

Futures Research in the Hawaii Judiciary: An Overview

by Sohail Inayatullah

The Judiciary of the State of Hawaii has been experimenting since 1980 with futures research as a way to help identify and explore the legal ramifications of emerging issues and social trends. This article offers a brief summary of the theory, process, and products resulting from this on-going effort.

Government is perceived by citizens to be reactive, rigid, inefficient, and even archaic. The third branch of government, the Judiciary, is no exception to this perception. Critics point to the fact that many of the institutions that served America well for the last two centuries are no longer relevant today. In an attempt to change these critical perceptions and respond to the changing judicial needs of the public, the Hawaii Judiciary has developed a futures research program that intends to follow a proactive, anticipatory model of policy-making.¹

In the Hawaii Judiciary, futures research derives its organizational legitimacy and purpose from comprehensive planning. Comprehensive planning is an attempt to integrate various levels and approaches to planning. As part of comprehensive planning the Judiciary conducts, along with futures research, strategic planning, program planning, and operational planning. Futures research attempts to identify the organization's future needs and problems, formulate strategies based on the basic missions of the Judiciary, and assess alternative future environments and future judicial needs.

More concretely, the Judiciary's Planning and Statistics Office conducts the following futures activities: a) emerging issues analysis, b) trend analysis, c) caseload forecasting, d) policy-impact analysis and e) institutional design. The time frame for futures research tends to be between 5 and 25 years.

In the first few years of futures research in the Courts, 1980-82, research activities centered around emerging issues analysis and caseload forecasting; however, at present, trend analysis is increasing in importance.

Need for Emerging Issues Analysis

The organizational rationale for adopting futures research stems from the Judiciary's fifth dimension—The Judiciary as a Societal Institution. In the words of Court Planner Gregory Sugimoto:

... it is incumbent upon the Judiciary to develop suitable mechanisms for the monitoring of the present and future changing demands of society as well as for developing appropriate means to accommodate its changing needs whenever the pressures of such needs are manifested in the present.²

The fact that a state judiciary is willing to consider itself a societal institution represents quite a substantial departure from the more conventional view of the Judiciary as being merely a forum for resolving disputes. This new societal perspective has partially come about because of the realization that although the conservative nature of institutions is thought desirable in order to provide continuity and stability, this conservative nature has become increasingly dysfunctional. That is, an institution only concerned with replicating its past behavior is not likely to survive the onslaught of the future.

The Judiciary, as in the case of other branches of government, is facing an increasing number of crises. These crises, to mention only a few, include: a) high levels of caseload backlog and delay, b) numerous conflicts with the other branches of government, c) budgetary and fiscal problems, d) a rapidly declining public image, e) the bureaucratization of law, and f) increasingly complex cases owing to the emergence of new technologies.

In light of these crises and in anticipation of more problems to come, the Judiciary has decided that instead of being a reactive institution that simply responds to whatever happens to it, it should anticipate the future and thus itself become a *catalyst* for change.

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Moreover, the Judiciary needs to become a catalyst for change not only in terms of its organizational functions but also in terms of its adjudicatory functions. As Chief Justice Harlan Fiske Stone said many years ago in reference to Justice Benjamin Cardozo:

Cardozo believed . . . that the law must draw its vitality from life rather than the precedents and that ‘the judge must be historian and prophet all in one.’ He [Cardozo] 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.³

However, today not only must judges be historians and prophets, but so must administrators. All need to participate in the process of forecasting and designing alternative futures. In the Hawaii Judiciary, this desire to be proactive has led to the development of a variety of futures research activities—the primary one, as mentioned earlier is emerging issues analysis.

Purpose of Emerging Issues Analysis

The purpose of emerging issues analysis is to discover issues that have the potential of significantly impacting the organizational and adjudicatory aspects of the Hawaii Judiciary; the legal, socio-political, and cultural climate of Hawaii; and, where appropriate, the larger national, regional, and global environment.

In addition, the goal of emerging issues analysis is to provide information about the future to key decision-makers that is *relevant* and *timely*. It should be relevant in the sense of providing information that they can eventually act upon. For instance, informing the administrative director that the Judiciary will disappear due to nuclear war or due to the collapse of western civilization may be an emerging issue, but certainly not one that the courts can do much about. The information should be timely in that it provides enough lead time so that plans and programs can be designed that can impact the issue.

As Bertrand de Jouvenel wrote, it is important to acquaint “oneself with emerging situations while they can still be molded, before they become imperatively compelling.”⁴

Thus, by providing relevant and timely information to policy-makers, emerging issues analysis aims to increase the effectiveness of decision-making.

Theory of Emerging Issues Analysis

At this point the obvious critical question is how does emerging issues analysis work, what is the theory behind this futures methodology? Emerging issues analysis does not pretend to be a science, rather, emerging issues analysis admits to being largely normative. Nonetheless, within this normative methodological orientation, it is possible to “scientifically” forecast future issues simply because issues tend to develop in certain patterned ways.

Sociologist Herbert Blumer, for example, noticed that social problems display various stages in their historical development: social problems emerge, they are legitimized, plans of action are drawn up and then implemented.⁵

Graham Molitor, one of the first to identify emerging issues analysis as a forecasting method also argues that policies or laws, like social issues follow a pattern, an evolutionary process “that is preceded by long shadows—trains of activity.”⁷ Molitor’s model, like Blumer’s, emphasizes an emergent phase characterized by isolated events, individual claims-makers, innovators, small scale publications and the like. This is followed by a take-off point in which the pace of activity increases, hits a peak, and then levels off or declines. When these activities are plotted in a time-line, an S-Curve growth pattern often emerges. This pattern can be divided into three phases: emergent, take-off, and decline.

In addition, Molitor writes that emerging issues tend to be discovered by utopians, visionaries, deviants, avant-garde publications and other fringe elements. It is also possible to identify leading organizations, and political jurisdictions (on the international, national, and local level) called precursors which initiate new ideas.⁸

To forecast new issues it is important to recognize these fringe and marginal individuals and publications. In addition, it is necessary to determine which organizations or political jurisdictions tend to exhibit precursor activity.

Thus, research into the life cycle of issues has discovered that they fall into certain patterned phases thereby making them possible to forecast.

Other Methods Used to Forecast Emerging Issues

Of course, it is important to note that not all issues display an S-Curve pattern, or can be identified by precursor activity. Thus, scanning marginal literature or examining precursor organizations or political jurisdictions are not particularly useful techniques in detecting these issues. However, attempting to forecast these issues is critical as they tend to be highly disruptive due to their sudden and abrupt

appearance. Fortunately, there are alternative methods available. One could look for anomalies within present paradigms hoping to derive new potential issues; or one could simply brainstorm; also, one could simply ask "what is the full range of what can happen." This approach involves forecasting an array of alternative futures. For the Judiciary, these futures could range from System Collapse due to delegitimation and backlog to System Expansion, wherein the Judiciary becomes the most powerful branch of government.

In addition, another excellent source for detecting issues comes from the dialectical approach. Here the researcher looks for legal, socio-economic, cultural and political contradictions and opposites within the system. Social change theories are particularly useful in forecasting issues as they help determine where in social, economic, and legal space one should look for issues. For example, social change theories that stress the role of technology lead one to look closely at new technologies and their potential social impacts. Conflict social change theories, on the other hand, lead one to look for issues at points of conflict—class, ethnic, age, center-periphery, and other salient categories.

Another strategy for determining emerging issues examines what experts believe are the potential problems in their respective areas. Still another approach extrapolates key societal trends far into the future in order to examine if absurdities would occur if the trend continued unabated.

Given that emerging issues identification is not an easy task, using a multiplicity of approaches is probably the best strategy.¹⁰ Such a strategy not only reduces researcher bias, but it also ensures some degree of comprehensiveness.

The Actors

To properly understand the emerging issues analysis process in the Hawaii Judiciary, it is first necessary to understand the various actors involved in futures research and the vehicle through which they interact. The main actors in the futures program consist of the Administrative Director of the Courts, the Court Planner and the staff of the Office of Planning and Statistics, the director of the Alternative Futures Option of the University of Hawaii Political Science Department, graduate interns from the Alternative Futures Option, various attorneys, members in the community who have an interest in futures studies or in the future of the Judiciary (for example, the director of the Neighborhood Justice Center), interns from the University of Hawaii Law School, Judiciary staff from the various programs, and professional futurists.

The actors primarily interact through the vehicle of the Judiciary's Committee on Emerging Issues Analysis. Meetings are held to discuss the process and product of the Judiciary's futures research efforts. They tend to focus on a presentation of an emerging issue paper with an ensuing unstructured discussion.

The Process

The process of emerging issues analysis consists of five parts: (a) search for issues, (b) evaluation of issues, (c) generation of in-depth impact reports, (d) discussion of issues, and (e) legal analysis of issues.

A) **Search for Issues:** The search for issues is done primarily by interns from the University of Hawaii Alternative Futures Option and secondarily by members of the Emerging Issues Committee. The primary methodology used for this search is literature scanning. However, other forecasting techniques such as paradigmatic search—deriving issues from social change theories, especially technological and conflict theories—and brainstorming have been used with great success.

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As mentioned earlier, emerging issues analysis is a normative methodology. The type of issues generated depend on: (a) the creativity, intelligence, and world view of the researcher, (b) the methodology used; and (c) the background that the researcher has in the field being investigated. This background is important so the researcher has a context from which to observe any possible anomalies or deduce unforeseen events and trends. Also important is the ability of the researcher to self-educate. In fact, the whole process of scanning is constant learning. There are no experts.

In addition to the above points, Jay Mendell suggests that scanning is primarily an intuitive exercise.¹¹ Intuition also plays a critical role in other emerging issues forecasting techniques as well. Thus, "better" issues can be obtained by increasing the intuitive and creative qualities of researchers themselves.

B) **Evaluation of Issues:** Once a pool of issues is compiled the Emerging Issues Committee chooses four or five topics for further research. The issues are chosen according to the following criteria: (a) the probable severity of impact of the issue, (b) the level of awareness of the issue in the Judiciary and the legal system—the lower the awareness level, the more benefit may come from further research, (c) the probability of occurrence of the issue, and (d) the issue's relevance in terms of its potential to be influenced by Judiciary action, and (e) intuition, or what the group, or specific members thereof, feel are the most important issues.

The first round of issues evaluation and selection for the Hawaii Judiciary was completed in July 1981. The second round was completed in July 1982.

C) **Generation of In-Depth Impact Reports:** This part of the process requires graduate futures in-

terns to write research papers on the selected issues. In general, papers are expected to forecast the impact of the issue on: social cosmology, political-economy, individual and collective world-view, and the Judiciary's dimensions. Papers are also expected to explore the above in a variety of alternative futures. Finally, alternative Judiciary strategies to deal with the issue are to be outlined.

D) **Discussion of the Issue:** In this stage the issue is presented by the graduate intern, researcher, to the Emerging Issues Committee. The Committee examines and critiques the paper. In addition, at this time appropriate strategies with respect to the issue are developed. The Judiciary could choose to

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wait and do nothing until the issue develops further, or it could choose to educate those that can influence the issue or those that will be affected by the issue. The Judiciary could also sponsor a bill asking the Legislature to take action. It could also initiate a pilot project to deal with the issue or develop other creative approaches. However, for the present the main strategy being followed by the Emerging Issue Committee with respect to papers already submitted is consciousness-raising within certain segments of the Judiciary and the public.

E) **Legal Analysis of the Paper:** The legal analysis of the emerging issue paper is intended to complete the cycle by providing information as to the effects of the issue on the legal system, on specific legal questions that the issue may raise, on precedents and guidelines that the courts may use to decide the issue, and new areas of law that the issue may create. The first legal issues paper, “The Legal Impact of Brain Drugs,” examines brain drugs in Corrections, the conflict between individual and states' rights that brain drugs may raise, including questions of liability. The legal dimension extends the relevance of emerging issues analysis from administrators and researchers to judges and lawyers.

The Product of Emerging Issues Analysis

The 1981 issues search identified 28 emerging issues. They were presented to the Committee on Emerging Issues in July, 1981. The issues were evaluated and four were chosen to be developed into in-depth impact reports. However, only three were developed, as the fourth, “Alternative Dispute Resolution Systems,” due the rapid emergence of Neighborhood Justice Centers was developed as a trend paper. A brief explanation of these issues ensues.¹²

A) **Futures of the Mind via Brave New Brain Drugs:** This report concentrates on the many brain chemicals that have the potential, in their present form and as they are further developed, to impact society through the altering of our basic emotions, through enhancing memory, boosting creativity, and remedying mental illness. These drugs include endorphins, enkephalin, MSH ACTH 4-10, Vasopressin, Serotonin, and Norepinephrine. The paper explores issues of governmental regulation, use of these drugs in corrections, and legal and moral questions that these new drugs raise.

B) **The Federal Constitutional Convention: Possibilities, Probabilities, and Alternative Futures:** Cognizant that, as of the summer of 1982, 31 states had applied for a Constitutional Convention, this paper attempts to speculate on what might happen if a ConCon occurred. Some of the issues that the author investigates are: the purpose of the constitution, the future of politics in a variety of alternative futures, alternative designs for new constitutions, and forces for and against the holding of a federal constitutional convention. In addition, the legal and political issues involved in calling a convention are explored. The paper concludes by suggesting that the Judiciary should support attempts to hold a mock convention wherein America could reexamine the philosophical basis of its constitutional ideology.

C) **Crises in Bureaucracy:** The paper examines trends and events which might transform the structure and function of governmental organizations. The author argues that this may occur because of the increasing complexity of bureaucracies, the high level of interdependence in bureaucracies, the increasing growth of bureaucracies, the development of telematics, the widespread dissatisfactions with present bureaucracies, and the rise of a new world view that emphasizes holism and participation.

D) **Other Issues:** Some other emerging issues that were not selected to be developed into impact papers (but may still be explored at a later date) include the following: 1) Domestic Terrorism in Hawaii, 2) Future Characteristics of Hawaii's Emerging Leaders, 3) Rights of Children, 4) Rights of Fathers, 5) Space Law, 6) Incest and the Courts, 7) New Technological Developments in the Forensic Sciences, 8) Differentials in Health Among Ethnic Groups in Hawaii and Impact Therefore, 9) Rights of Animals, 10) Futures Impact Statements, 11) The Potential Impact of Parapsychology on the Law and the Courts, 12) Possible Endangerment to the Free Flow of Scientific Information, 13) The End of Torts, 14) Disappearance of Labor Unions, 15) The New Psychiatry, and 16) Food Versus Fuel.

From the list of 24 issues compiled in 1982, four were chosen for further development. They are:

A) **The Rights of Robots:** This paper examines the future of robots from a rights perspective. The author argues that even though it may seem difficult to imagine robots having legal rights today, given probable technological developments in artificial intelligence, it may become a basic reality tomorrow.

This paper also examines the history of rights. Finally, it asks, will a robot one day have standing in court?

B) Hawaiian Sovereignty: This paper examines the Hawaiian sovereignty movement from a variety of perspectives—namely, cultural, political, economic, spiritual, legal and global. It asks, what factors could lead to Hawaii seceding from the United States of America? Who would benefit from such a political change? In addition it asks, what would a sovereign Hawaii look like? Would it be self-reliant? Part of Japan? An International Information Center?

C) Squatters' Rights: This issue forecasts that there is a strong possibility that a squatters' rights movement could develop in Hawaii given that the Hawaiian Economy is declining, that more than 23,000 people reside in sub-standard housing, that numerous hotel rooms sit empty, and that there is a strong and growing squatters' movement in Europe and in a few U.S. cities as well.

D) Future Laws of the Aged: This issue is concerned with the long-range effects of America increasingly becoming a nation of older people. This aging of America may lead to numerous problems, such as the collapse of the social security system. What future laws will be enacted to cope with the problems to come? How will current retirement, health, and social service laws be affected? Finally, will Hawaii become another retirement haven, like Florida?

Of these issues only the first has been completed, the rest are being researched but more from a short term, one to five year perspective, than a long term emerging issues perspective. In addition, the research for these reports is not formatted in the lengthy report style, but more in terms of short communications to decision-makers.¹³

E) Other Issues: Some other issues that were not chosen for further development at this time include the following: 1) Social Scientists as Expert Witnesses, 2) Humanism as Repression or the Development of Friendly Fascism, 3) Execution by Injection, 4) The Five Branch Government, 5) Mental Health Law Issues, 6) Legal and Moral Issues Raised by Brain Transplants, 7) Regionalism and Local Rights, 8) Information Terrorism, 9) The Future of Crime in Alternative Futures, 10) Mass Transit Alternatives, and 11) Emerging Advertising Technologies: Can the Law Keep Pace?

Challenges Facing Futures Research in the Hawaii Judiciary

Implementing a new program in any organization is difficult, and implementing new programs in governmental organizations whose organizational structure favors the status quo is even more difficult. New programs tend often to lack legitimacy, and must face skepticism from management and employees alike.

Futures research has not escaped these problems. In fact, the specific nature of futures research, its long-term perspective on issues coupled with the

fact that it is conducted by graduate interns not professional experts has made futures research especially problematic to implement.

In addition, futures research has entered the Judiciary from the theoretical, academic world of the university, thus the emphasis has been on issues that are intellectually stimulating, but not necessarily relevant to the needs of the Judiciary. For example, a discussion of secession by Hawaiians may be very useful in getting participants to think about Hawaii in unconventional ways, but such an event is irrelevant to the on-goings of the courts. And although such an issue may be important in the far future, the magnitude of immediate problems make it unnecessarily burdensome for administrators to have to be worried about such emerging issues.

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But, just as there are some problems with futures research that need to be adjusted and redesigned, there are some aspects of the structure of the Judiciary, or any other similar modern organization, that make it difficult for futures research to become an accepted part of court operations. First, the courts, especially the adjudicatory part of the Judiciary, have been traditionally reactionary, in the sense that decisions are often based on precedence rather than on future outcome. Of course, in many ways the Hawaii Judiciary has been outcome oriented—land use decisions by the Supreme Court being only one example.

Second, the immense workload on administrators and their daily political world forces them to make decisions based on intuition and past experience. Making decisions based on future goals or possible events that may impact the future is not an easy perspective to learn. Government is structured around time and urgency restraints—the budget must come out, there is only so much man power and time available to do certain tasks. Therefore, planning and decision making in the context of alternative futures design is difficult to do.

Thus, the nature of futures and the nature of the Judiciary have led to futures research not being a complete success. For example, although the Hawaii Judiciary may be a forerunner in legal futures research in the US, many parts of the organization—judges, attorneys, clerical employees, and the courts of the outer islands—have yet to be influenced by the ideas of futures research.

However, the information that futures research provides has become a basic part of the planning network in the courts. Forecasting, notions of alternatives, proactiveness, and others futures methodologies and terms are part and parcel of the Judiciary Planning Office's scope. In addition, the

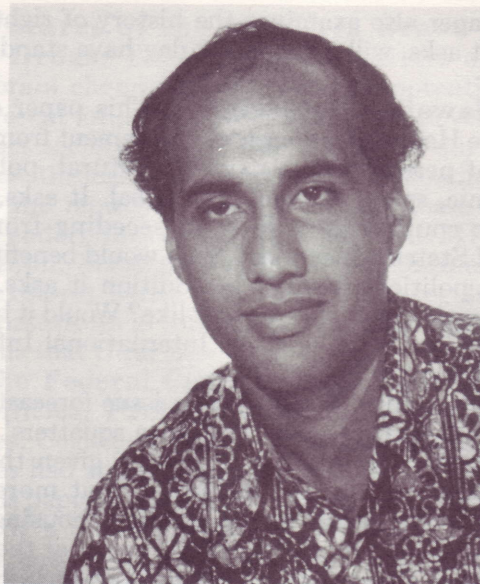
language of the courts—speeches by judges, articles in the newsletter, conventions—all have adopted the futures perspective.

Challenges Ahead

The challenges of making futures research more relevant to legal and administrative decision-making lie in meeting the needs of management. The trend analysis program, just begun, is one method to achieve this. Trend reports concentrate on more quantitative issues, thus making credibility easier. They also concentrate more on issues that are local in scope, and issues that will directly impact the courts in one to five years. Trend reports provide the necessary link between long-range forecasting and short-range program planning. In addition, the short-term forecasts provide valuable input into the budget cycle.

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Besides re-orienting the focus of futures research to trend analysis, reaching the policy community is equally important. For futures research to gain credibility not only must the quality of work be considered, but those in the policy community—judges, attorneys, the legal system, and others who define, analyze, and critique the courts—must be aware of futures research and what it can and cannot do. In this regard, the development of the legal dimension of futures research is critical. So are other projects that professionals from the legal field may find relevant (for example, projects that look at the future of lawyers, new forms of judicial decision-making and so forth).



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In addition, the visionary aspects of futures research need to be tied into the rational planning efforts of planners and administrators. Here, scenario writing, developing Judiciary and court designs for the future need to be formulated. This is not an easy process as there are few available models for this type of activity. Nonetheless moving from vision and futures design, to strategic and program planning is a critical part of the comprehensive planning venture.

However, there is reason to hope that, by reaching the policy community, developing trend analysis, developing the legal dimension of emerging issues analysis, further refining emerging issues analysis, and integrating the visionary aspects of futures research into rational planning, futures research in the Hawaii Judiciary may become an integral part of the Judiciary policy-making apparatus.

NOTES

1. I would like to thank Wayne Yasutomi for his insightful research and Les Cingcade for his support of futures research.

2. State of Hawaii Judiciary, *Comprehensive Planning in the Hawaii Judiciary*, p. 79.

3. Bernard Schwartz, *The Law in America*, New York: American Heritage Co., Inc., 1974, p. 201.

4. Bertrand de Jouvenal, *The Art of Conjecture* quoted in Geoffrey H. Fletcher, "Key Concepts in the Futures Perspective," *World Future Society Bulletin* (January-February 1979), p. 29.

5. Bertrand de Jouvenal, *The Art of Conjecture* in *ibid.*, p. 29.

6. Herbert Blumer, "Social Problems as Collective Behavior," *Social Problems* Vol. 18, No. 3 (Winter 1971), p. 301.

7. Graham T. Molitor, "How to Anticipate Public Policy Changes," *Journal of the Society for Advancement of Management*, Vol. 42, No. 3 (Summer 1977), p. 6.

8. Molitor, "Public Policy Changes," pp. 10-11; also see for a discussion on precursor nations, Marvin J. Cetron and Audrey Clayton, "Investigating Potential Value Changes," in Harold Lindstone and Clive Simmonds (eds.), *Futures Research: New Directions*.

9. Theodore J. Gordon, "The Nature of Unforeseen Developments," in Wayne Boucher (ed.), *The Study of the Future: An Agenda for Research*, Division of Intergovernmental Science and Public Technology, 1977.

10. See Peter Schwartz, Peter J. Teige, and Willis W. Harman, "In Search of Tomorrow's Crises," *The Futurist* (October 1977), p. 220; also see Richard Drobnick, *Emerging Issues: Concepts, Methods, and Forecasts*, Los Angeles, California: Center for Futures Research, University of Southern California, p. 14.

11. See Jay S. Mendall, "The Practice of Intuition," in Robert B. Fowles, *Handbook of Futures Research*, Westport, Connecticut: Greenwood Press, 1978.

12. Authors of the various papers include: Wayne Yasutomi, Sohail Inayatullah, Christopher Jones, Anne Witebsky, and Ted Hong (legal analysis). Copies of the in-depth reports, and more information on specific issues and trends are available on request. Write: Court Planner, Office of the Administrative Director of the Courts, P.O. Box 2560, Honolulu, Hawaii 96804.

13. The issues list for 1983 consists largely of trend issues.