

Back to the Future



Rob Buchanan

"You can't connect the dots looking forward; you can only connect them looking backwards. So you have to trust that the dots will somehow connect in your future."

— Steve Jobs

A little more than 30 years ago, the dots for today's state courts were being laid.

In 1990, the State Justice Institute, the National Center for State Courts, and the American Judicature Society hosted a five-day national symposium in San Antonio entitled "Alternative Futures for the State Courts of 2020."

The conference's mission was helping "the state courts of the nation better provide effective, fair, and responsive justice to all Americans in a future filled with expected, but undefinable, change." The intent was to "formulate visions of the American judicial system over the next 30 years and beyond, establish goals for the long-term needs of the state courts, and identify an agenda for planning, action, and research to achieve those goals."

The organizers provided the carefully selected attendees with a framework for

exploring this change, the opportunity to assess the impact on the judicial system, and encouragement to think and plan big, which they did. The attendees, including Michigan Supreme Court Justice Dennis Archer, then state court administrator Marilyn Hall, and current State Bar of Michigan Executive Director Janet Welch, heard from judicial branch luminaries and academic icons. They were asked to "look over the rim" and imagine what state courts might look like in 2020 based on 50 societal trends and 63 court-related trends identified by a group of 40 judicial and legal experts as part of a Georgetown University study.

Archer served on a panel called "Focus on Citizen Access: Fair Treatment and Court Responsiveness," one of 33 substantive sessions that considered "legal, social, scientific, and economic changes in the national and global environments and their impact on the future of the American state judiciaries." The panels were asked to formulate their own models of the forces shaping the future and the courts, define their own visions of a desirable future judicial system, and identify specific steps they believed were most important to achieve the desired vision for the courts of the future.

On the final day, they shared these visions and action agendas, which were intended to "ensure that the courts of the future, while adapting to the unrelenting and pervasive

demands of a changing environment, will dispense justice in keeping with our nation's highest values."

With the notable exceptions of the pandemic and social media, the discussions captured all the trends that seem to have driven us to the moment we're currently living in — the rise of majority-minority communities, rising income disparity, environmental distress, an aging population, gun violence, women's rights, growing resistance to government funding, and, of course, technology in general.

So here we are in 2021, having made it "over the rim" the conference imagined. How did they do? Did they connect the right dots? And where do we go next?

Those were among the questions I recently asked Michigan Supreme Court Chief Justice Bridget McCormack and State Bar of Michigan Executive Director Janet Welch.

(Responses have been lightly edited for clarity — Ed.)

Connecting the dots...

Rob Buchanan: *Generally speaking, do you believe the conference was a success in terms of predicting the future needs of state courts? Where did the conference really nail it, and where did it swing and miss? And what surprises you most in terms of what they got right and wrong?*

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The mission of the 1990 "Alternative Futures for the State Courts of 2020" conference was to "formulate visions of the American judicial system over the next 30 years and beyond..."

Bridget McCormack: It seems to me that the conference identified many of the themes we have seen in our justice system as well as the need for court and bar leadership to take action to ensure that courts continue to be places people can turn to with confidence for dispute resolution. But I'm not sure that even with this foresight there was much that could be done to address the structural problems we see (and they saw and predicted) regarding equal access to justice. The number of people who can't

afford help with a civil legal problem hasn't changed, and clearly, the incremental approach won't cut it.

Janet Welch: There were seven scenarios we worked with, from dystopian to utopian: Judicial Leadership; Generic Justice; Road Warrior; Multi-Door Courthouse; Global High Tech; Super Surveillance; and Green and Feminist. Each captured elements of what we're living with today, but none had the look and feel of life today. But I need to single out the remarkable Shirley Abrahamson of the Wisconsin Supreme Court for sounding a note that was fresh and well-received at the conference and has gotten "legs" in the court-reform conversation in recent years — that the public and court users should be the center of all justice reform efforts. Describing what an average member of the public would say about courts, she said:

"This is my court, a people's court, not the lawyers' or judges' court. The court does not belong to the professionals. You all work for me. I pay your salaries. What do you mean you have to save yourselves for the important cases? If I come to your court with my problems, it is the important case. You say you believe in family values. Then family law cases are important. You think there should be safety on the road? Then drunk driving and accident and traffic cases are important. You think streets should be safe? Then the misdemeanor cases and juvenile cases are the important cases. I want the judge who sits on my cases to be well trained, well qualified, well educated, and well paid to handle my important matters impartially, independently and fairly."

Because every attendee had lived through the sexual revolution and the civil rights events of the '60s, I think we were pretty good at imagining how ongoing challenges to the prevailing norms on gender and race might continue to roil the status quo and the justice system and we even were spot on about how the years leading up to the inflection point of a majority-minority U.S. population might drive demagoguery, violence, and an erosion in public trust and confidence in government.

But we didn't pay enough attention, I think, to how the physical environment

might precipitate conflict. While there was widespread recognition of the destabilizing significance of environmental degradation based on human activity, we were focused on what was right before our eyes at the time — chemical contamination and pollution — and missed the greater significance of climate change and, even more importantly, how reliance on science would become a political flashpoint.

We acknowledged the strong possibility of growing income inequality but didn't envision how income disparity might affect the economics of the practice of law. And I don't recall anyone spotting on the horizon what I think has become a ray of hope — the ease with which technology would allow us to amass and process huge amounts of data and employ artificial intelligence in analysis to find paths forward out of big, looming problems.

Buchanan: *How significantly do you think the worries and concerns of 1990, such as the drug war or collapse of the Soviet Union, clouded their projections?*

McCormack: I think the pressing issues in any moment can obscure our ability to see a bigger picture. I have always wanted to write a law review article that I have a great title for: "Let's Do Emergencies Last." But I haven't been able to get to it...because of the emergencies. But I see lots of thought and care given to issues beyond the 1990 emergencies in the conference report.

Welch: It's the old problem of focusing (for very good reason) on what's coming right at you and missing a few clues along the side of the road about what you need to prepare for down the road.

Buchanan: *Conference participants predicted the impact of technology, even using the term "road warrior," but got it wrong. Their focus was its impact on judicial decision making and not on transforming and mobilizing the legal practice. Why do you believe that happened?*

McCormack: I don't think many of us know all the ways technology can support and transform our work, so I'm not going to throw stones. The truth is our profession has been (and might continue to be) stubborn about innovation and technology. There are lots of reasons for this; some are normative, some cultural, and some are legal — central to our work is a commitment to

1990 Georgetown University survey of societal and court-related trends

Top ten societal trends identified by respondents ranked in order of greatest impact on courts:

1. Illegal drug trade
2. Children in poverty
3. Growth of aging sector
4. Poverty cycles
5. Weakening family structure
6. Availability of handguns
7. Child abuse
8. Environmental disputes
9. Declining public schools
10. Organized crime

Top ten court-related trends identified by respondents ranked in order of greatest impact on the courts:

1. Growth in caseloads of state trial courts
2. Jail and prison overcrowding
3. Unavailability of effective programs for drug offenders
4. Emergence of court-mandated arbitration
5. Unrealistic appropriations to judicial branch in light of demands
6. Inability of correction systems to rehabilitate felons
7. Compensation of state judges
8. Enhancing the quality of judicial education
9. Escalating litigiousness
10. Child custody disputes

decisions that have been made in the past. I think we continue to struggle with this.

Welch: I think lawyers in general tend to be great at analyzing what's in front of us to solve the legal problem of the moment, but at least in our professional lives our imaginations usually lie dormant and I think that's what happened here. Although clunky mobile phones were commercially available in 1991, no one at the conference had a cell phone. If someone had said, "Imagine in a few years that everyone in this room has a phone, computer, and camera in a small device in their pocket, how might that change things?" our answers probably would have been pretty pedestrian, like "ease of scheduling" or "more efficiency." (We thought we were being sci-fi, forward thinking about the wonders that technology had in store when we imagined all judges and lawyers being able to send, receive, and create documents — including exhibits! — easily from their desks.)

I blame lack of imagination that we all failed to comprehend the scale and impact of what was coming and utterly missed the rise of social media and its transformative impact on how information and "knowledge" is disseminated. And we missed how search engines and the internet would open up court opinions, statutes, and other research tools to the whole world, fueling DIY lawyering, for better or for worse.

Buchanan: *The conference's goal was to establish a plan that would help state courts better provide "effective, fair, and responsive justice to all Americans." Do you believe state courts are doing better in this regard than they were 30 years ago? If so, in what ways? Where are state courts still lacking?*

McCormack: I think we have seen more change in state courts' processes in general in the last 16 months than in the last 30 years, and those changes have certainly improved the effectiveness and responsiveness of courts to all Americans. But there is lots of room to continue to grow. Without better justice system data, it is hard to measure where we are improving and where we need to focus our efforts. I would prefer to be able to answer this question with data.

In addition to data, we need new models for thinking about how to ensure equal access to justice. The number of Americans who must navigate civil justice needs with-

out help is too high and hasn't changed. Our regular strategies are not making enough of a difference, and we need to be considering new ones.

Welch: Yes, hands-down yes, we are doing better today! Thirty years ago, the actors were just as dedicated to improvement, but the initiatives about access to justice and a fair and responsive system were pretty superficial — like how to make courts work more efficiently, how to find enough money to pay for legal services for the poor, how to launch legal insurance for the middle class. Very few people were questioning the basic elements of the delivery model, much less how to measure effectiveness. And the tools for measuring effectiveness are getting better and better all the time.

Buchanan: *What can/did we learn from the conference?*

McCormack: I think we learned that court and bar leaders understand the problems and threats our justice system faces and how intransigent some of these are. That we are still talking about many of the same problems our leaders worried about 30 years ago is helpful. What can we do now to make sure we are having a different discussion in 30 years?

Welch: In the end, I think the value of the conference was not so much how well the attendees nailed what the future would look like, but how it opened our eyes about negative and positive possibilities, about how fast change was coming at us, and about the need for judicial and bar leaders to be able to recognize significant signposts of change and "inflection" opportunities to nudge the justice system toward the positive scenarios.

Laying new dots...

Buchanan: *Looking "over the rim" to 20, 25, 30 years from now, and based on social and court-related trends you see, what will state courts look like? What should they look like?*

McCormack: This is a difficult one. I believe we are at a critical crossroads. As a result of the forced innovation the pandemic caused, we learned some critical lessons — that, despite our resistance to change, lawyers and judges can innovate to solve problems, technology can increase access and

transparency, [and] collaboration across the branches of government can lead to better solutions for peoples' legal problems. But either we take these experiences and lessons and use them to bring transformational change to what we do and how we do it, or we won't. If we do, courts will be a service more than a place and will be a force for help and healing in our communities.

Welch: That's a rim I have no expectation of living to see over, but I hope the readers who do will look back from it at our courts today and say, "Wow, what we have today is so different and so much better! Thank goodness they took the first steps 30 years ago!"

Buchanan: *What "dots" can and should legal leaders begin to lay in 2021 that will help state courts provide greater justice in the future?*

McCormack: I think we need more than dots. We are at an access-to-justice inflection point right now. We have learned so much as a result of the pandemic and the public is engaged in what the legal system does, how it does it, and whom it does it to. Legal leaders need to work together to harness the interest and the lessons learned to build a more accessible and more transparent justice system.

Welch: Change "dots" to "data." Be smart about collecting the right data and continuously analyzing it; identify successes and failures more objectively, quickly, and systematically; and be persistent and courageous about pressing forward in the direction to which the data points.

Buchanan: *How do we go about doing this? What can we do now to ensure a healthy future for our state courts?*

McCormack: In Michigan, we are working on it! The new Judicial Council is engaging in a strategic planning process that brings stakeholders together to think about these questions. The Justice for All Commission is doing the same to bring transformational change to our civil justice system. And the recent multi-branch Jail and Pretrial Incarceration and Juvenile Justice task forces are modeling the collaboration and innovation we need to ensure healthy justice systems. We need everyone to be involved and help us all row in the same direction.

Welch: Keep the bar as an active, engaged partner. ■