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BOOKS REVIEWED

Points of Rebellion. By William O. Douglas. New York: Vintage Books. 1970. Pp. 97. \$1.95.

Mr. Justice Douglas has found inspiration in the spring foliage spreading along the towpaths beside the Chesapeake and Ohio barge canal. He has sought it on lonely Himalayan heights. He has marvelled at the splendors of Yellowstone and the sparkling streams of his home state of Washington. He is, indeed, a primate among ecologists, one of the first apostles of a pure environment, a willing worshipper at all of nature's shrines. But the Douglas world of nature does not encompass the whole of God's creation.

"I pray thee, then, write me down as one that loves his fellow men," Abou Ben Adhem said. In *Points of Rebellion* Mr. Justice Douglas is no Abou Ben Adhem. His love for nature seeks out very few of his fellow-men. Like Ko-Ko, he has a list of "society offenders who might well be underground." But Douglas' list is no little one.

It is somewhat amazing that in some ninety-seven sparse pages—several blank—of this tiny treatise Mr. Justice Douglas can find so many human pigeons for his buck-shot salvos. It is amazing that in these casual comments he can catalogue so much that is so cruel, so much crass stupidity, so much that so enslaves, so much corruption in our American institutions. And yet, it is really not a vitriolic piece. One does not put it down angered at humanity and one does not come away ready to join all the angry young men and women of today in their war against the Establishment. This is so because Justice Douglas has written neither a convincing nor a persuasive treatise. And that is so because his points for rebellion are, I believe, lost in hyperbole¹ and in distortion.²

The Douglas prospects for the future of man, and in particular the future of our American society, are, absent a radical revolution, dim indeed. The evil is in the Establishment whose idol is conformity—conformity to its own ways. Conformity dulls invention and destroys progress. And who are the wrongdoers, past

1. See notes 24-28 *infra* and accompanying text.

2. E.g., W. Douglas, *Points of Rebellion* 15 (1970) [hereinafter cited as Douglas]. He reports that Columbia University sought to build a gymnasium in Morningside Park and to thus destroy a "piece of woods" available for Harlem residents. Columbia proposed to build on its own land, to make the recreational facilities of the gymnasium available, free of charge, to the residents of the area and, apart from that, one would have to look hard to see the woodbine twine in the imaginative "woods" where Columbia planned its gymnasium. How persuasive is this passage (Id. at 89), put without further documentation "Thomas R. Melville and Arthur Melville are two Maryknoll Fathers and Marian P. Bradford, a nun, who later married Thomas.

"These three worked primarily among the Indians who make up about 56 per cent of the population of Guatemala. They saw the status quo, solidly aligned against the Indians, being financed by our Alliance For Progress and endowed with secret intelligence service to ferret out all 'social disturbers.' Between 1966 and 1967 they saw more than 2800 intellectuals, students, labor leaders, and peasants assassinated by right-wing groups."

and present, who have run and are running the Establishment? One might almost answer, "thee and me." As noted, it is no *little* list.

In nine or ten of those sparse pages his fusillade cuts down, or sometimes merely wounds, state police and police in general, the "affluent members of this society" (which presumably does not include members of the Supreme Court), the "older generation" (which again presumably does not include members of the Supreme Court), the "corporation state," Madison Avenue and its propaganda techniques which are followed in Washington, D.C., the public school—more specifically public school administrators, the patent system, and our colleges and universities.³ His heaviest fire is leveled at the Pentagon and the C.I.A.⁴ And there is specific scorn for John Foster Dulles,⁵ the F.B.I.,⁶ psychologists,⁷ N.A.T.O.,⁸ the "dictatorial government" of Greece,⁹ the militarism of Japan,¹⁰ and President Johnson.¹¹ His wrath, of course, reaches Mr. Nixon¹² but neither former Presidents Truman, Eisenhower, nor Kennedy escape.¹³ So who else is evil? The Shah of Iran and his "military, repressive dictatorship,"¹⁴ the China lobby "financed by the millions extorted and extracted from America by the Kuomintang . . . to brainwash us about Asia,"¹⁵ finance companies,¹⁶ the Bureau of Public Roads,¹⁷ and the Alliance for Progress.¹⁸ And we dare not overlook the Selective Service System.¹⁹

In brief Mr. Justice Douglas, who has found so much to admire in uncradled nature, finds much that is corrupt and corruptible in man and the institutions of man. There are, if his listing be sincere, very few of our fellowmen and very little in our society which deserve to survive.

The Pentagon and the "military-industrial complex" which it has nurtured and manipulated to propagandize education, to dominate our economic and social life, and to suppress individual liberties, rates the Justice's repeated scorn. But the Pentagon is only one tentacle of the Establishment. It is the entire Establishment²⁰ which is responsible for the banalities of modern society. It is the Estab-

3. *Id.* at 4-13.

4. *Id.* at 13.

5. *Id.* at 20.

6. *Id.* at 21-23.

7. *Id.* at 27.

8. *Id.* at 37.

9. *Id.*

10. *Id.* at 37-38.

11. *Id.* at 39.

12. *Id.* at 46.

13. A "military regime . . . has ruled us since the Truman administrations . . ." *Id.* at 43-44.

14. *Id.* at 42-43.

15. *Id.* at 42.

16. *Id.* at 47-48.

17. *Id.* at 86.

18. *Id.* at 89.

19. *Id.* at 39.

20. The Establishment is not really defined by Mr. Justice Douglas. It would appear

ishment which has encouraged the exploitation of human beings, which has ever endeavored to enrich the rich and debase the poor, which has, for financial gain, spread pesticides to destroy our fields and beslime our streams, and which has seeded and cultivated a system of racial discrimination.

He does not paint a pretty picture of the present or of the recent past. But he preaches not to pronounce condemnation upon all mankind. He reverts to a theme that bears repetition. In *The Right of the People* Justice Douglas wrote, "Man is a child of God entitled to dignified treatment."²¹ In *Points of Rebellion* he states: "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. This period of dissent based on belief in man will indeed be our great renaissance."²² Justice Douglas might have concluded his thesis there but then *Points of Rebellion* would have been less pointed and would not have approached being the treatise the publisher pretends it to be. Justice Douglas therefore concluded with some speculation on the possibility of rebellion.

It is obvious to him that our society is not responsive to human needs. If it is to be responsive, a vast restructuring of our entire society is essential. Failure of the Establishment, the corporation state, and the government to respond has provoked the violent dissent we have begun to hear. He does not advocate—as some have alleged—violent revolution. He recognizes that violence has no constitutional sanction. He does declare that today's Establishment is the new George III.²³ But the new revolution need not be a repetition of 1776. "It could be a revolution in the nature of an explosive political regeneration."²⁴

Certainly radical revolution—violent and oppressive—could come to this country again. That is, quite obviously, always a possibility. But if it comes, it will be in defiance of our basic law. The Justice makes that quite clear. In the end he does not state a novel or even a debatable issue. He states the obvious. The publisher's jacket throws dust in our eyes when it declares this to be an "explosive and critically important book." I found it harmless, insignificant, and at best a mediocre accomplishment, as though it were hastily dictated to meet a deadline.²⁵ There is not even a pretense of documentation for Justice Douglas'

to be an amorphous, propagandizing group admitting to membership only those over the age (more or less) of twenty-four, i.e., those who have ceased to be students or who have become—for want of a better word—domesticated. Justice Douglas writes repeatedly of the rebellion of youth against the Establishment. He speaks of a sixteen year-old boy in Japan as "symbolic of the dissent that is sweeping Japan" and presumably West Germany (Id. at 37) and the United States. Id. at 92. What Justice Douglas does not essay to answer is whether the sixteen year-old boy has the maturity, the experience, the competence to evaluate the needs of his society or any society and to determine what is best not only for the youth of Japan or West Germany or the United States but for the whole of society.

21. W. Douglas, *The Right of the People* 145 (1958).

22. Douglas at 33.

23. Id. at 95.

24. Id. at 97.

25. The deadline would have been for "Playboy," where portions of the book first appeared.

more excessive assertions. And there is an excess of excess. While judicial restraint has never been a Douglas hallmark, here he abandons caution completely. Is it not excessive—nor is it judicious or cautious—to assert that “President Johnson avoided all constitutional procedures and slyly maneuvered us into an Asian war” with “lies and half-truths,” and “used his long arm to try to get colleges to discipline the dissenters” and turned “the Selective Service System into a vindictive weapon for use against the protestors,”²⁶ that during the Truman administration “thousands lost their jobs” and were labelled poor security risks by answering “yes” to such questions as, “Did you vote for Henry Wallace?”²⁷ that for the poor who seek to borrow “interest rates have been known to rise to 1000 percent a year,”²⁸ that “[a]t the present rate of the use of oxygen in the air it may not be long until there is not enough air for people to breathe,”²⁹ and that “A.B.M. which started as a five billion dollar item, quickly jumped to ten billion and 200 billion and even 400 billion.”³⁰ Finally, it is inconceivable to me that, in this age of liberty and license, anyone could say, let alone a justice of the Supreme Court, that “our First Amendment traditions have been watered down or discarded altogether.”³¹ To appreciate the libertine license of the day, Mr. Justice Douglas should forsake the foot-paths of the Potomac and stroll along 42d Street, New York City, between Seventh and Eighth Avenues.

Flights of fancy are not becoming to a justice of the Supreme Court. Certainly not to one in Mr. Justice Douglas’ present position. There is, as we know, a core of Congressmen who would seek Mr. Justice Douglas’ impeachment. That is indeed unfortunate. It is equally unfortunate that Justice Douglas should respond with a hyperbolic hymn at this time. It is as if he would dare hard-headed Congressmen and their hard-hatted constituents to twist out of meaning and split, if they can, this slender splinter of an essay.

That is doubly unfortunate. God has gifted Mr. Justice Douglas with great talents. He has always used them with great compassion. He is, despite constant incantations to the contrary here, the champion of his fellow man. What he wrote, dissenting in *United States v. Wunderlich*, is, I am sure, still for him a paramount life principle:

“Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man’s other inventions.”³²

26. Douglas at 39.

27. *Id.* at 17-18.

28. *Id.* at 48.

29. *Id.* at 49-50.

30. *Id.* at 64-65.

31. *Id.* at 11.

32. 342 U.S. 98, 101 (1951).

The talents which God has given him need not be "lodged in him useless." But at this stage in life, at this time in history, Mr. Justice Douglas might better devote them to the business of the Supreme Court and leave the game of politics to other players.

LEONARD F. MANNING*

The Year of the People. By Eugene J. McCarthy. Garden City: Doubleday and Company, Inc. 1969. Pp. viii, 323. \$6.95.

Senator Eugene McCarthy describes the contest for the Democratic party's presidential nomination in 1968, a year he calls the Year of the People, for it was then that "the people, in so far as the system and the process would permit, asserted themselves . . ."¹

Although McCarthy failed to win the party's presidential nomination, he claims his campaign was significant because it inaugurated "[n]ew politics in every aspect: the new kind of people who were involved; the new ways that were opened for raising a challenge; and new in the substance of the challenge itself."²

I.

The new people were large numbers of students, many of them below voting age, together with adults who had previously been politically indifferent or inactive. These new people developed a sense of involvement. "In consequence of the campaign," says McCarthy, "there are thousands of young people who will never again be indifferent to politics."³ The involvement of these new people came to be known, he comments, as "'participatory politics'—a rather awkward term that encompasses acceptance of civic responsibility and, following that, political action."⁴

Of course the political action he refers to is the conduct of a campaign for the Democratic party's presidential nomination; that is what the book is about. In only one brief passage does McCarthy relate this to a larger topic, the involvement of the people in public decision making in general.⁵

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1. E. McCarthy, *The Year of the People* viii (1969) [hereinafter cited as McCarthy].

2. *Id.* at 248-49.

3. *Id.* at 249.

4. *Id.*

5. "The concept of one man-one vote, which has now been clearly defined by the Supreme Court in setting up legislative districts, must be established not only in the practices of the political parties, but in many other areas of American life: on college campuses for both faculty and students who want to have something more to say about their life on campus and their education; at stockholders' meetings at which participant stockholders accept that they have an intellectual and moral responsibility for the operation of the corporation; in movements like the National Farmers Organization in agriculture." *Id.* at 252-53.

Elsewhere I have suggested that public decisions of all kinds should be made with the maximum practicable participation of interested parties.⁶ Examples of this principle are found not only in the electoral process, but also in such time-honored procedures as petitions for redress of grievances, lobbying, parent-teacher associations and neighborhood zoning hearings. Recently, consumers have been permitted to participate in proceedings of a regulatory agency concerning their supplier, while certain community action programs must be conducted with "maximum feasible participation" of the local community.

Of course, various types of governmental decision making call for various types of popular participation, and the procedures need constant refinement and improvement. Participation makes the governmental process more difficult and involved. But experience with its limited applications in the past shows quite clearly that citizen participation in public affairs reduces tensions and frustrations, promotes communication, and produces constructive reforms.

The decade of the sixties was marked by intensified interest in providing citizens with the maximum opportunity to influence governmental decision making. The term "participatory democracy," popularized by the Students for a Democratic Society, became a central theme of the rhetoric of the New Left.⁷ The constructive possibilities of participatory democracy tended to become obscured by the militant means which were advocated for its achievement. While SDS espoused a revolutionary program in the name of participatory democracy, Senator McCarthy offered young people the opportunity to involve themselves in his "participatory politics," a movement clearly within the framework of our established institutions.

McCarthy's book would have been greatly strengthened by an analysis of the counterpoint between (1) his participatory politics, (2) the SDS version of participatory democracy and (3) the ongoing tendency of our government to accept and even require increased citizen participation in public decision making.

II.

The second characteristic of the new politics is, according to McCarthy, the new way to raise a challenge. Here he distinguishes the personality-orientation of the old politics from the issue-orientation of his new politics. He ran an issue-oriented campaign; the predominant issue was our involvement in Vietnam. He decided to seek the nomination only after other methods had failed to persuade the Administration to change its Vietnam policy.⁸ His candidacy was intended to give the people an opportunity to register their views on this issue and simul-

6. Levinson, Book Review, 43 S. Cal. L. Rev. 147 (1970). On popular participation in government, see also D. Moynihan, *Maximum Feasible Misunderstanding* (1969); Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 385 *Annals* 14 (1969); Verba, *Democratic Participation*, 373 *Annals* 53 (1967); Weyrauch, Book Review, 22 *Stan. L. Rev.* 141 (1969).

7. Hoover, *A Study in Marxist Revolutionary Violence: Students for a Democratic Society, 1962-1969*, 38 *Fordham L. Rev.* 289 (1969); Lynd, *The New Left*, 382 *Annals* 64 (1969).

8. McCarthy at 49-50.

taneously to generate pressure within the Democratic party for adoption of an appropriate platform.

The party's structure and rules presented many obstacles to this kind of challenge. McCarthy's supporters made great efforts to reform the party; their partial success may well be one of the most durable achievements of the campaign.⁹

If McCarthy's issue-oriented campaign had functioned ideally, the Democratic convention delegates who supported McCarthy's views on Vietnam would also, presumably, have supported his candidacy for the presidential nomination. However, the McCarthy-supported plank on Vietnam attracted 40% of the Chicago convention votes, while McCarthy's candidacy for the presidential nomination received only 23%, and the combined votes of all three anti-Administration candidates amounted to 32%.¹⁰ The performance of the New York delegation shows a similar anomaly in more extreme proportions. In the New York primary, 51% of the elected delegates were pledged to support McCarthy for the presidential nomination; at the Chicago convention, the New York delegation cast 47% of its votes for McCarthy as presidential nominee and 78% of its votes for the McCarthy-supported plank on Vietnam.¹¹

These statistics are open to various interpretations. McCarthy attempts none. His only comment is, surprisingly, that the New York procedure for electing delegates "[c]omes closest to carrying out the constitutional provisions for the electoral college [and] should be developed as a national pattern."¹² He might usefully have probed the distinction between votes for people and votes for issues, in the old politics and the new. He might also have suggested how the issue-oriented new politics could function where a single candidate takes a strong stand on more than one key issue, or where identical positions on a single issue are taken by competing candidates.

III.

The third feature McCarthy claims for the new politics is "the substance of the challenge itself." By "substance" he evidently means the topic which was

9. The Democratic convention adopted a reform program, by a vote of 1,350 to 1,206, whereby the official party call to the 1972 convention is to specify that: (1) "all convention delegates be elected through 'procedures open to public participation;'" (2) "the delegates be selected, within the calendar year of the convention;" and (3) the "unit rule be eliminated at all levels of the delegate selection process down to the county or precinct level." *Id.* at 201.

10. At the Chicago convention, opponents of the Administration position on the Vietnam plank of the party platform cast 1,048¼ of the total 2,616 votes cast. *Id.* at 208. This amounted to 40% of the total vote. At the same convention, a total of 2,575 votes were cast for presidential nominees, of which McCarthy received 601 (23% of the total); the three candidates running against Vice President Humphrey (McCarthy, McGovern and Phillips) received 815 votes combined (32% of the total). *Id.* at 209.

11. In the New York primary, 62 of the 123 elected delegates (51%) were pledged to McCarthy. *Id.* at 178. At the Chicago convention, 87 of the 183½ presidential nominating votes (47%) cast by the New York delegation were in favor of McCarthy. At the same convention, 148 of the 190 party platform votes (78%) cast by the New York delegation supported the minority position on Vietnam generally identified with McCarthy. *Id.* at 179.

12. *Id.*

at issue during the campaign, namely, the Administration's foreign and military policy in general, and its Vietnam policy in particular.

It is difficult to see anything new about making a campaign issue of foreign policy. No doubt McCarthy displayed unusual political courage in challenging an incumbent President for the nomination of his own party, especially when the challenge involved foreign policy, the issue most likely to evoke sentiments of party and national unity. But this seems to relate back to the second feature of the new politics, the way to raise the challenge.

IV.

Despite the occasional gaps in his analysis, McCarthy presents a significant and essential account of the 1968 campaign. This chronicle is the work of a statesman-poet, who took time along his campaign trail to notice the changing countryside,¹³ to appreciate a lunch of roast beef and strawberries at the home of a Nebraska Republican¹⁴ and a rendition of Vivaldi's *Four Seasons* by a quartet in Indiana,¹⁵ and even to write poems of his own.¹⁶ Newsmen, students and writers are sketched with the same respect as presidents, senators and party notables. The police raid on student-occupied rooms at Chicago's Conrad Hilton Hotel is narrated with as much sensitivity as the assassinations of Robert Kennedy and Martin Luther King, Jr.

13. E.g., describing winter in New Hampshire: "The state was covered with snow; all the trees, excepting the evergreens, were lifeless and black. Most houses had storm windows and storm doors; long underwear flapped frozen on the wash lines." *Id.* at 68. And spring in Wisconsin: "The snow was gone, although the northern lakes were still frozen over, and the geese in their northern migration walked about on gray April ice in a state of indecision and surprise. The brown of winter grass and corn stalks and of fields of stubble was the dominant color of the state, in contrast, for the most part, with the black of the plowed strips." *Id.* at 102.

14. *Id.* at 142.

15. *Id.* at 132.

16. McCarthy gave the title "Three Bad Signs" to the group of three poems he completed during the Indiana campaign. The poems were inspired by signs he had seen around the country, entitled (1) Green River ordinance enforced here. Peddlers not allowed; (2) Mixed drinks; (3) We serve all faiths. *Id.* at 135-37. The following excerpt from "Three Bad Signs" may serve as a sample:

Mixed drink is manhattan red
 Between the adult movie and the unmade bed
 Mixed drink is daiquiri green
 Between the gospel mission and the sheen
 Of hair oil on the rose planted paper.
 Mixed drink is forgiveness
 Between the vicarious sin
 And the half-empty bottle of gin.
 Mixed drink is remembrance between unshaded
 40-watt bulbs hung from the ceiling,
 Between the light a man cannot live by,
 And the better darkness.
 Mixed drink is the sign of contradiction.

Id. at 136-37. In addition to McCarthy's "Three Bad Signs," the book contains numerous short poems by other authors, mostly contemporary American.

McCarthy describes his own unique role in the new politics with candor and without self-consciousness. He modestly calls 1968 the year of the people. When his impact on our affairs is measured in the light of history, 1968 may be called the year of Gene McCarthy.

L. HAROLD LEVINSON*

Causes and Conflicts, The Centennial History of the Association of the Bar of the City of New York. By George Martin. Boston: Houghton Mifflin Company. 1970. Pp. xviii, 380. \$10.00.

One February evening earlier this year some of New York City's most distinguished attorneys, dressed in black tie, gathered in Philharmonic Hall to celebrate the one hundredth anniversary of the Association of the Bar of the City of New York. New York's legal establishment listened attentively to Chief Justice Warren Burger criticize America's penal system and urge that there be a new emphasis upon rehabilitation.¹

A few months later, on a sunny May Wednesday, a group of more than one thousand attorneys, organized under the auspices of that same Association of the Bar of the City of New York, travelled to Washington to lobby for an end to the Vietnam conflict.² Arriving literally upon the heels of thousands of college students, the attorneys conferred a special sort of legitimacy upon the peace movement.

These two events suggest the century-old paradox of New York City's major bar association³—on the one hand, a group which has been the epitome of "establishment;" on the other, a sometimes effective catalyst for professional and judicial reform, which has for "a few brief passing moments" set shining examples of institutional courage.

The appearance of George Martin's enjoyable "house history,"⁴ *Causes and Conflicts, The Centennial History of the Association of the Bar of the City of New York*,⁵ allows an opportunity to join in a celebration. Pausing to appraise Martin's book, moreover, permits us to suggest the need for others to pursue

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1. N.Y. Times, Feb. 18, 1970, at 16, col. 1.

2. N.Y. Times, May 21, 1970, at 23, col. 1.

3. The other important association of lawyers is the New York County Lawyer's Association, founded in 1908.

4. Histories of the Association have appeared concurrently with its major anniversaries. W. Berry, *Association of the Bar of the City of New York, The First Quarter-Century of Its Library* (1896); Sheldon, *The Association of the Bar of the City of New York, Historical Sketch, 1870-1920*, 23 Ass'n B.C.N.Y. Reports No. 226, at 35 (1920); Perkins, *Historical Sketch of the Association, 1920-1946*, 90 Ass'n B.C.N.Y. Reports No. 730, at 39 (1946).

5. G. Martin, *Causes and Conflicts, The Centennial History of the Association of the Bar of the City of New York, 1870-1970* (1970) [hereinafter cited as Martin].

complementary research as to the functions of associations of lawyers in the political system.

The Association of the Bar was a happy by-product of that rather distasteful period in American public life following the Civil War. Organized to resist the decline in "professional and civic virtues,"⁶ the Association was created in the aftermath of vicious fights for control of the railroads of New York State. These bitter contests, which featured as major protagonists those legendary moguls Cornelius Vanderbilt, Jay Gould, and Jim Fisk, were marked by multiple law suits,⁷ injunctions and counter-injunctions from "friendly" judges, the sale of unauthorized shares of stock, and the bribing of legislators.⁸

During the winter of 1869-1870, a group of attorneys signed an anonymously circulated call for a meeting to organize an association. So careful and so anonymous were the authors of the call—afraid no doubt of being struck by contempt citations wielded by Jovine judges as well as deprived of business by their less scrupulous clients—that even today we do not know whose idea the call was, when exactly it was drafted, or who circulated it. Its drafters believed "[t]hat the organized action and influence of the Legal Profession, properly exerted, would lead to the creation of more intimate relations between its members than now exist, and would, at the same time, sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public . . ."⁹ While the elevation of ethical standards of practicing attorneys might have been attempted through the existing law association, the New York Law Institute, the desire to circumvent the leadership of that organization's prickly President, Charles O'Connor, as well as the need for a law library north of 14th Street, spurred the creation of the rival association.

Within eighteen months, the new Association claimed as members one-eighth of Manhattan's attorneys and was the possessor of an attractive brownstone, with the beginnings of what became an internationally celebrated library. Progress in purification was somewhat slower; Governor John T. Hoffman of New York had reappointed the three judges most closely connected with Boss Tweed and both the State Legislature and the Municipal Government were under his domination.

Mr. Martin has chronicled in a most interesting way the fortunes of the Association of the Bar of the City of New York in its principal public functions—guardian of its profession, sporadic keeper of the purity of the judiciary, municipal watchdog, and advocate of "moral politics." The Association has had its share of successes—the rout of Boss Tweed's ring, the impeachment of his corrupt judges, the defeat of Isaac Maynard for the Court of Appeals in 1893, the successful participation in the Constitutional Convention of 1894.

6. *Id.* at 3.

7. There were twenty-one different law suits in the battle for the Albany & Susquehanna Railroad. *Id.* at 14.

8. When one assemblyman demanded an investigation, after having been offered a bribe for his vote, the Speaker reluctantly appointed a committee, placing on it the man who was accused of attempting to bribe him. *Id.* at 6-7.

9. *Id.* at 15.

The second quarter of a century saw the Association's true moment of glory—its fight against the expulsion of five socialist members of the New York State Assembly in 1919. Spurred by member Charles Evans Hughes, the Association not only made its stand public but also sent a committee to appear before the Assembly and presented a brief.¹⁰ Mr. Martin suggests that although the socialists were not reinstated, the Association ought to be credited with awakening America's conscience and bringing needed perspective in a time of hysteria.

During the third quarter of a century, influential members, most notably Samuel Seabury, participated in the investigation of the City's Magistrate's Courts. In its most recent twenty-five years—a time of great productivity—the Association received the greatest amount of publicity for the measured use of its resources in opposition to the hysteria of McCarthyism.

As public reformer, the Association of the Bar has not achieved an endless string of successes. Indeed, almost all efforts to reform the city and state court systems have proven futile. There have been many years of retreat to value the building and library and the social advantages of the Association.¹¹

Mr. Martin, an attorney, ex-member of the Association and a free-lance writer¹² has labored with love and brought forth an enjoyable narrative history. He has worked amidst the archives of the Association—the minutes and reports, pamphlets and clippings—and produced a lively book. The leaders of the Association come alive in a series of deft sketches. We read of Samuel Tilden with his thin and plaintive voice, of the combative and self-assured David Dudley Field, of the extraordinary Root and austere Hughes, of C. C. Burlingame ("CCB") and Harold R. Medina dueling over Harrison Tweed's succession as President, and Tweed himself, perhaps the most ingratiating character in the chronicle. Along with the richness of character portrayal and the brisk pace of narrative, Mr. Martin has produced two luscious appendices to absorb both the member and the antiquarian—the histories of the library and grievance committees.

The weaknesses of the Association have not been overlooked (although they are not highlighted in bold print). This has been, and in some sense still can be, an exclusive group of sometimes stuffy and oftentimes cold Anglo-Saxon¹³ patrician reformers. The Association still insists upon a letter of recommendation from a proposer and a seconder before admitting a member and that letter is referred to the committee on admissions, whose recommendations are weighed by the Executive Committee.¹⁴ The high dues tend to discourage single practitioners.¹⁵

10. *Id.* at 206-13.

11. *Id.* at 172.

12. He is author of several books on Italy and the opera, including the enjoyable *Verdi: His Music, Life and Times* (1963).

13. The organization is no longer "Anglo-Saxon" but how well its membership reflects the ethnic distribution of the New York City bar is not discussed in Mr. Martin's work.

14. "All applicants for membership, except for honorary membership, shall be admitted only by vote of the Executive Committee, on recommendation of the Committee on Admissions, as hereinafter provided." The Association of the Bar of the City of New York, Const. art. III, § 3 (1966).

15. For an attorney with an office in New York, the dues vary from \$30 to \$125 an-

Martin does not shy away from suggesting the anti-Irish and anti-Semitic bias of *earlier* generations of leaders,¹⁶ and his book suggests no excessive institutional concern with racial civil wrongs. While the Association took a stand in 1919 and 1956, while it has earned credentials as the most liberal of America's bar associations,¹⁷ nonetheless, its leaders have not generally been found numbered among America's most humane or courageous.

Mr. Martin has chosen to write a readable narrative history and has done well. If one is to quarrel with the book on Mr. Martin's terms, one would suggest that there may be somewhat too much detail about the leaders of the Association, and somewhat too little of the broad historical perspective necessary to comprehend what the Bar Association's role was in each successive attempt at reform.

The potentially rich field for study of the Association of the Bar of the City of New York must not be allowed to lie unreaped until the next anniversary year. Mr. Martin has written the centennial history. We now need more analytical and reflective studies—studies of the political role of the Association, of the Association as an interest group, of its membership, and the functions it performs.

The political role of bar associations needs greater illumination. For example, as reformers of the judiciary, they cloak themselves in unassailable generalities about removing courts from political influence. Unfortunately, unless there is a career judiciary—as in many European countries where the judiciary has much less political power—there will always be some "politics," in the broad sense, in the selection of judges. Some attorneys will seek judgeships and someone must choose between them. Such "neutral plans" as the Missouri Plan of judicial selection just change the political actors—from bosses and elected officials to bar associations and a chief executive. A recent study of the Missouri Plan's workings in its home state suggests that attorneys tend to prefer different types of judges, depending upon whom their own clients are.¹⁸ While bar associations may have impeccable credentials to speak of "professional qualifications," their role in passing on judicial appointments may well often be to approve of candidates whose socio-economic background are consonant with their own and/or their clients. This problem takes on added importance with the newly increased power of the American Bar Association Committee on the Federal Judiciary, which will now screen in advance of appointment those names whom the President has under serious consideration for the Supreme Court.¹⁹ Surely, the past record of the ABA, which fought Brandeis and supported Carswell, gives one

nually plus an admission fee equal to one year's dues. The New York County Lawyer's Association dues schedule is from \$15 to \$50 annually without an admission fee. See Association of the Bar of the City of New York, By-Laws art. VIII, § 1 and art. X, § 1(a) (1966).

16. See Martin at 177-79 for Joseph H. Choate's notorious address to the Friendly Sons of St. Patrick, probably the most flagrant public display of nativist bias.

17. See generally J. Hurst, *The Growth of American Law*, The Law Makers 364 (1950).

18. See generally R. Watson and R. Downing, *The Politics of the Bench and the Bar*, Judicial Selection Under the Missouri Nonpartisan Court Plan 39 (1969).

19. *Time*, Aug. 10, 1970, at 43.

pause to question their ability to pass adequately upon professional qualifications.

We need to know better why the recurrent campaigns to purify the judiciary have failed. While it is difficult to interest the general public in the problems of the courts, it may well be that the non-political stance of the Association has prevented it from finding the political allies it has needed to achieve its ends.

One would further hope to see a study of the Association as an interest group in order to answer a series of questions: How effectively have the positions taken by the Association's Committees represented the interests of the membership? What other interests has the Association represented in its fight to reform substantive law and procedure? Who has benefited from these fights and who has lost? How well has the Association succeeded?

It would be valuable to study further the recruitment of membership. Who joins which New York City Bar Association and why? Mr. Martin is silent but others have suggested that the members of the Association of the Bar are generally "high-status" attorneys—those from large law firms and national law schools, those who tend to represent negligence defendants, banking and other commercial interests. Lower-status attorneys tend to join the New York County Lawyers Association.²⁰

Those concerned with the profession of law would be interested in further study of the effectiveness of the Association in upholding professional and ethical standards. Such efforts have been limited by the Canons of Professional Ethics, long irrelevant as a guide to the practice of attorneys for large firm and corporate "house counsel." The dedicated and industrious grievance Committee of the Association spends innumerable hours on what must just be the tip of the ethical iceberg.²¹ One comes reluctantly to agree with Jerome Carlin that "[t]he organized bar through the operation of its formal disciplinary measures seems to be less concerned with scrutinizing the moral integrity of the profession than with forestalling public criticism and control."²²

Of further value would be a book or series of articles devoted to analysis of the monographs and reports produced by the committees of the Association. There are innumerable reports, lectures, speeches and important monographs. Some have been worthy but forgotten; others have left a major mark.²³

Finally, a comparative analysis of professional associations is in order—what

20. J. Carlin, *Lawyers' Ethics, A Survey of the New York City Bar* 36 (1966); E. Smigel, *The Wall Street Lawyer, Professional Organization Man?* 172 (1969).

21. J. Carlin, *supra* note 20, at 160 suggests that in any given year fewer than 2% of lawyers who violate the generally accepted norms of the bar are formally handled by the official grievance procedures and only about .02% are publicly sanctioned.

22. *Id.* at 161.

23. E.g., Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956); Special Committee on the Federal Conflict of Interest Laws of the Association of the Bar of the City of New York (1960); Special Committee on Congressional Ethics, Report of the Association of the Bar of the City of New York, Congress and the Public Trust (1970).

functions are performed by state and local bar associations? How does their work compare with that of various other professional associations?

The accomplishments of the Association of the Bar of the City of New York have not been small. More than the library and the social meeting place, the Association has offered facilities for a series of "reform efforts" in New York politics. While other bar associations throughout the nation have proven particularly reluctant to recognize their obligations to the poor and the underdog, this one, particularly during the past twenty-five years, has often remembered. If their achievements have not always measured up to what one might expect from an able group with such distinguished leadership, nonetheless they have been "at the very center of our effort to govern ourselves wisely and for our survival."²⁴

JEFFREY B. MORRIS*

The Boston Massacre. By Hiller B. Zobel. New York: Norton Press. 1970. Pp. 372. \$8.50.

In this year of domestic turmoil, spotlighted by the tragedy at Kent State University on Monday, May 4, 1970, it may be helpful to reflect on the parallels and dissimilarities with an earlier "Massacre," that which took place in Boston on the evening of Monday, March 5, 1770. We can thus examine whether the causes of the first American Revolution have any lessons to offer to revolutionaries or reactionaries in 1970. At Kent State four innocent bystanders—apparently students going about the business of education—were killed by a volley fired by frightened members of the Ohio National Guard at a crowd or mob of noisy, pushing students who had attended a forbidden protest meeting that followed a weekend of campus disturbances, including the burning of the R.O.T.C. building. Two centuries earlier a noisy, pushing mob was taunting a sentry who called for assistance which arrived in the form of a guard of eight men under the command of a senior officer, Captain Thomas Preston. Preston ordered the mob to disperse. They did not, and the captain ordered his men to load their weapons. A soldier fell or was struck and the word "fire" was heard, although the context in which the word was heard and the speaker thereof would never be known for certain. In any event, the guard fired a volley into the mob and a bystander and four members of the mob were killed.¹ The Boston Mas-

24. Martin at 316 quoting Report of the President, 21 Record of Ass'n B.C.N.Y. 471 (1966).

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1. The four members of the mob who were killed were: Crispus Attucks, a black dock worker experienced in riots; James Caldwell, a ship's mate accustomed to brawls; Patrick Carr, an Irish workman experienced in riots; and Samuel Gray, a ropewalker known as a troublemaker. The fifth victim was a young bystander, Samuel Maverick. The victims were buried in the Old Granary Burying Ground of Boston; the site of the massacre being marked

sacre followed 18 tense months during which a British army was quartered for the first time in a colonial city in peacetime. The purpose for quartering the troops had been to keep the peace and protect the revenue. Thereafter the protest machinery of Sam Adams² and the Sons of Liberty made martyrs and heroes of the dead men. It is the despair of many thinking Americans today that there is no propagandist genius—no Sam Adams—who knows how to use the tragedies of our times to move the country to social changes. As of this time (June, 1970) there are still many unanswered questions about Kent State, and 200 years later there are still many unanswered questions about the Boston Massacre.

Professor Hiller Zobel, who teaches Admiralty and Evidence at Boston College Law School, has most skillfully combined his work in these specialties with the early history of the American Revolution, the mythology about the Massacre and the legal career of John Adams.³ He has given us a brilliant study of

in the pavement of State Street. H. Zobel, *The Boston Massacre, 180-205* (1970) [hereinafter cited as Zobel].

2. Samuel Adams (1722-1803), a second cousin of John Adams, was the organizer, agitator and brilliant propagandist of independence. Unsuccessful in business and the civil service (tax collector) he used his position as clerk of the Provincial House of Representatives to push the colonies toward total separation from England. He agitated against the Sugar Act (1764), the Stamp Act (1765) and the Townshend Acts (1767) whereby the London Parliament sought to impose part of the costs of colonial administration and defense on the colonists. He participated in 1765 in the organization of the "Sons of Liberty," the Weathermen of the 1760's, whose "trashing" included the destruction of the homes and property of stamp commissioners, customs commissioners and other royal officials, including Lieutenant Governor Hutchinson. He also participated in organization of the merchants' Non-Importation Agreements (1768). The extent of his exact role in the disturbances on the evening of the Boston Massacre has always been uncertain. *Id.* at 190. In 1773 he organized the Boston Tea Party. Subsequently he served in the Continental Congress and became governor of Massachusetts. See S. Beach, *Samuel Adams, The Fateful Years 1764-1776*, at 190-214 (1965); J. Miller, *Sam Adams, Pioneer in Propaganda 178-83* (1936). See generally J. Hosmer, *Samuel Adams* (1898).

3. The present book draws on the author's earlier study with Professor Kinvin Wroth of the Legal Papers of John Adams (3 vols. 1965), which was part of a project of the Massachusetts Historical Society to publish the complete papers of the Adams Family. A brief chronology of the 91 year life of John Adams may be in order: born Quincy, Massachusetts, Oct. 19, 1735; A.B. Harvard College, 1755; admitted to Massachusetts Bar, 1758; married Abigail, 1764; began practice in Boston, 1768, active practice of law ceased about 1774; elected member of Massachusetts House of Representatives, 1770; successfully defended British soldiers in Boston Massacre Trials, 1770; elected delegate to First (1774) and Second (1775) Continental Congresses; drafter with Thomas Jefferson and Benjamin Franklin of the Declaration of Independence (1776); American Commissioner to France and Holland, 1778; drafter of Massachusetts Constitution, 1780; negotiated Peace Treaty with Great Britain, 1782; first United States envoy to Great Britain, 1785; elected and re-elected Vice President, 1789 and 1792; elected President of the United States, 1796 but defeated for re-election by Thomas Jefferson, 1800; his son John Quincy Adams elected President in 1825; he died at Quincy, Massachusetts on July 4, 1826 on the same day as Thomas Jefferson.

John Adams' career up to the time of the Declaration of Independence is presented in the

all aspects of the background, the event and the subsequent trials, clearly and concisely presented for specialists as well as the general public.

The ingredients of the 1770 tragedy were incompetent administration, mob violence, failure of authority, military force and inflammatory journalism.

The legendary British tolerance of incompetence in high places was amply demonstrated by the measures casually conceived by uninformed London politicians such as George Grenville, Charles "Champagne Charlie" Townsend and Lord Hillsborough to enforce new revenue measures on the colonies.⁴ To execute imperial policy in Puritan Massachusetts, London sent Francis Bernard, a mediocre placeseeker whose career in colonial administration illustrates the "Peter Principle"⁵ of man rising to new levels of incompetence. On the other hand, it could be said for Bernard, that, given the ingredients of the situation there existed an unbridgeable gap that would eventually lead to confrontation and revolution. Stated even more simply, did the physical separation of 3000 miles of water make revolution inevitable? (Our own question must be whether the generation gap between the present "youth" movement and the establishment makes revolution inevitable.)

One of the important contributions of this book is its close study of the make-up and operations of the revolutionary mobs.⁶ Prior to 1765 groups of rough workingmen from rival Boston districts had been coming together in an annual orgy of anti-Catholicism called Pope's Day, November 5th (celebrated as Guy Fawkes' Day in England, a remnant of which will still be found in the Ulster celebrations of the Battle of the Boyne on July 12th). It was the genius of

novel by C. Bowen, *John Adams and the American Revolution* (1950). An earlier study, also sympathetic, is G. Chinard, *Honest John Adams* (1933). A newer full length life is P. Smith, *John Adams* (2 vols. 1962). The famous 50 year correspondence with Thomas Jefferson will be found in the *Adams-Jefferson Letters* (L. Capon ed. 1959). Adams' battle with the radical supporters of the French Revolution may be found in Z. Haraszti, *John Adams and the Prophets of Progress 180-234* (1952). As of June, 1970 the musical comedy *1776* by Sherman Edwards and Peter Stone about the drafting of the Declaration of Independence is a hit on Broadway and in London.

4. The disruption of British parliamentary politics under the corruption of royal patronage is told in L. Namier, *England in the Age of the American Revolution 45-66* (1930).

5. L. Peter and R. Hull, *The Peter Principle* (1969). Francis Bernard (1712-1779) considerably enriched himself while serving as governor from December, 1760 to August, 1769. He had previously served as Governor of New Jersey for two years. Bernard was temporarily replaced by his Lieutenant-Governor, Thomas Hutchinson (1711-1780), a native-born Massachusetts man, A.B. Harvard 1727, who succeeded him as Governor in 1770. Hutchinson left the colony in 1774 with other loyalists and lived in London until his death. He is known for his 3 volume *History of the Colony and Province of Massachusetts Bay [1764]* (L. Mayo ed. 1936).

6. See C. Bridenbaugh, *Cities in Revolt: Urban Life in America 1743-1776*, at 299-314 (1955); Greene, *The Revolutionary Generation: 1763-1790*, in 4 *A History of American Life* 198-230 (1953); J. Miller, *Origins of the American Revolution* 295-98 (1943); A. Schlesinger, *The Birth of the Nation* 108-10 (1968). See also E. Forbes, *Paul Revere and the World He Lived In* 151-68 (1942); A. Schlesinger, *The Colonial Merchants and the American Revolution: 1763-1776*, 181-86 (1957); A. Tourtellot, *William Diamond's Drum* 66-70 (1959).

Samuel Adams and his associates to turn this energy into political channels which would eventually paralyze the royal administration and become the effective government of the province. The unthinking Boston mob, like others, neither tolerated dissent nor approved a common humanity, nevertheless no one was killed by the revolutionary mob—unlike Paris in 1789 and 1792. The Boston mob's political action began in 1765 to compel repeal of the Stamp Act by terrorizing the stamp sellers. Hanging effigies on the Liberty Tree, demonstration meetings and protest marches were soon succeeded by the destruction of houses and personal property. The mob began its "frolics" by sacking the home of stamp seller Andrew Oliver on August 14, 1765. Thereafter they sacked the home of Lt. Governor Hutchinson, the homes of customhouse officials, informers, court officers and destroyed court records. Eventually tar and feathers were applied to the mob's enemies and no one would dare oppose its will.

Quite naturally the general population began to feel that no one was in charge of things. The incompetent royal administration had no moral authority over the mob which despised it and its corruptible courts. Unhappily the royal governor had no means of suppressing the mobs other than through appeals for self-control. Both General Gage, Commander of British military forces in America at New York, and Governor Bernard were unwilling to take the responsibility for using troops in Boston on the ground that the military does not interfere with force until requested by the civil authority.⁷ This principle led to a tragic miscalculation by the mob who believed the troops would never fire—not even in self defense—without approval of the governor and council. After the riot accompanying the customs seizure of the vessel "Liberty" the dilemma regarding the use of troops was resolved by Lord Hillsborough. Although royal government in the province did not formally come to an end until 1775, nevertheless the Boston Massacre marks the end of effective civil government, although direct military control did not follow until 1774. Nevertheless, even before the Massacre the Boston courts had ceased to administer justice between loyalists (including British troops) and revolutionaries. The double standard of justice was freely applied in that grand juries would not indict revolutionaries while petit juries were vindictive to loyalists. Loyalists and military thereby became contemptuous of the process of the law—an opinion already shared by the populace. Thus General Gage could write, with respect to the Massachusetts practice of making indentured servants of convicts who could not pay their fines, "Such an infamous piece of Tyranny, savours more of the Meridian of Turkey than a British Province. It is a trite Remark, that these Bawlers against Government under the pretence of Liberty, are always the greatest Tyrants. It is not Tyranny they dislike, they only Squabble for the Power to become Tyrants."⁸ No society can continue to exist when people become accustomed to take the law into their own hands. Even after the Revolution the lawlessness demonstrated in

7. Zobel 70, 80-1.

8. *Id.* at 137. The practice of "Default Imprisonment" is apparently of medieval origin. Its application to indigent defendants has now been severely restricted by the Supreme Court because of the violation of the Equal Protection Clause. *Williams v. Illinois*, 38 U.S.L.W. 4607 (U.S. June 29, 1970).

Shays' Rebellion in 1786, the Whiskey Rebellion of 1794 and the breaking of Jefferson's 1807 Embargo by Yankee merchants plagued the new government long after the British had withdrawn. Another casualty of these troubled times was the jurisdiction of the Admiralty Courts. Although the common law courts had successfully restricted the English Admiralty Courts to a narrow jurisdiction, these courts had developed an expertise in handling all maritime and commercial problems. One of the peculiarities of Admiralty was the trial of facts by the judge alone. Since colonial juries could not be trusted,⁹ the London administration determined to enforce the customs regulations and the Acts of Trade in the Admiralty Courts. Colonial distrust of Admiralty jurisdiction, based on this experience, has complicated the law ever since.¹⁰

The use of the military to solve a political problem was the immediate cause of the Massacre. Benjamin Franklin had clearly predicted the outcome: "They [British troops] will not find a rebellion; they may indeed make one."¹¹ The London administration ordered the 14th, 29th, 64th and 65th regiments from Halifax and Cork to duty at Boston in October, 1768 to keep the peace. Eventually two regiments were withdrawn, so that at the time of the Massacre there were only about 400 effective troops in the streets of Boston to control a population of about 16,000. The Boston population was not accustomed to the presence of the military and there were inevitable clashes with the soldiers, none of which caused a death until the Massacre. It might be appropriate to extend the story beyond Mr. Zobel's cutoff date to indicate the exacerbation of tensions between the civilian population and the military. To avoid further bloodshed, most of the troops were temporarily withdrawn after the Massacre to fortified islands in the harbor. Eventually a clash with the revenue administration led to the Boston Tea Party in 1773,¹² followed by Parliament's "Coercive Acts" of 1774 punish-

9. See D. Robertson, *Admiralty and Federalism* 69-93 (1970); C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 189-201 (1960).

10. One of the great issues in Admiralty practice for the past twenty years has been the question whether an injured maritime worker has the right to trial by jury. The Constitution confers the Admiralty and Maritime jurisdiction on the federal courts, but the Judiciary Act of 1789 saved to suitors their common law remedies where the common law was competent. See 28 U.S.C. § 1333 (1964). Seamen who suffer job related injuries have a bundle of rights against the shipowner: a right to maintenance and cure, a traditional Admiralty remedy; an action for negligence under the Jones Act (46 U.S.C. § 688 (1964)) containing a statutory right to jury trial; the maritime tort of unseaworthiness, a form of absolute liability. The Supreme Court under the concept of pendent jurisdiction will permit the trial of all factual issues arising out of this bundle of rights by jury. See *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Haskins v. Point Towing Co.*, 395 F.2d 737 (3d. Cir. 1968). See also Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1 (1959); Zobel, *Admiralty Jurisdiction, Unification and The American Law Institute*, 6 San Diego L. Rev. 375 (1969). In personal injury cases it appears that trial by judge alone will be a relic of the past.

11. C. Van Doren, *Benjamin Franklin* 344 (1938).

12. A model study of the causes and effects of that incident is B. Labaree, *The Boston Tea Party* (1964).

ing the port of Boston and its citizens. This was first followed by the call for a Continental Congress and then by Lexington and Concord in 1775.¹³ The pyrrhic victory of the British in returning to Boston from Concord was followed by the siege of the city by the continental army under General Washington. Finally on March 17, 1776 British troops evacuated Boston forever.

The journalists of 1770 set a pattern familiar to us today. Even before the Massacre Sam Adams had begun his "Journal of the Times" outside Boston to continue the work of the Boston journalists, Edes and Gill whose "Boston Gazette" made them known to loyalists as the "Trumpeters of Sedition." On the other side the Tory press in John Mein's "Boston Chronicle" was equally vituperative and one-sided. These journalists worsened an already ugly situation before the Massacre. It was no surprise that the Massacre case was tried to excess in the newspapers during the months of pre-trial preparation.¹⁴ The result was that the self-righteous revolutionaries were in serious danger of not being believed. Thus, John Adams had the delicate task of defending his clients and winning his case without at the same time destroying the revolutionary cause to which he was personally committed.

The mythology of the Massacre has always emphasized the problem of the lawyer's duty to take unpopular cases, as reflected in the courage of John Adams in defending Captain Preston and the eight British troops who were indicted for murder by the Boston Grand Jury. Mr. Zobel adds the point, however, that the revolutionary cause really required Adams to supervise the defense so that the actions of the Boston revolutionaries generally would not be on trial. Today we might say that there would be a conflict of interest but it is certain that Adams did not see it that way. The optimum result for the revolutionaries would have been a trial strategy that would have blamed the entire massacre on the customs officials and the London politicians. Professor Zobel feels that the leadership of the revolutionary party failed to consider that acquittal was even a possibility and therefore they had no objection to John Adams and Josiah Quincy (brother of the prosecutor, Samuel Quincy) taking the defense.¹⁵ Adams was confronted at the outset with a more serious conflict of interest than that between his personal beliefs and the defense of his clients. The trial strategy for Captain Preston and the enlisted men seemed to demand inconsistent allegations with respect to the defense of superior orders; the officer claimed his orders were disobeyed while the men claimed the orders were obeyed as given. The practical solution reached in 1770 was merely to sever the officer's trial. Despite the fact that these were long trials for the eighteenth century it is now apparent that Adams had won the first trial before the verdict was rendered since the jury had been "packed" with two avowed loyalists who would not convict servants of the king. Thus, Professor Zobel believes that Adams' secondary task (after ensur-

13. The first battles between Americans and British troops were fought on the morning of April 19, 1775 at Lexington and Concord. See A. Tourtellot, *supra* note 6, at 124-88. The British view of these incidents may be found in P. Mackesy, *The War for America* 29-80 (1964).

14. Zobel 211-14.

15. *Id.* at 221.

ing that Boston itself did not end up in the criminal dock) was to ensure that the prosecution did not come up with evidence of guilt so overwhelming as to overcome even loyalist principles. In any event John Adams gave a brilliant defense. The jury deliberated for three hours and acquitted Captain Preston. At the subsequent trial of the enlisted men six were acquitted but two (Kilroy and Montgomery) were found guilty of manslaughter and branded on the thumb.

Political trials in any time or place are not designed to do justice. The Anglo-American legal system has shamefully produced a number of political trials long before the Chicago Seven. One thinks immediately of the trials of Thomas More and Anne Boleyn, Joseph Smith in 1846, Doctor Samuel Mudd in 1865, the Haymarket rioters in 1886, John Scopes in 1925 and Sacco and Vanzetti in 1927. The saving feature of the Boston Massacre trials is that no one was beheaded or sent to Devil's Island. An entirely independent question is whether justice was done. That we shall never know.

In 1770, as now, radicals believed that elections which change nothing are futile. Indeed, the politicalization of society then included protest marches and rallies, pressure on merchants and school closings just as today. Then, as now, the established authorities believed that force could contain violence and that a little demonstration of force might preclude future trouble. In a rational world social progress is achieved through discussion, study and compromise. Nevertheless, rational arguments based on the British Constitution and economic pragmatism did not change imperial policy in 1770. Even stronger is the example of France where three generations of enlightened rationalism could not change the absolutist monarchy. Thus, in the real world it seems that social change always is forced by popular disturbances. An important problem beyond the scope of this book is what turned the usually docile middle class into revolutionaries. Radicals in any revolution can accomplish very little until the great middle of society becomes disaffected, and it is the latter process which brings about social change. Professor Palmer has explained it in terms applicable to the American Revolution of 1770-1783:

Great revolutions are not made by professional revolutionists, nor are they manifestations of abnormal psychology in any ordinary meaning of the word. Later on, when the revolution is under way, both professionals and abnormal types (which need not be the same) may seize positions of power. But the revolution occurs, in the first place, when men who are ordinarily unexcited by politics, generally moderate, and engaged in their own private affairs, are drawn into revolution as a course to which no acceptable alternative seems to exist. If their behavior becomes abnormal, it is because such behavior represents the reaction of normal minds to extraordinary conditions. It would be hard to explain otherwise how whole peoples turn revolutionary.¹⁶

The drafters of the first amendment knew the Boston, New York and Philadelphia mobs at first hand, yet they willingly took the chance that free speech, free assembly and the right to petition grievances might get out of hand.¹⁷ Per-

16. R. Palmer, *The Age of the Democratic Revolution 470-71* (1959).

17. See Z. Chafee, *Free Speech in the United States 5-6, 16-23* (1964); M. Konvitz, *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly, 347-61* (1955).

haps freedom of speech is worthless unless accompanied by the right to demonstrate tumultuously. The real problem is whether change can be made without undermining all authority. Boston in 1770 shows that it may not. Our times will test the proposition again.

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Cf. L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* vii-viii (1960).

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