

CAMPBELL LAW REVIEW
SYMPOSIUM 2008:
ALTERNATIVE DISPUTE RESOLUTION

Concerns About and Objections to
Alternative Dispute Resolution
Frank V. Williams, III

Agenda for Change

- ▣ ADR cannot be understood in isolation from the broader agenda to Reinvent the Courts
- ▣ Part of a complex of ideas driving change:
 - Court Futures Commission Reports and Strategic Plans
 - Therapeutic Jurisprudence
 - Problem Solving Courts
 - Access to Justice
 - Court and Community Collaboration
 - Judicial Outreach
 - Public Trust and Confidence in the Justice System
 - Judicial Independence
 - Court Performance Standards and Measures

Mediation Changes the Mind

- Changes how we think about the courts
 - "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 courts in a community....
 - "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 courts."

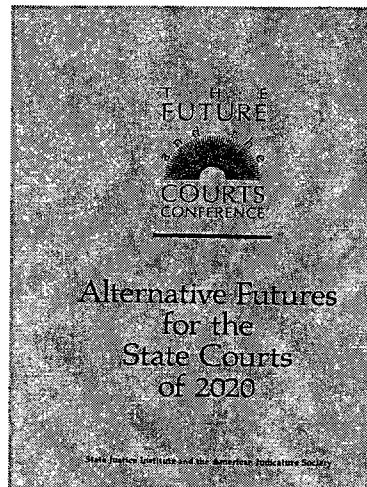
Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 Ohio St. J. on Disp. Resol. 627 (2002) at 630-631

The Future and the Courts

- The San Antonio Conference - 1990

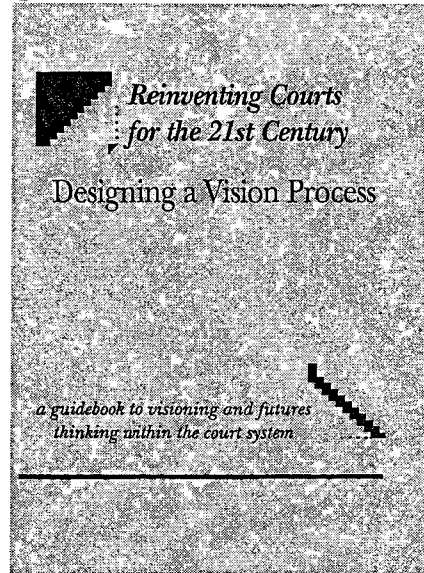
In 1990 participants began to decide what changes in the courts had to begin being made in order to bring into being their "preferred" future for the courts in 2020.

Participants began to search for "more humane" methods of resolving disputes that produced "win-win" outcomes rather than have winners and losers under the "traditional" court system.



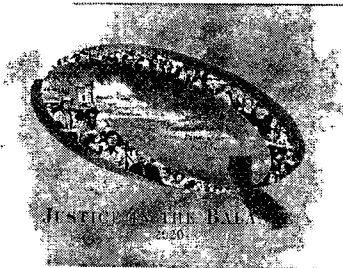
Reinventing the Courts

▣ Training Manual



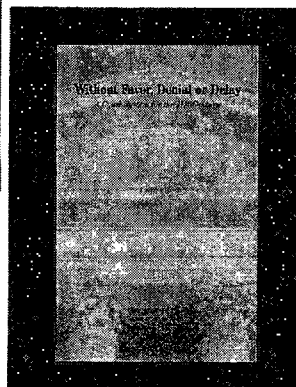
Court Commission Reports

▣ Futures Commissions



California Futures Commission

North Carolina Futures Commission



THE COMMISSION ON THE FUTURE OF MARYLAND COURTS



FINAL REPORT

December 12, 1995

Maryland Futures Commission

Reinventing the Courts

- ▣ The Multi-door Courthouse
- ▣ ADR
- ▣ Culturally Appropriate Dispute Resolution
 - Mediation
 - Transformational Mediation
 - Collaborative Dispute Resolution
 - Holistic Law
 - Restorative Justice
 - Peacemaking tribunals

Redefining the Judicial Power

- ▣ The "Judicial Power" defined:
- ▣ Constitution of the United States, Article 3
 - ▣ 1. [Judicial power.] - The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish...
 - ▣ The "judicial power" is the power to *adjudicate* disputes between litigants.
 - ▣ The court resolves disputed issues of fact and applies rules of law to reach a decision
 - ▣ Protects the life, liberty and property of citizens from unlawful encroachment by people and the government.

Reasons Given for ADR

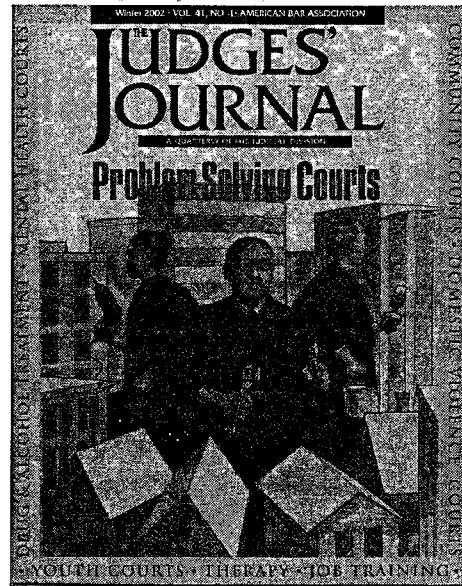
- ▣ The Constitution is out of date
- ▣ The multi-door courthouse
- ▣ Meeting the physical, sociological, psychological, and economic needs of litigants
- ▣ Creates win-win-win outcomes
- ▣ Rejection of authority
- ▣ Transformational dispute resolution
- ▣ Increases Public Trust & Confidence in the Courts
- ▣ Breaks the lawyers' monopoly on the justice system and increases Access to Justice

Objections to ADR

- ▣ Annexed to the state, to the judicial system
- ▣ Professionalization of mediators, volunteers and others
- ▣ One component of deconstruction
- ▣ Merges courts with the community
- ▣ Coercive environment
- ▣ Closing the courts
- ▣ Appeals to feelings and interests rather than fixed principles
- ▣ Denies that rules of law should be based on truth about life
- ▣ Pragmatism
- ▣ The Vanishing Trial
- ▣ Destroying the legal profession
- ▣ New Gatekeepers

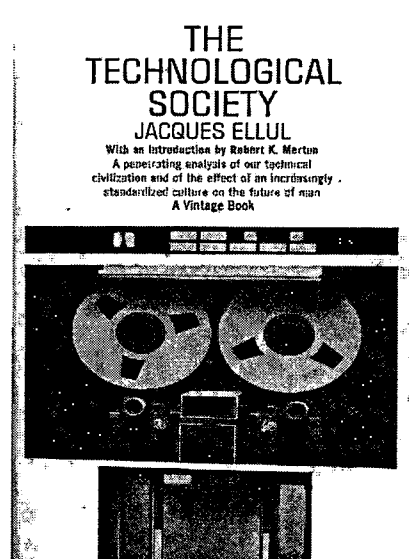
A New Role for the Courts

- ▣ Behaviorism and Social Engineering



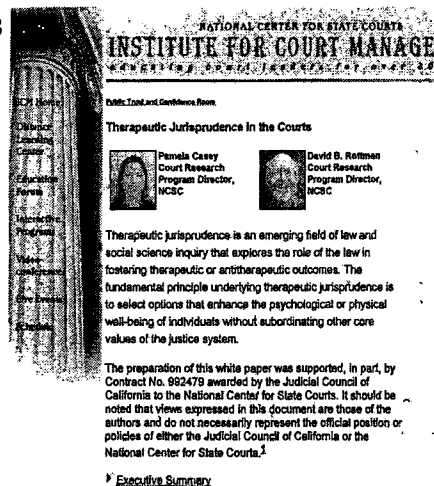
Technique

- ▣ Solving Problems:
- ▣ Technique is the ensemble of means or methods by which the discoveries of science are systematically applied for the attainment of a predetermined end.



Therapeutic Jurisprudence

- ▣ Problem-solving Courts
- ▣ Transformative Justice
- ▣ Human technique
- ▣ Social sciences are employed to manipulate and modify human life.



NATIONAL CENTER FOR STATE COURTS
INSTITUTE FOR COURT MANAGEMENT

Therapeutic Jurisprudence in the Courts

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Therapeutic jurisprudence is an emerging field of law and social science inquiry that explores the role of the law in fostering therapeutic or antitherapeutic outcomes. The fundamental principle underlying therapeutic jurisprudence is to select options that enhance the psychological or physical well-being of individuals without subordinating other core values of the justice system.

The preparation of this white paper was supported, in part, by Contract No. 992479 awarded by the Judicial Council of California to the National Center for State Courts. It should be noted that views expressed in this document are those of the authors and do not necessarily represent the official position or policies of either the Judicial Council of California or the National Center for State Courts.¹

Executive Summary

The Ethic of Care

- ▣ “Recently, problem solving courts (including drug courts, domestic violence courts, mental health courts, truancy courts, gun courts, etc.) have sought to introduce an ethic of care and principles of therapeutic jurisprudence into court processes.
- ▣ “Focusing on the extent to which court practices promote the psychological or physical well-being of the people affected, these courts try to address the social and psychological problems that underlie legal disputes. But they also seek to introduce an “ethic of care” into court process and to generally refocus on the qualities of respect, participation and trustworthiness often cited by litigants and the general public.

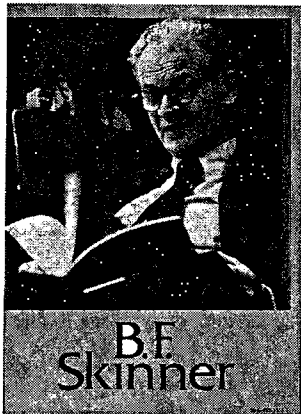
Court Review, Fall 2000, p 15

The Abolition of Man

- ▣ C. S. Lewis:
 - "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 propoganda 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?" *The Abolition of Man*, 1943

Behaviorism

- ▣ B. F. Skinner



"His [autonomous man, the man of freedom and dignity] 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 as 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 obserced, from the miraculous to the natural, from the inaccessible to the manipulable."

B. F. Skinner, *Beyond Freedom and Dignity*, p. 200-201

Justice is Redefined

- ▣ Lady Justice -
Where is the
double-edged sword
of the law?

Social justice - meeting
the needs of people
and communities.
Equality of outcomes.



Courts in Transition

- ▣ Courts are transitioning from decision-makers
to life changers.

Resolution 22

- The joint resolution of the Conference of Chief Justices and the Conference of State Court Administrators – 2004
 - 4. Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community....
 - BE IT FURTHER RESOLVED...
 - d. Encourage the development in each state of at least one "demonstration" jurisdiction to serve as a laboratory in the use of problem-solving court principles and methods within a traditional court setting;...
 - i. Request that the Association of American Law Schools support expanded education by their members on the principles and methods of problem-solving courts;...

<http://cosca.ncsc.dni.us/WhitePapers/Resolution-Natl%20Agenda-Final-Aug-04.pdf>

A New Worldview

- Man is just another part of the natural world
- Ignorance, illness and inequality, not sin, are the problems of life.
- No reason not to tinker with man – no reason not to modify what people believe and how they think.