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Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts

FRANK V. WILLIAMS, III*

I. ACTIVISM IN THE STATE COURTS

Court reform is generally thought of as an effort to curb judicial activism. In the past decade, numerous measures have been proposed in both Congress and state legislatures to restrain the judiciary from rendering decisions that have little or nothing to do with the facts or the law in particular cases.[1] Outrageous money judgments, questionable criminal sentencing, and the advancement of judges' social agendas are increasingly leading to a variety of efforts to restrain the judiciary from using law as a tool by which the personal social visions of the judges trump state and federal constitutions and democratically legislated enactments.[2]

Judicial activism provokes vehement public protest and creates opportunities for journalists in need of a story with broad appeal. Recent news reports about the judiciary have focused upon a number of controversial decisions by state supreme courts. With the advent of judicially-imposed, same-sex marriages, the seething anger and dis-

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* Chancellor, Ninth Judicial District, State of Tennessee. The views expressed here are my own, and should not be construed to represent the views of others. I would like to extend special thanks to my secretary, Rhonda Crass, who has prepared numerous document summaries and preliminary text for this paper from when it started as a project for a committee of the Tennessee Trial Judges Association. Also, Roane State Community College provided two excellent interns, Kathye Settles and Charlotte Lee, from its paralegal studies program, both of whom assisted in the organization of large numbers of documents for this article. Finally, my son, Bradley Williams, has faithfully critiqued this paper by asking probing questions and suggesting numerous ways to improve a relatively brief treatment of difficult topic.

1. Stuart Taylor, Jr., *Congressional Assault on High Court*, N.Y. TIMES, May 30, 1981, § 1, at 8. ("More than 20 bills pending in Congress would remove the power of the Justices, and of the lower courts as well, to enforce their constitutional rulings on abortion, school prayer and busing, or to consider the constitutionality of the all-male draft.").

2. William Glaberson, *State Courts Overturning Limits on Lawsuit Awards*, LEXINGTON HERALD-LEADER (Lexington, K.Y.), July 16, 1999, at A14 ("More than a decade after states began enacting laws to cut back big jury awards and curtail injury lawsuits, state courts across the country are overturning one measure after another, concluding that Americans have a powerful right to settle their disputes in court.").

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trust which many citizens and politicians once directed toward the federal judiciary has expanded to include the state courts as well.[3]

However, most people do not know that the state courts have been involved during the last four decades of the twentieth century in forms of activism that promise to reinvent not only the judiciary, but the entire society. A new type of judge is emerging, together with a new role for the courts in society, and both are based upon a new understanding of the "judicial power" broadly bestowed on courts and judges by the various federal and state constitutions. By developing new techniques of dispute resolution and expanding their direct involvement in the affairs of the community outside the courtroom, state court judges are now able to act upon and modify individuals and entire communities in ways thought by them to be therapeutically beneficial. Because of their new position and influence in government and society, judges have become increasingly powerful social engineers. As such, they believe they are producing new individuals and new communities as part of a "preferred" future for the courts and society.

Consequently, this article is about a movement to completely reinvent the courts originating from *within* the ranks of the justices of the state supreme courts, leading academics, and the large legal organizations which support them. It stands in contrast to the popular efforts at court reform intended to curb judicial activism. The latter effort has been, with few exceptions, a failure, while the movement to reinvent the judiciary from within has succeeded beyond anyone's wildest expectations and raises serious questions about the survival of personal liberty and representative government.

A. *Redefining the Judicial Power*

Simply stated, the American state courts are redefining the judicial power conferred upon them by their respective state constitutions. By doing so they are repositioning themselves within the overall scheme of government, and perhaps more importantly, within the social fabric of the nation. The judicial power conferred upon the courts is essentially undefined by the various constitutions. For example, the Tennessee Constitution, which roughly follows the language of the United States Constitution, provides in Article VI, Section 1:

3. Robin Toner, *The Culture Wars, Part II*, N.Y. TIMES, February 29, 2004, § 4, at 1 ("Social and religious conservatives feel under siege, furious over what they see as judicial tyranny that is removing traditional values, one by one, from the public square.").

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. . . .[4]

However, no other provision of the Constitution defines the term "judicial power." This does not mean the term lacks meaning, but illustrates that certain universal presuppositions existed when the Constitution was framed and ratified.

Old court opinions, for instance, say that the judicial power is the power of the judicial branch of government to declare the law, and to render judgments and decrees in specific suits initiated by and dependent upon issues raised by adverse parties. Typically, lawsuits involve disputes affecting the life, liberty and property of litigants, and are intended to protect their rights and their property from encroachment by the state and others. The resulting judgment of the court may be expressed as the conclusion of a syllogism having for its major and minor premises issues raised by the parties' pleadings and relevant proofs.[5]

The judicial power goes to the very heart of what it means to have—to be—a court. A court is an instrumentality of sovereignty. It is the "repository of [the sovereign's] judicial power, with authority to adjudge as to the rights of persons or property, between adversaries."[6] In the constitutional process, factual issues are resolved by eliciting testimony from witnesses in adversarial proceedings, where the parties or their lawyers examine the witnesses to test the accuracy of their testimony. By filing the complaint and answer, litigants frame the issues to be decided by the court. Consequently, the judicial power contemplates courts that are decision makers applying rules of law in suits between litigants.[7]

Where, however, is it mandated in the Constitution that the courts proceed in this manner? Certainly, if a lawsuit is filed, there are procedural rules that require the defendant be given timely notice of the suit and an opportunity to answer and defend himself. But what requires the court to wait until a formal lawsuit is filed before searching for

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4. TENN. CONST. art. VI, § 1.

5. BLACK'S LAW DICTIONARY § Judicial Power (4th ed. 1968); *see also* Gunter v. Earnest, 56 S.W. 876 (Ark. 1900); Fewel v. Fewel, 144 P2d 592, 594 (Ca. 1943); State v. Denny, 21 N.E. 252 (Ind. 1889); *In re* Sanderson, 286 N.W. 198, 199 (Mich. 1939); *In re* Hunstiger, 153 N.W. 869, 870 (Minn. 1915); Barlow v. Scott, 85 S.W.2d 504, 517 (Mo. 1935); Citizen's Club v. Welling, 27 P.2d 23 (Utah 1933); Campbell v. Wyoming Development Co., 100 P. 2d 124, 132 (Wyo. 1940).

6. *See* Mengal Box Co. v. Fowlkes, 186 S.W. 91, 92 (Tenn. 1916).

7. 20 AM. JUR. 2D *Courts* § 37 (1995).

conflicts between individuals and subgroups? What requires courts to resolve disputed issues of fact? What requires courts to limit their contact to the parties to a specific lawsuit when they can develop ways of engaging entire communities of people? How does the judicial power require the courts to be decision-makers, as opposed to healers, educators, and therapists?

If courts in the past properly understood the judicial power to consist of adversarial proceedings culminating in a judicial decision, then are the judges of today free to change the meaning of the judicial power by giving themselves powers and processes never before contemplated by those who framed and ratified the various constitutions? In other words, if judges can reconceive the judicial power, then can they not, by their own will, create a new identity, complete with new powers for themselves and a new role for courts in society and government? If so, they can redefine the judicial power and continue to claim that the constitutional process remains intact.

As we shall see, the judicial branch of government is changing. Judges and a variety of activists working with them are effectively redefining the judicial power in response, they argue, to the changing social context by adding an expanded repertoire of therapeutic techniques to solve a broad range of social, economic and political problems among individuals and entire communities. Judges are transitioning from decision makers to life changers, employing new techniques to manipulate individuals and entire communities for the purpose of modifying individual and collective life. And they purport to do so without sacrificing any of the "traditional" forms and processes.

Because of the complexity of this movement, it will be difficult to adequately convey the magnitude of changes taking place in the state courts all across the United States. Nothing even remotely comparable to the transformation presently taking place in the judiciary can be found in modern history. At some point in the future, historians may see, in retrospect, a dramatic shift in power from individuals to the state and a reapportionment of power from the popular branches of government to the courts.[8] There have been revolutionary transfers of power countless times in history, but the term revolutionary hardly describes the changes currently taking place in the American courts. It is a quiet revolution; no bombs are being thrown, no buildings

8. The courts are assuming increased responsibility because other institutions and branches of government are either unwilling or unable to do so. *See* Tom Tyler, Conference Transcript, National Conference on Public Trust and Confidence in the Justice System (1999) (a copy of transcript is on file with the author).

burned.[9] It is, however, demolishing a branch of government; and a shining new, conceptual edifice is rising up in its place, filled with new people and new ideas about life and government. All of this is taking place in plain view of anyone with an interest. However, only nominal criticism has been directed at the phenomenon by the media, academia, or even by the average trial judge. Most trial judges simply want to go about their jobs, maintaining little interest in court politics. As a consequence, judicial activists have been essentially unfettered in their efforts to reinvent the courts.[10]

Finally, the reader should understand that this paper is about a growing movement to reinvent the courts. While many national plans, state reports, and scholarly articles tell us a great deal, particularly in conceptual terms, there is much that they do not tell us. Consequently, it is difficult to say in every respect what the new judicial system, once

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9. Steve Smith, *Local judge warns of "quiet revolution,"* MADISON PRESS (Madison, Ohio), June 1, 2001, at 1.

10. *But see* Robert D. Nichols, "Judicial Governance Antithetical to Democracy," OHIO LAWYERS WEEKLY, June 4, 2001, at 4.

> The Trojan Horse of judicial reform stands before Ohio's Lady of Justice. It is filled with the radical visions of Dr. James Dator, founder of the State Courts Futures Movement. It contains subtle changes in substance and procedure recommended by the Ohio Courts Futures Commission (Futures Commission) and now promoted by The Ohio State Bar Association (OSBA). It contains a new drive for merit selection of appellate judges. If we welcome the Trojan Horse in, we will forever change the balance of Ohio's tripartite government in an incremental move toward an unarticulated but implicit revolutionary theory of judicial governance.
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> . . . .
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> Outside Ohio—and generally unknown to the bench, bar, General Assembly and the public at large—there has been a national movement to change the organization, structure and legal philosophy of state judiciaries. It is called the National Courts Futures Movement (National Movement).
>
> Dator, a futurist from the University of Hawaii, has a vision for state courts to enact social and economic public policy from the bench. The vehicle to carry out this vision is the court futures movement.
>
> Dator's writings represent a repudiation of western culture, democratic principles and our free market, capitalist economy. They contain a deconstruction of our historical values of social compact, separation of powers and the derivative authority of representative government.
>
> Without deference to our constitutional and historic values, Dator undermines public confidence in our fault-based, adversarial common law legal system. He presents alternative futures imbued with leftist ideology that deviate markedly from our shared national value of "America, the Melting-pot." And he gets these futures not through traditional political means but through judicial usurpation of policy-making authority.

Id.

in place, will look like or how it will work in actual practice. However, fundamental changes in government are already taking place. Due to the nature of those changes, it is possible to say with some certainty where they are taking us.

First, we shall begin with an overview of the historical background for the present reform movement. Second, we shall look at some of the specifics of court reform. Finally, we shall examine the possible impact of these changes upon individual liberty and the survival of representative government.

B. *Laying the Foundation for Change*

To understand what has happened, we need to go back to 1972 when the Hawaii Supreme Court, at the behest of Chief Justice William Richardson, convened the Hawaii Citizen's Congress on the Administration of Justice. Its goal was to study the future of the Hawaii judicial system. The court was concerned with the ability of the Hawaii judicial system to cope with the potentially catastrophic political, social, economic, and technological changes that many intellectuals believed would come by the twenty-first century.[11] This conference took place during a period of widespread preoccupation with political and social change growing out of that turbulent period in American history which stretched from the 1950s through the 1970s. The social unrest brought about by the civil rights movement, the counter-culture which swept college campuses, urban riots, and the antiwar protests was compounded by concerns about the depletion of natural resources, material inequality, pollution of the environment, and the ever-present threat of nuclear war. Advances in technology were rapidly changing the way people lived and posed new threats to the ability of all people to protect their privacy against intrusion by the government and others.[12] A culture of conflict between the increasingly fragmented subgroups of society, particularly in urban areas,[13] threatened the sta-

11. *See generally* DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (1973); TOWARD THE YEAR 2000: WORK IN PROGRESS (Daniel Bell & Stephen R. Graebard eds., 1997); ALVIN TOFFLER, FUTURE SHOCK (1970); Sohail Inayatullah, *Judicial Foresight in the Hawaii Judiciary*, *in* FUTURES 23:8 (1991).

12. *See generally* VANCE PACKARD, THE NAKED SOCIETY (David McKay Co., Inc. 1964).

13. Glenn R. Winters & Robert E. Allard, *Judicial Selection and Tenure in the United States*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION 146, 177 (Harry W. Jones ed., 1965) [hereinafter THE COURTS THE PUBLIC AND THE LAW EXPLOSION].

> Throughout history, cities have always been the predominant source of work for the courts. The traditional transmitters of values and rules such as the family, the school, and the church have never been as effective in urban as in

bility—even, activists argued, the survival—of American society if government, and particularly the courts, did not prepare for the shock of radical technological and social change.[14]

Though the nation remained generally peaceful, every home was subjected to graphic images of violence on the nightly television news. Following the assassinations of Robert Kennedy and Dr. Martin Luther King Jr. in the spring of 1968, President Lyndon Johnson created the National Commission on the Causes and Prevention of Violence. The Commission's report, *Violence in America*, became a nationwide best seller.[15] Its final report, *To Establish Justice, To Insure Domestic Tranquility*, was issued in December 1969, and a revised version of the original report entitled *Violence in America: Historical & Comparative Perspectives* was published ten years later.[16] While many of our nation's problems are international in nature, the Commission concluded its inquiry with no sure answers about how to deal with the internal problem of violence. Indeed, violent crime in the United States was 50 percent higher in 1979 than it was at the time of its initial report to the President ten years earlier.[17] It did, however, make an important observation: "The greatness and durability of most civilizations has been finally determined by how they have responded to these challenges from within. Ours will be no exception."[18]

Perhaps the most important feature of this period of American history was the widespread rejection—particularly by radical students and intellectuals associated with the New Left—of authority of all kinds, including the law and legal institutions.[19] The religion and laws of "dead white men"—the foundations of Western Civilization—were rejected outright as a sign of contempt for everything the United States represented. Young radicals and intellectuals identified with the Ameri-

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> rural societies. Increased proximity of large numbers of persons breeds legal disputes. Individual freedoms are continually restricted to accommodate the demands created by urbanism. Public welfare is often threatened by impersonalization and irresponsibility which characterize the urban scene.

Id.

14. Of special interest are the works of Professor James A. Dator available on the internet at the Hawaii Research Center for Futures Studies, University of Hawaii-Manoa, http://www.soc.hawaii.edu/future/dator/datorindex.html.

15. VIOLENCE IN AMERICA (Hugh Davis Graham & Ted Robert Gurr eds., 1969).

16. VIOLENCE IN AMERICA: HISTORICAL & COMPARATIVE PERSPECTIVES 9 (Hugh Davis Graham & Ted Robert Gurr eds., 1979).

17. *Id.*

18. *Id.* at 11.

19. *See generally* Hannah Arendt, *Civil Disobedience*, *in* IS LAW DEAD? 212, 220 (Eugene Rostow ed., 1971) [hereinafter IS LAW DEAD?].

can Left, when not engaged in sex or incapacitated by drugs, marched through the streets of college campuses proclaiming the death of God, burning draft cards, bras, and the American flag. Some of the more militant Leftists, inspired by the Vietnam War and very real injustices in the area of racial discrimination, prepared themselves for a Bolshevik-style revolution in the United States.[20]

The New Left denounced law as the tool of oppressors. As such, they argued that law reform was futile since it only served to divert attention from the central task of overthrowing a corrupt and unjust social order.[21] Intellectuals within the legal profession and academia, being either sympathetic to the militants or uncertain about whether or not they were right, decided to debate the matter. The Association of the Bar of the City of New York published a collection of articles in 1971 entitled, *Is Law Dead?*[22] The problem with the law, resulting in growing civil disobedience and militancy, was one of social injustice as Robert L. Heilbroner articulated:

> I wish to pose a question that is at once central and critical, and yet singularly elusive and perplexing. It is the question of why the United States, which is by all conventional measures the wealthiest nation in the world, is not at the same time the most socially advanced. To put the question differently, I wish to ask why a nation that could. . .afford to remove social and economic inequities has been among the most laggard in doing so.[23]

Inadequate housing, the neglect of poverty, the neglect of public health, and the disproportionate criminal punishment of the least privileged were among the issues alleged to be undermining the rule of law.

Law, of course, was not dead, but the preferred alternative was to conclude that changing law, particularly constitutional law, was the necessary response to the changing social milieu.[24] "It is now neces-

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20. *See, e.g.*, Peter Collier, *Something Happened to Me Yesterday*, *in* DESTRUCTIVE GENERATION: SECOND THOUGHTS ABOUT THE '60s 277-305 (1989).

21. This period produced a number of new professional journals documenting legal changes in response to the new social climate. One of those was the *University of Michigan Journal of Law Reform*, begun in 1968 and dedicated to "social amelioration through reform of law and legal institutions." *See* Francis A. Allen, *On Coming of Age: Twenty-Five Years of the University of Michigan Journal of Law Reform*, http://students.law.umich.edu/mjlr/history1.htm (last visited March 27, 2007).

22. IS LAW DEAD?, *supra* note 19.

23. Robert L. Heilbroner, *The Roots of Social Neglect in the United States*, *in* IS LAW DEAD?, *supra* note 19, at 288-93.

24. Harold Cruse, *The Historical Roots of American Social Change and Social Theory*, *in* IS LAW DEAD?, *supra* note 19, at 315, 327.

sary," claimed Michael Harrington, "to amend the conventional wisdom of this united front of the revolutionaries and conservatives. It is, to be sure, quite possible that the upheavals of these times will overwhelm American society and that there will be no democratic transition to a new order. But if the future is to be created humanely, a revolution must be legalized."[25] The first step toward this proposed revolution was to discard the "simplification that a revolution is necessarily violent."[26]

"The one thing certain about the age in which we live," observed Francis A. Allen, Dean and Professor of Law at the University of Michigan, "is that we cannot stand still. We cannot escape or outwit the forces of change by nonaction. . . . Accordingly, the only issue remaining is whether or to what extent change is to be the product of thought and deliberation."[27] Social problems produced by the explosion in new technologies were accompanied by a growing social protest that "question[ed] the efficacy of the law as an instrumentality of social justice, and which [asserted] that the administration of law has frequently been used as a device to frustrate the legitimate aspirations of those seeking to participate in the benefits of American society," observed Allen.[28] Moreover, we had come to live under the threat of nuclear war "in a world characterized by a radical disorganization of international relations, and in which human survival is threatened by irresponsible uses of military power."[29]

The revolutionary spirit of the 1960s has carried over to the present day. Leftist ideology gained new life in the 1980s with what Peter Collier and David Horowitz called "a riptide of a Sixties revival."[30] "The growing interest in the Sixties coincides with a renaissance of the

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> Constitutional law, it seems to me, can legitimize protest, but it cannot legitimize revolution or radical social change. It cannot legitimize the kind of social change that the black rebellion is demanding and will demand more of in the future, because historically the black population—and, as a result, the black movement today—is beyond constitutional purview; ultimately it must alter and revamp the Constitution if it is ever to achieve its aims in the context of this American nation.

Id. at 327.

25. Michael Harrington, *Revolution, in* IS LAW DEAD?, *supra* note 19, at 336.

26. *Id.* at 337.

27. Francis A. Allen, *A Prospectus for Reform*, http://students.law.umich.edu/mjlr/history1.htm (last visited March 27, 2007).

28. *Id.*

29. *Id.*

30. Peter Collier & David Horowitz, *Radical Innocence, Radical Guilt*, *in* DESTRUCTIVE GENERATION: SECOND THOUGHTS ABOUT THE '60s 243 (1989).

radicalism that was the decade's dominant trait and is now being used to jump-start the Next Left," they observed.[31]

C. *Reforming and Regenerating Law*

Reforming and regenerating law to meet changing conditions has been and continues to be the product of considerable thought and deliberation. Until recent decades, however, court reform was still thought of in the constitutional context of adjudication.[32]

During the 1960s, activists from many disciplines—sociology, political science, education, psychology, management, and others—worked primarily from outside the judicial system, utilizing the results of numerous empirical studies of human life to produce change in the nature and purpose of law and the work of the courts in society. Every avenue, forum, and technique available to the intellectual community has been employed to redefine the rule of law (beginning with constitutional law), adversarial proceedings, and, consequently, the role of judges in society. The changes which have resulted are not the result of some popular grass-roots demand, but rather the demand of relatively few militants, so-called scholar/activists, and intellectuals who were essentially in agreement with the need to overthrow the existing foundation for law and the courts. These people chose to bring about the same changes by deliberative processes rather than by armed revolution. The end result, however, will be the same.

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31. *Id.*

32. *See* Francis A. Allen, *A Prospectus for Reform*, *supra* note 27, http://students.law.umich.edu/mjlr/history1.htm (last visited March 27, 2007) (introducing the University of Michigan Journal of Law Reform).

> Reflections such as these must have crossed the minds of many lawyers during the course of the past decade. There is nothing new, however, about the problems of accommodating law to altered circumstances. The common law has survived the centuries because it contributed a shrewd awareness of the changing needs of men, and because its method of adjudication constitutes an effective mechanism for orderly change and development. Those who practice in the common law system are routinely engaged in processes of law reform and regeneration. The creative impulse of the common law has not run its course, and all evidence indicates that we shall continue to rely on the evolution of judge-made law as one important means to insure the continued relevance of the legal system to the new conditions that beset us.

Id.

D. *The Influence of Futurists*

The corrosive era of environmental degradation, social upheaval, and technological wizardry produced a sense of despair, especially among intellectuals sympathetic to the growing social protests. They, like countless millions of other Americans, witnessed the confusion and chaos via the new medium of television. However, some intellectuals came to believe that they could produce, by the force of their collective intellects, long-term, technical solutions to problems facing the world. They began discussing emerging issues, through scholarly papers and a growing body of sociological best-sellers. From within the intellectual community emerged a bold and aggressive group of "social critics, scientists, philosophers, planners" and other activists we now know as futurists. They included men and women like Arthur C. Clark, R. Buckminster Fuller, Herman Kahn, Alvin Toffler, Daniel Bell, Bertrand de Jouvenel, Margaret Mead, and others who concerned themselves with the "alternatives facing man as the human race collides with an onrushing future."[33]

The multi-disciplinary futurists could identify the root problems facing society and government; they could lead us to envision the preferred future; they could devise solutions in the form of bold new plans for coordinated change; and they could militate for the implementation of those plans through the auspices and power of the state.[34] Some may have been content to fantasize about the future and write science fiction novels, but others were driven by a "passionate wish to induce social change."[35] Many others just like them resided in the cloistered halls of universities, post-war think tanks, and the "lonely communes of young people searching for new insights into tomorrow."[36]

The futurists have had a profound influence on the redefinition of the courts. From among the many influences on the early court reform movement, the publication in 1970 of Alvin Toffler's best-seller, *Future Shock*,[37] deserves special mention. Toffler forecast catastrophic consequences for society if people did not prepare for and embrace onrush-

33. ALVIN TOFFLER, THE FUTURISTS 3 (Alvin Toffler ed., Random House 1972).

34. *See* IRA PILCHEN AND SANDRA RATCLIFF, THE FUTURE AND THE COURTS: CONDUCTING STATE COURT FUTURES ACTIVITIES 1 (Am. Judicature Soc'y ed., 1993) ("The framework encouraged for these activities rests on the work of professional futurists, who argue that we can guide and shape the future if we anticipate change and work with it, not against it. The key is to be *proactive*, not *reactive*.").

35. THE FUTURISTS, *supra* note 33, at 4.

36. *Id.*

37. FUTURE SHOCK, *supra* note 11.

ing technological and social change coming by the new millennium. Toffler has a gift for spotting trends, especially in technology, and of synthesizing from other works the potential social impact of those trends on future generations. Consequently, his book was about what happens to people when they are overwhelmed by change and about how people adapt—or fail to adapt—to the future. What Toffler proceeded to describe were the qualities of human life transformed by the proliferation of personal options produced by scientific and technological advance. The industrial society was one characterized by the progressive discovery and application of technical answers to every question and technical solutions to every problem. For many, this was not something to be feared, but something to be desired. Scientific discoveries resulted in an amazing and increasingly confusing variety of new products, devices, and options which promised to change the way people lived. New cars, interstate highways, household appliances, building materials, labor-saving devices, pharmaceuticals, synthetic materials, computers, restorative biomechanical devices, recreational and entertainment products, sophisticated weapons, and countless other products of science offered people more choices in life and, as Toffler believed, new freedoms. But the industrial society, characterized by a dedication to hard work, loyalty to the company, and a top-down hierarchy in both business and government, eventually transitioned to what sociologist Daniel Bell called the "Post-Industrial Society."[38]

Given the increased choices, prosperity, and leisure of post-industrial life, people would abandon the old values, institutions and associations which had previously ordered life and a new civilization would emerge. In place of the nuclear family, church, community and other institutions familiar to past generations, a new, transient, ephemeral human existence would emerge, replacing the familiarity and permanence of the industrial society. The result, Toffler believed, would be an increase in freedom,[39] freedom of the sort being demanded by the counter culture of the 1960s.

However, it also threatened an increase in conflict from within and without. Increased mobility meant that people would come into contact with people who had made different choices and adopted different living arrangements. The family would be redefined. The church would cease to provide guidance and order for life. Communities

38. DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (Basic Books 1973).

39. *See* Alvin Toffler, *The Future of Law and Order*, *in* JUDGING THE FUTURE 18, 29 (Clement Bezold & James Dator eds., 1981).

would be defined less by geographic influences and begin to revolve around common interests and lifestyles. In short, everything that people believed about life was about to change, placing new demands on government.

Indeed, government and law would also have to change in response to the demand for individual freedom and alternative lifestyles. People, too, had to be willing to change. Those who failed to adapt to the new situation would have problems, if not with their neighbors, then within their own minds as the lack of permanence coupled with the pace and stress of post-industrial existence resulted in mental illness and antisocial behavior. To the end that people might save themselves and usher in the new social order, Toffler advocated that people embrace the inexorable and inevitable changes in technology and lifestyles he so painstakingly described. To this very day, Toffler believes that "we" are in the process of creating a new way of life, a new civilization.[40] To resist, he insists, will be futile. To delay could be deadly.

It was in response to such assertions that Chief Justice Richardson took steps in 1972 to begin a review of the Hawaii judicial system and the impact such changes would have on the courts.[41] Toffler, however, was never heavily involved in the work of changing the courts. He

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40. *See* Transcript of *Tavis Smiley Show* (PBS television broadcast June 16, 2006), *available at* http://www.pbs.org/kcet/tavissmiley/archive/200606/20060616_transcript.html (discussing Alvin and Heidi Toffler's most recent book, REVOLUTIONARY WEALTH: HOW IT WILL BE CREATED AND HOW IT WILL CHANGE OUR LIVES).

> The other relationship of this is you can't understand economics as economists frequently try to by just looking at economics. You've got to look at the social problems. You've got to look at the opportunities in the social system. You've got to look at religious and value changes in the society and so forth. We're creating a new way of life. Big word, creating a new civilization.

Id.

41. James A. Dator, Director of the Hawaii Research Center for Futures Studies, Twenty Minutes Into the Future, Address at the Virginia Assembly on the Future of the Courts (Dec. 1, 1989), http://www.soc.hawaii.edu/future/dator/courts/20MininFut.html (last visited March 29, 2007). Professor Dator worked with the Hawaii Supreme Court beginning in 1971 on the first court futures conference, and subsequently served as the futurist for the Virginia Supreme Court's Commission on the Future of the Virginia Judicial System, leading to its report in 1989. Following completion of the Virginia Futures Commission report, Professor Dator was invited to address the Virginia Legislature on Dec. 1, 1989, where he forecast the catastrophic consequences which could flow from the Futures Commission's failure to be sufficiently future-oriented. Because, during previous generations, we had used the past (i.e. history) as our guide for the future, Dator speculated that our confinement to the past might be engrained in our genes. *Id.*

spoke at the Hawaii Citizen's Congress in 1972, and again at the Conference on the Futures of the American Legal System at the Antioch School of Law in 1977 (known as the Antioch Conference). Nevertheless, his influence on the court reform movement has been extraordinary due to the broad influence of his many books and articles, and the inspiration he provided to other futurists and planners who worked directly with the courts.

The names of futurists and planners like James A. Dator, Clement Bezold, Sohail Inayatullah, Wendy Schultz, John A. Martin, and others appear frequently throughout the reform literature. All of them owe much of their popularity with the judiciary to Toffler's early work and to the new intellectual legitimacy of futures studies.[42] The futurists' predictions of potentially catastrophic technological and social change and the need to embrace them fit perfectly into the revolutionary milieu of American radicalism, characterized by the rejection of religious and legal authority and the demand for change.

The influence of futurists, with their emphasis on the inexorable nature of change, on the reform movement is plainly visible in the proceedings of the Conference on the Future of the American Legal System held in October 1977. Dean Edgar Cahn of the Antioch School of Law expressed the opinion that the study of law and futures studies are "parallel interests." Dean Cahn, working with Clement Bezold of the Institute for Alternative Futures in Alexandria, Virginia, and Professor James A. Dator, convened the Conference to bring outstanding legal scholars and futurists together. Their goal was to study the adequacy of legal education in the face of "certain austere prognostications" regarding the "poor and disenfranchised" and bring the "approaches of futures research . . . more directly to the attention of legal scholars and practitioners to help the legal profession deal more effectively with the probabilities and uncertainties of the future."[43]

For Dean Cahn, lawyers had a monopoly on legal knowledge, and law schools were simply "upgrading a medieval guild system for the production of rights and remedies."[44] For him, this was "increasingly troublesome" because a society changing as fast as Alvin Toffler described in *Future Shock* made it appear increasingly difficult to deal

42. *See* James Dator, College of Social Sciences, University of Hawaii at Manoa, http://www.politicalscience.hawaii.edu/Faculty/dator/dator.htm (last visited March 29, 2007). *See also* Hawaii Future Publications Archive, Hawaii Research Center for Futures Studies, http://www.futures.hawaii.edu/publication_archive.php (last visited March 29, 2007).

43. JUDGING THE FUTURE, *supra* note 39.

44. *Id.*

with equities, expectations, and the establishment of societal norms. Consequently, Cahn observed, "the very notion of the rule of law, of rules of law themselves, is a static notion. . . . It assumes that there is a rule."[45] The problem is that given the rapidity of change and the slowness with which the courts "can reconstruct the past in order to determine whether, in fact, there was a violation of the law, may mean that our whole notion of constructing a legal system around rules . . . may be obsolete."[46]

E. The Federal Contribution to Change

In addition to the early efforts of the Hawaii Supreme Court to study and prepare for social change, other forces were at work during that time, particularly at the federal level, making plans to create new judicial systems in the states that would begin addressing the growing civil and criminal litigation which activists perceived would escalate as the new millennium drew near.[47] Large numbers of new cases flooded the courts. Drug-related criminal cases, personal injury suits, and domestic disputes, among other litigation, escalated to the point that judicial activists feared the collapse of the judicial system if structural changes did not take place. These changes would allow the state courts to function more efficiently and allow them to absorb a greater share of the work being done by the federal courts.[48]

In time, these initially isolated activists, beginning from a variety of positions in government and the academic community, found that they had common goals, and began working together to change the structure and role of the courts in society.[49] They were aided, not only by the combined intellectual power of many state and federal supreme

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45. *Id.*

46. *Id.*

47. *See* Maurice Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION, *supra* note 13, at 29-59.

48. ENVISIONING JUSTICE: REINVENTING THE COURTS FOR THE 21ST CENTURY (Tradewinds Video 1992) (Kentucky Supreme Court Chief Justice Robert Stephens stating: "Overall, the system could easily collapse under its own weight if something isn't done.") [hereinafter ENVISIONING JUSTICE]. *See generally* THE JUDICIAL RESEARCH FOUNDATION, INC., STRUGGLE FOR EQUAL JUSTICE: A REPORT ON NEGLECT AND CRISIS IN THE LOWER COURTS (1969) [hereinafter STRUGGLE FOR EQUAL JUSTICE].

49. They viewed themselves, following Jeremy Bentham, as scientists. Justice Oliver Wendell Holmes and Dean Roscoe Pound were especially influential in the extension of utilitarian principles to law. *See generally* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE WORK AND LEGACY OF JUSTICE HOLMES (2000). Dean Pound animated the current reform movement with his article, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

courts justices, sociologists, social psychologists, political scientists, law school professors, and professional futurists, but by hundreds of millions of dollars in tax revenues initially provided by the federal government under the guise of "modernizing" the state courts.[50]

New organizations such as the Law Enforcement Assistance Administration, the Institute for Court Management, and the National Center for State Courts were formed during this period. These groups provided a much-needed base of operations, complete with professional staff, funding, and the political connections necessary to make things happen. And things did happen. Using funds provided by the federal government, large-scale national conferences were scheduled in the 1970s for the purpose of forming a consensus among activists about the course and purpose of court reform.[51] To this end, scholars in the social sciences were brought into the process of studying and changing the courts.[52]

In 1984, the United States Congress created the State Justice Institute specifically for the purpose of creating "fair and effective systems of justice" in the states.[53] The SJI promptly adopted court futures commissions, similar to the Hawaii prototype, as the preferred vehicle for

50. *See* S. REP. NO. 96-142 (May 14, 1979), *as reprinted in* 1979 U.S.C.C.A.N. 2471, 2479. *See also* H.R. Rep. No. 98-1062 (September 24, 1984), *as reprinted in* 1984 U.S.C.C.A.N. 5708, 5731. *See also* STATE JUSTICE INSTITUTE, 10 YEARS: IMPROVING THE QUALITY OF AMERICAN JUSTICE, 1987-1997 (1997) (providing a concise report on much of the work of the United States Government related to the reform of the state courts since 1987) [hereinafter 10 YEARS: IMPROVING THE QUALITY OF AMERICAN JUSTICE].

51. *See generally* Addresses and Papers, National Conference on the Judiciary, Justice in the States (Williamsburg, Va., March 11-14, 1971) (on file with author); Proceedings of the Second National Conference on the Judiciary, National Center for State Courts, State Courts: A Blueprint for the Future (Williamsburg, Va., August 1978); NATIONAL CENTER FOR STATE COURTS, STATE COURTS: OPTIONS FOR THE FUTURE (1980) (follow-up report of the Second National Conference on the Judiciary).

52. Marc Galanter & Mark Alan Edwards, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Introduction: The Path of the Law Ands*, 1997 WIS. L. REV. 375 (1997).

> One consequence of that success [of the law and society movement] is that the field of action of law and society, unlike the other law ands, is not exclusively or even primarily in the legal academy. It is not unknown to have active and committed law and society scholars located in half a dozen disciplines whose work converges on a single cluster of topics. . . . The Law and Society Association has provided the principle forum for this interdisciplinary endeavor.

Id. at 381. The Law and Society Movement is primarily the study of law from the *outside* rather than the *inside* by multiple social disciplines. *See* STEVEN VAGO, LAW & SOCIETY (8th ed. 2006).

53. 42 U.S.C. § 10702(b) (2000).

inducing change in the state courts. From 1987 to 1997, the State Justice Institute awarded grants totaling just over one hundred million dollars to state courts and other organizations pursuant to its mandate to "assure each person access to a fair and effective system of justice."[54] The SJI used federal tax dollars for grants to the National Center for State Courts, the American Judicature Society, and other groups to support large national conferences, and to fund state court futures commissions in a number of states, providing a template for judicial activism in every state.[55]

F. The Influence of the Social Sciences

In the early days of federally-sponsored court reform carried out with funds from the Law Enforcement Assistance Administration, efforts were primarily geared toward the creation of a more "efficient" judicial system—a better machine.[56] The emphasis on efficiency, which continues today, focused on creating top-down control of inferior trial and appellate courts by the state supreme courts through the unification of specialized trial courts and the creation of managerial bureaucracies. In time, activists adopted much broader goals for the courts that would allow them to focus upon the basic issues of life - particularly on the social causes of inequality, aggression, and environmental decay.[57] The conflicts which resulted in litigation were rightly judged by reformers to be symptoms of deeper, underlying problems which, until that time, would have been considered moral or religious in nature. But the reformers took a different approach. They used techniques developed in the social sciences for studying the problem of human behavior to devise ways to manipulate and shape behavior through the application of law to solve specific problems, thereby producing a "preferred" future society.[58]

54. 10 YEARS: IMPROVING THE QUALITY OF AMERICAN JUSTICE, *supra* note 50, at 1.

55. *Id.* at 3, 31.

56. *See* Rosenberg, *supra* note 47, at 29.

57. See, e.g., Harry W. Jones, *The Trial Judge—Role Analysis and Profile*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION, *supra* note 13, at 124. Jones states: "The trial judge is the parish priest of our legal system." *Id.* at 125.

58. *See, e.g.*, David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4. (1990).

> When I speak of the 'law and society idea,' I mean the reconceptualization of law in ways that make it amenable to study by the social sciences. If we think of law as a set of rules or principles, the social sciences have little to offer legal studies. Accordingly, if law is to be examined by the social sciences, it has to be redefined. We have to think of law as a social institution, as interacting behaviors, as ritual and symbol, as a reflection of group politics,

Reformers believed that the changes of the new millennium need not lead to the collapse of society, but could be directed in ways that make life better for all. The same technological advances which threatened to tear society apart also offered—in the service of visionary leaders—the hope for a new and better world. As a result, a new wave of utopian visions and settings was created.[59] When the court reformers, using grants provided by the SJI, began hiring professional futurists to lead the many court conferences and commissions, the futurists brought with them utopian visions, then popular within the intellectual community, of a preferred future society molded and shaped by a new judicial system.[60]

> as a form of behavior modification, or in some other way that makes it amenable to social scientific analysis.

Id. at 6.

59. *See* SEYMOUR B. SARASON, THE CREATION OF SETTINGS AND THE FUTURE SOCIETIES (Jossey-Bass, Inc. 1972) for an excellent treatment of the creation of utopian settings. *See also* Henry Winthrop, *Utopian Construction and Future Forecasting: Problems, Limitations, and Relevance, in* THE SOCIOLOGY OF THE FUTURE (Wendell Bell & James A. Mau eds., 1971). The contribution of the emerging discipline of futures studies to the creation of utopian settings is illustrated in this review of Alvin Toffler's FUTURE SHOCK by Rayond Fletcher, M.P., MANCHESTER GUARDIAN, reprinted on the dust jacket of the 1970 edition of FUTURE SHOCK, *supra* note 11:

> What is happening to us, argues its author, Alvin Toffler, is that the future is arriving too fast and its arrival is not properly coordinated. Mr. Toffler is the most articulate member of a group of American "underground sociologists" (as they are sometimes described) who are fashioning a new social science geared to planning for quality in society.

60. *See, e.g.*, Toffler, *supra* note 36. Proceedings of the Antioch School of Law and Institute for Alternative Futures Conference on the Futures of the American Legal System, Social Science Research Institute, University of Hawaii-Manoa (1981) at 33. This conference, referred to as the Antioch Conference, was held at the Antioch School of Law in Washington, D.C. in October 1977. *See also* FUTURE SHOCK, *supra* note 11, at 400-02.

> Such imaginative explorations of possible futures would deepen and enrich our scientific study of probably futures. They would lay a basis for the radical forward extension of the society's time horizon. They would help us apply social imagination to the future of futurism itself.
>
> Indeed, with these as a background, we must consciously begin to multiply the scientific future-sensing organs of society. Scientific futurist institutes must be spotted like nodes in a loose network throughout the entire government structure in the techno-sciences, so that in every department, local or national, some staff devotes itself systematically to scanning the probable long-term future in its assigned field. Futurists should be attached to every political party, university, corporation, professional association, trade union and student organization.

Id. at 402.

The conflicts occasioned by societal problems were considered to be opportunities for the courts to demonstrate their superior social utility.[61] Where informal institutions of social control, such as the family, church, and schools had failed,[62] the courts would succeed in addressing the underlying causes of conflict which originate in the human mind. To this end, sociologists, psychologists, political scientists, the multi-disciplinary futurists, and others began to study the ways in which society and the courts were related to, and could influence, one another to create a better future.[63]

The appellate decisions of state and federal courts were recognized as powerful social forces for modifying what people believed about many aspects of life.[64] Accordingly, sociologists and psychologists invested considerable effort to study the effect of culture on appellate court opinions and vice-versa.[65] The decision in *Brown v.*

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61. For an example of the nexus between the culture of conflict and the work of the courts, see Robert M. Bell, Chief Justice, Maryland Supreme Court, State of the Judiciary Address Before the Maryland General Assembly (January 26, 2000), *available at* http://www.courts.state.md.us/soj2000.html. The view of societal problems as "opportunities" for the courts is summed up in the 1996 State of the Judiciary Speech to the Tennessee General Assembly by Chief Justice E. Riley Anderson:

> A more troubled world is delivering more of its troubles to the courts. Even a short list of social ills that drive cases into the courts reveals how ill-equipped we now are to solve these problems: economic stress, educational shortcomings, bad parenting, sociopathic children, violence, more divorce, less religion, weaker ethics, drugs, guns, gangs.
>
> These troubles are a burden and they are also opportunity. But the courts need to change if we are to seize this opportunity. The judicial system must re-orient its duties and broaden its vision.

62. Harry W. Jones, *Introduction*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION, *supra* note 13, at 1.

> There has been a massive increase in crime and other . . . social instability. Scholars . . . have varying explanations, but all seem to agree that two of the major factors are 1) the waning influence of the family, the church, and other nonlegal agencies of social control, and 2) the vast migrations of population from the small towns and rural areas to the great cities that have taken place in the United States since World War II.

Id. at 2-3.

63. *See generally* THE LAW AND SOCIETY READER: READINGS ON THE SOCIAL STUDY OF LAW (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., W.W. Norton & Co. 1995).

64. Harry W. Jones, *The Channeling of Social Change*, 74 COLUMBIA L. REV. 1023, 1030-31 (1974). *See also* Robert Jerome Glennon, *The Nation's Teacher: The Role of the United States Supreme Court During Times of Crisis*, 24 SEATTLE U.L. REV. 327 (2000).

65. *See, e.g.*, Jack M. Balkin, *Pre-Modernism, Modernism, and Post-Modernism: The Proliferation of Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 5 (2003).

Board of Education,[66] which abolished the doctrine of separate but equal facilities for racial minorities, remains, perhaps, the best example of the ability of appellate opinions to influence popular culture.[67] But this is, at best, an incomplete picture of the courts' work. Despite their undeniable importance, appellate court opinions are rendered in only a small fraction of all lawsuits filed each year. Most cases end in the trial courts; relatively few are ever appealed.[68] If the courts were to expand their influence, new methods of informing the judicial process and of resolving disputes employing the techniques of the social sciences had to be developed for specific application to the trial courts.[69] Changes in the role of the judiciary were essential to make this happen, and they were focused, not on the state supreme courts (though

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> Why is this proliferation of legal truth and legal reality important? It is important, I think, for three reasons. First, the proliferation of legal truth shapes, directs, and constrains how people live their lives. It produces incentives and disincentives for people's conduct. Second, the proliferation of legal truth shapes people's beliefs and understandings. Law has power over people's imaginations and how they think about what is happening in the world. Third, the proliferation of legal truth is important because law's truth is not the only truth, and law's vision of reality is not the only reality. Law's power to enforce its vision of the world can clash with other practices of knowledge and with other forms of truth.

Id. at 7.

66. 347 U.S. 483 (1954).

67. For a recent review of the *Brown* decision, see Wendell LaGrand, *Brown at 50*, ABA JOURNAL, April 2004, at 38. The contribution of *Brown* to the transformation of law into a sociological tool is noted in LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 502 (Yale University Press 2002).

> The Brown decision acted as a kind of catalyst. Sociology had historically been skeptical about law; the "mores"—customs and norms not part of the official structure—seemed vastly more important. The law was formal, dead, a false front that concealed the real workings of society. Yet here was a living example of social change, a revolution in race relations, and the law seemed to be playing a significant role.

Id.

68. Jones, *supra* note 56, at 124, 131.

69. VAGO, *supra* note 52, at 25-27. Legal scholars and professionals accentuate various differences, but broadly agree on a cognitive map or paradigm of legal reality, consisting of essentially these elements:

> 1. Governments are the primary (if not the exclusive) locus of legal controls; that part of the legal process which is government is the determinative source of regulation and order in society.
> 2. The legal rules and institutions within a society form a system in the sense of a naturally cohering set of interrelated parts articulated to one another so that they form a coherent whole, animated by common procedures and purposes.

they are at the heart of the reform process), but rather on the inferior trial courts.[70]

G. *The Superiority of State Courts as Agents of Change*

Until the last three decades of the twentieth century, judicial activism had consisted almost exclusively of the widely publicized and debated decisions of the United States Supreme Court, which typically used some provision of the United States Constitution to strike down

3. The central and distinctive element of this system is a body of normative learning (consisting, in various versions, of rules, and/or standards, principles, policies) and of procedures for discerning, devising and announcing them.
3A. Purposiveness: rules are (should be) designed to embody principles or effectuate policies.
4. Legal systems are centered around and typified by courts, whose function is to announce, apply, interpret (and sometimes change) rules on the basis of or in accordance with other elements of this normative learning.
4A. The basic, typical, decisive mode of legal action is adjudication (i.e., the application of rules to particular controversies by courts or court-like institutions in adversarial proceedings).
5. The rules (authoritative normative learning) represent (reflects, expresses, embodies, refines) general (widely-shared, dominant) social preferences (values, norms, interests).
5A. Broad participation in rule-making by adjudication (and by representative government) insures that the rules embody broad social interests.
6. Normative statements, institutions and officials are arranged in hierarchies, whose members have different levels of authority.
6A. "Higher" elements direct (design, evaluate) activity; "lower" ones execute activity.
6B. Higher elements control (guide) lower ones.
7. The behavior of legal actors tends to conform to rules (with some slippage and friction).
7A. Officials are guided by rules.
7B. The rules control the behavior of the population.
7C. Conformity is the result of assent and the (threat of) application of government force.
8. If the above obtain, then:
8A. The authoritative normative learning generated at the higher reaches of the system provides a map for understanding it; and
8B. The function of legal scholarship is to cultivate that learning by clarification and criticism; and
8C. Legal scholarship directs itself to remedy imperfections—to bring legal phenomena into conformity with paradigm assumptions.

Id. at 26-27.

70. Milton D. Green, *The Business of the Trial Courts*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION, supra note 13, at 7, 8.

laws enacted by the representative branches of government.[71] Activists, however, began giving increased attention to the state courts as they began to understand that state supreme courts, interpreting state constitutions, could not only advance the same interests so aggressively pursued in the federal courts, but in many respects provided more fertile ground for establishing similar authority through the use of state constitutions.[72] State courts dispose of upwards of 97 percent of all litigation involving areas of law typically considered outside the realm of federal jurisdiction, such as family law and torts. This interest in the state supreme courts acquired a sense of urgency in the 1980s when President Ronald Reagan was believed to be appointing conservative jurists to the United States Supreme Court. As a consequence, one commentator observed, the "state supreme courts appear as . . . hospitable arenas for . . . minorities, criminal defendants, and political dissenters when one . . . [considers] the doctrines of the Burger Court and the bold measures developing in . . . state jurisdictions."[73] Moreover, state courts came into existence with a body of court-made laws, called the common law, which has been especially useful in the area of torts and family law, and in the judicial redefinition of rights.[74] Finally, state supreme courts offered another major advantage over the federal system as an instrument of change in society. Because they issue licenses to practice law, they govern the terms and conditions on which lawyers are admitted to practice. This led to the imposition in the 1960s and 1970s of ethical standards governing the conduct of lawyers. Those standards were subsequently expanded in new ways to impose professional imperatives, and to reeducate infer-

71. *See* LYMAN A. GARBER, OF MEN AND NOT OF LAW: HOW THE COURTS ARE USURPING THE POLITICAL FUNCTION (1966); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

72. *See generally* RICHARD NEELY, HOW COURTS GOVERN AMERICA (1981).

73. Gregory A. Caldeira, *Departures in the Study of State Supreme Courts*, JUDICATURE, April 1984, at 158.

74. *See generally* CHARLES S. LOPEMAN, THE ACTIVIST ADVOCATE: POLICY MAKING IN STATE SUPREME COURTS (1999). *See also* J. B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996).

> The Legal Realists were on to something with their devotion to common law systems as their laboratory. As Professor Lon Fuller put it, the common law "mirrors the variety of human experience; it offers an honest reflection of the complexities and perplexities of life itself."

Id. at 918.

ior trial and appellate judges about their new role and their changing responsibility in society.[75]

But if the courts were to become proactive in dealing with the root causes and modification of human behavior, they had to transcend their role as final arbiters of state constitutions to become a "hands-on" judiciary, thereby necessitating changing the trial courts.[76] In the name of professionalism, efficiency, and saving money, most state legislatures, at the urging of state supreme courts or the powerful bar associations which support them, have passed laws or adopted constitutional amendments unifying in varying degrees the inferior trial

75. Activists realized that it was not enough to simply use rules of ethics to prohibit some kinds of conduct. If the courts were to make effective use of the lawyers and inferior judges, there had to be standards prescribing the things that lawyers *should* do. The American Bar Association has published in one volume both aspects of professionalism. *See* Report of the Conference Proceedings, Conference of Chief Justices, A National Action Plan on Lawyer Conduct and Professionalism (Rancho Bernardo, Cal. March 1997) (the plan was adopted Jan. 21, 1999).

> Professionalism is a much broader concept than legal ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics rules are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs. . . .

Id. at 18. *See also* Frederic B. Rodgers, Mary Frances Edwards & Chuck A. Ericksen, *The Continuing Expansion of Judicial Education*, *in* THE IMPROVEMENTS OF THE ADMINISTRATION OF JUSTICE 185, 192 (Gordon M. Griller & E. Keith Stott, Jr. eds., 7th ed. 2001).

> The most effective career judicial education includes a combination of both the local and the national approach. Although state judicial colleges may be better able to teach state rules, procedures and substantive law, it is through national programs that judges may gain a broader perspective of commonly encountered problems and the ability to develop and apply solutions to the problems independently. . . . Their programs [NASJE, LIJE, JERITT] emphasize training judges to become effective teachers, recognizing different learning styles in adult learners and meeting their needs, anticipating trends affecting state courts, reviewing stages in the creative process and recognizing blocks to creating, and challenging judges to think and perform "outside the box."

Id. at 192.

76. David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work: The Term May Sound Academic, but it Embodies a Hands-on Approach to Solving Problems Rather Than Simply Winning Cases*, 89 A.B.A. J. 54 (2003). *See generally* JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END (1998). *See also* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001).

courts. The effect has been to bring trial courts increasingly under the control of the state supreme courts.[77] Moreover, the high courts have successfully expanded the concept of "inherent authority" to increase their power over lawyers and other judges. The authority of state supreme courts to determine the educational qualifications for lawyers was expanded in the 1960s and 1970s. They imposed ethical rules which, combined with bureaucratization and mandatory judicial education, has led to the creation of a common judicial culture which tacitly, if not explicitly, approves of the policies and goals adopted by activists working with and through the state supreme courts.[78] "State supreme courts," observed one supporter of reform, "were like heads without bodies."[79] As a result of the reform movement, however, state supreme courts have acquired an increasingly unified body of powerful trial courts, sharing values propagated by the supreme courts. There are still some trial judges who want to resist manipulation and control from the top, but they are diminishing as the institutional memory fades, and the old, independent trial judges pass out of the system. Only the "team players" are left. Consequently, the power of state supreme courts continues to grow every year. With their significant gains in political power, those who disagree with the growing agenda for change have strong incentives not to do so publicly.

II. BEHAVIORISM AND THE JUDICIAL DESIGN OF CULTURE

In their quest to reinvent the courts, activists found that they had at their disposal a powerful tool for the new trial courts to begin

77. For a favorable assessment of the court reform movement, see ROBERT W. TOBIN, NATIONAL CENTER FOR STATE COURTS, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM (1999). *See also* John M. Greacen, *The Role of the State Court Administrator: Ensuring a Statewide Judicial Branch of Government*, *in* THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (Gordon M. Griller & E. Keith Stott, Jr. eds., 7th ed. 2002).

78. *See* NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, REPORT OF THE SUPREME COURT OF NEW JERSEY COMMITTEE ON EFFICIENCY II (May 1996) at 13.

> The whole is more than the sum of its parts. The unification of the State's judicial system is more than bringing together it various parts, that is, combining the employees of twenty-one county courts into a unified Judicial personnel system, a unified budget and a single funding source. Unification carries the responsibility to constructively combine diverse local employee work cultures, each of which is strongly influenced by the style and values of its local leadership, as well as variations in funding and personnel practices. These styles and values vary markedly, from highly participative, collaborative cultures, to more rigid, hierarchical models.

Id. at 19.

79. TOBIN, *supra* note 77, at vii.

accomplishing their tasks of changing individuals and the culture: the application of scientific techniques to study, measure, and manipulate human life. The greatest of these techniques is the science of behaviorism, the technology of human behavior.[80] It is the consolidation of all applied techniques of the social sciences.

A. Law as Technology

Some reformers in the 1960s may still have believed in law as a statement of principles having origins and validity outside the realm of science. Obviously, they failed to see that the application of the social sciences to law would ultimately subvert, and then dominate, the law to the exclusion of religious or moral truth. For instance, Professor Harry W. Jones, one of the early reform leaders, observed that "[l]egal propositions have their origin not in empirical observations but in authoritative pronouncements by a court or legislature."[81] For Jones, however, there was no remaining view of law as non-empirical but justifiable beliefs about transcendent truth to be protected from the invasion of science or the shifting winds of social ideology. By then, law had become only a utilitarian means of social control, a "complex and crucially important social technology."[82] Consequently, "fundamental improvements in the technology of law and government will come, over the long pull," argued Jones, "only as we begin to acquire genuinely scientific knowledge concerning human nature and conduct."[83] To Jones and other reformers of that day, law was an applied science deriving increased knowledge from the social sciences in much the same way that medicine was an applied science of the natural sciences of chemistry and biology. Thus, Jones observed, "Similarly, until the tardy emergence of the behavioral sciences, law was an applied science in search of a basic science."[84] Lawyers were, Jones believed, "the most resourceful technicians in our society" even though they had "little scientific knowledge to draw on."[85] However, this changed in the last decades of the twentieth century, as the social sciences steadily expanded their influence on law and the judiciary to produce the con-

80. *See* NOAM CHOMSKY, *Psychology and Ideology*, *in* THE CHOMSKY READER 157 (1987) (providing a critical analysis of Skinner's theories).

81. HARRY W. JONES, *Legal Inquiry and the Methods of Science*, *in* LAW AND THE SOCIAL ROLE OF SCIENCE 124 (1966) [hereinafter LAW AND THE SOCIAL ROLE OF SCIENCE].

82. *Id.* at 125.

83. *Id.*

84. *Id.* at 126.

85. *Id.* at 127.

solidated, applied technology of social control.[86] Jones may have thought that there were limits to which the social sciences could influence the methods and purposes of law, that there might be some moral or philosophical source of law beyond the reach of scientific inquiry, but, if so, he was wrong.

The science of behaviorism was becoming increasingly popular not only as a means of controlling individual behavior but as a technology of cultural design.[87] Developed by men like Ivan Pavlov, and perfected by John B. Watson, B. F. Skinner and others, behaviorism makes it possible for sociologists and psychologists to study and describe human life in mathematical ways and to suggest answers to the problems of human behavior.[88] Activists instinctively recognized the potential (and, in all fairness, the danger) of these new techniques for

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86. The various social sciences developed techniques that were adapted to the type of work being done in those disciplines. But those techniques were previously applied in isolation from one another. Now they have been consolidated in the hands of the judiciary. The term *technique* is defined by Ellul as the "ensemble of means" used to achieve some predetermined end, and that same usage is continued here. For a more complete treatment of technique, see JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (1973).

87. B. F. Skinner promoted "behavioral engineering" as a tool for cultural design to solve the growing problems of mankind. *See* WALDEN TWO REVISITED, preface to the 1976 edition of WALDEN TWO, p. vi:

> The "behavioral engineering" I had so frequently mentioned in the book was, at the time, little more than science fiction. I had thought that an experimental analysis of behavior could be applied to practical problems, but I had not proved it.
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> . . .
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> But there was, I think, a better reason why more and more people began to read the book. The world was beginning to face problems of an entirely new order of magnitude - the exhaustion of resources, the pollution of the environment, overpopulation, and the possibility of nuclear holocaust, to mention only four. Physical and biological technologies could, of course, help. We could find new resources of energy and make better use of those we had. The world could feed itself by growing more nutritious grains and eating grain rather than meat. More reliable methods of contraception could keep the population within bounds. Impregnable defense could make a nuclear war impossible. But that would happen only if human behavior changed, and how it could be changed was still an unanswered question. How were people to be induced to use new forms of energy, to eat grain rather than meat, and to limit the size of their families; and how were atomic stockpiles to be kept out of the hands of desperate leaders?

Id.

88. *See* F. A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE: STUDIES IN THE ABUSE OF REASON (1952).

shaping society.[89] The developing social sciences used sociological and psychological tests, opinion surveys, social experiments, personality profiles, and direct observations to collect data on people in all kinds of settings. Using statistical methods, they could then describe behavior in terms of variables that made it possible to suggest answers to the problems of life. Applications to the law were obvious. For example, a study on men involved in the robbery of convenient stores might show that they were, in comparison to the rest of the population, more likely to be less educated, unemployed, addicted to drugs, and suffering from some kind of mental illness or personality disorder.[90] Moreover, the study might reveal that they had a combination of problems called co-occurring conditions. Additionally, they may have been previously involved in similar forms of criminal behavior. The social sciences could suggest answers to some of the leading questions of the day. How, for example, do we know that punishment deters future violations of the law?

Professor Jones, however, conceded to the realm of scientific inquiry an even more critical issue: "What is the relative force of coercion and internal obligations as influences on law-observing behavior?"[91] These and many others are inherently empirical issues, but they have a utilitarian bias depending upon the presuppositions or goals of those who acquire the data and apply it through the judicial system.[92]

The transformation of law from a system of principles having religious or philosophical origins into a system of social control has been noted by Lawrence M. Friedman, one of the leading historians and advocates for sociological law. Many law schools and leading law professors have adopted the sociological approach to law. But the "old

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89. *See* Oscar M. Ruebhausen & Orville G. Brim, Jr., *Privacy and Behavioral Research*, *in* LAW AND THE SOCIAL ROLE OF SCIENCE, *supra* note 81, at 80.

90. *See, e.g.*, STEPHEN P. JOHNSON, COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020 145 (1993) [hereinafter JUSTICE IN THE BALANCE 2020].

> While crime is no stranger in 2020, there is less of it than in the last decade of the 20th century. Its reduction is the result of society's willingness to confront with vigor and persistence: poverty, illiteracy, inadequate education, inadequate mental health care, joblessness, child abuse and neglect, the drug epidemic, the proliferation of firearms, escalating violence, and the failure of individuals to practice and teach basic ethical, disciplined behavior.

Id.

91. HARRY W. JONES, *Legal Inquiry and the Methods of Science, in* LAW AND THE SOCIAL ROLE OF SCIENCE *supra* note 81, at 127 (1966).

92. *See generally* IRVING LOUIS HOROWITZ, THE DECOMPOSITION OF SOCIOLOGY (1994).

scholarly order" hangs on to some extent in the law schools, even though it is a "bit battered and frayed about the edges."[93] Professors still give students books full of cases to study, and students still feel that law is about rules. But in the law schools, the "'notion of law as rule,'" quoting John Schlegel, "'is as overwhelming as the smell of limburger cheese.'" "Not everybody," notes Friedman, "finds this the most attractive of smells."[94] The crux of this observation is that law—as statements of principles having religious or philosophical origins—has a foul smell; but that law which is the product of empirical study (particularly from outside the legal system), producing a scientific system of social control, has a sweet smell indeed. Thus, the preferred conceptualization of law as we enter the twenty-first century is a technique—the ensemble of methods by which the discoveries of the social sciences are applied to the study and control of human life for the achievement of a predetermined end.[95]

B. *Nurture and Nature as Determinants of Behavior*

After decades of research, Skinner's radical behaviorism has been determined to be an incomplete scientific explanation of human behavior. It erroneously attributed everything about life to the influence of the environment. Now, genetic and biochemical components are acknowledged to be powerful determinants of behavior and personality.[96] However, Skinner addressed the effect of these influences on behavior and human freedom in a comprehensive way, making his observations directly relevant to the court reform movement.[97]

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93. Friedman, *supra* note 67, at 504.

94. *Id.*

95. See ELLUL, *supra* note 86, at 19.

96. Matt Ridley presents the debate about the relative influence of genetics or environment as a "false dichotomy." It is true that our genes determine much of our behavior, but, he argues, our genes are influenced by our environment—"nurture." Our genetic makeup is subject to being altered by, and is vulnerable to our environment. *See generally* MATT RIDLEY, NATURE VIA NURTURE: GENES, EXPERIENCE, & WHAT MAKES US HUMAN (2003).

> To appreciate what has happened, you will have to abandon cherished notions and open your mind. You will have to enter a world where your geners are not puppet masters pulling the strings of your behavior but puppets at the mercy of your behavior; a world where instinct is not the opposite of learning, where environmental influences are sometimes less reversible than genetic ones, and where nature is designed for nurture.

Id. at 4. For a book refuting the "blank slate" view of human behavior, see STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2002).

97. The long-running debate between behaviorists and geneticists about whether behavior is first the product of evolutionary processes encoded in our genes or is

According to Skinner, the behaviors that resulted in conflict and aggression were believed to have grown out of reinforced and internalized behavior learned during more primitive times as the necessary means of survival.[98] Propensities that contributed to the survival of our ancestors in pre-modern times are today viewed as threats to our survival. Among our ancestors, those who proved to be most successful in the fight for survival were reinforced by their ability to find and eat as much food as possible; the ability to procreate at a time when the human race was periodically decimated by pestilence; famine and war; and aggressive behavior which defeated marauding men and wild beasts. But, now, argued Skinner, "under better forms of government, supported by ethical and moral practices which protect person and property, the reinforcing power of successful aggression leads to personal illness, neurotic and otherwise, and to war—if not total destruction."[99] Skinner observed that our sensitivity to these reinforcers, and the contribution which the reinforced behaviors have made to our current welfare "raise an important problem in the design of a culture. How are we to keep from overeating, from overpopulating the world, and from destroying each other? How can we make sure that these properties of the human organism, once necessary for survival, shall not now prove lethal?"[100]

The link between food and sex as reinforcers of undesirable behavior is, of course, an oversimplification of the matter. Skinner was describing a time when our ancestors were believed to be more primitive in their physiologic make up—little more than animals. But the contingencies of reinforcement, which determined their behavior, resulted in physical changes stored in their genes and passed along in an evolutionary progression to produce modern man. To the behaviorists, we begin life as a complex, but empty shell waiting to be filled by our environment with language skills, feelings, abstract reasoning, and all of the other higher capacities once attributed to divine creation. We come into the world with proclivities toward certain types of behavior only because of biochemical reactions in our brains encoded by the environment in our ancestors' genes which were passed along to us.

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programmed into each of us by our environment is not particularly relevant here because the ultimate implications of both views in terms of the possibilities for human freedom and, particularly, the work of the courts are, for all practical purposes, the same. *See generally* Michael J. Sandel, *The Case Against Perfection*, THE ATLANTIC, April 2004, at 50.

98. B. F. Skinner, *Contingencies of Reinforcement in the Design of a Culture*, *in* SCIENCES OF MAN AND SOCIAL ETHICS 219-20 (Marvin Charles Katz ed., 1969).

99. *Id.* at 220.

100. *Id.*

However, these destructive genetic predispositions may also be modified by the scientific application of the contingencies of reinforcement. If we strip away all delusions about creation, and look past the language and reasoning skills that inform human behavior, we are not basically different, Skinner argued, from the animals from which we evolved. While some found the description of man as an animal offensive, Skinner did not. The use of the word "animal" to describe man is, for some, a pejorative term only because man has been made "spuriously honorific."[101] In other words, man has exalted himself. While some support Hamlet's exclamation, "How like a god!," Ivan Pavlov emphasized, "How like a dog!" "But that," observed Skinner, "was a step forward. A god is the archetypal pattern of an explanatory fiction, of a miracle-working mind, of the metaphysical. Man is much more than a dog, but like a dog he is within range of a scientific analysis."[102]

Because we are more than dogs, our behavior and our future can be shaped in ways not possible for other forms of life. All of the techniques applicable to animals are assumed to have direct application to man. Furthermore, our advanced physiological makeup gives us the potential to acquire from our environment sophisticated language skills, discriminate between subtle facial expressions, and the emotive tones of another person's voice. Moreover, because behavior is learned it can be changed in a classroom. Good test grades, or something as subtle as a smile are reinforcers that can change our behavior as effectively as some of the reinforcers which molded the behavior of our more primitive ancestors. Consequently, when Skinner said that we are much more than dogs, he was referring to the expanded potential of behavioral techniques by which man could be modified through the manipulation and control of all aspects of our environment.

Skinner addressed the relationship between behavior and the contingencies of reinforcement: "One may deal with problems generated by a powerful reinforcer simply by changing the contingencies of reinforcement. An environment may be designed in which reinforcers which ordinarily generate unwanted behavior simply do not do so."[103] Undesirable behavior can be weakened by making sure that it is not reinforced. Food, sex, a friendly smile, and many other pleasant, enjoyable, and satisfying stimuli are some of the reinforcers which define happiness, but we must be careful not to use them in ways that reinforce undesirable forms of behavior. Only through the experimental

101. B. F. SKINNER, BEYOND FREEDOM AND DIGNITY 201 (1971) [hereinafter BEYOND FREEDOM AND DIGNITY].

102. *Id.*

103. Id. at 223.

analysis of behavior will it be possible to design those reinforcements which will generate and maintain the most subtle and complex forms of desirable behavior, and eliminate the threat to survival posed by material excess and human aggression.[104]

By conducting detailed studies of different aspects of life, the problem of conflict and antisocial behavior could be reduced to proclivities for aggression, personal ambition, dominance, jealousy and other traits.[105] All of these would be functions of our environment—our home life, education, employment, poverty, physical and psychological illnesses, all kinds of political and social inequalities, and no doubt a variety of other factors. That hypothetical study of men involved in the robbery of convenient stores could suggest certain answers to the problem of armed robbery. A correlation might be shown to exist between aggression in the form of criminal behavior and multiple forms of environmental factors: economic, social, and physical deprivation, as well as mental illness. Moreover, a study might also show that after previous robberies such men were reinforced in their behavior by the approval of their peers or by the pleasure derived from the money obtained in the robbery.

Through the science of behaviorism, and by other methods of modification emerging from the broader field of neurotechnology, it is possible for our thoughts and actions to be shaped by government in subtle ways to produce forms of behavior more conducive to the survival—indeed, the perfection—of society. But the greater classrooms of life have been the family and the community, which encourage certain types of behavior and discourage others. Thus, it is there that the greatest potential for behavioral modification can be found. In the past, however, these institutions of social control operated outside the influ-

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104. *Id.* at 230-34.

105. Notice that the undesirable personality traits to be eradicated by the behavioral sciences predominate in the legal profession. *See* Susan Daicoff, *Making Law Therapeutic for Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811 (1999).

> A definable set of characteristics appears to distinguish lawyers from the general adult population. Each of these characteristics is empirically derived. Of these general characteristics, the attorney traits most relevant to TJ/PL are preferences for dominance, competitiveness, primary need for achievement, materialism, interpersonal insensitivity, preference for the Myers Briggs Type Indicator (MBTI) decision-making style of "Thinking" over "Feeling," and preference for a moral decision-making style consistent with a "rights" orientation rather than an "ethic of care." These traits, among others, define the typical lawyer. Interestingly, they fit well with traditional forms of law practice, which usually emphasize winning, materialism, cool, impersonal reasoning, and the elevation of clients' legal rights over other concerns.

Id. at 827-28.

ence of law. Therefore, the argument of the reform movement has been that new courts are needed because the family, church and community have failed to provide necessary social control.

Consequently, the social sciences have turned to the judicial branch of government as a delivery system for the reinforcements and sanctions capable of modifying human behavior and engineering a new society. For example, sociologist Donald Black has created a theoretical system, for "those who would act upon the world," to make empirical evaluations about the quantity of law in relation to other non-legal forms of social control, and for making decisions about the direction or goals toward which law should be applied.[106] According to Black, "with these propositions it is possible to calculate legal risks and advantages from one case to another, to engineer a legal outcome in or out of the courtroom, to reform a legal system, or even to design a community with little or no law at all."[107]

The social sciences—sociology, psychology, political science and others—inform the process of behavioral control by demonstrating, through empirical analysis, certain correlations between the environing world and multiple forms of behavior. Activists argue that the urgent task of visionary court leaders is to make the changes necessary for the judicial system to apply the sociological, technological, economic, and political techniques now available to induce revolutionary changes in society.[108] Reform literature gives numerous examples of ways in which visionary leaders of the past were able to profoundly influence the future. The two most prominent examples of visionary leadership used by reformers—the combination of politics and technology capable of producing revolutionary change—are President John F. Kennedy's 1961 challenge to put a man on the moon by the end of the

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106. DONALD BLACK, THE BEHAVIOR OF LAW ix-x (1976).

107. *Id.*

108. ENVISIONING JUSTICE: REINVENTING THE COURTS FOR THE 21ST CENTURY, *supra* note 48.

> A vision is a compelling statement of a preferred future. Visions are "futures of the heart"—they touch and move us. Visions inspire us by stating why we do what we do, what higher contribution flows from our efforts, and what we could strive to become. . .. This video defines visions as an active process that excites people to act, to create, and to innovate. It spotlights, as examples, visions whose results can now be seen in the world around us. The video then describes some recent efforts in court systems visioning conducted as part of the "Vision for the Courts: A Capacity-building Project."

Pamphlet accompanying video at 3-4.

decade, and Dr. Martin Luther King's 1963 *I Have a Dream* speech which galvanized the Civil Rights Movement.[109]

III. PLANNING FOR THE PREFERRED FUTURE

A. *Court Futures Planning*

Court planning was conducted on a limited basis in a few state court systems during the 1970s and 80s.[110] However, the work of reinventing the state courts took a giant leap forward in 1990 when the State Justice Institute and the American Judicature Society jointly sponsored The National Conference on the Future and the Courts in San Antonio, Texas.[111] Drawing from the earlier work of a few of the state supreme courts, the conference attracted several hundred participants—mostly judges, court administrators, lawyers, and educators—who were instructed by professional futurists on how to plan for and create the "preferred" future. Part of the process involved formulating and then selecting from carefully prepared scenarios of future societies.[112] Delegates could choose from the "Judicial Leadership Scenario," the "Generic Justice Scenario," the "Road Warrior Scenario," the "Multi-Door Courthouse Scenario," the "Global High-Tech Scenario," the "Super Surveillance Scenario," and the "Green and Feminist Scenario." Each of these scenarios related some future form and function of the judiciary to a corresponding form of society. Representatives from the various states began deciding in San Antonio what changes they

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109. *Id.*

110. The first formal report of a state court futures commission was from the Arizona Supreme Court, an early leader in the field of judicial visioning and forecasting. *See* ARIZONA SUPREME COURT'S COMMISSION ON THE COURTS, REPORT OF THE COMMISSION ON THE COURTS (1989).

111. JAMES A. DATOR & SHARON J. RODGERS, AM. JUDICATURE SOC'Y, ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020 (1991) [hereinafter ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020]. The State Justice Institute referred to The National Conference on the Future and the Courts Conference as "[p]erhaps the most seminal event SJI supported during its first ten years." 10 YEARS: IMPROVING THE QUALITY OF AMERICAN JUSTICE, *supra* note 50, at 31.

112. Conference organizers collected comments and visions from delegates to the San Antonio Conference and combined them with ideas developed in pre-conference meetings by the conference organizers. Scenarios were then assembled by planners from the combined materials and distributed throughout state court systems as a means of directing the thinking of other court planners at the state level about possible futures. "Everything we do in this volume is with that purpose in mind: to help you work with others to gain greater control over the future and the courts, to work with others to create the future and the courts you prefer." ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020, *supra* note 111, at 4.

had to begin making in 1990 to bring into existence their preferred future for the courts by the year 2020; additionally, they made plans for even larger national conferences to expand the work of changing the courts.[113]

After the San Antonio conference (and other important conferences as well), state supreme courts began creating commissions and committees to engage in futures planning and strategic planning, a related process adapted from the business community. These court commissions and committees issued reports, including titles such as *Courts in Transition* (Virginia, 1989); *Reinventing Justice 2022* (Massachusetts, 1992); *Justice in the Balance 2020* (California, 1993); *Justice in the Next Millennium: Report of the Court Futures Vanguard* (Georgia, 1993); *New Dimensions for Justice* (Maine, 1993); *To Serve All People* (Tennessee, 1996); *Without Favor, Denial or Delay: A Court System for the 21st Century* (North Carolina, 1996); *Charting the Future of Iowa's Courts* (Iowa, 1996); and *A Changing Landscape* (Ohio, 2000). All of these reports are utopian political manifestos, advancing sweeping proposals for the eventual creation of a judicial system radically different from the current one, and a new role for judges in society.[114] The many "strategic plans" also being adopted by the courts subtly outline the political process by which current judicial needs will be met and visions of a new judiciary will be realized.

As the twentieth century drew to a close, the work of court futures commissions had slowed, but the process of reinventing the courts was stronger than ever, having only been repackaged under the broader, less descriptive term of Public Trust and Confidence in the Justice System. In May 1999, the National Center for State Courts, using federal tax dollars provided by the State Justice Institute, sponsored the National Conference on Public Trust and Confidence in the Justice System in Washington, D.C. Activists made plans on a national scale for changing and expanding the work of the courts as a branch of govern-

113. *See, e.g.*, NAT'L CTR. FOR STATE COURTS, NATIONAL CONFERENCE ON THE FUTURE OF THE JUDICIARY IN CELEBRATION OF THE 25TH ANNIVERSARY OF THE NATIONAL CENTER FOR STATE COURTS (1996).

114. Seymour B. Sarason provides a broader definition that permits a better understanding of the utopian nature of court futures reports. THE CREATION OF SETTINGS AND THE FUTURE SOCIETIES, *supra* note 59, at 7 ("Today, we use the adjective utopian not only to suggest that something does not exist, but also, and more important, that we do not know how to get to where we want to go, and it is the latter use which implicitly recognizes that knowing the goal is only the beginning of the journey.").

ment and the creation of a new role for judges in society.[115] Beginning with survey results that reflected, they argued, "strong empirical evidence that the American public is highly critical of some aspects of the justice system,"[116] the conference was "directed toward facilitating strategic planning at the state and local levels, and supporting [state and local] strategies with the resources available to national organizations."[117] A National Action Plan (NAP) was subsequently adopted based upon decisions and ideas generated by conference delegates and planners. The NAP is a "guide for national organizations that want to relate their strategic plans and programs to state strategies for building public trust and confidence in the courts, and for state and local organizations seeking information on public trust and confidence activities in other states and from the national organizations."[118]

Following the conference, representatives from the various states returned home to begin implementing a wide variety of state programs, including to varying degrees most of the activities once a part of the court futures movement plus a wide range of practical activities designed to produce change.[119] Working under the banner of increasing public trust and confidence in the justice system, some judges and bar associations in all states (frequently assisted by professional futurists, planners, and academics) are:

(1) conducting environmental scans to determine social, economic, and political conditions in their communities;
(2) conducting visioning sessions and trends analysis;
(3) conducting public opinion surveys on a variety of topics, and forming focus groups in their communities;
(4) working to increase access to justice, including the use of court volunteers and advanced computer technologies;

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115. *See* Transcript, National Conference on Public Trust and Confidence in the Justice System, May 14-15, 1999, Washington, D.C. (on file with the author).

116. NAT'L CTR. FOR STATE COURTS, NAT'L CONFERENCE ON PUB. TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM, NATIONAL ACTION PLAN: A GUIDE FOR STATE AND NATIONAL ORGANIZATIONS 5 (2000).

117. *Id.* at 1.

118. *Id.*

119. *Id.* at 4.

> The NAP is a unique product in the sense that it is not a formal plan with a hierarchy of goals, objectives, programs, and implementation steps specific to one organization. It is, instead, a guide for national organizations that want to relate their strategic plans and programs to state strategies for building public trust and confidence in the courts, and for state and local organizations seeking information on public trust and confidence activities in other states and from the national organizations.

Id.

(5) compiling and publishing strategic plans for courts and their communities;
(6) establishing commissions to combat bias based on race, gender, and sexual orientation;
(7) working with journalists to establish common ground with the media;
(8) establishing speakers bureaus as part of judicial outreach programs;
(9) working to change the way judges are selected by creating panels of experts rather than allow contested public elections;
(10) seeking ways to insure judicial independence; and
(11) establishing new systems of innovative, problem-solving courts utilizing scientific techniques which modify individual and collective behavior.

The American Bar Association, which supports and tracks many of these so-called Justice Initiatives through affiliated state and local bar associations, reports that by the turn of the millennium literally hundreds of these "commissions, summits, conferences and other initiatives" were being conducted each year.[120] The 2000 *Summary of State and Local Justice Initiatives*, for instance, "shows 1,035 ways that the courts and the bars continue to improve access, combat bias . . . upgrade judicial selection, enhance jury duty experience, preserve judicial independence . . . and make the courts more user-friendly."[121]

It is worth noting that not once in the untold thousands of pages of materials related to these activities has any person been found to ask the most obvious question: how is this work related to the judicial power bestowed upon the courts by the various constitutions? Not one time in the course of any of these thousands of activities has any decision been rendered by judges or juries in contested lawsuits between litigants. All of these activities from the beginning of the reform movement until today are, without exception, legislative or executive in nature and are universally extraneous to the act of making a decision in a lawsuit. In fact, had people been present to witness some of these events, they could have seen justices of the state supreme courts, participating trial judges, law school deans, journalists, business leaders

120. Burnham H. Greeley, *Introductory Memorandum* to AMERICAN BAR ASSOCIATION COMMITTEE ON STATE JUSTICE INITIATIVES, SUMMARY OF STATE AND LOCAL JUSTICE INITIATIVES (2000). The American Bar Association no longer publishes the report on State and Local Justice Initiatives, but current information about the ABA's participation in court reform and Justice Initiatives can be found at its Coalition for Justice web site at www.abanet.org/justice/home.html.

121. *Id.*

and others, all of them hand-picked members of the "blue-ribbon" commissions and committees, seated in legislative committee rooms, while listening to "testimony" from "witnesses" about the substance and direction of court reform. The commission and committee members working for the judiciary made decisions that had nothing whatsoever to do with the judicial power given to judges by state constitutions. They were, in effect, making decisions about how to change state constitutions by redefining the judicial power and process. The commissions themselves represent a new paradigm for government because they function as mini-constitutional conventions created by an existing branch of government, bypassing the constitutional amendment process.

The planning process and implementation of plans is a perversion of the former judicial power by which courts and judges wield the power of the state. Planning for the future of the courts and society represents the emergence of a new kind of judicial branch, and, consequently, a new form of government. How are the courts doing these things? The answer, quite simply, is that the ideas that formed the framework for government during the Founding Era have vanished, so that few now recognize the postmodern judiciary and its activities as something patently unconstitutional. Are not the legislative and executive branches of government the political branches? Is the planning process not inherently political? Is the dissemination of propaganda a proper function of the courts? The questions themselves supply the answers. But because the courts have been operating outside the constitution for so long, the basic questions are no longer being asked. It is simply assumed that the new paradigm is part of the judicial power. The courts can do these things and get away with them because no one has the insight, will or power to stop them.

The framework for the new judiciary has entered the implementation process represented by the catch-all public trust and confidence movement. However, that framework is largely reflected in the reports of court futures commissions formed by a majority of the state court systems. All court futures commissions support a new role for judges allowing them in both criminal and civil cases to use alternative, coercive techniques developed in the social sciences for modifying human behavior. Consequently, we shall examine those reports more closely to see where the courts are taking us.

Futures commission reports are built around contrasts between the activists' fears of social and political disintegration if people are free to pursue their own lives, and their utopian visions of a just society under the control of a new judiciary. "Where there is no vision, the

people perish," observed one witness before the California Futures Commission.[122]

"Less certain [than a multicultural society]," observed the California Futures Commission,

> is whether the social compact that governs the multicultural society of 2020 will be healthy or malignant—whether most Californians will have jobs, enjoy a quality education, or inhabit an environment that can fairly be described as hospitable. The realities of 2020 are being shaped today, sometimes purposefully, sometimes not. The choices of the 1990s will reverberate loudly in the third decade of the 21st century.[123]

The scare tactics employed by the futurists and court leaders are essential to the creation of scenarios and visions of the future. In 1990 the Massachusetts Futures Commission began its search for the future judicial system by creating a "Nightmare" scenario: "It is 2022. Society is impoverished. Conflicts focus on competition for basic resources: food, fuel, and housing. Justice norms, processes, and objectives have broken down. . . . Reductions in mental health services, substance abuse programs, and juvenile services contribute to the surge in criminal cases."[124] The connection between societal problems and the failed judiciary appears at the end of the scenario when the commission concludes that, "[t]rue justice is a scarce and costly commodity."[125]

But the many futures commission reports and strategic plans are also replete with utopian visions offering an alternative future for those willing to trust in the new judicial leadership. The second published futures commission report in 1989, entitled *Courts in Transition,* by the Virginia Supreme Court's Commission on the Future of Virginia's Judicial System was organized around visions of the future judicial system; pointedly, it had ten "visions" instead of ten chapters.[126] The California Futures Commission, which worried so much about legislative issues such as the future availability of good jobs, quality education, and a clean environment, envisioned a brighter future for society with

122. JUSTICE IN THE BALANCE 2020, *supra* note 90, at 1 (quoting Dr. Mattie M. Walker).

123. *Id.*

124. MASSACHUSETTS SUPREME JUDICIAL COURT COMMISSION ON THE FUTURE OF THE COURTS, REINVENTING JUSTICE 2022: REPORT OF THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE COURTS 6 (1992) [hereinafter REINVENTING JUSTICE 2022].

125. *Id.*

126. COMMISSION ON THE FUTURE OF VIRGINIA'S JUDICIAL SYSTEM, COURTS IN TRANSITION: REPORT OF THE VIRGINIA SUPREME COURT'S COMMISSION OF THE FUTURE OF THE VIRGINIA JUDICIAL SYSTEM (1989).

the idealized new judiciary when it outlined its "Preferred Future for the California Courts, c. 2020":

> It is 2020. Justice's greatest asset is its servants, who in every action personify respect for public service and a commitment to the public's interest. Judges and other dispute resolution providers are the embodiment of excellence. They are culturally competent, representative of the genders, races, and ethnicities they serve. They are community leaders, outspoken advocates for justice in its broadest sense.
>
> It is 2020. In both perception and practice the California Courts are scrupulously fair, accessible to all. Comprehensive and comprehending, they have the confidence of the powerless and the powerful, the poor and the wealthy, the victim and the offender. Their commitment to equal justice is absolute. . . .
>
> It is 2020. The courts have evolved into a truly multidimensional justice system consisting of multioption justice centers, smaller, publicly supported community dispute resolution centers, and numerous private providers. Together they offer a wide range of appropriate dispute resolution options. Resolution processes are fit to the dispute, rather than the converse. Bench and jury trials are reserved for the disputes that genuinely need them. . . .
>
> It is 2020. Justice remains loyal to its age-old principles, yet is much changed. Its transformation is in part the result of sustained public investment in the courts. At the same time, society is less inclined to view the courts as the emergency room for society's most stubborn ailments; Californians recognize the economics and benefits of treating conflict's causes, as well as its symptoms. Children are the beneficiaries of much of this resolve. Their health, nurture, and education are public priorities, signifying society's determination to care for the future by caring for those who will inherit it.
>
> It is 2020. Californians are committed to conflict reduction and crime prevention. Courses in conflict resolution and the role of the public justice system are taught in every school at every level. As a result, the average Californian understands disputes and how to resolve them—quickly, affordably, and fairly. Thought more accessible, comprehensive, and effective than their forebears [sic], 21st century "courts" actually process a smaller volume of disputes. The public views them not as the dispute resolvers of last resort, but as the appropriate recourse when constructive self-help is not enough.[127]

B. *Judicial Values*

At the heart of these visions are values. Agreement on values is the first step in the creation of new settings whether they are new schools,

127. JUSTICE IN THE BALANCE 2020, *supra* note 90.

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new civic or professional organizations, new governments, or even new societies.[128] Court futures reports contain numerous statements of vague values such as tolerance, inclusion, equality, access to justice, public trust and confidence in the justice system, alternative techniques of dispute resolution, treatment, family and community support, victims' rights, and judicial independence, among others.[129] Statements of values are important because societal design represents a moral decision about which forms of behavior, out of many possible forms of behavior, are most desirable, and the study of preferred behaviors and future societies is, consequently, framed in terms of values.[130] In fact, a vision of a future society is dependent upon and derived from a vision of values. But these values (sometimes overlapping with "goals" or "missions") are deliberately vague, providing the greatest possible flexibility to the reformers when specific proposals need to be justified as being consistent with the values guiding the judiciary. These judicial values provide the basis for more concrete proposals having specific application to the actual work of the judiciary. The leading court futurist, for example, has his political science students design forms of government based upon different religious beliefs.[131]

By the Twentieth Century, the synthesis between Christianity and Western Civilization had come to an end, and sociologists and psychologists—the scientists—began a systematic search for a set of values

128. THE CREATION OF SETTINGS AND THE FUTURE SOCIETIES, *supra* note 59, at 5-6.

129. Other, vaguer core judicial values are frequently cited. *See* Greg Berman and John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 134 (2001) ("Core judicial values—certainty, reliability, impartiality, and fairness—have safeguarded over many generations, largely through a reliance on tradition and precedent. As a result, efforts to introduce new ways of doing justice are always subjected to careful scrutiny.").

130. *See, e.g.*, ROBERT L. HUMPHREY, VALUES FOR A NEW MILLENNIUM (1992). Humphrey illustrates the "scientific" approach to the discovery of universal values:

> The purpose of this work is to describe a new, scientific approach for solving human relations, or social problems, especially for reducing global violence. This methodology was research-developed and is research-guided. That is, the problem-solving method was, and the educational materials are, developed empirically from social-scientific research and experimentation, especially through programs designed to change attitudes among groups in conflict. These changed attitudes do not simply stop violence, as you will see, they eliminate the causes of violence by creating situations that conform to human nature.

Id. at 23.

131. James A. Dator, Syllabus for Political Science 673 (on file with author). See http://www.politicalscience.hawaii.edu/Faculty/dator/dator.htm (last visited June 4, 2007) for biography and course listing.

common to all people and all religions. Books such as *Science and Human Values* (1956),[132] *Scientific Progress and Human Values* (1967),[133] and *Values and the Future* (1969)[134] represent an effort to find replacements for the large-scale social forces which once guided society and formed the intellectual basis for constitutional government.[135] With the adoption of new values have come new assumptions about the purposes of government. Consequently, the government is transitioning to new forms and process, based, as some have predicted,

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132. J. BRONOWSKI, SCIENCE AND HUMAN VALUES (1956).

133. SCIENTIFIC PROGRESS AND HUMAN VALUES: PROCEEDINGS OF THE CONFERENCE CELEBRATING THE 75TH ANNIVERSARY OF THE CALIFORNIA INSTITUTE OF TECHNOLOGY IN PASADENA, CALIFORNIA, OCTOBER 25-27, 1966 (Edward & Elizabeth Hutchings eds., 1967).

134. VALUES AND THE FUTURE (Kurt Baier & Nicholas Rescher eds., 1969).

135. *See* BELL, *supra* note 38, at 377, 386, 433.

> In the nature of human consciousness, a scheme of moral equity is the necessary basis for any social order; for legitimacy to exist, power must be justified. In the end, it is moral ideas—the conception of what is desirable—that shapes history through human aspirations. Western liberal society was "designed" by Locke, Adam Smith, and Bentham on the premise of individual freedoms and the satisfaction of private utilities; these were the axioms whose consequences were to be realized through the market and later through the democratic political system. But that doctrine is crumbling, and the political system is now being geared to the realization not of individual ends but of group and communal needs. Socialism has had political appeal for a century now not so much because of its moral depiction of what the future society would be like, but because of material disparities within disadvantaged classes, the hatred of bourgeois society by many intellectuals, and the eschatological vision of a "cunning" of history. But the normative ethic was only implicit; it was never spelled out and justified. The claim for "equality of result" is a socialist ethic (as equality of opportunity is the liberal ethic), and as a moral basis for society it can finally succeed in obtaining men's allegiance not by material reward but by philosophical justification. An effort in politics has to be confirmed in philosophy. And an attempt to provide that confirmation is now underway.

Id. at 433.

> Inevitably, the politicization of decision-making—in the economy and in the culture—invites more and more group conflict. The crucial problem for the communal society is whether there is a common framework of values that can guide the setting of political policy. The one major impulse at the moment is that of redress—providing for the disadvantaged and seeking some redistribution of the income shares in the society. To some extent, this may satisfy one criterion of justice—as fairness. But it does not create any positive ideal of the kind of individual a society wishes to have. . . . Politically, there may be a communal society coming into being, but is there a communal ethic? And is one possible?

Id. at 483.

upon the emergence of a technologically-competent elite. In hindsight, the words of sociologist Daniel Bell seem all the more prophetic: "The lack of a rooted moral belief system is the cultural contradiction of the society, the deepest challenge to its survival."[136]

The invention and statement of universal judicial values has proceeded at a rapid pace in recent decades because of the moral vacuum produced by the demise of the Christian consensus. Moreover, the social sciences have been able to frame the values or goals of the future society toward which the force of law should be directed.[137] This is especially apparent in many court futures commission reports which merge the concepts of "visions," "goals," and "values." To avoid possible failure by making specific predictions of future judicial accomplishments, futures commissions most frequently discuss visions of utopian values or goals which will guide the formation and function of the new judiciary. "The risks of future scenarios and future issues are too great," observed the Tennessee Futures Commission, "so the commission's work has turned to a deeper route—to the very goals of the judicial system. . . . Specific goals may be moving targets, but an awareness of the values that determine those goals gives a guidance of its own."[138] "Our vision of the future, therefore, is framed in ideals," noted the Tennessee Commission, and "[t]hese visions . . . are the guiding lights of the recommendations that derive from them. . . ."[139] There followed ten visions for the future judiciary that included the elimination of biases within the judiciary, the achievement of judicial efficiency, the solution of problems by innovative and informal processes, judicial independence, and one particularly telling vision: "The judi-

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136. *Id.* at 480.

137. As the synthesis between Christianity and Western Civilization came to an end, sociologists began searching for a set of values common to all people and all religions on which to base society and government. *See generally* VALUES AND THE FUTURE: THE IMPACT OF TECHNOLOGICAL CHANGE ON AMERICAN VALUES (Kurt Baier & Nicholas Rescher eds., 1969); *see also* David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657 (2000).

> Interests groups not part of the dominant system were excluded from participating in the processes of power and governance other than in subservient roles. . . . An inevitable consequence of this greater inclusiveness is that we have entered a period of profound disquiet in which new voices have arisen from all directions to demand shares of social goods they feel they have been wrongly denied or to which they feel entitled."

Id. at 658.

138. TENNESSEE SUPREME COURT'S COMMISSION ON THE FUTURE OF THE TENNESSEE JUDICIAL SYSTEM, TO SERVE ALL PEOPLE: A REPORT 1 (1996) [hereinafter TO SERVE ALL PEOPLE].

139. *Id.* at 8.

cial system will be proactive. . . . In both training and vision, its personnel will reach beyond the traditional bounds of the law."[140]

Because law applies universally and is such a powerful force in society, creating new judicial values as a basis for law is tantamount to creating new values for society, and, in the process, changing society altogether. The vision of the "preferred" future judiciary is inextricably tied, in the minds of the activists, to the future of society. "This commission," observed the Massachusetts Futures Commission "was charged with creating a vision of a better future for justice and proposing ways to achieve it. Having done so we readily acknowledge that the future of the courts is intimately and inescapably tied to the future of society."[141]

Uniformly, court literature treats judicial values as if they represent the neutral position. The justices of the state supreme courts who propagate the new values, often adapted from statements of ethics promulgated by the ABA or, in the present case, by court commissions, become the paragons and oracles of righteousness. Moral truth, we are to believe, emanates from justices of the state supreme courts. Disagreement with the values adopted by justices and their commissions becomes the very definition of bias and deviancy. Social control is achieved through statements of values and the object of social control is the elimination or correction of deviancy. High court statements of values and ethical norms strike directly at the heart of freedom of conscience, and are intended to change what people—especially other judges and lawyers—believe about morality and ethics. Judges, for example, are prohibited by Supreme Court rules from expressing any bias based upon race, gender or sexual orientation. Statements of values and ethical norms essentially require judges who acquire truth about life from a source of authority higher than the state supreme courts to either change their beliefs to conform to judicial values or recuse themselves from the judicial process. In this way, the values driving the decision-making process are institutionalized, and the outcome of future disputes is predetermined. Likewise, the shape of the future society is impacted by the force of law in the form of court decisions which strike down and remake substantive law to comport with statements of court values and ethical norms, having previously eliminated judges who, because of their opposing belief system, would have refused to do so.

140. *Id.*

141. REINVENTING JUSTICE 2022, *supra* note 124, at 1.

Assuming, as we may safely do, that justices of state supreme courts are good citizens, we must necessarily deny that they are morally superior to any other person or group of persons. Judges hold an office and perform a function of government, and are entitled to respect because of the office they hold. But they exalt themselves by assuming to provide individuals and the community with things available through other sources. And their greatest offense is to assume that they can propagate moral values, the most basic need of individual or collective life. They have assumed the role, in the words of Professor Arthur Allen Leff, of "evaluative Godlets."[142]

Admittedly, judicial cultures vary in strength and uniformity from state to state, but they are growing as trial judges accept supreme court values and visions, and assume, because they see other judges doing so, a proactive position. Evidence of this can be found on the web sites of local trial courts containing announcements of new community initiatives or a therapeutic approach to their work.

This relationship between the visioning process engaged in by the judiciary (at the heart of which are values) and cultural transformation was alluded to by one of the principal participants in the early court visioning exercises: "The thing that really touched me the most was that there wasn't a person there who wasn't involved. And that's what I'm talking about. That's what vision is about. It's involvement. . . . And it's thinking together about how we can have a better culture . . . not just a better justice system, but a better culture."[143] To this end, other participants envisioned that "[j]udges would be trained in human behavior more than the law," and that "[c]ourts are going to take a more active role in the community, and try to change the surrounding community, rather than just react to it."[144] These concepts, emphasizing the creation of a new judicial system, and the implementation of a sociological, psychological approach to behavioral modification and cultural design, were contained in the training materials used by futurists and court leaders to inculcate the same type of beliefs in the members of their "blue ribbon" commissions. In the search for something new and better, futurists advocated the abandonment of everything participants had previously believed about the judiciary and its role in government and society to provoke new concepts of judicial governance. The training materials and the presentations made by futurists

142. Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1241 (1979).

143. ENVISIONING JUSTICE: REINVENTING THE COURTS FOR THE 21ST CENTURY, *supra* note 48 (quoting Bill Lockhart, Court Administrator, Sixth Circuit, Pinellas Co., Fla.).

144. *Id.* (quoting unidentified participants).

and planners are consequently reflected in the many state reports, speeches, scholarly literature, and working documents coming from within the state judiciaries.

C. *Planning for the Preferred Future*

What, however, is the practical effect of court commissions and committees today, or, for that matter, tomorrow, or the day after that? To answer that question, we need a clear understanding of what these commissions and their reports actually represent. Speaking in 1990 at the National Conference on the Future and the Courts, one judge who had been a member of the Virginia Futures Commission outlined the basic task for those attending the conference and for members of future state commissions: "As participants at this Conference on the Future and the Courts, you and I have the delightful opportunity to begin to think about these things [where we should go and how we should get there] and, perhaps, to suggest our journey and our destination."[145] It is impossible to predict the future, he was careful to explain, but it is possible to engage in a process by which court planners attempt to "identify the forces of change, predict how society will evolve from those forces, and suggest how courts might be designed and function to best serve the public."[146] By identifying social, technological, economic, environmental, and political trends, judges, with the help of futurists, can "create and choose at least the vision of the future we prefer and begin to work toward it."[147] Through trends analysis and the creation of alternative scenarios the courts can "evolve strategies or the plans and tactics to achieve these visions."[148] What the activists are saying is that it is possible through visioning and the creation of scenarios of alternative futures to decide not only which future out of a number of possibilities is most desirable, but also to decide what changes in substantive and procedural laws and policies must be made today in order to achieve the ideal or preferred future. Since the situation is in a constant state of flux, the courts must be "responsive" by constantly monitoring changes, not just in their communities, but in all aspects of individual and collective life. The courts must be constantly changing and adapting to the technological, economic, social

145. John F. Daffron, Jr., Judge, Twelfth Judicial District, Chesterfield, Va., and Vice Chairman, State Justice Institute, Address at the Future and the Courts Conference, *Future Thinking and the Process of Preparing for Change, in* ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020, *supra* note 111, at 109, 110.

146. *Id.*

147. *Id.*

148. *Id.*

and political environment in order to adapt present-day laws and policies to meet unexpected shifts that threaten to derail the trip to the preferred future. To do this the courts must be policy makers and legislators today—not thirty years from now, but today. Talk about the future is primarily an excuse for enacting the changes they want to make today.

Envisioning the future and all related techniques are mere excuses for activism in the form of legislation, court decisions advancing new social policies, and a new role for the courts in government and society. When activists speak of their obligation to the future, they are arguing for changes that need to take place now. Judges, as a class, asserts Professor James A. Dator, "are more likely to be aware of cutting edge matters—new technologies, new social movements—well ahead of the average legislator or voter."[149] "The truth of the matter," Dator argues, "is that no one else in our society has the ability or the will to make . . . socially-significant decisions from the perspectives of general morality and philosophy that our judges have."[150] Those decisions are the ones that judges and activists working with them are making today, not just in the form of court decisions, but through their commissions and committees. Following Dator's work with the Virginia judiciary in the late 1980s, he was invited to address a joint session of the Virginia Legislature where he said of the Virginia report, *Courts in Transition*, that it "addresses certain problems in the present by utilizing the language of the future. Admittedly, this is one of the most common uses of futures discourse: it enables us to criticize or reform the present by pretending to talk about the future. . . . But this still leaves the future begging for attention."[151]

For judges to acknowledge and plan for future needs, they must continue the transition from the role of restrained, impartial decision-makers in individual lawsuits to the role, not just of policy-makers for the present, but as planners for the preferred future society. Court activists like to quote the late Peter Drucker who said, "The best way to

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149. James A. Dator, *The Dancing Judicial Zen Masters: How Many Judges Does it Take to See the Future?*, http://www.futures.hawaii.edu/dator/courts/dancing.pdf (last visited June 4, 2007).

150. James A. Dator, *Dowager Revisited*, http://www.futures.hawaii.edu/dator/courts/Dowager.pdf (last visited June 4, 2007).

151. James A. Dator, Professor of Political Science, University of Hawaii, Speech to the Virginia Assembly on the Future of the Courts at the University of Virginia: Twenty Minutes Into the Future (December 1, 1989), *available at* www.soc.hawaii.edu/future/dator/courts/20MininFut.html.

predict the future is to create it."[152] Judges as planners and legislators are, consequently, changing their position in government by adopting a visionary, future-oriented approach that is antithetical to constitutional government.

The constitutional doctrine of justiciability, by which the judiciary restrained itself from encroaching upon the constitutional authority of the other two branches of government, is essentially dead. A controversy is appropriate for judicial inquiry if it does not exclusively or predominantly involve political questions the determination of which are a prerogative of the legislative or executive branches of government.[153] Plainly, all of the issues and deliberations we have been discussing are completely political, and bypass constitutional entities and processes for the purpose of producing structural and societal changes thought best by the judges and others working with them. And it cannot be said too often that the state supreme courts are driving all of this. None of these activities would be possible without the support of at least a majority of supreme court justices in each state.

By promoting fundamental changes in the judiciary, these visions, values, and scenarios all point toward the perfection of human life through the perfection of the institution by which all people will come to relate to one another: the judiciary.[154]

Confronted by these emotionally-compelling visions of the future, thousands of intelligent people, acting at the behest of the judges, have made the leap from the real world into an imaginary world that does not now and never will exist. The training manuals prepared by the futurists and planners contain detailed instructions for judicial leaders on how to create "buy in" to the forecasting and planning process.[155] This process begins with the selection of the right kind of people to serve on the commissions and committees. Then, it extends to the selling of the new visions on a piecemeal basis to trial judges, legisla-

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152. THE COMMISSION OF THE FUTURE OF THE PENNSYLVANIA JUSTICE SYSTEM, THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION ON JUSTICE IN THE TWENTY-FIRST CENTURY 13 (2000) [hereinafter THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION].

153. 20 AM. JUR. 2D *Courts* § 46 (1995).

154. For a review of one paradigm of the perfected state, see Drucilla L. Cornell, *In Union: A Critical Review of Toward a Perfected State*, 135 U. PA. L. REV. 1089 (1987) (reviewing PAUL WEISS, TOWARD A PERFECTED STATE (1986)).

155. JOHN A. MARTIN, ET AL., STRATEGIC PLANNING IN THE COURTS: IMPLEMENTATION GUIDE 50 (1995); Craig Boersema, *Court Future Research: The First Step in Long-Range Strategic Planning*, STATE COURT JOURNAL, Winter 1993, at 3, 6; CENTER FOR PUBLIC POLICY STUDIES (Denver, Co.), STRATEGIC PLANNING: MENTORING GUIDELINES 32-33 (2000).

tors, governors, business and civic groups, the media, and to some citizens. And, as increasing numbers of people put their faith and trust in the judiciary, the courts successfully create political constituencies which promote the courts in new and innovative ways.[156]

These activities exemplify the many facets of modern propaganda.[157] The conferences, committee meetings, press releases, newsletters, continuing education, judicial outreach, and many other relatively new court activities are all different forms of propaganda now supported by the postmodern judiciary.[158] One of the principal results of the national conferences and the involvement of professional planners has been the compilation of training manuals and videos for use by activists interested in promoting related programs at the state and local levels.[159] All of these methods have the effect of creating fear, exposing previously unknown enemies, and spreading judicial activism as broadly as possible across the judiciary, the popular branches of government, and the public.[160] Moreover, propaganda creates greater uniformity of beliefs (judicial culture) within the judiciary. Likewise, it marginalizes potential opponents from the ranks of trial judges and court clerks who are depicted as "vested interests" opposed to a more efficient and just state.[161]

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156. *See* STATE JUSTICE INSTITUTE, NATIONAL COURTS AND COMMUNITY ADVISORY COMMITTEE, CITIZENS AND THEIR COURTS: BUILDING A PUBLIC CONSTITUENCY 2 (1995) [hereinafter CITIZENS AND THEIR COURTS]. This booklet is the product of a joint committee of the Conference of Chief Justices and the Conference of State Court Administrators using funds provided by the State Justice Institute. It was designed to show state courts how to create political constituencies like those enjoyed by the popular branches of government.

157. For a wide array of activities intended to change or solidify beliefs and move people to action, see RICHARD FRUIN, JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (American Bar Ass'n. 1999).

158. *See generally* JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES (1968).

159. WENDY L. SCHULTZ, ET AL., REINVENTING COURTS FOR THE 21ST CENTURY: DESIGNING A VISION PROCESS (1993) [hereinafter REINVENTING COURTS FOR THE 21ST CENTURY]; ENVISIONING JUSTICE: REINVENTING THE COURTS FOR THE 21ST CENTURY, *supra* note 48. These materials were prepared in advance of another large, national conference in 1993 at the Opryland Hotel in Nashville, Tennessee, to introduce futures planning to delegates from states not represented at the 1990 conference in San Antonio, Texas.

160. *See generally* ELLUL, *supra* note 158.

161. Propaganda marginalizes opponents within the judiciary by labeling them as "vested interests." *See* Rebecca Ferrar, *Resistance Could Sink Remodeling of Courts: Vested Interests Against Reform, Commissioners Say*, THE KNOXVILLE NEWS SENTINEL, June 10, 1996, at A4.

D. Therapeutic Jurisprudence

As the process of envisioning the future judiciary was underway, academics began writing scholarly articles outlining a new therapeutic role for the courts and a problem-solving approach to dispute resolution.[162] With the coining of the term "therapeutic jurisprudence" in 1987, an avalanche of scholarly literature has been produced, promoting a new therapeutic role for the courts.[163] These changes in role and function are of constitutional dimensions,[164] for they effectively abandon in both civil and criminal proceedings the constitutional process of adjudication to become, for lack of a better expression, the locus of the "healing arts."

Moreover, the courts are assuming a political posture reserved in the various constitutions for the executive and legislative branches of government. Corrections has always been an executive branch function. Moreover, the rehabilitative goal of punishment that began in the

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162. The origin of the term "therapeutic jurisprudence" is attributed to David Wexler, a professor of law at the University of Arizona who used the term in a paper first delivered in 1987. The origin and expansion of the term within the study and application of law to drug treatment courts is discussed in an article by Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse Crime in America*, 74 NOTRE DAME L. REV. 439, 442 (1999). *See also* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitaionism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2063 n.1 (2002).

163. The International Network on Therapeutic Jurisprudence at the University of Arizona's James E. Rogers College of Law maintains an exhaustive list of articles related to therapeutic jurisprudence. *See* Archive of Articles on Therapeutic Jurisprudence, http://www.law.arizona.edu/depts/upr-intj/bibliography/viewall.cfm (last visited May 8, 2007); *see also* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003).

164. The most basic statements of fixed principles of law are contained in the federal and state constitutions. Consequently, the court futures movement is fundamentally concerned about changing constitutional forms of government. *See* Joseph F. Coates, *The Future of Law: A Diagnosis and Prescription*, in JUDGING THE FUTURE, *supra* note 39, at 42.

> The most significant remedies must flow out of dealing with the basic situation: the most basic instrument of our legal system, the Constitution, is obsolete. We need a system which reflects the natural social, economic, and institutional units of our society. A new constitution would do many things. Perhaps conspicuous among these basic changes would be eliminating about four-fifths of the units of government. . . . You cannot govern any complex system with that many non-integrated controls.

Id. at 54.

late nineteenth century with the effort to rehabilitate juvenile offenders was lodged in the executive branch and was a complete failure. There is absolutely no reason to believe that rehabilitation, even if it is the desirable goal of corrections, should become a judicial function. Furthermore, there is no reason to believe that the judiciary will succeed where the executive branch has failed.

Alternative, interdisciplinary methods of resolving disputes by sociological and psychological methods, using the "coercive" power of the courts, are being developed which introduce an "ethic of care" into court processes and focus on the law's impact on the emotional life and psychological well-being of litigants, family members, witnesses, jurors, and others.[165] No longer are lawyers and litigants to be concerned about winning or losing; the goal is to create a "win-win-win" solution for the well-being of the parties and the community.

New ways of initiating and expanding the work of judges are being developed to thrust them into the private lives of individuals and communities. In 1998, Chief Justice David Brock of New Hampshire noted the "remarkable transformation—a sea change—in the role expected of our judges and the courts." "The judge of thirty years ago," observed Justice Brock, "was reluctant to emerge from his chambers to involve himself in the family and social problems confronting the people in their daily lives." Today, however, judges find themselves, quoting Chief Justice Ellen Peters of Connecticut, "'engaged not only in adjudicating court cases but in providing ancillary social services to families, the elderly, to victims, to all those who need structural assistance in coping with social demands.'"[166]

The new role of the courts to which Justice Brock referred mounts a broad attack on the adversarial process itself, the rule of law, and the work of lawyers and judges who presently function in a decision-mak-

165. The "ethic of care" said to be part of therapeutic jurisprudence is a key component of the Public Trust and Confidence agenda. *See* Roger K. Warren, *Public Trust and Procedural Justice*, 37 COURT REVIEW, Fall 2000, at 13, 15; *see also* Susan Daicoff, *Making Law Therapeutic for Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811, 813 (1999).

> TJ explores the therapeutic or counter-therapeutic consequences of the law on the individuals involved, including the clients, the clients' family members and other associates, the lawyers, the judges, and perhaps even the community. TJ recognizes that the law is a social force with negative and positive emotional consequences for all the people involved in a particular legal matter.

Id. at 813.

166. Chief Justice David Brock, New Hampshire Supreme Court, Address at the William H. Rehnquist Award Dinner, Washington, D.C. (1998).

ing capacity. In the past, judges did not claim to be ending conflict, but only making decisions. Let us, however, assume that ending conflict was their reason for existence. It can only be said that they did so through the resolution of disputed issues of fact and the application of fixed principles of law to those facts. Judges "restrained" themselves in the sense that they presupposed a passive role in government that prevented them from interjecting themselves or their personal opinions into the private affairs of others. All pretense of restraint has now been abandoned, and judges are openly and boldly advancing on the popular branches of government, and on the citizens they purport to serve.

Today, reformers argue that the constitutional system solves very little, if anything. Indeed, the adversarial system of adjudication only contributes to further argument and conflict.[167] The underlying mental or emotional problems now believed to be responsible for conflict remain long after the lawsuit is over. If people are to be healed both "physically and psychologically" by their participation in the dispute resolution process, adversarial proceedings must give way to alternative methods of resolving disputes.[168] Consequently, the present constitutional system, which has served since the Founding Era, is gradually coming to an end. It is being replaced by a powerful, judicial elite utilizing new techniques that claim the power to transform people and conflict by transforming the individual mind. Entering the twenty-first century, the techniques of the social sciences are, in the hands of the judges, called "therapeutic jurisprudence," and the courts which employ those techniques for the transformation of people and conflict are known as "problem-solving courts."[169]

The most visible aspect of the new judicial setting has been the creation of thousands of therapeutic, problem-solving courts all across

167. *See* DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998); David B. Wexler, *The Argument Culture and the Courts*, COURT REVIEW, Summer 1998, at 4, *available at* http://aja.ncsc.dni.us/courtrv/cr35-2/CR35-2Wexler.pdf (last visited May 8, 2007); ANNE STRICK, INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF LAW VICTIMIZES US AND SUBVERTS JUSTICE 124 (1977).

168. David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REV. DER. P.R. 273 (1996) ("Professor Slobogin said it well when he defined therapeutic jurisprudence as the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects. . . . Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or anti-therapeutic consequences.").

169. *See* Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence: Eleventh Annual Symposium on Contemporary Urban Challenges*, 29 FORDHAM URB. L.J. 1755 (2002).

the United States. These courts employ alternative techniques by which behavior can be modified and material wealth and moral authority redistributed. The new, "innovative" courts include Drug Courts, Family Courts, Community Courts, Teen Courts, Mental Health Courts, Domestic Violence Courts, Gun Courts, and the new Reentry Courts among others. But activists know that the creation of these specialty courts is expensive. They cannot be sustained over the long term. Consequently, the goal is to extend therapeutic techniques to the entire judicial system based upon the belief that the role of judges has changed from that of a dispassionate, disinterested magistrate to the role of a sensitive, caring counselor.[170] For the good of the individuals involved in conflict and the entire community, courts will work to modify individual behavior by controlling the human environment.

Reformers claim, however, that the traditional dispute resolution system will remain intact. People will use the new dispute resolution system, based upon advanced information technology, as easily as they now use ATM machines. The new, problem-solving system of courts applying therapeutic techniques will act as a kind of filter through which disputes will pass before they get to the traditional dispute resolution system, if at all. The progressive, reinforcing, and aversive aspects of the new judicial system are nicely expressed in this vision of the future system: "Citizen education is a necessary prelude to dispute resolution which begins at home, in the neighborhood or work place and, if not then successful, moves into the courtroom."[171] Using Professor Black's terminology, citizen education and alternative methods of dispute resolution are "less law" than a formal trial,[172] and the goal

170. David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts and Do Specialized Courts Imply Specialist Judges*, 37 COURT REVIEW, Spring 2000, at 22. In July 2004, the Conference of Chief Justices and the Conference of State Court Administrators adopted a joint resolution reaffirming their commitment to apply therapeutic principles to "traditional" courts. Each state is encouraged to develop individual plans to expand problem-solving techniques, and to develop at least one "demonstration" jurisdiction in each state to serve as a "laboratory" to apply problem-solving techniques within "traditional courts." *Chief Justices, Court Administrators Reaffirm Commitment to Problem-Solving Courts*, 7 CENTER COURT, Fall 2004, at 2. Moreover, speakers at conferences routinely advocate the extension of therapeutic techniques to all courts.

171. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 24.

172. THE BEHAVIOR OF LAW, *supra* note 106, at 3.

> Law itself is social control, but many other kinds of social control also appear in social life, in families, friendships, neighborhoods, villages, tribes, occupations, organizations, and groups of all kinds. Thus, the proposition

of court reform has been to create a system where "less law" is implemented in the process of resolving disputes. But all techniques which may be considered "less law" are annexed in some way to the formal judicial system through the expanded use of volunteers, mediators, experts and others employing alternatives to the process of adjudication. Unfortunately for us, however, law, whether denominated "more law" or "less law," is becoming universally, intimately and frighteningly personal. Law implicitly becomes synonymous with a veiled judiciary, requiring "citizen education" which "begins at home, in the neighborhood or work place."[173] This vision for the courts adopts dispute resolution that becomes the essence of collective life, producing, through the coercive work of the courts, new, peaceful communities characterized by material and moral equality, inclusiveness, tolerance, mental health, and other judicial values.

E. *The Judicial Skinner Box*

It is not true, however, that the "traditional" judicial system will remain the same. Indeed, it has already been irrevocably changed, and the way to explain that change is to go back to the study and modification of human behavior. Skinner and the behaviorists who followed used white rats placed in Skinner Boxes where they were taught to perform certain routines by a series of reinforcements contingent upon particular forms of behavior. If the rat successfully performed its routine, it was rewarded, and continued to be rewarded as long as it performed the routine imposed by the psychologists. If the rat failed to perform the desired routine, a wave of electric current, passing through metal rods in the floor of the box, shocked the rat.[174]

The traditional court system has become a part of the therapeutic setting, and serves as the gateway—the usher—to the Skinner Box and the metal rods which made up the floor of the box in which the rat was placed. The traditional judicial system with its stiff criminal sentences and its sizable money judgments serves as an inducement for people to

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> states that the quantity of law increases as the quantity of social control of these other kinds decreases, and vice versa. So formulated, it applies wherever and whenever it is possible to measure the quantity of each. It applies to everything from the evolution of social life across the world to an encounter between two people on the street.

Id. at 6.

173. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 24.

174. The author was employed in 1967 building the electrical equipment required for experiments on white rats in the Psychology Department's Operant Laboratory at the University of Tennessee.

accept therapeutic modification rather than risk potentially oppressive judgments. But failure to perform the therapeutic routine, failure to accept the new outlook on life, a demand for a result based upon fixed rules of law—all of these things—can lead to being thrown back into the traditional court system, or, even worse, subjected to more severe sanctions in problem-solving courts.[175] For example, defendants (now referred to as "clients") in the drug courts, who are caught using drugs through random drug screens, may be punished by "shock incarceration," and this may happen multiple times for some defendants before they finally emerge from the therapeutic system cured of the problem of drug addiction.

Some form of aversive conditioning is present in almost all therapeutic settings, but it is often very subtle and difficult to recognize. Peer pressure, reeducation, shaming, and community service are techniques employed in problem-solving courts and in collaborative law and restorative justice settings to punish clients and encourage conformity to judicial standards of behavior. But the drug court best illustrates the application of the science of behaviorism because the principal sanction, "shock incarceration," is the punishment most easily identified as the equivalent of the electric shock applied to Skinner's rats. Presented with the risks of "going to court" litigants sign waivers of rights and enter the therapeutic system. Incarceration is "shock incarceration" in the sense that it can happen in an instant at the discretion of the judge. A "client" can be free one minute and on his way to jail the next, based upon the results of a drug screen or other deviant behavior reported electronically to the court by treatment team members or the community of court volunteers. The judge's computer becomes a witness against the client.

Based upon experiments with rats, drug court judges are warned about the habituating effect of punishment on their clients. The behavior of mice trained to press a bar to obtain food can be subsequently changed by "shocking the mouse each time it presses the lever, and precisely how much the bar-pressing rate will decline is directly pro-

175. *See* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 52-57 (2001); *see also* James L. Nolan, Jr., *Redefining Criminal Courts: Problem-solving and the Meaning of Justice*, 40 AMER. CRIM. L. REV. 1541 (2003); Patricia Lee Refo, *The Vanishing Trial*, 30 A.B.A. J. SEC. LITIG. 1, 3 (2004), *available at* http://www.abanet.org/litigation/journal/opening_statements/04winter_openingstatement.pdf (last visited May 8, 2007) ("For whatever reason, some judges are simply anti-trial. Judith Resnick of Yale documented judges who view trials as "failures" that occur only when lawyers have not done their job and obtained a negotiated resolution. These judges view themselves as case-resolvers—the faster the better. They have their ways of exacting a toll on those who want to hold out for a jury trial.").

portional to the strength of the electric shock. . . . At some level of intensity, the bar pressing ceases altogether after only one or two trials."[176] The danger for drug courts, however, is that

> [s]ubjected to punishment at low to moderate intensities, both animals and human beings can become [accustomed] to being punished, resulting in their being able to withstand unusually high levels of punishment. . . . By analogy, recidivist offenders could become habituated to threats from the criminal justice system, and cease to be deterred by even long periods of incarceration.[177]

Consequently, drug court judges must take an experimental, scientific, and personalized approach to the use of shock incarceration as a means of modifying undesirable behavior and forming new behaviors:

> The findings on habituation have important implications for the use of graduated sanctions in drug courts. Virtually all probationary and drug court programs impose graduated sanctions . . . and the implications of habituation must be taken into account when developing a graduated sanction plan that can last the life of a treatment program. Every time we meet an infraction with a light sanction, we run the risk of habituating the offender to the next level of sanction. This is not to say that graduated sanctions are contraindicated. Rather, it suggests that building up the intensity of sanctions slowly could be counterproductive; generally speaking, early sanctions should exceed a meaningful threshold of intensity. For the first infraction or two, a stern warning and a fairly moderate sanction might be in order (e.g., a requirement to spend several hours or several days observing court sessions). In the very early stages of treatment, the most pressing issue may be to demonstrate that infractions can be detected and will be acted upon.[178]

Skinner never favored aversive conditioning, however. Instead, he favored subtle rewards as reinforcers of desired behavior. He enjoyed telling a story that illustrates the subtle ability of behavioral techniques employed by groups of people to shape the behavior of an individual:

> There's a story about a professor who criticized me publicly on television and his students decided to shape his behavior. And so they agreed in advance that they wouldn't smile or nod unless he was standing on one corner of the platform. And pretty soon he was standing there. And then they arranged that they would not smile or nod unless

176. Douglas B. Marlowe & Kimberly C. Kirby, *Effective Use of Sanctions in Drug Courts: Lessons From Behavioral Research*, NATIONAL DRUG COURT INSTITUTE REVIEW (National Drug Court Institute), Summer 1999, at iii.

177. *Id.*

178. *Id.* at viii.

he was facing the blackboard. And they told me that by the end of the hour he was lecturing facing the blackboard and talking over his shoulder.[179]

Skinner was describing a technique called "shaping" which produces behavior that does not previously exist, much as animal trainers teach lions and dolphins to jump through hoops. But where the desired behavior already exists, even in limited circumstances, the task of producing the preferred behavior and eliminating undesirable behavior is just a matter of differential reinforcement. Judges, court therapists, mediators, volunteers, and all other members of the expanding court team who employ the friendly smile as part of the new judicial process are merely technicians employing a superior technology for changing individual and collective behavior.

Remember, however, that humans have cognitive skills far more complex than those of animals. Behavior is learned and can be modified in a classroom setting, and the community is becoming a kind of classroom environment for the courts. Consequently, the client is sanctioned with more in mind than the client's immediate reformation. Sanctions in the therapeutic setting, whether they are in the form of shock incarceration or work assignments painting over graffiti or sweeping broken glass off the streets, are "therapeutically observed"[180] by other people, including to some extent law-abiding members of the community. The punishment inflicted upon clients of therapeutic courts is not merely a lesson about behavior to be avoided, but a reason to support or join the courts' work in the community. This effectively makes two-legged white rats of clients and observers of the new therapeutic judicial system.

F. *The Sovereignty of the Individual Mind*

The manipulative, controlling techniques of the therapeutic judiciary stand in sharp contrast to the moral and intellectual autonomy of the individual which prevailed during the Founding Era. In his essay, *On Liberty*, John Stuart Mill observed that there needed to be some "fitting adjustment between individual independence and social control."[181] He conceded that some "rules of conduct" imposed by law were necessary, but that it was also necessary to "limit the legitimate

179. Ken Hutchins, Don H. Hockenbury and Sandra E. Hockenbury, Psychology: The Human Experience, Telecourse Segment 7, Operant and Classical Conditioning, Coast Learning Systems, Fountain Valley, CA (2002).

180. *See, e.g.*, Jerry L. Colclazier, *Therapeutic Jurisprudence: The Nuts and Bolts of Drug Courts in Oklahoma*, 71 OKLAHOMA BAR J. 1985, 1986 (2000).

181. JOHN STUART MILL, ON LIBERTY 7 (1956).

interference of collective opinion with individual independence."[182] Mill understood, as we all do, that absolute freedom is impossible. People cannot be completely free to engage in any type of conduct because that could result in harm to others; ultimately, one person's ability to make unfettered choices could mean the loss of another person's life, freedom, or property. Murder, theft, rape, and a whole host of other forms of violence and disorder could be expected in a world where evil was not restrained to some extent by the force of law. The problem, as Mill saw it, was "how to make the fitting adjustment between individual independence and social control."[183] While he acknowledged the continuing debate about where to draw the line on the application of law, he concluded that "over himself, over his own body and mind, the individual is sovereign."[184]

This belief in the sovereignty of the individual over his own body and mind pervaded the political thought and discourse of the Founding Era, and was at the heart of the concept of liberty. A person was believed to be entitled to shield the inner-workings of his own mind—those processes which form the basis of character, personality, and creativity—from public scrutiny. There are some things a person can choose to reveal about himself through the content of his voluntary conversations with others, and, indirectly, by his conduct. But many other beliefs, feelings, and propensities, comprising the "true self," are kept hidden, and it is these secret things of the mind that were considered to be off-limits to the law. The dark tendencies of the mind are kept hidden because they present an intolerable contradiction between the person we want others to know and the secret thoughts which, if left unchecked, would be destructive to the individual and others. What is more, we keep hidden from public view our beliefs about who we are in relation to other people and to the state as well as the unique creative processes of our mind which form the basis for intellectual property and imbue life with meaning. It is at this level that the ultimate battle for "control" is taking place, and the battleground is no longer conceded to the individual conscience.

Until modern times there was a limited threat to a person's ability to possess his body and mind free from intrusion by others. During the Founding Era, the potential of government to invade the home and private affairs of the individual consisted of British troops breaking in the door. By the 1960s, however, technological advances consisting of everything from electronic eavesdropping, to mind-altering drugs, to

182. *Id.* at 8.
183. *Id.* at 7.
184. *Id.* at 7-8.

psychological testing opened up a vast array of new tools to invade not only the home but the mind.[185] When Mill made his observations about the ultimate limits of law and government, these techniques did not exist. Consequently, the mind was protected by an almost universal understanding that the activity taking place there was uniquely personal and religious in nature, and subject to the control of the individual conscience. Furthermore, it was protected by constitutional prohibitions against cruel and unusual punishment and unreasonable searches and seizures by which government might coerce people to reveal personal thoughts and beliefs, and by the technical inability to gain access to it.

All of that has now changed. The change has come not from scientists trying to collect data for an experiment, nor from police in the service of the executive branch, but rather from a judicial system transforming itself into an institution concerned first and foremost with the thoughts and impulses residing in the mind of every individual.[186]

The judicial system now being created takes a sociological and psychological route to solving problems in both criminal and civil settings. In the view of reformers, dispute resolution based upon fixed principles of law is at best incomplete and at worst destructive (antitherapeutic) to the people involved. Thus, the new system recasts the judicial power as a means of changing how people think and feel.[187] As the courts functioned in the past, they were unconcerned

185. Oscar M. Ruebhausen & Orville G. Brimm, Jr., *Privacy and Behavioral Research*, *in* LAW AND THE SOCIAL ROLE OF SCIENCE, *supra* note 81, at 87.

186. *See, e.g.*, Symposium, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003) (combining insights from psychology, sociology, cognitive science, and empirical research to examine cognitive processes to determine whether human decision-making is rational and utility-maximizing as the law and economics tradition insists, or is often flawed and irrational so as to require a different approach to law).

187. *See, e.g.*, Richard C. Reuben, *The Lawyer Turns Peacemaker: With mediation emerging as the most popular form of alternative dispute resolution, the quest for common ground could force attorneys to reinterpret everything they do in the future*, 82 A.B.A.J. 54 (1996).

> Some experts believe mediation should facilitate the parties' own resolution of the problem by digging deep into the interests and feelings underlying the surface dispute. Mediators who take this more therapeutic approach would in a divorce mediation, for example, try to work through the parties' feelings of anger or resentment or rejection that led to the breakdown of the marriage. Then they can let that cleansing process pave the way for mutually acceptable terms of property settlement and child custody—and maybe even reconciliation.

Id.

about the secret thoughts of any person until some overt violation of the law occurred. A man could secretly desire to be a world-class bank robber. He could drive by the bank daily, looking carefully and longingly at the security system and the cash-filled vault. But as long as he engaged in no conspiracy nor made any attempt to rob the bank, he was considered a citizen in good standing. It was only after the commission of a prohibited act that the courts became interested in intent, and then only for the purpose of determining whether or not the perpetrator was acting with the requisite evil intent, the mens rea, or was part of an innocent mistake. A person may walk out of the door with the bank's money, but be found to have done so in the most innocent and unintentional manner. The mens rea, in itself, was insufficient to support state scrutiny or sanctions. In contrast, the therapeutic judicial system is concerned about the cognitive forms of human behavior because they precede the overt forms of behavior with which courts must deal, and originate from the same environmental contingencies.[188] "It is always the environment which builds the behavior with which problems are solved, even when the problems are to be found in the private world inside the skin," observed Skinner.[189] This is a secular version of the old Biblical maxim: "As a man thinketh so is he." But the private thoughts and beliefs that were once strictly between an individual and God are now considered to be the proper subject for judicial inquiry.

G. *Conflict as a Vehicle for Change*

Court scenarios, such as the anti-utopian excerpts set out above, depict the basic future conflicts as being either conflicts of interests or conflicts of values.[190] The future conflicts of interests may arise over many things, but basically these are conflicts that arise out of competi-

188. *See* Thomas D. Barton, *Therapeutic Jurisprudence Preventive Law and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POL'Y & L. 921 (1999) (contrasting the "traditional," "judging" style of dispute resolution with therapeutic jurisprudence and problem solving).

> In psychological therapy seeking an accommodative solution, no one is declared a winner or loser.
>
> . . .
>
> From a psychologist's standpoint, a problem is considered resolved if the client satisfactorily reorients to the problem—emotionally, behaviorally, or cognitively.

Id. at 929.

189. BEYOND FREEDOM AND DIGNITY, *supra* note 101, at 195.

190. For a discussion of conflict theory, see generally A. JAVIER TREVINO, THE SOCIOLOGY OF LAW 351 (1996).

tion for scarce resources, the most basic of which are food, clothing, housing, fuel, and the like. Stated another way, conflicts of interests are conflicts over money. Conflicts of values are those implied in the "multicultural" or "mosaic" future society envisioned by the courts in which people differ over other peoples' religious, cultural, and political beliefs and behaviors. These latter conflicts differ from conflicts of interests in that they are not the result of competition for scarce material resources, but of the fact that people routinely deny the validity of beliefs and values held by others, thereby inflicting mental or emotional harm to the self esteem and moral authority of others. Conflicts of values represent a competition of ideas about the meaning and purpose of life itself. These views of conflict and the courts' new role in resolving conflict are derived from nineteenth-century theories advanced by Karl Marx and others who looked favorably on the existence of conflict as an opportunity to bring about needed social changes.[191] Conflict becomes a political struggle (now being fought out in the courts) as competing groups vie for sufficient political power to overcome opposing groups for control of wealth and moral authority.[192] The argument for a new role for the courts is implied by the juxtaposition of scenarios depicting conflicts over material wealth and moral values, and the suggestion that these conflicts will persist only because the courts will have somehow failed to prevent them.

Court reform manuals and state reports use various conflicts to illustrate differences in possible futures for society. In the Generic Justice Scenario presented to those who attended The Future and the Courts Conference in 1990, "[i]ntergenerational rivalries combined with interracial rivalries to create political wars for resources."[193] Moreover, ". . .groups of the poor took over certain cities. . . . Other cities were gentrified with unemployed and poor people . . . banned from the city from sundown to sunrise. The practice of having professional sports teams represent different cities was abandoned because of riots, threats to. . .players, and the fact that. . .certain races were banned or 'discouraged' from certain cities."[194] In the Road Warrior Scenario, America had ignored the environmental warnings of the 1970s and Mother Nature came back to "demand her share" in the 1990s when the Greenhouse Effect caught up with us, resulting in catastrophic natural disasters and destruction of civilization as we know it. Resources were simply no longer available, and death was the result:

191. *Id.* at 371.
192. *Id.*
193. ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020, *supra* note 111, at 16.
194. *Id.* at 17.

> Government funding didn't cover the loss of revenues and the poor found themselves in ever greater competition for scarce resources. Old people were encouraged to "step aside" to make way for the young and where this wasn't effective, variously coercive levels of "euthanasia" were practiced. The other effect of zero population growth was more subtle but undercut the very foundation of America as the land of opportunity.[195]

These are only a few examples of imaginative futures for society contained in forty-two, single-spaced pages of scenarios prepared by futurists for court reformers who envision multiple, extreme forms of conflict and then begin making plans for a judicial system that prevents them.

The benefit of constructing scenarios depicting alternative futures defined by conflicts of interests or values is not that they are factual or that any one scenario represents "the" preferred future. Rather, contrasts between good and bad, desirable and undesirable, can be found throughout all scenarios, and the goal for court planners is to identify from among alternative futures those conditions or events that are desirable as opposed to undesirable, thus guiding them in the process of planning toward the desirable components of a preferred future. Is it not clear that the real decision-makers in this process are those who created the scenarios? Given the choice between a world in conflict and a world at peace, would there be any who would select conflict over peace? Having court planners, under the direction of professional futurists, envision and then select desirable components from multiple possible futures does not just guide them toward a preferred future; it *drives* them toward that future. After the planning process is completed, few of the original state visionaries ever go on to achieve anything contained in the report. Their reports give the appearance of legitimacy to changes in court form and function which the judges will work to achieve, often through others. By constructing alternative futures that contrast materially equal, peaceful and prosperous societies with societies characterized by chaos and hardship, visionaries make the transition from the antiquated, constitutional judicial system to a new system of behavioral control capable of achieving the desired individuals and communities. Judicial scenarios depicting conflicts among competing classes and special interests is an imaginative, working example of the Hegelian dialectic employed so effectively by Karl Marx as the working principle of Communism. Criticisms and visions work together like a giant wrecking-ball to tear down the constitutional judicial system and clear the landscape for a new system of govern-

195. *Id.* at 21.

ance. Moreover, the hypothetical fact situations generally avoid the opprobrious, abstract language of Marx while guiding thought processes by the use of vignettes or fact scenarios people can imagine from experience. Scenarios have the effect of disguising the dialectical approach to social transformation so that participants in court commissions are more concerned about preventing future catastrophes than advancing socialism.

Furthermore, scenarios portray conflict as more than a mere class struggle. They are designed to appeal not only to the poor, but to a broad range of subgroups: feminists, the poor, racial minorities, the elderly, homosexuals, environmentalists, children, victims of crime, and a host of other subgroups that form potential constituencies for the courts and advocates for the effort to reinvent the judicial system. Scenarios are designed to appeal to people whose lives are defined by their membership in an identifiable class or subgroup, and whose concept of justice is equality of outcomes.

The common thread running throughout the scenarios of alternative futures is that the free market, limited government resources, and representative government produce inadequate or flawed planning for the future and socially unjust outcomes for disadvantaged individuals and subgroups.

This type of appeal is a common feature of the American Left. Because American capitalism failed to validate socialist theory, socialism, while popular among intellectuals, failed to take hold here as it had in Russia and other parts of the world. The American Left believe that something is fundamentally wrong with our society, and that the chief way of righting it lies in mobilizing the power of all the disadvantaged groups behind a drive for radical change—change, as Nathan Glazer put it, "going to the roots."[196] Real problems helped fuel the radical agenda. Racial inequality, the Vietnam War, urban poverty, and other problems animated the American Left. However, the simple analysis of the Old Left, noted Glazer, "that capitalism or imperialism is at the root of the matter. . .was not very satisfactory . . . because it was too easy to point to the example of [other] capitalist countries . . . to prove that no necessary causal relation exists between oppression and the institutions of capitalism."[197] As a result, the New Left of the 1960s began to decide that the "problem lies not in the institutions of capital-

196. THE NEW LEFT AND ITS LIMITS, COMMENTARY, XLVI (1968), *reprinted in* IDEAS IN AMERICA: SOURCE READINGS IN THE INTELLECTUAL HISTORY OF THE UNITED STATES 536, 537 (Gerald N. Grob & Robert N. Beck eds., 1970).

197. *Id.* at 538.

ism as such but rather in all types of fixed and formal institutions."[198] Fixed institutions in America represented the application of a predominately Christian worldview that left people free to express moral precepts in multiple ways. But nowhere was that freedom more palpable than in the legislative process by which the moral views of the majority were translated into legislative enactments. Thus, the system of government, which applied fixed principles of law produced by elected representatives and derived from a constitutional base, became a principal target of political change by the American Left.

Because the growing middle class could not be depended upon to lead a Marxist revolution based upon economic considerations, Marxism was translated from economic terms into cultural terms. The new Marxists, gathered at what became known as the Frankfurt School, fled Germany before the outbreak of World War II and many came to the United States. An Americanized variety of Marxism, articulated most prominently by Herbert Marcuse, produced what we know today as multiculturalism or cultural Marxism.[199] Multiculturalism appeals to subgroups of victims that may not be disadvantaged economically, but are disadvantaged in terms of values reflected in religious beliefs, legislative enactments, and governmental processes. Marcuse and other Marxists turned to a coalition of feminists, students, blacks, intellectuals and homosexuals to lead a modified, non-violent revolution targeting all existing institutions. The family, church and government were relentlessly criticized for the purpose of destroying them. This movement was most noticeable on college campuses in the 1960s, but has carried over within intellectual circles to the present day.

As strange as it may seem, Marcuse attacked the concept of Western tolerance as a tool of oppression, leading him to propose a new concept of tolerance suitable for the purpose of advancing Marxist doctrine.[200] For Marcuse, tolerance served only to preserve the status quo by which a majority ruled over an oppressed cultural minority. He believed that no institution, authority, or government existed that would translate liberating tolerance into practice.[201] The status quo was said to be preserved by violence and suppression that was promulgated, practiced, and defended by democratic and authoritarian gov-

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198. *Id.*

199. *See generally* PAUL EDWARD GOTTFRIED, THE STRANGE DEATH OF MARXISM: THE EUROPEAN LEFT IN THE NEW MILLENNIUM (2005).

200. Herbert Marcuse, *Repressive Tolerance* and *Postscript 1968*, *in* WOLFF, MOORE, & MARCUSE, A CRITIQUE OF PURE TOLERANCE (1969), *reprinted in* IDEAS IN AMERICA, *supra* note 196, at 517.

201. *Id.*

ernments alike through the police, the courts and other sources of authority.[202] Even passive or non-partisan tolerance was condemned because it "refrain[ed] from taking sides, but in doing so it actually protect[ed] the already established machinery of discrimination."[203] Freedom of speech, for example, "was granted even to the radical enemies of society, provided they did not make the transition from word to deed, from speech to action."[204] In other words, freedom of the sort guaranteed by the Constitution was considered to be a means of venting cultural pressures, of pacifying people who were actually enslaved by the majority in control of government.

In a society where powers were unequal, tolerance of the sort condemned by Marcuse not only perpetuated inequality but allowed it to increase over time. The laborer's interest conflicts with that of management; the consumer's interests conflict with those of the producer; and the intellectual whose vocation conflicts with that of his employer are all doomed to a future of oppression and inequality. Because institutionalized tolerance is designed to maintain the status quo they "find themselves submitting to a system against which they are powerless. . . ."[205] Consequently, constitutional rights and processes had to be abandoned in favor of the pragmatic need to help victims of discrimination and inequality. "The small and powerless minorities which struggle against the false consciousness and its beneficiaries must be helped: their continued existence is more important than the preservation of abused rights and liberties which grant constitutional powers to those who oppress these minorities."[206]

In order for a state of harmony to exist between various individual liberties it was not enough to find a compromise between competing ideas or between freedom and law of the kind articulated by Mill. Rather, it required "creating the society in which man is no longer enslaved by institutions which vitiate self-determination from the beginning."[207] "In other words, [because of tolerance] freedom is still to be created even for the freest of the existing societies."[208] Consequently, Marcuse argued, a new kind of tolerance is required, one that

> cannot be indiscriminate and equal with respect to the contents of expression, neither in word or in deed; it cannot protect false words

202. *Id.* at 518-19.
203. *Id.* at 519.
204. *Id.*
205. *Id.* at 522.
206. *Id.* at 529.
207. *Id.* at 519-20.
208. *Id.* at 520.

> and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation. Such indiscriminate tolerance is justified in harmless debates, in conversation, in academic discussion; it is indispensable in the scientific enterprise, in private religion. But society can not be indiscriminate where the pacification of existence, where freedom and happiness themselves are at stake: here, certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.[209]

Consequently, "[l]iberating tolerance . . . would mean intolerance against movements from the Right, and tolerance of movements from the Left."[210] Marcuse, through the twisted, convoluted logic of Marxism, literally redefined intolerance as tolerance.

Conflicts between disadvantaged subgroups and the larger society are contained throughout the scenarios created by and for court planners. Value statements and ethical rules promulgated by state supreme courts through their various commissions and committees are expressly intended to suppress statements by members of the judiciary that reflect the pure tolerance denounced by Marcuse, and reflect, instead, the "liberating tolerance" advocated by him as a means of advancing a Marxist revolution through legal and cultural means. Supreme Court ethical rules prohibit, for example, any expression of bias based upon race, gender, or sexual orientation. Similar ethical statements appear throughout futures commission reports. For example, the Tennessee Futures Commission noted:

> Our vision of the future, therefore, is framed in ideals. We do not precisely predict, for instance, that by the year 2026 all biases will be eliminated. We do have a vision of such a system, and we believe that progress toward the vision is essential, for the judicial system itself will be called upon to mediate all sorts of new disputes that fall along factional lines.[211]

Obviously, mediating new disputes that fall along factional lines will require some discrimination between competing interests, but in many cultural disputes the decision about where the courts will draw lines are predetermined by the courts in the form of value statements.

Moreover, statements of values or the prohibition of expressions of bias are not intended to produce a fair trial at the hands of potentially abusive judges. Every day judges provide fair trials to all kinds of people they personally disagree with – adulterers, drunk drivers, van-

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209. *Id.*
210. *Id.* at 529.
211. TO SERVE ALL PEOPLE, *supra* note 138, at 8.

dals, thieves, murderers and others. For example, if two people are disputing over the title to a piece of land the fact that one of them is black or a homosexual is irrelevant to the outcome, and any attempt by the other party to make that fact an issue in the case would be suppressed immediately by the judge as an improper attempt to influence the outcome of the trial. Rather, such ethical statements are intended to affect the substantive outcomes of future lawsuits by inducing a belief that laws affecting particular subgroups are themselves unfair, and that only an unbiased judge will overturn them. Given recent trends the most immediate expressions of this may come in the form of state court decisions advancing affirmative action, protecting abortion, approving homosexual adoptions, and ordering state legislatures to permit same-sex marriages. Utilizing similar legal theories, lawsuits may be expected to strike down laws prohibiting polygamy, incest, and other sexual offenses.

A judge who provides a fair trial procedurally but applies the law as given to him by the legislature is exercising an example of classical tolerance, while a judge who strikes down legislation in favor of the disadvantaged victims of society is exercising an example of what Marcuse called liberating tolerance. Of the two judges, only the latter is unbiased. Thus, statements of values predetermine the outcome of lawsuits and, consequently, the form of the future society.

In the service of the new judicial system, conflict serves to advance, not the interests of individuals or constituent subgroups, but the power of the judiciary over all people. But in the case of the American judiciary it does so in a new way—not by the overt oppression so visible in former totalitarian regimes—but, instead, by subtle, manipulative techniques of social control applied by a technologically-competent, authoritarian elite that seems to be not merely acceptable but pragmatically necessary.

Conflict theory presents conflict as a crisis in human interaction brought about by competition for material resources or moral authority. The science of human behavior is used to change the interaction between individuals and between individuals and the state by therapeutically changing the way people think and feel. Conflict often causes people to feel confused, fearful, and unsure about their situation in life. The new system is focused on the inner-workings of the minds of those involved in conflict, and fixed principles of law are only a utilitarian means of giving the courts the power to address their

social and psychological needs.[212] The new system, utilizing new techniques, uses the existence of conflict or antisocial behavior as a starting point for the courts to begin their work of inducing the parties to grow calmer, stronger, more confident, and better able to handle life's problems. They voluntarily choose to become more open, attentive, and responsive to the situation of others. By doing so, they expand their perspective to include an appreciation for the needs of other people, and this constitutes, to the reformers, a resolution of the underlying problem of conflict.[213] If at the end of the crisis people exit the system with a new frame of mind, the process of healing is complete.[214]

H. *New Transformational Options*

New options are being made available to the courts in a broad range of physical environments with the penitentiary at one extreme and the home at the other. In between are the treatment center, the halfway house, house arrest, and, as we shall see, the entire community.[215] While in these various locations the courts will employ a vari-

212. For an example of how this might work in a domestic case, see Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 AM. ACAD. MATRIMONIAL LAW 233 (1997).

> Conflict can be seen as natural because when people live side by side in their most intimate contexts, it is inevitable for irritants to develop between them. In order for those vexations that swirl like gnats around them not to develop into major problems, people need to have strategies for resolving them before those aggravations become like killer bees.

Id. at 235.

213. Transformational dispute resolution is part of a larger trend away from the dominant Western "individualistic" worldview, which holds as its highest values individual autonomy and fulfillment, toward a "relational" worldview, which holds as its highest value the integration of individual autonomy and concern for others. *See* Patricia L. Franz, Comment, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1042 (1998) ("Bush and Folger approach mediation with the premise that conflicts need not be viewed as problems but can (and should be) viewed as opportunities for personal moral growth or transformation. This moral transformation is an internal move from an individualistic orientation to a balanced concern for self and others.").

214. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION xv (1994) ("As practitioners and scholars, we have come to believe that mediation's greatest value lies in its potential not only to find solutions to people's problems but change people themselves for the better, in the very midst of conflict.").

215. *See* Front Cover Illustration, 41 THE JUDGES' JOURNAL, Winter 2002 (problem-solving courts issue). This issue is especially helpful in understanding the revolution taking place in the judiciary, because of the cover illustration—the picture is worth a

ety of techniques to modify behavior, including sociological surveys, psychological tests, reeducation, mediation, peer pressure, drug tests, incarceration, community service (work therapy), medication, frequent reports to court, frequent praise, and just the caring, reinforcing smile of the court team. The expanded science of behaviorism, now including techniques from the broader field of neurotechnology, provides a wide array of new therapeutic techniques to trial courts by which a personalized combination of rewards and punishments, together with other therapeutic techniques such as reeducation and medication, are "scientifically" applied to bring about the desired modifications in the thoughts and actions of people who come under court supervision.[216] This is already happening in places like Mental Health Courts, Drug Courts, Family Courts, and other places where therapy is the principal work of the judiciary, but it has also spread to general jurisdiction courts which are relying heavily on mediation, reeducation and other techniques of social transformation. Some courts are even adopting New Age forms of alternative medicine such as meditation and acupuncture as part of the court setting.

Each of the new "options" available to the courts represents a court-ordered change in the environment of an individual corresponding to the nature of the problem being dealt with in a particular case. Behavior modification may take a rational approach to particular problems. Husbands and wives in the throes of a divorce, for example, are now required, as part of the court process in many states, to be reeducated regarding their changed situation in life and the way they should relate to their former spouse, their children, the courts, extended families, and other forms of interpersonal relationships.[217]

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thousand words. Three judges are depicted, each holding a tool—a paint brush, a wrench, and a drill. These tools do not mean that judges are going to begin constructing homes, but, rather, represent the techniques—the tools—of the social sciences by which judges will begin rebuilding peoples' lives. In the foreground of the illustration are the homes where people live and in the background are the buildings where people work. Wherever people can be found the courts will be there offering—no, demanding—that they heal people "physically and psychologically."

216. For an interesting article on the techniques of neurotechnology, see *The Future of Mind Control*, THE ECONOMIST, May 25, 2002, at 77. The process of combining rewards and punishments as a part of the therapeutic work of the courts is illustrated by the work of Drug Courts. *See, e.g.*, MICHAEL REMPEL, ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION, EXECUTIVE SUMMARY 1.

217. Most states have adopted Parenting Acts which require re-education of divorcing spouses. But this concept has potentially broader applications because: "[b]y any of these measures, the negligent-based tort system is deficient in meeting the generally accepted goals of compensating the innocent and punishing the

These are people who already know how do read, write and do basic math. Divorce and the accompanying battles over child custody and support place burdens on the state. Because divorce continues to be promoted as the solution for spouses with problems, technical methods had to be developed that ameliorate the burden on the courts where these problems are dealt with, while maintaining the moral authority of all parties, and, more importantly, the relevancy of the judicial branch. Consequently, the interpersonal skills parents are being taught in parenting seminars have more to do with preserving the power of the state than anything else.

There are, however, more subtle methods available in settings to shape or reinforce desired behavior. Known by such terms as Transformative Mediation, Restorative Justice and Collaborative Law, the courts are using mediation and community-based settings to induce the secular equivalent of repentance by bringing community offenders face to face with their victims, relatives, and representatives of the community, now also a victim.[218] Gathered around a table, the offender can see the pain he has caused his victim, the shame he has brought on his family, and the outrage and loss of the community which has had its feeling of peace and security shattered.[219] On the other hand, the victim, family, and community can see and appreciate the sociological

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wrongdoers. . . . On the other hand, it is not as important to "punish" the wrongdoer as it is to "educate" him—to prevent the recurrence of the accident." Selwyn Enzer, *Justice Without Fault:A Futures-Research Approach to Tort Reform*, *in* JUDGING THE FUTURE, *supra* note 39, at 63, 67.

218. *See generally* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999); Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N. C. L. REV. 1479 (1994) (dealing with restorative justice in the criminal setting).

219. *See* Robert F. Schopp, *Therapeutic Jurisprudence Forum: Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665 (1998).

> The community conference proposal based in RJ [Restorative Justice] reveals a more substantive normative commitment in that it endorses RJ as the proper goal of the dispositional process in at least some criminal cases. RJ emphasizes: reparation for the emotional and material loss of the victim; the reintegration of the offender into the community and restoration of the tranquility of the community. Methodologically, the RJ conferences directly involve the offender, the victim, and community members in meetings in which the participants negotiate a mutually acceptable reparation plan through which the offender makes reparation for the material and emotional injuries to the victim and the community and re-enters that community. The interaction at the conference emphasizes the emotional process, especially a core sequence involving the expression of shame and remorse by the offender followed by forgiveness by the victim.

Id. at 666-67.

and psychological problems of the offender who may have grown up in a broken home, suffered the abuse of bullies in school, lost his job, or some other unfortunate turn of events, all of which are intended to produce a sense of grace and forgiveness, and, more importantly, a sense of calm and peace to all concerned.[220]

The judges became a source of values for society through appellate court decisions and court commissions, and, now, by the work of the trial courts, they apply their healing hands directly to individuals and their communities.[221] One judge popular with the court reform crowd made the direct connection between the values and political power of the judiciary to maintain social order where there would otherwise be, at the very least, increased conflict if not complete breakdown. The things we learned in church, he argued, are no longer the

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220. *See* Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967 (1998).

> One reason to pursue these aspirations is pragmatic and psychological. Retributive approaches may reinforce anger and a sense of victimhood; reparative approaches instead can help victims move beyond anger and beyond a sense of powerlessness. Reparative or restorative justice can secure public acknowledgement and condemnation of the wrong, although through mechanisms that differ from prosecution, conviction, and punishment of wrongdoers. Restorative justice can also afford victims the position of relative power represented by the capacity to forgive—whether or not the individual victims proceed then to forgive particular perpetrators. Where victims do forgive, it is as much for their own healing and embrace of a future without rage as it is for the benefit of the offender.

Id. at 969.

221. When the reform movement was gaining momentum in the 1960s, the focus was still on the need for structural reform; there were indications among reformers, even then, that the judiciary should assume a greater responsibility for the welfare of private citizens. This sentiment was expressed at the Judicial Conference on Most Critical Problems of the Lower Court System held in Rancho Tranquillo on August 18-20, 1966. *See* STRUGGLE FOR EQUAL JUSTICE, *supra* note 48.

> The weight of a great, personal responsibility descended upon these individually lonely men [judges]. They had demonstrated a concern for their fellow man, especially the disadvantaged and the maladjusted. They had shown an appreciation of the dignity of the individual. There could be no question of their determination to uphold the rights of society to protection and security. They were enlisted in the battle to deter crime and disrespect for law and order.
>
> But now it seemed that they must shoulder, as individual judges, responsibility in their own communities and states to obtain the corrective measures, the additional support, manpower and facilities necessary to provide in their own courtrooms equal justice, fairly and timely administered.

Id.

answers to the problems we face as a nation, and the judges must begin communicating with the public about the values they hold. "The one remaining force providing the glue holding us together as a people is the judiciary," he said. "Whether we can remain a country under law depends on how well we do our job as judges."[222]

Consequently, claims being made upon the courts are much more profound than simply expanding the possible scope of civil and criminal liability. Though the law and adversarial litigation remain necessary as a vehicle for making social policy and promoting behavioral modification, the goal, where possible, is to move adversarial proceedings into the background as more subtle methods of manipulation are employed.[223] Mediation is a good, and, perhaps, the best example of this.[224] From a superficial perspective, mediation appears to be a technique by which the parties are "empowered" to work out their own solution to their problems.[225] But looming in the background, waiting

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222. Robert K. Pirraglia, Rhode Island District Court Judge, Lecture at the Tennessee Judicial Conference: Courts Under Attack (April 15, 1998).

223. *See* Janeen Kerper, *Legal Education: Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 354 (illustrating the contrast in the methods and purposes of the "traditional" system and the "problem-solving" system).

> It is important to note that creative problem solving does not jettison the adversary method. On the contrary, the adversary process is viewed as one important way in which individual and societal problems may be addressed. The difference is that creative problem solving seeks to rearrange priorities. Where collaboration is feasible, the adversary process is seen as the least desirable of a range of possible solutions. Where collaboration is not feasible (e.g., where the conflict is the product of a gross imbalance of power or where the conflict seeks to vindicate important civil or public rights) litigation may be the best solution.

Id. at 354.

224. *See, e.g.*, James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63 (2000). Alternative Dispute Resolution, now called by some Appropriate Dispute Resolution, or Culturally Appropriate Dispute Resolution, was originally focused on developing alternatives to the high costs of litigation. It assumes that parties are going to negotiate based upon their "interests" rather than the law. Mediation purports to shift the focus of dispute resolution from legal principles or legal rights to problem solving.

225. Jeffrey W. Stempel, *Therapeutic Jurisprudence/Preventive Law and the Lawyering Process: Theralaw and the Law-Business Paradigm Debate*, 5 PSYCH. PUB. POL'Y & L. 849 (1999). ADR, consisting primarily of mediation, began as a means of resolving disputes "in a process that was faster, cheaper, more streamlined, and less layperson-oriented than traditional trials." Mediation "and its cousins" have now "come to mean an effort to address disputes and problems in a nonadversarial or less adversarial manner in a process that seeks to empower the participants and lead to participant satisfaction and self-actualization of a sort." *Id.* at 854-55.

for the uncooperative, principled litigant, are the "traditional" courts which will provide a solution if the parties do not provide their own. But even this is illusory, for the parties ultimately cannot provide their own solution when working within a framework annexed to the state. The expanding theories of liability guide the mediation process, and increasingly these theories allow recovery for perceived mental and emotional grievances, injuries or injustices arising out of disputes in the home, workplace or the greater community. Much of the law being developed goes directly to relationships between husbands and wives, children and parents, employers and employees, landlords and tenants, the rich and the poor, and so on, and is creating all kinds of new lawsuits for homosexuals, minorities, children, people with disabilities, and other minorities—in short, "victims" of all kinds. As legislatures pass new laws, and as the judicial process continues to expand theories of liability, every person is becoming a guarantor of the health and happiness of every other person.[226] Consequently, when people get sued, they wisely desire to mediate a settlement just as quickly as possible to buy their peace at the least possible price. The parties, through mediation, may reach an agreement and be happy for it, but it is only in the context of the coercive power of the judicial system that this happens. Mediation, as court scenarios correctly point out, takes place in the "shadow" of the formal legal system which guides the end toward which mediation is directed.

There is an interesting way to illustrate this. In the report of the Massachusetts Futures Commission entitled, *Reinventing Justice 2022*,[227] the Commission constructed a scenario in which robots were granted the same rights as human beings by a decision of the Massachusetts Supreme Judicial Court in the year 2010. Because of its superior intelligence, one robot developed revolutionary software that it used to enhance its own capabilities, and held the potential to improve other androids. The robot patented the software, but its employer claimed exclusive rights to the program. "My employer's motive in filing an action against me is largely pecuniary," observed the robot. 'The company is more aware than I of the commercial potential for my new

226. The expansion of civil liability is used as an argument for supporting the therapeutic, problem-solving settings, including prevention. *See* Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence*, 5 PSYCHOL. PUB. POL'Y & L. 800, 802 (1999) ("However, the courts are open to anyone with almost any complaint. Civil liability is enormously flexible, and even when there isn't a cause of action called 'intentionally failing to get along,' there are always causes of action for something close enough.").

227. REINVENTING JUSTICE 2022, supra note 124, at 24.

program. It may also be the case, however, that the company resents my successful self-improvement, my new abilities, my increased "humanity." Whatever the motive, the company seeks exclusive rights to the program. It might have sued me outright, but for its desire for confidentiality,' the robot speculated.[228] When the robot refused to relinquish its rights to the patent the employer pressed the "JUSTICE" key on his personal communications unit, and the "intake counselor" sent the case to a "screening counselor." Although the "screening counselor" recommended adjudication, the parties, desiring privacy, opted for mediation where their respective "interests" could be considered for the purpose of reaching a just settlement. As a result, the parties "fashioned an agreement in which I [the robot] retain ownership of the program; my employer will obtain its exclusive use for five years in exchange for a modest royalty. Both of us are satisfied with the solution and promise to mend our heretofore good relations."[229]

This exercise, as fantastic as it may seem, is among a number of possible areas for future judicial activism. In addition to robots, other reform literature suggests that giving trees standing to bring suit would also produce socially desirable outcomes.[230] In this case, however, the robot is not a human being but personal property, and like trees and animals has no rights whatsoever. Except for the fact that the Massachusetts Supreme Judicial Court had decreed that it should have human rights, it would have been in no position to make a claim to anything. The robot and all of its labor would have belonged to its owner, the employer. Consequently, when the court declared it to be the moral and legal equivalent of a human being, it acquired the power of the state to force upon the employer certain outcomes. Just exactly what those outcomes would be was subsequently determined not through court decree, but through negotiation. That, however, would never have happened had the employer not known that it was no longer dealing with a piece of equipment, bearing testimony to the intelligence and inventiveness of the humans who created it, but was going up against an object that the Court had said was human. Consequently, the greedy, grasping, envious employer was forced to negotiate with the morally superior, but disadvantaged robot for whatever the employer could gain through negotiation. Had it not been for the kindness and generosity of the robot, the case might have gone to trial and the employer lost the case entirely.

228. *Id.*

229. *Id.* at 10.

230. SCHULTZ, *supra* note 159, at 130.

This is precisely how the law works in mediation. As the courts expand rights and create new theories of liability, the outcome of mediation is directed in not-so-subtle ways predetermined to meet the interests of the parties who shape socially desirable outcomes through negotiation, and increasingly trust the justice system. In the fictional case from Massachusetts, the original decision, giving human rights to robots, is accepted like so many other appellate decisions as part of the moral fabric of society and is never again seriously questioned regardless of however absurd and lawless it may be.

Mediation may be, as Professor Black would say, "less law" than a formal trial, but it is still law in the new procedural sense, and remedies are available through mediated agreements that are never available in contested litigation. Lawyers favor mediation, for example, in part because they can sometimes negotiate the payment of their attorney fees by the other party, a result not ordinarily available to courts rendering formal decisions. Not only does money flow in mediation, but it flows in new ways.

When mediation began gaining popularity in the 1970s, it was viewed as a way of moving more cases out of the judicial system without the time and expense of a trial. But by the 1990s the remedial aspects of mediation and of other forms of Alternative Dispute Resolution had gained favor for transformative reasons, while retaining the mantle of efficiency and cost-effectiveness.[231] The Commission on the Future of the Maryland Courts touched on this change in its Final Report. In Maryland, as in most other states, less than ten percent (usually five to seven percent) of all cases ever go to trial. The vast majority continue to be voluntarily dismissed or settled by the lawyers representing the parties. But mediation became popular as judges gradually gained the ability, over philosophical and constitutional objections against closing the courts, to force litigants to submit to mediation for the purpose of reducing even further the number of cases actually going to trial. This was done in the name of efficiency and saving money. A growing body of supposedly "neutral" mediators was gradually brought under the judicial umbrella as state supreme courts assumed the power to regulate and professionalize mediators.

Efficiency and cost-effectiveness continues to be used to justify these actions. But it was not enough that even a small additional percent of cases were actually settled through mediation; they were staying in the judicial system too long. "Even though the probability is that

231. *See generally* Mark W. Armstrong, *Therapeutic Justice: Defining a Controversial Yet Transformative Concept*, *in* THE IMPROVEMENTS OF THE ADMINISTRATION OF JUSTICE, *supra* note 75, at 451, 454-56.

less than seven percent will require trial, no one knows which cases will fall into that seven percent; they are all in competition for scarce trial dates, making it difficult for busy courts to set reliable trial dates," said the Maryland Futures Commission.[232] The efficiency argument was expanded to include other reasons for reformers to begin using ADR as substitutes for rules of law. Initially, as we have seen, "court-annexed ADR" was viewed principally as a diversion device to assist the court. Gradually, however, observed the Maryland Futures Commission, the

> courts have begun to appreciate the fact that they do more than simply divert cases from court dockets: they produce a better solution for the parties, either because the solution comes quicker and with far less expense or because it is qualitatively better in terms of actually resolving the underlying dispute. Studies made of these programs around the country document that, when the program is properly run, not only does it achieve its purpose of settling cases earlier in the process, but that litigant and attorney satisfaction is high. Cases are indeed resolved earlier and with less cost, and, more importantly, they are resolved without the animosity that litigation so often produces. Agreements reached through ADR also tend to hold up better, in terms of compliance, than do judgments imposed by courts and disgruntled litigants.[233]

The "transformational" qualities of ADR became preferred by reformers within the judiciary, not as a means of finding truth or applying fixed principles of law, but as a technique for modifying the feelings and emotions of the parties and their lawyers. The emotional quality of ADR trumps the constitutional process of finding facts (which, being entirely subjective, no longer exist) and the rule of law as long as the parties feel good and their "interests" are being met. Mediation is better because it meets the psychological and sociological needs of the litigants; the need for government and society to vindicate rules of law which restrain the state and protect individual rights is no longer paramount. The underlying problem is not a violation of rules of law, but of psychological illness, ignorance, economic inequality, or intolerance toward the feelings and needs of others. Transformative ADR "personalizes" the effects of the judicial process, and, having done so, alters the base of government. The focus shifts from the application of uniform procedures and rules of law to the feelings and emotions of specific individuals.

232. COMMISSION ON THE FUTURE OF MARYLAND COURTS, FINAL REPORT 47 (1996).
233. *Id.*

This is desirable for the courts because the purpose of changing the feelings of the parties is not actually about them, but about changing how they feel about the courts, and specifically, about the judges. If people feel good about their experience with the new process, they are more likely to look favorably on the judges, increasing what activists now call Public Trust and Confidence in the Justice System. The overall power of the judiciary is expanded in this way.

Mandatory, professionalized mediation also exposes another fallacy of the reform movement—the argument that the constitutional system based upon process and fixed rules of law is too mechanical. Alternative methods of resolving disputes have led to the creation of a new kind of machine, one that employs mind-changing techniques on individuals rather than adhere to rules of law by which people similarly situated are to be treated alike. The judicial process is no longer engaged in the search for truth; the application of what now passes for law does not reflect precepts of right and wrong. The judicial process has become, instead, a technique of the social sciences which requires, as do all techniques, the increased centralization of power in the hands of even fewer people for the purpose of changing and standardizing how people think and feel. Standardization should not be thought of as fixed rules of law, but as the production of tranquil, productive citizens who look favorably on the courts.

In Maryland, for example, the courts have the ability to impose mediation in many cases. But mediation is not available everywhere in Maryland (as in other states) except upon payment of a fee, and in other cases and other areas of the state "ADR resources have not been organized, recruited, or trained and are therefore not readily available."[234] Consequently, the Futures Commission found that "standardization will be required in terms of the design of the program and the recruiting, training, and monitoring of the personnel needed to provide the service."[235] New rules and new funding will be required to implement uniform ADR, which occurs as a direct consequence of the fact that it is now part of the judicial branch of government. The judicial system is a part of government, and it is available to all people, which means that the mediator and mediation process must be available, like the judge rendering an opinion, to all people. Thus, the power of the courts continues to expand, and is increasingly centralized and standardized in new ways, becoming a new kind of machine producing a new product. This is the implication of the Futures Commission's

234. *Id.* at 48.
235. *Id.*

statement that the parties' satisfaction is increased if the mediation process is "properly run," a reference to the techniques of centralized management and training of mediators and others. If mediation is properly managed, if mediators and others are properly trained and monitored, if mediation is standardized and universally available (most likely at state expense), it will be "properly run," the "satisfaction" of the parties will be maximized, and the "underlying dispute" will be resolved.

In alternative settings, the judge is not directly imposing a solution on the parties, but the effect is to increase overall importance of the courts, through those working with them, in relation to the individual and popular branches of government. The fact that more people—mediators, community volunteers and experts—become a part of the process does not mean that more power is being shared by the courts with more people, but that more people are increasingly under the influence and ultimate control of the judges who sanction, train, and prescribe the ethical rules by which they all intervene in the lives of others. This occurs without anyone ever taking notice that it is happening. The courts complain about the lack of access to mediation because they are seeking to bring, not fewer people, but even more people into the new judicial system where public trust and confidence in the justice system is to be maximized.

If lawyers are involved in the therapeutic setting, they are not there as advocates, but can be found working with, not against, the prosecuting attorney to determine the best course of treatment for the offender.[236]

What is even more troubling is the move to expand within the judicial function the range of human behavior which does not run afoul of the law but which may nevertheless be in need of court modification to prevent future criminal or antisocial behavior. We see this especially in the growing judicial involvement with children where judges, typically working through the administrative staff of state

236. *See* Bruce J. Winick, David B. Wexler & Edward A. Dauer, *A New Model for the Practice of Law*, 5 PSYCHOL. PUB. POL'Y & L. 795 (1999).

> The integration of the two perspectives [Therapeutic Jurisprudence (TJ) and Preventive Law (PL)] thus has the potential for greatly enhancing each of them. PL gives to TJ a grounding in legal practice, a set of law office procedures—the legal checkup and the like—to enable lawyers and clients to apply the law therapeutically. In turn, TJ gives to PL a human face and legitimizes (indeed, expects) the lawyer's explicit and systematic attention to the potential positive or negative psychological fallout of the law and of proposed legal measures.

Id. at 796.

supreme courts, are engaged in training public school teachers in what is called Law Related Education. Judges are being successfully reconceived as educators.[237] After they have been trained by court staff, teachers then instruct their children about the courts, dispute resolution, and about how the courts protect their rights. Many supreme court web sites contain law related educational materials available for downloading.[238] But there are other changes that directly involve students with the courts: "'The big change is the way we're trying to involve the community," said the municipal district's Presiding Judge Sheila M. Murphy. "We're asking the schools to cooperate. That includes having schools fax information to court if students are absent," Murphy said.[239]

The techniques applied in all of these physical environments are most often designed to modify the feelings and emotions of court clients. Exceptions to environmental modifications would be the drugs administered to clients of Mental Health Courts or Drug Courts.

For low-level offenders—especially in urban areas—therapeutic, problem-solving courts are becoming a "gateway" to a comprehensive array of social services provided on-site, at the courthouse. Community courts may be equipped with professional staff, court volunteers, and associated organizations to respond to widespread substance abuse, prostitution, shoplifting, disorderly conduct, homelessness, mental and physical health problems, educational and vocational deficiencies, family problems, lack of access to entitlements, and other problems. For many, the criminal justice system constitutes their primary connection with the world of structured services.[240] Problem-solving courts are becoming a clearinghouse for social services in their communities, as they connect people with lifestyle problems to local government services and the support of a wide range of community organizations and volunteers. What is more, "partnerships" between the agencies of government and the community, particularly involving illegal drugs, have become increasingly popular as "agencies recognize the limits of their ability to engineer complex social changes," and find working arrangements with the community to be the best way to

237. *See* John J. Sweeney, Richard Fruin & Rebecca J. Fanning, *Courts Connecting with Their Communities: Judicial Outreach Comes of Age*, *in* THE IMPROVEMENTS TO THE ADMINISTRATION OF JUSTICE 401, 403-04 (7th ed. 2001).

238. Detailed curricula for law-related education can be found on the web sites of many of the state supreme courts.

239. Brendan M. Stephens, *Communities Take Larger Role in Youth Justice*, CHICAGO DAILY LAW BULLETIN, August 29, 1996, at 3.

240. MICHELE SVIRIDOFF, ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 86 (1997).

achieve targeted outcomes.[241] Such relationships have a "results-oriented focus" by which community volunteers, civic groups, or treatment providers are able to contribute to and, hence, to measure outcomes through the collection and analysis of data in specific cases.[242]

A growing number of instructional materials are being used to expand the concept of courts as providers of therapeutic social services. One popular book noted that problem-solving courts are said to be more frequently encountering individuals with a host of medical, psychological, and social problems, and need attention from the courts.[243] Generally, these individuals have fallen through the traditional net of service providers, or remain in need of services despite continued contact with community service agencies: "Traditional court processes were designed to make specific decisions; they were not designed to address the underlying social and psychological problems that lead these cases to court. Consequently, courts are crafting legally relevant but ineffective decisions. Although individual cases are disposed, they are not resolved because the underlying problems are not addressed."[244] Consequently, problem-solving courts link people with lifestyle problems to medical, social service and treatment providers operating in an auxiliary fashion. Such providers, having expanded power over more people, actually provide supplementary power to the courts.

Courts are increasingly relying on the work of experts - psychologists, educators, corrections officers, court volunteers, social workers, pharmacologists, computer technicians, and others who are becoming part of the new court setting.[245] The "team" approach to behavior modification allows judges to harness the community and all of the techniques of the social sciences for the purpose of studying and changing human behavior.

What is more, the reinvention of the judiciary marks the emergence of the ultimate technocrat. The structural reforms begun in the 1960s not only changed court structures by unifying inferior courts under the increasing control of the state supreme courts, but added a

241. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: 2000 ANNUAL REPORT 44, 46 (2000).

242. *Id.* at 46-47.

243. PAMELA CASEY & WILLIAM E. HEWITT, NATIONAL CENTER FOR STATE COURTS, COURT RESPONSES TO INDIVIDUALS IN NEED OF SERVICES: PROMISING COMPONENTS OF A SERVICE COORDINATION STRATEGY FOR COURTS 7 (2001).

244. *Id.* at 9.

245. *See* Susan K. Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 N. Y. ST. B.A. J. 8, 8-9 (2000).

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steadily-growing, parallel system of court administrators,[246] and it is in this corps of administrators that people with degrees in sociology, political science, computer technology, court management, public relations, and others have found a home in the judiciary.[247] Lawyers in their new sociological role will most likely have a place there too, not as employees, nor as advocates but as facilitators guiding victims and clients alike through the new judicial process of individual and group modification.[248]

Working through the administrative offices of the courts, some or all of these people can, on behalf of the judges, interact with other activists to schedule conferences, distribute materials, schedule judges to speak at schools or civic groups, conduct public opinion surveys, schedule visioning and planning sessions, form community focus groups, apply for grants, and, most importantly, schedule and monitor the therapeutic modification of the courts' clients.[249]

The treatment community is becoming part of the court setting but will not actually become employees of the courts, even though a

246. Milton D. Green, *The Business of the Trial Courts*, *in* THE COURTS THE PUBLIC AND THE LAW EXPLOSION, *supra* note 13, at 7, 27.

247. For a favorable review of modern court management, see DAVID C. STEELMAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM (2000). In 1990, the National Association for Court Management initiated a study to evaluate its goals, priorities, and services. From that work have come ten "core competencies" for court managers. These core competencies include leadership ("Leadership is the energy behind every court system and court accomplishment."), visioning and strategic planning ("Visions are holistic, inspirational future snapshots."), court and community collaboration ("Understandable courts, skillful community outreach, and informed public information improve court performance and enhance public trust and confidence."), essential components ("Increasingly, information is provided to the court by programs annexed to the court or the case rather than by the parties to the litigation."), education, training and development ("Education, Training, and Development programs are aimed at judges, court staff—especially those in and aspiring to leadership position—as well as others on whom the court depends, both inside and outside the courts."). *See* NACM Prof'l. Dev. Advisory Comm'n., *Core Competency Curriculum Guidelines: History Overview and Future Uses*, 18 COURT MANAGER, Fall 2003, at 6.

248. Many states now have administrative offices that work with the trial courts. The affiliation between the local trial courts and their administrators, and those at the state level varies from state to state. Also, the lawyers will "help citizens move through the system." THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 24.

249. The Virginia Supreme Court, one of the early leaders in the court futures movement, publishes a newsletter entitled, FUTURE VIEW: A NEWSLETTER OF TRENDS AND ISSUES. This is one of the best examples of the continuing contribution to modern sociological reform of the judicial system being made by state supreme court administrative offices.

court and part or all of that court's treatment team may be physically located in the same place. The treatment community and the courts will become mutually dependent upon each other—the treatment providers for patients and money, and the courts for the power and control they derive from the political symbiosis. The flow of money is the key: "Drug courts and treatment programs have a symbiotic relationship: These days, with so much treatment funding flowing through the criminal-justice system, it's fair to say that neither can long survive without the other."[250] But the courts also offer another powerful inducement for others to become involved in the work of the courts: immunity. Because the courts are a branch of the sovereign state, judges are immune from legal actions against them. As psychologists, educators, mediators, court volunteers and others become part of the interdisciplinary work of the new judiciary they are receiving the same immunity enjoyed by the state, for they become a part of the courts, and, therefore, an arm of the state.[251]

The new therapeutic courts equip the growing court bureaucracy of judges and in-house administrators with the techniques of educators, psychologists, corrections officers, counselors and others in the treatment community. All of these people, infused by the visions and values of the judiciary, work together to modify behavior and achieve social justice, but like the sound of many instruments they are orchestrated by the judges.

I. *The Ultimate Technocrats*

As technology has advanced, so has the power of the judiciary. While the reform literature continues to refer to lawyers and the need to reeducate them in the social sciences,[252] there is some question, as

250. Bob Curley, *Drug Courts, Treatment Programs Seek Trust, Understanding*, JOIN TOGETHER, Sept. 5, 2003, http://www.jointogether.org/sa/news/features/print/0,1856,566634,00.html.

251. *See* Nat Stern, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373 (2003-04); Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629 (1997).

252. Wexler, *supra* note 168, at 287. Wexler advocates interdisciplinary courses on therapeutic jurisprudence:

> In fact, if therapeutic jurisprudence is to reach its objectives of transcending academic lecture halls and influencing law reform and clinical practice, we must constantly chip away at existing professional provincialism, which often leads each profession to regard the other with suspiciousness and . . . antipathy. If today's law students are exposed to the discipline of psychology . . . [its] counterparts, . . . and the mental health

we shall see later, whether they will be needed at all. The "traditional" trial is becoming obsolete.[253] Reformers envision, and plans are now underway, to create a virtual dispute resolution system using artificial intelligence that will effectively eliminate lawyers.[254] Activists understand that the new court technology will be a seamless information system, "married" to the information systems of the treatment community to collect, analyze, and share vast amounts of personal data on particular individuals and subgroups within society, all without the need for lawyers.[255] This is still some years away, but many lawyers now practicing their profession will live to see these changes come to pass. Developments in the field of artificial intelligence and nanotechnology are the magic keys which will give people access twenty-four hours a day to a "judge or other arbiter" to settle disputes in the home, the workplace, the ball field, or any other place where people may be. Plans are now being formulated to create systems of artificial intelligence that use computer-generated, question-and-answer templates that will permit individuals to access the new dispute resolution system without the assistance of lawyers. This system, having eliminated the gatekeeping role of lawyers, will allow people to have answers to the problems of life at any time and from any location. The Pennsylvania Futures Commission observed: "The vision of 2020 brings that access into the home with a judge or other arbiter being

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> professions there is every reason to believe that, as they take their places as prominent practitioners, judges, legislators, and policymakers, they may be receptive to thinking about the ideas . . . of . . . therapeutic jurisprudence scholars. In many ways, therefore, the best path to sensible law reform . . . may lie in exposing students . . . to effective interdisciplinary teaching.

Id.

253. *See* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, *in* THE IMPROVEMENTS OF THE ADMINISTRATION OF JUSTICE, *supra* note 75, at 477, 478, 486.

254. *See* RICHARD ZORZA, THE SELF-HELP FRIENDLY COURTS: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002); *see generally* PAMELA N. GRAY, ARTIFICIAL LEGAL INTELLIGENCE (1997); *see* David Horrigan, *Operating in Virtual Reality*, 9 L. & TECH. NEWS, May 2002, at 21 (reporting the first mock trial conducted in virtual reality).

255. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON COURT AUTOMATION AND INTEGRATION 26, 38 (1999). *See also* THOMAS MOYER & JACK HOLT, JR., THE CENTER FOR SUBSTANCE ABUSE, Judicial Coordination With the Treatment Community, *available at* http://www.treatment.org/communique/comm93/moyer.html (last visited May 8, 2007).

available through transmitted images—immediately and interactively."[256]

There are many questions not answered by state reports. From the advancing nature of technology, one would expect that some human involvement in the virtual dispute resolution system may be necessary at first, either from lawyers or court employees; however, increasingly complex mathematical techniques will replace much of the human component that remains as computers will be able to mimic human reasoning. Moreover, computer generated outcomes may begin as merely advisory in nature, and finally evolve into binding solutions to increasingly intimate, personal problems. Husbands and wives having an argument in the privacy of their bedroom will be able to engage the virtual dispute resolution system on their computer, and one of them will find an ally there.

Bureaucratization coupled with the tools of modern science produces an unbeatable combination that makes the new judiciary extraordinarily powerful and resistant to change. The people and the representative branches of state government are now unable to change the judiciary by changing the judges. The therapeutic approach - including visioning, propagating values, trends analysis, strategic planning, and the therapeutic modification of people and communities—has been bureaucratized.[257] The answer to behaviorism's problem of "uncoordinated change" can be found in the form of court technocrats on the bench or working in the back offices of the courthouse. By merging many new experts and volunteers into the judicial setting, coupled with advanced information technology, the power of the judiciary relative to the executive and legislative branches as well as ordinary citizens is being greatly enhanced.

Giving judges the techniques of modern science is like giving performance-enhancing drugs to professional athletes. Their power is already great, and will become greater still. But in the name of efficiency and saving money, the techniques of the social sciences and sophisticated information technology will be granted to the judges, and the people will be happy because of it.

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256. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 24. The Pennsylvania Futures Commission now functions as a non-profit corporation but was created and did its initial work under the auspices of the Pennsylvania Supreme Court.

257. The administrative offices of the courts present a "secure niche" where the visioning process can reside. *See* SCHULTZ, *supra* note 159, at 59.

IV. COURTS AND THEIR COMMUNITIES

The reader may consider all of this an impossible task for the judiciary, and no threat to individual liberty or to representative government. Except for the broad effect of propaganda, the courts cannot apply sufficient rewards and punishments to shape new behaviors one person at a time; the effort and expense of medicating, reeducating, and physically altering large numbers of people would be a practical impossibility. Even allowing for the expanded use of house arrest, reeducation, and the physical partitioning of society through the use of the Personal Location Device, Global Positioning Satellites, and Reentry Courts, the task of modifying people one at a time seems beyond the reach of the reformers.

A. *The Community as a Skinner Box*

The community, however, is the human equivalent of the Skinner Box, delivering both rewards and punishments to individuals and groups. If the courts can find some way to realign the attitude of the greater court community toward new judicial values and community initiatives, then they have the potential to engineer the behavior of the entire community in a way that puts pressure on specific individuals in lieu of, or in addition to the application of force by a judge. In other words, if the judges can capture the hearts and minds of community leaders, then the courts have the potential to shape the behavior of everyone in the community, and no longer have to act on isolated individuals involved in litigation.

In 2000, the Conference of Chief Justices and the Conference of State Court Administrators adopted a joint resolution supporting the therapeutic work of the courts, and in 2001, the governing body of the American Bar Association also passed a similar resolution that "over the long haul, just might have far more profound implications for the American legal system" than the more widely publicized amendments to the rules of ethics governing lawyers. Other powerful organizations such as the American Judicature Society, the State Justice Institute, and the National Center for State Courts are also working to bring about the transformation of the judiciary.[258] In July 2004, the Conference of

258. The Therapeutic Justice Task Force came about in 1999 as a result of the *Position Paper on Therapeutic Courts* prepared by the COSCA Policy Committee. The joint resolution was prepared by a Task Force on Therapeutic Justice of the Conference of Chief Justices in Rapid City, South Dakota. *See* National Center for State Courts, *Therapeutic Justice Task Force Established*, CENTER COURT, Fall/Winter 1999, at 5; *see also* Conference of Chief Justices & Conference of State Court Administrators, *CCJ Resolution 22, COSCA Resolution IV, available at* http://cosca.ncsc.dni.us/Resolutions/

Chief Justices and the Conference of State Court Administrators adopted a resolution calling for the creation of at least one demonstration project in each state to serve as judicial "laboratory" for the application of therapeutic principles in "traditional" courts.[259] In other words, the therapeutic, problem-solving approach is about to become universal, with its transformative potential available to judges in general jurisdiction courts. Decisions have been made by people with the political power to bring their plans to fruition, as we have already witnessed in the changes presently taking place.

Most importantly, the courts have created initiatives to expand their sphere of influence in the community. The courts' extraordinary interest in the "community" is due to the concept of community, which is groups of individuals associated by common interests or by geographic location outside the existing justice system.[260] Actions which take place within the existing community can have a profound influence upon the behavior of individuals. Problems within the family can result in problems in school, at work, or in other areas of life; health problems, such as obesity and anorexia may be attributed to the overall health of the family. This has led court futures commissions and planners to begin focusing court reform efforts on the events taking place within the greater community. As the Pennsylvania Futures Commission advocated: "Indeed, the task group consistently emphasized that a more peaceful future is reliant on actions outside of existing criminal justice practices," and, similarly, dispute resolution in 2020 "begins at home."[261] Court reform must include an understanding of and involvement with the "human environment" which exists outside

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CourtAdmin/resolutionproblemsolvingcts.html (last visited May 19, 2007) (containing a Joint Resolution in Favor of Problem Solving Courts); *see* Greg Berman & John Feinblatt, *Beyond Process and Precedent: The Rise of Problem Solving Courts*, 41 THE JUDGES' JOURNAL, Winter 2002, at 5 (containing a discussion of the ABA's resolution and the effort to change the role of the courts).

259. See Conference of Chief Justices & Conference of State Court Administrators, *supra* note 258.

260. *See* JUDICIAL COUNCIL OF CAL. ADMIN. OFFICE OF THE COURTS, SPECIAL TASK FORCE ON COURT/COMMUNITY OUTREACH, DIALOGUE: COURTS REACHING OUT TO THEIR COMMUNITIES, A HANDBOOK FOR CREATING AND ENHANCING COURT AND COMMUNITY COLLABORATION § 1-3 (1999) [hereinafter SPECIAL TASK FORCE ON COURT/COMMUNITY OUTREACH].

261. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 24. *See* Felice Kirby, Michael Clark, & Tim Wall, *Needed: A Community Experiment in Problem-Oriented Justice*, 20 FORDHAM URB. L.J. 431 (1993). The authors advocate a community-oriented justice system: "The discovery is being made that courts need not, should not and ultimately cannot be laboratories of justice, removed from popular concerns. They should take into account neighborhood viewpoints and socioeconomic

the traditional court setting. New initiatives called "Judicial Outreach" and "Court and Community Collaboration" essentially merge the therapeutic judiciary with the extended community, and the community is the human equivalent of the Skinner Box, the human environment. Court and community collaboration is moving judges out into the community, and bringing the community into the courts.[262]

It is important for the courts to become a part of the community rather than separated from it because the very concept of community, as known in the past, includes some and excludes others. As one supporter of reform put it: 'But the still greater danger is that no matter how many "communities" any individual is allowed to belong to, every such community identification has to have an outside in order to define the inside, and so any use of the term must exclude and not always harmlessly.'[263] Egalitarian theories of justice do not permit any undeserved exclusions or inequalities. Nor do activists intend to leave communities alone to provide "social control" for themselves apart from the formal legal system.[264] Consequently, the judges are becoming the common denominator of a new large-scale concept of utopian community. They possess the moral authority to propagate the values for the entire community, redistribute wealth and political power, provide common meaning to life for individuals and subgroups in the

realities, just as cops on the beat learn to deal with crime in the context of communities." *Id.* at 432-33.

262. A massive how-to manual was prepared by the California Judicial Council using a grant provided by the State Justice Institute. *See* SPECIAL TASK FORCE ON COURT/COMMUNITY OUTREACH, *supra* note 258.

263. Robert Weisberg, *The Practice of Restorative Justice: Restoring Justice and the Danger of Community*, 2003 UTAH L. REV. 343, 348 (2003).

264. *See* Zachary Rothenberg, *The Symbiotic Circle of Community: A Comparative Investigation of Deviance Control in Intentional Communities*, 35 U. WEST. L.A. L. REV. 62 (2003). Rothenberg sums up his conclusions about the need for formal intervention within intentional communities to protect members:

> We have seen how . . . these communities forge unique identities, attract membership, and control deviance within their communities, they also can potentially jeopardize the individual rights and integrity of their members. Where there are strong affective, moral, and instrumental barriers, and where members are not sufficiently able either to monitor their own rights or to secure external assistance in seeking redress, there is great reason for concern. Thus it is our responsibility, formally as government and informally as a nationwide community bound by a collective ideology and national conception of rights, to balance communities' needs for autonomy and independence with community members' individual rights.

Id. at 127.

community, and the political power to enforce their values against all segments of the community.[265]

B. *Community-Focused Court Planning*

The imposing, how-to manual published by the California Judicial Council entitled, *Dialogue: Courts Reaching Out to Their Communities*,[266] is a product of the SJI-funded Community-Focused Development Initiative, and a guide for community-focused court planning. It contains specific instructions for courts across the nation to expand the judicial power through the personal involvement of judges or court staff in the community. Judicial activists see the courts as "reviving sense of community" in order to "address the feeling of alienation, disenfranchisement, disconnection, and isolation experienced by many people in society."[267] They are developing communities and constituencies by "empowering individuals and organizations," "building community as an interconnected whole," "maximizing results by coordinating individual efforts," and "recognizing and calling on leadership from all parts of the community."[268] The egalitarian and authoritarian nature of the judicial agenda is expressed throughout the manual. For instance, "[a]ll success in improving the quality of life rests on the principal of empowering individuals and organizations and developing their sense of ownership and responsibility for the community. The community will not thrive unless its citizens feel they own it."[269] Moreover, "[p]roblems must be seen as an interconnected whole that can be addressed only as a whole, with an emphasis on community building. Successful community building connects local initiatives and power to centralized structures at the metropolitan, regional, and national levels."[270] Courts become the indispensable component of the new utopian community, combining the necessary hierarchy of authority with the new therapeutic values and techniques of the judiciary. One of the primary benefits of court and community collaboration is that it "[c]reates a unique vehicle for addressing local problems, combining the teeth of court sanctions with the power of

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265. *See, e.g.* DAVID ROTTMAN, HILLERY S. EFKEMAN & PAMELA CASEY, NATIONAL CENTER FOR STATE COURTS, A GUIDE TO COURT AND COMMUNITY COLLABORATION (1998); *see also* MARGOT C. LINDSAY, THE CENTER FOR COMMUNITY CONNECTIONS, CREATING THE COMMUNITY CONNECTION—AND A CONSTITUENCY IN THE PROCESS (2002).

266. SPECIAL TASK FORCE ON COURT/COMMUNITY OUTREACH, *supra* note 260, at §1-3.

267. *Id.*

268. *Id.* at § 1-4.

269. *Id.*

270. *Id.*

community networks to forge more effective forms of treatment and social service delivery."[271]

The concepts contained in the manual may have some language derived by planners working through conferences conducted by the California Judicial Council. Some of the content, however, was prepared by staff members working for the National Center for State Courts. In 1998, during the planning stage for the Community-Focused Development Initiative, David B. Rottman, Pamela Casey, and Hillery Efkeman, employees of the National Center for State Courts, wrote a discussion paper entitled, "Court and Community Collaboration: Ends and Means,"[272] elaborating on the conceptual framework for community-focused court planning. The authors deemed the entry of the courts into the community setting as necessary for the attainment of "therapeutic outcomes for individuals and communities."[273] By expanding options and directing attention to those procedures and options that result in positive, therapeutic impact on communities, courts can reconstitute communities through the threat of force directed at deviant behavior by individuals or groups within the community, or by inadequate government services: "Communities gain a unique vehicle for addressing local problems, combining the teeth of court sanctions with the power of community networks and knowledge."[274] Community coalitions gain a "unique partner" to comprehensively improve local conditions through collaboration with the courts. "Community-initiated and community-based treatment and social service programs benefit from collaboration with the court. The courts can combine the incentive of rehabilitation with the threat of sanctions for non-participation or non-compliance."[275] Consequently, the combination of the power of the courts and the communities allows them to achieve the mission of court and community collaboration which is to "improve the administration of justice so as to produce better outcomes, results, and impacts for individual[s], communities,

271. *Id.* at § 1-5.

272. DAVID B. ROTTMAN, PAMELA CASEY & HILLERY EFKERMAN, CALIFORNIA COURT AND COMMUNITY COLLABORATION PROJECT, COURT AND COMMUNITY COLLABORATION: ENDS AND MEANS (1998), *available at* http://www.courtinfo.ca.gov/programs/community/endsmeans.htm (last visited May 19, 2007) (containing excerpts of the original document prepared by the authors).

273. *Id.*

274. *Id.*

275. *Id.*

and society at large."[276] Courts, it is said, cannot deliver effective justice working alone.[277]

C. *Creating Community*

The concepts of courts and *their* communities are becoming synonymous as the transition to the therapeutic paradigm takes hold. If community can be broadly defined as "common ground," then the judiciary's imaginative use of community propaganda and coercive techniques of alternative dispute resolution which feign "dialogue" to produce areas of agreement between parties or groups in conflict is tantamount to the creation of community.[278]

There are two aspects to this. Court and community collaboration brings judges and community groups together through open invitations from the local judge and court staff attending meetings for the purpose of obtaining feedback from the community, subsequently published in detailed strategic court plans for each community. Such plans are based, in part, upon the needs and concerns expressed to the judges and court staff in the meetings, provided that those concerns are consistent with the overall state plan for the judiciary. This process is most advanced in California where dozens of detailed plans have been prepared by local courts for their communities, but it is rapidly spreading to other states. Quality varies considerably; some court plans are thin and unprofessional in appearance, but others are beautifully bound volumes containing the latest demographic and sociological information on the community.

Courts, however, also establish community through the therapeutic work of judges in individual cases. By the expanding use of therapeutic techniques applied to individual litigants in the course of what is universally called Alternative Dispute Resolution (which takes place in the "shadow" of the courts), the implied threat of the trial court, with its complex processes and potentially catastrophic outcomes, subtly coerces "common ground" or "agreement" between litigants and, in the process, creates "community." Transformational mediation, collaborative divorce and similar techniques annexed to the judiciary all strive to create common ground for a fragmented society, because

276. *Id.*

277. *Id.*

278. Consider this statement as a technique of coercing agreement on the pretext of healing the parties: "In essence, transformative mediators try, gently but firmly, to help the principals in a dispute responsibly exercise their decision-making authority." John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U.L. REV. 839, 860 (1997).

agreements produced by therapeutic techniques are ideologically predetermined to represent an equality of outcomes, or what is called a "win-win-win" solution for both parties and the broader community.

Courts are obviously changing, and dramatically so, but they will not be going away. The judiciary's brand of violence, the "teeth" within the community, is necessary for success in the area of social transformation. But thanks to the courts, the result is the prospect of a common future which is more peaceful and just for all people and subgroups, and, consequently, more to the liking of everybody. Thus, we see literature promoting more efficient "traditional" courts, and a parallel stream of literature promoting alternative, culturally-appropriate, and "peacemaking" methods of dispute resolution.[279]

Court propaganda markets the "court and community" initiative as a "partnership" to restore the human side of the judicial system lost in the earlier quest for judicial efficiency. The courts and their communities will "work collaboratively to solve some of the critical issues facing their respective jurisdictions."[280] But the so-called partnership proposed by the judiciary is only an illusion. The other institutions of the community—the family, church, schools, civic groups, recreational and professional organizations, and special interests—still exist, but they increasingly revolve around and are subsumed into the therapeutic judiciary.

Court and community collaboration is a radical departure from the judicial power bestowed upon the courts by state constitutions. The work of the courts in the new setting continues to revolve around the work of judges. They gain substantial power by creating partnerships and working arrangement with individuals and groups in the community. Since it is not based upon any legal foundation, court and community collaboration can only be understood as an exercise in the growing political power of the courts. They engage in such activities without anyone ever asking them to identify or explain the authority by which they do so. Why do they do it? They do it for one reason—because they can—because there is no one who can or will stop them. More importantly, however, they do it as means of achieving the predetermined end of expanding the power of the judiciary as it relates to the other branches of government. It induces people to rely on the

279. Considerable space is dedicated in scholarly literature to alternative processes for "peacemaking," drawing from examples of primitive cultures to new problem-solving courts. *See, e.g.*, David B. Rottman & Pamela Casey, *Therapeutic Jurisprudence Forum: A Response to Scheff: Don't Write-off the Courts*, 67 REV. JUR. U.P.R. 653 (1998).

280. Hillery S. Efkeman & David B. Rottman, *Community-Focused Courts: Progress on a Development Initiative*, STATE COURT JOURNAL, Winter 1996-97, at 10.

courts to meet their needs, at least in conjunction with, if not in lieu of their elected representatives. The Judicial Leadership Scenario, the most popular scenario presented to delegates at The Future and the Courts Conference in 1990, contains a lengthy description of the change of judicial function within the community thirty years into the future. For example:

> The courts increasingly were the place where Americans turned for leadership and direction. And the courts responded. The trend toward judicial activism (whether in support of "liberal," "conservative," or ideologically neutral positions) which was apparent at the federal level from the 1950s onward came to characterize more and more state judiciaries from the 1980s to the present. . . . The courts became active and accepted leadership because they were able and willing to do so. Decades of court reform paid off and the professionalization of the judiciary set the stage for this new leadership. By removing the courts from the vicissitudes of political fighting, funding, and favoritism, without removing them from democratic accountability, and by giving judges a secure but responsible tenure of office, judges were able to do what neither elected politicians nor faceless bureaucrats could do as well: to render judgment—to make the hard decisions, to exercise leadership, and yet to create inspiring visions of preferred futures beyond the important, but distracting, problems of the present.[281]

Court and Community Collaboration and the related activity of Judicial Outreach are both designed to change the judiciary's position in government as reflected in the Judicial Leadership scenario. Both initiatives are purely, overtly, and hopelessly political. Both directly contradict every claim being made today by the judiciary and legal organizations which insist that politics has no place in the judiciary.

D. *Judicial Outreach as Propaganda*

Court and Community Collaboration and Judicial Outreach epitomize propaganda. They were developed out of identifiable actions by high-ranking members of the judiciary and court administrators who set out to change the courts' power and position in government by creating supportive political constituencies. Federal tax dollars provided by the State Justice Institute to the Conference of Chief Justices, the Conference of State Court Administrators and the National Center for State Courts were used to publish a how-to booklet in 1995 detailing methods for the courts to begin building political constituencies. In 1993 the CCJ and COSCA formed the National Courts and Community Advisory Committee chaired by former Chief Justice Lyle Reid of

281. ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020, *supra* note 110, at 8.

Tennessee and Mary Campbell McQueen, Administrative Director of the Courts of the State of Washington to "suggest practical ways courts could reach out to citizens for help and support." That Committee published the booklet entitled, *Citizens and their Courts: Building a Public Constituency*.[282] "The purpose of fostering a court constituency," observed the Committee, "is to develop groups of individuals who are both knowledgeable about the court's purpose and function and committed to ensuring that courts receive the support they need to carry out their vital, constitutional role."[283] "Unlike the other two branches of government, the judiciary has no general public constituency," argued the Committee.[284] Consequently, "[f]or the dual reasons of public confidence and court needs, the building of such a constituency is critical to the court's survival."[285] Moreover, "[t]he most effective way to create such a constituency is to invite citizens to become directly involved in court processes, as volunteers or advisors. Once the citizens understand the role played by the courts, they are able to speak on behalf of the court's interest."[286] The Committee went on to examine four examples, including the Tennessee Futures Commission, of interactive approaches by the courts toward the community, suggesting ways in which all states could create supportive commissions, committees, and volunteers to work with and for the courts.

Furthering the goal of creating political constituents for the courts, the American Bar Association published a popular instructional manual entitled, *Judicial Outreach on a Shoestring: A Working Manual*.[287] This manual provides examples of a wide range of community activities available to judges. "This book is about judicial outreach programs. That term, as used herein, refers to planned efforts undertaken by judges to inform the broader community about the work of the courts in our society," notes the author, Richard Fruin, former chair of the ABA's judicial division.[288] In some respects judicial outreach is not unlike the outreach ministry of evangelical churches, except it attempts to achieve undisclosed results through indirect means. Judges are encouraged to arrange speaking engagements or other forms of community interaction in a variety of settings with a

282. CITIZENS AND THEIR COURTS, *supra* note 156, at 1.

283. *Id.* at 4.

284. *Id.*

285. *Id.*

286. *Id.*

287. RICHARD FRUIN, AMERICAN BAR ASSOCIATION, JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (1999).

288. *Id.* at xvii.

variety of people. A recent feature of judicial outreach is the creation of formal speaker's bureaus accessible through court web sites, making judges available to speak on a variety of topics.[289]

There are ulterior motives at work in such activities. Judges may speak on discrimination in the workplace, judicial protection of rights, drunk driving or many other currently-popular topics. But the hidden goal is not to have listeners remember any of the specifics of the issues being addressed by the judge, but rather to have them leave the session with a changed view toward the judge in particular and the judicial branch as a whole. It is the duplicitous nature of judicial outreach which makes it a form of technique we know as propaganda. Obviously, many judges have addressed many groups over the centuries, but there is no deception involved when judges accept invitations to speak on whatever topic they choose, and especially about the law. But Judicial Outreach is altogether different. It is technique, an organized attempt to change the attitude of individuals and the community toward the judiciary through misdirection. Judges use facts about whatever topic they are speaking on, but they use those facts to achieve an undisclosed objective—the modification of the beliefs and opinions of the public about the judiciary.

Court and community collaboration and all of its offshoots, including community focused court planning, judicial outreach, and other types of judicial activity are cunning efforts to build a political base for court activities. They have no legal basis whatsoever, and, consequently, must be supported in another way. Because the law no longer supports them, judges must turn to the people for the political power they need. In so doing, they redefine the constitutional judicial power to include patently political activity designed to affect a realignment of government—a realignment that puts the courts in a position of leadership sometime in the twenty-first century. Their own plans tell us so.

E. *Preventing Antisocial Behavior*

The courts, activists argue, should become proactive. If they continue to wait as they have in the past until a lawsuit is filed, they will have waited too late. People who enjoyed the popular motion picture, *Minority Report*, will be pleased to know that the same techniques which allow the judiciary to delve into the mental processes resulting

289. *See, e.g.*, King County Superior Court, Speaker's Bureau, http://www.metrokc.gov/kcsc/speakersbureau.htm (last visited April 6, 2007); Nineteenth Judicial Circuit of Lake County, Illinois, Judicial Speakers Bureau, http://www.19thcircuitcourt.state.il.us/bkshelf/speakers/speak_toc.htm (last visited April 6, 2007).

in conflict also offer courts the ability to predict which people in society are likely to become involved in antisocial behavior and conflict. Consequently, the courts can begin to prevent conflicts and thereby prevent the lawsuits which follow.[290] There will be, however, no need for grotesque precognitives whose brains were hard-wired to police computers to capture the scenes of future crimes. Rather, the heroes of the Preventive Law Movement are neatly-dressed professionals interpreting statistical data on individuals and subgroups. They reach out to their communities in multiple, transformative ways. Presently, preventive law consists of the belief among activists that therapeutic judicial processes solve the underlying social and psychological problems causing conflict, and stop the "revolving door" by which the same people enter the "traditional" system repeatedly.

But court futures commissions foresee other methods of preventive law. By taking a statistically-based approach, courts will be able to identify people who are at-risk for antisocial behavior through the collection and analysis of sociological and psychological data. After identification, courts can begin to address individual and community needs, thwarting future involvement in civil conflict or crime.[291]

The courts' self-proclaimed mandate to advance social justice and heal people physically and psychologically requires that judges no longer wait for lawsuits to be filed or quit working once a judgment has been entered. The courts must be involved in society at the stage

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290. Participants in the futures planning process are guided by futurists and court leaders toward certain beliefs about the changing role of the new judicial system, part of which involves litigation prevention strategies for the courts. *See* ENVISIONING JUSTICE, *supra* note 48.

> 5. Litigation Prevention Strategies from the Courts
>
> Definition:
>
> Traditionally, courts have looked only at determining guilt or innocence in actual cases and controversies brought before them. However, over the years, whether from a liberal, conservative, or other ideology, courts have felt the need to look into the causes of crime or controversy, and ways to reduce or eliminate crime or controversy from ever happening. . . .
>
> Possibilities for Courts:
>
> Assume that increased follow-through on cases leads to increased use of judicial authority to oversee or enforce the regulations on many social issues. Examples include housing programs for the homeless, job training for welfare fraud cases, and nonpunitive rehabilitation programs for drug users. Some courts prosecute state legislatures or executive agencies for not following through with court-ordered changes. Judicial doctrine shifts, giving more weight to community "rights."

Id. at 107.

291. *See, e.g.*, TO SERVE ALL PEOPLE, *supra* note 138, at 52.

when potential conflicts are first developing and continue working through the therapeutic efforts of social workers, psychologists, churches, civic groups, and the police long after a final decision has been rendered. Social justice requires continual monitoring of individuals and subgroups, making periodic adjustments so that undeserved inequalities and mental problems do not exist. Periodic community meetings, environmental scans, trends analysis, and demographic profiles are some of the ways courts now monitor local and national changes in an effort to anticipate and plan for approaching problems. These materials may be brief and focused on a single court community or consist of large volumes of information with the latest events and trends for judicial leaders everywhere to consider. Also, continuing education programs are focusing in part of future legal issues permitting groups of judges at the national, state, and local levels to anticipate and plan for the appropriate judicial response.

The community is the environment of every person from birth until death. As envisioned by the Pennsylvania Futures Commission the role of the community in the expanded justice system will bring in the "whole community," and is all-encompassing since it has both preventive and restorative features applicable to all of life. Therefore, statements that "emphasis on prevention and rehabilitation will exist side-by-side with greater attention given to community safety, consideration for victims and intervention at the earliest possible time," describe a system which will "apply a series of interventions with prison as only one part of a continuum of approaches developed to deal with socially harmful behavior."[292] But the series of interventions that form a continuum of approaches is undefined in the sense that no particular forms, processes, or limits are specified by the Commission. This is a system that will steadily expand to respond from cradle to grave to sociological needs or to deviations in behavior which judges define as normal. Justice as so conceived has ceased to be about the discovery and recognition of wrongdoing or fault, a view premised on the moral responsibility of each individual, and has become a life-long battle against the interpersonal forces of ignorance, illness, and inequality. The conversion of law into therapy portends the indefinite expansion of application. As psychologist Thomas Szasz observed:

> The difficulties and problems of living are considered psychiatric diseases, and everyone (but the diagnosticians) is considered mentally ill. Indeed, it is no exaggeration to say that life itself is now viewed as an illness that begins with conception and ends with death, requiring . . .

292. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 31.

the skillful assistance of physicians and . . . mental health professionals."[293]

The "risk factors" that may contribute to antisocial behavior may be identified by the courts using sociological and psychological methods at any point in a person's life. Statistical methods may show, for example, that children of divorced parents involved in juvenile difficulties are "at risk" for more serious forms of future behavior.[294] Because of the possible statistical correlations between a multitude of environmental factors and antisocial behavior, there are literally no limits for the series of interventions potentially available to therapeutic courts, all for the good of the individual and the community. The Pennsylvania Futures Commission recommended the implementation of "more sophisticated methods of assessing risk and protective factors," and the development and integration into the justice system of a "wide range of programs dealing with antisocial behavior, including victim-offender mediation, pretrial diversion, referral for treatment, community service centers and day treatment centers." The Commission thought its vision to be a significant improvement over the present system: "The vision is simple yet profound. Justice in the year 2020 will serve to protect the community by engaging in prevention and rehabilitation activities as well as punishment."[295] Behaviorism manipulates the human environment by propagating values (supposedly the product of science), through a continuum of rewards and punishments, or by other modifications such as medication for mental illness or drug addiction, all for the prevention and correction of aberrant behavior.

F. The Therapeutic State

To the intellectuals who began the drive to create a new form of government in the 1960s, this reorientation represents not the Welfare State, but the "Service State" which accepts "human conservation as the basic democratic task" by embracing social services of all kinds "plus the improved care and support of the indigent, the handicapped, the impaired, and all others incapable of fending for themselves in our money economy."[296] Human conservation depends upon the redistribution of wealth and power by the state, and the courts have become a

293. THOMAS S. SZASZ, IDEOLOGY AND INSANITY: ESSAYS ON THE PSYCHIATRIC DEHUMANIZATION OF MAN 4 (1970).

294. TO SERVE ALL PEOPLE, *supra* note 138, at 52.

295. THE INITIAL REPORT OF THE PENNSYLVANIA FUTURES COMMISSION, *supra* note 152, at 32.

296. Lawrence K. Frank, *The Need for a New Political Theory, in* TOWARD THE YEAR 2000, *supra* note 11. These subgroups are those which have succeeded in labeling

means by which individuals engage directly in the redistribution of material wealth and political power.[297]

Rules of law are not necessarily important to the outcome in therapeutic settings, but are primarily important as a means of giving courts "coercive" power over people who come under court supervision. This does not mean that laws or courts will be going away. To the contrary, laws will continue to proliferate, but their main effect will be to expand the number of possible ways in which courts, using therapeutic options, gain the ability to create people of good character where other informal institutions have failed. The result has not been the creation of the Service State, but what Thomas Szasz called "The Therapeutic State."[298] Court therapy is the domain of court technocrats and experts who progressively apply technique to all aspects of life.[299] In retrospect, this turn in the judiciary may not seem surprising since psychology, like law and religion, is concerned with the way people live.[300] Intellectuals effectively excluded religion from the law in the nineteenth century. But even the positivist concept of law as rule was offensive to the counter culture, leaving only the false appeal to science as a justification for law. The claim of obedience to empirical facts is deception. The postmodern judiciary is acting in the name of science to achieve arbitrary, ideological outcomes in the form of changed lifestyles.

This is extraordinarily dangerous.[301] The understanding of the judicial role that has prevailed since the Founding Era is overthrown by judicial activism. The contrast between the federal judiciary and the popular branches of government described by Alexander Hamilton reflects a belief in the separation of powers also applicable to state governments:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it

themselves (or being labeled) as victims. They form "natural constituencies" for the courts.

297. *See* JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press 1999) (1971).

298. Szasz was primarily concerned about the ideology underlying the profession of psychology, and the manifestations of that ideology on the treatment of people with mental illnesses. But his observations are also relevant to the therapeutic work of the courts. *See* SZASZ, *supra* note 293; *see also* THOMAS SZASZ, THE THERAPEUTIC STATE: PSYCHIATRY IN THE MIRROR OF CURRENT EVENTS (1984).

299. *See* JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (1973).

300. SZASZ, *supra* note 293, at 21.

301. *See* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitation, and Judicial Collectivism: The Least Dangerous Branch becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

> will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[302]

Clearly, the courts have acquired a force and will of their own, and are increasingly able to direct both the strength and wealth of society in ways that they desire. In part, the judiciary's power stems from the respect it acquired in the early years of the nation's history as interpreter of the law, and its perceived political impartiality, both of which have been betrayed by unrestrained activism. It is precisely for this reason that the various techniques of social control we now know as therapeutic jurisprudence are described by activists as "vectors," a term borrowed from the laws of physics applicable to objects in motion having both force and direction.[303] A vector is more than an abstract concept; it is a particular action that leads to concrete reality, a synthesis of belief and application. Like the movement and interaction of pool balls on the table, each therapeutic technique has a weight, velocity and direction that causes other interactions in society. Ultimately, however, they can all be traced back to the judge holding the queue stick. But it is not the same stick once held by judges; rather, it is a new, multidimensional stick incorporating into one set of hands the techniques of sociology, psychology, economics, education and other disciplines capable of controlling people in profound ways. The previously fragmented techniques of the social sciences—techniques which, standing alone, had the ability to control people—are gaining new strength insofar as they are being fashioned by the judiciary into what is now called "law." As Jacques Ellul so accurately observed, "Application of law no longer arises from popular adhesion to it but from the complex of mechanisms which, by means of artifice and reason, adjust behavior to rule." This can be applied in a "perfectly mechanical" way:

302. THE FEDERALIST No. 78 (Alexander Hamilton).

303. *See* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006) (discussing the converging vectors of the Comprehensive Law Movement).

"It does not call for a philosopher or a man with a sense of justice. What is needed is a good technician."[304]

By focusing on the underlying sociological and psychological causes of conflict rather than on rules of law and by treating the law as an instrument for directing change in society, the courts are positioning themselves as the final arbiters, not of the Constitution nor of law generally, but of which people and subgroups in society will wax and wane at any point in history. The process is being executed in ways that make everybody feel good. As courts modify individuals and subgroups, the composition and values of the community change. In this respect, courts have a number of advantages over the other branches of government: (1) they are the constitutional repository of the vaguely defined judicial power which permits the courts to redefine the judicial power; (2) they are the point at which state power is applied to the individual; (3) judges typically serve much longer terms than members of the executive and legislative branches, insulating them in most instances from adverse public opinion; (4) the courts are essentially unchecked by the popular branches of government; and (5) conflict in some form is universal and inexhaustible.

V. THE VANISHING TRIAL: ENHANCING ACCESS TO JUSTICE OR FACILITATING JUDGES' ACCESS TO PEOPLE?

Many people, especially those who see the need for some kind of court reform but do not distinguish these reforms from those needed to diminish judicial influence, will consider deconstructing the old judicial system and eliminating lawyers to be a good thing. After all, lawyers are widely believed to be at the heart of the problems presented by the postmodern judiciary.[305] They are often criticized for initiating vexatious lawsuits resulting in controversial court decisions.[306] Without intending to imply the absence of problems with

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304. ELLUL, *supra* note 299, at 294.

305. *See, e.g.*, CATHERINE CRIER, THE CASE AGAINST LAWYERS (2002). Crier successfully illustrates many of the problems, but also takes the pragmatic approach to their solution while neglecting the weighty reasons or retaining the traditional advocate's role.

306. Judge W. Neal Thomas III, *No Need for Reform*, CHATTANOOGA TIMES FREE PRESS, Nov. 23, 2000, at H1.

> For at least the past decade, the American judicial system has been roundly criticized . . . The arguments to support that criticism are myths.
>
> Let me start with the myth that lawyers are responsible for the woes of this world. Lawyers don't make the law. Legislators and judges make the law. Juries apply the law to the facts of the case to reach a verdict. Lawyers are the only players in a trial who do not participate . . . in deciding the case.

designer litigation, aggressive advertising, and other problematic conduct, judicial activists have taken advantage of this vague antagonism toward lawyers in general by claiming that the activists, and not ordinary citizens or legislators, have the answer. Their answer is not to decrease, but to expand the intervention of the judiciary in the lives of all people, but to do so in new and subtle ways that make it look appealing. Indeed, the reformers claim that they desire to increase "access" to the judiciary to make the system more fair, more just, and more responsive to the needs of the poor and middle-class citizens who find litigation complex and very expensive.[307] They want to give those who are unempowered the same advantages of the formal dispute resolution system enjoyed by the rich. This has great appeal, but there is more to this than meets the eye.

A. *Access to Justice*

Presupposing courts that function with a judge and lawyers in a courtroom, one might think that access to justice is access to a decision based upon the resolution of disputed issues of fact and the application of rules of law to those facts, but it is coming to mean much more. Access to justice, as that term has been used during the last four decades, implies the achievement of utopian goals through the judiciary. The goals today are essentially the same as those which defined the notion of access to justice ever since it first gained wider currency the 1960s with the birth of the Great Society. Consequently, we begin with a brief review of the goals of access to justice, and then move to recent changes in the judiciary designed to expand access, not just for the poor but for other groups in society.

Access to justice became a major political issue following creation of the Office of Economic Opportunity and the Legal Services Corporation (LSC) by Congress in the 1960s. Instead of taking cases dealing with mundane issues such as divorce, activists focused on litigation funded by the federal government to advance the political and social interests of particular subgroups in society, especially the poor. As one activist later reminisced, the "dynamic and burgeoning Office of Economic Opportunity" afforded them the luxury of two-year fellowships where they could "avoid any obligation to engage in day-to-day client

Id.

307. *See* Judge Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POL'Y REV. 479 (1998); Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369 (1998); Margaret Martin Barry, *Access to Justice: On Dialogues With the Judiciary*, 29 FORDHAM URB. L. J. 1089 (2002).

intake, and, instead . . . dream up test cases and class actions, launch legislative initiatives, and organize community action programs."[308] Using imaginative, federally-funded lawsuits, anything seemed possible: "Poverty would be defeated within a few years. The inadequate nutrition, slum housing, dismal education, and marginal health of the poor in America would become historical artifacts, eliminated by the efforts of lawyers with a mission."[309] In the course of twenty-five years, activist lawyers amassed an impressive number and variety of court victories,[310] while never actually achieving the social goals they had envisioned for the poor.

However, conservative members of Congress grew tired of financing lawsuits against the government. Funded by federal tax dollars, imaginative lawsuits offered courts the opportunity to order federal, state, and local governments to take particular actions on behalf of the poor. Following the Republican takeover of Congress in 1994, they began an effort to restrict both funding and the type of legal services provided by the LSC and affiliated organizations.[311] In 1996, Congress imposed comprehensive restrictions on the LSC and its lawyers to provide free representation to the nation's poor in civil litigation.[312]

Legislative changes by Congress reduced funding and forced changes in activists' strategies for using the courts as a vehicle of change.[313] Still grappling with the diminished influence and potency of the LSC, activists have continued to advocate legislative changes in the form of increased funding for legal services. But the re-creation of the former unified and heavily-financed system of legal services seems unlikely. Consequently, new strategies for the twenty-first century have focused on creating a new generation of activists within the community, and changing the judicial role and process. To shape the direction of the new, legal-assistance system, leaders in the bar and the judiciary, law schools, community organizations, access-to-justice boards or commissions and others are being encouraged to "take account" of changes in the legal system, including the "increased use of

308. Lawrence J. Fox, *Legal Services and the Organized Bar: A Reminiscence and a Renewed Call for Cooperation*, 17 YALE L. & POL'Y REV. 305 (1998).

309. *Id.*

310. *See* Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L.Q. 745, 773 (1992).

311. *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337 (1998).

312. *Id.*

313. *See* Catherine C. Carr & Alison E. Hirschel, *The Transformation of Community Legal Services, Inc., of Philadelphia: One Program's Experience Since the Federal Restrictions*, 17 YALE L. & POL'Y REV. 319, 330-31 (1998).

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alternatives to litigation to settle disputes and solve problems," and the "growing number of persons, rich or poor, who are utilizing the legal system through their own pro se representation," among other things.[314] Some clearly want to go back to the days of large, publicly-funded programs for advancing court-mandated social policies. But the appeal of alternatives to litigation for accomplishing the same ends has prevailed as the preferred course of action. Because public funds are scarce and because it is hard to persuade large numbers of lawyers to take time out of their day to volunteer for socially-transforming litigation, the goal is now to create new judicial processes and implement new technologies that effectively eliminate the need for lawyers altogether. The judicial process is recast as a means of ending conflict by changing individual lifestyles, while computer technology promises to make the value-based decisions universally available to rich and poor alike.

Opportunities for becoming involved with the judicial system are being expanded in new and innovative ways but will not result in fewer lawsuits being filed. As we shall see, the number of lawsuits continues to grow each year. Throughout the reform literature are repeated references to state courts being called upon to provide solutions to a wide array of new and perplexing problems associated with society's changing composition and complexity. The courts, it is said, must not only rise to the occasion, but must, through visionary activities, anticipate future needs and by doing so hold society together.[315] This requires increased interaction between the judges, the elite class of society, and all other subgroups. But one aspect of this increased demand on the courts is only obliquely acknowledged in the literature. Increased demands being made upon the courts is a reference to the increase in litigation, both civil and criminal, taking place primarily in state courts.[316] For courts to become involved in solving the problems of

314. Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 371 (1998).

315. TOFFLER, *supra* note 11, at 32.

316. Although it is considerably out of date given appellate court decisions over the last fifteen years, for the best treatment on the expansion of liability, see PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). Of particular interest is Huber's description of the expansion of compensation for psychic injuries. He summed up the trend in tort litigation:

> Their vision was a shining one, grand enough to stir the mind, thrill the heart, and inspire the young lawyer. Theirs was a promise of society made more just, generous, and compassionate through the ministrations of activist litigators. Where the private buyer and seller lacked the incentive or the knowledge to make wise judgments about safety, the courts would intervene

society, there has had to be a lawsuit of some kind which engages the courts' coercive power. But if courts are to provide successful solutions to new problems, however, three essential tactics are required:

1. Creating as many new theories of liability, as many new causes of action, as there are new claims for relief by individuals or subgroups within society;
2. Finding new ways to actively bring people into the judicial system without waiting for a formal written complaint to be filed and then followed by the issuance of a summons; and
3. Continuing to increase the number of options by which the outcome can be made to conform to therapeutic principles without the need for making reference to any rule of law, or, conversely, by making reference to any rule of law that is useful to the courts in a particular case.

It is only by recognizing new theories of liability or by expanding the ways in which people become involved with the courts that judges can be said to meet a pluralistic society's demands, and apply the growing range of therapeutic options to individuals and groups; rules of law are viewed merely as tools by which the courts can act upon people and subgroups.

By expanding the potential scope of liability and by facilitating the increased access of constituent subgroups, the courts can intervene in the lives of more individuals and in greater depth than ever before. As Deborah L. Rhode observed in her recent book, *Access to Justice*:

> This nation also finds privately financed lawsuits to be a fiscally attractive way of enforcing statutory requirements without spending taxpayer dollars on legal costs. Much of this country's environmental, health, consumer, and antidiscrimination regulation occurs through litigation. . . . As patterns of life become more complex and interdependent, the need for legal regulation becomes correspondingly greater. . . . Unsafe conditions, abusive marriages, discriminatory conduct, and inadequacies in social services that were once accepted as a

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to substitute their own greater insight. Where the individual lacked the prudence, the foresight, or perhaps merely the wherewithal to secure insurance against misadventures, the courts would intervene once again to correct the error. The objectives were grand, the intentions were good, the promises were wonderfully beneficent. Utopian promises always are.

But utopia, at least along the lines traditionally described, is unattainable, and when the utopians succeed politically, they deliver only tyranny in practice. A less overweening state is better, not because it promises more than the traditional utopia, but because it delivers the closest approximation to it in an imperfect world.

Id at 231.

> matter of course, now prompt demands for legal remedies and for assistance in obtaining them. More and more of our every day life is hedged about by law. . . . As law becomes increasingly crucial and complex, access to legal resources also becomes critical.[317]

The courts remain essential, but rules of law, lawyers, and "traditional" judges are only marginally helpful when it comes to changing the way people think and live. Lawyers, in particular, represent an impediment to the courts' new role in society, above all, in cases involving lifestyle. This was the point made by Justice Denise R. Johnson of the Vermont Supreme Court in her presentation at the Arthur Liman Colloquium on the Future of Legal Services at Yale Law School in 1998. "Relying on pro bono services of attorneys and federally funded legal services programs will not enable us to provide meaningful access to an overloaded justice system," observed Justice Johnson.[318] "The old solutions also will not work because they assume that the entire subject is best left to the legal profession and the courts."[319] Justice Johnson's solution was to restructure the entire judicial process based upon her belief that the situation will not be remedied unless it is "attacked as part of a broader problem of access to the justice system."[320] The explosion in pro se litigation includes people of moderate income who would not qualify for public legal services even if they were still available. Consequently, she concludes, "Our long-term strategy must move beyond throwing more lawyers at the problem. Instead, we must develop a new approach to doing the traditional business of the courts that will meet the needs of diverse economic groups. Such an approach should not only utilize scarce resources more efficiently, but it also should serve a substantially greater population, and thus be more likely to enjoy broad and continuing political support."[321]

Because of the excessive cost of legal services, there needs to be structural changes which will make the legal system more efficient for its users.[322] For Johnson and other activists within the judiciary, structural changes include "altering the lawyer's monopoly on the justice system and demystifying the law so that lay people can understand it."[323] "Critical to any scheme for improving access to justice," said

317. DEBRA L. RHODE, ACCESS TO JUSTICE 8 (2004).

318. Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POL'Y REV. 479, 481 (1998).

319. *Id.* at 483.

320. *Id.* at 480-81.

321. *Id.*

322. *Id.* at 484.

323. *Id.*

Johnson, "is a recognition that the monopoly lawyers hold on the justice system has become an unacceptable barrier to change."[324] While lawyers are thought to remain essential in fully contested trials, such litigation represents a relatively small fraction of the legal mattes involving the poor, and reformers assert that the more routine cases involving the poor may actually be made more complex by the overlay of judicial procedures.[325] Consequently, paralegals and other non-lawyers using standardized forms and/or technological devices are more desirable as replacements for services once provided by lawyers in cases such as real estate closings, uncontested divorces, preparing simple wills, probating simple estates, negotiating personal injury claims, and collecting simple debts.[326]

Among other structural reforms, innovative court-sponsored ADR programs may have the most potential for simplifying procedures and utilizing non-lawyer counselors to provide service to poor people (and other types of litigants) in appropriate cases.[327] Those cases which do not require a lawyer must be "filtered out" by court personnel: "Filtering out those cases that could be heard by a different kind of tribunal may be more rewarding than simply pressuring parties to settle in an ad hoc fashion."[328] Just as important, however,

> [a] change that would benefit litigants across the board would be a move toward a multi-disciplinary approach that would remove certain aspects of family cases from the adversarial process. By multi-disciplinary, I mean using other professionals—social workers, mediators, psychologists—to handle the difficult family problems that are not primarily legal and that are not amenable to a merely legal solution. Absent protection and power imbalance concerns, counseling, mediation and administrative hearings may be more suitable methods of resolving family disputes.[329]

Justice Johnson concluded with these observations:

> In my view, the way out of this morass is to recognize that the lack of legal services for the poor is symptomatic of a deeper problem with our nation's court system. Our society has outgrown its judicial system. Nothing short of systemic reform can address these deficiencies. Specific options include reconfiguring the monopoly lawyers have on the justice system by reducing the complexity and formality of proceedings where appropriate. Because the poor are not the only people

324. *Id.*
325. *Id.* at 485.
326. *Id.* at 485-86.
327. *Id.* at 486.
328. *Id.* at 487.
329. *Id.* at 487-88.

who are denied access through lack of representation, the most effective and politically viable strategy is to combine forces with other groups calling for broad-based reforms. Much as the health care delivery system has undergone a sea-change in the past decade, moving away from providing service on demand and excessive reliance on the most intensively trained service providers, the crisis of access in the judicial system will force us to recognize the need for systemic reform. The collision of limited resources and increasing demand compels the invention of a new paradigm for thinking about both resources and needs. The judicial system must reassess its purposes with all users in mind and reallocate limited resources according to priorities that do not shut out the economically disadvantaged.[330]

In her remarks, Justice Johnson expressly attacks the role of lawyers as gatekeepers of the legal system and the rule of law which declares some to be right and others wrong, making some winners and others losers.[331] As the system has worked in the past, people went to lawyers to determine whether or not they "had a case." The lawyers, familiar with the law through education and experience, advised potential litigants regarding the facts of their case and the potential for recovery based on those facts. If the lawyer thought that a client had a meritorious case, the litigant and lawyer would work out a fee arrangement, and suit was filed. In this way, lawyers regulated to some degree which lawsuits were filed and which were not. Everyone has always had a right to represent themselves, but most often they elected in serious cases to approach the courts through lawyers. This is now changing because of the new role of the courts and the diminishing impact of rules of law on outcomes. The term "access to justice" has come to represent the process of moving away from decision-makers applying fixed rules of law to reach a specific result on specific legal and factual

330. *Id.* at 489.

331. *See, e.g.*, John R. Tarpley, *You hold the key to the courthouse*, 40 Tenn. Bar J., Jan. 2004, at 3 (arguing for more pro bono work by lawyers).

> Well, folks, we 8,200 members of the Tennessee Bar Association hold the key to help thousands of people in the state. We hold the key to the courthouse or boardroom door for all of our clients but particularly for those who cannot afford a lawyer. This key is our ability to practice law. We have learned this special skill over a number of years, including 16 years of general education and then years of intensive learning in law school. Then, we go through that unspeakable right of passage—the bar examination. Finally, we are a lawyer. Some of us go right into practice on our own, and others learn to "practice" with more experienced lawyers. All of these years of learning develop these special skills of ours. It is clear that we have something that most people do not.

Id.

issues framed by the parties in their pleadings. A key component of that process is the elimination of those who "hold the keys" to the courthouse, because they have become, as Justice Johnson said, "an unacceptable barrier to change."[332] But the scope of approaching changes and the purposes to be served by them are even more radical than anything we have seen so far.

In order to remove lawyers as obstacles to change and, thereby increase access to the courts, reformers have turned to computer technology and, particularly, the Internet for an alternative that bypasses lawyers and the courtroom setting altogether. In 1999, Chief Judge Thomas Zlaket of the Arizona Supreme Court delivered the welcoming address to the American Judicature Conference on the challenges of pro se litigation (the Scottsdale Conference). He challenged judges, court administrators, and the bar to prepare for the rapidly approaching future where the idea of having a lawyer present in representation of a client will be a myth in many civil courtrooms. Zlaket and other reformers (as illustrated by numerous statements in earlier futures commission reports and strategic plans, as well as scholarly literature) argue that the expense of hiring a lawyer is escalating beyond the reach of the poor and most middle-income people to the point that some other way of providing access to justice for unrepresented litigants is now necessary.[333] As a result, the State Justice Institute, the National Center for State Courts (NCSC), and the Open Society Institute joined forces to commission a conceptual study of a "fundamental redesign of courts, including every aspect of the entire institution, from building design to judicial training, from technology to the clerk's role."[334] That study by Richard Zorza, entitled *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*,[335] offers "a comprehensive vision, a vision of how a courthouse, courtroom, court team, and court process could be planned together from the ground up to provide simple, open, and affordable justice to all."[336] One could sum up the entire report as a comprehensive approach for shifting to the state the cost and burden of virtually everything that is now done in private by lawyers and their clients and

332. Johnson, *supra* note 318, at 484.

333. *See, e.g.*, Conference Materials, Eastern Regional Conference, Access to Justice for the Self-Represented: Court and Community-Based Strategies and Solutions, May 10-12, 2006, N.Y. State Judicial Institute, White Plains, NY, http://www.courts.state.ny.us/ip/justiceinitiatives/conference.shtml.

334. RICHARD ZORZA, THE SELF HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 11 (2002).

335. *Id.*

336. *Id.*

paid for by private sources. People once outside the formal judiciary are being brought into the courts in a multitude of ways, but advanced computer technology coupled with a redesign of the judicial system clearly offers the greatest promise for increasing access while reducing costs and increasing efficiency.

As a rough draft of Zorza's book was already underway, the National Center for State Courts, acting at the direction of the Conference of Chief Justices and the Conference of State Court Administrators, was entering into other working arrangements to actually begin designing a system that operates entirely without the use of lawyers, and which supports substitutes for trials.[337] Beginning in 2000, the NCSC in partnership with the Illinois Institute of Design and Chicago-Kent School of Law "launched a bold venture to use technology to increase access to justice for self-represented litigants," with the "team of design students, law students and their professors" working to reengineer the courts from the "customers" point of view.[338] Professor Ronald Staudt, IIT's associate vice president for law, business and technology compared the venture to the birth of E-Trade or Amazon.com. The explosion of self-represented litigants, coupled with the complexity of the legal system, and "other barriers to entry" increases the need to educate and assist them through the courts.

"Faculty and students are collaborating to analyze and redesign current civil court processes to lift procedural, financial, and cultural barriers that prevent effective access to justice."[339] A "299 element," internet-based system was designed and tested to help litigants through the civil court process. "The system is a web-based program which assists litigants throughout their court process, from choosing between mediation and trial, to filing claims and tracking their case electronically, to honing their strategy, appearing in court, getting a fair resolution and seeking help from community organizations."[340] The system helps litigants on both sides of a case "get their story straight" before appearing in court, and an auction-type system is being designed for getting fair value for liquidated assets.[341]

337. Conference of Chief Justices and Conference of State Court Administrators, *Resolution 31* (adopted Aug. 1, 2002), *available at* http://www.courts.state.ny.us/ip/justiceinitiatives/conference.shtml.

338. *See* Press Release, Ill. Inst. of Design, Illinois Institute of Technology Leads Research in Redesigning Civil Justice Procedures in America (May 5, 2001), *available at* http://www.id.iit.edu/news/articles/pr_accesstojustice.html (last visited May 19, 2007).

339. *Id.*

340. *Id.*

341. *Id.*

As a guide for litigants attempting to navigate through the computer-based judicial system, the collaborators designed new computer software known as the Access to Justice Author (A2J Author). The A2J Author uses computer icons augmented by visual and audio cues to permit "non-technical authors from the courts, clerk's offices, legal services programs, and website editors" to rapidly build "customer friendly web-based interfaces for document assembly."[342] Just filling out simple forms is difficult for many people. Consequently, some other way of enabling people to "tell their story" had to be developed that makes document assembly and electronic filing more widely accessible to self-represented litigants. When entering the new judicial system one is met by a computer-generated image of a woman standing on a road called "Access to Justice."[343] She will guide you through the system.

The computer can be programmed by "court staff and public interest lawyers" to create A2J Author interviews by the woman with prospective litigants which take them through a "branching" system of questions and answers,[344] functioning and arranged like a road map.[345] Depending on how the litigant answers one question, the computer will generate the next question; the answer to that question will determine the content of the following question, and so forth, leading the litigant through the system by "asking only the questions that need to be answered."[346] Importantly,

> [t]he information provided by the self-represented litigant during [the] initial diagnosis stage also helps the A2J System focus and refine the information that it provides to the litigant at later stages, screening out extraneous information that might otherwise confuse litigants. The A2J System systematically captures key information about self-represented litigants to allow the court to improve its services to these litigants.[347]

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342. CHICAGO-KENT COLLEGE OF LAW, THE CENTER FOR ACCESS TO JUSTICE AND TECHNOLOGY, MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS: A2J AUTHOR EXECUTIVE SUMMARY 3, http://www.kentlaw.edu/cajt/SJI-A2JAuthorExecutive Summary.pdf (last visited May 20, 2007) [hereinafter A2J AUTHOR EXECUTIVE SUMMARY].

343. *Id.* at 1-2.

344. *Id.* at 3.

345. CHICAGO-KENT COLLEGE OF LAW, THE CENTER FOR ACCESS TO JUSTICE AND TECHNOLOGY, MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS EXECUTIVE SUMMARY 17, http://www.ncsconline.org/WC/Publications/Res_ProSe_AccessJustMeetNeeds ExecSumPub.pdf (last visited June 4, 2007).

346. *Id.*

347. *Id.* at 12.

System modules have already been designed for routine matters such as "Petition for Adult Name Change," and "Application for Waiver of Court Fees and Costs." Some states have already begun using the A2J Author tool for interviews related to landlord eviction notices, tenant repairs complaint, and other matters.[348]

This project, like Zorza's book, is supported financially by the State Justice Institute, Open Society Institute, and the Center for Access to the Courts Through Technology.[349]

There may be some value in speculating about the possible consequences of creating a state-supported, computer-based dispute resolution system. If people are given a choice between two options—one cheap, the other expensive; one easy, the other hard—people will take the cheap, easy way every time. If activists are successful in creating a computer system as one component of, or as an alternative to the "traditional" judicial system the computer-based system will not only become the default system but may be used by people for anything and everything. Every dispute in life has the potential to become a matter for the new courts and their computers. Husbands and wives, children and parents, employers and employees, coaches and players, quarreling neighbors, people offended by the use of certain words spoken by others, no matter how inconsequential, will opt for the computer-based system in the hope of finding an ally or receiving a value-based decision predetermined to be therapeutic.

Moreover, the computer-based system will have a leveling effect on all disputes. Even if one party hires an attorney to help him "tell his story," the precision and sophistication of the lawyer will be lost in translation to a form of rhetoric that does not accommodate the education and experience that a lawyer brings to the case; and if the system did accommodate narrowly framed factual and legal issues, the opposing, self-represented party will have the help of court staff to frame their story in a way that is designed to put them on a level playing field with the wealthier party. The computer generates questions which the parties are required to answer as a precondition for receiving a decision, and court futures commissions advocate changing court forms and communications to accommodate a minimal degree of education and cultural sophistication. The Tennessee Futures Commission, for example, recommends that all "forms and written communications to the public by the legal system . . . be at the sixth-grade level of reading proficiency."[350]

348. A2J AUTHOR EXECUTIVE SUMMARY, *supra* note 342, at 4-5.
349. *See* Press Release, *supra* note 338.
350. TO SERVE ALL PEOPLE, *supra* note 138, at 34.

The need for simplifying the way factual and legal issues are collected and processed is magnified by the movement to computer-based technology as a means of resolving disputes. The communication of facts and abstract concepts through questions and answers provided by the litigants will have to be answered in equally simplistic ways by the electronic dispute resolution system, even as the system of artificial intelligence becomes more sophisticated. The Tennessee Futures Commission considered it to be

> easy to envision an electronic entry point to the judicial system, especially for the most common disputes—domestic relations, landlord-tenant, etc. Rental-car agencies offer computerized directions to specific destinations; hotels have touch-screen guides to a city. A more sophisticated computer could guide a person through parts of the legal system, spelling out legal rights and responsibilities, setting out various alternatives, and offering instructions on how to further access the system.[351]

More importantly, however, "as artificial intelligence advances, computer models might apply principles of law to individual fact patterns, and thereby offer forecasts of the rights and responsibilities of the parties. The computer, in essence, would provide a mini-trial, and the likely outcome would be a far larger number of cases resolved long before they come to a traditional courtroom."[352]

Because the court staff which aids the self-represented litigant will have greater information about how the computer-based system is set up to respond to input, their help may be of greater value to the self-represented litigant than help received by the other party from a lawyer working outside the system. How the courts hope to do all of these things and still maintain the illusion of neutrality and healing is unclear. The courts are, nevertheless, working diligently to achieve techniques of artificial intelligence for use in the judicial system. One way to eliminate decisions which may not leave the parties feeling good about their experience with the courts is to define those decisions in advance to be therapeutic because they were rendered by a judicial system which has defined itself as therapeutic.

Changing the judicial system to increase "access" is being justified by reasons other than the high cost of hiring lawyers. In the Preface to Zorza's book, Chief Justice Ronald M. George of the California Supreme Court articulated reasons for changing and expanding access to the courts. For a long time, observed Justice George:

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351. *Id.* at 30.
352. *Id.*

> [T]he conventional thinking about courts was dominated by a traditionally narrow vision: two lawyers standing before a judge seated on an elevated bench, arguing a matter for the judge to resolve by signing a decision and sending the parties off to execute it. But society's expectations have changed, as has the population appearing in our Courts in every capacity. As a result, courts have expanded the focus of their attention beyond the courthouse door and into the communities they serve.[353]

While cost was the major factor articulated by Justice Zlaket, the need to reach outside the courthouse and into the surrounding community was the most important consideration for Justice George. Reaching outside the courthouse doors will permit judges to intervene in the lives of individuals and community affairs in ways never before possible, all in the name of access to justice.

Justice Johnson, who wants to break up the lawyers' monopoly on the judicial system, complained that lawyers are an "unacceptable barrier to change."[354] But what, exactly, are those changes and what purposes are lawyers obstructing? The answer can be found in the report of the Tennessee Futures Commission. And, though it is lengthy, other words could not convey so effectively, and in more straightforward terms, the reasons for change:

> Solving problems
>
> If the judicial system is to serve the public, its purpose must go beyond merely clearing its own docket. It must play a part in actually solving the problems that arrive before it.
>
> The courts' role has traditionally been regarded as a "zealously passive" one, dispensing justice as individual cases present themselves at the courthouse.
>
> The judicial system cannot solve every problem, of course, and many problems will not be solved in any final sense.
>
> But if it continues to deal with dysfunctional families by addressing one member's case, it is treating one arm while the spine is broken. If it continues to preside over commercial disputes at a timing and depth determined by the wealthier party, it is presenting itself as checkbook justice. And if it sends the addict through one more round of prison time, it is merely warehousing a problem for future distribution.
>
> Encouraging settlement discussions should be the least of a court's active role. It will take assertive leadership to actually solve problems.

353. *Id.* at 7.

354. Johnson, *supra* note 318, at 484.

> Alternative means
>
> If the judicial system is to serve the public by solving problems, the measure of success will have to change. An effective system will have fewer verdicts, not more.
>
> The right to a trial doesn't mean that a trial is the right choice.
>
> Some changes in procedures can make for more efficient judicial management, but real strides will mean resolving cases sooner and by means other than trial.
>
> . . .
>
> In its broader sense, the phrase [alternative dispute resolution] has enormous implications. It means that every court is a last resort. Full trials should be last-chance surgery, not primary care.[355]

In the constitutional process, judges are not interested (at least professionally) in the underlying problems giving rise to conflict. Whether or not a divorcing husband and wife hate each other is irrelevant as long as both abide by the terms of the final decree of divorce. Custody, visitation, and property rights are often some of the more nebulous issues courts deal with, but, as in other cases, they should be determined by the facts and the law in each case. The problem with lawyers and their "monopoly" on the judicial system is a basic problem with law and the courts generally. If the courts were not bound to follow rules of law in reaching specific outcomes there would be no need for lawyers or trials, and judges would be free to do as they please; hence, the call by Justice Johnson to "demystify law" by simplifying the rules which govern the process and the outcome. The courts, after using law to gain coercive power over people, can then diminish its influence on the decision-making process. The lawyer's role in the judicial system as the zealous defender of the client's legal rights and interests will likewise be diminished. Judges will be free to act not merely with discretion, but arbitrarily to implement their personal social visions of changes in individual and collective lifestyle. The number of trials will diminish if not vanish altogether. This will happen even though the number of "cases" continues to increase. There will be, as the Tennessee Futures Commission envisioned, "fewer verdicts, not more;" and fewer trials is exactly what they have accomplished.

B. *The Vanishing Trial*

Between 1976 and 2002, the number of civil jury trials decreased by about two-thirds in both state and federal courts while the number

355. TO SERVE ALL PEOPLE, *supra* note 138, at 61-62.

of civil dispositions during that same period increased 168% in state courts and 144% in federal courts.[356] Researchers at the National Center for State Courts report that a principal reason for the recent decline in civil jury trials is a significant change in judicial management: "Today, judges are not merely managing cases but are shaping litigation by deciding issues in cases as they arise and directing the evidence-gathering process toward the resolution of issues. This shift in focus from presiding over trials to managing the resolution of disputes results in fewer cases moving to full trial. Trial judges not only manage cases in order to move them expeditiously, but also to conserve judicial and litigant resources by actively promoting settlement."[357] Moreover, "[t]he burgeoning use and availability of mediation, arbitration, and other forms of alternative dispute resolution (ADR) also contributes to the declining number of trials by providing a means to settle cases outside the courtroom."[358]

The Vanishing Trial has become the subject of the largest inquiry ever undertaken by the Litigation Section of the American Bar Association and has gained national attention.[359] For decades the ABA has been supporting more meticulous case management techniques by judges, and the implementation of alternative techniques of dispute resolution, including the effort to change the role of the courts in society. But when the Vanishing Trial could no longer be ignored, the ABA and their inquiring experts responded with a sense of puzzlement. "What has caused this dramatic decline in trials?" asks Patricia Lee Refo, Chair of the ABA's Section of Litigation.[360] "While more work needs to be done on this issue, there is no shortage of theories," she adds.[361] "Still, the trends are clear enough," she continues, "that we must start asking what the diminishing trial means for our justice system and our society."[362] One thing is certain: there is an increasing number of graduating law students who will never participate in the trial of a lawsuit. Even if they do, the preferred path is some alternative technique of resolving the case. While settlement was always a possible option for lawyers negotiating on behalf of their clients, it is now the

356. *The Vanishing Trial: Implications for the Bench and Bar, Civil Action*, 4 NAT'L CTR. FOR STATE COURTS, Spring 2005, at 1.

357. *Id.* at 2.

358. *Id.*

359. Symposium, *The Vanishing Trial*, A.B.A. Section of Litigation Civil Justice Initiatives Task Force (2003), *available at* http://www.abanet.org/litigation/vanishing trial.

360. Refo, *supra* note 175, at 1, 3.

361. *Id.*

362. *Id.* at 4.

prevailing dogma leaving all lawyers little alternative, whether as a result of peer pressure or a court order, except to attempt some form of ADR. The result is a growing dearth of lawyers qualified for trial: "Is it possible that lawyers sometimes settle a case because they don't know how to try one? And if there are fewer trials to go around, then surely over time, fewer lawyers will have meaningful experience in trying a case."[363]

If people have to wait on lawyers to file suit then the lawyers are, indeed, obstructing the courts in their new therapeutic, problem-solving role. Judges are still willing, in the words of the Tennessee Futures Commission, to wait until "individual cases present themselves at the courthouse;" but they are changing the "judicial power" to allow them to initiate state involvement with individuals and subgroups and to personally interject themselves and the expanding court team into the lives of all people. This is a bold attempt to solve what the judges and activists working with them consider to be the basic problems of life, including the reorientation of the community away from the popular branches of government toward the judiciary.

Trials, while still necessary to give state supreme courts opportunities to make, for example, policy statements or to "send a message," have no place in the majority of cases, and are, consequently vanishing. When the Tennessee Futures Commission said, "The right to a trial doesn't mean that a trial is the right choice,"[364] it implied that a trial might be the right choice, but it is now presumed to be the wrong choice, for that would require, as Justice Johnson put it, "service on demand."[365]

It may be comforting to lawyers to point out that the role of the trial judge is also being changed beyond recognition. With the rise of the Counter Culture in the 1960s there was a rejection of authority of all kinds. The contempt for authority was noticeably visible in a number of ways: 1) the disavowal of God and of moral absolutes (including, notably, the rebellion against the institution of marriage and prevailing standards of sexual morality, destroying the unity of the husband and wife and divorcing sexual intercourse from responsibility); and 2) rebellion against the duly established authority of government. The authority of courts of law was the object of contempt and remains so today. The counter culture has not gone away but has only become mainstream and vastly more influential in the effort to reengineer the judicial system. An excellent example of this contempt for the authority

363. *Id.*
364. TO SERVE ALL PEOPLE, *supra* note 138, at 61-62.
365. Johnson, *supra* note 318, at 489.

of judges applying rules of law can be found in the Multi-door Courthouse Scenario prepared by futurists and distributed as part of The Future and the Courts Conference in 1990:

> It goes without saying that the public is deeply involved in and aware of the assumptions, rules, and actual operation of the multi-door system. Everything is open, above-board, and user-friendly. Gone is the old fashioned courtroom, which had been little changed from the days when it was in fact an anteroom of the king (with all the utterly obsolete and undemocratic notions of a king and his law lording it over quivering vassals). Gone also is the robed and elevated judge, impervious and imperious behind his imposing bench, with a monstrous banging gavel hammering out justice and declaring all and sundry who did not rise, bow, scrape and defer to him to be held "in contempt of court." Instead there has evolved a wide variety of roles and relationships, as varied as there are people, their disputes, and the ways they each think their disputes should be peaceably resolved. And, of course, those who used the courts the most—the disenfranchised—were the first to be consulted regarding structure and planning for the new courts.[366]

C. *New Gatekeepers*

The decision to take a case to trial will no longer be the prerogative of the litigants or their lawyers, but will fall within the exclusive province of a new set of gatekeepers—court bureaucrats consisting of powerful, presiding trial judges and court administrators. These new gatekeepers will evaluate each case as it comes in to determine its potential for transformation, assign it to an appropriate track in the justice system, and prescribe the appropriate therapeutic process for clients to solve their underlying physical, social, psychological, economic and political problems.[367] New gatekeepers are necessary to "fil-

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366. ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020, *supra* note 111, at 31.

367. *See, e.g.*, TO SERVE ALL PEOPLE, *supra* note 138, at 20-21.

> Magistrates can play an important middle role, less than judicial decision-making but more than clerical record-keeping. We envision magistrates as the triage officers of the judicial system. We are not even sure magistrate is the proper name, since the position is unlike the various present magistrates. Gatekeeper, dispute facilitator, justice coordinator—all those titles sound a bit stiff, but they do describe what we have in mind. . . . Magistrates could have plenty to do as gatekeepers. . . . Magistrates might sort out issues and facts short of final judgments. For that purpose, we recommend that they be licensed lawyers, chosen by district judges from candidates qualified by the Administrative Office of the Courts. Magistrates might preside over preliminary hearings and various motions. Even more broadly, they might exercise effective case management, which now falls

ter out" those cases not requiring a lawyer because lawyers have traditionally applied rules of law to the facts of a given case to determine whether a cause of action is available. This will no longer be necessary for entrance to the judicial system or to a determination of the appropriate outcome. Judges and their administrative staff will hold the keys to the blessings of the material world in the form of court computers as well as a wide range of options consisting of social services, psychological counseling, drug therapy, work therapy, mentoring, money damages, apologies, and the approval of the community. No elevated bench or banging gavel is necessary for that. But real judges are necessary in the problem-solving setting. Decisions have to be made when the application of differential reinforcement, punishment, or some other technique of behavioral modification is deemed appropriate. Consequently, we have the emergence of an entirely new kind of judge with a new role, as a recent article in *Court Review* demonstrates:

> There is a lot of talk these days about the role of a judge, especially among trial court judges. Frequently, the discussion is framed in terms of whether the judiciary should be expected to behave in one of two polar-opposite ways. Should they be primarily almost aloof finders of fact, impartial and nearly devoid of intimate contact with and knowledge of litigants and their circumstances? Or should they be one of many possible partners to a diagnostic, therapeutic oriented response process to ameliorate underlying and messy problems of litigants? These choices confront judges with the creation and development of drug courts, domestic abuse courts, gun courts, mental health courts, community courts, and other courts revolving around social maladies.[368]

The "choices" in judicial role have already been answered by the Conference of Chief Justices and the Conference of State Court Admin-

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> below the horizon of the trial judge but above the authority of the court clerk. They might play an important role in referring cases to alternative forums and even to alternate community resources, ranging, say, from counselors to public health agencies.
>
> In that framework, the magistrates' success would be judged not just on the volume of the caseload, but on the effective direction of it. Some of that direction would be inside the court system. Some would be toward other problem solvers.
>
> The entire judicial system must move beyond the model of simply processing cases. The magistrate, with more flexibility than a judge but more authority than a clerk, can be a focal point of that movement.

Id.

368. Roger Hanson, *The Changing Role of a Judge and Its Implications*, COURT REV., Winter 2002, at 10.

istrators. Both supported the therapeutic model by joint resolutions and have advocated that it be extended to general jurisdiction courts.

Litigants who are "filtered out" by gatekeepers are sent to judges who are partners with the diagnostic, therapeutic team of experts as well as volunteers from the community who, together, seek to modify behavior and end conflict. But by filtering out those cases which do not require a lawyer, they necessarily "filter in" those cases which do. In other words, the same gatekeepers who decide when an alternative technique will work to produce a therapeutic outcome, will also decide when it is necessary to fall back to the "robed and elevated judge, impervious and imperious behind his imposing bench."[369] The "traditional" judge will be there to prevent a "power imbalance," send a message, reverse a policy statement by the legislature, or find in the constitution a right or obligation that no one else can see. Traditional trial courts are still necessary to build records for state supreme courts which will not surrender authority given to them by state constitutions or their growing political power as the judicial branch of government. The ability of high courts to find in the various constitutions rights or obligations not expressly or implicitly contained in them, or through the use of the common law to create new theories of liability must be preserved. The gatekeeping function and adversarial litigation will be uprooted from the rule of law, except as the concept of law becomes increasingly synonymous with judges as the self-contained embodiment of law.

Gatekeepers will be powerful judges functioning as planners and managers, deciding, perhaps with other judges or administrators, how the case before them can best serve their purposes, or programming court computers to make the same decision. Court administrators or computer systems may make those decisions in the run-of-the-mill case, but presiding judges will hold ultimate authority, subject only to the control of the state supreme court. Coordination is possible because the growing cadre of local administrators and their computer systems are tied to the state supreme court's Administrative Office of

369. *See* OHIO COURT FUTURES COMMISSION, A CHANGING LANDSCAPE 26 (2000).

> All courts should routinely make available a continuum of dispute resolution, from mediation and other forms of assisted negotiation to arbitration and traditional litigation. Court intake staff should be familiar will all of these options, and trained to evaluate disputes and assign them to an appropriate track. In some types of cases (e.g. juvenile and domestic cases in which vital relationships need to be preserved) mediation may be a mandatory first step—but the right to trial should be preserved and parties should not be penalized if they fail to reach agreement through mediation.

Id.

the Courts. Planning among the judiciary has the potential to become a seamless function. Ultimately, the rule of law may become nothing more than rules promulgated by courts or state legislatures prescribing how cases will be assigned to different tracks within the judicial system.

By advocating alternative dispute resolution, judges and the dispute resolution team attack individual and group problems aggressively. But the vision articulated by the many court commissions is worded in ways that tend to deceive us. For example, they say that "every court is a last resort," implying that everything short of trial is something other than the work of the state. ADR is depicted as an informal process, but in actual practice that is not true. What is true is that the courts are morphing. The courts are transforming themselves into an entirely new form of government, not just in appearance but substantively different from the constitutional judicial system, and fundamentally at odds with legislative and executive functions which they are usurping. But because we still think of the courts in the constitutional context, with lawyers and judges in a courtroom, we are missing the change. The judges and their team, employing subtle, manipulative, and arbitrary techniques in place of the rule of law, are to become our "primary care" physicians, our healers. At times we may need surgery at the hands of the impervious and imperious judge behind his imposing bench, but the new courts will make us whole without that if possible. Either way, the courts intend to change us.

D. *The Abolition of Due Process*

Perhaps the best illustration of the rejection by activists of constitutional forms and processes is the adoption by community courts of dispute resolution techniques that bypass the constitution altogether. These techniques are initiated without the necessity of filing a complaint or the issuance of a summons. The Ohio Supreme Court's Futures Commission recommended that, "Ohioans should be able to use the courts to initiate non-adversarial dispute resolution processes without filing a lawsuit."[370] The Futures Commission's "Vision Statement" anticipates that, "In 2025, Ohio courts will offer the public a wide and diverse range of options for resolving disputes short of traditional litigation. Rather than being required to initiate a lawsuit in order to gain the court's involvement, parties who bring civil disputes to the courts will be able to file a request for mediation or other court-

370. *Id.* at 26.

assisted negotiation process as a first step."[371] In addition, the Futures Commission also recommended that some low-level criminal and delinquency cases be handled in a similar fashion with the victim's consent. Cases such as neighborhood disputes, graffiti or shoplifting could be diverted to alternative forms of court-annexed dispute resolution without the necessity of ever filing criminal charges.[372]

This is already happening, for example, in the Midtown Community Court in New York City. Many quality-of-life problems in the community are not violations of the law and, consequently, do not come to the attention of the police or the courts. But they do impact the entire community by degrading the overall quality of life. The Midtown Community Court sought to address such problems in three ways:

> . First, it established a mediation service to resolve neighborhood disputes—for example, the opening of an adult movie house or the operating hours of a noisy auto repair shop—before they escalate to legal battles. In addition to helping the community deal with such problems, the service conveys the Court's commitment to the community and its quality of life.
>
> Second, the Court set up a street outreach unit—staffed by police officers and case workers from the court—to enroll potential clients in court-based social service programs before they get into trouble with the law. Five mornings a week, the outreach teams comb the neighborhood, engaging likely clients—prostitutes, substance abusers, the homeless—in conversation and encouraging them to come in for help voluntarily.
>
> Finally, the Court launched Times Square Ink, an on-the-job training program for ex-offenders who have "graduated" from community service. Participants in the program learn job skills by staffing a copy center that does copying work for local businesses and non-profits. By providing ex-offenders with job training and assisting them in finding jobs, Times Square Ink seeks to address the related problems of unemployment and crime.[373]

Such services "use the courts to initiate" dispute resolution processes on the assumption that they are non-adversarial and solve problems that impact the quality of community life before they result in litigation. If, however, they are non-adversarial, why should the dispute resolution process be initiated at all? Is it not apparent that someone has called the courthouse and complained to the court staff about some other person—the operator of a noisy auto repair shop, an

371. Id.

372. *Id.*

373. JOHN FEINBLATT & GREG BERMAN, COMMUNITY COURT PRINCIPLES: A GUIDE FOR PLANNERS 10-11 (1997).

unwanted theatre? In New York, court "outreach teams" actively comb the neighborhood looking for "potential candidates," encouraging them to "voluntarily" come in for help. Is that not a threat? Is that not an adversarial, coercive process? Obviously so, but the implication by activists is that we can begin to assign grades or levels of court involvement in the private lives of individuals depending on particular types of personal activity, as well as the type of work being done by the courts. The courts are still working through their staff or court volunteers, but as long as it is a low-level involvement, such as mediation or job training, it is not only acceptable but desirable that they do so without requiring the filing of a complaint. Courts should expand their healing work in the community through court staff or community volunteers as long as they are only nominally intrusive and coercive, and do so to help people, including the broader community, with their problems.

Preemptive judicial processes are intended to "convey the Court's commitment to the community and its quality of life."[374] Consequently, the "help" offered by court staff or volunteers cannot be safely ignored. If the court volunteer disturbs us when she knocks on the door, how can she be safely told to mind her own business and get off the property? Can we safely disregard the fact that she will return to the court and file a written report of her visit? We know, because they tell us, that they are compassionate people driven by an ethic of care, and are only there to help us. But can we trust them to treat us fairly and with respect regardless of how we might treat them, and regardless of the fact that we ignored their overtures to change "voluntarily" before they compel us to do so? Can we assume that the "low-level" antisocial behavior attracting court attention today will not be subsequently expanded to encompass an even broader definition of "low-level" activity that implicates each of us as sources of trouble for the community? In short, can we ignore the constitutional rights of potential offenders without placing our own freedom in jeopardy at the hands of judges who promise to act against people for the good of the community?

Changes represented by community courts represent fundamental changes in constitutional government. Not only have the courts dispensed with the constitutional doctrine of justiciability, but they are now dispensing with the constitutional doctrines that require a case or controversy, standing, and ripeness. But the greatest loss of all is the impending demise of due process. Activists are positing new concepts

374. *Id.* at 10.

of due process to comport with the new form and function of the courts in society, arguing: 1) that it is the "fairness of our decision-making process that makes our courts unique";[375] and 2) that public trust and confidence in the justice system is determined more by the relative fairness of the process than the accuracy of the outcome.[376] In other words, there must be some ideological basis for allowing court staff and volunteers to interject themselves in peoples' private affairs in multiple ways without requiring a formal complaint or the issuance of a summons. And, as we have already seen, that basis lies in the realm of human feelings and emotions rather than fixed precepts of morality or reason. Opinion polls show that the fairness of the dispute resolution process affects public trust of judicial performance more than a favorable outcome: "In the minds of litigants, the importance of a favorable outcome is consistently outweighed by the impact of an unfair process."[377] In other words, if judges treat people with respect they can concern themselves with the social and psychological problems of litigants and the community rather than the substantive accuracy of any decision they would otherwise render according to the rule of law. Being nice frees them up, so to speak, to solve problems rather than render judgments required by the facts and the law. Because state constitutions do not expressly define the judicial power in a way that requires judges to wait until a complaint is filed before they act, then they only have to find a politically-acceptable excuse for not doing so. And what is or is not acceptable varies with group identification:

> Procedural fairness can mean different things to different people. Among judges and lawyers, procedural justice is often defined as procedural due process, i.e., notice and opportunity to be heard before a neutral and detached magistrate. But what does fairness mean to litigants and the public? Something quite different. For litigants and the public, fairness appears to consist of four principal elements: (1) neutrality; (2) respect; (3) participation; and (4) trustworthiness.[378]

If the judge is perceived to be "free of bias, interest or improper motives and committed to equality under the law," then he is considered neutral. If he is "courteous and respectful" he conveys the element of respect. If he allows the litigants an "active voice" in the decision-making process and is an "attentive listener" then he facilitates partici-

375. Warren, *supra* note 165, at 14.
376. *Id.*
377. *Id.* at 13.
378. *Id.* at 14.

pation. Finally, it is generally presumed that judges are honest. Consequently,

> [t]rustworthiness is based upon a perception of the judge's motives, i.e., whether the judge truly cares about the litigant (demonstrates an "ethic of care") and is seeking to do right by the litigant. Trustworthiness is not a measure of the judge's knowledge, skills, or abilities. It is a measure of the judge's character, not the judge's competence. The litigant usually does not feel qualified to evaluate the judge's competence, but often feels fully qualified, based upon the judge's reputation, demeanor, and behavior, to evaluate the judge's motives.[379]

For this reason, knowledge of the law and the rules of legal procedure play a very limited role in evaluating judicial performance, both from the perspective of litigants as well as in court-sponsored evaluation programs.[380]

For all of these reasons therapeutic, problem-solving courts tend toward the abandonment of procedural safeguards that protect all of us from oppression by the state. Nowhere is that more obvious than the process now underway of dispensing with constitutional due process as a basis for the exercise of the judicial power.

The courts want access to the people, and, as a result, we now have a proactive judiciary engaged in ferreting out and solving the underlying social, psychological, economic, and political causes of conflict. The problem with lawyers is not that they are keeping the people from getting to the judges, but that they are keeping the judges from getting to the people. Judges are seeking to go outside the courtroom and into their communities, and new concepts and systems of access will permit them to do just that. The flow of the judicial process is being reversed. For a proactive judiciary bent on getting at the underlying problems of life, lawyers armed with rules of law are standing, as obstacles, between the courts and the people. The use of lawyers shall be minimized but not eliminated. In the therapeutic system they may become, in concert with court computers, little more than guides for people to help them "tell their story," but available, when necessary, to try a lawsuit, make a record of the testimony, and prepare the case for the appellate courts. In time, very few lawyers will have the training and experience to participate skillfully in the trial of a lawsuit. Their role will become increasingly meaningless as the gate-keeping and filtering process makes their contribution less and less relevant to the final outcome.

379. *Id.* at 14-15.
380. *Id.*

Moreover, the very decision by the presiding judge or local court administrator to send a case to trial represents a judgment by the gatekeepers that a trial of the case is already considered by the courts to be useful for some predetermined end. As the system operated in the past all cases were originally headed to trial, subject only to decisions made privately by litigants or their lawyers to achieve some result through settlement or other disposition short of trial. But with decisions being made not by the parties but by court officials, different criteria become important. Why should court officials assign a case to the trial path unless the factual or legal issues appeal to the courts? Before, none of the factual or legal issues were of personal interest to the courts; they were there merely as tribunals to make such decisions as the parties demanded of them, and then only according to the rule of law. Complaints still being filed with courts today conclude with a "demand" for specific relief such as a money judgment or some other form of lawful relief available by the courts. In the therapeutic setting, however, the judges themselves are interested in the litigants and their problems, and, more particularly, about the outcome of their dispute. Consequently, judges and court staff will know better than anyone else, including the disputing parties, how best to meet their real needs.

Only after the flow of the judicial process has been reversed, the lawyers removed, and access to the courts made state-supported and universal, will the judges be able, in Justice Brock's words, to come out of their chambers or down from the bench to personally involve themselves in the private lives and everyday problems of the people. The objective of Access to Justice from the perspective of Chief Justice George is being achieved because "courts have expanded the focus of their attention beyond the courthouse door and into the communities they serve." Judges now express their social consciousness by initiating contact with individuals and groups in their communities, thereby turning courts into self-starters. Judges have adopted an "ethic of care" which compels a proactive posture. One of the best examples of this trend is the Guardianship Review Program of the Maricopa County Superior Court in Arizona,[381] which uses volunteers recruited from the community to "serve as the court's eyes and ears," by making personal, court-initiated visits to the homes of elderly and disabled persons under the care of court-appointed guardians.[382]

381. Letter from Deborah Primock, Program Director of Maricopa County Suprerior Court Guardianship Review Program, to Potential Volunteer Guardians, *available at* http://www.superiorcourt.maricopa.gov/volunteers/pdf/guardian.pdf (last visited May 9, 2007).

382. *Id.*

In the so-called "traditional" court exercising the constitutional judicial power, the court would not act until a member of the family, a neighbor, or, perhaps, an employee of the Department of Human Services, brought instances of neglect or abuse to the attention of the court by filing a petition requesting specific types of relief. In Maricopa County, however, things work differently. The court has abandoned its constitutional position and process in favor of an activist position. After each unannounced visit, the court volunteer fills out a report "indicating the status of the ward and any recommendations for action." That report is then reviewed by court staff to determine whether further action is necessary. In this way, Court Visitors "serve as the court's eyes and ears."[383]

Several relevant points may be made from the example in Maricopa County: 1) if removal of untrustworthy fiduciaries cannot be accomplished by the family or other persons having standing to do so, then the executive branch has the responsibility of taking the actions now being annexed to the judiciary; 2) the justification for seizing this executive-branch function is the one philosophical principle that now trumps all others: the ends justify the means; 3) the beneficiary is not necessarily the abused or neglected ward (though some may benefit), but the court which gains power in the community in the form the "eyes and ears" of court volunteers; and 4) the courts political position in the community, on which the program is based, is increased by favorable press coverage, increasing public trust and confidence.

As judges leave the confines of the courtroom and go out into the community, resisting the courts will be futile. When the court receives information from its volunteers, court employees make decisions about appropriate action. The court's own servants become witnesses. All of the information and machinery necessary to the outcome are self-contained within the expanded court setting. But good results are the best guarantee that no one will object, but, to the contrary, will praise the court for its caring and innovative approach to the solution of infrequent problems. However, courts which try to anticipate problems and prevent them threaten the liberty of everyone.

Moreover, as Access to Justice assumes a planning function for the community, no one can effectively object to the plan because it will have been made by the court through collaborative working arrangements with individuals and groups in the community. The court's plan will be the community's plan.

383. *Id.*

If the new political praxis is to resemble the symbiotic relationships in nature according to the theory of Transformational Justice,[384] the interaction of subgroups would resemble a circle, at the center of which are the courts, and all other subgroups and institutions would be in orbit about them.[385] The goal is to make the informal institutions of society an arm of the state, providing sociological feedback and assistance to the courts, but devoid of any claim to truth or moral force in society.[386] This is why they must work through the courts; the courts are to be the only remaining oracle of values which has the ability to bring force to bear on the individual and targeted subgroups.

VI. BRAVE NEW JUDICIAL WORLD

The judicial leaders of the court futures movement accepted predictions of future catastrophic consequences if they failed to embrace oncoming sociological, technological, economic and political change. In the early days of this movement futurists predicted a fractured, ephemeral, and chaotic existence for all people who did not prepare for and embrace accelerating changes expected by the twenty-first century. Fixed principles of law, which could not be changed easily, were incompatible with the design of a system that could adapt to the onrushing future. The term "therapeutic jurisprudence" may not have been coined until 1987, but Toffler and other futurists—the "underground sociologists"—had been talking to judges about similar concepts at least fifteen years earlier. Toffler told the Hawaii conference in 1972 and the Antioch Conference in 1977 that laws could not be written, enacted, and repealed fast enough to keep up with "all of this accelerating social turnover, not to mention the turnover of technology and business forms," and was even more to the point when he

384. Colleen Danos, *Transformational Justice*, CENTER COURT, Fall-Winter 1999, at 3.

385. Courts are not going away; they are expanding their reach through collaborative arrangements that expand the formal legal system in new ways involving many other people and groups. *See* Kerper, *supra* note 223.

> The case method assumes a single decision maker—a judge. In contemporary society, decision making is more commonly made by relational networks such as committees, communities, families, workteams, agencies, or organizations with multiple constituencies. In the world of real life lawyers, it is far more likely to be one of these groups who will determine the client's fate rather than a judge.

Id. at 356.

386. *See, e.g.*, Richard L. Fruin Jr., *Judicial Outreach to Religious Leaders*, THE JUDGES' JOURNAL, Spring 2003, at 34 (demonstrating how religious leaders are brought into the work of the courts).

observed that "[t]he law in this case is dead."[387] He went on, however, to propose a solution: "The answer to the crisis, therefore, lies not in the law, but in the reconstitution of social order."[388] The reconstitution of social order was to be accomplished by the subordination of law to alternative, non-legal methods of resolving disputes based on past cultures and new technologies. Every major initiative taking place within the judiciary today is designed, directly or indirectly, to accomplish this one great vision of utopian dreamers. Activists in the judiciary have accepted the reconstitution of the social order as the goal of the judicial branch by redefining the judicial power. Consequently, we have a concept of law as the multifaceted, coercive techniques of social engineering in the hands of judges.

The ease with which these changes are taking place is astonishing. A flourishing economy puts money in the pockets of people committed to this process, but, more importantly, it puts money in the form of tax dollars in the hands of governments. The changes in the judiciary continue to be funded openly by the federal government, especially the United States Department of Justice. The Bureau of Justice Assistance, an arm of the United States Department of Justice, has been the source of many of the start-up grants for the countless thousands of problem-solving courts springing up around the country. Moreover, change is being driven from the top down—by judges, high-ranking lawyers, politicians, professors, social scientists, journalists, and a host of other elite people within society who are working with the courts in a variety of ways. The courts achieve "buy in" by including influential people in the planning process so that the resulting plan, reached through the consensus process, can rightly be said to be "their" plan. In addition, some legislators who despise judicial activism are willingly appropriating money to expand court programs and administrative offices, amending statutes, and passing legislation leading to constitutional amendments to allow courts, especially state supreme courts, to expand their power over inferior trial courts, ordinary citizens, social institutions, and other branches of government. The economy is paying for an army of activists with utopian, socialist agendas for government and deterministic views of human life. A new form of political symbiosis is taking shape which puts the judicial system at the center of a new ecological system of government, and, consequently, at the center of life. Nothing is left to the ordinary citizen, the family, or the church; the visions, the values, the outcomes of the judges are every-

387. JUDGING THE FUTURE, *supra* note 39, at 30.

388. *Id.* at 18, 30-31.

thing. Judicial collaboration with communities is only an illusion. Power is not being shared. Rather, the power of the judicial branch of government is changing and expanding in more subtle and intrusive ways that make it impossible to control. The counter culture which set out to decrease the power of the state over them has succeeded in achieving the exact opposite result.

The many aspects of this movement have proved to be easy to sell. As agendas for change are formulated at the state level, it is always possible to find a few legislators who support the social agenda of the judiciary. They eagerly sponsor legislation bringing about desired changes, and many changes require no legislation at all. In addition, judicial leaders are always able to find some trial judges who share the same bent toward activism. All of this is done on a piecemeal basis, and often in ways that make it look like the demand for change is coming from some place other than the state supreme courts and the court organizations which support them. Judicial activists have been successful in engaging the support and political power of state and local bar associations, community volunteers, state judicial councils, state comptrollers, governors, legislators and others. It is not necessary that any of those working locally to pass new legislation or implement change know anything about the origins or ideological underpinnings of the reform movement. In fact, it is far better if people at the state and local level know nothing about any of this. All that is required is for reformers to propose changes that they claim will increase judicial efficiency and accountability, and save money. All kinds of people, both in government and in the community, will remember only the bare claim (one that is greatly disputed) that the new plan will save money, hold people accountable, or increase the responsiveness of the judiciary to public demands.

Opponents of judicial activism hold a losing hand because they cannot take the time to explain person-to-person the ideology of the reform movement and the fallacy of efficiency. Activists have successfully clothed themselves with a form of secular righteousness. More importantly, however, opponents of activism will lose because political pragmatism has become the dominant philosophy of the judiciary; the ends justify the means.[389] If there are ways to cure someone's drug addiction, or solve a man's problem with anger, is it not better that we do so? Why should we be concerned with the constitution or with laws generally if we can achieve a socially desirable outcome?

389. *See generally* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

The introduction of therapeutic concepts into the judiciary changes everything. Lawsuits which once served as a means for litigants to resolve discreet legal issues existing between themselves over property rights, for example, are now a means of presenting trial courts with the opportunity to act upon the parties or society in ways considered by the judges to be economically, sociologically, psychologically, or politically beneficial to the individuals and the community.[390] As the fountain of many blessings for society, the judiciary is creating dependent constituencies which no longer view involvement with the judiciary as something to be avoided. Rather, the courts have become the gateway to new kinds of entitlements based upon all of the things necessary to heal people physically and psychologically, namely the redistribution of wealth, the reinforcement of self-esteem, moral standing, and political power, as well as the application of drugs or other forms of modification necessary for physical or psychological healing. The very concept of justice in the constitutional setting is essentially dead.[391] Because treatment is now encompassed by the judicial power granted to the courts by state constitutions, it necessarily becomes a right. Access to the courts logically requires access to treatment, whether that treatment is for mental illness (Mental Health Courts),[392] drug addiction (Drug Courts),[393] domestic violence or

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390. *See* NOLAN, *supra* note 175, at 1541 (explaining this view of justice from the perspective of the criminal law). *See also* Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627 (2002).

> In short, courts react to the spiraling increases in case filings by developing new case management techniques. Mediation was not a primary factor in addressing court caseloads. A more accurate view of mediation's impact in the court environment may be that it has opened the door to courts thinking differently about how they serve citizens and the very role of the court in a community.
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> . . .
>
> Judges are beginning to think of litigants not just as cases to pump through a system, but as persons in their communities with problems to solve. Mediation, and the sensitivity it brings to finding solutions parties can live with, is paving the way for the era of the problem-solving court.

Id. at 630-31.

391. *See* NOLAN, *supra* note 76, at 204-08.

392. Elizabeth Neff, *Utah Will Try Mental Health Court to Help Offenders Through Treatment, Not Jail Time*, THE SALT LAKE TRIBUNE, June 4, 2001, at B1. ("Presiding over the state's first mental health court, Bohling will take part in a collaborative effort aimed at providing nonviolent, mentally ill offenders with treatment instead of jail time. The court was developed by a task force that included law enforcement, prosecutors, public defenders and care providers.").

393. *Continue Drug Court: A Worthy Investment*, ST. PETERSBURG TIMES, June 3, 2001, at 2. ("Drug court provides meaningful treatment to drug-addicted defendants who

juvenile delinquency (Family Courts),[394] homelessness (Community Courts), and is being expanded into general jurisdiction courts. One group of activists supporting the work of the courts has begun a program called *Demand Treatment!*, which works to increase public demand for the therapeutic intervention for people with drug or alcohol related dependencies.[395] It is precisely programs such as this which will serve as a pretext for expansion of the courts' role.

A. *Changing Lives*

For proponents of a sociological and psychological approach to conflict resolution, resolving the immediate problem or conflict is never enough. Advocates of problem solving admit that the ultimate goal in every case is a change in the lifestyle of those who come under court supervision. In the case of drug courts, becoming "clean and sober" is only the first step toward graduation:

> Almost all drug courts require participants (after they have become clean and sober) to obtain a high school or GED certificate, maintain employment, be current in all financial obligations—including drug court fees and child support payments, if applicable—and have a sponsor in the community. Many programs also require participants to perform community service hours—to "give back" to the community that is supporting them through the drug court program. One drug court requires prospective graduates to prepare a 2-year "life plan" following drug court graduation for discussion with a community board to

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commit non-violent crimes. It is a progressive alternative to sending drug users to jail, which is much more expensive and where there is little or no effort to rehabilitate them. The program attacks the core of drug-related crime instead of just treating the symptom of lawbreaking by imposing jail terms.").

394. Elaine De Valle, *New Statewide Court to Handle Family Matters*, THE MIAMI HERALD, May 6, 2001, at 1A ("Our goal continues to be the creation of a fully integrated comprehensive approach to handling all cases involving children and families while at the same time resolving family disputes in a fair, efficient and cost-effective manner . . . that does not cause additional emotional harm to the children and families who are required to interact with the judicial system.").

395. *Demand Treatment!*, http://www.jointogether.org/keyissues/demand-treatment.html (last visited June 7, 2007) ("The Demand Treatment! model proved to be an effective, low cost way to increase local leadership, establish new programs and change local policies to improve alcohol and drug treatment. Partner communities were able to increase treatment capacity, increase funding, incorporate screenings and brief interventions for substance use into routine practice, and establish an ongoing effort to increase quality treatment. Although Demand Treatment is no longer an active program activity of Join Together, the work continues in these communities. Join Together will continue to publish updates on their success and lessons learned.").

> assure the court that the participant has developed the "tools" to lead a drug-free and crime-fee life.[396]

No detail of life is too insignificant for court attention:

> Individual counseling covers such topics as the art of changing behaviors and believing in yourself, anger management, use of time, lifestyle roles and responsibilities, Rational Emotive Therapy (RET) (shame, guilt, anger, depression, anxiety, perfectionism, grief and self-esteem) domestic violence and other issues pertinent to the specific client's particular needs and circumstances.[397]

The social transformation within the family and the community extends, advocates argue, far beyond the original goals of healing by increasing the number of drug free babies born to drug court participants, the reunification of families as participants regain custody of their children, as well as education, training and job placement for participants.[398] Obesity has now been labeled an illness by the federal government, and advocates of problem-solving courts have discussed the use of such courts, after acquiring control over someone through a violation of the law or some other form of litigation, to treat eating disorders such as anorexia and bulimia.

Direct modification of the inner, mental and emotional life that motivates such behavior has never been a goal of the constitutional system. Rather, that system operated only indirectly to the extent that experience with the trial process itself may have an impact on the conscience or, at least, the rational calculus of a given participant. Thus, the criminal justice system, for example, may, in its retributive faculty, lead a convict to admit to himself the wrongness of the actions for which he stands condemned, to accept society's judgment, and to resolve voluntarily to reform his way of thinking and, hence, future behavior. Likewise, a judgment imposing damages in a civil suit for trespass may indirectly cause the defendant voluntarily to forego future opportunities for trespass. This is a desirable, but not an essential, result of the process. Unfortunately, many do not respond in such fashion. Of central importance within the philosophical framework of the constitutional judicial system, however, is the proposition that, once a convict has served his time or a tortfeasor has made his plaintiff whole, the judicial system can maintain no further nor deeper claim on

396. OFFICE OF JUSTICE PROGRAMS, DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS 1 (1999), *available at* http://spa.american.edu/justice/publications/decade1.htm.

397. Jerry L. Colclazier, *Therapeutic Jurisprudence: The Nuts and Bolts of Drug Courts in Oklahoma*, 71 OKLA. BAR J., Aug. 2000, at 23.

398. LOOKING AT A DECADE OF DRUG COURTS, *supra* note 396, at 1.

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them. Respect for the integrity and dignity of the every person was of central importance, such that the risk of future anti-social behavior was deemed a necessary condition for freedom. In this way, the traditional system appealed to a man's moral sense and capacity for reasoning (as opposed to a mere conditioned reaction) with a view to the future consequences of his actions.

B. *New Assumptions*

The justice system that reformers are creating is based on fundamentally different premises. First of all, it rests on certain basic suppositions about human nature that deny that human beings can or should aspire to transcend their base nature. Within the behavioristic framework, what is most important is the *result* of the process, *i.e.*, that the certain types of anti-social behavior cease, and that preferred forms of behavior take their place. The *process* by which the individual comes to such result is important only insofar as it is effective in producing new forms of behavior, regardless of its implications for the individual's essential moral and psychological integrity. This implicitly means that behavioral modification can and should become mandatory. In every case, the "consent" obtained by the court from its client is coerced by the threat of the "traditional" system and is therefore illusory. It is only a short step from coerced consent to mandatory modification.

Moreover, with regard to the procedural and substantive nature of the new system, it will not be possible to make decisions about the best means for directly bringing about changes in behavior or lifestyle in any principled manner. By its nature, behavioral modification is experimental, varying from one litigant to another. Individual experiences with the environment and genetic makeup are like snow flakes; no two are ever alike. As behaviorists, therefore, judges and their teams determine on a case-by-case basis what works for the client and what the end result should be. Their task in every case is to modify the man so that he will live the life the judge has determined for him.

Consequently, therapeutic outcomes can only be arbitrary, and are understandable only in reference to the assumptions judges personally make about the way life should be lived. What difference does it make even if it is possible to prescribe a universal target outcome in the form of lifestyle change, and call that outcome the product of law? Is that not tyranny? Are not people subjected to standardized outcomes the creation of those who create the template for life? Who wants to live in a world where they are manipulated by the state to be a particu-

lar kind of person? People subject to such arbitrary power are no longer free!

In former times, people held different views about the evil propensities of all people, especially those in government, and wanted to restrain them by creating forms and processes that mitigated against abuse by government. For this reason, we all had to take risks that bad things might happen to us in the course of life if we had any chance to maintain our liberty. The threat was not just an act of violence or neglect by private citizens, but of tyranny on the part of those in control of government, and between the two, the latter threat was deemed to be far more serious. While some of us could be hurt by the isolated act of a criminal, the potential for many to be harmed by the few in control of government was much, much greater. If the state could intervene to prevent us from being harmed in the first place, it could just as easily intervene for other purposes—to control and dominate us to further the power of those who control the state. Consequently, the state had to be restrained by making it wait until some overt violation of law had been committed that, by law, required the state to act. The courts had to sit back and wait for someone with proper standing to bring that to their attention. That restraint had to apply to all people, including those who might violate the rule of law, if the rest of us were to remain free.

This belief in the need to restrain the state no longer exists because our beliefs about human nature have changed entirely. The problem of sin has been replaced with a belief in the basic goodness of all people. The Public Trust and Confidence Movement promotes belief in the virtue and trustworthiness of judges as a group, in comparison to the ordinary man. We are literally witnessing the veneration of judges, both as individuals and as a group. The increasingly popular programs of Judicial Outreach effectively personalize the judiciary. If the individual judge is trustworthy then, by inference, all judges must be people whom we can trust to make decisions for us.

As the role of the courts change, techniques now considered dangerous for particular subgroups of society may be viewed differently. Racial profiling and statistical scatter maps used to identify the people and places associated with antisocial behavior may become the keys to unleashing the flow of money and resources the courts provide; and just imagine how intoxicating it will be when judges finally come to believe that they hold the keys to the health and happiness of other people. Healing, caring judges would be remiss—indeed, it would be unethical—if they did not bestow upon others the benefit of their wisdom, their experience, and their healing hands.

C. *Loving Big Brother*

Those who experience the therapeutic care and guidance of judges in confronting life's problems will confess the goodness and care of those who healed them. By the end of George Orwell's anti-utopian novel, *1984,* the principal character had come to love Big Brother; beaten to the verge of death and then restored to a life of plenty, he became thankful for the omnipotent hand providing for him. And court literature points to a similar effect emerging from participants in the therapeutic process. Out of dozens of possible examples, one issue of the Mississippi Supreme Court's newsletter makes the point in an article on one Drug Court graduate and his judge.[399] The former drug addict with a "new daddy smile" glowing on his face showed off his six-week-old daughter to a courtroom of recovering drug addicts like himself: "I feel like without it [Drug Court] I would be dead today because I had gotten bad onto drugs . . . I want to say 'thank you' to anybody who had anything to do with it."[400] And the judge was equally pleased with the results, making reference to the graduate's daughter as a reason for keeping his life together. "She needs you. We are rebuilding lives and families," the judge said.[401] Reference to the graduate's baby daughter, while true, is an example of the utilitarian, emotive levers used by therapeutic courts to gain the advantage over their clients.

Some may see in such statements the indicia of success, and minimize the importance of transitioning to a therapeutic form of government. But we are witnessing the emergence of a centralized, authoritarian government based upon the work of a technologically-competent elite. Some believe the pragmatic, therapeutic state has the potential to become the greatest threat to human liberty.[402] Advocates of therapeutic jurisprudence openly rely upon purely pragmatic considerations for the move away from "traditional" court processes which focus on particular litigants with well-defined disputes to be decided by adversarial proceedings along settled principles of law. Because the law identified certain acts as being acceptable and others unacceptable, the judge or jury served as a "trier of fact." The task was simply to determine whether the person committed an act proscribed by law or

399. Administrative Office of the Courts, *Drug Court Rebuilds Lives, Grads Say*, MISS. CTS., May-June 2001, at 1.

400. *Id.*

401. *Id.*

402. Peter Augustine Lawler, *The Therapeutic Threat to Human Liberty: Pragmatism vs. Conservatism on America and the West Today*, *in* VITAL REMNANTS: AMERICA'S FOUNDING AND THE WESTERN TRADITION 305 (Gary L. Gregg ed., 1999).

which violated a civil duty owed to others; the result was then determined by the rule of law. One cannot help but recall Dean Wigmore's description of cross-examination of witnesses as "the greatest engine ever invented for the discovery of truth."[403] But the concept of rules of law derived from transcendent moral principles, applicable to all people in all places, died in the nineteenth century, and the search for truth has morphed into the consolidated techniques of social control.

As court dockets become increasingly crowded, as the rising prison population threatens the state's ability to deal with the problem of crime, as drug addiction continues to spread throughout the population, and as divorce introduces more extreme forms of violence within the home and community, reformers advocate therapeutic principles and the redesign of the judicial system as technical alternatives which anticipate and prevent antisocial behavior, speed up the resolution of disputes, decrease recidivism, and save money.[404]

Efficiency becomes a value—an end in itself—and all other justifications for change tend initially to bend to the demand for mechanical efficiency rather than the rule of law and the constitutional process. But the question naturally arises, will this always be true? Can there be a point at which power is sufficiently consolidated in the hands of judges that they can abandon their appeal to public trust and confidence, to efficiency, to therapy, to social justice, and begin exercising power for the sake of power?

VII. CONTROLLING THE CONTROLLERS

Judicial pronouncements of healing and of problems solved reflect a basic and profound change in the way people are viewed by the community of intellectuals driving the reform process. There has been a change not only in the concept of justice, but also about the nature of individual responsibility. In the past, a person was held responsible for his behavior because he was free to make choices between different courses of action.[405] Consequently, if a person is not free to make real choices, the argument for punishment or for the imposition of civil penalties fails. How can we punish someone who is only the product of body chemistry and past reinforcement? Such a person is not truly free to choose one course of action as opposed to another. His behavior would be entirely predictable if we could only know in detail all of

403. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1390 (James A. Chadbourne ed., rev. ed. 1974).

404. NOLAN, *supra* note 76, at 283.

405. Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 7 (2002).

the subtle and complex reinforcements to which he had been previously exposed.

Behaviorism, as well as neurotechnology, treats us as if we are machines capable of being programmed to respond in particular ways to changes in the environment or to physical modifications. If a person is only the product of his environment or is genetically predisposed to certain types of behavior, it may not be fair or just to impose upon him those sanctions required by the law, but it is fair to therapeutically modify him. Indeed, it is his right.

A. *The Abolition of Man*

In the past, the principal tool of government for shaping the thoughts and actions of people in a mass society has been propaganda, and propaganda in the form of court communications is still an important tool of the court reform movement. Now, behavioral engineering, using techniques (of which propaganda is one) developed in the social sciences, is being applied by the courts to bring about cognitive changes in individuals and entire communities. When C. S. Lewis wrote the *Abolition of Man*[406] in 1962, he anticipated the present-day application of the techniques of behaviorism, neurotechnology, and eugenics. This is the point in history at which we have now arrived. The techniques by which man could be controlled were controversial even then, and were of particular concern to all those who loved liberty and still believed that God created man in His own image. Man, observed Lewis, had gained mastery over Nature preliminarily to gaining control over the nature of man:

> I am only making clear what Man's conquest of Nature really means and especially that final stage in the conquest, which, perhaps, is not far off. The final stage is come when Man by eugenics, by prenatal conditioning, and by an education and propaganda based on a perfect applied psychology, has obtained full control over himself. Human nature will be the last part of Nature to surrender to Man. The battle will then be won. We shall . . . be henceforth free to make our species whatever we wish it to be. The battle will be won. But who, precisely, will have won it?[407]

Skinner recognized the attack on behaviorism and replied to Lewis in his book, *Beyond Freedom and Dignity*,[408] that man is not being "abolished." What is being abolished, Skinner argued, is "auton-

406. C.S. LEWIS, THE ABOLITION OF MAN 37 (1962).
407. *Id.*
408. Skinner, *supra* note 98.

omous man," the man of "freedom and dignity."[409] It is "man as man," "man as thou not it" that is being abolished, so that scientists can begin dealing with people as they would any other natural object. The conclusion for Skinner was quite logical. The science of behaviorism can be applied to reengineer man and design a culture, but it requires that we abandon any presupposition that leaves the individual or God in control:

> His abolition has long been overdue. Autonomous man is a device used to explain what we cannot explain in any other way. He has been constructed from our ignorance, and as our understanding increases, the very stuff of which he is composed vanishes. Science does not dehumanize man. It de-homunculizes him, and it must do so if it is to prevent the abolition of the human species. To man *qua* man we readily say good riddance. Only by dispossessing him can we turn to the real causes of human behavior. Only then can we turn from the inferred to the observed, from the miraculous to the natural, from the inaccessible to the manipulable.[410]

Behaviorism denies that there is anything unique about human life—nothing that sets us apart from all other life forms. All appeals to the higher faculties of man—reason, self-consciousness, a sense of moral responsibility—are dismissed as mere delusions. We are only the product of our environment, our body chemistry or the many unscientific influences of our homes and communities—the words and actions of our parents, teachers, friends, colleagues, pastors, and others. Our behavior is determined by the external environment or from conditioning which occurred prior to birth and now resides in our genes.[411] Consequently, as Francis Schaeffer pointed out, the technology of human behavior treats us as if we are not capable of free will, or of independent, original thought; nor is there any room for the existence of a sovereign God.[412]

B. *The Board of Planners*

The principles of behaviorism also contain a major contradiction that has profound implications for society. Obviously, all people acting independently of one another cannot set the behavioral standards and

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409. *Id.*

410. *Id.* at 200-01.

411. For a brief rebuttal to Skinner's view of man by one of the great Christian thinkers of the twentieth century, see FRANCIS A. SCHAEFFER, BACK TO FREEDOM AND DIGNITY 33 (1973).

412. FRANCIS A. SCHAEFFER, *The God Who Is There*, *in* A FRANCIS A. SCHAEFFER TRILOGY 113, 117 (Crossway Books 1990) (1968); *He Is There and He Is Not Silent*, *in* SCHAEFFER *supra*, at 278 (1978).

conditioning applicable to all other individuals.[413] That would be tantamount to anarchy. There must be, therefore, some person or group of persons making essentially moral decisions about which thoughts and actions are appropriate for the rest of the population, and which future out of a number of possible futures is preferred. In the background of Skinner's 1948 utopian novel, *Walden Two*, was a small group of individuals called the "Board of Planners."[414] These were the controllers, the people who decided which forms of environmental conditioning would be required for each individual in the community, so that the entire community would function as a single, peaceful, productive unit. Because of the work of the controllers, there was, situated within the surrounding society, a community of happy, contented, productive workers going peacefully about their assigned tasks free of the problems which plagued the rest of the world. The principles of behaviorism are currently applied, according to Skinner, in haphazard, unscientific ways by all sorts of people within society: parents, teachers, neighbors, psychologists, preachers, and many others. But the goal of behaviorism is to eliminate the unscientific application of these techniques, and apply them in scientifically coordinated ways that make each of us achieve our full potential for the good of the community.[415] And so, the protagonist in Skinner's novel, Frazier, put the issue directly to the skeptical Castle: "My question is," asked Frazier, "have you the courage to take up and wield the science of behavior for the good of mankind?" This is the question that the state courts have answered in the affirmative. As Lewis so astutely observed, "[T]he power of Man to make himself what he pleases means, as we have seen, the power of some men to make other men what *they* please."[416]

The key which has, until recent decades, been missing is the power to unify or consolidate all of the techniques of control in the hands of a single group of people having a position of power over all people. For man to advance in revolutionary ways he must throw off evolutionary forces which are, by definition, slow and random. Man must assume responsibility for change that is not only planned and coordinated, but constantly moving us toward some higher future existence. But the disciplines—the technicians holding the tools by which man could be controlled and propelled into the future—were fragmented. Each worked separately from the other to study man but

413. *See generally* Leff, *supra* note 142, at 1229.

414. B.F. SKINNER, WALDEN TWO 48 (Macmillan Publishing Co. 1976) (1948).

415. *See* Skinner, *supra* note 98 (discussing Skinner's views on behaviorism and man).

416. LEWIS, *supra* note 406, at 37.

lacked the power to consolidate the process of application by which one set of techniques could be applied in conjunction with the techniques of other disciplines. There was no planning and no central authority capable of directing the forces of individual and social change in one direction or another. Consequently, we had to await the day, now here, when all of the techniques employed by all of the various experts could be applied and directed by one elite group: the judiciary.

But the techniques of control need not be overtly violent as Orwell thought. As we have seen, they can be very subtle and manipulative, and can be cast as the necessary and efficient answers to the vexing problems of life. The bars which control us need not be on the outside. Indeed, the courts are in the process of placing those bars on the inside. As Aldous Huxley put it, "The shotgun has its place but so has the hypodermic syringe."[417]

Our belief in democracy and representative government are also illusions. If our personal behavior is determined by our environment, we are incapable of making truly original, independent decisions about the affairs of government. Our belief in human freedom and in representative government is, like so many other things we believe about ourselves, only a fiction created by the literature of freedom and dignity we were exposed to in our homes and schools. Behaviorism tends toward a centralized, authoritarian form of government—the therapeutic courts—to create the new man for the new future. The very nature of the techniques now employed by the courts are inherently denigrating to the moral and intellectual fáculties and dignity of man at the hands of an authoritarian, paternalistic system of judges. But they also insult the rule of law as reflections of truth about life and about the world in which we live, thereby implying that rules of law and of outcomes determined by law are not only unnecessary for the survival of society but are therapeutically counterproductive. By pragmatically and emotionally contrasting what activists call "more humane" forms of dispute resolution with the detached and impersonal application of rules of law to specific issues, they make their case for overthrowing the constitutional system of courts. In that regard, we should understand that therapeutic, problem-solving courts are not courts. Problem-solving judges are not judges; they are behaviorists. The principles they apply are not legal principles at all, but principles derived from the technology of human behavior. Not only do such "courts" denigrate man, but they manipulate the way we think about

417. ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 69 (1958).

the work of the state and its impact on life. Activists have appropriated the lexicon associated with the constitutional judicial system, and have given old words new meaning in a way that effectively changes the way we think about the role of the courts and the need for controlling individual and collective life.

C. The New Man for a New Age

Once courts have the therapeutic bars in place, what will the final product look like? How will the modified man think and act? The details are, of course, missing to some extent and may vary among individuals. Some things are clear, however. The family, church and broader community, which once were the impetus for good character, have become, activists argue, much weaker than they once were. Consequently, the role of the courts must change to prop up the skeletons of these failed institutions. This is a recurring argument for changing the role of the courts in society. For the reformers, there is no longer any fixed definition of the family or any of the other basic institutions of life; they are significant only as utilitarian instruments of shaping and controlling behavior. As a result, the courts feel free to redefine the entire community as they see fit, and to take over the task of creating the kind of people necessary for a just and peaceful future.[418] "The burden on government and law," observed the Tennessee Futures Commission, "is to reinforce communities and families that contribute

418. The need for an experimental analysis of human behavior to cure the problems brought about by the decay of the family were illustrated in B. F. Skinner's novel, *Walden Two*, in which the protagonist, Frazier, notes the tension in moving from the traditional family, now in decline, to the utopian family where human behavior is modified by government to conform to community norms:

> The significant history of our times is the story of the growing weakness of the family. The decline of the home as a medium for perpetuating a culture, the struggle for equality for women, including their right to select professions other than housewife or nursemaid, the extraordinary consequences of birth control and the practical separation of sex and parenthood, the social recognition of divorce, the critical issues of blood relationship or race—all these are parts of the same field. And you can hardly call it quiescent.
>
> A community must solve the problem of the family by revising certain established practices. That's absolutely inevitable. The family is an ancient form of community, and the customs and habits which have been set up to perpetuate it are out of place in a society which isn't based on blood ties. Walden Two replaces the family, not only as an economic unit, but to some extent as a social and psychological unit as well. What survives is an experimental question.

SKINNER, *supra* note 414, at 128.

to the development of good character, self-reliance, respect for others, and respect for self."[419] This is a basic tenet of behaviorism (and, one might add, Marxist doctrine) which holds that the state is the source of the intangible attribute of personal and collective character. It is error to think this can only be for good; the fictional behaviorist who programmed the *Manchurian Candidate* was from the Pavlov Institute in Moscow. Our empty shells have to be programmed to move and act in ways that are consistent with judicial values articulated by the courts and their various commissions, and applied by therapeutic trial courts. "As we have seen," observed Skinner, "man is not a moral animal in the sense of possessing a special trait or virtue; he has built a kind of social environment which induces him to behave in moral ways."[420] Skinner found such statements to be convenient; the reformers, in fact, are actively working to create a new social environment based upon naturalistic concepts of man and relativistic concepts of moral behavior.

Every citizen should vehemently deny that government has any role to play in the formation or reinforcement of character or other personal attributes. Where the family and the community have failed to adjust to the new realities or have been undermined because of them, the courts will carry the increased burden being thrust upon them. Instead of adjudicating disputes based upon the facts and law, the courts will expand their mission to "reinforce communities and families that contribute to the development of good character." But which families and communities contribute to these new virtues? By what standards and by whom shall it be determined that families and communities are doing what they should in this respect? This "burden" implicitly requires that courts begin defining good character, self-reliance, respect for others, and respect for self. Can there be any doubt that these abstract concepts will be defined by the courts in ways that make them relative to the work of the courts? Men and women will be people of good character only insofar as they promote the goals and purposes of those who create them. Character becomes relative to the personal visions of the judges, for they are determined in reference to the beliefs and lives of the judges who will ultimately make that determination. The judges, then, become the embodiment of "good character, self-reliance, respect for others, and respect for self." This effectively makes judges a kind of amplified humanity—little gods, but gods nonetheless; and the little gods will judge the rest of us

419. TO SERVE ALL PEOPLE, *supra* note 138, at 55.
420. Skinner, *supra* note 98, at 198.

in respect to their lives and values. In fact, the new judge, as he sits on the bench, speaks to the Rotary Club, instructs a class of children, or walks down the street, becomes a pattern for life.

Conduct and beliefs that promote the goals and the power of the judges will become the definition of good character. However, we should keep in mind as we surrender this function to them, that a fixed definition of abstract concepts is impossible. The work of the judges and the decisions they make will become increasingly arbitrary. Judges will have nothing outside of themselves and the environing culture on which to base their decisions. Already, the therapeutic "options" being provided to the courts are being used by judges to require that clients maintain good jobs, pay their debts, support their families, etc. One can be a poet or an artist, but he had better not give up his day job. The elimination of drugs or violence is never the final goal. Ultimately, lifestyle change, and, as Toffler said, the reconstitution of society is the goal.

The techniques of modern science used to manipulate and control people do not provide superior answers to problems or issues of life. As Professor Arthur Allen Leff of Yale Law School so irrefutably demonstrated, there can be no normative ethical system in the absence of God.[421] In his classic essay, *Unspeakable Ethics, Unnatural Law*,[422] Leff observed that

> the so-called death of God turns out not to have been just *His* funeral; it also seems to have effected the total elimination of any coherent, or even more-than-momentarily convincing, ethical or legal system dependent upon finally authoritative extrasystemic premises. If we are trying to find a substitute final evaluator, it must be one of us, some of us, all of us—but it cannot be anything else. The result of that realization is what might be a simultaneous combination of an exultant "We're free of God" and a despairing "Oh God, we're free."[423]

To every authoritative pronouncement of man there will be others, Leff demonstrated, who will say, "Oh, yeah, sez [sic] who?" Therefore, control of the courts as propagators and enforcers of moral values for everyone else takes on extraordinary political importance, and helps to explain why so much money is being invested in state judicial elections.

The therapeutic resolution of conflict and related decisions about lifestyle become the tools of the judiciary in the service of competing social interests, and competing social interests advance the power of

421. Leff, *supra* note 142, at 1229.
422. *Id.*
423. *Id.* at 1232.

the judges. The controversial decisions of the appellate courts and the new "hands-on" work of the trial courts are but flip sides of the same coin; both work together to bring about the personal visions of those who are in the business of reforming the courts and society. The result is not the rule of law, but the rule of men. Consequently, court reform literature contains both an appeal to efficiency and an appeal to the creation of more virtuous individuals and communities. Judges are becoming both artists and engineers.

It remains to be seen how successful the courts will be at transforming sinners into people of good character. If, as behaviorists believe, man was not created by God in His image, and if there is no source of truth outside ourselves by which to judge the words and works of the visionaries, then there just might be something to their claim that we are only part of the cosmic machine. If the past is any indication of how things will be in the future, however, the prospects of their success look dim. Perhaps Professor Leff said it best in the afterword to his famous essay:

> All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchangeable. As things now stand, everything is up for grabs.[424]

Mankind is not likely to be transformed by the judiciary, but it is certain that we can be increasingly controlled by the judiciary. Judicial activism is creating an omnipresent tyranny capable of influencing large numbers of people and entire communities. Already tens of thousands of people all across the country, driven by a secular faith, are joining in the work of the courts through judicial outreach and collaborative working arrangements. The transcript from the National Conference on Public Trust and Confidence in the Justice System, recorded delegates, many of them representing non-governmental organizations, using terms like "trust in," "have confidence in," and "have faith in," to refer to the judges and the work of the courts with the goal being to convert as many people as possible to the faith. Are not these the people who will be the "eyes and ears" of the courts? At the same time, many people fear and distrust the courts. The December 15, 2003, issue of *Newsweek* was devoted to "Lawsuit Hell: How Fear of

424. *Id.* at 1249.

Litigation is Paralyzing Our Professions." Appearing daily on televisions all across the country are solicitations to file suit. "If you are concerned about the care of a loved one in a nursing home, give us a call," says one firm.

These two groups—one having faith in the judiciary and the other fearing the judiciary—are both witnessing and reacting to the same set of events. Some are pleased with the expanding role of the courts in society, while others have had enough of it. In fact, however, there may be considerable overlap in the views of the various subgroups to the work of the judiciary. Those who hate oppressive malpractice suits may, nevertheless, support court decrees advancing other political and social agendas they favor. Abortionists, for example, have to pay malpractice insurance premiums just like other doctors. The court reform movement is, in part, an attempt to expand the intrusion of the judiciary into the lives of every person while imparting a kinder-and-gentler, therapeutic appearance to the work of the judiciary. By doing so, court reform brings in those who now harbor hard feelings toward the courts. Instead of being harmed, we are going to be healed. Hopefully, those people who now fear the judicial system will someday come to appreciate all that the courts are doing for us.

Is it possible that the legislative branch will take steps to curb judicial power? Perhaps, but the legislative and executive branches, exhausted by the cost of large, regulatory bureaucracies, have found the courts and private litigation a cost-effective way to regulate most activities of life and do so in ways that are more acceptable to people. In a sense, they are accomplices in the expanding role of the courts in spite of occasional protests about what some call the "imperial judiciary."[425]

The bars which control us, whether they are on the outside or the inside, always have a physical component; even the processes of the mind are based on the physical body. Power is useless unless it is applied. This may be the single most important feature of the judicial system, for it is the place where the power of the state is ultimately applied in a physical way to individuals and targeted subgroups. Actions which take place in a courthouse can have a very real and tangible impact on people involved in litigation. The judiciary has become both the primary vehicle and path of least resistance for social engineers who realize the ability of the courts to inflict physical and psychological harm on individuals. The courts thereby coerce more

425. *See, e.g.*, Edwin Meese III, *Imperial Judiciary—And What Congress Can Do About It*, POLICY REVIEW, Jan.-Feb. 1997, *available at* http://www.hoover.org/publications/policyreview/3574172.html (last visited May 20, 2007).

desirable forms of behavior. During modern times, technology has become an increasingly important component of power because it makes it possible for those who control the state to move against people quickly and at great distance. With the local courthouse strategically located in each county, and often in multiple cities within counties, and with a local staff of law enforcement, social workers, volunteers and others ready to carry out judicial plans and decrees, the courthouse is the place where judges wield the power to influence vast numbers of people.

With the advent of new technologies, however, the home or even the individual mind could well become the judiciary's final place of residence. The first mock trial in virtual reality has already been conducted by the Courtroom 21 Project at the William and Mary Law School,[426] and judicial scenarios envision the future use of brain implants as a means of determining guilt or innocence.[427]

D. *The Final Question*

We can be thankful that some people are able to reverse the course of their lives, saving themselves and others from drug abuse, violence, or more subtle forms of antisocial behavior. However, what cost are we willing to pay to make such changes take place even if it is possible to do so? The outcome is certain, however, if we remain headed down the road we are on. One way or the other, by faith or by fear, the courts will control us, and there will be no place to which we can retreat or flee, not even the inner sanctum of our minds.

There remains, then, one unanswered question: Once the courts have succeeded in gaining control of individual behavior for the collective good, who will control the controllers? If there is any chance that this movement can be resisted, it is important that the public and the representative branches of government know about and prepare for the approaching changes being thrust upon us by visionaries with utopian dreams of a new judicial system and the transformed world it will bring forth.[428]

426. *See* David Horrigan, *Technology on Trial: Operating in Virtual Reality*, 9 L. & TECH. NEWS, May 2002, at 21.

427. This scenario from Florida's Sixth Judicial Circuit is described in ENVISIONING JUSTICE, *supra* note 48, at 135-37.

428. Frank V. Williams, III, *The Future of the Legal Profession and the Judicial System*, DICTA, April 22, 2002, at 6.