

State of the Judiciary
Chief Justice Harry L. Carrico, Virginia Supreme Court of Appeals
Message to the Judicial Conference of Virginia
1988

Earlier this month, a significant event occurred in the life of the Judiciary with the publication of the report of the Commission on the Future of the Virginia Judicial System. Since this document may affect the direction the courts take for years to come, I want to share with you some general observations from the report about what the future holds for our court system.

As those who have read the report know, it does three major things. First, it offers a glimpse of the demographic, social, economic, environmental, political, and technological trends that will shape the future of society and it identifies the specific impact these trends will have on the judicial system. Next, it defines a mission and a philosophical statement of purpose which will serve as a foundation upon which our system can effectively function. Finally, the report suggests a blueprint of how to develop the Commission's vision of the preferred future. Thus, the Commission has prescribed a philosophical sense of purpose for the Judicial System and has recommended a practical sense of direction.

The report notes that several basic propositions must be considered when we look to the future of the court system. First, society in general is being transformed at an unprecedented rate. Second, the future direction of the Justice System must be viewed within the context of global as well as local issues. Finally, technologies of the present and future will profoundly alter the court system's operation and its methods of delivering justice. While keeping these considerations in mind, the Commission focused its energies upon identifying emerging trends and on calculating the future effect of these trends.

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In the area of demographics, the Commission reports that the United States will experience steady growth in the coming decades, increasing from the current population of 246 million to 300 million by the year 2030. In contrast to this 22 percent gain, Virginia's population will grow by 43 percent during this time period, from 5.8 million currently to 8.3 million by the year 2030.

An important factor in population growth is the number of people who are migrating into the state. Only a handful of states attract more immigrants than Virginia. In the future, persons moving into the state will account for more than one-half our population growth. Newcomers may bring new outlooks, speeding the transition from the old to a new dominion.

The fastest growing segment of the population, both in Virginia and in the nation, is the elderly. By the year 2020, one in five Virginians will be 65 or older. Obviously, the "graying" of Virginia's population will bring an older constituency into the courts. In civil cases, the use of the courts to settle estates will increase and this use will come predominantly from women who outlive their husbands. Intergenerational conflict over the control of family assets may be brought increasingly to the courts for resolution. Requests for appointments of guardians may

grow along with cases of age discrimination, retirement disputes, and conflicts involving the care of the elderly people.

Increased longevity will be accompanied by complex legal questions involving life-sustaining technologies and right-to-die issues, the ethics of biotechnology, and other medical advancements such as organ transplants.

A major portion of the federal budget growth reflects increased expenditures for entitlement programs. Since most federal entitlement programs involve a federal/state match in funding, increased federal outlays require increased state expenditures. Because entitlement programs have grown at a faster rate than the federal budget as a whole and projected demographic trends tend to indicate a continuance of this pattern, state government should expect to see a growing proportion of its budget allocated to these programs. This situation promises to intensify competition among government agencies for limited state resources and may reduce available funding for the courts.

Another trend that will affect the courts is the changing philosophy on punishment of criminal offenders. Increased rates of violence — most notably murder, rape, and violent crime accompanying drug trafficking and usage — have led to increased fear of crime and intolerance toward criminal offenders. Such fear has, in turn, led to growing demands for incarceration and lengthy sentences for these offenders. Substantial overcrowding of Virginia prisons has resulted. Some projections estimate that the net annual increase in prisoners will be 1200 to 1500 per year, costing the state tens of millions of dollars each year. So immediate is this problem that Governor Baliles has established a commission to study prison crowding and to make recommendations to reduce expensive incarceration through use of alternative programs.

The demand by the public for stiffer sentences coupled with the reluctance to pay for prison facilities will pressure the courts to customize sentencing in ways that suit the conditions of the offense and the offender while deterring repetition of the criminal behavior. The courts must seek creative methods to distinguish violent from non-violent offenders and must consider as alternatives to prison the possible use of electronic monitoring, drug therapies, and other methods of behavior modification.

Globalization of national economies will further accelerate in the future. Communications satellites and jet travel, global trade and investment, global banking, technology transfer, and immigration are weaving nations together in an increasingly integrated world economy. The potentially spectacular growth of the Pacific Rim and Europe's elimination of trade barriers in 1992 will make the next decade a great challenge to U.S. competitiveness. States like Virginia are especially and increasingly tied to global markets. With its major port, international airports, natural resources, and proximity to the nation's capital, Virginia is in a prime position to play a stronger international role in the coming decades.

The Virginia courts will see expanded litigation in such areas as international business and finance. In turn, litigation involving multinational companies, international patent laws, trade disputes, and foreign co-production and investment will require that judges, lawyers, and other court personnel have more training and expertise in international business and finance.

Technological change is acknowledged almost universally as the driving force of the future. The related technologies of automation, telecommunications, robotics, and biomedicine will profoundly alter the way Virginians think, work, and live. In addition, optics, space manufacturing, bionics, aquaculture, desert greening, and energy source research represent a few of the emerging areas in the technological revolution.

The promises these technologies offer — increased productivity, improved services, widespread access to data, and enhanced ability to cure diseases — are part of this unfolding revolution. Its darker side includes the specter of technologies causing widespread displacement of employees within the workforce, providing information systems that may jeopardize privacy and other constitutional rights, and generating fear that biotechnology will have unexpected and frightening consequences. Courts have only begun to access the vast opportunities and potential threats that technology will pose to justice.

Computerization of all court records seems a likely first step in an information revolution within the courts that will move from data collection to data management and analysis and, finally, to changes in court administration as well as the adjudicative process itself.

Medical advances in causes of criminal behavior and treatment of addicted and violent offenders could transform our approach to crime and punishment. New techniques for identifying, testing, and screening for maladaptive conduct are emerging from studies of the chemical and genetic bases of human behavior. Profound changes may occur in the nature and concept of individual rights should these or other scientific means be used to provide treatment in lieu of punishment for criminal conduct.

Given these expected trends, how should the courts respond? The report states that, in the future, courts should be actively managed to provide an array of dispute resolution methods that are responsive to the needs of society. Government has the duty of providing its citizens with a vehicle to resolve disputes in a peaceful fashion. Since disputes differ in nature, the method of resolution required may vary from case to case. Individual litigants must have available the method of resolution best suited to the type of dispute involved and the one most likely to attain the highest standard of justice in a specific case.

The Commission observes that, while the court system should remain as the final means of resolving disputes, the judiciary must assume active responsibility for providing a range of remedies which allows litigants the option of choosing the most appropriate and responsive forum. These alternatives will serve as complements to rather than as replacements for traditional adjudication. Given that justice can be obtained in more places than the courthouse, development of alternative dispute mechanisms must be a joint venture with the community.

The report maintains that, in creating non-traditional resolution alternatives, either by the courts or by the community, methods must be forged which provide an opportunity to deal with the causes of the underlying issues in a dispute. New approaches must provide ways to limit polarization, gain greater acceptance of the outcome, and restore a sense of control to the participants.

To realize this vision of the future court system, the Commission has recommended the expanded development of alternative dispute resolution methods, both within the court system and by community-based providers. Also proposed is the creation of an Office of Alternative Dispute Resolution Services which would coordinate and promote the use of these services.

In further constructing its vision of the preferred future for the courts, the Commission suggests that the impact of changing socio-economic and legal forces must be systematically monitored and that the law must provide both the substantive and procedural bases for responding to these changes. Our justice system is the product of multiple forces both internal and external. Broad socioeconomic and legal developments have created the existing justice system with its extensive and intensive use of the courts. The justice system has intrinsic to it a component of supply and demand, with the system supplying its concept of justice and society demanding what it needs.

The Commission points out, however, that the needs of society change from time to time and that the legal system must be able to respond when change occurs. The laws should provide a framework to regulate and to ensure consistency in governmental action and should reflect the ideals and social values of its citizens. In order to be responsive to both social and technological changes, the substantive and procedural law must be continually reviewed. Coherent and well-informed changes in the law, as well as new laws, are needed in many areas today.

Science and technology have created situations which must be clarified or regulated. Examples of some of the most obvious candidates are new medical technologies such as surrogate parenting and genetic engineering. Other changes such as the "graying" of the population, increases in automation throughout society, the increase in immigration, changes in the roles of women and the composition of households, and matters of public health such as AIDS, need careful and informed study and legislative responses.

In the same vein, broad areas of existing law need to be studied, with a view to change. Areas such as tort, mental health, and environmental law are in need of systematic examination. Institutionalization of this monitoring and review process will better enable government personnel to carry out the aspirations of the citizens and help the courts render decisions which are seen as fair and responsive. The Commission suggests that this can be achieved through the creation of a public corporation known as the Virginia Law Institute, which would conduct an ongoing study of the substantive and procedural laws of the Commonwealth.

In the desired future, the Commission foresees that the public's perception of the courts must be one of confidence and respect. Compliance with the law is dependent to a great degree upon the respect accorded the court system by the people. The reverence and esteem granted to the courts stem not only from actual performance but also from how the public perceives justice to be done.

The public's perception is fashioned in many ways. Key in the formulation of the public's view of the court system is education. A general understanding of the role and responsibilities of the courts in the American system of government must be achieved through the formal school system and must be supplemented on a continuing basis by specific instructional and explanatory materials disseminated by the bench, the bar, and the media.

The Commission makes the point that openness is another factor which facilitates both understanding and acceptance of court actions. Broad access to court proceedings and records encourages effective participation. For those who do participate, the court's demeanor must express the value and dignity of all individuals and not distance or indifference. The court and its staff must create an environment of courtesy and responsiveness to the needs of the public. Equal treatment and respect must be accorded all who conduct business with the court.

The Commission states that the courts must have a mechanism to obtain feedback on their strengths and weaknesses and that they must have the ability to react to identified needs. The need for information on levels of customer satisfaction with the courts and mechanisms to enhance the quality of services delivered are as necessary to the judiciary as they are to the private sector. The Commission further states that development of a consumer research and service development process within the judicial system will allow the translation of the public's opinions and needs into specific consumer-oriented measures to help citizens make more effective use of the legal system.

In calling for the devotion of greater attention to the needs of the users of the court system, the Commission states that it does not seek to reduce the stature of the legal profession but to enhance it. The fundamental element for any profession is the existence of a direct relationship with the client or user. The legal profession generally and the courts specifically must improve this relationship by listening to the concerns of the clients and by responding to their needs.

Another basic value articulated by the Commission which forms the foundation for the Virginia court system is that all persons should have effective access to justice, with the opportunity to resolve their disputes without undue hardship, cost, inconvenience, or delay. The quality of justice rendered by the judicial system is directly related to the citizens' ability to gain access to the courts, the cost involved in participating, the ease with which a dispute is resolved, and the length of time involved in obtaining final disposition. The courts must be accessible to all those who desire to and are required to use them. Elimination of barriers such as complex procedures, high costs, and delay will reduce the obstacles to obtaining justice and will increase accessibility.

The cost of dispute resolution must be affordable to avoid either an actual or perceived impediment to court usage. The court system must work with the legal community to insure the provision of legal services for those of modest means. The use of clear, concise, and understandable language as well as simple procedures in all court activities will open the courts to a broader spectrum of users and will facilitate their participation and their acceptance of the results.

Courts should discharge their responsibilities in a timely and expeditious fashion. Delay impedes factual recall, predictability, finality, deterrence, and rehabilitation. Delay engenders injustice and hardship. To avoid delay, the Commission recommends that courts take control of their dockets and institute calendar management practices, such as time standards, aimed at achieving the prompt disposition of all cases.

In criminal cases, delay has the further effect of diluting the deterrent value of punishment. On

the subject of punishment, the report states that "[t]he goal of a just system for resolving criminal charges should be deterrence, designed to eliminate repetition of criminal behavior and to protect the public." The report also states that "[s]entence disparity should be minimized by the systematic analysis and dissemination to judges of historical sentencing data."

As an aside, but in very timely fashion, I can tell you that only yesterday the judicial sentencing guidelines oversight committee of this conference, chaired by Judge Ernest Gates, made an interim report to the executive committee on the positive results of the voluntary sentencing guidelines pilot program which has been conducted since July 5, 1988, in six pilot circuits. The purpose of the guidelines project, of course, is to try to minimize sentence disparity by the systematic analysis and dissemination to judges of historical sentencing data.

Although the original plan was to continue the pilot program only until July 1, 1989, Judge Gates' committee recommends the continued use of the guidelines in the pilot circuits until this conference makes its formal decision regarding statewide implementation of the guidelines program. The committee states that "[m]any judges in the pilot circuits have said that they do not want to forego the use of the guidelines after the official termination date of the pilot program."

The committee expects to make its final report sometime after July 1, and it is expected this conference's formal decision regarding statewide implementation of the guidelines program will be made this fall. In the meantime, I endorse the committee's recommendation that the pilot program continue in the six pilot until the formal decision is made. The committee, under Judge Gates' leadership, has done a perfectly splendid job, and he and the other members are due a vote of confidence by being permitted to continue their work as they recommend.

Now to return to my subject. The Commission foresees that, in the future, technology will increase the access, convenience, and ease of use of the courts for all citizens and will enhance the quality of justice by increasing the court's ability to determine facts and reach a fair decision. But technology may well add to, not reduce, the workload of the courts. A more attentive, better informed public may use courts more and expect more from them.

Nevertheless, innovations in technology will make the courts more efficient, and, accordingly, will alter the way courts work. Courtroom practices are rooted in centuries of common law, so it may be hard to believe that the future will be much different from the past. But the courtroom of the future and what happens there will be much changed. Live testimony, even live trials, may be less standard.

Many proceedings will employ sophisticated video and graphic displays. Videotapes may be the official court record, and voice recognition systems will prepare an electronic transcript that is interspersed with the video record. Televised trials may become commonplace.

While the judge's job will continue to be determination of the facts and application of the law, the tools judges use— videoconferencing, electronic mail, computer-aided legal research, expert systems — will become customary. The management of the courts — e.g., scheduling, docketing, storage and retrieval of records, internal management functions — will be automated fully. Computer networks will link the courts electronically and will connect the courts and other

justice agencies.

The Commission warns, however, that as we strive to become more efficient, we must make sure that the use of technology in the name of efficiency does not depersonalize the courts. The courts already are accused of being indifferent, and the use of technology must not result in callous, mechanical justice. Fortunately, by improving scheduling and other steps, technology can make the courts more considerate of jurors, victims, and witnesses and more responsive to their needs.

In sum, the report expresses what the Commission foresees as the preferred future of the judicial system, coupling expectations of what will be with dreams and aspirations of what should be. You may not agree with the sort of vision the Commission has suggested. I do hope, however, that when you have read the report, it will serve to convince you that there is a need to try to identify future problems and suggest their solutions.

I also hope that after giving the report your objective analysis, you will agree to support those recommendations which, if implemented, would improve the administration of justice in Virginia. In any event, I am sure no one will disagree with what the Commission perceives as our ultimate mission, both now and in the Twenty-First Century:

To provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia Constitutions.