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FORUM: POINTS OF REBELLION†

OPENING REMARKS

*Professor Forkosch:**

Brooklyn Law School is honored to welcome this group of distinguished guests, each of whom is prominent in his own right. This forum is initiated to discuss critically the latest volume by one of our great public figures, the Honorable William O. Douglas, Associate Justice of the Supreme Court.

The background of this volume, as I see it, discloses that this geometrically rapid century has thus far managed to bring together a degree of wealth, population, and poverty; of knowledge, ignorance, and degradation; of a planet-and-earth technology versus an oxen-and-cart society; of spending \$35-billion to land men on the moon, projecting into the seventies a robot fly-by of Jupiter and three other planets, and yet cutting back sharply on man's care for his brethren; of the frustrations of peace through a United Nations with a continuing Goliath of arms and tensions; and now man's alienation from his environment—with the century still having three decades to go!

For at least fifty years violence and rebellion have been a continuing part of the national scene. These twins helped found the American experiment and have never vanished, but it is their extent and infiltration which today cause alarm. The Mauve Decade of the last century really extended into that of the present one, at least insofar as our bucolic heritage created a climate of sentiment which continued into The First World War. It was in the twenties that the present ancients had their fling, and their offspring today are surfing on the waves then created and surging on. There is, however, a difference.

† This article is an edited version of the Symposium on Points of Rebellion which was presented at the Brooklyn Law School on April 10, 1970.

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The distinction between the twenties and the sixties is that which distinguishes crass materialism and idealism; not in a Manicheistic struggling dualism of separate and independent existence but, rather, as coin-faces. Half a century ago it was materialism which dominated the nation; today it is idealism. Youth, misguided then, may still be so today, but who is to decide, and why? If the generation gap discloses a failure in communication and understanding, it also points up this viable dissimilarity and divergence. Thus, there should be no occasion for surprise when protests and violence occur, and anyone who reads aright can appreciate the underswell of change. And that change is not confined to the sciences, but is found in the arts as well. For example, there is a revolution in the theatre today, as well as rebellion on the campus, in political circles, in consumerism and environmentalism—and who can decide where it will end.

If a conservative is one who seeks to conserve and to retain, albeit change as dictated by societal forces and by reason, then both Roosevelts and the other Chief Executives in this century have been such. So, too, have been the people in continuing power, that is, the so-called Establishment, although for variegated reasons. The latter's rate and degree of change in different areas is the problem of today. It is their refusal to recognize in one or more of these fields that the time has come to bend with the winds of mutation that has sparked the type and amount of rebellion which has occurred. Conservatism, therefore, takes on different hues within, for example, economics, politics, humanitarianism, and law. Thus the political stand-patter may nevertheless be a forward-looking social legislator, despite a superficial incompatibility. Ambivalence is therefore understandable.

For example, the so-called Warren Court has been assailed as revolutionary, leading the country to chaos, and downright treasonable, and yet its decisions have been in the mainstream of American ideology. In this sense its Justices have been conservatives. And if Burkean eighteenth-century liberalism is the historic base for conservatism, then the Douglasean 1970 warnings of the need for the current (technological) Establishment to bend slightly to the winds of rebellion follow those earlier far-seeing ones addressed to the benevolent oppression of Burke's own Establishment, namely, the landed and entrepreneurial gentry whom the newly-emerging classes opposed. Unyielding stubbornness which adheres to abstract principles may thus result in rebellion and social chaos; so cautioned Burke, and so cautions Douglas. Even the Senator from Massachusetts has written that "no university needs to have turmoil

if it can demonstrate, before turmoil comes, the kind of commitment to change and momentum toward progress which turmoil usually brings."¹

How, therefore, can one disagree with these concepts and these admonitions? Disagreement there may be in the assembling of the facts of the day, or in their analysis, and especially in one's prognosis. Or one can reject the logic, if not the premises, or else feel that much resilience still remains before any breaking-point is yet reached. As our panelists will undoubtedly disclose, many other aspects of dissent may also occur. One hopes that this verbal dissent will remain confined to the writing within the covers of *Points of Rebellion*, and it is to these disputations that we now turn.

Our first panelist is the senior author of the most successful civil rights case book in America, that is, *Political and Civil Rights in the United States*, now in its third edition. He is the Lines Professor of Law at Yale and his impressive governmental background begins with the New Deal agencies in 1933 and goes into the Second World War. He was president of the National Lawyers' Guild in 1950-51, and has written extensively in the area of civil rights, in which he is an acknowledged authority. I am privileged and honored to present Professor Thomas I. Emerson.

Professor Emerson:

The main themes of Mr. Justice Douglas' book, as I understand them, are three. (For the purposes of exposition I am reversing the order of chapters I and II). First, there are grave and valid grounds for dissent in American society. More precisely, America faces unprecedented problems—problems which have been of particular concern to our younger generations. These include a futile and immoral war, the possibility of nuclear annihilation, the growing power of the military-industrial complex, the ever-widening antagonism between the races, the bias of our laws and institutions against the poor, the dismal state of our inner cities, poverty, hunger, pollution, overpopulation, and others. All in all, we have made only inconsequential progress in the solution of these threatening issues.

The second theme is that American society, more particularly the older and governing generation, displays little indication that it is capable of dealing with these problems. The generation now in power is not responsive to protests, and indeed does not understand them. This failure to comprehend is the result of many forces generated by the corporate state. The loyalty

¹ Edward M. Kennedy, *Student Riots, Civil Rights, and the Rule of Law*, 46 *Social Science* 6, 8 (Jan. 1970).

programs, the investigations by our intelligence agencies and legislative committees, the reliance on personality tests for judgment of individual capacity, the intrusions on privacy through wiretapping, and many similar practices have tended to produce a blank conformity. Our colleges and universities, which might hopefully have been expected to present a critical evaluation of our society, have substantially failed to perform this function. The result is that, far from being prepared to react affirmatively to the crisis, American society has merely watched the mounting protest with fear, hostility, and repression.

The third theme is that a major reconstruction of our society is necessary if we are to meet the problems that now confront us. This involves primarily a reallocation of our resources, which are now utilized largely in the interests of the dominant business elite, and a reinstatement of popular controls over our growing bureaucracies, which now operate in the interests of the same elite and ignore the needs of the great mass of our people. Unless we can accomplish this task, the outcome is likely to be violence. We thus face the choice of forceful repression ending in a police state, or of forging a new society responsive to human needs. Our youth have taken the leadership in this challenge. Their goal, the coming revolution, is to make society serve the ends of mankind. Whether we face violence, or "an explosive political regeneration," depends upon the older generation and most particularly upon the Establishment.

I agree fully with the basic analysis put forward by the author. I do not necessarily agree with every detail of his exposition, or at times with his exact choice of language or emphasis. I am of a somewhat more cautious temperament, and I have a more conservative, not to say dull, style. But I believe he has caught the essence of our present dilemma.

Furthermore, it seems to me a matter of the first importance that a high official of our government has said these things to the country, directly, plainly, and unequivocally. Our official leaders have been either unaware of the real problems, afraid to face them, or unwilling to discuss them openly. Mr. Justice Douglas has not only said what needs to be said, but he has done it in a way that is understandable to the ordinary citizen. It is meant for those who are genuinely concerned, those who want to think about the problems, but do not have the time or inclination to pursue weighty tomes or wade through elaborate scholarly presentations.

The book has been attacked as advocating, or at least promoting, violent revolution. It has even been suggested that the author should be impeached. All this seems to me a bit of comic

irony. Mr. Justice Douglas does talk a good deal about revolution. The word surely is appropriate to the present situation. And he does say, quite honestly, that where grievances mount, and no relief is forthcoming through democratic procedures, "violence may be the only effective response." But his clearest message is that, if we are to avoid chaos and violence, we must understand the grievances and take prompt action to meet them. "The tools and opportunity exist," he stresses; "Only the moral imagination is missing." For anyone to construe this as a call to violence, or encouragement of violence, is to misunderstand the whole thrust of the argument. Such attacks on the book, it seems to me, are to be taken seriously only as illustrations of the very fears, insecurities and misapprehensions that Mr. Justice Douglas contends are leading us down the road toward violence.

My quarrel with the book, if it can be called that, proceeds from another direction. I am inclined to feel that, taken as a whole, Mr. Justice Douglas underestimates the dangers and the difficulties of our present situation. There is considerable evidence from which one can conclude that the problems are more intractable, the resistance to solution more intransigent, and the solutions more complex than the author asserts. In short, rather than subversive, the book may be overly optimistic. It is impossible to deal with these fundamental issues at any length in this short review. However, a brief observation on this feature of the book may be ventured.

On the whole I agree with the author's position concerning the nature and extent of our current problems. The causes of dissent and protest are deep-rooted and largely justified. But a further element is present, one which the author recognizes but perhaps does not stress sufficiently. That is the growing uncertainty that existing institutions in our society are capable of solving its problems. In this respect the situation is far different from the period of turmoil known as the New Deal. In those days we who sought to bring a higher measure of social justice to our society were confident we knew the way. Today there is not only skepticism; there is loss of faith in traditional procedures. Even those principles which we of the older generation believe most fundamental to any civilized society—such as freedom of expression—are viewed in some quarters with doubt or indifference. We are reaping the results of our own lack of honesty and conviction. Democratic principles, never having been really tried, have been found wanting. This whole trend of events adds a new dimension to our problems. It gives them an urgency, and an intractability, they have not had before.

Second, to follow the author's main categories, the book may

underestimate both the degree of resistance on the part of our Establishment to change, and the incapacity of the Establishment to adjust to the new problems. The author is certainly right in his emphasis upon the many factors which produce conformity in our people, and the various special measures taken to assure that independent thinkers are given a hard time. He is certainly correct, though here I might take issue with some details, in saying that our institutions of higher learning have not been the centers of social criticism and innovation that they ought to be in a democratic society. All of this has meant that members of the Establishment, and large sectors of our population, are unaware of the problems and unwilling to alter the status quo.

Yet, the dilemma seems even deeper. Our institutions have become so complex, so rigid, and so entrenched that, almost in spite of the wishes of the individuals who man them, the structure is impervious to adjustment. Our military, our defense industries, our government commissions, our labor unions, our police, and many of our other organizations, have developed a life and direction of their own. They are guided by internal forces of bureaucracy which are often unrelated to and unresponsive to the public welfare. Thus, resistance to change has been built, not only into the minds of men, but into the institutions which control their complex society.

Furthermore, even those individuals—in the government, industry, the university, or other areas of conventional life—who may have some perception of the course of events have been remarkably inactive. The call to action has been sounded from many unorthodox quarters. But the Establishment leaders have given no leadership. Not only have they made no plans or preparations, but they have not even sought to inform themselves or their public. As for the less enlightened sector of the Establishment, it has reacted to events with hysteria or stupidity. It has viewed the problem as one of simple law and order, a position that has led, and can only lead, to greater and greater repression. In short, I would conclude that the forces which resist change in America are even more recalcitrant than our author depicts.

Third, and finally, I take some exception to the author's view concerning the nature of the change that our present condition demands. I think the adjustments may be more far-reaching than the book suggests. Although the author calls for a "vast restructuring" of society, the specific proposals seem to contemplate, by and large, various forms of traditional political reform. Apart from expansion of legal services, the author's principal program is one of reallocating our resources and find-

ing new ways to control our bureaucracies. My guess is that the changes necessary are, and will be, far more profound.

The fact is that the younger generation, which now supplies much of the motive and power for change, is coming to accept a whole new way of life. This is presumably the result of the spectacular changes in technology, the progress from scarcity to affluence, the vast increase in population, the dismal failure of existing modes of operation, and numerous other factors. But, whatever the cause, major portions of our system of values, and many of our traditional institutions, have been repudiated by the more advanced sections of the on-coming generation.

More specifically, the new generation tends to reject the values of a materialistic, highly competitive society. It seeks a different relation between individual members of society, and between the individual and his natural environment. It distrusts the artificialities and fictions of everyday existence, and prefers immediacy to abstract general principle. It opposes organization and centralization, and hopes to restore a human element to institutions for collective living. Its goals are not to achieve a greater and better version of the present world, but to find a new world.

Moreover, the methods by which the younger generation struggles to achieve its goals are not necessarily the same as those which have governed our past. It is true that one segment of rebellious youth continues to pursue change through political methods. Yet, even these do not follow customary patterns. This group does not, for instance, cling to any clearly defined theory or follow a well-formulated program. Another segment of youth seems to reject traditional political methods altogether. They look for change by changing individual consciousness. They operate almost wholly outside our present institutions, sometimes in full disregard of accepted norms. What their ultimate impact will be no one can safely predict.

These currents and cross-currents among our youth raise unprecedented issues for those who, like the author of this volume, hope to achieve orderly adjustment between the old and the new. The book helps to point the way. Let us hope its lessons will be taken to heart. But, the path may be even more arduous than Mr. Justice Douglas warns us.

Professor Forkosch:

Thank you, Professor Emerson.

Our next speaker is a political scientist from the distinguished Graduate Faculty of the New School for Social Research. He is the author of an excellent analysis entitled *Search and Seizure and the Supreme Court*, published in 1966, and