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A POLITICAL THEORY OF POLITICAL TRIALS

RONALD CHRISTENSON*

Are political trials necessary? Do they reflect something about the nature of politics and law which makes them inevitable in every society? Or, are political trials a disease of both politics and law? Predictably, totalitarian regimes employ political trials—some sensational, most secret—in order to accomplish the obvious ends of total power: the total control of a total population. Stalin's purge trials and the Nazi Peoples' Court were juridical nightmares, demonstrating that corrupted absolute power tends toward absolute self-justification. Do such "trials" have anything in common with other trials which must also be called political, including the Wounded Knee trial, the trials of the Boston Five, the Chicago Seven, and the Berrigan brothers, or even of Galileo, Joan of Arc, and Socrates? Do political trials make a positive contribution to an open and democratic society? This Article concludes that they do make a positive contribution to an open and democratic society. They bring together for public consideration society's basic contradictions, through an examination of competing values and loyalties. They are not incompatible with the rule of law, and they are best understood by examining the questions they raise.

I. INTRODUCTION

What is a political trial?¹ Are political trials better classified as law

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¹ Attempts to define political trials are valuable, but ultimately unsatisfying. The near-definitive work, Otto Kirchheimer's *Political Justice*, suggests that political trials are those in which "the courts eliminate a political foe of the regime according to some prearranged

or politics? If they are totally political, why have a trial? Since the courts are part of the "system," are all trials, therefore, political? Or, because in every political trial the accused is charged with a specific violation of the criminal code, are no trials political? Is the designation *political trial* pejorative, used when justice seems impossible, or is it merely descriptive, used when more is at stake in a trial than a transgression of the criminal code?

Most attempts to designate a trial as *political* become mired in the quicksand of motive, in the argument that the prosecution, the judge, even the entire court system, is "out to get" the defendant, or conversely, that the defendant and his lawyers are using the court as a platform in their program to undermine the legal system and accomplish their political goals. Such judgments are fine instances of the genetic fallacy. Legal and political assessments, when made on a guess at motives, become quagmires. Motives are always numerous and various, and they generally operate at odds with each other. In both law and politics, however, we must make judgments. If we refuse to make judgments, believing that one motive is as good or as bad as another, we will land either in the cynical position that law is the will of the stronger and therefore *all* trials are political trials, or in the naive, Panglossian position that *none* are political.

We might sidestep the difficulties of definition by beginning with the ingenuous assumption that we can recognize political trials when we see them. If we can point to a number of trials and say with some confidence that these, if any, are political trials, then we might more easily understand the nature of law and politics that precipitates such trials. The trial of Socrates for corrupting the youth of Athens and the trial of Jesus for blasphemy and sedition are most likely to be generally recognized as political trials. We could follow these two classic examples with others: the Inquisition (both the medieval and Spanish versions), the 1431 trial of Joan of Arc for heresy and witchcraft, the 1534 trial of Thomas More for "maliciously" remaining silent when asked about Henry's supremacy in religion, or the 1633 trial of Galileo for heretically suggesting that the earth moved around the sun, or the many treason

rules." O. KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 6 (1961). *See also id.* at 46-49, 419; *POLITICAL TRIALS* xii-xiii (T. Becker ed. 1971); J. SHKLAR, *LEGALISM* 149 (1964). Both Shklar and Becker follow Kirchheimer's lead. For a discussion of the range of definitions of political trial, see N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT* ch. 5 (1973); *see also* *AMERICAN POLITICAL TRIALS* 3-16 (M. Belknap ed. 1981); A. TURK, *POLITICAL CRIMINALITY* (1982); Friedman, *Political Power and Legal Legitimacy*, 30 *ANTIOCH REV.* 157 (1970); Hakman, *Political Trials in the Legal Order*, 21 *J. PUB. L.* 73 (1972); Harper & Haber, *Lawyer Troubles in Political Trials*, 60 *YALE L.J.* 1 (1951).

and seditious libel trials in England's Puritan Revolution. Are there more certain examples of political trials than the trials of two kings, Charles I in 1649 or Louis XVI in 1792? Would anyone suggest that the trial of the Irish patriot, Robert Emmet, or of the traitor Lord Haw-Haw (William Joyce) after World War II were not political trials? What then about the trials of Alfred Dreyfus, Sacco and Vanzetti, or Julius and Ethel Rosenberg?

These trials, and more, come to mind when political trials are mentioned. Most of the above defendants have come to us in the judgment of history as heroes unjustly prosecuted. Yet, in each of these cases an argument can be made that under the circumstances the prosecution was understandable, even reasonable, and the judgment sensible if not just.

In 399 B.C., while Athens was recovering from the disastrous Peloponnesian War, the democratic leaders Anytus and Meletus recognized that Socrates, who had associated with the oligarchic faction, was a threat to the post-war reconstruction. Two of his students, Alcibiades and Critias, had been ruthless while in power. Socrates, meanwhile, was undermining what small faith the youth had in democracy.² Likewise, Jesus presented an internal threat to Rome. Judea was difficult to govern with a mix of nationalist extremists inclined toward terror, such as the Zealots, and such religious fanatics as the Essenes or the followers of John the Baptist. The elders in the Sanhedrin, who had authority in Jewish law, regarded Jesus as a threat to the delicately balanced political relationship with the Roman governors. Further, he was a peril to the Jewish law. His activities during Passover, driving the merchants and money-changers from the Temple in Jerusalem, were a forewarning to both the Sanhedrin and Rome. Removing such a troublemaker and blasphemer from the scene, one hailed by the mob as "King of Israel that cometh in the name of the Lord," could be defended as best for the imperial and the community interests. The full force of Rome, in fact, did move against the next generation in Jerusalem (70 A.D.).³

Similar sensible arguments can vindicate other notable political prosecutions. Joan was given every chance by her examiners to acknowledge that her "voices" were not superior to the authority of the Church. She was admonished to return to the way of salvation but persisted in her heresy.⁴ The interrogation of Thomas More was designed

² A. TAYLOR, *SOCRATES* ch. III (1932); Stone, *I. F. Stone Breaks the Socrates Story*, N.Y. Times, April 8, 1979, § 6 (Magazine), at 22.

³ See *Matthew* 26-27; *Mark* 14-15; *Luke* 22-23; *John* 18-19; see also S. BRANDON, *THE TRIAL OF JESUS OF NAZARETH* (1968).

⁴ W. BARRETT, *THE TRIAL OF JEANNE D'ARC 270-79* (1931); 2 A. PAINE, *JOAN OF ARC: MAID OF FRANCE 251-58* (1925).

to secure his compliance, not his execution. Henry VIII and Thomas Cromwell desired the assent of More, the ex-Chancellor, to the new policy of supremacy and to the revised order of succession after Henry's marriage to Anne Boleyn. When Henry learned that Pope Paul III had intervened by elevating More's fellow prisoner, John Fisher, to cardinal, he exploded. Only then did he set in motion the machinery which led both More and Fisher to their deaths.⁵

Galileo was admonished in 1616 by Cardinal Bellarmine that the Church expected only obedience, not "absolute assent." He was not forbidden from entertaining his opinions as a probability or from discussing them with his peers. At his 1633 trial it was revealed to Galileo that even the Inquisitor Firenzuola had "no scruple in holding firmly that the Earth moves and the Sun stands still." Nevertheless, the issue of the trial was not the scientific truth but the Church's authority.⁶

Charles I had been waging war against Parliament, which tried him. Louis XVI, likewise, conspired and intrigued with foreign powers to bring about a war and "be really king again."⁷ Robert Emmet was a leader in an insurrection which resulted in the assassination of Lord Kilwarden and Colonel Brown.⁸ William Joyce collaborated with the Nazi propaganda machine.⁹ Charles, Louis, Emmet, and Joyce, in different ways, all attempted to bring down the state by force.

With the perspective of time, the post-war trials of Dreyfus, Sacco and Vanzetti, and the Rosenbergs can be seen as products of hysteria: anti-Semite, anti-foreign, and anti-Communist. Nevertheless, at the time, highly respected leaders of opinion looked into the cases and put the weight of their influence behind the convictions. The French General Staff was intractable in its support of the court-martial of Captain Dreyfus, and the entire French society was divided. France had lost Alsace and Lorraine to Germany; Dreyfus had been born in Alsace, and it was evident that someone assigned to the General Staff had passed information to the German Military Attaché Schwartzkoppen.¹⁰ A distinguished committee composed of Harvard President Lowell, M.I.T. President Stratton, and Judge Grant advised Governor Fuller against

⁵ G. ELTON, *POLICY AND POLICE: THE ENFORCEMENT OF THE REFORMATION IN THE AGE OF THOMAS CROMWELL* 400-20 (1972).

⁶ G. DE SANTILLANA, *THE CRIME OF GALILEO* chs. XI-XII (1955).

⁷ *REGICIDE AND REVOLUTION: SPEECHES AT THE TRIAL OF LOUIS XVI* ch. 5 (M. Walzer ed. 1974).

⁸ 28 T. HOWELL, *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1169-78 (London 1809-1826) [hereinafter cited as STATE TRIALS]*.

⁹ R. WEST, *THE NEW MEANING OF TREASON* (1964).

¹⁰ A. DREYFUS & P. DREYFUS, *THE DREYFUS CASE* (1937); N. HALASZ, *CAPTAIN DREYFUS: THE STORY OF A MASS HYSTERIA* (1955).

clemency for Sacco and Vanzetti.¹¹ The Supreme Court, in a six-to-three decision, refused to stay the execution of the Rosenbergs.¹² President Eisenhower refused clemency, explaining that "the Rosenbergs have received the benefit of every safeguard which American justice can provide. . . . I can only say that, by immeasurably increasing the chances of atomic war, the Rosenbergs may have condemned to death tens of millions of innocent people all over the world."¹³ If the passage of time has brought the consensus of considered opinion to a different conclusion in each of these cases, we have, after all, the advantage of historical distance and hindsight.

II. PARTISAN TRIALS

An initial distinction should be made between those political trials which are totally unsupported by law and those which, while proceeding with a political as well as a legal agenda, are within the rule of law. The former, a fraudulent trial, can be called a partisan trial. Partisan trials are fully within the realm of power and completely outside the rule of law. The Spanish Inquisition,¹⁴ the Star Chamber under the Tudors and early Stuarts, Judge Jeffreys of the Bloody Assize during the English Restoration,¹⁵ and the Jacobin Tribunal during the Reign of Terror in the French Revolution¹⁶ provide pre-twentieth century prototypes.

In our century, wars, revolutions and regimes which made war on their own people in the attempt to thwart revolution make partisan trials prominent. Two examples, one from Nazi Germany and one from Stalin's regime, furnish clear illustrations.

Hitler and Goering were angered when the German Supreme Court acquitted three of the four Communist defendants accused of setting the Reichstag Fire in 1933, a fire planned by the Nazis themselves and ignited by their stormtroopers. The Supreme Court decision led Hitler and the Nazi leaders to ensure that henceforth jurisdiction over political crimes, those involving "insidious attacks against the government," were removed from the ordinary courts to Special Courts. In

¹¹ F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1962); B. JACKSON, *BLACK FLAG: A LOOK BACK AT THE STRANGE CASE OF NICOLE SACCO AND BARTOLOMEO VANZETTI* (1981); R. MONTGOMERY, *SACCO-VANZETTI: THE MURDER AND THE MYTH* (1960); F. RUSSELL, *TRAGEDY IN DEDHAM; THE STORY OF THE SACCO-VANZETTI CASE* (1971).

¹² *Rosenberg v. United States*, 346 U.S. 273 (1953).

¹³ W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST* 248 (1965).

¹⁴ *See* H. KAMEN, *THE SPANISH INQUISITION* (1965).

¹⁵ *See* 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 168-80, 411-13 (1883).

¹⁶ *See* G. LENOTRE, *THE TRIBUNAL OF TERROR: A STUDY OF PARIS IN 1793-1795* (1968); 2 J. THOMPSON, *ROBESPIERRE* chs. XV-XVI (1968).

1934 an additional court was established by Hitler and Goering, the notorious Peoples' Court, controlled by the Nazi Party and the Gestapo. Clearly instruments of terror and propaganda, five of the seven Peoples' Court judges were chosen from the Party, the S.S., or the military. Defense lawyers were "qualified" Nazis who seemed resolved to outdo the prosecution in castigating the accused. The Queen of Hearts, best known for her shrieks, "sentence first, verdict afterwards," and "off with her head," was a wise jurist compared with Nazi Judge Roland Freisler. No appeals were allowed. Rather, Hitler and Goering retained the right to quash the criminal proceedings in the event the result would be unfavorable.¹⁷ Partisan courts such as the Peoples' Court operate at the center of propaganda and on the fringe of terror, waging psychological warfare more against the entire population than against the accused on trial.

In the trials following the Russian Revolution, continuing throughout the Stalin era, the courts operated on the premise that under the new revolutionary order the question of guilt was irrelevant. Guilt was itself declared to be a bourgeois concept, unworthy of the new order of justice. N.V. Krylenko, the Prosecutor General, sculptured, as he put it, "a new law and new ethical norms." The tribunal became "an organ of the class struggle of the workers directed against their enemies," acting in the "interests of the revolution . . . having in mind *the most desirable results* for the masses of workers and peasants." Defendants are "carriers of specific ideas," and the court must recognize this fact in judging a defendant: "*Only one* method of evaluating him is to be applied: evaluation from the point of view of class expediency." Individual guilt is replaced by class expediency. "We protect ourselves," Krylenko concluded, "not only against the past but also against the future."¹⁸

Roland Freisler in Nazi Germany and N.V. Krylenko in Stalin's U.S.S.R. were mistaken if they thought that their jurisprudence was new, or that their courts could create a new order. It is more accurate to say that their legal standard, expediency, was the oldest law. In a crisis or tyranny it is the most commonplace. In all circumstances it is the most tedious. It is not new, however. Freisler and Krylenko do not give us a creative idea about law, only a restatement of the operative motto of all tyrannies: justice is the interest of the stronger. The people of the

¹⁷ G. DIMITROV, *THE REICHSTAG FIRE TRIAL* (1969); W. SHIRER, *THE RISE AND FALL OF THE THIRD REICH; A HISTORY OF NAZI GERMANY* 369-78, 1389-97 (1959); F. TOBIAS, *THE REICHSTAG FIRE* (1964).

¹⁸ I. A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918-1956; AN EXPERIMENT IN LITERARY INVESTIGATION* 306-09 (1973); see also Fuller, *Pashukanis and Vyshinsky*, 47 *MICH. L. REV.* 1157-66 (1949); Powell, *The Legal Nihilism of Pashukanis*, 20 *U. FLA. L. REV.* 18-32 (1967).

small island of Melos faced this standard when powerful Athens demanded that they submit or be destroyed. The Athenians stated the principle Freisler and Krylenko advocated with flat clarity: "The standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept."¹⁹

The one-sidedness of a partisan trial and its lack of contradiction envelopes it in an ideological wonderland, not too different from what Alice found. In challenging the prosecution at a partisan trial, the accused stands no chance of seriously contesting the indictment, much less persuading the court. Nikolai Bukharin, for example, was charged with leading a conspiratorial group (the Bloc of Rightists and Trotskyites) to sabotage and dismember the U.S.S.R. and undermine its defense capacity. In the 1938 show trial, Bukharin challenged Public Prosecutor Andri Vyshinsky's strategy of using those in the dock to verify the "evidence" presented during the preliminary investigation. Bukharin wedged his protest between the demand that he cooperate as a condition for being allowed to appear in court and his desire that he set his political ideas on record for future generations. Although he was cut short by Vyshinsky whenever, by way of his confession, he explained his heretical views, he was the only defendant who refused to play the evil conspirator role cast for him. Even then, Bukharin was only partially successful, for, as George Katkov concludes, "In the process he found himself ensnared in a net of equivocation and ambiguous phrases, so that instead of defending what he believed to be the truth, he upheld that most powerful weapon of the very tyranny to which he had fallen victim—institutionalized mendacity."²⁰

The Nazi and Stalinist partisan trials thus provide evidence that certain political trials take place outside the framework of the rule of law. Are all political trials, by their very nature, outside the rule of law? Is what we call *constitutionalism* contrary to the idea of a political trial?

The rule of law—more broadly constitutionalism—means limited government. Its principles are that no one speaking with the authority of government has arbitrary power over a citizen or any person in society, that all persons stand as equals before the law and share equal responsibility to it, and that judicial remedies from independent courts can secure the rights of individuals against encroachment by the state.²¹

¹⁹ THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 90 (R. Warner trans. 1954).

²⁰ G. KATKOV, THE TRIAL OF BUKHARIN 192 (1969). For a transcript of the trial see THE GREAT PURGE TRIAL (R. Tucker & S. Cohen eds. 1965).

²¹ See A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-03 (1959); J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 37-40 (1978); C. FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON (1974); C. MCILWAIN, CON-

Political trials are not incompatible with the rule of law. An examination of the questions political trials raise reveals that political trials can make a positive contribution to an open and democratic society.

III. A TYPOLOGY OF POLITICAL TRIALS

Political and criminal trials differ in the questions that they raise. Criminal trials with no political agenda naturally raise difficult questions of law. Matters of due process, from controversies over search and seizure or the *Miranda* rights to whether the death penalty is a cruel and unusual punishment, can hardly be dismissed as easy cases. However, ordinary criminal cases do not involve the dual legal and political agenda that political trials simultaneously address. More precisely, ordinary criminal trials within a constitutional framework operate from a legal agenda with only a trace, if any, of the political agenda. Conversely, partisan trials proceed according to a fully political agenda with only a facade of legality (although the legalism might be turgid). Political trials within the rule of law juggle both the legal and the political agendas.

A further classification of political trials would categorize them as four types according to the basic issues of politics brought into question by the trial: (1) Trials of corruption. The nature of the public realm is at issue and the underlying question is, What things are public and what are private? (2) Trials of dissenters. Here the correctness of both public policy and methods of dissent is at issue. The dissenter asks, Is the policy immoral? The dissenter, in turn, is asked, Is the dissent appropriate? (3) Trials of nationalists. A more basic issue, the nature of representation, is raised here, and the questions become, Is the government representing one people yet ruling another? Does this nationalist group represent a distinct people? (4) Trials of regimes. The most fundamental issue of politics, the nature of legitimacy, is undertaken when one side asks, Was the former government legitimate? The other side responds by asking, Is this court legitimate?

We should note the progression from the issue of the relationship of the public and private realms to judgments about policy and dissent, to conflicts over representation, and finally to the critical matter of legitimacy. This escalation from a political trial of a rather common variety to the rare breed puts the court, the law, and the political order in increasing difficulty. Each type presents a Gordian knot tied successively tighter. The chart on the following page illustrates these types.

TABLE 1
TYPES OF POLITICAL TRIALS

Trials of:	<u>Political Trials within the Rule of Law</u>	<u>Partisan Trials</u>
<u>Corruption</u>	<p>Issue: The Public Realm</p> <p>Questions: What is public? What is private?</p> <p>Examples: Francis Bacon (1621) Judge Otto Kerner (1973) Abscam Congressmen (1980)</p>	<p>Issue: Power and Expediency</p> <p>Question: Is this political revenge?</p> <p>Examples: Anne Boleyn (1536) Marcus Garvey (1925)</p>
<u>Dissent</u>	<p>Issue: Correctness of Policy, Methods of Dissent</p> <p>Questions: Is the policy immoral? Is the dissent appropriate?</p> <p>Examples: Fritz Adler (1917) Catonsville Nine (Berrigan brothers, 1968) Boston Five (Spock & Coffin, 1968) Karl Armstrong (1973)</p>	<p>Issue: Power and Expediency</p> <p>Question: Is the trial designed to eliminate opposition?</p> <p>Examples: Socrates (399 BC) Thomas More (1532) Roger Williams (1635) Anne Hutchinson (1638) French Revolutionary Tribunal (1793-94) Stalin Trials (1936-38)</p>
<u>Nationalists</u>	<p>Issue: Representation</p> <p>Questions: Does the government represent all? Does the nationalist group represent a distinct people?</p> <p>Examples: Guy Fawkes (1606) Robert Emmet (1803) Roger Casement (1916) Wounded Knee (1974)</p>	<p>Issue: Power and Expediency</p> <p>Question: Is the trial designed to further the domination over an ethnic group?</p> <p>Examples: Spanish Inquisition (1478) Sacco & Vanzetti (1921) Scottsboro (1931) SASO/BPC (South Africa, 1976)</p>
<u>Regimes</u>	<p>Issue: Legitimacy</p> <p>Questions: Was the former government legitimate? Is the court?</p> <p>Examples: Pres. Andrew Johnson (1868) Nuremberg (1945)</p>	<p>Issue: Power and Expediency</p> <p>Question: Is this victor's justice?</p> <p>Examples: Charles I (1649) Louis XVI (1792) Iranian Tribunal (1980) Gang of Four (1980)</p>

Political trials which proceed within the rule of law have their corresponding partisan trials. Trials of corruption can become mere trials of revenge. This is apparently what happened to Anne Boleyn and to Marcus Garvey. Trials of dissenters can become a convenient way to eliminate the opposition, as the trials of Socrates, Thomas More, and others who have questioned public policy illustrate. Trials of ethnic nationalists, from the Spanish Inquisition against the Jews to the "terrorist" trials in South Africa today, can become a step in the establishment of

domination or elimination. Finally, a trial of a regime has the capacity for being purely partisan, victor's justice. The issue in all partisan trials is the same, namely, expediency in the use of power.

Obviously, any attempt to arrive at a typology involves a procrustean effort to fit unique cases into a few pigeonholes. More than one political question can be raised in a given trial. Dissenters are often nationalists, and nationalists dissent. From John Lilburne and Peter Zenger to Lech Walesa, challengers of entrenched power raise many questions. How, for instance, should we categorize those in the Soviet Union? Some dissent on religious grounds, others for classically liberal reasons, and still others as nationalists. Yet the Soviet authorities treat them all as cases of insanity. As the Director of the Institute of Forensic Psychiatry, G. Morozov, put it, "Why bother with political trials when we have psychiatric clinics?"²² Nevertheless, in order to understand the nature of political trials, we must classify and arrange them in some logical order. Grouping them according to the issues they generate in the political sphere recognizes that, acknowledged or not, the political agenda is inescapably present in many trials.

A. TRIALS OF CORRUPTION

If there ever was a classic trial for corruption, it would be the trial of Lord Chancellor Francis Bacon in 1621. Bacon, one of the founders of modern science, had published his critique of Aristotle, the *Novum Organum*, the previous year. His influential *Advancement of Learning* had been published nearly two decades earlier. As a politician he had served in Parliament for nineteen years and, with the accession of James I, became the solicitor general, then the attorney general, a member of

²² Z. MEDVEDEV & R. MEDVEDEV, *A QUESTION OF MADNESS* 67 (1971). Richard Moran demonstrates that Daniel McNaughton did not meet the test which carries his name. It seems that he was not insane, and, what is more, he attempted to assassinate Prime Minister Peel for political reasons. The insanity verdict, Moran concludes, was employed to discredit his political act. R. MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL McNAUGHTON* (1981). As for attempts to classify political trials, it might be noted here that Kirchheimer employs the following categories of political trials: (a) a common crime committed for political purposes, (b) a regime's attempt to incriminate a foe, (c) use of defamation, perjury, or contempt to discredit a foe. O. KIRCHHEIMER, *supra* note 1, ch. III. Becker classifies political trials by using quotation marks to designate which part of the proceeding is phony: (1) political trials, where the crime is political and the court impartial, (2) political "trials," where the court is questionable, (3) "political" trials, where the charge is a subterfuge but the court is fair, and (4) "political trials," where the charges are fabrications and the proceeding is also fabricated. T. BECKER, *supra* note 1, Introduction. Nathan Hakman finds the following types: (1) agents of foreign governments, (2) frame-ups, (3) resistance and civil disobedience, and (4) "constructive" political trials where the defendant has no connection with a movement for or against change. HAKMAN, *supra* note 1. Friedman suggests three types: (1) politically motivated, (2) politically determined, and (3) ordinary trials with political consequences. FRIEDMAN, *supra* note 1, at 158.

the Privy Council, Lord Keeper of the Great Seal, and finally the powerful right hand of the king, Lord Chancellor. His affluence grew with his power, but so did his enemies. His impeachment by Parliament for taking bribes must be viewed as an attack also on King James. James, who was not above taking bribes himself, acknowledged that "if I were . . . to punish those who take bribes, I should soon not have a single subject left."²³

On the advice of James, Bacon confessed to twenty-three counts of corruption, admitting that he took gifts from litigants but denying that he had been influenced. The House of Lords condemned him to pay a ruinous fine of £40,000, to be imprisoned in the Tower during the King's pleasure, and to be forever barred from holding office. Granting full pardon, James released Bacon from the Tower after four days and remitted the fine. Although his scholarly career continued, Bacon's political career was at an end. Before he died, he wrote in his notebook about his trial: "I was the justest judge that was in England these fifty years. But it was the justest censure in Parliament that was these 200 years."²⁴

History reveals no lack of trials for misuse of public authority for private ends. Every generation has its Abscam, Watergate, or Teapot Dome cases, and many similar cases involving lesser officials, calling our attention to the temptations of power. The dilemmas inherent in holding public office arise not only from the influence that those with power have for shaping policy toward special interests while claiming that they are acting in the public interest, but also from their vulnerability to the bad publicity of false charges.

For example, in 1971, Secretary of the Treasury John Connally urged President Nixon, as a taped conversation reveals, to "satisfy dairymen" in order to secure their financial support in the 1972 election. In 1975, Connally was tried for accepting \$10,000 in illegal gratuities from the Associated Milk Producers in return for his efforts to obtain an increase in the milk price support. The major prosecution witness was a lawyer from the Milk Producers, Jake Jacobsen, who had been granted immunity from prosecution by the federal authorities in return for his testimony. Connally was acquitted, but Jacobsen was arrested by the Texas authorities for misuse of \$825,000 in a savings and loan firm for which he was an officer.²⁵ Was Connally the victim of a "con job" by Jacobsen, or did Connally merely "beat the rap?"

When public officials are tried on charges of corruption, public con-

²³ C. BOWEN, *THE LION AND THE THRONE* 428 (1956).

²⁴ *Id.* at 209; *see also* F. ANDERSON, *FRANCIS BACON* (1962).

²⁵ *N.Y. Times*, Apr. 4, 1975, at 1, col. 2; *Id.*, Apr. 15, 1975, at 1, col. 2; *Id.*, Apr. 18, 1975, at 1, col. 1; *Id.*, Aug. 7, 1975, at 61, col. 4.

fidence in the judicial system is often at stake. Judge John Sirica became *Time* magazine's Man of the Year for upholding the integrity of the law in the Watergate cases. Conversely, federal Court of Appeals Judge and former Illinois Governor Otto Kerner was convicted of taking a bribe of racetrack stock in return for favors to racetrack owners while he was governor. Although he had an unimpaired reputation and insisted that he was innocent, it was important to demonstrate to the public, as a *New York Times* editorial pointed out, that not even so powerful an official as Kerner is beyond the reach of the judicial system, especially when the system is often accused of being stacked in favor of the elite and against the lowly.²⁶ The prosecutor, incidentally, was James R. Thompson, who later became the Illinois Governor partially because of his reputation for being tough on crime, gained somewhat in the Kerner case.

A trial of corruption can easily become partisan. Anne Boleyn's trial for adultery and incest in 1536 is an example. Although Anne had borne a female child to Henry VIII, she incurred Henry's sharp displeasure when a baby boy was born dead. Henry's eye was also attracted toward a maid of Anne's, Jane Seymour. He accused Anne of adultery, and he referred the matter to the Privy Council. Faithfully, the members of the Council reported that Queen Anne had committed adultery with five members of the court, including her own brother. The five, plus Anne, were sent to the Tower, tried in Westminster, found guilty, sentenced to death, and executed. Before the month was out Henry married Jane.²⁷ Like all partisan trials, Anne Boleyn's lacks significant political or legal questions. Just as the Privy Council and the court at Westminster had obliged Henry, the Archbishop obliged Henry by annulling his marriage to her and declaring Elizabeth a bastard. Henry wanted Anne out of his way, and the only question was how it could be accomplished.

In summary, trials for corruption which operate within the rule of law often present difficult entanglements of facts, legal issues, and ethical judgments. From the trial of Francis Bacon to the Watergate and Abscam trials, a mesh of problems ensnare the courts and the public. Who did what? Which witness can be believed? Was there criminal intent? Were the defendants entrapped? These and many more questions arise in each case. Unlike a partisan trial, in which such potential embarrassments are sidestepped, these matters arise because of the rule of law. Nevertheless, such trials are closer to ordinary criminal trials than to other political trials. They might have far-reaching political consequences, often knocking powerful figures out of the arena. Their consid-

²⁶ N.Y. Times, Feb. 21, 1973, at 42.

²⁷ 2 J. FROUDE, THE REIGN OF HENRY THE EIGHTH 146 (1909).

erable effect on historical events notwithstanding, such trials are largely criminal trials of important political figures.

B. TRIALS OF DISSENTERS

When dissenters are tried, so are the policies of the government. In the trial of the Berrigan brothers and the others in the Catonsville Nine case who were charged with destroying government property when they raided the Selective Service offices and burned the draft records, the prosecutor emphasized that the war in Vietnam was not an issue of the trial:

I want it clearly understood that the government is not about to put itself in the position—has not heretofore and is not now—of conducting its policies at the end of a string tied to the consciences of these nine defendants. This trial does not include the issues of the Vietnam conflict. It does not include the issue of whether the United States ought to be in the conflict or out of it.

. . . .

But this prosecution is the government's response, the law's response, the people's response, to what the defendants did. And what they did was to take government property and throw flammable material upon it and burn it beyond recognition. And that is what this case is about.²⁸

The defense, on the other hand, saw the Vietnam war as the only important issue in the trial. As William Kunstler told the jury:

The trial of Socrates was not merely a question of a man sowing confusion and distrust among the youth in Athens; the trial of Jesus could not be reduced to one of conspiracy against the Empire.

. . . .

In the first place, we agree with the prosecutor as to the essential facts of the case. The defendants did participate in the burning of records.

. . . .

It is not a question of records which are independent of life. We are not talking about driving licenses or licenses to operate a brewery. We are speaking of one kind of record. No others so directly affect life and death on a mass scale, as do these. They affect every mother's son who is registered with any Board. These records stand quite literally for life and death to young men.

. . . .

They wanted, in some small way, to throw a roadblock into a system which they considered murderous, which was grinding young men, many thousands of them, to death in Vietnam.

Also, they wanted, as they said, to reach the American public, to

²⁸ D. BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* 100 (1970). Stephen Schafer makes the important distinction between the conventional criminal who "acts to fulfill his ego or personal interest" and the convictional criminal who aims at moral or social change, "a David striking at a Goliath of injustice." S. SCHAFFER, *THE POLITICAL CRIMINAL; THE PROBLEM OF MORALITY AND CRIME* 146-47 (1974).

reach you. They were trying to make an outcry, an anguished outcry, to reach the American community before it was too late. It was a cry that could conceivably have been made in Germany in 1931 and 1932, if there were someone to listen and act on it. It was a cry of despair and anguish and hope, all at the same time. And to make this outcry, they were willing to risk years of their lives.²⁹

If the political issues cannot be introduced as part of the testimony, they can make their entry through various legal portals. In 1916, for example, Friedrich Adler, a brilliant physicist who was also a leader of the Austrian Social Democrats and associate of the key European socialists, shot and killed Prime Minister Count Sturgkh. For Adler, the central issue of his trial was not his guilt or innocence, but whether his act had been justified. Although not allowed to introduce his position as evidence, Adler succeeded in putting it forth whenever he had the opportunity. When asked by the judge, "Herr Doctor Friedrich Adler, please step forward. Do you plead guilty?" Adler startled the audience and the court by replying, "*I am guilty to the same degree as every officer who has killed in a war or who has given the order to kill—no less and no more!*"³⁰

Adler distanced himself from his counsel, who would explain the assassination by saying he was insane: "The defense counsel, from the responsibilities of his office, has the duty of seeking to save my life. I have the duty of standing up for my beliefs, which are more important to me than whether during this war in Austria one more man will be hanged or not." Adler was tried before an especially moderate and untraditional judge who permitted him, when asked to present his version of the facts in the case, to analyze the indictment. The indictment stated that "the reprehensibility of murder as a political means cannot be a subject for debate among moral men in an orderly society." Adler attacked the assumption that Austria at war was an orderly society and cataloged the illegal acts of the government. Throughout the trial Adler reversed the government case, constructing an indictment against the Austrian government, not for the court but for the public.

Although he frequently spoke his mind during the trial, working in his justification at every point, in his closing remarks Adler reasserted his indictment. Adler responded to the prosecutor's claim that vanity motivated the assassination by stating:

The real reason I want to speak is that I must explain that the question of murder, for me, has always been a *real moral* question. . . . I have always believed that the violent killing of men was inhuman, and that it is because we live in an Age of Barbarism that we are reduced to killing men.

²⁹ D. BERRIGAN, *supra* note 28, at 103-04.

³⁰ R. FLORENCE, FRITZ: THE STORY OF A POLITICAL ASSASSIN 221 (1971) (emphasis in original).

I completely agree with my colleagues who argue: *War is inhuman*. And I will not deny: *Revolution is also inhuman*.

. . . .

[W]hen one comes to the historical realization that man cannot and should not be a true Christ in the Age of Barbarism, in the Age of Inhumanity, in the Age of *Unkultur*, in which we live, then there is only the alternative standpoint: If we must really kill and be killed, then *murder cannot be a privilege of the rulers*, we must also be ready to resort to force. If it is true that the Age of Humanity has still not come, then we should at least employ force only in the service of the idea of humanity.

. . . .

I have heard the war justified, and I have understood the arguments which justified the war.

As they marched through Belgium and an innocent people fell as victims, as women and children were killed, they said: Necessity knows no commandments, it is war, there was no alternative.

As the *Lusitania* sank, and a mass of innocent civilians met their deaths, again they said: It is war, there was no alternative. . . .

We live in a time when battlefields are covered with hundreds of thousands of dead, when tens of thousands of men lie beneath the sea. It is war, it is necessity, they say to justify it.

But if one man should fall, a man who has destroyed the constitution of Austria, who has trampled the laws of Austria into the ground, if the one man who is most guilty for these horrors should fall, then suddenly they confront me and say: Human life is sacred.³¹

Adler concluded by saying that he knew what the verdict would be, but, quoting poetry, "Not all are dead who are entombed,/ For you cannot kill the spirit, ye brethren!"³² Adler was found guilty and sentenced to death. As he was escorted from the courtroom, he turned to the galleries and the windows and shouted, "Long live the International Revolutionary Social Democracy!" Since Austria lost the war, Adler was not executed, but he had his sentence commuted to eighteen years imprisonment, and finally he was granted the amnesty extended to all political prisoners. By 1921 he was the organizer of a new international, the Social Workers International, and he lived to be eighty-one years old.³³

In another trial of a war dissenter, the issue for the prosecution was again the method of dissent, while the issue for the defense was the war itself.³⁴ Karl Armstrong bombed the Army Math Research Center at the University of Wisconsin in 1970, unintentionally killing a physics

³¹ *Id.* at 263-65 (emphasis in original).

³² *Id.* at 266.

³³ *Id.* at 263-65, 267, 276, 302, 317.

³⁴ Transcript of Sentencing Hearing at 7-9, *Wisconsin v. Armstrong* (No. 7-258) (Cir. Ct. Dane County Oct. 15, 1973).

student and injuring five other persons. His sentencing hearing became a trial of the war in Vietnam.

The defense endeavored to demonstrate the illegality of the war itself, to show that it was conducted illegally with weapons forbidden by the Geneva Convention, and to establish that the Army Math Research Center translated theoretical knowledge into instruments of war designed to kill. As William Kunstler, Armstrong's attorney, expressed the defense aim:

[F]or the general public this will be a unique educational experience. Because out of the absolute chaos and tragedy of the last dozen years we hope to provide a clue to the motivation of a young man brought up in this Madison community who saw nothing ahead but a continuation of a tragedy that passes all human understanding.³⁵

Kunstler led an array of thirty-eight Vietnam veterans, anti-war activists, and experts on the war through nine days of testimony to evince that Armstrong's bombing, which mistakenly took one life, must be weighed against the government's war which was deliberately killing thousands.

The prosecution, in brief cross-examinations, established that most defense witnesses had never met Karl Armstrong before coming to Madison to testify in his behalf. Michael Zaleski, Assistant Attorney General, portrayed Armstrong as "an egotistical loser" who had a desire for recognition when he built the bomb, and remained unrepentant after he killed one person, injured others, and destroyed both property and research. Zaleski saw no morality in the bombing, only the "anarchical law of the lynch mob, taking the law into our own hands."³⁶

Both Adler and Armstrong turned to violence after becoming frustrated with democratic methods. Adler had watched his father, Victor Adler, spend years leading the Austrian Social Democrats against war. In 1914 the senior Adler, then a member of the Austrian parliament, began to support and justify the war. Listening to his father rationalizing the abandonment of his "war against war" rhetoric, Friedrich felt as if his "whole life plans and life work had been wrecked."³⁷ Hence, Friedrich resolved to oppose the war as an individual and began planning the assassination of the Prime Minister.

Armstrong had participated in various demonstrations against the Vietnam war, but his experiences at the 1968 Democratic Convention in Chicago convinced him that nonviolent demonstrations would not stop the war. The trials of Adler and Armstrong confronted society with dissenters who maintained that a selective act of violence was morally right

³⁵ *Id.*

³⁶ *Id.* at 11 (Nov. 1, 1973).

³⁷ R. FLORENCE, *supra* note 30, at 133.

in order to halt war's wholesale killing. The state, on the other hand, naturally drew the public's attention to the violent act and the consequences for society if those who commit them receive a light punishment.

Violence wipes away the persuasive argument of conscience. It is difficult to convince a judge, jury, or the public that an act of dissent was morally justified when someone is killed, whether that someone is directly involved like the Austrian Prime Minister, or an innocent bystander like Robert Fassnacht, Armstrong's victim. The position of conscience is powerful when, as in the case of Thomas More or the Berrigan brothers, the acts are symbolic. When faced with a charge of treason for refusing to give assent to royal supremacy over the Church, More submitted that silence itself is no crime, and that treason is an overt act. He further maintained that even if silence were construed as an act, the presumption must be that it means consent rather than the reverse, that a loyal subject by definition cannot harbor seditious thoughts, and that such a subject when in doubt will refer to his conscience.³⁸

The issue in More's trial became the question of the obligation of conscience. According to G.R. Elton, conscience for More meant "a recognition of . . . the truth established by a greater consensus than was available in one realm alone."³⁹ More made it clear that by conscience he did not mean everyone's right to judge arbitrarily but, instead, the duty to accept a vision granted to the body of Christians. "And therefore," he said, "I am not bound to conform by conscience to the council of one realm against the general council of Christendom." Archbishop Thomas Cromwell, More's prosecutor, argued for "the conscience of the subject, the member of the community of England who owed a duty to obey the law made for that community by the King-in-Parliament," a duty which Cromwell did not see as conflicting with divine law because the pope's authority rested on no scriptural authority.⁴⁰ Both More and Cromwell accepted the idea that conscience is a joint knowledge between an individual and the community. Both rejected the notion that conscience is an individual assertion of judgment. Where they differed was in the source of the community's knowledge: Does conscience derive from all Christendom or from a national realm?

When William Kunstler quoted Peter Zenger's attorney's exhortation that the jury "make use of their conscience" to the Catonsville jury, Judge Roszel Thomsen admonished Kunstler:

You are urging the jury to make their decision on the basis of conscience.

³⁸ Derrett, *The Trial of Sir Thomas More*, 312 ENG. HIST. REV. 459 (1964).

³⁹ G. ELTON, *supra* note 5, at 417.

⁴⁰ *Id.*

This morning, I said to you that if you attempt to argue that the jury has the power to decide this case on the basis of conscience, the court will interrupt to tell the jury their duty. The jury may not decide this case on the basis of conscience of the defendants. They are to decide this case only on the basis of facts presented by both sides.⁴¹

Daniel Berrigan asked the judge to consider whether or not his reverence for the law did not require him:

to interpret and adjust the law to the needs of people here and now. I believe no tradition can remain a mere dead inheritance. It is a living inheritance which we must continue to offer to the living. So it may be possible, even though the law excludes certain important questions of conscience, to include them none the less [sic]; and thereby, to bring the tradition of life again for the sake of the people.⁴²

Judge Thomsen responded during a colloquy outside the hearing of the jury that as a man he was moved by what the defendants said, but as a judge he must say that the "basic principle of our law is that we do things in an orderly fashion. People cannot take the law into their own hands."⁴³

Questions about the relationship between conscience and law can arise in trials of dissenters when the trials are conducted within the framework of the rule of law and, even in rare instances such as More's trial, in partisan trials. Judge Thomsen commented to the defendants that:

[I]f you had done this thing in many countries of the world, you would not be standing here. You would have been in your coffins long ago. Now, nobody is going to draw and quarter you. You may be convicted by the jury, and if you are, I certainly propose to give you every opportunity to say what you want.⁴⁴

At many political trials the "getting-to-say-what-you-want" is the whole point.

C. TRIALS OF NATIONALISTS

In trials of ethnic nationalists the nature of representation is at stake. Does the government represent all the people, or does it represent one people yet rule another? Who speaks for the American Indians: the United States government, tribal councils, or the American Indian Movement? Do the Unionist members of Parliament from Northern Ireland speak for the Catholic population, does Parliament, or does the Irish Republican Army? This controversy is comparatively more challenging to the rule of law than is the issue raised in trials of dissenters.

⁴¹ D. BERRIGAN, *supra* note 28, at 105.

⁴² *Id.* at 114-15.

⁴³ *Id.*

⁴⁴ *Id.* at 114.

Dissenters will condemn immoral policies of the government, and their prosecutors will denounce their methods of dissent. Both are important political issues. Nevertheless, both parties in such trials come to the court willing to use the trial as a vehicle for touching the sense of rightness held by the public. Adler, Armstrong, and the Berrigans, for instance, could approach the trial with the attitude that within the rule of law the trial enables them to address the immorality of war, making an appeal for the people to wake up and prompt a change in policy. The government, on the other hand, could approach such a trial with the expectation that it would discredit the dissenters in the eyes of the public. Trials of ethnic nationalists, by contrast, up the ante by raising more difficult questions: Who are the people and who can speak for them? Is there a distinct people within the public that the government does not represent but that a nationalist group does? Can the judge and jury in such cases operate within the rule of law?

Because of these questions, trials of nationalists are more likely to become partisan than trials for corruption or dissent. In trials of corruption or dissent both sides can say, for example, "We are all Americans in one legal and political tradition which is now violated and is in danger of being undermined by the other side." The judge, the jury, and finally the public can be aroused to return us to the rightful tradition. But this *one* tradition and its common public are the very matters questioned in trials of nationalists. Consequently, the opportunities and dangers of fabricating a partisan trial are ample.

South Africa, with its apartheid and draconian terrorism laws, provides clear examples of partisan trials of nationalists. The many apartheid laws ensure that separate communities develop and that the whites dominate the Africans, while the security laws interpret all opposition by the Africans, even speeches, as terroristic activity.⁴⁵ In 1974, following the independence of Mozambique which was led by the Frelimo movement, the leaders of two black organizations, the South African Students' Organization (SASO) and the Black People's Convention (BPC), were arrested and later brought to trial for the "Viva Frelimo" rallies they held in celebration. The speeches, publication, poetry, and theater, were, according to the prosecution, intended to promote hostility between whites and blacks and to endanger the law and order of the society.

Although not among the accused, Steve Biko (who was already under banning orders, otherwise he surely would also have been indicted) was called as a defense witness. As a founder of SASO and head of BPC, Biko was a key witness who was questioned by one of the lead-

⁴⁵ J. DUGARD, *supra* note 21, at 53, 262.

ing South African defense lawyers, David Soggott. In five days of testimony Biko was able to explain the intentions and meaning of the two black organizations. When asked by Soggott what the concept of Black Consciousness means, Biko replied:

[I] think the Black man is subjected to two forces in this country. He is first of all oppressed by an external world through institutionalized machinery, through laws that restrict him from doing certain things, through heavy work conditions, through poor pay, through very difficult living conditions, through poor education—these are all external to him—and secondly, and this we regard as the most important, the Black man in himself has developed a certain state of alienation. He rejects himself, precisely because he attaches the meaning White to all that is good; in other words, he associates good—and he equates good—with White.⁴⁶

The nine SASO/BPC leaders were convicted of terroristic conspiracy and sentenced to five- and six-year imprisonments. Although Judge Boshoff found that neither SASO nor BPC had conspired to bring about revolutionary change by violent means, he thought that they were part of the larger conspiracy “to achieve total liberation of the black people and to bring about a total change of the political, social and economic system of the Republic.” Their means of liberation were, according to the judge, designed to further the hostility between whites and blacks to such an extent that he was “satisfied on all the evidence that SASO and BPC were protest groups, politically, and that the common method or means employed by them was in the prevailing circumstances capable of endangering the maintenance of law and order, and constituted participation in terroristic activities.”⁴⁷

In his 1962 trial for inciting African workers to strike, Nelson Mandela, a lawyer and leader of the African National Congress (ANC) who is still imprisoned following a 1964 trial, expressed the feelings any nationalist would have in a partisan trial:

I want to apply for Your Worship's recusal from this case. I challenge the right of this court to try me. First, I challenge it because I fear that I will not be given a fair and proper trial. Secondly, I consider myself neither legally nor morally bound to obey laws made by a Parliament in which I have no representation. What sort of justice enables the aggrieved to sit in judgment over those against whom they have laid a charge?

The white man makes all the laws, he drags us before his courts and accuses us, and he sits in judgment over us. In this courtroom I face a white magistrate, I am confronted by a white prosecutor, and I am escorted into the dock by a white orderly. The atmosphere of white domination lurks all around in the courtroom. It reminds me that I am voteless because there is a Parliament in this country that is white-controlled. I am

⁴⁶ S. BIKO, *BLACK CONSCIOUSNESS IN SOUTH AFRICA* 22 (1979). See also D. WOODS, *BIKO* ch. 3 (1978).

⁴⁷ J. DUGARD, *supra* note 21, at 226.

without land because the white minority has taken a lion's share of my country and forced my people to occupy poverty-stricken reserves, overpopulated and overstocked, in which we are ravaged by starvation and disease. These courts are not impartial tribunals dispensing justice but instruments used by the white man to punish those among us who clamor for deliverance from white rule. . . .

Any thinking African in this country is driven continuously to a conflict between his conscience and the law.⁴⁸

The trial of Dennis Banks and Russell Means for the take-over at Wounded Knee provides an instance of a trial of nationalists which was conducted within the rule of law. Those associated with the American Indian Movement (AIM) felt that the federal government had failed to fulfill its commitments under the 1868 Treaty, the local white people and governments were openly hostile, the Bureau of Indian Affairs (BIA) was unresponsive, and the tribal council was dominated by a corrupt chairman and his "goon squad." AIM was invited to the Pine Ridge Reservation in order to promote change. Banks and Means were charged with burglary of the Wounded Knee Trading Post, assault against FBI agents, obstructing federal officials by building roadblocks, unlawful possession of firearms, and with conspiring with others to do all of these things and even more, such as seizing the homes and trailers of the Wounded Knee residents and the Sacred Heart Catholic Church.

For the prosecution, these acts, and not violations of the 1868 Treaty or treatment of Indians by the government, were the issue at trial. Assistant U.S. Attorney R.D. Hurd told the jury:

I don't care and it doesn't make any difference if conditions on the Pine Ridge Indian Reservation are good or bad. Conditions everywhere should be improved. . . . I don't care if the 1868 Treaty was violated or was not violated by the United States. In our society we have methods and means of redress. Primarily there are two. There is the courts, and there is the ballot box. . . . If people in their vigor can inflict violence on innocent people, can commit crimes, then a system of democracy cannot exist. It's anarchy.⁴⁹

The government's presumption was that the U.S. government, the BIA, and the elected tribal council all represent the Oglala Sioux. Hurd stressed to the jury that the government case was not against Indians, for, after all, many of their witnesses were Indians. The case, he insisted, was against Banks and Means who, with AIM, brought terror to the Indians and others in Wounded Knee.

By calling witnesses such as Vine Deloria and Dee Brown, both well-known authors on Indian politics and history, the defense intro-

⁴⁸ D. WOODS, *supra* note 46, at 22.

⁴⁹ Transcript of Trial Proceedings 21,128-33, 21,190, United States v. Dennis Banks and Russell Means (Nos. CR 73-5034, 5035, 5062, 5063) (W.D.S.D. Sept. 10, 1974).

duced the jury to the 1868 Treaty and to historical justification for violence, such as the American Revolution. The treaty had guaranteed all of what is now South Dakota west of the Missouri River, including the Black Hills, to the Sioux. The 1934 Indian Reorganization Act enrolled nonmembers into the tribe, according to Gladys Bissonette, a Sioux witness, depriving "the grass roots people of our reservation" and giving control to the "new people," now represented by the tribal council. When presented under cross-examination with the words of Banks suggesting that AIM would win the war at Wounded Knee, and that this war was only a beginning, she replied, "I would say that this was not the beginning of a war between the United States government and the Indians. We've been at war with the government all our lives."⁵⁰

Trials of Irish nationalists often feature what is known as the "Irish speech from the dock." When twenty-four-year-old Robert Emmet traveled to Europe in 1802 seeking support for an expected uprising in Ireland, he met Napoleon and Talleyrand but returned to Dublin with nothing more than promises from France to help if the rebellion were successful. Although Emmet and a few hundred supporters, dressed in green, began the rebellion and killed the lord chief justice and several others, the Emmet forces were soon in disarray. During his trial for treason, and after he had been judged guilty, the judge asked him why he should not be sentenced to death. "Why the sentence of the law should not be passed upon me," he replied, "I have nothing to say. Why the sentence which in the public mind is usually attached to that of the law, ought to be reversed, I have much to say." He then launched into an eloquent refutation of the charge that he conspired to join Ireland to France. His cause was "not for France, but for liberty." He admitted communication with France, but:

God forbid that I should see my country under the hands of a foreign power. . . . If the French came as a foreign power, Oh, my countrymen! meet them on the shore with a torch in one hand—a sword in the other—receive them with all the destruction of war—immolate them in their boats before our native soil shall be polluted by a foreign foe.

When he proclaimed that his true cause was not France but Ireland, "to effect a separation from England," the judge interrupted Emmet to remind him that he was called upon to tell the court why the death sentence should not be pronounced, but instead "you are making an avowal of dreadful treasons." The judge admonished Emmet: "You

⁵⁰ *Id.* at 19,218-31 (Aug. 16, 1974). In 1980, the Sioux "won" a United States Supreme Court case based on the 1868 Treaty and were awarded \$106 million. *See United States v. Sioux Nation*, 448 U.S. 371 (1980). Because they wanted the land, not the money, AIM, under the leadership of Bill Means, Russell's brother, occupied an 800-acre campsite in the Black Hills. *Minneapolis Tribune*, Aug. 23, 1981, at 9A.

should make some better atonement to expiate your own crimes and alleviate the misfortunes you have brought upon your country. . . .” Emmet answered that his motive resulted from “an ardent attachment to my country, from a sense of public duty,” but if he were not permitted to vindicate his cause and character, he would go to his cold grave in charitable silence and rest there without an epitaph.⁵¹

Likewise, in 1916 when Roger Casement was tried in Old Bailey for going to Germany and returning to Ireland in a German submarine in time for the Easter uprising, he ordered his counsel not to attempt to clear him but, rather, “to defend and make clear an extreme Irish Nationalist’s standpoint—that I wanted to put up a straight fight for Ireland,” that he was not an English traitor, not a dreamer, and not a fool, but an Irish patriot. Casement told the jury that “the rebellion was not made in Germany, and that not one penny of German gold went to finance it.” He said he had never sold himself to any government, but he always claimed that an Irishman “has no right to fight for any land but Ireland. . . . From the first moment I landed on the Continent until I came home again to Ireland I never asked for nor accepted a single penny of foreign money . . . for only the money of Irishmen.”⁵² He, like Emmet, was executed as a traitor.

D. TRIALS OF REGIMES

Trials of nationalists are challenging because the court must inevitably assume that it represents those for whom the accused presumes to speak, that, AIM and Irish nationalist organizations notwithstanding, the law covers all, including Indians under United States governance and the Irish under British governance. An English charge of treason against an Irish nationalist is difficult enough to try, but when the regimes themselves are tried, the law can hardly encompass the task. Under what law can those who make law be tried? The principle of the rule of law providing that no one is above the law should, strictly from the perspective of the law alone, be enough. When regimes are tried, however, the full force of symbolism and the total weight of the political consequences of putting the head of state on trial are as much present in the courtroom as the principles of law. The basic issue which gives such trials their unique gravity is legitimacy. By what authority can a regime be tried? Is a regime beyond good and evil and responsibility to the law? Is a court?

When Cromwell persuaded the Rump Parliament to establish a court to try Charles I, he answered the question of authority:

⁵¹ 28 STATE TRIALS, *supra* note 8, at 1172-77.

⁵² B. REID, THE LIVES OF ROGER CASEMENT 399-400 (1976).

'If any man hath carried on the design of deposing the King and disinheriting his posterity . . . he should be the greatest rebel and traitor in the world, but,' . . . 'since the Providence of God hath cast this upon us, I cannot but submit to Providence, though I am not yet provided to give you advice.'⁵³

When Charles appeared before the High Court in Westminster Hall, however, he refused to answer the charge of treason ("levy war against parliament and kingdom") until he was told by what lawful authority he was summoned:

When I know what lawful authority, I shall answer. Remember I am your king, your lawful king, and what sins you bring upon your heads, and the judgment of God upon this land; think well upon it, I say, think well upon it, before you go further from one sin to a greater. . . . I shall not betray my trust; I have a trust committed to me by God, by old and lawful descent; I will not betray it, to answer to a new unlawful authority.⁵⁴

Thus, the duty to try the king because of Providence's command is met in court by the refusal to answer the charges because of divine right of kings: a legal impasse, but not a political stand-off.

Charles persistently refused to answer the charge of treason, but "required" that his reasons be heard. Lord President Bradshaw informed him that "it is not for Prisoners to require." "Prisoners!" responded Charles, "Sir, I am not an ordinary prisoner." Charles continued to challenge the authority of the High Court of Parliament to charge and try the king, although he was "no skeptic for to deny the Power that you have; I know that you have Power enough." To Charles' insistence that "the Commons of England was never a Court of Judicature" and that he as king could not be delinquent under the law, Bradshaw answered with a lengthy exposition. He told Charles that "as the Law is your Superior, so truly, Sir, there is something that is superior to the Law, and that is indeed the Parent or Author of the Law, and that is the people of England." The end of all governments, kings or any other kind, is the enjoyment of justice, and all who govern are officers in that trust. Parliaments were ordained to redress the grievances of the people, but Charles had intended:

[T]o subvert the Fundamental Laws of the Land: for the great bulwark of the Liberties of the People is the Parliament of England; and to subvert and root up that, which your aim hath been to do, certainly at one blow you had confounded the Liberties and the Property of England.

In an ominous image Bradshaw told Charles, "Sir, we must deal plainly with you," and compared him to Emperor Caligula who had said he wished the people of Rome had but one neck so that in one blow he might cut it off:

⁵³ E. WINGFIELD-STRATFORD, *KING CHARLES THE MARTYR: 1643-1649*, at 312 (1950).

⁵⁴ 4 *STATE TRIALS*, *supra* note 8, at 990-96.

And your proceedings have been somewhat like to this: for the body of the people of England hath been (and where else) represented but in the Parliament; and could you but have confounded that, you had at one blow cut off the neck of England. But God hath reserved better things for us, and hath pleased for to confound your designs, and to break your forces, and to bring your person into custody, that you might be responsible to justice.⁵⁵

Three days later Charles was beheaded.

When Louis XVI was tried by the National Convention during the Jacobin supremacy, no one pleaded the king's case. One deputy, Charles Morisson, came close when he argued that the revolutionary Constitution of 1781 recognized the ancient inviolability of kings. His main argument, however, was that given the consequences for England when Charles was executed, it would be in France's interests to banish Louis.⁵⁶

The twenty-five-year-old firebrand, Saint-Just, argued that the laws and courts are intended for citizens, not kings. Louis, Saint-Just maintained, must either reign or die, but he could not be judged. Louis was a rebel, an alien, a prisoner of war who waged war against the people and was conquered. Only the law of nations, not the law for citizens, could apply to Louis. "No man can reign innocently. The folly is all too evident. Every king is a rebel and an usurper."⁵⁷ Louis, in other words, was guilty of being king.

Robespierre, Saint-Just's fellow Jacobin, continued this line of thought by denying that the proceeding against Louis was a trial, that Louis was accused, or that the National Convention members were judges:

You are, and you can only be, statesmen and representatives of the nation. You do not have a verdict to give for or against a man, but a measure to take for the public safety, a precautionary act to execute for the nation. A deposed king in a Republic is good only for two things: either to trouble the tranquillity of the state and to undermine liberty, or to strengthen both.⁵⁸

The victory of the revolution, in Robespierre's reasoning, was the verdict against Louis. He could not be judged because he had been condemned already. To put Louis on trial would be "counter-revolutionary since it would bring the revolution itself before the court." If Louis were to be tried, he might be found innocent and would be presumed innocent until the verdict. "If Louis is acquitted, where then is

⁵⁵ *Id.* at 1000-11.

⁵⁶ REGICIDE AND REVOLUTION, *supra* note 7, at 110-20. See also D. JORDAN, THE KING'S TRIAL (1979).

⁵⁷ REGICIDE AND REVOLUTION, *supra* note 7, at 121-26.

⁵⁸ *Id.* at 131.

the revolution? If Louis is innocent, all defenders of liberty are slanderers."⁵⁹

Saint-Just and Robespierre present us with the most transparent case for the logic of power upon which the justification for modern totalitarianism has been built.⁶⁰ Contrary to the Jacobin thinking, however, a trial of a regime need not be outside of law. The impeachment trial of President Andrew Johnson appears to be within the standards of the rule of law,⁶¹ and there seems to be every reason to expect, had President Nixon been tried upon his impeachment, that he would have received a fair trial by the Senate.

The most important political trial of our century was the Nuremberg Trial. It raised the same questions other trials of regimes do: Was the Nazi regime legitimate? Was the International Military Tribunal legitimate? Except for Article Three of the Tribunal's Constitution, which disallowed any challenges to the Tribunal's authority, the Nazi leaders might have taken the position Charles I took. On the other side, Justice Robert Jackson, the Chief Prosecutor for the United States, began his opening address by justifying the Tribunal's authority:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.⁶²

Jackson went on to acknowledge that the trial was unprecedented and that, unfortunately, the nature of the crimes was such that "both prosecution and judgment must be by victor nations over vanquished foes." The accused were given a fair opportunity to defend themselves and, despite a public opinion which condemned their acts, a presumption of

⁵⁹ *Id.*

⁶⁰ See A. CAMUS, *THE REBEL* ch. III (1956); J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* 78-98 (1960).

⁶¹ In a recent study of the trial of President Johnson, Michael Les Benedict observes:

Historians should view the trial of impeachment for what it was: not as an attempt by a violent majority to remove an innocent president for partisan purposes, but as one of the great legal cases of history, in which American politicians demonstrated the strength of the nation's democratic institutions by attempting to do what no one could justifiably expect them to do—to give a political officer a full and fair trial in a time of political crisis.

M. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 143 (1973). On the other hand, Raoul Berger concludes that Johnson's impeachment was an abuse of the impeachment process. "It was the culmination of a sustained effort to make him subservient to Congress, to alter the place of a coordinate branch in the constitutional scheme." R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 308 (1973).

⁶² 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1947).

innocence.⁶³

Was the Nuremberg Trial within the rule of law? From a position of positivist jurisprudence it decidedly was not within the rule of law. No international code outlawed "crimes against humanity" and, therefore, the indictment was new law and the trial *ex post facto*. Likewise, the Nazi leaders were charged with conspiracy, an Anglo-American legal concept unknown in either European or international law. Two other charges, on the other hand, could be understood as defined by the Hague and Geneva Conventions (war crimes, "violations of the laws or customs of war") and the Kellogg-Briand Pact (crimes against peace, "planning, preparation, initiation, or waging of aggression"). Nevertheless, a positivist would not accept the notion that aggressive war was a crime.

Other flaws in the Nuremberg Trial are also serious. Francis Biddle, the Senior American Tribunal Member, sat as a judge, although he had helped plan the trial. The Soviets blamed the Nazis for the Katyn massacre of Polish officers; the massacre was a Soviet act. As prosecutor, Jackson asserted that the same law would be applied to all, but the Tribunal did not allow the defendants to cite Allied misdeeds, which were considerable. The London Charter of June 1945 resembled a bill of attainder singling out individuals for prosecution. Finally, planning for the trial was rushed, creating several blunders: the elderly Gustav Krupp, who was not competent to stand trial, was indicted instead of his son, Alfred. Julius Stricher was hanged, but Rudolf Hoess, the commandant of Auschwitz, was used as a prosecution witness. Otto Dietrich, second to Goebbels in the propaganda hierarchy, was not prosecuted, while Hans Fritzsche, a mere radio announcer, was prosecuted.⁶⁴

Nevertheless, while admitting how deeply flawed the Nuremberg Trial was, compelling reasons can lead us to say that, on balance, it was within the rule of law. First, the Tribunal possessed judicial independence. Both the British and the American judges insisted on this principle, and the French judges exhibited their independence from the French government. Only the presence of the Soviet members, taking a hard line, serves to raise questions about the degree of their independence from Stalin's policy. As Bradley Smith shows, evidence indicates that, given the interaction among the judges especially during deliberations, "all in all, it is reasonable to conclude that, although there were different degrees of independence granted to the Tribunal members,

⁶³ *Id.* at 100-02.

⁶⁴ B. SMITH, REACHING JUDGMENT AT NUREMBERG 9, 33, 43, 71, 81, 104, 203, 293 (1979).

and although the individual judges made different use of their prerogatives, the defendants faced a court surprisingly free from outside control."⁶⁵

Another important consideration in assessing the Nuremberg Trial is to assess the main alternative. In the United States, President Roosevelt faced the Morgenthau Plan which, among other suggestions, contained a simple proposal: compile a list of the Nazi criminals for the Allied military to identify and shoot as soon as they were captured.⁶⁶ The trial and the deliberations associated with it, Bradley Smith points out, may have forestalled a bloodbath. By establishing what procedural protections there were in the trial, the Nuremberg Tribunal also avoided becoming merely a *pro forma* trial, a partisan trial as a wartime precedent.⁶⁷

Finally, the Nuremberg Trial strengthened the rule of law at the international legal level by enforcing what has come to be known as the Nuremberg Principle: "[I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."⁶⁸

IV. CONCLUSION

A political trial falls between politics and law. In politics, justice and the legal bounds of the rule of law are embarrassments to the realist. In law, the legalist cannot acknowledge public influence and the political consequences of judgments by courts. The realist would have us believe that, as the world goes, all trials are political, just as the legalist would have it that, properly, none are political. Yet, it is evident that trials can be political without being partisan. The Nuremberg trial cannot be equated with the trial of Louis XVI; the Wounded Knee trial was different in kind from the SASO/BPC trial; what Karl Armstrong or the Berrigan brothers experienced in their trials bears no resemblance to the experiences of those tried by the Stalin regime.

If law and politics are thought of as two completely separate realms in our public life, political trials would not cease to exist. We might, however, deny that they exist by defining them away. The lofty pedestal of legalism encourages us to mistake the rules of law for the rule of

⁶⁵ *Id.* at 8. *See also id.* at 77, 144, 168, 215, 267, 291, 303-04.

⁶⁶ *Id.* at 23-24.

⁶⁷ *Id.* at 303.

⁶⁸ T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 84 (1970) (*quoting* the International Tribunal at Nuremberg).

law. We see the rules so clearly that we miss the principles on which they stand. An introduction of such issues as the rightness of policy or the representativeness of government, from this perspective, is rejected as contrary to the rules of law, as a "political defense." The problem with this critique of political trials is that while a "political defense" is castigated, a "political prosecution" might slip past us unnoticed. While William Kunstler might be accused of introducing matters of social justice to sway a jury by appealing to their conscience, every prosecutor who jumps from the narrow confines of an indictment to warn the jury that the defendant is a harbinger of anarchy taking the law into his own hands is doing for his side what Kunstler does for the defense. Clarence Darrow won acquittals for many of his clients accused of conspiracy by convincing the jury that a worse conspiracy was represented at the prosecution table by those who were using the "law for the purpose of bringing righteous ones to death or to jail."⁶⁹

Still, unless law and politics are separate, unless a respectful distance is maintained between them, law will become an instrument of expediency. We have enough evidence in partisan trials to see this danger. If believing that law and politics can be totally separate is an illusion, thinking that law is politics by another means imperils those very rights which in a free and democratic society are the purpose of politics. An independent judiciary keeps constitutional politics honest by holding it to the rule of law.

Political trials within the rule of law provide society with the occasion to examine, and perhaps redefine, itself. Such trials do not, perhaps cannot, resolve the tensions forever. The Berrigans did not stop the draft, nor did the federal government halt anti-Vietnam protests with the Catonsville Nine trial. The issues about the immorality of the war and the proper methods of dissent were not given a definitive answer. They were clarified, however. The trial for the occupation of Wounded Knee neither restored to the Sioux the Black Hills guaranteed by the 1868 Treaty nor reconciled AIM and its supporters to the BIA and the tribal council. The issue of who speaks for the American Indians, or even the Lakota, remains, as does the larger issue of the place of the American Indian in American society. The Wounded Knee trial did, however, bring about a better understanding of the Sioux and the issues they have raised. Political trials confront tangled issues, tied in tight knots. While a trial might not untie the knot, but only cut it, our reflection on the knot in front of us will help us to understand the next one much better. Hard cases, the adage has it, make bad law. Nevertheless, hard political cases make a better understood society.

⁶⁹ I. STONE, CLARENCE DARROW FOR THE DEFENSE 130 (1941).

In every criminal trial, whether for prostitution, driving while intoxicated, theft, rape, or murder, public order is at stake, as is one individual's liberty. This tension between society and the individual is rooted in both criminal law and religion, twins at birth and throughout their growth. It is far from an accident that the Christian liturgy and courtroom ritual have so much in common: beginning with an invocation of authority, followed by the entrance of a judge or priest in a robe signifying a special office, continuing with indictments and proclamations, confession of transgressions, the central issue of guilt, reliance on oaths and witnesses to the truth, and concluding with judgments and sanctions. It is interesting to note that the word *sanction* in law means punishment, but that the roots of the word are in that which makes life holy, which occurs in a civic sense when a judge passes sentence. Naturally and fortunately, there are crucial differences between criminal law and religion, especially in the adversary system, but criminal law cannot deny its origin in expiation.

A political trial involves these tensions and much more. Its agenda (often more latent than manifest) includes, in addition to those inherent in the criminal law, the tensions of our public identity, our myth of history, and our sense of destiny. The contradictions which arise over these issues intensify from trials of corruption, to trials of dissenters, to trials of nationalists, and finally to trials of regimes. Like Charles I, no defendant in a political trial is an ordinary prisoner. The atonement sought by the public, represented by the judge, in a political trial reaches further than in an ordinary criminal trial. The fact that Otto Kerner was a judge and former governor rather than, for instance, a corporation president, made his bribe-taking a threat to the integrity of the public realm. The court, in imposing the sanctions of law, restored that integrity. Likewise, the contradictions represented in the Armstrong trial involved more than arson and second-degree murder, just as those in the Banks-Means trial went far beyond theft, disorderly conduct, and illegal possession of firearms. The added agenda in these, as in all political trials, touches the fundamental dilemmas of politics: the morality of war and of violent protest, the identity of a people and who can speak in the name of that people.

All criminal trials touch society's fabric. Judgments about public order and individual liberty made in ordinary criminal trials involve everyone. The texture of civility in everyday life is woven from such decisions. Political trials go beyond this warp and woof of law to the pattern in the public tapestry itself. That pattern, with all its unresolved contradictions, is the reason political trials become central moments for understanding nations and entire civilizations. The trial of Socrates is the event through which we generally approach Athens and

all ancient Greece. Socrates's *Apology* at his trial is one of the cornerstones in the tradition of enlightened thought and freedom of inquiry in the liberal tradition. The trial of Jesus is, likewise, central to Christianity, and a foundation for the strength of religious feeling. Who would write a history of France without devoting close attention to the trials of Joan, Louis XVI, and Alfred Dreyfus? Are not the trials of John Peter Zenger, John Brown, Sacco and Vanzetti, the Rosenbergs, the Chicago Seven, and the Berrigans equally important for understanding America? For an Irish nationalist, the words Robert Emmet spoke before he was sentenced to death have come to have the same meaning as the Gettysburg Address does to an American.⁷⁰

"The ultimate foundation of a free society," in the words of Justice Felix Frankfurter, "is the binding tie of cohesive sentiment. . . . We live by symbols."⁷¹ Political trials serve a free society by bringing together for public consideration the basic contradictions which arise from the clash of conflicting values and loyalties. The tensions over the relationship of the private to the public realms, the rightness of policy and of dissent, the nature of representation, and the legitimacy of government are all present in any political system. Especially in crises, these tensions must be faced. Although the judgments in political trials do not resolve these contradictions, it is important that they be raised. Generally, if either side of the tension were to win and dominate, we would all lose. This much we have known about such fundamental contradictions at least since Aeschylus wrote his *Oresteia*. In the three plays of this cycle justice is found neither completely on the side of the accused Orestes nor completely on the side of the accusing Furies. Orestes was guilty of murdering his mother, and Athena knew it, but Athena also knew that the angry vengeance of the Furies would not guarantee justice. She ended the cycle of blood revenge in the House of Atreus by establishing a court of law. In short and in conclusion, political trials within the rule of law, while not resolving contradictions about the nature of society and history, do bring them into clear focus, and open the way for us to see and accept the ironies of law, politics, and history.

⁷⁰ M. BROWN, *THE POLITICS OF IRISH LITERATURE* 22 (1972).

⁷¹ *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1940).