

Judges or lawyers—who are the keepers of the flame?

by Michael E. Tigar

I must begin by telling you about the police department of Dripping Springs, Texas. This is a small town on Route 290. Several years ago, they got a large grant from the Law Enforcement Assistance Administration. With this money, they did two things. First they sent their entire police force—all two officers—to an expensive training program in riot and crowd control, with special emphasis on dealing with radical protesters. Second, they bought the most modern and best-equipped police patrol car ever seen in Texas. It looked like a moon landing vehicle, with colored lights and bullhorns and antennas. The only traditional elements were a gun rack and a clip to hold a Stetson hat. It had power brakes, power windows, armor panels, bulletproof glass—everything.

Two days after the car was delivered, one of the officers took it out in the country. He was roaring along blowing the carbon out of the cylinders, lurching over the one-lane roads, up and down the hills that are a feature of our part of Texas.

As he rounded a bend, he saw in the distance a longhaired teenager. Pulling closer, he saw it was a boy, wearing Oshkosh B'Gosh overalls and a plaid shirt. As the police car approached, the kid leaned out and shouted right at the cop, "Pig! Pig!" Quick as could be, the officer hit that power window button, leaned his head out and shouted back, "Communist!"

And just over the next hill, he plowed into a 700-pound hog.

The moral is that everybody needs to understand the difference between an insult and a warning.¹

My story begins in the future. On September 9, 1991, the vending machines in the courthouses all over America—the

machines that dispense justice—stopped working.

The problem was first noticed by a courthouse employee at 100 Centre Street, in downtown Manhattan, who idly kicked the machine on his morning rounds and discovered that it would not respond. He was used to this sort of thing, but when he checked the others, they too had frozen up. He called the administrative judge, and told his story to the *Daily News* reporter in the press room.

Out in White Plains, New York, the chief judge of the United States District Court for the Southern District of New York issued a press statement, saying that he was sure that Article III of the Constitution was proof against any breakdown of justice-dispensing machines in the federal courts. His confidence eroded, to be replaced with chagrin and amazement, when a deputy clerk reported that the White Plains machine had stopped, and the Foley Square ones weren't working either.

As the world turned, machines in Chicago, Denver, San Francisco and eventually Honolulu were found jammed. There was no external sign of tampering—the machines just wouldn't dispense any justice, no matter how much money you put in the slot, or how you jiggled the knobs and handles.

It came as no surprise that everybody had an explanation for the breakdown, but that nobody would take blame or responsibility. Ted Koppel went live and direct. First, from Cambridge, Massachusetts, we heard from Professor Duncan Kennedy.

"Have you actually been down to the courthouse to look at these machines, sir?"

"Of course not. We have been predicting this for a long time."

"What causes it?"

"Hegemony."

"Hegemony, sir?"

"Yes, hegemony, white male domina-



JERRY WARSHAW

tion of the system. The German word for this is *Herrschaft*."

Seizing upon an imperfect understanding of German philosophy, eager law students and a few professors began to write law review notes on *Herrschaft* and the justice machines, with due dates ranging from late 1992 and onwards. Their rudimentary knowledge of German philosophy led some of them astray. Some thought that Professor Kennedy had said "hair shaft," and they began to study how bald-headed judges had harmed the system. Others thought he said "air shaft," and they focused on the practice by large New York law firms of giving new associates offices that did not look out on Park Avenue.

A federal judge studied the docket and consented to an interview. "This would never have happened," he said, "if Congress had permitted us to paint the machines grey and olive drab and other neutral colors, and programmed them to accept only federal coins. By painting them in a diversity of colors, by accepting a diversity of coins, the machines became overloaded."

Ted Koppel nodded as sagely as he could without overtaxing his hairspray. "This diversity overload," he intoned, "would it be fair to say that it reached frightening proportions?"

"Frightening?" replied the judge, "it

This article is adapted from an address to the Seventh Circuit Judicial Conference on May 21, 1990.

1. I heard this story from somebody, and I don't remember who it was. But I want to acknowledge the debt.

is more than frightening. It is *Erie*."

While Ted Koppel was filling the airwaves with speculation, a team of researchers in full protective gear pried the covers off the justice machines in five urban centers. What they saw caused several people to faint, while others quickly donned their masks. The stench was overpowering.

All of the parts seemed to be coated with sticky stuff, the residue of something like flypaper. People questioned at the scene remembered that a number of men in three piece suits and carrying attache cases had been seen performing weird cabalistic rituals around the machines. First, they would prime the machine with money. Then, they would put some plain paper in it, with writing on it. Then, they unrolled great hunks of sticky paper, just like flypaper only bigger, and began stuffing it into the machines. They chanted as they did so: "Now let's send our first interrogatories, and see what sticks to them. Let's discover everything, no matter where or when."

Horried, the researchers asked the witness whether any of the judges had tried to stop the three-piece-suited men from stuffing the machines full of sticky paper.

"No," said the witness. "The judges would stand by while all this went on and do nothing. Then, every once in a while, after the men had stuffed the paper in, a judge might come along, sneak up behind a lawyer and hit him with a rolled up paper, shouting "Here's an 11 for you. I'm hitting you with an 11."

The story of the three-piece suited legions was quickly confirmed throughout the system. Members of this group had been seen elbowing their way up to

the machines with pockets full of change, and stuffing their mouths with goodies they got. And all the time, others who did not know how to work the machines, who had no one to help them use the machines, and who had no money to put in them anyway, looked on with disgust, sadness or even anger.

Some of the machines, when opened, bore signs of tampering. Those in Chicago and New York were the worst, but the problem was everywhere. There was a telling moment on a local channel in a great Midwestern city. At a press conference, an angry judge shouted at a local reporter, "Have you ever heard my integrity questioned?" And the reporter shot back, "Sir, I've never even heard it mentioned."

The machines that were in the worst shape seemed to be those that dispensed death. It was reported that people who had stood at the machines and received the death tokens would turn around and find that they had nobody to help them manipulate the levers and knobs to exchange their tokens for something else. When they did get help, the machines had begun to act strangely, as though possessed by a malign force. If the lawyer-helper pulled the wrong knob by mistake, the machine would make a dreadful noise and refuse to work anymore. It turned out that only tokens of a certain type—those minted long ago—could possibly make the machine work again. New tokens, no matter how shiny and well-made, would not be accepted: the machine would make a rude noise that sounded like "non-retro, non-retro, Teague, Teague, Teague." Someone suggested that making the machines dis-

pense death tokens in the first place might be causing the trouble, but that was taken under advisement.

The investigation

At 3:00 in the afternoon, Eastern time, the Director of the FBI announced that progress was being made in the investigation. He thought that a small group of theorists, in Chicago and elsewhere, might be at the root of the difficulty.

"This afternoon," he announced, "we discovered that for many years these machines had not been maintained at all. Those responsible for maintaining them—judges, lawyers, and legislators—claimed that they had religious scruples against maintaining the machines in proper working order. They said that they had experienced a vision. That in the night, a mysterious force they called "The Market" would magically appear to take care of the machines, and would clean out the sticky paper, and clear a path through the three-piece legions to let others be served."

"How," said an earnest *New York Times* reporter, "could anyone have believed such a thing?"

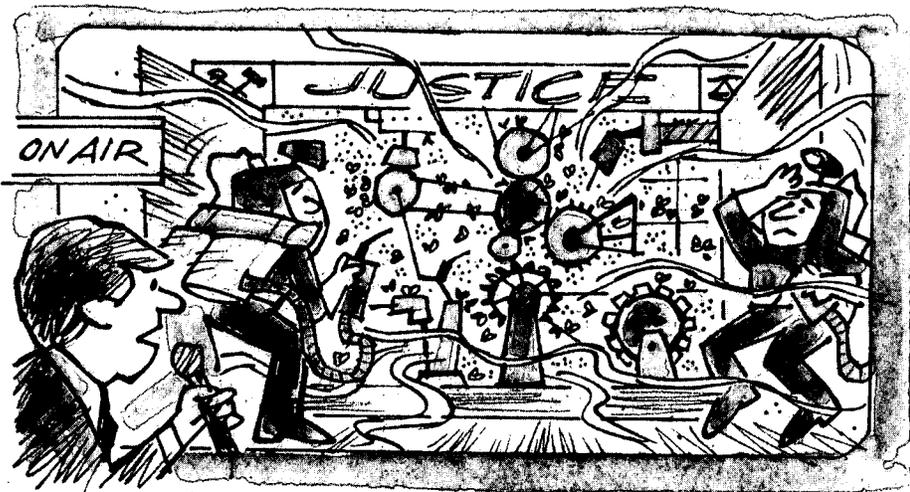
"We do not know," the Director replied. "We have taken some of the leaders of this movement to a deprogrammer, who is making them write on a blackboard 100 times, 'The Market is dead. The Market has failed. The invisible hand only works in crowded elevators.' "

The Washington, D.C., Metropolitan Police reported that they had arrested a man calling himself the Czar, who confessed to stuffing the machines in the federal courts full of cocaine and other illegal drugs. When asked why he had done this, he said that he, the President and the Congress had decided that stuffing all the illegal drugs into the machines would cause the drugs and the drug problem to disappear. He was held overnight for observation.

The judges, the lawyers, the law professors and the legislators looked on as the researchers continued their work. At last, someone stepped forward. The face looked familiar. It was someone who had been seen standing in line to use the machines, but who never seemed to get a turn.

"You know," she began hesitantly, "there are only so many machines. And speaking for me, they are very hard to

JERRY WARSHAW





JERRY WARSHAW

learn to use. You have to put money in the slot or they don't work at all. We have seen that we need helpers to let us know which knobs to pull and which dials to turn.

"I will tell you a story. For years, I have stood here. I have seen young people come by. They have stopped and talked with us. They have told us to wait awhile and they would be back to help us get our turn at the machines.

"Then, they go up the street to the building with the words 'law school' over the door. When they come back out, they don't even speak the same language anymore. But they pat us on the back and tell us to be patient. Then they go into that big law office building over there. When they come out, they are walking with their heads down alongside one of the three-piece-suit people, and they cut in line and help put that sticky paper into the machines so they don't work for anybody.

"Last night, I stopped two of these young people, and I reminded them that they were going to help us. I could not understand what they were saying, except they kept using the words 'billable hours, billable hours.' What does that mean, and what have you done to them? Are you—law professors, judges, lawyers, legislators—are you eating your young?

"Sometimes a lawyer would stop to help us work the machines, and a judge would come out as he was trying to make the knobs work and say things like 'You're wasting the court's time. Move along and let the three piece suits have a turn.

"You know," the speaker continued, "you people in charge of the machines think that you stand at the center of every event by which the world is moved. Look at things from Eastern Europe to South Africa and think again."

"You once told us that you were a profession. Forgive me if I thought that was

different from a market. Now some of you say that you will become proficient in every technique of your discipline, but that you will perform only for money. There is a word for people who do that. Let me go and find it."

The speaker faded back onto the crowd. Some people thought they saw the portraits on courthouse walls—portraits of the antimarketeer advocates like Thomas More, Lord Erskine, Dan O'Connell, and Clarence Darrow—smile and nod their heads.

Of course, this is only a story, a parable, if you will. I would like to tell you how the parable ends. But that, my friends, is not up to me alone—it is up to all of us. □

MICHAEL E. TIGAR holds the Joseph D. Jamail Centennial Chair in Law at the University of Texas at Austin, and is immediate past chair of the ABA Section of Litigation.