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TOWARD A THEORY OF THE POLITICAL DEFENSE

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IF THE CONCEPT of "Political Justice" was only a dimly formulated one prior to 1961, then the publication that year of Otto Kirchheimer's classic exegesis[1] should have alerted all to "what oft was thought but ne'er so well expressed." Today Kirchheimer's general definition—"[T]he courts have become a new dimension through which many types of political regimes, as well as their foes, can affirm their policies and integrate the population into their political goals"[2]—has become a staple of learned discourse on the subject. The "great" Chicago conspiracy trial, the "Harrisburg Seven" trial, Mr. Ellsberg's problems, and prosecutions of Black Panthers and other dissident groups have engendered recurring charges of political persecution. Indeed, some view all prisoners, especially blacks, as political captives. Whether they endorse one or another particular definition of "political crime" or not, both serious scholars and laymen are queasy about (a) the existence of that phenomenon (in some form) (b) its implications for the future of our democratic political system, especially for one of its perceived central characteristics, an independent judiciary, and (c) its propensity to foster such morally repugnant practices as electronic surveillance, informers, the use of "cover crimes" to disable political opponents, and other

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1 KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961) [hereinafter KIRCHHEIMER].

2 *Id.* 17. As Kirchheimer has stated in another section:

> The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken that of their political foes.

Id. 419.

paraphernalia of the dreaded police state.[3] Thus, Political Justice should and at some level does concern us all. If our goal is to minimize governmental temptation to win political victories in the courts and to preserve the criminal justice system for essentially serious anti-social acts—and only the most threatening of those—then we must ask both how Political Justice should be defined and what should be done about it.

Analysts of the subject agree that, in a certain sense, all "crime" is "political" insofar as the State, a political instrumentality, has established a criminal code and maintained agencies to discover, apprehend, bring to trial and punish violators of that code.[4] In short, the judicial apparatus is one part of a large (breathtakingly large) *political* apparatus which serves numerous functions, including the primary function of government—the authoritative allocation of values and resources in society.[5] Appointments to the judiciary of a particular state are invariably political or quasi-political or at least "elitist" (when ostensibly "non-partisan"), and judges are expected to maintain the ongoing values of their particular societies. The laws are framed that way, and the law enforcers (including, in this sense, the judiciary) are expected to execute them and to defend them from frontal attack by social enemies.

Of course, this general truism is subject to the political and sociological climate of a given society. That climate will define the role of the judge differently in differing systems, within the general assumptions discussed above. In the United States, the concept of an independent judiciary requires the existence of a body functioning somewhat apart from other political power holders. Although political regimes have numerous tools to deal with their opponents —ranging from assassination through harsh police repression to mere censorship—our political traditions severely limit the utility of those tools—except in wartime. Since mobilization of popular support for a democratically functioning government may be undermined by repugnance to the perceived arbitrariness of political action, political use of the courts often becomes a necessity.

To alleviate the charge of arbitrariness —or to anticipate it at the inception of political action against a foe—society (all societies), for a complex of reasons, resort to some form—perhaps virtually unrecog-

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[3] Yet the threat to individual liberties in the second half of the twentieth century may well be Big Brother and not the third degree. The horror of George Orwell's *1984* was the pervasive fear that Big Brother's government was always watching . . . [i]f government surveillance rather than backroom interrogation is the threat of the future, then the Supreme Court committed the bulk of its prestige and attention to a battle against the wrong evils of the police state. For while the public furor raged over *Miranda,* the Court handed down a series of decisions that enshrined the system of government informers in the constitutional system . . . and laid the groundwork for the constitutional use by police of bugging and wiretapping.
F. GRAHAM, THE SELF-INFLICTED WOUND 22 (1970). *See also* A. MILLER, ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1971); A. WESTIN, PRIVACY AND FREEDOM (1967).

[4] POLITICAL TRIALS (T. Becker ed. 1971) xi [hereinafter POLITICAL TRIALS].

[5] H. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW. (1936).

nizable—of Political Justice, as broadly defined by Kirchheimer. Thus, we must recognize that governments, perhaps democratic governments most of all, often turn to the judiciary and seek its aid in eliminating or curtailing the activities of political opponents.

When they do so, at least in this country, a paradox ensues. The judiciary is not a branch of the executive or legislature and the decision to utilize it inevitably widens the area of uncertainty of governmental action.[6] Since government seeks credibility and would be denied that credibility if the judiciary, in fact, was perceived as a handmaiden of, let us say, the executive, a political trial entails the assumption of risks not present in purely administrative action. For every Judge Thayer presiding over a Sacco and Vanzetti case or a Judge Hoffman in Chicago, there may be a Judge Wyzanski to confound matters.[7] Thus, the uncertainty and vagaries of a trial, the form by which judicial sanction for political action is sought, limit the freedom of government to deal with dissidents.[8] As Donald Kommers puts it,

> Before a Constitutional regime decides to transfer its political quarrels into courts of law it must be sure of two things: that its authority is sufficient to command public support, and that its credibility will remain intact.[9]

Once a decision to deal with political opponents in the judicial arena has been made, a new dilemma arises. Should the battleground be on the more or less advantageous terrain of the "common crime" —even what might be called the "common political crime" (treason, riot, overthrow of government)—or upon the shifting sands of the "pure political crime" (conspiracy, trespass, interference with the administration of justice)? There are advantages and disadvantages to each course.[10] In considering these options, we should make some fundamental distinctions between the two (or perhaps, among the three) classes of activities.

All societies maintain an elaborate network—and a growing one—of laws and regulations designed to discourage the commission of anti-social acts in the form of "common crimes." Centralized, bureau-

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[6] Frequently, the attack follows the "common crime" route. But, this presents problems as well since [t]he narrower the scope of the theme selected for proof, the greater the likelihood that the operation will succeed, but the less chance that the result will do more than serve momentary political purposes.

KIRCHHEIMER 118.

[7] *See* I. Silver, *Sisson's Complaint, Wyzanski's Ploy,* 89 COMMONWEALTH 385-89 (1969).

[8] As Kirchheimer puts it, "[j]udicial proceedings serve to authenticate and thus to limit political action." KIRCHHEIMER 6.

> Furthermore, [a]s a weapon in the fight between the established government and forces hostile to the political system, legality is a two-edged sword. It lends the appearance of justice and decency to the action of the government, but it reduces the action's range and blunts its striking power. Of course, this applies to the opposition as well. Legality permits . . . [use of] the protective shield of the law, but it also instills . . . the urge to be protected, and [forces] . . . pressure to stay within the bounds of permissible action so as not to jeopardize the broad range [of] protection . . . .

Id. 166-67.

[9] D. Kommers, *The Spiegel Affair,* POLITICAL TRIALS 5-33 (1971) [hereinafter Kommers].

[10] *See* note 6 *supra.*

cratized, prosecution of alleged violators of those laws and regulations has replaced individual vengeance in western society and the State has become entrusted with the duty to maintain social order and to punish offenses against its citizens. There is often a substantial core of agreement in society about the types of acts to be labelled "criminal" (except in the areas of "victimless" and "economic" crimes, about which more later) and of the State's responsibilities in suppressing such acts.

No one would now seriously dispute the necessity, in modern society, for formal, impartial bodies—commonly termed "judiciaries"—to aid in the performance of that function.[11] Historically, again referring to the West, there has been common agreement that certain acts inimical to life and dignity (as well as to "property," though the definitions of that term are always in flux) are also inimical to the order of the State. Although disputes about where the "lines should be drawn" are numerous (*i.e.*, the moral, "victimless" crime debate),[12] there is no doubt that we generally accept both the role of the State as crime-definer and crime-fighter and the appropriateness of the judiciary in the identification of social offenders.

Most also generally concede that the State has the legal—and perhaps moral—right to defend *itself* against forcible destruction. Thus, we accord the State the virtually unlimited right to define foreign threats to its existence and to defend itself accordingly. As one Supreme Court Justice put it, "The power to wage war is the power to wage war successfully." Unfortunately, in the absence of a direct and immediate—or even remote—threat of foreign conquest, the definition of National Security becomes embroiled in semantics; also, the consensus about that definition begins to break down. Even the most revolutionary of world movements maintains that it is not wed to destruction of the State as such (except perhaps at some indeterminate time in the future) but rather argues that it wishes to rearrange the political and economic order *within* the State itself. A Communist would be quite satisfied to see a United Socialist America rather than some form of military or political satellite dependency upon another country such as the Soviet Union or China. Presumably, retention of the identity and viability of the State (whatever the rubric) is the goal of any revolutionary—except perhaps the militant anarchist. Under these circumstances, the latitude of permissible governmental resistance to domestic adherents of revolutionary action is not quite as broad as that accorded to the State in foreign policy. What is that latitude, or, more precisely, what do our democratic beliefs tell us about the nature of the State and its ability to define and deal with political revolutionaries?

Proponents of the democratic state argue that defense against the annihilation of the territorial state (or its identity) is virtually —though not entirely—equatable to de-

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[11] For an interesting example of how a non-judicial dispute mechanism operates in modern society, see T. BECKER, COMPARATIVE JUDICIAL POLITICS 104-09 (1970) [hereinafter COMPARATIVE JUDICIAL POLITICS].

[12] *See* L. DEVLIN, THE ENFORCEMENT OF MORALS (1959); H. HART, LAW, LIBERTY AND MORALITY (1963); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

fense against forcible rearrangements of extant relationships, and prevention of both are proper objectives of government. Of course, they concede, the constitutional rights of domestic revolutionaries operate to limit State action in the latter situation, but, apart from that, the power to suppress is basically similar to the power to suppress international opponents. The argument concedes the right—at least in theory—of advocates of fundamental rearrangements to attempt to win a majority of the voting populace to their views and to effect necessary changes through either the ballot box or, more fundamentally, constitutional amendment. Even in an imperfect democracy, it is argued, resort to the ballot box —and, increasingly, to the courts—provides sufficient recourse to those who wish to effect radical change.[13] Where theory and argument fail or are inadequate, it then becomes perfectly clear that no State, even a democratic one, will admit the right of its dissidents to overthrow either itself or its internal arrangements by revolution or rebellion, Thomas Jefferson—as they say —to the contrary, notwithstanding. Of course, democratic theory concedes the right to convince the voting populace that non-violent, fundamental rearrangement is socially necessary or desirable.

Despite these postulates, there can be no doubt that political administrations (regimes, some are wont to term them)[14] often equate threats to their own existence —or to the existence of those interests they represent—with threats to the State itself. While it is true that attempts to overthrow a *particular government* (or administration) are as socially dangerous as violent overthrow of *government* itself, we should skeptically observe that all political administrations live in a state of perpetual suspicion. They have their political enemies, they perceive that their policies are not only wise but necessary for continued national viability, and, regrettably, often believe that their opponent's programs are not only unwise but dangerous as well. They solemnly argue that the national interest is threatened not only by attempted overthrow (increasingly rare in advanced societies today) but by certain forms of opposition to the dominant party. Such are the fulminations of a McCarthy in the '50's or an Agnew today who treat criticism as a form of dangerous deviancy. Thus, to a party in power, shadings of opposition are often black, rather than grey.[15] Thus, laws

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[13] Recently certain democratic theorists have attempted to extend the boundaries of permissible political action into some of the areas to be discussed herein. *See* C. COHEN, DEMOCRACY (1971); T. LOWI, THE POLITICS OF DISORDER (1971); R. WOLFF, IN DEFENSE OF ANARCHISM (1970). *See also* THE RULE OF LAW 54-74, 147-70 (R. Wolff ed. 1971).

[14] Kirchheimer constantly uses this term with, at times, pejorative connotations.

[15] Perhaps the most famous historic instance of this tendency is the Aaron Burr treason trial where, as Richard Morris demonstrates, President Jefferson "was the directing legal genius behind the prosecution at every stage." R. MORRIS, FAIR TRIALS 125 (1971) [hereinafter MORRIS]. Jefferson had instructed the prosecutor to "go to any expense necessary for this purpose (to obtain evidence of treason)" *Id.* 129.

Predictably, "the defense sought to portray the prisoner as a victim of personal persecution (*id.*)—and succeeded. John Marshall's ruling that "To advise or procure a treason is not treason itself," (*id.* 152) has severely limited the possibilities of that charge being utilized against political enemies. Such is not

protecting political administrations, not necessarily government, from scrutiny and criticism proliferate in response to political attack. "Obstruction" of, "interference" with, governmental functions become criminal acts. We need not of course speak of the various forms of "sedition" laws periodically enacted to protect particular governments from their enemies. As we shall see, there have been numerous occasions when the law has been utilized to protect an administration in power, and the boundary line between what I have termed "common political" and "pure political" crimes often becomes evanescent.

To sort matters out, we must first analyze extant concepts of political justice to ascertain (a) their susceptibility to political misuse and (b) the social interest allegedly protected. When such has occurred, we shall be in a better position to know what modifications in our legal thinking are necessary to curb misuse of political justice (for, as we have seen, in certain senses, the concept is valid—or at least generally accepted) and to preserve the valid interests involved.

Perhaps the first startling statement about our political and legal system is that there is no formally recognized concept of Political Justice in America.[16] We overlook the pithy observation of a Scottish judge: "To see no difference between political and other offenses is the sure mark of an excited or stupid head."[17] We make no distinction between "common" and "political" trials and overlook the temptations faced by government to equate political opposition with common criminality.[18] Instead, our system steadfastly regards all crimes as equal (except for certain designations inserted to control the degree of punishment involved) and all prosecutions as subject to traditional rules of criminal procedure. Judges solemnly admonish defense counsel not to allude to the proceedings as "political"[19] and to try cases involving un-

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always attributable solely to the "unofficial" or "radical" opposition. Sometimes it extends even to the traditional opposition; Senator McCarthy's wholesale attack on the Democratic Party in the early fifties is but the most recent example.

[16] American political science is no less remiss for it "has spent very little of its time in studying these phenomena . . . Otto Kirchheimer is the one major exception to the rule." COMPARATIVE JUDICIAL POLITICS 374.

[17] Judge Henry Cockburn *quoted in* KIRCHHEIMER 48 n.2.

[18] Until the eve of World War I . . . constituted authorities acknowledged rather than contested the differences between political and common offenses.

KIRCHHEIMER 40.

[19] The argument is frequently couched in terms of "depoliticization," "but 'depoliticization' of an event always tends to favor the established order." Kommers 23. An example of the unmentionable occurred in the Chicago Conspiracy Trial:

> [Defense Counsel] Kunstler: [T]his prosecution . . . is the result of two motives on the part of government—
>
> [Prosecutor] Schultz: Objection as to any motive of the prosecution, if the court please.
>
> Kunstler: Your Honor, it is a proper defense to show motive.
>
> The Court: I sustain the objection.

D. Danelski, *The Chicago Conspiracy Trial*, POLITICAL TRIALS 164. When judging the prickliness of Judge Hoffman when confronted with an overly insistent defense counsel, Judge DeLancey's confrontation with Andrew Hamilton in the Zenger case should be remembered: "After the court had declared their opinion, it is not good manners to insist upon a point in which you are overruled." J. ALEXANDER, A BRIEF

popular defendants (often brought together to reinforce the unpopularity of each by adding a juicy conspiracy by all) for vaguely defined crimes as if they were simple murder cases.

It is not inconceivable that the judges may be right and that it would be too distracting to formally recognize and allow certain systemic modifications for "political justice." Perhaps it is too early to consider the formal creation of new legal categories, and to assume that defendants will benefit by it; after all, it is undoubtedly true that, at present, government itself rather than its political adversaries often loses face in bungled prosecutions.[20] Clever defense attorneys do manage to shake the testimony of informers or other unreliable witnesses; juries do not regard every burst of revolutionary rhetoric as evidence of a massive and devious conspiracy. Political defendants—as other defendants—often win "their share" of the cases; in fact, unlike other defendants, they may not want to win at all. If the general system of criminal justice is a "game" depending upon various skills of its primary actors (often skills of negotiation), why not treat political prosecutions as games also, and be satisfied with some kind of rough justice? When Spiro Agnew called the acquittals of the Chicago Seven for conspiracy and the conviction of five for the substantive offense of interstate travel to incite riot an "American verdict," should we not all agree? Should we not leave worse off alone rather than be tempted with solutions, the implications of which "we know not of?"

I think not, for several reasons. Often, the defendant does not win his "fair share" of the prosecutions; often, he is not a Jerry Rubin or an Abby Hoffman who courts prosecutions and their resulting publicity (incidentally, there is no evidence that this was true of their conduct in Chicago—at least in the sense that they believed they would be indicted for a *federal* crime). Often, the legal—and physical—costs of litigation exact a fearful price and deter—as they are meant to—political activities. Political crimes often involve calculated harassment and such harassment of local dissidents, often under vague rubrics, will continue, even if major charges are dismissed. Also, the flexibility of the criminal justice system is often not available to political defendants because "plea bargaining" is simply not envisioned by either side. Insofar as "gamesmanship" pervades the criminal justice system, it should be reduced in all cases. Certainly, its existence is not a *positive* argument in favor of the *status quo*. Finally, the integrity of the system is at stake—and, more importantly, is perceived to be at stake. The courts are being used for ignoble purposes and the temptations for government to continue this practice should be reduced. Purposeful discrimination in law enforcement is an evil in a democratic system—and may well be a violation of the fourteenth amendment's equal protection clause—and it is doubly evil when practiced calculatingly against political enemies who pose little, or no, social danger. I think that it is worthwhile to establish a meaningful category of Political

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NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 75 (1963) [hereinafter ALEXANDER].

[20] The most recent examples are the trials of the "Panther 21" in New York and the "Conspiracy Seven" in Seattle.

Justice and to allow those included within it as victims the benefit of certain new techniques to deal with their plight. What definition and what techniques?

To Kirchheimer, the definition involves the use of the courts—generally, but not exclusively, in criminal proceedings—to suppress political enemies.[21] He finds three varieties of political trial:

> the trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution, the classic political trial: a regime's attempt to incriminate its foe's public behavior with a view to evicting him from the political scene and the derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.[22]

Of course, these categories are only slightly less informative than the term Political Justice itself and they do not seem to exhaust the possibilities. For instance, how do we label a charge of a "common crime" commited for non-political purposes, the Sacco-Vanzetti situation? What about clearly "political crimes" such as draft resistance committed by relatively anonymous individuals who are (apparently) impartially prosecuted. Draft resisters, whose identities are of no importance and whose violations of law are often relatively clear ones, may not be the sort of victims envisioned by Kirchheimer. Other categories can be created, but these two additions to Kirchheimer's trio indicate the magnitude of the definitional problem.

Kirchheimer's first category and my own first suggestion obviously involve political problems, but it may not be appropriate to label the conduct involved as "political crimes." The crime charged, by hypothesis, is a "common" one (although in the case of "incitement to riot" by language alone, the distinctions become hazy) and, presumably, the acts complained of are both simple and commonly accepted as anti-social. Sacco and Vanzetti were accused of murder and robbery and while inflammatory appeals about their radicalism were made to the jury, they were not on trial for their beliefs. This is, of course, not meant to excuse the reprehensible conduct of their trial. Rather, I would suggest that other approaches within the present framework of the system may well eradicate the grievous wrongs of that case.[23] Ap-

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[21] He argues that

> [T]he need to resort to courts arises where . . . (c) the regime in question has decided on a policy of either totally repressing its foes or of wearing them down, restricting their political availability by continuous judicial proceedings against them; and (d) where carefully chosen segments of deviant political activity are submitted to court scrutiny, less for direct repressive effect than for dramatizing the struggle with the foe and rallying public support.

KIRCHHEIMER 17.

For one case involving not a criminal proceeding but a motion picture licensing statute forbidding distribution of films "injurious to the . . . Republic of the Phillipines or its people" and an attempted "political" use of the statute, see POLITICAL TRIALS 51.

[22] KIRCHHEIMER 46. The foes may not only be direct political ones. Professor Samuel Krislov observed of the Hoffa cases that "[t]he criminal process was activated (even hyperactivated) not primarily to enforce the law but to affect and control the leadership of a nominally private organization (The Teamsters' Union)." POLITICAL TRIALS 223.

[23] Of course in one-on-one confrontations between police and political dissidents, in common

pellate threats of reversals for inflammatory language have operated to cool prosecutors' zealousness for trying "common" crimes as "political" ones, and it is difficult to acknowledge that the grotesqueries of Sacco and Vanzetti can occur again. Often, in political prosecutions for crimes other than common ones, evidentiary rules and just procedures are not sufficient to fully protect defendants' rights.[24] In a "common crime" prosecution, evidence of defendant's "bad character" is generally excluded because of its prejudicial effect upon the jury, and there is no reason why reference to deviant political beliefs should not be outlawed on the same grounds. Of course, in political prosecutions, those beliefs are either at the heart of the prosecution's case or at least legally relevant to it. The results of Huey Newton's California trial, the New York Panther 21 prosecution, the Bobby Seale indictment in New Haven, and the Harrisburg prosecution indicate that even avowed revolutionaries accused of common crimes may be able to obtain fair trials and that the chances of another Sacco-Vanzetti miscarriage of justice are reduced in the contemporary setting. In fact, government may well decide in the future to attack its political opponents by use of either of what I have termed "pure political crime" or "common political crime" laws rather than by way of traditional "common crime" prosecutions.

Also, the chances of proving a "common crime" are often less, since greater specificity is required while the chances of conviction for the other forms rise since, unlike classical conspirators, dissidents are rarely secretive about their political activities. I am not entirely satisfied with Kirchheimer's categories as the basis for an understanding of the dilemmas of Political Justice.

For analytical purposes, Theodore Becker may be more helpful.[25] His focus is not so much on the nature of the charge as upon governmental motivation. "The important distinguishing factor [between political and common crime] is the motive triggering such a trial."[26] He distinguishes between a political trial (without quotes)

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crime situations, problems of proof become simply a matter of credibility and traditional trial techniques may be insufficient to ferret out the motives of the prosecution and possible perjury or questionable testimony of the chief state witnesses. Kenneth M. Dolbeare and Joel B. Grossman, in their perceptive study *LeRoi Jones in Newark*, POLITICAL TRIALS 227, note that the Black militant was a fortuitous defendant who accidentally fell into police hands during the 1968 riot; the State—with the cooperation of the trial judge—then decided to make Jones an example. The authors concluded that

> It is highly unlikely that any lawyer could have successfully defended LeRoi Jones in this case. Jones himself was the best witness for the prosecution before a middle class, all-white jury.

Id. 237.

[24] "Cross-examination, however, did not show that government witnesses were lying, and only occasionally exposed distortions." D. Danelski, *The Chicago Conspiracy Trial*, POLITICAL TRIALS 162.

[25] POLITICAL TRIALS. He is occasionally too simplistic. Thus, in his introduction he argues that the purpose of a political trial is to *eliminate* enemies and that "[P]erception of a direct threat to established political power is a major difference between political trials and other trials," *id.* xi, a statement as meaningless as his qualified generality that "no system ever devised has been reluctant to face some of its foes in court," *id.* xii.

[26] *Id.*

involving a "clearly political" crime and an impartial judiciary, a political "trial" involving an acquittal and the creation of a new conviction-prone tribunal of questionable impartiality for a subsequent retrial, a "political" trial involving a common crime with an impartial judiciary, and a true "political trial" utilizing vague charges and a partial court.[27] The second and last categories are more relevant to other societies (as Becker demonstrates) and shall not be dealt with further here.

Becker may be somewhat shortsighted when he lumps together, under the rubric of "clearly political" crimes such as attempted overthrow of government and failing to move upon the command of a police officer. Overthrow, like riot, partakes of both "political" and "common" elements; I believe that—in proper cases—the "common" prevails because the attempt at overthrow may clearly involve violence against persons or property while failure to move on only involves non-disabling interference with a governmental function. Since overthrow, or attempted overthrow, may pose a direct threat to the existence of government —again, in a proper case—I would term it a "common political crime." Certainly, state action against such conduct would fall well within the range of socially sanctioned conduct. Short of attempts—and the law of attempts is certainly clearer and more socially pressing than the law of "conspiracy" —I would agree with Becker that conspiracies to overthrow and failing to move on are "clearly political." The dubious concept of "conspiracy" to commit even a "common political crime" should be classed —in my terminology—as a "pure political" crime.[28] The changes in the system to be proposed herein would therefore encompass such conspiracies as well as the actual commission of nondangerous "crimes against public order."

At this juncture the "common crime" should be eliminated from consideration. American history is replete with examples of the perverted uses of the criminal law of common crimes against political opponents. In addition to Sacco-Vanzetti, the Haymarket Affair immediately comes to mind. There, conspiracy to bomb was alleged; only a non-conspiracy to agitate for overthrow was shown. There is no question that, in a certain sense, such perversions are even more dangerous than those which attend "pure political crime" cases. Those prosecutions are calculated to totally disarm political opposition; often the penalties—and the stakes—are higher than is true of pure political cases; the temptations to falsify evidence are substantially increased; community passions are readily (and purposefully) aroused. A comparison of the Chicago of the Haymarket trial with the rather bland atmosphere surrounding the courtroom (and generally even within it) during the great conspiracy trial is instructive. Despite the notoriety of the latter trial, a reading of the transcript indicates that it was essentially a benign affair, the fracases occurred in relation to only a few points (such as Bobby Seale's right to defend himself), and that most of the lengthy trial was uneventful. Clearly, a government bent upon going "for the kill" by instituting "common crime" prosecutions will achieve

[27] *Id.* xv.

[28] *See* notes 45, 48-49 *infra.*

either (a) its goal because of an aroused populace and an inflamed jury or (b) total defeat because it has misread the temper of the times. Given our national revulsion toward violence—and the awesome power of government to fabricate a case—it is impossible to deal with "common crime" prosecutions by means of the few reforms I shall suggest. In these cases, the defense fights with bare knuckles, the appellate courts reverse convictions because of blatant prejudice, or the jury revolts. They are extreme cases—though not rare ones—and totally unsusceptible to measured reforms, such as shall be proposed herein. Those trials partake of war, not law.

Although we can only deplore an administration crass enough to wield the ultimate weapon of accusation of a serious "common crime," we can only hope that the defense will respond in kind. Often, the contest will become a war for public opinion, and, if the climate is not vengeful, techniques such as demand for proof of the specific crime charged, the ability to impugn the veracity of informers, undermine the validity of eye-witness identification, and even attempts to argue that defendants' political beliefs would preclude adoption of the tactics charged may work. These admittedly inadequate protections, along with the fact that "common crime" charges themselves, as previously mentioned, may present certain problems for government, provide minor protection to political dissidents.

The results of these cynical prosecutions are always less than satisfactory, for the odds are often insurmountable. Either the prosecution's evidence is fabricated and the defense can do little but poke holes, or both sides resort to mendacity, each in the belief that such tactic has become necessary. In any event, it should be realized that *whenever* government turns its power against particular individuals—not necessarily only political foes—gross miscarriages of justice are bound to result.[29] On the other hand, revolutionaries do commit common crimes and should not be exonerated by a professed nobility of purpose.

Another form of political trial to be omitted from this discussion involves the random use of "clearly political" charges against anonymous opponents, with no discernible motive to punish particular individuals.[30] Here, of course, I am speaking of what we commonly label "crimes of civil disobedience." Generally—perhaps not invariably—the crime is specific and the motive for prosecution is traditional. The offender is not singled out because of his visibility and the government is acting in a generally socially acceptable way *i.e.* impartially apprehending and trying all who can be caught, whatever their motivation. Although the shift of law enforcement manpower into these areas—and away from others—presents troublesome questions, the degree of governmental ignobility here seems to be less than that present in the cases to be mentioned.

Also, in these cases, certain "non political" defenses may well provide adequate safeguards to the political defendant. Fed-

[29] Krislov, *The Hoffa Case,* POLITICAL TRIALS 204 *et seq.*

[30] That, in some sense, these are political trials is inescapable. Becker notes that draft evasion prosecutions involve an "obvious intent . . . to clear the political scene of threats to those trying to maintain the established political order." COMPARATIVE JUDICIAL POLITICS 373.

eral courts have held flag desecration laws to be unconstitutionally vague. A nascent "right of conscience" may be developing to protect certain disobedient activities, and the first amendment plays a role (albeit a minor one, at present) when rights of "symbolic speech" are claimed. Generally, in addition, the crimes involved carry less severe penalties than do "common crimes" (although given the outrageous severity of our penal laws, that may not be saying much).

Are these safeguards sufficient? Manifestly not, but then a government which can demonstrate that its motives are pure (or as pure as governmental motives usually are) and that the law involved protects a substantial interest (often not true, and attackable on the aforementioned grounds) will obtain the public sanction it seeks to support its actions. Certainly, its moral stance, under these circumstances, is stronger than it would be if its immense resources were being used to impale its enemies on bamboo stakes of treason, conspiracy, or heinous common crime charges.

This paper shall be solely concerned with political trials involving (a) the bad faith of public authorities, (b) governmental use of charges of vague crimes directed toward maintenance of public order or the effective functioning of government, (c) the calculated decision to harass or destroy visible public enemies. Although the categories are vague, they are no more so than those proposed by Professors Kirchheimer and Becker.[31] In addition, the moral sense of the community is —or should be—more clearly outraged by the conduct described herein than by that involved in the excluded forms. Also, the social interests supporting government action in this category almost vanish. The judge and jury, conscientiously seeking to balance the various interests involved, are more clearly confronted with the "classic" situation of governmental attack on a political opposition with little or no reason. Such a judge and jury will find it easier to "bite the bullet" and try the government's, as well as the defendants', motives. If we are to begin to relate abstract notions of political justice to the real problems of

[31] The sweeping nature of those scholars' categories may have led to a questioning of a term "Political Justice" by Professors Kenneth M. Dolbeare and Joel B. Grossman. In their article, *LeRoi Jones in Newark* they concluded that Jones was given a manifestly unfair trial, with the judge and district attorney zealously combining to make it so. Largely because of the accidental arrest of Jones and the consequent opportunity to indict him with all of the sins of the Newark riot, the authors conclude that "the regrettable truth is that the LeRoi Jones case *is* probably an example of the 'law' in action and may be only marginally a political trial." POLITICAL TRIALS 243. Clearly, broad categorization was in the authors' mind when they observed, "[w]e suspect the existence of a substantial additional number of trials which, if covered with equal intensity, would acquire similar images of unfairness." *Id.* Unfortunately their own tentative definition,

> a "political trial" is merely one which is marked by one or more of the authoritative actors failing to perform the social control ritual within the range of "norms" for such behavior

Id. 244, would virtually exclude all notorious American trials because the "norms" are extremely broad; its definition would also include non-political, but idiosyncratic, events. The definition overlooks the twin elements of prosecutorial (not necessarily judicial) motivation and the nature of the crime.

our society, and to find a mechanism for integrating the general concept into the system of criminal justice, it would be appropriate to find the easiest case, that of the particularized defendant, charged with a "victimless" crime, by a government acting in bad faith. Of course, as the principles to be discussed herein are developed, they may well—in some form—become acceptable for challenging governmental action in any, or many, other forms of political trial.

The arguments for ameliorating the impact of the law in this area of "victimless" crime substantially resemble those used to question the intrusion of the criminal law into traditionally defined crimes against morality.[32] Criminologists and other social scientists have long questioned whether society's ultimate sanction, the criminal law, is the appropriate vehicle to discourage condemned moral, often sexual, conduct. The issue has become a burning public one, and courts have been split on questions such as birth control, abortion, private non-harmful sexual acts between consenting parties, and even whether the possession of marijuana should be de-criminalized (not necessarily legalized). Yet, the concept of "victimless" crimes—and the arguments that swirl about it—has not been extended to the "crimes against public order" category—generally because the protection of such order has traditionally been the first task of government. With the chances of internal revolution or fifth column aid to an advancing enemy considerably reduced in contemporary life and with the extension of "public order" into various areas such as "public convenience" and even "administrative convenience" where an amorphously defined "society" becomes the victim (but, strangely enough, no real person is harmed or threatened), some rethinking of the role of the criminal law becomes necessary.[33]

In a technological, complex and sophisticated society, the perception of danger to the social order changes. Crimes such as interference with the functions of government (in the form of trespass, illegal assembly, disorderly conduct, filing false reports, and obstruction of justice offenses) become magnified because interference (even slight interference) with the machinery of the state becomes genuinely perceived to be a threat to the state. Our only apparent weapon to deal with such a threat—if threat there be—is the criminal law, with its draconian and clumsy precepts and egregiously harmful consequences. Richard Nixon's "classic" defense of the Washington D. C. police force's unconstitutional arrest procedures during the Mayday demonstrations was couched in precisely these terms—"the government continued to function." For him—and for

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[32] The sociological debate has (inevitably) become legal. *See* United States v. Vuitch, 402 U.S. 62 (1971); Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated for other reasons,* 401 U.S. 989 (1971); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); Massachusetts v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969).

[33] If trespass and vagrancy statutes can be employed to sustain action against civil rights demonstrators in America's Southland, there is no less reason to call the court proceedings political trials.
COMPARATIVE JUDICIAL POLITICS 372-73.

others laboring in the bowels of a bureaucracy—efficiency, both in keeping the government going and in the dispatch with which the arrested were bundled off, becomes the supreme virtue and overriding value of political life.[34]

Doubtlessly, this overweening concern for bureaucratic values—including preoccupation with both efficiency and convenience as social goods—reflects the political and social "culture" of modern society, just as the concept of petit treason, encompassing the death of the father, was deemed to be a worthwhile analogy to high treason, encompassing the death of the king, in Medieval society. If 18th century England could punish counterfeiting with the same severity as murder because the former almost literally "murdered" that nation's predominance in international trade, then it becomes evident that each society defines its priorities for itself, and that we have chosen to protect bureaucracy. Of course, petit treason no longer exists and counterfeiting has been reduced to a felony of considerably lesser magnitude than murder in accordance with "changing times." Perhaps our instinctive dislike for bureaucracy (accompanied by a resignation to its prevalence) and knowledge of its growth (whereby any public demonstration anywhere somehow manages to interfere with its operations) may enable us to modify our contemporary political and social climate to limit the power of government to punish transgressors of those values.

The arguments in both of the traditional and the new "victimless" crime situations *are* similar. The law should tread warily where no harm to specific individuals or property is involved. Just as traffic violations (also crimes against "order") in many states are not technically "crimes"—at least for certain purposes—so every anti-social, or better, anti-governmental, act need not be labelled criminal. Just as we no longer accept the moral tenets of Puritanism as validating rationales for the criminality of sexual conduct, so we need not endorse a metaphysical Hegelianism to support "crimes against the state." Just as our sexual norms (or, at least the range of our tolerance) are changing so, perhaps more subtly, are our attitudes toward the state. The legal concept of sovereign immunity is under severe attack,[35] the ability of the state to utilize an exalted—though imprecise—interest in maintenance of "public morality" to outlaw personal, non-harmful conduct is being eroded,[36] and critics of administrative officers of the state are being accorded increasing freedom, a freedom to be even somewhat libelous.[37]

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[34] In this regard, Kirchheimer states the case for (while simultaneously disparaging) the law as reflector of bureaucratic values:

> Whoever refuses to play ball, rejecting the standard political patterns of mass society, should be made to pay as heavy a penalty as anybody else who shuns mass produced goods. This is not so much the fear of harmful results, but the price for being allowed to indulge in a display of nonconformity, especially if this nonconformity connotes access to modes of life, community of shared values, [or] purposefulness outside the sphere of personal success. . . .

KIRCHHEIMER 238-39.

[35] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[36] *See* note 32 *supra*.

[37] Rosenbloom v. Metromedia, Inc., 403 U.S. 29

Religiously based "dysfunctional" activities are being recognized.[38] If the flag as legally protected symbol has suffered some battering,[39] can the lesser symbols of state office itself be far behind? In short, the state's interest in not being villified (or perhaps just embarrassed) is being diluted, just when paradoxically its growth has rendered more and more activities as subjects of regulation—often through the criminal law. These proscriptions are promulgated in terms not of respect but of efficiency. As Lyndon Johnson once put it, "I'm the only President you've got." Presumably, a similar lame justification for its activities by a particular political administration would argue that "We're the only bureaucracy you've got."

At this point, we must inevitably inquire into the purposes of criminal law and its administration. Would excusable failure to respect *some* of our legal norms—as I shall propose—engender a crisis, a crisis of "disrespect for law"? Although "respect for law" is a term often used by scholars with total imprecision, it is generally assumed to mean that a given polity understands that the law (especially the criminal law) extends to legitimate concerns of the state, that it will be generally impartially enforced, and that a reasonable accommodation between personal self-interest and the communal interest is all that will be required of the individual. One argument for abandoning laws that criminalize harmless conduct is that, somehow, greater respect for the law in general would result. That argument, which is by no means proved (and perhaps it is incapable of proof), could readily apply to the phenomenon of "political crime" (as I have previously defined it).

Sex laws punish harmless acts, as do many "public order" statutes. The rationales, moral protection of the population in the first, and protection of governmental "efficiency" or "convenience" in the second instance, are not overwhelming. Both types of prohibition often sweep broadly and without definition, rather than narrowly and specifically. There is an absence of universal agreement that the acts proscribed are morally wrong, in both instances, so that penance and remorse are not likely to affect the future conduct of offenders. Also, the laws in both areas are capable of—and often involve—discriminatory enforcement. Both types of proscriptions have been used to harass either unpopular people or people who do unpopular things.[40] Victims can only believe

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(1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); New York Times v. Sullivan, 376 U.S. 254 (1964).

[38] Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). *But see* Gillette v. United States, 401 U.S. 437 (1971). Kirchheimer sourly observes that "the degree of tolerance granted the religious is seldom granted the political militant."
KIRCHHEIMER 239.

[39] Street v. New York, 394 U.S. 576 (1969); Hodson v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

[40] Should individual freedom be given the greatest leeway, and prohibitions and punishments restricted to clearly definable acts which characterize an advanced stage in the endeavor [to overthrow government] [o]r should the hostile attitudes' earliest manifestations, possibly inconsequential in themselves, be nipped in the bud?
KIRCHHEIMER 39.

that they are being punished for something other than the specified crime, in both cases, and the law—and its enforcers—are perceived to be part of a system hypocritical to the core.

One major complicating factor in "public order" crimes often not present in "victimless" ones is that of vagueness. Often, in "victimless crime" cases, the law is fairly clear and defense counsel are afforded a variety of traditional weapons some of which have already been mentioned—to fend off the more egregious effects of prosecution. Offenses against public order, in contrast, often exalt vagueness, most probably because the underlying interest to be protected is itself a vague one. In one case involving a police officer who issued a summons for a "sidewalk obstruction" to the custodian of a three foot square table (containing, of course, anti-Viet Nam literature) emplaced on a street more than twenty feet wide, the classic answer to why proprietors of other tables were not similarly treated was "If I felt it violated the law, I gave them a ticket."[41] The facts of the *Shuttlesworth* and *Thompson* cases in the United States Supreme Court demonstrate other facets of the problem.[42]

Compounding and confounding matters is the omnipresent conspiracy charge, an allegation not ordinarily present in the traditional "victimless" crime case. As Judge Ford during the *Spock* case put it, "A conspiracy may be defined as a breathing together" (a phrase which he did not invent).[43] Judge Ford is quite wrong, of course, for the dragnet definition of conspiracy includes far more than compatible breathers; it encompasses multifarious activities of people who may have never met, who may have fragmentary knowledge—if any—of each other's activities, and whose acts "pursuant to" the conspiracy may have been totally innocent, as well as totally innocuous.[44] Also, in conspiracy prosecutions, numerous counts including "speech" ones, are frequently jumbled together to create an impression of overwhelming documentation against a host of defendants.[45] Evidence is admitted of wildly disparate and unconnected events on the theory that it relates to the conspiracy, but of course, that is precisely what the case is all about.[46] Often, evidence of acts is used

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[41] Record at 48, People v. Katz, 21 N.Y.2d 132, 233 N.E.2d 845, 286 N.Y.S.2d 839 (1967).

[42] Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Thompson v. City of Louisville, 362 U.S. 199 (1960).

[43] MITFORD, THE TRIAL OF DR. SPOCK 102 (1969).

[44] "Attribution of criminality to a confederation which contemplates no act that would be criminal if carried out by any one of the conspirators is a practice peculiar to Anglo-American Law." Krulewitch v. United States, 336 U.S. 440, 450 (1949) (Jackson J., concurring).

> The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district.

Id. at 452-53.

[45] "The multiplication of overlapping counts in a sedition indictment creates risks of unfairness . . . . A series of changes . . . amounts to piling up as many bad names as possible to fling at the accused." CHAFFEE, FREE SPEECH IN THE UNITED STATES 114 n.8 (1969) [hereinafter CHAFFEE].

[46] In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that a conspiracy existed.

Krulewitch v. United States, 336 U.S. at 453 (1949) (Jackson J., concurring).

as a substitute for evidence of conspiracy, and the jury believing that the acts occurred, is tempted to assume that the conspiracy must have also existed. Bits of information about the "conspirators" are fed to the jury, and, upon objection, the prosecutor and judge agree that they are admissible "subject to connection." That connection will always, we are promised, be made in the future—and that "future" somehow is not often reached. As one prominent American historian has said of the Haymarket case, "The prosecution was to discover that it was a lot easier to establish [a] conspiracy . . . than to demonstrate that the defendants were accessories to murder."[47]

Since "public order" trials often involve conspiracy counts (which is not to say that "common crime" prosecutions are free of them) and since defenses against those counts are difficult to establish,[48] it becomes again imperative—in terms of the integrity of the law—to distinguish those cases from the ordinary ones and to inform the actors in the criminal justice system that a political prosecution is occurring.[49]

The argument that only the most serious forms of antisocial conduct should fall within the purview of the criminal law is a

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[47] MORRIS 310-11.

[48] A classic example of the conversion of a "conspiracy" charge—in this case conspiracy to commit a common crime—into a political trial, in the absence of proof of individual guilt, occurred in the Haymarket bombing case in 1886. There, "instead of affixing individual culpability for the crime, the verdict expressed society's condemnation of an entire group for a program of ideas and action deemed inimical to the general welfare." MORRIS 296. The distinction between "common" and "political" crimes in that case evaporated in the opening statement of the prosecution:

> Gentlemen: for the first time in the history of our country people are on trial for their lives for endeavoring to make Anarchy the rule, and in that attempt for ruthlessly and wilfully destroying life. I hope that while the youngest of us lives this in memory will be the last and only time in our country when such a trial shall take place. It will or will not take place as this case is determined.
>
> In the light of the fourth of May we now know that the preachings of Anarchy, the suggestion of these defendants hourly and daily for years, have been saping our institutions, and that where they have cried "murder," "bloodshed," "anarchy," and "dynamite," they have meant what they said, and proposed to do what they threatened.

Id. 308.

In summation the prosecutor noted that "[i]f you have now prejudice against these defendants under the Law as the court gave it to you, you have a right to have it" and "the defendants are on trial for treason and murder."

Id. 318-19.

As Justice Jackson said, in the *Krulewitch* case:

> A co-defendant . . . occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and, if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.

336 U.S. at 454.

[49] "So long as we apply the notoriously loose common law doctrines of conspiracy and incitement to offenses of a political character, we are adrift on a sea of doubt and conjecture to know what you may do and what you may not do, and how far you may go in criticism, is the first condition of Political Liberty. . . ." CHAFFEE 85, *quoting* Ernest Freund, *The Debs Case and Freedom of Speech,* 19 NEW REPUBLIC 13 (1919).

cogent one. The overuse of law to label all sorts of essentially harmless individuals as criminals and, thereby, to create juristic (and ultimately, social) deviants is wisely condemned. It seems that the most "American" thing about America is its passion to equate undesirable and criminal conduct—an unhealthy endeavor. We recognize that a significant purpose (perhaps *the* significant purpose) of a legal system in a democratic society is to aid in the creation and enunciation of norms appropriate to a free society. To paraphrase the economists, Bad Criminal Law drives out Good Criminal Law. The mindless labelling of harmless or only marginally harmful activity as "criminal" immediately serves to (a) encourage the sanctimoniousness—if not the overt activities—of those predisposed toward repression of non-conformity and (b) breed resentment in those who perceive themselves to be acting morally, though "criminally." The assumption that law is the first weapon needed to deal with social conflict (rather than the last) encourages resort to its inflexible mandates to (a) curb newer forms of "deviant" conduct and (b) substitute vacuous phrases such as "law and order" (and to act as if those phrases had discernible meanings) for hard thinking about widespread social problems. Social tensions are aggravated by the existence of, or use of, laws to persistently stifle the demands—or pressures—by benignly motivated groups, even deviant groups. Democratic theory simply has not adequately dealt with the problem, and if political theory is lacking then legal theory becomes woefully deficient.

Of course it would be absurd not to recognize that there is a persistent need for society to define itself, in part, in terms of "conformity-deviancy," "we" and "they" and to enlist the legal system to sanction such definition.[50] Whatever the virtues of that need in other areas, it simply cannot automatically be invoked to cut down on the "breathing space" needed by personal integrity and its handmaiden, personal worth and esteem, and cannot be reduced to the enactment of a majority's (a temporary majority's, at that) prejudices; it becomes necessary to reduce the sociological ostracism of whole groups of people by means of law.

We know that law *is* often a reflection of community feelings and antipathies and that its very existence serves to temper and ameliorate the passions involved. At least, we are told, it subjects those passions to impartial (or relatively impartial) scrutiny in a forum somewhat removed from the hurly-burly of everyday life itself. Thus, we are told, it is better to fight these battles in a courtroom rather than in the streets.

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[50] Durkheim, in discussing the "public temper" and its consequent sentiments which are "common to everybody," and "strong because they are uncontested" and "universally respected," observed,

> But crime is possible only if this respect is not truly universal. Consequently, it implies that they are not absolutely collective. Crime thus damages this unanimity which is the source of their authority. If, then, when it is committed, the consciences which it offends do not unite themselves to give mutual evidence of their communion and recognize that the case is anomalous, they would be permanently unsettled. They must reinforce themselves . . . the only means for this is action in common.

DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 103 (1964). *See* THE SOCIOLOGY OF GEORG SIMMEL 99-104 (K. Wolff ed. 1950).

Because of this, the argument continues, the law in operation has little normative value; it is merely a symbolic expression of communal disapproval—albeit a disapproval often couched in glittering exhortations. In its vulgar form, the theory postulates the necessity of changing "the hearts and minds" of a people to effect "truly lasting" reform and is singularly pessimistic about the ability of law to effect change. To modify institutions and practices, as I shall suggest, is conceived of as ineffective, especially when strong community counterpressures exist.

To this argument, there are three answers: First, the law is a complex of factors, and only in part a reflection and taming down of community vengefulness.[51] Indeed, on particular issues, there is often no community consensus.[52] We grudgingly obey even those laws with which we disagree and we even more grudgingly refrain from opposing some forms of distasteful conduct by others because that conduct is legally protected. Although "impact" studies of, for instance, Supreme Court decisions demonstrate that, often, "community standards"—at least in cohesive communities—will prevail over contradictory court rulings,[53] we cannot ignore the evidence that, equally as often, the law is obeyed simply because it is "the law."[54]

Secondly, not all community standards and mores are embodied in the law. The law is a particularized institution in society and is often granted a dispensation from prevailing practices. We do feel that the stamp of "legality" upon a practice invests it with more than mere acceptability. It virtually enshrines it. Conversely, we also believe that "legalizing" an unpopular practice is, in some manner, "sanctioning" (*i.e.* approving) it. The perceived moral content of the legal system means, to us, that the legal imprimatur should not be granted to every practice because not every practice should be enshrined. We instinctively agree with Dean Eugene V. Rostow's lament about the Japanese internment cases of

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[51] The argument ignores the historical dimension and the fact that *all* modern societies have *increasingly* come to rely upon "Political Justice," for instance, as a device. As Kirchheimer put it, "Today the boundary lines of the nineteenth century seem unconsciously generous." KIRCHHEIMER 34.

[52] Becker has noted that some believe that courts come into existence "when the society loses its foundation of kinship bonds and gravitates toward more impersonal relationships as the size and complexity of the social milieu increase." COMPARATIVE JUDICIAL POLITICS 102. The use of courts, even in this context, may be limited by a particular nation's "political culture." Thus, "Japan, then, furnishes an excellent illustration of a highly complex society—even a highly industrialized society—minimizing the usage of courts as a device to maintain order." *Id.* 117. The consequences of a breakdown are discussed by Kirchheimer. "If no informal consensus exists on fundamental community issues, the judges cannot play their traditional role in realizing the community value structure and pointing it up in relation to specific issues." KIRCHHEIMER 215.

[53] *See* COMPARATIVE JUDICIAL POLITICS 31-34, 356-361.

[54] The precipitate decline in resistance to desegregation mandates by formerly "hard-line" southern school boards, a recurring event in daily headlines every Fall, indicates that either (a) "the Law"—at least when accompanied by an apparent national consensus on the issue involved—has a dynamic of its own or (b) resistance to law when unsanctioned by strong moral posture—will erode with the passage of time. *See* THE SOCIOLOGY OF GEORG SIMMEL 42 (K. Wolff ed. 1950).

World War II, "That step converted a piece of war-time folly into political doctrine and a permanent part of the law."[55]

Finally, many problems, including that of political justice, engender ambivalent community feelings. Accompanying overt enthusiasm for—or perhaps a resigned acceptance of—political prosecutions of unliked people is a latent distaste for many of the accoutrements of such proceedings. There may even be an occasional stirring of sympathy for the defendant and perhaps even for his ideas. There may even be some active resentment against government in cases of unfair prosecution. It is along the borderlines of such ambiguities that, I believe, certain reforms can be initiated and accepted by the society.

Given this general background, how can we recognize that a "political defense" can be meaningful in at least the limited class of cases—the bad faith prosecution of visible political opponents for violations of vague laws against public order—I have mentioned. Such a defense, I would argue, is appropriate, especially in our system where tremendous discretion is given to virtually all of the government officials who participate in the criminal justice system. Most of my comments will reflect my belief —perhaps a naive one—that the jury, either the grand jury or the petit jury, is the appropriate focus for the use of such a defense. To a lesser extent, I would include the judge. To understand why I choose such pressure points, and not others, we should remind ourselves of what we know about the other actors in the system.

It is difficult to determine, analytically, whether the discretion of the prosecutor is greater than that of the police officer—or for that matter, of the sentencing judge.[56] Certainly, the discretion of the officer, while unbounded at the start of the criminal process, quickly becomes subjected to extensive and continuing formal and informal review—when that discretion is exercised in favor of an arrest. A district attorney will process the case to determine whether there is enough evidence to take the matter to a grand jury, the grand jury itself may (rarely) refuse to indict, a reduction of the offense or some other "bargain" may be struck by the district attorney actually prosecuting the case, and, should the matter go to trial, in the dim future lies the path through verdict and appeal.

Some of the same considerations apply to the district attorney himself. But, his role is different; he becomes a propelling force in contrast to the police officer who initiates. Indeed, the police officer, after arrest and investigation, becomes akin to the defendant, a spectator. The crucial decisions prior to trial are made by the prosecutor and what was once an officer's duty becomes converted to the prosecutor's zeal. At virtually all stages between arrest and ultimate disposition (and even before arrest, if it is based upon a previous indictment), the district attorney becomes the principal governmental actor in the

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[55] E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 196 (1962).

[56] *See* P. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY (1969); J. WILSON, VARIETIES OF POLICE BEHAVIOR (1960). *See also* notes 57 and 58 *infra*.

drama. As such, there is no doubt that he (in the words of Justice Jackson)[57]

> has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. . . . He may dismiss the case before trial, in which case the defense never has a chance to be heard. . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

No idea for systemic reform will succeed unless it involves the imposition of some limitations upon the virtually absolute discretion of prosecutors.[58]

The strategies to be discussed herein merely allow the opening up of some of the blockages within the system—especially blockages caused by discretion—to a true political defense. They involve the creation of new procedures, but no new institutions; they permit various actors in the criminal justice process—especially non-governmental representatives—to consider the political nature of the proceedings during their deliberations. These strategies are voluntary on the part of political defendants and will, presumably be utilized only when they are perceived to be useful. Prudence will often dictate non-use—for instance, where both the criminal justice apparatus and the community are unabashedly hostile to the claims of particular defendants, the strategies will be of no avail. The following proposals would have done defendants little good in the mid-60's, in the south, if the cases involved civil rights sit-in demonstrators prosecuted under local trespass laws. Behind all of these strategies is the notion that the true political defendant (at least, my true political defendant) should be steered out of the criminal justice system at the earliest possible moment. It is manifestly insufficient to rely upon eventual vindication, for the loss of integrity of the system cannot be restored at a later stage, one remote in time and effect from the act prosecuted. Since *ex hypothesis*, the true political defendant should not be subject to criminal proceedings, the necessity to remove him as quickly as possible should be the primary consideration. How is this to be accomplished?

Criminal proceedings commence, essentially, in two ways. The first, an arrest for a "crime" committed in the officer's presence—or reported to the officer by a complainant at the time it occurs—shall be

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[57] Jackson, *The Federal Prosecutor*, 24 AM. JUD. SOC'Y J. 18-19 (1940).

[58] "Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but one that stands out above all others is the power to prosecute or not to prosecute." K. DAVIS, DISCRETIONARY JUSTICE 188 (1969). Morris notes, "too often (in America) have prosecutors sought advantage for tempering the force of the law for their political friends and vigorously enforcing it against their foes." MORRIS 96.

considered first. An arrest is an arrest is an arrest—a truism, the absoluteness of which more than one political defendant (or indeed any other kind of defendant) has learned to his sorrow. At that time, the defendant—not yet a defendant—will obviously be in no position to urge a "political defense;" indeed, in all likelihood, he is being arrested *because* of his political endeavors. The earliest opportunity to assert a political defense, under these circumstances, arises before the committing magistrate. For the offenses listed earlier —those against public order—a magistrate should be required to inform the defendant of the right to compel what might be called an oral bill of particulars at the preliminary hearing to follow, if the initial evidence indicates that the arrest occurred in a political context. That bill of particulars would be directed not only to circumstances of the "crime" but also to the question of whether there was a "clear, present and substantial danger" to the public interest allegedly protected by the law involved. The hearing judge could then determine as a matter of law whether there was probable cause to believe that (a) a "political offense" was involved and (b) a "clear, present and substantial danger" either to citizens or to a valid governmental function was involved. In such a case, the prosecutor should be forbidden to submit the matter to a grand jury during the pendency of such hearing (often done precisely to avoid the hearing) until the hearing's conclusion. If the magistrate fails to inform the defendant of his rights herein, defense counsel could secure from the hearing judge, either prior to the hearing itself or during its course, a ruling as to whether a predicate of political conduct has been established. Presumably, the discretion of the judge (or the magistrate) on this question would be reviewable on appeal. It would be wise to consider whether an interlocutory appeal from this stage could be taken immediately and prior to the continuation of proceedings against the defendant.

Should the defendant choose to waive his right to a hearing and have the matter submitted to the grand jury or should the hearing judge find cause to hold the defendant and forward the case to the grand jury, the grand jury "secrecy" rules should be modified to allow defense counsel to appear and to offer for consideration the contentions set forth in the previous paragraph. He could also argue that, irrespective of the merits, the prosecution was being undertaken in bad faith (a term to be defined later). Of course, a grand jury hearing is not an appropriate body for the presentation of evidence to substantiate the defense claim and the attorney himself would not be sworn. The grand jury would be instructed by the district attorney to consider the contentions raised by defense counsel in light of the other testimony it has heard. This process would serve several functions: (a) it would allow the jurors to comprehend the seriousness of the acts they perform (b) it would permit a certain "breathing space" to be established between it and the district attorney and (c) it would serve its original, and still professed, function of filtering out malicious and bad faith attempts to incriminate individuals. In addition, the jurors would have before them the defense contention that mere technical establishment of a crime is not sufficient to warrant an indictment in the absence of the "clear, present

and substantial danger" envisioned by these proposals. In this situation, the defendant and his attorney would have been previously alerted to these rights and would, if deemed advisable, demand an appearance, since both know that the case has been forwarded to the grand jury.[59] Incidentally, the practice of grand jury appearances by defendants—though not their attorneys—is not novel; in some states, the "targets" of grand jury investigations have been accorded these rights. Also, some court decisions have held that in "sensitive" cases *i.e.* those involving first amendment rights, grand jury witnesses may consult with their attorneys whenever the questioning threatens to intrude upon constitutionally protected areas.

In non-arrest cases, where the grand jury is independently investigating to determine whether a crime was committed, the situation is obviously different. There are no defendants in theory until the jury has voted to find a true bill. The would-be defendant may not even know that an indictment is being considered. How could the right of appearance be insured in this situation? Here, a requirement of notice to one against whom a jury has tentatively voted to find a true bill, in a relevant case, and permitting such an appearance prior to the final vote, would be necessary. The onus would be placed upon the district attorney to inform the jury of this right or risk having the indictment dismissed upon subsequent motion. In jurisdictions allowing for prosecution by information rather than indictment, a hearing by a judge could be substituted and either (a) the information could be dismissed or (b) the judge could require that a grand jury be convened and the matter set over for that body's consideration. Suspicion of the cavalier use of information in political cases is consistent with our traditions; the question of whether seditious libel indictments could be brought by information, at least after a grand jury had refused to indict, was a burning one in the *Zenger* case.[60]

Since many of the crimes involved in political prosecutions are labelled misdemeanors, and are, in most jurisdictions, non-indictable offenses, substantial procedural changes may be necessary. In these cases, for the reasons cited above, the "information" procedure should be duplicated and a grand jury empanelled. At the preliminary hearing—if one is accorded by state law (or, as I have suggested, even if one is not)—the court would be empowered to either empanel a jury or to submit the case to an appropriate, extant, jury—always, of course, on the assumption that a proper predicate has been established.

Should an indictment carry and a trial occur, the political defendant would have

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[59] One eminent historian of Amercian law has noted that

> Since (the Grand jury) may, and often does, accuse a man of an atrocious crime upon the mere ex-parte statements of malicious witnesses, it is doubtful if this archaic institution provides any measure of protection against unfair prosecutions.

MORRIS xi. But, perhaps all is not yet lost.

[60] "In an admittedly political trial, this procedure (use of information) doubtless alienated many New Yorkers, and made the prosecution even more unpopular." ALEXANDER 19.

another opportunity to assert defenses of bad faith prosecution or absence of "clear, present and substantial danger." These defenses could be managed without visible rearrangement of the system; already, there are numerous times when governmental activity becomes the focus of criminal trial proceedings. The most prominent example is that of entrapment, where officious police conduct has engendered acquittals of even "guilty" defendants, defendants incidentally guilty of far more heinous crimes than those under consideration.[61] If the integrity of the system is at stake in the entrapment situation, no less is true here.[62] Sometimes, even in common crime cases, claims of purposefully discriminatory and differential law enforcement are honored, even where guilt is conceded.[63] The ra-

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[61] The two leading Supreme Court decisions on the issue of entrapment are Sherman v. United States, 356 U.S. 369 (1958) and Sorrells v. United States, 287 U.S. 435 (1932). In the latter, Justice Roberts' concurring on behalf of himself and Justices Stone and Brandeis, argued that "Public policy forbids such a sacrifice of decency" and that "[t]his view calls for no distinction between crimes *mala in se* and statutory offenses of lesser gravity [,]. . . ." *id.* at 455. For cases involving "common" rather than victimless crimes, see Brown v. United States, 367 F.2d 145 (5th Cir. 1966); United States v. Becker, 62 F.2d 1007 (2d Cir. 1933); Sassnett v. State, 156 Fla. 490, 23 So. 2d 618 (1945). One expert has declared that, "No federal court has yet held that there is a crime for which the defense is inapplicable." Orfield, *The Defense of Entrapment in the Federal Courts,* 1967 DUKE L.J. 39, 52.

[62] Virtually all commentators have agreed that no comprehensive theory to explain the nature of the entrapment defense has yet emerged, but they are in general accord with the rationales expressed by Justice Roberts in his *Sorrells* concurrence, and by Justice Frankfurter (on behalf of himself and Justices Douglas, Harlan, and Brennan) in *Sherman.* The precise argument urged herein—that of preservation of the integrity of the courts—constituted the basis of both sets of concurrences. As Justice Frankfurter said in *Sherman,*

> The courts refuse to convict an entrapped defendant . . . because, even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced.

356 U.S. at 380.

In terms startlingly similar to those employed by Kirchheimer, Justice Frankfurter continued:

> Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means *or means that violate rationally vindicated standards of* justice, and refuse to sustain such methods by effectuating them.

Id. (emphasis added).

> The crucial question . . . is whether the police conduct revealed in this particular case falls below standards, *to which common feelings respond,* for the proper use of governmental power.

Id. at 382 (emphasis added).

Roberts also grounded his rationale on considerations of "the purity of government and its processes":

> Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong. The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings.

287 U.S. at 455.

He also spoke of "the inherent right of the court not to be made an instrument of wrong." *Id.* at 456. The commentators agree and some have argued that the right not to be entrapped is of constitutional dimension. Sherrill, *The Defense of Entrapment: A Plea for Constitutional Standards,* 20 FLA. L. REV. 63 (1967); Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense,* 74 YALE L.J. 942 (1965).

[63] *See* United States v. Elliot, 266 F. Supp. 318 (S.D.N.Y. 1967); People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (1960); People v. Walker, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964); Note, *Applying Estoppel*

tionales supporting such decisions are surely no less compelling than the ones I have proposed to deal with the political crimes analyzed herein.[64]

In political cases, the judge and jury would be required to consider certain defenses such as "bad faith" prosecution. The dimensions of that term need not be fully explored at this time. I believe that it would essentially consist of an amalgam of discriminatory law enforcement, purposeful selection of defendants, and the use of questionable evidence (for instance, in public demonstration cases, the exclusive use of police witnesses without corroboration by civilian onlookers might well be considered by the jury as evidence of bad faith). Just as the common law has built up accretions that form a gloss on legal terms, so I would expect that—within the broad guidelines established above—a diversity of conduct and circumstance would eventually come under close defense and jury scrutiny.

Exploration of the question of bad faith may well involve putting the prosecutor on the stand and compelling examination of his "work product" (in the form of interoffice memoranda, etc.). Obviously, the defense should have some room to explore the question of "bad faith" at the alleged source, the prosecutor's office. Where bad faith is readily apparent, further investigation may not be necessary; the judge could instruct the jury to consider in its deliberations such bad faith, as a matter of law. Where bad faith is not readily discernible, present rules of evidence would have to be bent to insure the defense a reasonable opportunity to establish its existence. Clearly, the public interest—and the jury in a political case is a surrogate for that interest—is served by a policy directed toward disclosure of the use of public power by public employees to attack the political opposition. In essence, such disclosure would constitute the judicial equivalent of a miniature "freedom of information" act in an area subject to virtually no scrutiny now. Perhaps the best analogy to the sweeping powers of the defense under these circumstances is the startlingly similar

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Principles in Criminal Cases, 78 YALE L.J. 1046 (1968); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103 (1961).

[64] The argument for applying the equitable concept of estoppel in criminal cases closely resembles the one set forth in this paper.

> If a criminal estoppel defense were generally available, however, its importance would be greatest in prosecutions under regulatory statutes, public welfare laws, and the minor crimes of numerous types and varying scope which pervade American life . . . . These rules-of-the road laws usually have little to do with common notions of good and evil, and the defendant unaware of their existence will get no warning from his moral instincts that his conduct may be criminal. Most important, such statutes often commit broad rule-making powers and discretion to the enforcement agency, leaving even the knowledgeable individual no other reliable guide to the law. The ambiguity and complexity of . . . these circumstances, an estoppel defense, once raised, should be persuasive.
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> Perhaps the strongest case for a defense of estoppel is one in which the occasional arrest and prosecution is based on reasons completely external to the offense itself. . . . Minor criminal statutes may serve as means of oppressing and intimidating classes of people whom the police dislike. In the latter situation, the estoppel defense can rest equally on due process and equal protection principles. Note, *Applying Estoppel Principles in Criminal Cases,* 78 YALE L.J. 1046, 1062-66 (1972).

ability enjoyed by the defense in forcing disclosure of illegal wiretaps and bugs in fourth amendment cases. A "check of the files" in political cases may reveal some embarrassing—but not disabling—truths;[65] on the other hand, it may reveal a commendable dedication to the even-handed enforcement of justice.

I should think that the jury, if it found bad faith, could acquit, irrespective of the proof adduced. It should be remembered that this paper is addressed primarily to the abuse of the legal process by government; if that be true here—as it is in entrapment cases—then the question of guilt or innocence recedes. Presumably, where the bad faith is established as a matter of law, then a directed verdict of acquittal would follow. As under present procedures an improper failure to direct such a verdict would be reviewable on appeal.

I would also argue that, irrespective of bad faith, the jury could acquit if it found the acts committed occurred in a political context, in the conscientious exercise of political belief and not out of a general disrespect for law and had no "clear, present and substantial" effect upon the functioning of government. One reason for this lies in the pragmatic truth that "bad faith" in particular cases may well be difficult to prove (especially if the burden of proof lies with the defense). If "bad faith" were the only allowable "political defense," the government could take certain obvious countermeasures to assure that no documentary evidence of such would ever be found. Acquittal for the above mentioned reasons would provide a meaningful prop to the primary defense of bad faith.

Another reason for permitting the jury to consider acquittal under the aforementioned circumstances lies in the necessity to make the system more flexible in political cases. Although many lament the porousness of the system and the fact that hasty and ill-advised procedures often result in justice delayed or "bad" bargains for the prosecution allowing hardened criminals to virtually go free, many of these considerations do not apply to political justice. There is little plea bargaining, the defendants are not hardened criminals, and prosecutors often seek early "justice." In many ways, the power of the state against political defendants is greater—because more purposeful—than would be otherwise true. Whatever the truth about pre-trial proceedings, where the ordinary defendant may well have enough leverage to balance the prosecutor in negotiation, that leverage simply vanishes whenever the case gets to trial. Since political cases invariably are tried, we are confronted with the "classic" case of the massive resources of the state arraigned against an often procedurally hapless defendant.

I have said that some nascent concept of "conscience" is being developed in certain forms of political prosecution, but it is clear that the gestation will be a long and agonizing one. There is no reason why "conscience" should not be submitted to the jury as an issue. We expect juries to mitigate the harshness of the law, especially

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[65] The rules for such investigation can be established by judges in their traditional role as supervisors of discovery proceedings in criminal cases. The guidelines are contained in numerous cases affecting witnesses' prior statements, wiretapping evidence, and the like.

the law in practice; it is deemed to be the glory of the jury system. We know that juries often act out of conscience. The instructions I have proposed would simply enable the jury to clearly recognize its duty to add its conscience and comprehension of prevailing community standards to the equation of guilt or innocence.[66] Such instructions would serve (modestly) to counter the pressures and emotions that often "charge" the atmosphere against defendants, especially in political trials.[67] Such instructions would stand half-way—or virtually so—between the state's contention that all trials are equal, that the law is not to be judged save by higher courts,[68] that the facts alone are within the province of the jury, and the defendant's attempt to invoke the claims of conscience in no context whatsoever (an attempt frequently frustrated by the judge).[69] The

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[66] Of course, the *Zenger* decision in New York is the classic example of the "run-away" jury; in England the *Seven Bishops* case in 1688 is the prime example. Given the present state of the jury system, such a role might revive its vigor. Kirchheimer feared that "the increasing apathy of people toward subjects outside their immediate life experience" made it virtually certain that the elimination of continental juries "has evoked [no] more than occasional regrets." KIRCHHEIMER 220. He also finds Justice Black's position on the jury as a bulwark against oppression to be a "problematic argument in the service of a worthy cause." *Id.* 222, n.98.

[67] A countervailing force is often necessary. "Particularly in the area of the political offense, there is very little reason to suspect that a jury would be more likely to acquit than a professionally trained *judge* . . . given the tremendous public pressures and hysteria often attending this kind of trial." COMPARATIVE JUDICIAL POLITICS 325.

[68] Such has not always been the case. In the Burr prosecution Marshall charged:

> The jury have now heard the opinion of the court on the law of the case. They will find a verdict of guilty or not guilty as their own consciences may direct.

MORRIS 153. The jury returned a verdict of "not proven" which Marshall converted to not guilty.

In the *Zenger* case, Hamilton, in speaking of special verdicts in seditious libel cases, said that the jury has

> the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This of leaving it to the Judgment of the court *whether the words are libellous* or not in effect renders the juries useless. . . .

ALEXANDER 78.

Hamilton concluded with the legally unsound (but, practically, potent) argument that

> [J]urymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.

Id. 93.

[69] The greater scope of argument allowable to defense lawyers may well alleviate some of the tensions between the judiciary and the militant "new breed" of attorney. It may abate the problem, stated by Kirchheimer, of the use of judicial catchphrases such as "officer of the court" which ignore "their own emotional and political involvement, the fact that the credibility of the trial, their own credibility, and that of the State organization they serve are for better or worse inseparably linked." KIRCHHEIMER 156. Kirchheimer also noted the differences between French and American judicial style (differences which may no longer exist) and characterized the former as involving

> [A] traditional . . . indulgence toward the lawyers and their courtroom performances, enforced by the judges' comfortable knowledge that theirs is, after all, the final word. . . .

This, he claimed "has discouraged any search into problems of lawyers' allegiance. Courtroom discipline is handled on an ad hoc basis." KIRCHHEIMER 252. In more recent times, a prosecutor has said of the alleged purloiner of the Pentagon Papers: "Ellsberg's sincerity—his motivation—is

jury would be doing its duty—to provide an independent check upon the excesses of government, under these circumstances.

These safeguards are necessary because the political defendant cannot be classified with the common criminal by the standards available to the criminal law. *Mens rea*, that factor which presumably distinguishes the criminal from the rest of society, is simply not present. Until we have devised ways within the law by which sincerity can be distinguished from cynicism, wherein crimes *mala in se* can be differentiated from acts *mala prohibita* (not only in political but in other kinds of justice), then we simply, at this stage in history, cannot treat all crimes as equal. We cannot deny the existence of social contexts which often mitigate, if not entirely adumbrate, the seriousness of the offense involved (of course, prosecutors take advantage of "context" when it favors their position). We have placed a heavy burden on the jury to mitigate the harshness of the criminal law and the proposals herein described are designed to aid the jury in meeting its burden. To permit defendants in the cases mentioned to broaden the proceedings—while staying within traditional norms of courtroom procedure—will, at least, enable the jury to place the accused along a spectrum of deviancy, and to judge the seriousness of his conduct (and the harm it has caused) by reference to values outside the narrow confines of the criminal law itself. Of course, political fanatics who resort to violence will be judged severely by their contemporaries, if not necessarily by history. These are not the defendants that concern me.

Although the breadth of Constitutionally protected free speech in this country is remarkable, the prophylactic doctrines involved are confined to "pure" or "symbolic," virtually conductless, speech.[70] Some of that breadth should be applied to insulate essentially harmless conduct not far removed from speech itself. If that cannot be done by law, then it should be done by broadening the jury's perspective and discretion. The Supreme Court agonizingly avoided one of the major issues of the middle '60's by declining to rule on the Constitutionality of the sit-in convictions for criminal trespass.[71] I realize that those cases presented Constitutional questions at the borderline of the law; for that reason, the discretion of the jury should be invoked, for it can diminish the inevitably "bad" law made by those "hard cases."

The "chilling effect" of political prosecutions for violations—or for potential violations—of laws against "public order"

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not a redeeming factor here. The fact that he broke the law is. He has no more chance and no more right of the debating the morality of the war in court than Spock or the Berrigans." NEWSWEEK, Aug. 30, 1971, at 27.

[70] *Compare* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) *with* United States v. O'Brien, 391 U.S. 367 (1968). In the latter, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376.

[71] For a particularly thoughtful discussion of this problem, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY, ch. vi (1969). *But see* Brown v. Louisiana, 383 U.S. 131 (1966).

was noted by the Supreme Court in *Dombrowski v. Pfister,*[72] and the Court took the unusual step of enjoining prosecution. Although the Burger Court has limited the implications of that decision,[73] it is clear that dissidents who fight for their views at the boundary of the law are entitled to some protection, in the absence of a strong, direct, countervailing public interest. This is especially true, as I have previously noted, where the conduct involved is only modestly and peripherally harmful to an essentially metaphysical interest of the state. It is manifestly true when a political administration utilizes the courts to protect not the state, but itself.

Our judicial system cannot safely accept the rationale that the law should be invoked to protect the interests of an incumbent political administration. The temporary sovereign's definition of political danger should not be conclusive upon the courts, in our system. They are still required, in Kirchheimer's words, "to try to differentiate permissible words of opposition from reprehensible action and language bordering on violence."[74] As Samuel Krislov characterizes the problem in his discussion of the *Hoffa* cases, "How much [should] the forces of light . . . be permitted to take on the shading of their opponents?"[75] As Kirchheimer put it:

> Thus the Western judge's policy direction, unlike that of his totalitarian colleague does not come from explicit or intuitive communion with party hierarchy. It emerges from his own reading of the community needs, where lies its justification as well as its limitation.[76]

We have increasingly come to realize that government has a vast arsenal of weapons which it freely seeks to utilize against its political adversaries. This has always been true, but we are only beginning to appreciate it in terms of our own legal system. As Kirchheimer put it, "Political trials are inescapable."[77] Whether government be benign or repressive, whether the citizenry be apathetic or aware, it is clear that the arsenal should be reduced to those implements minimally necessary for the maintenance of government itself and for the protection of the lives and property of the citizenry.[78] When the

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[72] 380 U.S. 479 (1965).

[73] Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

[74] KIRCHHEIMER 33-34.

[75] POLITICAL TRIALS 205.

[76] KIRCHHEIMER 429.
Indeed, antagonism between the judiciary and other political power holders is the essence of our revered concept of judicial independence, according to Becker's definition.
> Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conception of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have, political, or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.

COMPARATIVE JUDICIAL POLITICS 144.

[77] *Id.* 47.

[78] After noting that in the *Hoffa* case,
> Individuals were persuaded to cooperate by means of promises of leniency, exemptions from criminal charges, or threats of prosecution. An elaborate series of informers . . . were clearly employed. Wiretapping there clearly was . . . .

present administration announced that the distinction between "external" and "internal" enemies was meaningless and sanctioned unlimited non-judicially approved wiretapping against domestic groups with no foreign connections (among other things), then the identification of state and regime was complete.[79] Fortunately, the Supreme Court did not agree.[80] When an administration—such as the present one—comes perilously close to characterizing its turmoil with domestic dissidents as a form of war, then it clearly seeks, as in time of war, "to withdraw the most remote and questionable policies from the scope of ordinary discussion simply by labelling them a war matter."[81] At this point the state becomes the vanquisher of any threat, from any quarter, of any magnitude—and all threats are defined by the executive.

Of course, the proposed remedies are stated with the profoundest understanding of their ultimate irrelevancy. The relationship between law and society is of almost unbearable complexity and in true conflict society will prevail over law. Our own history amply confirms this.[82] Of course, these proposals will work well in good times, will be of some aid in doubtful times, and will be swept into the maelstrom of conflict in passionate times. But, that is true of the law in general. Juries—those often faltering bulwarks against oppression—will grossly reflect the public will, and when the bugles blow, will convict; when times are placid or particular political dangers recede (witness the recent fate of the Black Panthers as their perceived menace dwindles), acquittals will be won. These propositions are then best viewed as incremental additions to a society professing itself to be a civilized one. As with all incremental additions—or even major ones, often reduced to incrementalism—the social fabric will be affected only marginally. If these proposals can claim any one distinction, it is that they reinforce the perception that the greatest danger to the political order lies in official lawlessness or arbitrariness, not in criminal activity. If the participants in the criminal justice system are made more aware of the meaning

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POLITICAL TRIALS 221.
Krislov then stated the rationale for minimizing objections to such questionable procedures: "Though we may be troubled by governmental intensity, it is difficult to exonerate a major crime." *Id.* 222. This is precisely the point of this paper—are "political crimes," as herein defined, "major" crimes where the countervailing considerations may permit the tactics which so obviously discomfit Professor Krislov?

79 Kirchheimer terms the distinction between the two to be the "mainstay of nineteenth century political jurisprudence." KIRCHHEIMER 46.

80 United States v. United States Dist. Court, 403 U.S. 930 (1971).

81 CHAFFEE 118. He reviled the Espionage Act of 1917 for making it "criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional though the Supreme Court had not yet held it valid, to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christ." *Id.* 51. One scholar discussing the Alien and Sedition Acts of 1798 noted that they were passed to destroy a political party. "Opposition to the administration thus became opposition to the Constitution." MILLER, CRISIS IN FREEDOM 11 (1951).

82 "When a system is perceived by its elite or elites to be threatened, there is little leeway for judicial protection of individual rights—*particularly against strong anti-system counterelites (or those perceived as strong)*." COMPARATIVE JUDICIAL POLITICS 165 (emphasis in original).

of "Political Justice," and modify their conduct accordingly, then there will have been a great advance indeed.[83]

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[83] I agree with Kirchheimer that the very existence of political prosecutions creates a dilemma for the judiciary. He asks:

> If a judiciary operates with a margin of tolerance that is set by its own interpretation of opinion trends and political and moral requirements, rather than by commands of an identified sovereign, how can it be organizationally and intellectually equipped to face such contingencies?

KIRCHHEIMER 18. The proposals contained herein are designed in part to reduce the dilemma. If, again, in Kirchheimer's words, "It is difficult to prosecute a heretic while explicitly recognizing the purity of motivation which triggered his action," *Id.* 241, then the government may well think twice before allowing that judgment to be explicitly made by a jury. That judges may well bridle at clear attempts to use the courts as political instrumentalities. *See* POLITICAL TRIALS 58.