

However, there is much the profession can do to alter the climate that makes such books so successful. One thing is to engage in programs to educate the public about what a lawyer does do. Another thing is to allow the individual member more flexibility including the right to advertise what he does personally, and for that matter what his prices are and how they are determined. A bit of competition would not hurt the profession. This would take away from the secretive and closed-shop aura of the profession that fosters suspicion in the uninformed layman's mind.

Another step would be to admit that from time to time there are dishonest lawyers and always there are less competent ones. No profession is always totally honest and totally competent. We try to weed out the crooks as fast as they appear, and upgrade the inept or put them out of business. That is all anyone expects. We would be far wiser to advertise this fact than to pretend there never is problems of this sort. The public is aware of the errant lawyer's existence. The profession's secrecy and its re-imburement fund convey the aura of a conspiracy when a more straightforward approach would put the problem in its proper context. And after all, what other profession insures the honesty of its members. Re-imburement funds do make it look as if the legal profession expects some of its members to be caught with their hands in the trust fund.

If the profession forgets *The Trouble with Lawyers* and resists the temptation to lash out at it blindly and instead attacks the problems in communication that have created a situation which fosters such books, then even this work will have beneficial results for someone other than the author or publisher.

It is up to lawyers to take concrete steps to educate the public so books such as Bloom's will be recognized for what they are by everyone, and not just some. It is up to lawyers to create a market for books like Mayer's fine work. And if the lawyers fail in this task, who else can be expected to do the job for them?

D'A. K. BANCROFT*

ENGLISH AND AMERICAN JUDGES AS LAWMAKERS
By Louis L. Jaffe; (Clarendon Press, Oxford), 1969; 113 pp.,
Index 2 pp.

Without reservation, I urge all you who have taken the time to read this review to take the additional short amount of time, that is

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required, to read this most erudite and readable contribution to the ongoing debate concerning to what extent if at all ought judges to become involved or to engage in the making of law in addition to or as distinct from their task of administering justice and applying the law (as made by the legislature and its delegates). The author is a teacher at the Harvard Law School and in this book he expands upon three lectures which he delivered originally at Oxford. In the preface Mr. Jaffe very frankly but quite accurately explains his motivation and his performance in writing the book:

"This essay is an exercise in self-exploration. I have been disturbed by the bold innovations of the Supreme Court of the United States. Is this because I believe that the judiciary is usurping the legislative and constitutional amending power? Or is this belief — if I do entertain it — an attempt to conceal my dislike for many of the Court's substantive innovations, a dislike which proceeds from a conservatism which I somewhat distrust? In this Essay I seek to exorcise this intellectual and emotional confusion. The reader will find that despite my hostility to an 'activist' court I come down strongly on its side, leaving for a final chapter the hazards of judicial law-making. If I have overstated the case for a lawmaking court, the reader will know why."

In the first of the five chapters comprising the book, Mr. Jaffe examines the innovative record of English judges past and present. In the second chapter he turns, "for both its intrinsic and its comparative value, to . . . the great burgeoning of judicial lawmaking in my own country." In the remaining chapters the author compares the performances of English and American judges, discusses some of the potentially dangerous aspects of judicial lawmaking, and then concludes.

Rather than giving you a boiled version of Mr. Jaffe's views on judicial lawmaking, for I do not believe that this a function of a review, let me simply close by setting out a few quotes from the book with a view to whetting your appetite:

"There have been great judges in England. Coke, Bacon, Holt, Mansfield, Blackburn, Willes. Is the 'great' English judge a relic of the past? Are these gods dead today, the victims of their irrelevance? Or have they moved to America where a new Pantheon is flourishing? The great judge was great because when the occasion cried out for new law he dared to make it. He was great because he was aware that the law is a living organism, its vitality dependent upon renewal . . . Has the English common law suffered a menopause? Are the judges the mere faithful interpreters of the omnipotent, all-purposing, omniscient Parliament? The American judges today are fired with an exuberant enthusiasm. Judicial law-making is bursting out all over. Does the American experience have relevance for the English scene? . . . Judges who innovate are being called 'activists.' Their critics assert that the activist judge is doffing his robes and nakedly, without warrant or office, exercising the power of the legislator. I think that we can say with assurance that such grandiose outbursts of judicial lawmaking would be unthinkable in England. English lawyers argue that the American performance is not relevant because England does not have a written constitution. They appear to forget that England does have an unwritten constitution. It would seem that the English judges do not want to remember that in the past they were themselves among the constitution-makers. They determined the powers of the Crown and the executive un-

der the Constitution and the laws of England — whether for example the King's Secretary of State could ransack the premises of a subject for evidence of *lese-majeste*. English lawyers know all this, but to many of them it is history. They do not deny that an unwritten constitution must be constantly made and unmade but they want no part of the job. That is for Parliament and the electorate. But constitution-making is not the only nor even the most important task of the judiciary. There is the common law and the interpretation of statutes, and here too the reigning judicial philosophy of passivity limits the thinking and the acting of many judges to a degree where they are unable to make valuable contributions to the solution of current problems. Indeed, the law is all of a piece. Whether enforcing constitutions written or unwritten, interpreting statutes or applying the common law, the job is much the same, the difference is one of degree. Whichever is resorted to for the solution of social problems offers the opportunity for creative manipulation or resigned impotence. Judges who regard themselves as the mere servants of Parliament and its government of the day will perform routinely whatever the source of law in question, whether constitution, statute or common law . . . There will not be an explosion of judge-made law in England, but there is a new yeast at work. There are stirrings, of which the most dramatic is the recent pronouncement of Lord Gardiner that the House of Lords will no longer necessarily regard itself as bound by its decisions. Important figures, such as Lord Reid and Lord Denning, have committed themselves to more creative role. . . .

"I find it difficult to believe either from what I know of history or of human nature that if courts lay down new law from time to time the public will cease to believe in their fairness and probity. We in the United States have found that, if anything, faith in the courts has increased; faith, that is, in the day-to-day dispensation of justice . . . if judicial lawmaking is kept within limits and if it is responsive to the totality of societal claims, it will not jeopardize the prestige of the judiciary. . . .

"British courts do not administer a written Constitution, but they have played a great role in the development of the unwritten Constitution, above all in creating safeguards against the abuses of executive and administrative power. A judiciary which too much reminds itself that its power is limited by the dogmas of Parliamentary omniscience, Parliamentary supremacy, and Parliamentary responsibility may lose the will to exercise this great historic function. The power of Parliament and of its executive, in theory unqualified, will in practice be limited by the Constitution as currently expounded and by the public opinion which can be mobilized to reinforce it. In this area there is no organ so competent to expound and so potent to mobilize public opinion as the judiciary. . . . Because the individual citizen is dwarfed by the State and because the legislature may be relatively subservient to the executive, the judiciary is the most immediately available resource against the abuse of executive power. . . .

"In comparing the performances of English and American judges, scholars often fail to take account of significant differences in the history and politics of the two countries. . . . There are justifications for American judicial action which would not — at least to the same degree — apply to England. Furthermore, what ultimately is to be compared is not the judicial performance but the performance of the total lawmaking machinery. . . . The United States is a federation of fifty states, each with its own legislature in addition to the federal legislature. Compared to England with its single Parliament making law for a single centralized jurisdiction, the structure of American law is almost frighteningly complex. It is complex because the mere fact of federation, with its necessary intrastate, interstate and state-federal adjustments, is intrinsically complex. It is complex and at the same time bristling with contradiction because of the violently clashing interests and lack of homogeneity among the states and regions of the country. It is complex because the rate of technical, economic, and social change is so great and at the same time so uneven. Many of the state legislatures are badly organized and poorly staffed. The Federal Congress is faced with an enormous burden of business and legislation. There is, in short, a voracious demand for lawmaking and at the same time a law-

making machinery with a relatively limited capacity. It would seem that the English Parliament is potentially capable of dealing with more of the country's law needs than are our legislatures. If so, the demand for judicial lawmaking in England may be to that extent less. Whether Parliament has found it possible to close the 'law gap' is, I gather, questionable. Perhaps the answer lies in the Law Commission which will assist Parliament to undertake law reform, particularly of private law."¹

CAMERON HARVEY*

THE REAL WORLD OF CITY POLITICS

By James Lorimer; (James Lewis and Samuel, Toronto), 1970; 158 pp.

Occasionally, and too rarely, a book appears which exposes the real world of the urban crisis and the contribution of municipal politicians to that crisis. This is the kind of journalism that has been produced by James Lorimer. It is something far different from much of the bland and irrelevant platitudes written about the cities; it is also unlike the ponderous volumes full of statistics, but equally lacking in relevancy to the day to day frustrations of the ordinary people in the urban jungle. Perhaps this is enough about what this book is not.

For the past number of years the author, a graduate of the University of Manitoba who received his doctorate in economics from the London School of Economics, became involved in the real world of municipal politics as a sociologist-activist in an urban renewal area of Toronto. He joined the people in the neighborhood residents' association. From actual experience with City Hall and from the point of view of the victims of the bureaucracy, he learned of the bungling and of the resistance of the local politicians to permitting the people to have a real voice in the decision-making process. From these experiences of the people vs. City Hall and a rigid School Board Dr. Lorimer wrote a series of articles published in the Toronto Globe and Mail; this book is a reproduction of these articles with an introduction by Jane Jacobs, the eminent authority on urban problems ("The Life and Death of Great American Cities" and other publications). Lorimer's book is a down-to-earth, devastating indictment of the Establishment-elected and of the Administrators. He names specific politicians and cites actual cases where vital urban issues were arrogantly botched: urban renewal, public housing, downtown schools, bull-doing expropriation, and city planning.

It is no wonder that the politicians and officials reacted violently to the author's documentation and exposé. As Lorimer says in the book's introduction:

1. These quotes were taken from pp. 1, 2, 4, 5, 14, 15, 19, 59 and 69.

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