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*Real men don't go to court:
The futures of ADR, then and now.*

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For the past forty years, my academic life has been focused on the futures. I am what is known by some as a futurist--by others a fool and a charlatan. You be the judge. And we can mediate any differences.

For the past thirty years, I have been the director of the Hawaii Research Center for Futures Studies, which was created by the Hawaii State Legislature and placed in the University of Hawaii. I was for ten years first the Secretary General and then the President of the World Futures Studies Federation, the major global network of people professionally involved in futures research. I also coordinate the Alternative Futures Option within the Department of Political Science of the University of Hawaii. We aim, at the graduate level, to produce people who can earn their living as professional futurists. And I can assure you that some of them earn a very handsome living indeed as consulting futurists. If you are discontented with your job, or have children looking for exciting, high paying work, let me know. We have a place for you.

I do a lot of speaking and consulting around the world myself on futures-oriented themes, most frequently with judges, court administrators, and lawyers who, surprisingly enough, seem to be able to care about the future more consistently and conscientiously than almost any other group on Earth. I can assure you that the demand for useful futures-oriented information is very high, while the supply is very low and for the most part very disreputable.

Again, you be the judge.

But I was not asked to talk with you today primarily about the futures.

If you have been keeping track of the numbers of years I have said I have been at this, or if you have just been paying attention to me at all, you are aware that I am an old geezer. And it is in my role as a geezer, and less as a futurist, that I have been asked by Barlett Durand to speak with you today.

You see, I have been a fellow traveler of the ADR movement for as many years as I have been a futurist. The two have been very much intertwined in my work. However, as you well know, I have not been a major player here. I am at best an observer or a schleper, and not a heavy lifter of any of the theories or practices of which most of you are so intimately aware.

But Barlett thought it might be worthwhile for me to tell you a bit about what I have observed, how my day job as a futurist who consults with judges and lawyers intersects with your work, and what I might see as some of the alternative futures of ADR within the context of the futures of governance and the administration of justice in general. So I shall not resist the temptation to offer some ideas about the futures after all. I will just take a little longer getting to them than usual, perhaps.

So sit back, relax, doze off if you wish, while an old man tells an old story of a young group of visionaries and upstarts who, long, long ago, believed they were in the process of inventing conflict resolution

techniques that would operate entirely outside of the formal justice system and, because these techniques would be so effective, they would bring the formal system to its knees, and become the far more worthy and humane successor to that discredited and archaic system.

Because that is what we dreamed back then. And by "we", I mean mainly people like Ted Becker, Christa Slaton, Dee Dee Letts, and Linda Colburn who were active in the earliest days of the ADR movement here in Hawaii, and to a lesser extent people like Neal Milner, David Chandler, John Barki, and Kem Lowry who were just as active, but far more sensible and reserved in their enthusiasm than were Ted, Christa and myself.

Those were, you see, the so-called 60s, when the world was a changing, and for the better; when war was forever discredited as an instrument--or at least as a prime instrument--or at least as a proud, defiant, preferred instrument--of national policy; "a world [as John Gilliom recently described it] of 'penal welfarism'--a world increasingly defined by the assumptions that reform and social intervention were plausible responses to crime; that alternatives to prison were healthy; that the death penalty was useless and barbaric; that crime control was a clinical, scientific discourse free of populist sentiments; that personalized victims were not part of the criminologic equation; that the state was to be the only player in crime control; and that things were generally okay--some basic level of deviance was a normal part of mass society and we were making progress in managing it. Scholars and policy makers predicted a continued strengthening of these premises." [Online book review by John Gilliom, of *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* by David Garland].

This is the world in which Ted Becker and I imagined we were living and working, and the future into which we were moving. The only part of our world that differed from Gilliom's description that I just read you is that we did NOT believe that "the state was to be the only player in crime control." Indeed, we saw the state fading away in many areas, most certainly in having a monopoly in the administration of justice.

We observed that the formal Adversarial System was dysfunctional and widely hated. Only oversocialized judges and underpaid lawyers liked it. Everyone else avoided it. Indeed, at that time when plea bargaining was rising to prominence ("50%-70% of all felony cases which enter the court are disposed of by guilty pleas," wrote Isaac Balbus in 1973), it was obvious that savvy people did everything possible to avoid having their day in court--the process was tiring, expensive, frustrating and delayed, and fraught with procedures and phrases that made sense--if they made sense to anyone--only to the Obfuscatory Knights of the Inner Sanctum Seclorum.

Before coming to Hawaii, I was for six years a professor in the College of Law and Politics of Rikkyo University in Tokyo, engaged in formal and informal study of the Japanese legal system. Like anyone else familiar with the Japanese system, I was stuck by how efficient it was; how professional and dedicated were the officers of the court; how few lawyers there were per capita; how seldom people resorted to the courts to settle their disputes; how low was the crime rate--and how even lower the rate of recidivism--all in spite of the fact that the social fabric of the country had been totally torn apart by a devastating war and then kept in perpetual turmoil by the ensuing mad rush towards economic growth and global economic prominence.

How could that be? It was contrary to all of the explanations of the causes of crime in the US?

While I was in Japan I also read a lot of legal and political anthropology and I slowly came to understand how communities settled disputes in the thousands of years before modern times.

On coming to Hawaii, I observed the way native Hawaiians, Samoans, and residents of the small island communities of Micronesia preferred to settle their disputes, in contrast to the way the formal state system required.

I also had the chance for several years to work with the judiciary of the Federated States of Micronesia, and especially with the state of Pohnpei as they developed their own legal and judicial system. I marveled at the principles and practices of their still-living traditional system known as "Apology". I strongly felt that

Apology was vastly superior to the modified American system they ended up adopting at the insistence of Peace Corps lawyers from the American State of Georgia.

But my experiences in Japan, Hawaii, and Pohnpei, along with my reading in legal anthropology, made it abundantly evident to me that the formal adversarial legal system was at odds in almost every aspect with the way people preferred to settle disputes. Moreover, the adversarial system was not only dysfunctional, it was also patently pathological if not indeed etiological--the formal legal system arguably produced more criminals than it cured, and generated far more violence by the state than any terrorists could imagine in their wildest heroin-crazed dreams.

Thirty years ago, I wrote the following:

"Most of us have been sufficiently mesmerized by the ringing rhetoric of the State to believe without question that society without law is unruly, and that the establishment of 'law' is unquestionably a great advance over the 'anarchy' of primitive societies. Yet on the basis of much recent anthropological evidence, this is almost certainly not the case. In fact, the reverse may more nearly be true: the establishment of 'law' is an important step in the *destruction* of primitive social stability in many instances. The establishment of 'law' is almost always associated with military and cultural conquest whereby the custom of the victors (called 'The Law') is imposed in place of the custom of the vanquished. This is one reason why the law must be written down: it is foreign; it is 'unnatural.' The law, in fact often requires conduct which is contrary to the way people customarily behave, and still wish to behave. Not always, but quite frequently, then, law destroys order so that a centralized military force and the secret knowledge of an elite which is uniquely 'learned in the law' is often required to suppress the natural order of the primitive human community, and to replace it with the State's own impersonal and written law. (Or, as one student of English law commented, 'Little is know of the content of the old Celtic customs [in England] ... because the druids held it undesirable to commit their doctrines to writing. They were acquainted with the literary traditions of the Greeks, but considered that the reduction of their wisdom to literary form would result in the neglect of memory and the possible confusion of the ignorant... .' (Baker, 1971, p. 1) They were not mistaken.

"'Thus', says Stanley Diamond, 'the law against homicide (for example) was not a "progressive" step, as if some abstract right were involved which the state, coming of age, finally understands and seeks to establish. Antisocial conduct is exceptional in small kinship groups ... Crimes of violence are rare ... and murder virtually unknown.'" (Dator and Bezold, p. 87f)

"Law and order is the historical illusion; law versus order is the historical reality," Diamond, p. 140), in Dator and Bezold, p. 88).

Thus "the literature of the anthropology of law makes it quite clear that in traditional societies negotiation, rather than adjudication, is the rule. The parties at dispute intimately and directly (as well as through intermediaries) attempt to reach a settlement that is more or less agreeable to all concerned. The process is most decidedly not adversarial--the basis is not the 'rights' of the parties at dispute, but the peace of the community as a whole. The purpose is not to decide who is guilty and who innocent, but what can be done to restore the common weal, in a manner acceptable to both disputants and the community generally." (Dator and Bezold, p. 90)

Given all this, it seemed obvious to me then that people would prefer conflict resolution techniques more in line with the traditional processes than was the adversarial system. Indeed, most people who got caught up in the formal system hated the experience--even if they won. Indeed, they were more likely to disrespect the system IF they won because the reason for their victory likely would result from some lawyer's clever procedural trick, and not because a judge or jury ever got to hear, much less then came to believe, that their position was right and the other side was wrong. In the formal system, even victory was dissatisfying.

I have mainly been looking at the criminal side of the formal justice system so far. The civil side was worse--far worse. Delays were so lengthy and dockets so clogged that babies were born, grew old, and died waiting for their paternity to be determined and their inheritance distributed.

Torts were a cruel joke, made only crueler by the annual farce called "tort reform" which was right up there with "military intelligence" and "income tax simplification" as choice governmental oxymorons.

Speaking of cruel jokes, as exhibit A of what common folks think of the formal system, I ask you to consider the huge outpouring of jokes about lawyers. I quote here one of my favorites. I don't usually tell jokes, and I am sure you have heard this one since it made all possible rounds in the last year or so, but I cite it merely to illustrate my point:

A lawyer is questioning a doctor who is in the witness box. The lawyer asks:

>> Q: Doctor, before you performed the autopsy, did you check for a pulse?

>> A: No.

>> Q: Did you check for blood pressure?

>> A: No.

>> Q: Did you check for breathing?

>> A: No.

>> Q: So, then it is possible that the patient was alive when you began the autopsy?

>> A: No.

>> Q: How can you be so sure, Doctor?

>> A: Because his brain was sitting on my desk in a jar.

>> Q: But could the patient have still been alive nevertheless?

>> A: It is possible that he could have been alive and practicing law

>> somewhere--perhaps in this very court!

I suppose there are jokes about mediators, but I must confess I have never heard any, and I doubt they are as vicious. But if you would care to share some ADR jokes with me later, I would appreciate the educational opportunity.

In May 1990, the State Justice Institute sponsored a nationwide conference in San Antonio, Texas, on "The future and the courts." Three hundred people from all across the US participated. Most were federal or state judges, lawyers, or court administrators. The rest were law professors or people professionally involved in improving one or more aspects of judicial administration in the US.

All of them, thus, were very much involved in the current judicial system and all of them were concerned about its futures.

One of the products of the conference were responses to questions that had been derived from an analysis of the images of the future contained in the speeches, panels, and workshop discussions during the conference. The participants were asked to indicate their preference from among a very wide range of possible futures of the existing judicial system that had been suggested by one or more participants at the conference. The choices ranged from a future which saw the present system totally unchanged, through various suggestions for reforming the existing system, to examples of dispute resolution options totally different from the current system.

Much to our surprise, only 11% of the respondents said they favored the present system either as it is now, or slightly modified. Forty percent favored future judicial systems that are completely different from the present while 49% favored significant modifications in the current system--generally in the direction of ADR-type reforms on the one hand and/or the aggressive use of the most advanced high technology, often at the global level, on the other. (See results and discussion in Jim Dator and Sharon Rodgers, *Alternative Futures of the State Courts of 2020*. Chicago: American Judicature Society, 1991, especially p. 66)

So is it any wonder that we had such high hopes for ADR? Everybody seemed to dislike the formal adversarial system and here we were with our Neighborhood Justice Centers poised and ready for action!

Mediation--and not even arbitration--was the wave of the future, we were certain, because the mediator did not impose her beliefs on the disputants. No. Rather, she helped the disputants settle their own disputes themselves, as any self-respecting human would want.

Who would admit that they were so incompetent a human that they could not even settle their own disputes rationally and peacefully? Make peace, not war, at the interpersonal level as well as at the state level. Certainly that was to be the case.

So it was a primary tenant of mediation, as I first came to understand it, that mediation was going to be something different and entirely apart from the formal judicial system. Judges and lawyers were going to hate it because they were not going to be allowed any part of it, and because mediation in community justice centers would quickly suck the life out of the formal system.

The worse thing we could imagine--I recall Ted Becker being especially insistent on this--would be to have lawyers involved in the mediation process. They have been brainwashed by eons of Perry Mason and three years of law school into the stifling procedures of the adversarial system, and so would bring to mediation--if they were allowed in--the overweening authoritative manner of the judge and lawyer.

No. Mediators would be real people. Not lawyers. They would be people who still reason by common sense and compassion, and not by the hundreds of years of perversion of Anglo Saxon tribal custom called The Law.

Maitland said long ago, "The King has a peace that devours all others." Well now, we believed, the stinking residue of "the peace of others" was excreting loosely from the bowels of a dying system, and true justice, mediated justice, was emerging whole, beautiful, and pure from the putrid slimy mess.

Real men don't go to court, we proclaimed, Only incompetent wimps with no interpersonal skills go to court. As in Japan, it will be a disgrace, a sign of personal weakness, to have to resort to a lawyer and to the arbitrary and capricious rule of somebody else's law to settle disputes.

Real men settle their disputes among themselves in the presence and with the support and comfort of their friends and neighbors, all trained in mediation.

And of course we would all be trained in mediation too, because the school system was going to teach it. Mediation would be so much a part of the formal process of education that children from the earliest ages even through adolescence would learn how, and prefer to, settle their disputes peacefully through talking over differences, and not by fighting on the school yard, or worse, on the way home after school.

And all of this would be reinforced and modeled by an American nation who, like Japan, recognized the utter futility of war, and practiced instead patient diplomacy, skillful negotiations, and peaceful, fair trade.

O Brave New World, and we alive to see the dawn of it!

But then something happened. Something totally unexpected, outside the ken of many of us naively involved in the movement then.

As Gilliom tells it, following Garland:

"Over the course of the last twenty or thirty years, these premises have not only unraveled, but almost INVERTED as we have undergone a fundamental reorganization of the discourse and practice of crime control in the United States and the United Kingdom. The conventional wisdom now places the victim at the center of an ongoing crisis in crime, embraces retribution, applauds the death penalty, fills the prisons, and laughs the idea of reform or rehabilitation off the stage. James Q. Wilson's once jarring assertion that 'nothing works' (so let's lock them up as fast as we can and as long as we can) has emerged as the now unsurprising common sense of a new era in crime control. Confounding the expectations of many scholars writing about the almost inevitable unfolding of a patient, caring, rational, tutelary state in which crime

control institutions are a sort of boundless treatment center, we seem to have revived an earlier mode of the angry, violent, indiscriminate punisher who seeks revenge and exclusion."

Indeed we have, and in the process, we have seen ADR move from being (in the eyes of some) a revolutionary movement that would overthrow and replace the formal system, to ADR becoming fully incorporated into the formal system, primarily as a way to help unclog dockets, to divert cases away from the courts to cheaper and quicker venues, and to give the ever-growing number of lawyers hemorrhaging from our law schools something to do (and so ADR is now routinely taught in law schools and has become just another weapon in the lawyers armamentarium).

Look who is sponsoring this conference for heaven's sake--A law school and a bar association. Vile intruders from the belly of the beast!

But of course, a prime reason for the failure of our vision was that it turned out that vast numbers of people don't want to have their disputes mediated. Women who resent being required by the courts to "mediate" with their deadbeat husbands as a precondition for going to divorce court are vastly less willing to mediate with their rapists in order to help those misguided men get in touch with their inner feelings and so apologize tearfully for their ill-advised advances.

They want to watch the bastards fry--preferably with their dicks cut off and shoved down their throats.

And so do the rest of us. No matter how wretched the system is for us, it is our hope that it will be even worse for our adversary. And knowing that prisons are hellholes that have given up any pretense of rehabilitation is just fine. Criminals deserve to rot in hell. The longer and more hideous their prison experience, the better.

And so Americans have just gone through two decades of turning our criminal system into something rivaling the Great Inquisition, and a decade of prison building that, if diverted to education, could have funded a Punahou School on every block and a Harvard University in every community. America now proportionately has more young men in prison than does any other nation in the world. We are Number One! And we are very pleased with that.

The rest of the world, meanwhile, has looked at us in amazement and despair. Embracing one of the earliest dreams of ADR, the Restorative Justice movement has boomed, comparatively, in many parts of the world, and while it has its brave advocates in the US, Restorative Justice is far, far too wimpy for the likes of most Americans.

But am I saying that the formal judicial system is either unchanged or has grown worse over the past forty years?

In some ways, yes, I am saying that, but in many important ways my answer is no. However much I lament the repressive laws coming from Congress, state legislatures, and the current Supreme Court, much good has emerged within the formal judicial system itself, especially that of the several American states.

It may very well be the case that my dream for the ADR movement failed because it succeeded. The formal system now does many of the things the early ADR enthusiasts advocated. It no longer demands or expects to have the monopoly on justice that it had, and never even dreamed it should not have, forty years ago.

There are many ways courts have changed positively:

One of the most important is the professionalization of the courts beginning, in the US, with the decline in the number of states still electing judges, and moving on to the formal training and continuing education of judges, to the creation of professional court administrators with their professional clerks and staff. Similar developments have swept all of the courts of the Common Law tradition as well.

Edward McConnell was the first professional state court administrator in the US. In July 1976, he gave a speech at the Western Regional meeting of State Court Administrators describing what law and the administration of justice was like when he became administrative director of the courts of New Jersey in the mid 1950s, and forecasting what he expected judicial administration to be like by the year 2000.

Here is what McConnell said according to a mimeographed copy of his speech:

"Harry Truman was then serving his last year as President, and Frederick Vinson was the Chief Justice. The landmark case of *Brown v. Board of Education of Topeka* had just been argued before the Supreme Court, although the decision had not been rendered until May of 1954 after Earl Warren had become the Chief Justice. All of the significant criminal law decisions of the Warren Court, with which you are so familiar and which have become virtually household words, were yet to come: *Gideon*, *Griffin*, *Escobedo*, *Mapp*, *Miranda*, *Gault*. In fact, few at the time considered the criminal, juvenile, and appellate courts to present any particular problems let alone administrative problems. All of the concern was on the civil side, especially with the auto negligence cases. Few were the least bit concerned about affording speedy trial to those charged with crime--in fact the New Jersey Supreme Court, not then noted for being conservative, had held that one 'Cockeye' O'Leary, charged with murder, was not entitled to have the indictment against him dismissed although it had been mislaid in the prosecutor's office for some 20 years!

"Not only were there no public defenders, but in most states defendants did not have counsel even in felony cases, the decision in *Gideon* still being over a decade away. Legal aid offices to assist the poor in civil matters were just coming on the scene. Judicial education was almost unheard of--a lawyer took the oath of judicial office, was shown his courtroom, given a case, and that was it. Rule-making by courts was a novelty, in most states being still considered as within the sole province of the legislature.

"Starting to work as a court administrator in those days was a lonely job indeed--at the time there was only one other court administrator, and he worked for the Federal Courts. It was difficult, if not impossible, to explain to lawyers and judges--let alone to family and friends--what it was you did for a living. Everyone knew, either from sad experience or hearsay, that no one directed a judge to do anything, and that no one could possibly be managing the courts. As for the supporting staffs of the courts, they were almost invariably political hacks or friends of the judge with no professional qualifications, except perhaps those of the oldest profession." (Quoted from Jim Dator, "Alternative Futures for the Adversary System in America," in Jim Dator and Clem Bezold, eds., *Judging the Future*. Honolulu: Social Science Research Institute, University of Hawaii, 1981, p. 95f)

The work of the American Judicature Society in Chicago, the National Center for State Courts in Williamsburg, and the annual meetings of the National Conferences of Chief Justices and of Court Administrators, at the state level, and of the Federal Judicial Center in Washington and the National Judicial College in Reno among many, many other organizations and developments have created a national, state, and local judiciary that is vastly different--and substantially better--from what it was when Ed McConnell became a court administrator, or later, when ADR was born.

Another aspect of the professionalization of the formal judicial system that merits specific comment is the incorporation of the theories and methods first of strategic planning and then of futures studies into the routine administration of justice, especially at the state level, thanks to the excellent (and always beleaguered) work of the State Justice Institute, the American Judicature Society, and others.

In 1976, McConnell offered ten predictions for law and judicial administration by the year 2000. 2000 has come and gone, so listen carefully and tell me what you think: did he get it mostly right, or mostly wrong?

McConnell said that:

1. Court centralization will continue.
2. Court personnel professionalization will continue.
3. Lay involvement will increase.
4. Courts will become more consumer oriented.

5. Judicial management will improve.
6. New court houses will be less specialized and more diverse.
7. Courts will recover jurisdiction over matters recently delegated to administrative agencies and other alternative dispute resolution organizations.
8. Considerably more empirical research will be done by the judiciary.
9. Substantive law will be radically revived: more 'no fault,' no 'victimless crimes'; more uniform laws.
10. "the courts, through the common law process, will continue to exert a great influence on our daily lives." (*Op cit.*, p. 98)

How do you judge that forecast?

I would say it is at least 98% correct--one of the most accurate forecasts in any field I have ever seen.

A second reason courts are different now from then goes under the rubric of age-cohort analysis--or generational change. Our legal systems are now headed by Baby Boomers and staffed by Gen Xers, both of whom, as age-cohorts, are vastly different in education, socialization, worldview, and overall abilities from the brazen GIs and craven Silent Generation folks who ran the courts (and everything else) forty years ago.

I might add that one of the reasons the decisions of the US Supreme Court seem so weird, pernicious, and out of touch with reality is not that they were mostly appointed by Republicans, though that helps, but because with only two exceptions they are members of the Silent Generation. One is worse--he is from the GI Generation--while only one Justice is a Baby Boomer (as the Court ought properly to be), but he is as uncharacteristic a Boomer as is our unelected President of the US. You have to look far and wide to find Boomers like Bush and Clarence Thomas.

In addition, there are many more women, and more (but far from enough) people of color working inside the legal system and not merely appearing before it as defendants and inmates--though there are still far, far more men of color who are defendants and inmates than there are those who are judges, lawyers, or clerks in the system. This must and will change.

These demographic developments, both within the system and in the broader society, are important for understanding the changes over the past forty years and in anticipating the changes over the next forty.

Some of you know that I have pasted on my door a statement that expresses one of the few reasons I can feel optimistic about the future. It reads, "100 years from now? All new people!" One of the glories of God's good creation is that the old farts die off and young turks get to take over, eventually to become old farts themselves.

Though with cloning, genetic engineering, and the rest, even that is now under doubt. Death seems well on its way to becoming just another curable disease. Old farts may get to hang around forever.

Which brings us to the third and what I believe to be the major reason the courts have changed over the past forty years, and are in the process of changing even more dramatically now.

And that is technology. New technology which not only allows--if it does not in fact require--behavior now that was literally impossible forty years ago, but also and more importantly that creates beliefs, values, and cultures that were impossible, or impossible to be dominant, forty years ago.

Technology has caused the most obvious and dramatic changes over the past forty years.

In most important ways, all courts in 1960 were just like the courts of 1860 and very little different from the courts of 1760, if not of 1060 for that matter.

But the courts of 2002 differ significantly from those of 1960 and those of 2040 almost certainly will be totally different as far as the physical structure of the courts and the administration of justice are concerned.

But wait, what I said about the courts of 1060 compared to 1960 is not quite true.

The big difference is that courts in 1060 were largely based on the spoken word, plus a few--a very few--written notes and basic documents, while the courts from the 17th Century onward, and especially from the 19th Century onward, were based on the printed word--on law not in the heads of judges as it was in 1060, but law (even the Common Law) residing only in the strict printed words of legislatures and administrative bureaus, those words themselves written in conformity with the most solemn and holy words of written Constitutions.

During the 19th and 20th Centuries, with the creation of mandatory public education systems leading up to universities as necessary pathways to all professions, and law school graduation and passing a written bar examination (instead of apprenticeship under a lawyer or judge) as prerequisite to entrance into the legal professions, law became synonymous with formally written documents, while the practice of law and adjudication became a contest over the interpretation of those written words.

That could not have been the case in 1066, and it could not have been the case anywhere for the thousands of years humans lived before the invention of the printing press and the creation of mass, industrial, so-called democratic society.

And it will not be that way in 2040, or at least not nearly as much as it is now, though by 2100, I am fairly certain that law and printed words will have absolutely nothing to do with each other.

After all, it is not the words that are important, it is the behavior that the words are meant to require, regulate, or prohibit. And words, even the most precise printed words of the law, as authoritatively interpreted by a supreme court and as tortuously explained in their written decisions, are very poorly related to actual human behavior.

So as Ethan Katsh has most clearly pointed out, the concept of "law" has shifted over time from being the fluid, oral, highly changeable statements of judges in the old medieval courts, to fixed printed documents (expressed in written "constitutions" and "positive" laws), and now to being fluid electronic bits.

With the advent of the interestingly-named "word processor" everything written now is just a draft which can be and usually is easily "cut and pasted" into other documents. Nothing is ever final. Everything is fluid, flexible, temporary. "Law" is now as dynamic as everything else in the society it seeks to regulate.

But these bits, though fluid, are still "words" while the clear evolution of communications modes is away from abstract words to icons, and thence to simulations of the acts which the words are meant to symbolize. Law in the future will eventually not be expressed in words at all, but as dynamic 3-D audio/visual/tactile/olfactory simulations in cyberspace of proscribed or required behaviors.

Electronic communication technologies are also changing the practice of law with a clear movement from geographically-defined "sovereignty" and "jurisdiction" with its physical "court houses", "law offices" and "law libraries", to "virtual communities" with virtual courthouses and virtual law offices.

As I am sure you know, the State of Michigan recently established a cybercourt where cases are heard via video or audio conferencing, the Internet, or other means. When feasible, the court broadcasts its proceedings over the Internet. The parties appear from their own remote, camera-equipped computers, or from a public terminal located in a Kinko's or elsewhere, They use teleconferencing for the initial hearing, during discovery, for settlement conferences and, if the case goes this far, for the trial and the judge's decision. Attorneys distribute pleadings, exhibits and other documents via e-mail, and witnesses testify over a video link.

Cases move quickly because judges don't need to set court dates far in advance to accommodate out-of-town participants with busy schedules. Participants don't have to cool their heels while the judge hears other cases scheduled on the same day.

Besides making it easier for companies to settle lawsuits in Michigan, supporters hope the cyber court will send an encouraging message to businesses, especially technology firms, shopping for a home.

"We see ourselves as a high-tech state and we want others to see us that way as well. The cyber court shows how seriously Michigan takes its technological infrastructure." "Companies that are comfortable using advanced technologies in business transactions might see the cyber court as a good reason to locate in Michigan."

<http://www.govtech.net/magazine/story.phtml?id=303000000003173>, October 2001

But why must one locate in Michigan to use the cybercourt? That defeats the whole purpose, it seems to me. Certainly cybercourts will come to service a globally-dispersed personnel.

Moreover, while there is good reason now to plan for the emergence of a truly global system of justice which can deal with all of the problems of our increasingly globalized planet, as humanity spreads throughout the inner solar system on the Moon, Mars, and various L-5 locations--and all cyberpoints in between--it is also necessary for future-oriented jurists to begin to contemplate the emergence of "Cosmic Justice" as well which, being electronic--or "post-electronic"--is "located" wherever intelligence in conflict is found throughout the universe.

Finally, electronic communication technologies are changing the "persona" of law. Once upon a time, intelligence, such as it is, was a human monopoly. "Homosapiens, Sapiens!" we boastfully call ourselves. But with the emergence first of "expert systems" and increasingly of artificial intelligence, we can expect the rise not only of intelligent legal and judicial software, but also of cyber lawyers, cyber judges and the creation of a Bill of Rights for Robots--or a Jurisprudence for Artilects, as the matter has recently been redefined.

These developments are by no means inevitable--and certainly not obviously "good." But I do believe a very strong case can be made for this as a possible future, if not necessarily either a preferred or presently plausible future.

Richard Susskind's book, *The future of law*, begins with the following story:

"It is said that one of the world's leading manufacturers of electric power tools invites its new executives to attend an induction course, at the opening session of which they are urged to consider a slide projected onto a large wall screen. The image put before them is of a gleaming electric drill and the executives are asked if this is what the company sells.

"The executives look uncertainly around one another and tend as a group to concede that, yes, this is indeed what the company sells. It seems like a safe bet. They are immediately challenged by the next slide, however, that of a photograph of a hole, neatly drilled in a wall.

"'That is what we sell', the trainers suggest with some considerable satisfaction. 'Very few of our customers are passionately committed to the deployment of electric power tools in their homes. They want holes. And it is your jobs as executives in this corporation to find ever more competitive, efficient, and imaginative ways of giving our customers what they want, of putting holes in their walls.'

"The suitably humbled executives are urged in this way to think about commercial ends not means; to focus on the needs of their customers and not to succumb to tunnel visioned, corporate enthusiasm for a particular (and perhaps quite transient) product range.

"There is a crucial message here for lawyers and indeed for every individual involved in the administration of law. For it is surely doubtful that clients and other citizens who become entangled in the machinations of the legal system are irreversibly tied to the way in which law is currently administered."

What judicial "clients" want is fair, speedy, justice. They don't care whether they get it from a wigged barrister before a robed judge in a stuffy courtroom, or from a warm and friendly mediator in the comfort of her own home, or from a cute and cuddly robot in some cybercafe. Or whether they settle disputes peacefully among themselves without recourse to any third party at all.

All legal systems thus are being transformed by technology and by the preferences and behaviors of age-cohorts worldwide who are growing up in the post-literate, image-rich, iconic world of whatever communication technologies are yet to come--law I say is being driven out of words and back to where I hope you in the ADR world are now--back to the immediate, interpersonal, negotiable, temporary, fleeting, indeterminate, world of ADR.

So we may have won after all. The old law, and the old state and all that goes with it, is being swept aside not by our revolutionary rhetoric and dreams of forty years ago, but by the new realities and possibilities of our ever more transformative communication technologies and the cohorts who use them.

It is just not the victory we imagined when we began.

Of course, there are a few impediments in the way of this future.

One of those impediments may be you.

The world of ADR may not be as "immediate, interpersonal, negotiable, temporary, fleeting, and indeterminate" as I imagined after all.

As I looked over your websites in preparation for this talk, I came to see that ADR appears to have gone the way of many reforms before it, like equity as a reform of the common law; like Baptists as a reform of Catholics, like communism as a reform of capitalism: you now appear to be more structured, restrained, legalized, formalized, and word-bound than the formal system itself.

Maybe I am wrong, but that is the impression I have. Please correct me if I am wrong.

Please correct yourself if I am right.

But the even bigger impediment to the future I suggested above is September 11, 2001 and the current insanity in its wake. Indeed, if I were to extrapolate a future of governance, law, and ADR from September 11 onward, I would have to say that you guys are out of business and that the future of "rap um and slap um the state knows best so shut up and do as you're told" law has never looked better.

But I am hopeful--I don't know why; I'm just a sentimental old fool as I warned you--that the US and the world will come to its senses.

Indeed, I am heartened by the fact that so many of you here are not from the US--and I beg your pardon for my focusing almost entirely on American examples in my talk. I have spent a great deal of my life in Asian and Oceanic regions of the world, and I feel your cultures are much closer to the spirit of ADR than is mine. I hope you will use my examples here as an inspiration to pursue your own way of ADR and not become trapped by the ADR that sprang from the pathologies of the Anglo-Saxon system.

I heard the Chief Justice of the Singapore Judiciary, the Hon. Yong Pung How, end his opening keynote address to the 3rd Asia-Pacific Courts Conference, held in Shanghai, by quoting the following ancient Chinese proverb:

"When swords are rusty
and spades bright,
When prisons are empty
and granaries full,
When temple-steps are worn
by the footprints of the faithful
and the courts of justice
are overgrown with grass,
When doctors go on foot
and bakers on horseback,

Then the Empire is justly governed."

"When courts of justice are overgrown with grass!"

My sentiments exactly. And, I hope, your sentiments too. Please make it so.