

August 2015

Book Review: Justice is the Crime

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Recommended Citation

France, James G. (1973) "Book Review: Justice is the Crime," *Akron Law Review*: Vol. 6 : Iss. 1 , Article 8.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol6/iss1/8>

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BOOK REVIEW

JUSTICE IS THE CRIME:

By LEWIS R. KATZ, LAWRENCE B. LITVIN,
RICHARD H. BAMBERGER

*The Press of Case-Western Reserve University,
Cleveland, 1972. Pp. 386.*

THE BOOK with the catchy title was once a report to the National Institute of Law Enforcement and Criminal Justice, reporting some of the more glaring deficiencies of the criminal justice system, notably those which produce delays in adjudication of guilt. Principal locale is Cleveland, Ohio, from which a statistical study, the ostensible reason for a sizeable L.E.A.A. grant, is produced. After the parade of deficiencies, the authors proceed to outline some twenty-five structural and procedural changes aimed at reducing the overall time span from arrest to adjudication to a maximum of sixty days.

For attractiveness to the lay reader there has been added a selection of tragic individual case histories and a short hornbook chapter, copiously footnoted, on the origins of the American Criminal Justice System. For the professional there are appended twenty pages of tables, the product of docket and file research in the Cleveland courts, and a highly worthwhile one hundred-twenty-page digest of constitutional provisions and criminal procedure statutes of the various states. There is a slap at the municipal courts which "may be the worst courts in the nation." This may be very true of metropolitan municipal courts, in relation to misdemeanors and traffic offenses, but is not true in the context of delay of felony cases. In this portion of the discussion, which is unfortunately somewhat disjointed, the book makes a full survey of practices as they exist in the metropolitan areas of various sections of the country, excepting, curiously the South and Southwest.

The reform suggestions are bold, sometimes to the point of brashness. Many of them are urgently needed, but few are new. They bear a curious resemblance to those offered by the National Conference on the Judiciary in its *Consensus Report*, and to some of the more recent reports and recommendations of state court studies, all financed by L.E.A.A. grants, some of them quite substantial. It is as if the real source of the proposals was in the Department of Justice in Washington, all for the benefit of the untutored provincials. These suggestions are of three types: Those which are untried and radical; those which have been tried on a limited basis with results not yet tested or documented with statistical studies as to their usefulness, and those which have been unsuccessfully advocated for years by reformers and management consultants.

In the radical list are two suggestions guaranteed to whiten the hair and roughen the tongue of professional defense counsel. The first, made apparently with straight face, is that much time, possibly so much as a full day, could be saved by eliminating the initial appearance of the defendant before the magistrate and by delegating his purely ministerial functions of advising the defendant as to constitutional rights, setting bail and selection of defense counsel for the indigent to the police department booking officer. Tempting as it might be to do so, no words of comment are wasted on such a suggestion. The second bold step is the imposition of a requirement for a simplified *two-way* discovery procedure, with compulsory disclosure of witnesses. This is a double improvement on the present *no-way* practice which is the norm in most sections of the country, but the typical criminal practitioner, who is all for open files in the prosecutor's office, is likely to think twice before paying for a view of the state's file by opening his own. A third radical suggestion involves not only a recognition and regulation of the plea bargaining process, but a setting of arbitrary limits on the period within which it may occur. Just why it is so important to limit the bargaining process to the fourteen days following the cutoff of discovery does not come through clearly in the book. Of course, the scheduling of trials would be vastly simplified, but is the cost to be paid in additional trials not too high?

In the second group of suggestions are proposals for the Omnibus Hearing, the single court, the individual judge's docket and computerized master scheduling. The first of these, the omnibus hearing, is one at which the progress of discovery is reported and encouraged, protective and coercive orders applied for, motions made to the form of the charge and for exclusion of evidence, and determination cutoff dates for any further motions. Federal courts in the southern district of California and the western district of Texas have pioneered in applying this type of hearing to their criminal cases and there is much favorable opinion from participants to the effect that it speeds up the criminal justice process. . . . Unfortunately, hard data to back up this glowing impression is completely lacking, or at least undisclosed by the book,¹ and the omnibus hearing may be in much the same position as to prove results as was civil pretrial before the Rosenberg New Jersey experimental demonstration. The device

¹ The latter is the case. The San Diego experiment in omnibus hearing has been thoroughly dissected in report of the American Bar Foundation: *The Omnibus Hearing: An Experiment in Relieving Inefficiency, Unfairness and Judicial Delay*, American Bar Foundation, 1971, and in a law review article by the author of the report: Nimmer, *A Slightly Moveable Object: A Case Study in Judicial Reform in the Criminal Justice Process—The Omnibus Hearing*, 48 DEN. L. J., 179 (1971).

may or may not be a time saver, but apparently no one has bothered to find out by measuring the results, even on a side-by-side or a before-and-after study.²

A second incompletely tested suggestion is that for the single court to handle all felony cases from arrest to trial, eliminating the interplay between committing magistrate, grand jury and felony trial court. Conceptually such a plan has much to recommend it, but data from the few courts which have embraced it, such as the Wayne County (Mich.) Recorders Court, New Orleans Criminal District Court, the Florida criminal courts of record and, in part, Philadelphia (The Philadelphia Justice Consortium) is either not available or does not offer support for the plan. A related remedy, suggested in the book and adopted in many federal courts and recently in Ohio, is to assign criminal cases to all available judges and to make each judge responsible for his assigned cases from inception to final disposition, the so-called unlimited individual judge's docket system. Here hard data on time saving should be available from the Management Statistics maintained by the U.S. Administrative Office of the Courts or from a time study of the Cleveland Courts on a before-and-after basis. Unfortunately the book presents neither, although detailed time data is already available from nearby Akron and Ravenna after the compulsory changeover of the Ohio courts to the system. There seems to be a curious tendency, on part not only of the authors but of many proposers of reform, to ignore any possibility of proving their case by statistical evidence. The reader, instead, is expected to rely on the conceptual excellence of the device rather than a pragmatic demonstration of its virtues.

Finally the suggestion is made that all courts and all judges have their trials and hearings scheduled by a computerized master scheduling system. To their credit, the authors take a gingerly approach to this

² The study conducted by the American Bar Foundation, *supra* note 1, was not a controlled experiment on the model of the Institute for Effective Justice's New Jersey pretrial study but the product of a random sampling on a before and after technique. The report was adverse to the efficacy of the omnibus hearing as a device to speed adjudication: "In addition, the hearing proved to be counter productive in that it increased judge time per case and lengthened the time required to dispose of the caseload." Nimmer, *A Slightly Moveable Object*, 48 DEN. L. J., 179, 188. "The resulting impact on time lapse was severe. For all early disposition cases . . . comparison of time lapses indicates an average increase of more than 12 weeks." *The Omnibus Hearing*, p. 43. "In sum, the omnibus hearing did not speed the disposition of cases. Its impact on time lapse was largely negative and mostly unexpected." *The Omnibus Hearing*, p. 51.

device, which requires a touching faith in the powers of a computer engineer to solve all the problems of engaged counsel, of absent, ill and unnotified witnesses, of counsel whose fees are uncollected and of protracted trials in anywhere from twenty to fifty metropolitan court-rooms. Recent experience in a partial use of the device in Philadelphia suggests that the faith may be somewhat misplaced.

Tried and true suggestions of the third class include dispensing with the use of the grand jury where public preliminary hearing has been had and elimination of the post-charge fixing arraignment, thus substantially shortening the time from arrest to trial scheduling. Many of the suggestions are excellent, even if not new. Unfortunately, in the case of the grand jury, they fly into the teeth of present constitutional requirements in many states which the voters thereof have shown no inclination to alter, despite the lack of protection to the accused afforded by prosecutor-dominated grand juries. In the case of timing the preliminary hearing, the proposals counter a dismaying tendency of judges to take even longer periods in scheduling cases for preliminary hearing than required by existing law.

The chief defect of the book, however, is not with the concepts and suggestions, but with its use of statistical data to support the need for them. It is understandable that propinquity to the authors' law school would lead to selection of the Cleveland, Ohio, courts as test area to prove how badly things are going under the current system. But why Cleveland in 1968 for a 1972 report, when its system has twice been reorganized since that year with beneficial results? And why four-year-old case samples, when other recent studies³ in the same area have dealt with two- and three-year-old data? It gives the impression that the year was deliberately selected to show the system in the worst possible light, as the outstanding horrible in a parade of horrors. Suspicion as to this purpose is deepened by the authors' reliance in the text on the arithmetical mean, or straight-line average, as the key to understanding their completed measurements of the no-longer existing Cleveland system. The arithmetical mean is useful only when time and quantity distribute themselves in relatively equal segments; it produces wide distortion when the bulk of cases are disposed of in a comparatively short time and a relatively small

³ Order in the Courts, University of Akron, 1970, dealt with civil, criminal and appellate time spans, the criminal case samples being from the spring of 1967. Criminal Case Processing, Summit County, Ohio, report of Center for Urban Studies, University of Akron, 1972, dealt with similar data in Akron for the calendar year 1970.

number take exceptionally long periods. This is the case, generally, in criminal prosecutions, and it is particularly true in Cleveland, as the authors' own tables demonstrate. The "average" time quoted consistently in the book becomes somewhat meaningless when the time span of the *median* case is approximately thirty percent shorter and nearly seventy percent of cases are disposed of within the "average" time span. A further problem is presented by a shift of terms in midstream of the discussion. The authors speak in terms of *pre-trial* delay and most of their tables are properly concerned with the time taken by the various preliminary steps leading to trial. But when the tables turn to an overall time measurement they speak of time from arrest to *disposition*, which is not the same thing as trial or receipt of plea of guilty. Time to disposition includes the post finding, pre-sentence period, that of the pre-sentence report and of proceedings on motions for new trial and application for probation. This period in Cleveland, Ohio, is particularly long, taking from two to four months. The book thus supports its criticism of the lengthy *pre-trial* process with figures taken in substantial part from the post-trial process, with which the authors demonstrate no concern. Thus, while their announced *average* time span to disposition is 245 days in 1968, the *median* case in Cleveland in 1968, based on similarity to the 1967 study, probably reached trial or guilty plea in 120 days, or less than four months.⁴ This may not seem like speedy justice, and in fact is not, but it is a far better performance than the Cleveland courts are given credit for.

But with all its excesses of sob-sister additives, of Mitchellesque dragooning of the preliminary appearance, of its statistically unreliable conclusions which are perhaps to be expected of advocates trying to prove a point where scientists would merely find the facts,⁵ the book makes one point beautifully: The decay and impending collapse of American criminal justice is the product of a selfish and financial gain-oriented distortion of

⁴ Total elapsed time for 1968, as shown in Table 1 of the book, was comparison graphed with the total elapsed time for the 1967 cases reviewed in *Order in the Courts*. The two progress lines were almost identical. It is fair to assume that the progress line from arrest to trial or guilty plea in the *Order in the Court Survey*, which was recorded, would hold true for the 1968 survey, which was not recorded in satisfactory form. The median case in 1967 went to trial or plea in slightly less than four months.

⁵ Neither in text nor in its elaborate bibliography does the book so much as mention the 1970 Knight Foundation survey, the Omnibus Hearing report by the American Bar Foundation or the Nimmer Denver Law Journal article. It is understandable that *Order in the Courts* would be missed since it was not widely circulated and did not appear in all standard law library bibliographies. Failure to list the American Bar Foundation report is inexplicable and gives rise to the impression that the authors simply did not desire to list any report carrying data adverse to their pre-formed conclusions.

a brilliantly conceived system, all for the profit of the American lawyer. Certainly not since Mayer's "The Lawyers," has such a thorough piece of reformist name-calling appeared. The authors ring every possible change on the twenty-third chapter of the Gospel of Matthew, and the book is well worth reading for its conclusion alone.

As for consequences, this reviewer, who drew censure from a local bar association for a far milder criticism of a smaller portion of the criminal justice process, can only say: "Welcome to the club, Professor Katz."

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