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PUNISHMENT IN A FREE SOCIETY†

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EVEN IF MEN WERE ANGELS, the experience of Divine Revelation would suggest the prudence of retaining the threat of punishment to keep them so. So long as non-angelic mortals seek pleasure and avoid pain, punishment will play a vital role in influencing human behavior, in intimidating actual offenders and in deterring would-be ones. But punishment, like the infliction of any pain, as an end in itself, is an evil. Those who insist that punishment is the just desert of crime, that punishment must fit the crime ("an eye for an eye"), or that punishment is the debt owed society by some criminal, may assert the unstudied belief of mankind. By viewing punishment as an end, they cannot justify its infliction. Only by considering it as a means, may punishment be properly evaluated. In this light, punishment is just or unjust in proportion as it serves or disserves the attainment of a good end. Punishment imposed to prevent crime promotes the common good, and is accordingly just. Punishment inflicted for the sake of vengeance, retribution, or sadistic satisfaction, promotes no common good, and is unjust.

Those who would substitute lenient for punitive treatment of criminals, argue that the deterrent efficacy of threats of punishment is overrated. They insist that crime continues in spite of the threats because criminals seldom look ahead to the possible consequences of their lawless acts. How much greater the crime rate would be without such threats must remain conjectural: no society has yet been foolhardy enough to experiment with suspension of penalties for crime. As to the effect of such threats on criminals, this writer could only wish that his students, after a semester of exposure to criminal law materials, would acquire the ready grasp of subtle distinctions among various degrees of burglary

†The author has in substance reproduced a sentence or two from his writing, *Petition in the Matter of the Imprisonment of Archibishop Stepinac to the President of the United States* (1946).

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and the mastery of the tangled skein of the law of sentencing second offenders that goes with the acumen of a second-story man who has spent some time in prison.

Those who would lessen the severity of punishment argue historically that crime in fact increased when penalties were most severe. It is of course true that penalties were severe and crime flourished prior to nineteenth century reforms, and this was especially so in England. As late as 1819, no fewer than 220 crimes were capitally punished. Most of these crimes, however, were "clergyable," *i.e.,* subject to respite from the death penalty. In days before uniform crime reporting, a Select Committee of Parliament attributed 72,000 executions for robbery and theft alone to the reign of Henry VIII. Yet during the time when picking pockets was punished by death, a good harvest was reaped by pickpockets who plied their trade among crowds at public executions as they gazed skyward at the hangman's noose. But the efficacy of punishment in preventing crime depends primarily upon the certainty of infliction, and only secondarily upon its severity. The abolition of brutal punishment happened to be followed by the disappearance of the armed footpads that infested the highways to London. It would be *post hoc ergo propter hoc* reasoning simply to attribute this amelioration to lessened severity of penalties. The establishment for the first time in 1829 of a professional police force assured a measure of certainty in criminal law enforcement theretofore unknown. It was that certainty that emboldened the House of Commons in 1832 to test the thesis that certainty, and not severity, was the important ingredient in deterrence by adopting the humanitarian reforms abolishing the death penalty for all but four offenses.

Punishment in Free and Totalitarian Societies

The major concern of a free society with punishment is that a fair trial precede its infliction. This concern involves resolution of two weighty interests: on the one hand, convicting the guilty and preventing crime; on the other, acquitting the innocent and protecting fundamental rights of the individual. In our society the interest of preventing crime has assumed considerable magnitude. Major crime in the United States has increased twice as fast as the population since 1940. For seven years in a row, the two million mark has been exceeded for the more serious crimes (homicides, robberies, aggravated assaults, burglaries, rapes, and larcenies). But the interest in acquitting the innocent and protecting fundamental rights is the crucial one that differentiates a free from a totalitarian society. This interest postulates man as a creature of God. As such, man, and not government, is the measure of things. Government's image of man must be that of a creature with spirituality, uniqueness, and dignity. Man's image of government must be that of a means to the attainment of the ends for which he was created. In this ordering of affairs, government is a limited, and not an exclusive, means. Government cannot be the end of man and shall not subsume the total sphere of his existence.

Dialectical materialism, the official doctrine of communism, views man and his relationship to government in a different penumbra. Man is a simple, undiversified product of economic forces. Lacking Divine authorship, man *naturally* lacks spirituality, uniqueness, and dignity. Man is objective and can be no mystery. The most that can be said for his individuality is that he is

an undifferentiated part of the mass. This mass man must conform or perish. He must conform to the official theology (atheism), philosophy (dialectical materialism), art, science, or what-have-you, of communism. In short, this piece of protoplasm is either a means to the end of the attainment of one or another five-year plan, or he is an enemy of the people. In this order of things, there can be no room for human, individual, or personal rights.

Once upon a time, if the accused could walk blindfolded and barefoot over nine red-hot ploughshares laid lengthwise at equal distances without being scorched, he was entitled to acquittal. Otherwise, as usually was the case, he was condemned as guilty. One by one with the passing centuries, the ancient ordeals by fire, water, and battle, have been abandoned. In the course of centuries, they have ceased to command confidence as sound methods of resolving disputed issues of fact. Their recrudescence, in the form of the twentieth century totalitarian trial of Archbishop Aloysius Stepinac, indicates that some of the progress of mankind is illusory.

Archbishop Stepinac was sentenced in 1946 to sixteen years of forced labor with confiscation of all property, and loss of civil rights for an additional five years. Cardinal Stepinac passed away this year. The indictment by the Public Prosecutor charged the Archbishop with collaborating with the regimes of occupying nations and with an independent nationalist movement during World War II, and participating in forced conversions to Roman Catholicism of various Yugoslav groups. The nature of these charges, their historic background, the motivation of a new Balkan government in ordering them made, and the evidence existing to refute them as well as that contrived in their support, have been discussed elsewhere.[1] Our focus is on the method of trying the disputed issues of fact, and fundamental standards of fairness demanded by the civilized practice of mankind in criminal trials.

The trial of Archbishop Stepinac offers the lawyer of the Western World, and particularly the Anglo-American practitioner, an almost unique catalogue of fundamental rights disregarded by governmental action to inflict punishment on a human being.

Pre-trial by Government-controlled Press

One year before the trial of the Archbishop, a Pastoral Letter of the Yugoslav Hierarchy accused the government of widespread persecution of the Church.[2] The Letter noted the religious victims: 269 dead, 169 in prisons and concentration camps, and 89 missing. Protest was made of the confiscation of Church property, the closing of religious seminaries, convents and schools, and the abolition of the religious press. The Yugoslav embassy in Washington in 1946,[3] and a group of Protestant clergymen and editors who visited Yugoslavia as guests of that government in 1947,[4] have denied such persecution. But in 1947, the non-Catholic Serbian Bishop of Dalmatia complained at length of even more drastic persecution of his Orthodox

[1] Cavalli, *Il processo dell'Arcivescovo di Zagabria*, LA CIVILTA CATTOLICA (Rome, 1947); MARTIRIUM CROATIAE (Rome, 1946); MIGLIORATI, LA CHIESA NELLA REPUBBLICA FEDERATIVA POPOLARE JUGOSLAVA (Rome, 1946); PATTEE, THE CASE OF CARDINAL ALOYSIUS STEPINAC (1953).

[2] PATTEE, *op. cit. supra* note 1, at 470-80.

[3] The Case of Archbishop Stepinac, Pamphlet, Embassy of the Federal Peoples Republic of Yugoslavia, Washington, D.C., 1946.

[4] Religion in Yugoslavia, Pamphlet, 1947.

Church. "Though the communist regime has set out to destroy all religion and all belief in God, it would be no exaggeration to say that at the present time the Orthodox Church is being even more severely persecuted than the Catholic."[5]

A series of attacks on the Archbishop, whose name headed hierarchal signers of the Letter, was initiated in the Zagreb newspaper, *Vijestnik*.[6] By January 1946, this campaign assumed sufficient proportion to warrant comment by Randolph Churchhill, a British observer, that "the Yugoslav propaganda against the Archbishop has only one purpose, *i.e.*, to prepare his trial."[7] Eight months later, on the day of the indictment of the Archbishop, *Vijestnik* denounced him as the:

> supreme head of all the dark and bloody crimes committed by (pro-fascist bands). . . . Stepinatz will answer for the heavy crimes he committed during the occupation and since Yugoslavia's liberation. He is responsible for close four-year collaboration with the enemy. He is responsible for the protection of Ustashi slaughterers, for "diplomatic" activity before the collapse of the Croat independent State, for the episcopal letter directed against the national liberation struggle and for the anti-national spirit that he propagated as supreme head of the church among his subordinates.[8]

The remaining Zagreb papers and the provincial Croatian press joined in a concerted editorial attack on the Archbishop.[9]

In the Anglo-American press, free from governmental dictate, comment on criminal cases pending before a jury sometimes adversely affects the rights of a defendant. Under a totalitarian regime, when the press is an arm of government, the effect of adverse comment on a defendant is utterly fatal. This is certainly so when the triers of fact are not a jury of laymen recruited from the community at large, but rather a few full-time designees paid by the regime in power. But it is especially the case when mass media that might conceivably support the defendant are totally suppressed. The attack on the Archbishop in the government controlled press and radio coincided with the suppression of Catholic publications in Yugoslavia.

Mob Domination of Trial

In the wake of the press and radio campaign came the mass demonstrations and circulation of petitions against the Archbishop. These were staged and organized as can be done only in a totalitarian state. They were timed for the day of indictment, and again for the opening of trial. The courtroom audience, admitted only by ticket by the OZNA (national secret police), were well screened to maintain the atmosphere of hysteria and hostility. A symphony of hisses accompanied the reading by the court of a prejudicial (and quite hearsay) article describing the Archbishop's alleged collaboration with an independent Croatian movement.[10] A cacophony of jeers repeatedly interrupted the Archbishop in his brief thirty-eight minute defense address.[11]

Biased Tribunal

Whatever the system of jurisprudence, the minimum standard for a fair trial is notice and hearing on the merits before an

[5] N. Y. Times, Aug. 23, 1947, p. 14, col. 5.
[6] See, *e.g.*, Dec. 19, 1945; Dec. 21, 1945; Jan. 1, 1946; Jan. 19, 1946; Jan. 26, 1946.
[7] London Daily Telegraph, Jan. 23, 1946.
[8] N. Y. Times, Sept. 21, 1946, p. 4, col. 5.
[9] N. Y. Times, Sept. 23, 1946, p. 2, col. 3.
[10] N. Y. Times, Oct. 1, 1946, p. 14, col. 1.
[11] N. Y. Times, Oct. 4, 1946, p. 7, col. 2.

impartial tribunal. The Supreme Court of the Popular Croat Republic, one of the so-called people's courts of the new regime, was constituted, according to the Yugoslav press, to render judgments that "were not to be given by trained jurists under the complicated laws heretofore in force but are to be made by the best sons of the people, not the dead letter of the written law but by the proper, healthy conception of the people. The judges are to be chosen from the people."[12] Three judges thus chosen conducted the trial of the Archbishop – Zarko Vimpulsek, Ante Cireneo, and Ivan Poldrugac. These were true to the new totalitarian jurisprudence. "Frequently," the *London Times* reported of the examination of the Archbishop, "both the president of the court and the prosecution were directing so many questions at him that he was cut off in the middle of a sentence."[13] The prejudicial mental set of the president was repeatedly manifested. In the middle of the trial, he accused the Archbishop, "You must have a very loose conscience," and cried out, "Stepinac supported terrorism."[14]

Denial of Assistance of Counsel

Fundamental in civilized criminal procedure to a fair hearing is that the accused understand the proceedings. He must be accorded time and opportunity to select counsel and consult with them in the preparation and presentation of the case. The court rejected, for no stated reason, one of the two attorneys designated by the Archbishop for his defense.[15] After the trial, incidentally, the chief defense counsel, Dr. Ivo Politeo, and two of his aides were arrested and imprisoned.[16] A third aide escaped to Italy.[17] The Archbishop was arrested in 1946, at 6. A.M. on September 18, indicted September 23, placed on trial on September 30, and sentenced on October 11. During that entire period the Archbishop saw his counsel only once, and then for a single hour, on September 27.[18] To frustrate preparation of a defense, not only was the Archbishop imprisoned, but also his three closest administrative aides were arrested, questioned, and detained by the prosecution during the time between arrest and verdict in the Archbishop's case.[19]

Exclusion of Defense Witnesses

Basic to a fair hearing is the right of the accused to have his witnesses heard. The prosecution was permitted an unlimited number of witnesses, and indeed on one day of the trial, October 5, 73 testified. The defense was permitted to call only 20, of which 14 were barred, without even being put in the witness box before their exclusion.[20] Said the tribunal: "These witnesses cannot contribute anything to modify the substance of the indictment. They can only testify regarding details. They might be able to show that Stepinac protected a few isolated Serbs and Jews. But to pretend to base a defense on this would be an intolerable effrontery in a people's

[12] Slobodna Dalmacija (Zagreb), Dec. 31, 1944; Programme et status du parti communiste de Yougoslavie (Belgrade, 1948).
[13] Oct. 2, 1946.
[14] Cavalli, *Il processo dell'Arcivescovo di Zagabria* 37 (1947).
[15] PATTEE, THE CASE OF CARDINAL ALOYSIUS STEPINAC 57 (1953).
[16] N. Y. Times, April 23, 1947, p. 13, col. 1.
[17] *Ibid.*
[18] PATTEE, *op. cit. supra* note 15, at 57.
[19] *Ibid.*
[20] PATTEE, THE CASE OF CARDINAL ALOYSIUS STEPINAC 62 (1953).

court."[21] The same exclusion was accorded the documentary evidence of the defense. An additional ground for exclusion of defense witnesses was advanced by the tribunal: "Fascists cannot testify on behalf of fascists in our country."[22] Yet, three former officials of the independent Croat movement, all awaiting trial as "fascists," were permitted to testify for the prosecution.[23]

Retroactive and Vague Penal Laws

The concept of fair trial involves clear notice by the state of the conduct sought to be punished in advance of its commission. The *ex post facto* principle antedates the Romans and has been basic to every civilized system of criminal justice in the Western World for centuries. The Archbishop was indicted under Article 13, Paragraph 2, of the "Law on Criminal Activities against the People and the State."[24] These statutes were drafted and put into effect by the new government on August 15, 1945, with subsequent amendment on July 9, 1946. The conduct that the prosecutor charged to the Archbishop was alleged to have occurred during the four years preceding their enactment. Concededly, these statutes constituted a total departure from those previously in effect. As such, they were replete with political terms having no content ascertainable in criminal jurisprudence. To charge "treason" and "conspiracy" has meaning in the criminal courts of civil and common-law countries; to accuse of "collaboration" offers a defendant and his counsel no particular notice of the charge. Even prospective application of such vague statutes would violate fundamental rights. Retroactive application compounded that violation in the case of Archbishop Stepinac.

Denial of Confrontation

The Archbishop was indicted on September 23, 1946. Actually, his trial commenced two weeks before the indictment. Eighteen defendants, twelve of them priests, were placed on trial on September 9, 1946, on charges of collaboration. Nine days later, after much testimony had been taken, an adjournment for ten days was announced. A new defendant was to be added, the Archbishop. Thus, when the trial resumed on September 30, with the Archbishop as defendant for the first time, much of the evidence against the new target of the prosecutor had already been presented.[25] At the time of offering this evidence, the Archbishop had not been present, and indeed not even accused. Such is a trial without either notice or hearing. Its manifest unfairness was aggravated by the circumstance that the testimony given against the Archbishop in his absence was that of indicted individuals squirming under the arbitrary sword of Damocles of the new people's democracy.[26]

Fundamental Law and Fair Trial

There is no requirement that the criminal trials of one country be conducted according to the canons of another. However, there are minimum standards of fairness to an accused, which when ignored and violated, justify concern and even active

[21] Cavalli, *Il processo dell'Arcivescovo di Zagabria* 36-37 (1947).
[22] *Ibid.*
[23] PATTEE, *op cit. supra* note 20, at 62.
[24] Programme et status du parti communiste de Yougoslavie (Belgrade, 1948).
[25] PATTEE, THE CASE OF CARDINAL ALOYSIUS STEPINAC 54-55 (1953).
[26] *Ibid.*

intervention by civilized nations of the world. The Dutchman, Grotius, writing in the early seventeenth century, qualified the general rule of non-intervention:

> The case is different if the wrong is manifest. If a tyrant . . . practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such a case.[27]

The German, Martens, maintained that public opinion:

> irresistibly compels governments to pronounce their judgments and to take steps, as soon as such truly deplorable phenomena as religious persecutions or denials of the civil rights of . . . subjects of this or that denomination make their appearance.[28]

The Frenchman, Fauchille, wrote:

> Intervention is legitimate *vis-a-vis* a State which is in a condition of anarchy or whose institutions are actually inhumane; if a State cannot impose upon others the form of its government, it can at least demand that they submit to a rule of law, in conformity with the principles of civilization.[29]

And Sir Robert Phillimore, Judge of the High Court of Admiralty, and member of the British Privy Council, insisted upon the right of intercession to uphold religious equality by "remonstrance, by stipulation, by a condition in a Treaty concluding a War waged upon other grounds."[30]

Since the sixteenth century, states have intervened to uphold the human rights of freedom of worship by treaty, diplomatic protest, withdrawal of diplomatic representation, and outright non-recognition of the persecuting sovereign.[31] The government of the United States has recognized the principle of freedom of worship in the international community, and has frequently protested to other states that have persecuted its own subjects on religious grounds.[32]

Indeed, the federal nature of the government of the United States offers a concrete and systematic example of the application of fundamental law to the criminal procedures of sovereign states. In the first eight amendments to the Federal Constitution there are set forth twenty-five specific protections that comprise the Bill of Rights. Seventeen of these guarantees relate to fair criminal procedure. These provisions, however, are restrictions on the federal government. They have no direct application to the fifty sovereign states. Yet it is on the state level that the bulk of responsibility for the prosecution of crime rests. Since 1868, the Fourteenth Amendment has prohibited states from depriving "any person of life, liberty, or property, without due process of law." The due process clause has provided a rule of fundamental law for review of state criminal procedure. The reviewing body is a federal one, the Su-

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[27] II GROTIUS, DE JURE BELLI ET PACIS 308, 440 (Whewell transl. 1853).

[28] II MARTENS, VOLKERRECHT: DAS INTERNATIONALE RECHT DER NATIONEN 111 (Berlin, 1883).

[29] I-I FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIQUE 572 (8th ed., Paris, 1922).

[30] I PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 622 (3d ed., London, 1879).

[31] BLUNTSCHLI, DAS MODERNE VOLKERRECHT DER CIVILISIERTEN STAATEN 270 (3d ed. 1878); BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 14 (1915).

[32] *E.g.*, on behalf of Jewish racial and religious minorities: President Van Buren to Turkey (1840); Hamilton Fish, Secretary of State, to Roumania (1872); James G. Blaine, Secretary of State, to Russia (1881); John Sherman, Secretary of State, to Persia (1897); John Hay, Secretary of State, to Roumania (1902); President Roosevelt to the Third German Reich (1938). JANOWSKY, INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES 6-32 (1937); N. Y. Times, Nov. 15, 16, 1938.

preme Court of the United States.

The principle of due process does not incorporate all of the guarantees in the first eight amendments. The principle exacts from the states a criminal procedure that accords even to the lowliest and most outcast all that is "implicit in the concept of ordered liberty."[33] Obviously, in the name of fundamental law, federal intervention in state criminal proceedings has been the exception and not the rule. For the first fifty-five years of the due process clause, in the Fourteenth Amendment, the Supreme Court did not disturb a single state criminal conviction on constitutional grounds, except ones involving denial of equal protection of the law for discrimination along racial lines in selection of jurors.[34] Since 1923, the year of first federal intervention,[35] this writer has been able to find only fifty-seven instances for the next thirty-five years of interference by the Supreme Court with state criminal proceedings on the grounds of denial of due process.[36] These instances have been sufficient to indicate the minimum standards for civilized criminal procedure implicit in the concept of ordered liberty.

In 1923, the Supreme Court interfered in a state conviction for murder of five Negroes after a trial, in essential respects, similar to that of Archbishop Stepinac. The proceeding was dominated by a mob, and though eminent counsel had been designated, there had been no preliminary consultation with the accused. The Court held that when "the whole proceeding is a mask – that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion," then there is no due process of law.[37] A decade later, the Court reversed the convictions of seven defendants in the celebrated *Scottsboro* case, solely because of inadequate representation by counsel. Though counsel had been designated and appeared in that case, the Court noted that "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."[38]

In the other instances of federal interference, the Supreme Court has required that state criminal trials be open to the public at large,[39] that they be conducted before judges who are impartial,[40] with evidence that is neither coerced[41] nor sup-

[33] Palko v. Connecticut, 302 U.S. 319, 325 (1937). See also Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[34] *E.g.*, Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Bush v. Kentucky, 107 U.S. 110 (1882); Neal v. Delaware, 103 U.S. 370 (1880); *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879).

[35] Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923).

[36] Ludwig, *The Role of the Prosecutor in a Fair Trial*, 41 MINN. L. REV. 602, 603-04 (1957).

[37] Moore v. Dempsey, 261 U.S. 86 (1923). This was an appeal from a denial of habeas corpus by a United States District Court for the Eastern District of Arkansas. The Supreme Court could not reverse the state conviction in this proceeding. The Court directed the lower federal tribunal to hold hearings. As a consequence, the state authorities, without contesting the case further, commuted the sentences and released the prisoners who had been in custody for four years.

[38] Powell v. Alabama, 287 U.S. 45, 59 (1932).

[39] *In re* Oliver, 333 U.S. 257 (1948).

[40] Tumey v. Ohio, 273 U.S. 510 (1927).

[41] Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Rochin v. California, 342 U.S. 165 (1952); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Vernon v. Alabama, 313 U.S. 547 (per curiam), *reversing* 240 Ala. 577, 200 So. 560 (1941); Lomax v. Texas, 313 U.S. 544 (per curiam), *reversing* 144 S.W.2d 555 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama,

pressed by the prosecution,[42] and that fair post-conviction remedies be made available by state law to the accused.[43] The conduct defined by the state as criminal cannot be vague, but must be clearly ascertainable in advance of commission of the facts by the accused.[44] That conduct also cannot infringe freedom of worship,[45] or liberty of opinion.[46]

Against this background, the Acting Secretary of State of the United States, Dean Acheson, thus characterized the trial of Archbishop Stepinac:

> [W]e have for a long time been concerned about civil liberties in Yugoslavia. You will recall at the time we recognized the Government of Yugoslavia, we drew their attention to what we thought was the undesirable situation in that field and reminded them of their undertakings under the United Nations Charter in which all of these matters are specifically dealt with and urged that the matter be rectified as soon as possible. We have since recognition unhappily had to take up a very considerable number of cases with the Yugoslav Government where we have felt that trials of our own citizens were unfairly conducted. It is this aspect of the Archbishop's trial which I am able to say now concerns us. . . . It is the civil liberties aspect of the thing which causes us concern: aspects which raise questions as to whether the trial has any implications looking toward the impairment of freedom of religion and of worship; the aspects of it which indicate at least to the reporters who reported it from the spot that the actual conduct of the trial left a great deal to be desired.
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> You will recall that under the Constitution and law of the United States fairness of trial is guaranteed under the 14th amendment, and the Supreme Court of the United States has set aside as not being legal procedure at all trials in which the courtroom has been dominated by feelings adverse to the defendant by demonstrations of prejudice. That is deeply inherent in the American system, that the very essence of due process of law is that in trials we shall lean over backward in being fair to the defendant, in the atmosphere in the courtroom, in forbidding demonstrations of spectators, in opportunity of facing and cross-examining witnesses – all these matters seem to us to be absolutely inherent in the matter of a fair trial. It is that aspect of the thing . . . which causes us concern and deep worry.[47]

The expression of "concern and deep worry" regrettably did not ripen into protest, cessation of economic and military

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309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

[42] Mooney v. Holohan, 294 U.S. 103 (1935).

[43] Jennings v. Illinois, 342 U.S. 104 (1951); Young v. Ragen, 337 U.S. 235 (1949).

[44] Musser v. Utah, 333 U.S. 95 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[45] Kunz v. New York, 340 U.S. 290 (1951); Tucker v. Texas, 326 U.S. 517 (1946); Marsh v. Alabama, 326 U.S. 501 (1946); Taylor v. Mississippi, 319 U.S. 583 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923).

[46] Butler v. Michigan, 352 U.S. 922 (1957); Terminiello v. Chicago, 337 U.S. 1 (1949); Saia v. New York, 334 U.S. 558 (1948); Winters v. New York, 333 U.S. 507 (1948); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).

[47] *U.S. Interest in Civil Liberties in Yugoslavia,* 15 DEP'T STATE BULL. 725 (Oct. 20, 1946).