

## BOOK REVIEWS

THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC. BY RICHARD E. ELLIS. New York: Oxford University Press, 1971. Pp. xii, 377. \$9.75.

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This is an extremely ambitious book, for in its relatively brief compass it undertakes to discuss three aspects of the Jeffersonian era: (1) the contest for control of the national judiciary, usually personified as a struggle of the titans, Thomas Jefferson and John Marshall; (2) the battle for reform of the judiciary at the state and local level; and (3) the meaning of Jeffersonian democracy as a whole, as it may be inferred from the judicial controversy. Of his three objectives, Mr. Ellis achieves the first most successfully. He has more difficulty with the second and raises more questions than he answers with respect to the last. Despite its limitations, the book is interesting and challenging—and, at times, irritating and frustrating. Legal scholars should be forewarned, however, that Ellis is writing neither legal history nor even judicial history. Rather, his emphasis is on the politics of the judicial controversy, as much *within* the Republican and Federalist parties as *between* them. In short, Ellis has written a history of the politics of the judicial conflicts during Jefferson's administration.

The story of the Republican assault on the federal judiciary under Jefferson is a tale more than thrice-told. It occupies an honored place, of course, in every American constitutional history and has been treated by every biographer of Jefferson. Henry Adams, in his classic history of the first two Republican administrations, described the confrontation between Jefferson and the courts as a less-than-heroic struggle, with the President emerging as a paper tiger, longer on rhetoric than on action, and a traitor to his own principles for failing to curb judicial power in any significant way when he had the chance.<sup>1</sup> Albert J. Beveridge, in his extensive biography of John Marshall,<sup>2</sup> provided, with a moderately Federalist bias, the fullest account of the judicial controversy. The effort to repeal the Judiciary Act of 1801—usually described as a last-ditch Federalist move to retain control of at least one branch of the federal government—was, in Beveridge's view, essential to Republican efforts to demolish Federalist power. If the Federalists could not be swept from

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<sup>1</sup> H. ADAMS, HISTORY OF THE UNITED STATES OF AMERICA, THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 1801-1805, at 255-63 (1891).

<sup>2</sup> A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919).

the bench, then the national judiciary "must be humbled and cowed."<sup>3</sup> The failure of the impeachment of Justice Samuel Chase in 1805 was "[o]ne of the few really great crises in American history":<sup>4</sup> it rendered the Supreme Court independent and left Jefferson in mourning over his failure to subjugate the bench.<sup>5</sup> Edward S. Corwin, offering a milder verdict on the outcome of the Jeffersonian campaign against the courts, described it as "a fair compromise":<sup>6</sup> impeachment would not be employed against judges for partisan purposes, and the judges would refrain from partisan politicking.<sup>7</sup> In his magisterial history of the Supreme Court, Charles Warren assumed a somewhat detached and dispassionate view of the judicial conflict: repeal of the Judiciary Act of 1801 did not prostrate the court system; *Marbury v. Madison* was not regarded by the Jeffersonians as an unwarranted exercise of a novel judicial power; a proposal by extreme Republicans after the unsuccessful Chase trial to subject federal judges to removal by the President upon the request of a majority of Congress received little approval from the majority of moderate Republicans; the judicial controversy was not a great struggle over constitutional principles so much as a difference of political, social, and economic interests.<sup>8</sup> Such measured judgment did not prevent a violently partisan Jeffersonian historian, Claude G. Bowers, from luridly portraying the judicial contest as a struggle between a high-minded President and a judiciary infected with "bigoted partisanship" and representing the outcome as a welcome purging of the courts of "anti-American and morally criminal" practices.<sup>9</sup>

Ellis insists that his book is "a revisionist study."<sup>10</sup> How much so is his treatment of the Jeffersonian encounter with the national judiciary? Despite his claimed attention to "complicated and subtle political considerations,"<sup>11</sup> Ellis' account of developments at the national level is relatively uncomplicated, though it contains, at least, original emphases. The Republican attitude toward the judiciary, Ellis believes, was conditioned not only by simple opposition to Federalism, but more so by deep-seated divisions within the Republican ranks. Extreme "Old Republicans" looked not only toward the removal of Federalists from the bench but also to congressional appointment and removal of judges, and to limitations on the employment of common law doctrine in the federal courts. Moderate Republicans, by contrast, sought only to end the

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<sup>3</sup> *Id.* 19.

<sup>4</sup> *Id.* 220.

<sup>5</sup> *Id.* 220-21.

<sup>6</sup> E. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 85 (1919).

<sup>7</sup> *Id.* 84-85.

<sup>8</sup> I. C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835*, at 215, 232, 255-57, 267, 296 (1926).

<sup>9</sup> C. BOWERS, *JEFFERSON IN POWER* 268-93 (1936).

<sup>10</sup> R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* viii (1971).

<sup>11</sup> *Id.*

Federalist monopoly of the judiciary. They had no objections to the institutionalization of an independent judiciary and hoped through conciliation to curb factional strife and perhaps even to win over the Federalists to the Republican cause. It was the latter course, says Ellis, that Jefferson took. His famous first inaugural address typified his conciliatory disposition: "We are all Republicans; we are all Federalists." He did not plan the destruction of the judiciary and was pushed to greater militancy, albeit tempered by caution and restraint, only by the uncompromising attitude of extremists among the Federalists.<sup>12</sup>

The evidence Ellis offers of Jefferson's moderation is considerable. He refrained from the wholesale removal of Federalist officeholders;<sup>13</sup> in the repeal of the Judiciary Act of 1801 he sought only to reaffirm Congress' constitutional right to establish and abolish courts;<sup>14</sup> he was not disturbed by Marshall's pronouncement in *Marbury* of the power of judicial review;<sup>15</sup> and he consented to the Chase impeachment only because the judge's intemperate anti-Republicanism became too much to stomach.<sup>16</sup> When John Randolph, the Republican leader of the House, chose to make the Chase trial the occasion for promoting the "radical" position on the judiciary, Jefferson withdrew his support and encouraged the moderates in his party to vote for acquittal.<sup>17</sup> For Ellis, the real victors in the Chase trial were not the judges but Jefferson and the moderate Republicans. The independence of the judiciary was preserved not by Republican blundering in the abortive impeachment but by Jefferson's skillful outmaneuvering of the radicals in his own party.

Much of Ellis' argument is not entirely new. Corwin called attention to the moderation of the Republicans in merely reducing the Supreme Court in size by their repeal measure of 1802 rather than packing it with Jeffersonians.<sup>18</sup> Henry Adams emphasized that the Republicans never raised the issue of an elective judiciary or legislative control of judicial appointments.<sup>19</sup> Warren pointed out that Republican criticism of Marshall's decision in *Marbury* arose from the Court's claim to control the executive department by mandamus and not from the Chief Justice's enunciation of the doctrine of judicial review.<sup>20</sup> More recently, William N. Chambers has shown that the Republicans under Jefferson and Madison were moderates committed to undoing the work of the Federalists rather than to pursuing a program of basic political reconstruction that would exacerbate social cleavages by intransigent

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<sup>12</sup> *Id.* 22-35.

<sup>13</sup> *Id.* 33-35.

<sup>14</sup> *Id.* 51-52.

<sup>15</sup> *Id.* 66.

<sup>16</sup> *Id.* 79-80.

<sup>17</sup> *Id.* 102-05.

<sup>18</sup> E. CORWIN, *supra* note 6, at 63.

<sup>19</sup> H. ADAMS, *supra* note 1, at 297.

<sup>20</sup> C. WARREN, *supra* note 8, at 248-55.

positions.<sup>21</sup> Jefferson's latest biographer has also reaffirmed the essential moderation of the President's position on the judiciary.<sup>22</sup>

In drawing upon established interpretations, however, Ellis has taken a somewhat longer route to the conclusion that the Republican crusade against the national judiciary was not much more than a skirmish. Everyone except the radicals in Jefferson's own party seemed fairly satisfied. Republican moderates, sobered by the impeachment of Chase and by the earlier removal of Judge John Pickering of New Hampshire, abandoned this tactic; Chase, of course, was pleased with his acquittal; Marshall and the majority of Federalists were relieved by Jefferson's restraint in attempting any further curbs on the court. Only John Randolph, the eccentric "Old Republican," was enraged. While one is tempted to agree with Ellis that the drama of the contest has been exaggerated by some historians, legal and otherwise, it is difficult to reduce the event to Ellis' modest proportions. Jefferson did come into office embittered toward the judiciary for its partisanship against Republicans during the Sedition Act "witchhunt," and he regarded the courts as the last bastion of the Federalists, from which they could erase all the work of the Republicans. Jefferson was not temperate in his replacement of Federalist officeholders. Historians differ on the numbers, but the best estimates say that some forty-six to fifty-nine percent of the offices under executive control were swept clean of Federalists by mid-1803, a larger housecleaning than that engineered by Jackson, the "spoilsman."<sup>23</sup> Jefferson's moderation toward the judiciary did not prevent him from entertaining, as early as 1803, the thought that the Constitution should be amended to authorize presidential removal of judges on the address of Congress,<sup>24</sup> a view he reiterated after the mishandled trial of Aaron Burr in 1807.<sup>25</sup>

However indecisive and improvised Jefferson's campaign against the judiciary, the popular view, held by both Republicans and Federalists, was that a death struggle was being waged and that the issues at stake were not merely patronage and control of the courts but substantive and philosophical concepts of law and government. To Federalists, the assault on the judiciary was an attack, on the common law and on the entire concept of a national judiciary, that, if successful, would reduce the availability of federal justice, elevate the state courts, and

<sup>21</sup> W. CHAMBERS, *POLITICAL PARTIES IN A NEW NATION* 66, 177 (1963).

<sup>22</sup> 4 D. MALONE, *JEFFERSON AND HIS TIME, JEFFERSON THE PRESIDENT: FIRST TERM 1801-1805*, at 133 (1970). See also M. BORDEN, *PARTIES AND POLITICS IN THE EARLY REPUBLIC, 1789-1815*, at 66-67 (1967).

<sup>23</sup> Prince, *The Passing of the Aristocracy*, 57 J. AM. HIST. 563, 565 (1970) (46%); W. CHAMBERS, *supra* note 21, at 181 (59%). See also M. SMELSER, *THE DEMOCRATIC REPUBLIC, 1801-1815*, at 48-50 (1968); L. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY* 379 (1951); N. CUNNINGHAM, *THE JEFFERSONIAN REPUBLICANS IN POWER* 60-63 (1963) (concluding that slightly more than half of federal offices were filled by Republicans in 1803).

<sup>24</sup> R. ELLIS, *supra* note 10, at 71-72.

<sup>25</sup> L. LEVY, *JEFFERSON & CIVIL LIBERTIES* 80-81 (1963).

ultimately destroy the nationalist principle embodied in the Constitution.<sup>26</sup> Republicans agreed that the common law was at issue, but they would just as soon cleanse the American legal system of this vestige of English monarchy and aristocracy and replace it with indigenous law or "natural justice." This was the essence of Republican ideology, and therefore the attack on the courts was a necessary first step to promoting republican government.<sup>27</sup> It may well have been more than hyperbole when Gouverneur Morris, a Federalist, said of the Constitution after the repeal of the Judiciary Act of 1801: "It is dead, it is dead."<sup>28</sup> Ellis is quite right in arguing that the judiciary issue defined the meaning of the "Revolution of 1800," but he never quite explains how either that issue or the nature of the revolution was resolved during Jefferson's administration.

In the second part of the book, Ellis discusses the struggle for local judicial reform in Kentucky, Pennsylvania, and Massachusetts. He again sees the real contest as one between extremists and moderates within the Republican party, with the Federalists often aligning with moderate Jeffersonians. The demands for "root-and-branch" legal reform at the state level stemmed from popular hostility to the legal profession, an antagonism that, while antedating the Revolution, became particularly intense during the post-Revolutionary years. Suspicious of the law, its mysteries, and its practitioners, radical Republicans sought simple codes of justice, limitations on legal fees, the use of laymen as counsel in place of attorneys, and the substitution of arbitration procedures for complex judicial process. Moderates responded with a plea for codification of the law, systematic law reporting, improved training of lawyers and judges, and a more efficient and uniform court system. The contests in the three states Ellis chooses for discussion were complex and tangled. What appeared to emerge, in his view, is a victory for the radicals in Kentucky, where voluntary arbitration<sup>29</sup> and a system of county circuit courts<sup>30</sup> were initiated; a comparable extension of local courts and authorization of voluntary arbitration in Pennsylvania,<sup>31</sup> which Ellis chooses to label a moderate victory despite the similarity to the "radical" outcome in Kentucky;<sup>32</sup> and another moderate triumph in Massachusetts, where Federalists organized a program

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<sup>26</sup> L. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* 143-47 (1970).

<sup>27</sup> On the Republican view of the judiciary war, see Knudson, *The Jeffersonian Assault on The Federalist Judiciary, 1802-1805; Political Forces and Press Reaction*, 14 *AM. J. LEGAL HIST.* 55 (1970). See also P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 105-09 (1965) (common law issue).

<sup>28</sup> M. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 698 (1970).

<sup>29</sup> R. ELLIS, *supra* note 10, at 137.

<sup>30</sup> *Id.* 154.

<sup>31</sup> *Id.* 182.

<sup>32</sup> *Id.* 242-43.

of streamlined judicial procedures, improved education of the bar, and "a meaningful common law."<sup>33</sup>

The account of these developments is interesting, informative, and offers material that is not readily available in other publications,<sup>34</sup> but the relation between these local events and those at the national level is bafflingly unclear. The arguments of the protagonists in the states almost always revolved around the question of the prompt, efficient, and reasonable administration of justice. The independence of the judiciary seems to have been accepted, and there was no serious effort to substitute elective for appointive judges. The tirades against the legal profession appear to have been more rhetorical than real, which is not surprising considering the substantial number of lawyers among the Republican leadership.<sup>35</sup> Radical arguments were not consistent. At times, there were objections to the high cost of justice arising from the multiplicity of local courts; at times, the complaints centered on the inadequate number of courts and the infrequency of their sessions. Bench and bar were castigated for their erudition and sophisticated legalism, but local justices of the peace were also criticized for being ignorant and unlettered. Codification was demanded as a safeguard against arbitrary judge-made law but also opposed as the antithesis of "natural justice."<sup>36</sup> Perhaps Ellis' difficulty is his unwillingness to recognize that Americans entered nationhood with an ambivalent attitude toward law and the legal profession<sup>37</sup> that makes it hazardous to use the designations "radical" and "moderate" to describe any position. The revolutionary generation was suspicious of lawyers but was led by them; the colonists were hostile to lawyers but respected law. In the early republic, Jeffersonians, although leary of its intricacies, were reluctant to abandon the common law.<sup>38</sup> James Fenimore Cooper's frontier character, Natty Bumppo, expressed this attitude neatly: "The law—'tis bad to have it, but I sometimes think it is worse to be entirely without it."<sup>39</sup>

From a historiographical perspective, Ellis has thus far written "consensus" history, that is, a view of the American past which mitigates the forces of class and sectional conflict in our history and sees more agreement than disagreement in the shaping of our national

<sup>33</sup> *Id.* 229.

<sup>34</sup> For a fuller discussion of the developments in Pennsylvania, see articles cited in R. ELLIS, *supra* note 10, at 316 n.1.

<sup>35</sup> In Massachusetts, for example, where Republicanism was not strong, 13.1% of the legal profession was Jeffersonian in political affiliation. Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 AM. J. LEGAL HIST. 283, 295 (1970).

<sup>36</sup> P. MILLER, *supra* note 27, at 104.

<sup>37</sup> *Id.* 241; see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 295-99, 303-04 (1969).

<sup>38</sup> See L. KERBER, *supra* note 26, at 138.

<sup>39</sup> J. F. COOPER, *THE PRAIRIE* (1827), quoted in P. MILLER, *supra* note 27, at 99.

tradition.<sup>40</sup> At least so it appears from his attention to the victory, in the battle for judicial reform, of moderates over extremists in both parties. But the inexplicable conclusion that Ellis draws from his analysis is that the judicial contest really symbolized a struggle between two sharply divided and long contending segments of American society—the democratic-minded and the elite-minded—the former comprising the advocates of judicial reform and the latter, its opponents. The democrats, according to Ellis, sought to fulfill the principles of the American Revolution, while the elitists worked to frustrate those principles.<sup>41</sup> Ellis finds the roots of democratic ideology in New Light evangelical religion, anti-intellectualism, and agrarianism; the elitists were rationalists in religion and commercial in socio-economic outlook.<sup>42</sup> This interpretation is in the tradition of “Progressive” American historiography, the very antithesis of consensus history.<sup>43</sup>

There is neither space nor time to dissect fully the limitations of this simplistic interpretation of the evolution of American democracy.<sup>44</sup> It is enough, however, to call attention to a few significant exceptions to the generalizations that Ellis himself concedes are anomalous. Perhaps the most vigorous advocates of “radical” judicial reform at the state level were Benjamin Austin of Boston and William Duane of Philadelphia, yet both of these “democrats” were commercial and urban in outlook, and, if either was evangelical, Ellis provides no such evidence. The most agrarian-minded Republicans, on the other hand, were the planters from the economically declining tobacco regions of Maryland, Virginia, and North Carolina. Uncompromising “democrats,” they were nevertheless hostile to a radical program of judicial reform.<sup>45</sup>

Despite these and other exceptions, Ellis insists that there is a dialectic to the period 1776-1815, originating with a conflict between the aristocrats who controlled American society on the eve of the Revolution and the aspiring democrats. Independence ousted the colonial oligarchs and “ushered in the age of the demagogue,” typified, says Ellis, by John Hancock, George Clinton, and Patrick Henry.<sup>46</sup> The Constitution was a victory for the counter-revolutionary commercial community,<sup>47</sup> but true democrats reorganized under Jefferson to restrain business and restore agrarian values. Immediately after their victory in

<sup>40</sup> See generally Higham, *The Cult of the American Consensus*, 27 COMMENTARY 93 (1959).

<sup>41</sup> R. ELLIS, *supra* note 10, at 250, 252-53.

<sup>42</sup> *Id.* 253-59, 261.

<sup>43</sup> See Crowe, *The Emergence of Progressive History*, 27 J. HIST. IDEAS 109 (1966).

<sup>44</sup> For an extended critique of progressive history, see R. HOFSTADTER, *THE PROGRESSIVE HISTORIANS* (1968).

<sup>45</sup> R. ELLIS, *supra* note 10, at 260-61.

<sup>46</sup> *Id.* 268-71.

<sup>47</sup> *Id.* 271.

1800, however, the Republicans split into moderate and radical wings.<sup>48</sup> The ultimate triumph of the moderates is the synthesis of Ellis' dialectic, constituting "the real meaning of Jeffersonian Democracy,"<sup>49</sup> and representing the reconciliation of democracy and business enterprise and the defeat of "negativist popularistic" agrarianism.<sup>50</sup> Apart from all its curious inconsistencies, its unsupported generalizations, and its remarkable conclusion, Ellis' analysis says little about the role of the judiciary and the issue of judicial reform in the evolution of Jeffersonian democracy, presumably the central focus of his book. Perhaps the most charitable observation one might make of the last section of the book is that it requires a volume of its own. Mr. Ellis is imaginative and thoughtful, and he writes vigorously and perspicaciously. One hopes that he will enlarge upon his provocative, though largely unproven, conclusion in another book. Until then, the present volume will stand as a contribution to the still unwritten history of American law and the American judiciary; raising questions concerning the relation between law and politics, it charts the course which must be followed if legal and judicial history is to be more than a chronicle of judges, lawyers, and court decisions. More than a century ago Alexis de Tocqueville perceptively called attention to the close connection between law and politics, observing that "[S]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."<sup>51</sup> Mr. Ellis wisely understands the significance of this observation.

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<sup>48</sup> *Id.* 275.

<sup>49</sup> *Id.* 277.

<sup>50</sup> *Id.* 284.

<sup>51</sup> 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (P. Bradley ed. 1945).



CITY OF NEW YORK: CRIMINAL JUSTICE PLAN FOR 1971. BY EXECUTIVE COMMITTEE, CRIMINAL JUSTICE COORDINATING COUNCIL. New York, 1970. Pp. ii, 120.

James R. Cavanaugh †

The statistics are startling: an annual police budget of \$638 million;<sup>1</sup> an annual homicide rate in excess of one thousand persons;<sup>2</sup> robberies at a rate of 60,000 a year<sup>3</sup>—burglaries 170,000;<sup>4</sup> and almost 50,000 persons employed by the city government who are directly involved in crime control.<sup>5</sup> The galaxy of agencies, institutions, commissions, societies, task forces, and projects committed to the problem is awesome. A review of existing criminal justice programs typically identified by acronyms—YSB, HSA, ROR, ASA, MAP, NACC, LIFT—boggles the mind of the uninitiated.

Faced with the enormity of the crime problem and the patchwork of federal, state, city, and private facilities aimed at solving the problem, New York City established the Criminal Justice Coordinating Council (CJCC) in 1970 to develop a coordinated approach to criminal justice problems.<sup>6</sup> This agency has assumed the responsibility for expenditures of funds available to New York City by reason of federal grants pursuant to the Omnibus Crime Control and Safe Streets Act of 1968.<sup>7</sup> As an outgrowth of this responsibility the Commission has published its *Criminal Justice Plan for 1971*. In well-organized and readable form, the publication describes a plan for disbursement of some \$17.5 million expected to be available for New York City in 1971 through the federal program and required matching funds.<sup>8</sup>

After citing statistics to demonstrate that crime has reached epidemic proportions, the Council finds the growth of the phenomenon has reached a "socially intolerable level" because the general citizenry is now restricted in its movements and often required to alter its basic patterns of life. While making this sociological observation, however, the Council makes the concessions that the criminal justice system, unfortunately, can only treat symptoms, and that dealing with the

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<sup>1</sup> EXECUTIVE COMMITTEE, CRIMINAL JUSTICE COORDINATING COUNCIL, CITY OF NEW YORK: CRIMINAL JUSTICE PLAN FOR 1971, at 10 [hereinafter cited as CRIMINAL JUSTICE PLAN].

<sup>2</sup> *Id.* 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* 10.

<sup>6</sup> *Id.* 98 (Copy of N.Y.C. Exec. Order No. 6 (Apr. 6, 1970), as corrected by errata sheet dated Mar. 19, 1971).

<sup>7</sup> Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 47, 48 U.S.C.), as amended.

<sup>8</sup> CRIMINAL JUSTICE PLAN, *supra* note 1, at 3.

causes of criminal behavior is beyond the scope and capability of the criminal justice system. While it would be unfair to fix upon the criminal justice system the sole responsibility for determining the causes of crime, certainly the armies of men and millions of dollars (\$843 million in New York City in 1970-1971<sup>9</sup>) available to the system should allow it to carry a fair share of the burden of ferreting out the roots of the increase in the incidence of crime in our country today.

Within its self-limiting purpose of helping the criminal justice system to treat the symptoms of crime, however, the Council makes some notable contributions. For those who simplistically argue that the answer to the crime problem is more police, the study notes that the New York Police Department, with a manpower quota of 39,026,<sup>10</sup> is the largest in the world and that the diffuse demands upon the police bureaucracy are such that at present it would take ten new men to increase the force on the street by one man!<sup>11</sup>

Rejecting as a solution expenditures for more police, the Council proceeds to establish a list of the five problems it views as most critical and therefore deserving of priority:

- (1) failure of the adjudicatory system to process cases;
- (2) spreading narcotics addiction;
- (3) conditions in the jails;
- (4) lack of rehabilitation programs;
- (5) lack of programs for juvenile crime prevention.<sup>12</sup>

Although (3) and (4) are parts of the same problem, no thoughtful critic could argue with the Council's priorities for the use of available funds.

Of major interest to lawyers and judges is the fact that the Council has given top priority to needs for improving the court system. Using the guideline of improving court efficiency while assuring due process, the *Plan* recognizes three "paths of reform." First, it proposes taking certain forms of undesirable conduct such as parking violations and violations of various codes—including housing, health, sanitation, liquor, and business regulations—out of the court system.<sup>13</sup> The second path is diversion of narcotics addicts, alcoholics, and certain minor offenders with high rehabilitation potential, to treatment before (and presumably instead of) criminal processing.<sup>14</sup> Finally, efforts are to be made to seek alternatives to the enforcement of private, and social, moral standards through the criminal law.<sup>15</sup> Specifically mentioned are laws making criminal such conduct as gambling, abortion, homosexuality,

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<sup>9</sup> *Id.* 11.

<sup>10</sup> *Id.* 10.

<sup>11</sup> *Id.* 13.

<sup>12</sup> *Id.* 29 (paraphrased).

<sup>13</sup> *Id.* 33.

<sup>14</sup> *Id.* 34.

<sup>15</sup> *Id.*

and pornography. Numerous specific recommendations relating to court management and procedure are suggested. The recommendations seek to achieve maximum efficient allocation of court time.

Recommendations for the other priority areas—drug addiction, juvenile detention, and rehabilitation problems—are well considered and far-reaching. They range from employment of familiar ideas, such as the release-on-recognizance (ROR) bail alternatives and the work-release-program jail sentence, to support for such innovative and specialized programs as the Education Alliance, which deals with girl gang members and their families.

What does the *Criminal Justice Plan* mean to lawyers and judges? For one thing it must be noted that the court system itself is but a small part of one of the recognized areas of criminal justice activity. Moreover, the study explicitly states that a paramount aim is to divert as much activity as possible away from the criminal justice system—witness the three paths of reform outlined above. Of the proposed expenditures of \$17.5 million, only \$2.5 million are to be assigned to the courts for criminal justice projects,<sup>16</sup> a sum significantly less, for example, than the \$3.5 million earmarked for extrajudicial narcotics programs alone.<sup>17</sup> One recognizes in the *Criminal Justice Plan* concrete evidence of long-suspected erosion of our court system as the keystone of criminal justice. The courts in their traditional role as arbiters of human conduct and providers of forums for determination of guilt or innocence, may, to some extent at least, be irrelevant to today's special problems. Is the helpless narcotics addict who wins his motion to suppress because of an illegal search better or worse off than the addict who is found guilty and, as a result, placed in a well-organized drug treatment program provided by public funds? If the goals of the *Criminal Justice Plan* are achieved, it is suggested that in all but the purest courtroom-type cases—such as a lying-in-wait homicide, or a planned burglary (by a nonaddict)—the lawyer will play a secondary role to the social worker, the educator, and perhaps the psychiatrist. While this may shock the lawyer who has been trained to believe that the prime object of the criminal justice system is the determination of guilt or innocence, careful students of the problem should agree that most of what the *Criminal Justice Plan for 1971* suggests makes good sense and that perhaps the legal profession has hoarded criminal justice to the detriment of society. On sober reflection, the direction staked out by the *Plan* may lead to the salvation of our court system. It may herald a recognition that our courts were never intended to be used as healers of social ills or dictators of public morals. Only if this occurs will our great system be placed in proper perspective. The *Criminal Justice Plan for 1971* warrants consideration by the entire legal community.

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<sup>16</sup> *Id.* 95.

<sup>17</sup> *Id.*

FEDERAL TAXATION OF BUSINESS ENTERPRISE. By  
 BERNARD WOLFMAN. Boston: Little, Brown & Co., 1971.  
 Pp. x, 1095. \$14.50.

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This work represents a high attainment of legal scholarship by an eminently qualified craftsman. For teachers of corporate tax law who prefer the case method, it offers an excellent pedagogical vehicle. While prior works have encompassed in one casebook both the individual and corporate areas of taxation, Dean Wolfman's concentration on the corporate tax area provides a wider coverage of this field than has previously been offered.

The detailed and useful table of contents reflects the breadth of coverage; the book includes both the traditional areas of corporate taxation and a number of areas that have no individual counterpart and that are not generally included in a work of this nature. To keep the book to a manageable size, however, several topics in the first two chapters are treated in one or two paragraphs or in one page. As one would expect from the title, there is no coverage of nonbusiness estates, trusts, and tax exempt organizations. Also excluded is the special tax treatment of banks, insurance companies, cooperatives, exempt farmers' cooperatives, and farming. In fact, the sole departure from the field of corporate taxation consists of a limited chapter on partnerships, "intended to illustrate some of the structural questions and to provide a basis for comparison with the tax treatment of corporations under Subchapter C and Subchapter S of the Code."<sup>1</sup>

Organizationally, there is a substantial departure from the usual approach of treating together all tax aspects of a particular transaction. Chapter 1 deals with the impact of the corporation income tax on corporate transactions, while Chapter 2 is concerned primarily with the effect of distributions and dispositions on shareholders under the individual income tax. It may be helpful to separate certain aspects of corporate tax treatment from shareholder tax treatment of the same transactions as Dean Wolfman has done in Chapters 1 and 2, thus permitting organic development and policy analysis. He may, however, have introduced some confusion by further separating the tax aspects of single transactions; the effect of this choice of structures is to intersperse various tax aspects of corporate distributions with a discussion of the sale and purchase of assets, receipt of capital, incidence of the corporate income tax, and general information on the individual income tax. Some might even prefer, from an organizational standpoint, that

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<sup>1</sup> B. WOLFMAN, FEDERAL TAXATION OF BUSINESS ENTERPRISE ix (1971).

no separation of single transactions be undertaken and that the corporate tax and individual tax aspects of distributions be treated together.

Chapter 3, which is relatively short, takes up incorporation, and those preferring to use this as their beginning point should encounter no problem in doing so. It covers the tax effects on both the corporation and the investor of transactions involving the incorporation of assets. Chapter 4 is massive (340 pages) but presents a well-organized picture of stock dividends, reorganizations, carryovers, and a glimpse of the foreign aspects of these topics. Chapter 4 rounds out Part I (the "core"), which Dean Wolfman has designed for a three-semester-hour offering. Those teaching a three-hour course may desire to delete areas of Part I—for example, foreign corporations—and substitute selections from Part II, which is comprised of chapters on partnerships, "small business" corporations, the accumulated earnings tax, personal holding companies, and finally a kind of "catch-all" chapter, *The Corporate Identity—Special Problems*. While Part II is designed for a two hour "advanced" course, portions of it could easily be added to Part I for a four-hour offering.

As the preface states, it is assumed that students using this book will have "the background of a basic federal income tax course covering the pervasive issues pertinent to both corporate and non-corporate taxpayers."<sup>2</sup> Presumably the students' prior experience, while limited to areas in which the corporate and individual income taxes overlap, would at least extend to the tax aspects of ordinary corporate business operations. Since Dean Wolfman has omitted treatment of the latter, one might wish to consider whether one's basic tax course sufficiently covered the corporate aspects of such areas as cost of goods sold, depreciation, losses, bad debts, charitable contributions, and tax accounting. This book also assumes the background of a basic course in corporation law, and perhaps in most cases the senior law student will possess this foundation. But when this is not the case it will be desirable in the beginning to examine some general corporate definitions, for the book contains no vehicle suitable for this purpose beyond the possible starting point of the materials on professional corporations and associations.

As the follow-up of a temporary edition by Dean Wolfman, published in 1969, the present edition adds, as Part B of the Appendix, a set of problems which have been used at the University of Pennsylvania Law School in planning seminars and in examinations. The problems are presented "in the hope that they may be useful to others as vehicles for classroom discussion and analysis as well as for study and review."<sup>3</sup> While the problems may, as suggested, be useful in the classroom, some of them are of such complexity that a thorough treatment would require

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* 1067.

several sessions. Although access to them should also be helpful to students seeking a better grasp of some of the more difficult areas of corporate taxation, probably their greatest value will be for use in seminars.

Dean Wolfman expresses a strong preference for the case method of teaching, and toward this end his cases are well chosen with an effective balance among those that might be useful as landmark, historical, explanatory, and problem-presenting cases. Some would prefer that many of the problem cases, which comprise about one-third of the total, be omitted in favor of specially drafted problems and additional commentary. The case selections are current, however, including decisions dealing with the relatively new idea of avoidance of section 351 and cases reflecting the recent revival of interest in "F" reorganizations. Relevant changes made by the Tax Reform Act of 1969 are reflected, revenue rulings and procedures are used effectively, and the author's notes contain provocative and challenging questions.

For those who wish a more particularized development in certain situations, this book might be complemented, as the preface suggests, by referring students to a detailed textual work such as the distinguished *Federal Income Taxation of Corporations and Shareholders* by Professors Bittker and Eustice. Dean Wolfman has made no effort to make his book both a teaching tool and a handbook for practitioners, and has limited his commentary and notes to matters that will be useful to students. For those who are convinced that the case method is the best approach to teaching corporate taxation and for new teachers who wish to try this method, Dean Wolfman has provided a first-rate casebook.