judges, but response from non-lawyers was not as good, perhaps because at that time they may not have felt that the Congress was as relevant or worthwhile for them to spend three days with us. I think that, nevertheless, in the future, with the kind of interest we have here, it seems to me that the public will become increasingly involved because this Congress has proven to each of us that it is worthy of effort.

I am encouraged that the judiciary, from the Chief Justice himself, has made the serious commitment to this process that is necessary. I'm particularly pleased that the Chief Justice is willing to open up the judiciary system to comment, to criticism, to a wholesale review of the process for the sole benefit of looking to the future and improving the process. There are certainly challenges ahead. For example, the cultural diversities we talked about seem to conflict with our concept of the melting pot here. Also, we're looking at the long term, but there are many short-term issues and problems that face us. Nevertheless, the Hawaii judiciary seems to be in the forefront of judicial futures efforts. Other state judiciaries are looking at us carefully. It seems to us that the future is too important for us not to participate in this meaningful process. I welcome you and I urge you to join in this effort to creating a joint future vision together.

# CULTURE, TECHNOLOGY AND LAW

by

**Arlene Lum**

In 1884, ethnic Chinese constituted 22.7 percent of the 80,578 persons living in Hawaii. By 1886, the sixty-acre Chinatown which contained their stores and homes was fully one-half of the city of Honolulu. It was also in 1886, by the by, when the first Chinatown fire leveled that area of the city, under suspicious circumstances. History does not record any legal remedies available to those who lost homes, belongings and business establishments.

The first Japanese arrived in Hawaii in 1885, the first Okinawans and Koreans at the turn of the century, the first Filipinos in 1906.

Given these facts, I find it curious that the contributions of each of these cultural groups to an orderly society, specifically in the area of dispute resolution intra- and inter-family and inter-business, were not mentioned in an otherwise excellent official film on the judicial system in Hawaii.

Are we to believe that only the amalgamation of the Hawaiian legal tradition and Euro-American legal systems evolved into the system of justice as we know it today in Hawaii?

I submit: is it any wonder that the current buzz phrase is discussions on enhancement of the judicial system, alternate dispute resolution, should receive such familiar and warm response in the non-white communities in our Islands? We have only to recall yesterday afternoon's video presentation to realize that each group has its own, and sometimes similar, non-judicial methods to resolve problems.

The American system of government to which we are heirs was designed with the three branches of government with three specific functions, and that of the judiciary was reactive and responsive to the design of the executive and the legislative branches. Thus, in any talk of the future of the judicial system, we must involve the other two branches, particularly, the legislative. And jurists must speak out in public on the issues that touch our lives.

To that point, many of us know that one of our distinguished sitting judges has a scroll of elegant calligraphy hanging in his office. Read from top to bottom, it can be translated as, "To end confusion, write a law." "However, read from bottom to top, it can also mean, "To write a law, create confusion." A caveat.

Let me share some of my favorite experiences in the idiosyncratic nature of the fundamental work of the judicial system, that of providing justice in a trial situation.

I once covered a federal trial during which the jurist asked, in what I gather was mock confusion, "Where are the rest of the ball bearings?" You see, the defendants were accused of stealing shiny, steel, cannon ball-sized ball bearings off of nuclear submarines stationed at Pearl Harbor and

selling them for scrap.

"They had to be replaced in the submarines, Your Honor," the U.S. attorney prosecuting the case answered. "The ball bearings cost thousands of dollars each, and there are no spare parts."

There followed a discussion on whether the defendants were getting a fair trial without all the evidence.

Then there was the time in another courtroom: The Honolulu Star-Bulletin was in court to fight a (TRO) temporary restraining order on publication of some story, the subject of which escapes me now. I covered the hearing, and was very surprised when the judge, after denying the TRO, called the editors and me into chambers to ask us informally not to publish. Of course, the editor's response had to be "No" to prior restraint.

Another time, another courtroom: I was covering the Watergate trials in Washington, D. C., and Judge John Sirica, in frustration, exploded, "Shit!" followed quickly by "Strike that" to the court reporter. That's all I remember of that one session, I don't even recall who was testifying.

That there is widespread ignorance of the judicial system is no surprise. Those of us who have covered court proceedings, routinely checked filings in the clerk's office and talked story over courthouse coffee with attorneys or those of us who are married to law professors have a better inkling--and it's only just that, an inkling--of the judicial process.

Interestingly, we can understand revolutionary discoveries in astrophysics, aerospace, communications technology and medicine more easily than conceiving of change in the judicial system. Is it perhaps because a space shuttle launch, a new vaccine, a knowledge traveler are tangible, whereas process is not?

In that regard, is the press not doing its work? Our coverage of the judicial system focuses on courtroom proceedings. A quick read of the stories covered in the newspapers of the last six months reveals murder and/or abuse trials, the non-appearance of the habitually non-appearing Merinos, the Waipahu child abuse/attempted murder case, and others of that ilk. Are we not getting to the heart of the judicial process? You can help us answer that question. In a quick and dirty personal survey taken among you the past two days, two points stood out. First, coverage of court proceedings far exceeds that of mainland newspapers in both numbers of stories and prominence of play. Second, newspapers do not get at the heart of the complicated civil suits or of deals made by foreign buyers. I would be interested in what the rest of you think; drop me a line or call me. Like the judiciary itself, we, too, need to do a better job of informing the public about the judicial system.

On a subject discussed these past few days: a month ago, Page One stories in the New York Times and the Boston Globe told of a discovery of a defective gene--the Li-Fraumeni Syndrome--causing breast cancer traced in some 100 families worldwide. On the one hand, my brother-in-law, Dr. Frederick Li, was happy 20 years of research work had borne fruit. On the other hand, he had ethical concerns over informing the families. He asked what would happen to their prospects of a future facing certain development of cancer and of a future for children inheriting the same mutant gene, and further, what would be the ramifications with regard to insurance? Will it be that one day his questions would

be echoed in a courtroom?

As an aside: When informed of his accomplishment, Grandma Li said, "All things being equal, it would have been preferable that a medicine bear the family name, not a disease." When, years ago, Dr. Richard K. C. Lee, a distinguished former state and city director of health as well as a dean of the University of Hawaii School of Public Health, discovered the cause of a liver ailment afflicting Asians in Hawaii, his mother requested that the disease not be name "Lee." It is a cultural idiosyncrasy, much like early immigrants' avoidance of the judicial system for redress.

It is the humanity and compassion of our latter-day judges and most of our attorneys which sifts through such idiosyncracies and distinguishes us from, say, the arbiters of justice in Beijing. But the barbarism of 1989 aside, are there lessons to be learned from the judicial systems of other nations? In Taiwan law schools, for example, students are divided into three groups on the basis of aptitude and interest. For a period of time, all the students matriculate as do our law students. But then tracking begins, and certain students pursue studies in magisterial work or in prosecutorial work. It is not uncommon to see judges in their twenties presiding in the lowest level courts.

To hear American judges lament the work overload and hear their suggestions that many current functions of the court system be assigned elsewhere and to hear law professors warn that, for example, genetic engineering in human reproduction will tax the time and abilities of judges leads one to believe that the education of judges, whether it be a la Taiwan or some other form, must be more comprehensive in depth and universal in breadth. Certainly, our sitting jurists, if conscientious, are tireless in their pursuit of knowledge. But might not the example of, say, an astrophysicist who also hold a law degree, a journalist-attorney, or a physician-attorney present a model for our jurists?

And we have not even touched on the education of jurists! We have to leave that for another day.

As tempting as it may be to suggest that computer checklist justice replace a human jurist, we must remember that technology is merely a tool, albeit a highly efficient one. I, for one, rue the day when a machine tells me--but ONLY after 5 p.m.--whether or not I must appear at the courthouse for a jury pool the following day. Oh, I don't mind the radar guns that hold in check my heavy accelerator foot, but to suggest that artificial intelligence will decide my guilt or innocence is demeaning. The bottom line is--and, yes, I am using a business term despite Jim Dator's characterization of those of us in the business world as having reptilian brains--the bottom line is that with the advanced technology now in use, and the inevitable further use of such, it is so much more important that we retain the wisdom and humanity of people judges. Yes, I much prefer a Judge Sirica's four-letter word to a computer screen.

The year 2020? It is only 30 years away. Some of us in this room will still be around then who today remember 1960. Have the changes since then been such that we have forgotten our common sense and sensibility, characteristic only of man, in the past 30 years?

May I just add here that before this session started, Momi Cazimero brought an issue to my attention. Oh, it's okay for us to "cat" around in this day of more relaxed attitudes towards social behavior, but should our jurists be held to a higher standard of morality, should they be above

reproach? That's a question which needs to be addressed.

Thank you for indulging a layman. You have had a stimulating conference. With the overwhelming number of the participants at this conference in the legal world, you, the members of the bar and the bench, have exercised stringent self-criticism in the workshop sessions. I applaud your open minds as you look to the future of your profession--the law and the justice system.



# AN INVITATION TO THE FUTURE

by

**Patrick Yim**

Thank you. This is what happens to you when people talk about the browning of the face of the United States and missing important meetings, you get to have the enviable task of standing up here to try and close such an endeavor that we've all been involved in for the last three days.

You know sometimes things happen and they happen for a good reason. Let me share with you an experience that I had just last evening. As I was going home, I stopped over at Rainbow Drive-In to pick up a plate lunch. And this counter person looked at me and said, "Eh, you Judge Yim?" And I say yea! And judges really hesitate when people identify you in person. I said "Yeah." I saw you on TV last night and you folks doing something about the futures." I said "Yeah." And the counter person looked at me and said, "Can I tell you what I think, about the future." I said, "Sure, why not." Everybody else is telling us what they think." And the counter person looked at me and said, "Judge, if can, can. If no can, no can. And judge remember, up to you." See how these things happen to one when one just wanders around.

Much has been said, and I don't want to repeat those comments of the reaction panel. We've all worked hard for the last three days. The last three days have been stimulating and difficult for all of us. I'm frankly experiencing information overload. Certainly, however, our efforts cannot be allowed to be printed and published only to come to be placed on a shelf somewhere to gather dust until the next Congress, some 20 years hence.

For those of us who are lawyers, judges, administrators, and staff in the judiciary family, we must commit to work from within. I urge, therefore, that we resolve to take the product of this Congress and be proactive in addressing the challenges of the 21st Century. And in doing so, commit to continue to keep our judiciary relevant and effective in addressing the needs of Hawaii's people. For in doing so, justice is served. And our community has the right to expect, demand, and receive justice.

For those outside of the judiciary, you are challenged to continue your willingness to work, to risk, to alert us, for with such efforts your judiciary will continue to be relevant and effective.

The Chief Justice's call for the formulation of a Permanent Foresight Commission, is both a commitment and an invitation. A courageous commitment by the judiciary to run to the 21st Century, not just wait for it to happen. An open invitation to the community to join in this endeavor. In running to meet the 21st Century, I charge you in the Hawaiian language.

*E HANA LIKE PU KAKOU, E ALU LIKE KAKOU  
E HOLOMUA KAKOU, IMUA KAKOU, E KA LANAKILA!  
LET'S ALL WORK TOGETHER, LET'S WORK TOGETHER IN  
COOPERATION WITH EACH OTHER, LET'S MOVE FORWARD, MOVING  
FORWARD TO VICTORY!*

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## **IV. APPENDICES**

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- A. SCENARIOS AND STATEMENTS OF POSSIBLE AND PREFERRED FUTURES**
- B. LIST OF SMALL GROUP RECOMMENDATIONS**
- C. BIOGRAPHIC PROFILES: PROGRAM PARTICIPANTS**
- D. LIST OF CONFERENCE FACILITATORS AND RECORDERS**
- E. ABOUT THE EDITOR**



# **SCENARIOS AND STATEMENTS OF POSSIBLE AND PREFERRED FUTURES**

The May 1990 San Antonio Conference on the Courts and the Future produced numerous scenarios or possible futures of how the courts might look like in the future. The January 1991 Hawaii Judicial Foresight Congress modified these scenarios and used them as information input for the second day of the small group meetings. Based on these scenarios, Congress participants developed their own range of preferred and possible scenarios. These were then used as a starting point for developing concrete recommendations as to future directions for the courts. This report is divided into three sections: (A) presents the San Antonio scenarios derived from an analysis of statements of the future by small groups, (B) presents Hawaii Foresight Congress statements of possible futures and © presents statements of preferred futures of the ideal court by Hawaii Congress small groups.

## **SECTION A: SAN ANTONIO SCENARIOS FOR THE FUTURE OF THE COURTS: DAY 2 INPUT**

### **1. GENERIC JUSTICE**

- A tremendously overburdened system that creates bargain-basement justice
- Grossly inadequate public funding
- Consumers assume low quality services
- Judges accept the role of bureaucrat (or "courtacrat") with few incentives for judicial leadership
- Feminization/minoritization of court system combines with low status of judicial profession
- Courts become the "whipping boy" for failings of the general society
- Courts forced to practice depersonalized processing, summary trials and case consideration ("microwave justice")
- Public perception of the courts is second-rate in every dimension; courts end up like public education institutions with too much work, too few resources
- Clientele leave for private judicial forums

### **2. COURTS GONE AWOL (Adjudication Without Legitimation)**

- Civil cases absolutely disappear from the public courts leaving the Judiciary only with serious crimes
- Standardization is sacrificed, inequities prevail in the way justice is served running the gamut from "street justice" to "suite justice"
- ADR mechanisms diffused throughout public and private sector creating two tier system with widening class gap
- Nearly all disputes go to ADR because of the severe penalties for going to trial

("Courts at Your Peril"); ADR solves disputes but does not address issues of equity, of injustice

- Courts abdicate traditional responsibilities for science and technology cases and controversies

### **3. HIGH TECH/SUPER SURVEILLANCE**

- Totalitarian use of technological developments to control criminal and anti-social behavior through electronic monitoring, genetic screening (in employment), genetic alteration of prisoners and deviants
- Reduction of individual rights in favor of State rights
- Super high-tech efficiency (including use of artificial intelligence) for "tough justice/punitive" processing of cases
- Biomedical mind control of defendants to determine facts/truth and chemical control
- Judiciary managed by efficiency experts and scientific technocrats
- Robo-prisons

### **4. APARTHEID JUSTICE**

- White minority refuses to share power in the face of newly emerging black/brown/yellow majority
- White court system now main means of social control of emerging pluralistic society; however, anglo-saxon, "white law" completely alienated from nonwhite majority
- Constant social unrest and violence creates overwhelming caseload and majority tries to hold the center
- Justice driven by class, culture and ethnic antagonisms

### **5. ROAD WARRIOR JUSTICE ("SOCIAL CHAOS AND COLLAPSE")**

- Natural disasters, severe depression, and plague create the conditions for social collapse
- War on drugs is lost
- Communities develop their own private security systems
- Vigilante justice prevails ("might is right"); due process no longer relevant
- Regular violence against judges and courthouses

### **6. CITIZENS AS ACTIVE CONSUMERS OF JUSTICE ("BETTER ACCESS MODEL")**

- High degree of citizen involvement in all areas of the legal process; the victim rights movement of the 1980 was a beginning trend in this direction
- Consumers become as sophisticated about legal services as they are about their own health
- Local and national consumer report magazines for the courts thrive as do law

- oriented consumer association movements
- Ombudsman, public complaint and information programs become institutionalized in the courts
- Consumer gain court drive-thru programs with 24 hour service, parking, personnel courtesy, day care, and evaluation procedures
- Courthouse on wheels (judge mobile) develops

## **7. DECENTRALIZED BOTTOM UP JUSTICE**

- Neighborhood/community based justice with lay judges (advised by law trained clerks; multiple ADR forums in accessible forums (shopping malls, near health centers)
- People empowered to interact with legal system regardless of their financial or educational resources
- Values and attitudes (humanistic treatment and prevention model) focus on crime prevention and conflict management
- Conflict management taught at all educational levels throughout society (this leads to a decrease in litigiousness and less demand for lawyers)
- From the adversarial "let's sue" society to the mediation "let's resolve" society
- Courts address problems in a holistic solution-focused manner with the emphasis on outcome and affect of decision (on individual and society) rather than on precedent

## **8. THE POST-MODERN HUMANISTIC COURTS**

- Judges as sages; as examples for others
- More women and minorities in the courts have enhanced the system's ability to be caring, compassionate, tolerant and accommodating of cultural, gender and ethnic differences
- Judicial education incorporates broader "ways of knowing and perceiving" the world including the effective use of intuition and emphasis on the whole rather than compartmentalization
- Family and community systems approach of justice prevails over philosophy of individual rights
- Courts become social service brokers with less emphasis on traditional adjudication
- Multi-door courthouse means a greater variety of dispute resolution approaches (cross-cultural, cross-gender)
- Humanistic and transpersonal methods used to alter prisoner's behavior and perception

## **9. GREEN JUSTICE**

- Focus on community and environmental responsibility not on individual property and economic rights
- Self-help focus in all aspects of life including solving your own disputes (self-

- reliance and self-sufficiency)
- Culturally appropriate techniques are available for anyone wishing to use them
- Prisons are seldom used; ostracism and shame are more effective as punishment and deterrence
- Environmental damage is taxed and/or severely punished including rectification
- Environmental acts which affect many are punished more severely than traditional criminal acts which hurt an individual

## **10. HIGH-TECH/HIGH EFFICIENCY JUSTICE**

- Extremely efficient, elimination of clerical staff/paper flow, even with large, diverse, complex caseload
- Strong continuing education for judges and court personnel (through teleconferencing as enhanced by expert system learning processes)
- Computer driven jury selection; artificial intelligence relieve lawyers and judges of routine work
- Interactive software for improving negotiation skills of disputing parties (also eliminates the need for court intervention)
- Expert systems (and information navigators) enable judges to easily access vast amounts of information on cases, relevant criminal histories, and recent social and natural science findings

## **11. THE AUTOMATED COURTS ("BEAM ME UP, JUDGE")**

- Virtually no use of courtroom or courthouses; video and satellite hearings, jury decision making by video or cable television (the interactive jury box), and interrogation via interactive tv of witnesses make personal appearances rare
- Voice recognition verifies witness identity, "truth determining devices" check veracity
- Computer judging of normal routine cases (e.g. child support, traffic violations)
- Judges free to reflect on and adjudicate issues of social significance
- Fewer judges and support staff needed effective and efficient system management
- Expert system also administer the courts (Planning, modeling and data collection)

## **12. GLOBAL JUSTICE**

- Global economy breaks down national barriers of all kinds
- Multinational corporations, travel, global computer and information networks have resulted in global jurisdiction for state courts
- Less emphasis on national sovereignty and more emphasis on human rights and human dignity
- Financial penalties set as a percentage of a person's or corporation (or other global associations) wealth
- Legal and dispute resolution traditions of different cultures gradually evolve into global law; world constitution ratified and world government formed

## **SECTION B: HAWAII SCENARIOS OF THE FUTURE OF THE COURTS**

Hawaii Judicial Foresight Congress participants used the national San Antonio scenarios to devise their own. As with the San Antonio scenario constructions, in our scenario constructions, we have not been faithful to each small group scenario rather we have taken the scenarios of the Congress as a whole and modified them to develop discrete future possibilities. As presented below they no longer represent the preferred ideal court (section C presents these) or possible court scenario of any one group, rather they represent possible futures based on the data provided by the small groups. They are presented here for heuristic purposes--as points of departure for further discussion--and for comparison to the national scenarios.

### **1. INCREMENTAL JUSTICE**

- Better court management through new technologies
- Interpersonal violent cases decriminalized
- Removal of traffic, DUI, small claims and some family cases from Judiciary jurisdiction
- Artificial intelligence used to solve routine cases
- Multi-door courthouse
- Individualized tailored sentences
- Options for civil trial: (1) judge with advisor/expert in complicated cases, (2) three to nine judge panel, no jury with lay judges as well, and (3) three/three clone jury (three must be clone of defendant and three clone of plaintiff, (4) civil cases decided using ADR with professional mediators
- Criminal cases by three judge panel. Decision must be unanimous. Judge required to participate, bring up issues and ask questions (European model). Also six person blue-ribbon jury selected for education and experience

### **2. EDUCATIONAL COURTS**

- Judiciary committed to outreach program which educates public and makes system easy to use. Education also involved understanding of rights
- Attorneys and judges are not only educated in the law but in cultural values and processes of the community
- Judges are given field sabbaticals so as to be exposed to the real world of the community. They become increasingly wise and tolerant
- Law students choose between lawyer and judge track
- ADR mandatory with education on conflict resolution statewide from K-12
- Training in cultural sensitivity required for all
- Judges as holistic doctors to prevent conflict and where there is conflict to diagnose problem and prescribe solution.

### **3. INTUITIVE JUSTICE**

- Balance high-tech with high-touch
- Empty rooms in neighborhood sites where parties work out disputes by themselves



with facilitators who are like psychotherapists contributing advice not imposing right or wrong

- Courts monitor dispute resolution not decide truth
- Emphasis on consumer access, for example, child care provisions
- Enhance ability to be caring and accommodating to cultural and ethnic differences
- Acknowledgment of the use of intuition; spiritual qualities important for judges
- Self-help focus
- Shared decision making and shared policy making with emphasis on communications and holistic solutions
- Win/win less adversarial

#### **4. COMMUNITY STANDARD COURTS**

- No attorneys in community courts
- Less reliance on formal rules of evidence
- Less appellate review of community issues
- Criminal cases accountable to community boards
- Determination of criminal conduct decided by community/region but balanced by global interests
- Legal background not necessary for judicial selection
- Reduced individual rights in favor of community rights
- Twenty-four hour decentralized courts
- Community standards to determine appropriate punishment

#### **5. THE COURTS OF SOCIAL JUSTICE**

- Justice available to all but not cheapened
- Land distribution as an issue for courts
- Possible specialty courts such as green and science courts
- Decrease threshold to enter and use courts. Lack of resources not a bar to use courts
- Cultures and living things have standing
- Courts decentralized and held at home, satellite offices and through electronic media
- Institute authorization of legitimate collective force when alternatives for the realization of the rights of the oppressed fail
- Special forums for cross-cultural/ethnic crimes
- Universality of certain cultural values incorporated into court system. Cultural translators in court system to articulate community values
- Native Hawaiian rights recognized

#### **6. "MONEY TALKS" JUSTICE**

- Access limited to those with means
- Quality of Justice dependent on financial assets
- "Yakuza" and other criminal elements have institutional influence

## **7. LOSER PAYS ALL**

- Loser pays all costs of trial (attorney fees and courts costs)
- No juries in civil cases
- No contingency fees
- Discovery severely limited
- Courts charge parties in civil suits for use of courtroom

## **8. REGULATED INDUSTRIES**

- Legislature and Judiciary regulate legal fee structures
- Code of professional responsibility revised
- Imposing of sanctions including suspension and disbarment for failure to act consistently with good faith, expeditious, and fair resolution of cases

## **9. NATIONALIZED MODEL**

- Government nationalizes legal profession and dictates administration, size, composition and when necessary dismantling of law schools
- All lawyers become government employees. They are salaried and paid out of public funds
- Government determines where and what lawyers will practice (as a function of perceived social needs)

## **SECTION C: HAWAII STATEMENTS OF PREFERRED FUTURES OF THE HAWAII COURTS**

Hawaii Judicial Foresight Congress participants used the San Antonio scenarios and a checklist of design characteristics to devise their own visions of the ideal Hawaii Judiciary. Most favored courts that had the following as key vectors: (1) community not bureaucracy or attorney driven, (2) ADR focused, (3) sensitive to culturally appropriate dispute resolution forums, (4) a wide and wise use of high-technologies, and (5) public educational oriented so as to make the courts more understandable and accessible. Preferred scenarios of the courts, in general, were variations on this theme. Most groups adopted a menu approach and chose the best characteristics from the San Antonio scenarios. We have not presented the preferred scenarios of each group as there was a great deal of duplication; instead, some representative preferred futures have been selected.

### **1. DECENTRALIZED BOTTOM UP JUSTICE**

- Courts charge parties in civil suits for use of courtroom
- Better court management through new technologies
- Interpersonal violent cases decriminalized; community standards to determine appropriate punishment
- Removal of traffic, DUI, small claims and some family cases from Judiciary jurisdiction

- Training in cultural sensitivity required for all; recognition of the universality of certain cultural values incorporated into court system. Cultural translators in court system to articulate community values
- Multi-door courthouse
- Native Hawaiian rights recognized
- Artificial intelligence used to solve routine cases
- Reduced individual rights in favor of community rights

## **2. KA PONO**

- Informed citizen driven, egalitarian, culturally diverse
- Multi-resolutional, environmentally responsible, globally connected, holistic
- Expert systems
- Electronically decentralized courts and information system
- More emphasis on mandatory ADR in civil cases
- Prepaid legal insurance (voucher system)
- More women and minorities in the courts
- Courtroom for hearings and trials only
- Strong respect for the courts by the public

## **3. KULIA I KA PONO**

- Judiciary committed to outreach program which educates public and makes system easy to use. Education also involves the understanding of rights
- Attorneys and judges are not only educated in the law but in cultural values and processes of the community
- Judges are given field sabbaticals so as to be exposed to the real world of the community. They become increasingly wise and tolerant
- Law students choose between lawyer and judge track
- ADR heavily used and highly accessible
- Science and high-technology cases diverted
- Prisons seldom used but environmental crimes severely punished

## **4. COMMUNITY BASED INTUITIVE JUSTICE**

- Balance high tech with high touch
- Justice available to all but not cheapened
- And distribution as a key issue for the courts
- Court-ordered rehabilitation instead of punishment for substance abuse offenders
- Individualized tailored sentences
- Empty rooms in courthouse where parties workout disputes by themselves with facilitators who are like psychotherapists contributing advice not imposing right or wrong
- Courts monitor dispute resolution not decide truth
- Small neighborhood disputes settled between parties without lawyers or courts.

## **5. COURTS R US**

- No licenses, no law school, no paid staff or advocates rather resolution, restitution and protection are the key
- Emphasis on consumer access, for example, child care provisions
- Removal of all barriers to court access
- Institute authorization of legitimate collective force when alternatives for the realization of the rights of the oppressed fail
- Enhance ability to be caring and accommodating to cultural and ethnic differences
- Acknowledgment of the use of intuition; spiritual qualities important
- Self-help focus
- Shared decision making and shared policy making with emphasis on communications and holistic solutions
- More emphasis on specialty courts and juries
- Conflict management techniques taught
- Gender bias training for all court personnel; elevate status of women in court system and create discrimination free system

## **6. HUMANISTIC JUSTICE**

- Two systems: civil and criminal; separate supreme courts; traffic, misdemeanors, and family cases administratively.
- Use of non-judges--divorce referees, psychologists
- Possible specialty courts such as green and science courts
- Decrease threshold to enter and use courts. Lack of resources not a bar to use courts
- Judges selected based on life experience; the judge as sage
- Decreased staff but increased judges due to electronic, computer equipment
- Cultures and living things have standing
- Courts decentralized and held at home, satellite offices and through electronic media

## **7. COMMUNITY CENTERED COURTS**

- No attorneys in community courts
- Less reliance on formal rules of evidence
- Less appellate review of community issues
- Criminal cases accountable in community boards
- Civil cases decided using ADR with professional mediators
- Determination of criminal conduct decided by community/region but balanced by global interests
- Special forums for cross-cultural/ethnic crimes
- Legal background not necessary for judicial selection
- Win/win, less adversarial

## **8. RESTRUCTURED COURTS**

- More ADR, wide menu of alternatives including culturally appropriate ones
- ADR mandatory with education at school level
- Options for civil trial: (1) judge with advisor/expert in complicated cases, (2) three to nine lay judge panel with no jury and (3) three/three clone jury (three must be clone of defendant and three clone of plaintiff)
- Criminal cases by three judge panel. Decision must be unanimous. Judge required to participate, bring up issues and ask questions (European model). Also a six person blue-ribbon jury selected for education and experience

## **9. HIGH TECH/HIGH EFFICIENCY**

- Holographic recreation of events and trials; witnesses by holograph; instant replay of portions of testimony; veracity tests
- Videotaping by law enforcement officers of arrests; confessions, field sobriety tests
- Individualized judicial training with increased technology
- Robot lawyers, computer specialists to represent cases in courts but humans still have standing
- Home based courts
- Non-attorney at appellate level
- One trial court level with compulsory mediation
- Judge selection by affirmative action

## **10. PREVENTIVE/DIAGNOSTIC**

- Use holistic medical model to understand future of courts
- Judges as holistic doctors to prevent conflict and where there is conflict to diagnose problem and prescribe solution.
- Use of mentors. Experts work with criminals to meet their particular needs
- Peace and conflict education from first grade onwards
- Truth based on remedy (diagnosis that reduce conflict and lead to increased individual and social health and justice)
- Twenty-four hour decentralized courts

**HAWAII JUDICIAL FORESIGHT CONGRESS  
SMALL GROUP RECOMMENDATIONS  
JANUARY 6 - 8, 1991**

While the introductory chapter summarized participants's recommendations, what follows is the full text of recommendations proposed by the twenty small groups. We have not attempted to edit them save for minor points of clarification.

**Group 1: Burns/DeSilva**

1. Establish an office of ethical practices to educate and advise all judiciary employees.
2. Set up external board/agency for advisory purposes made up of citizens to be elected by other citizens similar to neighborhood boards.
3. Appellate judges must have trial judge experience.
4. Lottery for substitute judges and (appellate) justices.
5. Educational programs for public in simple language/plain English about judiciary.
6. Additional I.C.A. judges.
7. Improved internal interpersonal communication, internal house organ for communication office for public information to help educate public and news media.
8. Educational sabbaticals for judges and staff.
9. Offering culturally and constitutionally appropriate A.D.R.
10. Bring calendars current and stay current.
11. Have professional calendar administrators for trial and appellate courts.
12. Consensus based effective management in all state courts.
13. Create single level trial court including bringing calendars current and staying current.
14. No specialization of judges.
15. Appellate judges sit as trial judges on rotation basis.

**Group 2: Chang/Maa**

Insights:

1. Awareness of our role in global picture vs. our cultural uniqueness; potential of conflict.
2. Affirm that system is not one way but should incorporate different strengths of different cultures and mesh.
3. "Keepers of the earth" teaches us that harmony is key for judge's role in future; try to create harmony out of chaos.
4. Judges will need to resolve more internationalized conflict issues (global impact).
5. Judicial planning congress is very progressive and commendable.
6. Judges need to be flexible and anticipate future changes and be proactive.

Recommendations:

1. Eliminate exclusionary rule.
2. Double number of circuit judges for backlog.
3. Give judges opportunity to get into community, go to training sessions.
4. Judiciary driven on values of cooperation and harmony.
5. Incorporate law school representatives at congress.
6. Shift resources to outer islands where caseload is increasing.
7. Eliminate residency requirement for judge applicants.
8. Establish commission to apprise/coordinate congress results with broad based input.
9. Remove incentives for "stalling" from system.
10. Have earlier evaluation of cases settlement conferences earlier and greater integration of early arbitration mediation.
11. Weed out cases early, for example D.U.I. should not go to trial. "Multi-Door" concept is process for deciding, process cases go.
12. Eliminate current rules of evidence and redraft without lawyer/judges input (including exclusionary rule).
13. Regulate attorney fees. Use experts, auxiliary professionals.
14. Go with medicare system where you set standard for types of cases (time) and impose disincentives for exceeding time standard.
15. Find counseling for domestic drug abuse cases.
16. Recognize importance of education early on and support work in that context, for example, "just say no" program. Develop working relationship with DOE (legislature).
17. Limit cases that can be appealed and limit adversarial system. Courts should determine what cases appropriate to appeal (internal decision).
18. Redefine route to due process.
19. Increase access to ADR and discourage use of traditional adversarial system. Have different types of advocates, rethink need for current law school curriculum (refocus, redefine). Make court system more responsive.
20. Reevaluate role of courts as primary dispute resolvers.
21. Require courts in civil cases to restrict court approved fees, time-based lawyering to save resources.
22. More appellate judges with direct appeals from ADR.
23. Separate appellate courts from criminal and civil.
24. Judges trained early on; establish as real career choice.
25. Add lay expertise to trial and appellate panels (relate to substance of case)
26. Reduce size of juries (cut costs and time).
27. Have specialized juries especially in complex litigation.
28. Increase minimum jurisdiction of circuit court to encourage ADR to \$50,000.
29. Get traffic and small claims out of District Court (streamline).
30. Bar lawyers from District Court.
31. Relax adherence to rules of evidence and procedure in District Court.
32. Mandatory education in prisons.
33. Private industries should be encouraged to have own built-in dispute resolution mechanisms.
34. More efficient ways of recording court proceedings. Computers on judges desk with access to criminal dockets; network with other judges.
35. Periodically reconvene congress (every 5 years?).

36. Use professional managers/administrators in court.

**Group 3: Cingcade/Takahashi**

Legislature:

1. Mandatory conciliation/mediation before entering trial courts.
2. Regulated industries: contract language requiring use of ADR.
3. Realization needed that judiciary is 3rd branch of government.
4. Enactment of private right of action for unfair settlement claims act.
5. Empower commissions to enforce/better regulate to give individuals/private parties power to get redress.
6. Judicial impact statement for each new law.
7. Pursue alternatives to prison.
8. Incremental decriminalization of victimless crimes.

Supreme Court:

9. Mandatory conciliation/mediation before entering trial courts.
10. Specialization of judges.
11. Flexibility of rules and structures to account for different cases.
12. Increase in discretionary powers for judges to use alternatives.
13. Increased role in public education with respect to court system.
14. Assumes role of advocacy for entire legal system.
15. Court annexed arbitration program should be changed to compensate attorney/arbitrators for time and increase disincentives for appeal.
16. Limit appeals in certain kinds of cases (e.g. child custody).
17. Increase use of masters.
18. Settlement conferences at outset of litigation (frontloading).
19. Intake officer for each court.
20. Direct litigation and referrals to approved outside services.
21. Increase payment of costs in civil cases based on ability to pay.
22. Superintendence of private dispute resolution outside of court.
23. Simplification of information (paper) flow and process less filings; less hoops to go through.

Governor:

24. Eliminate appointment of judges by Governor.
25. Needs to realize that judiciary is 3rd branch of Government.
26. Use more extensively hearings officers or administrative appeals officers to relieve judiciary.

University/Department of Education:

27. Professors acting as special masters for technologically complex cases.



28. Mini-courses available to bench and bar in specialized areas (continuing education).
29. Law school course in community values which the law is seeking to enforce.
30. (Mandatory) law school courses; settlement negotiations, dispute resolution.
31. Curriculum that addresses need for increased public education with respect to judicial system.
32. Legal education: K-12.
33. Better job in teaching professional ethics.
34. Mentor system.
35. More humanistic, green and global curriculum.
36. Include mandatory pro-bono within law school experience.
37. Training for journalists about legal system.

Bar:

38. Training in mediation and other ADR.
39. Mandatory continuing legal education.
40. Specialization.
41. Peer review by other lawyers in fields (periodic not disciplinary, evaluative).
42. Bar committee for continuing dialogue with community representatives on community needs.
43. Public information/education.
44. Family court cases should be reviewed by lawyer for litigation direction and outside referral to appropriate social services.

#### **GROUP 4: Gillmor/Florendo**

1. Need to humanize court.
2. Would like to incorporate changes into present court structure, not a separate, private ADR court.
3. More conscious of outside pressures on judiciary.
4. Judiciary should implement court sponsored multi-problem solving methods through screening mechanism available to people with appropriate, for example, traditional litigation, ADR, specialty courts and culturally-sensitive courts.
5. Increased funding needed to buy high tech.
6. Judiciary should maximize high tech to promote efficiency within system and increase accessibility.
7. Judiciary should maximize educational opportunities to promote better understanding of legal process. (Demystify) redo entire criminal justice system, including punishment.
8. Increase number of settlement judges.
9. Increase settlement opportunities by educating judges.
10. Rethink malpractice dangers.
11. Support aggressive posture of judges in pursuing early resolution instead of trial.

#### **GROUP 5: Kaulukukui/Fairbanks**

1. Establish and gain adequate funding for the permanent judicial foresight commission.

2. Review/improve uses of technology.
3. Truly independent judiciary (separation of powers).
4. Eliminate "hostage hold" of legislature; independent commission to oversee judicial funding/spending (including salaries for judges) judicial auditor (more effective/expanded role).
5. Review and streamline the functions of the supreme court.
6. Remove inappropriate programs.
7. Expand educational role of the judiciary. Go to the schools; "public" coordination with Department of Education including conflict management and dispute resolution classes.
8. Review and streamline organization and administration of courts to increase flexibility and responsiveness to problems and needs.
9. Judiciary to develop plan for various programs for different forms of dispute resolution and make recommendations to appropriate organization/branch and implement those appropriate to it.
10. Mandate futures planning for all branches of government with coordination and information sharing.
11. Expand bar association role in recommendations and bringing about changes to judicial system.
12. Increased education of attorneys, judges and parties in judicial forums.
13. Judiciary should be umbrella organization over the various forms of dispute resolution.
14. Continue to improve quality of judges; continuing educational training and review qualities of judges needed for different functions and forms of dispute resolution.
15. Reevaluation of jury system.
16. Provide for more participation by the public in the shaping and organization of the judiciary system.

**GROUP 6: Kim/Sampson**

1. A more efficient process that shortens disposition time.
2. An independent ADR system.
3. Shorten judges first term to four years.
4. Shorten judicial selection list from six names maximum to three names minimum.
5. Periodic evaluation of judicial performance to chief justice for review and corrective action; and to judicial selection committee in far retention evaluation.
6. Cultural groups develop own ways of dispute resolution; university facilitates this process.
7. Use of technology to permit easier participation (testifying and scheduling) by witnesses.
8. Simplify legal language and procedures.
9. Video orientation to courts, including defining settlement and pretrial conferences.
10. Legislature funds consumer services advisor for each court.
11. Unified system of interpretive services for the courts.
12. Seriously examine alternatives to incarceration (legislature).
13. Three branches of government cooperatively and comprehensively consider implications of all changes in judiciary, for example, maintenance and construction.

**GROUP 7: Klein/Aquino**

1. Maintain merit system of appointment of judges but change nominee number from six to three; amend constitution to minimum of three.
2. Continuing education and evaluation of judges within court system (education for whole court system on global/environment issues).
3. Increase in-use of ADR.
4. Increase females and minorities as judges.
5. Specialized judges (environmental law).
6. Court access to experts at decision-making level.
7. Improved information system via enhanced computer use; throughout court system; provide feedback to judges. Judge ability to track decision-making.
8. Bar more active role in education. Education and inform public as to controversial judicial decisions.
9. More creative solutions for corrections (alternative sentencing possibilities).
10. Improved communication between judiciary and business community joint task force (judiciary, bar, business).
11. Lifetime employment for judges similar to federal system.
12. Legislature to remove traffic minor offenses from courts. One level of trial judges.
13. Professional programs (UH) to train in mediation/arbitration.
14. Education for seasoned business persons in informal dispute resolution and mediation.
15. Evaluate court rules to streamline litigation.
16. Education at law school and bar level (problem-solving versus adversarial/confrontation approach).
17. Public reeducation as to problem-solving versus litigation on national/global level.
18. Lay judges.
19. No contingency fees.
20. Attorney to have financial stake in litigation. Win or lose to curb trial cases.
21. ADR in the courthouse.
22. Rethink/reevaluate concept of crime and punishment, guilt versus innocence.
23. Increase ADR; ADR in courthouse, training and education of bar, judiciary, business, law school.

**GROUP 9: Matsunaga/Namuo**

1. Improvement of technology that results in reduced need for staff and smaller courtrooms more accessible to public via technology, (for example, court procedures on public T.V., etc). Personal computer access to court records.
2. Increase number of judicial deciders where necessary.
3. Move all civil cases to fast track ADR.
4. Increase efficiency through more specialized judges and courts to maintain human element. Such as: More deciders in family matters less in traffic.
5. Mandatory computer literacy for judges, staff and lawyers.
6. Preserve the bill of rights.
7. Have a futures division in the judiciary.
8. Establish a judicial ombudsman.
9. The judiciary shall be public service oriented at all levels to increase public confidence.
10. Increase sanctions for lawyers.

11. Establish a judiciary information/education office whose duties include community outreach programs to educate the public about the judicial process.
12. Judiciary budget independent of the legislature.
13. Staff and smaller courtrooms more accessible to public via technology (for example, court procedures on public T.V., etc). Personal computer access to court records.

**GROUPS 8 AND 10: Milks/Radcliff and Martell/Oshiro**

Legislature:

1. Take selection of judges out of political process; shorten term of commissioners; shorten list of applicants.
2. Funding for "preventive" type programs as opposed to rehabilitation type.
3. Public education for ADR.

Supreme Court:

4. Reduce or eliminate memorandum opinion.
5. Summary judgement; change philosophy so it is easier to eliminate cases.
6. Rule change mandating earlier trial settlements.

University/Department of Education:

7. Develop college course in the business of judicial resolution.
8. College of ADR.
9. Courses for nonviolent dispute resolution.
10. Law school which teaches lawyers to be lawyers as opposed to thinking like lawyers.

Bar/Judge:

11. Shorten initial term of judges and longer successive terms.
12. Detached funding for judges--(entire judiciary budget) judicial salary commission--also judiciary's budget--maintain judiciary's independence by independent funding.
13. Annual administrative appraisals of judges.
14. Pay raises for judges. Minimum wage no less than \$150,000/yr.
15. Judge's qualification: "private practice" experience and "trial practice" experience .
16. Propose resolution judges (equal status).
17. Losing party pays costs of litigation (problem of equal access to courts if this were adopted).
18. Sabbatical leaves for judges.
19. Diverting cases to administrative system/specialty court.

Public/Society:

20. Raise pay of judges.
21. Teach legal system early demystify.

22. Teach ADR early.
23. ADR "academy."
24. Course on how to solve disputes early.

### **GROUP 11: Musto/Hayashi**

#### General discussion:

1. System needs to be more humane and accessible to all.
2. Justice (criminal) has become increasingly slow: must increase handling of cases; justice must be faster/swifter.
3. Importance of fairness (equal access).
4. Judicial system must have "legitimacy" in the eyes of its constituency.
5. Change should be incremental; work within present system.
6. Courts are too isolated (public isn't aware of court's decisions); judges must become more involved in community affairs but not compromise impartiality.
7. Increases in technology should not compromise legitimacy.
8. Person starts out with good behavior then behavior enters a zone where criminal justice system becomes involved. However, prior to the criminal system there were "stops" (that is, family, church, school, treatment) that would modify person's behavior. Today those have been removed and cause pressure for the criminal justice system.
9. Lack of public education about the courts and the legal system yet these people are being asked to assist in planning the future of the judiciary; if public was better educated, then pressure to change would be less.
10. Judiciary cannot change without changing all aspects of society.
11. Application of laws should be uniform to avoid chaos.
12. Judiciary should assure leadership role and design flexible plan for administering justice which includes public education partnership with the community; ways public comes into contact with the legal system: plaintiff; defendant; juror; witness.

#### Recommendations for the judiciary:

1. Flexibility in the outcome of the settlement--judges and decision makers should not be bound by the specific standards: child support formula; property divisions; criminal sentences.
2. Delay in rendering decision appellate decisions within 15 days of the trial decision. Limit the number of pages for the appellate decision.
3. Eliminate U.S. Department of Justice including federal courts, DEA, other law enforcement agencies which duplicate local law enforcement.
4. Custody decision to be made by a council (panel) rather than one person.
5. Simplify procedures: Encourage paraprofessionals; uncontested device--file document with bureau of conveyance.
6. Put truth back in the process modify the exclusionary rule standard to be truth rather than legal technicalities.
7. Punish behavior but do not exclude testimony at trial (cop can go to jail too).
8. White collar crime should be vigorously pursued and harsher sentence approved.

9. Application of affirmative action for those going to prison (quotas).
10. Direct assignment to a trial judge (eliminate master calendar).
11. More training: judges (learning to manage caseloads); all government employees; courts take leadership role in prevention (criminal antisocial behavior).
12. Judges as policy makers is a big mistake but policy makers should be lobbied by judges (judges should educate policy makers).
13. Judges are educators (schools, boards, community groups) time should be allocated for these tasks.
14. Judiciary should be involved as leaders from partnerships with community (schools, business, etc).

### **GROUP 12: Neubauer/Fukunaga**

#### Recommendations and Insights:

1. District Court-decriminalize
2. Anachronistic system--new ways to resolve disputes are needed.
3. Reassess court's role; more responsive to community; new approaches on judiciary, for example, culturally appropriate resolution forums.
4. Separate judiciary from legislature. Rule-making power exercised by courts.
5. Legislatively separate courts civil and criminal.
6. Change number of jurors or use pool (for example, out of 20 take 12).
7. Possibly use professional juries.
8. Use court system for serious offenses--non serious cases to use non-court methods.
9. Crimes versus property handled differently from serious crimes versus person.
10. Life-time terms for judges.
11. Redefine jurisdictions to include communities.
12. Upgrading standards for law school; for example, curriculum.
13. Legislature to adopt alternate codification of the common law--affordable and accessible to citizens.
14. Reevaluate punishment options; other than jail.
15. Abolish legislature. Require meeting every 10 years, for example.
16. Reduce cost of litigation; for example, eliminate punitive damages; no attorney's fees.
17. Specialized forums for high priority areas; for example, family law, environmental.
18. Reform discovery procedures; for example, turning over evidence informally.
19. Better court facilities especially in rural areas.
20. Early intervention by "social work" type individuals.
21. Police legal insurance program like medical insurance, for example, prepaid insurance.
22. Decentralized access, by telephone, etc.
23. Evaluation system for judges; judges evaluate lawyers-- provide feedback.
24. ADR: ADR education in law school; voluntary referral to ADR; education for courts, judges, lawyers; evaluate mandatory ADR; institute mandatory ADR; private settlements before court.
25. More experiments with dispute resolution methods to determine which is better.
26. Culturally appropriate dispute resolution forums: alternate culturally sensitive system to courts; cultural officers attached to court education; action to quiet title; more access;

- ADR options; reexamine Hawaii history for ideas to use currently and in future.
- 27. Streamlining: Single tier trial courts. No district courts.
- 28. No parole board.
- 29. Life terms for judges.
- 30. Legislature to separate courts into civil and criminal.
- 31. Limit number of jurors.
- 32. Greater high tech use.
- 33. Gramm Rudman (for example cap on prison sentencing).
- 34. One court system for only serious offense: non-serious to administrative forums.
- 35. No appeals from trial courts.
- 36. Education: gathering information from other states for example, national center; upgrading standards for law school.

### **GROUP 13 - Park/Nakea**

- 1. Civil losers pay cost of trial.
- 2. Presumptive use of mediation beyond family court.
- 3. Incentives and rewards for creativity within judiciary.
- 4. Legislature and judiciary--increased sensitivity to "heterogeneous cultures vs. American juries".
- 5. Increased representation of women minorities on bench and commissions.
- 6. Cultural ADR's "multi-door access."
- 7. Reduce judicial selection commission list to three.
- 8. Probationary period for judges of two to three years.
- 9. Eliminate circuit labeling.
- 10. Department of Education should include curriculum about legal system with consultation of judiciary.
- 11. Judiciary should establish two-track system where appropriate track: (1) american juries, (3) cultural juries. Lobby for enabling legislation (cultural statutes).
- 12. Accelerate judges/staff specialists for family court domestic and trouble problems.
- 13. Increase use of high tech to "accessibility of courts and reduce costs" (remote arr/plea/testimony) and functioning of court.
- 14. Judge sabbaticals to get in touch with "real world."
- 15. Establish judicial foresight commission.

### **GROUP 14: Paul/Shaw**

- 1. Use specialized courts.
- 2. Legal standing for certain endangered plants, and animals and/or
- 3. Supervised community service alternative to incarceration.
- 4. Emphasis on restitution restoration; protection of community and parties instead of emphasis on punishment.
- 5. More continuing education for judges and court personnel.
- 6. Build incentives, to attract and retain quality personnel and judges through, for example, sabbaticals.
- 7. Adopt techniques for earlier settlement.

8. Eliminate distinction among circuits/create one trial-level.
9. Improve access to judicial system and access to legal services.
10. Continuous meeting with congments of criminal justice system on ways to improve it?
11. Disincentives for "over lawyering".
12. Women in supreme court.
13. Gender balance on the bench.
14. Earlier dispute management.
15. Expand access to public legal resources.
16. Proliferation of forms. Product takes precedence over procedures.
17. Tell legislature and executive to unload executive responsibility on judiciary.
18. Explore new technologies to improve communication and to replace repetitive tasks, for example, clerking responsibilities.
19. Electronic filing/standardization of forms/paperless courts.
20. Assure public access to courts by all sectors.
21. Lawyer and litigant access through technology to court records.
22. Night court.
23. System engineering at the administration of the judiciary.
24. Hire implementers to studies and streamliners.
25. More entrepreneurs.
26. Greater opportunities for judiciary to engage in process orientated planning and policy decisions.
27. Incorporate improved working group structure to foresight commission function and progress.
28. Supportive measures by governor for institutionally nonofficial for forums for the execution of justice.

#### **GROUP 15: Schultz/Chillingworth**

1. Funding up for judiciary.
2. Judicial selection commission recommends only three.
3. Mandatory pro-bono for lawyers including arbitration.
4. Limit appeal routes in civil cases.
5. Community counselors in contested custody cases with no appeal.
6. Eliminate court appointed attorneys.
7. Increase court appointed attorneys.
8. Prerequisite for judges should be cross cultural training.
9. Automate judicial administration.
10. More special courts.
11. One trial court only.
12. Paperless court.
13. Public education with respect to judiciary functions.
14. Select chief justice by supreme court members.
15. Increase salaries for judges.
16. Take civil service out of judiciary.
17. One peremptory for trial judge.
18. Move ADR into court house.



19. Fewer jurors in jury trials.
20. Voir dire by judge.
21. More dialogue between judges and lawyers.
22. Judge's speaking for community groups.
23. Enhanced employment protection for jurors thru legislature.
24. Pay jurors more and employer pay.
25. Juries pool needs review re-mixed ethnicity (and gender).
26. Improve training for jurors and judges (ongoing).
27. Family court to facilitate pro se divorces and child support modifications.
28. Administrative proceedings for probate and divorce and traffic.
29. Tougher judges for shortened litigation process.
30. Judges instruct juries during case.
31. Mandatory continued legal education for negotiation and ethics.
32. Increase pay for court appointed attorney in cases.
33. Beefed up outer island police department and legal aid.
34. Offers of judgement expanded to allow by plaintiff and to encourage settlement.
35. Expand continued judicial education.
36. Expand teaching of dispute resolution in schools.
37. Graduation requirements for U.H. (law school?) to include ADR.
38. ADR on bar exam.
39. Sensitize judges to needs of private attorneys.
40. Enhanced priority in legislature to environment.
41. Expand office of disciplinary counsel.

#### **GROUP 16: Ling/Rodgers**

1. Change jury selection procedure especially length of time required for prospective jurors.
2. Subsidize law to make good law affordable.
3. Mandatory pro-bono.
4. Radical reform of legal fee structure.
5. Categorical vs. hierarchical promotional structure for judges.
6. Explanation by judges articulation/justification of decisions.
7. Media must be more responsible and accountable. Reporting of cases (less emphasis on polarization, dissent by media).
8. Education of media on decisions.
9. Explore other sentencing authorities (not just judges, that is, citizens, panel; family panel; church panels).
10. Judges follow past cases for sentencing for accountability and feedback.
11. Elect judges.
12. Continued support of judicial conference (judiciary and bar).
13. Judges' working sabbaticals in community.
14. Reexamine per diem judges procedures (maybe whole notion of per diem judges).
15. Outlaw contingency fees.
16. Limit discovery.
17. Civil cases: loser pays legal fees.
18. Mandatory pre-litigation information and education and information other alternatives (for

- clients).
19. Increased emphasis on ethics in law school.
  20. Mandatory law school training in: "Let's resolve instead of let's "sue."
  21. Judicial and lawyer evaluation.
  22. Demystify judiciary through following actions (A) broad-based public education on law/judiciary; (B) "nuts and bolts" (re: who to go to, etc.) education © multi-prong public education using attractive technologies; that is, video games); (D) information line w/dispatcher to different services (must be well-advertised) and (E) judges more accessible to public (that is, through working sabbaticals in community).
  23. Outlaw contingency fees?
  24. Mandatory pro bono work?
  25. In civil cases, loser pays all legal fees.
  26. Improve judicial information to public through (A) media more responsible and accountable, (B) articulation/justification of decisions by judges and, © education of media on processes/decisions.

### **GROUP 17: Tanabe/Levinson**

1. Three or fewer judicial nominees to appointing authority.
2. Biannual foresight congress with more nonlegal and broader based participants.
3. Appoint commission to review and simplify rules of court procedure.
4. Reassess basic concept of "rules" as it impacts upon "justice," incorporating concept of "aloha."
5. Shift as many civil disputes as possible into alternative resolution modes.
6. Judges to participate more actively in community to education the public re: judiciary process.
7. "Judicare" system of legal services insurance.
8. Expand law school curricula to include reassessment of fundamental assumptions regarding dispute resolution.
9. Department of Education and University of Hawaii system to develop curricula re: actual and potential legal systems.
10. Integrate ADR into bar exam.
11. Give judicial recognition to and application of concept of "aloha."

### **GROUP 18: Town/Simms**

1. Reduce adversarial system (wasteful and counter productive).
2. Reemphasize human/family role as a value.
3. Demystify judiciary, especially at appellate level.
4. Reexamine role/mission of judiciary.
5. Judges as facilitators.
6. Promote "lokahi."
7. Move citizen participation in annual judge conference.
8. Public education re: legal system and how/why it works.
9. Promote ADR by: Court discretion to mandate ADR.
10. Encourage public to seek ADR before filing.

11. Take traffic violations out of court.
12. Eliminate two-tier system.
13. More citizen participation in annual judicial conference.
14. Judicial conference needs broader perspective.
15. Flexibility in judiciary.
16. Redefine paradigms we hold about litigators/litigation (flexible, yet persuasive).
17. Formation of international science court.
18. Don't be afraid to try new approaches.
19. Public education re: legal system and how/why it works.
20. Return family problems to family service institutions/remove court and lawyer from family issues.
21. Take traffic violations out of court/administrative procedures.
22. Non-lawyer facilitators/lay reps where appropriate non-court forums.
23. Court has discretion to mandate mediation/ADR.
24. Litigators barred from court after set number of winning cases over set amount.
25. Build in incentives to settle cases and achieve win/win situations.
26. Lawyer have greater responsibility to society than zealous advocacy for one client.
27. Change in disciplinary rules to allow for use of mediation.
28. Encourage public to seek ADR prior to filing cases.
29. Eliminate access to "deep pockets."
30. Cap awards.
31. Revise contingency fee system.
32. Eliminate jury trials in civil cases.
33. Judicial retreats re: structure.

### **GROUP 19: Waldorf/Franzel**

1. System of legal education should encourage diversity: practical, emphasize pro bono, ADR should be taught.
2. Multi-cultural approach to education of lawyers.
3. Education for judges should include continuing legal education and a judge's school.
4. Specialization of judges is important (labor, etc).
5. Conflict resolution classes in early education.
6. Determine in an appropriate fashion what the real view is of the judicial system today "what is really happening" from attorneys/public/judge's view.
7. Determine how the courts can themselves reflect and meet the needs and desires of the public.
8. Determine whether decentralization of services is necessary at different stages to make services accessible. For example, voluntary ADR provided by attorneys.
9. Custody decision by a board in family court matters.
10. Judicial education through dispute resolution classes if excellent, special assignment? Also, sabbatical (paid) with mandatory education component. Also regular continuing education specialty education.
11. Attorney education: multi-cultural education (exposure); mandatory dispute resolution classes; (resolution orientation) in addition to advocacy skills; encourage pro bono and change pre-law education.

12. Public education in schools: conflict resolution classes and legal system awareness.
13. Increase public accessibility through (A) media to general public: information campaign (even through ad agency), (B) public visitation of courts and more judges in the community, © make it easier for pro se litigation? Or make it easier to get a lawyer (e.g. for lower income population).
14. Decentralize the institution itself.
15. Include judiciary in menu for the Ask 2000 system.
16. Investigate what, if any thing is broken? What is already in place versus what's needed.
17. Establish permanent commission with community base.

**GROUP 20: Yamashita/Barner**

1. Broad education campaign to educate re: alternatives for dispute resolution, including outside of judicial system litigation, arbitration, mediation and wide open other in community.
2. Electronic trials by judges on neighbor islands; eliminate geographic jurisdiction.
3. One level of trial judges only.
4. Six person jury, three "clones" of plaintiff, three "clones" of defendant (based on profession and social/economic characteristics majority decision.
5. Two judges decide case equally. One a law judge. One lay expert judge. Civil and criminal.
6. Three judge to nine judge panel for criminal and civil cases, including lay judges 1 no jury, no appeal.
7. In civil cases, no juries, judge has expert nonvoting advisor.
8. Before filing a case, public judiciary agency must have informed parties of all alternatives to litigation (before discovery).
9. Eliminate all paper in court procedures-all electronic.
10. Explanation by judge immediately after decision on how and why decision made. Made verbally and off record to the parties.
11. Mandatory jury duty, no excuse with full compensation.
12. Elimination of peremptory challenge in jury selection.
13. No jury in criminal cases, three judges enhance, must be unanimous.
14. "Blue ribbon" jury with minimum education requirements, serving repeatedly in criminal cases.
15. No appeals. One level of judges.
16. Training for judges: More on evidence.
17. Judge training--judge school as alternative to law school. Requirement post law school for master in judging probation (4 years) first for judges, then longer terms, 10 years psychological testing for suitability before entering law or judge school.
18. All judges must be part time.
19. All judges elected for 10 year terms.
20. Mandatory binding ADR for minor cases, civil and criminal.
21. Decriminalize all crimes not involving harm to persons.
22. Neighborhood boards become neighborhood ADR.
23. To avoid judge's conflict of interest: have not assets beyond salary: property interests of judge shall disqualify judge from certain cases.

24. Automatic annual incremental increases in judges' salary.
25. Administrative law judge system expanded, with no appeal beyond. Also elevate training requirements for administrative law judges concerning constitutional rights.
26. Courtrooms should be smaller, judge and parties sitting around table informally.
27. All trials televised.
28. Eliminate trial judges and juries, all disputes settled with public forum, electronic participation by all interested citizens.
29. All parties and witnesses, judges must take truth serums or other means/guarantees of truth (non-harmful or painful).
30. No contingent fees. Loser pays all, limited discovery.
31. Decisions should be satisfying to both parties (win-win situation).

## **BIOGRAPHICAL PROFILES: Program Participants**

**SHIRLEY S. ABRAHAMSON** has been Justice of the Wisconsin Supreme Court since 1976. She is the first woman to serve on the court. She earned an S.J.D. degree in American legal history from the University of Wisconsin Law School in 1962, a J.D. with high distinction from Indiana University in 1956, and an A.B. magna cum laude from New York University in 1953. She is the recipient of ten honorary doctor of law degrees. Justice Abrahamson serves on a number of boards, including the John D. and Catherine T. MacArthur Foundation Program of Research on Mental Health and the Law. She is a member of the Council of the American Law Institute.

**PETER S. ADLER** is Executive Director of the Hawaii Bar Foundation, a not-for-profit grantmaking organization, and Managing Director of the Accord Group, consultants in mediation, facilitation, and consensus building. He was formerly director of the State of Hawaii Judiciary's Center for Alternative Dispute Resolution (1985-1992) and executive director of the Neighborhood Justice Center of Honolulu (1979-1985). He received his Ph.D. in Sociology from the Union for Experimenting Colleges and Universities, Antioch University (1974), and his M.S. in Sociology from the University of Missouri (1970).

**AMEFIL (AMY) AGBAYANI** is Chair of the Hawaii Civil Rights Commission and Director of Minority Student Programs at the University of Hawaii at Manoa. She received her B.A. in Political Science from the University of the Philippines and her M.A. and Ph.D. in Political Science from the University of Hawaii at Manoa. She attended the 1990 summer institute for higher education administrators at Harvard, was an East-West Center grantee and received the 1989 Outstanding Community Service award from the Honolulu YWCA. Her work in the community and the university involves affirmative action for women and minorities, immigrant rights, educational opportunities for underrepresented groups, and Filipino culture and arts.

**PAUL DOUGLAS ALSTON** of Alston, Hunt, Floyd & Ing, has been in private practice for 16 years. Earlier, he was Litigation Director for the Legal Aid Society of Hawaii and Staff Attorney for the Model Cities Comprehensive Legal Services. In 1990-91, he was President of the Hawaii State Bar Association and from 1985-89, he was President of the Hawaii Bar Foundation. He has also been a trustee of the National Conference of Bar Foundations, a member of the American Arbitration Association, and has served as Hearing Panel Chairman of the Office of the Disciplinary Counsel for the Supreme Court of Hawaii. He was also a director of the Mental Health Association of Hawaii. Alston is a graduate of the University of Southern California Law Center in Los Angeles where he served as editor for the Southern California Law Review.

**CLEMENT BEZOLD** is Executive Director of the Institute for Alternative Futures and the President of Alternative Futures Associates. He works closely with state and local governments in their efforts to involve the public in strategic planning. He also has done extensive consulting with the private sector, including pharmaceutical companies, the legal profession, and the information industry. For several years he was visiting scholar at the Brookings Institute and

has taught at American University, University of Florida, and Antioch University. Dr. Bezold earned his Ph.D. in Political Science from the University of Florida where he served as Assistant Director of the Center for Governmental Responsibility. Author of numerous books and publications, his works include, among others, Anticipatory Democracy, Judging the Future, and The Future of Work and Health, and he has contributed to the recently released courts guidebook, Reinventing Courts for the 21st Century.

**ROBERT A. BOHRER** has been Professor of Law at California Western School of Law since 1982. He is the founder and Chairman of the Annual San Diego Biotechnology Conference and has chaired the San Diego Biotechnology Forum at California Western School of Law since 1986. Bohrer received his J.D. from the University of Illinois College of Law and a LL.M. from Harvard Law School. He is one of the first full-time law professors to concentrate on the emerging area of biotechnology law, regularly offering a seminar on biotechnology at California Western, and writing and lecturing widely on biotechnological issues. Bohrer is a founding member of the Board of the Biotechnology Institute at the United State Patent Office and chair of the Committee on Scientific and Technological Issues in Environmental Law for the ABA's Section on Science and Technology. A member of the Illinois Bar since 1974, he practiced with the Chicago firm of Bell, Boyd & Lloyd from 1974 to 1978.

**GEORGE CHAPLIN** was editor of the Honolulu Advertiser from 1958 to 1986, since serving as editor-at-large. Chaplin was one of the early Nieman Fellows at Harvard, is a past president of the American Society of Newspaper Editors. He is a member of the International Press Institute. He has been decorated by the by the governments of Japan, Israel and Italy. He is recipient of honorary doctorates from Clemson University, his alma mater, and Hawaii Loa College. He chaired the East-West Center Board of Governors, the Governor's Conference on the Year 2000, and the Governor's Advisory Council on Foreign Language and International Studies. He also co-founded the Coalition for a Drug-Free Hawaii. Currently, he is working on a biography of the 137-year old Advertiser.

**JOHN F. DAFFRON, JR.**, is Senior Judge of the Twelfth Judicial Circuit of Virginia. He was a former prosecutor, defense attorney, United States Magistrate and as a General District Judge. A member of the Judicial Council of Virginia and the Commission on the Future of Virginia's Judicial System, he was recognized by special resolution of the Virginia Legislature for "excellent work in and contributions to the betterment of our judicial system." He serves on the Judicial Administration Division Council of the American Bar Association. He has served as a faculty member or speaker for programs sponsored by the National Judicial College, the Institute for Court Management, the Federal Bureau of Investigation and the National Institute of Justice. He received a Presidential appointment and was confirmed by the Senate to the Board of Directors of the State Justice Institute.

**JAMES DATOR**, a Professor of Political Science at the University of Hawaii, is Director of the Hawaii Research Center for Futures Studies. He was advisor to the Hawaii State Commission on the Year 2000 and has been planning consultant to numerous state judiciaries including Hawaii, Virginia, Idaho, and Arizona. He has been a consultant with the American Bar Association, the National Institute of Law Enforcement and Criminal Justice, the Association of State Court Administrators, the New Jersey Bar, the American Judicature Society, and the

Board of the State Justice Institute. Internationally, he has been a consultant with judicial officials with Micronesia, Ponape, South Korea and the U.N. Far East Institute for the Prevention of Crime and Treatment of Offenders in Japan. He has written numerous publications in a variety of fields. His view on the future of the courts have been featured in Futurelaw, the ABA Journal, the National Law Journal and numerous local media sources.

**JOHAN GALTUNG** was the recipient of the Right Livelihood Award in 1987 (considered the "alternative Nobel" in Europe) "for his systematic and multidisciplinary study of the conditions which lead to peace." He has published over 50 books and more than 1,000 articles. He has held over 30 visiting professorships. After initial research as a mathematician, Galtung turned to the social sciences. In 1959 he set up the International Peace Research Institute in Oslo where in 1964 he founded the Journal of Peace Research. He has been a consultant for numerous United Nations agencies and has held faculty positions in international economics, world politics, civilizational studies, and international studies. Galtung's publications reflect his position as one of the founders of peace research. They range from the early Gandhi's Political Ethics in 1955, five volumes of Essays in Peace Research, The True Worlds, There Are Alternatives to his most recent books about Europe. Galtung has been actively engaged as a conflict resolution facilitator between North and South Korea, Israel and Palestine, and East and West Europe. He is professor of Peace Studies at the University of Hawaii during the spring terms from 1992-1996.

**M. KAY HARRIS** is an Associate Professor with the Department of Criminal Justice at Temple University. Before joining the Temple faculty in 1981, she served as Director of the Washington Office of the National Council on Crime and Delinquency. She previously held positions with the American Bar Association, the Unitarian Universalist Service Committee, and the U.S. Department of Justice; the Office of the U.S. Attorney General, the National Institute of Law Enforcement and Criminal Justice, and the Bureau of Prisons. She also served as Assistant Director of the National Advisory Commission on Criminal Justice Standards and Goals. Professor Harris holds a Master of Arts degree from the University of Chicago, School of Social Service Administration (1971) and a Bachelor of Arts Degree from the University of Kansas (1969).

**DANIEL G. HEELY** is currently a Circuit Court judge assuming the responsibilities of the Office of the Administrative Director of Hawaii's Courts. He was previously Senior Judge of the Family Court of the First Circuit. He graduated in philosophy from the University of Hawaii in 1970 and received his law degree from the University of Minnesota Law School in 1973. Judge Heely was appointed in 1984 as a District Family Court Judge and in 1985, he was appointed Circuit Court Judge and Criminal Administrative Judge. He is Chair of the Hawaii Board of Bar Examiners, the Juvenile Justice Interagency Board, and the Committee on the Evaluation of Per Diem Judges. He is also a member of the Judicial Council and the Committee of Judicial Administration, and serves on the Board of Directors of the Friends of the Judiciary History Center. He has published numerous articles on the administration of justice and law.

**SOHAIL INAYATULLAH** is a political scientist/futurist and was a consultant with the Hawaii Judiciary, where he edited the Judiciary Review, Justice Horizons.

**CHRISTOPHER BURR JONES** is an Assistant Professor of Political Science at Eastern



Oregon State College. He was formerly research associate with the Hawaii Research Center for Futures Studies, the Center for Development Studies, and the Social Science Research Institute of the University of Hawaii-Manoa. He has been research assistant with the Pacific International Center for High Technology and was a research collaborator with the Centro de Estudios Economicos y Sociales del Tercer Mundo in Mexico City. He recently authored Gaia Futures: Emerging Mythology and Politics of the Earth, and "Sea Level Rise: Assessing the Scientific Data." His recent media presentations include "What the Marshall Islands Can Do About Global Climate Change and Environment," "Hula in the 21st Century," and "Dreamtime: Visions of a Green World." He is a member of the American Political Science Association and the World Futures Studies Federation.

**GEORGE S. KANAHELE** is an international business consultant, author, lecturer and civic leader. Born and raised in Hawaii, he graduated from the Kamehameha Schools and received his Ph.D. from Cornell University. Kanahale is well-recognized for his work in entrepreneurship training and development in Asia and the Pacific. He was a former member of the Board of Governors of the East-West Center and Honorary Consul of the Republic of Indonesia in Hawaii. Kanahale is recipient of the Ellis Island Medal of Honor (1986) and was Minority Advocate for the Year (1982). He is author of Ku Kanaka--Stand Tall, A Search for Hawaiian Values.

**KARL E. KIM** is a faculty member of the Center of Korean Studies and an Assistant Professor of Urban and Regional Planning at the University of Hawaii at Manoa. He is also an Instructor for the Public Administration Program. He received his Ph.D. from the Massachusetts Institute of Technology. His primary research has been on transportation policy and he has published numerous studies in this area. He is on the editorial board of Korea Studies Journal and has lectured widely in Hawaii and the Pacific. He is a representative of the Governor's Highway Safety Council and chair of the Faculty Executive Committee, College of Arts and Sciences.

**SHUNICHI KIMURA** is a retired Circuit Court Judge of the Third Circuit who served in that capacity from 1974 through 1993. Prior to his appointment, Kimura was elected Mayor of the County of Hawaii for two terms in 1968 and 1972 and Chairman and Chief Executive Officer in 1964 and 1968. He had also previously been a Deputy Prosecuting Attorney for the City and County of Honolulu, a Deputy County Attorney for the County of Hawaii, and in private practice. He was a former member of the Board of Education and a member of the Task Force for the Governor's Conference on the Year 2000.

**KEM LOWRY** is a Professor of the Department of Urban and Regional Planning at the University of Hawaii at Manoa. He has been a visiting scholar at the Institute for International Relations and Development in Asia, Sophia University, Tokyo; visiting faculty at the Department of City and Regional Planning, University of North Carolina; and a fellow at the Marine Policy Program, Woods Hole Oceanographic Institution. He has published articles in journals such as American Planning Association Journal, Urban Law Annual, Publius, Environmental Impact Assessment Review, and Policy Studies Review. He has served as a consultant to the U.N. Development Planning Agency, the U.S. Agency for International Development, the U.S. Congress Office of Technology Assessment, and several state agencies in Hawaii. He is a mediator, a member of the Advisory Board of the Center for Alternative Dispute Resolution, and

a member of the Executive Board of the UH Program on Conflict Resolution. From 1966 to 1969, he was a Peace Corps volunteer in Sarawak, Malaysia.

**ARLENE LUM** is a former publisher of the Honolulu Star-Bulletin, a fifth-generation Hawaii Chinese. She has worked as a journalist for Seventeen Magazine, the Honolulu Star-Bulletin, and Gannett News Service. Recently she was editor of Sailing the Sun, a book celebrating the bicentenary of the arrival of the Chinese in Hawaii. She is member of the Board of Directors of the Aloha United Way, St. Francis Center Lay Advisors, Hawaiian Historical Society, Hospice Hawaii and the YWCA. She is a member of numerous organizations including the Asian-American Journalists Association, Chamber of Commerce of Hawaii, Hawaii Publishers Association, Japan-Hawaii Economic Council, and the Pacific and Asian Affairs Council.

**HERMAN LUM**, former Chief Justice of the Supreme Court of Hawaii, was admitted to the Hawaii Bar in 1950. He began his career as an Assistant Public Prosecutor that year. He has been the Chief Attorney to the House of Representatives, the Chief Clerk to the House of Representatives, and a United State Attorney for the District of Hawaii. In 1967 he was appointed to become a Circuit Court Judge, in 1971 Senior Judge of the Family Court, in 1980 an Associate Justice, and from 1983 through 1993, Chief Justice. He is chair of numerous organizations, a member of the Conference of Chief Justices, and a trustee of Hawaii Loa College. Among other awards, Chief Justice Lum is a recipient of the Herbert Harley Award from the American Judicature Society (1988).

**AH QUON McELRATH** is a child of immigrant Chinese parents. She was educated in the public schools of Hawaii and at the University of Hawaii. She did graduate work at the University of Michigan where she received honors in Anthropology. She was employed by the ILWU for twenty-five years as a social worker. She has volunteered for the Aloha United Way, was Director of the Schutter Foundation, and worked in Washington, D.C., on elderly issues for private non-profit organizations. She also worked in the Office of Economic Opportunity in Alabama in 1966.

**LAWRENCE S. OKINAGA** is a partner with Carlsmith, Ball, Wichman, Murray, Case, Mukai and Ichiki. He was a member of the Federal Savings and Loan Advisory Council to the Federal Home Loan Bank Board and vice chairman and member of the Consumer Advisory Council to the Board of Governors of the Federal Reserve System. He has also served as chairman of the Hawaii Judicial Selection Commission, as well as a member and past vice-chairman. He is now a member of the Commission on Judicial Conduct. He is presently a member of the Board of Directors and Vice-President of the American Judicature Society and a member of the Georgetown Law Alumni Board. He was law clerk for Chief Judge Martin Pence of the U.S. District Court. He earned his J.D. from the Georgetown University Law Center where he was Editor-In-Chief of Law and Policy in International Business.

**GREGORY G. Y. PAI** is the Special Assistant to the Governor for Economic Affairs. Pai graduated from the University of Hawaii in 1967 and spent three years with the Peace Corps in Korea. He completed his Master of Architecture degree from Harvard University and Ph.D. in Urban and Regional Planning from the Massachusetts Institute of Technology in 1979. Previously, he served a Vice President and Chief Economist for the First Hawaiian Bank.

Earlier he worked as an economist for the Bureau of Economic Analysis, U.S. Department of Commerce in Washington D.C. Pai served as President of the Hawaii Korean Chamber of Commerce and the American Statistical Association Hawaii Chapter. He is also an Affiliate Faculty Member in the College of Business Administration at the University of Hawaii at Manoa and sits on the Advisory Board of the Kapiolani Community College.

**ILIMA A. PIIANAIA** is Deputy Director of the State of Hawaii's Department of Agriculture. Prior to that, she was Director of the State of Hawaii's Office of International Affairs where she was responsible for coordinating and developing an overall strategy for international activities for the State of Hawaii. She has also served as Chairperson of the Hawaiian Homes Commission as well as worked for the Hawaii Community Development Authority. In addition to being a practicing planner, Ms. Piianaia has taught planning and geography at both the Manoa and Hilo campuses of the University of Hawaii. She holds degrees from the University of Michigan and the University of Hawaii at Manoa where she is a doctoral candidate in Geography.

**SHARON RODGERS** is an independent futures researcher in England. She was formerly with the Hawaii Research Center for Futures Studies. She is co-author of State Court Futures and has done extensive research on cross-cultural mediation.

**WENDY L. SCHULTZ** is currently a Research Associate at the Social Science Research Institute of the University of Hawaii. Her most recent work includes facilitating foresight workshops for the Foreign Service Institute and for the State of Hawaii Department of Health, and contributing to the draft Hawaii Ocean Resource Management Plan. She received her doctorate from the University of Hawaii in Political Science and has done extensive lecturing and research on court visioning and planning.

**VITA TANIELU** has been a special consultant for the Samoan Language and Culture Program at the University of Hawaii for the past 14 years. He is the Media Specialist and Outreach and Liaison Officer for the federally-funded Samoan Service Provider's Association. He produces and directs a weekly Samoan radio program on KNDI radio station on Sunday nights. He also holds an historical Royal High Chief title, Fepulea'i from Western Samoa.

**DAVID I. TEVELIN** was appointed Executive Director of the State Justice Institute in January 1987. Tevelin was formerly Deputy General Counsel of the United States Sentencing Commission and prior to that served as Associate General Counsel for the Office of Justice Programs of the United States Department of Justice. He was instrumental in the passage of the Victim of Crimes Act of 1984 and has considerable experience in the administration of Federal grant programs. Tevelin is a member of the District of Columbia Bar and the American Bar Association. He earned his B.A. and J.D. degrees from George Washington University.

**BAMBI E. WEIL** is a Circuit Court judge in the First Circuit of the State of Hawaii. She is a 1980 graduate of the University of Hawaii's William S. Richardson School of Law, where she was editor-in-chief of the law review. She completed a clerkship for the Hawaii Supreme Court and thereafter practiced labor law and personal injury litigation. In 1987 Chief Justice Lum appointed her to the Honolulu District Court bench. Weil is a former Honolulu television news

reporter.

**FRANCES Q.F. WONG** is a Circuit Court judge in the First Circuit of the State of Hawaii and is currently serving as the Senior Judge of the Family Court. She obtained her Juris Doctor from the University of Southern California Law Center in 1977 and her Baccalaureate Degree in special education from the University of Hawaii in 1973. Prior to her appointment to the bench, Judge Wong was in private practice, practicing primarily in the area of corporate law. Wong is presently serving as a member of the Attorneys and Judges Assistance Program Board (a program offering assistance to attorneys impaired by substance abuse and/or mental health problems) and is serving on the Judiciary committee charged with drafting a policy regarding AIDS. She is also a member of the Board of Directors for the Hawaii State Trial Judges Association.

**ERIC KEN YAMAMOTO** is currently Professor of Law at the William S. Richardson School of Law. He was an attorney with Case, Kay and Lynch from 1978 to 1983. He has published law review articles in journals such as the University of Hawaii Law Review, the Harvard Civil Rights-Civil Liberties Law Review, and the Santa Clara Law Review as well as other journals such as Court Review. He is presently on the Board of Directors for the Legal Aid Society of Hawaii, Advocates of Public Interest Law, the University Council, Spark M. Matsunaga Peace Institute and the Native Hawaiian Legal Corporation. He also serves as an arbitrator for the State of Hawaii Judiciary's Court-Annexed Arbitration Program.

**PATRICK K.S.L. YIM** graduated from the University of Hawaii in 1964 and from Boston University's School of Law in the spring of 1967. After a year as a field attorney with the National Labor Relations Board in San Francisco, Judge Yim returned to Hawaii and served as a Deputy Prosecuting Attorney with the City and County of Honolulu until February of 1981. He then became a Referee with the Family Court of the First Circuit. Since then he has served as a District Family Judge and was appointed in 1984 as a Circuit Court judge where he now serves.

**FRANCES KAHN ZEMANS** is Executive Vice President and Director of the American Judicature Society. Before joining the American Judicature Society, she taught political science at the University of Chicago and conducted research on the legal profession and the judicial system at the American Bar Foundation. Her publications include The Making of a Public Profession as well as articles in numerous journals including The American Political Science Review, Law and Contemporary Problems, and Law and Policy Quarterly. She recently served as a member of the Illinois Judicial Inquiry Board. Zemans received her Ph.D in Political Science from Northwestern University.

## CONFERENCE FACILITATORS AND RECORDERS

### Facilitators

James S. Burns  
Leland Chang  
Lester E. Cingcade  
Helen Gillmor  
Thomas K. Kaulukukui, Jr.  
Nathan Kim  
Robert Klein  
Kenneth K. M. Ling  
Linda Martell  
Matt Matsunaga  
Marie N. Milks  
J. N. Musto  
Deane Neubauer  
Patricia Kim Park  
James T. Paul  
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## ABOUT THE EDITOR

**SOHAIL INAYATULLAH** is currently a Research Fellow at The Communication Center, Queensland University of Technology, Box 2434, Brisbane Q 4001, Australia. From 1981 through 1991 he was a Futures Researcher in the Office of Planning and Statistics of the Hawaii Judiciary. He is on the editorial board of Futures, member of the World Futures Studies Federation, and author of over 40 articles in various professional journals. He recently guest edited two special issues of Futures Research Quarterly on the futures of state courts. Inayatullah has forthcoming books on macrohistory, the futures of South Asia, and comparative social theory.