Vanderbilt Law Review

Volume 18
Issue 2 *Issue 2 - March 1965*

Article 11

3-1965

Justice William 0. Douglas and the Concept of a "Fair Trial"

Helen S. Thomas

Justice William O. Douglas and the Concept of a "Fair Trial"

*. . Helen Shirley Thomas**

Basic to Justice Douglas' concept of a free society is a fair, unbiased trial for all, regardless of the race, ethnic or economic background of the accused. The author examines Douglas' views in regard to the right to counsel, detention of tho accused, bail, the right to trial by jury, and trial procedures to determine the content of his concept of a "fair trial."

For Justice William O. Douglas, one of the basic characteristics of a free society is the unbiased treatment accorded persons accused of crime. It is imperative that the individual be respected in his unique capacity; it is equally necessary that the integrity of society remain above reproach when it turns its enormous force and power to the task of apprehending and convicting criminals. Society can be said to be vindicated when, and only when, a just conviction is reached after all substantive and procedural rights of the accused are honored from the moment of his apprehension, through his detention, to the conduct of his trial in an impartial manner. Justice Douglas' credo on this issue is clear, unequivocal, and succinct. He has recently given voice to his belief by quoting an inscription on the walls of the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts."[1] Justice can never be done if there is societal infringement on individual rights, even the rights of the most unsavory character.

While the above quotation refers specifically to the United States, Justice Douglas does not hold the states to any lesser degree of accountability. A "fair trial" for him must conform to the same high standards irrespective of whether federal or state authorities are being called to account. This may result from Justice Douglas' well-known acceptance of the so-called incorporation theory whereby the entire Bill of Rights is made applicable to the states by the due process clause of the fourteenth amendment, or it may stem from his belief that the ingredients of a "fair trial" are invariables which do not change from tribunal to tribunal.

This article seeks briefly to demonstrate the ways in which this

* Assistant Professor of Political Science, Loyola College, Baltimore, Md.

1. Brady v. Maryland, 373 U.S. 83, 89 (1963).

basic commitment of Justice Douglas bear on particular constitutional issues, particularly with regard to criminal cases. The article treats these issues under five general headings: detention; the right to counsel; bail; the right to trial by jury; and trial procedures. Some overlapping between sections cannot be avoided; but it is hoped that this organization will bring the problems more sharply into focus.

I. DETENTION

"Whenever unfairness can be shown to infect any part of a criminal proceeding, we should hold that the requirements of due process are lacking."[2] Thus did Justice Douglas summarize his position in a case involving the actions of a grand jury. This statement of principle can be applied to his over-all view of criminal proceedings, beginning with the apprehension and interrogation stage. It is fundamental that any suspect immediately be brought before a magistrate and openly charged with the suspected crime. Only in this way can what the Justice considers abusive police tactics be eradicated. The practice of protective custody, whereby a prisoner is held solely at the discretion of law officers, leads almost inevitably to inquisitorial sessions and other third-degree methods. Justice Douglas has strongly denounced such results, remarking that "detention without arraignment is a time-honored method for keeping the accused under the exclusive control of the police. They can operate at their leisure. The accused is wholly at their mercy."[3] Out of protective custody often come confessions of dubious validity as to the voluntariness with which they were made. This fact makes Justice Douglas highly indignant when arraignment is unnecessarily delayed.[4]

When protective custody is employed, the individual who is detained may be given the opportunity to get in touch with friends, relatives or legal counsel. However, on just as many occasions, he is denied any access to the outside world.

Justice Douglas has long implied that the denial of access to counsel at this point, even though prior to arraignment, is an unconstitutional infringement of a citizen's rights,[5] a view which the Court has now

2. Beck v. Washington, 369 U.S. 541, 581 (1962).

3. Watts v. Indiana, 338 U.S. 49, 57 (1949). *Cf.* Agoston v. Pennsylvania, 340 U.S. 844 (1950).

4. The writer does not mean to imply that trustworthiness of confessions is the sole problem involved in these cases. Exclusionary rules of evidence also serve as a means of regulating police conduct in general. See Allen, *Due Prcoess and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); Spanogle, *The Use of Coerced Confessions in State Courts*, 17 VAND. L. REV. 421 (1964).

5. Epstein, *Justice Douglas and Civil Liberties*, 26 WIS. L. REV. 125 (1951).

espoused at least in part.[6]

Detention incommunicado is fraught with evil opportunities from beginning to end. While it is agreed that "the police have to interrogate to arrest," Justice Douglas adds the important qualification that "they may [not] arrest to interrogate."[7] In other words, they may not hold a person by a system of administrative detention endlessly incommunicado and use the time so derived to question him incessantly about any matters which may come to their attention. Not only is the question of a coerced confession immediately raised but also the broader issue of the limits of self-incrimination. One of the underlying infirmities of detention incommunicado has to do with the type of person trapped by this procedure. A wealthy or prominent person is not likely to be denied his request for external aid. Indeed, it would be ludicrous folly for the police to attempt incommunicado detention for the vast majority of American citizens. The group of persons against whom such detention can be employed successfully are those with no social status or those who come from a lowly environment. For Justice Douglas, this is the very group which needs the law's special protection.[8]

Closely related to the problems discussed above are those which surround what Justice Douglas has dubbed "legal" detention. In this instance, a man is arrested on one count, often of a rather minor nature, while the police are actually interested in his activities with regard to a different crime, usually one of a more serious nature and one more difficult to prove. At least two police purposes are served by this technique. First, the suspect is conveniently taken out of circulation. Second, the police always have access to the prisoner for further and prolonged questioning. Justice Douglas has castigated such subterfuge and has held that, even though police efficiency may be reduced by curtailing the practice of "legal" detention, the price is not too high to pay for maintaining the integrity of our legal system.[9]

In condemning these procedures, Justice Douglas is motivated by a fear that they will inevitably produce coerced confessions. It matters not whether the victim has been subjected to unconstitutional pressures before arraignment,[10] or after arraignment.[11] It does not even make a difference to the Justice whether a civilian or a member of

6. Escobedo v. Illinois, 378 U.S. 478 (1964).
7. Reck v. Pate, 367 U.S. 433, 448 (1961).
8. See Culombe v. Connecticut, 367 U.S. 568 (1961); DOUGLAS, WE THE JUDGES 367 (1956).
9. United States v. Carignan, 342 U.S. 36 (1951).
10. See Williams v. United States, 341 U.S. 97 (1951).
11. See Spano v. New York, 360 U.S. 315 (1959).

the military services is involved.[12] For all American citizens at all stages of their involvement with the police, certain rudimentary protections are always available. The use of force, whether of a physical or psychological nature, invalidates a confession. Interrogation in secret is pre-emptory evidence that a confession has been irregularly obtained. Circumvention of the law by police officers, as found in "legal" detention, is especially reprehensible. Justice Douglas has firmly committed himself to the position that "it is the right of the accused to be tried by a legally constituted court, not by a kangaroo court."[13] If the police can act as a preliminary tribunal, both accusing and forcing confession, then unavoidably and undesirably our concept of justice and our court system will be damaged to the detriment of all our people.

II. RIGHT TO COUNSEL

"Happily," for Justice Douglas, "all constitutional questions are always open."[14] It was especially gratifying in this instance for the Supreme Court was overruling the "ill-starred decision in *Betts v. Brady*,"[15] and proclaiming in *Gideon v. Wainwright*[16] that the states must furnish counsel to indigent defendants in criminal prosecutions. Justice Douglas was one of the three dissenters in the *Betts* case[17] and, since its decision in 1942, had been attacking the idea that counsel must be furnished in only the most unusual circumstances.[18] Perhaps it was more than a coincidence that Mr. Abe Fortas, who was selected by the Court to represent Gideon's interest, had also been Justice Douglas' chief assistant when the latter carried on investigations for the Securities and Exchange Commission during the early days of the New Deal.

The prime reason why Justice Douglas has been so adamant over the need for counsel stems from his belief that most of the inequities discussed in the first part of this paper could be eliminated or greatly reduced if adequate legal advice were available to an accused. This need is apparent from the very first moment when an individual is called to account by any legal authority, for in those very first moments constitutional rights may mistakenly be given up, never to be recalled. They will largely be lost through ignorance or inadvertance. Because such is the case, Justice Douglas feels that "the

12. See Burns v. Wilson, 346 U.S. 137 (1953).
13. Williams v. United States, *supra* note 8, at 101 (1951).
14. Gideon v. Wainwright, 372 U.S. 335, 346 (1963).
15. Bute v. Illinois, 333 U.S. 640, 677 (1948).
16. 372 U.S. 335 (1963).
17. Betts v. Brady, 316 U.S. 455 (1942).
18. See, *e.g.*, DOUGLAS, WE THE JUDGES 382-84 (1956).

right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself."[19]

If the lack of legal advice at pre-trial stage can prejudice a case because of inadequate defense preparation, approach of the pleading stage without like assistance can prove permanently detrimental. The untrained individual faced with the prospect of entering a plea upon which the remainder of the proceedings will rest is at a terrible disadvantage. Issues of fact and of law may be so complex that the layman cannot disentangle them. By his plea he may irrevocably commit himself to a course of action which is unwise and unnecessary. Therefore, for the individual's protection, Justice Douglas has insisted that counsel be appointed in time to fashion a reasonable plea, given the facts of the case and the law prevailing in the court's jurisdiction.[20]

Clarence Earl Gideon was enough of a prison lawyer to demand that his trial court furnish him counsel. Not all persons charged with a crime are sage or adroit enough to ask for assistance. Consequently, another ingredient of a "fair trial" for Justice Douglas involves the court's responsibility to the accused. Believing that "a defendant is not capable of making his own defense," the Justice has held that "it is the duty of the court to appoint counsel, whether requested so to do or not."[21] And it has made no difference to him whether the person stood accused of a capital crime. The need of the defendant for aid, not the nature of the crime, is determinative. Justice Douglas has little patience with those who suggest that his view would lead to legal assistance for one charged with violation of a parking ordinance. He believes that a line can be drawn, but to draw that line between those facing the death penalty and those facing prolonged imprisonment is neither prudent nor reasonable.[22]

A great deal of recent criticism of the Supreme Court centers on the fact that unsavory characters are often the beneficiaries of rulings guaranteeing procedural or substantive rights. Somehow if the defendant could have been a little more "respectable" the rulings would apparently have seemed more justified. To Justice Douglas this is plainly nonsense if for no other reason than the fact that "respectable" people rarely become embroiled in criminal proceedings. It is the underdog, the uneducated, the economically deprived who is most apt to need protection. Peculiarly enough, some lower courts have tended to assume that because a man is educated he, too,

19. Crooker v. California, 357 U.S. 433, 443 (1958).
20. See Chewning v. Cunningham, 368 U.S. 443 (1962); Williams v. Kaiser, 323 U.S. 471 (1945).
21. Carter v. Illinois, 329 U.S. 173, 181 (1946).
22. See Bute v. Illinois, 333 U.S. 640 (1948).

does not need counsel. Justice Douglas forthrightly rejected this implication.

> The Court speaks of the education of this petitioner and his ability to take care of himself. . . . No matter how well educated and how well trained in the law an accused may be, he is sorely in need of legal advice once he is arrested for an offense. . . . The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of crime. He may be implicated by ambiguous circumstances difficult to explain away. He desperately needs a lawyer to help extricate him if he's innocent.[23]

It does not matter whether the accused is educated or illiterate, wealthy or destitute, a member of a majority or minority group, he can just as easily get lost in the labyrinth of the law. He needs a trained guide who can lead him safely over unknown terrain.

One of the obstacles which a trained eye would avoid would be the pitfall of rushing headlong into a confession. Confession may be good for the soul but in terms of legal maneuvering it may be damning. A confession often obviates the need for a trial before judge and jury, a trial which could introduce evidence of extenuating circumstances or which could present other special factors for consideration. As will be demonstrated, the jury system is at the very heart of the "fair trial" concept for Justice Douglas. He looks askance at any suggestion that a layman, without counsel should have the right to waive a jury trial in order to exercise the high privilege of conducting his defense in his own manner. "That argument," for him, "is faintly reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields."[24] The individual has a constitutional right to a jury trial; he has no constitutional right to reject impetuously and uninformed one of his main lines of protection. In the event that the accused neither confesses nor waives his right to a jury trial, Justice Douglas is still convinced that the presence of counsel is an absolute necessity. The ways in which facts are marshalled, the trial lawyer's intuitive reaction to the mood of the jury, the time when objections should be raised, these are talents developed by diligent study and steady application. They are not talents which the average defendant can display. Left to his own devices, he will at least be confounded by intricate procedural rules with which he cannot cope and he will, in all probability, make an unfavorable impression upon the jury. Thus the injury is doubly compounded. The defendant does not, for all practical purposes, have his day in court and "the jury

23. Crooker v. California, *supra* note 16, at 446-47 (1958).
24. Adams v. United States, 317 U.S. 269, 286 (1942).

system—pride of the English-speaking world—becomes a trap for the layman because he is utterly without ability to make it serve the ends of justice."[25] These injuries could be avoided if counsel were appointed in all criminal trials, a result which now seems inevitable in light of *Gideon*.

As part of its legislative program, the Kennedy Administration proposed establishment of a public defender system which would, on a rotating basis, provide competent counsel for an accused in all federal criminal cases. Justice Douglas supported the proposal strongly.[26] If more members of the legal profession could be persuaded to think of their duties as servants of society, then they would re-familiarize themselves with the crucial problems of society as reflected in criminal trials. The burden of defense would be lifted from the shoulders of the dedicated few and the many would return to their respective law offices with a better understanding of the intricate nature of human relationships. This has been a course of action urged upon the legal profession by Justice Douglas for a number of years and it has been a recurrent theme in his many speeches. The bar to live up to its high purpose and to fulfill its necessary mission must individually and collectively make itself responsible for providing legal assistance to any individual facing criminal prosecution in state or federal courts.

III. Bail

Up to this point, focus has been placed on the vital prerequisites of a "fair trial" in terms of apprehension, detention and representation. Another aspect of the picture is the use and misuse of bail. Generally, the accused in a non-capital case may, at the discretion of the court, be admitted to bail. Justice Douglas feels that the accused is thereby benefited in two respects: "it permits the unhampered preparation of a defense, and it serves to save the accused from being punished prior to his conviction."[27] Of course there is always the possibility that the person admitted to bail will take flight, but that is one of the risks inherent in our concept of justice. If reasonable bail is set after considering the peculiar circumstances surrounding the particular individual, government is adequately protected and the individual in the vast majority of cases will appear to stand trial.

A significant number of Justice Douglas' Opinions in Chambers deal with bail, many with the problem of how to determine just what is

25. Carnley v. Cochran, 369 U.S. 506, 524 (1962).
26. See N.Y. Times, April 4, 1963, p. 37, col. 5.
27. Douglas, An Almanac of Liberty 137 (1954).

"reasonable." He believes that "there is a constitutional question that lurks in every bail case,"[28] a question arising from the eighth amendment's prohibition against "excessive bail." To set a figure that would stagger the imagination would obviously invalidate the action. Reasonableness depends upon checking into all the relevant facts concerning the individual: his wealth, his character, the type of crime of which he is accused, and his prior record or lack thereof. In his Opinions in Chambers, the Justice is particularly concerned with the plight of the indigent defendant. The indigent is denied equal protection of the law if he is denied the right to appeal his case solely because of poverty. Likewise, Justice Douglas believes that special consideration is due the indigent with regard to bail. He has asked, almost rhetorically, "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[29] His answer was an unequivocal "no." The reason given was that fixing bail, even in a modest amount, would have the effect of denying the indigent release. While in prison, he could not aid in preparing his cause, he would have a period of freedom denied for which society could never repay, and finally he would be denied the opportunity to seek employment and the monies necessary for his defense.

Akin to his belief in the benefits of bail is Justice Douglas' preference for a broad interpretation of the habeas corpus jurisdiction of the federal courts. Or, as he has expressed it, "[habeas corpus] has done high service in the administration of justice."[30] Often when cases reach the Supreme Court, the record shows that important constitutional issues have been dealt with inadequately at the state court level. Justice Douglas sees the great writ of habeas corpus as providing a safety valve whereby the issues can be clarified, new pertinent material inserted into the record, and many costly mistakes rectified.

IV. THE JURY

While Justice Douglas and the late Jerome Frank held very similar views of the judicial process, they disagreed over the utility of the jury system. Judge Frank was highly critical of the system whereas Justice Douglas has been one of its staunchest supporters. The Justice interprets broadly the fifth amendment's command that indictment be by a grand jury. He has interpreted this to mean, additionally and in conjunction with the sixth amendment, that there must be a

28. Carlisle v. Landon, 73 Sup. Ct. 1179, 1182 (1953).
29. Bandy v. United States, 81 Sup. Ct. 197, 198 (1960).
30. Chessman v. Teets, 354 U.S. 156, 171 (1957).

trial before a petit jury, that there must be a right to counsel and that there must be the right to have the accused confront his accuser.[31] Justice Douglas has called the right to trial by jury "one of the most important safeguards against tyranny which our law has designed."[32] He would even, by an interpretation of the Articles of War, make a jury trial obligatory upon military authorities unless outright hostilities prevented this course of action.

On two occasions Justice Douglas has used the same words verbatim to describe his views on the characteristics of a jury. Phraseology so obviously important to him merits reproduction here.

> A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.[33]

The jury, then, becomes the vehicle through which community concepts of justice can help temper the law's strictness, thus assuring that a "fair trial" in terms of current mores will be afforded the defendant. Doubtless juries have in some instances inflicted injustices. (But, one must remember, so have many jurists.) Juries, to the Justice's mind, bring a quality of mercy to the decisional process, a quality too often lacking when the courtroom is treated as surgically sterile as an operating room. The jury may, indeed, infect the atmosphere but the germs which it releases are likely to be the benign ones of tolerance and understanding rather than the injurious ones of legal intransigence and stodgy acceptance of outmoded principles.

Since, in most jurisdictions, an accused must be indicted by a grand jury, that type of jury plays a special role in the concept of a "fair trial" and has received rather protracted attention from Justice Douglas.[34] The grand jury has an awesome responsibility to fulfill for it must initially determine if there is probable guilt to justify detention of an individual for formal trial. Usually, the grand jury

31. See DOUGLAS, FREEDOM OF THE MIND 23 (1964).

32. Lee v. Madigan, 358 U.S. 228, 234 (1959).

33. DOUGLAS, WE THE JUDGES 389 (1956); and DOUGLAS, AN ALMANAC OF LIBERTY 112 (1954).

34. See Hannah v. Larche, 363 U.S. 420 (1960); Ewing v. Mytinger & Casselberry, 339 U.S. 594, 599 (1950); United States v. Socony Vacuum Oil Co., 310 U.S. 150, 233-34 (1940). These cases decided even decades apart show Justice Douglas' continuing interest in the topic from early after his appointment to the Court to the present.

returns an indictment against a man without hearing his version of the occurrences surrounding the alleged crime. Additionally, grand jury testimony is confidential and not part of the public record, an aspect of the proceedings which Justice Douglas finds unreasonable and believes should be abolished once the grand jury's particular responsibilities are ended. Grand juries are the only body accusatorial in nature permitted by the Constitution for the federal government. They act in secret, often on hearsay evidence. These usually abhorred practices are permitted on the assumption that the grand jury has a special mission. The grand jury was created to prevent a government vendetta against any individual, and to prevent irreparable harm to reputation by unfounded, public accusation of crime. The laymen who compose these juries may be mistaken in certain of their judgments, but, for the most part freed from technical rnles, they act without prejudice and are impartial spokesmen for the conscience of the community. They provide fairness in indictment before the trial stage.

The Supreme Court has become increasingly concerned over the problem of discrimination, regardless of whether it is practiced on the basis of race, religion, or nationality differences. Nowhere for Justice Douglas is discrimination more invidious than when it infiltrates the procedure for jury selection. The jury, whether grand or petit, must reflect an adequate cross-section of society or otherwise it will be unable fully to perform its function which is to mirror community consensus. The very concept of a so-called "blue-ribbon" jury is for him a contradiction in terms. Education, economic status, or knowledgeability should not be the criteria for choosing a jury panel. And neither should sex. When women were systematically excluded from jury service only because of their gender, Justice Douglas raised a voice in protest.[35]

Discrimination has been most blatantly practiced on the basis of race. Since such discrimination strikes at the very heart of the "fair trial" concept, Justice Douglas has been unstinting in his judicial efforts to curb state practices which even hint at discrimination. The whole issue for him boils down to this: "The Constitution gives Negroes the right to be tried by juries drawn from the entire community, not hand-picked from white people alone."[36] The real point was that an all-white jury, per se, if chosen at random and by mere chance from the list of eligible voters, would not necessarily be unconstitutional. It is when officials manipulate the lists purposefully to create a jury all of one race that the action becomes unacceptable.

35. Ballard v. United States, 329 U.S. 187 (1946).
36. Stein v. New York, 346 U.S. 156, 206 (1953).

The recent attempt of Louisiana to circumvent a possible charge of discrimination by deliberately placing a Negro on a jury trying a case of another of his race was struck down because it involved unnatural manipulation.[37] Not only was the state paying mere lip-service to the principle of equal protection but also it was paying the tribute in a manner which did not comport with the requirements of due process of law.

While Justice Douglas is an advocate of a strong jury system, he does look more critically at jury action when first amendment rights are invoked. Specifically, he is concerned with the role of judge and jury in censorship cases when obscenity is the issue. He was particularly disturbed by a New York state statute which made one conviction for distributing obscene literature the basis for contempt proceedings if the same publication appeared elsewhere in the state. He felt that a judge and jury in Albany might make a different determination of what was obscene than might its counterpart in Rochester. Juries do vary on definitions and this variance is caused by differing community mores and the particular circumstances of each case. If the jury was to be used in this type of proceeding, then it should be allowed to make an independent appraisal of just what constitutes obscenity. But Justice Douglas has serious reservations about using a jury in this capacity at all. "Free speech," he has stated, "is not to be regulated like diseased cattle and impure butter. The audience (in this case the judge or the jury) that hissed yesterday may applaud today, even the same performance."[38]

Even in the sensitive area of censorship, if there is to be punishment meted out it should be by jury proceedings and not by the contempt method. Justice Douglas has been joined by Justice Hugo L. Black in denouncing a growing tendency to withdraw more and more matters from jury consideration. When, in January, 1963, the United States Supreme Court proposed changes in the Federal Rules of Civil Procedure which would have allowed lower court judges greater discretion in granting motions for directed verdicts without submitting the question to a jury, Justices Black and Douglas criticized the modifications. Although agreeing that no momentous changes were wrought, they felt that by its actions the Supreme Court was giving "formal sanction to the process by which the courts have been wresting from the juries the power to render verdicts. Since we do not approve this sapping of the seventh amendment guarantee of a jury trial, we cannot join even this technical coup de grace."[39]

37. Collins v. Walker, 335 F.2d 417 (1964).
38. Kingsley Books v. Brown, 354 U.S. 436, 447 (1957).
39. Quoted in the Baltimore Sun, January 22, 1963.

While the general maintenance of jury trials is of utmost importance to Justice Douglas, he has been particularly vigorous in their defense in two significant fields. These are the disparate areas of litigation under the Federal Employers' Liability Act and the equally complex determination of a definition for legal sanity.[40] In adjudging sanity, Justice Douglas is a supporter of the *Durham* rule, rather than the older *M'Naghten* approach whereby sanity was made to depend upon an ability to tell right from wrong.[41] Under the *Durham* rule, all medical and psychiatric knowledge about the defendant is made available to the jury, and it is up to the jury to evaluate this testimony and to determine whether the defendant was insane at the time of the crime. Basically, "the question whether society should assess punishment for criminal conduct, is, in the last analysis, a moral judgment. The jury, being of the community, reflects its attitudes and speaks for it."[42] Nowhere is this statement more necessary or more conclusive than when a question of sanity is raised. For here the jury must decide the factual issue of guilt, determine the question of motivation, and, if it finds the condemned act the product of a diseased mind, adjudge whether society wants to inflict a punishment. Of course, it would be the jury which would render a final decision under the *M'Naghten* rule also, but without the same kind of knowledge put in evidence for it to consider. As Justice Douglas phrased the argument:

> After the *Durham* case, as before, the jury has the final say. The psychiatrist merely expounds of the theoretical and clinical aspects of the problem. The jury evaluates his testimony, as it does the evidence on every other factual issue. . . . But the *Durham* case puts at the jury's disposal all the wisdom, all the knowledge that medicine and psychiatry have to offer in answering the question whether the defendant was insane at the time of the act, and whether the act was a product of the insanity. Under the *Durham* rule no one principle of psychiatry is turned into a principle of law.[43]

Justice Douglas is also concerned with the interrelationship of sanity and a jury trial from a slightly different perspective. In some states, a person may be declared insane by medical authorities before trial and be committed to an institution for an indeterminate period. His condition may improve to the point where, under any definition, he could not be considered insane. Yet, because of his commitment, he may never receive his day in court. To avoid this infringement of individual rights, Justice Douglas would prefer to see any declaration of

40. See Massey v. Moore, 348 U.S. 105 (1954).
41. See Douglas, *Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956).
42. DOUGLAS, LAW AND PSYCHIATRY 10 (1956).
43. DOUGLAS, *op. cit. supra* note 33 at 485-90.

insanity made in open court, before commitment, with definite provisions for reconsideration of mental status included. Under this procedure, the individual could subsequently be tried for the crime. In assessing the question of legal guilt, however, the jury would be informed that, at the time the crime was committed, the person was considered mentally irresponsible for his actions.

Cases brought under the Federal Employers' Liability Act have also emphasized Justice Douglas' belief in the jury as being an indispensable ingredient of a "fair trial." A few years after he became a member of the Supreme Court, the Justice explained at some length his reasons for this belief.

> The right to trial by jury is a "basic and fundamental feature of our system of federal jurisprudence." . . . It is part and parcel of the remedy afforded . . . workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefits of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress afforded them.[44]

Throughout his tenure, he has continued to adhere to this position and has become one of the Court's most outspoken advocates for a liberal interpretation of its power to review and to act as a final arbiter in FELA disputes.[45]

Justice Douglas has not been in agreement with a number of his brethren on the role which the Court should play in these types of disputes. He has become quite incensed when litigation involving liability has been brought up to the Court by a certiorari vote of four only to have the case dismissed as being improvidently granted by the vote of the other five members.[46] He has also seemingly resented the suggestion that the Court will be more amenable to overturning lower court judgments when these judgments have gone against the worker rather than the employer.[47] He believes that the lower courts have not given a friendly reception to the FELA with its jury provisions and have therefore been too inclined to withdraw doubtful questions of fact from the jury and to resolve them in favor of the employer. In sum, and reflecting his attitude toward the entire

44. Bailey v. Central Vermont R.R., 319 U.S. 350, 354 (1943).
45. See, *e.g.*, DOUGLAS, WE THE JUDGES 132 (1956).
46. Harris v. Pennsylvania R.R., 361 U.S. 15, 17-18 (1959).
47. Wilkerson v. McCarthy, 336 U.S. 53, 70-71 (1949).

question, Justice Douglas finds "the difference between the majority and minority of the Court . . . concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment. . . ."[48] He, for one, believes the vigil should never end.

V. THE TRIAL

"One reason the means are so important to us is that in a vivid sense the individual stands above the state and can insist on a strict accounting from it."[49] These words encompass in a general sense Justice Douglas' view that any doubts about the procedure or conduct of a trial should be resolved in favor of the citizen. All actions of government touching upon a trial at any stage and in any manner must be, like Caesar's wife, above reproach. The sixth amendment lays out, with some specificity, certain minimal requirements for the federal government, requirements which the Justice thinks are also applicable to the states. He has given a very literal interpretation to the demands that a trial be speedy and that it be held in the district in which the crime was supposedly committed.[50] These requirements were put into the Constitution by the framers because they believed that only by such procedures could there be a "fair trial." Justice Douglas shares this belief.

Certain other procedures, while not directly forbidden by the Constitution, are so harmful in their effects that they may destroy the impartiality of a trial and thereby deny the defendant due process of law. For example, Justice Douglas is convinced that, except under the most unusual circumstances, the accused has the right to a complete trial before the tribunal first chosen to judge him. He takes a very niggardly view of a judge's discretion to discharge a jury before it has reached a verdict.[51] This is especially true when a request for a mistrial is made by the prosecution. "Once the prosecution can call a halt in the middle of a trial in order to await a more favorable time, or to find new evidence, or to make up the deficiencies in the testimony of its witnesses, the promise of protection against double jeopardy loses the great force it was thought to have when the Constitution was written."[52] The threat of repeated harassment and subsequent prosecution at a later date when it is more agreeable to the government are burdens which he does not believe a defendant should have to bear.

48. Harris v. Pennsylvania R.R., *supra* note 46, at 17 (1959).
49. Douglas, *The Means and the End*, 1959 WASH. U.L.Q. 103, 106.
50. Johnston v. United States, 351 U.S. 215, 224 (1956).
51. Downum v. United States, 372 U.S. 734 (1963).
52. Brock v. North Carolina, 344 U.S. 424, 442 (1953).

Even when the prosecution confesses error and asks, not for a mistrial, but for the dismissal of the charges altogether, Justice Douglas would be hesitant before approving such a request.[53] In other words, once a case has been heard on its merits, a decision should be forthcoming. If the courts are merely to be rubberstamps for the prosecution, they will lose their independence entirely. There may be a number of reasons for confessing error, among them honest mistakes of judgment. But confession of error in one case can be used as a maneuver to save the government's cause in another litigation. The harm done to the accused, who in reality is neither cleared nor convicted, is in terms of his reputation and his future standing in the community. He deserves better treatment at the hands of the law. The prosecution must also represent its majesty and integrity. Therefore when one prosecutor recently suppressed evidence favorable to the accused, Justice Douglas for the Supreme Court held that due process of law had been violated and then went on with a dissertation on the behavior expected of officers of the courts.[54]

The sixth amendment in addition to providing for a speedy trial also declares that that trial should be public. With certain reservations noted below, Justice Douglas has interpreted this provision to mean that the news media may make fair comment on the progress of a trial or on the demeanor of its participants, from judge, to lawyers, to defendant.[55] This is so because "newspaper comment on trials, though ill-tempered or prejudiced, is part of our freedom of speech and of press."[56] He displays little patience with judges who take offense at criticisms of their actions and he is especially against the use of contempt citations to silence or punish such criticisms. If the news media step beyond the bounds of fair comment or if their actions so prejudice a community that an impartial judgment cannot be reached, there are remedies other than contempt that can be applied. Prejudice can be overcome by a change of venue. Libelous or slanderous statements can be made the basis for a civil or criminal charge. In this event, however, those called to the bar of justice would be accorded all the safeguards of criminal procedures inherent in a "fair trial" and would not be subject to summary punishment by the judge at his own discretion.

The advent of radio, and especially of television, has caused some rethinking on Justice Douglas' part as to what the framers of the

53. Casey v. United States, 343 U.S. 808 (1952).

54. Brady v. Maryland, 373 U.S. 83 (1963).

55. See, *e.g.*, Craig v. Harvey, 331 U.S. 367 (1947); Fisher v. Pace, 336 U.S. 155 (1949).

56. DOUGLAS, AN ALMANAC OF LIBERTY 359 (1954).

Constitution meant by a "public" trial. He has come to the conclusion that

> The concept of the public trial is not that every member of the community should be able to see or hear it. A public trial means one that is open rather than closed—a trial that people other than officials can attend. The public trial exists because of the aversion which liberty-loving people had toward secret trials and proceedings. . . . That is the reason our courts are open to the public, not because the Framers wanted to provide the public with recreation or with instruction in the ways of government.[57]

He finds photographing, broadcasting or televising trials highly disruptive of the serene atmosphere in a courtroom, an atmosphere which is most conducive to arrival at a calm and considered judgment. Perhaps more than any other media, television can focus mass attention and therefore mass opinion on the delicate question of guilt or innocence. And for Justice Douglas, "[mass opinion] is anathema to the very conception of a fair trial."[58] Innocence or guilt may be measured mathematically, but it is the mathematics of the twelve good men and true of the jury who unanimously announce their verdict after due consideration, not the mathematics of a popularity contest entered into on the spur of the moment.

The final televised moments of the trial of Jack Ruby in the Dallas courtroom of Judge Joe Brown about a year ago must surely have confirmed Justice Douglas' dislike for the raucous, impassioned, and foreign influences which television can bring to a forum which is supposed to be the sacrosanct seat of justice. If the courts of this land are to continue to be the final refuge for both innocent and guilty alike, if they are to be the final spokesmen on perilous issues of life and death, freedom and imprisonment, then they must live up to the finest traditions of Anglo-American judicial practice. They must never deviate from the highest procedural standards or divert their attention from the substantive end of equal justice under law. A "fair trial," in the broad context that Justice William O. Douglas uses the term, will go far toward creating the environment in which American jurisprudence can make a real contribution to human welfare and human understanding.

57. Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840, 842 (1960).
58. *Id.* at 844.