BOOK REVIEWS

THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM. BY ARCHIBALD COX. Harvard University Press, 1968. Pp. 144. $4.95.

Luther A. Huston †

The appointment in 1953 of Earl Warren as Chief Justice of the United States marked the beginning of a new era in the development of constitutional law. In the ensuing years changes of vast dimension and historic impact have taken place. Few men are better qualified to assess the significance of the decisions of the Warren Court than Archibald Cox, student of law, teacher of law and, from 1961 to 1965, Solicitor General of the United States. As Solicitor General, he literally sat at the feet of the Justices while profoundly important and incredibly complex issues were presented for their decision. He presented many of them himself.

In his rather too brief book,[1] Professor Cox discusses decisions of the Warren Court affecting civil rights, criminal procedure, judicial power, first amendment freedoms and electoral procedures. He repeatedly emphasizes the need for judicial action when both the legislature and the executive have failed to take affirmative steps to correct abuses. The Warren Court readily accepted the responsibility, and the judicial branch began to decide major aspects of our most pressing and divisive social, economic and political questions. As a result, constitutional development under the Warren Court has resulted in a redistribution of governmental power between the state and federal governments and among the branches of the federal government itself.

Professor Cox does not believe that it is possible in modern times and under our democratic system to divorce law from politics. The docket of the Supreme Court in any recent term reflects the fact that "[i]n the United States, as nowhere else in the world," [2] the courts are asked to participate in the disposition of critical aspects of social, economic, political, and philosophical questions. "[C]onstitutional adjudication presents an insoluble dilemma," [3] since the questions

† Washington Correspondent, Editor & Publisher Magazine. Mr. Huston's most recent book is PATHWAY TO JUDGMENT: A STUDY OF EARL WARREN (1966).

[1] A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968) [hereinafter cited as COX]. The book is a compilation of lectures, edited and expanded, given in 1967 to an audience of lawyers and laymen at a summer school in Honolulu under joint auspices of the Harvard Law School and the University of Hawaii.

[2] COX 2.

[3] COX 4.

presented for decision today require recognition of the political nature of the Court's task of deciding, according to law, what is best for the country.

Professor Cox explains how the Warren Court applied the Constitution in answering these questions:

> Ability to rationalize a constitutional judgment in terms of principles referable to accepted sources of law is an essential, major element of constitutional adjudication. It is one of the ultimate sources of the power of the Court—including the power to gain acceptance for the occasional great leaps forward which lack such justification. . . .
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> . . . In times of economic, social, and even moral upheaval the danger of exaggerating the importance of certainty and stability as elements of law is probably greater than the risk of valuing it too lightly.[4]

He makes clear his conviction that the Warren Court not only did not shrink from discarding conventional legal doctrines and sloughing off precepts of "wise constitutional adjudication" [5] erected by earlier Courts to avoid constitutional rulings, but, in addition, readily assumed the responsibility for constitutional, rather than statutory, interpretation of legislative enactments, both federal and state, and thereby plunged into the political thicket the late Justice Frankfurter often warned it to avoid.[6]

The political thicket had grown thickest in the field of human rights; the failure of the other branches of the federal government to prune this growth forced the Warren Court to act. Where injustice exists in the field of human rights, "[l]egislative redress is more flexible and more effective than judicial intervention," Professor Cox observes; but he adds that "the student of recent constitutional history will observe that the Warren Court has been most activist in areas where politicians were blind to fundamental injustice." [7] He points out the difference between laws that regulate property and business conduct and those that concern personal liberties. A marked difference between the Warren and some earlier Courts is that while the Taft Court and others moved more often to strike down legislation regulating or outlawing business conduct, the present tribunal has been quick to invalidate federal or state legislation it deemed offensive to the principles of the Bill of Rights. No court has been more zealous in using the Constitution to bulwark individual rights against abridgement by

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[4] Cox 21-22.

[5] Cox 16.

[6] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 266-70 (1962) (Frankfurter, J., dissenting).

[7] Cox 70.

governmental action. Professor Cox indicates that concern with the protection of personal liberty and privacy from governmental intrusion is a major element in the evolution of the Warren Court's approach to constitutional adjudication.

Successively holding the due process clause of the fourteenth amendment to incorporate virtually all of the guarantees of the Bill of Rights, the Court has expanded its control over judgments of state courts and, in effect, has nationalized the administration of justice. Both by bringing functions previously regarded as within the province of state courts under the umbrella of the Federal Constitution and by acting where legislatures have failed to act, the Warren Court has raised serious questions concerning the role of the judicial branch in the government of the American people. Decisions thought to invade "states' rights" account for most of the Court's unpopularity in Congress and afford an explanation for legislative efforts to nullify some of its judgments and restrict its jurisdiction. However, the manner in which the Warren Court has played its part also accounts for the charges that the Court subordinates law to personal political preference and acts "like a legislature or an omnipotent council of not-so-wise wise men instead of a court." [8]

Professor Cox addresses this problem in his chapter on judicial innovation. Although he does not accede to these charges but rather believes that the Court's adventures in constitutional adjudication have contributed to the progress of essential reforms, he nevertheless recognizes their source and criticizes the Court's disposition of a specific problem in *Reitman v. Mulkey*.[9] *Reitman* illustrates the potential dangers in constitutional adjudication not rationalized by law, and the influence exerted by judicial craftsmanship upon the judgments of lawyers when considering the work of the Court. "The Court's power to give its decisions the force of legitimacy ultimately depends upon its artistry in weaving wise statecraft into the fabric of the law." [10]

The Court's artistry failed in *Reitman*. This case involved California's Proposition 14, wherein the voters, by referendum, amended the state constitution to prohibit state interference in the disposition of private housing. The Supreme Court of California sustained the plaintiffs' contention that adoption of the amendment violated the fourteenth amendment to the Federal Constitution; the United States Supreme Court agreed. Speaking for the Court, Mr. Justice White adopted the California tribunal's argument that Proposition 14 would "encourage and significantly involve the State in private racial discrimination. . . ." [11] Professor Cox, dissatisfied with the reasoning, asks: "Is there really any firm basis for concluding that the adoption

[8] Cox 4.
[9] 387 U.S. 369 (1967).
[10] Cox 48.
[11] 387 U.S. at 376.

of Proposition 14 gave more encouragement to acts of private discrimination than would the mere repeal of an open housing law . . . ?" [12] He wonders whether the Court "gave enough thought to the implications of placing so much reliance upon the psychological consequences of State action that is otherwise constitutionally unassailable," [13] and to the proposition that every private person who engages in racial discrimination violates the fourteenth amendment.[14] "Proposition 14 was a dragon," Professor Cox asserts.

> We shall have neither a great society nor even a modicum of racial calm so long as discrimination in housing breeds urban ghettos. The repeal of open housing laws seems even more dangerous than the failure to enact them. But whether the Supreme Court should play St. George (and, if so, with what weapons it should slay the beast) is quite another question.[15]

> My criticism is that the difficulties were not faced; that the opinion fails to probe the true issues behind the doctrine of State action; that the opinion is inscrutable except as it hints at the proposition that the supposed psychological consequences of a particular bit of State action may render it a violation of the Fourteenth Amendment. The absence of a better rationale invites the cynical charge that the Warren Court is out to slay the dragons without regard to law.[16]

Like others who have "sensed the sheer delight of legal reasoning," Professor Cox acknowledges that he may mistake the importance of craftsmanship. But, he continues,

> if . . . the law is chiefly important as a substitute for and limitation upon power—and if the capacity of judge-made law to command free assent . . . rest[s] upon principles more enduring and more general than the wills of individual judges—then the effectiveness of the Court, its very ability to slay the dragons, is eroded by any failure to show how the novel decisions required by changes in human condition and the realization of bolder aspirations nonetheless draw their sanction from a continuing community of principle. The more rapid the pace of social change the faster the law

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[12] Cox 45.

[13] Cox 46.

[14] When, in 1968, the Court interpreted 42 U.S.C. § 1982 (1964) to bar all private racial discrimination in the sale or rental of housing, it found congressional power to enact the statute not in the fourteenth amendment, but in the thirteenth. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[15] Cox 43-44.

[16] Cox 46.

> must develop. But the faster pace of legal development would seem to create still greater need for striving to preserve, through the articulation of sound rationale, that sense of impartiality and continuity that gives legitimacy, and thus provides the sanction, for the judgments of a court.[17]

Professor Cox premises his chapter on civil rights and legislative power upon the belief that injustices proscribed by the fourteenth amendment can be eliminated within the framework of law only through the action of the national government. The Supreme Court could provide the leadership for abolishing the requirement of "state action." However, Professor Cox believes that legislative action would be sounder since racial injustice is a national problem; without federal legislation, "the civil rights revolution cannot be accomplished within a framework of law." [18] Nevertheless, the Supreme Court's decisions in cases involving civil rights have laid the constitutional foundation upon which Congress may build an enduring structure "securing other fundamental human rights." [19] For example, federal legislation could be enacted to punish the private individual "who sought to silence an unpopular speaker or to suppress the exercise of religion," as well as to bring crimes against property "within the federal domain." [20]

Two aspects of the Warren Court's thorough reform of criminal procedure that Professor Cox regards as deserving particular attention are electronic eavesdropping and the law of confessions. In his discussion of wiretapping, he deals with specific cases in which the Supreme Court has applied what he describes as a "contrariety of views," [21] and a variety of interpretations of statutory and constitutional provisions. While clarifying some aspects of the law, the decisions have not supplied a clear judgment whether all electronic surveillance is (or is not) unconstitutional. Rather, the Court has attempted to strike a balance between outright prohibition and a limited use of wiretapping that would serve the purposes of law enforcement. Professor Cox suggests that perhaps the best that can be done under present circumstances "is to frame a temporary measure designed to strike a passable accommodation by effectively outlawing the clear abuses and regularizing the eavesdropping made permissible in such a way as to provide a factual foundation for subsequent reevaluation." [22] However, he does not venture to say whether such temporizing would meet with the approval of his erstwhile colleague, J. Edgar Hoover,

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[17] Cox 48-49.
[18] Cox 55.
[19] Cox 55.
[20] Cox 64.
[21] Cox 78.
[22] Cox 82.

or whether future Supreme Courts would find ensuing legislation constitutional.

Constitutional questions governing the use of confessions in criminal cases had been debated for decades before the Supreme Court promulgated definitive rules in *Miranda v. Arizona*.[23] Few rulings have provoked more controversy and raised more doubts among lawyers and in legislative halls. Professor Cox embraces some of these doubts. He says, "The costs of the Court's activism must be reckoned in long-range institutional terms," and "the readiness of a bare numerical majority of the justices to overturn recent precedents . . . [does] no service to the ideal of law as something distinct from the arbitrary preferences of individuals." [24]

Although shifting the judicial responsibility for the administration of criminal justice from the states to the nation has raised grave questions, Professor Cox does not feel that as yet the Supreme Court has "disturbed the processes of representative self-government." [25] Nothing in the Court's opinions, he feels, "is inhospitable to legislative action rooted in careful investigation, even if it involves some qualification of the doctrines announced in recent cases." [26]

Professor Cox begins his examination of the Warren Court's treatment of first amendment freedoms with a discussion of the Court's opinions in *New York Times Co. v. Sullivan*[27] and *Time, Inc. v. Hill*.[28] *Sullivan* repudiated old doctrines of seditious libel in the discussion of official conduct; *Hill* raised the question whether New York's right-of-privacy law protected a family of four held captive by escaped convicts from having their plight thrust into the limelight by a false dramatization of their experiences. Cox finds the *Hill* opinion deficient for its failure to discuss the constitutional underpinnings of a doctrine that allows the press a privilege to penetrate the privacy of the Hill family; he suggests that

> the Court was not sufficiently attentive to the complexities of introducing a new constitutional privilege into an area generally governed by State law.
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> . . . The *New York Times* and *Hill* cases, taken together, suggest that the Court was more successful in making a bold thrust forward than in working out corollaries necessary to integrate the principle into a complex legal system.[29]

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[23] 384 U.S. 436 (1966).
[24] Cox 89.
[25] Cox 90.
[26] Cox 91.
[27] 376 U.S. 254 (1964).
[28] 385 U.S. 374 (1967).
[29] Cox 101-02.

Group action, Professor Cox asserts, is essential to political action: freedom of political association must rank next to freedom of expression. In scrutinizing the Court's decisions in *NAACP v. Alabama*[30] and *Bates v. Little Rock*,[31] he sets forth the thesis that secret associations and far-out groups stimulate important changes in civilization and are entitled to constitutional protection.

> Perhaps heretics are very seldom right, but their value upon those rare occasions is too great to trust the power to separate falsehood from truth to government officials. In protecting heretics the Court is protecting the opportunity for progress.[32]

Some critics of the Court will undoubtedly deny that it has an obligation to protect heretics, and will consider Professor Cox a little far-out himself for asserting that it has.

In his view of the electoral process, Professor Cox sees the Court's extension of its constitutionally granted power to control this process enlarged by decisions such as *Baker v. Carr*,[33] *Katzenbach v. Morgan*,[34] and *Reynolds v. Sims*,[35] as "bottomed upon the fundamental political egalitarianism of the American people."[36] These and similar opinions may have been "against . . . ingrained teachings of the lawyer's profession"[37] and unpopular with professional politicians, but they revealed "the stark fact that the cancer of malapportionment would continue to grow"[38] unless halted by some external pressure. Since neither Congress nor the state legislatures were likely to excise the cancer, the Court acted to cure it. Professor Cox hopes that these decisions will shift present party power and revitalize state governments. These decisions, he feels, reflect a conception of a clear majority of the Warren Court that it is "one of the self-conscious functions of constitutional adjudication to secure at least some of the basic democratic elements in the political process."[39]

Obviously a supporter of the Warren Court's activism in the field of constitutional adjudication, Professor Cox predicts that

> historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit

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[30] 357 U.S. 449 (1958).
[31] 361 U.S. 516 (1960).
[32] Cox 104.
[33] 369 U.S. 186 (1962).
[34] 384 U.S. 641 (1966).
[35] 377 U.S. 533 (1964).
[36] Cox 120.
[37] Cox 117.
[38] Cox 117-18.
[39] Cox 114.

> humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions.[40]

His book is not so much a defense of the Court as an explanation of its methods of exercising what it conceives to be its constitutional responsibilities. He thinks that on the whole the Warren Court has exercised those responsibilities well.

"One who has sat in the Supreme Court almost daily awaiting oral argument or the delivery of opinions acquires both admiration and affection for the Court and for all the justices," [41] Cox says at the close of his most interesting volume.

> The problems with which they deal are so difficult, the number and variety of cases are so overwhelming, the implications are so far-reaching, that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony not only to the genius of the institution but to the wisdom and courage of the individual justices.[42]

As one who, like Cox, sat many days in the Supreme Court and listened to countless arguments and decisions, this reviewer, while not accepting all his premises, is moved to join Professor Cox's paean.

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[40] Cox 133-34.

[41] Cox 134.

[42] Cox 134.

BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY. By ARTHUR NIEDERHOFFER. New York: Doubleday and Company. 1967. Pp. 253. $5.95.

THE BIG BLUE LINE: POLICE POWER VS. HUMAN RIGHTS. By ED CRAY. New York: Coward-McCann, Inc. 1967. Pp. 250. $5.95.

Wayne R. LaFave †

No one would deny that one of the major problems confronting our society today is the proper functioning and control of our police agencies. Two presidential commissions have recently given attention to the problem,[1] and a growing volume of literature spawned by several disciplines attempts to analyze the complex issues confronted and created by the police.[2] Two recent additions to this literature are Arthur Niederhoffer's *Behind the Shield*[3] and Ed Cray's *The Big Blue Line*.[4] Niederhoffer is a sociologist with over twenty years of experience in police work, and Cray is director of publications for the American Civil Liberties Union of Southern California.

Cray's purpose is to present a "comprehensive study of the problem of police malpractice," [5] apparently to support his concluding argument for civilian review of complaints against the police. In large measure he succeeds, for one cannot read through his numerous accounts of police abuses without being outraged. Cray admits that he is "a special pleader," although he expresses the hope that he has "retained his objectivity." [6] I do not question his attempt to remain objective,[7] although it must be said that his accounts lose some of their force because of less than adequate concern for what the law is and what the facts actually are.

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[1] NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT chs. 11-13 (1968) [hereinafter cited as RIOT COMM'N REPORT]; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY ch. 4 (1967), and TASK FORCE REPORT: THE POLICE (1967) [hereinafter cited as TASK FORCE REPORT].

[2] Other recent books include M. BANTON, THE POLICEMAN IN THE COMMUNITY (1964); D. BORDUA, THE POLICE: SIX SOCIOLOGICAL ESSAYS (1967); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); E. NEWMAN, POLICE, THE LAW AND PERSONAL FREEDOM (1964); POLICE AND THE CHANGING COMMUNITY: SELECTED READINGS (N. Watson ed. 1965); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); RALPH L. SMITH, THE TARNISHED BADGE (1965); and L. TIFFANY, D. McINTYRE & D. ROTENBERG, DETECTION OF CRIME (1967).

[3] A. NIEDERHOFFER, BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY (1967) [hereinafter cited as NIEDERHOFFER].

[4] E. CRAY, THE BIG BLUE LINE: POLICE POWER VS. HUMAN RIGHTS (1967) [hereinafter cited as CRAY].

[5] CRAY 7.

[6] *Id.* at 15.

[7] Some, I am sure, would view the book as biased solely because it is concerned with police malpractices.

Although Cray is not a lawyer, and thus might be excused for being unaware of all the technical niceties of the law, it is nonetheless distressing to see the law frequently misstated in a book purporting to show that the police are breaking the law. For example, all accounts of police use of weapons in several jurisdictions are tested against the erroneous assertion that "the law permits a policeman to use his weapon only to protect his own or a citizen's life from immediate danger or to apprehend a person *known* to have committed a felony." [8] Another broadside, italicized for emphasis, misleadingly states that "whenever they do delay in arraigning the suspect, the police themselves are breaking the law," [9] although the next paragraph reveals that the law is to the contrary. Similarly, Cray charges California police with repeated violations of law in releasing persons without bringing them before a magistrate,[10] a rather curious conclusion in view of his observation in the previous paragraph that California law gives the police this authority.

Cray advises the reader that his book is based upon "more than 200 fully documented cases from fifty police jurisdictions . . . ." [11] Apparently the reader is expected to accept this without question, as there is no attempt to indicate what precautions were taken to ensure the accuracy of what is reported as fact. Cray frequently cites newspaper clippings and notes that much of his material was collected by attorneys and ACLU offices, leaving the reader with the uneasy feeling that in some instances Cray merely reports the allegations of those who claim to be victims of police misconduct. It may well be that most of these "cases" are largely true, but it would not have been inappropriate to acknowledge that the police have not cornered the market on falsehoods.[12] Indeed, I would find Cray's argument for civilian review more compelling had he given equal emphasis to the need to prove valid claims against the police and the need to disprove others in a fashion that the public would accept as fair and reliable.

Niederhoffer's book is uneven and sometimes lacking in direction, although the theme of police cynicism (which is treated more specifically in a lengthy appendix) reappears with some frequency. Many of Niederhoffer's hypotheses concerning police cynicism merely state the obvious: recruits are less cynical than experienced policemen; superior officers are less cynical than patrolmen; foot patrolmen are more cynical than patrolmen assigned to other duties. The discussion ranges from the heights of sociological jargon (for example, the

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[8] CRAY 157.

[9] *Id.* at 64.

[10] *Id.* at 70.

[11] *Id.* at 11.

[12] Cray frequently notes instances in which police have lied about their prior misconduct. *See, e.g., id.* at 68-69. As to those complaining about the police, see note 29 *infra.*

chapter on *anomie*) to the depths of precinct locker room tales. In a sense, however, *Behind the Shield* complements Cray's book, as it sheds some light upon why police engage in the kind of malpractices related in *The Big Blue Line.*

Some comments on specific subjects discussed in these two books are in order.

1. Law Enforcement in the Ghetto. On the basis of arrest and clearance statistics which hardly prove the point, Cray concludes that "Negro divisions are overpoliced . . . ," [13] and complains that "police have sought to repress lawbreakers by overmanning these areas." [14] He is wide of the mark. As Niederhoffer correctly observes,[15] and as ghetto residents have themselves made more than clear,[16] the real need is for *more* law enforcement in the ghetto. The Kerner Commission reached this conclusion:

> [P]olice responsibilities in the ghetto are even greater than elsewhere in the community since the other institutions of social control have so little authority: the schools, because so many are segregated, old and inferior; religion, which has become irrelevant to those who have lost faith as they lost hope; career aspirations, which for many young Negroes are totally lacking; the family, because its bonds are so often snapped. It is the policeman who must deal with the consequences of this institutional vacuum and is then resented for the presence and the measures this effort demands.[17]

The basic dilemma in ghetto law enforcement stems from police-minority group hostility, which is manifested and maintained in numerous ways. (a) Cooperation with and assistance to the police is minimal. "In almost any slum there is a vast conspiracy against the forces of law and order. If someone approaches asking for a person, no one there will have heard of him, even if he lives next door." [18] The police are in part responsible for this situation; they have not always treated victims and witnesses differently from offenders. Yet, the lack of cooperation in turn brings about more repressive police measures to solve crimes and more law enforcement apathy concerning much ghetto crime. (b) Many police have come to accept violence as a way of life in the ghetto, and thus do not aggressively seek enforcement of assault and similar laws when violations involve only Negroes.[19] As

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[13] CRAY 189.

[14] *Id.* at 188.

[15] NIEDERHOFFER 61-63.

[16] See RIOT COMM'N REPORT 161-62; TASK FORCE REPORT 148-49.

[17] RIOT COMM'N REPORT 157.

[18] M. HARRINGTON, THE OTHER AMERICA 16 (1964), quoted in NIEDERHOFFER 131.

[19] W. LAFAVE, *supra* note 2 at 110-14.

a former New York City police inspector has pointed out, "minor criminals . . . are sometimes treated like children, or are laughed at, when their violations are the type that run down the minority community, but do not seriously annoy the police or vocal complainants." [20] (c) Former inspector Brown adds that "it becomes particularly galling to [respectable members of a minority group] when, on the other hand, they feel that excessive police attention is given to other violations by their members," [21] indicating that in one sense there is overenforcement in the ghetto. For example, minor nonprofessional gambling is often an object of enforcement in the ghetto but not elsewhere. There are undoubtedly various colorably legitimate reasons for this unevenness, including the fact that such violations are more likely to be open to police view in the ghetto and the fact that gambling arrests are a convenient way of improving the enforcement record of unpopular laws without arousing an effective public outcry. Obviously, a reordering of law enforcement priorities in the ghetto is necessary. (d) Finally, there is what is commonly referred to by the police as aggressive patrol—stopping pedestrians and drivers for questioning and search. One need not argue that stop-and-frisk is unconstitutional nor rebut the contention that such tactics are more frequently called for in high-crime ghetto areas in order to conclude that a more careful assessment of aggressive patrol is needed. Again the Kerner Commission: "Many police officials believe strongly that there are law enforcement gains from such techniques. However, these techniques also have law enforcement liabilities. Their employment therefore should not be merely automatic but the product of deliberate balancing of pluses and minuses by command personnel." [22]

2. Institutionalized Malpractice. The phrase is Cray's, and he uses it to describe those illegal police activities which are in a sense routine and which are supported by the tacit approval of superior officers. Cray refers to the frequent illegal arrests, searches, and detentions which serve, in the eyes of the police, to "keep the lid on" and to enhance the record of "clearances" (a frequently used measure of police performance which disregards whether the offender was actually convicted or whether the police, by their illegal conduct, were responsible for the lack of conviction). As Cray points out, "this institutionalized malpractice, rather than the casual brutality of an individual officer, is the greatest problem." [23]

Niederhoffer gives us some insight into the persistence of knowing violation of constitutional rights by the police, even in the face of the

[20] William P. Brown, *The Police and Community Conflict* 19 (Paper delivered at the 8th Annual Institute on Police & Community Relations, Michigan State Univ., May 1962).
[21] *Id.*
[22] RIOT COMM'N REPORT 160.
[23] CRAY 10.

exclusionary rules. Because of the nature and atmosphere of police work, the typical police officer's "morality is one of expediency and his self-conception one of a martyr." [24] The police are sensitive to criticism and, because of their defensive posture, assume—not without some justification—that the public blames them for the continued existence of crime. The frequent police response is to shift the blame to the courts ("the courts are handcuffing the police"), and the police become convinced by their own propaganda that they cannot both enforce and comply with the law. Confronted with this apparent dilemma, the choice too often is to maintain a respectable record of arrests and clearances.[25] Unfortunately, police administrators have not carefully considered the possible long-range costs [26] of the choice to maximize clearances by ignoring constitutional guarantees.

3. Casual Acts of Brutality. Cray presents several cases involving senseless acts of brutality unrelated to any law enforcement objective. Unlike institutionalized malpractice, which may be understood if not excused, individual acts of excessive force reflect upon the calibre of men in police service. It has sometimes been suggested that the problem arises because police work attracts persons who are prone to aggressive and violent conduct; if so, the basic need is for more careful screening of police candidates. Niederhoffer, however, presents a different thesis: "The police system transforms a man into the special type of authoritarian personality required by the police role." [27] Moreover, Niederhoffer concludes that the system places the most authoritarian men where they have the greatest opportunity to resort to violence, as the toughest police are assigned to the toughest areas while those who are less authoritarian tend to move rapidly into service and supervisory positions. As Cray's case histories illustrate, the authoritarians are most likely to respond with force to what they perceive as a lack of respect for the police.

Niederhoffer's thesis, if true, certainly complicates the problem, and points up the necessity of machinery to uncover acts of police brutality and prevent their recurrence. Unfortunately, police brutality often recurs, as illustrated by Cray's numerous references to repeated acts of violence by the same officers. In part this may be attributable to what Niederhoffer calls "the principle of equilibrium, . . . an

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[24] NIEDERHOFFER 92, quoting W. Westley, The Police: A Sociological Study of Law, Custom, and Morality ii, 1951 (unpublished doctoral dissertation, University of Chicago).

[25] LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices,* 30 Mo. L. REV. 391, 457 (1965).

[26] Police should take account of the very real possibility that deliberate violation of existing rules may influence courts to impose even greater restrictions. *Id.* at 457 & n.212.

[27] NIEDERHOFFER 118.

organizational imperative that requires the negation of any and all criticism." [28] Criticism of any one officer, no matter how serious the charge, is often taken to be criticism of all police, and the tendency is to close ranks against the outside challenge.

4. Civilian Review Boards. Both authors favor civilian review boards as a means of airing complaints against the police, and both authors amply demonstrate how uncommonly silly police spokesmen have been in charging that "Review Boards undoubtedly can and do serve as a secret weapon of the Communist Party." [29] In my opinion, the arguments presented establish the need for some form of civilian review. Cray's 200 cases, even if viewed as charges rather than proven facts, clearly demonstrate the need for fact-finding machinery in which the public will have a measure of confidence. (Indeed, if the police correctly claim that most of the charges made against them are unfounded,[30] the police have much to gain.) Niederhoffer's analysis of the police bureaucracy shows the need for some form of outside scrutiny and pressure.

It does not necessarily follow, however, that civilian review boards are the answer. For one thing, in view of the longstanding and understandable persecution complex of the police, it does not seem wise to single them out for special scrutiny. For another, as Professor Walter Gellhorn has aptly noted, "One may safely guess . . . that disadvantaged persons more frequently find themselves in controversy with welfare and educational authorities than with the police." [31] I find much more promise in Gellhorn's proposal for an ombudsman-type official who would concentrate not upon the guilt or innocence of particular policemen, but rather upon the effectiveness with which police superiors have sought out, considered, and acted upon citizen complaints.[32] Niederhoffer's analysis supports the notion that pressure at the higher levels of the police bureaucracy would be most fruitful; it is there, he observes, that one is most likely to find a new breed of professionals who would more actively pursue reforms if the pressure for such reforms were greater than the pressure by the conservative defenders of traditional police mores.[33]

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[28] *Id.* at 13. Similarly, Cray quotes an attorney on the staff of the United States Commission on Civil Rights as saying: "The police have a pathological paranoia about complaints; they feel strongly that they are the object of counter-terrorism. They won't listen to criticism; they're practically hysterical about it." CRAY 197.

[29] *Fraternal Order of Police, Police Review Boards—A Threat to Law Enforcement* 4 (undated).

[30] *See* CRAY 173. The St. Louis ACLU affiliate conducted an independent investigation of 20 complaints of police brutality and concluded that only two were well founded. Civil Liberties, No. 232, Dec. 1965, at 1, col. 3.

[31] W. GELLHORN, WHEN AMERICANS COMPLAIN 185 (1966).

[32] *Id.* at 191.

[33] *See* NIEDERHOFFER 3-4.

LAND OWNERSHIP AND USE. By Curtis J. Berger. Boston: Little Brown & Company, 1968. Pp. xxil, 1055. $14.00.

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The object of a casebook review all but defies description. The review cannot be looked upon as a vehicle for introducing the new arrival to one's law school colleagues, for they receive periodic dispatches from the publisher covering every aspect of the book's development—from conception to delivery. An audience cannot be found among students, for their examination of casebooks seldom extends beyond the particular volume assigned by their instructor. Again, the reviewer cannot evaluate a casebook as might an opening night critic. If a work is in a professor's field, he will want to examine it first hand; if in a foreign field, he is likely to be interested in neither the book nor its review. Accordingly, the reviewer must forsake the usual objective of influencing others to read (or avoid) the offering Perhaps more to the point, casebooks are often nothing more than literary afghans—cases, statutes, and textual passages pieced together. This all but limits the observer to commenting upon the arrangement of the squares and the fineness of the stitching. Thus circumscribed, a casebook review must find its justification in a discussion of the book's impact upon the law school curriculum and teaching methods.

In my judgment, Professor Berger's work is the most distinctive property casebook to come along in a generation. In the late forties, a great debate took place over the content and emphasis of the basic property course. It is safe to conclude that the private-law orientation prevailed and that developing public areas (such as zoning and subdivision control) were relegated to the last chapter in each book. These latter materials represented ten per cent or less of the average casebook's coverage and received even less class time. Most casebooks appearing in the last few years have continued to place the modern materials last in order of presentation, but have expanded treatment of these topics to twenty or thirty per cent of the overall volume. Professor Berger departs from this mold by bringing the reader through all phases of each topic, from the yearbooks to tomorrow morning's newspaper. In his preface, he makes several points that are worthy of note:

> *First*: Conveyancing does not belong in the first-year curriculum. Real estate transactions—as they are practiced today—are pregnant with considerations of income taxation, financing, and contract. Except possibly for contract, a be-

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> ginning law student lacks the necessary background in these areas, and if we ignore them, we waste everyone's time. . . .
>
> *Second*: It seems irrelevant to concentrate on future interests in a course that emphasizes land in present-day America. . . .
>
> *Third*: Resource allocation, and the means to achieve it, deserve equal billing with the more conventional chapters on estates in land. . . .
>
> *Fourth*: Property is no longer a common law (or even a private law) discipline, a realization that has been slow to arrive. State and local legislatures—and, of course, the Federal Government—are recasting the institution of property with breath-taking speed; to what end is what this course examines.[1]

Carrying this credo into execution, Professor Berger allocates 112 pages to the institution of property; 131 pages to classification of interests in land; 46 pages to the formation of interests by operation of law, and 103 pages to landlord and tenant. The remaining 646 pages are devoted to allocation and development of land resources. There are no chapters devoted to the land contract, deeds, recording and other traditional conveyancing subjects. This rough table of contents gives some idea of the changes Professor Berger has made in the content and emphasis of the basic property materials.

In addition to its modern outlook, the strength of this casebook lies in its depth and in its ability to present traditional materials in a stimulating manner. These qualities reflect the great pains Professor Berger has taken in the selection process and in the preparation of copious notes and probing questions. The book's only flaw, if such it be, lies in the complete omission of conveyancing materials. While I embrace every word of the last three points made in Professor Berger's preface, serious objections must be voiced concerning his views with respect to conveyancing. Far from being overly difficult, the study of voluntary land transfers gives structure and direction to the property course. Similarly, conveyancing provides the backdrop for a study of adverse possession, title insurance and other interesting topics. Although subject to being drawn out, a presentation of the recording acts offers the unique opportunity to compare four or five statutory solutions to a unitary set of problems. Moreover, other instructors may proceed on the assumption that students receive their grounding in caveat emptor and bona fide purchaser principles in the property course. Finally, it seems incongruous to probe complex socio-economic aspects of property, such as slum clearance and relocation

[1] C. BERGER, LAND OWNERSHIP AND USE ix-x (1968).

problems, when the fundamentals of voluntary land acquisitions have not been investigated. This is analogous to embarking upon advanced estate planning without the benefit of prior studies in wills, trusts and future interests. In my judgment, condensation of the conveyancing materials would have been preferable to their complete elimination.

Despite the omission of conveyancing, this casebook will have a marked impact on the future direction of the basic property course. The omission may even be a blessing in disguise, prompting instructors to prepare their own supplementary materials. This reviewer found Professor Berger's materials on allocation and development of land resources so provocative that they were adopted as the nucleus of a seminar in land use planning. Few casebooks bring enduring credit to their authors, but every few years a *Hart & Wechsler* or *Casner & Leach* appears on the scene. Professor Berger's product belongs in that company.