the same bemused, blind, elitist, arrogant crew who have steered our country's course in its flight from reality. He is the American counterpart of Mao Tse-tung. If one revolution doesn't work the cure is to foment another and yet another. Nor is he above the basest kind of argument, including the tactic of "guilt by association" (with which the Liberals flailed the late Senator Joseph McCarthy), as witness the snide analogy with which Justice Douglas seeks to dispose of the need for restoration of a greater degree of "law and order":

> . . .The powers-that-be faintly echo Adolf Hitler, who said in 1932:
>
> "The streets of our country are in turmoil. The universities are filled with students rebelling and rioting.
>
> "Communists are seeking to destroy our country. Russia is threatening us with her might and the republic is in danger. Yes, danger from within and without.
>
> "We need law and order.

To the young, to the gullible, to the wishful thinkers who believe there are solutions for all the problems of society (many of the most troublesome of which, in forms that differ with different eras, have always, and will forever, plague mankind because of the very nature of human beings), this latest potboiler by Mr. Justice Douglas may appear to have significance; but to the more thoughtful members of his own tribe his shopworn banalities are a considerable embarrassment. One of them (echoed by others) has sought to counter its damage to the already frayed Liberal cause by treating it as the "silly" but well-intentioned and essentially harmless crochet of a great man who has seen better days. Silly it is, but "silliness" in men in powerful positions in government can hardly ever be harmless, and the Justice certainly didn't intend it to be so. Indeed the key title word, "Rebellion," is most loosely used. There *is* a difference between rebellion and revolution but the proper distinction between the terms is not that which is drawn by Justice Douglas. In the context of this political pamphlet, any kind of resistance to governmental, economic and social dictates of which he disapproves is proper rebellion, whereas one may be sure that were Justice Douglas and his cohorts to obtain complete command of all the political, social and economic forces of our country, determined opposition thereto would become vile revolution. W. O. Douglas started his public career as a partisan of leftist viewpoints and despite his tenure of more than thirty years on the bench of the United States Supreme Court Justice Douglas has not acquired either a judicial or a judicious temperament.

Should one feel he must read *Points of Rebellion*, let him by all means buy the cheaper paperback edition, itself an expensive bargain at $1.95, and use part of the money thus saved to acquire Burke's *Reflections On The Revolution In France*. If one wants to grapple with the anatomy of revolution, here one will find grist for one's mill. Justice Douglas has always been and always will be a troublemaker, but a profound or responsible thinker—never!

Reviewed by DEAN TERRILL

Principle vs. Pragmatism

The Supreme Court and the Idea of Progress, by Alexander M. Bickel, *New York: Harper & Row, 1970. 210 pp. $6.50.*

THERE ARE a good many Americans named Brown, and more than one has appeared as a petitioner or appellant in the Supreme Court of the United States. Two of their more interesting cases have led to encounters with the jurisprudence of Oliver Wendell Holmes. In 1921 Robert B. Brown,

of *Brown v. United States,* was assured by Mr. Justice Holmes on behalf of the Court that "the law has grown and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature." Holmes, of course, was a Harvard man and Harvard honored itself by honoring Holmes in the Oliver Wendell Holmes Lectureship. On three occasions since Oliver Brown (*et al.*) of *Brown v. Board of Education* won the school desegregation ruling in 1954, Holmes lecturers have discussed the decision, each more or less critically. The latest Holmes lecturer, the Chancellor Kent Professor of Law and Legal History at Yale, is the author of this book, and the book itself is an expanded version of the Holmes lectures of 1969. Mr. Bickel's verdict is not quite that *Brown v. Board* was a mistake in our legal history—he calls it "the Warren Court's noblest enterprise"—but he does see it as heading "toward obsolescence and in large measure abandonment. . . ."

This represents a firming and maturing of views first intimated in Mr. Bickel's "The Least Dangerous Branch: The Supreme Court at the Bar of Politics." The book was largely a commentary on the two earlier lecturers who had discussed *Brown v. Board.* In 1958 the late Judge Learned Hand had criticized the Warren Court generally for behaving like "a third legislative chamber," deciding great and passion-ridden causes—as he felt it had decided *Brown v. Board*—less by law or logic than by a mere "*coup de main.*" In 1959 Herbert Wechsler of the Columbia University Law School had detected a failure by the Court in *Brown v. Board* and other rulings either to follow or to develop "general" and "neutral" principles in its adjudication.

In the earlier book Bickel was particularly alarmed by the Wechsler thesis, which he felt would all but paralyze the Supreme Court in its mandated function as interpreter-at-large of the Constitution under which a continental people in an advanced technological culture lives. If the justices can apply only principles antiseptically neutral and cosmically general, who would settle the meaner and more tangled quarrels which rise to the justices in real life? Professor Bickel's ingenious answer sounds again in these later pages. Principle, he said, "cannot [always] be the immutable governing rule"; but most emphatically it must always "affect the tendency of the policies of expediency." Where its application *merus,* so to speak, is possible, principle must govern. Where expediency does, and must, intrude, then principle is the snubbing-post, from which the judges play out the expedient rope, meagerly, cautiously, prayerfully, in a word, judicially. And what technical guides are available for this existential recession from principle? Bickel called them the Passive Virtues, speaking through the several jurisdictional and administrative rules of standing, of ripeness for decision, all of which, taken together, instrumentalize Justice Brandeis' aphorism that "the most important thing we [justices] do is not doing." Wechsler, Bickel felt, would too often not do. Brandeis and the Passive Virtues should strike the prudential balance required in a sinful world.

But the present book turns largely into a catalog of the occasions when the Warren Court, in departing from absolute and neutral principle, departed also from the passive virtues that were to mediate and monitor expediency. In case after case Bickel exposes not just deviation from principle but deviation from reasoned argument and impartial choice. In the matter of the convicted pornographer Ginsburg, "the Court punished a man under a rule applicable to no one else, past or future." In the long series of criminal-law decisions in behalf of the accused, some reflect "the blatant injustice . . . of applying new rules only to a random few lucky defendants in whose cases they were announced. . . ." In a voter qualification decision the Court "insisted on a conclusion that it did not bother to reason through, because it will not wash."

Professor Bickel reserves his sternest commentary for the two boldest ventures of the Warren Court—those on school desegregation and legislative apportionment. Devoted to the Idea of Progress, a "broadly conceived egalitarianism," was the Warren Court's main theme, so Bickel argues. In *Brown v. Board* its inarticulated premises seem to have been: (a) that Negroes yearn to go to school with whites and (b) that whites were, or could be made, willing to go to school with Negroes. Neither premise has worked out in fact, though the failure of (a) is both more recent and more surprising than the failure of (b). The phenomenon of the tipping-point—at which the races approach mathematical balance with the momentum toward Negro predominance—has emptied school after school of what was once a white majority, then a white half, and threatens to become a white minority. In recent times Negroes have discovered that black is as beautiful for Negroes as white for whites, and have in many areas and with increasing enthusiasm repudiated the idea that Whitey is all that attractive as a schoolmate or all that dynamic as an energizer of the educational motivation which white ideologues have seen as the major lack in all-Negro schools.

As for the Court's procrustean insistence on arithmetical identity in legislative apportionment, one of its most obvious miscarriages is its enhancement of white majority power over the black minority in school as in other matters. Mr. Bickel, as stated, salutes the doctrine, however arbitrarily proclaimed, that states cannot legislate school segregation. He thinks it now clear beyond peradventure (as lawyers like to say) that courts cannot legislate desegregation. The court intervened, as Justice Jackson recognized at the outset, because Congress had not acted. And the reason Congress had not acted was pretty much the reason that the Court's intervention has failed.

A wide reader of the general periodical press with an ear for mode words will note that Professor Bickel denies himself much use of the very modish "pragmatic." Fanciers of the Warren Court have called it pragmatic when what they meant was that it slighted tradition, hence precedent, hence principle, to push towards conclusions, some of which Professor Bickel admittedly finds attractive. But even in the illiterate interpretations now current of the word "pragmatism," there is a second but hardly subordinate meaning: the test of goodness is workability, hence what does not work is bad and should be abandoned. The Warren Court, we may now agree with its friends, judged often in the first sense of pragmatism. So far, the Burger Court shows some disposition to judge by the second—and so to edge, unobtrusively but resolutely, back to tradition, precedent and principle, i. e., in "the direction of rules consistent with human nature." All involved in the process—and not least the nominating and confirming authorities—may well take note of Bickel's early and now his latest testimony.

Reviewed by C. P. Ives

Of Action and Reaction

The Counter-Revolution, by Thomas Molnar, *New York: Funk & Wagnalls, 1969. 203 pp. $8.95.*

It has been the viewpoint of this reviewer that only by hard-minded thinking, realism and the candid consideration of alternatives can our accustomed civilization be preserved. This state of mind can be summarized by reference to a lively and motivating awareness of crisis. The prime virtue, among many other virtues, of Professor Molnar's new book, *The Counter-Revolution,* is its pervasive recognition of cultural