

2020 vision: a bifocal view

In thinking about the future of the courts, we need to look beyond the institutions of the law—we need to quicken our sense of humanity.

by Michael E. Tigar

Editor's note: The following article is adapted from the opening address delivered at The Future and the Courts Conference, cosponsored by the State Justice Institute and the American Judicature Society, May 18-22, 1990 in San Antonio, Texas.

I would not presume to tell you *what* to think about the future. I will venture only thoughts on *how* to think about it. Think, if you will, of some 30-year periods in human history.

If you were white, and you lunched in a Southern diner in January 1960, you might be confident that the serene world in which you thought you dwelt would continue on its appointed course, changing gradually in response to the Supreme Court's 1954 decision. How sharply you would have been brought to attention when on February 1, 1960, some college students sat in at a Greensboro, North Carolina lunch counter and triggered protests, first across the South and then all over America. You would not likely have predicted that the passion and commitment of the civil rights marches would be translated into the 1964 Civil Rights Act.

More prosaically, I recall a vignette. In 1988, the Fifth Circuit held its Judicial Conference in Jackson, Mississippi, and Mississippi's governor invited all the conferees to dinner at the governor's lovely antebellum mansion. As I went up the front stairs, I fell into step alongside John Minor Wisdom, a judge of the Fifth Circuit since 1957 and a genuine hero of the civil rights decisions of the

1960s. I turned and asked, "Judge, did you imagine 25 years ago that you would be coming up the front steps of this place, and by invitation of its occupant?" He smiled, and thought, and ventured, "Not really."

In 1761, James Otis argued in a British court in Boston against the writs of assistance, by which British officers could search at will for contraband goods. I find it hard to believe that many people imagined what 1791 would bring. Given all the bicentennial talk since 1976, you have only to pause and reflect for a moment to see what I am talking about.

Looking back 30 years, who can honestly say that he or she would have foreseen the dramatic changes now taking place in South Africa, or Eastern Europe? The Soweto shootouts had shown us what we should have known—that oppression breeds anger and that the South African security forces were well-armed. But who would have said that an Afrikaner president of South Africa would feel obliged to sit down with Nelson Mandela? I was in South Africa again last summer, where people were already talking about a post-apartheid constitution. In the 12 months since I had been there last, working with Black lawyers and civil rights groups, the atmosphere had changed dramatically.

Why is it that the future is so murky? More pointedly, why are the truths that lawyers proclaim and judges decree with such self-assurance, not to say piety, so quickly confounded by events?

The visionary scientists have done a little better. There is a house in Amboise, near the Loire River, where Leonardo daVinci lived for many years. It is now a

museum, housing models and drawings of his scientific and technological predictions. Leonardo was, to be sure, the stellar intellect of his time. But more generally, the scientists, working with a materialist view of the known world, can chart the broad outlines of our technological future. Some of this conference will explore the ways we can, with some confidence, predict that technological changes, particularly in information storage and retrieval, might make justice more accessible to all.

But you and I—and the organizers of this conference—have hoped for more. So I continue to ask, "Why are the lawyers and judges *not* gifted with the same power of vision as the scientists?" And in asking that, I was struck with the idea of a "bifocal" view. The metaphor will appeal especially to those who are approaching my age, with our need for help in seeing both near and far. Who besides the scientific visionaries are blessed with such a power of double vision?

The poets' vision

And I suggest it is the poets. Yes, the poets. I will tell you why I think this is so, and what concrete insights we can draw from it.

In France of the 1750s and 1760s, nobles and rich merchants piled stone on stone, building those magnificent chateaux. What a sense of confidence they had that the truths of 1789 would be the same ones they knew in 1759. And how wrong they were. But a poet saw.

Denis Diderot wrote of the coming tumult:

The rule of Nature and of my Trinity, against which the gates of Hell shall not

prevail, ...establishes itself very quietly. The strange god settles himself humbly on the altar beside the god of the country. Little by little he establishes himself firmly. Then one fine morning he gives his neighbor a shove with his elbow and—crash!—the idol lies upon the ground.

The poet Percy Shelley reflected on his own time in a provocative preface to an edition of *Prometheus*, itself a drama laden with metaphorical significance:

The great writers of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it. The cloud of mind is discharging its collective lightning and the equilibrium between opinions and institutions is now restoring, or about to be restored.

Diderot's warning to watch out for the "strange god" that might topple the idol of the country turned out to be a modest though chillingly real prediction of 1789. Shelley's words foreshadowed the events of Europe in the mid-Nineteenth Century.

Think with me about Shelley's words: "the equilibrium between opinions and institutions." "Institutions." As lawyers and judges we have been trained to build, and then to dwell in, social institutional structures. We see dispute resolution as a function of the structures we have built. We tend to assume the continuity of what we have built. Indeed, our entire legal system is premised upon the notion of continuity, which we call "precedent."

Looking at the history of the common law, the most powerful ideological tool, even of activist lawyers and judges, has been to invest fundamental rules with historical legitimacy, even when that legitimacy had a mythic quality. When Lord Coke wished to proclaim the courts as arbiters between the citizens and the sovereign, he did not declare that he was building a jurisprudence of revolution. No, indeed: He said that he was merely holding to a course charted in 1215 with Magna Carta and wending its way through the copyholders' tenancies of the Fourteenth Century. When James Otis argued that British tax collectors should leave colonial merchants alone, he did not thumb his nose at precedent. He spoke of the historic rights of Englishmen.

But this institutional vision, even when used to justify needed change, keeps us focused nearsightedly on the

pages of the lawbooks in front of us, and on the walls of the buildings where we work. To return to my opening, our hypothetical diner patron of 1960 would see the gradual relaxing of segregation, as old rules were pruned away one by one, and imagine that the pace of this institutional change could be confined within its institutional boundaries.

He should have listened to the poets. Institutions, the idols of the country, may not be so fragile that they will be hurled to the ground. Perhaps only their equilibrium with opinions will be adjusted.

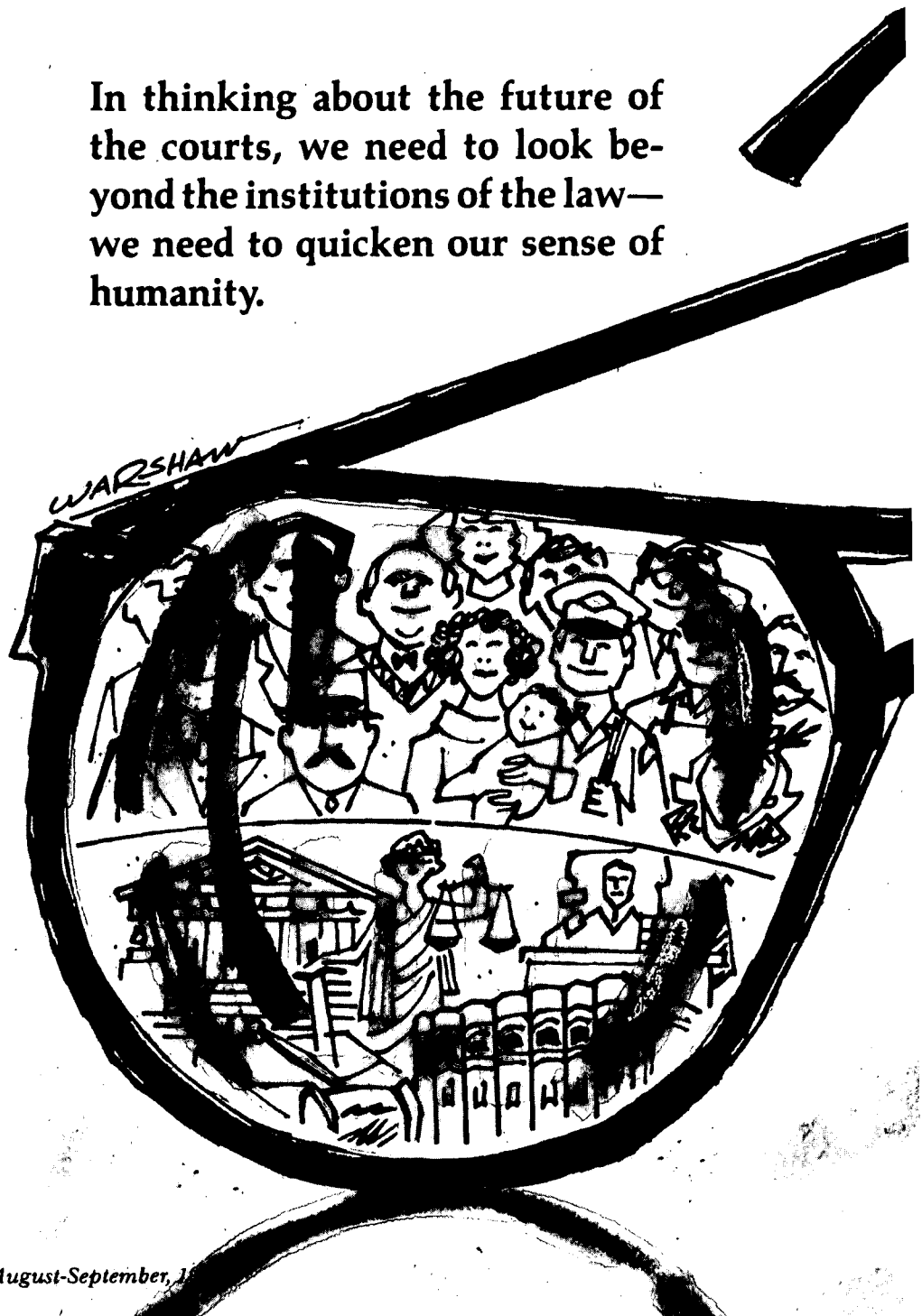
And here is the other part of our bifocal vision: What Percy Shelley called

"opinions," and Diderot called "the strange god." We can build prototypes and archetypes, imagining all the structures we would like. We can lament the pressure on the courthouse walls, and from all the people inside wanting their cases heard. We can take out our saws and cut doorways, diverting people into administrative channels and jiffy justice anterooms away from the main event of adversary inquiry.

A passion for justice

But these would merely be other institutional structures. Opinion, the strange god, the passion for justice and fairness,

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will confound us at every turn unless we honor it. We will fail if we do not see the real world of popular demand for justice that the poets saw and have described.

More bluntly, I put these words in the mouth of a character in a play I wrote last year: "You cannot make a bargain with history, you can only act in it, hoping that those who follow you, and rail at your misdeeds, will call to mind the dark times that brought them forth."

To describe our task is not a counsel of despair. The ghost of Christmas future showed Ebenezer Scrooge a landscape of woe, but only to tell him that he could change it if he abandoned his easy faith

in institutions, and quickened his sense of humanity. More mundanely, a school of historians has illuminated our path by studies of people's daily lives—beginning with Marc Bloch and continuing with such writers as Fernand Braudel.

And lawyers have sometimes had the needed vision. Centuries after Phillippe de Beaumanoir published his famous treatise in 1283, someone said of him that "he broke the mirror in which the law was accustomed to look at itself, and he showed us the path." The image is apt. We could take for ourselves the insight.

For me, the most telling sign on the landscape of justice, and the one we

ignore only at our peril, is this: The market has failed.

Twenty years ago, nearly 20 per cent of our law graduates went into public service or public interest law. Today, less than 7 per cent do so. Is this an epidemic of selfishness and unconcern? I think not. The beggaring of the public justice system, and of the institutions that meet the legal needs of ordinary people, has dried up the job opportunities that these young people flocked to accept two decades ago.

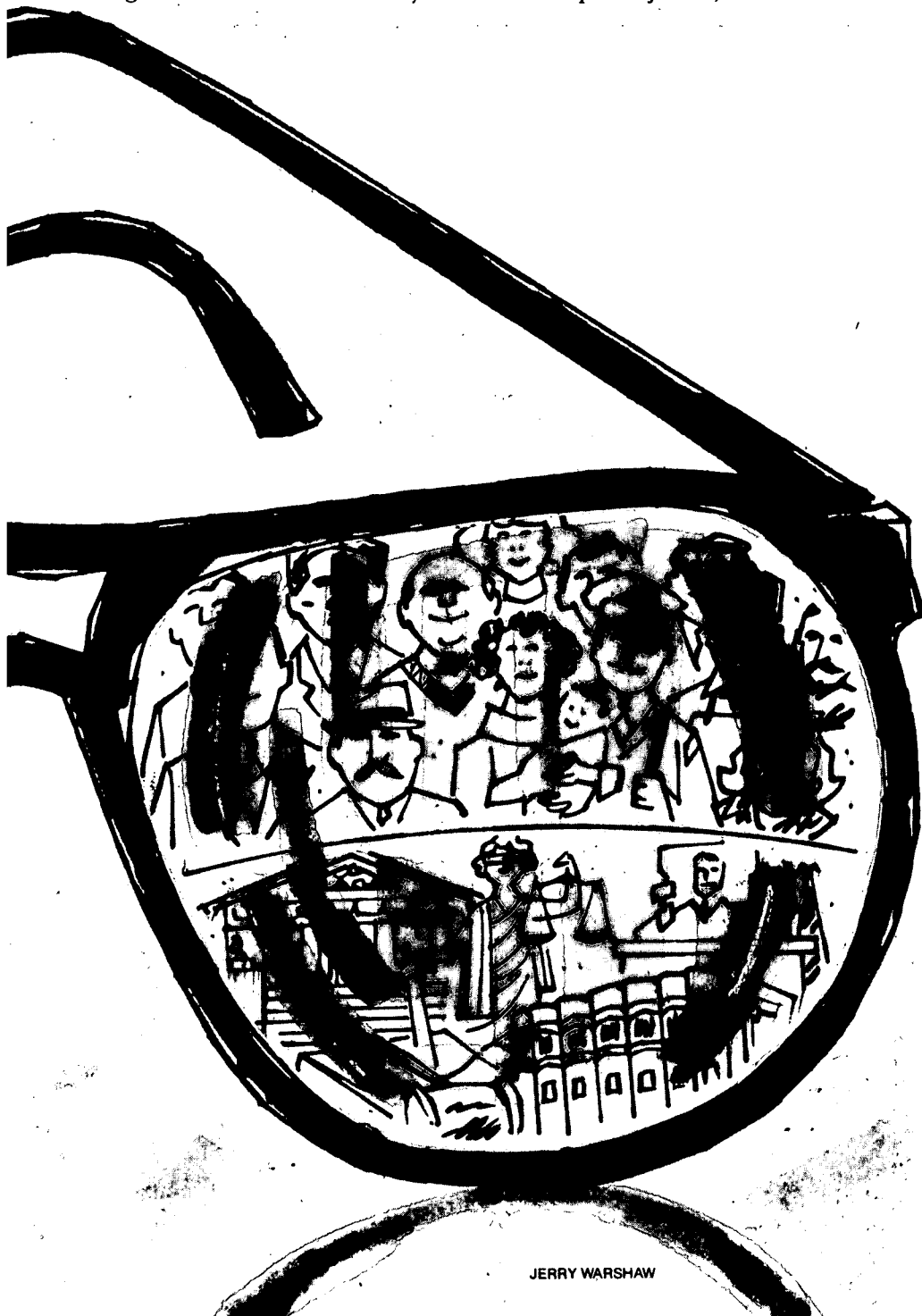
Stepping past the profession's entry-door, the same penury may be seen in the antechambers of justice and on into its grander rooms. Judges and court personnel are undervalued and overtaxed.

A scarce commodity

The market has failed in another dramatic way. Justice is a scarce commodity. There are only so many courts, clerks and judges, so many days of court-time for adversary inquiry. And look what we are doing with this scarce resource. I take it that our ideal model is adversary resolution of disputes as the capstone of our system. I yield to no one in my regard for alternative dispute methods, arbitration, mediation, and informal resolution. But the perceived legitimacy of such devices—against a backdrop of hundreds of years of popular demand for justice—depends vitally upon the existence of a system of review that will apply basic principles of freedom and fairness.

I insist on this point because it is central to my vision of a justice system 30 years hence that will have any chance of meeting the people's needs. Some countries have moved to informal dispute resolution systems for entire ranges of disputes. Such mechanisms work well when they rest upon a more or less formally-expressed consent to the process and a consensus about the principles of decision.

A complex, alienated and increasingly pluralistic society lacks the cohesion necessary to permit such devices to be legitimate substitutes for entire areas of adversary justice. Such devices will become, and more important will be perceived as being, means by which the state imposes solutions on people without a meaningful chance to be heard. That meaningful chance to be heard, in a complex society, requires formal devices



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because with complexity and alienation comes the loss of innocence and community, the two qualities that undergird consensual systems of justice. The risk is, as another character said in a play I wrote, that law will become—and be seen as becoming—simply a mask the state puts on when it is about to commit some indignity upon the oppressed.

In sum, justice must have some adversary quality, and only limited resources are available to provide that quality. Now we can see how badly the market has failed. I have been studying complex lawsuits. I find—and I concede that the evidence is so far anecdotal—that lawyers are convincing sophisticated consumers of legal services such as corporate and public parties, that the right amount of discovery and motions practice is what the client can afford, and not what the case inherently requires. The “bottom line” mentality of law firms means that if you have a litigation budget of \$1 million, the law firm will do that much discovery and then shamelessly come back for more.

In a distressing number of cases, therefore, the market behavior of legal services consumers is irrational in two senses. It is irrational in terms of their own interest, which is a crucial market failure. It is also irrational because a small minority of cases and lawyers are chewing up a grossly inflated amount of judicial resources.

This overconsumption, by the way, has nothing to do with adversary justice, which rests on quite different premises. Overdiscovery is not overuse of the adversary system, it is sabotage of it.

We also know from excellent studies by such folks as Professors Richard Abel and David Trubeck that the market shuts off access to justice for people with important claims ranging from child custody to workplace discrimination to consumer fraud. The contingent fee, awards of attorney fees, and treble damages do not seem to have solved these problems. Indeed, in civil RICO litigation, where you see all three of these market-priming devices, overconsumption of court time is pandemic.

If I am right that the market has failed, there is another lesson here. We should be very suspicious of proposed solutions that permit people with dollars to get to the head of the line and not share the

burdens of overloaded systems. To use a crude but apt analogy, the most far-reaching debates of this century on military policy took place when conscription was instituted to raise the army.

And make no mistake: The popular image of lawyers and the justice system is not a happy one. Knowing that, what might we do to fashion institutions that are controlled by opinions? I repeat that no society will long succeed at doing it the other way around: Institutions can control opinions only in the short run, and then there are the dramatic consequences foretold by Diderot and Shelley.

Some key words

I have time only to put some key words before you. The first of these is “profession.” The greatest lawyers and judges have been those who saw their work as a profession bound by an oath about justice, and not as a market-driven search for profit at any cost. Bar associations and courts—and failing that, legislatures—must demand that lawyers give something back. This initiative must go beyond, though it must surely include, appointment of lawyers where claims for justice are now unmet.

In commercial cases, court costs now taxed as derisory sums must be enhanced to make litigants who can afford it pay for what they use.

The second word is “control.” Information storage and retrieval systems now routinely used in the private sector must find a home in every courthouse and dispute resolution center. But this technology will be useless if lawyers and litigants are unfettered in what they put into it. We need drastic controls on the type and duration of discovery. We need to invent and enforce sorting devices, to terminate meritless cases and identify those that will require more resources. As matters now stand, market forces overwhelm scarce dispute resolution time because people with resources can keep on churning the system in ways that obscure dispositive points and that resist diversion into controlled mechanisms of settlement and mediation.

The third word is “confidence.” We respond to our every fear by criminalizing its perceived source and insisting on harsh penalties for transgressors. I have time for only one dramatic example. In death penalty litigation, our fear, loath-

ing and anger call for vengeance. But the social cost of administering the penalty has long ago outstripped its dubious value. In the federal courts of Texas, long prison terms for minor drug cases continue to block dockets and prevent adjustment of civil disputes.

The fourth word is “principle.” There are valid reasons why our model vision of justice contains vigorous lawyers battling in the presence of a generalist judge, and putting their case to a jury of citizens. It is not just a romantic backward look that conjures this vision. This system was purchased for us by our grandmothers and grandfathers at no little cost, because they needed it as a defense against oppression and arbitrariness. I wish I could say that oppression has gone out of fashion, but I cannot.

We can work at a “microresolution” level to identify disputes that lack merit, or whose parties will see the wisdom of diversion to another forum. But we cannot in larger context shut the courthouse doors to litigants, or to the jurors who will often give verdicts that warn us when the gap between opinions and institutions has become alarmingly wide.

I am honored to be here, though like many of you fearful of what I will find out, and distressed at how intractable these problems are. Sometimes I feel like the Spanish intellectuals at whom Federico Garcia Lorca directed his words in the 1930s:

“I have shut my balcony
For I do not wish to hear the weeping
But from beyond the grey walls
Nothing else is heard but the weeping”

And because we are in San Antonio, the original goes:

“He cerrado mi balcon
Porque no quiero oir el llanto
Pero por detrás de los grises muros
no se oye otra cosa que el llanto”

This leads me to my last word: “universality.” Our sense of frustration and despair is shared by people like us all over the world. As a challenge and an inspiration, we must also know that the cry for justice is universal. It is the strange god who will always come to sit beside whatever idols we fashion here. □

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