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Book Reviews

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BOOK REVIEWS

POINTS OF REBELLION. By William O. Douglas. New York: Random House. 1970. Pp. 97. \$4.95.

Rebellion's demand is unity; historical revolution's demand is totality. The former starts from a negative supported by an affirmative, the latter from absolute negation and is condemned to every aspect of slavery in order to fabricate an affirmative that is dismissed until the end of time. One is creative, the other nihilist. The first is dedicated to creation so as to produce results in order to negate more and more completely. The historical revolution is always obliged to act in the hope, which is invariably disappointed, of one day really existing. Albert Camus, THE REBEL.

For all the turmoil it has caused, Mr. Justice Douglas's latest pamphlet-book, *Points of Rebellion*, is a terrible disappointment. While the book is not, as some of its critics would have it, a call to revolution or even rebellion, it does pretend, at least in its title, to "declare the causes which impel [or might impel, some] people to dissolve the political bands which have connected them with ['the Establishment']."¹ The pretension is just that. One suspects that had the book been written by anyone other than a Justice of the Supreme Court of the United States, it would not have been published; some would say that it should not have been published *because* it was written by a Justice of the Supreme Court of the United States. Neither point of view is wholly without merit.

Aside from containing much prose which has been kindly described as "rough hewn" and "stern stuff [which] is not planed down,"² this 97-page Dick-and-Jane-print primer on the causes of our discontent covers such a variety of subjects in such a shallow and superficial manner that it could hardly have contributed much to the literature of American politics. And this is unfortunate, for many if not all of the points which Justice Douglas touches upon are important and deserve serious analysis. Simply stated, *Points of Rebellion* purports to discuss much of importance, but unfortunately does not live up to its promise.

For example, in his first chapter, "How America Views Dissent," Justice Douglas tells us precious little about how we view dissent. Instead he tells us that because of a fear "generated" by Joseph McCarthy, "nurtured" by President Truman and "promoted" by President Johnson (as manifested by congressional

1 Justice Douglas warns that "today's Establishment is the new George III." W. DOUGLAS, POINTS OF REBELLION 95 (1970). "The Establishment" is one of those wonderful terms in the American political lexicon which everyone uses but no one cares to define, lest it include him. Justice Douglas is no different. By way of example, "the Establishment" is used to describe the police, *id.* at 5, corporate giants, *id.* at 12, the Central Intelligence Agency and the Pentagon, *id.* at 13, the university—"symbol of the Establishment," *id.* at 14, mass media — "essentially the voice of the Establishment" (Spiro Agnew notwithstanding), *id.* at 42, the owners of mines in West Virginia, *id.* at 52, persons in control of the political parties, *id.* at 53, persons who sit on federal regulatory agencies and the persons they control and "most elected spokesmen," *id.* at 89. How much simpler it was in the days of George III when evil could be attributed to one person.

2 See Clark, Book Review, 83 HARV. L. REV. 1931 (1970). Perhaps that reviewer, former Justice Tom C. Clark, had the following phrase in mind when he characterized the style as "rough hewn": ". . . the Constitution was designed to keep government off the backs of the people" W. DOUGLAS, *supra* note 1, at 6.

hearings, government surveillance techniques and practices and personality tests),³ we are now witnessing "a protest against the belittling of man, against his debasement, against a society that makes 'lawful' the exploitation of humans."⁴ While the existence of increased surveillance and personality tests may demonstrate how we discover, control and regulate "dissent" (which presumably means thinking or doing whatever "the Establishment" finds objectionable) one never does learn precisely what is objectionable to "the Establishment."⁵

Justice Douglas can be forgiven for not being faithful to his chapter headings, but it would seem that when one chooses to put on the hat of the pamphleteer he has little time or space to waste and accordingly has an obligation to present his ideas lucidly, coherently and concisely. Because Justice Douglas attempts too much, he does too little and fails on all three counts. Thus, in the second chapter, entitled "Legions of Dissent," we are offered little more than a catalogue of the following disparate matters of public interest: (1) Japan's twin fears of Russia and of a war between the United States and China; (2) President Johnson's war in Vietnam; (3) the lack of deterrent capability in our nuclear weaponry; (4) the President vis-à-vis the Pentagon; (5) the China lobby; (6) the budget of the Department of Defense; (7) the problems of the Black; (8) the problems of the Mexican; (9) our bias against the poor as expressed in our vagrancy, consumer credit, garnishment and landlord-tenant laws; (10) the ecological crises (with special emphasis on West Virginia); (11) the evils of government bureaucracy; (12) violence as a part of the tradition of our country; and (13) the role of dissenters as the loyal opposition. With twenty-two pages in which to present the subject matter, Justice Douglas could barely do more than trot through the titles. How much better it would have been had he taken one point (hopefully somewhat related to the rest of the book) and given it more than a passing nod. One of the great questions of our day is: To what extent can the loyal opposition dissent and still remain loyal? In *Concerning Dissent and Civil Disobedience* Justice Fortas gave a partial answer, but the nature of the dissent has changed so significantly in two years that another serious discussion *ex cathedra* would not have been improper. Unfortunately *Points of Rebellion* does not offer such a discussion.

It is not until his final chapter, "A Start Toward Reconstructing Our Society," that Justice Douglas's presentation takes on any semblance of meaning or order. There we are told that the vital problems "will require a great restructuring of our society"⁶ and that in order to make this restructuring as non-violent as possible we must devote our immediate attention to (1) reallocating our resources (to be achieved primarily by reducing our military budget, closing tax loopholes and generally taking away our direct subsidies to the "rich" farmer, shipper, broadcaster and publisher in order to provide the necessary monies to

3 For a particularly good discussion of the importance of privacy in a free society, the technology and techniques being used to probe into man's private life and the constitutional limitations of the invasion, see A. WESTIN, *PRIVACY AND FREEDOM* (1967).

4 W. DOUGLAS, *supra* note 1, at 33.

5 Perhaps a better title for the chapter would have been "How America Reacts to and Controls Those Who Are Likely to Dissent—and How Those Who Want to Dissent React to America."

6 W. DOUGLAS, *supra* note 1, at 63.

subsidize the "poor");⁷ and (2) creating control or surveillance over key administrative agencies, particularly those agencies which should, but are not, giving attention to improving the quality of our environment.

Because we have not done enough to reallocate our resources or control our official bureaucracy, Justice Douglas finds that "[t]he use of violence as an instrument of persuasion is therefore inviting and seems to the discontented to be the only effective protest."⁸ Justice Douglas does not say (at least not directly) that resort to violence is the only effective means of protest, but rather he says that to some in our society this *appears* to be the case. To be sure, to the disciples of Herbert Marcuse protest cannot be effective unless it is violent for, they say, the existing structure is essentially rotten. Justice Douglas would have us do that which is necessary to provide assurance that the voice of the disenchanting does not have to be shouted in anger to be heard. With this noble effort one can hardly disagree.

A single question to which Justice Douglas might have profitably directed his book is whether fundamental changes in a political system can be achieved in a rational, orderly manner—whether we can rely on "rebellion" to bring about the reallocation of our resources and control of our governing bodies he views as so important. While I think that Justice Douglas is hopeful that such is still the case in America today, he secretly wishes that he had more to rely on than hope. Despite its promise, *Points of Rebellion* adds very little, if anything, to our knowledge about why there is discontent and does not really offer anything constructive with respect to how that discontent might be presented in a rational, orderly manner. What is offered instead is an agenda on which urgent and positive action must be taken,⁹ and even though the print is large and the pages are few, one must swallow an incredible amount of pap to get to even this small amount of meat.

Some books, like some book reviews, are better left unwritten—and *Points of Rebellion* is one of those books. I say this as an admirer of Justice Douglas and as one who would prefer that when he and other members of the judiciary write outside the pages of official reports, they publish something more than random thoughts and ideas in first-draft form. On the book's inner jacket, the publisher notes that it is the first of a trilogy "dealing with dissent and rebellion." One would hope that as Justice Douglas writes the second and third installments he does not feel obliged to follow the pattern of the first.

Paul F. Eckstein*

7 In this regard Justice Douglas thinks it imperative that the public sector be the employer of last resort.

8 W. DOUGLAS, *supra* note 1, at 78.

9 The proposals put forth by Justice Douglas are: (1) reduction of "the budget of the Pentagon" from 80 billion to 20 billion dollars; (2) lawyers for the "poor and disadvantaged"; (3) revision of laws so as to eliminate their present bias against the poor; (4) exposure of important decisions of federal agencies to public criticism before they are put into effect; (5) revision of the food program; (6) creation of public sector employment with "meaningful and valuable work"; (7) substitution of faculties and students for the "CIA and Pentagon" as the controlling forces in the universities; and (8) continuation of the battle of "equality of opportunity" for the Blacks. W. DOUGLAS, *supra* note 1, at 93-94.

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PUNISHMENT: THE SUPPOSED JUSTIFICATIONS. By Ted Honderich. New York: Harcourt, Brace & World. 1969. Pp. 202. \$6.50.

Ted Honderich, the dust-jacket tells us, teaches philosophy. This should not immediately prejudice the reader against what the author has to say. But when the author confirms the prejudices the reader has tried to control, one is tempted to say, "I told you so." I finished the book with a high esteem of the problem and a low esteem of those who approach it as a verbal game. One has only to confront the efforts of a lingual analyst, as here portrayed, with the trenchant dissection of the same problem by Camus, say in *The Stranger* or *The Fall*, to discover that there are at least two types of men we call philosophers: those who examine the words men use to describe life and those who examine life itself.

But let us not dismiss the efforts of linguistic philosophers out of hand without recalling the fragile dependence of the law on the words to achieve justice. The essays of the British legal philosopher H. L. A. Hart have made a significant contribution to our understanding of such concepts as "cause" and "responsibility."¹ Mr. Honderich refers to a number of other British scholars whose passion for logic has helped clarify several important problems for those interested in the question of criminal punishment.² Perhaps it is fair to say that one rather comes to expect the British to express deep emotion in a turn of phrase and burn with passion over the moral dilemma of punishment by a precisely honed argument. It would be dangerous to deny moral concern to men of obvious integrity and intellectual capacity.

But when it comes to discussing punishment, one is dealing with a vitally human problem which demands more than logic. In essence we are asking of ourselves an explanation of why we, as an organized body of people, have chosen through the years to apply this particular means of gaining social conformity. We no longer use the quaint gibbet iron³ to extort conformity, but twenty years in a prison will do as a substitute. Nor is it the fact that we are dealing with physical suffering alone. While the Cat went out as a means of punishment some time ago, the use of social degradation causes a deeper pain. The reason why logic breaks down in the face of such a situation is that criminal justice, when dispensed to a person who has intentionally caused harm to others in property or person, must evoke all of the emotions of man from hatred to pity. It is not a coldly objective process in which detached scientists quietly observe phenomena and apply exact formula for precise results. On the other hand, it cannot be a victim-centered retaliation in hot blood. It is, strangely, a medley of the reactive and objective qualities in human relations which Strawson uses to describe our attitudes toward those who are responsible and those who are not.⁴

1 H. HART & A. HORACE, CAUSATION IN THE LAW (1959); H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

2 For a recent summary of these authors, see Gerber & McAnany, *The Philosophy of Punishment* in THE SOCIOLOGY OF PUNISHMENT AND CORRECTIONS at 337 (1970).

3 For those who fancy the lore of our obscene past, Thorsten Sellin has described what our forefathers did to criminals in and around the City of Brotherly Love. Sellin, *The Philadelphia Gibbet Iron*, 46 J. CRIM. L.C. & P.S. 11 (1955).

4 Strawson, *Freedom and Resentment* in PROCEEDINGS OF THE BRITISH ACADEMY (1962). See T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 115-23 (1969).

All of which returns me to the positive note about the author which I made at the beginning. The subject matter of the book is of extreme value for contemporary society. As society makes demands upon itself for change at a rapid rate, there is bound to be a continuing series of social crises that seem best solved by the ordinary means of social disapproval: criminal punishment. But as we most recently witnessed in the Chicago Seven trial, the criminal justice system may not be the best or only means to gain order. The moral justification of using the coercive means of criminal law (and here I would include the total process of indictment, trial and punishment) is an important one for us because it makes us answer other fundamental questions about the individual and society. Perhaps no other issue can bring us, if we are willing to go, as quickly to the ethical foundations of our society.

Mr. Honderich's book takes up three traditional justifications: retribution, deterrence, and reformation. He devotes a chapter to each and adds a chapter on the critical state of the compromise among those in a contemporary movement toward a pluralistic justification. He adds two other chapters to the book which deal with the arguments about free will and determinism and the exact meaning of Mill's principle of governmental non-intervention. These latter relate at best only obliquely to the thesis of the book.

My criticism of the author's analysis of retribution is that it ends exactly where Professor Stanley Benn says all retributivists would end once they undertake an explanation: as disguised utilitarians.⁵ Mr. Honderich says that retribution in criminal justice is nothing more than the satisfaction of the victim-grievance. This satisfaction is brought about by the punishment of the criminal offender, not because he *deserves* it, as most traditional retributivists say, but simply because the victim is requited by the suffering of the punished criminal. It is, in its own way, a utilitarian analogue of the metaphysical argument advanced by Hegel that punishment is a restoration of right through a process of negation of evil. In any event the author in no place confronts or grasps the meaning of desert or free choice of social evil. Indeed, at this point in the book⁶ and at others, he regrets the moral significance of responsibility.⁷ This seems very strange for a person who devotes a chapter to rescuing human freedom from the determinists on the basis of morality.⁸

The chapter on deterrence grasps the significance of the critical lack of statistical data to support the thesis that criminal punishment restrains socially deviant behavior. What data there is speaks of the failures in the system where deterrence did not work. But the author correctly argues that the supposition that deterrence is a myth because there is little positive evidence of its working is itself myth-making. Professor Zimring has analyzed the current state of evidence

5 S. BENN & R. PETERS, *SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE* 177 (1959).

6 "It [culpability] seems not to be a moral reason for action at all, good or bad. The fact, taken entirely by itself, that a man has caused a certain harm by a responsible action, seems to have no moral consequences." T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 32 (1969).

7 *Id.* at 72 and 161.

8 *See id.* at ch. 4 ("Freedom"). His argument that determinism is in logical conflict with judgment is well developed. *Id.* at 123-30. But if punishment is itself a moral judgment, taken in the sense of denunciation, then the author should have recognized his contradiction and have opted for his argument as developed here.

in the deterrence debate and has made similar common-sense and cautionary arguments in favor of continued research on the subject.⁹

The author devotes the main part of his chapter, rightly I believe, to dealing with the moral dilemma of punishment of the innocent under a deterrence system in which the sole justification of punishment is its ability to deter others from crime. Honderich argues that in some cases (more logical than real) victimization might be justified where the benefit to others was great and the detriment to the innocent sufferer was minimal (the Benthamite "economical" deterrent). We can all imagine a case where a court would convict an innocent man because of the great benefits to law and order. In the Dreyfus case, the benefits to France's anti-Semitic patriotism were great and the cost to Captain Dreyfus was—well, negligible. Very few deterrists are willing to go this route with Honderich and he himself concedes that his point is more a debater point than a telling argument. He ends by leaving the deterrist in a quandary by asserting that punishment has to be justified by more than utility.

Reformation as a justification of punishment takes two forms: one argues that punishment itself reforms and is thus justified; the other, that treatment reforms and should be substituted for punishment which is never justified. The author raises the problem for the punishment reformists that they may be using it to indoctrinate. But that charge is at least as valid against the treatment-reformists, if not more so, when techniques such as psychotropic drug therapy and operant conditioning are used.

There have been several serious efforts to bring the conflicting goals of punishment into a coherent rationale of justification. The author gives special attention to that offered by Professor H. L. A. Hart.¹⁰ Hart argues that punishment might have a different justification for different questions asked about it. Thus, he says, we can ask the general question of what are we trying to accomplish—what is the general justifying aim? To that question we must give the utilitarian answer: to prevent crime. But we can go on to ask whom we shall punish and we must answer: only the guilty. This is a limitation which we place on the general aim and is called "punishment in distribution." Its justification is based firmly on desert, which is criminal responsibility.

For anyone who has read the recent writings of Hart carefully, one feature is evident: the insistence on criminal responsibility.¹¹ But Honderich seems to ignore this or, when he does confront the issue in Hart, he argues weakly that moral justification cannot rest upon freedom of choice.¹² This is consistent with his earlier denial of moral significance to freedom. However, the centrality of freedom, responsibility and culpability to our Western approach to criminal law

9 F. ZIMRING, PERSPECTIVES ON DETERRENCE (to be published by the National Institute on Mental Health in the very near future).

10 T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS ch. 1 ("Prolegomenon to the Principles of Punishment") (1969); H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

11 H. HART, PUNISHMENT AND RESPONSIBILITY chs. 2 and 4-9 (1968). Lady Barbara Wootton is the target of much of the Hartian criticism. See B. WOOTTON, CRIME AND CRIMINAL LAW (1963). Her point is somewhat different from the pure determinist in that Lady Wootton feels that intent may have some significance after a determination of guilt in devising a plan of rehabilitation.

12 T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 161 (1969).

and punishment is acknowledged by some of its severest critics, such as Lady Wootton.¹³

When one finishes the book and asks at last what, for Ted Honderich, does justify criminal punishment, the answer must be an odd type of victim-revenge which seems to be based on the principle of fairness and utility. The author may, in his own abstract way, be acknowledging what practical people have said all along: retaliation cannot be entirely eliminated from our treatment of criminals. But what others will admit as an enduring evil, he seems to exalt in the general principle justifying punishment. The book omits any mention of the denunciatory theory of punishment which is the contemporary choice of retributivist-minded persons as a leading explanation of punishment.¹⁴

From the point of view of an ordinary reader, the book will make for difficult reading. Not only is there the problem of trying to focus the attention of a mind blurred by daily visual media such as television on precise, logical arguments, but Honderich has an irritating habit of interrupting himself in the midst of an argument to "clear the ground" for the argument he is giving. As the author says on the verge of such an excursion: "We lose nothing, given the purposes of the present discussion, if we discuss the proposal before us in this way. . . ."¹⁵ I would counter, "We lose nothing—except the reader." Let me end as I began. The subject matter is of great importance and is still in search of an author to tell us why we so often ignore the ethical implications in applying punishment.

*Patrick D. McAnany**

13 B. WOOTTON, *CRIME AND CRIMINAL LAW* (1963). Herbert Packer has written an admirable book that defends staunchly the criminal system of culpability. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

14 See Hart, *Aims of Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958); N. WALKER, *THE AIMS OF A PENAL SYSTEM* 25-29 (1966).

15 T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 157 (1969).

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BOOKS RECEIVED

- AMERICAN VIOLENCE.** Edited by Richard Hofstadter and Michael Wallace. A history of violence in America through four centuries. New York: Alfred A. Knopf. 1970. Pp. xiv, 478. \$10.00.
- THE APPORTIONMENT CASES.** By Richard C. Cortner. A study of the strategy, tactics, and procedures of constitutional litigation as developed in two principal apportionment cases. Knoxville: The University of Tennessee Press. 1970. Pp. ix, 283. \$10.95.
- CIVIL RIGHTS: A CURRENT GUIDE TO PEOPLE, ORGANIZATIONS AND EVENTS.** By A. John Adams and Joan Martin Burke. A reference handbook which provides information on key people in the civil rights movement. New York: R. R. Bowker Co. 1970. Pp. viii, 194. \$9.95.
- DEFENDING BUSINESS AND WHITE COLLAR CRIMES: FEDERAL AND STATE.** By F. Lee Bailey and Henry B. Rothblatt. Two superb trial attorneys take the reader through the entire criminal process, discussing white collar crime in general and specialized discussion of several specific crimes, including embezzlement, mail fraud and perjury. Rochester, N.Y.: Lawyer's Co-op. 1969. Pp. xxviii, 670. (Price unreported.)
- HANDBOOK OF LEGAL MEDICINE.** By Alan R. Moritz and R. Crawford Morris. Saint Louis: The C. V. Mosby Company. 1970. Pp. xiii, 238. \$8.75.
- JEROME FRANK: JURIST AND PHILOSOPHER.** By J. Mitchell Rosenberg, Ph.D. A study of the jurisprudential writings and judicial opinions of the late Judge Jerome Frank of the Second Circuit Court of Appeals. New York: Philosophical Library Inc. 1970. Pp. xviii, 274. \$8.75.
- THE LIMITS OF STATE ACTION.** By W. Von Humboldt. The author examines the propriety of state action and its relation to stifling individual freedom and growth, mandating conformity, regulating moral and ethical development, protecting the citizenry from deviant members (criminal law) and providing for those who are unable to take care of themselves (welfare and mental health law). New York: Cambridge University Press. 1969. Pp. xliii, 143. \$7.50.
- NARCOTICS CASES: PROSECUTION AND DEFENSE.** Edited by Brian Freeman. A companion sourcebook to DRUNK DRIVING CASES. New York: Practising Law Institute. 1970. Pp. xxxi, 1172. (Price unreported.)
- THE POLITICS OF LOCAL JUSTICE.** Edited by James R. Klonoski and Robert I. Mendelsohn. A civil-rights oriented discussion of legal problems on the local level. Boston: Little, Brown and Co. 1970. Pp. xxii, 255 (paper-bound). \$3.95.

- REBELLION, RACISM, AND REPRESENTATION. By P. A. Dionisopoulos. A study of the Adam Clayton Powell case and its antecedents. DeKalb, Illinois: Northern Illinois University Press. 1970. Pp. x, 175. (Price unreported.)
- A REPORT ON DENMARK'S LEGALIZED PORNOGRAPHY. Edited by Gordon Schindler. In a rather explicit book, the editor includes a series of interviews with prominent Danes, Gallup Polls on freeing pornography, and Pornography Reports of the Danish Penal Code Council. Torrance, Calif.: Banner Books. 1969. Pp. 528. (Price unreported.)
- THE ROSENBLUTH CASE: FEDERAL JUSTICE ON TRIAL. By Rosemary Reeves Davies. Ames, Iowa: The Iowa State University Press. 1970. Pp. xxii, 252. (Price unreported.)
- THE TRIAL OF THE CATONSVILLE NINE. By Daniel Berrigan, S.J. Boston: Beacon Press. 1970. Pp. xi, 122. \$5.95.
- WAR CRIMES AND THE AMERICAN CONSCIENCE. Edited by Erwin Knoll and Judith Nies McFadden. An edited transcript of a Congressional Conference on War and National Responsibility which convened in 1970. New York: Holt, Rinehart and Winston, Inc. 1970. Pp. xiv, 208. \$2.95 paper, \$5.95 cloth.

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