

Crisis in the Courts

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BOOK REVIEWS

Crisis in the Courts. HOWARD JAMES. New York: David McKay Company, Inc. 1968. Pp. xv, 267. \$5.50.

The 1960's have been years of inquiry, dissatisfaction, rejection, violence, and almost revolutionary change. Long-standing institutions and values no longer enjoy the high degree of respect that they once engendered. Conduct at one time condemned has become commonplace. Those who call America their home in the 1970's will be heirs to mores, ethics, ideals, and aspirations different from those that prevailed in 1960. Activists and prophets are bequeathing new standards and sentiments to guide man in the 1970's.

A concomitant of this period has been the appearance among laymen of a conscious, systematic, extensive, and often astute reevaluation of our legal system.¹ In 1968 the state of the law is not regarded as the exclusive domain of judges, lawyers, administrators, and legislators. Persons whose life work lies in areas far removed from the practice or creation of law have immersed themselves in exploring the adjective and substantive branches of law. Their conclusions are often negative and call for qualitative improvement. Their militant appeals for change invite an affirmative response from bar, bench, and legislators. The time is ripe for an aggressive, introspective study of the law by those intimately connected with it.

Why are the reports prepared by many of those who have scrutinized our legal system so disdainful? Why do those who scratch beneath the law's surface often conclude that law is moribund and merely a deceptive facade? Has the death knell, unheard by many in the Establishment, really been sounded for our brand of jurisprudence? Is the current legal order at the threshold of an apocalyptic confrontation? Is a violent reaction to the law in the offing? Such questions serve as the structural framework of *Crisis in the Courts*.

In 1966 the editors of *The Christian Science Monitor* were moved to respond to critics of the law and its administration. The editors' concern led to their decision to oversee a study of the legal system. For the object of their study they chose the day-by-day operation of state trial courts. *Crisis in the Courts* is a by-product of the quest and the book resulted in a 1968 Pulitzer Prize for National Reporting for Howard James. After assiduously burrowing through various segments

¹ See, for instance, M. MAYER, *THE LAWYERS* (1967), written by a journalist—an incisive study of lawyers, the law, the legal process, and their respective shortcomings.

of the infrastructure of the law and the courts, James discovered what all those familiar with the law know but seldom express—law is neither self-creating nor self-enforcing. The administrators of the law, judges, occupy a critical position in the legal process. Its level of quality can be no higher than that instilled by these administrators.

James was determined to learn how individual judges conducted themselves in the courtroom and he succeeded. His portrayal of judicial action is discomfiting. Regrettably, lawyers who have been exposed to even a modicum of trial practice would concur with James's presentation. James candidly points out that, although there are men presently serving as judges who would rank high on any list of qualified and competent individuals,² too many others would not. James categorizes as hacks the men who receive judgeships for services previously rendered, who envision the sought-after office as a sinecure, who are deficient in essential physical or mental capacity, or in some instances, who regard a judgeship as a harbor of last resort, a way to earn a livelihood when other means have failed. Some judges see their role as not warranting the expenditure of their best efforts. Some fail to take an interest in their work; they are inattentive while on the bench and neglect to demand the kind of decorum one would reasonably expect to find in a courtroom. Some are too inexperienced, or overwhelmed by their prejudices, or too weak to refuse the personal wishes of a mentor or friend. A number succumb to the basest of temptations, trafficking in outright bribery and doling out "fixed" justice.³

How can the ranks of the judiciary be upgraded? James believes that salary increases would help⁴ and that in some states selection processes must be altered.⁵ He describes the Missouri Plan with approval.⁶ Under the plan, an impartial committee of laymen and attorneys prepares a list of persons believed to be qualified and competent to serve as judges. The appointing authority may fill judicial vacancies by selecting individuals from among those named by the committee. After a probationary period of service, the appointee's name is placed before the public and the incumbent is retained or replaced on the basis of a majority decision of the electorate. The aspirant does not carry the banner of any political party in this election. This approach is consistent with James's disapproval of judicial

² P. 16.

³ Pp. 6-10.

⁴ P. 16.

⁵ P. 17.

⁶ *Id.*

office-seekers soliciting campaign funds and stumping under a party label.⁷

James believes that short tenures have an adverse effect upon judicial behavior, and that extended terms would tend to upgrade the quality of the judiciary.⁸ As an adjunct to the lengthening of tenure he stresses the need for a "good removal system."⁹ But the power of removal, James cautions, must not come to rest in the hands of persons who might, if they so desired, use such power for political purposes.

James correctly discerns judging as a personal rather than mechanical process. But he does urge that some constraints be imposed upon trial judges in a number of areas in which they presently enjoy almost boundless discretion,¹⁰ and he condemns the abuses, improprieties, and lapses in good sense too frequently found inside courtrooms.¹¹ James suggests that guidelines should be fashioned to cover such matters as working hours, vacation periods, and the manner in which judges should treat jurors.¹² He concludes that extensive informality has had a debilitating influence on judicial conduct.¹³

James cogently comments on the perennial problem that plagues the law—the lengthy span of time between the placing of a litigated matter on the trial calendar and the ultimate disposition of the dispute.¹⁴ He echoes the oft heard remark that justice delayed is justice denied. Although delay is not unique to the nineteen sixties, the incisive unwillingness to tolerate it is unique. James depicts our age as quantitative and result-oriented. He sees a need for lawmakers and judges to be affirmative and to be sensitive and responsive to social needs and wants. If the existing legal framework is to continue, he writes, it is essential that suitable and acceptable means be adopted to put a halt to extensive delays.¹⁵

What are the common causes of delay? James points to the shortage of judges, an insufficient number of courtrooms, dilatory tactics of counsel, cumbersome procedures to secure expert testimony, detachment of legislators, inefficiency in court administration, and the dump-

7 P. 248.

8 Pp. 17-18.

9 Pp. 18-19.

10 Pp. 247-49.

11 Pp. 1-19.

12 P. 249.

13 P. 8.

14 Pp. 20-35.

15 Pp. 34-35.

ing of dreg cases on court trial calendars.¹⁶ As possible remedies he proposes assignment of judges to locations where they are most sorely needed, use of supervisory judges to control judicial behavior, use of certificates of readiness, use of computers and other electronic equipment, employment of arbitration within the court system, adoption of six-man juries and split verdicts in civil cases, and expanded utilization of pre-trial techniques.¹⁷ Dissatisfied with the manner of disposal of automobile accident claims, James urges that possible alternatives or innovations be scrutinized. In his opinion, the following methods are worthy of consideration: (1) compelling litigants to bear the true cost of processing their litigation; (2) elimination of the jury as a fact finder; (3) the right to recovery being limited to the obligation imposed on the injured person's insurance company to compensate him; (4) adoption of a procedure comparable to that found in the workmen's compensation sector.¹⁸

A query posed by present-day activists has triggered a serious re-examination of many of society's long accepted practices. For centuries, respectable inquiries have been couched in terms of "why" and "how." Critics of the status quo have found "why not" to be a more important question. James asks why not put an end to the multitude of diverse, outmoded, and worthless procedures and mandates now found within the legal system. He objects to the preservation of those features of the legal order that are retained simply because they are thoughtlessly regarded as immutable.

Why not put an end to the game-like approach to litigation? Why not measure and evaluate court performance and output in business productivity terms? Why not shed the less attractive features of the adversary system? Why not institute reforms designed to elicit from court bailiffs, court clerks, court attendants, and court reporters the kind of service that would enhance rather than impede the operation of our courts? Why not redefine the role of lawyers in our society in terms of present-day ideals? Laymen, lawyers, judges, legislators, and court officials, after having read what the author has to say in regard to each of the foregoing "why not's" would find it difficult to abstain from saying: "yes, why not?"

¹⁶ Pp. 23-32.

¹⁷ Pp. 33-34.

¹⁸ P. 34. Others have argued against the need for reform in this area. See, e.g., Fuchsberg, *Lawyers View Proposed Changes*, in *CRISIS IN CAR INSURANCE* 209 (R. Keeton, J. O'Connell & J. McCord eds. 1968) in which the author contends that the significance of delays and the alleged difficulties of adjusting automobile accident claims are greatly exaggerated.

Happily, some deficiencies laid bare and explored by James have already incited some legislative corrective action. On the federal level, bold promise of further improvement in judicial administration can be found in the recently established Federal Judicial Center.¹⁹ The Center's research could provide the impetus for future change.²⁰ On the state level, there has been a flurry of legislation and rule-making designed to make judges quality conscious. Steps have been and are being taken to impress judges with the need to relate to processing of cases in the same way businessmen look after the needs of their clients. In the context of recent legislative directives, there are specific references to the desirability of speeding up the flow of business through the courts.²¹

¹⁹ The Center was established under the terms of 28 U.S.C.A. § 620(a) (Supp. 1968).

²⁰ The functions of the Center are detailed as follows:

(1) to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies; (2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States; (3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government, including, but not limited to, judges, referees, clerks of court, probation officers, and United States commissioners; and (4) insofar as may be consistent with the performance of the other functions set forth in this section, to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees.

²⁸ U.S.C.A. § 620(b) (Supp. 1968).

²¹ Each of the following states has established a judicial conference or a judicial council. ALA. CODE tit. 13, § 9(2) (Supp. 1967); CAL. CONST. art. 6, § 6; COLO. REV. STAT. ANN. § 37-11-2 (Supp. 1967); CONN. GEN. STAT. REV. § 51-6 (Supp. 1965); DEL. SUP. CT. (CIV.) R. 35; IDAHO CODE ANN. § 1-2101 (Supp. 1967); ILL. CONST. art. 6, § 19; IND. ANN. STAT. §§ 4-7503 to -7506 (1968); IOWA CODE ANN. § 684.20 (Supp. 1968); KAN. STAT. ANN. § 20-2201 (1964); KY. REV. STAT. § 22.050 (1965); ME. REV. STAT. ANN. tit. 4, § 451 (1964); MD. ANN. CODE art. 26, § 102 (1957); MASS. GEN. LAWS ch. 221, § 34A (1955); MINN. STAT. ANN. § 480.18 (Supp. 1967); MO. ANN. STAT. § 476.320 (Supp. 1967); N.H. REV. STAT. ANN. § 494:1 (1968); N.J. SUP. CT. R. 1:23; N.Y. JUDICIARY LAW § 224 (McKinney 1968); N.C. GEN. STAT. § 7-448 (1953); N.D. CENT. CODE § 27-15-01 (Supp. 1967); OHIO REV. CODE ANN. § 105.51 (Supp. 1967); ORE. REV. STAT. § 1.810 (1965); R.I. GEN. LAWS ANN. § 8-1-9 (Supp. 1967); S.C. CODE ANN. § 15-2101 (1962); TENN. CODE ANN. § 16-901 (Supp. 1968); TEX. REV. CIV. STAT. ANN. art. 2328(a) (1964); VT. STAT. ANN. tit. 4, § 561 (1958); VA. CODE ANN. § 16.1-218, 17-222 (Supp. 1968); WASH. REV. CODE ANN. § 2.52.010 (Supp. 1967); W. VA. CODE ANN. § 56-11-1 (1966); WIS. STAT. ANN. § 251.181 (Supp. 1968).

In general the legislative directive to the conference or council is to examine the business of the courts and to undertake to speed up the flow of work of the courts and to improve the efficiency of the tribunals under the charge of the conference or council. Each of the following states has made provision for an Administrative Office or Administrative Officer, entrusting such Office or Officer with the task of gathering and reporting information pertaining to the manner in which court business is carried on: ARK. STAT. ANN. §§ 22-142, 22-143 (Supp. 1967); COLO. REV. STAT. ANN. § 37-11-1 (1963); CONN. GEN. STAT. REV. § 51-2 (Supp. 1965); KY. REV. STAT. § 22.120 (1965); N.J. REV. STAT. § 2A:12-3 (1951); N.Y. JUDICIARY LAW § 210 (McKinney 1968); WASH. REV. CODE ANN. § 2.56.010 (1961).

Those involved in the judicial process are asked to investigate and innovate. Efficiency and volume have been designated areas of concern and involvement.

In the past, it was presumed that one chosen to serve as a judge was instantly equipped to sit in judgment on the conflicting claims of litigants. This presumption no longer prevails. The capacity to judge may have to be cultivated. James details some of the efforts that have been expended to improve the quality of the judging process. Not referred to by the author, but worthy of note, is the experimental program now in effect in New York State. With the assistance of a Ford Foundation grant, the New York Academy of the Judiciary has been created and is housed at New York University School of Law. Under this program, those tapped for a judicial post in the First or Second Judicial Departments of the State of New York attend the Academy for an initial period of instruction, followed by a number of seminars. The Academy may be the forerunner of future efforts to enhance the quality of the judiciary by affording men and women the opportunity to familiarize themselves with their new roles prior to assuming the bench.

Of special interest is an educational program established by Congress. Since James's study is confined to state trial courts, he does not explore the contents of this program. Under the congressional plan, federal district court judges may periodically attend institutes designed to immerse them in ideas, techniques and discussions relating to sentencing.²² The Federal Judicial Center may foster expanded use of the institute approach in other sectors of the law.

The criminal law draws especially heavy fire from James. The research that preceded the writing of *Crisis in the Courts* carried him into criminal courts, police stations, and several prisons. James relates the ugly vicissitudes of prison life and the too-often inane attitudes of society which deform the composition and *modus operandi* of the criminal law. The author believes that the content of the criminal law and the mode of its enforcement are not solely determined by judges, prosecutors, and lawyers. The conduct of policemen, prison officers, and non-judicial court officers, as well as the sincerity or superficiality of society's interest in those accused or found guilty of a crime, constitute important ingredients in the total mix which passes under the heading "criminal law."

Are correction institutions correction oriented? Ordinarily no, insists James. The term correction institute, when used to depict a

²² 28 U.S.C. § 334 (1964).

prison is, he contends, almost invariably a misnomer.²³ Many of those who oversee prisons envisage themselves as instruments of society's retribution rather than as persons charged with the responsibility of rehabilitating their charges. The incidence of crime could be decreased if prisons were employed as a means of transforming inmates into worthwhile citizens. James is of the opinion that horrendous prison conditions and frightful, hostile, and archaic attitudes toward those charged with or convicted of a crime add to the rancor which now pervades some strata of American society.²⁴ James summons proponents of change to rally to the cause of converting prisons into true rehabilitation centers. His call to arms is directed at society as a whole and not only at those intimately connected with law and its administration.

James contends that the malignancy with which the criminal law is afflicted is not localized. He traces its tentacles through the bail system, the treatment accorded impoverished defendants, and the sentencing procedures. Sentencing practices are labelled a "wonderland."²⁵ James is repulsed by overt emphasis on form and the failure of judges to come to grips with substance. He is highly critical of the absence of efforts to deal with persons as individuals. How can significant overall improvement be attained? James suggests that the answer can be found, in part, by consistently invoking a fairness standard. If crime is to be controlled and abated, and if those found guilty of violating society's laws are to become worthwhile members of the community, those charged with formulating and administering the criminal law must breathe fairness into the law and make the term "correction" something more than a deceptive euphemism for imprisonment.²⁶

James finds fault with our juvenile courts. He concludes that they have failed to fulfill their assigned mission.²⁷ Can *Gault*²⁸ alone, he asks, rectify the blatant wrongs which now characterize the rampant disorders in the juvenile courts? Although *Gault* offers some hope of improvement,²⁹ it is at best a stop-gap measure.

²³ P. 159.

²⁴ Pp. 165-66.

²⁵ P. 144.

²⁶ P. 155.

²⁷ P. 78.

²⁸ *In re Gault*, 387 U.S. 1 (1966).

²⁹ In *Gault* the Court applied to state juvenile delinquency proceedings a number of the procedural safeguards treated as requisites of procedural due process in state criminal proceedings. The Court concluded that the fourteenth amendment obliged a state, in proceedings which could result in the incarceration of the juvenile, to: (1) afford him notice of the charges against him so that he could prepare a defense, (2) advise him of his right to counsel and assignment of counsel, (3) inform him of his right to remain silent, (4) grant him the opportunity to confront the witnesses against him, and (5) permit

Why did a sophisticated group of literary judges confer the coveted Pulitzer Prize on James? It is doubtful that the answer to this inquiry can be found exclusively in the author's thoughtful analysis, perceptive suggestions, and exemplary presentation. It is the nature of the author's message that commands recognition and elicits accolades. The tour de force of *Crisis in the Courts* is James's insistence that ways and means must be found to interrelate in a more effective fashion law, man, and society. Law is not a game governed by immutable rules; rather, he lectures, it must have its roots in contemporary man and society. Law must be structured to reflect the best of man. Law must be ethical in its mandates and operation. Law must complement the finest of man's inner urgings. Law must foster the realization of worthy objectives. The chemistry of the law must be a blend of individual and societal needs and desires.

Crisis in the Courts is provocative and educational. Laymen will find this volume an eye-opener; reformists will devour it. It should be assigned reading for first-year law students. Exposure to this book is certain to instill an inquisitive, critical, and constructive attitude in newcomers to the law. Lawyers, judges, legislators, prosecutors, police officers, court officials, and prison personnel may read *Crisis in the Courts* to acquire a better understanding of their daily work activities. They will abhor a great deal of what they see. James's often damning portrayal bids those directly participating in the operation of the legal system to wage battle as steadfast partisans of reform. James is not a foe of law. He attacks not as a warrior but as a skillful surgeon who is determined to sever parasitic growths from an otherwise healthy parent organism. He draws attention to wrongs and suggests what may be done to right them. James believes that law, cleansed of gross imperfections, can properly be regarded as a trusted and helpful companion, a needed champion, a beneficent guardian. The proposals embodied in *Crisis in the Courts* can serve to cleanse and improve the American legal system.

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him to cross-examine such witnesses. Justice Stewart, in dissent, maintained that proceedings in juvenile courts are not of an adversary nature, and that detention was not intended as a punishment but rather as a means of correcting a juvenile offender.

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