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# A DECADE OF FORECASTING: SOME PERSPECTIVES ON FUTURES RESEARCH IN THE HAWAII JUDICIARY

by

Sohail Inayatullah and James Monma

## INTRODUCTION

Forecasting, strategic planning, environmental scanning and other similar activities associated with the futures field have in the past decade found an unusually receptive home in the State of Hawaii Judiciary.

Futures research emerged from the Courts' comprehensive planning efforts. Specifically, its role was to develop a proactive, anticipatory model of policy-making. The method used to futurize the courts in these early years was that of emerging issues analysis. With various political changes, other techniques including trend analysis, information scanning, and caseload forecasting were successfully (and at times unsuccessfully) utilized. Initial papers, describing in depth the issues generated by the process, attempted to come to terms with the politics of futures research, largely the perennial conflict between short-term management needs and the long-term, often disruptive, visioning of futures research. At that time we concluded that if comprehensive planning could go beyond rhetoric and actually impact organizational decision-making, it may well become as important a development as court unification was in the 1960s. However, the politics of planning and shifts of power and authority that are part of any bureaucracy have not led to the change in behavior that planners and futurists might have desired. Nonetheless, the futures program continues to experiment and inject an alternative perspective to policy-making in Hawaii government.

In the overview which follows, we will briefly address the following areas directly and indirectly: 1) the justification of futures studies in the courts, 2) the various methodologies used in making the future intelligible, 3) problems that have emerged in the use of

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futures studies, 4) various responses to these problems at political and institutional levels, 5) useful products that have resulted from the decade, 6) not so useful products, 7) futures and institutions generally, and 8) of course the politics of futures research.

## HISTORY

After a series of judicial conferences in the 1970s, the Hawaii Courts, spurred by Federal government grants, initiated a problem-oriented planning process. The results of this orientation merely shrank the time horizon such that, instead of a discussion of visions and purposes, high level planning conferences discussed day-to-day problems such as parking. Problem solving simply reinscribed the present into the future making the present all-pervasive and hence unsolvable.

Dissatisfaction with this approach led to a comprehensive planning project in 1979 that was concerned with fundamental missions, present problems and their prioritization, as well as future goals and alternative social environments that contextualized these goals. Finally, this planning approach placed the Judiciary in a new historical/ontological context arguing that it was composed of five dimensions: a government branch, a dispute resolution forum, a public agency/bureaucracy, a subsystem of the larger legal/criminal justice system, and an institution in a changing society.

This fifth dimension with its accompanying mission of anticipating and responding to the changing judicial needs of the public served as the overall justification for the various futures research efforts. Once the Judiciary's mission became that of *anticipating* future needs, then methodologies to do this were necessary. Moreover, experts to create and monitor this information were required. While finding justification through an organizational structure certainly bureaucratized the futures function, it forced the research program to negotiate the world of local politics, and thus allowed it greater durability than if it had been simply the inspiration of a particular administrator, justice commission or the one-shot consultant model of futures research.

## THE ARGUMENT FOR FUTURES RESEARCH

The argument used at the Judiciary has been that an institution concerned only with replicating its past behavior is unlikely to survive the changes of the future. Institutions, therefore, need to forecast their futures *and* articulate their own preferred future. According to Chief Justice Harlan Fiske Stone, Justice Benjamin Cardozo, among others, believed that the law must draw its vitality from life rather than precedence and that "the judge must be historian and prophet all in one". He saw in the judicial function the opportunity to practice that creative art by which law is molded to fulfill the needs of a changing social order (Schwartz, p. 201). Judges

and administrators need to show leadership that goes beyond simple management. Unfortunately and historically (for various structural reasons), most administrators are accustomed to informal "muddling through" or problem-solving decision-making modes. Indeed, it is difficult to convince an administrator that the issues of tomorrow are more important than, or of equal importance to, those of today.

The Hawaii Judiciary was fortunate to have at the time an Administrative Director who not only saw the need to inject a culture of innovation and critical thought in middle management, but who also desired to develop a layer in the system that was concerned with not only the larger vision, the larger project, but also that of employees learning about themselves and the world; and that of creating generalists within the organization who could steer it when his age-cohort retired.

From this experience it appears that one of the necessary conditions of a successful futures program is that the organization has already achieved some level of institutional excellence and recognition. The institution must be searching for new ways to construct the world, new organizational and, more importantly, intellectual challenges. Without this desire, even when planning of futures is used, the institution remains within the bureaucratic or political behavior model. Planning of futures is used as an exercise to increase efficiency or to placate a funding body.

In the case of the Hawaii Judiciary, by 1980 the Courts had achieved the three goals they had set out for themselves in the 1960s: those of administrative unification, independence (a separate personnel and budget system from the executive) and national recognition. They then were ready to reshape their future. Significantly, they also saw that societal conditions were becoming increasingly difficult to interpret—the legislature, the economy, the prosecutor's office, the local legal climate all were undergoing a variety of changes which prompted the courts to experiment with futures studies. Unfortunately, as with most bureaucracies, much of the interest in using planning and futures studies was (and remains) partially symbolic in showing the world that modernity has been achieved.

## METHODOLOGY

The initial forecasting effort of futures studies in the Hawaii Judiciary was *emerging issues analysis*. This project was chosen as the issues identified were intellectually challenging and mind-expanding. They forced individuals to rethink their present worldview inasmuch as issues chosen created a distance from the present. For example, the emerging issue, the rights of robots, forced people to rethink the "naturalness" of rights as well as injecting a "politics" into contemporary notions of technology as value-

free. Moreover, early issue identification provides lead time for the courts in preparing for a deluge of new cases arising from the intersections of social and technological space. For example, robotic and computer technologies will expand case volume and case complexity and make court management even more arduous. At the same time, robots and computers (for efficiency and for sentencing) will help in resolving new system demands in the near future.

After the initial years of concentrating on emerging issues analysis, there was a sense among administrators and those involved in the futures project that information more relevant to operational and political needs was required. Thus, we—planners and futurists in the Office of Planning—developed a *trend analysis program* which attempted to merge qualitative trends such as alternative futures for a particular judicial circuit, for example, Maui, with statistical trends such as population, unemployment, and attorney levels. After a series of well-received trend reports (*The Future of Attorneys*, *The Future of Mediation*, *The Future of the Family and Family Court*, *The Future of Kona, Hawaii*), the program began to merge the long-term (emerging issues analysis) with the medium-term (trend analysis) and the short-term (quantitatively oriented research findings) in the newly created futures newsletter, *Nu Hou Kanawai: Justice Horizons*. Eventually, these efforts were useful in the various strategic planning projects for the entire Judiciary as well as for the various programs (family court, district court) that were initiated by the new administration in the late 1980s.

The goal behind these efforts was to aid in articulating a new vision for the courts; provide management with better and timely information so as to enhance decision-making; train middle management to be generalists and go beyond problem solving and towards predicting and creating. In addition, the aim of futures studies was to provide judges with salient, but relatively unknown, information on new legal developments such as artificial intelligence, "brain drugs," genetic engineering and new areas of caseload increase so as to raise their awareness as to the type of legal problems and new contexts that would frame their decision-making in the future. Eventually the program hoped to encourage the Legislature to pass resolutions or enact laws related to emerging issues and finally to develop pilot programs within the courts, such as mediation and electronic monitoring for certain offenses.

#### *Emerging Issues Analysis*

We now move from the historical gloss of futures in the courts and the politics that emerged from this process to focus and comment on the methodologies used to forecast.

Emerging issues analysis—the technique we began with and still use now to some extent—was developed by futurist Graham Molitor and further refined for the judicial legal context by James Dator of the University of Hawaii. This technique is primarily con-

cerned with issues that very few of us are aware of and which may have a large and, perhaps, fundamental impact on the institution in question. Trend analysis, on the other hand, is more concerned with researching issues that have already developed such that a clear recognizable pattern has emerged.

To discover these issues and trends, it was necessary for researchers to scan a variety of journals and other information sources. The rationale behind scanning derives from research which hypothesizes that problems tend to develop in patterns, typically an S-curve shape, thus making them possible to forecast. The pattern can be divided into three phases: emergent, takeoff, peak and decline. Emerging issues are those at the first phase, trends at the second, and problems at the third.

Further, issues could be identified by searching for anomalies—new perceptions, new paradigms, new ways of thinking from individuals, groups, and areas of the world which presently have little intellectual credibility. One can also identify issues by developing expertise in a particular area and then learn how to recognize what is controversial, what doesn't fit, what challenges the old paradigms. One can also examine various types of conflicts and see what issues might emerge. For example, the increasing importance of the Pacific, and conflicts emerging from the rise of Japan and the decline of the US, might result in the need for mediation and arbitration centers in the Pacific—in Hawaii, potentially.

One can also identify key issues by extrapolating far into the future in hopes of locating discontinuities. Research reports written for the Chief Justice included an analysis of questions: for instance, if case filings and backlog continue at a high rate, when will the Courts collapse? Or, if public approval drops every year by 10%, what will happen to the legitimacy of the Courts?

#### *Caseload Forecasting*

The caseload forecasting dimension of futures research functioned on two basic levels: linear regression projections which used the past to predict the future; and multiple regression, which used multiple variables such as population, number of attorneys and unemployment. Both methods are largely quantitative with a mid-range of two to ten years. Specifically, linear regression was used to answer questions such as, how many judges will we need in the future? If judge productivity continues at this rate, what will backlog be like in the year 2000? What are the policy alternatives given various assumptions of funding, available judgeships, judge productivity, and level of automation?

The ability of these methods to justify new judgeships, increased judicial salaries, and program budgets served to legitimize the futures program to administrators and judges who questioned the need for futurists when they were perhaps having an arduous time obtaining an additional clerk.

### *Scenarios*

In addition to linear and multiple regression, futures researchers also used scenarios or stories of a projected series of events and trends. For example, various societal scenarios were applied such as continued growth, green/socialism, Hawaiian sovereignty, and economic collapse or decline. From these scenarios, we inferred how the legal system in general and the courts in specific would be impacted.

Besides societal scenarios, futures studies have also utilized Judiciary-generated scenarios in research reports. In one project, three case scenarios were developed for the following patterns: 1) High Growth (Judiciary grows by 10% in terms of budget, caseload, personnel); 2) Negative Growth (Judiciary budget reduced by 5% yearly due to reduced State funds or increased monitoring by the Legislature); 3) Growth Continues as Before.

These scenarios opened the possibility for specific policy recommendations, for instance: which programs to emphasize and which to cut. While no policy decisions directly emerged from our scenario development, the exercise did clarify various alternatives. Scenario writing, thus, served as a useful educational heuristic.

### *Legal Analysis*

Initially (1981-1984) the futures program encompassed a legal analysis component. This was first accomplished by including attorneys in the Courts' emerging issues committee. Subsequently, law interns were utilized to examine the legal implications of selected emerging issues on the legal system: specifically, the impact of these issues on the administration of justice; legal problems that these issues may raise; precedents or guidelines that the courts may use if and when these issues become a legal case; the impact of court decisions on the maturation of emerging issues; and new laws that these issues may create. A research report on the legal implications of brain drugs emerged from this effort to bring together law interns from the University of Hawaii law school and the Judiciary. Unfortunately, this project died quickly for financial, bureaucratic and, most significantly, epistemological reasons—the idea of applying precedent to the future was nonsensical to those trained in the legal discourse.

### *Information Scanning*

As mentioned earlier, the Judiciary futures program in 1983 developed a scanning mechanism whose end-product was a newsletter sent to all state judges and administrators as well as interested institutes and agencies. Through scanning various journals, issues and trends as well as empirical research findings were identified and then used for speeches by justices and judges, legislative requests, and special trends papers. The newsletter, which is now titled *Justice Horizons: Nu Hou Kanawai*, again due to the politics of the immediate, was on hold, but recently the addition of a desktop

publishing system has once again propelled the scanning of the horizon in search of the future. While previous issues focused on new technologies and their anticipated impact on the law, we have begun a new category titled "social theory" which attempts to relocate issues within a critical perspective drawing on Continental and Asian philosophical traditions.

## BASIC RESEARCH PROBLEMS

In doing caseload forecasts, or any research in futures studies, there exist many inherent problems. From the empirical/behavioral scientific perspective, futures studies are "soft" as data do not exist about the future. This proves to be somewhat problematic in an institution like the Judiciary which is constantly forced to justify its existence to the media/legislature on quantitative/empirical grounds. To those in the administration as well, the future does not exist, it is but a dream, an illusion, a *subjective* (in the negative, not hermeneutic, sense of the word) interpretation. What is needed are "hard" facts about the future; what is needed is certainty, predictability! Too, scenarios and emerging issues are considered normative and, consequently, not credible.

This tension between the need for one truth and the alternative possibilities of truth that futurists give has led to numerous criticisms. In the past decade there have been marked periods where futures research in general was seen as unnecessary information for the Judiciary. This was particularly the case when the administrator who founded the futures program left the courts in 1985. It took planners and futurists exhaustive effort to convince the new administrators of the necessity of long-range alternative futures planning. This was especially so as it coincided with a larger crisis of legitimacy with respect to local political conditions (the rise of Republicanism, criticism of the Judiciary for too much growth and for various improper lobbying techniques). Initially, the reaction from the new administration was, all too often, "Who needs the information anyway? I have too many problems already, I don't need to know future problems. In any case, the organization is already working day to day, I just need better staff and more money". This type of mentality tended to retard immensely the efficacy of futures research.

### *Epistemological Problems*

Futures research is also hindered by a realization of its own limitations. Many of the reasons expounded by decision makers to discredit futures studies in the Judiciary are ones which futurists themselves try to grapple with. Areas of concern include inaccuracy of forecasts and/or predictions, not enough historical data, and identified issues which are too "far out" to be of interest to decision makers, for instance, Hawaiian Sovereignty, or the Rights of Robots. While some of these reasons can be directly attributable to



the "softness" of futures studies, others simply reflect the mind set of decision makers (the search for information that would increase their bureaucratic and personal power and prestige) and their lack of foresight.

In addition there is, of course, the problem of too much information. Management often wants one vision, one plan, instead of a multiplicity of alternatives and futures. Futurists, knowing the unpredictability of the future, try to include as much information as possible, among other reasons, so as to cover their predictions. This is especially so for management teams which privilege the bureaucratic and political ways of knowing and doing over the educational perspective.

Furthermore, futures studies, especially emerging issues analysis, tends to be long-term, while organizations need short-term budgetary type information. Offices are organized in anticipation of the short-term, day-to-day problems. Futures information often makes little sense to accountants as they have organized their administrative agendas and personal worlds to exclude the visionary, the sense of possibilities, and unlikely dramatic events and issues. The goal of bureaucracy or corpocracy is to domesticate and tame time; to make time itself predictable and routine, such that through its control, profits and other goals can be maximized. Futures research which makes time problematic and, for example, argues that the CEO must exist not in moment-to-moment time, but in mythic (at best) long-term, thirty years (at least) time, clashes directly with most corporate and bureaucratic cultures.

#### *Institutional Problems*

Moreover, the perspective of futures research is problematic not only on the management level and at the level of court bureaucracy, but especially and significantly at the level of structure of law itself. Law is incremental, inefficient, and reactive. Attorneys and judges are trained in the facts, in that which is immediately relevant; consciousness-raising is a foreign word to them. In addition, many judges believe that their role is simply to interpret the law, not to shape or create public policy, for that is the role of the Legislature.

In addition, judges are threatened by the increasing importance of administrators in managing the courts. They see themselves as leaders and managers, as change agents. They resist planning and futurizing efforts from professional administrators, understanding them to be a way of shifting power in the organization from the judicial/legal discourse to the bureaucratic/administrative discourse. From the critical futures perspective, law supports the status quo and efforts to change this are resisted through the professional monopoly that lawyers enjoy, and through the power relationships and structures within the Judiciary and at the level of language (legal language is often used to mystify power relationships).

Indeed, many of the most valuable issues are those that institu-

tions are unwilling to hear; for example, one startling paper argued that the Hawaii Judiciary would collapse. Using a mixture of emerging issues, trend analysis, caseload forecasting and scenarios, it was postulated that, due to a declining image, a challenge of legitimacy, caseload increases, and fiscal crises, the courts might conceptually collapse. Indeed, after the shift from the administration of the 1960s to the middle 1980s, the courts did nearly collapse. The all-too-near-the-truth nature of this paper and the resultant cognitive dissonance—"we are at our peak in expansion, our goals have been met, thus how can we collapse?"—led this paper to become yet another dusty future to be.

Even in circumstances where futures research proves to be invaluable, the politics of decision-making is ever present. For example, while forecasts for determining judgeship creation or the need to raise judges' salaries may be useful for official justification, actual legislative decisions are often based on 1) needs of the legislature or the special interests of a legislator, 2) fiscal condition of the State, 3) personal ties with the Governor, 4) rapport with legislatures (what have you done for me lately?) and other nontechnical political considerations. Unfortunately, the futurist or the planner/policy analyst might often see his or her work as quite secondary to the real issue at hand: lobbying.

#### *History of the Present*

As mentioned earlier, there have been different phases in the use/non-use of futures research. At the outset, in the first few years, the goals of the futures program coincided at some points with the goals of the administration. The futures program stressed the need for structural changes in the courts ranging from new types of courts to efforts to increase participation among employees. While there was often bureaucratic resistance, a culture of critical and creative thought and dialog was in the process of creation. This is not to say that the context of futures was apolitical or that there were no significant problems. Futurists and planners recognized that their plans were gaining only symbolic acceptance. In fact, there was little change in the informal planning process or redistribution of power. Still, in general, there was faith in the leadership and a sense among planners and futurists to "do the best possible job" and see if over the long-run the bureaucracy could be changed or function more effectively. We, perhaps naively, defined this as meeting the needs of management.

However, by 1985 the organizational culture within the bureaucracy became increasingly politicized and polarized. In this context, meeting the needs of management became increasingly problematic especially as there was a perception that the administration needs futures and planning not for the public good, but pathologically for its own sake: in other words, to increase control of the social/legal environment, and thus increase power and centralization

through "better" and "quicker" information. But this, of course, is a problem with perhaps all futures research. A consultant working as a futurist with a transnational drug company hopes that she or he is giving the company new ways to organize itself and to see its mission; by, for example, providing visions and strategies that do not include the exploitation of the third world. But the actual corporate desire for futures research could simply be for alternative more efficient methods to domesticate time and commodify people. While the pressures of the world market create these conditions for the private sector, the public sector has its own structural pressures—funding, personal or office status wars, and so forth.

In addition, there exists the natural tension between the long-term and short-term, the problem solvers and the visionaries, given the present institutional structures. As futurists we have tried to remain true to our mission as we envision it, and at the same time attempt to meet the needs of administrators, hoping to educate them (and ourselves) into the long-term, and to alternative organizational structures and politics. In the mid-1980s, this meant an increased emphasis on caseload forecasting, on justification for judges and buildings. In general, we have used futures studies to solve present problems as much as possible: for example, by developing politically oriented strategic scenarios for the Legislature in terms of political alignments between the parties and between the branches of government. The short-term projects have also justified the increasing cost of the futures program as researchers move from intern status to professional consultant/state civil service status. At the outset there were three part-time interns and at present the futures group consists of three futurist/planners in the Judiciary's Planning and Statistics Office.

#### *Strategic Planning as a Solution*

Finally, the most successful way of solving some of the problems that futures studies have encountered has been to use the information of futures studies as input into the Judiciary Strategic Plan and other organizational plans: in other words, a futures perspective that explores alternative environments. The planning component then articulates which is feasible and which is preferred. At present, the draft Judiciary Plan has sections on 1) caseload demands, 2) the rise of the Pacific Rim and the impact on law and Hawaii, 3) the impact of social science methodologies, 4) the development of new technologies: automation, brain drugs, computers, electronic monitors, artificial intelligence (legal reasoning expert systems), 5) public disapproval of the courts, 6) the growing interdependence of the legal system, and 7) government delegitimacy, to mention a few. Moreover, it attempts to set a vision for the courts that has its basis in Pacific-globalism; employee interaction and participation within the courts; and efficiency through automation and reorganization.

The strategic plan developed for the Family Court uses alternative visions of the future as its starting point. Specifically, it investigates: the rise of new socialist/spiritual movements; an economic depression; a high-tech Pacific Rim culture; and, a continuation of the present. In addition, at the level of the family court itself, the plan explores the consequences if the court became totally adjudication-oriented; if it became entirely social services-oriented; and, if it ceased to exist. In addition, trends such as the decline in juvenile population (the family court's main client) and the rise of the elderly were explored. Among questions raised were: should the family court change its emphasis to the elderly? should there be an elderly court? The Family Court conference, by mixing the long- and the short-term, managed to play both a bureaucratic role (a plan of who does what and by when) and an educational role (things to think about).

Therefore, there has been a great deal of acceptance of futures in terms of organizational self-image. However, there remains the tension between the need for organizations to predict and thus control the future, and the vision of futures studies to anticipate alternative futures and to encourage the democratic design of a purposeful future. Notwithstanding the example of the Family Court planning project, on the whole, the Judiciary futures research program has found itself constantly attempting to address the bureaucratic needs of the administration and the strategic-political needs of various justices and managers, often at the expense of the educational purposes of futures studies.

## SOME RESEARCH PRODUCTS

In the years that the Judiciary has used futures studies, numerous undertakings involving various trends and issues have been developed. While some of these issues and trends have not materialized as expected, there were episodes where issues and trends have emerged and proved to be useful to the Hawaii Judiciary.

One issue paper called *Brain Drugs* explored new drugs that mimic natural brain chemicals which may increase memory, cause incredible pleasure as well as induce awesome pain, and control many behaviors. The legal analysis of this issue examined the use of these drugs in corrections as well as individual/State right's issues. Issues related to this have included electronic monitoring and other forms of punishment. Significantly, the Adult Probation division is researching this area and lobbying for funds for electronic monitoring. However, no legislation, or resolutions, have yet been sought to monitor or encourage these brain drugs.

Reports dealing with the future of Kona, Maui and other circuits have attempted to forecast future caseload, ethnicity composition, crime rates, and recently determine where construction of new courts should be located based on these projections. A paper of