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## REVIEWS

### REFORM OR REVOLUTION

Donald H. J. Hermann\*

POINTS OF REBELLION. By William O. Douglas. New York: Vintage Books, 1970. Pp. 97. \$1.95.

REBELLION AND REPRESSION. By Tom Hayden. Cleveland: Meridian Books, 1969. Pp. 186. \$2.65.

REVOLUTION FOR THE HELL OF IT. By Abbie Hoffman (alias Free). New York: The Dial Press, 1968. Pp. 231. \$2.25.

In a speech last year, President Nixon, diagnosed the social crises facing the nation and reaffirmed his declaration of faith in America and its future:<sup>1</sup>

We live in a deeply troubled and profoundly unsettled time. Drugs, crime, campus revolts, racial discord, draft resistance—on every hand we find old standards violated, old values discarded, old precepts ignored. A vocal minority of our young people are [*sic*] opting out of the process by which a civilization maintains its continuity: the passing on of values from one generation to the next. Old and young . . . shout across a chasm of misunderstanding—and the more loudly they shout the wider the chasm grows.

. . . .  
The values we cherish are sustained by a fabric of mutual self-restraint, woven of ordinary civil decency, respect for the rights of others, respect for the laws of the community, and respect for the democratic process of orderly change. The purpose of these restraints is not to protect an “establishment,” but to establish the protection of liberty; not to prevent change, but to ensure that change reflects the public will and respects the rights of all.

. . . .  
Now there are some who see America’s vast wealth and protest that this has made us materialistic. But we should not be apol-

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1. Address by Richard M. Nixon, Dedication of the Karl E. Mundt Library at General Beadle State College, June 3, 1969.

ogetic about our abundance. We should not fall into the easy trap of confusing the production of things with the worship of things. We produce, abundantly; but our values turn not on what we have, but on what we believe.

. . . . We believe in liberty, in decency, and the process of freedom. On these beliefs we rest our pride as a Nation. On these beliefs we rest our hope for the future, and by our fidelity to the process of freedom we can assure to ourselves and our posterity the blessings of freedom.

William O. Douglas, Tom Hayden and Abbie Hoffman have each offered an analysis of the current social and legal situation which to varying degrees rejects the faith in America held by President Nixon.

Justice Douglas, as the establishment critic, sees serious social injustices which if not remedied will lead to violent rebellion.<sup>2</sup> Hayden, however, views rebellion as inevitable: "We have to give up any illusions about 'peaceful' and 'legal' methods of change working in the long (and perhaps even the short) run. Repression cannot be avoided."<sup>3</sup> While both Douglas and Hayden view a series of social issues as providing the basis either for frustration or radicalization, Hoffman calls for: "Revolution for the hell of it? Why not? . . . One learns reality is a subjective experience. It exists in my head. I am the Revolution."<sup>4</sup> Hoffman rejects the formation of a list of grievances or a program of reform; instead he advocates a program of rebellious activity. He approvingly quotes Fidel Castro of Cuba as support for the proposition that the revolutionary is a man of action, not a man of reasoned discourse.<sup>5</sup> These three books present differing attitudes of the left toward perceived social injustice and the current social order: the reformist, the disillusioned, and the nihilist or anarchist.

2. W. DOUGLAS, *POINTS OF REBELLION* 88-89 (1970) [hereinafter cited as DOUGLAS].

3. T. HAYDEN, *REBELLION AND REPRESSION* 16 (1969) [hereinafter cited as HAYDEN].

4. A. HOFFMAN, *REVOLUTION FOR THE HELL OF IT* 9 (1968) [hereinafter cited as HOFFMAN].

5. Castro assesses the revolutionary man as follows:

There are those who believe that it is necessary for ideas to triumph among the greater part of the masses before initiating action, and there are others who understand that action is one of the most efficient instruments for bringing about the triumph of ideas among the masses. Whoever hesitates while waiting for ideas to triumph among the masses before initiating revolutionary action will never be a revolutionary. Humanity will, of course, change; human society will, of course, continue to develop—in spite of men and the errors of men. But that is not a revolutionary attitude.

Address by Fidel Castro Ruiz, Closing of the First Conference of the Latin American Organization of Solidarity (OLAS), August 10, 1967, (as quoted in HOFFMAN at 10).

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A student of law may well ask why he should concern himself with such popular tracts as these when there are ample scholarly treatments of the subject of violence and law,<sup>6</sup> reports of executive and legislative committees,<sup>7</sup> and a developing case law in both opinions and published transcripts.<sup>8</sup> The answer must be that books such as these are read by

6. Baldwin, *Methods of Social Control of Academic Activists Within the University Setting*, 14 ST. LOUIS UNIV. L.J. 429 (1970); Bay, *Political and Apolitical Students: Facts in Search of Theory*, 23 J. SOC. ISSUES Vol. III at 76 (1967); Brown, *Student Stress and The Institutional Environment*, 23 J. SOC. ISSUES no. 3, July 1967, at 92; Glazer, *Campus Rights and Responsibilities: A Role for Lawyers*, 39 THE AMERICAN SCHOLAR 445 (1970); Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 CALIF. L. REV. 40 (1966); Skolnick, *Student Protest*, 55 A.A.U.P. BUL. 309 (1969); Comment, *Campus Confrontation: Resolution by Injunction*, 6 COLUM. J.L. & SOC. PROB. 1 (1970); Comment, *Campus Confrontation: Resolution by Legislation*, 6 COLUM. J.L. & SOC. PROB. 30 (1970).

An excellent collection of essays surveying the area can be found in URBAN RIOTS, VIOLENCE AND SOCIAL CHANGE (R. Connery ed. 1969).

7. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). See also, REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1970). Task Force and Investigative reports to the Commission have been published in paperback form. See, e.g., THE HISTORY OF VIOLENCE IN AMERICA, (D. Graham and T. Guir ed. 1969); THE POLITICS OF PROTEST (J. Skolnick ed. 1969); and RIGHTS IN CONFLICT (D. Walker ed. 1968).

For Congressional reports, see generally *Hearings on Campus Unrest Before a Special Subcomm. of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. (1969); *Hearings on Riots, Civil and Criminal Disorders before a Permanent Subcomm. of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess., Pts. 16, 18, 19, 21-23 (1969).

8. See *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 505-06 (1969) where the Court held that the wearing of armbands by students to protest the war in Vietnam was closely akin to "pure speech," an activity for which the students could not be disciplined. The Court rejected the notion that first amendment rights may be limited by undifferentiated fear or apprehension of disturbance, confined to expressions of those sentiments approved, or restricted to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Id.* at 508-11.

In *Saunders v. Virginia Polytechnic Institute*, 417 F.2d 1127 (4th Cir. 1969) a previously registered student demonstrated at V.P.I. in connection with protest activities and was subsequently denied readmission. The court ordered that he be admitted. Although Saunders was warned both before and during the demonstration that his participation would violate school policy, the court ruled that his status was not different to any marked degree from that of the students whose rights of expression were respected. However, it limited its decision to demonstrations involving the exercise of free speech; it did not reach the question of demonstrators who had no past connection with the college. *Id.* at 1129-31.

In *U.S. v. Spock*, 416 F.2d 165 (1969) defendants were indicted under the Universal Military Training and Service Act § 12(a), 50 U.S.C. § 462(a) (1967), for conspiracy to aid and abet registrants resisting the draft. The tone of the opinion is reflected by the following findings:

The principle of *strictissimi juris* requires the acquittal of Spock. It is true that he was one of the drafters of the [Call to Resist Illegitimate Authority], but this does not evidence the necessary intent to adhere to its illegal aspects. Nor does his admission to a government agent that he was willing to do "anything" asked to further opposition to the war. Specific intent is not established by such a generalization. Whatever the reason the fact is that his speech was limited to condemnation of the war and the draft, and lacked any words or content of counselling. The jury could

persons engaged in protest activity and provide the theoretical justifications for their actions. Moreover, these authors reflect a sensitive understanding of militant protest and represent segments of the left who are actually engaged in programs of social protest, hence providing a primary source of the views of those so engaged.

William O. Douglas, himself a member of the establishment, is and has been a severe critic of that establishment and a strong advocate of an expansive concept of civil liberties, both in his court opinions and in his less formal writings.<sup>9</sup> Tom Hayden, as founder of the Students for a Democratic Society and recently convicted of violating the 1968 "Anti-Riot Act,"<sup>10</sup> is an organizer and articulate spokesman for the "New Left."<sup>11</sup> Abbie Hoffman, a co-defendant of Hayden's,

not find proscribed advocacy from the mere fact, which he freely admitted, that he hoped the frequent stating of his views might give young men "courage to take active steps in draft resistance." This is a natural consequence of vigorous speech.

*Id.* at 178-79.

See also, *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

For an edited version of the transcript of *United States v. Dellinger*, No. 69 Crim. 180 (S.D. Ill., Sept. 26, 1969) (the CHICAGO CONSPIRACY TRIAL), see *THE TALES OF HOFFMAN* (M. Levine ed. 1970). See also *CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES AND RESPONSES OF THE CHICAGO CONSPIRACY 10* (anon. ed. 1970).

9. See, e.g., W. DOUGLAS, *THE RIGHT OF THE PEOPLE* (1958). See also Justice Douglas' concurring opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), reversing a conviction of a Ku Klux Klan leader under a state criminal syndicalism statute. Douglas argues there, as he does in *POINTS OF REBELLION*, against the clear and present danger test: "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace." 395 U.S. at 452. See generally Douglas' opinion for the Court in *Elfbrandt v. Russell*, 384 U.S. 11 (1966), declaring an Arizona loyalty oath unconstitutional.

10. *United States v. Dellinger*, No. 69 Crim. 180 (S.D. Ill. Sept. 26, 1969).

11. Hayden was the principal author of the 1962 S.D.S. manifesto known as "The Port Huron Statement," a general social critique denouncing both pathological anti-Communism and Communism itself. It is more reflective of the view set forth in *POINTS OF REBELLION* than is Hayden's work reviewed herein. The "Port Huron Statement" begins:

When we were kids the United States was the wealthiest and strongest country in the world; . . . .

. . . .  
As we grew however, our comfort was penetrated by events too troubling to dismiss. First, the permeating and victimizing fact of human degradation, symbolized by the Southern struggle against racial bigotry, compelled most of us from silence to activism. Second, the enclosing fact of the Cold War, symbolized by the presence of the Bomb, brought awareness that we ourselves, and our friends, and millions of abstract "others" we knew more directly because of our common peril, might die at anytime.

*THE NEW LEFT: A DOCUMENTARY HISTORY* 164 (M. Teodori ed. 1967).

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is a founder of the Young International Party (YIP), and has become a media symbol of "hippie" turned political activist.<sup>12</sup> The writing form and style of each author is indicative of the political and philosophical style of each. Douglas writes in a manner that permits easy generalizations and provides a format for wide ranging criticism. The publication of this mildly provocative volume has resulted in a hostile reaction by certain members of Congress as evidenced by threatened impeachment proceedings.<sup>13</sup> Hayden's book consists of transcripts of his testimony before the National Commission on the Causes and Prevention of Violence and the House Committee on Un-American Activities. These hearings offered the opportunity to present formal statements which derive an air of legitimacy from the very nature of the forum in which they are presented, and provided him the further opportunity of practicing his rhetoric in the form of a dialectic with government officials.<sup>14</sup> Hoffman offers a montage of prose, coherent and incoherent; poetry; pictures; newspaper clippings and reproductions of other published materials. Hoffman's is a deceptive book: on the surface it is simply an exercise illustrating the theories of Marshall McLuhan, by involving the reader in an attempt to make sense out of the book, and then revealing that there is no sense to it other than the involvement of the reader in the futile exercise.<sup>15</sup> However, Hoffman

12. It was reported, for example, that: "Yippiel is the first attempt to give social direction to the drug movement. It is a search for total freedom and fulfillment through a reformation of society . . ." Buckley, *The Battle of Chicago: From the Yippies' Side*, N.Y. Times, Sept. 15, 1968, § 6 (Magazine), at 30.

13. Typical was the following denunciation by the House Minority leader:  
When I first encountered the facts of Mr. Douglas' involvement with . . . and espousal of hippie-yippie style revolution, I was inclined to dismiss his fractious behavior as the first sign of senility. But I believe I underestimate the Justice.  
116 Cong. Rec. H 3116 (daily ed. April 15, 1970) (Remarks of Representative Ford).  
A typical statement in defense of Mr. Justice Douglas appears at 116 Cong. Rec. E 5548 (daily ed. June 15, 1970) (Remarks of Hon. Edward Koch).

14. Hayden considers these requests to testify as an opportunity and a challenge: "The problem, then, was to use their own forum to ridicule their authority, defy their stereotypes, and present a meaningful case to the American people." HAYDEN at 12.

15. Hoffman rejects the traditional approach aimed at presenting the reader with a passive experience. He attempts to fulfill McLuhan's prescription that his book might become a medium through which "our human senses, of which all media are extensions, are also fixed charges on our personal energies, and . . . configure the awareness and experience of each one of us . . ." M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 21 (1964).

is not nearly so simple.<sup>16</sup> The first page of text begins with an apparent nonsensical juxtaposition of citations:<sup>17</sup>

"In a Revolution one wins or dies"

—Mayor Ernesto "Che" Guevara

"Dash: A revolution in cleansing powder.

From a TV commercial"

With this simple opening Hoffman pays tribute to Herbert Marcuse, who has provided the philosophical basis for many of the current political activists and the Marcusean notion of "cooptation."<sup>18</sup> In order to maximize the benefit from an examination of the texts under review, it would be well to keep in mind the background of each author and the form each has chosen to convey his message.

Justice Douglas' premise is that while violence has no constitutional sanction, "[w]here grievances pile high and most of the elected spokesmen represent the Establishment, violence may be the only effective response."<sup>19</sup> His hope is that through law society can be restructured

16. Hoffman, like Hayden, began his involvement with the movement in liberal protest reform as a civil rights worker. He describes himself as a "nice Jewish boy from The Bronx" who attended Brandeis and Berkeley, then worked in Mississippi for S.N.C.C. before dropping into hippiedom. *TIME*, December 20, 1968, at 88.

Hoffman joined other ex-civil rights workers in the founding of YIP in January of 1968. Buckley, *The Battle of Chicago: From the Yippies' Side*, N.Y. Times, September 15, 1968, § 6 (Magazine), at 31.

17. HOFFMAN at 9.

18. H. MARCUSE, *ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1968). Marcuse explains the notion which Hoffman so aptly illustrates:

Today's novel feature is the flattening out of the antagonism between culture and social reality through the obliteration of the oppositional, alien, and transcendent elements in the higher culture by virtue of which it constituted *another dimension* of reality. This liquidation of *two-dimensional* culture takes place not through the denial and rejection of the "cultural values," but through their wholesale incorporation into the established order, through their reproduction and display on a massive scale.

• • •  
As the great words of freedom and fulfillment are pronounced by campaigning leaders and politicians, on the screens and radios and stages, they turn into meaningless sounds which obtain meaning only in the context of propaganda, business, discipline, and relaxation. This assimilation of the ideal with reality testifies to the extent to which the ideal has been surpassed. It is brought down from the sublimated realm of the soul or the spirit or the inner man, and translated into operational terms and problems. Here are the progressive elements of mass culture. The perversion is indicative of the fact that advanced industrial society is confronted with the possibility of a materialization of ideals. The capabilities of this society are progressively reducing the sublimated realm in which the condition of man was represented, idealized, and indicted. Higher culture becomes part of the material culture.

*Id.* at 57-58.

19. DOUGLAS at 88-89.

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so that there is a possibility of redressing grievances; and that through such positive reform, the "sense of futility" will be alleviated rather than developing into frustration which results in violence.<sup>20</sup>

Douglas begins by faulting the law for not living up to its promise of liberty. Local laws directed at "breach of the peace" and "disorderly conduct" are considered as attempts to silence dissent.<sup>21</sup> Furthermore, the Supreme Court itself is criticized for upholding statutes which punish persons "for being active advocates of an ideology, for 'conspiring' with others to conduct classes or seminars on the Marxist creed" and for freezing dissent through such doctrines as "clear and present danger" and the concept of "no 'socially redeeming value.'"<sup>22</sup> Douglas views this erosion of the first amendment sanctuary as an attempt to stifle the cathartic value of protest.<sup>23</sup> While conceding that violence itself is not protected by law, he argues that "American protesters need not be submissive. A speaker who resists arrest is acting as a free man."<sup>24</sup> Much of Douglas' text reflects his vigorous dissent in *Adderley v. Florida*<sup>25</sup> where he wrote:<sup>26</sup>

Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

•••••  
Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach of the peace statute, a vagrancy statute will be put to the

20. *Id.* at 56-57.

21. *Id.* at 4.

22. *Id.* at 11-12. See also cases cited at note 9, *supra*.

23. DOUGLAS at 3.

24. *Id.* at 6.

25. 385 U.S. 39 (1966). In *Adderley*, students protesting against the arrest of other students, who had been demonstrating at a county jail against segregation, were convicted for violating a Florida trespass statute. Justice Black, writing for the majority of the Court, stated: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 U.S. at 48.

26. *Id.* at 50-51, 56.



same end. . . . Yet by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us.

In *Points of Rebellion*, Douglas notes with sympathy that both emotional commitment and police provocation, while not providing a legal justification, at least provide some excuse or explanation of protest violence.<sup>27</sup>

Much of his text is devoted to noting those grievances which give rise to frustration which is expressed by violence. The litany of societal afflictions includes: United States militarism,<sup>28</sup> racial discrimination and unremedied poverty,<sup>29</sup> despoiling the environment,<sup>30</sup> and political atrophy as a consequence of a bureaucracy without commitment or plans for social reform.<sup>31</sup> For Douglas the solution is a vast restructuring of society.<sup>32</sup>

Douglas himself offers very little in the way of any general plan for this societal restructuring. Rather, he puts great emphasis on the reaffirmation and protection of individual liberties and places a tremendous faith in the "law" as a means to achieve this end. The spectre Douglas dreads is "the diminished man" for he fears that "[m]an is about to be an automaton."<sup>33</sup> Douglas is comforted by the very fact of the current protest activity.<sup>34</sup>

The dissent we witness is a reaffirmation of faith in man; it is protest against living under rules and prejudices and attitudes that produce the extremes of wealth and poverty and that make us dedicated to the destruction of people through arms, bombs, and gases, and that prepare us to think alike and be submissive objects for the regime of the computer. . . .

The dissent we witness is a protest against the belittling of man, against his debasement, against a society that makes "lawful" the exploitation of humans.

For Douglas, the alternative to a society which reflects this "faith in

27. DOUGLAS at 5.

28. *Id.* at 37-43.

29. *Id.* at 42-49.

30. *Id.* at 49-52.

31. *Id.* at 53-55.

32. *Id.* at 56-63.

33. *Id.* at 32.

34. *Id.* at 32-33.

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man" is a "police state."<sup>35</sup> A national paranoia which has produced "a black silence of fear" is a real and actual threat in his view.<sup>36</sup> Its presence is felt not merely through security hearings and conspiracy trials,<sup>37</sup> but through a national system of surveillance characterized by "growing dossiers" and a computer data bank.<sup>38</sup> Official surveillance is complemented by private activity such as psychological testing.<sup>39</sup> These "invasions of privacy" produce "a creeping conformity that makes us timid in our thinking at a time when the problems which envelop us demand bold and adventuresome attitudes."<sup>40</sup>

In addition to protecting individual liberties, Douglas advocates using law to accomplish this social restructuring by reallocating resources from military spending to public employment;<sup>41</sup> by recognizing and protecting the new property;<sup>42</sup> by watching over administrative agencies;<sup>43</sup> and by recognizing that individual citizens have standing to protect the public's interest in economic and environmental activities.<sup>44</sup>

Douglas concludes by warning that revolution will come if legal reforms are not used to restructure society.<sup>45</sup> The aim of the dissidents "is to regain the freedom of choice that their ancestors lost, to be free, to be masters of their destiny."<sup>46</sup> This freedom is defined in terms of a reordered society: "The search of the youth today is for ways and means to make the machine—and the vast bureaucracy of the corporation state and of government that runs that machine—the servant of man."<sup>47</sup> Failure to satisfy this craving for a new order can only mean violence, repression and revolution.

35. *Id.* at 92.

36. *Id.* at 6.

37. *Id.* at 17-20. *See also* Hayden's testimony before the House Un-American Activities Committee. HAYDEN at 53-186.

38. DOUGLAS at 20-21, 28.

39. *Id.* at 24-28.

40. *Id.* at 29.

41. *Id.* at 64-70.

42. Douglas argues:

Property has assumed a different form. To the average man it is no longer cows, horses, chickens, and a plot of land. It is government largesse—farm subsidies, social security, veterans' benefits, unemployment insurance, old-age pensions, medicare, and the like.

*Id.* at 78.

*See generally*, REICH, *The New Property*, 73 YALE L.J. 733 (1964).

43. DOUGLAS at 64, 78-80.

44. *Id.* at 82-88.

45. *Id.* at 95.

46. *Id.* at 96.

47. *Id.*

Tom Hayden begins with the assumption that reform is impossible, that rebellion is inevitable, and that with it will come repression: "(Robert) Kennedy's death convinced young people that America as a whole society is irrational and off its bearings. McCarthy's defeat convinced young people that the political machinery is corrupt and insensitive, unrepresentative, and probably impossible to reform."<sup>48</sup> One should not conclude that Hayden's observations are based merely on his experience with the current political scene. His inveterate pessimism is a pessimism about "law" itself, "law" which Douglas views as the mechanism through which social restructuring should occur. Hayden argues: "Law serves power."<sup>49</sup> Nevertheless, his list of basic grievances basically conforms to those identified by Douglas: the war in Vietnam,<sup>50</sup> racism,<sup>51</sup> and an unpoliced bureaucracy.<sup>52</sup> Behind these grievances, however, Hayden finds a "power structure [that] is bankrupt;" having "no solutions to the pressing economic needs of the people. . . ."<sup>53</sup> Rather than reform through law, the establishment threatens repression through law:<sup>54</sup>

So the rulers these days acknowledge in public that "change" and "reform" are needed, but their excuse is that "law and order" must be secured first. The chief obstacle to "change," according to Establishment propaganda, is the very movement which demanded the change in the first place. Those who originally demanded the changes are being shot down, jailed, or kicked out of school.

While Douglas blames the legal system for permitting an erosion of fundamental freedoms, Hayden indicts the legal system itself for being an agent of repression:<sup>55</sup>

48. HAYDEN at 33. Hayden traces the development of the new left to the beginnings of the past decade. "The New Left in this country has been very reluctant to become revolutionary, . . . [T]he Peace Corps represented an alternative symbolically . . . [but] the Peace Corps became wedded to American foreign policy as a whole." The same pessimistic analysis is made of the experience of civil rights work in the South and of the inability of American society to overcome a national racism. *Id.* at 23-25.

49. *Id.* at 24.

50. *Id.* at 21-22.

51. *Id.* at 22.

52. *Id.* at 24-25.

53. *Id.* at 14.

54. *Id.*

55. *Id.* at 15.

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We need to expand our struggle to include a total attack on the courts. The court system is just another part of this rigged apparatus that is passed off as "open and impartial." The system is most threadbare within the military and municipal courts, but can be exposed at all levels. There is no reason for us to become submissive at the courtroom door.

Accordingly, Hayden first posits "as a matter of conscience, the right to resist and take any penalty that he receives as a result."<sup>56</sup> But he goes beyond this traditional formulation of civil disobedience,<sup>57</sup> proposing that one has a right to resist illegitimate authority.<sup>58</sup> This second proposition constitutes his major premise; the minor premise is that the establishment authorities are in fact acting illegally and, hence, are illegitimate.<sup>59</sup> Finally, Hayden concludes that the activists are justified in refusing to subject themselves to penalties imposed by the constituted legal order: "We no longer believed and we do not believe that we should be punished by immoral, illegal, unconstitutionally constituted authorities for doing what is right."<sup>60</sup> Moreover, he rejects the belief that much of the protest activity which is deemed to violate "trespass laws" and "disorderly conduct statutes" is in fact illegal: "[In the Columbia University disturbances of 1968] students decided finally to occupy buildings. That action was termed illegal, but that term assumed the legitimacy of the authoritarian university power structure which allowed no other method of successful protest."<sup>61</sup>

56. *Id.* at 39.

57. See Hermann, Book Review, 57 CALIF. L. REV. 1281 (1969).

58. Hayden argues:

If you decide that someone's authority now must be put into question because of the blind and insane way that he has used his authority, then you don't want to grant him the right to punish you for doing what you consider to be far more legitimate and moral than what he has done.

HAYDEN at 43.

59. The illegality of "blocking doors" is eradicated, according to Hayden's argument, by the illegality of government authorities:

To say that we are acting illegally is to say that the manufacture of napalm is legal, that the war in Vietnam is legal, that the system is operating according to law . . .

We couldn't accept that. That was the beginning of a new stage into which the movement passed—to a concept of resistance against an inhuman and unresponsive machine.

*Id.* at 31.

60. *Id.*

61. *Id.* at 32. Hayden goes farther than merely arguing for the protection of action symbolic of speech or for the illegitimacy of trespass laws and disorderly conduct statutes. He argues for the legitimacy of criminal conduct which is a response to exploitation:

People are arrested, beaten, and even shot down for supposedly stealing from stores which had illegally robbed them with the permission of the state for years. The law

Hayden would hold the protestors exonerated of any criminal violations either because there is no legitimate authority to determine criminal sanctions or because the acts themselves were not illegal.

While arguing that the protest movement is legitimate Hayden acknowledges the forceful response of the state through its legal agencies: "When the victims rebel, greater force is employed to restore the status quo."<sup>62</sup> To him, this response will take several forms: police action through "shooting and gassing;" legal repression through court litigation; and legislative and administrative attack through hearings and the enactment of repressive legislation.<sup>63</sup> Hayden's testimony before the House Committee on Un-American Activities (HUAC)<sup>64</sup> is apparently offered as an example of the repression by the establishment which he views as inevitable. HUAC, rather than trying to understand the protest movement, attempts to find a communist conspiracy:<sup>65</sup> by discovering Hayden's association with both foreign and domestic communist party leaders;<sup>66</sup> by attempting to show violations of State Department travel restrictions;<sup>67</sup> and finally by interpreting

serves power.

*Id.* at 25.

62. *Id.*

63. *Id.* at 11.

64. This committee is now the House Internal Security Committee. The official transcript of this testimony is to be found in *Hearings on Subversive Involvement in Disruption of 1968 Democratic Party National Convention Before the House Committee on Un-American Activities*, 90th Cong., 2d Sess. (1968). The exhibits referred to but not reprinted in REBELLION AND REPRESSION can be found in the transcript of the hearings.

65. HAYDEN at 60, 120-30.

66. *Id.* at 61-66, 82-85, 117-19.

67. *Id.* at 144-48. The following represents one of the more devious lines of questioning addressed to Mr. Hayden by the Committee:

Conley: "[D]id you make a trip to Havana, Cuba?"

Hayden: "Yes."

Conley: "To take part in the International Cultural Congress, which was a gathering of communists and other revolutionaries whose aim is to destroy the non-communist governments of the world?"

Hayden: "I don't remember those aims being enunciated in quite that way. But then there are no more people like yourself in Cuba. It was essentially a meeting of intellectuals who are not strong enough to pick up a gun and were (sic) film makers, painters."

Conley: "Do I have the title right, the International Cultural Congress?"

Hayden: "It was a cultural congress. I don't know if it was called the International Cultural Congress."

Watson: "Mr. Counsel, the witness is not implying that there are not some intellectuals who are fighting for this country? You are not implying that are you?"

Hayden: "Oh, no."

Watson: "You said earlier that they were not strong enough to lift a gun."

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Hayden's writings as an attempt to initiate a conspiracy to commit espionage.<sup>68</sup> After two days of testimony before the Committee, through which he patiently offered his analysis of "the Movement" and described his own protest activities, in the face of the Committee's method of grilling through irrelevant questioning, Hayden abdicates out of frustration by exclaiming at one point, "Oh, forget it."<sup>69</sup> At another point, when asked to respond to the rhetorical question: "And I would ask you, sir, don't you think that the young people who follow you in these various movements should take a second look at you, before they place their lives and their responsibilities in the hands of you?", Hayden merely responds: "Shit."<sup>70</sup> This last response provoked a reaction from one committee member: "I happen to be one who will not tolerate any such language as that. We have ladies in this room, and I shall not tolerate it, and if it is necessary for me to ask the police to arrest a man for such disorderly language as that, I shall do so. . . ."<sup>71</sup> Hayden answered in a manner which poignantly reflects his notion of "illegitimate authority": "Well, will you tolerate a question of the indecent kind that was just made by your own counsel?"<sup>72</sup> Hayden concluded his testimony before HUAC by summarizing his theory of "illegitimate authority":<sup>73</sup>

You have taught them [militant protestors] very well to have no respect for your authority, by what has happened in the City of Chicago [at the 1968 Democratic Convention]. And that is a victory in the sense that committees like yourselves are now through. You exist only formally; you exist officially, but you have lost all authority, and when a group of people who have power lose their authority, then they are lost. You have lost, period.

Yet he acknowledges the power retained by "illegitimate authority"

Hayden: "I was replying to the suggestion that this was a meeting of armed revolutionaries which was implied although not exactly stated by the question. I wanted to indicate that it was a meeting of intellectuals."

Watson: "Do you consider yourself an intellectual?"

Hayden: "I never thought about it."

*Id.* at 142-43.

68. *Id.* at 74, 84-110, 152-58.

69. *Id.* at 158.

70. *Id.* at 176.

71. *Id.*

72. *Id.*

73. *Id.* at 178.

while calling for a reliance "on the right to self-defense and revolution as protected by the Bill of Rights and Declaration of Independence."<sup>74</sup> The "confrontation" cannot be avoided.<sup>75</sup>

The power structure will become more and more violent. Even if we beat them in their own rigged courts, they will create "courts" of their own [*see* HUAC investigation] to take care of us. We have to be able to survive, to fight back against whatever level of terror or coercion is applied. The coming of repression will speed up time, making a revolutionary situation—especially between the power structure and the black colony—more likely. If we look at the last ten years, we see that history is moving faster and calling us to become a new generation of American revolutionaries.

However, when confronted with a Yippie flier advocating the destruction of old institutions as the only way to achieve true freedom,<sup>76</sup> Hayden did not respond with a plea for social reconstruction or reformation; nor did he argue that a new and peaceful society will rise as a phoenix from the burned ashes of the old. He replied limply and insipidly: "I think that beautiful sentiments are expressed in that statement, and I wish that you could understand them. . . ."<sup>77</sup>

What Hayden accepts flaccidly as a "beautiful" statement, Abbie Hoffman greets with exuberance. Hoffman begins *Revolution for the Hell of It* with his "song of joy:"<sup>78</sup>

Revolution for the hell of it? Why not? It's all a bunch of phony words anyway. Once one has experienced LSD, existential revolution, fought the intellectual game-playing of the individual in society, of one's identity, one realizes that action is the only reality; not only reality but morality as well. One learns reality is a subjective experience. It exists in my head. I am the Revolution.

74. *Id.* at 15.

75. *Id.* at 16.

76. The flier provided in part:

[Y]ou know life is a dream, and that all our institutions are manmade illusions, effective because you take the dream of reality. Break down the family, church, nature, city, economy, turn life into an art form . . . . What is needed is a generation of people who are freaky, crazy, irrational. . . . Burn your houses and you will be free.

*Id.* at 186.

77. *Id.*

78. HOFFMAN at 9.

While Hayden urges a "politics of confrontation," Hoffman calls for a "politics of ecstasy."<sup>79</sup> The most important tactical consequence of Hoffman's departure from the established radical left is that he rejects dialogue, debate and rational discourse: "Don't rely on words. Words are the absolute in horseshit. Rely on doing—go all the way every time."<sup>80</sup> Hoffman correctly observes the universal boredom with the new left rhetoric:<sup>81</sup>

The point is, nobody listens to politically relevant statements. In Chicago we'll have a huge free music festival. Everyone already knows our feelings on the issues because we are there. It will have a tremendous impact if we can also project the image that we are having all the fun too.

Hoffman recasts new left political theory in almost existentialist terms: "You believe in participatory democracy (especially when talking to a New Left audience), only you call it 'everyone doing his thing.'"<sup>82</sup>

Hoffman also parts with Black militancy which he views as self destructive: "Ours is a circle: respect, love, trust, delicate. A black meeting image: sweat, yelling, stomping, 'Burn, baby, burn.'"<sup>83</sup> Hoffman retains that eschatological vision of the civil rights movement, "because all men are brothers."<sup>84</sup>

Just as he accepts the revolutionary stance of the new left but rejects its political program, accepts the dream of equality but rejects black militancy, Hoffman accepts the liberal value of individual liberty but rejects the traditional balancing of rights and liberties which has become the hallmark of our system of civil liberties. Not by argumentation, but by illustration, Hoffman makes clear his rejection of the notion of restraint.<sup>85</sup>

79. *Id.* at 59. Hoffman puts himself in opposition to Hayden:

Back to the Conference: Hayden asked, "How do you make it stick, how do you prevent cooptation?" I thought he said *copulation*. I answered that you build a better system. Assume America is dead, dead for those kids who are flocking to the lower East Side and Haight-Asbury, [*sic*] and give them a new, positive, authentic frame of reference.

*Id.* at 36-37.

80. *Id.* at 29.

81. *Id.* at 62.

82. *Id.* at 28.

83. *Id.* at 37.

84. See, Bach-Glazer, *Because All Men Are Brothers*, from *See What Tomorrow Brings* (Warner Bros. Records 1965) (as performed by Peter, Paul & Mary).

85. HOFFMAN at 15.



## AN EXPLANATION

What does free speech mean to you?

To me it is an image like all things:

ME: Yes, I believe in total free speech.

INTERVIEWER: Well, surely you don't believe in the right to cry "fire" in a crowded theatre?

ME: Fire!

Reflecting his confidence in drugs as the means to total personal realization, Hoffman asks: "Is it legal to cry *Higher* in a crowded theater?"<sup>86</sup> Yet his rejection of traditional civil libertarians is done without passion; he considers them merely irrelevant.

Law, too, is viewed as irrelevant by Hoffman. While he professes no respect for law,<sup>87</sup> he acknowledges force in the hands of the police: "Cops are our enemy."<sup>88</sup> His rejection of law is based on a perception that its principal purpose is to protect property. The police are viewed as the agents of the legal system, and "a cop's principal role is to protect private property. Our goal is the abolition of property."<sup>89</sup> This conclusion is derived from a fundamental premise: "PROPERTY IS THEFT. PROPERTY IS ROBBERY."<sup>90</sup>

While law is irrelevant and "cops" are repressive, lawyers are mere instruments to be used when one is faced with incarceration. In rejecting both the traditional notions of civil disobedience ("I don't like the concept of a movement built on sacrifice . . . responsibility . . .")<sup>91</sup> and the notion of confrontation politics ("The first duty of a revolutionist is not to get caught"),<sup>92</sup> Hoffman, nevertheless "uses" lawyers whenever arrested. Yet he holds them in contempt: "One of us is in the can, is there a fuckin' lawyer here? . . . They grab some fat cat who identifies himself as a lawyer and go off to the local pokey to bail

86. *Id.* at 44.

87. "There must be something wrong in the way we brought you up—I thought (or at least *we tried*) to bring you up to *respect law and order, other people's property, etc.*" *Id.* at 4-5.

88. *Id.* at 68. Hoffman repeatedly describes his perception of police brutality; at one point, he recounts an experience of his own: "In the back room three cops are working over one demonstrator who has his arms handcuffed behind his back. They beat him a good ten minutes." *Id.* at 49.

89. *Id.* at 69.

90. *Id.* at 31.

91. *Id.* at 61.

92. *Id.* at 154.

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out a fellow Digger."<sup>93</sup> This same contempt is shown for the courts: "It's the usual Northern courtroom scene: Ninety-year-old judge hunched over the bench; lawyer's scuttling around . . . the pews are filled with the usual number of Puerto Ricans, black people, and a scattering of longhairs."<sup>94</sup> However, it is not merely the personnel of the legal system that leads Hoffman to reject the legal order. He rejects the law, as it is, as a sham—the same laws indicted by Douglas for their freezing of first amendment liberties are denounced by Hoffman as means to persecute the "new minority." Prosecutions for "idleness" and "vagrancy" are viewed as repressive.<sup>95</sup> The legal system itself is described as moribund in face of "legal repression." "Supreme Court decisions? Civil rights? The Supreme Court is a long way from the Ninth Precinct and the Ninth Precinct is a longer way still from the cop on the beat."<sup>96</sup>

Although he is pessimistic about the present social order, Hoffman places great confidence in the social order of the future. Not through ideology, but through involvement, will an "alternative society" be organized that will allow people to do what they "can do" and "want to do."<sup>97</sup> Technology will satisfy material needs, and a "revolution in consciousness" will permit full personal realization.<sup>98</sup> Cooperation will replace competition as institutions are replaced by unfettered individualism.<sup>99</sup> The "participation mystique" will insure social harmony,<sup>100</sup> as man witnesses the "destruction of property." "The free thing (another clue) is the most revolutionary thing in America today."<sup>101</sup> Although Hoffman gives witness to the absurdist position: "accept contradiction,"<sup>102</sup> "[t]he truth lies through insanity,"<sup>103</sup> he is serious

93. *Id.* at 34. *TIME* described the Diggers, a group with which Hoffman was associated in New York, as "those altruistic dispensers of free food and medicine" to hippies living on New York's East Side. *TIME*, December 20, 1968 at 88.

94. *HOFFMAN* at 49.

95. *Id.* at 71.

96. *Id.* at 72.

97. *Id.* at 135.

98. *Id.* at 86.

99. *Id.* at 57.

100. *Id.* at 103.

101. *Id.* at 28. A large section of Hoffman's book is devoted to this notion of "the free thing." Hoffman quotes the entire text of G. Metesky's pamphlet *Free New York*. *Id.* at 219-28.

102. *HOFFMAN* at 31.

103. *Id.* at 39. One of the more compelling statements of Hoffman as the "absurd"

about his non-ideological revolution. Hoffman describes himself as "total and committed"<sup>104</sup> to the "alternative society" in which each person will play his own "role."<sup>105</sup> While the nature of the "alternative society" is undefined, and must remain so according to Hoffman's philosophy, he offers some hint of its nature: "I'm interested in just living with a few friends and building a community."<sup>106</sup> Hoffman confidently concludes that his movement will be successful: "we will win the future"<sup>107</sup>; and with fervor affirms his faith in that future: "We will learn how to govern ourselves."<sup>108</sup>

These three books present a sample of the spectrum of dissent and protest from liberal reform to radical nihilism or anarchism, and allow the reader to familiarize himself with such political and legal theories of the new left as "social restructuring," "participatory democracy," and "illegitimate authority."<sup>109</sup> But the significance of these books to lawyers must lie in the questions and challenges they pose to the legal system: (1) can the law correct those problems which have given rise to social discontent; (2) how should the law deal with those engaged in provocative protest activity.

Can society through legal reform meet the demands for change and accommodate the protestors? Vice President Agnew thinks not and dismisses any attempt at accommodation:<sup>110</sup>

man is a description of a typical protest demonstration: "We come prepared to give our lives and debate the morality of parking on a crosswalk." *Id.* at 46.

104. *Id.* at 27.

105. *Id.* at 135.

106. *Id.* at 64.

107. *Id.* at 70.

108. *Id.* at 69.

109. See Lusky and Lusky, *Columbia 1968: The Wound Unhealed*, 84 *POLITICAL SCIENCE Q.* 169 (1969). The authors provide a compelling criticism of the notion of "illegitimate authority":

There are some, including even a few law professors, who pay lip service to the proposition that existing rules ought to be enforced without hesitation or apology, but who also insist that the University loses the right to enforce its rules—that the rules lack "legitimacy," so that there is no obligation to obey them—if it has been callously unresponsive to reasoned remonstrance. Thus, in their view, the duty to comply with the rules is a conditional one—conditional on the University's reasonableness in the making of the rules. This is a considerable extension of the social contract doctrine of conditional promises.

*Id.* at 282. The Lusky's go on to describe the limited use of this notion of feudal law (the right of defiance: *diffinitio*) and note the hesitancy of feudal barons to invoke it: "It is a suitable prescription for cataclysmic revolution, but dangerously strong medicine if the objective is no more than reform." *Id.* at 284.

See also McWilliams, *On Violence and Legitimacy*, 79 *YALE L.J.* 623 (1970).

110. Interview with Spiro T. Agnew, Vice-President of the United States, November 16, 1969. (Broadcast on CBS, July 7, 1970).

You can't bring two hundred million people together. Let's stop talking in technicalities, and look at the President's figure of speech, [it] was a plea for national unity to bring the responsible elements of our society together. But let's never underlook the fact that there are irresponsible elements of our society and instead of attempting to dignify and condone what they are doing, let's polarize—let's get rid of these undesirable people by recognizing that they cannot participate in our legitimate process of government unless they play by the rules.

Even if reform and accomodation are attempted will they come with sufficient speed and magnitude to satisfy the disaffected? Perhaps reform is a sufficient response to the "politics of confrontation"; but it may not be sufficient to deal with "the politics of ectasy," which may be no more than a plea for anarchy.

The legal order is still confronted with the question of how to deal with "illegal" protest activity. The Justice Department's prosecutions under the 1968 "anti-riot law,"<sup>111</sup> first in Chicago,<sup>112</sup> and now in Seattle,<sup>113</sup> have posed problems for the courts which have resulted in great controversy over their ability to effectively deal with political conspiracy prosecutions.<sup>114</sup> However, one of the most lucid and compelling judicial treatments of the question of revolutionary protest was presented by Judge Frankel in *Grossner v. Trustees of Columbia University*.<sup>115</sup> Judge Frankel was faced with the defense of "illegiti-

111. 18 U.S.C. § 2101 (Supp. V, 1968).

112. *United States v. Dellinger*, No. 69 Crim. 180 (S.D. Ill. Sept. 26, 1969).

113. *United States v. Marshall*, No. 51942 (W.D. Wash., filed April 16, 1970).

114. See MacDonald, FOREWORD TO THE TALES OF HOFFMAN at xi-xxiv (M. Levine ed. 1970). See also Epstein, *The Trial of Bobby Seale*, TRIALS OF RESISTANCE, 189-246 (1970); Hayden, *The Trial*, RAMPARTS, July, 1970 at 10-62.

115. 287 F. Supp. 535 (S.D.N.Y. 1968). This was an action brought by students involved in the 1968 disturbances at Columbia asking for an injunction against a school disciplinary proceeding, state criminal proceedings, further police action on campus, and, finally, asking for a court order directing "a restructuring of the University under a program to be submitted to this Court for its approval." 287 F. Supp. at 539. In a remarkable opinion dismissing all of the students' petitions, one is presented with a recounting of the nature of the university disorders and the response by university and state authorities. Judge Frankel was presented a brief which urged the legitimacy of seizures of buildings and imprisonment of deans as

consistent with the American tradition of democratic and legal confrontation . . . protected by the First Amendment . . . [and] absolutely necessary to breathe life into the First Amendment principle that government institutions reflect the will of people and that this interest must prevail under any balancing test against the inconvenience to defendant Columbia University . . .

*Id.* at 545. The court, relying on statements in United States Supreme Court opinions, acknowledged that "debate on public issues should be uninhibited, robust, and wide open," but observed that the Supreme Court

mate authority” of the university authorities in an action involving the appropriateness of university disciplinary proceedings.<sup>116</sup>

[The plaintiffs] proceed to argue that the rhetoric and the tactics of the American Revolution are the guides by which judges are to construe the First Amendment. The “rule of law,” they explain, must not be overrated: “Had the Americans agreed that the rule of law, however despotic, must always prevail; . . . had the Americans not focused on fundamental principles this country might still be a colony today.

Frankel dismisses this argument as unacceptable to a court of law: “It is surely non-sense of the most literal kind to argue that a court of law should subordinate the ‘rule of law’ in favor of more ‘fundamental principles’ of revolutionary action designed forcibly to oust governments, courts, and all.”<sup>117</sup> Nevertheless, Frankel’s refusal to give judicial recognition to the “revolutionary” legal (or non-legal) theories of the protestors did not necessarily mean that he was unsympathetic to their position. A few months later, in a speech before the New York County Lawyers Association, he commented on his ruling in *Grossner*.<sup>118</sup> He said:<sup>119</sup>

I had not meant to hold that they were wrong, and their adversaries were right, in all possible respects. I had insisted with some vigor that courts of law are not entitled to assert revolutionary powers superior to the rule of law. I had not meant to pretend that rule of law is the final solution for all aspects of the human predicament.

Frankel then pleaded for social analysis of the cause of protest,<sup>120</sup> and called for reform in the face of American society’s “highly developed talent for thinking the unthinkable and tolerating the intolerable

has also made clear, however, the gross error of believing that every kind of conduct (however non-verbal and physically destructive or obstructive) must be treated simply as protected “speech” because those engaged in it intend to express some view or position.

*Id.* at 544.

116. *Id.* at 545.

117. *Id.*

118. Frankel, *Remarks on Law and Revolution*, 160 N.Y.L.J. No. 109 at 4 (1968) and 160 N.Y.L.J. no. 110, at 4 (1968).

119. 160 N.Y.L.J. No. 109 at 4.

120. “[A]ssume that these are not monsters and that if they feel themselves driven to behave so badly and use such dirty language, something we’d do well to identify is probably driving them.” *Id.*

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. . . [and] our ability not only to accept the unacceptable, but to seek it and defend it as inevitable."<sup>121</sup> Frankel's list of reforms remarkably coincides with that of Douglas: alleviation of unemployment, control of corporate merchandisers, and an end or at least a convincing explanation of the Vietnam war. Frankel concluded his speech much the way that even a critical reader would summarize his final impression from these three books:<sup>122</sup>

We should accept and welcome the need for radical change, swiftly accomplished, to keep us abreast of the technology we have created and the hopes that has engendered . . . and be prepared to join with the young activists in positive striving after shared goals.

121. 169 N.Y.L.J. No. 110 at 4.

122. *Id.*