Scanning for Justice

Contents

EXECUTIVE SUMMARY

PURPOSE

The purpose of this report is to provide the bases for future-oriented planning. From these scans, scenarios of the future of the Victoria Justice Portfolio can be developed. The scans and scenarios can help determine what strategies should be pursued, how best the needs of the public can be met.

Scanning for the court system was first developed in the 1980s in the Hawaii Judiciary. Through the news journal, *Justice Horizons*, trends, emerging issues and short-term research papers were presented to judges, administrators in the courts and the larger justice system. These scans were specifically used to develop short and long range strategy. Following the success of this project, the Virginia Courts instituted a foresight program. The Virginia Courts regularly scan the future, searching for indicators of change in its areas of concern – the timely and effective administration of justice. Other courts in the United States have followed the Hawaii model as well. Most significant has been the work of the Massachusetts Courts. In 1992, through their scanning activities, they published a major report titled, *Reinventing Justice 2020.* The Pennsylvania courts have followed their example. As well in the 1990s, the US Federal Government's State Justice Institute sponsored Futures Planning conferences and workshops throughout the US. By 2001, 24 American states have had Judicial Foresight Commissions, generally chaired by the Chief Justice, with broad based judiciary and public input. Most recently has been the example of the Singapore Subordinate Courts who engage regularly in Foresight activities and develop scenarios and action plans based on these scans. The United Kingdom has a national foresight commission that has written reports in a variety of areas including health systems as well as the futures of crime.

PLANNING CONTEXT

There are four main approaches to planning the future.

(1) Problem-oriented planning. In this approach, the problems facing the system are assembled and prioritized by the stakeholders. The utility of this approach is the functional efficiency of the system increases, however structural problems are often not noticed (meta-problems) and gains are often for the short-term;

(2) Mission-oriented planning. In this approach, the system's fundamental core missions are determined, for example, the justice system as a bureaucracy with a responsibility to be accountable and transparent, or the justice system as a public institution with the responsibility to anticipate and respond to the changing judicial needs of the public. The utility of this approach is that there is clarity of core competence and mission –

individuals know why they are doing what they do. The weakness in this approach is that it is static, not accounting for technological or economic changes or of the changing needs of citizens.

(3) Vision-oriented planning. In this approach, strategic directions of the system are developed by discerning where stakeholders would prefer the system to move toward. While this approach moves the organization forward, it is often difficult to get buy-in from day-to-day mangers who prefer the problem-oriented approach.

(4) The Future-oriented approach. Strategic directions are determined by anticipating the short and long-term future. Environmental scanning aids in creating a map of the probable future. This map gives the tools to analyze how specific trends might impact core missions, which missions need to emphasized, which directions need to become a focus of human and budgetary resources. The weakness of this approach is that it can be overwhelming as well it is difficult to ascertain what is relevant versus what is merely interesting.

SCANNING

Scanning seeks to identify issues and trends as evidenced in published material. These, for example, can be speeches by experts, items in newspapers, scholarly journal articles, magazine editorial pieces as well as interviews of leading jurists and administrators. Scanning is both volume driven, seeking to focus on issues wherein there is a great deal of mention (as with ADR) as well as leading indicator driven (searching for new issues of which there is only marginal support in the literature – the cyber judge, for example). Scanning as well seeks to understand which issues are located in the current paradigm and which issues challenge the current paradigm, and which issues are outside current understandings of law and jurisprudence (outside the doxa). Scanning requires an understanding of the micro dimensions of a particular field as well as the macro big picture.

Scanning needs to be conducted on a regular basis, so as to able to track issues from being "beyond the horizon" to "on the horizon" to today's problems. Regular tracking can also help identify anomalous issues. Scanning is similar to the more academic literature review; however, the issues presented are more focused and news item driven. While breadth and depth are important, it is relevance in terms of impact on the Victoria Justice System and the probability of occurrence that are far more crucial.

Relevance for this project is defined by:

(1) Time Horizon.

This is divided into:

(A) Short term (1-3 years);
(B) Medium term (4-6 years) and
(C) Long term (7-9) years.

(2) Impact on the Victoria Justice Portfolio.

This is divided into two areas:

(A) Direct impact on Portfolio Areas and
(B) Indirect impact. That is, there is likely little that the Justice system itself can do about the issue; its capacity to influence the direction of the trend is minimal.

Direct and indirect impact are to be specifically determined by stakeholders at the Department of Justice.

IMPACT FRAMEWORK

There are several approaches to ascertaining the nature of impact.

1. Supply and Demand.

How will the scan (the issue, trend, event) increase or decrease the demand for justice? Demand can be measured by volume of cases as well as the attention needed by a particularly case. Thus, for example, parking violations may increase substantially but this volume can be managed in lower courts or through an automated system, thus leading to no dramatic change in pressure on the Justice System. However, if there was a movement to not pay parking tickets – and seek trial – then volume becomes a factor.

The attention needed for a case can partly be judged by its complexity. Thus, new or novel cases in which the knowledge base is weak may require additional court resources, thus increasing the pressure on the courts, and potentially slowing down justice, and thus negatively impacting the public's perception of the courts, ie justice delayed is justice denied.

Supply can be measured by the different methods the Justice system used to resolve cases. This could be preventive, that is, community policing, neighborhood justice systems or general positioning systems to regulate society or other early monitoring and actions methods or pre-trial such as court mandated mediation or the trial itself or automated systems.

The supply of justice again can be understood in terms of volume (the range of methods in which cases can be heard) and complexity (the different types of methods).

The following scans generally attempt to focus on specific theme areas (the courts, emerging forms of dispute resolution, organizational efficiency) as well issues of supply and demand. However, and this is crucial, scanning is as far as possible an objective assessment of the social, political, economic and technological environment. Scanning is generally less concerned with the search for specific information bits and more with gaining a thorough understanding of the future justice terrain. While individual scans are important, far more noteworthy are the trends that emerge from environmental scanning.

SCANS

THEMES

The following themes have emerged from the scans. Following each theme, some of the key ideas/issues are noted. They are not presented in any order of priority. Details are provided in the full scan.

Theme one – Administration of Justice and Court Reform

- Jurimetrics. The need for the development of more sophisticated methods to count not just a case but a case event (the range of issues associated with a case) and the complexity or weight of a case.
- The increased need for using social science methods to determine social and legal policy and in legal education.
- Changes in the jury system including their empowerment (more information, power to ask questions) and improvement (mixed juries, lay and professional, for example) – generally jurors as active participants in the process.
- The development of a multi-door and multi-place courthouse. The courthouse could have a range of doors including: an electronic mediation door; an electronic arbitration door; face-to-face mediation and arbitration (court mandated, court annexed); traditional litigation; culturally appropriate dispute resolution; and, virtual courthouses; as well as, home judicial chambers.
- The reduction of adversarial excess.
- The strengthening of court and community links. 1. Increased use of web for informational and access purposes. 2. Court monitoring of trials by community groups. 3. The legitimation of a new concept called, user-friendly justice.
- Structural innovations, including a single tiered system (unified court)
- Elimination of barriers for self-represented litigants
- The development of the balanced scorecard and triple bottom line as indicators for a responsive, transparent and accountable justice system.
- Development of foresight as central to the increased effectiveness of the administration of justice
- Restorative justice
- The development of Sister Courts
- ADR courses in law school and in primary and secondary schools.
- Judicial education to help judges adapt to a multicultural and globalized world.
- Creation of a Science and Technology Court.

Theme Two – Crime and Justice

- Increased crime and changing nature of crime because of globalization
- Increased crime associated with the new internet technologies – identity crimes and well as increased health related fraud
- Changes in drug policy, generally decriminalization
- A new category of crime – State crime.
- Rethink institutionalization given the link between recidivism and time spent in jail
- Development of international criminal courts – among the many challenges to national sovereignty
- The use of new technologies to solve crime, enhance security – biometrics, for example.

Theme Three – Future of Lawyers

- Increased competition to lawyers from artificial intelligence technologies and globalization. Commodity services predicted to decline.
- Competition from alternative dispute resolution
- Generally the loss of exclusive professional monopoly that attorneys have held.
- The possibility of the lawyer as knowledge navigator.
- The Internet both as a channel and content provider.
- The urgent necessity for lawyers to question and then change their skill sets to adapt to a rapidly and dramatically changing world.

Theme Four – From IT to Artificial Intelligence

- Use of IT for caseload management
- Use of the Net for mediation and arbitration
- Use of the Net for delivery of information to citizens as well as communication.
- Citizens as active participants in the developing strategies for change, for enhancing efficiency and effectiveness.
- Development of expert systems for the rationalization of judicial decisionmaking.
- Development of law or just-bots, following the development of health-bots.
- The eventual development of cyberjudges.
- The eventual development of virtual juries, holographic courthouses, and tele-judging.

Theme Five – Increasing rights and complexity

- Long term trend of increased human rights throughout society (form equal pay to human rights) and litigation to ensure this.
- Long term trend of increased rights for animals and to some extent nature and litigation to ensure this.
- Discussion of rights of indigenous people in new areas, copyright, for example.

- Discussion of rights of liminal persons (as being created by the new genetics) and discussion of rights of future persons (as possible through human germ line intervention) as well as other issues related to genetic engineering.
- Creation of a national human genetics advisory committee to deal with complexity from new technologies and rights issues they raise.
- Development of a science court to deal with the complexity of new technologies and a whole range of novel legal issues they raise.

Theme Six - Macro-Societal Trends

- Long boom and prosperity – the peace dividend and productivity gains from new technologies.
- The Long Deep Recession – globalization of markets, speculation, over capacity and fear caused by 9/11 terrorism tear the world economy apart
- Aging of Australia leads to concerns over pensions, worker-retiree ratios, loss of societal innovation as aging become even more politically entrenched and increased depression from lack of meaning and health problems.
- Continued lack of balanced and gender and ethnic representation in the courts.
- Rise of cultural creatives focused on gender partnership, ecological sustainability, community identity, spirituality and integrative balanced planet – a demographic shift.
- Rise of tortocracy – increasing use of the court system to institute social policies without legislative authorization.
- Judicial foresight and activism given legislative gridlock
- Healthy organization – health and learning as defining in organizations instead of traditional measures of profit and/or productivity.

Theme Seven - Scenarios

- Positive and Negative scenarios from the Hawaii Judicial Foresight Congress. Negative ones based on generic justice; adjudication without legitimation; super surveillance, apartheid justice; and road warrior justice. Positive scenarios include: citizens as active consumers of justice; decentralized bottom up justice; postmodern humanistic courts; green justice; high-tech/high efficient justice; automated courts and global justice.
- National Center for State Courts, USA, offers these scenarios: 1. Global transformation as AI transforms the courts; 2. Cultural mosaic as multi-door courts become the norm; 3. Hard time, generic justice; and 4. High-tech Growth for the Few.
- James Dator of the University of Hawaii offers these alternatives. 1. Teleworking Global justice – all connected, place no longer matters; 2. Green, Native, Feminist Justice - informal and ADR driven. 3. Inertia forever – problems are too tough to solve, justice slowly delayed, changes incremental; and, 4. Judicial leadership – the use of humane, consumer-sensitive and integrative future oriented methods to transform the administration of justice.

TRENDS

The following trends emerge from the themes and scans.

1. **Increased sensitivity to the changing needs of the public,** in the form of court and community out reach programs (court monitoring) as well as in making the courts more transparent (including new indicators, the balanced scorecard and triple bottom line accounting) and in jury and trial reform (for example, empowering jurors and simplifying procedures for those who choose to defend themselves). The community is first seen as the customer and thus the necessity in making the customer happy and secondly, and more importantly, as co-partner in the design of judicial reform. Citizens thus are seen as the vehicles for innovation and not only as case numbers.

2. **Mediation, arbitration** moving toward the multi-door courthouse – increased use of alternatives to traditional dispute resolution, including discussion on culturally-appropriate dispute resolution.

3. **Increased use of Information Technology.** In jurimetrics, in case efficiency, in decision-making, and in dramatically changing the nature of how lawyers and judges search for information relevant to cases and how they resolve disputes. In the longer-term future this may lead to the beginning of what can be called the Cyber Judge. However, in the directly relevant short run, increased use of IT will be via expert systems. These systems will increase the efficiency of the courts, primarily through information management but also through increasing the access of the courts to the public.

4. **Increase in volume and complexity of cases related to bio-informational sciences** – issues of intellectual property, standing of natural persons, liability issues related to gene therapy, increased costs associated with the life and health sciences. This trend will continue in even more dramatic forms in the near and far future.

5. **Increased rights for all disenfranchised persons**, including indigenous persons, women, children, and even future persons. The rights issue will increase caseload, complexity, as well as call into question the structure and legitimacy of the court system, as those previously rightless will call for different types of dispute resolution (mediation, restorative justice, and multi-door courthouses and systems, as well as more localized informal justice).

6. **New channels** for conducting mediation and arbitration, specifically web-based dispute resolution, as for example, in Singapore.

7. **Increased cases, complexity and issues relating to sovereignty and jurisdiction** as capital globalizes and crime grows. At a simple level this means new types of cases – including issues relating to the relationship between Western and Indigenous law. Further on, this could mean the creation of new types of courts, including international criminal courts.

8. Indeed, this is **the globalization and internationalization of everything**, including crime, courts, and leading even to strategic sister court relationships throughout the world and the selling of dispute resolution services by state courts (from those who either have under capacity and are more efficient to those experiencing delay either from inefficiency or high demand).

9. **Increased attention to restorative justice** as a way to stop the vicious cycle of repeat offending.

10. Increased use of **foresight** through the Judicial Commission mechanism.

11. **Macro issues** – In terms of the overall economy, there remains the possibility of a severe global recession as well as a sustained long-term boom. In addition, globalization through freer movement of capital and knowledge economy labor challenges professions as well as provides new opportunities. New technologies enhance the administration of justice as well as lead to endless new cases. Demographic shifts point to a softer kinder Australia and a social isolated fragmented nation.

Drivers

Finally, to summarize, what is driving the future of the courts?

1. **New technologies** both providing administrative solutions as well as increasing the complexity of the cases the courts must hear.
2. **Social movements** expanding notions of rights and challenging the courts monopoly on justice.
3. **Democratization of the courts**, increased pressures to more accountable, more transparent and follow balanced scorecard and triple bottom line procedures.
4. **Globalization**, including new types of crimes and threats as well as new jurisdictional issues and new relationships with courts, and jurists throughout the world.
5. **Demographic shifts**, including the shift to partnership values and the aging of society.

While these are the pushes to the future, as important as the push is the pull – the desired vision of the Justice system, the preferred scenario of the various stakeholders. Lastly is the weight, that which ensures that there is stability in periods of change (and which mitigates against creating better systems). It is thus crucial that the Department of Justice develop a preferred vision and a clear strategy to achieve that vision (in the context of the push to the future and the weight of history mitigating against new futures).

THEME ONE

ADMINISTRATION OF JUSTICE AND COURT REFORM

JURIMETRICS

1. James Mcmillan, **Technology trends and the practice of law: An Administrative Perspective**, *Technological Forecasting and Social Change* (Vol. 53, No. 2/3, June/July 1996), 221-226.

Mcmillan discusses the technologies that can assist in the administration of law. While much of what he writes on has already occurred, he does, however, offer a novel twist.

Instead of merely counting cases, he suggests counting case events. An event is some type of work in the courthouse. Along with events – number of matters brought to the courts, the time between events, and those doing the work – are perceptions of litigants that justice has been achieved. The third part of this counting measure is the weighting of each case for difficulty, ie for complexity. While there is always bias in the weighting with event tracking capabilities, over time courts can develop reasonable measures of weighting. This would allow the comparison of a judge who had a difficult case, weighted at 50, with a judge with five easy cases, weighted at 10 each.

Impact

Measures focused on numbers, associated events and complexity are needed in judicial management information systems.

SOCIAL SCIENCES AND THE ADMINSTRATIONOF JUSTICE

2. Empirical scholarship can assist both courts and lawmakers in their decision making. **www.ajs.org** (accessed November 5, 2001).

The following is an abridged editorial of *Judicature*, the journal of the American Judicature Society.

"Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has decried the "epistemic shallowness" of traditional legal scholarship and has offered the economic analysis of law as an alternative. Today, the influence of other disciplines, in addition to economics, has transformed legal scholarship to the point that the kind of academic work

upon which the bench and bar relied in the past is difficult to find. That may help to explain why studies suggest that the courts are citing academic literature less than they did in the past. Although we applaud cross-fertilization between law and other disciplines, we are concerned that too much of published legal scholarship today is, or is regarded as, irrelevant to policy decisions, whether by courts, legislatures, or administrative agencies. It need not be that way.

The collection of the data that are necessary to do useful empirical work can be a time-consuming and prohibitively expensive enterprise. The analysis of data that have been collected requires knowledge and skills that have not been part of traditional legal education. These are two reasons why law professors have done so little empirical work and why one who seeks empirical guidance on a question regarding the courts must usually turn to the political science literature. Unfortunately, help may not be available there because of the daunting expense of data collection and analysis. Again, it need not be that way.

This issue of *Judicature* presents a symposium that describes and suggests potential uses of three "multi-user databases" for the United States Supreme Court, the United States courts of appeals, and state supreme courts. We think it important that scholars in all disciplines who study courts be aware of these databases and we are hopeful that the contributions in this issue will stimulate law professors in particular to design collaborative research projects that make use of them.

More generally, we reissue the call made in these pages in 1994 ("How to improve civil justice policy," January-February, *Judicature*) for the systematic collection of data on our civil justice systems comparable to the data that are collected on criminal cases. Recent years have witnessed numerous debates concerning both substantive and procedural law in which anecdotes, horror stories, and myths have featured prominently and reliable empirical data not at all. The issues are too important for lawmakers to continue groping in the dark. Especially in these days of budget surpluses, public funds should be made available so that lawmakers can know what they are talking about. Moreover, the availability of such data would enable talented scholars who were so inclined, working alone or in collaboration, to return to the work of generating useful knowledge for an audience that is broader than their colleagues."

Impact

The necessity for closer relationships between the Justice system and Law schools, Departments of Criminal Justice as well as Sociology.

JURY REFORM AND ALTERNATIVE DISPUTE RESOLUTION

3. Franklin Strier**, Reconstructing Justice: An Agenda for Trial Reform** (Prof of Law, California State U-Dominguez Hills). Westport CT: Quorum Books/Greenwood, Sept 1994. Abstracted in: Michael Marien, *Future Survey*, April 1995.

"Rather than encouraging rationality and fairness, the adversariness of American trials frequently conduces rancor, irrationality, and inequity. So unreserved is the legal profession's

commitment to trial adversariness that its ethical codes suggest that anything less than zealous advocacy is a breach of responsibility. General traits of the US system include presumption of conflict, party control, partisan advocacy, judicial impartiality, and zero sum remedies. We pay little heed to the relatively nonadversarial process used in continental Europe and much of the rest of the world (the so-called inquisitorial system, considered as an inquest by the state, where judges control the investigation and scope of inquiry). Without reform, current trends portend an apocalyptic vision of the US court system. Technical advances and complications of future life will result in more and more complex cases. Court backlog will continue mounting, due to population increase, the rise of drug cases, creation of more 'justiciable rights,' and insufficient allocation of resources.

Proposed reforms:

* ***Jury Empowerment and Improvement***: better juror orientation, enabling juries to take notes and ask questions, enabling access to a transcript or videotape of testimony, allowing more information to reach the jury, fewer professional exemptions in jury selection along with limited term of service and more pay, lay and professional judges sitting together in 'mixed juries';

* ***Mitigating Adversarial Excesses***: moderating some attorney prerogatives and increasing discretion and control by the judge, discovery reform, eliminating peremptory challenges;

* ***Other Measures***: equalizing access to representation, the "multi-door courthouse" now used in several cities (referring cases to alternative dispute resolution), more diverse remedies.

Impact

This is likely to make the judicial system far more citizen friendly. However, the workload on the administration is likely to dramatically increase.

ALTERNATIVE DISPUTE RESOLUTION

4. John Dunlop and Arnold Zack, **Mediation and Arbitration of Employment Disputes**. (Prof Emeritus of Economics, Harvard U; former US Secy of Labor) (former President, National Academy of Arbitrators). San Francisco: Jossey-Bass, Sept 1997. Abstracted in Michael Marien, *Future Survey*, January 1998

Over the past century, the US has developed two paths to resolve workplace disputes:

1) the use of collective bargaining between employers and unions, with procedures for private resolution of disputes related to provisions of negotiated agreements;

2) ever-expanding statutory protections for employees, allowing them to resort to administrative agencies and the courts for enforcement. But something is wrong with this process: civil courts and regulatory agencies are overwhelmed by caseloads they were never meant to accommodate. Employment law litigation in the Federal courts increased nearly fivefold between 1971 and 1991, and by the end of 1995 the Equal Employment Opportunity Commission had a backlog of about 100,000 cases. This led to formation of the Commission on the Future of Worker-Management Relations (1993-1995), chaired by Dunlap.

It is increasingly clear that as the economy grows, as the coverage and quantity of regulatory legislation grows, and as the public seeks to restrict the size and role of government, a new decentralized approach is needed: greater reliance on alternative dispute resolution (ADR) through arbitration and mediation. The courts have given a green light to arbitration instead of litigation. Administrative agencies seek relief from backlogs. Managements seek relief from litigation. Workers in union and nonunion settings seek less expensive and quicker resolution of their claims for rights and protections. Over the next decade or so, these players have the capacity to develop a matrix of policies and procedures to establish a voluntary system of mediation and arbitration in employment law disputes. ADR would not govern all disputes, but would be "*a significant option providing more rapid and less expensive decisions with roughly equivalent results--and many more resolution**s***."

Resolution of workplace disputes is only the first step in bringing more justice to more people through a fair, affordable, and expeditious procedure.

Writes Marien of this issue: "Authoritative statement on an important problem that receives little attention. Workplace disputes are simply the dark underside of teamwork, participation, two-way communication, and all the other upside prescriptions in the burgeoning management literature."

Impact

ADR continues to be seen a significant way to improve the courts.

JUDICIAL REFORM IN SINGAPORE

5. Seventh Workplan - 1998/1999 *Subordinate Courts 21: Leading Justice into the New Millennium* http://www.subcourts.gov.sg/justout/review/1998.html. Accessed November 1, 2001.

In this seventh Workplan, the Subordinate Courts focused on building competencies that would enable them to lead justice into the next millennium. Key initiatives included the establishment of the Multi-Door Courthouse, the re-designation of the Court Mediation

Centre as the Primary Dispute Resolution Centre, the launch of the Strengthening Community Links project and putting in place the trilogy of court governance.

- The Court Mediation Centre (CMC) was renamed the **Primary Dispute Resolution Centre (PDRC)**, signifying the shift in mindset and emphasis towards mediation as a primary means of dispute resolution in civil matters. The PDRC also comprises a Multi-Door Courthouse.

- The **Multi-Door Courthouse (MDC)** was launched in May 1998, and is the first such multi-door courthouse in the Commonwealth and Asia-Pacific region. The MDC is a one-stop centre for the screening and channelling of cases. It seeks to increase public awareness of the dispute resolution process, offer and co-ordinate a selection of high quality dispute resolution programmes and facilitate the public in locating appropriate dispute resolution means.

- The **Strengthening Community Links Project** was launched in collaboration with the Ministry of Law, the National Council of Social Services, the People's Association and the Singapore Police Force, in order to assist the community in accessing justice easily. The project aimed to institutionalise and operationalise these various community-based programmes and initiatives, and to co-ordinate the various services provided to the public by enforcement agencies, community agencies and the Courts in order to strengthen community links.

- The Subordinate Courts have in place a **trilogy of court governance** comprising the *Justice Statement*, the *Strategic Framework*, and the *Framework of Core Competencies*. The Justice Statement identifies timeless and immutable universal justice values. The Framework of Core Competencies provides the knowledge capital and catalogue which will drive the Courts into the 21st century while the Strategic Framework provides a reference or benchmark against which future activities should be assessed.

In addition, these were some of the other achievements under the Seventh Workplan:

- The **Women's Charter (Matrimonial Property Plan) Rules 1998** were introduced in December 1998, to facilitate an early and effective resolution of the division of matrimonial property comprising HDB matrimonial flats.

- **Video link testimony** was introduced for **cases involving family violence**, to enable family violence victims to give evidence via video link, thereby reducing the trauma of the family violence victims.

- The **Small Claims Tribunals (SCT) telephone and video conferencing system** was set up in March 1998, which enabled users at the different SCT branches to communicate via both video link and teleconferencing. Users will be able to attend the Consultations or hearings through a telephone or video link, at a centre most convenient to them instead of travelling to a specific location.

- The **Vulnerable Witness Support Programme (VWSP)** was launched by the MDC in August 1998. The programme provides volunteer support to vulnerable witnesses who have to testify in public prosecutions in criminal cases.

- The **Technology Chambers** was developed, incorporating office automation, multimedia presentation as well as video-conferencing facilities into a Hearing Chambers.

- The third Information Technology Planning (ITP) is undertaken alongside a **Business Process Re-engineering (BPR)** project that focuses on establishing a one-stop intake and diagnostic centre - the Multi-Door Courthouse. With detailed study of the current processes in the various functional departments, coupled with strategic business and IT visions from the Subordinate Courts Management, the BPR/ITP project will deliver both the solution for the MDC as well as the IT masterplan for the Subordinate Courts for the next millennium.

- The **Balanced Scorecard**, a more comprehensive performance measurement approach, was adopted to achieve higher levels of excellence in the administration of justice, and to further nurture the Subordinate Courts into a performance oriented organisation. A pilot Balanced Scorecard was first implemented for the Small Claims Tribunals in November 1998.

6. *Singapore Courts develop scenarios for the future***.**
http://www.subcourts.gov.sg/justout/ar2000/future.pdf. Accessed November 1, 2001.

Singapore courts engage in scanning on a quarterly basis. Reports are provided by various branches – judicial administration, criminal, civil, family, juvenile. These scans have lead to a range of scenarios – wither justice, beleaguered justice and preferred justice. The Justice Policy Group meets regularly to conduct foresight work.

Impact

What are likely scenarios of the futures of the Victoria Justice System? What is the preferred? Worst Case? Most probable given current trends in demand?

7. *Singapore Courts develop International Court Dispute Resolution Program.* www.subcourts.gov.sg.. Accessed November 1, 2001.

Court Dispute Resolution International (CDRI) is a settlement conference co-conducted by a Singapore Subordinate Court Judge and a judge from another jurisdiction, such as Australia, Europe, or the USA. The co-mediation provides a forum in which additional judicial perspectives and views are brought to bear on disputes.

CDRI applies to complex civil matters with substantial claims.

Two internet based services are now provided with CDRI. First is, **e-med**, " a new high-tech information super-corridor, in which judges and mediators can confer. Discussion … is … facilitated by a moderator and will center on new mediation initiatives, techniques and topical issues. Experts are from all over the world.

Second is **e.cdri**. This is an electronic version of cdri. "Parties may seek an early neutral evaluation from a settlement judge, who may introduce a foreign settlement judge into the discussion, if parties request," or if appropriate. E.cdri is conducted on a voluntary basis, and settlement orders must be with the agreement of parties.

Along with these innovations there is: Singapore Mediation Centre, Singapore International Arbitration Center. In 1991 there were 2 cases and 89 cases in 1999. Its focus is cross-border disputes and the rules are modeled after UNCITRAL. Arbitrators are local and from overseas.

And: there is now e.dr for e-commerce disputes. Writes, the Senior District Judge, Richard Magnus. **E.dr** is a non-profit service. In order to create and maintain a conducive business climate, parties in e-commerce transactions must be able to seek redress quickly, efficiently and inexpensively.

Disputes filed through e@dr is received by a moderator who channels it to an appropriate forum. The moderator may refer the dispute to the small claims tribunal, an e@dr mediator, the Singapore mediation center of the Singapore International Arbitration center. Parties work out disputes online with the mediator to achieve a speedy and impartial resolution. The mediator explores the facts and the respective positions of the interested parties, and finds a mutually acceptable solution using the net as a medium for communication.

For more on the Singapore Courts, write: Subordinate Courts, 1 Havelock Square, Singapore. www.subcourts.gov.sg

Impact

These innovations place Singapore as perhaps the world's leader in court reform. With e@dr they have embarked on a mixture of virtualization and humanization, creating a virtual touch system.

How does Singapore continue to be at the top of the pack?

8. Judge Peter Blaxell, **The Future Role of Australian Courts in the Resolution of International Disputes. Globalization and Law Reform: Cooperation Through Technology.** www.wa.gov.au/lrc/lawreform/pdfs/Addresses/07%20Blaxell.pdf. Accessed November 1, 2001.

Judge Blaxell notes that the Western Australia courts have entered into a strategic relationship with the Singapore courts, primarily in the mediation and international dispute resolution areas. He asserts that there is an international market in these areas that Western Australia can enter. Moreover, given the delay in courts in Australia, Blaxell, argues that there is a national market as well. Court services thus are marketable commodities.

Impact

Should Victoria Courts enter strategic relationships with International courts? Are there any services the courts can market nationally? What are the risks and benefits in seeing the courts from an economistic perspective?

How might technology and mediation work together to help local, national and international players?

CREATING COURT-COMMUNITY PARTNERSHIPS

9. American Judicature Society – www.ajs.org . Accessed November 12, 2001.

The following is based on an editorial of the American Judicature Society.

"Because the courts depend on the public for their legitimacy, they must seek ways to develop public understanding and support.

It is a basic notion of American government that the judicial branch has the power neither of the purse nor the sword; its legitimacy and authority depend on public understanding of and appreciation for the importance of an independent and effective judiciary.

There is a growing body of theoretical knowledge and practical experience about how courts can effectively develop such support. Several state court systems have undertaken systematic efforts to explain how and why they do what they do. This experience suggests that courts can be effective in that role and that they should make a priority of creating public understanding and popular support for them.

For instance, the Wisconsin courts have devised a series of programs to include the public in the delivery of justice. The outreach program in that state includes such features as a supreme court visitor's guide; a court system speakers bureau; supreme court sessions conducted in locales around the state; a ride-along program for legislators, county board officials, and media; and judge-journalist forums.

California's Judicial Council is modeling a statewide program on the successful 1995 National Town Hall Meeting on Court-Community Cooperation sponsored by AJS, the National Center for State Courts, and the State Justice Institute. Separate meetings will be conducted around the state, bringing together local court and community officials and opinion leaders to help

the courts address issues of common concern and to develop structures to deal on an ongoing basis with endemic problems.

One of the lessons of these efforts is that judges must accept primary responsibility for reaching out to the public and that they are effective communicators and educators when they apply themselves to the task.

Another area that has emerged from the experiences of court systems in outreach and educational efforts is that courts have much to learn from the public about how to do their job more effectively. Access to justice is a mutual effort. Courts must communicate to their constituents how they may gain effective access to court services and must solicit the public's views about how the courts can do a better job in providing those services.

In that spirit, many state and federal jurisdictions have conducted public hearings in connection with gender, race, and ethnic fairness studies, and public comments have motivated a variety of positive changes. One member of the Second Circuit task force observed that comments helped judges focus on and remedy shortcomings in the way the courts' business was conducted in basic service areas, such as access to the clerk's office.

AJS has initiated several programs and projects to assist in this task. Its guidebook, *User Friendly Justice: Making Courts More Accessible, Easier to Understand, and Simpler to Use,* suggests a customer-service approach to the delivery of justice. AJS is also developing both a customer-service training curriculum for court personnel and a guide for courts to assist unrepresented litigants.

Each court system, every court, and every judicial officer has the responsibility to make justice accessible to the citizens served by their courts. The creation of partnerships between the courts and their constituents increases respect for and accountability by the courts and at the same time creates a viable public support system for the courts. We all have a responsibility to make the justice system work; these efforts help deliver that message effectively."

Impact

Many of these suggestions appear to be easily transportable to Australia. As society becomes increasingly complex, innovative ways to include the public in the administration of justice are necessary.

PRACTICAL COMMUNITY AND SOCIAL CAPACITY BUILDING

10. Report of the Chief Justice's Commission on the Future of the Courts. **Reinventing Justice.** Massachusetts. 1992.

The Massachusetts Foresight Program has led to the following practical outcomes – generally community building and the creation of social capacity has been the result of including the community in planning the futures of the courts. Specifically this has been the result.

"Collaborative projects that have emerged in Franklin County since October 1996 are described below:

- **Information desk in the courthouse.** The desk is staffed 20 hours per week by a senior citizen through the local home care corporation. In the first seven months she responded to more than 2,500 questions and requests. She keeps track of the requests so that the committee can develop appropriate information and resources over time.

- **Law-related speakers bureau.** The Speakers Bureau Committee arranges on average two talks per month, drawing on more than 40 volunteer lawyers and judges. If a request comes in for a topic covered more appropriately by a related practitioner, such as a juvenile probation officer or a substance abuse counselor, the committee will identify and invite that practitioner to speak.

- **Court in action program.** The formation of the committee arranging this program grew from the commonly held perception in Franklin County that law enforcement officers and teenagers have a mutual distrust that is detrimental to the community. The goal of the Kids & Cops Group, as it called itself, was to develop a program that would allow police officers and juveniles an opportunity to break down some of the communication barriers. The group created a program, based on a North Carolina model, that brings high school students to the courthouse to learn about legal, social, and family consequences of drinking and driving. The Kids & Cops Group hosted the day-long program four times in the spring of 1997, and approximately 120 high school students participated.

  For each program, the students met first with a judge, saw several videos provided by a state trooper and a local police chief on the committee, watched several operating under the influence arraignments, and then broke into small discussion groups. Several police officers took part, as did a substance abuse and guidance counselor. For many students, this was the first time they had ever talked with a police officer. The students then went to the Franklin County House of Correction for lunch, a tour, and a discussion with a young inmate about the life-changing consequences of substance abuse and addiction.

- **Substance abuse intervention program.** Funded by an array of federal grants to municipalities and local law enforcement agencies and supported by services from the Massachusetts Department of Public Health, this program offers individuals who qualify an intensive treatment and therapeutic program as an alternative to incarceration. The program is geared toward offenders who will likely be incarcerated because of the frequency of their appearances before the court. It is also available for referrals from the juvenile and the probate and family courts for cases where substance abuse affects custody, visitation, neglect, delinquency, truancy, and similar issues. Two judges have been cross-designated to hear district, juvenile, probate and family, and superior court matters for these individuals. The primary judge holds weekly substance abuse court

sessions with the clients and reviews their progress. The second judge provides backup. Since the program began in February 1997, approximately 100 individuals have enrolled.

- **Family, Children and Juvenile Justice Delay Reduction Project.** Funded by the State Justice Institute, the purpose of this project is to expedite cases where custody of children is at issue and where family members may be involved in custody disputes in different trial court departments. A case coordination protocol has been approved, and the judges interested in this case consolidation have been cross-designated to hear matters of particular families that pertain to the district, probate and family, and juvenile courts. Implementation began in the fall of 1997.

- **Juvenile diversion program.** The program, which has received a grant from the Massachusetts Executive Office of Public Safety, screens applications from first-time juvenile offenders and from juveniles for whom CHINS (Children in Need of Services) petitions have been filed. The juvenile diversion coordinator, in conjunction with a team consisting of a representative from the district attorney's office, the chief juvenile probation officer, a Department of Social Services supervisor, and a CASA (Court Appointed Special Advocate) guardian ad litem, accepts qualified applicants and works with the juvenile and his or her family to develop an appropriate contract that provides salient and creative consequences in response to the offense and addresses underlying issues. Upon successful completion of the contract, the charges are dismissed in delinquency cases and the CHINS petition is dropped. At the end of the first six months, the coordinator had approximately 50 open cases and received between 70 and 80 percent of the CHINS applications in the two juvenile courts in the county.

  Other projects under development include a court education program that will give disputants an overview of available dispute resolution options; supervised visitation services that will provide a place and personnel to oversee visits by non-custodial parents where supervision is required; and a community justice process based on restorative justice principles that will look at crime as an event with human as well as legal ramifications. In addition, the Court Facilities Committee is meeting with community groups and systems constituencies to develop a master plan for a new comprehensive justice center in Franklin County."

Impact

The Massachusetts experience shows how court reform can in fact develop social capital in the community, enhancing the legitimacy of the courts.

SINGLE-TIERED COURTS, JURY INNOVATION AND RESTORATIVE JUSTICE

11. Honorable Ronald T. Y. Moon Chief Justice, Hawaii State Bar Association Convention Young Lawyers Division Luncheon, Thursday, September 27, 2001

Moon offers the following reform suggestions:

Single-Tier System

The goal of the "single-tier" initiative is very simple. The vision is to formulate a one-tier trial court system in which parties and attorneys need not spend hours and hours of valuable time trying to determine: (1) which state trial court can handle a claim; (2) whether different claims must be heard in different trial courts; or (3) whether some claims must be abandoned because a party simply cannot afford to litigate in more than one court at a time. In other words, the single-tier initiative is -- to put it in its most simplistic terms -- based on the premise that the assignment of cases to a proper docket should be an administrative matter, not a major legal decision. What we envision is a future court system that is flexible enough to create specialty divisions, if needed, without having to combine two or three kinds of judges or levels of courts to meet the needs of the litigants and their attorneys. We want judges to be able to concentrate in specialities for which they are most competent, but to also be able to take on other kinds of matters or issues -- with training, of course -- should the need to do so arise. Finally, we envision that a single-tier trial court system will enable us to use the resources made available to us by the people of this state in a manner that appropriately and efficiently serves their needs. Although we believe our current trial court system works quite well, we also believe it can be so much better and much less bureaucratic if it is administered as one court instead of three, that is, the family, district, and circuit courts.

Jury Innovations

"As you know, a short time ago, jury and jury trial innovations were written into our court rules. I submit that the significant role of juries in this country is central to democratic governance and is a testament to the vision of our forefather's who believed that a verdict by one's peers can be fair, unbiased, and accurate. In many states, however, -- and Hawaii is no exception -- jury service has become such a burden that many people called for jury service fail to appear. In fact, the resulting shortage of some demographic groups is so severe that jury pools in some states are in danger of violating constitutional standards for fairness.

Theorizing on the decline in citizen participation, many observers have raised concerns about the traditional restrictions on the role of jurors in trials. In this regard, a growing body of research has demonstrated that permitting more juror participation, in general, and improving communication with jurors, in particular, improves the quality of the experience for jurors and, ultimately, the quality of the trial and verdict.

Many of you may recall that, after a fifteen-month pilot project on certain jury innovations, the Hawaii Supreme Court adopted amendments to several court rules designed to enhance the functioning of the jury system. In the new model, jurors are not treated as passive recipients of information, but as active participants and full partners with the judge and the attorneys in the court's proceedings. As you may be aware, since July 1, 2000, jurors have been allowed, at the discretion of the trial judge, to suggest questions to be asked of witnesses. Also, parties have been allowed to make "mini-opening statements" to potential jurors prior to jury selection. To the extent possible, all expert testimony is scheduled during

the same phase of the trial in civil and family court cases, and jurors have received hard copies of jury instructions before closing arguments.

What you may not know is that Hawaii is the only jurisdiction in the nation to have conducted extensive jury innovation evaluations before implementing them. Now that they have been utilized for more than a year, we are now readying questionnaire forms to be circulated to former jurors, attorneys, and trial court judges to determine the extent to which the innovations are used, the reasons judges may have for not using the innovations, and whether the innovations did or did not enhance the trial process. "

Restorative Justice

Restorative Justice is central to the Hawaii Judiciary. It is defined as " a balanced approach that requires the justice to devote attention to the victim, the offernder and the community as active participants in the criminal justice system. "

To increase the use of restorative justice in Hawaii five methods are recommended. 1. Supreme Court endorsement. 2. Implementing New Programs. 3. Legislation. 4. Partnering with the Executive Branch. 5. Community Partnering.

Restorative Justice as used by indigenous persons, would increase trust in the Judiciary (as it resonates with the community understanding of justice) and implementing restorative justice would lead to Judiciary staff working closely with the community.

Details of what restorative justice practices are currently under use are available from the Hawaii Judiciary's website – Restorative Justice Ad Hoc Committee.

RESTORATIVE JUSTICE

12. Lord Woolf, The Lord Chief Justice of England and Wales, **Restorative Justice** Speech to the Youth Justice Board, Church House Conference Centre, London SW1, 25 October 2001. **http://www.lcd.gov.uk/judicial/speeches/lcj251001.htm**

Lord Chief Justice Woolf discusses the importance of restorative justice in England. He argues that restorative justice has the possibility to break the cycle of of repetition of offending, punishment, release, re-offending and punishment again! Restorative justice balances victim, community and offender leading to gains for all three.

We quote at length from his speech.

> *A great deal has been happening recently and is continuing to happen in the criminal justice system. I can see chinks of light coming through what up till now has been a very gloomy picture. ...Another chink of light is provided by the interest and understanding of 'restorative justice' which is developing.*
>
> *We need those chinks of light. Why do I say that?*

Well there are two obvious reasons, the first is that regrettably it is my belief that the public's confidence in the justice system is far below what it should be.

The second is the rapidly rising population of our prisons. The figure is 67,465 inmates, an increase from 67,056 at the end of August. Those figures are to be compared with the population which can be accommodated in available establishments which is just under 64,000. They have also to be compared with the figures 10 years ago, when I did my prison reports, where overcrowding was thought to be a major cause of the rioting. It was also an explanation as to why a by no means 'soft' Home Secretary described prisons as an expensive way of making bad people worse.

I know this audience is probably well aware of the cost of all this. But can I remind you the average cost of keeping a prisoner in custody is about £27,500. The cost of housing the volume of prisoners we now have has caused a prison building and maintenance program costing around £2.7 billion over 10 years.

Why is the prison population so high? If you talk to magistrates which I regularly do, not least because my wife has been a magistrate longer than I have been a judge, they will tell you that they only use a custodial sentence as a last resort. I am sure that they are absolutely right. The problem that they are faced with and we as a community are faced with, is that unfortunately there are so many repeat offenders in the system. We have to find ways of tackling those offenders effectively. In doing this, we now have the advantage of the Halliday Report. This report, by a highly experienced civil servant in the Home Office, really tries to address the problems to which I have just been referring. Forgive me if I give 2 quotations from the Report, of which, you are no doubt already aware.

The first: "One of the most important deficiencies in the present framework is the lack of utility and short prison sentences - those of less than 12 months. Only half of such sentences are served. Release is automatic and the second half is subject to no conditions whatsoever. With Home Detention and Curfew, for many the period in custody is shorter than it would otherwise have been. The sentence is nevertheless used for large numbers of persistent offenders, with multiple problems and high risk of re-offending, whose offences (and record) are serious enough to justify a custodial sentence, but not so serious that longer prison sentences would be justified. A more effective recipe for failure could hardly be conceived."

Then again… "For large numbers of offenders who receive these sentences, they are markedly ineffective. Reconviction rates within 2 years of release -at 60% of those released - are higher for these sentences than for other prison sentences." Short prison sentences have in recent years come to play an increasing part in penal policy, largely because of choices made by sentencers, mainly magistrates.

The review found widespread dissatisfaction with the state of affairs.

"Sentencers are frustrated at having to pass sentences they know have such limited effect. The prison service looks in vain for guidance on how to make the best of these sentences. The probation service feels, and is, powerless until the offender re-offends. Other participants, for example in the employment service, who are involved in the resettlement of these prisoners, wonder about their purpose. The results are the worst aspects of the so-called "revolving-door". The mischief lies not in the revolving-door itself, but in the lack of any material impact on either side of it."

What can we do about this? Don't send people to prison unless it is really necessary. If you are sending them for short-term, pause before you do so – ask yourself, if you are going to sentence for 12 months would 6 months be sufficient and achieve exactly the same benefits for the public, at lower cost to, the Treasury and our prison system. If 6 months is what you have in mind would not 3 months do? If 3 months will do, what about 1 month?

Of course, for serious offenders and serious persistent offenders, there is no alternative but for substantial punishment. What we have got to do is try and avoid the offenders who appear before us getting to that stage. Here we have the valuable assistance that the Youth Justice Board is helping to provide.
Among the choices we should be considering, where it is appropriate to do so, is taking action which falls within the label 'restorative justice'. What do I mean by 'restorative justice'? Well, no one has produced a satisfactory definition and that is probably a good thing because the loose label can be appropriately applied to a variety of situations. I would not wish to see it too restrictively defined. What it does involve however, which is important, is the victim and the community who are affected by the victim's crime and the offender.

We take first the victim - there can be nothing which is more frustrating for a victim than to find they have been a subject of a crime and the consequences for them not being taken into account or addressed by the justice system. That is inherently unjust. I welcome within 'restorative justice' that the offender has to acknowledge the wrong he/she has done to the victim. The victim should not be involved in that process unless they are clearly willing to be involved. But subject to their being willing, they should be able to be involved. The offender, where appropriate, should have brought home to him/her personally precisely how the victim feels about the offence.

More important for the victim, but is also important for the offender, is that the offender learns that there is a real person who suffers in consequence of his/her action.

Then the offender has to take the appropriate steps to remedy the situation so far as that is possible. This is salutary for the offender. It is more demanding than being shut up in a cell where the majority of time is spent asleep or lounging on their bunk. To have to confront the victim is no 'soft touch'. It brings home to the offender the consequence of what he/she has done.

It prevents the offender ignoring the consequences of his actions by dehumanising the victim. Incidentally, it avoids the victim dehumanising the offender.

Finally, there is the community. The offender should make reparation in an appropriate way to the community. One way of doing this is by embarking on courses which involve confronting offending. Other ways are performing services for the public. Either way it is beneficial to the victim and the public that the offender should make reparation for his offence. The benefits to the community can be enormous.

We have to find ways of breaking the viscous cycle of repetition of offending, punishment, release, re-offending and punishment again! 'Restorative justice' can not be the sole answer to this problem but can assist. What you have to discuss today is how to maximise that contribution.

Impact

Restorative Justice appears to be gaining legitimacy throughout the world. Should a trial program be implemented in Victoria?

UNIFIED COURTS AND OTHER REFORMS IN ENGLAND

13. Lord Woolf, The Lord Chief Justice of England and Wales,The 2001 Kalisher Lecture,**Making Sense of the Criminal Justice System**, Central Criminal Court, City of London http://www.lcd.gov.uk/judicial/speeches/lcj091001.htm, 9 October 2001

In this speech, the Lord Chief Justice recommends: **1: a new code of substantive criminal law, a code of criminal procedure and a code of sentencing**. **2. A Unified Court** instead of two tiered system, ie for management efficiency. **3. Standardized case management**. **4. A Board for Female Offenders. 5. A sentencing advisory board.**

The Essentials of a Justice System

In other words the criminal courts are not as efficient, effective or economic as they need to be in the 21st century. However the existence of the talent is critical since it means the faults will be so much easier to remedy. I regard it as essential to use the resources available to the criminal justice system in the most efficient and effective manner possible. I do not hide the fact that I want to see this for financial reasons but not only for financial reasons. As to the financial reasons the resources available to the justice system are limited. The justice system is in competition for resources with the other public services including health and education.

If the criminal system is inefficient in the way it uses its resources this has an adverse effect on the other parts of the system including the provision of public funding for other litigation. If witnesses and jurors and in particular victims and their families are kept hanging about when this is not necessary this damages the reputation of the system and the public's confidence in the system. If they are made to come to courts when it is unnecessary because the defendant always intended to plead but this had not been

ascertained in time to avoid their having to do so, or if the jury consider their time is wasted because the case is trivial or if there are constant adjournments this is damaging to the confidence of the public in the justice system. We are nothing like so successful as we should be in managing the system and the cases within the system. We need to make the system less complex and more streamlined.

It is in order to assist to achieve this that the reforms proposed by Auld are so important. They provide a comprehensive way forward. As Lord Justice Auld states:

> *The strong impression that I have formed of the criminal justice system in the course of the review is there are complexities in every corner of it. Their consequence is much damage to justice, efficiency and effectiveness of the system and the public confidence in it. The central thrust of this report has been to find ways of removing or reducing these complexities and the damage they do.*

We have to do so since otherwise we will find that if an offence is committed the public will not want to become involved. A massive stride to achieving this would be if we produce as Auld recommends a new code of substantive criminal law, a code of criminal procedure and a code of sentencing. The law of evidence should also be less technical and more flexible. The degree to which we have suffered from piecemeal, often ill thought out over hasty legislation in each of these areas horrifies me. To take an example it looked as though we had recognised the errors of our ways with the Powers of the Criminal Courts (Sentencing) Act 2000 , which was an exercise in consolidation not codification. But it was incomplete as it omitted deportation, drug trafficking and confiscation orders and before the ink was dry it was being supplemented by a stream of further legislation including the 400 amendments contained in the Criminal Justice and Court Service Act 2000 which came into force on five different dates, one of which was appropriately 1st April 2000 and so the process goes on. In addition we have the extraordinary situation as Dr Thomas points out that over a dozen statutes require a judge when sentencing to utter an incantation.

Turning to procedure, it is extraordinary we still do not have a procedural code for crime as we do for civil litigation. Instead we depend on a motley array of practice directions some of which conflict with each other and some of which are obviously out of date.

The Unified Court

I turn to the management of the courts.Here Auld raises the question whether we should have a two-court system based on independent magistrates and the crown court as at present, or a single unified court system. The report recommends that we should move to one unified court. I suggest that the case for this recommendation is overwhelming. It will avoid having to send cases from one court to another. It would mean that the Magistrates Court and the Crown Court would be managed and financed as a single entity instead of separately. It will mean that the magistrates will have the benefit of the leadership and training which is available at present to the Crown Court. It will produce increased flexibility. It will mean that the requirements of the particular

case will be determined by the tribunal who is to hear it. Summary cases, as at present, will normally come before three magistrates, if a case needs special treatment it could come before magistrates sitting with a judge or a judge alone. The Magistrates Court will no longer be inferior to the Crown Court. If this was appropriate a High Court Judge could sit with Magistrates to hear a particular difficult case.

Linked to the recommendations of a unified court is the recommendation of the three Divisions or three-tiered system. The intermediate tier of magistrates sitting with a judge to hear cases triable either way is controversial because of its effect on the right to the defendant to be tried by jury. I am totally committed to the importance of the right to trial by jury unless that form of trial is manifestly disproportionate. But if it is disproportionate then I believe there is a need for a more sensible way of resolving who hears the case than we have at present depending as it does in part a list of offences.

Can I very briefly summarise some of my reasons for making the proposals;

1. *To achieve proper case management. The way a case is tried should not depend on the inclination of either the prosecution or the defence. However I would want the prosecution to face up to the issue at the outset of deciding what is the maximum punishment which they consider is appropriate. If a sentence beyond magistrates or magistrates and judges' normal power of sentence is contemplated either by the prosecution or the allocating judge then I would not qualify the right to trial by jury except if a defendant decided and the allocation judge agreed in a complex case that he would prefer to be tried by a judge alone or a judge and a special jury.*
2. *Two magistrates sitting with a judge would constitute a mini-jury and provide a proportionate form of tribunal for a case the seriousness of which would only warrant a short sentence.*
3. *Halliday makes clear that custodial sentences of under 12 months are not effective in achieving a change of behaviour on the part of an offender and so when a short prison sentence is required it should be very short. If a longer sentence is to be imposed it should be imposed by a professional judge. Although I do not believe that Magistrates are the only tribunal at fault we have to limit our over use of imprisonment and here to focus primarily on those who are the subject of the short sentence.*
4. *It is not only the defendant who is affected by an election for trial in a case which is not appropriate for such a trial. In particular I do not believe a defendant should be able to inflict on the jury the burden of having to hear cases which do not warrant their attention.*
5. *I am well aware of the alleged problem of lack of confidence in Magistrates. But the causes for this are being tackled by the method of selection of magistrates and the way they are trained. We have to face up to the fact that either Magistrates are fit or are not fit to be part of the trial and sentencing process. If, as I believe is the case they in fact already provide a high standard of fairness we must dispel the misconception that this is not the position. The misconception I am confident is no longer justified if it ever was.*

(When I refer to the maximum sentencing power I am referring to the power prior to the discount for plea.)

Management of the System

If we have a unified court, then it should be managed by the new Criminal Justice Board recommended by Auld. This is an important recommendation. It is a single body which is designed to overcome the problems created by the fact that there are at least three agencies which at the present time contribute to the management of our courts. Auld recommends that it should be chaired by an independent chairman and its membership should include senior civil servants from the three main criminal justice departments and the Treasury, the chairman of the youth justice board, chief officers of the criminal case management agency, the unified criminal court, police and probation services and a small number of non-executive members. That is hardly a compact body but absent from its not inconsiderable number of members are the judges. This is because Lord Justice Auld considered that it would be inappropriate for members of the judiciary to be involved in a board of this sort. He was however in favour of close consultation between the judiciary and the board

A significant change for the better, which has occurred over the last few years, is the partnership which has been established between the judiciary and both the Lord Chancellor's Department and the Court Service. It is recognised now, on both sides, that the judiciary have a most significant role to play in the efficient running of the courts. In my view it would be unwise to exclude senior judicial representatives from the board unless this is essential. That, I do not believe is necessary. It is possible that from time to time issues could arise before the board on which it would be inappropriate for judicial members to express views. If this happens, it seems to me that the judicial members could merely abstain from expressing views on the subject in question. Subject to this it seems to me vital that the judicial members should be heard as of right by the other members of the board. What I have said about the composition of the Criminal Justice Board also applies to the local boards which are intended to be responsible for giving effect at local level to the national Criminal Justice Board's directions.

Management of Complex Cases

Another significant recommendation is in relation to the case management of the more complex cases. Here, I welcome what is proposed. The present plea and direction and Nairey hearings are not achieving the management which is required. As in civil proceedings, so in criminal proceedings, I believe case management has a huge contribution to make. However, unless it is to be disproportionately expensive, hands-on case management must be confined to the complex cases. In the straightforward cases what is needed is standard written directions which set out a timetable which, except for very good reason, is to be strictly adhered to for bringing the case to hearing. The parties should agree between themselves any issues of law, procedure or evidence that may affect the length of the trial and when it can start. Only if they cannot reach agreement on matters which justify this should there be a pre-trial hearing. In a case which justifies it, a case management hearing needs to be conducted by properly

instructed lawyers on both sides who are fully aware of the nature of the case. Normally the hearing needs to be conducted by the judge who is to be in charge of the trial.

To achieve a situation where this is possible demands a huge change of culture. To bring this about Auld recommends that there should be a statutory criminal procedure rules committee whose responsibility it should be to draft in a single procedural code for the unified criminal court to which I have already referred. I am convinced that such a code is urgently required and could be as important for criminal justice as civil procedural rules have been for civil justice. However, case management, if it is to work, requires the front loading of costs and if case management is to work it must be paid for properly and be supported by the necessary IT. At present, the IT is not in position and the way lawyers are paid inhibits proper case management, the simplification of trials and the reduction in the length of trials.

Women Prisoners

...What the Youth Justice Board is already achieving convinces me of the need for a dedicated board to deal with female offenders.

The present situation is deeply depressing. The figures tell the story; as Gwyn Morgan has pointed out in the new law journal, in 1970 there were 988 women in prison; in 1990 there were 1597; at the end of June 2000 and 2001 there were 3736. Over 60 percent of women in prison are mothers and 45 percent have children living with them at the time of their imprisonment; almost a third of these children are under five and 2/3 are under 10. I quote:

> *"prison affects the living arrangements of around 8000 children each year. No one has even attempted to quantify the knock-on affects in terms of the cost to local authorities, the disruption in education and the social exclusion and likely criminality of a new generation".*

This is a subject which desperately needs attention.

The Sentencing Advisory Panel

The establishment of the Sentencing Advisory Panel was a most imaginative initiative.

It is already making an impact. I find its recommendations most valuable. The problem is that at present it is not possible to implement recommendations by incorporating them in a guideline decision until a suitable appeal can be found. Auld recommends and I agree that should not be necessary.

Impact

Does the Australian judicial system need an overhaul as Lord Woolf suggests the British does?

DISPUTE RESOLUTION, CULTURE AND ALTERNATIVES

14. In Victoria Laurie, **Justice in Black and White**, *The Weekend Australian Magazine* (October 20-21, 2001), the tensions between aboriginal and white law are explored. Can there be two systems of law, asks the writer? Of course, there has been tacit understanding of aboriginal sentencing principles but the legal framework is after the fact, argues Mick Dodson, of the Indigenous Law Centre at the University of New South Wales. In addition, there is a foundational difference as aboriginal customary law is more about the relationship. However, questions remain, for example, Could aboriginal offenders choose not to be aboriginal if they prefer white justice?

15. Some of these issues have already been explored in, Sharon Rodgers, **The Future of Cultural Forms of Dispute Resolution in the Formal Legal System**, *Futures Research Quarterly* (Winter, 1993), 41-49.

She reports that at the 1991 Judicial Foresight Congress, 9% believed that culturally appropriate dispute resolution techniques ought to be incorporated into the Judiciary and ought to replace the current adversarial system in most situations; 62% believed that a special commission ought to further investigate this issue; 17% said that although they were sympathetic to culturally appropriate modes of settling disputes, the formal system ought not to be required; 12% believed that the focus should be on ensuring that current laws are administered fairly to all groups rather than risking even more unequal treatment; and, 0% said that culturally appropriate dispute resolution techniques have no place in the Judiciary.

What this means is that there is a broad mandate, at least in one American Jurisdiction, for exploring culturally appropriate dispute resolution methods.

Impact

What might a survey in Australia reveal in terms of culturally appropriate dispute resolution techniques? Should there be separate systems for different cultural groups in Australia? What would a multicultural court system look like?

ROLE OF JUDGES AS GUARDIANS OF THE ADR PROCESS: EUROPE

16. http://www.iadb.org/mif/eng/conferences/speeches/hascher.htm

This scan summarizes the latest developments of ADR in Europe. They conclude that: Courts in Europe have been in the vanguard of the promotion of arbitration and, New judicial initiatives have emerged for the organization of mediation.

Importance given nowadays by judges in their respective countries to ADR

1. Public vs. Private Sector of Dispute Resolution

Courts are in the public sector of dispute settlement but exercise no monopoly over the administration of Justice. The considerable development of patterns of international trade and commerce has created conditions for the emergence of a private sector in the field of dispute settlement.

2. Enforceability of Arbitration Agreements

The validity of an arbitration agreement is now a permanent fixture of arbitration law in Europe. The authority of the arbitrators to decide over their own jurisdiction is a well-settled principle in the arbitration laws in Europe and so is the obligation of the courts to refer the parties to arbitration. Courts have no jurisdiction to adjudicate over a disputed matter covered by a valid arbitration clause :

- arbitrators are judges of their own competence ("competence-competence"),
- arbitrators have jurisdiction to decide over the objection of a party regarding the existence, validity of an arbitration agreement or with respect of the irregularity in the appointment of the arbitrators or constitution of the arbitral tribunal,
- an allegation as to the invalidity of or non-existence of the contract containing the arbitration clause does not affect the jurisdiction of the arbitral tribunal ("separability of the arbitration clause").
- Adherence to the UNCITRAL Model Law
- Expansive scope of subject-matters that can be dealt with arbitration
- Consumer related arbitration

Role of the Judge in the ADR and/or arbitration procedures in their country

Article 279 of the German ZPO : The Court shall bear in mind at every stage of the proceedings an amicable settlement of the case or of individual points of controversy. It can refer the parties for an attempt of amicable settlement to a judge of the court delegated to that effect.

Reasons for a new approach to litigation. The new English Civil Procedure Rules (in force since 26 April 1999) and the Woolf Report on the civil justice system :

Judges have a duty to manage cases : The court must further the objective to deal with the cases justly by actively managing cases, and in particular by encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate and by facilitating their use of such procedures (Rule 1.4(2)(e)).

A party may ... make a written request for the proceedings to be stayed Courts may stay proceedings while the parties try to settle the case by alternative dispute resolution or other means (Rule 26.4(1) and (3)).

Pilot mediation scheme at the Central London County Court, the Commercial Court, the Technology and Construction Court.

The French legislation of February 5, 1995 and Decree of July 22, 1996 : - any party has the right at any moment to terminate the mediation process

- the mediation process must be of short duration (envelope of time must not exceed 6 months)
- absolute confidentiality
- court-annexed mediation takes place within the development of the of the court proceedings, with the aim of finding a consensual solution acceptable by the two parties but without unduly prolonging the length of litigation
- mediation costs must be kept as low as possible in order to remove all financial obstacle for the parties

JUDICIAL TRAINING IN A MULTICULTURAL WORLD

17. Lord Justice Brooke,The Administration of Justice in a Multi-Cultural Society, Address to the Grotius Colloquium on the Fight Against Racism in the Administration of Justice, London 27 March 200 http://www.lcd.gov.uk/judicial/speeches/speechfr.htm. Accessed November 11, 2001.

In this speech, Justice Brooke makes the case that unless the judges and the justice system becomes more multicultural, it will lead to a loss of a faith in the quality of justice.

> *The JSB has now published two editions of a specialist handbook which is sent to all judges. In each edition a very early chapter is called "Ethnic Minorities in England and Wales". In this country we are still fairly heavily dependent on the results of our 1991 national census, but various methods have been used to bring some of the figures up to date.*
>
> *In 1991 there were just over 3 million people here of ethnic minority origin. They constituted about 5.5% of our total population. Nearly half of them were born here. Equivalent figures for 1997 are 3.6 million and 6.4%. I remember being told a few years ago that our proportion of ethnic minority citizens was likely to go up to about 10% in 2020, assuming no more primary immigration, and that it would then level out.*
>
> *Nearly half our ethnic minority population live in Greater London. Four great urban centres, London, the West Midlands, Greater Manchester and West Yorkshire, contain nearly three-quarters of them. In some country areas there is still hardly ever a black or Asian face to be seen.*
>
> *Our minority population is mainly young. Of all those who were under 25 in the 1991 census, 8.2% came from an ethnic minority background. This proportion was even higher among those who were younger than 25. In contrast, nearly 30% of our white*

population was then over 55, compared with less than 10% of those from ethnic minorities.

Where does this minority population come from? Again, I have to give you the 1991 figures. 840,000 were of Indian origin, 475,000 from Pakistan and about 160,000 from Bangladesh. Half a million were of Caribbean origin, and there were 180,000 called "black other". A lot of these are the children of settlers from the Caribbean who like to think of themselves as "black British". There were also 200,000 black Africans, 160,000 Chinese, and about 300,000 who would describe themselves as Jewish. All these figures will have increased by now. In 1998 it was also estimated that there were about 120,000 recognised refugees and asylum-seekers in Britain, mostly living in London.

This is why – (increasing multiculturalism and difference is worldviews) - in those days my expert advisers told me to talk endlessly to judges and magistrates about oaths, names, familiar words which have more than one meaning, family structures and other things that are different for people from different cultures, important matters of religion and mistakes with body language. They all rammed home to me how crucially important these things were. I remember how pleased I was when I gave one of my standard talks to magistrates in the West Midlands. One of them, who had great experience in race relations in Birmingham, came up to me afterwards. She told me I had covered in my talk all the matters which in her experience gave rise to difficulties again and again in dealings between people of different ethnic backgrounds.

The message I was taught to give was that if people encounter what they see as shockingly bad practice over simple things like oathtaking, or if they are addressed or referred to by the wrong name, or if they are described by judges and lawyers in court in a way they find offensive (such as "coloured" or "half-caste" in an English context), then they are unlikely to be very impressed by the quality of the justice which is being provided at courts which are obviously not taking much trouble about things that are very important to them.

MODERNIZING THE COURTS FOR THE 21ST CENTURY

18. Lord Woolf, Lord Chief Justice of England and Wales, **The Needs of a 21st Century Judge**, Address to the Judicial Studies Board, London, 22 March 2001. **http://www.lcd.gov.uk/judicial/speeches/22-03-01.htm**. Accessed November 11, 2001.

In this speech, Lord Chief Justice of England argues that: 1. The Judicial Studies Board (which trains judges) should be expanded. 2. Court architecture needs to be redesigned, perhaps like American concept of the multi-door court so as to reflect the new responsibility of the judiciary to support ADR? 3. Modernized and Internationalized.

For the last few years the justice system in this country has been subjected to unprecedented change. I sometimes think that the only thing that has not either changed, or is in the process of change, or the subject of a proposal for change, is the

robes we wear. The system has stood up to the process extraordinarily well. The judiciary has also coped extraordinarily well with the changes imposed upon them. Remarkably, they have taken in their stride a fundamentally different approach to family law, civil procedure and an ever more complex process of sentencing. They have also absorbed an entirely new tier of the judiciary. It is early days yet but the omens are encouraging for saying that the domesticating of human rights has been achieved astonishingly smoothly.

*That this has been possible is undoubtedly in part due to the **Judicial Studies Board** (JSB), an institution which some feared and others regarded as unnecessary when it was established, but which is now recognised as being an immense success. It is an institution which is already of fundamental importance to the judiciary at all levels. Its beneficial influence has been immense.*

However, it is my thesis that the time has come for the role of the JSB to be significantly expanded. I regard this not as an option. It is essential. Its present role does not include valuable features that similar institutions in other common law and civil jurisdictions are providing. This must now be remedied. However my contention is more fundamental. This is that the JSB is the most obvious body to perform a vital role (which I will explain) which is not performed elsewhere.

Part of the reason the JSB is a success story is the fact that it is based on judges training judges. At present, we totally lack any institution that acts as a think tank. The type of issues we need judges to consider include:

> *the qualities we should be seeking in the judges we appoint and promote how we appoint judges, their terms of appointment, their deployment, their career, development, management of judges, the support which the contemporary judge requires the role of the judiciary in promoting mediation.*

These are all subjects of interest to the Lord Chancellor's Department but at the present the judiciary's contribution is entirely reactive. It should be proactive. The fact that it is reactive means that many of the subjects do not receive the consideration they should. This results in decisions which are neither in the interest of the judiciary nor the public and decisions not being taken which would be in the interests of both.

The judiciary has grown in size but the senior judiciary, with notable and distinguished exceptions, are recruited by very much the same process and from the same section of the practising profession as when I became a judge 22 years ago. Furthermore, at least to the casual onlooker, the way in which the judiciary performs its role has not altered. The QB judges still travel on circuit in much the same way as they did. We still have the distinction between the Divisions. Non-chancery practitioners are appointed to the Chancery Division. Whilst a Chancery practitioner has prosecuted a very serious fraud trial (Saunders and Others), and although that counsel is now an LJ, as far as I am aware neither he nor any other Chancery judge has conducted a criminal fraud trial. Should this happen?

There are new court buildings but the courts in those buildings are contemporary reproductions of the courts in the old buildings. The furniture may be lighter but the layout is basically unaltered. Are the designs still correct? Should they be based on the United States concept of the multi-door court so as to reflect the new responsibility of the judiciary to support ADR?

So far I have been talking of the past. But the dimension of the changes which the judiciary has had to absorb up to now diminishes dramatically when compared with the scale of change with which it is faced in the foreseeable future. The scale of this change is daunting but it should be welcomed. I have repeatedly said that although this may not be as widely accepted as it should be, we have the finest judiciary in the world. However, if we are going to maintain this position, it is essential that the judiciary itself presses energetically for the resources which it needs if it is to perform its role effectively in the future.

Why do I believe the changes are going to be so dramatic? Well, first of all, there is the impact that IT will have on the way which the justice system works. If any confirmation of this is required, it is provided by the consultation paper issued by the Lord Chancellor's Department in January under the title ***Modernising the Civil Courts*** *(MCC) as part of the Modernising Government Programme. The Lord Chancellor's Parliamentary Secretary, in launching the report, said this:*

> *"The way we run our courts has not in essence changed for 150 years. Almost every court still operates as both a hearing centre and administering the cases under its control. Whilst other services in the public and private sector have centralised administration and gain tangible benefits from IT to benefit their services, investment in the civil courts has been very limited.*
>
> *"It is not necessarily right to run our civil courts in the 21st century using the systems developed in the 19th century. Just as banking, insurance and many public services have modernised so our courts can and must take advantage of new technology and new ways of working and deliver the benefits to those who use the courts.*
>
> *"Modern technology allows the front office to leap beyond the doors of the court on to the personal computer and the digital TV and to develop partnerships with solicitors and advice agencies so that everyone has the opportunity to benefit from the new ways of working. This is an exciting concept."*

Impact

Do the Victoria Courts need to be modernized? Does their architecture need to be changed to represent the multi-door courthouse? How can the courts become more up to date? What should not be changed?

JURY SYSTEM

19. American Judicature Society. **Enhancing the jury system** *Judicature*, March-April 1996, p. 212.

"Recent attention to the American jury system provides an excellent opportunity to devise ways of improving how jurors are treated and enabled to fulfill their role.

Reforming the jury system is currently a subject of widespread interest not only within the courts and the legal profession but among legislators, the media, and the general public. Arizona and New York have recently led the way in improving how jurors are treated and involved in trials, and other states are developing proposals to improve their jury systems.

- More inclusive jury pools. To make juries better reflect the communities in which they sit, many jurisdictions have implemented or are considering proposals to expand jury pool source lists, reduce or eliminate automatic exemptions from jury service, and reduce the number of peremptory challenges. Providing for adequate payment of jurors also increases the number of available jurors by easing the financial sacrifice of individuals who report for jury service. And the widely adopted one-day/one-trial system, which reduces the time demands of jury service, helps broaden jury pools by enabling more citizens to serve.
- Improved treatment of jurors. We ask a great deal of citizens who serve as jurors, and they deserve to be kept clearly in mind as court policies are developed and procedural issues are decided. It is the particular responsibility of every trial judge to ensure that the needs of jurors are accommodated. If we are to maintain the effectiveness of the American jury and the value of the right to a jury trial, we must be sensitive to the effect of delays and other inconveniences on jurors. It should hardly take a bill of rights for jurors, as Arizona has proposed, to require that they are "treated with courtesy and respect and with regard for their privacy," "provided with comfortable and convenient facilities," "informed of trial schedules that are then kept," and allowed "to express concerns, complaints and recommendations to courthouse authorities."
- Enhanced performance by jurors. A variety of proposals are being considered to improve jurors' understanding of the evidence and the law and to facilitate their deliberations. Many have been adopted. These include allowing jurors to take notes, furnishing them with notebooks of trial exhibits, instructing jurors on the law at an earlier stage of the trial, allowing jurors to propose questions of witnesses, requiring more comprehensible jury instructions, giving the jury written copies of the instructions, allowing jurors to discuss the case among themselves prior to deliberations in certain cases, and providing deadlocked juries with additional argument by counsel to avert mistrials.
- More expeditious trials. Eliminating unnecessary delay in the trial process is a desirable end in itself, but it also furthers the goal of making jury service a more positive experience. Judges are being urged to keep trials moving, require that attorneys stick to prearranged schedules whenever possible, and hear arguments on motions or conduct other judicial matters when the jury is not assembled to minimize the need for the jury to be repeatedly excused from the courtroom during a trial.

COURT MONITORING

20. American Judicature Society, Court monitoring: A say for citizens in their justice system www.ajs.org

" Programs that use non-lawyer volunteers to observe and evaluate courthouse facilities and proceedings are valuable for improving the administration of justice.

While many citizens are concerned about the quality of justice rendered in America's courts, few feel they can do anything that will actually improve the court system. Without an organized presence, individual citizens find it difficult to articulate their complaints and recommendations for improving the courts.

In 1975, the nonprofit Fund for Modern Courts developed a program to give New York citizens a powerful voice in how their courts are run. The concept, known as court monitoring, was simple: form groups of volunteers around the state, representing a cross-section of their communities, to observe court proceedings on a regular basis. The monitors would assess the courts from the point of view of outsiders to the system and recommend improvements to make them more efficient and user-friendly. The monitors' findings and recommendations would be published and released to court administrators, lawmakers, judges, bar associations, civic groups, and the media.

Over the past 22 years, citizen court monitoring has been the centerpiece of the Fund for Modern Courts' effort to involve the public in improving the administration of justice in New York. Today, groups of volunteer court monitors--almost all non-lawyers and outsiders to the court system--number more than 600 and work in 17 New York counties. Similar court monitoring programs have been operating in the Chicago area by Cook County Court Watchers, in Washington, D.C., by the Council for Court Excellence, and in other locations by organizations such as the League of Women Voters.

Any initial misgivings that judges and court administrators may have had about monitoring has largely given way to recognition of the benefits of public scrutiny. Court monitoring has proven highly successful at creating an ongoing and productive dialogue between citizens and their judiciary, at making the courts more accountable to the communities they serve, and at producing tangible improvements in the courts.

How monitoring works

In New York, groups of monitors around the state observe their local courts, recording their common-sense assessments of the performance of the judges and personnel, and of the workings of the court. Volunteers are recruited by Modern Courts' staff through press releases and announcements in local newspapers; through contacts with agencies that place volunteers, such as the United Way's Retired Senior Volunteer Program; through contacts with area civic groups, such as the League of Women Voters; and through the offices of local elected

officials, who help recruit constituents. In areas where monitoring has gained a foothold, volunteers are also recruited by the monitors themselves through word-of-mouth.

Each project begins with an open house in a public meeting place, such as a town hall or a public library. Occasionally, the meeting takes place in the court to be monitored. A Modern Courts staff member describes the goals of court monitoring and how the program works. In addition, a judge or other court official outlines the workings of the court being monitored and the types of cases the volunteers will observe. If the project involves monitoring a court that handles criminal or family cases, the volunteers receive a handbook that provides an overview of the relevant law and procedure.

While the volunteers are provided with general orientation, they are not given formal training. Instead, they are asked to look at the courts from a fresh, outsider's perspective and to use common sense to evaluate how the courts can be improved.Each monitor is then asked to attend court one morning or afternoon a week, at their convenience, for a period of three to six months. The length of the project depends on the size of the court being monitored. Each judge must be observed a sufficient number of times so that fair conclusions can be drawn.

The monitors do not assess the judges' legal rulings or decision making. Instead, each time a monitor attends court, he or she uses a form to comment on the efficiency and demeanor of the judges; the way victims, witnesses, jurors, and members of the public are treated by court personnel; causes of delay in court proceedings; the availability of public information; factors that make it difficult for people to receive a fair hearing; the court's physical condition; and other aspects of the court's performance.

Approximately two months after the project has begun, a Modern Courts staff member organizes a meeting of the monitors. There the monitors can compare observations, ask questions about what they have observed, and hear a speaker from the court system discuss issues related to the court being monitored.

At the end of each project, Modern Courts' staff convenes the monitors one final time for an in-depth focus group session. Comments and criticisms are exchanged, potential ways to improve the court are explored, and recommendations are formulated. The staff then analyzes the forms submitted by the monitors and drafts a 30- to 40-page final report detailing the monitors' observations and recommendations for improvement. The report is reviewed by the volunteers prior to being published and distributed.

The reports often receive a good deal of press attention, especially in areas outside New York City. More importantly, the reports generate rapid and detailed responses from court officials.

Achievements

The hundreds of dedicated court monitors who work each year with the Fund for Modern Courts have had a significant impact on the quality of justice provided by New York's courts. The monitors' work has been especially important in recent years, as their projects have focused mainly on lower courts, such as the Family Court, the Housing Court, and the town and village courts, which are most likely to directly affect the lives of ordinary citizens. User-friendly innovations are critical in these courts, where many people appear without a lawyer.

The direct involvement of citizens in these "people's courts" has helped foster an atmosphere in which court administrators are increasingly sensitive to the public's needs. In addition, by helping to create a constituency of citizens who understand the problems facing the courts, monitoring has enhanced efforts to lobby for court reform legislation.

Many of the court monitors' recommendations for improvement have been implemented.

In just the past three years:

- In-court child care facilities have been established in 15 family courts around the state. These facilities protect children from the harsh experience of a day in the courtroom and enable parents to tend to court business without distraction;
- Court calendars have been staggered in order to shorten waiting times and reduce overcrowding. For example, the Brooklyn Family Court now uses a staggered calendar in which people are summoned to court at three different times throughout the day;
- In response to complaints about insensitivity to the public by court personnel, a mandatory civility training program was established for all nonjudicial personnel;
- Information kiosks are being installed in courthouse lobbies across the state;
- Pressure from court monitoring groups has helped spur several localities to build new courthouses to replace outdated, dilapidated, severely overcrowded facilities. In addition, cleaning and maintenance of courthouses has been significantly improved;
- The audibility of court proceedings has been enhanced, as more judges use microphones and direct lawyers and witnesses to do so;
- Judges are increasingly sensitive to the need to start court proceedings promptly and to explain delays to observers;
- Courthouse security has increased;
- Jury pools have become more diverse, as new legislation has required jury commissioners to expand their lists of prospective jurors;
- The experience of serving as a juror has been made less burdensome by legislation that will ultimately raise juror compensation from $15 to $40 a day. In addition, mandatory sequestration of deliberating juries has been eliminated in most felony cases, and many once-shabby jury assembly rooms have been dramatically upgraded;
- Telephone call-in procedures and rules that permit jurors to be excused after serving one day or one trial have reduced the amount of time sacrificed by citizens called for jury duty;
- A procedure was established to review charges of ethical misconduct by Housing Court judges and to sanction those judges.

Many other improvements have occurred at least in part as a result of court monitoring. But the most important benefit of citizen court monitoring is that it creates a broad avenue of communication between citizens and their judiciary. As a result, the courts better understand what needs to be done to increase public satisfaction, and the public has a more realistic idea of the problems faced by the courts in their efforts to administer justice.

Impact

Court monitoring, while possibly resisted by judges, may enhance the trust of the public in the Courts.

NEW JUDICIAL CHAMBERS

21. George Nicholson, "**Judicial Chambers of the Future**."
http://www.judgelink.org/About/AdvisoryBd/Nicholson.htm

Nicholson believes that there will be dramatic changes to the judicial chamber of the future. The chamber will have at-home facilities which will enable trial and appellate judges, state, federal, and tribal, to utilize the most advanced technologies, whether in chambers or at home. The paper deals with the advent of wireless smart cars, or e.cars, by which judges may be virtually "in-chambers," even while on the road. Finally, the paper deals with "on-foot" judges who may acquire and use miniaturized, wireless resources to enable them to be "in chambers" or on the bench.

VIRTUAL COURT

22. Gene Stephens, "Trial run for virtual court**,** The Futurist; Washington; Nov/Dec 2001;

Writes Stephens:
"*An animated, three-dimensional recreation of an (hypothetical) incident is presented as key evidence in a mock trial, conducted to test an array of new technologies that together are creating the cybercourts of the future. Observers online and visiting the courtroom witnessed a demonstration of high-speed videoconferencing, automatic speech transcription, automated language interpretation, photorealistic animations, and a 360-degree dome camera that recorded and broadcast" the proceedings."*

Impact

Cyber courts, seemingly science fiction a few years back, appear to be almost here. Will they enhance citizen perception and participation in the judicial system? Are administrators ready for such a change?

SISTER COURTS

23. Nicholson as well in his article, "**A vision of the future of appellate practice and process,"** The Journal of Appellate Practice and Process" http://www.ualr.edu/%7Eappj/

Argues for the sister judicial cities.

Justice Ellis raised the additional issue of "Sister Courts," akin to the "Sister City" concept which has long enjoyed worldwide currency. The central question: Might there be utility for courts around the world to ponder the idea of sister courts, bolstered by technological appendages, for the enlightenment of judges and the enhancement of justice everywhere? The answer to that question may already be at hand. Judge Lucian Netejoru, Trial Court, District of Giurgiu, Romania, and Judge Gerald Elliott, Johnson County District Court, State of Kansas, are presiding over the establishment of a "Sister Courts" project between their two courts.15 According to Judge Netejoru:

The alliances between courts from different countries, have the aptitude to fight against a"court's narcissism" with its own arms; each court in such an alliance shall be the "mirror" for the other, reflecting a non-neutral image. The alliance of "Sister Courts" shall have two pillars: the informal relationship between judges and the institutional conjunction. There is a need for judges to think more broadly, more inclusively, and more creatively. To this end, "Sister Courts" can provide the primary mechanism represented by a "network" of immediate links, professional as well as social, between all the judges of two courts from different countries. The existence of mutual interests at the personal level is out of doubt; therefore, the determination of such interests and the establishment, on this basis, of personal relationships is a very important task. The aforementioned "network" shall enable the involved courts to enlarge their respective horizons in order to speed and improve the delivery of justice, in both jurisdictions.

Impact

The sister court concept could be a win-win innovation, for Victoria and Australia.

CITIZEN AND SELF-REPRESENTED LITIGANTS – WHAT CAN BE DONE.

24. Nicholson, "**A vision of the future of appellate practice and process,** *The Journal of Appellate Practice and Process*. http://www.ualr.edu/%7Eappj/.

Nicholson develops solutions to the problem of self-represented litigants.

"In the past decade, trial and appellate courts have witnessed an explosion in the number of cases filed by self-represented litigants--particularly in the areas of family law, landlord/tenant, and small claims. Some jurisdictions report that at least one party is self-represented in up to 90% of new filings; in over 60% of cases, both parties are self-represented. Although the great majority of cases filed by self-represented litigants are

factually and legally uncomplicated, many of these litigants struggle to navigate a procedurally complex court system that is unfamiliar to most lay persons, that employs difficult, even arcane, terminology, and that imposes highly technical requirements for pleadings, motions and evidentiary proofs. These litigants invariably require greater expenditures of time and attention by judges and court staff to move their cases through the judicial process. To date, little effort has been spent trying to simplify the court process itself so that self-represented litigants are able to navigate the courts without undertaking a crash course in civil procedure.

To address this major shortcoming, the National Center for State Courts ("NCSC") has initiated a partnership with the Illinois Institute of Technology's Institute of Design and the Chicago-Kent School of Law to examine court processes and recommend modifications to eliminate or reduce procedural barriers to access for self-represented litigants. This unique partnership brings together the extensive expertise of the NCSC in court management, the distinguished expertise of the Institute of Design in human-centered systems design, and the nationally renowned expertise of the Chicago-Kent School of Law in the use of technology in the justice system.

This consumer-based approach designs and proposes new court processes from the ground up, based on the needs of all court users--attorneys and litigants. The partnership will also design and propose user-friendly electronic interfaces to aid courts to provide public access to redesigned court processes.

A two-pronged strategy will be utilized, according to Professor Ronald Staudt of the Chicago-Kent College of Law. First, it will seek to reduce the complexity of court proceedings through a systemic, human-centered design process that works from the ground up. The design process is sensitive to the cultural, language, educational background, and computer literacy of people who choose to or must represent themselves in court. Equitable and fair treatment of all litigants will be a key consideration throughout the design process. Second, the partnership will harness the power of the Internet to help appellate court justices and trial court judges, and their respective staffs, to create "portals" to their civil justice processes, to help provide consumer-friendly computerized assistance for potential and actual self-represented litigants. The two strategies come together to create a web-based prototype of a consumer-based approach for either or both trial and appellate dispute resolution processes.

COURT TRENDS AND REFORMS FROM PENNSYLVANIA – EDUCATION, ADR AND FORSIGHT

25. The Pennsylvania Courts offers the following trends futures analysis:

Alternative Paths to Justice
In the year 2020, we will have preserved the right to trial, but evolved alternative methods for the growing number of disputes better solved without a traditional trial. The result will be a multi-door justice system that does not overburden the courts, but provides all citizens with an appropriate path to justice, regardless of the claim. To develop alternative paths to justice, the Commonwealth will have to:

- Educate citizens on the possibilities and mechanisms of alternative dispute resolution, beginning at an early age.
- Educate people on the need to take responsibility for resolving disputes amicably outside the adversarial process.
- Develop a body of qualified facilitators.
- Develop mechanisms to anticipate new types of dispute and provide suitable means to resolve them.

To reach these goals, the Alternative Paths to Justice Task Force recommends the following actions:

- Develop a program to educate judges and attorneys on alternative resolution options, including production and distribution of a dispute resolution manual written in plain English.
- Establish a statewide dispute resolution coordinating office to review programs and to determine disputes for which ADR will become the first step in the litigation process.
- Have all levels of government take the lead in establishing mechanisms to resolve disputes between different levels of government.
- Continue to integrate dispute resolution training in the school systems and develop a model ADR curriculum for use by school districts.
- Establish ADR courses as requirements for law schools.
- Establish a state-level office to collect and disseminate information about ADR.
- Establish a set of standards for certifying ADR professionals and create CLE courses in ADR.
- Explore the development of automated programs to provide statewide guidelines for personal injury evaluation, equitable distribution, support payments and other areas where such standards will expedite alternative dispute resolution.
- Create a statewide Commission to report on new types of disputes every five or 10 years.

Court Trends

- A growth in caseloads in the courts.
- The legislation of tougher and longer sentences and mandatory sentence guidelines.
- The creation of new causes of actions, particularly in complex cases such as mass tort, medical malpractice and product liability litigation.
- An increase in prose litigants, that is, litigants appearing on their own behalf without legal representation.
- Pressures arising from a growing inadequacy in the available options for dealing with those convicted, such as overcrowding in prisons and the unavailability of drug programs.
- The introduction of computers and information technologies into management of court proceedings.
- Funding problems for the courts.
- Restrictions on judicial independence.
- The emergence of alternative dispute resolution as a viable alternative to the courts.

- A declining respect for the legal system and the courts, partially stemming from a decline of respect in all American institutions and partially the result of a decrease in the average citizen's knowledge of how the courts operate and a belief that they do not truly serve citizens' needs.

Some of these trends, such as demographic changes, have had a neutral impact on the courts, but changed the environment in which the courts operate and/or the population that is served by the courts. Other trends, such as the use of computers and alternative dispute resolution, have actually helped to improve justice in the Commonwealth. Many of the trends of the recent past, however, have overburdened the courts, slowed down the administration of justice, made the court system relatively inaccessible to large segments of the population and impeded the ability of the justice system to do its work.

FORESIGHT AS CORE COMPETENCY FOR COURT ADMINISTRATION.

26. National Association for Court Management.
http://www.nacmnet.org/CCCG/cccg_10_corecompetency_visioning.html

The National Association for Court Management is the largest court professional organization in the world, with over 2,500 members. Its Professional Development Advisory Committee, working with the Justice Management Institute, and funded by the State Justice Institute, is developing the ten Core Competencies and associated Curriculum Guidelines for court managers.

"Effective court leaders take time to vision the future because visioning impacts the bottom line. Through visioning and strategic planning, leaders improve day-to-day court management. Visioning is practical and bottom-line.

The urgent often drives out the important in all organizations, courts included. Visioning and strategic planning counteract natural tendencies toward inertia—activity rather than accomplishment—by focusing courts on: their most enduring purposes; visions of the future built around these commitments; and, realistic steps to realize their preferred future. Through visioning and strategic planning, courts and court leaders avoid isolation and create and maintain momentum for change. While complementary, visioning and strategic planning processes and results differ.

Visions are holistic, inspirational future snapshots. They look forward and reach back to core values: the ends of justice and service and the means of judicial independence, substantive and procedural due process, equal protection, open access and the fair and efficient application of the law to the facts. Visioning invites court leaders, their justice partners and the community, first to imagine and then to deliver the future they prefer. Court futures commission in 24 states, beginning in the mid-80s to the present, plainly show that court leaders can prescribe preferred futures, and then turn to strategic planning.

Strategic planning is a process—involving principles, methods and tools—to help court leaders decide what to do, and how and when to do it. The strategic planning process is

directional and linear and translates vision into plans and action steps, taking into consideration: environmental trends; fiscal conditions; current operations, processes and performance; the sources and magnitude of opportunities and threats; and, the court's response."

Impact

Foresight has ceased to become an add-on to part of core curriculum. Should the Department of Justice, Victoria develop curriculum for the other states and the Federal government to follow?

THEME TWO

CRIME AND JUSTICE

FUTURES OF CRIME

1. **www.foresight.gov.uk.** Crime Prevention Panel. **Just Around The Corner – A Consultation Document. Foresight Making The Future Work For You.** Accessed September 20, 2001.

This is an excellent document that provides scenarios for the futures of crime. It forecasts increases in violence and disorder, increases in fraud, personation and extortion; more crime committed by those outside national jurisdictions and theft targeting electronic services.

"Your identity, in whatever form it takes, will increasingly have value and therefor a target for crime. Identity crimes may be facilitated either by counterfeit identifiers or the misuse of legitimate identifiers. "

INTEGRATED MEASURES

2. From Jennifer Cootes, **Future Watch,** *Journal of Futures Studies* (Vol. 5, No. 3, February, 2001), 161.

Australian criminologist M. Findlay, The Globalization of Crime, Cambridge, Cambridge University Press, 1999, sees crime as a major player finding new contexts in globalization. Findlay argues for integrated globalized crime control measures and the loss of community responsibility in crime control as professionalism intensifies.

REDUCING CRIME

3. Gene Stephens, **"Preventing Crime: The Promising Road Ahead**," *The Futurist* (November 1999), 9.

US criminal justice professor Gene Stephens summarizes studies of numerous experiments in crime prevention. He concludes that community policing with well trained staff and a proactive alternative policy of restorative justice can reduce crime and fear, as well as revitalize communities.

PRISONS AND CRIME – DEINSTITUTIONALIZAITON AND RESTORATIVE JUSTICE

4. Tim Anderson, **"Go straight … back to jail,"** *The Sydney-Morning Herald* (November 15, 2001), 15.

Anderson reviews perspectives on crime. He argues that the get tough approaches, as in the USA have not worked. Over the last twenty years the USA has doubled its imprisonment rate yet now has a higher rate of violent crime.

Anderson concludes that there is a link between prison and violent crime: crimes of violence are often committed by those who have been institutionalized.

There is also a link between legal processing of young people and recidivism. He argues that a "better considered response is to reduce levels of institutionalization" and use "diversionary programs for young offenders which are consisted with the recommendations of many official inquiries, and the with Convention of the Rights of the Child."

He also cites a recent study by the Australian Institute of Criminology which shows that restorative justice has a better rehabilitative potential than traditional sanctions.

DRUGS AND CRIME

5. Geoffrey Stokes (Centre for Democracy, U of Queensland), Peter Chalk (RAND Corp, Washington), and Karen Gillen (U of Queensland), editors. ***Drugs and Democracy: In Search of New Directions.*** Melbourne: Melbourne U Press, Oct 2000. (Dist. in US by Paul & Company/COSI, Leonia NJ; 201.840-4748.) Abstracted in: Michael Marien, *Future Survey*. Vol. 23, No. 7, July 2001, 13.

"Australia's national drug policies are considered to be a failure. They were not adopted by a careful assessment of previous policies and evaluation of options. Commitment to these policies has become increasingly entrenched, at the same time as community support for them appears to be eroding. Essays discuss the global heroin and cocaine trade, security issues related to drug trafficking in Southeast Asia, distribution and use of illicit drugs in Australia, the history and politics of drug prohibition, balancing individual rights and community norms, the profound impacts of illicit drugs trade on social and political life, evaluating the national drug strategy, and law enforcement and accountability.

Some strategies for better outcomes: 1) the most important step is to redefine illicit drug use as primarily a health and social issue rather than a criminal justice problem; 2) set appropriate penalties, with more emphasis on non-custodial sentencing to divert selected offenders from the criminal justice system to drug treatment; 3) decriminalization of the cannabis industry; regulation and taxation of cannabis production and sale may be a long-term inevitability, but progress to this end will be incremental; 4) better allocation of drug funding, with equal funds for law enforcement, prevention, and treatment; 5) adequately-funded, research-based drug education for schools and the community; 6) improving the range, capacity, and quality of

drug treatment; 7) evaluation of new treatment options; 8) renewed commitment to reduce harm

DRUGS AND THE FUTURE

6. Reducing Illegal Drug Use in the United States: Blueprint for a Drug-Free Future. Edmund F. McGarrell and Jason D. Hutchens. Indianapolis: Hudson Institute, Feb 2001/101p/$11.95pb. Michael Marien, *Future Survey*, Vol. 23, No. 7, July 2001, 12.

"Illegal drug use and distribution has dominated the criminal justice system in the last quarter century, and significantly reduced levels of safety in American neighborhoods. Despite huge expenditures for interdiction, street-level enforcement, incarceration, and drug treatment, the problem remains at alarming levels. The persistence of the drug problem has led some, such as New Mexico Governor Gary Johnson, to "wave a white flag and essentially accept illegal drug use as a normal and acceptable feature of American life." The authors argue, instead, for a *true commitment* to reducing the demand for illegal drugs, and less emphasis on supply-side approaches.

1) ***General Proposals***: clear and consistent moral leadership from the White House on down (reinforcing the message that drug use is harmful and wrong), reject calls to legalize medical marijuana and needle exchange, target education campaigns to reduce demand for illegal drugs, adequate treatment slots for drug users, hold treatment providers accountable for results, support faith-based efforts to reduce drug use, government benefits contingent on recipients remaining drug-free;
2) ***Hard-Core Users***: routine drug testing for all arrestees coupled with coerced abstinence and treatment for drug offenders, expansion of accountable drug courts and/or rigorous probation supervision, drug-free prison zone projects, coerced treatment for substance-abusing pregnant women (their drug use should be treated as child abuse), coerced abstinence for neglectful or abusive parents (such parents should be subject to drug testing), research on chemicals that reduce addiction and block drug effects;
3) ***Recreational Drug Users***: support drug-free workplaces, drug tests after motor vehicle accidents (similar to blood alcohol tests), eliminate open-air drug markets, seize vehicles of drug users who travel to drug markets to purchase illegal drugs, publish the names and pictures of users when arrested;
4) ***Youth-Specific Measures***: drug testing for driver's license applicants, a national anti-drug media campaign, character-building institutions for youth, enforce laws against youth drug possession and use.

7. After Prohibition: An Adult Approach to Drug Policies in the 21st Century. Edited by Timothy **Lynch** (Director, Cato Institute Project on Criminal Justice). Foreword by Milton Friedman (Hoover Institution). Washington: Cato Institute, Nov 2000/Michael Marien, *Future Survey*, Vol. 23, No. 7, July 2001, 12

In contrast, Lynch and others take a libertarian perspective.

"Billions of dollars have been spent on drug law enforcement, with the result that the criminal justice system has grown much larger. Yet the demand for illegal drugs remains strong, and the supply has not been hampered in any serious way despite a record number of seizures. It is lamentable that drug use and addiction rates would likely increase if the criminal sanctions were lifted. But a fair appraisal of the drug war must take all of the negative impacts into account: the black market in illegal drugs generates billions of dollars for gangster organizations, rival gangs use violence to usurp and defend territory for drug sales (with innocent people caught in the crossfire), billions of taxpayer dollars are squandered in a futile attempt to keep drugs from entering the US, a large number of undesirable police practices have become routine (paramilitary raids, roadblocks, property seizures), police departments suffer from drug-related corruption, and limited resources for criminal justice are diverted from investigating other criminal activity. "*The time has come to put an end to this tragic revisit of Prohibition*." Americans rejected alcohol prohibition because the laws proved to be unenforceable and led to gang wars and corruption. The war on drugs has created similar problems. The law should treat substances such as marijuana and cocaine the same way it treats tobacco, beer, and whisky: by restricting sales to minors and jailing any user who endangers the safety of others. "Education, moral suasion, and social pressure are the only appropriate ways to discourage adult drug use in a free and civil society." Follow-on essay by Gov. Gary Johnson of New Mexico calls for legalization and redirection of the $50 billion that is presently being set on an old set of laws to enforce a new set of laws. "*Alcohol killed 150,000 people last year…The health effect of tobacco killed 450,000 people…but I don't know of anybody who ever died from a marijuana overdose*."

NEW CATEGORY OF CRIME

8. Controlling State Crime (Second Edition). Edited by Jeffrey Ian Ross (Center for International and Comparative Law, U of Baltimore). New Brunswick NJ: Transaction Publishers, May 2000/Michael Marien, *Future Survey*, December 2000

First published in 1995, this paperbound edition makes a work that breaks new conceptual ground more widely available. There is opposition to the concept of state crime, because of indiscriminate use of the term and typological confusion. One author in this volume distinguishes among those governmental or political actions prohibited by the state's laws, those defined as criminal by international law, and those regarded as criminal by some other criteria of harmfulness. "*Governmental crime*" can include the whole range of crime committed in a governmental context, but "*state crime*" more accurately describes activities carried out by the state or on behalf of some state agency (and is more inclusive than the concept of human rights violations), while "*political white-collar crime*" includes illegal

activities carried out by officials and politicians for direct personal benefit. National security, military, and police organizations are collectively referred to as "*state criminogenic organizations*," in that national security agencies in many countries have broken the law (or engaged in practices considered to be state crimes), crimes have been committed by the military since creation of the first army, and police are in a highly advantaged position to commit state crimes. Chapters discuss whether certain state actions should be called crimes, controlling crimes by the police and military, control and prevention of crimes committed by state-supported educational institutions (disinformation, sexism, negligence, biased curricula, grade inflation), crimes of the capitalist state against labor, state crimes against the environment during military operations, and international organizations to control state crime (the European convention on human rights, the International Court of Justice). Methods for controlling state crime include victimization studies of citizens, criminal and military trials, **judicial** or legislative commissions of inquiry, special agencies or social auditors, greater quantity and quality of resources for controlling state crime, and analyses of state crimes in individual states.

GROWTH AREA – HEALTH FRAUD

9. Mark Fention-Jones, "**Sleuths eye Taliban Money**," *The Sun-Herald* (21 October 2001), 15.

Deloitte Touche is predicting that the next big increase in fraud will come from the health care area. Tim Phillipps, a partner with Deloitte Forensic, said: Australia was likely to follow the US trend, where health care fraud is a US$ 24 billion problem. Frauds can involve overservicing, the false registration of doctors and ghost practices that make claims for non-existent patients. "

Indeed the ingredients for growth are already here in Australia. These include: a large pool of federal money for health care and claims that are not subject to intense processing.

BIOMETRICS

10. Eddie Fitzmaurice, "Shoppers have finger on new technology," *The Sun-Herald* (21 October 2001, 15).

Biometrics is set to take away in every field, whether it is retina scanning or using finger prints instead of credit cards.

Impact

This will likely increase security, and could lead to cost savings for government and business. As with all technologies, new legal issues will arise.

GLOBALIZED JUSTICE

11. Richard Moore, **Twenty-First Century Law to Meet the Challenges of Twenty-First Century Organized Crime**, *Technological Forecasting and Social Change* (Vol. 53, No. 2/3, June/July 1996), 185-198.

Moore outlines possibilities for the future of organized crime. He argues that organized crime will excel in a digital environment (as we are seeing from the Al-Quaida network) with illegal trade in body parts, children, refugee smuggling, and technological products (for example, spare parts for aircraft, high tech guidance systems – in 1992 the estimate was put at 400 million us$).

The author writes: Just as the telegraph at the beginning of the twentieth century opened up the realm of off-track betting and led to the creation of criminal organizations based on gambling, twenty-first century technology will lead to nightmarish global criminal enterprises that cannot be controlled by the traditional criminal law and judicial systems of the nation-state.

The only reasonable solution is international criminal law to deal with the internationalization of crime, especially as culprits may head organizations more powerful than the government (as in Afghanistan today or Khum Sa of Burma).

Writes Moore, " trial courts must be established at a number of sites throughout the world, with locations depending on caseload. The courts must be completely free from any domestic jurisdiction of the state in which they are located, although the same act could be a crime under both the domestic law of the site of the commission of the crime and the international criminal code. "

The greatest obstacle to the creation of these courts (at trial and appellate levels) is, says Moore, "the political challenge of getting nation states to reduce their sovereignty by allowing an alien enforcement body within their territory to enforce a low other than their own, most likely against their citizens."

Impact

Should Melbourne be the site of an Asia-pacific International Criminal Court? What would be the economic impact? What jurisdictional trade-offs might need to occur?

12. Charles Truehart, **A New Kind of Justice**, The Atlantic Monthly (April 2000), 80-90 (See Michael Marien, *Future Survey*, Vol. 22, No. 4, April 2000, 8)

Writes Truehart about the International Criminal Tribunal for the Former Yugoslavia, "something like this tribunal may soon become a permanent feature in the world." And "With every assertion of jurisdiction, every prosecution, every sentence, the tribunal is setting precedent." Says jurist Louise Arbour, "We have moved international criminal justice to the point of no return. We made this process entirely irreversible."

THEME THREE

FUTURE OF LAWYERS

REFORMING THE LEGAL PROFESSION

1. Deborah L. **Rhode**, **In the Interests of Justice: Reforming the Legal Profession.** (Prof of Law/Dir., Center on Legal Ethics, Stanford U). NY: Oxford U Press, Dec 2000. From Michael Marien, *Future Survey,* Vol. 23, No. 7, July 2001, 15.

The legal profession is beset by chronic laments from critics within and outside the bar, such that it seems permanently in decline. Given the centrality of law and lawyers in American life, the problems of legal practice become problems for us all. "*The central premise of this book is that the public's interest has played too little part in determining professional responsibilities. Too much regulation of lawyers has been designed by and for lawyers*."

Chapters discuss the dynamics of discontent, the structure of practice, the priority of profit, myths of meritocracy, alternative structures, the price of partisanship, procedural pathologies and prescriptions, problems of excess (too many lawyers, too much litigation, too much law, too much cost--yet too few choices), regulation of the profession, and legal education. In short, the current system offers overly zealous representation for those who can afford it and inadequate representation for everyone else. Lawyers deserve conditions of practice that will reinforce ethical values in the service of social justice.

Three clusters of reforms:

1) ***Markets for Legal Services***: clients choosing lawyers, litigants choosing dispute resolution processes, attorneys choosing law firms, and students choosing law schools all should have more options and more reliable information about options available;
2) ***Oversight Structures***: lawyer complaint records should be open to the public, ethical rules on competition should be recast in more socially responsible directions, and more efforts should be made to identify and deter misconduct; authority for development and enforcement of ethical standards should be placed in an independent regulatory commission;
3) ***Encouraging More Personal Responsibility***: law schools and bar associations must create more opportunities to rethink and reinforce professional responsibility (the current ethics curriculum is inadequate); pro bono strategies need to be part of broader efforts to encourage a sense of responsibility for the public interest.

IT AND LAW

2. Chris Merritt, **Technology challenges key practice areas**, *Australian Financial Review* (14 September 2001), 53.

"After two years' research, the Law Council of Australia has predicted a major realignment in legal work and the potential decline of several practice areas that form the backbone of many law firms."

Commodity services in particular – conveyances, will preparation, mortgage documents, divorce papers – "will be replaced increasingly by electronic suppliers and non-legal suppliers."

While the first generation programs provide simple legal tasks, the next generation programs will be able to provide preliminary case analysis.

Already in the UK, online conveyancing has been introduced.

As the low end of what lawyers do – the two largest practice areas are property and wills, says Law Council President Anne Trimmer – is replaced by electronic suppliers and non-legal suppliers, lawyers may be squeezed out of those areas.

Alternatively, says, Trimmer, "As consumers become more educated about the informational part of legal services, the role of the lawyer will be more about interpretation, application, dispute aversion skills and negotiation."

Impact

Increased efficiency of transactions as well as increased reliability and efficiency. The impact on the courts will be that they will need to keep up with changes in the legal system. Users will expect the same level of automation and artificial intelligence.

LAW AND THE INTERNET

3. M. Ethan Katsh, "**Competing in Cyberspace: The Future of the Legal Profession,**" *Technological Forecasting and Social Change* (Vol. 52, No. 2/3, 1996), 109-118.

Law will be changed by the Internet. What is required in order to see cyberspace as a place where change is rapid and where the future is unfamiliar and where lawyers will not have exclusive professional monopoly. As one attorney says: "I believe that we need to focus more on what our true rule is in the grand scheme of things. Traditionally, haven't we been the keepers – some might say hoarders – of information. Well, the cat's out of the bag and we'd better come to grips with it.

Impact

Attorneys will be squeezed from new entrants in the market, from AI technologies, and from a changing global environment. Managing relationships, settling disputes, confronting complexity and establishing standards will be crucial skills in a digital world. Those who can provide value along the communication side of the data-information-knowledge-communication value change will prosper.

COPING WITH RAPID CHANGE

4. Paul Martin, "**The Barbarians at the Palisades**," A Law Society of NSW Monograph. (23/10/2001).

In this monograph, Martin attempts to understand and search for ways for the legal profession to cope with rapid change.

His qualitative research suggests that lawyers will need to change their skills sets, becoming more international, more concerned with quality, and work smart to find ways to add value. If they don't there are signs that there will be increased pressures on them. He calls these portents of the storm.

1. Loss or liming of the profession's monopoly in areas of practice such as conveyancing, third party and compensation litigation.
2. Public unawareness of the services which lawyers can provide – in 1990 42.5% of people in New South Wales with a specified legal problem did not seek legal advice. (Is this now outdated?)
3. A rapid increase in the number of law students.
4. The competitive impact of mutual recognition legislation, combined with increased direct and indirect competition from accountants, banks, insurance companies, real estate agents and licensed conveyancers.

5. Walter Gottwald and Peter Kiel. Teaching Law In The "European Village": Do We Really Need To Work Together? http://www.solent.ac.uk/law/lun.html ---Southampton Institute Law Review-Volume 4 Issue 1

Contrasting the function of law in a village community with that of law as a universally accepted instrument of intervention for international and global regulation, Professor Cooper asks the question: How can law retain its reputation as a universal ideal when it is being used to perform so many disparate functions? Professor Cooper concluded that law has become a problem in the global village. They argue that among the best techniques to learn about the laws of others is through legal clinics where there is role playing. They is that law is becoming more and more internationalized. Future lawyers and administrators must bear this in mind in their decisionmaking.

Impact

Are Australian law schools ready for the challenge of the globalization of law?

THEME FOUR

FROM IT TO ARTIFICIAL INTELLIGENCE

IT USE IN BRITISH COURTS

1 Lord Justice Brooke, Keynote Speech to the13th Bileta Conference: **The Changing Jurisdiction"IT** and the English and Welsh Courts: the Next Ten Years" Dublin, 28 March 1998. http://www.lcd.gov.uk/judicial/speeches/speechfr.htm.

Lord Justice Brooke writes that the UK is behind the USA and Singapore in its implementation of IT. He further reminds that portability of IT is the key for Judges. The wearable computer perhaps? He also argues for the use of IT to communicate with the public using the kiosk method.

We quote sections of his speech:

> *" Last May I went to a conference for judges in Washington. There were about 40 of us there, drawn from a dozen different countries, including England & Wales, Scotland, Northern Ireland and the Irish Republic. The first day of the conference was given over to IT matters. It was held in a courtroom in Maryland which was equipped with masses of up to date IT equipment, and we received interesting presentations from judges in Singapore and the United States about the progress they are making in those two jurisdictions towards paperless courts. For reasons I will explain, we are quite a long way behind those two countries, but we are making determined efforts to try and catch up. This is the story I have come to tell you today.*
>
> *One problem we have, which was not fully identified in the consultants' first-rate reports, is that judges are not deskbound office workers. They spend a lot of their days in court and they use their computers for their judicial jobs at home a great deal in the evenings and at weekends. Any forward planning had to take considerations like these into account. Of the 79 judges who answered a survey sent out by the consultants, 27 said they used their computers in court, 69 in chambers, 9 in lodgings, 11 while travelling and 71 at home: these figures are not, of course, cumulative. 81% of them said they made use of the portable nature of their machines. One very skilled district judge has said that for his work the three main requirements, so far as a computer is concerned, are portability, compatibility and adaptability. In other words, a future based on a "dumb" terminal, with information downloaded from a central processor, might have some application in commercial situations but it was unrealistic for judges.*

At the end of their Futures Study, which described the way that technology might be harnessed in aid of judicial services in future, the consultants said that the challenge now was to create the organisational structures to realise their vision of the future. There were, however, some fundamental issues which had to be resolved first. Who should speak for the judiciary and how could they represent the whole range of judicial opinion within a single coherent view? What priority would be given to judicial needs in planning the IT future given that the funding must come out of the Court Service budget? How would the needs of the legal profession and the other justice system agencies be taken into account?

I have already described how the challenges of IT have forced the different levels of the judiciary to work together for the greater good of every judge in the country. The work I have just been describing illustrates two further developments: the need for some judges to be released from court work to help to prepare these new IT systems, rather like the administrative judges who are so common on the other side of the Atlantic, and the need for senior judges to work very closely alongside senior Court Service directors and staff to plan the IT future of our court system in a collaborative way.

In England the Court Service is planning to explore the benefits of a variety of different technologies to support the hearing of cases in the courtroom. This initiative, which will be known as "Courtroom of the Future", will provide for the careful evaluation of different technologies in a controlled environment. The Court Service will call on EDS to help with this initiative as appropriate. The LiveNote system of court reporting, where the judge and the parties have a running record of the evidence available to them within seconds of it being given, has already proved itself, and it is in increasing use in major inquiries, and in major civil litigation and criminal trials. In the recent Maxwell trial, which was conducted in a very wide modern courtroom, Press and public also had access to two monitor screens, one of which showed the witness's face when it was not being used to display a document being shown to the witness, and the other was being used to show the LiveNote transcript.

Now that E-mail is much more popular, it is possible to use it to receive witnesses' proofs of evidence and parties' written representations in public inquiries. currently happening in the case of Lord Justice Phillips's BSE Inquiry.

And now I have moved on to the need to bring court users into the network of systems servicing the courts. A lot of work has been done on this in other jurisdictions in developing common standards and protocols for the exchange of information electronically, and I know that the two longterm planning groups which I have mentioned will be addressing these issues. Ideally the Court Service and judicial Intranet (and all the different closed conferences which it would contain) will become the inner circle of three concentric circles. The middle circle would include not only members of the other agencies who do business with the courts - police, probation, prison, the Crown Prosecution Service, justices' clerks and the magistracy and so on - but also 10,000 barristers, 60,000 solicitors (and their 200,000 supporting staff), and a whole mass of people and organisations who need to do business with the courts and to

have the opportunity to do so by a convenient electronic means. Appropriate controls would have to be devised to enable them to pass information to those within the Intranet, or to obtain information from within the Intranet, on payment of a charge, where appropriate, to be extracted and receipted electronically.

Most lawyers would like access to a secure electronic mail service, and unless an integrated approach is adopted, such services will just grow up haphazardly. The user will then have to move from one communications system to another for different purposes. This would be awkward and unnecessarily time-consuming. Standards will of course have to be created, and a system of certification devised to ensure the accuracy, authority, and integrity of the information which is being supplied. The cost of creating the networks could be recouped from the charges levied for their use.

The third circle would embrace members of the general public, to whom legal information (for example, in the form of systems containing legal guidance that are available through information kiosks) will be much more accessible once these new means of communication are available. Here there will not normally be the same need for security controls, since the information will be available for all who wish to have access to it, although there is no reason in principle why charges should not be made for some types of information, since costs will be incurred in providing it. I understand that the Court Service is already engaged in discussions with some local authorities about pilot kiosk projects, and the demand for these services is bound to grow. What is already being posted on the brand new Court Service website in terms of the reproduction of simple leaflets for users of County Courts bodes very promisingly for the future, particularly when more and more of will be able to access the Internet from our digital television sets at home."

Impact

Is there a short term, medium term and long term IT strategic vision and plan for the Victoria Justice System?
What is driving the Victoria IT strategy? Is Victoria and Australia ahead of behind the USA and Singapore?

JUSTICE BOTS

2 Sohail Inayatullah, "**Trends transforming the futures of General Practice and Practitioners**: Or is there a doctor in your future(s)? www.gpfutures.net.au and www.metafuture.org, March 2000.

While health systems are currently web-based, very soon they will expand to higher levels of virtualisation. This will lead to the always on, wearable computers, or web-bots. These emergent health bots may take a robotic form or a more virtual form – either a robodoc or an always- present doctors.com.

As the web develops, we can anticipate health-bots or health coaches, that is, always-on wearable computers. They will provide individualized immediate feedback to our behavior, for example, letting us know caloric intake, the amount of exercise needed to burn off the pizza we just ate. They will also let us know the make-up of each product we are considering purchasing, helping us to identify allergies, for example. [1]These intelligence computer systems would be reflexive knowledge systems, learning about us and our preferred and not so preferred external environment.

In a rudimentary form, telemedicine is already current underway in Australia (2000 hours of consultations are conducted monthly) and consists of:

- tele-assistance, consulting with doctors using email and videoconferencing
- using nurses to preform simple procedures supervised by video-linked doctors (remote supervision)
- Access to research data bases as well as potentially a medical records database

The justification and goal of telemedicine is to use technology wisely so that the institutional care costs (21billion dollars of the 46$billion Australian dollar budget) are reduced.

3. Clement Bezold, **"Will heart disease be eliminated in your lifetime? The best of health futures,"** *Futures Research Quarterly* (Summer 1995) and *The Future of Complementary and Alternative approaches in US Health Care*. Institute for Alternative Futures, 1998;

Writes health futurist Clement Bezold:

Future approaches to heart problems reflect ongoing changes in health care and biomedical knowledge. In 2010, our DNA profile will be part of our electronic medical record, and our genetically based proclivity to major diseases, including heart disease, will be known. There will be sophisticated, low-cost, noninvasive or minimally invasive biomonitoring devices; for example, a wristwatch device will provide very accurate, ongoing information on your health status.

You will likely have powerful in-home expert systems, probably supplied by your health-care provider, which will not only aid diagnosis but also reinforce pursuit of your chosen health goals. These expert systems, or electronic personal guides, will tailor the information to your own knowledge level, interest level, and learning style, as well as those of your family members, each of whom would have a personal electronic "health coach." If you are genetically or otherwise inclined to heart disease, your coach will encourage specific preventive measures

Impact

Has Health becomes increasingly dominated by health-bots and other AI systems, will law as well move toward tele-law? Will there be law-bots, handling our legal affairs? Will judges use them instead of law students ie law-bot is law student plus

web/library?

4 Clement Bezold, **"Shaping the Future and the Courts: Challenges from Science and Technology**," *Futures Research Quarterly*, (Winter, 1993), 31.

Bezold argues that knowledge navigators or know-bots will lead to a host of opportunities for running courts and cases more effectively. At the same tiime, 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. For example, notes Jim Dator, most cases should be adjudicated by expert systems, reserving only those cases where standing before a human judge and/or jury is essential.

For a long term perspective on this, see, Ray Kurzweil, *The Age of Spiritual Machines: When Computers Exceed Human Intelligence*. New York, Penguin, 1999.

5 Jim Dator, "**How to think like a futurist and some things to think usefully about**," Background reading for the legal services futures session, American Bar Association, May 12, 2000). www.futures.hawaii.edu

Writes Dator: "In connection with the vision of the future of law and courts found at the end of that essay, I call your attention to this following item about a currently-existing "Cyber Judge:"

> Under the headline, "Laptop is cyber judge and jury" the BBC TV1(BBC One Tv Online News World News Summary -Wednesday, 26 April, 2000, 18:02 GMT 19:02 UK http://news.bbc.co.uk/hi/english/sci/tech/newsid_726000/726837.stm) carried the following news story:
>
> An artificial-intelligence program called the "Electronic Judge is dispensing justice on the mean streets of Brazilian cities. The program is installed on a laptop carried by a roaming human judge and helps to assess swiftly and methodically witness reports and forensic evidence at the scene of an incident. It then issues on-the-spot fines and can even recommend jail sentences.
>
> The software is being tested by three judges in the state of Espirito Santo. It is part of a scheme called Justice-on-Wheels, which is designed to speed up Brazil's overloaded legal system by dealing immediately with straightforward cases.
>
> Most people are happy to have the matters sorted out on the spot, says the program's creator, Judge Pedro Valls Feu Rosa, who sits in the state's Supreme Court of Appeals. He adds that the idea is not to replace judges but to make them more efficient.

After police alert the rapid justice team to minor accidents, they can be on the scene within 10 minutes. Most cases require only simple questions and no interpretation of the law - the decision-making process is purely logical, Judge Feu Rosa claims in *New Scientist* (April 29, 2000, on which this news item is based).

The program, written in the Visual Basic language, presents the judge with multiple choice questions, such as "Did the driver stop at the red light?" or "Had the driver been drinking alcohol above the acceptable limit of the law?"

These sorts of questions need only yes or no answers, says Judge Feu Rosa: "If we are concerned with nothing more than pure logic, then why not give the task to a computer?" He notes that the program gives more than a simple judgement: it also prints out its reasoning. If the human judge disagrees with the decision it can simply be overruled.

He admits, however, that some people who have been judged by the program do not realise that they have been tried by software.

It could be some time before a similar system takes the place of an English court. "It would have to satisfy the authorities that it was absolutely foolproof first," says a spokesman for the Lord Chancellor's office, which oversees courts in England and Wales.

But it could be put to use in the US, where Judge Feu Rosa says he is in discussion with insurance companies to set up a mobile system to resolve disputes over traffic accidents.

6 George Nicholson , "**A Vision of the Future of Appellate Practice and Process.**" *The Journal Of Appellate Practice And Process.* http://www.ualr.edu/%7Eappj/

Writes Judge Nicholson, " Consider the potential impact of artificial intelligence. Will appellate judges ever be replaced by"thinking machines"? What will be the role of the appellate practitioner ten, twenty, or fifty years fromnow?Are we so entrenched in our traditions that we are blind to the possibilities, if not probabilities? In another context, Judge Learned Hand cautioned pertinently that a failure to adopt the fruits of progress cannot be excused simply because the failure is universal.

A short story, entitled Non Sub Homine, written by a lawyer under the pseudonym H.W. Whyte, provides fodder for discussion concerning the application of technology to the judicial process. The story takes place in the future at the "old" Foley Square courthouse in New York. A computer, called the "2-10," operated by a man named Cook and his assistant Jane, has replaced the courts, both trial and appellate While the computer had originally been intended as a library of legal decisions, its opinions on questions previously decided was soon accepted as irrevocable . . . . [I]n only four and a half years of full service, the 2-10 had

generated a new respect for the law . . . for Cook knew that the people felt they were no longer subject to the vagaries of an inherently political judiciary, of mindless whim, of the flux of ulcers. By taking law out of the hands of man, the 2-10 had put it beyond corruption. This time, however, the 2-10 was unable to reach a decision. "[A] simple question about the assignability of a lease under an ambiguous contract" froze the computer. It printed out two decisions, one in favor of the plaintiff and one for the defendant, but could not choose between them because "there was nothing to either [opinion] that was not completely justified." "'The 2-10 is infallible,' Cook found himself saying. 'It cannot be permitted to fail.'"Cook tore up the opinion in favor of the defendant and directed Jane, over her protest, to file the opinion in favor of the plaintiff. Cook immediately programmed the 2-10 to select an opinion randomly when the case was evenly balanced. Realizing, however, that the public confidence engendered by the 2-10's ability to dispense perfect justice would be shattered if the public were to learn the computer had failed to reach a decision, Cook concluded that Jane must be killed to insure the safety of his secret.

Judge Richard A. Posner, in Overcoming Law, concluded Non Sub Homine has "no literary merit." Nonetheless, he acknowledged that [a]bove all, the story makes us think about the ineradicable element of creativity in legal judgment. The computer has been programmed with all decided cases. It is supposed to decide new cases by reference to them. But many of those decided cases (all that were not mere replays of earlier cases) were once new cases. How is a new case to be decided when the only materials for decision are old cases that by definition are different from it? A computer needs more in its memory bank than this computer has been given; needs as much, in fact, as fallible humans have in their memory banks.

The possibility that, in the future, computers will be powerful enough and contain sufficient information to replace human judgment is surrealistic and even disturbing. The scenario presented in Non Sub Homine, while absurdly implausible, causes one to pause and consider just what we hope to achieve, ultimately, in the application of technology to legal and judicial practices and processes. Judge Posner utilizes as a premise, for which it appears no proof is needed, the necessity of creativity in legal judgment and further suggests that creativity is a uniquely human function. How can we be sure this wisdom, perhaps conventional wisdom, will always hold true? Might there come a day when pure objectivity based on former experience will be preferred over human judgment, even if that objectivity results in a perfectly balanced case and a random judgment is chosen from two equally sustainable options? Furthermore, will computers, ever faster, and their programs, ever more complex, imitate human judgment, maybe even with the biases and self-preservation tendencies omitted?"

Impact

The issue of cyberjudging, while certainly not on the horizon, is an issue that will become more and more pronounced in the decade ahead. It may be useful tool for judicial education as well as courts and the community projects, ie using AI to help citizens understand precedence.

7. Alexandra Wyke's ***21st Century Miracle Medicine: RoboSurgery, Wonder Cures, and the Quest for Immortality*** *(Ple*num, 1997).

Writes biochemist Wyke: "Surgey will depend not on the steady hand and experience of the doctor but on devices such as the recently invented ROBODOC, combined with new imagery technology and computers that essentially make flesh and bone transparent in 3-D images, allowing machines to make cuts or dissolve tumors and blockages in exactly the right place."

Can these virtual systems be used to simulate court room trials, not only for law schools but as well used for advantage by law corporations, ie to simulate jury verdicts.

Impact:

Does this give unfair advantage to those who can afford to use virtual systems. Is this an equity issue along with a technological issue. Will poorer defendants have access to such systems. Will those who attend poorer law schools?

8. Clement Bezold, **Judges as Futurists and A Futurist's View of the Early 21st Century**, Advanced Judicial Studies, Judicial Department Education Center, May 4-5, Missouri.

Bezold offers these trends likely to impact courts.

1. Virtual reality leading to virtual offenses (as well virtual reality leading to real offenses).
2. The Virtual Jury
3. The Holographic Courthouse
4. End of some geographic boundaries (ecommerce, taxes, professional regulation).

His forecasts of new issues for the courts to consider include:

1. Privacy of predispostional test data (from gene testing)
2. Discrimination and rights
3. Patent on new life forms.

He asks: will political participation become increasingly net based, what impact will that have on the courts. Virtual jury chat groups? Electronic voting on cases?

He also asks: What is the next civil rights movement that will impact the workload on the courts.

9. Sausage Part of World Forum, *The AustralianIT,* (February 8, 2000) 55.

In the near term future, sensors will be developed that detect health problems through the smell of breath and alert doctors for early diagnosis. These are as well being developed for cars such that automobiles will turn off once they detect certain levels of alcohol. Insurance companies will either require this of those already convicted of drunk driving, or for certain age-groups, or will reduce premiums for those willing to be fitted with such devices.

Impact

Policing will be easier. Car accidents should decrease. However, there may be cases against product manufacturers in case of false positives, among other possibilities. Increased complexity for the Courts as well as increased volume.

Should there be special courts for case dealing with new technologies? A science and technology court?

10. Margaret Carlson, **Someone to Watch Over Me**, *Time* (July 16, 2001), 84.

Writes Margaret Carlson: "Civil libertarians would also like to do away with the Sniffer, a 600 US$ flashlight that illuminates the inside of a car and the blood-alcohol level of the person in it quicker than a weaving driver can say he has had only two beers. A man's car is his castle after all."

However, with 42000 Americans dying from road deaths a year, there may be other factors here. As well as Supreme Court Rulings, which have not afforded privacy protection. The USA Supreme Court protected a house from a high-tech surveillance device capable of detecting a marijuana lamp from afar, but extended no such protection to a car.

Impact

While a man's car is his castle, is a women's. Given death tolls in Australia, it is likely that safety devices will be mandated both the government and by insurance companies. Increased safety should reduce the volume of cases that appear before the courts.

ROBOTS AND RIGHTS

11. Frank Sudia, **A Jurisprudence of Artilects: Blueprint for a Synthetic Citizen**, *Journal of Futures Studies*. November 2001.

Sudia argues that the advent of artificial intellects (*artilects*) with knowledge and reasoning capacity surpassing humans will create new legal issues. New rules and standards may be required to govern their use and behavior.

Artilects can be accommodated within our existing legal frameworks with "minimal" effort. The main issues for an artilect seeking to operate as a free-standing legal entity will be reliability and insurance. Once these are figured out legislation could be enacted to recognize them, first as incorporated entities, and possibly later as citizens with political rights.

12. Carolyn Dowling, **Should your computer program have a code of ethics**, *Australasian Science* (November/December, 2001), 42-43.

Dowling believes as agents – computer programs with a high degree of intelligence, autonomy, and the capacity to "learn" from experiences – we need to ensure that there exists a strong code of ethics in their design. This is especially crucial as they are being used for mission critical areas such as health and defense.

Impact

What might be an appropriate code of ethics for the Justice system for law-bots or justice-bots as they develop.

ELECTRONIC JUDICIARY

13. Sohail Inayatullah, **The Rights of Robots** *Australasian Science* (November/December, 2001), 39-41.

Inayatullah argues that within 50 years, the Judiciary may be run by robots. From using knowledge based library systems to artificial intelligent web-know-bots, eventually an electronic intelligent judiciary will emerge. Humans will provide the design as well as sit over foundational ethical issues. Most humans will prefer cyborg judges, just as they prefer cyber-psycho-therapists.

THEME FIVE

INCREASING RIGHTS AND COMPLEXITY

RIGHTS FOR ALL

1. Simeon Beckett, **Refugees may sue for unlawful detention**, *Australian Financial Review* (14 September 2001), 54.

Justice Tony North's decision that the Commonwealth had no lawful authority to detail asylum seekers on board the Tampa has ramifications beyond being forces to bring them to the Australian Mainland.

Asylum seekers could potentially sue the Commonwealth for wrongful imprisonment. SAS officers who carried out the Commonwealth's orders could also be sued. Compensation would be for injury to liberty, injury to feelings and any resulting illness or discomfort.

Impact

As it turns out, Justice North's decision was overturned. However, this scan shows an increase sensitivity toward human rights. As Beckett writes" "Respect for their human rights, including instructing lawyers, would have helped provide certainty and resolution of the crisis for both the Australian people and the asylum seekers."

This is likely to increase the volume and complexity of cases that the Courts will have to hear.

2. Kitten case prompts law review, *The Sydney Morning Herald*, 6.

"Animal cruelty laws will be reviewed following a case in which a man who admitted torturing a kitten received a six-month suspended sentence, the NSW Minister of Agriculture said.

Proposals to be looked at include broadening magistrates' powers to ban anyone convicted of animal cruelty from access to pets, and on-the-spot fines for cruelty.

3. Geesche Jacobsen, **Gender pay claim one for the books**, *The Sydney Morning Herald* (7 November 2001), 3.

Writes Jacabosen: "A pay claim being launched today by librarians will test the water for thousands of women who say their work is undervalued because they are female.

The case, in the Industrial Relations Commission, seeking an average 14% pay rise for librarians and similar workers, is the first to test the new principle of gender pay equity, established by the commission last year."

While it has been illegal for women and men to be paid differently for the same job, this is the first case to test pay rates of female dominated professions with male-dominated careers.

While some men are also librarians, the Public Service Association (PSA) (representing librarians, library technicians and archivists) argues that "the whole profession is undervalued because it has employed mainly women."

Impact:

Increases salary for librarians is the obvious impact. Increased cost for employers is also an obvious impact. However, this case is part of the longer-term movement toward increased rights. The PSA barrister argues that this case represents: "a culmination of a series of efforts over many years to identify and rectify an historical gender-based inequity."

We can anticipate increased demands on the courts in equity areas.

INDIGENOUS RIGHTS

4. Indigenous Rights in Australia – issues of copyright. The report: **Our Culture: Our Future** provides recommendations with respect to indigenous rights in Australia. (http://www.atsic.gov.au/issues/intellectual_property/Default.asp)

Chapter 4 - Recommendations

1. *A national Declaration of Indigenous Cultural and Intellectual Property Rights should be developed, based on the list of rights and developed in consultation with Indigenous people.*

2. *Apropriate measures should be taken to educate the broader Australian community about Indigenous value systems, law and cultural processes, where sharing this knowledge is appropriate.*

The recommendations in terms of indigenous and Australia law are as follows.

Chapter 5 - Recommendations

1. *Indigenous people need to be informed about existing intellectual property laws and how these impact on their cultural obligations..*
2. *Indigenous people need to be informed about how existing intellectual property laws might benefit their needs regarding the use and control of their Indigenous cultural heritage.*
3. *There is a need for greater protection for Indigenous heritage, particularly in relation to communal rights, and the protection of sacred/secret material.*

5. http://www.caa.org.au/campaigns/election/globalisation/indigenous.html

"In addition Australia should:

Negotiate a treaty that shrines indigenous Australians' rights, including land rights and recognition as the original owners of this land, the rights to culture, language, self-determination, social justice and equity, and the full protection of all international covenants to which Australia is a signatory.

In collaboration with States and Territories, implement all the recommendations made by the Aboriginal and Torres Straight Islander Social Justice Commissioner to reduce the rates of detention and incarceration of Indigenous Australians."

Impact

This is a meta-issue. While caseload may increase if Aboriginal gain rights previously denied, not doing so is likely to lead to problems relating to aboriginal health. Negotiating now is likely to save dollars.

5. Roy Brooks, **Why Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice**. NY, New York University Press, 1999. (See Michael Marien, *Future Survey*, Vol. 22, No. 4, April 2000, 8)

The author argues that there are four conditions for successful redress.

1. The demands for claims should be placed in the hands of lawmakers and not Courts. Courts can play a useful part in the redress process but they can only apply existing rights and remedies.
2. Political pressure needs to be brought on lawmakers.
3. Unquestioned support by the victims themselves for the claims being pressed.

4. Claims must be meritorious.

RIGHTS OF LIMINAL PERSONS AND RIGHTS OF FUTURE PERSONS

6. David Turnbull, **What place is there for people with 'serious' genetic conditions in a genetized world?**" *Journal of Futures Studies* (Vol. 5, No. 3, February, 2001), 17-36.

Turnbull argues that we are increasingly moving into a geneticized world. He writes: "A geneticised world is one in which genetic knowledge is widely used to give guidance in reproductive and lifestyle decisions. Reproductive decisions in such a world may involve pre-selection of reproductive partners and selective testing of 'tentative' pregnancies before final reproductive decisions are made. Lifestyle decisions concerning the children who may eventuate from a selective process include such matters as family gender balance, form of health surveillance, possible ongoing therapy, insurance, type and extent of schooling and employment, all ordered according to genetic information.

Do we, in the year 2000, live in a geneticised world? The answer is of course relative to locality and culture. In Australia the evidence is that rapidly increasing geneticisation is occurring. One way of portraying geneticisation is through describing an emerging 'gene consciousness'. From everyday conversations and journalism through to erudite research, more and more people are talking in terms 'the genes responsible for' every deficiency of health and wellbeing and the potential for biotechnology to provide a remedy. Such language suggests that people are embracing a form of biotechnological determinism."

Among the results of such a world is the creation of liminals. Liminality is a state of being 'neither / nor', for example being neither fully independent, nor completely dependent and therefore having an ill-defined social place. Nevertheless greater understanding of developmental psychology and the introduction of early childhood intervention has enabled many children with the condition to take up valued social roles and form highly meaningful relationships in their communities.

Liminality, an 'in-between' state, potentially creating ambiguity and uncertainty given the cultures in which is occurs, also applies to fetuses. Fetuses with Down syndrome are therefore doubly liminal. liminality is a state that poses a distinct set of ethical possibilities. Such possibilities may not be considered by ethicists adhering to a positivist framework of 'either / or,' such as human or non-human, person or non-person.

One contemporary argument that eugenic or therapeutic elimination (however it is framed) is ethically defensible is based on the premise that no actual people are eliminated; only possible future people are.

FUTURE PERSONS AS THEY WOULD HAVE BEEN

7. Alan Fricker, **Biomimetic and Genetically Engineered Futures: Humanity at the Crossroads**, *Journal of Futures Studies* (Vol. 5, No. 3, Feburary, 2001), 1-16.

Writes Fricker on recent advances in genetic engineering. " Germ line therapy is directed at future people, who might inherit an undesirable condition. Furthermore, the effect will be permanent for it will persist in their progeny. The gene pool will be altered. This is the perverse logic of denying a future person the right to exist as they would have been. The responsibility however for the potential unknown risks to the yet unborn will be carried by persons long deceased. How necessary is it that the person should be conceived or born? Genetic screening can indicate alternative options, avoidance of conception, embryo selection, and adoption. Screening itself is not without risks, both medical and social. Screening for Tay Sachs, where avoidance rather than treatment is the only option at present, has had beneficial outcomes, whilst screening for sickle-cell anaemia had very unfortunate social outcomes wherein our innate assumptions and prejudices about racial differences were quasi-officially confirmed (Appleyard 1999:78). Although medical ethical committees from all around the world have already rejected the notion of engineering human germ lines, the notion lives on and is certainly researched with other animals."

Impact

What are the rights of future persons? How do these relate to our current rights? Certainly the genetics revolution will dramatically increase both the volume and complexity of cases that the courts here, irrespective of laws enacted by Parliament.

SCIENCE AND TECHNOLOGY COURT

8. Sohail Inayatullah and Jennifer Fitzgerald, **Gene Discourses: Politics, Culture, Law and Futures**, *Technological Forecasting and Social Change* (Vol. 53, No. 2/3, June/July 1996), 161-184.

In this article they point that in the last few hundred years, from focusing on death (the role of the King), the state is now focused on regulating life. Through Focault's notion of biopower, the authors assert that law will be less concerned with the management of life and more with issues around the creation of life and the many new invented life forms to follow. Owning life, killing a computer program, deciding on the rights of our genetic futurecestors will become issues that plague future legal thought.

In addition, law has been successful in conditions of print, cool media, in text based rules of behavior, but as we enter hot, interactive media that transform channels of communication (genetics, robotics, telematics), law itself will be far less of a useful tool to negotiate and stabilize society.

Among other legal issues will be: whether genes are private, public, or whether they have their own rights and their own special space in legal discourse. The central issue will be who has standing. The legal concept of 'the natural person' will come under increasing attack from genetics, so that a large part of the law's role will be to determine who has legal standing. Thus, not only will appropriate (legal) ways of interacting by redefined by changing identities, but also the the (legally) relevant players in the interaction will have to be identified

Four scenarios for the futures of Law are offered.

1. Law provides intellectual property control so that the genetics revolution can take off. For example, in the classic Diamond v Chakrabarty 447 US 303, the US Supreme Court interpreted US patent laws to extend to the patenting of human-made organisms. Those regions and nations that provide such protection will gain bio-technology investment, those that do not, will find invest dwindling away.

2. Law as Preserver of the Natural. In this scenario, the old saying, "Leave well enough alone" will be the philosophical justification for the banning of genetic research – germ line intervention. However, this is likely to see gene research and therapy move to backyard experiments or to other countries/regions.

3. Fast Law – the Postmodern discourse. In this scenario, there will be less reliance on legislatures to make laws and more upon more informal committees to make quick and binding decisions.

Impact

Those regions/jurisdictions that can create flexible institutional arrangements to meet the changing needs of scientists, technologists and health consumers will be able to attract capital and the necessary human resources required for the knowledge Economy. Can Victoria play such a role?

4. The law in the wisdom tradition. Legal solutions come from traditional spiritual perspectives – the wisdom traditions – as well as the need to look forward, to create law based on future desired world. Therapeutic justice may be far more crucial here. In this the role of the law will become that of social activist and guardian of future generations.

For lawyers, genetics and related technologies promise new avenues of work.

Impact

For Justice systems they are likely to increase the complexity of cases. Inayatullah and Fitzgerald however offer and alternative – the creation of a science court with special jurisdiction over issues related to emerging technologies.
Is a Science Court then the required innovation?

HUMAN GENETICS ADVISORY COMMISSION NEEDED

9. Justice Kirby, **A Scientific Revolution** – http://www.lawfoundation.net.au/resources/kirby/

Justice Kirby focuses on the complexity of the genetics revolution, creating areas where we don't even know we don't know, ie where precedence may not be of much help in judicial decisionmaking.

> *Lawyers will only be able to respond efficiently if they are aware of the developments which are occurring and if they familiarise themselves with at least the rudiments of the science and technology which those developments reflect. Here's the rub. So rapid are the advances and so sophisticated and complex are the details of the science and the explanation of the technology, that even an informed lay person finds it difficult today to comprehend exactly what is occurring.*
>
> *Inescapably, genetics, and the technology that has grown to respond to scientific advances, have jumped ahead of ordinary human comprehension. Yet the outcomes of genetics are vital to our society, its democratic institutions, its laws and even to the human species itself. These are not, therefore, issues that can be left to scientists alone.*
>
> *An indication that lawyers are beginning to wake up to the great significance for their discipline of the revolution in human genetics is found in a recent special issue of the Modern Law Review, published in Britain. Instead of the usual fare of problems in the law of negligence, public law and statute law, ten essays are presented which review some of the major implications of the genetic revolution for the legal discipline, both internationally and nationally.*
>
> *Specific legal topics identified in the Modern Law Review include (1) how regulation will be possible in the fast moving genetic revolution; (2) what are its implications for human dignity and human rights; (3) should the law condone interventions in the human genome which alter the genetics of living persons and future generations; (4) what will be the implications of these developments for family law; (5) what consequences will they present for insurance, given the potential of genetic data to remove entirely predictive doubts about an insured's likely health prognosis; (6) will the criminal law need to be revised in so far as it posits the free will of the individual? If the conduct of some persons stems from their genes, should this be exculpation,* a *defence or at least mitigation?; and (7) how will intellectual property law apply to genetic discoveries? Should scientists, and those who support them, be entitled to the protection of patents in respect of their work or is the genome and its incidents an inalienable part of the common heritage of humanity so that, however temporarily, it cannot be "owned" or "controlled" by any person or corporation however big their investments?*

> *These subjects give a clue as to a number of the principal issues which lawyers now, and in the future, will have to examine as the genetic revolution continues to unfold. In Britain, the former Conservative government established the Human Genetics Advisory Commission. It is a high powered affair. One of the first essays in the Modern Law Review is by Sir Colin Campbell, Chairman of the Commission. He describes the way in which the Commission is obliged, under its terms of reference, to keep under review scientific progress at the frontiers of human genetics; to report to government and society on issues arising from the new developments that can be expected to have wider social, ethical and economic consequences; and to advise on ways to build public confidence in, and understanding of, the new genetics. Sir Colin describes the endeavour to bring the complex issues to a wide audience in Britain and to ensure that the Commission's advice will mirror the broad range of opinion which these complex and sensitive questions evoke. "*

However, while the above is important, the crucial part of Justice Kirby's speech is the following.

> ***"There is no such body in Australia.*** *The closest we get to it is the Australian Medical Health Ethics Committee which is chaired by Professor Donald ChaLmers of the Law School of the University of Tasmania. There is insufficient public debate in Australia about the genetic revolution. Most people, including politicians, opinion leaders and the overwhelming bulk of the legal profession, must depend upon articles in the popular media for the rudiments of their knowledge*[10]*. Inevitably, such articles tend to concentrate on highly contentious and sometimes sensational issues such as the potential for reproductive cloning of a human being."*

Impact

Should there a national commission for genetics in Australia? Or a special court, or … what design innovation is needed? Or should market forces decide?

10. 10 Ways to Make a Baby, *Fairlady*, 24 October 2001, 102-104.

The title says it all. While historically there has only been one way to make a baby, there is now ten with each method potentially leading to legal consequences. These ways include: 1. Adult cells – transferring genetic material from ordinary adult cells into sex cells. 2. Insemination – semen is introduced into the mother's reproductive tract. 3. Donor insemination – sperm from an anonymous donor is used to. The sperm is kept in frozen banks. 4. In vitro fertilization. Hormonal drugs are used to stimulate a woman's ovaries to produce large number of eggs, these are surgically extracted and taken to a lab, where they are fertilized by exposure to sperm, normally the partner's, after which several embryos are implanted in the mother's womb. 5. IVF with pre-implantation. Similar as above but genetic

testing is undertaken to test for various diseases – only embryos free of the condition under investigation are implanted. 6. Intra-cytoplasmic sperm injection. A variation of IVF but used for women who produce no sperm in their semen but are not completely sterile to have children. Sperm are thus extracted surgically from the testicle or epididymis. 7. Egg donation and surrogacy. This involves a standard IVF procedure but instead of the mother's own eggs, donated eggs are fertilized by the father's sperm and implanted. 8. Frozen eggs. Eggs are taken from the ovaries, frozen and stored in liquid nitrogen to be defrosted later for use in an IVF procedure. 9. The future – cloning. 10. Sex.

Impact

As technology continues to dramatically speed up evolution, or replace natural evolution, ethical issues and legal cases will continue to dramatically increase.

What is the best way for the judicial system to keep up with technological advances?

MODES OF REGULATION

11. " Bartha Maria Knoppers, et al.,**Commercialization of Genetic Research and Public Policy**, *Science* 17 December 1999, 2277f (From James Dator, "How to think like a futurist and some things to think usefully about," Background reading for the legal services futures session, American Bar Association, May 12, 2000)

"Human genetic material is increasingly an object of commerce." But there is considerable public concern about this and no clear way to determine public policy. Four avenues have been followed so far, each with strengths and weaknesses:

1. **The Human Rights Approach**, which calls upon the courts to decide. "Such cases clarify issues and set far-reaching precedents in the interpretation of, for example, the right to privacy, or discrimination resulting from application of new technologies in the areas of employment or insurance. Yet, on the whole, they are ad hoc in nature and achieved after the technology has already been integrated into research and health care. Furthermore, like all litigation, the process is a costly and lengthy one."

2. **Statutory Approach.** "In this method, specific legislation crafted in response to new technologies addresses the implications of scientific advances through prohibitions, constraints, or moratoria." "The danger of this approach is that such legislation is limited to the current issues and tends to close the public debate." "Finally, if hastily adopted because of public outcry, they will be lacking a proper foundation based on scientific risk assessment."

3. **Administrative Approach**. This "allows for the gradual development of self-regulatory professional codes of conduct and, where necessary, licensing, monitoring, and quality assurance." "However they can be seen as self-serving and as a way to avoid either lawsuits or restrictive legislation."

4. **Market-Driven Approach**. "Maintains that proper, professional practices will ultimately win-out in an unfettered marketplace." "The market, however, is also subject of lobbying by special interest groups, including those who stand to gain financially from public investment or lack of public control, and those who, for a variety of reasons, see certain technologies as potentially harmful or in conflict with their particular values."

LAW, THE COURTS AND GENETICS

12. Deborah Smith and Sarah Crichton, " Gene test 'horror stories' worry lawyers," *The Sydney Morning Herald*, November 15, 2001, 6.

In a recent report by the Australian Health Ethics Committee, the Commission's president said that safeguard needed to be introduced to prevent improper use of genetic information for employment, insurance and for commercial gain. "Ensuring proper regulation of this area should leave people feeling more secure in making better-informed choices about their health care without suffering adverse consequences in other areas of their lives."

While there is almost no regulation of genetic testing by employers in Australia, the country has yet to experience the litigation in the USA and England with respect to genetic testing and discrimination (denied insurance, sacked or demoted because of a genetic predisposition to a disease).

Impact

Most likely Australia will follow the litigious path of the USA unless a regulatory framework is set up.

13. Carl Wellman, **The Proliferation of Human Rights: Moral Progress or Empty Rhetoric?** (Distinguished Prof in Humanities, Washington U-St Louis). Boulder CO: Westview Press, Jan 1999/ Michael Marien, *Future Survey,* May 1999. Vol. 21, No. 5, 221.

Clearly there has been a "vast proliferation" of human rights in the five decades following formation of the UN. This recent proliferation has three interwoven strands:

1) reformers asserting a large number of moral rights (the most general complaint about proliferation is that inflation of rights devalues the currency);
2) 2) the proliferation of new legal rights by legislation or judicial decision, in the US and many other countries (e.g., the right of a pregnant woman to have an abortion; the right not to be sexually harassed in the workplace);
3) 3) proliferation of the language of rights in political discourse (more and more social and political debates appeal to alleged moral rights and support creation of new legal rights, e.g.: the children's rights movement, which, according to some, crowds out the different and more relevant voice of the ethic of care).

Chapters discuss the development of human rights, new civil rights, women's rights (to equal pay, to equal employment opportunity, to maternity leave, etc.), animal rights, environmental rights, and new medical rights (consent to medical research, right to die, rights to medical care). Concludes with a pro and con appraisal of

1) alleged moral rights (the recent proliferation may have gone too far);
2) legal rights (the increased number has multiplied the number of legal disputes and interpersonal conflicts in the US, but some of the recently added rights have promoted the public welfare);
3) political discourse (alleged moral rights can inhibit dialogue and exclude reasonable political debate, but can stimulate jurors and moral philosophers to develop new and more sophisticated theories of rights). In sum, "*although seriously defective in many ways, the proliferation of rights has done much more good than harm*." [Though largely focused on the US, this fair-minded questioning can also apply to universal human rights, and may suggest a turning point away from uncritical embracing of rights.

A very different view is provided by **InHuman Rights: The Western System and Global Human Rights** by Winin Pereira of Mumbai (Other India Press/Apex Press/Third World Network, 1997/259p/$17.50pb), who argues that human rights must be based on the inclusive right to life and universal social justice, and that promotion of full human rights can only be possible in systems outside Western enclosures.]

THEME SIX

MACRO-SOCIETALTRENDS

GLOBAL AGING

1. Sohail Inayatullah, **Ageing Futures: From Overpopulation to World Underpopulation**, *The Australian Business Network Report* (Vol. 7, No. 8, October, 1999), 6-10;

Writes Paul Wallace, author of *Agequake*, historically "we have been remarkably young. Our average age has been around 20 or less. But in the current generation's lifetime, the average age of the world will nearly double from 22 in 1975 to 38 in 2050, according to the UN's latest projections issued at the end of 1998. Under another projection, it could reach over 40 as early as 2040. Many countries will reach average ages of 50 or more."

While many of these changes will be obviously positive, longer life (by mid-century there will be over two million centenarians compared with 150,000 today), healthier life styles, less childhood deaths, and falling number of young people (which means falling crime rates), others are not so positive. Who will pay for the retirement benefits of the older population? This is especially important after 2010 when the ratio of the working age population to old dependents will decrease. And over the next thirty years the ratio of workers to retirees on pension in industralised nations will fall from the current 3-1 to 1.5 to 1

Beth J. Soldo and Emily M. Agree of the American Population Reference Bureau argue that in developed nations such as Canada and the US, as the elderlypopulation grows due to life expectancy gains and the ageing of the huge baby-boom generation, there will be many more sick and disabled old people The average person is sick or disabled for nearly 80 percent of the extra years of life he or she gains as life expectancy rises. Health expenditure for Australians over 65 is already four times higher than for the rest of the population. The World Health Organization estimates that by 2020 depression will be the leading cause of “disability adjusted life years“ dramatically increasing the demands for psychiatric health services for young and old. The aged, particularly those removed from family and community, will be especially prone to mental illnesses. In Queensland, Australia the porportion of those over 60 years will increase from 15% in 1995 to 23% in 2031. Already 25% of those over 65 demonstrate functional psychiatric disorders.

"Global aging is happening almost everywhere, it is a new problem for humankind. A change has occurred in human behavior that is as revolutionary as it is unheralded. Around the world, fertility rates are plummeting. According to an account, women today on average have just half the number of children they did in 1972. In 61 countries, accounting for 44 percent of the Earth's population, fertility rates are now at or below replacement levels. Life expectancy is

also up. The year 2000 will mark for the first time in history that people over 60 will outnumber children 14 and younger in industrial countries. Globally, the average life span has jumped from 49.5 years in 1972 to more than 63 years." (59f)

Wen-hui Tsai, "The evolution of the social security system in America and its future." *Journal of Futures Studies*, November 1999 Vol. 4, No. 1, 45-64

WOMEN IN LAW – UNDER REPRESENTATION

Generally, this is increasingly become a concern yet the data shows that women are still underrepresented.

2. The Hon Justice Michael Kirby AC CMG, High Court of Australia, Women Lawyers - Making a Difference Address to WLA/NAB Breakfast Speaker Series, 18 June 1997.

"I put this news item from the United States down wondering whether things were very different in Australia. Leave aside the highest Court, appointment to which is bound to involve many chance factors. What about the position further down the line? What about the advancement of women to partnerships in law firms, to the rank of professor and in the Bar, which is the usual highroad to judicial appointment? Other United States publications show that, in the 500 major law firms of that country only about 14% of the partners are women. The highest proportion in the country in female partnerships is in Denver where they have risen to 21%. The proportion of staff attorneys in the big 500 who are women is 39%. The proportion of summer associates appointed who were female was 43%. Every lawyer knows that Justice Gaudron is the only woman Justice of the High Court of Australia. But how are women performing elsewhere in the Australian profession?

To find the answer to this question I opened the growing body of literature which analyses the suggested gender bias of the legal profession of New South Wales and of other States, and of Australia more generally.

The position in New South Wales is probably better than in most parts of Australia. But progress is slow. True, there have been important developments since the first woman law graduate emerged, testamur in hand, from the University of Sydney in 1902. True, there has been progress since the first woman was admitted as a legal practitioner in New South Wales, following legislative amendment to permit that course, in the 1920s. The proportion of women law graduates has gradually risen over the past 20 years. In 1984, the percentage in New South Wales was 33%. In 1990, it had risen to 46%. Now, it hovers at 50%. This change in the gender composition of the legal profession promises, ultimately, a remarkable change in its self-image and in the way it goes about its work.

The same percentages are reflected in the admissions to the College of Law. In 1984 it was 36%. In 1990, 47%. In 1994 it reached 50% for the first time.

In seventy years, the proportion of women actually admitted to the legal profession in New South Wales has gone up most significantly. In 1920 it was 0%. In 1984, it was 31%. In 1990 it was 43%. Now, as with legal graduates, it hovers at 50%.

Interestingly, there is a shift in the sectors in which women lawyers are working. In 1984, 79% were employed in the private sector of the legal profession. This had dropped to 72% in 1988. In 1994 it was fewer than 69%. The fall in such employment was largely compensated by a rapid rise in the number of women lawyers finding work in private corporations. This raises questions as to the attitudes of people in the corporate sector and their capacity to make adjustments which the practising legal profession has found it difficult to make.

So far as partnership status is concerned, an analysis of employment in the private legal profession in 1993 showed that, in New South Wales, 13% of women legal practitioners were partners compared to 44% men. Thirteen percent of sole practitioners were women compared to 23% men. Twenty-nine percent of employed solicitors were men whilst 73% of women were engaged as employees. The percentage who have made it to partnership status almost exactly parallels that of the 500 big firms of the United States. Are we doing better? Or is there the same barrier which women lawyers wherever they are must still break through?

That there is a barrier in respect of the top legal appointments seems beyond doubt. An analysis of the employment of women lawyers in government posts in New South Wales showed that 13% of all male employees had made it to the top grade, only 5% of women made that grade. Sixty seven percent of the women find themselves at the bottom grade whereas only 45% of men are there. The same pattern appears in the appointment of academics in New South Wales. Sixteen percent of all male academics have professorial or equivalent rank. Yet only 6% of women have attained that position. The proportion is reversed at the lowest (tutor or associate lecturer) status: 16% of women and only 5% of men.

As to the top of the pile - the judiciary - the situation is even less encouraging. In 1970 the statistic was an easy one to remember. The proportion of women in judicial office in New South Wales was zero percent. In fact, it was not until 1962 that a women (Miss Roma Mitchell of Adelaide) was appointed to the rank of Queen's Counsel. It was not until 1965 that the same woman was appointed to judicial office in the Supreme Court of South Australia. In 1970, Justice Mitchell was still the only woman judge appointed to a superior court of our country. The career of Dame Roma Mitchell remains a beacon of hope, encouragement and example.

The position has improved somewhat in the intervening quarter century. In 1980, in New South Wales 2%, of judicial officers were women. Now the percentage is getting closer to 10%. According to the Australian Law Reform Commission, the position across Australia is marginally worse. At the time of its analysis in 1994, about 7% of all federal judgeships were held by women. About 6% only of State judicial officers nationwide were women. The position has changed a little with the recent appointment of the first women judges to the Supreme Courts of Victoria and Western Australia. But there are still many courtrooms in our country where women advocates must go and, unlike Kathryn Tucker in the Supreme Court

of the United States, they cannot look up to the bench to find the reassurance of a woman holding judicial office and exercising it with professionalism and skill.

IMPACT

When is it likely that women will play an equal part in the Victoria Courts? What can be done to ensure gender equality?

GLOBALIZATION AND THE COURTS

3. Christie S. Warren, **Court Administration as a Tool for Judicial Reform:An International Perspective**, Institute for Court Management, Court Executive Development Program, Phase III ProjectApril 2001. http://jeritt.msu.edu/resources.asp?Page=12

Writes Warren**:** " In conclusion, it can argued that during the next decades, globalization will impact no governmental institution more than the courts. Disputes are an inevitable part of human interaction. The ability of civilization to carry on, and indeed progress, in the next millennium will depend upon our ability to develop trustworthy, orderly, and efficient ways to resolve conflict at local community levels and among the nations of the world. If we are able to create flexible training modules, abandon rigid assumptions, and learn from the experiences of people in other nations, knowledge we have accumulated along our own path of judicial reform can contribute valuable insights into the development of procedures and institutions to facilitate resolution of the increasingly complex range of disputes likely to arise in the next century."

Impact

Court reform must be an open ended process, with learning coming from all over the globe.

GLOBALIZED LAW

4. Michael Brown and Richard Rosecrance, **The Costs of Conflict**. Lanham, MD, Rowman and Littlefield, 1999. (See Michael Marien, *Future Survey*, Vol. 22, No. 4, April 2000, 14)

They argue for preventive global policies. That is, world powers have received early warnings of impending problems but have failed to act. Three methods are used to determine comparative costs. They conclude: In every case we examined – which included different kinds of conflict and diverse international responses – conflict prevention actually cost or would have cost the international community much less than the conflicts themselves. In some cases the cost difference is truly staggering – in short, conflict prevention is cost-

effective. In contrast are the costs that result from doing nothing – refugee costs, military costs, direct and indirect economic costs and reconstruction and rehabilitation.

Impact

What local, state and national conflicts can be acted on now – where can early warning systems be enhanced? What are the costs of the courts waiting for the conflict to be resolved by Parliament?

5. Bruce Tonn, **Decision Day**, in Tae-Chang Kim and James Dator, eds, . *Co-Creating a Public Philosophy for Future Generations***.** Praeger Studies on the 21st Century. Westport CT: Praeger, Aug 199

Recent discussions about why we need to be aware of our obligations to future generations fall into four categories: the "fairness" obligation (not imposing risks on FGs that present generations would not accept), the "maintaining options" obligation (giving to our posterity future worlds that are as free of human-made constraints as possible), the "quality-of-life" obligation (insuring that FGs enjoy all the most important aspects of life), and Wendell Bell's argument for humility (humble ignorance ought to lead present generations to act prudently). "*Future-oriented public philosophy and behavior does not imply an argument for or against specific policies towards the future, but rather is a way of ensuring that the needs of future generations are specifically taken into account whatever policies are made in all areas.*

However, more significantly, Bruce E**.** Tonn develops a scenario of a Court of Generations interacting with a four-chamber Futures Congress of the North American Affinity States Collaborative;

GLOBALIZED NATIONS

6. Provided by James Dator, University of Hawaii. Social Science Research Institute. Honolulu, Hawaii. Dator@hawaii.edu. www.futures.hawaii.edu

Thursday 5 August 1999 0:20am Cyber Yuga, the world's first online nation, was launched.

Cyber Yuga was set up by two former Yugoslav citizens who wanted to create a 'homeland' based in cyberspace. In the first three weeks, they gathered the support of almost 2,000 'remote citizens'.

The project emphasizes equality and democracy, with each citizen obliged to become minister of a virtual department of their choice. Their only other obligations are to read the constitution regularly and to vote on proposals to change it.

Ultimate power lies in the Algorithm of the Social System - based on open source code - which chooses national anthems and kicks out citizens who do not fulfil their duties.

Cyber Yuga's ambitions go well beyond existing political sites, such as news portal, VirtualJerusalem.com. Some citizens are treating it as a unique political experiment. One, a political exile living in Slovakia, said: "I think the campaign will show how many people in the world are sick of the state as institution."

If and when its population reaches five million, Cyber Yuga will apply to become a member of the United Nations. It will request 20 square kilometres of land on which to place its server.

In the meantime, it needs programmers to help stake out the territory. Cyber Yuga is located at (http://www.juga.com)

Impact

How will the Courts deal with new forms of identity, cyber and genetic? Will they have standing?

7. Identity and Community - from Jennifer Cootes. Futurewatch. *Journal of Futures Studies*. (Vol. 6, No. 1, August 2001), 185.

J. Paluski, B. Tranter analyse national data for broad Australian social identities based on strong/weak attachment to either society or nation. Three groups emerge:- civics, with strong attachment to Australia as a society and its culture, comprising nearly 37.8%, post war born, well educated and secular. Ethno-nationalists comprise 30%, are mostly older, less educated and religiously affiliated, often male. Their attachment is to the nation, understood as a culturally circumscribed identity for those born to, or long immersed in it. (NZ has 40.3% and 27.4% respectively) A small group, 5.9%, identify as "denizens" with weak attachment, mostly immigrants.(NZ 6.2%) A large group show mixed characteristics in both countries, just over 26%. Both nations show surprisingly "bonded" and inclusive national identities, compared with Canada or US, (International Social Science Survey, 1995) and the civic group is likely to grow. *Journal of Sociology, August.*

CULTURAL CREATIVES

8. Paul Ray and Sherry Henderson. *Cultural Creatives. **How 50 million people are changing the world***, Harmony, New York. 2000. www.culturalcreatives.org.

In contrast to these identity formations, Paul Ray and Sherry Anderson argue that in the United States there are three main demographic categories. They are the traditionalists, modernists and cultural creatives. The traditionalists have been in decline and cultural creatives in rapid increase.

What's most important to **moderns** is (a) making lots of money; (b) climbing the ladder of success with measurable steps toward one's goal; (c) having lots of choices (as a consumer, or voter or on the job); (d) being on top of the latest trends, styles and innovations; (e) supporting economic and technological progress at the national level; (f) rejecting the values and concerns of native people, rural people, Traditionals, New Agers, and religious mystics.

Moderns represent 48% of the U.S. citizenry (93 million adults) and, in 1995, they had a median family income of $42,500.

The **Traditionals** represent 24.5% of U.S. citizens (48 million adults). "Many Traditionals are not white bread Republicans but elderly New Deal Democrats, Reagan Democrats, and old-time union people as well as social conservatives in politics...."

Traditionals tend to believe (among other things) that

(a) patriarchs should again dominate family life; (b) FEMINISM is a swearword; (c) men need to keep their traditional roles and women need to keep theirs; (d) family, church, and community are where you belong; (e) customary and familiar ways of life should be maintained; (f) it's important to regulate sex -- pornography, teen sex, extramarital sex-- and abortion; (g) men should be proud to serve in the military; (h) all the guidance you need for your life can be found in the Bible; (i) preserving civil liberties is less important than restricting immoral behavior; (j) freedom to carry arms is essential; (k) foreigners are not welcome.

Many Traditionals are pro-environment and anti-big business. They are outraged at the destruction of the world they remember, both natural areas and small-town life. Traditionals tend to be older, poorer, and less educated than others in the U.S. At the end of World War II, Traditionals were 50% of the population, but today they are 25%, and their numbers are shrinking as older Traditionals die and are not being replaced by younger ones.

The **Cultural Creatives**: What Ray and Anderson discovered during a decade of research is that the Moderns and Traditionals have now been joined by a third subculture within the U.S., 50 million strong (26% of all adults) -- a population the size of France, and growing. Ray and Anderson have labeled them "Cultural Creatives." Here is a list of 18 characteristics; if you have 10 or more of them, you're probably a cultural creative:

(a) love nature and are deeply concerned about its destruction; (b) are strongly aware of the problems of the whole planet and want to see action to curb them, such as limiting economic growth; (c) would pay more taxes or higher prices if you knew the money would go to clean up the environment and stop global warming; (d) give a lot of importance to developing and maintaining relationships; (e) place great importance on helping other people; (f) volunteer for one or more good causes; (g) care intensely about psychological or spiritual development; (h) see spirituality and religion as important in your own life but are also concerned about the role of the religious Right in politics; (h) want more equality for women at work and want more women leaders in business and politics; (i) are concerned about violence and the abuse of women and children everywhere on Earth; (j) want politics and government to emphasize children's education and well being, the rebuilding of neighborhoods and communities, and creation of an ecologically sustainable future; (k) are unhappy with both left and right in politics and want a new way that is not the mushy middle; (l) tend to be optimistic about the future and distrust the cynical and pessimistic view offered by the media; (m) want to be involved in creating a new and better way of life in our country; (n) are concerned about what big corporations are doing in the name of profit: exploiting poor countries, harming the environment, downsizing; (o) have your finances and spending under control and are not concerned about overspending; (p) dislike the modern emphasis on success, on "making it," on wealth and luxury goods; (q) like people and places that are exotic and foreign, and enjoy experiencing and learning about other ways of life.

Cultural Creatives are not defined by particular demographic characteristics -- they are accountants and social workers, waitresses and computer programmers, hair stylists and lawyers and chiropractors and truck drivers, photographers and gardeners. The large majority of them are very mainstream in their religious beliefs. They are no more liberal or conservative than the U.S. mainstream, though they tend to reject "left-right" labels.

Really, their one distinguishing demographic characteristic is that 60% of them are women, and most Cultural Creatives tend to hold values and beliefs that women have traditionally held about issues of caring, family life, children, education, relationships, and responsibility. In their personal lives, they seek authenticity -- meaning they want their actions to be consistent with what they believe and say. They are also intent on finding wholeness, integration, and community. Cultural Creatives are quite clear that they do not want to live in an alienated, disconnected world. Their approach to health is preventive and holistic, though they do not reject modern medicine. In their work, they may try to go beyond earning a living to having "right livelihood" or a vocation.

Ray and Anderson summarize the forces that have given rise to Cultural Creatives: "In the twenty-first century, a new era is taking hold. The biggest challenges are to preserve and sustain life on the planet and find a new way past the overwhelming spiritual and psychological emptiness of modern life. Though these issues have been building for a century, only now can the Western world bring itself to publicly consider them. The Cultural Creatives are responding to these overwhelming challenges by creating a new culture." New businesses, new management styles, new technologies, new forms of social organization (for example, leasing products, such as carpets and refrigerators, to consumers instead of selling

them, to make sure they are recycled), and new decision-making techniques (the precautionary principle, for example) -- the Cultural Creatives are constructing a new world in our midst, largely ignored by the media.

By different paths, fifty million Cultural Creatives emerged from (or were influenced by) social movements of the '60s and '70s. Ray and Anderson describe 20 such movements that have spawned

Cultural Creatives who, in turn, have begun to put a positive spin on movements that have been mainly oppositional. "Slowly a lesson has been drifting in on one movement organization after another. At some point, opposing something bad ceases to be enough, and they must stand for positive values, or produce a service that is important to their constituency," Ray and Anderson note.

Ray and Anderson see this shift occurring in the environmental movement, and we see it too. "Cultural Creatives are urging the environmental movement into a new phase. Having educated us through protests and information, some are moving beyond that now, to develop new kinds of businesses, technologies, and cooperative ventures." To put labels on these innovations, they are the Natural Step, clean production, and zero waste. Together, they are beginning to rebuild the industrial infrastructure of the Western world. There's a long way to go, but it's a start.

IMPACT

If these categories hold up for Australia then we can anticipate quite a dramatic change in Australia's culture. For the Justice system, this is likely to mean: 1. Far less emphasis on litigation. 2. Increased interest in community mediation, indeed, all community/local/but global solutions to conflicts. 3. Increased interest in ensuring that government follows triple bottom line practices (see below), that is, profit (excellence), social justice and environmental justice, and indeed, even the fourth bottom line – concern for future generations. The impact of the Cultural Creatives cannot be underestimated.

TRANSFORMATIONS IN GOVERNANCE

9. James Dator, **From Democracy to Tortocracy to Self-Governance**
Scan and assessment provide by James Dator, University of Hawaii, Social Science Research Institute. Dator@hawaii.edu. www.futures.hawaii.edu

While it certainly is not a new complaint, there is increased concern that courts are taking over governance in the US— that America is less a Democracy and more and more a Tortocracy.

Tortocracy can be defined as the increasing use of the court system to institute social policies without legislative authorization, guidance, or oversight. See the following websites for details on this scan.

But, to the contrary, there may be something much more profound going on. Courts may be in the process of returning to certain functions once typical of their past, thereby helping modern liberal, republican governance systems transform into new systems more fit for the 21st Century and beyond.

For many hundreds of years, until the rise of the United States and other modern nations, "law" was not a set of generalized rules "made" by legislators. Rather, law was typically declared (or, it was pretended, "discovered") by judges on behalf of kings in common law communities on a case by case basis, and not generally for all people and for all time. Judges typically did of course seek to follow the decisions of other judges in similar cases, but, given the rarity of adequate written records, there was actually considerable variance between and within jurisdictions. Law was, in effect, highly localized and individualized.

During modern times, however, "law" was thought to be "made" by legislators acting as representatives of citizens, typically guided by principles contained in written constitutions. Law in modern societies was intended to apply to everyone in order to be a stable, long-lasting set of rules by which the newly emerging games of industrialization, nation-building, and capitalism could be played. The widespread use of the printing press, and of educational and other institutions based upon and furthering the use of the written word for economic and governance purposes, further led to a system whereby judge-discovered oral law gave way to legislatively-made written law, with the primary role of the courts being to render judgments based upon reconciling specific human actions with generalized written rules, requirements, or prohibitions.

Under this modern system, judges neither made nor discovered law. Their role was simply to interpret and announce the meaning of (and perhaps to clear up any ambiguity in) the written laws and constitutions so that everyone would be playing the modern game according to the same set of rules.

While arguments about the existence or propriety of "judicial activism" and "judge-made law" permeate American legal history, it seems clear that recently more and more important policy decisions are being made by judges, and less and less by legislatures.

The opening sentences of an article in the Weekend Edition of the *Financial Times* for December 11/12, 1999, titled "Legal eagles rule the roost," written by Patti Waldmeir, states the situation very well: "Americans lean heavily on the law. More than any society on earth, the US relies on its civil justice system to define relations between man and man, man and woman, man and corporation. Americans depend on the civil law to shape and bind society: to defend individual rights, tame the excesses of capitalism, and compensate them for the modern and ancient adversities of living. Litigiousness is not just a perverse American character flaw: it is something closer to a core American value. But now, as big government wanes, America seems to be entering an era of more and bigger lawsuits. For more than a

decade, mass litigation has become increasingly common in areas of personal injury, product liability, and workplace discrimination. . . Courts are increasingly called upon to assume an oversized role, making public policy in areas vacated by politicians. The glacial pace of legal change has suddenly accelerated as the third branch of government assumes responsibilities from the other two, regulating and taxing whole segments of US industry."

Note again that, except for the "mass" basis of class-action suits which is the focus of the article, this is not really a NEW role for courts. It is better understood as a RENEWED or an EXPANDED role. Some of the reasons for this resumption of judicial law-making were mentioned in the passage quoted above:

1. Elected officials try not to make decisions about controversial or unpopular matters for fear of losing elections, leaving the issue to be decided by appointed judges.

2. The practices of tax cuts and "downsizing" governments at all levels, most especially at the US Federal level, has rendered most nonmilitary and non-paramilitary governmental agencies increasingly understaffed and underfunded, and thus unable to function as intended. While this primarily impacts the administrative branch, the effect is to force more and more decisions into the hands of judges.

3. Alexis de Tocqueville commented on the American tendency to solve disputes by turning to the courts more than a hundred years ago. With enrollments in law schools (and the number of law schools—and now of online law schools) in the US continuing to grow more rapidly than the overall rate of population growth, an ever-increasing proportion of American citizens are lawyers, trained primarily to solve their disputes by going to court.

   There are other reasons which the author of the Financial Times article does not mention which also contribute to the increased use of courts over other dispute-resolving and policy- making processes:

4. Because of the rapid rate of technological and hence social change, corporations as well as ordinary individuals often find themselves facing problems (or opportunities) which require a quick and authoritative decision, but about which no legislative body has set (or, as likely, even considered) public policy. Hence, cutting-edge, future-oriented cases and controversies come before judiciaries for policy decisions before the public, or its elected representatives, is even aware of it.

5. There seems little doubt that, as the pace of technologically-induced social change increases, as time and space coalesce into a single instantaneous and global market which never sleeps and seldom rests while governments become weaker and weaker, that courts everywhere—and not just in the US—will resume more and more policy-making roles.

In her FT article, Patti Waldmeir quoted primarily from people—many of them American judges, lawyers or legal scholars—who were opposed to increasing judicial activism. She summarizes and concludes her article:

> *Used as a regulatory system, civil litigation is unpredictable and costly; as a system of social insurance it is random and expensive. All involved in the debate should remember that the role of the courts is to deliver justice— not to compensate for small government with even bigger litigation*

This rather typical conclusion may be missing the most important point about the increase of judicial activism.

Modern governments everywhere appear to be losing their legitimacy. In the US this seems especially advanced. Fewer and fewer Americans vote or are otherwise politically active. Fewer and fewer even bother to pay attention to politics. While young people have always been less active and less attentive to the formal political process in the US than are adults (tending to become more involved as they themselves reach middle age), apathy towards formal politics and political issues seems increasingly widespread among American youth.

While the symbols of American government—the Constitution and the Flag—retain their almost holy status, politicians and the actual process of politics are either held in contempt, or totally ignored by more and more people.

At the same time, "gridlock" (the inability of legislative and executive branches to agree quickly, or at all, on policy matters) has come increasingly to characterize American politics. Gridlock is nothing new. Neither is it a temporary mistake. Gridlock is a fundamental design feature of the US Federal Constitution, more or less widely copied by all State Constitutions and most municipal charters. The US Constitution intentionally makes it almost impossible to govern without agreement between the executive and the legislature, and yet the Constitution also enshrines a system of governance, best called "presidentialist," which makes such agreement almost impossible.

Because of the two-party system—itself an inevitable and totally predictable consequence of specific political design features of the US and all state constitutions— formal discussion of the many varied opinions and preferences different citizens might actually hold is structurally impossible, and only a narrow range of basically similar proposals, representative of few if any actual citizens, ever get discussed in legislatures. To make matters worse, decisions there are reached by a simple majority vote which virtually guarantees that in every matter of controversy, almost everyone is substantially dissatisfied with the outcome.

In contrast to this, judge-made law is both faster (though often still not fast enough) and personalized—tailored to the specific case and controversy, and generalized to other cases and controversies only with great difficulty.

This certainly does result in a situation where there are scores, if not hundreds, of different decisions being rendered on barely distinguishable cases every day, or every year, in the US. Many of these cases make it to the US Supreme Court where they often are affirmed or overturned without a hearing, with only a tiny number of them being heard and decided, often by a narrow margin and sometimes with several different written concurring or dissenting opinions.

Surely this lack of uniformity is lamentable, as the FT article says. Surely capitalism requires stable, predictable, long-lived rules.

Modern capitalism perhaps did, but the postmodern "New Economy" of the "Long Blur" does not, if we read its proponents correctly. The kind of judge-made, personalized, and highly transitory rule-making is precisely what the Long Blur seems to require.

And the Long Blur neither needs nor wants rules about anything which are made by highly unrepresentative and remote "representatives"—rules which then must be administered and adjudicated slowly over many years. No! By the time such rules are finally and authoritatively rendered by the US Supreme Court, the technology, the economy, and the society will have long since moved on to other cases and controversies about which the legislature remains ignorant and silent, while trying to place the dead hand of past regulations on the throttle of dynamic change.

Judges thus are not "usurping" the proper role of legislators. Rather, they are merely responding as responsibly as they can to the increasingly common and real need of global economic actors to have quick decisions rendered on matters of great immediate, but probably quite transitory, urgency.

In the paragraphs below, Peter Spiller is writing of British and New Zealand judges, but much the same can and should be said of American judges as well.

"It is true that judges in England and New Zealand are bound to apply the unambiguous wording of valid Acts of Parliament, and that they do not have the right nor the opportunity to introduce systematic and wide-ranging reforms of the legal system. The reality is that the great majority of judges spend most of their time 'sifting through a mass of conflicting factual material' and applying settled law to disputed facts, rather than formulating new principles of law. Nevertheless, it is evident that judges play a creative role in the legal system. They do this by virtue of 'the manner in which they perceive and interpret "facts" in cases before them.' Furthermore, particularly at the higher levels of the court system, they play a key role in legal development by extending the law to cover new or 'grey' areas and in exercising discretions allowed by statute. Modern judges tend to acknowledge their law-making power openly. . .

"The current President of the Court of Appeal, Sir Robin Cooke, claimed (in 1990) that 'the great majority of New Zealand judges, perhaps all, now openly recognize, albeit, no doubt, in varying degrees, that the inevitable duty of the courts is to make law and that this is what all of us do every day.' (176)

"Thomas J has recently called for a distinct break with the traditional notion 'that past cases should be followed for the sake of precedent,' with the effect that 'the past.. . has predicted the future.' He believes that it should be recognised that 'the common law today remains what it has always been, the law as forged and reforged and made and remade by the judges.' He argues that 'past cases should be accepted as authorities and followed in a later case when, and

only when, the judge consciously and sensibly determines that they accord with sound principle, will contribute to the achievement of justice in the individual case, and are responsive to the current norms and needs of their community.' He says that 'ultimate judges are not bureaucrats applying preordained rules, nor are they fundamentalists applying a rigid gospel unable to question the wisdom, validity, and relevance of the law which they are called upon to administer,' but are social artisans dealing with the affairs of people." (177) (From Peter Spiller, et al., *A New Zealand Legal History*. Wellington, NZ: Brooker's, 1995)

Some one will certainly object that US judges do not have this kind of freedom; that they are bound by the US Constitution, their state Constitutions and previous judicial decisions.

They are so bound only because of their mutual willingness to pretend they are. And if they are, then this might be yet another reason why the US Constitution—a magnificent political design for America 200+ years ago, in the very earliest days of industrialization— deserves a serious reconsideration.

In the meantime, American judges find themselves obliged by the dynamics of postmodern society, technology and economics to be fluid, flexible, and fair.

It goes without saying that this rising judicial activism is a fundamentally "undemocratic" process and, according to liberal democratic theory, a thoroughly illegitimate process as well. Until a more responsive form of democracy is invented, judges are required to act.

It also goes without saying that judges are very poorly prepared, by prior academic training, to be the futurists and philosophers they are increasingly expected to be. So the continuing legal education of the bar and bench is even more essential.

Lastly, until a personalized, swift, highly flexible, authoritative (but not authoritarian), and future-oriented system of governance is finally invented to replace our obsolete republican form, judges will be required more and more to make, unmake, and remake highly private "public" policy decisions which current conditions demand and future conditions will make even more imperative.

Impact:

This analysis is likely to be the case for Australia as well. If so, there is likely to be continued conflict between the Executive and the Judiciary, already evidenced by comments made by the Prime Minister Howard against Justice's North's opinion on the Tampa.

10. Editorial, **Legal tangle in need of reform**, *Financial Review* (2 November 2001), 74.

This editorial makes a range of salient points for the future of justice.

1. The current attorney-general Daryl Williams is in favor of devolving some court power, particularly in family law, back to community organizations for dispute resolution. This would mean less case load for the courts as well as increased focus on mediation and restorative/therapeutic justice.

- Williams as well proposes laws to stop age discrimination (continued the trend for rights, mentioned elsewhere in this scanning report) and,
- Williams proposes to remove State barriers making a uniform national legal system.
- The Labour shadow Attorney-General outlines a centralist vision of courts in the nation, "with referrals from the States sought in the areas of competition policy, cross-vesting of legal cases, administrative review, gene technology, and drugs in sport.

BAD TIMES AHEAD

11. John Hewson and Peter Brain, **We All Fall Down**, Review, *Australian Financial Review* (2 November 2001), 1-2.

These two leading forecasters that we are about to enter a long term recession, partly as this is the first syncronized global downturn since the 1970s.

The causes: 1. 9/11 terrorist attacks and the resultant culture of fear, and heavy government spending (the loss of the peace dividend). 2. Syncronized downturns. 3. Downturn in the USA. 4. Inequities created by globalization.

This will be a long term down turn. As they write: "The increases in the iequality of income distribution will make post-2001 recover more difficult in the same way that it held back recovery in the 1930s. Full recovery did not occur until the post-war taxation and income distribution measures created preconditions for the 1950s and 1960s decades of prosperity. "

Generally, they compare the 1920s with the 1990s. However, there is a bit of brightness for Australia as it is likely to have a higher relative growth rate than the rest of the world. Still, the conclude: " Whether or not the world avoids a depression in the next five years will not alter the likelihood that Australia is drifting towards a socio-economic crisis."

12. *The Economist*, "**How Far Down**," (20 October 2001), 71.

This leading magazine as well forecasts a severe downturn. The question they ask is: "How far down." They cite that it is a syncronized downturn and it is not terrorism but the economic and financial imbalances from the 1990s.

Impact

Less funds for new innovative programs.
Increased crimes.
Increased bankruptcies especially in among small businesses.
Increased pressures on the Justice system to be proactive given the likely paralysis of the executive and legislative branches.
Increased needs for community and neighborhood mediation and other sources to decrease the pressures on the official justice system.
More work for fewer people
Increased firings of key staff
Growth area will be in automation and community centers.

GOOD TIMES AHEAD

13. The Long Boom: **A History of the Future, 1980 - 2020** By Peter Schwartz and Peter Leyden www.wired.com/wired/archive/5.07/longboom.html. Accessed November 19, 2001.

Peter Schwartz and Peter Leydon offer this scenario.

"We're facing 25 years of prosperity, freedom, and a better environment for the whole world.

By the late 1990s,…a meme began to gain ground. Borne of the surging stock marketand an economy that won't die down, this one is more positive: America is finally getting its economic act together, the world is not such a dangerous place after all, and our kids just might lead tolerable lives. Yet the good times will come only to a privileged few, no more than a fortunate fifth of our society. The vast majority in the United States and the world face a dire future of increasingly desperate poverty. And the environment? It's a lost cause.

But there's a new, very different meme, a radically optimistic meme: We are watching the beginnings of a global economic boom on a scale never experienced before. We have entered a period of sustained growth that could eventually double the world's economy every dozen years and bring increasing prosperity for - quite literally - billions of people on the planet. We are riding the early waves of a 25-year run of a greatly expanding economy that will do much to solve seemingly intractable problems like poverty and to ease tensions throughout the world. And we'll do it without blowing the lid off the environment.

If this holds true, historians will look back on our era as an extraordinary moment. They will chronicle the 40-year period from 1980 to 2020 as the key years of a remarkable transformation. In the developed countries of the West, new technology will lead to big productivity increases that will cause high economic growth - actually, waves of technology will continue to roll out through the early part of the 21st century. And then the relentless process of globalization, the opening up of national economies and the integration of markets, will drive the growth through much of the rest of the world. An unprecedented alignment of

an ascendent Asia, a revitalized America, and a reintegrated greater Europe - including a recovered Russia - together will create an economic juggernaut that pulls along most other regions of the planet. These two metatrends - fundamental technological change and a new ethos of openness - will transform our world into the beginnings of a global civilization, a new civilization of civilizations, that will blossom through the coming century.

Sitting here in the late 1990s, it's possible to see how all the pieces could fall into place. It's possible to construct a scenario that could bring us to a truly better world by 2020. It's not a prediction, but a scenario, one that's both positive and plausible. Why plausible? The basic science is now in place for five great waves of technology - personal computers, telecommunications, biotechnology, nanotechnology, and alternative energy - that could rapidly grow the economy without destroying the environment. This scenario doesn't rely on a scientific breakthrough, such as cold fusion, to feed our energy needs.

Also, enough unassailable trends - call them predetermined factors - are in motion to plausibly predict their outcome. The rise of Asia, for example, simply can't be stopped. This is not to say that there aren't some huge unknowns, the critical uncertainties, such as how the United States handles its key role as world leader.

Even those from the hardened criminal underworld migrate toward the expanding supply of legitimate work. Over time, through the first decade of the century, this begins to have subtle secondary effects. The underclass, once thought to be a permanent fixture of American society, begins to break up. Social mobility goes up, crime rates go down. Though hard to draw direct linkages, many attribute the drop in crime to the rise in available work.

Others point to a shift in drug policy. Starting with the passage of the California Medical Marijuana Initiative n 1996, various states begin experimenting with decriminalizing drug use. Alongside that, the failed war on drugs gets dismantled. Both initiatives are part of a general shift away from stiff law enforcement and toward more complex ways to deal with the roots of crime. One effect is to destroy the conditions that led to the rise of the inner-city drug economy. By the second decade of the century, the glorified gangsta is as much a part of history as the original gangsters in the days of Prohibition.

Women spearhead many of the changes that help make the multicultural society work. As half the population, they are an exceptional "minority" that helps pave the way for the racial and ethnic minorities with fewer numbers. In the last global boom of the 1960s, the women's movement gained traction and helped promote the rise in the status of women.

Through the 1970s and 1980s, women push against traditional barriers and work their way into business and government. By the 1990s, women have permeated the entire fabric of the economy and society. The needs, desires, and values of women increasingly begin to drive the political and business worlds - largely for the better. By the early part of the century, it becomes clear that the very skills most needed to make the networked society really hum are those that women have long practiced. Long before it became fashionable, women were developing the subtle abilities of maintaining networks, of remaining inclusive, of

negotiating. These skills prove to be crucial to solving the very different challenges of this new world.

The effort to build a truly inclusive society does not just impact Americans. At the turn of the century, the United States is the closest thing the world has to a workable multicultural society. Almost all the cultures of the world have some representation, several in significant proportions. As the century moves on, it becomes clear to most people on the planet that all cultures must coexist in relative harmony on a global scale. On a meta level, it seems that the world is heading toward a future that's prefaced by what's happening in the United States.

One hundred years ago, the world went through a similar process of technical innovation and unprecedented economic integration that led to a global boom. New transportation and communications technologies - railroads, telegraphs, and telephones - spread all over the planet, enabling a coordination of economic activity at a level never seen before.

Indeed, the 1890s have many parallels to the 1990s - for better or worse. The potential of new technologies appeared boundless. An industrial revolution was spurring social and political revolution. It couldn't be long, it seemed, before a prosperous, egalitarian society arrived. It was a wildly optimistic time.

Of course, it all ended in catastrophe. The leaders of the world increasingly focused on narrow national agendas. The nations of the world broke from the path of increasing integration and lined up in competing factions. The result was World War I, with everyone using the new technologies to wage bigger, more efficient war. After the conflict, the continued pursuit of nationalist agendas severely punished the losers and consolidated colonial empires. The world went from wild optimism to - quite literally - depression, in a very short time.

IMPACT

If the Growth scenario is correct, while prisons might decrease, as earlier scans hint, global criminal associations will also participate in the long boom, or what Dator in his scan calls the Long Blur.

What are the likely impacts on the Justice System?

SOCIAL ISOLATION TO INCREASE

14. Prof. Rob Moodie, CEO VicHealth, **Life, leisure and longing in 2050** The Edwards Oration (28th April 2000)

Rob Moodie argues that social isolation is set to increase in Australia.

"Information put together by the Australian Bureau of Statistics suggests that, although we are interacting with a wider range of people, more of us will live alone in the future. It is estimated that by 2030, one in 7 Australians will be alone at home compared to one in 12 in 1996. Approximately one quarter of these will be 75 years or older, and of these three quarters will be women.

Families are changing. With rising divorce rates and an increasing number of children living with one parent, almost one third (31%) of 0-4 years olds are projected to living with one parent by 2021.

Household size is projected to decrease from 2.6 per household to 2.2 in 2030, reflecting an increase in those who live alone, in couple-only families, and in one-parent families.

In addition to people being more likely to live alone, current trends indicate that we will spend more time by ourselves. In only 5 years from 1992 to 1997 the proportion of our waking time spent alone increased by 14% to 3 hours a day, with more marked increases among those that live alone, the elderly, men, and people with disabilities.

Time spent alone may not, in itself, be an indicator of social isolation. However, it produces very interesting results if combined with the measure of time use, that is, the extent to which people report that they always or often have spare time.

It is young people aged between 15-24 years old that are the most likely to report always or often having spare time. Followed closely by the elderly with disabilities.

The figures are telling us that the number of socially isolated individuals in Australian society is growing. Repeated observation of the impact of social isolation is telling us that the consequences are dire. We know that those who are socially isolated die at two to three times the rate of those with good social networks. On the other hand we know that adolescents who have someone to depend on, someone to trust, someone they can talk to and someone who knows them well are much less likely to report depressive symptoms than those who don't report good support networks.

The increasing secularisation of Australia (17% reporting no religious affiliation in 1996 compared to 0.4% in 1961) may have more consequences by decreasing social opportunity than by resulting in a paucity of theology in our lives.

There are many organisations -such as churches, sporting and recreation clubs, arts, environment and crafts organisations, local government, service clubs, scout and guide troops, hospitals and adult education centres, to name but a few- that provide us with the opportunity to participate, to belong and to be connected, either as active participants, coaches, volunteers or administrators.

Yet, the marked changes in our lifestyle have placed many of these organisations under pressure- the changing trends in religious behaviour that I just mentioned seem to corroborate that argument. Will new technologies diminish our face-to-face contact with each other, and

hence diminish our sense of connectedness. Will our virtual connectedness increase and our physical connectedness decrease?

Impact

Social isolation is one factor in declining health. How might it impact the legal system?

NEW INDICATORS

15. Hazel Henderson, John Lickerman, and Patrice Flynn, **Calvert-Henderson Quality of Life Indicators.** Bethesda, MD, Calvert Group, 2000.Robert Kaplan and David Norton, **The Balanced Scorecard**. Havard, Harvard Business School Press, 1996.Peter Schwartz and Blair Gibb, **When Good Companies Do Bad Things**. NY, John Wiley and Sons, 1999. www.triplebottomline.com.au, www.futurists.net.au

Numerous corporations are developing new measures to account for what they do. Perhaps the most famous is Shell's People (social justice), Planet (environment) and Profits (accumulation of wealth). This has been translated into triple bottom line.

More and more citizens and clients are expecting that not only companies but governments acts in accordance with triple bottom line accountancy measures. Writes Joseph Voros of Swinburne University: The issue of corporate social responsibility is no longer simply a question of good business ethics; rather, it now has to do with an increasingly well informed public's changing expectations of business on local, national and global scales.

Impact

Victoria Justice will be expected to follow ppp account principles. Is it doing so now. Are there any courts following these best practices.

HEALTHY ORGANIZATION

16. Sohail Inayatullah, "**From the Learning to the Healing Organization**." BRW. Forthcoming, 2001.

Is health the next bottom line? Are employees happy about their lives; relationship with others; the organization itself; with the environment and their own spiritual lives.

What are indicators for a healthy organization? Is it sicki days or something more profound? What are the appropriate indicators for such an organization?

A healthy organization moves forward from Senge's learning organization, ie an organization where the adaptability to changing conditions is developed and procedures and structures routinely questioned.

Inayatullah argues that while many organizations have started to think through what needs to be done to create a learning organization, few have made it to the next required transformation – that of becoming healthy and healing organizations.

Impact **Can Victoria Justice become an healthy organization?**

THEME SEVEN

SCENARIOS FOR THE FUTURE

1. Sohail Inayatullah, editor, ***Judicial Foresight in the Hawaii Courts: Proceedings of the 1991 Hawaii Judiciary Foresight Congress*** (Honolulu, State of Hawaii, 1994).

In 1990, The State Justice Institute sponsored a USA wide conference on the futures of the courts. The following scenarios were developed by the participants, who consisted of judges, attorneys, court administrators, social scientists and futurists.

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 broaders "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 decisionmaking 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.

2. Wendy Schultz, Clement Bezold and Beatrice Monhan**, Reinventing Courts for the 21st Century.** Bethesda, MD, Institute for Alternative Futures, National Center for State Courts, Hawaii Research Center for Futures Studies, 1993.

The authors offer four scenarios for the futures of the courts.

1. **Global Transformation.** In this scenario, AI is the primary driver in creating the courts. The secondary driver is the public exhaustion with the adversarial system. "Voice responsive interactive computers with one-quarter life-sized holographic display capabilities literally walk customers through a variety of resolutions before assisting the customers in choosing the techniques that will enable them to solve their disputes.

2. **Cultural Mosaic and the Multi-Door, Multi-site Courthouse**. The primary driver is the rights movement and the power and voice of cultural creatives. The emphasis is placed on eliminated the social causes of crime (the greed based consumer society of artificial wants, scarcity and meaningless jobs) on one hand and on enabling people solve their own problems with the help of their friends and neighbors, on the other.

   The courthouse is now a multi-door, multi-site institution, accessible from neighborhood justice centers, and even electronically from home. Effective and user friendly services (including those typically provided by translators, cultural interpreters, social workers, lawyers, judges, architects) are available from expert systems or humans around the clock.

3. **Hard Times, Generic Justice.**

   Economic difficulties lead to a culture of fear of the other. With debh high, governments provide reduces levels of health and justice. Swift, stern, generic justice are the hall mark

of most judicial systems. The public feels this is fair. Many courts also have introduced usesr fees: charges per minute of services, accesses to prosecutor and defendant alike.

The limits on judicial discretion have discouraged people who are motivated to demonstrate leadership, wisdom, justice and mercy from becoming judges. Determinant sentencing has made the bench a much less attractive seat, as has the elimination of parole and other limitations on judicial discretion.

High Tech Growth for the Few

AI systems along with liberal economic polices drive this scenario. While consumers are generally happy with these results, not everyone has benefited from these advances. The combination of a market-driven society with ineffective and underfunded social welfare policies have meant that the benefits came to those who could afford them first.

The pattern of problems brought to the courts evolved with the new technologies (eg, computer fraud and terrorism, rights of robots, and wrongful birth suits by children who had not been genetically improved). However, the largest percentage of conflicts brought to the courts continued to be those associated with poverty, lack of meaningful roles in society, and the consequent resort to unlawful means to raise money or find meaningful roles. The courts retained their historic role of resolving conflicts. Prevention was left to the executive and legislative branches.

There was more technology but this did not lead to wiser courts.

3. James Dator, "**American State Courts, Five Tsunamis and Four Alternative Futures,**" *Futures Research Quarterly* (Winter 1993), 9-30..

Dator offers these scenarios.

1. Teleworking Global Justice

The drivers in this scenario are expert systems, multiculturalism and globalization. He writes: "In the globally linked teleworking virtual judiciary of the future, the judge can be on the beach in Waikiki, the defendant at home in Auckland, his lawyer in Beijing, the prosecuting attorney in Paris, the clerk in Nashville, the probation officer in Pyongyang, the witnesses on the Moon …who cares, who knows where anybody is.

The files have disappeared and universal translators make language universal.

2. Green, Native, Feminist Justice

The drivers in this scenario are the anti-system movements challenging capitalism, western male domination and the exploitation of the planet.

ADR is used everywhere, all the time, via neighborhood justice centers. Native techniques allow indigenous persons to heal, from women to recover their ways of knowing and for Gaia to finally stop the carnage. Trees do have standing.

3. Inertia Forever

This scenario is driven by the lack of judicial and government will to change. With society increasingly divided between the rich globalized and the poor others, state courts can barely survive less forecast the future. Nothing can be done, except incremental change. Nothing else should be done.

4. **Judicial Leadership**.

The incorporation of humane, consumer-sensitive, integrated and future oriented methods and procedures into the administration of justice enables the formal system to regain the confidence of the public, and to settle all issues brought before it in a timely and fair matter.

Impact

What are the drivers shaping the Victoria Justice System? What are the scenarios?