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A Tribute to Justice Douglas

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A TRIBUTE TO JUSTICE DOUGLAS

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How felicitous that the Antioch Law Journal honors Justice William Orville Douglas with this first issue, having apprised him of its show of esteem, receiving his gracious acknowledgment, all in short succession before his death. Good fortune, this dedication, for it will not likely be the lot of other journals, in seasons near, to pay homage to such a man. Such men do not pass by that often.

Store clerk, window washer, janitor, sheep herder, newsboy, waiter, berry picker, second in his Columbia law class, neophyte Wall Street lawyer, law professor, mountain climber, SEC Chairman, author, Supreme Court Justice—he was all of these. Of the 105 Supreme Court sitting Justices, he stands head and shoulders above the crowd. Not because he served on the High Court more than 36 years, longer than any of his predecessors; not because he wrote almost 1300 opinions, over 500 in dissent, or contributed to more than one-third of the 444 volumes of the United States Supreme Court Reports; not because he was a true genius, the only one Justices Brennan and Fortas said they ever knew.

No, Douglas occupies a special place in our legal constellation because he is an exciting distillation of our most deep seated democratic urges and longings; because of his tantalizing irreverence for the cant and shibboleth in our judicial liturgy; because of his passionate egalitarianism, his distrust of the business ethos, his oneness with the oppressed, with racial minorities, with the poor, and with the propertyless people we send to jail for coveting property in a system where property holds sway; because of his indefatigable defense of the first amendment, especially during the miasma of the 1950's when liberalism collapsed and betrayed its traditions. For all these reasons, Justice Douglas is an American treasure.

He was not, it is true, the darling of the academics. But what does the dust and must of much of legal academia have in common with this man? His concern was this nation's seething, struggling humanity—life existential, raw and real, not some other-worldly abstraction far above the fray of the streets.

His opinions toppled time-honored Court monuments: atrophied doctrine, studied opacity, feigned reliance on precedent, jural jargon, and above all—pseudo-objectivity, the idea that judging is a value-free pursuit, transcending ideology like a bird in flight barely visible to the earthbound.

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In sum, the man was an embarrassment to the judicial system and the high priests hovering over it; for his opinions could be comprehended by the uninitiated without advanced degrees in legal astrology. Walter Hamilton's pithy description of early Justice Black is even more applicable to Justice Douglas.

> [H]e regards the sacred cows as ordinary heifers; finds it impossible to accept verbal symbols as realities; refuses to metamorphose the actual question to be resolved into an esoteric issue at law; and fails to appreciate the pomp and circumstance of circumlocution by which the processes of justice are kept decorous. And the Supreme Court, like any other savage tribe, demands of its members a reasonable conformity to its folkways.[1]

Thus Douglas did the unforgivable. He swept away the seemingly seamless webs of the law. He demystified mystery. He illuminated the living legal process. Whether writing for the majority, concurring or in dissent, he shed light, in the context of the case at hand, on some of the most critical questions—where the power lay, who benefitted from its use, and, under the Court's decision, who really won, who really lost, and why.

Though we may at times balk at an opinion sketched in haste, penumbral and emanatory, a mere maquette for a tapestry which never leaves the loom, we forgive him. He was, you see, a marvel, not a god.

To glimpse his soaring spirit, Justice Douglas must be read, not portrayed. Yet the few brief quotations which follow, limited necessarily to scattered topics, cannot hope to capture his inner essence but only barely begin to hint of the man, his irrepressible ideas, his stunning style. While "the Court does not sit," Paul Freund reminds us, "to compose for the anthologies,"[2] it is not by chance that Douglas has been anthologized.

He was, first and foremost, a tenacious civil libertarian. "The essential scheme of our Constitution and Bill of Rights," he wrote, "was to take the government off the backs of the people."[3] This theme, pervasive in his writing, had its corollary: the government belongs to the people and must account to them. "Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional

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[1] *Mr. Justice Black's First Year*, New Republic, June 8, 1938, at 121.

[2] Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 552 (1951).

[3] Laird v. Tatum, 408 U.S. 1, 28 (1972) (Douglas, J., dissenting).

theory is that we the people are the sovereigns, the state and federal officials only our agents."[4]

If the first amendment has a preferred position in our constitutional design, and the legal literature assures us it does, then Douglas has a preferred position as its defender *extraordinaire.* Professor Emerson summed it up well. Douglas' view was that:

> [a]ny conduct that constitutes expression and is not so 'closely brigaded with illegal action as to be an inseparable part of it' is entitled to full protection against government prohibition . . . . [A]ssuming one adopts a common sense, functional definition of expression, [this] full-protection test is not only wholly viable but also better able to effectuate the purpose of the first amendment than any other doctrine.[5]

He dissented vigorously to Smith Act convictions of communists during the McCarthy period and fifteen years later adverted to the Court's novel manipulation of the "clear and present danger" test in that case.

> First, [communist] threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted . . . as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.[6]

He was not troubled that speech could be disruptive. "[A] function of speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[7]

Nor was obscenity part of his official lexicon. "Censors, of course, are propelled by their own neuroses."[8] Erotica simply could not be excised from the first amendment. "We are judges, not literary experts . . . . We are not competent to render an independent judgment as to the worth of any book . . . ."[9] Moreover, "a universally accepted definition of obscenity is impossible."[10] Most importantly, "the test

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[4] Colten v. Kentucky, 407 U.S. 104, 122 (1972) (Douglas, J., dissenting).

[5] Emerson, *Justice Douglas' Contribution to the Law. The First Amendment,* 74 Col. L. Rev. 353. 354 (1974), quoting Roth v. United States, 354 U.S. 476, 514 (1975) (Douglas, J., dissenting).

[6] Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

[7] Terminiello v. Chicago, 337 U.S. 1,4 (1949).

[8] Ginsberg v. New York, 390 U.S. 629, 655 (1968) (Douglas, J., dissenting).

[9] Memoirs v. Massachusetts, 383 U.S. 413, 427 (1966) (Douglas, J., concurring).

[10] Ginsberg v. New York, 390 U.S. 629, 656 (1968) (Douglas, J., dissenting).

that suppresses a cheap tract today can suppress a literary gem tomorrow."[11] In a key obscenity case, Chief Justice Burger, for the majority of the Court, attempted to counter these precepts. "[M]odern societies [do not] leave disposal of garbage and sewage up to the individual 'free will,' but impose regulation to protect both public health and the appearance of public places."[12] To which Douglas responded: "As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV or over the radio."[13]

Loyalty probes, whether Congressional or Executive, were anathema to Douglas.

> [A]ll matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by the investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which since 1947, when Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.[14]

To hold to account those who govern, he would not, like the Court majority, grant absolute immunity from damages to legislators and judges who traduce the Constitution. As for legislators, "[May] they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?"[15] And judges?

> What about the judge who conspires with local law enforcement officers to "railroad" a dissenter? What about the judge who knowingly turns a trial into a "kangaroo" court? Or one who intentionally flouts the Constitution in order to obtain a conviction? Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.[16]

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[11] Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).
[12] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973).
[13] Miller v. California, 413 U.S. 15, 45 (1973). (Douglas, J., dissenting).
[14] Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).
[15] Tenney v. Brandhove, 341 U.S. 367, 382 (1951) (Douglas, J., dissenting).
[16] Pierson v. Ray, 386 U.S. 547, 566-67 (1967) (Douglas, J., dissenting).

Douglas' defense of black rights was implacable. His positions were distinctive. He was the first and last Supreme Court Justice to use the word *apartheid* to describe aspects of race relations in this country. "Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants. . . . Segregation of Negroes in restaurants and lunch counters is a relic of slavery . . . a badge of second class citizenship."[17] He was quick to note the "racist overtones" in Congress' expulsion of Adam Clayton Powell.[18] Along with Justice Powell he rejected the Court's distinction between "intentional" and "unintentional" school segregation.

> I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies. . . .
>
> There is state action . . . when public funds are disbursed by urban development agencies to build racial ghettoes.
>
> [W]here black teachers are assigned almost exclusively to black schools [it] constitute[s] state action. . . .
>
> When a state forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.[19]

This is but the scantest sampling of a prodigious output of more than a third of a century. Very little constitutional or federal jurisprudence escaped his ken or pen.

Since he took leave, a pall, almost visible, has gradually settled over the Court. His erstwhile *compadres*, Brennan and Marshall, are now fairly isolated and beleaguered. Yet they give no hint of spiritual fatigue. They carry his banners well. At times modest victories are theirs, defined not as capturing new territories but holding existing trenches. The other Justices (save Burger and Rehnquist) often rotate to join them in dissent—sometimes, one suspects, as much out of collegiality as conviction.

The Court is not the same without him. So much is missing: the anger, the passion, the parry, the thrust, the daring, the combative, the brilliance, the outrageous.

And yes, the poet.

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[17] Bell v. Maryland, 378 U.S. 226, 259-260 (1964) (separate opinion of Douglas, J.)

[18] Powell v. McCormack, 395 U.S. 486, 553 (1969) (separate opinion of Douglas, J.).

[19] Keyes v. School District # 1, 413 U.S. 189, 216 (1973) (Douglas, J., dissenting).

Who now will rescue solitude in blaring public buses?

Who will locate health in erotica?

Who will insist the teenage child is free to resist the religious commands of angry parents?

Who will rage against abusive power leveled at the least of those unable to fend?

Who, in robes, will match the haunting verse in his rhapsodic song?

> Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . .
>
> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sounds, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction. . . .
>
> Those who hike the Appalachian Trail into Sunfish Pond, New Jersey . . . or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community. . . .
>
> That, as I see it, is the issue of 'standing' in the present case and controversy.[20]

William O., you are sorely missed.

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[20] Sierra Club v. Morton, 405 U.S. 727, 741-52 (1972) (Douglas, J., dissenting).